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RESEARCH ARTICLE

Critically Queer Yet Politically Affirmative Engagements with Human Rights

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Abstract

Considering recent queer engagements with international human rights, this article argues that emerging attempts at queering rights have often resulted in framing queer critique into the normativity of human rights. This article critiques this tendency, suggesting that queer engagement with rights can be critical yet (potentially) affirmative. It shows that queer critique, understood as non-essentialist politics, can contribute to contemporary critical human rights studies and their analyses of identity-producing functions of rights. In this way, the paper engages not only with the subject paradox of the rights discourse but also with queer responses to identity-based rights claims. I argue that queer critiques, shifting the focus from ontology to politics, encourage an affirmative engagement with framings of rights by considering identities as political claims, understanding rights not in ontological terms but as instruments for shifting temporary strategies in practice. The arena of rights, a site where debates about the definitions of human are contested, is a crucial space for deploying non-essentialist politics. In this context, the article refers to queer as a critical method in deploying rights to reduce the disciplinary effects of identities, helping us to free ourselves, our engagements with others, and politics from the eyes of the Normative.

Keywords

Human rights, identity politics, critical theory, queer theory, Michel Foucault

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*Rights produce the subject they pretend only to presume.*¹

Wendy Brown

*...it is not just gender and sexuality that are in some sense performative, but their political articulation and the claims made on their behalf are performative, as well.*²

Judith Butler

This article examines the current engagements of queer theory with the politics of human rights and debates the potential of queer to serve as a critical method in contemporary advocacy for rights. Over the past decade, legal scholars have increasingly turned their attention to queer theory and politics. Recent analyses suggest that this curiosity often identifies queer politics with the increasing formalization of LGBTI+ rights as human rights. Attempts at *queering* international human rights have led to a normalization process of queer within the human rights discourse, moving queer away from its critical *ethos*. In other words, 'queer has gone normative' within the framework of human rights. Rather than equating queer politics with LGBTI+ rights or regarding them as mutually exclusive, this paper advocates an alternative positive engagement between these two forms of politics. Drawing inspiration from Michel Foucault, Wendy Brown, and Judith Butler, this study proposes a *critically queer yet politically affirmative engagement*.

Within this engagement, the critique of queer theories on mainstream rights advocacy shifts the focus *from ontology to politics*. They encourage us to consider homogenizing identities not as ontological claims but as political constructs, as impossible yet politically necessary categories. Accordingly, with their simultaneous effects of emancipation and discipline, human rights are understood not in ontological terms but in terms of strategy, as instruments for shifting temporary strategies and tactics in various political contexts. Moreover, drawing from critical human rights studies, since the arena of human rights is a normative/normalizing site where debates about the political definitions of what constitutes the subject are contested, it is also a very convenient space for non-essentialist and antinormative politics of queer. In addition, within the presence of regulatory and identity-producing effects of human rights, to know how to govern identities and rights, rather than fully totalized by them, and to form a distance between ourselves and our political-legal tools as much as possible, critical capacities of queer can contribute a *self-critical perspective* to the ongoing struggles. Eventually, queer critique forces us not to see ourselves and our relationships from the eyes of the Normative.

1 Wendy Brown, 'Revaluing Critique: A Response to Kenneth Baynes' (2000) 28 Political Theory 469 (2000) 472.

2 Judith Butler, *Notes Toward a Performative Theory of Assembly* (Harvard University Press 2015) 57.

I. Introduction: Queer's Current Engagements with Human Rights: A Framing?

As we examine how queer is currently situated within the international human rights law framework, the attempts of *queering rights* come into question. It is crucial to underscore the critical capacities of queer theory in challenging the human rights discourse in this context. Thus, one of the central focuses of the article is the inevitable tension between the normativity of human (LGBTI+) rights and the anti-normative, non-identity politics of queer:

To delineate the distance between queer politics and the advocacy of LGBTI+ rights, I first clarify the concept of queer and how I refer to *queer politics* in this article. The term queer refers to various meanings and usages in our contemporary world. Occasionally, it serves as an umbrella term encompassing all individuals within the LGBTI+ community. It can also be adopted by anyone troubled by prevailing gender and sexuality norms. Furthermore, queer embodies theoretical and political viewpoints that contest the conceptual dichotomies of sex and gender and critiques the normalization processes entrenched within societal norms of gender and sexuality and granted stabilities in everyday life. However, at its core, queer emerges as an opposition to identitarian and assimilationist politics within the anti-ontological framework, focusing on the normative devices that shape subjectivity.³

Historically, queer has emerged as a political movement countering hegemonic normativity and the normalization processes of sexuality and gender. It evolved from various political debates surrounding gender, gender identity, and sexual orientation. Yet, queer destabilizes the notion of singular and unitary categories of identity, such as gay or woman. It posits that these identities are not natural but socially constructed and inseparable from existing power dynamics. Thus, while queer occasionally refers to LGBTI+s, rather than an identity, it embodies a critical stance towards identities, a resistance to *naming* and *essentializing*.⁴ Even employed as a 'false unifying umbrella'⁵ or a collective identity that works as a shelter or an instrument to make political claims with others, queer signifies an anti-essentialist position on identity. It is understood as a political stance that resists assimilation into normalization processes⁶ through rigid or totalising legal framings, 'at odds with the normal, the legitimate, the dominant'⁷.

3 Annamarie Jagose, *Queer Theory: An Introduction* (New York University Press 1996) 31, 58–71; Cathy J Cohen, 'Punks, Bulldaggers, and Welfare Queen: The Radical Potential of Queer Politics' (1997) 3 GLQ 437, 439–440; Nikki Sullivan, *A Critical Introduction to Queer Theory* (New York University Press 2003) 81; Lorenzo Bernini, *Queer Theories. An Introduction* (Michela Baldo and Elena Basil trs, Routledge 2021) 33.

4 Leo Bersani, *Thoughts and Things* (The University of Chicago Press 2015) 18.

5 Sullivan (n 3) 44.

6 Michael Warner, 'Introduction' in Michael Warner (ed), *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press 1993).

7 David Halperin, *Saint Foucault. Towards a Gay Hagiography* (Oxford University Press 1995) 62.

Therefore, the emergence of queer critique has often been welcomed with a discussion regarding whether queer signals the end of existing forms of politics, particularly identity-based rights claiming. As queer fundamentally represents a non-identity, more precisely, an anti-normative endeavor challenging the hegemonic norms of sexuality and gender, the argument against queer has been that queer critique leaves no *ground* for collective action, contending that without recourse to an identity category, one cannot make political claims for the group.⁸ Queer approaches, in this context, have been accused of personalizing political identities. Its theoretical concerns have been dismissed as detached from ‘the blood, bricks, and mortar of everyday life’⁹.

A similar tension arises in the relationship between the queer and the advocacy for identity-based rights, as well. Queer politics maintains an ambiguous stance toward rights: to assert rights claims, one must begin with unitary identities as a *foundation*. Legitimacy and the pursuit of equal rights necessitate clearly defined group identities, as political claims must be definitively framed to gain legal recognition. Yet, queer perspectives prioritize exposing the inherent oppression within these political-legal identities, which is crucial for political gain. By asserting that gender and sexuality are socially constructed and fluid, queer perspectives challenge the identity politics model that underpins the LGBTI+ rights activism.¹⁰ Some accounts have even been concerned about the potential ‘disastrous consequences’¹¹ of queer theory for LGBTI+ rights. Indeed, framing struggles into the human rights rhetoric, for instance, declaring that “I am gay” and “gay rights are human rights” have been very effective in an era where rights serve as a moral high ground, in the ‘age of rights’¹². However, queer interventions interrogate the stabilization and normalization of sexuality in the name of rights, the Western-centric global governance of gay rights struggles, and the depoliticizing effects of the rights discourse on sexualized subjects. The queer critique thus engages *uneasily* with legal normativity, questioning how law eventually plays a role in how we perceive, declare, and/or reject ourselves regarding our sexuality via rights.

However, over the past decade, there has been a notable shift in queer curiosity. It has been shaped differently among legal scholars, particularly within Western jurisprudence and international human rights law. Despite the efforts to distinguish between the LGBTI+ and queer, recent publications often conflate the two, queer being equated with the acronym LGBTI+, and queer politics recognized as the

8 Max H. Kirsch, *Queer Theory and Social Change* (Routledge 2000) 2–6.

9 K. Browne and C. J. Nash, ‘Queer Methods and Methodologies An Introduction’ in K. Browne and C. J. Nash (eds), *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research* (Routledge 2010) 6.

10 Julie Mertus, ‘The Rejection of Human Rights Framings. the Case of LGBT Advocacy in the US’ (2007) 29 *Human Rights Quarterly* 1036, 1063.

11 Richard D Mohr, ‘The Perils of Postmodernity for Gay Rights’ (1995) 8 *Canadian Journal of Law and Society* 5, 5.

12 Costas Douzinas, *The End of Human Rights. Critical Legal Thought at the Turn of the Century*. (Hart Publishing 2000) 1.

LGBTI+ rights advocacy.¹³ In some cases, the term *queer rights* has been proposed as a more inclusive alternative to LGBTI+ rights terminology. Indeed, in global politics, human rights standards and terminology serve as the primary normative order, regulating our engagement with politics and defining our roles as political agents. While developments in international human rights law, women's rights advocacy, and political mobilization around HIV have ultimately elevated human rights as a central focus of LGBTI+ activism, queer politics is often depicted as synonymous with demands for LGBTI+ rights: LGBTI+ rights, it is noted, have become 'a central claim of queer politics'¹⁴. This mainstream narrative, through an evolutionist perspective of history and the rights triumphalism, tends to homogenize diverse local and global struggles under the umbrella of the struggle for rights, potentially erasing their distinctiveness. When queer politics is viewed as the transformation of political demands into legal terminology through the rhetoric of rights, eventually into the human rights regime of the liberal international order as such, Ratna Kapur argues, the critical examination of queer has been located into the normativity of rights. Queer politics, which initially aimed to challenge the naturalization and normalization of gender and sexuality categories, has become normalized through its engagement with human rights.¹⁵

Hence, re-radicalizing queer and embracing its critical capacities within jurisprudence emerge as essential endeavors. Nonetheless, Kapur suggests that 'the potential for queer radicality remains on the outskirts of human rights, rather than within its embrace'¹⁶. In contrast, this paper explores the possibility of re-radicalizing queer within the politics of rights without conflating queer politics with struggles for rights. Instead of asserting 'the incompatibility of law and queer theory'¹⁷, it seeks to explore critical yet affirmative engagements between these distinct politics. Non-essentialist political positions do not necessarily suggest rejecting struggles for rights based on identity. Queer can serve as a critical *impulse* within political action, emphasizing that rights and identities should be viewed in terms of strategy and tactics, contingent upon the dynamics of politics. Hence, the primary purpose of this article is to realign the current engagements to queer with its critical *ethos*, suggesting queer as a critical tool that would allow agents to deploy rights and identities cautiously and to instrumentalize them for alternative political paths.

13 Ratna Kapur, 'The (Im)Possibility of Queering Human Rights Law' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complications, Risks* (Routledge 2018) 132–133; Anthony J Langlois, 'Queer Rights?' (2017) 71 *Australian Journal of International Affairs* 241, 244; Brenda Cossman, 'Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)' (2019) 6 *Critical Analysis of Law* 25 <<https://cal.library.utoronto.ca/index.php/cal/article/view/32562>> accessed 8 February 2024.

14 Dennis Altman and Jonathan Symons, *Queer Wars. The New Global Polarization over Gay Rights* (Polity Press 2016) 17.

15 Kapur (n 13) 132–134.

16 Ibid 132.

17 Cossman (n 13) 28.

Structured into three sections, the first and second sections focus on the critical dimension of queer engagements with human rights, mainly of the discourse surrounding gay identity and gays' human rights. Drawing from critical human rights studies and their main discussion topics, the first section contends that the concept of human rights is primarily challenged through its *identity-producing effects* and *subjectification processes*. The paradoxes within the discourse of human rights essentially result from the problem of defining the subject of rights. Therefore, this section portrays struggles for rights based on difference and identity as struggles for redefining and destabilizing what it means to be human.

Since the subjectivity of the liberal-legal essentialist humanist tradition is a main critical focus of queer critiques, the second section indicates the contributions of queer critique to critical human rights studies, highlighting the subject paradox inherent in the rights discourse. In the context of queer perspectives, there has been a pressing concern about the normative and exclusionary effects of (gay) rights. While the discursive effects of rights are still undeniably powerful in challenging oppression and the rhetoric of rights is on the main agenda of global gay activism, the deployment of the framework of human rights is highly paradoxical in many local contexts. As the subject of rights is based on Western sexual epistemology, several questions have been raised about whether the framework of gay rights dictates Western concepts of and perspectives on gender and sexuality. Apart from that, alliances between the agenda of mainstream gay rights advocacy and the prevailing nationalist, neoliberalist, colonialist, or racist discourses have also been investigated.

Following these critical approaches that enable us to compile the current political debates over gay rights, the third section analyzes the socio-political practice of identity-based rights claiming. Based on conceptual tools provided by Foucault, Brown, and Butler, this section critiques the identities at stake; however, it is more interested in exploring the affirmative dimension of queer engagements with the politics of rights. Foucault's insights on identity and the politics of rights are particularly relevant, as he offers a perspective on rights that refers to the concept within the arena of political action in terms of strategy and tactics. Foucault affirms identities not as ontological claims but as political constructs, and the politics of rights are deemed impactful for their contingent and performative effects on challenging the existing relations of power. The concepts of contingency and performativity are central to this discussion, highlighting the ambiguity, fluidity, and necessity of a self-reflexive approach within rights activism.

Consequently, following a critical yet affirmative perspective on rights, the article emphasizes rights' contingent nature and performativity inherent in political action. It questions whether queer critique can be deployed to challenge the framing effects

of rights discourse. This study explores how queer can serve as a method in ongoing struggles to reduce the disciplinary and regulatory effects of rights and identities as much as possible. It concludes by probing the queer potentials to disrupt and transform conventional understandings of rights and identities.

II. Who is the Subject of Human Rights?

Human rights, a fundamental concept of modernity, remain prominent in our moral and political imagination. However, despite the promises of the human rights discourse, there have been considerable critiques from various theorists, lawyers, and/or activists in recent years regarding the disparity between the discourse and practice.¹⁸ Since the early 2000s, there has been a growing interest in critically examining human rights, leading to the expanding literature of critical human rights studies. Critiques of rights stem from various perspectives on different grounds, challenging rights-claiming based on fixed identity categories or questioning the authority of rights as neutral, self-evident truths and above politics. While these critiques vary in their focus and methodology, they converge on a shared concern regarding the normative effects of the subject of human rights.

It is generally argued that the Human-subject serves as the norm that enforces specific subjectivities, characterized by traits such as whiteness, Western heritage, able-bodiedness, heterosexuality, cis-maleness, and citizenship.¹⁹ The top-down regime of human rights regulates non-conforming bodies in accordance with the Human-subject category, in alignment with these normative standards. In essence, while human rights have emancipatory potentials, to many critical perspectives, they are at stake with their subjectification effects and identity-producing functions.²⁰ Even if we accept that rights are political in origin, are established and reshaped through/by political struggles, their invocation directs attention to the legal sphere and the normativity of legal systems. As law cannot function without framing political demands, categorizing and naming subjects, and privileging specific aspects of human experience, any invocation of rights requires a determinate idea of the subject. This subject-norm serves as a shared language by establishing *objectivity* and *naturality* irrespective of any particular doctrine.²¹ Consequently, the deployment of rights always risks reinforcing the subject as the norm while reproducing a range of others as marginalized subjects. Therefore, at what cost do the dehumanized socio-

18 Douzinas (n 12).

19 Wendy Brown, *Politics out of History* (Princeton University Press 2001) 9–12.

20 Anne Grear, “‘Framing the Project’ of International Human Rights Law: Reflections on the Dysfunctional “Family” of the Universal Declaration’, in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012) 18–20; Jim Ife, *Human Rights from Below: Achieving Rights through Community Development* (Cambridge University Press 2012) 70.

21 François Ewald, ‘Norms, Discipline, and the Law’ in Robert Post (ed), *Law and the Order of Culture* (University of California Press 1991) 156.

political others (such as gays) or natural others (such as non-human beings) of the Human-norm haunt the rhetoric of human rights that categorically expel them? At what cost do they use rights while simultaneously being regulated by them? These questions underscore the complex dynamics within the interplay among rights, identity, and power.

Following these questions, contemporary critical human rights approaches, with various perspectives and methodologies, often highlight the paradox inherent in the subject of the human rights discourse through interconnected discussion points. We can categorize these critical themes as follows:

- *Legalistic effects of human rights*: Within this theme, critical approaches question how political questions are translated into framed legal issues through rights. The critique focuses on the expansion of law at the expense of politics via human rights, advocating the possibility of political projects not entirely constrained by legalistic frameworks. This perspective aims to uncover the political origins of rights, which are often obscured by legal discourses and philosophical questions over the ontological basis of human rights.²²
- *The authority of legal/ontological perspectives on human rights*: Another critical path questions the authority of legal and philosophical interpretations of rights, of 'juridico-philosophical discourse'²³ on rights, which often reduces political questions into legal technical problems or portrays rights as neutral entities, separating them from their political context. As politics are reframed into legality through rights, the orthodox human rights discourse presents rights as almost identical to justice, aiming to persuade us that social justice is only achievable through rights, measurable by judicial neutrality.
- *The history of human rights and agency*: Many argue that the orthodox historical narrative suggests that human rights represent the pinnacle of political emancipation²⁴, as something 'the most we can hope for'²⁵. Critical studies have revealed the ideological aspects of the teleological and progressive historiography of human rights on rewriting political agency, framing it into legal struggles, and obscuring the diversity of struggles from different historical conjunctures. The new human rights historiography emerging since the 2010s challenges the triumphalist narratives and explores the political-historical conditions that have shaped the idea of human rights as a universal

22 Wendy Brown and Janet Halley, 'Introduction' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 20.

23 Michel Foucault, '*Society Must Be Defended*'. *Lectures at the Collège de France, 1975-76* (David Macey tr, Allen Lane 2003) 52.

24 Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press 2010).

25 Wendy Brown, "'The Most We Can Hope For...': Human Rights and the Politics of Fatalism" (2004) 103 *South Atlantic Quarterly* 451, 451.

normative order, focusing on the last quarter of the twentieth century.²⁶ On the other hand, the social theory of human rights priorities acknowledging historical connections between political agency and rights.²⁷

- *The state-centrism of human rights*: It mainly focuses on the false dichotomy between the Human and the Citizen. Inspired by Hannah Arendt's analysis²⁸, this path stresses the constitutive relation between the discourse of rights and the nation-state model, challenging the postulate that rights derive from a universal moral nature common to all, instead emphasizing their link to citizen identities. The critique remains relevant, particularly in the refugee crisis in Europe, where the state-centric approach to rights has profound implications.²⁹
- *Gender of human rights*: The gendered dimension of human rights discourse is a critical point of discussion, revealing the gendered subject concealed behind the mask of impartiality. Historically, it is the first objection to human rights discourse, which dates back to the objections of French feminist movements in the late eighteenth century towards the Declaration of the Rights of the Man and of the Citizen. Since then, it has highlighted the centrality of the male experience, the gendered language, and the framework of the international law regime from different feminist standpoints.³⁰
- *The cultural identity of human rights*: Another paradox lies in the cultural identity of universality: critical perspectives aim to reveal the Eurocentric and colonialist underpinnings of the universal discourse. The rhetoric of the victim-savior illustrates this, depicting human rights as championed by the white Western man who bestows dignity and rights upon the *victim*, often associated with non-Westerns.³¹ This equation has often justified humanitarian interventions and militaristic endeavors in the name of (Western) democracy and human rights.³²

26 Devin O Pendas, 'Toward a New Politics? On the Recent Historiography of Human Rights' (2012) 21 *Contemporary European History* 95, 98; Joseph R Slaughter, 'Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World' (2018) 40 *Human Rights Quarterly* 735, 736.

27 Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 2.

28 Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Brace 1951).

29 Étienne Balibar, "'Rights of Man" and "Rights of the Citizen": The Modern Dialectic of Equality and Freedom', in James Swenson (tr), Étienne Balibar, *Masses, Classes, Ideas. Studies on Politics and Philosophy Before and After Marx* (Routledge 1994); Giorgio Agamben, 'Beyond Human Rights' in Vincenzo Binetti and Cesare Casarino (trs), *Means Without End: Notes on Politics* (University of Minnesota Press 2000).

30 Joan Wallach Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Harvard University Press 1996); Dianne Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2009); V Spike Peterson and Laura Parisi, 'Are Women Human? It's Not an Academic Question' in Tony Evans (ed), *Human Rights Fifty Years On. A Reappraisal* (Manchester University Press 1998) 132–134; Tony Evans, *Human Rights in the Global Political Perspective* (Lynne Rienner Publisher 2011) 32–36.

31 Makau Mutua, *Human Rights: A Political & Cultural Critique* (University of Pennsylvania Press 2002) 22–40.

32 Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007) 51; Tony Evans, *The Politics of Human Rights. A Global Perspective* (2nd edn, Pluto Press 2005) 37.

- *The victimization effects of human rights*: Consequently, the victimization effects of human rights discourse are subject to critique, highlighting the normativization of suffering and the construction of victimhood.³³ Furthermore, questions arise regarding rights' capacity to normativize the suffering, determine which suffering is worth protection, and reproduce their victim subjects.
- *Neoliberal functions of human rights*: Critical examinations of the relations between the discourse of rights and the capital reveal the commodification of suffering within human rights markets. This critique can be taken back to Karl Marx's objection³⁴ to the Declaration, questioning the historically contingent subject figure behind the *abstract* man endowed with natural rights. This paradox is currently intertwined with the legalistic model of rights within neoliberalism.³⁵
- *Anthropocentrism of human rights*: Critical approaches illuminate the political and physical violence of liberal-legal essentialist humanism inherent in the discourse. This path prompts questioning whether rights are adequate tools to combat the exploitation of nature and non-human beings, as the discourse inherently assigns dignity solely to the human species and often makes account of the environment due to the interests of human beings.³⁶

On the basis of this overall categorization, contemporary critical human rights studies provide insights into the multifaceted nature of human rights, shedding light on its legalistic, historical, and ontological dimensions. These perspectives challenge dominant narratives and offer starting points for understanding the political implications of the liberal human rights discourse. Importantly, these discussions intersect and converge on common ground: as discussing rights and the paradoxes they embody, the focus invariably shifts to the subject, particularly the hegemonic Human subject of human rights, and simultaneously to the others of the hegemonic Human-norm. Critical literature delves into the perspectives of the stateless, refugees, socio-political others such as women, as well as non-human entities like animals and the environment. Unlike the orthodox juridico-philosophical discourse, they examine the historical figures and agents of several political struggles overlooked by the *lawful* Human-norm. The subject's identity – encompassing gender, gender identity, sexual orientation, culture, economic and political status, nationality, citizenship, ethnicity, etc. – is always at the forefront. Defining who the subject is and what they are not becomes a central concern. Yet, orthodox wisdom dictates

33 Upendra Baxi, *The Future of Human Rights* (3rd edn, Oxford University Press 2012).

34 Karl Marx, 'On the Jewish Question' in Robert C Tucker (ed), Thomas B Bottomore (tr), *The Marx-Engels Reader* (2nd edn, W W Norton & Company 1978).

35 Evans (n 30); Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019).

36 Baxi (n 33); Luc Ferry, *The New Ecological Order* (Carol Volk tr, University of Chicago Press 1995).

that any discussion of human rights theory necessitates a foundational understanding of the human. Indeed, engaging in discourse on human rights requires having some determinate idea of the human. This foundationalism often leads to a metaphysical presumption wherein rights are considered inherent entitlements based solely on human existence.³⁷ However, critical analyses challenge this presumption, highlighting the complexities inherent in defining subjects entitled to human rights.

As stated, critical studies emphasize that the human rights discourse cannot effectively address rights without initially defining who the subject is and conversely, who is not – that is, who falls outside the norm. The question ‘Who is the subject of human rights?’³⁸ therefore, is consistently revisited and answered in various ways across different historical contexts. In this context, the Human of human rights might refer to the Western, white, wealthy, able-bodied, heterosexual, cisgender man citizen as the norm. Critical approaches frequently pose this *wrong* question of who the subject of human rights is to challenge the norms embedded within the human rights regime. The aim is to uncover the subject’s biases, expose the arbitrary characters of normative criteria, and call for rewriting what it means to be human.³⁹

Since the normative Human is always defined in relation to a constitutive other within the framework of the dualist reasoning, it implicitly incorporates the humanity of these others as well. However, these very others are simultaneously masked within the Human-norm and reproduced within it. Thus, while rights can have emancipatory functions, they also serve as a power technique that defines humanity, invent divisions, and subjectify individuals. The discourse of rights works as a normalizing regime. As such, the political arena of rights becomes a crucial battleground for disrupting the divisions of political power and redefining identities. The others of the Human-norm, by ‘their quivering humanity,’ reside already within this framework, making it a strategic site for resistance and transformation:

So, reckoning the human involves addressing the norms by which intelligibility as human is conferred: an intelligibility without which the human must remain out of place, on the far side of being and becoming. At the same time, the univocal category of the human is perpetually troubled and haunted by the quivering humanity of those living, differing, sexing, mattering, touched and touching otherwise, elsewhere.⁴⁰

This haunting finds its embodiment, particularly in identity-based rights claiming. It has been suggested that the discursive power of human rights has been started to weaken since the 1990s in the West, simultaneously with the rise in rights-based

37 Ben Golder, ‘What Is an Anti-Humanist Human Right?’ (2010) 16 *Social Identities* 651, 660.

38 Jacques Rancière, ‘Who Is the Subject of the Rights of Man’ (2004) 103 *South Atlantic Quarterly* 297, 297.

39 Judith Butler, *Undoing Gender* (Routledge 2004) 33.

40 Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Polity Press 2013) 32–33.

struggles centered on identity and difference.⁴¹ Those advocating for emancipation, equality, and recognition through rights have illuminated that the human of rights is imbued with its own contents, including heterosexuality, patriarchy, capital, or whiteness. When several oppressed groups seek to speak the language of the universal, the inherent paradox of the subject becomes apparent. Consequently, these groups have embraced their differences and invented new rights claims based on a group identity. They assert that gay rights are human rights, for instance, thereby participating in the rights regime under this group identity. However, this discursive practice comes with a price: identity becomes totalized. While identities have been instrumental in creating spaces of liberation and ensuring participation in the institutional game of human rights, they have also contributed to the formation of regulatory norms and the production of their own others, akin to the Human subject of rights. In fact, a close reading of the current practices of rights sheds light on social movements' challenge to these totalizing subjectivities. Subjected to the oppression of humanist normativity, various movements have begun to question the standards, methods, and efficacy of rights. By making rights claims for legal recognition, these movements not only engage in a struggle for rights at the legal level but also resist being homogenized by legal framings⁴² in a critical engagement with rights claiming.

In this regard, many critical approaches do not solely aim to expose the regulatory effects of rights. Criticism also serves as a positive activity.⁴³ Under our political circumstances, a critical approach to the practice of international human rights regime still would seem a serious strategic political loss if the *critical* has been understood as the renouncement of the benefits that rights provide. While there exists a theoretical trend⁴⁴ that rejects human rights as politics, there is also a powerful inclination, referred to 'critical affirmation,'⁴⁵ which seeks to explore the potential of rights politics by referring to critique as a method. These approaches, highlighting the paradoxes, seek a re-articulation: an endeavor to offer theoretical game openings to the politics of rights in diverse ways, seeking alternative paths to affirm rights not ontologically but politically, fostering a political dialogue that acknowledges those engaged in struggles for their rights, alongside the legal/philosophical authorities of rights.

Thus, critique does not necessitate forsaking the opportunities provided by rights. A theoretical critique also refrains from undermining ongoing struggles for rights and

41 Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press 1995) 18–19; Baxi (n 33) 6.

42 Butler and Athanasiou (n 40) 85–86.

43 Michel Foucault, 'What Is Critique?' in Sylvère Lotringer and Lysa Hocrath (eds), *The Politics of Truth* (Semiotext(e) 1997); Michel Foucault, *The Government of Self and Others: Lectures at the Collège de France, 1982-83* (Graham Burchell tr, Palgrave Macmillan 2010); Wendy Brown, 'Revaluing Critique: A Response to Kenneth Baynes' (2000) 28 *Political Theory* 469.

44 Agamben (n 29); Alain Badiou, *Ethics. An Essay on the Understanding Of Evil* (Verso 2001).

45 Ben Golder, 'Foucault's Critical (yet Ambivalent) Affirmation: Three Figures of Rights' (2011) 20 *Social & Legal Studies* 283, 286.

those who claim them. These movements are often aware of their language limitations, institutional practices and governance routines: they do not need the words of the theorist to be introduced to the *dark side* of human rights⁴⁶, or to the disciplinary dimensions of law. However, they weigh and seize their options within the given set of discourses and practices, grappling with the limits, contradictions, and disenchantment, simultaneously trying open spaces of maneuver and resistance. To a certain extent, a critical engagement with rights contributes to this political effort. It encourages reflection on the potential consequences of specific rights policies, scrutinizes the power dynamics produced by rights and identities, and provides conceptual tools and discussion points to the struggles if they choose to engage with them. As a critique in the sense understood by Foucault, it leaves experimenting with these conceptions to political movements, as Lorenzo Bernini noted, a queer quality as well, not necessarily offering alternatives but leaving to the movements the practice of the critique.⁴⁷

Given that queer embraces anti-normative and non-essentialist politics that distance itself from identification, it can serve as a potent instrument in revealing and redefining the notion of the subject of human rights: from a queer perspective, any attempt to define the boundaries of the human and establish what it means to be human inevitably leads to exclusion and the suppression of difference. Furthermore, queer critique does not aim to legitimate experiences based on an abstract notion of humanity. Instead, it posits that humanity is an evolving construct, devoid of a definitive endpoint, continually undergoing reconstruction and redefinition.

III. How Do Rights Subject Us?

The preceding section highlights how critical human rights studies engage in discussions about the subjectification and identity-producing functions of rights, employing various concerns. This section presents a queer image of gay rights by referring to salient debates over the contemporary politics of rights. Discussions on normative effects of the discourse of rights within the context of LGBTI+ rights revolve mainly around two key points: first, the challenge of appealing to rights without reinforcing the normalization processes of identities and the gendered, heteronormative, and Western framework of international human rights discourse⁴⁸; and second, the need to re-articulate LGBTI+ rights without imposing Western sexual epistemology to the ‘third world queers’⁴⁹.

46 David W Kennedy, ‘The International Human Rights Regime: Still Part of the Problem?’ in Rob Dickinson and others (eds), *Examining Critical Perspectives on Human Rights* (Cambridge University Press 2012) 22.

47 Bernini (n 3) 48.

48 Dianne Otto, ‘Introduction: Embracing Queer Curiosity’ in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2018) 6.

49 Rahul Rao, *Third World Protest. Between Home and the World* (Oxford University Press 2010).

Since the 1970s, the Western gay liberation movement has primarily relied on a strategy based on identity politics. It has been suggested that, particularly at the beginning of the 1990s, the movement shifted its focus to incorporate the human rights lexicon into its activism at large. The primary goal was to challenge societal norms by demanding the acceptance of sexuality. This strategy prioritized political participation and legal recognition based on *sexual orientation*, with other aspects such as gender, race, or social status being secondary considerations.⁵⁰ Gays' human rights have been grounded on the universal fixed identity of gay, fostering community ties and a feeling of belonging to a minority group, and this strategy has contributed to their political-legal representation. The quest for gay rights has rested upon two fundamental assumptions: 1) Without appealing to the category gay, as the essential foundation of action, one cannot make political claims for the group, since politics is understood as a representational discourse that presumes a subject that is ontologically grounded.⁵¹ 2) Legal battles are the pathway to liberation for the gay community.⁵²

Based on these assumptions, it is regarded that homosexual experience corresponds to a subject and under the identity groups can be politically visible and demand legal recognition and equal rights. However, the strategy has also contributed to the marginalization among them; the identity category has become the basis for oppression and assimilation, as well. Similar to the dynamics observed with the Human-norm of rights, the gay has created its own others, who do not fit the Norm. The subject of gay rights has faced challenges from social constructionist viewpoints on identity and subsequent queer interventions. Notably, the arguments of Foucault and Brown shed light on this issue:

Foucault, a prominent critic of identity and a pioneer of queer theory, famously contends that sexuality is historically experienced, constructed, and perceived in specific contexts. He argues that power regulates individuals through their identities because power does not merely exercise authority over subjects but governs their conduct by categorizing and making divisions among them.⁵³ Identification is one of the strategies of power, and sexual classification is one of its key strategies, with homosexuality emerging in the late nineteenth century in the West as a means to regulate sexual experiences. The invention of the homosexual shifted the focus from sexual acts to the sexualized subject, framing it medically and legally. In

50 Jagose (n 3) 71.

51 John D'Emilio, 'Cycles of Change, Questions of Strategy: The Gay and Lesbian Movement after Fifty Years' in Craig A Rimmerman, Kenneth D Wald and Clyde Wilcox (eds), *The Politics of Gay Rights* (University of Chicago Press 2000); Janet Halley, *Split Decisions. How and Why to Take a Break from Feminism* (Princeton University Press 2006); Tucker Culbertson and Jack E Jackson, 'Proper Objects, Different Subjects and Juridical Horizons in Radical Legal Critique' in Martha Albertson Fineman, Jack E Jackson and Adam P Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Routledge 2010).

52 Brown, *States of Injury. Power and Freedom in Late Modernity* (n 41).

53 Michel Foucault, *The Will to Knowledge. Vol 1. of the History of Sexuality* (Robert Hurley tr, Penguin 1979).

fact, the identity was based on the strict heterosexual-homosexual binary, which is already a heteronormative product normalizing heterosexuality while pathologizing homosexuality, later gaining collective political significance in the 1960s.⁵⁴ Foucault has suggested carefully analyzing the gay discourse, emphasizing that individuals both deploy and subject themselves to it. As participants, we contribute to its power to shape our perceptions and naturalize homosexuality as an autonomous, stable, coherent, and knowable description of sexual desire. The formula of power is simple: ‘tell me your desires, I’ll tell you who you are’⁵⁵.

Despite its empowering role in his time, Foucault has questioned this identity as restrictive and exclusionary, challenging its naturality, and highlighting its political construction. There exists no genuine gay identity, no inner nature, no gay essence, no gay desire, and no particular gay lifestyle.⁵⁶ Apart from ‘the myth of eternal homosexual’⁵⁷, we are, as gays, not everywhere, not in every society nor at every time, yet the products of historical power configurations.

Additionally, within the representation of gay, sexuality is emphasized at the expense of other facets of human experience. Brown suggests that the rigid classification of gay fails to acknowledge the intersections of identity, including factors like ethnicity, race, class, religion, or gender. While it unites individuals who share a common historical injury, it can also lead to an identification with the injury itself. Critical perspectives have highlighted that these ‘wounded attachments’ might be limited investments with exclusionary effects.⁵⁸ Moreover, when an ideal of identity is inscribed in law, it becomes an opportunity for disciplinary power. Since law inherently frames lives, rights potentially bring power strategies that have already been used in the first place. In discussing women’s human rights, for instance, Brown argues that neither the abstract equality of human rights nor the specificity of women’s rights adequately addresses the subordination of women.⁵⁹ Instead, they may inadvertently perpetuate the power dynamic by obscuring the mechanisms through which women are constructed and regulated as rights-bearing subjects. While it may seem empowering to have rights reflect complex identities, it risks reducing women’s experience ‘into the ontological basis of the rights claim’ and ‘seek recognition by the state of already constituted identities’⁶⁰.

54 Ibid. 36–49; Halperin (n 7) 33.

55 Michel Foucault, ‘An Ethics of Pleasure’ in Sylvere Lotringer (ed), Lysa Hocroth and John Johnston (trs), *Foucault Live: Collected Interviews, 1961-1984* (Semiotext(e) 1996) 377.

56 Halperin (n 7).

57 John D’Emilio, ‘Capitalism and Gay Identity’ in Henry Abelove, Michele Aina Barale and David Halperin (eds), *The Lesbian and Gay Studies Reader* (Routledge 1993) 468.

58 Brown, *States of Injury. Power and Freedom in Late Modernity* (n 41).

59 Ibid.; Wendy Brown, ‘Suffering Rights as Paradoxes’ (2000) 7 *Constellations* 229, 200.

60 Karen Zivi, ‘Feminism and the Politics of Rights: A Qualified Defense of Identity-Based Rights Claiming’ (2005) 1 *Politics & Gender* 377, 381.

Within this critical framework, for contemporary queer perspectives examining global gay rights advocacy, the key contention lies in recognizing that categories of rights and identities are not mere empty signifiers. Making rights claims based on a dominant gay identity, for instance, presupposes a universal sexual orientation, standardizes experiences, regulates non-conforming experiences, and promotes generalized biological narratives on homosexuality. Moreover, the universal identity is shaped within the framework of Western sexual epistemology, or as a Western 'gay conduct'⁶¹. The mainstream imposition of specific Western categories on gender and sexuality within gay rights tends to assimilate local and political traditions. As noted by Rahul Rao, individuals in non-Western contexts are usually caught between their homophobic nationalist governments and misguided interventions of the gay international.⁶²

From a Western perspective, thus, I suggest that the strategy of gay rights rests on three postulates: 1) Everyone has a particular fixed sexual orientation; 2) desires to come out with a specific language and a specific self-narrative; 3) and perceives sexuality through the lens of identity. Yet these assumptions are grounded in a unitary model of the Gay-subject – a Western, professional, middle or upper-class, able-bodied, white, cisgender, coupled, often with double male earning power, deemed highly marketable. Consequently, mainstream rights advocacy, as an assimilationist project, tends to bind subjects according to this Gay ideal.

In this context, queer critiques have raised several interrelated discussion points in relation to critical perspectives on human rights. Queer critique has resisted the uncritical embracement of rights as an end themselves, from an anti-assimilationist perspective, suggesting that such policies potentially tend to conform and *domesticate* rather than transform, simultaneously, excluding alternative forms of collective engagements.⁶³ Central to these discussions is the critique of the state-centric nature of gay rights advocacy. Scholars argue that promoting rights may inadvertently bolster nationalist agendas, as the discourse often perceives the nation-state as the primary source of rights and freedoms. Consequently, activism aimed at having and securing rights may inadvertently align with state interests, potentially reinforcing power structures governing gender and sexuality. To explore these complexities, scholars have introduced conceptual tools, such as the terms homonationalism, homocolonialism, or homoglobalism⁶⁴, that offer insights into the global dimensions

61 Lauri Siisiäinen, 'Foucault and Gay Counter-Conduct' (2016) 30 *Global Society* 301, 301.

62 Rao (n 49) 191.

63 Carl F Stychin, *Law's Desire. Sexuality and the Limits of Justice* (Routledge 1995); Cohen (n 3).

64 Jasbir K Puar, *Territorist Assemblages. Homonationalism in Queer Times* (Duke University Press 2007); Jasbir K Puar, 'Rethinking Homonationalism' (2013) 45 *International Journal of Middle East Studies* 336; Anthony J Langlois, 'International Political Theory and LGBTQ Rights' in Chris Brown and Robyn Eckersley (eds), Anthony J Langlois, *The Oxford Handbook of International Political Theory* (Oxford University Press 2018) <<https://academic.oup.com/edited-volume/28084/chapter/212153414>> accessed 7 February 2024; Aeyal Gross, 'Homoglobalism: The Emergence of Gay Governance' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complications, Risks* (Routledge 2018).

of rights advocacy and their assimilative impacts. These concepts prompt critical inquiries into how Western societies are symbolically embodied through gay rights and how these rights become entwined with a specific set of white, secular, progressive, and colonial normativity. Moreover, based on these concepts, scholars question how the idealized Western figure associated with rights advocacy can be weaponized to justify racist positions, doubting the implications of attributing homophobia to chosen cultures from a homonationalist perspective. In essence, critiques within this framework underline the importance of considering the benefits and costs of rights advocacy within a broader sociopolitical context.

One of the themes focuses on the legalism of gay rights, leading to discussions on its heteronormative and homonormative effects. As the feminist legal theory has already informed us, when legal systems engage with the sociopolitical others of the Human, they typically respond in one of two ways.⁶⁵ The dominant response, assimilation, assumes that differences can be erased; therefore, the other can be assimilated and tamed. Critics of gay rights argue that such assimilation promotes uniformity in a heteronormative manner. The other response is naturalizing differences, acknowledging them as inherent and unavoidable; eventually, perpetuating sexual essentialism and stereotypes, and contributing to homonormativity.⁶⁶ Based on the agenda of global mainstream advocacy, it has been proposed that gay rights advocacy has compelled groups to frame their sexual experiences in conformity with traditional heterosexual norms, emphasizing values such as heterosexual coupledness and family structures, ultimately aiming to include individuals into the heterosexual privilege and transforming the queer imagery. According to critical approaches, the deployment of identities within the gay right movement has inadvertently reinforced the dominant structures of sexuality, potentially resulting in homonormativity.⁶⁷ In the face of changes in Western public cultures of homosexuality, Lisa Duggan introduced a new form of homonormativity, which perpetuates existing heteronormative assumptions while offering the illusion of a ‘demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption.’⁶⁸

One aspect under discussion pertains to the production of the gay subject, often depicted as wealthy, in control of popular culture, and seen as useful in terms of promoting capitalist consumption, particularly evident in most Western societies.⁶⁹ Critical perspectives in this realm question the nexus between capitalism and gay identity, exploring the connections between capitalist expansion and the emergence

65 Otto (n 30); Mertus (n 10) 1038–1039.

66 Mertus (n 10) 1038.

67 Lisa Duggan, ‘The New Homonormativity: The Sexual Politics of Neoliberalism’ in Russ Castronovo and Dana D Nelson (eds), *Materializing Democracy: Towards a Revitalized Cultural Politics* (Duke University Press 2002).

68 Ibid 179.

69 D’Emilio (n 57).

of a *gay* lifestyle since the beginning of the 1970s and how these connections shape the agenda of mainstream gay advocacy.⁷⁰ Through conceptual tools, such as homocapitalism⁷¹, the real effects of the commitments of powerful financial institutions to gay rights are discussed. In brief, the role of capitalism in creating the material conditions for the ideal gay-subject (of gay rights) is brought into the discussion.⁷²

Furthermore, queer critique asserts the prevailing conception of gay rights, and its hegemonic identity is constructed through Western conceptions of sexuality, marginalizing local concepts and various experiences, perpetuating a cycle of Western hegemony within the human rights project. Postcolonial queer perspectives, in this regard, shed light on the complexities surrounding the strategy of gay rights, which, while linking experiences across the West and the East, also creates deep divisions.⁷³ Yet grassroots human rights activists in non-Western contexts have frequently faced conflicts between local demands or terminology and the agendas of global institutions, usually through NGOs funded by the West.⁷⁴

Joseph Massad famously answers the question of ‘who is the subject of gay rights’ as the ‘Gay International,’ which posits a specific Western understanding of sexual orientation and assumes a subject who perceives sexuality in the heterosexual-homosexual dichotomy. As Massad suggests, the Gay International produces valid gays and lesbians, where they do not exist, by repressing practices that refuse to assimilate into this sexual epistemology.⁷⁵ Additionally, it works on a narrative of victimhood and saviour dynamics, with the West assuming the role of the *civilized* savior offering protection to the Middle East.⁷⁶ On that note, queer critique, from various paths, highlights the cultural imperialism inherent in the universalization of gay rights and emphasizes the importance of considering local genealogies and practices; questioning whether resistance to global gay rights politics refers to another facet of Western exceptionalism, perpetuating homocolonialism and reinforcing anti-homosexual legislation in response to Western intervention.⁷⁷ Ultimately, the Gay International of rights is portrayed as a power technique that overlooks those who do not necessarily consider themselves gay, or those who cannot reach this terminology.

70 Libby Adler, *Gay Priori. A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018).

71 Rahul Rao, ‘Global Homocapitalism’ (2015) 194 *Radical Philosophy* 38, 38.

72 D’Emilio (n 57) 474.

73 Katerina Dalacoura, ‘Homosexuality as Cultural Battleground in the Middle East: Culture and Postcolonial International Theory’ (2014) 35 *Third World Quarterly* 1290.

74 Langlois (n 13) 244; Momin Rahman, ‘Queer Rights and the Triangulation of Western Exceptionalism’ (2014) 13 *Journal of Human Rights* 274, 282.

75 Joseph A Massad, *Desiring Arabs* (The University of Chicago Press 2007) 188-89.

76 Mutua (n 31).

77 Dalacoura (n 73).

Essentialist conceptions of sexual orientation and sexual identity, essential for claiming rights, also belong to this assimilative epistemology. Critics within the queer framework assert that the necessary term sexual orientation is often interpreted as a distinct and permanent aspect of self-identity and personhood.⁷⁸ However, this assumption has prompted questions from individuals who do not perceive sexuality as natural or stable or who do not interpret their sexuality through an identity frame. The rigidity of categorical thinking challenges and constraints, prompting contemporary queer discussions to focus on how these terms can be queered, reinterpreted, and reconceptualized to infuse them with new meanings.

Concurrently, gay rights often presuppose an individual with a stable sexual orientation who desires to come out; however, the assumption that coming out is universally desired and beneficial as a political strategy frequently overlooks practical complexities. The struggle for gay rights implies an imperative for individuals to explicitly declare their sexuality to claim their rights, conforming to prescribed concepts and self-narratives. Therefore, these trends in human rights need to be questioned based on how responsive they are to diverse experiences in local contexts. Indeed, historically, within the gay liberation movement of the late 1960s and 1970s in the United States, coming out was considered a strategic move to end oppression and link identity to the language of rights.⁷⁹ While significant in its historical context, the imperative to come out is presented as emancipatory yet regulative, shaping individuals' perceptions of self and their relationship with others. In this context, instead of 'I am out, therefore I am',⁸⁰ Sami Zeidan writes, "'I' is not always the 'I' we assume wants to come out'⁸¹. Furthermore, in some local contexts, individuals might choose not to pursue legal strategies or engage in struggles for rights because of concerns about personal safety. Since the pressure to come out fails to acknowledge the diverse range of experiences and the potential risks associated with visibility, invisibility and silence may serve as a form of self-protection in certain situations.⁸²

Depending upon contemporary critical analyses, therefore, from a queer perspective, questions arise regarding whether gay identity is a personal or legal one⁸³, how the

78 Jagose (n 3); Aeyal Gross, 'Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?' (2007) 101 *Proceedings of the ASIL Annual Meeting* 129; Ryan Richard Thoreson, 'Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name' (2009) 8 *Journal of Human Rights* 323; Carlos A Ball, 'Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meets Queer Theory' (2001) 26 *Law & Social Inquiry* 271; Stevi Jackson, 'Sexual Politics: Feminist Politics, Gay Politics and the Problem of Heterosexuality' in Terrell Carver and Veronique Mottier (eds), *Politics of Sexuality: Identity, Gender, Citizenship* (Routledge 1998) 76.

79 D'Emilio (n 57); D'Emilio (n 51).

80 Eve K Sedgwick, *Epistemology of the Closet*, p 4.

81 Sami Zeidan, 'The Remote Control of the "I" We Assume Wants to Come out: Sexuality and Governance in the Arab World.' in Oishik Sirca and Dipika Jain (eds), *New Intimacies, Old Desires: Law, Culture and Queer Politics in Neoliberal Times* (Zubaan 2017) 271.

82 Tony E Adams, 'Paradoxes of Sexuality, Gay Identity, and the Closet' (2011) 33 *Symbolic Interaction* 234.

83 Mariano Croce, 'Desiring What the Law Desires: A Semiotic View on the Normalization of Homosexual Sexuality' (2018) 14 *Law, Culture and the Humanities* 402.

law operates discursively and attaches us to a model of identity⁸⁴, and how legal frameworks shape our perceptions, expressions and/or rejections of ourselves. While advocating for gays within the framework of human rights is essential, it is crucial to recognize the costs associated with such rights. Queer critiques underscore the role of rights in identity-production, power dynamics, and marginalization, shaping individuals' perceptions of the self and their engagement in politics.

IV. Critical Yet Affirmative Engagements with Rights

In examining (gay) rights and the broader normativity of human rights, nevertheless, a critical approach does not inherently lead to the dismissal of potentials inherent in the politics of rights. This final section explores the possibility of adopting a critically queer yet 'politically productive'⁸⁵ perspective on rights and identities. This perspective becomes plausible when:

- Identities are understood not as ontological claims but as political facts.
- Rights are considered diverse tactics within the contingency of politics, and rights claiming is examined through a performative lens.
- The politics of rights is regarded as a site where debates about the definition of what constitutes human contested and destabilized.

By steering clear of the horrors of rights fetishism⁸⁶, which elevate rights to the status of eternal and metajudicial values, rights claiming grounded in identities linked to historical injustices is part of the resistance against heteropatriarchy. Our globalized conceptions of identities and rights are not static within the contingency of politics; instead, they intertwine with localized tactics and strategies. And queer serves as an analytical tool in facilitating this shift from ontology to politics, which accompanies the practice of rights.

Recognizing that rights and identities are mobilized within and through struggles where globalized terms intersect with local political notions is important. As Aeyal Gross has stressed, 'notions of sexuality change on axes of time and place, and the ideological constructions of sexuality are constitutive of the way we interpret and give meaning to our lives and actions, then we cannot, from a queer perspective, just say that the concept of sexual orientation is a Western one'⁸⁷. Thus, from a queer perspective, it is inadequate to label the concept of sexual orientation, for instance, as exclusively Western or to suggest the impossibility of the *gay* identity. Instead, queer

84 Lise Gottell, 'Queering Law: Not by Friend' (2002) 17 Canadian Journal of Law and Society 89, 97.

85 Evans (n 32) 40.

86 Valerie Kerruish, *Jurisprudence as Ideology* (Routledge 1992) 139.

87 Gross (n 78) 131.

critique reminds us that identities and rights are contingent products of history and therefore, subject to political transformation. In other words, this dynamic critique not only aims to refute and ridicule prevailing stabilities but also to invent new realities out of them. Law necessarily frames political claims and the individuals who assert them. Legal categories, indeed, have the power to produce binding effects when used to redescribe social realities by framing them. However, it is essential to recognize that rights, prior to their formalization into legal categories, emerge from the realm of politics and are established through our language and actions in socio-political life, within the processes of redefinition. The process of redescribing and redefining legal categories is achieved through specific deployments of performative acts. To further explain these arguments, Foucault provides some insightful conceptual tools.

As an opponent of the tradition that takes the Human as the departure point for politics, Foucault is central to thinking critically about human rights and the liberal assumption of subjectivity. His analysis of subjectivity and power brings a series of critiques to the ontological ground of rights. However, Foucault's critique does not lead to rejecting rights or undermining ongoing struggles. Since the mid-1970s, Foucault has engaged with the discourse of rights within the context of identity politics and difference, recognizing the rhetoric of rights as a prominent tool of his activism, albeit one that required critical examination in terms of tactics and strategy, since rights are considered simultaneously forms of regulation and resistance.⁸⁸ He acknowledges that rights possess disciplinary effects and are central modalities of governing that aim to categorize individuals and impose normative standards to govern them.

Briefly, Foucault's affirmative stance on rights is grounded in the notion of *counter-conduct*, which involves challenging the techniques of governmentality by deploying its own strategies and discourses; a concept 'to designate the type of revolts, or rather the sort of specific web of resistance to forms of power that do not exercise sovereignty and do not exploit, but conduct'⁸⁹. Since conduct and counter-conduct are derived from the same factors of power, the term counter-conduct refers to challenging the techniques of governmentality by using its own repertoire. It is the deployment of all available political discourses already furnished within the power. Thus, a critical approach to rights entails freeing them for diverse applications, revealing their contingent foundations, and being self-critical of their potential counter-effects. Then, critique emerges as an essential component of the politics of rights, allowing for the deployment of rights without succumbing to their totalizing effects. It involves understanding how to *govern* rights while simultaneously remaining cautious about their identity-producing and regulatory effects.

88 Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press 2015) 5–8; Paul Patton, 'Foucault, Critique, and Rights' (2005) 6 *Critical Horizons* 267, 269.

89 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78* (Graham Burchell tr, Palgrave Macmillan 2007) 200.

This attitude can most clearly be seen in his advocacy for the gay rights movement, where he speaks on his behalf as a gay man, and in his intellectual inspiration for the early AIDS activism in the 1980s.⁹⁰ Foucault regards the unitary gay identity as limiting by examining the historical conditions that made the discursive formation of homosexuality possible. Since identity politics and claiming rights based on identity have effectively mobilized groups for political equality, in terms of strategy and tactics are necessary. Foucault questions their tendency to essentialize and naturalize identity as an inner truth of oneself. The problem, in terms of Foucauldian politics of rights, is framing identity as an existential question rather than a political fact.⁹¹ His stance towards identity politics, as evidenced in *The Advocate* interview of 1982, underscores his broader perspective on identity:

Well, if identity is only a game, if it is only a procedure to have relations, social and sexual-pleasure relationships that create new friendships, it is useful. But 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 law, the principle, the code of their existence; [...] they will turn back to a kind of ethics very close to the old heterosexual virility. If we are asked to relate to the question of identity, it must be an identity to our unique selves. But the relationships we have to have with ourselves are not ones of identity, rather, they must be relationships of differentiation, of creation, of innovation. [...] we must not think of this identity as an ethical universal rule.⁹²

In this passage, Foucault highlights the limits of purely political and juridical strategies of identity-based protection. Moreover, there is a warning against the universalization of identity, emphasizing its tactical nature over a fixed norm. On several occasions, Foucault stresses that gay does not refer to a sexual existence: the question of identity is not related to the question of affirming one's sexual identity. Its assertion is contingent on the prevailing political conditions. Due to the circumstances, in Foucault's account, identity is something we make instead of something we already are. It is a collective construction that we declare with others within the political arena rather than an inherent trait. When an individual is called and attacked as gay, the only way of defending himself is to become gay. Therefore, in the political landscape of the 1980s, the statement of 'I am gay', besides being a truth-producing discourse, is an act of defiance amidst challenging times for the gay liberation movement. It is a strategy that locates oneself in opposition to the prevailing norm. In a 1984 interview,

90 Halperin (n 7) 16.

91 Michel Foucault, 'Sexual Choice, Sexual Act' in Paul Rabinow (ed), Robert Hurley (tr), *Essential Works of Foucault, 1954-1984, vol. 1: Ethics: Subjectivity and Truth* (Allen Lane/Penguin 1997) 141-143; Michel Foucault, 'The Social Triumph of the Sexual Will' in Paul Rabinow (ed), Robert Hurley (tr), *Essential Works of Foucault, 1954-1984, vol. 1: Ethics: Subjectivity and Truth* (Allen Lane/Penguin 1997) 160; Michel Foucault, 'Interview with Jean François and John de Wit' in James D: Faubion and Bernard E Harcourt (eds), Stephen W Sawyer (tr), *Wrong-Doing, Truth-Telling. The Function of Avowal in Justice* (The University of Chicago Press 2014) 261.

92 Michel Foucault, 'Sex, Power, and the Politics of Identity' in Paul Rabinow (ed), Robert Hurley (tr), *Essential Works of Foucault, 1954-1984, vol. 1: Ethics: Subjectivity and Truth* (Allen Lane/Penguin 1997) 166.

Foucault notably refrains from categorizing homosexuality as biological or socially constructed explicitly: ‘no comment’.⁹³ Gays’ human rights are the crucial component of the liberation movement because they are ‘still not respected in many places’⁹⁴. In this regard, the quest for legal recognition and equal rights embraces a resistance that can never be finalized. The gay subject refers to a political fact rooted in a historical injury, in a sense of shame and marginalization. ‘I was produced by insult,’ Didier Eribon⁹⁵ writes, ‘I am the son of shame’. Followingly:

*‘We are brought into a world in which a sentence has already been pronounced, and we come, at one point or another in our lives, to occupy the place of those who have been exposed to public condemnation, those who live with an accusatory finger pointed at them, who have no choice but to try to protect themselves from this condemnation [...] This curse, this sentence that one has to live with, produces feelings of insecurity and vulnerability in the deepest regions of the self, and the source of diffuse kind of anxiety that characterizes gay subjectivity.’*⁹⁶

*There comes a moment when, being spat on you turn the verbal attacks into a garland of flowers; a moment where shame turns into pride. This pride is political through and through because it defies the deepest workings of normality and of normativity. You don’t start from when you set out to reformulate what you are. It is a slow and painstaking process through which you shape an identity, starting from the one imposed upon you by the social order.’*⁹⁷

Since the 1970s in the West, the gay liberation movement has aimed to replace shame with the anger and pride, making identity a pivotal tool for empowerment. However, this strategy is not an inherent nor an ontological orientation; rather, it serves as a response to societal othering and the historical wound. It refers to a political fact that constitutes but does not *fully* determine what an individual is.⁹⁸ In the political sphere, even if we might be compelled to declare *what we are*, Foucault suggests on the other hand, *becoming-gay*, offers a dynamic process of inventing new relations and new understandings of *what we might be* in the future.⁹⁹ This perspective, concurrently, implies that our aspirations for the future are intricately linked to our present and past identities: the gay identity is marked by the shame and wound, yet not limited by them.

93 Foucault, ‘Sexual Choice, Sexual Act’ (n 91) 152.

94 Foucault, ‘Sex, Power, and the Politics of Identity’ (n 92) 164.

95 Didier Eribon, *Returning to Reims* (Michael Lucey tr, Penguin 2019) 194.

96 Ibid 212.

97 Ibid 216.

98 Butler, *Undoing Gender* (n 39) 3–4.

99 Foucault, ‘Sex, Power, and the Politics of Identity’ (n 92) 163–164; Michel Foucault, ‘Friendship as a Way of Life’ in Paul Rabinow (ed), Robert Hurley (tr), *Essential Works of Foucault, 1954–1984, vol. 1: Ethics: Subjectivity and Truth* (Allen Lane/Penguin 1997) 136.

In Butler's words,

*One of the central tasks of lesbian and gay international rights is to assert in clear and public terms the reality of homosexuality, not as an inner truth, not as a sexual practice, but as one of the definite features of the social world in its very intelligibility [...] Indeed the task of international lesbian and gay politics is no less than a remarking of reality, a reconstituting of the human, and a brokering of the question, what is and is not livable?*¹⁰⁰

In this regard, as stated, Foucault observed that the emergence of gay coincided with late 19th-century power dynamics, which necessitated a medicalized/criminalized subjectivity. The constant pathologization and criminalization of homosexuality have led to the essentialization of gay identity, prompting ongoing struggles to assert and affirm it publicly. However, identity-formation is also a means to forge new social and political alliances.¹⁰¹ Since claiming rights based on identity remains an urgent tactic for accessing the institutional/judicial game of power relations and re-articulating them, and since the universalistic effects of rights are potentially re-shaped by their deployment through various tactics and strategies, rights-claiming is something that 'we cannot not want'¹⁰². Both Foucault and Butler suggest that within the realm of rights advocacy, within an inherited set of discourses, diverse groups rally under seemingly contradictory or partial identities and strategically and *temporarily* engage with rights to advance their political agendas. Indeed, we necessarily rely on the language of legal recognition and rights. Though, it is essential to acknowledge our capacity to transform and rewrite the meanings of the language as well:

*It is not because there are laws, and not because I have rights, that I am entitled to defend myself; it is because I defend myself that my rights exist and the law respects me. It is thus first of all the dynamic of defense which is able to give law and rights the value which is indispensable for us. A right is nothing unless it comes to life in the defense which occasions its invocation.*¹⁰³

Focusing on the transforming processes, the passage highlights that rights are not inherent entitlements but emerge through defending them. They exist through the political investment of those who claim and assert them. The transformation of a right claim into a legal conception, then, depends on the persistence, power, and fortune of those claiming them, suggesting that the practice of rights-claiming itself establishes the foundation of rights. Rights-claiming is a performative act¹⁰⁴, as articulated by

100 Butler, *Undoing Gender* (n 39) 29–30.

101 Foucault, 'Sex, Power, and the Politics of Identity' (n 92) 166.

102 Gayatri Chakravorty Spivak, *Outside in the Teaching Machine* (Routledge 2009) 45–46.

103 Philippe Chevallier, 'Michel Foucault and the Question of Rights' in Ben Golder (ed), Colin Gordon (tr), *Re-Reading Foucault: On Law, Power and Rights* (Routledge 2013) 177.

104 Golder, *Foucault and the Politics of Rights* (n 88) 83.

Karen Zivi's performative account of rights¹⁰⁵, instead of an essentialist form. This account refers to rights claiming as a linguistic activity continually re-articulated through particular exercises. Despite the universalism of rights and identities, in practice, they are constantly subject to political and cultural translation. This means that the political articulation and claims made on behalf of rights and identities are performative and shape individuals and collectivities that struggle for them. Even though rights shape those who struggle for them, they are reshaped through particular contexts. The notion of *rights culture*, in this context, refers to the outcomes of the discursive circulations of rights rhetoric among people, societies, and institutions.¹⁰⁶ This circulation fosters a particular cultural context in which rights are discussed and claimed, potentially differentiated from the offered discourse, highlighting the influence of political actions on universalist concepts.

Therefore, for instance, even though we refer to a universalist category of gay, and even though this subject is not an empty signifier and contains norms, and even though these norms refer to a historical Western figure, in local contexts, the subject is rewritten by particular language and actions. There is often a gap between universalist discourse and its political implementations on these rights' ambiguous grounds. Each rights claim has the potential to create politically a new claim, as conducts and counter-conducts share the same instruments: 'no universal is freed from its contamination by the particular contexts from which it emerges and in which it travels'¹⁰⁷. This underscores the reversibility inherent in performative acts within the realm of rights claiming. Rather than debating whether rights are merely 'techniques or technologies'¹⁰⁸, a critical yet affirmative perspective¹⁰⁹ seeks to explore particular ways within the inherited set of discourses. Past and ongoing political struggles shape these discourses, and within this framework, we inevitably rely on the discourse of recognition. However, while we necessarily engage with the concepts of the human, the subject, and the international, we seek pathways not beyond this framework but within it.

The affirmative aspect of contemporary politics of rights prompts a reconsideration of the act of claiming rights, recognizing its ambiguous, contingent, and performative nature. The non-conformity and inconsistency inherent in this politics offer opportunities to leverage the law against itself, fostering a dynamic struggle across various fronts.¹¹⁰ A queer perspective might be interested in finding alternative avenues within this contested arena in which the notion of the human is defined, aiming to

105 Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (Oxford University Press 2012).

106 *ibid* 8–20.

107 Judith Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' in Judith Butler, Ernesto Laclau and Slavoj Žižek, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (Verso 2000) 40.

108 Michel Foucault and Jonathan Simon, 'Danger, Crime and Rights: A Conversation between Michel Foucault and Jonathan Simon' (2016) 0 *Theory, Culture & Society* 1.

109 Golder, *Foucault and the Politics of Rights* (n 88).

110 *Ibid.* 24; Butler and Athanasiou (n 40) 85.

redefine and rearticulate the usage of all these terms. Since our legal categories always contain historical articulations about the human-subject and its rights, then there is a crucial political space for queer's non-essentialist politics, focusing on the necessity of grappling with further questions about the *de-stabilization* of the human and the international. *Queering*, eventually, 'persists as a defining moment of performativity'.¹¹¹

V. Conclusion

We might find ourselves reliant on rights and identities. Rights hold a privileged position among various discourses for emancipation, especially evident in the mobilizing effects of its rhetoric. As one of the most visible instruments of gay activism, in our reality, they are something we cannot not want. Identities, on the other hand, serve normative and regulatory functions, deemed necessary within our political context: we might be compelled to embrace 'the necessary error of identity'¹¹². Besides, identity is something necessary yet impossible: it is impossible to live as a universalist concept within our reality, and we are constantly reminded by the presence of others who might even deem us inadequate, failing to fit into the norm. Yet, due to political circumstances and the wounds inflicted by power through our certain experiences, we embrace this *impossibility*, the *trouble*, or the *error* to defend ourselves. Gay rights are undeniably human rights.

This article acknowledges that queer critique does not necessarily reject this assertion. Rather, it highlights the constructed nature of the identities and rights we adopt, emphasizing their tactical orientations. While we advocate for them, simultaneously, we may need to resist being completely subsumed by them. Queer critique cautions against the dangers inherent in these identities and rights; serving as a critical tool to prevent their naturalization, encouraging a self-reflexive questioning regarding the normativity inherent in them, and urges us not to see ourselves and our relationships through the lens of the Normative.¹¹³ Maintaining a critical distance from our political claims becomes imperative, enabling us to be cautious, but at the same time, to know how to *govern* them. This represents one facet of queer engagements with identity-based struggles for rights: *a constant self-critical practice*.

As mentioned at the beginning of the article, recent queer engagements with human rights law have often resulted in framing and articulating a normative vision of politics that assimilates the critique. Contrarily, this engagement can be a critical one, since the engagement includes contestation as well, reminding us of how identities and

111 Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge 1993) 224.

112 *ibid* 229; Judith Butler, 'Imitation and Gender Subordination' in Henry Abelove, Michele Aina Barale and David Halperin (eds), *Lesbian and Gay Studies Reader* (Routledge 1993) 308.

113 Judith Butler, *Frames of War* (Verso 2009) 137.

rights subject us ‘even as we assert them in our defense’¹¹⁴, despite their liberation potentials. This contestation finds its meaning on the ground that contests ‘not only the exclusion of queers, but also the authority of liberal internationalist agents to set the terms of their political and economic existence and inclusion’¹¹⁵. Rather than focusing on who is the subject of rights, queer questioning prompts us to consider *how rights subject us*. This questioning can complement rights advocacy, offering to utilize political claims in alternative ways.

Furthermore, a queer engagement might offer us an alternative perspective on the politics of rights: a platform to rearticulate our political names and strategies. Within the arena of rights and identities, we do not just strategically *deploy* these legal strategies; we are constantly *conducted* by and through them. However, being conducted is not equivalent to being entirely *determined* by them¹¹⁶; we desire to transform their meanings and applications. This requires courage, indeed, and understanding rights and identities not ontologically but politically. Therefore, queer critique does not affirm rights and identities only because they are something we cannot not want. Instead, it embraces the rights for their ambiguity and potential to be reinterpreted. Our political claims of rights are performative; universal identity categories are subject to translation within the contingency of politics, allowing for diverse deployments. Indeed, law plays a pivotal role in framing and distinguishing between individual experiences. The human rights framework normative questions on who/what human is, shaping the political discourse around terms like human, citizen, gay, etc. Therefore, the politics of rights initiate a political-legal process of subjecting human to redefinition and destabilization, offering the opportunity and creativity to rearticulate it.¹¹⁷ Within this very fabric of rights, queer engagements remind us not to defend ourselves solely as identities but to affirm ourselves as creative forces capable of constructing new subjectivities and relationships.¹¹⁸ Thus, I suggest that it would be inaccurate to claim that identity is nothing more than the effects of power relations for queer approaches. Fundamentally, queer interest in rights stems from their potential to reinterpret framings for anti-essentialist politics. The non-normative stance of queer theory makes it a powerful tool for this political creativity, as it does not carry any inherent meaning.¹¹⁹

Deploying queer as a critical method enriches contemporary critical approaches to human rights regarding their subject-production effects. Besides, it fosters a critical

114 Brown, *States of Injury. Power and Freedom in Late Modernity* (n 41) 121.

115 Langlois (n 13) 245.

116 Culbertson and Jackson (n 51) 140; Karen Zivi, ‘Rights and the Politics of Performativity’ in Terrell Carver and Samuel A Chambers (eds), *Judith Butler’s Precarious Politics: Critical Encounters* (Routledge 2008) 163.

117 Butler, *Undoing Gender* (n 39) 33.

118 Foucault, ‘Friendship as a Way of Life’ (n 99) 136.

119 Bernini (n 3) 100.

practice within political movements regarding the effects of strategies and tactics they deploy. Our categories of rights are to be seized and employed as counter-conducts. However, within the dynamism of power relations, they inevitably produce their counter-effects, various unintended consequences. The effects of rights and other legal forms are unpredictable and beyond control. Therefore, in this very fragile domain of rights, rights are to be seized as *critical* counter-conducts. Given the unpredictable political nature of rights, maintaining a constant critical attitude might be necessary to be both participatory yet disclaimed within the interplay of legal institutions to its regulatory operations. Deploying queer critique, not prescriptively but methodologically, can assist in navigating this terrain. While the contingency and ambiguity of the politics of rights might be the reason for political vigilance, they also harbor emancipatory potentials. It may be an opportune moment to critically evaluate the political claims at our disposal, recognizing both their possibilities and effects on the self and on politics.

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