

# Undoing Sovereignty/Identity, Queering the 'International': The Politics of Law

Written by Po-Han Lee

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PO-HAN LEE, OCT 22 2018

### **This article has been shortlisted for the 2018 Article Award**

In November 2017, the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity celebrated their tenth anniversary, at which another group of international human rights experts and activists adopted the Yogyakarta (Additional) Principles plus 10 to supplement the original text. There has been widening acceptance across international organisations and increasingly corresponding state practices, and of course, there is a need for a wider appreciation of such norms. It is argued here, simultaneously, that it is necessary for a post-statist queer methodology to intervene in this developing field in both law and politics in order to relax the policing of identity upon a nationalised as well as gendered and sexualised body.

I would like to start with a scenario here that is displayed with three frames: Mr Randy Berry, the first US Special Envoy for the Human Rights of LGBTI Persons undertook a world tour of 42 countries, and, in early February of 2016, he went to Jakarta to visit the Indonesian government and civil society organisations. A few days before that trip, Indonesia's government officials in response to Berry's arrival made numerous aggressive statements. For example, on 25 January, Indonesia's Minister of Technology, Research and High Education, Mr. Muhammad Nasir, accused LGBT persons of corrupting 'the morals of the nation'. Meanwhile, recalling the ambivalence expressed by local activists – Dédé Oetomo, the founder of Gaya Nusantara, the first LGBT rights organization in the country, said in an interview, 'when we frame it in *rights*, there has not been progress'.

Queer international law – echoing the advocacy of queer International Relations – targets the heteronormative idea of state sovereignty, which, in itself, is patriarchal and paternalistic in normalising or discarding undesirable citizens and, nowadays, primitive/non-liberal states, which are just *not good enough* (Lee, 2017). From the perspective that the 'international' of International Relations and Law is a historical product reflecting the competition between powers at both the domestic and international levels, in this essay I consider the importance of politicising international legal discourse.

### **Queer Voices Necessary for International Studies**

As the LGBT rights movements prosper globally, international lawyers have gradually come to recognise that sexuality is significant in determining not only a person's moral worth but also a state's progressiveness and legitimacy. In a similar vein, queer theory along with poststructuralist feminist critiques have challenged our understandings of the body-mind and self-other relationships since their emergence in the 1990s, alongside LGBT identitarian politics. Nonetheless, such an innovative perspective has been considered much less in international political and legal scholarship compared to queer theory's legacy in other social sciences (Weber, 2016).

With a few exceptions, most attention has previously been focused on conceptual confluences such as sex/gender, sexual orientation/ sexual practices/ homosexuality, and gender identity/ gender expression/ transgenderism/ transsexualism (Otto, 2015). Queer theory matters when it comes to a human rights agenda that prioritises empowering certain *identifiable* groups of people (Morgan, 2000; Swiebel, 2009). Namely, how do we prevent the

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hierarchical, or even exclusionary, effect of the future agenda of human rights in the name of global justice?

In terms of a brief history, the first occasion of a collective elaboration can be traced back to the panel entitled *Queering International Law* (in response to the call for 'The Future of International Law') in March 2007 at the 101st annual meeting of the American Society of International Law. Much later, in December 2015, the conference on *Queering International Law, Possibilities, Alliances, Complicities, Risks* at the Melbourne Law School assembled a similar group of lawyers who posed questions regarding the unchallenged hierarchies of power and knowledge in the state-centred law-making system.

Quite recently, in 2017, the first book on *Queering International Law* edited by Dianne Otto was published. The contributors to the volume attempted to interrogate both the possibilities and challenges of an unimaginable project – to queer (as a verb) international law, a body of rules, norms and principles that has always presented the great deal of inconsistency and fragmentation since the determination of the Cold War (Koskenniemi and Leino, 2002). Today, queer theorists and methodologists have considered the fundamental tension stemming from the state-centric, sovereignty-based 'international' relations (Dhawan, 2016).

Then, what is the significance of 2017? Recently, the Yogyakarta Principles have been celebrating their tenth anniversary. There has been widening acceptance across international organisations and increasingly corresponding state practices. As Michael O'Flaherty (2015) reminds us, apparently there is much work to be done on further 'appreciation of the application of the Principles' (297). Simultaneously, I would argue that there is still a need for queer critiques to intervene to relax the policing of identity, including not just the discourses that characterise one's gendered body and sexual life but also the ethno-cultural nationalism that determines the 'sovereign community' to which we are taught belong (Balibar, 1990).

A post-statist queer theoretical approach attempts to deal with historical problems concerning gendered and sexualised bodies in modern societies, yet it should not be misinterpreted as refraining people from desiring to acquire a clear and fixed identity. Beyond the dialectics between acknowledging and refusing *an* identity, queer theory's non-dichotomous perspective offers the possibility of affirming the multiplicity, and sometimes the fluidity, of one's self vis-à-vis what the social world imposes. The task of dismantling oppression and destabilising the structures that maintain them is crucial – it not only challenges the heteronormative system and gender binarism but also is sceptical of one's *autonomy* engaged in social relations of diverse power dynamics. Such questions are applicable to an individual, a nation and a state.

Namely, queer scholarship does not target simply the international human rights regime but also the fundamental premise of international law – the state's pastorship. The metaphoric imagination of state governance as *man*craft is in itself patriarchal and paternalistic, taking other states as rivals, in order to self-inscribe the plausible 'delusion of sovereignty' and internationalism of this kind. In this respect, Cynthia Weber (2016) has introduced both epistemological and methodological approaches to the field of International Relations. In particular in an age of globalisation, international law has expanded its interests not only in preventing conflicts between states but also in promoting and standardising human flourishing and wellbeing in response to a call for global governance, which has subtly changed the relationship between states and between a state and its people (Cheah, 2014).

Therefore, it is considered that there is still an urgent need to queer international human rights law in particular, or international law in general, in order to counteract the taken-for-granted patronisation repeatedly affirmed by states. However, such a vision does not necessarily aim to overrule the efforts made in advocating the Yogyakarta Principles' normativity. Rather, it refuses the simplification, whereby most international lawyers equate conferring rights with attaining liberation. With the transnational emergence of the LGBT rights movement, the framing of gay/trans/human rights discourse relies heavily on the politics of identity and otherness oriented by the law of state sovereignty. A trajectory can be outlined with the globalisation of sexual identities through queer people's migration, interactions between civil society organisations, as well as diplomatic relations between states, and between states and international agencies (e.g. Langlois et al, 2017).

There is, thus, a need to address the problems left by strategic essentialism regarding sex, gender and sexuality, and

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the overgeneralisation of cultural sovereignty endorsed by law. At the same time, we may also have to face squarely the paradoxes of queer theory, especially regarding its impracticality and 'imaginative' force. In this respect, queering international studies (especially for international law), with its postmodern ontology, should be regarded as postulating *lex ferenda* – the law of the future, as opposed to *lex lata* (the law of the present) – based on the 'critique of present institutions' (Koskeniemi, 2012: 12). The project of queer international law, bearing an obligation of self-reflexivity, acknowledges its exercise of power in producing subjectivities and discourses while 'finding, naming and situating the missing voice' (Valdes, 1995: 346).

Nevertheless, overall, the *opinio necessitatis* – the sense of reformulating and reframing the legal discourse based on 'political necessity and reasonableness' (Mendelson, 1998: 271) – of such a deconstruction project derives from the fact that the state-centrism cannot properly address the *lacunae* where the rights-holders are beyond the scope of the current institutions. As a step forward towards critically *reimagining* international law, I argue that it is still crucial, in addition to the legal landscape, to prevent the risk of reducing thorough social activism regarding sexual liberation to a rights campaign, or to a state-to-state naming and blaming.

## The Inevitable Subjectivation for Legal Protection?

What legal protection offers, as part of and simultaneously the result of subjectivation, is a historical product that reflects the competition and selection between discourses and entities. On 25 December 1991, Australia ratified the Optional Protocol to the ICCPR, allowing individuals to appeal to the Human Rights Committee (HRC). On the day it came into force, Mr Nicholas Toonen, a leading member of the Tasmanian Gay Law Reform Group, filed a complaint before the Committee, challenging the then Tasmanian Criminal Code, which criminalised consensual sexual activity between adult men. At that time, Tasmania had experienced an unprecedented popular and large-scale mobilisation of homophobia. This was the very first case regarding homosexuality to resort to the international human rights mechanism, for the rights to privacy and equality before the law.

Of course, several cases have been decided by the ECtHR since the 1980s, for example, *Dudgeon v United Kingdom* (1981) and *Norris v Ireland* (1988), but the *Toonen* case was the first one in which the issues around (homo)sexuality were put forward, with respect to international human rights treaty law. The Committee's landmark decision broadened the interpretation that *sexual orientation* is included within the reference to *sex* related to the non-discrimination provision. However, social struggles around sexual and gender diversity emerged from a radical proposal for sexual revolution, which was thereafter simplified into social movements fighting for equality before the law. It is now entrenched in notions such as sexual orientation, gender identity and expression (SOGIE).

Before sexuality was taken as part of one's identity, it was primarily studied through a medical gaze, which was infiltrated with ideological prescriptions regarding good/bad sex (Warner, 2000). Through the line of probing people's erotic desire and practices, sexual orientation, which corresponds to another one's sex/gender (Waites, 2009), has been captured and located by moral and medical and thus legal judgments. In each field, people are necessarily positioned in the 'right' place within hierarchies. For the sake of empowerment in the rights language, sexual and gender identities have been made as a necessary condition for rights entitlements (Douzinas, 2007), but, as Michel Foucault (1997: 166) hesitated:

If identity becomes the problem of sexual existence, and if people think that they have to 'uncover' their 'own identity,' and that their own identity has to become the law, the principle, the code of their existence; if the perennial question they ask is 'Does this thing conform to my identity?' then, I think, they will turn back to a kind of ethics very close to the old heterosexual virility.

In the context mentioned above, such a pro-gay interpretation given by the HRC reaffirms the characteristics of sexuality pertaining to one's personhood, and has influenced other UN Human Rights bodies and international and regional organisations (O'Flaherty and Fisher, 2008; Tahmindjis, 2005). For example, the Special Rapporteur on the Right to Health once boldly claimed that 'sexuality is a characteristic of *all* human beings...which defines who a person is' (Hunt, 2004, para. 54). The process of subjectivation is legitimised then by the need for human rights protection.

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Such a human rights agenda nonetheless has been challenged by queer theory concerning its overgeneralisation of the heterogeneity between individuals and their lived experiences in different societies (Langlois, 2015). Queer critiques are more compassionate towards those who are *unidentified* – either because of rejection by oneself or due to misrecognition by society – and hence underrepresented by activism and law (Weber, 2017; Wilkinson, 2017). As a response, international human rights lawyers have become careful when *codifying* the rights of sexual and gender minorities, and advocates from the non-Western world may refer to their social movement as a SOGIE-related one rather than an LGBT rights campaign.

For example, many civil society organisations in Asia referred more to SOGIESC-related (sexual orientation, gender identity and expression, and sex characteristics) rights rather than LGBTI rights when I attended the ILGA-Asia Conference in October 2015. Most of the participants had considered adapting to community needs by situating the local knowledge of sexual and gender identities within the international human rights framework. In this light, the Yogyakarta Principles, endorsed by international human rights experts in 2006, give a relatively open-ended definition of *sexual orientation* and *gender identity* that has been cited by many international documents and domestic legislation (Brown, 2010).

In furtherance of de-policing minority victims with identities, international human rights law, based on its malleable nature, is closer than other subfields of international law to 'a potential site of emancipatory struggles and of individual recognition' (Jouannet, 2011: 21). In this light, queer utopias, though variable, in contrast to purely international legal positivism, which depends on states' (un)willingness and (in)actions, are still desirable (Douzinas, 2000; Hall, 2001). Regardless of the arguable origin of human rights, deriving from human reason and dignity (naturalism) or based upon the textual codification of rules (positivism) (Koskenniemi, 2011), the law at least *ought* to aim at liberating every rights-holder – whether visible and identified or invisible and unidentified – from ongoing or future suppression.

## Queer International Law: Taking Politics Seriously

Projecting a trajectory of how the SOGIE discourse enters into international law enables us to reconsider the profound influence of progressivist humanism upon the existing international legal system. Based on the need to rewrite human rights' conditionality, new subjects standing out in international jurisprudence stem from *opinio necessitatis* of authorising protected status for people who live on the margins of society. Although new rights of new *humans* are crystallisable via social movements from the local to the transnational, in practice they still need to be formally recognised/permitted by states through compromising their sovereign power, which assumes the monopoly of the production of law and justice.

That is, international law governs the legal relations between recognised subjects – states, on the one hand, self-authorised by default; and individuals and other non-state actors, on the other, depending on their visibility and capacity. Despite the international call for sexual and gender minorities' rights, states withhold the primacy of the Westphalian system, which is concerned with the sovereign's supremacy over its population and *domestic* affairs. In this vein, human beings are reduced to state citizens. However, from a queer perspective, such a universalistic assumption – or fiction – regarding moral state and cultural sovereignty is contestable. A reductionist approach to generalising lived experiences of people, whether (perceived as) normative or deviant, actually undermines each member's investment in legitimating the state's sovereignty based on people's self-determination.

Such taken-for-grantedness in effect reproduces the patriarchal-heterosexual matrix – 'a grid of cultural intelligibility through which bodies, genders, and desires are naturalized', as defined by Judith Butler (1990: 151). Thus, to *queer*, as a transposition from a noun to a verb, needs to identify one's positionality – individually and collectively (marked and assembled, voluntarily and involuntarily, along with other peers – compared to the normative, including the presumed representation of people by their state (Butler, 2012). The ascendance of the conceptions of SOGIE in law can do little to challenge the overstated idea of sovereignty, but *both identity-based rights* and hence *people-based sovereignty* have stabilised the status quo of modern international law.

Yet, Human rights are just like love, recalling Martti Koskenniemi's (2011: 153) metaphor, 'both necessary and

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impossible...Routine kills love, as it does to rights-regimes'. Such *identity*-based narratives for individuals and states thus serve to normalise so-called 'deviance' and 'non-conformity' in the juridical realm, which, in effect, restricts the extent of a revolution for gender equality and sexual liberty. The whole of a national culture within a fixed territory over a population has been preconditioned to justify one state's *imagined* sovereignty (Bayefsky, 1996), and based on this precondition, the social movement agenda is selectively approved by states, which consider the goal reasonable, namely culturally acceptable.

That said, there is a dilemma in placing the crafted notion of sovereignty over law; namely, the need for states' protection and the limit of states' attention. Modern international law is state-centred and voluntariness-based, and states, personified as moral men who always make rational and just choices, are presumed to legitimately represent the will of their people, in which sovereignty is 'an artificial soul', in Hobbesian terms. Nonetheless, the realities expose the inadequacy of this presumption in terms of human rights protection. Indeed, the *will* of a state represents its people, in the name of people-based democracy, which only voices the dominant ideologies in society (Olson, 2016). This kind of democracy could be achievable by discarding minorities, when there exists no Rawlsian 'veil of ignorance' in reality.

In this light, law is ineludibly politicised by, and in turn politicises, the subjects it creates. Thus, international law is not exempted from, but legitimises, mainstream ideologies in both conceptual and empirical terms (Etxabe, 2016; Kochi, 2017). The inscription (or more violently, imposition) of an identity upon a body, strategically applied to any human rights agenda, assists knowledge producers 'to rediscover the individual outside of the mechanisms of power', in Foucault's (1988: 50) words. For international human rights, it is not that *what a human is* matters; its answer, rather, reflects a value system concerning sexual and gender norms seized by primary agents – national governments and the scientific community.

The great danger here is the *non-presence* of the neglected rights-holders in history being read as their non-existence – as Susie Scott (2018) argues for a sociological inquiry into the symbolic meanings of 'nothing there' – and hence, historicising such absence becomes an important task for international lawyers. This does not conflict with, but furthers the idea contained within the international human rights regime in the post-Vienna Declaration era. That is, it is the duty of all individuals and all forms of governments involved in constituting their sovereignties, regardless of their political, economic and cultural systems, to promote and protect all fundamental freedoms of any other member under human rights norms.

## Conclusion: Unpacking the Simplified Sovereignty

Queer populations, standing in between the normative and non-normative realms for a liberal mind, is a good case that demonstrates the entanglement of international law and politics. Despite several remarkable triumphs of the LGBT social movement, locally and globally, discrimination by heteronormative fellows against those who are perceived to be *disobedient* or simply *forgotten* and their abandonment by good sexual citizens of better normalcy still exists and must be acknowledged and remedied (Richardson, 2004). A true commitment to democratising sexual and gender politics should be accountable for all measurements of social class in order to avoid hierarchical or exclusionary operations, which are often seen in local societies between activists.

Understandably, the construction of self is 'always a rapport of violence with the other; so that the notions of...self-presence...are essentially dependent on an oppositional relation with otherness', as Derrida (1984: 117) contends. However, the politics of identity/sovereignty as manifested in law should remain more cautious and attentive in terms of universal rights and their holders. Queer international law, on the contrary, submits an anti-essentialist and anti-reductionist proposal to prevent, or compensate for, an oversimplification of diversities in the real world and the corollary of its crowding-out effect.

For the rights of human race in the realm of international studies, the 'international' needs to be deconstructed and reordered in a non-state centric and non-heteronormative manner. The conventional human rights mechanisms should accordingly be advanced when there is considerable demand. The relationship between a state and its people should not simply rely on the given texts or the existence of the represented individuals (as positivists would

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assert), but adapt to the social reality where liberation is needed. It is argued here for *opinio necessitatis* of queer intervention in directing or effecting the construction of alternatives to doing state sovereignty and international law.

International (human rights) law, in an age of globalisation, is supposed to restructure the relationship between the governors and the governed but, in fact, it has often become subject to 'the *realpolitik* of the world' (Milanovic, 2012: 1035). While sexual and gender norms that are transformed and translated into the international realm become stabilised as identity narratives and sovereign imagination in a collective manner, there remains an uneven development across societies around the world concerning the 'rights' discourse. Yet, resorting to a state-to-state nationalist competition is not a solution, particularly when we face squarely the problem embedded in the politics of international law.

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