

Sexual Orientation, Human Rights and Global Politics

Matthew Waites, Department of Sociology, Anthropology and Applied Social Sciences, University of Glasgow, United Kingdom

Email m.waites@lbss.gla.ac.uk

Web: <http://www.gla.ac.uk/departments/sociology/staff/waites.html>

Abstract

Contemporary contestations of human rights by lesbian, gay and bisexual non-governmental organisations and movements focus on seeking inclusion of the concept 'sexual orientation' in definitions of human rights. For example the Declaration of Montréal from the International Conference on Lesbian, Gay, Bisexual and Transgender Human Rights 2006 proposes discussion of a new UN Convention on the Elimination of all forms of Sexual Orientation and Gender Identity Discrimination. This paper problematises utilisation of the concept 'sexual orientation' in moves to revise human rights conventions and discourses in the light of social constructionist and queer theory addressing sexuality, which has convincingly suggested that 'sexual orientation' is a culturally specific concept, misrepresenting many diverse forms of sexuality apparent in comparative sociological and anthropological research conducted worldwide. I will argue in particular that 'orientation' is a concept incompatible with bisexuality when interpreted within the context of dominant dualistic assumptions about sex, gender and desire in western culture (suggested by Judith Butler's concept of the 'heterosexual matrix'). I will discuss the implications of this for interpreting contemporary struggles among competing social movements, NGO and governmental actors involved in contesting the relationship of sexuality to human rights as defined by the United Nations.

Biography:

Dr. Matthew Waites is Lecturer in Sociology in the Department of Sociology, Anthropology and Applied Social Sciences, University of Glasgow, United Kingdom. He is author of *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave Macmillan, 2005); co-editor (with Jeffrey Weeks and Janet Holland) of a global reader *Sexualities and Society: A Reader* (Polity Press, 2003); and author of articles in *Sociology, Social and Legal Studies, Sexualities, Parliamentary Affairs, Contemporary Politics* and *Sociological Research Online*. He is on the editorial boards of *Sociology* and *Sexualities* journals.

Sexual Orientation, Human Rights and Global Politics

Introduction

The relationships between sexual identity, gender identity and human rights have emerged as central issues in contemporary global politics, including debates over cultural diversity and globalization. These issues are of crucial importance to lesbian, gay, bisexual and transgender people and otherwise-defined sexual and gender minorities worldwide.

As social research on gender and sexuality increasingly addresses global change and globalization (Adam, Duyvendak and Krouwel, 1999; Altman, 2001; Weeks, Holland and Waites, 2003; Binnie, 2004), including socio-legal and politics literature (Stychin and Herman, 2000; Bell, 2002; Buss and Herman, 2003; Stychin, 2003), and interdisciplinary work on sexuality and human rights develops (Petchesky, 2000; Miller and Vance, 2004) it is necessary to consider the relationship of marginalised sexual and gender minorities to global governance and 'global civil society' in the context of human rights debates (Delanty, 2000).

This paper addresses the relationship of sexual identity to human rights, relating emerging debates in interdisciplinary human rights studies, socio-legal studies and gender and sexuality studies to global politics. The central question addressed is: What is the relationship between sexual identity, and more particularly the concept 'sexual orientation', and human rights? How can contemporary interdisciplinary gender and sexuality research and theory illuminate contemporary processes of contestation of human rights within the international governmental organisations of the United Nations by transnational social movements and international non-governmental organisations, including those which are 'LGBT'? Analysis of these issues points to important implications for contemporary debates over 'global governance', and 'global civil society' - the latter apparent in recent books discussing global civil society by theorists such as John Keane (2003) and Mary Kaldor (2003).

Sexuality and Human Rights

It is useful to begin by outlining the general relationship of same-sex sexualities to human rights, focussing on the United Nations' human rights conventions.

Feminist commentators, such as Ros Petchesky (2000), have demonstrated the historical absence of 'sexuality' from human rights conventions. The Universal Declaration of Human Rights, like other major human rights conventions, was formulated with rights to 'privacy', 'family' and 'marriage' but without mention of sexuality, betraying a patriarchal inheritance.

The Universal Declaration of Human Rights (1948) includes the following provisions relating to family, privacy and marriage:

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. [...]

Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

In light of feminist and queer theory it is apparent that the Universal Declaration has been shaped by 'heteronormativity' (defined by queer theorists Berlant and Warner as 'the institutions, structures of understanding and practical orientations that make heterosexuality seem not only coherent – that is organised as a sexuality – but also privileged': Berlant and Warner, 1998, p.548). Yet it is also possible to recognise possibilities for redefinition: the concepts 'family' and 'marriage' are not explicitly defined as involving male/female partnerships, so are potentially subject to contestation and redefinition. 'Human Rights' as currently defined remain heteronormative in their definition and constitution, but there are possibilities for imaginative reinterpretation.

'Sexual rights' has been described by Ros Petchesky as 'the newest kid on the block' in international debates about human rights (Petchesky, 2000). Recent years have seen a variety of strategies of legal and political engagement with and reinterpretation of existing human rights conventions in relation to sexuality, which have achieved considerable extensions of the scope of existing conventions. Furthermore, as Petchesky has documented, references to sexuality emerged in relation to 'health', 'reproduction' and 'rights' in declarations from international conferences in Cairo (1994), and Beijing (1995) following struggles between feminist, Christian and Islamic international organisations (Petchesky, 2000).

The most important development in the contestation of United Nations human rights conventions with respect to same-sex sexualities was the landmark ruling by the United Nations Human Rights Committee in *Toonen vs. Australia* 1994

(Morgan, 2000, p.211). This found that non-discrimination provisions concerning 'sex' in the International Covenant on Civil and Political Rights encompassed 'sexual orientation', rendering discrimination against same-sex sexual behaviour illegal, in conjunction with Article 17's right to privacy (ILGA, 1997; Wintemute and Andenaes, 2001). The significance of this ruling is limited by the fact that the International Covenant on Civil and Political Rights is only legally enforceable in states which have signed the covenant's Optional Protocol; but nevertheless this was a hugely important development.

However, the subsequent cases of *Juliet Joslin et al vs. New Zealand* (1999) which upheld exclusion from civil marriage, and *Young vs. Australia* (2003) (which successfully challenged pensions available only to heterosexual married and unmarried heterosexual couples, but did not face opposing arguments) show the Human Rights Committee has not (yet?) interpreted the ICCPR as requiring non-discrimination with respect to marriage or partnership rights when 'protection of the family' may be at issue (Saiz, 2004, p.54; Wintemute, 2005, p.195-197).

As Ignacio Saiz of Amnesty International's International Secretariat has recently demonstrated in a valuable empirical overview of developments at the UN, 'sexuality remains a battleground within the UN human rights system' (Saiz, 2004, p.50). Human rights relating to sexual orientation continue to be opposed with reference to heteronormative understandings of cultural tradition, national identity and religious belief (Stychin, 1998; 2003; Buss and Herman, 2003; Rothschild, 2005). UN World Conferences have refused to address the issues. Similarly in the former UN Commission on Human Rights (CHR) a Brazilian resolution 'Human Rights and Sexual Orientation' was tabled and refused in 2003, 2004 and 2005 after fierce opposition from members of the Organization of Islamic Conference (OIC) and Holy See (the Vatican) (Saiz, 2004, pp.51, 57).

Interestingly opponents criticise 'sexual orientation' as an 'undefined term' which if defined as a human right could prevent protection of children (for relevant discussion see Gamson, 1997); however, the Commission's appointed experts have advanced the topic (Saiz, 2004, pp.56-57); and Human Rights Watch (2005) call for the Commission to affirm human rights irrespective of 'sexual orientation' or 'gender identity'. UN reforms which have replaced the Commission on Human Rights (abolished 16 June 2006) with a permanent standing Human Rights Council, and 'gender mainstreaming' policies, open new possibilities (Amaya, 2004; Charlesworth, 2005; Secretary General, 2005). However, negotiations are under way to review Special Procedures - which enable independent experts to act as rapporteurs for the UN Human Rights Council - within an intergovernmental working group of the UN. Abolition of this system could have a disastrous impact on moves to address same-sex sexualities and gender identity issues, and is being opposed by NGOs including Amnesty International, Human Rights Watch and the African centre for Democracy and Human Rights Studies (a petition was launched 6 March 2007: www.actforspecialprocedures.org).

A questioning of how sexual and gender identities are socially constituted is central to contemporary gender and sexuality theory, as social constructionist and queer theory gain influence (Foucault, 1981; Plummer, 1981; Warner, 1993; Seidman, 1996; Butler, 1990; 2004); including research on the diverse organisation of sexualities and genders in non-western cultures (Herdt, 1997; Drucker, 2000). Yet this is in tension with the emphasis on fixed adult sexual identities (Waites, 2005b) and gender identities (Waites, 2005c; Hird, 2002) apparent in public debates in the UK, and in the impact of the globalization of 'lesbian' and 'gay' identities on international lesbian and gay politics (Adam et al, 1999; Drucker, 1996; 2000, Phillips, 2000; Altman, 2001; Binnie, 2004). The relationship between essentialist and/or fixed conceptions of sexual and gender identity and the political discourses and strategies employed by LGBT movements in global human rights struggles is therefore a vital topic of growing academic interest (Stychin, 1998).

There is some emerging debate in law and philosophy over the appropriate relationship of human rights to sexual identity, and the claim that 'sexual orientation' should be a human right has been advanced (Heinze, 1995). The issue is becoming a key focus of debate for feminist, lesbian, gay and queer theorists, including Judith Butler who has written on the human rights theme (Morgan, 2000; Butler, 2005). This paper takes forward aspects of this research in a particular direction, offering detailed analysis of the increasingly pervasive concept 'sexual orientation', which is having a crucial structuring impact.

Orienting Human Rights? Sexual Orientation and Human Rights

There has been a strong focus on seeking inclusion of 'sexual orientation' in human rights declarations and discourses by LGBT international organisations and legal scholars (Heinze, 1995; see also Wintemute, 1995). This would repeat the inclusion of 'sexual orientation' in some existing state laws, such as in South Africa's constitution (see Palmberg, 1999). However Heinze's proposal has been critiqued by Morgan (2000), who argues that essentialist understandings of sexual identity underpin such claims, and that they fail to challenge 'heteronormativity' (Warner, 1993; Berlant and Warner 1998) in human rights law and discourse. Drawing upon broader critical and post-structuralist approaches, Morgan's work also challenges Heinze's legal positivism, whereby Heinze claims (methodologically and philosophically) to derive the principle of sexual orientation as a human right from existing human rights – an approach challenged in critical debates over the meaning, value and interpretation of 'human rights'.

Contemporary attempts to reinterpret and revise human rights conventions (including legal cases seeking reinterpretations in the courts) are focussing on introducing the concept of 'sexual orientation' in relation to non-discrimination provisions. For example, human rights organisations such as Human Rights Watch (2005) now call for UN human rights bodies to affirm human rights

irrespective of 'sexual orientation' or 'gender identity'. How should we critically evaluate this concept, and the wider discourses in which it is situated, employed in contemporary attempts to redefine human rights? This requires an answer developed in the context of: (1) contemporary gender and sexuality theory, social constructionist theory, post-structuralism and queer theory, which suggests how sexual identities are socially and discursively constituted (Foucault, 1981; Plummer, 1981; Warner, 1993; Seidman, 1996; Butler, 1990; 2004); (2) comparative anthropological and cross-cultural research on the diverse organisation of sexualities and genders in different cultures worldwide (eg. Herdt, 1997; Drucker, 2000).

Concerns have been expressed by many commentators over the years about the problematic nature of employing discourses of LGBT rights and LGBT human rights rather than less culturally specific concepts such as 'sexual rights'. For example, Peter Drucker has discussed the problematic relationship of lesbian, gay, bisexual and transgender identities to the developing world in his book *Different Rainbows* (Drucker, 2000). Dennis Altman has commented that international LGBT organisations such as IGLHRC and ILGA 'promote a universal language of identity politics' (Altman, 2001, p.126). Recently Ignacio Saiz of Amnesty International has drawn attention to the problematic ways in which an exaggerated emphasis on 'LGBT rights' can unhelpfully detach some issues from other sexuality and gender rights issues. So the critical questioning of the concept of 'LGBT rights' is alive in legal and human rights scholarship and activism (see also Bamforth, 2005).

However, the concept 'sexual orientation' has been subject to much less critical scrutiny. Typically even commentators who critically problematise the relationships of identity labels such as 'lesbian' or 'gay' (and of identity politics) to anti-discrimination and human rights law regard sexual orientation as entirely unproblematic. For example in a recent human rights text *The Essentials of Human Rights*, Nicholas Bamforth has commented on the problematic nature of 'the idea of LGBT rights'; he discusses the criticism that 'it is artificial to explain rights claims in terms of a person's lesbian or gay sexual orientation', but there is no critical comment on the scope or inclusiveness of 'sexual orientation' as a category in itself (Bamforth, 2005, pp.226-229).

A more important and prominent example of this is Robert Wintemute, who reflects on the distinction between symbolic and instrumental uses of law in relation to LGBT categories, yet in whose work the category 'sexual orientation' is foregrounded without problematisation (Wintemute, 1995, 1997, 2005). Wintemute favours an expansive understanding of human rights, in which same-sex partnership rights are human rights (Wintemute and Andenas, 2001; Wintemute, 2005), and has argued that sex discrimination provisions in human rights law can and should be invoked to encompass sexual orientation discrimination (Wintemute, 1997). Wintemute is co-author of the recent Declaration of Montréal (2006) from the International Conference on LGBT

Human Rights (Montréal, Canada, 26-29 July 2006, held in conjunction with the first World Outgames), of which he was Co-President (with Joke Swiebel, Dutch Member of the European Parliament). The Declaration uses the categories 'sexual orientation and gender identity' to formulate its calls for worldwide government policies against discrimination. The Declaration also uses 'LGBT' (as an acronym), and the concept 'LGBT human rights' extensively, with worldwide reference, for example in the Preamble. The concept 'homosexuality' is also used without clarification of whether this refers to identity or behaviour, and therefore conflating these: for example in section 1 'Essential Rights' it is stated that 'Nine countries punish homosexuality with the Death Penalty'. Leslie J. Moran has critically analysed the problematic effects of such confluences of identity and behaviour in his analysis of the use of the concept 'homosexual act' in the *Sexual Offences Act 1967* which partially decriminalised sexual behaviour between men in England and Wales (Moran, 1996).

But while the implications of using 'homosexual' and 'LGBT' have been widely discussed and critiqued in analyses of sexual politics and socio-legal studies, the concept 'sexual orientation' has received limited attention, yet is the concept above all others which is now being advanced for incorporation in global human rights law and discourse. It is therefore necessary to focus specifically on this concept, and attempt to critically evaluate the costs and benefits of its use. Just as theorists such as Leslie Moran in the UK have investigated 'the homosexual(ity) of law' (Moran, 1996), we need to investigate the 'sexual orientation' of law and human rights discourses.

My concern is that employment of the concept 'sexual orientation' implies undesirable restrictions upon the forms of sexual subjectivity, identity and 'ways of being' (a concept employed by Bech (1997) to capture forms of life experience not captured by 'identity') which are made available to human beings. After examining existing uses of 'sexual orientation' in national and international laws, I will argue that 'sexual orientation' is a concept historically aligned with a presumed 'heterosexual/homosexual binary' (Sedgwick, 1990) which has marginalised other forms of sexual identification, such as bisexuality.

Sexual Orientation in Law

The concept 'orientation' is at the heart of contemporary attempts to reform law and human rights with respect to sexuality. There has been a strong focus on seeking inclusion of 'sexual orientation' in human rights declarations and discourses by LGBT international organisations and legal scholars. For example, the claim that 'sexual orientation' should be a human right has been advanced by Eric Heinze in his book *Sexual Orientation: A Human Right* (Heinze, 1995; see also Wintemute, 1995).

The concept is used in some national laws. South Africa was the first state in the world to prohibit discrimination on grounds including 'sexual orientation', in 1994 (subsection 8(2) of the equality clause in the chapter on Fundamental Rights; Louw, 1998, p.141; see also Palmberg 1999). As another example, in the Canadian context it has been ruled by the Supreme Court (since at least the mid 1990s) that the Canadian Charter of Rights and Freedoms 1982, section 15, ensures that 'sexual orientation' discrimination is prohibited in law, as if it were an explicitly prohibited ground of discrimination in the Charter, by virtue of the analogous grounds approach (Stychin, 1995, p.109). Québec in Canada was the first government in the world (other than a city) to include 'sexual orientation' in its anti-discrimination legislation in 1977 (cf. International Conference on LGBT Human Rights 2006, p.27).

The European Union's Treaty of Amsterdam, 1997, included an anti-discrimination clause which included 'sexual orientation' (Article 6a; Bell 1998 p.65) - following lobbying by the International Lesbian and Gay Association. Furthermore, according to Wintemute, European Council Directive 2000/78/EC requires all EU states to prohibit sexual orientation discrimination in public and private sector employment and vocational training (Wintemute, 1995, p.190)

In the UK the concept 'sexual orientation' has recently been written into UK law in the *Equality Act 2006*, which creates a new Commission for Equality and Human Rights in the UK. The novelty of this is apparent from the absence of the concept from the index of Leslie J Moran's comprehensive and authoritative *The Homosexual(ity) of Law* (Moran, 1996).

Similarly at international level 'sexual orientation' is the concept mobilised in claims for reinterpretation and reform of human rights, for example in the policy statements of human rights organisations such as Human Rights Watch, where the formulation 'sexual orientation and gender identity' has become standard. It is interesting that with respect to sexuality 'identity' is now generally avoided in favour of 'orientation' in the human rights claims and discourses of elites lobbying for human rights reform, whereas 'identity' has become standard in relation to transgenderism, in the formulation 'gender identity' (see eg. Human Rights Watch, 2005; Wintemute, 1995, p.188).

Academic commentary on the concept 'sexual orientation'

The concept 'sexual orientation' has been debated in sexuality studies, including legal and political studies, and also within LGB and queer social and political movements, but perhaps not as much as many scholars in sexuality studies might think.

In general the concept is more used in biomedical and psychological literature than in the social sciences. A brief review finds the concept of 'sexual

orientation' absent from the title of any article in the journal *Sexualities* (which has a social focus) for example, and it is absent from a surprising number of core texts of the social study of sexuality, of lesbian and gay studies and queer theory (eg. Butler, 1990; Beasley, 2005). However the concept has been more commonly used in psychology and biomedical literature (eg. Herek, 1998; Whitehead and Whitehead, 1999).

The concept has become increasingly used in biomedical and psychological research since the 1980s, tending to replace 'sexual object-choice' in sexological texts, and related to this has been emerging to increasing prominence in claims for legal and policy reform, in legal and policy literature and in statutes (see previous section). However given that 'sexual orientation' was employed in anti-discrimination law by Québec (the first non-city government in the world to do other than a city) as long ago as 1977 (International Conference on LGBT Human Rights 2006, p.27), the lack of more detailed critical attention to the concept in politics research and critical socio-legal studies addressing sexualities is perhaps surprising.

Nevertheless concept 'sexual orientation' has certainly been analysed in the social sciences. In the sociological literature, Ken Plummer's well known foundational social constructionist text *The Making of the Modern Homosexual* (1981) distinguished 'two broad ways of approaching the problem of building a homosexual identity: the *sexual orientation model* and the *identity construct model*'. Plummer stated that: 'the orientation model is found among geneticists, clinicians and behaviourists alike and suggests that a person's sexual orientation is firmly established by mid childhood' (Plummer, 1981, p.68). The alternative 'identity-construct view' in this account is that of symbolic interactionists. Plummer proposed a synthesis of these two approaches 'which acknowledges the importance of childhood experiences in the restricting of our sexual possibilities and the importance of adult experiences in moulding, further limiting and sometimes transcending this childhood base' (1981, p.71); but in general Plummer supported and advanced the interactionist critique.

The important point in the present context is that critical accounts such as Plummer's have associated the concept 'sexual orientation' with medical and psychological theories in which sexual orientation is conceptualised as a fixed and given characteristic of an individual, at least after a given period of childhood. My own research on how medical and psychological perspectives on sexuality inform and structure political debates in the UK public sphere has demonstrated that during the mid and late 1990s the concept 'sexual orientation' was foregrounded by medical authorities such as the British Medical Association, and also by leading UK lesbian and gay organisations such as Stonewall, in their public interventions in relation to equalisation of the age of consent for sex between men (British Medical Association, 1994; Waites, 2003; Waites, 2005a, b). Such analysis suggests that biomedical and psychological expertise are also

likely to be implicated in configurations of power operating via international governmental institutions at a global level.

Following Plummer's social constructionist intervention, and others, the concept 'sexual orientation' became subject to critical interrogation during the 'social constructionist/essentialist debate' over the formation of sexual identities, notably in Edward Stein's edited collection of previous essays *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (Stein, 1992)

At the beginning of the 1990s in *Epistemology of the Closet* (1990), widely cited as one of the founding texts of 'queer theory', Eve Kosofsky Sedgwick commented:

'It is a rather amazing fact that, of the very many dimensions along which the genital activity of one person can be differentiated from that of another [...], precisely one, the gender of object choice, emerged from the turn of the century, and has remained as the dimension denoted by the now ubiquitous category of "sexual orientation"' (Sedgwick, 1990, p.8).

Here Sedgwick neatly identified one of the central problems with 'sexual orientation', that 'orientation' is overwhelmingly interpreted as existing in relation to *gender*. This is clearly limiting from the point of view of a queer sexual politics concerned with recognising and validating forms of sexual desire and practice which do not have this focus (see eg. Warner, 1993). However, it is also the case that the work of lesbian and gay political elites and legal scholars to define 'sexual orientation' as a relationship to an object defined exclusively by gender has occurred against a backdrop of critiques from opposing religious and right-wing groupings which have argued that 'sexual orientation' might encompass, for example, sexual desire towards children (as noted by Saiz 2004; see also Gamson, 1997, p.184).

A quote from United States anthropologist Gilbert Herdt is telling with respect to thinking about the cross-cultural value of the concept: 'Sexual orientation and identity are not the keys to conceptualizing a third sex and gender across time and space' (Herdt, 1994, p.47). This comment was made in the context of anthropological study, but is telling in the current context of thinking about the lexicon appropriate to human rights law reform.

A particular concern, which helps illuminate broader issues, is the incompatibility of 'sexual orientation' with 'bisexuality', in light of bisexual politics which has identified the ways in which a prevailing homosexual/heterosexual binary in society excludes bisexuality (eg. Hemmings, 2002; Storr, 1999). As Sedgwick notes, 'sexual orientation' tends overwhelmingly to be understood as an individual's relationship to a particular biological sex and/or social gender (in a context where the existence of only two sexes, male and female, and two genders, men and women, is assumed). In the context of understandings of sex

and/or gender as two dichotomous categories, male and female/men and women, in a relationship of both difference and opposition, the dominant meaning of 'sexual orientation' is that it refers to an individual's direction of desire towards one sex or gender, or the other, ie. male *or* female/man *or* woman. Within this framework of understandings, bisexuality is unthinkable and nonsensical as a 'sexual orientation'. Partly for this reason, historically 'bisexuality' appears not to have been described as a 'sexual orientation'. The absence of conceptions of bisexuality as a sexual orientation is indicated, for example, by the absence of the concept 'sexual orientation' from the index of Merl Storr's edited collection *Bisexuality: A Critical Reader*, which encompasses selections from both historical and contemporary medical, psychological, psychoanalytic, sexological and critical social scientific literature (Storr, 1999).

Existing Critical Attention to Sexual Orientation in Law/Legal Studies

Carl Stychin, now a Professor of Law at the University of Reading in the UK, critically addressed the legal category 'sexual orientation' in the concluding chapter of his first book, *Law's Desire*, in which he outlined the development of a Queer Legal Theory (Stychin, 1995, pp.140-156). In the context of dilemmas posed about identity in debates over postmodernism and poststructuralism, Stychin commented:

'Thus, sexual orientation as a category underscores the problems of categorical thinking more generally. Claims that the category warrants legal protection from invidious discrimination demand that it be understood as coherent, possessing some degree of stability, and also that sexual orientation is a relatively central aspect of individual identity. In other words, it must be argued that the primary gender direction of sexual object choice creates a category that *matters* and that warrants legal protection. The category is important because it has been historically invested with a meaning which must be acknowledged and remedied. At the same time, the category must maintain a certain provisionality in its deployment, so that: "as much as identity terms must be used, as much as 'outness' is to be affirmed, these same notions must become subject to a critique of the exclusionary operations of their own production" (Butler, *Bodies that Matter*, p.227)' (quoted from Stychin, 1995, p.155)

He continued:

'While the exclusionary forces of political movements should always be recognised, political life continues, and our efforts must be aimed, not simply at the exclusions performed around identities, but principally at the exclusions caused by the constitution of the dominant background norm itself.' (Stychin, 1995, p.155)

Stychin thus called attention to the specificity of the label 'sexual orientation' and pointed to the need to analyse this.

However, in its context, his final statement can be read as a defence of installing categories such as 'sexual orientation' in law, as a means to contest and challenge heteronormativity. Here Stychin shares the general emphasis of the self-identified queer theory of Michael Warner on pervasive power of heteronormativity, and the political necessity of de-centring this, even if this may require employing restrictive categories (cf. Warner, 1993).

Yet there is scope for further critical attention to the various and complex implications of using 'sexual orientation' in human rights law and discourses.

What is the meaning of the concept 'orientation'?

The question 'what does it mean to be orientated?' is of growing concern in queer studies, having recently also been posed by Sarah Ahmed in *Queer Phenomenology: Orientations, Objects, Others* (Ahmed, 2006) – a discussion I can only begin to engage with here.

A view of sexuality as part of a state of being which is socially contextual is advanced by Ahmed, who usefully foregrounds phenomenology as a resource for conceptualising sexualities, and particularly 'sexual orientation' (Ahmed, 2006). According to Harvie Ferguson, phenomenology in the twentieth century from Edmund Husserl 'seizes experience as the essential subject matter of philosophy', and seeks to overcome dualisms separating individuals from the objects of their perception (Ferguson, 2006, pp.37-38).

Perception does not consist in staring blankly at something lodged in consciousness, inserted there by some strange wonder as if something were first there and then consciousness would somehow embrace it... it is an accomplishment that must be new for every novel object. (Husserl, *Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy: First Book*; quoted in Ferguson, 2006, p.37).

Phenomenology focuses on the power of things to generate 'wonder' and 'astonishment'; the 'initiatory power of phenomena themselves' (Ferguson, 2006, p.17). A 'phenomenon is, first of all, phenomenal; something astonishing' (ibid p.17). This focus refutes an emphasis on the detachment of subjects and subjectivity from the objective world, in favour of recognition of states of subjectivity being inseparable from experience of the external world, including the social world and other people. At the heart of phenomenology is an insistence on the absence of absolute distinctions between subjects (conceived with an emphasis on the embodiment of lived experience) and the objects of their perceptions; and an emphasis upon the power of objects to generate emergent

and novel subjective states in those who perceive or encounter them (see also Moran, 2000). Applied to the conceptualisation of sexual subjectivities, phenomenology might thus suggest an emphasis on the persistent and unique powers of individuals defined by sex, gender or other features to generate unpredictable subjective states when encountered by others, beyond their conscious control, and in defiance of notions of 'sexual orientation' as a definitive natural or constituted condition.

The *New Shorter Oxford English Dictionary* (Brown, 1993) defines 'orientation' as a noun apparently deriving from the verb 'orient' in the mid 19th century, in a variety of ways:

1. The placing or arranging of something to face the east; (*specifically*) the construction of a church with the longer axis running due east and west; b The action of turning to the east, especially in an act of worship.
2. Position or arrangement of a building, natural object, etc, relative to the points of the compass or other defined data.
3. The action or process of ascertaining one's bearings or relative position, or of taking up a known bearing or position; the faculty of doing this, sense of relative position. b (*Chemistry*) The orienting effect of a substituent in a ring; the process of ascertaining the relative positions of the substituents in a ring.
4. (figuratively) A person's (especially political or psychological) attitude or adjustment in relation to circumstances, ideas, etc; determination of one's mental or emotional position. b. An introductory talk, course etc., given especially to newcomers to a university, organization etc.

This definition is followed by illustrative quotations which for sense 4 includes:

'J. GATHORNE-HARDY An adult's sexual orientation is determined between the ages of one and five.'

It is apparent that this illustrative quotation associates 'sexual orientation' with the fourth, figurative, definition of orientation as 'A person's (especially political or psychological) attitude or adjustment in relation to circumstances, ideas, etc; determination of one's mental or emotional position'.

The dictionary thus offers a fascinating set of supposedly authoritative definitions of 'orientation'. Synthesising these four definitions, several points can be made. Firstly, they all share an emphasis upon conceptualising orientation as being relative to *independently given characteristics of a real external world*. Secondly, in several of these definitions there is a considerable sense of orientation being relative to *specific* features of reality, rather than reality in general. In some there is the sense that orientation is relative to a *single and very particular aspect* of reality: in definition 1 there is an emphasis on orientation being relative to a

single direction (east), and in definition 2 there is the sense of orientation to a specific geographical and social setting.

Without assuming any straightforward correspondence between the definitions in this supposedly 'authoritative' text and the meanings of 'orientation' in culture more broadly, it can be suggested that these definitions resonate with wider cultural meanings in which orientation is understood to be relative to *specific objects*. For sexual orientation, these are specific forms of *sexed objects*. In general therefore the dominant meaning of 'sexual orientation' is a characteristic of an individual which (1) exists independently of external reality (has an independent ontology); but nevertheless (2) is defined relative to sexed individuals understood as male or female.

A problem with sexual orientation from a queer perspective interested to validate multiple forms of sexuality, is the tendency for it to be associated with the privileging of gender in defining sexual desire (as suggested by Sedgwick above). That 'orientation' is overwhelmingly interpreted as existing in relation to gender is clearly limiting from the point of view of a queer sexual politics concerned with recognising and validating multiple forms of sexual desire and practice. However, also as previously noted, it is also the case that the work of lesbian and gay political elites and some mainstream legal scholars to define 'sexual orientation' as a relationship to an object defined exclusively by gender has occurred against a backdrop of critiques from opposing religious and right-wing groupings which have argued that 'sexual orientation' might encompass, for example, sexual desire towards children (as noted by Saiz, 2004).

'Sexual orientation', I have shown, is a concept historically aligned with a presumed heterosexual/homosexual binary, which has marginalised some forms of sexual identification such as bisexuality, and other forms of sexuality more generally. But is it open to reinterpretation via the assignation of new meanings, and contestation of the discourses in which it is contextualised?

In light of social constructionist and queer post-structuralist theorisations of sexual subjectivity, and particularly Ahmed's phenomenological perspective, it may be suggested that 'sexual orientation' might be a flexible enough concept to be applicable to an individual's subjectivity (feelings or 'desire') at a particular moment rather than necessarily implying a continuous state. Hence bisexuality might be understood as involving a person having a shifting 'sexual orientation'. However, this would tend to imply conceiving a bisexual person as having shifting and successive 'sexual orientations' over time rather than a singular sexual orientation.

However, if such a notion of 'sexual orientation' were added to the essentialist understandings existing in mainstream scientific and public discourses, this would imply the concept 'sexual orientation' being used to encompass two different and mutually exclusive types of thing: (1.) a continuous characteristic

inherent to a person (eg. the idea of a person having an immutable 'gay', 'lesbian' or 'heterosexual' orientation); and (2.) a particular form of attraction (subjectivity) understood as existing for them only in a particular time and context. Stretching the concept 'sexual orientation' in this way would lead to uncertainties about meaning, ambiguity and incoherence. Naming bisexuality as a singular 'sexual orientation' alongside notions of a 'gay', 'lesbian' or 'heterosexual' orientation generates further inconsistency and incoherence, since the 'orientation' is being used simultaneously to refer to a person's ontology and a direction of desire in relation to gender.

Nevertheless in recent decades bisexuality has occasionally, and increasingly, been understood as a 'sexual orientation', including by the state. Often this has occurred implicitly, where documents clearly conceptualised first and foremost with reference to lesbians and gay men are also said to address bisexuals. Hence bisexuality becomes steadily drawn under the heading 'sexual orientation', but often in circumstances where it is unclear that there has been any systematic attempt to think about the applicability of 'sexual orientation' as a concept to bisexuality. This would appear to be the case in the UK's recent *Equality Act 2006*, which creates a new Commission for Equality and Human Rights (coming into existence from October 2007), and redefines the UK legal and policy framework relating to equality and diversity. Fascinatingly in this crucial legislation (section 35), 'sexual orientation' is defined as follows:

35. General

In this Part-

[...]

"sexual orientation" means an individual's sexual orientation towards -

- (a) persons of the same sex as him or her,
- (b) persons of the opposite sex, or
- (c) both

Hence by the single, little word 'both', the law attempts to recognise bisexuality and encompass it within 'sexual orientation'.

That the word 'bisexuality' does not appear is unsurprising, and reflects the erasure of the category 'homosexual' from law in recent years due to the problematic connotations of acts and identity which that concept's presence in statutes has entailed (cf. Moran, 1996). Nevertheless, minimising the language used ('both') appears to be an attempt by legislators to avoid drawing attention to this new and distinctive aspect of the law, and perhaps also to any incoherence of meaning it might generate. Here in any case is evidence that legislators can and do institutionalise explicit definitions of the concept 'sexual orientation' in law which move beyond the notion of attraction to a single sex or gender. But can 'sexual orientation' perform this conceptual and legal work? Can the concept 'sexual orientation' be coherent and

meaningfully defined if it is said to encompass orientation towards *both* persons of the 'same sex' *and* persons of the 'opposite sex'?

Importantly, notice that the concept 'opposite sex' (and 'same' sex) has simultaneously been encoded in the law. This use of 'opposite sex' appears to be a further novelty in English law (to my knowledge). The legislation installs the notion of a dichotomy of sex, male and female as not only mutually exclusive categories, different and distinct, but also *opposing*, encoded in the law for the first time. Such a model of sex has been profoundly questioned in feminist, queer and transgender theory, particularly that influenced by post-structuralism, for example in Butler's critique of the discursive constitution of a 'heterosexual matrix' entailing particular discursive and embodied formations of sex and gender (eg. Butler, 1990).

The notion that the two sexes are 'opposite' emphasises that an orientation towards both sexes simultaneously is inconceivable, an impossibility, if attraction or desire is conceived as being oriented towards and also constituted by a relationship to 'sexual difference' (difference between the sexes) or sameness (as is emphasised for example in most psychoanalytic theory, the predominant - albeit dubious - source of theories of 'desire'). If the sexes were simply different by degree but not 'opposite', then the possibility of experiencing desire towards both might seem more conceivable.

In this light it is interesting to consider the process of consultation which must have taken place over how to address bisexuality in UK law and the Equality Act, and I would speculate based on previous empirical research (Waites, 2003, 2005a, 2000b) that government consultation may have focussed on Stonewall, the formerly 'lesbian and gay' lobbying group which has become 'LGB' only in recent years – to the neglect of consultation with specifically bisexual organisations.

To summarise the argument in this section:

Dominant understandings of the concept 'sexual orientation' tend to assume it refers to

- (i) a characteristic of an individual (existing independently of socio-cultural reality external to that individual); and
- (ii) that this characteristic involves a disposition towards desire and/or behaviour in a particular, specific direction .
- (ii) that this is defined in relation to *gender*

In dominant cultural understandings of sex and gender, a relationship of both difference and opposition is assumed between both male and female (biological sex), and men and women (including social aspects of gender). This is usefully suggested by Butler's concept of the 'heterosexual matrix' – 'that grid of cultural intelligibility through which bodies, genders and desires are naturalized' (Butler,

1990, p.151) - formed by discourses of gender and sexuality. In this context the concept 'sexual orientation', given the dominant meaning of 'orientation' as a characteristic of a sexed individual relative to specific others defined by sex (male/female), is inherently incompatible with bisexuality. In short, bisexuality does not make sense as a 'sexual orientation' in the terms of the dominant Western culture. Therefore it follows that installing 'sexual orientation' in law, including human rights, entails exclusionary effects - not only for self-defined 'bisexuals', but for a huge range of groups in states and cultures worldwide which include degrees or forms of same-sex sexual desire/subjectivity, identity or behaviour in relation to men and/or women.

This does not necessarily imply that attempts to express bisexuality as a sexual orientation will fail - since law and culture are full of contradictions (as the post-structuralist move from structuralism tended to recognise). However, in this context attempts to express 'bisexuality' as 'sexual orientation' can be interpreted as likely to produce or reveal certain kinds of incoherence, slippages and disjunctures between signifiers and their intended signified's, with potential to be destabilising (a theme which might warrant further investigation via engagement with post-structuralist theory, particularly Derrida's deconstruction). Attempts to use 'sexual orientation' as a universal category in human rights law may be sustainable, but it seems appropriate to expect and look for incoherence, and perhaps use this to contest and redefine 'sexual orientation' itself, to achieve broader cultural and political changes

In light of the mutability of 'sexual orientation', particularly the possibility of conceptualising a sexual orientation as a mutable, time and context specific characteristic, it is not necessary to argue for the abandonment of sexual orientation as a concept in human rights discourse. However, it is necessary to develop political analysis in the context of recognition of the dominant meanings of 'sexual orientation' in contemporary global governance and global civil society. Politics and human rights literature, and relevant INGOs, and governmental organisations, should start noting explicitly the exclusionary effects of using the concept 'sexual orientation' within current discursive frames in order to transform its dominant meanings.

Sexual Orientation in Contemporary Global Sexual Politics

'Sexual Orientation' now seems to be everywhere. Canadian Prime Minister Paul Martin, in his statement of greetings to participants in the International Conference on LGBT Human Rights to be held in Montréal in July (26-29), as part of the first World Outgames, said:

'This conference is an excellent opportunity for some 2000 delegates from around the world to come together to discuss equal rights, with a particular focus on the issue of *sexual orientation*. [...] You can take great pride in

your participation in this gathering, which demonstrates your solidarity and commitment to eliminating all forms of discrimination related to *sexual orientation*.' (International Conference on LGBT Human Rights 2006; italics added).

The International Conference on LGBT Human Rights was 'the largest conference on LGBT human rights ever held'. One of the Co-Presidents, Robert Wintemute, Professor of Human Rights Law at Kings College London is author of texts including *Sexual Orientation and Human Rights* (Oxford: Clarendon Press, 1995). Yet Wintemute has been criticised by queer legal theorist Wayne Morgan in an important essay 'Queering International Human Rights Law' for advancing essentialist conceptions of sexuality (Morgan, 2000).

According to Wintemute's greeting to delegates:

'What the Outgames and the Conference have in common is defending the human right of every LGBT person in the world to participate fully, openly and equally in every part of life, without hiding their *sexual orientation or gender identity*.....' (italics added)

The Declaration of Montréal is now the major focus of lobbying of the United Nations, as well as of states worldwide. Organisers of the International Conference on LGBT Human Rights (2006) expected this declaration to represent 'a breakthrough for the international LGBT community and, indeed for the whole of humanity'. But exclusions are entailed in current understandings of the concept 'sexual orientation' at the heart of this.

Conclusion

We are witnessing the mainstreaming of the concept 'sexual orientation' in international human rights discourse, and might in coming years witness the installation of 'sexual orientation' in international human rights law - as has already happened in the UK equality laws. As demonstrated in this paper, dominant understandings of 'sexual orientation' tend to assume that it refers to (i) a characteristic of an individual (existing independently of socio-cultural reality external to that individual); and (ii) that this characteristic involves a disposition towards desire and/or behaviour in a particular, specific direction. However the concept sexual orientation is not straightforwardly incompatible with sexual diversity with respect to 'bisexuality' and 'queer' sexualities which de-centre gender as the focus of sexual 'object-choice', 'desire' and/or behaviour. Rather, 'sexual orientation' has a range of contested meanings defined by various authorities which are subject to ongoing contestation. The concept brings a form of visibility which should be evaluated in recognition that there are both costs and benefits in any form of language used. It is appropriate to recognise the benefits which do accrue through strategies which use legal reform as a means to 'public

visibility' - placing 'sexual orientation' in human rights conventions and discourse does this in ways which simply addressing 'sexuality' cannot.

However it is necessary to address its implications, noting costs and benefits – not only in academic analysis, but also in the interventions of INGOs and governmental organisations. Human rights scholars and activists need to take on board this perspective influenced by queer theory and much more vigorously situate the concept in relation to surrounding discourses which give it meaning, and contest these discourses. In relation to debates over 'global civil society' it is necessary to recognise implications for the leading international NGOs which claim to represent lesbian, gay, bisexual and transgender (LGBT) people, notably the International Gay and Lesbian Human Rights Commission (IGLHRC) and the International Gay and Lesbian Association (ILGA); and also for leading human rights NGOs such as Amnesty International and Human Rights Watch which increasingly address same-sex sexualities through the concept 'sexual orientation'. In relation to global governance this analysis demands reappraisal of developments at the United Nations. Even if 'sexual orientation and gender identity' become successfully incorporated in the global human rights framework, this would signal not the unqualified dissipation of inequalities in human rights relating to sexuality and gender, but rather the installation of a particular Western form of Butler's heterosexual matrix (Butler, 1990) in human rights law and discourse.

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