
Queering the Terrain: Lesbian Identity and Rights in International Law

Loveday Hodson*

Introduction

It is a pleasure and an honour to be part of this symposium celebrating the work of Di Otto. Di has been a guiding light through much of my academic journey, from her pioneering work on NGOs,¹ which inspired my PhD thesis on the relationship between civil society and the European Court of Human Rights,² to her more recent consideration of how queer theory might be applied to international law.³ On a more personal level, her generosity in encouraging and supporting younger feminist scholars of international law is, in my experience, unparalleled.

In this contribution, particular attention is paid to Di's work, foreshadowing her current turn to queer theory, on women's sexual diversity and sexual identities in international human rights law. Di's writing on this subject stands almost alone in making lesbian identities visible in international human rights law. It is also remarkable for its theoretical richness: she complicates questions of identity and draws on a long history of women's politics that at once resists compulsory heterosexuality and recognises the fluidity of women's sexuality and sexual identity. The hierarchical way in which language can be used is of central importance to her critique, in which the potential for language to oppress rather than emancipate is frequently highlighted. Importantly, her interventions in this area have demonstrated how international law narrowly shapes acceptable female identities and operates to control and suppress female sexuality. While her work is fearless in challenging dominant discourses, it is nonetheless characterised by a refreshing and compelling optimism; it demands that we undertake the hard work of finding solutions to the theoretical and practical conundrums that feminist engagement with international law throws up.

Identity and Invisibility

I first became aware of Di's work when I was taking a postgraduate module on Women's Rights at the London School of Economics. The module was everything I had hoped it would be: engaging, challenging, and, ultimately, life-changing. I came to be convinced that – with a hefty dose of imagination and will – international law could really be 'done differently'. This was revelatory. But it also seemed to me that there was something missing from the readings and discussions, and that was the absence of questions about and challenges to international law's assumptions about women's

* Leicester Law School, University of Leicester, UK. loveday.hodson@le.ac.uk

¹ Dianne Otto (1996) 'Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society' 18(1) *Human Rights Quarterly* 107.

² Ultimately published as, Loveday Hodson, *NGOs and the Struggle for Human Rights in Europe* (2011, Hart: Oxford).

³ Dianne Otto (2015) 'Queering Gender Identity in International Law' 33(4) *Nordic Journal of Human Rights* 299.

sexuality and sexual orientation, even by feminists working in the field. It appeared to be a blind spot that replicated some of international law's better-known hierarchies and evasions. In the words of Adrienne Rich, "This assumption of female heterosexuality seems to me in itself remarkable: it is an enormous assumption to have glided so silently into the foundations of our thought".⁴ International law, it became clear, was one terrain among many on which variant expressions of women's sexuality were being hidden, "rendering invisible the lesbian possibility".⁵ In the poetic description of Cheshire Calhoun: "Lesbians are not-women, engaged in non-sex, within non-relationships that may constitute a non-family".⁶

Di Otto was the first person I became aware of who shared these emerging concerns and broke the deafening silence. Importantly, she took the simple yet powerful step of naming lesbian identity in the context of international law. While always careful to treat terminology and identity categories critically, she has nonetheless highlighted that women whose sexual attraction is towards other women experience an intersection of discrimination that requires particular attention:

...discrimination on the grounds of gender and sexual orientation can combine to produce distinctive forms of discrimination that might be described specifically as "lesbian".⁷

The root of discrimination here can thus be seen to be distinct, and not, for instance, immediately comparable to that experienced by gay men. The experience and vulnerability of women with a lesbian identity can be shaped by violating gender norms, economic disadvantage, and falling outside of the protection that heterosexual relationships (notably marriage) offer. Sheila Jeffreys says of this difference: "It is the separateness of lesbians, which is perceived to be a failure of enthusiasm for the man and all his works, rather than the performance of naughty sexual acts, that is subversive".⁸

From a human rights perspective, the invisibility of lesbian identities is of particular consequence: it renders invisible discrimination, criminalisation, and sexual and physical violence that emerge from this particular intersection and that are, of course, experienced as very real. Laws criminalising certain sexualities are certainly implicated. The Human Dignity Trust reported in 2016 that ten States had recently expanded their criminal laws to encompass sex between women.⁹ For lesbian women, however, arrest and persecution often do not depend upon specific acts of sexual 'deviance'. As Haley Nelson notes, for women, often, it is the combination of state, legal, economic, religious, social and familial controls that combine in order to control their sexual expression:

⁴ Adrienne Rich (1980) 'Compulsory Heterosexuality and Lesbian Existence' 5(4) *Signs* 631, 637.

⁵ *Ibid.*, 647.

⁶ Cheshire Calhoun (1984) 'Separating Lesbian Theory from Feminist Theory' (April) *Ethics* 558.

⁷ Dianne Otto (2014) 'Between Pleasure and Danger: Lesbian Human Rights' 2014(6) *European Human Rights Law Review* 618.

⁸ Sheila Jeffreys, *The Lesbian Heresy* (1994, The Women's Press: London).

⁹ Human Dignity Trust, *Breaking the Silence: Criminalisation of Lesbians and Bisexual Women and its Impacts* (May 2016). Available at:

www.humandignitytrust.org/uploaded/Library/Other_Material/Breaking_the_Silence-Criminalisation_of_LB_Women_and_its_Impacts-FINAL.pdf.

Societal prejudice against sexual minorities is affirmed in domestic law. Physical, and particularly sexual, violence is sanctioned by social stigma and the perceived need to punish sexual deviance. This domestic environment of discrimination against sexual minorities encourages unchecked human rights violations and violence against lesbians.¹⁰

The tendency towards invisibility, however, means there is limited disaggregated data on human rights violations against lesbian women (as opposed to the wider ‘LGBTI community’).

As women who fall outside of society’s expectations of their sexuality, lesbian women have a particularly rich history of resistance. Thrillingly, Di’s is an activist’s passion – and sometimes one suspects, in spite of her temperate language, even anger – that has emerged from working in the field. Her work has revealed how international law’s structures and norms are complicit in this silencing: notably, the horse-trading that went on at the Fourth World Conference on Women in Beijing that led specific references to women’s sexual orientation as a prohibited ground of discrimination to be removed from the formal outcomes of the Conference in exchange for the dilution of references to cultural relativism.¹¹ Di declared her concerns about the apparently easy sacrifice of lesbian women, even by supportive countries, in order to advance the wider Conference aims. The Beijing experience demonstrated both the existence of diverse female sexualities, and the apparent challenges to their accommodation within the structures of international human rights. Di’s recognition of distinct identities within the realm of women’s rights is therefore compelling: for her, the “legal treatment of difference continues to be a critical issue for both domestic and international legal systems”.¹² However, while naming lesbian identities and opening up discussion of women’s sexual identities is a vital starting point to addressing invisibility, Di’s work goes on to both recognise and respond to the problematic terrain of identity politics that this potentially might lead feminists into.

Resistance, Hope and Community

International Law as Battlefield

Di’s work inspires because she eschews easy answers and insists that feminists raise their game in terms of finding a path to forge ahead. In her hands, international law becomes a potential site of resistance. In her 1995 article on the Beijing Conference, a clear link is made between the organised struggles and activities of the NGO Forum and developments in international law. International law thus spills beyond the confines of formal laws and becomes a place of political wrangling, pressure groups, and possibility. Looking beyond the formal structures of the law enabled her to shine a light on the prejudiced and bigoted views on female sexuality expressed off-stage by representatives in Beijing, which in more formal fora were masked by polite and

¹⁰ Chelsea Haley Nelson (2005) ‘Sexualized Violence against Lesbians’ 17 *Peace Review* 163.

¹¹ Dianne Otto (1996) ‘Holding up Half the Sky, But for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women’ 6(1) *Australian Feminist Law Journal* 7.

¹² Dianne Otto (1995) ‘Lesbians? Not in My Country: Sexual Orientation at the Beijing World Conference on Women’ 20 *Alternative Law Journal* 288, 289.

diplomatic references to cultural difference. In her 1996 article on the Beijing Conference, Di observed that the stakes were actually very high: “These negotiations of gendered identities mark the contested boundaries of acceptable womanhood in the global frame”.¹³ She went on to say:

It indicates that femaleness, as a category, continues to be heavily policed by masculinist interests and contained within narrow disciplinary boundaries. Women’s ‘citizenship’ within the global community is both limited to, and conditional upon, their position within the prescribed normative framework. This is contingent ‘citizenship’ at the price of women’s diversity and of fundamental global change.¹⁴

Women’s presumed heterosexuality under international law is exposed as one of many sites of oppression and exclusion.

Commonalities and Community

In order to marshal effective resistance in the face of such subjugation, Di’s work has foregrounded the need to identify commonalities around which resistance can be organised and progress generated. Thus, an important part of her work is to look for the common denominator, and to ensure, for instance, that the struggles of lesbian women are understood to be not only of exclusive relevance to women who share that identity. To take a specific example: while recounting the remarkable levels of intrusion and surveillance that the lesbian caucus faced as a group in Beijing, she drew parallels with state and patriarchal control of sexuality that is recognisable to women of all orientations.

Di’s work thus highlights the importance of identifying the commonalities that cut across feminist engagement with questions of women’s sexuality. There is a distinct ethical aspect to this compulsion towards understanding and mining for shared understanding that builds on the work of feminists such as Gunning.¹⁵ Di instinctively rejects the idea that this process is one of ‘winning the argument’ or the art of persuasion. Instead she appears to embody herself the importance of open-mindedness and respectful dialogue. Reiterating the hierarchical tendencies of international law, she presents heteronormativity as just one example. Effective coalition-building requires the challenging of hierarchies through self-awareness and reflexivity. The lesbian caucus’s strategy is thus taken to task for its failure to address questions of economic rights and social justice.

Adopting postmodern analysis, identities are thus harnessed as sites of resistance. Identities, however, are not risk free: without care and attention, they can operate as barriers to establishing women’s coalitions, reaffirming hierarchies. Di writes of her time speaking to the African caucus in Beijing on behalf of the lesbian caucus with characteristic self-awareness:

¹³ Dianne Otto, ‘Holding up Half the Sky, But for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women’ (1996) 6 *Australian Feminist Law Journal* 7, 25.

¹⁴ *Ibid.*, 27.

¹⁵ Isabelle R. Gunning (1992) ‘Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries’ 23(2) *Columbia Human Rights Law Review* 189.

Our reliance on the discourse of identity politics, while providing a space and a language for resisting certain forms of domination and claiming specific rights, worked against the possibility of us conversing across our differences. In asking for support, my hesitant assertion that sexual self-determination was of great importance to all of us was met with silence.¹⁶

Faced with this conundrum, Di looks for solutions: in doing so she turns to the idea of dynamic identity, which means “facing the challenge of conceptualising Lesbian as an unfinished, mobile, socio-discursive construct that enables us to struggle over its meanings and converse across differences”.¹⁷ The question this poses, of course, and one that I return to later, is whether this is erasure of Lesbian identity by other (postmodern) means.

Sexual Pleasure

I want next to consider Di’s turn to the idea of female sexuality as *pleasure*. She notes in ‘Between Pleasure and Danger: Lesbian Human Rights’¹⁸ that lesbian women are faced with two pathways: feminism and the movement for LGBTI rights, and the tension this creates between constructing sex as pleasure and sex as danger. In fact, the sex as pleasure (or ‘sex rights’) arguments made in the international human rights sphere, particularly in the context of LGBTI+ movements and campaigns, have rarely paid attention to women’s sexuality. Di charts international human rights law’s strong tendency to treat women’s sexual encounters and attractions outside of marriage as dangerous, and thus to be controlled. She laments:

While there were some hopeful moves in the 1990s towards the articulation of rights associated with women’s sexual agency and freedom (the pleasure factor), since then, the focus has turned squarely to danger, with the escalation of concern about ending impunity for sexual violence, fuelled by heightened attention to sexual violence during armed conflict and a more general turn in human rights law towards seeking criminal sanction.¹⁹

She goes on to note that even the UN Committee on the Elimination of All Forms of Discrimination against Women has fallen firmly into the ‘sex as danger’ model; it has made no attempt to address sex outside of the context of violence or family planning. A lesbian consciousness would question how empowering this approach to sexuality is to women, and would also question how it operates to exclude lesbian sexuality. Quite simply, “the idea that women/people should be able to have a ‘satisfying’ sex life has completely disappeared”.²⁰

Even on its own terms, in relation to discrimination, criminalisation and violence against non-heterosexual women, CEDAW is seen to be failing. Primarily, the issue is that it has failed to recognise the existence of a multiplicity of women’s sexualities. Di

¹⁶ Dianne Otto (1999) ‘Sexualities and Solidarities: Some Thoughts on Coalition Strategies in the Context of International Law’ 8 *Australasian Gay and Lesbian Law Journal* 27, 31.

¹⁷ *Ibid.*, 32.

¹⁸ Dianne Otto (2014) ‘Between Pleasure and Danger: Lesbian Human Rights’ 6 *European Human Rights Law Review* 618.

¹⁹ *Ibid.*, 622.

²⁰ *Ibid.*, 625.

notes the paucity of references to sexual orientation and gender identity in CEDAW's concluding observations, commenting that the "erasure of lesbians and other sexual and gender minorities in international human rights law is perpetual".²¹ She goes on to argue:

The motor of sexual violence, in the field of women's human rights jurisprudence and advocacy, has diverted attention from women's sexuality rights and freedoms to the point that the small gains made during the 1990s have been long forgotten, and repressive moral, religious and traditional edicts on women's sexuality enjoy free range. It would seem that feminist human rights promotion has indeed failed to pursue an agenda of erotic freedom and pleasure.²²

For Di, the promise of a better way forward lies in the potential coalition of feminist and LGBTI activists, with a keen eye to radical emancipatory goals. Sexual pleasure can operate as both a goal and a point of resistance: "Lesbian (and everyone's) sexual pleasure must be included as a core element of the law's conception of humanity and freedom".²³ What she does not address in detail, however, is the long history of women's silencing within LGBTI movements, nor how those movements might have opposing, perhaps irreconcilable, goals. The silencing of women, and discrimination, has a very real impact on the resources left to campaign for reform. I end this piece by considering how Di's work might be further built upon.

Looking Forward or the Problem with Queer

Women – including women with a lesbian identity – have been left cold at times by the queer theory that plays out, in the words of Jacquelyn Zita, as a drama between fathers and sons.²⁴ In this contribution I have concentrated on Di's legacy in taking on the task of reconciling queer theory and feminist praxis, thereby seeking to open up identity categories without rejecting them altogether. The point of emphasis I would end this contribution on is Di's reminder to feminists that, while encouraging critical engagement with identity categories, we should be wary of jettisoning those categories altogether. In terms of challenging compulsory heterosexuality, queer theory has scored considerable success; in challenging the oppression of female sexuality and in protecting lesbian rights, those successes have been far more modest.

The battle ground for sexual rights in international law has been played out over the limits of the state's right to regulate men's sexual agency. The first twenty years of the ECHR 'gay rights' cases, for instance, exclusively concerned criminalisation of consensual sexual activity between men in private, a line of cases that finally found success in the *Dudgeon* judgment of 1981.²⁵ So it is specifically around laws prohibiting particular sexual acts within which international law's discussions of

²¹ *Ibid.*, 626.

²² *Ibid.*, 627.

²³ *Ibid.*, 628.

²⁴ Jacquelyn Zita, 'Gay and Lesbian Studies: Yet Another Unhappy Marriage?' in *Tilting the Tower: Lesbians Teaching Queer Subjects*, ed. Linda Garber (1994, Routledge: NY) 258, 266.

²⁵ *Dudgeon v UK*, Series A No. 45, 23 September 1981.

sexuality have been framed. Despite the common usage of the LGBTI+ acronym, the first ‘L’ case before an international tribunal was not actually decided until 1986,²⁶ and there was no finding of a violation in a case brought by a lesbian applicant until 1999, a case that concerned the prohibition of homosexuals serving in the armed forces, and was brought in conjunction with a man.²⁷ The first finding of a violation in relation to female sexual orientation without a male co- or joined applicant was not until 2008 in *E.B. v France*,²⁸ which concerned adoption.

Di’s body of work is remarkable for opening the door to addressing women’s sexual expression, diversity, and pleasure in international law. She has provoked us to go beyond equating women’s sexuality with danger and victimhood. While many challenges remain, the passion and humanity evident in her work compel us to harness the power of feminism to address both that discipline’s and queer theory’s blind spots concerning female sexualities. Further, because her work focuses on solutions, it has equipped us with tools to do so. This is a remarkably rich legacy, and one that future generations of feminist scholars of international law will undoubtedly continue to draw upon and be inspired by.

²⁶ *S v UK*, Application no. 1171685, 14 May 1986.

²⁷ *Smith and Grady v UK*, 25 July 2000, 31 EHRR 24.

²⁸ *E.B. v France*, Application no. 43546/02, 22 January 2008.
