

Equal Rights/Equal Marriage: Creating Spaces for Jurisgenerative Praxis

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Abstract: In Canada, particularly since the protection of minority rights under the Charter, rights rhetoric and judicial challenges have emerged as a critical means of redressing the inequity experienced by subordinated peoples and groups - thereby privileging law and its accompanying equality framework as an agent of enfranchisement. Undoubtedly, no other social group has witnessed such rapid advancement of their rights via legal activism in the Canadian policy landscape as has the LGBTQ community – including access to marriage. This paper uses findings from a qualitative study with LGBTQ individuals who married their same-sex partners to increase our understanding of the impact of the Equal Marriage Charter challenge and associated equality discourse as a mechanism for, or moment of, jurisgenerative praxis for LGBTQ people choosing same-sex marriage.

Keywords: LGBTQ, marriage equality, equality discourse, jurisgenerative praxis

Over the past quarter century, and in Canada particularly, since the protection of minority rights under the *Canadian Charter of Rights and Freedoms*¹, rights rhetoric and judicial challenges have emerged as a critical means of redressing the inequity experienced by subordinated peoples and groups. Increasingly marginalized populations seeking access to the norms and privileges of dominant culture, pursue change via legal challenges and judicial decisions versus the more insurgent and adversarial approaches to social change historically engaged in social movement activism – thereby privileging law and its accompanying equality framework as an agent of enfranchisement. Undoubtedly, no other social group has witnessed such rapid advancement of their rights, via legal activism,

in the Canadian policy landscape as has the LGBTQ community—including becoming the fourth country in the world to grant the *pièce de résistance* of equality rights—access to marriage. Indeed, Cossman (2002:224) asserts that, in terms of formal LGBTQ equality rights, “the courts have done what almost no legislature was prepared to do”. The Equal Marriage Charter challenge and the accompanying/subsequent discourse provides a platform from which to explore the influence of the Charter of Rights and Freedoms, and the codified language of rights on LGBTQ Canadians. In order to better understand the impact of rights claims and legal challenges, this paper utilizes findings from a qualitative research study of legally married same-sex couples to gain insight into the personal and political meaning of gaining access to marriage for the participants, and the implications for progressive social change. Drawing on the narratives shared by the research participants, this paper explores the way in which the very

¹ The Charter’ will be used as shorthand for Canadian Charter of Rights and Freedoms in this paper.

public and oppositional struggle for marriage, and the language of equal rights that accompanied it, serves to inform a resistance identity, shift consciousness and initiate the prerogative of entitlement needed to disrupt normative activity. This paper posits that the impact of the Equal Marriage Charter challenged and associated equality discourse not only resulted in changes to legislation but, maybe more importantly, stimulated dialogical communication, fostered a climate of discursive identity formation, and became a *de facto* social movement.

Context

In establishing a politics of identity, little attention is given to the role of institutions in shaping both the collective consciousness and collective identities. Society itself creates spaces and possibilities for recognition struggles but also shapes patterns of solidarity and resistance. These interactions construct identities and perceptions of justice and equality, but also provide a context within which to employ strategic discourses. “Collective identity

formation is a dynamic process involving negotiations among individuals within a movement and with outside competitors, allies, and adversaries in relation to a political system,” (Hobson, citing Melucci, 2003:4) as well as, in dialogue both with elites and “others engaged in different recognition struggles” (Hobson 2003:5). “Collective identities are not just the sum of individual motives nor merely expressions of structural preconditions, but a dynamic interplay between structure and meaning . . . which often occurs within enduring political cultures” (Hobson 2003: 4); personal transformation takes place in collective action, and, in turn, collective action empowers individuals.

In a litigious culture that looks to law and policy to govern action and ‘legislate’ right-order, it is not surprising that those seeking redress for injustices welcome the artillery of legal argument and judicial decisions. In Canada, legal activism and Charter challenges have surfaced as principal means of social change as rights have come to be the primary measure of inclusion and equality, and has almost exclusively secured the attention and



Figure 1. Photo by Jenny Mealing - Flickr (Anti-Gay Protest, San Francisco)

imagination of social actors and the public alike. Equality rights, enshrined in the Charter, offer a form of social action that has demonstrated success and enjoys the legitimacy and respect of society. In a society that has enshrined the Charter of Rights and Freedoms in the constitution and, in so doing, made the language of equal-rights part of the very fabric of society (Demczuk, Caron, Rose and Bouchard 2002), it is not surprising that Charter challenges have become a critical means of resistance and social action. To be sure, Touraine (2000:909) agrees, “a call to Human Rights constitutes the core of social movements, of political programs and of movements which are limited at the public opinion level”. Nevertheless, controversy and debate surrounding the value of rights discourse have been rampant. While many activists, academics and subjugated citizens embrace rights-based activism as a vital, albeit inadequate, instrument of social change (i.e., Lahey 1999; Valdes 2003; Yamamoto 1997), others caution that rights claims offer empty promises and the illusion of inclusion that serves to impede social inequality (i.e., Cossman 2002; Eskridge 2000; Gavigan 2006; Hutchinson 1999; Kennedy 2002; Roithmayr 2001). These competing perspectives undoubtedly raise questions worthy of consideration, as discourses of rights and inclusion are quickly eclipsing front-line activism as the organizational framework of social change. The past couple of decades have witnessed a repositioning of LGBTQ²

activism—a shift from activism situated in grassroots community-based organizing, informal communication, and queer liberation politics, to smaller groups of ‘elites’ and professional associations utilizing legal representation, legislators, and the judiciary to gain greater access to the rights of inclusion. Certainly, one of the great measures of LGBTQ inclusion and, in Canada, of the primacy of the Charter in advancing minority claims, is that of access to same-sex marriage (Matthews 2005). However, this is not a gain without vigorous debate. The LGBTQ community is not a cohesive or unified group, nor has its history of activism been unified and consistent. It is, rather, a haphazard assortment of people with varying experiences, histories, identities, and sensibilities thrown together by the accident of sharing one common characteristic. Thus, it is not surprising that there is much disagreement as to the legitimacy of seeking recognition through access to equal marriage. While some LGBTQ activists assert that the equal marriage movement has served to “obscure and normalize the most compelling challenges of the queer public” (Warner 2002:218; Boyd 2004; Ettelbrick 1992), others consider same-sex marriage the ultimate litmus test of social equality (Calhoun 2000; Lahey 1999; Larocque 2006; Sullivan 2004). Largely absent from the discussion of same-sex marriage is an examination of equal rights activism as an agent of social change. The debate is measured and critiqued in terms of the possible effects of marriage; a discussion that is grounded in a

² ‘LGBTQ’ is used, recognizing that the language of equal rights does not appeal equally to all members subsumed within this acronym. However, differences within this group in general have been largely ignored in the quest for ‘equal’ rights. Thus, while rights may not apply uniformly to all members who fall under the LGBTQ classification, they have been assimilated into one ‘resistance identity’ and, as such, the acronym is used without making the distinction of (or even exploring) who benefits from rights and which members may actually be further marginalized with the achievement of certain rights. Also, the acronym is used recognizing that there are other ‘sexual identity’

groups added to the acronym (i.e., intersexed, pansexual, fluid, queers of color, two-spirited, etc.); however, LGBTQ is used without the inclusion of the other sexual minority groups as these groups remain peripheral even within the sexual minority distinction and, as such, are so excluded from the benefits of equal rights that it seems like an insult to pretend inclusivity by naming them in the discussion. Additionally, for the most part, LGBTQ is used throughout the paper as opposed to ‘queer’; this choice is made after much consideration and internal debate, as queer has an entire theoretical corpus attached to it and discussion of such is beyond the scope of this paper.

particular ideological standpoint. The pro-marriage camp proclaims the positive effects of marriage for individual LGBTQ people, while the anti-marriage faction warns of the dangers of assimilation and homogeneity of an entire identity. This argument is situated in the realm of ideology and theory, or even policy and practice, but it fails to consider the utility of equal rights in organizing and mobilizing LGBTQ social actors, influencing public opinion, and engaging the media. Hence, any exploration of rights discourse must include the utility of enlisting the judiciary to mobilize the polity, frame and elevate an issue, engage the public, and legitimate authority to speak for the group. Therefore, while not an irrefutable measure of inclusion, the equal marriage case is a symbolic place from which to launch a discussion about the role of formal equal rights in mobilizing for social change.

Charter Challenges

In any Canadian equality rights discussion, the centrality of the Charter must be acknowledged. The Canadian Charter of Rights and Freedoms guarantees the rights of individuals by enshrining these rights in the Canadian constitution. Patriated by the federal government and the provinces in 1982, the Charter expands the rights of minorities and subjugates the will of parliament and the legislatures to judicial scrutiny (Foot 2015). Senator Michael Kirby (2006), Chair of the Standing Senate Committee on Social Affairs and a public policy expert, asserts that the Charter is the single most important event in Canada since Confederation, and the greatest contributor to the protection of equality rights for Canadian citizens.

This shift has occurred more specifically since the 1985 inclusion of Equality Rights, section 15, in the Canadian Charter of Rights and Freedoms. Section 15 under the Charter states that every individual in Canada, regardless of race, religion, national or ethnic

origin, colour, sex, age or physical or mental disability, is equal under the law and must be protected from discrimination in laws and programs (Government of Canada 2013). Further, while some characteristics are not specifically named, Section 15 protects equality on the basis of other characteristics that are not specified. For example, although sexual orientation was not originally listed in Section 15 of the Charter as grounds for discrimination, in 1995 (*Egan vs. Canada*) the Supreme Court of Canada ruled that it constitutes analogous grounds on which claims of discrimination may be based and, in 1996, sexual orientation was formally included as a prohibited grounds of discrimination (*EGALE Canada n.d.*). Since that time many, if not most, LGBTQ equality claims have been settled in the courts as opposed to legislatures.

As part of the social fabric of Canada, legal challenges enshrined in Charter protections, have become a central organizing strategy for LGBTQ Canadians, and have shifted the measure of success to the realization of increased access to rights (Matthews 2005). It is unsurprising that the efficacy of the courts as an agent of change is questioned. Charter opponents regard the legal and political realms as dichotomous arenas between which one must choose, while Charter advocates consider law and politics as interrelated entities wherein judicial decisions, sanctioned by the Charter, become a tool of resistance (Herman 1994; Majury 2002). The following brief literature review offers an overview of the competing critiques of the use of legal actions, entrenched and represented in Canada via Charter challenges, as a tool of social reparation.

Critics assert that the remedying of inequality, via Charter protection, only creates an illusion of change while failing to offer any real transformative results. Further, Charter challenges demand the energy, attention and resources of many people, luring them into “legal battles that are conservatizing and counterproductive” (Majury 2002:302). The

Charter is essentially about formal equality in which individuals are divorced from inherent inequity and depicted, falsely, as formal equals; an approach that serves to ‘mask and neutralize’ inequality (Fudge 2001; Glasbeek 2001). Formal equality may in fact obfuscate discrimination (Fudge 2001; Glasbeek 2001; Lessard 2006; McIntyre and Rodgers 2006; Seidman 2002) and leave subjugated populations vulnerable. While previously subordinated groups, and indeed, society at large, may believe that injustices have been remedied by the state, it may be that private power persists and has actually made greater gains in exploiting an underclass of people. Additionally, Turpel-Lafond (1997) reminds us, Charter challenges and the language of equal rights impose a culturally and historically specific conceptual framework on people who do not necessarily share that culture or history. Thus, a reliance on the Charter to remedy social injustice must be approached with caution and scrutinized for its intrinsic hegemonic and colonizing undertones.

Any Charter victory is by its very nature limited and contradictory. Cossman (2002:225), in exploring the Charter as a tool to repair injustices suffered by LGBTQ peoples, asserts that “the legacy of gay and lesbian legal struggles under the Charter is a contradictory one—both the victories and defeats have been fragile, partial and contradictory”. Although in some cases LGBTQ people have gained “formal equality rights, lesbians and gay men have not been able to secure rights to sexual freedom” (Cossman 2002:223). Accordingly, while the Charter has afforded limited success in the attainment of formal rights for LGBTQ people, it has done so with little regard for the heteronormativity, patriarchy and sexism that is responsible for LGBTQ oppression.

In contrast, legal and political theorists (Chappell 2003; Lahey 1999; Majury 2002; Porter 2006; Smith 2005) assert that social activism, backed by constitutionally entrenched equality rights, as represented in the Charter,

has utility in bringing about change for marginalized groups and minority populations. There exists a need for an independent judiciary to make unpopular decisions and force elected officials to examine issues of human rights (Herman 1993). Hogg and Bushell (1997) contend that law tends to be ‘under-inclusive’ and that many people are excluded from their constitutional rights by virtue of their membership in a particular group. Judges, with the discretion to define and interpret law, often reflect anti-majoritarian decisions that are unpopular and controversial. It may be that, in the case of minority rights, only those not bound by the values, beliefs and/or vested interests of the electoral majority can challenge and rewrite discriminatory law (Herman 1993; Hogg and Bushell 1997; Majury 2002). Charter pragmatists (i.e., Bakan and Smith 1995; Chappell 2003; Hogg and Bushell 1997; Majury 2002; McIvor 2004; Porter 2006; Smith 2005) assert that the Charter is one among a limited number of tools to expose and to argue for the elimination of subordination. Law is a site of power, but it is also an arena for struggle and transformation; the Charter’s potential represents a huge advantage over “slow and grudging parliamentary reforms” (Herman 1993:30) and has shifted the discourse from the language of moral values to a question of human rights (Lahey 1999; Porter 2006; Smith 2005). The Charter can and should be used, albeit with caution and qualification, as it has the potential to be commandeered as a tool of social change and political redress.

Those who claim the importance of the Charter as a tool in the social policy landscape argue that the function of a Charter decision is greater than the formal legal outcome; more significantly, Charter claims act as a catalyst for debate and dialogue, facilitating increased access to decision making activities often relegated to the realm of the elites. Although the efficacy of the Charter as a vehicle of structural social transformation is questionable, it serves to reinvigorate debate (Majury 2002) by

providing a forum for raising concerns, developing a more sophisticated analysis of issues, mobilizing the public and garnering political support (Herman 1993; Majury 2002; McIvor 2004; Smith 2005). Charter decisions, with dissenting views, bring conflict into the open and raise debate over social values, beliefs and ideology. Charter challenges generate dialogue and debate – in the courtroom, in the legislatures and in the street.

“Law has both a constitutive and symbolic role to play in how identities and actions are characterized” (Herman and Stychin 1995:X). Because equal rights discourse has “presumptive validity in liberal democratic societies” and is “the dominant form of political discourse in Western capitalist states like Canada,” it is uniquely positioned to elevate the voice of marginalized people (Bakan and Smith 1995:370). Deliberative politics need no longer to rely on ‘collectively acting citizenry,’ but can depend on the “institutionalization of the corresponding procedures and conditions of communication” (Habermas 1996:27). A higher level of intersubjectivity of communication occurs in the flow through both parliamentary body and the informal network of the public sphere. Informal public opinion is translated into influence via communicative power represented through political elections, administrative power and legislation. Habermas proposes that, when communication flows through both the parliamentary body and associational networks, and, ultimately becomes institutionalized, the general interest will emerge.

The stimulation of awareness and response to issues, ignored previously, transcends immediate personal rights and moves into the realm of broader social rights (Nash 2005). It is in the formation of counter-publics, particularly for members of subordinated groups, that self-understanding, identity-formation, mutual-support and collective memory can be shaped and solidified, where capitalist, patriarchal, racist and classist principles can be confronted

(Fraser 1992). Consequently, it may be that the legal success of a Charter challenge is less important than the public discourse it provokes. “Rather than simply reflecting and reinforcing the established values of the legal system and legal elites, the Charter equality guarantee provides a basis from which to try to depose formal equality and individualism from their entrenched positions as dominant values” (Majury 2002:315). It is in debate and public dialogue that dominant discourse is questioned, challenged and displaced (McIvor 2004). The legal sphere, as a mediator between the legislative body and the polity, can open spaces for public participation and strengthen the democratic process and, in the interaction between the political and public spheres, democratic decision-making is engendered. It may be that the language of human rights and discourses of equality is positioned to reframe marginal issues into familiar language, give legitimacy to minority claims, and allow excluded people to participate in political discourse.

Jurisgenerative Praxis and Marginal Narratives

Feminists, progressive legal theorists, critical race theorists and Outsider critical theorists advocate the use of narrative to convey the experiences of marginalized people to society. Stories from the bottom, in the form of legal storytelling, can reframe a group in order to challenge assumptions, create new alliances and contest the governing structure (Crenshaw 1994; Hobson 2003; MacKinnon 2002; Matsuda 1995; Valdes 2000; Young 1996). The experiences and will of the marginalized can be translated into influence via communicative power represented through political elections, administrative power, and legislation (Habermas 1996); what Benhabib (2004) refers to as ‘jurisgenerative politics.’ The legal system, legitimated in the institutions of the courts, constitutions, and charters, has provided a forum

in which minorities and marginalized groups can challenge and resist majority dominance (Chappell 2003; Herman 1993; Majury 2002; Williams J. 1991; Williams P. 1991) and have their ‘stories’ heard. Thus, any exploration of the value of equal rights activism must consider not only the formal outcome, but also the relationship between constitutional rights and transformative engagement. Drawing on the voices of research participants, this paper seeks to understand how we can better understand the nature and possibility of the Equal Marriage Charter challenge an accompanying rights discourse as a mechanism for, or moment of, jurisgenerative praxis for LGBTQ people choosing same-sex marriage.

Methods

This paper draws upon the findings from qualitative interviews with 42 individuals who chose to marry their same-sex spouses subsequent to the constitutional ruling³ or were equal-marriage litigants.⁴ The participant pool included 30 females and 12 males ranging between the ages of 22 and 78 years old. They self-identified as white/Caucasian (33), Aboriginal (3), Métis (2), African-Canadian (2), Middle Eastern (1) and Gypsy (1) and, across the spectrum, as lesbian, gay, bisexual, trans,* gender-queer, dyke, homosexual, two-spirited, butch, femme, fluid and queer. Occupations included those employed in non-profit, social services, health care, civil service, academic, financial, professional and service sectors, as well as, students, artists, religious clergy and those who were unemployed. Couples had been together prior to their marriage between one year and 37 years and, at the time of the interview, had been married between one month and six years. Interview participants, at least

tangentially, reflected upon marriage as an act of transgression and indicated that marriage often became an occasion of dissent and defiance in the face of the dominant discourse. Accordingly, participant narratives were explored from the perspective of rights activism as a component of citizen engagement, social movement activism, and a space of social change.

Dialogical Communication

Personal narrative, elevated into public space, provides marginal voices with the opportunity to communicate what they value and why it is valued. In the example of the equal marriage suit, a civil rights legal case served to propel personal stories into the public realm. Contributing to the efficacy of the dialogue, a human face and story attached to disembodied rhetoric has the potential to engage and win over naysayers and doubters. *‘I think any time you give people the opportunity to tell their stories it is a very transformative thing – not only for the person telling the story - that is very, very powerful, and it also shared with other people because then there’s a relationship’* (Gail). The Charter challenge both highlighted stories for lawmakers in the form of appellant affidavits and for the public in the associated and subsequent media exploration.

I think putting a human face on the case helped it. ...I think that when you talk about rights or you are going up against ‘the gays who want to get married’ it is a problem. But when you start putting a face on it – Barb and Gail or John and Jack – these names, you actually see them and get to hear their story – they are not this frightening entity that nobody can identify with. (Barb)

The telling of stories attaches an individual, with feelings and lived experience, to an invisible and detested group and serves to humanize and personalize them for the masses.

³ The law was changed in Ontario in 2003 and in the rest of Canada in 2005, making Canada the fourth country in the world to legalize same-sex marriage.

⁴ This sample includes litigants in the Ontario, Quebec and British Columbia Equal Marriage Charter cases.

I think that one of the strategies...was to tell our stories; to tell the stories of our families, our children. Then there was some kind of ability to put a face to the story and that story resonated with people who we were trying to convince to change the law. (Dana)

As a tool of civil society membership, storytelling has the ability to stir recognition and forge bonds that surpass individual difference and dislike. Personal narrative can express values and experiences that cannot be communicated through reason or persuasion. Establishing relationships of commonality with members of an Outsider group renders it more difficult to exclude and alienate that group.

In the example of same-sex marriage, the media and civic debate generated by the Equal Marriage Charter challenge served a dialogical function by facilitating a space of public contestation. In the storytelling that emerged from the equal marriage dialogue, alternative and marginal narratives were entered into the discourse, creating a climate whereby opinions were shifted, allies were mobilized to participate in redress, and coalitions—even unlikely ones—were forged. As Gail pointed out, *‘the longer it went on, the more that conversations were happening, the more actual groups, whether they were unions or even religious groups, came on board and really started to do the work—became part of the group and through that they became part of the current change’*. Terri reflected, *‘It is important that there is dialogue. These issues need to be brought up. It takes a while for people to be on the radar of people not affected. There is opposition, then there is a tipping point with public awareness – it tips when people are aware – opinions shift and policies can change – then the policy feeds back into that and then helps shape opinions’*.

The equal marriage debate, while fragmented and thorny, allowed for various voices, or multiple discourses, to participate in the civil

sphere and contributed to the re-envisioning of queer social identity. In the example of equal marriage, *‘somebody heard, and somebody listened and something shifts. I think that was a very big part of the success of the same-sex marriage case—it was all of the talking that was done. Particularly with respect to people that absolutely did not agree; so we just weren’t talking to choir’* (Barb). Thus, the Charter challenge facilitated a formal venue from which to engage in informal politics and, served a communicative function in elevating marginal and minority voices to increased parity with more prevailing and powerful opinions.

Discursive Identity Formation

Participants who had not previously identified as politically motivated were politicized when refused entry into the sacrosanct institution of marriage. *‘It was highly offensive to be told at 50 years of age that people could tell you who you could marry’* (Colleen). *‘For me it was the fact that I belonged as someone who was lesbian - up until a point: then I was told I didn’t belong. And I didn’t agree with that’* (Barb). Opting for marriage in the face of hostility and controversy served to conscientize some of the participants as they deepened their awareness of the depth of animosity toward same-sex marriage and, by extension, queer identity. *‘I think that the ones that were serious did it for personal reasons and all of a sudden people realized that they were a part of something. I did it for personal reasons and all of a sudden I realized that it was very political. I am quite proud that I was a part of that’* (Alice). A politics of identity is important in highlighting the point of intersection between the individual and collective experience of oppression. For some participants, the equal marriage case and its associated reaction led to subjugated individuals recognizing their place of marginalization and finding their community—their tribe—in the

slow growth of an informal and haphazard social movement.

Participants experienced an increased politicization in joining with others and in the sharing of a common experience and interpretation of events. The formal cultural frame of a Charter challenge provided the political possibility for them to come together with others to confront imbedded structures; this, in turn, created an informal community of dissent by facilitating and giving media standing to the voice of a peripheral social group.

Well, I think at the time it wasn't politically motivated at all, but now we have become more involved with a gay women's movement, not so much a movement but a social group, and you hear a lot the more you talk with a lot more people. I'm proud now to say that I'm part of that political change. So it's probably just more my feelings about it have become more political based. (Joan)

Hence, another participant argued, it would be unconscionable not to be part of the movement for equal marriage as it is not just a matter of personal interest, but also integral to a larger concept of equity, as well as, a basic human right.

I guess the way I look at it is—black people have fought for their rights forever. Is it a basic right or is a white person's thing to just be able to work and not be a slave? Is that a white person thing or just a person thing? And that's how I see it. Marriage is not just a straight person thing so why on earth would I not fight for it? Why on earth would I say that I cannot have that and then write it off if somebody says I can't have it? That's exactly the way I see the black movement and independence. This is not a color thing – it should be a people thing. And marriage is a people thing. (Jacquie)

The collective experience of the retaliation that sought access to marriage produced a space

of dialogue and political fermentation that contributed to social mobilization, uniting participants and allowing them to see themselves as part of a larger countercultural group. In the dialectical exchange, recognition by others led to a recognition and reconstitution of the discursive self. As participants fought for the right to make individual and private choices about their lives, their consciousness regarding the communal nature of oppression was heightened.

I know for me it started out being a gay and lesbian issue and it transformed for me over those three years to an issue of equality and inclusion for everybody. To me it has nothing to do with gender or sexual orientation. It's anybody who experiences discrimination. (Barb)

As mutual exclusion and *misrecognition* are collectively experienced and named, the construction of individual and communal identity intensifies the identification of the self in one's community. Thus the language of rights, although partial, limited, and inadequate in and of itself, facilitates a social discourse that stimulates the cross-pollination of comprehension and contributes to the awareness of heteronormativity, which is situated in a politics of resistance.

The 'event' of an Equal Marriage Charter challenge acted as a moment of jurisgenerative praxis whereby individuals translated their experiences of homophobia and marginalization into both a theory and an action of resistance. The discursive nature of rights discourse carved out space for identity formation and, in so doing, presented a space of conscientization and politicization; the pursuit of denied rights in the context of legislated change precipitated and solidified the construction of an individual and collective social identity. In the backlash and contestation of space and meaning that naturally occur when the parameters of inclusion are stretched, participants were often propelled into spaces of accidental activism and, in their

exploration of individual identity, began to recognize the social nature of oppression. Through a process that brought their social identity into sharper focus, they began to become aware of their collective identity and, subsequently, their collective oppression. Research participants were able to identify themselves both as subjects of collective oppression and as agents of social change. In becoming aware of their shared resistance identity they saw themselves as participants in action for change, facilitating the alignment of themselves with other areas of marginalization – both within the queer community and in relation to other recipients of oppression. Equality rights discourse and social resistance created space for interrogating how power operates in society to further silence and marginalize oppositional voices, while contestation over human rights worked to solidify identity and shape policy, interrupting heteronormativity, and leading to increased social transformation.

Status Recognition

Although redistributive outcomes were important to those accessing the rights of citizenship, LGBTQ identity has been historically privatized, and the resultant ‘stay out of the bedroom of the nation’ social and political stance has effectively impeded the claiming of rights situated squarely in public sphere. LGBTQ people have experienced historical exclusion from civil society and, have been denied the opportunity to participate in the public discourse regarding what Habermas (1996) refers to as the ‘good life.’ Although, in Canada, laws for LGBTQ people and couples may have been largely redressed before the establishment of equal marriage, access was not equal as, in many cases, LGBTQ individuals did not feel permitted to claim the rights granted; indeed, the claiming of such rights often required individuals, without the benefit of a collective support, to enter into perilous territory by asking for benefits and rights in unsafe

environments. As Jacquie recounts, ‘*I’ve had experiences where employers have not been that friendly. I have had to hide my relationship. I’ve been afraid to even ask for the same benefits every other employee has.*’ The language of human rights and the notion of entitlement inherent in citizenship facilitated a sense of empowerment that shifted the claiming of rights from a ‘cap-in-hand’ approach, asking for something to which one may or may not be granted access, to one of demanding rights from a position of entitlement.

I was going to say as well that what it does is give me a quiet confidence about my status. Before we had the legal papers that we kept in our wallets and we could bring them out on the occasion when we did end up in the hospital or someplace and had to prove that, but it's true, I always felt that I had to prove that. (Arianna)

Marriage, in its public expression, shifted the space of contestation into the public sphere and shifted the dynamic from one of a private citizen claiming individual rights to that of a collective citizen claiming the public rights of social citizenship.

This newfound *status* recognition played a part in giving participants the courage and agency to engage in activism – to see themselves as actors in a social movement. The collective nature of the very public dialogue facilitated a sense of entitlement that, for some, was not there previously. As Joan reflected, ‘*I think, more on a psychosocial level, I feel more bold!*’ The language of human rights is not an end in itself but rather a cultural frame by which to resist dominant discourses. The discourse of equality enables a repertoire of contention that serves to interrupt and irritate the boundaries of heteronormativity and challenge the dominant ideology. Therefore, it may be that Charter challenges and the preoccupation with equal rights litigation, in practice, act as a subaltern counter-public sphere wherein citizenship, in its expanded interpretation, is cultivated and

strengthened. While the language of equal rights as protected in charters, proclamations and declarations is limited in its transformative capacity, it performs a 'jurisgenerative' function as it serves to facilitate a dialogical relationship between the state and the polity. As individuals begin to see themselves not as individual victims of homophobia and discrimination, but rather as members of a subjugated community, they are able to move toward resisting and challenging power. This membership stimulates awareness and responses to issues ignored previously which transcend immediate personal rights and moves into the realm of broader social rights.

Discussion

Legislated inclusion represents an expansion of the mediated space in which social movements and politics can interact and vie for a voice. Conscientization, stimulated by group identification and collective action, provides the incentive and the possibility to contest socially sustained power imbalances. While the equal marriage case was about a limited action seeking a specific type of remedy, the very act of having to engage in the struggle for acceptance, as well as, the consequent backlash, created a climate ripe for the recognition of broader notions of injustice and inequality. A *subaltern counter-public voice* was engendered as members of a subordinated group came together to oppose entrenched and powerful discourses and found a space of mutual support, identity formation, and self-understanding. Legislated inclusion created enclaves of civic engagement and facilitated the dialogue of membership whereby the excluded can determine their degree of participation and insert themselves into society, even when society defines them as Outsider. Legislated equality in general, and the Charter specifically, has an instrumental role to play in empowering marginalized populations and stimulating dialogical exchange – and, in so doing, it also

plays a role in challenging and shifting intransigent beliefs and opinions. Thus, this space of jurisgenerative politics and praxis, protected and promoted in the form of codified inclusion, establishes a place of formal contestation. State-sanctioned equality rights and human rights claims work to create a discursive arena in which those with less social power can see themselves reflected and engage in public debate—exercising their potential to shape and transform society. Consequently, it may be that Charter challenges and the preoccupation with equal rights litigation, in practice, act as an intermediate public/private sphere wherein subaltern counter-public citizenship, in its expanded interpretation, is cultivated and strengthened.

The role of equality rights as sanctioned by legislation, law, civil codes, charters, international conventions and other avenues of codified inclusion, work to institutionalize the influence of public discourse over lawmakers and create a space wherein dissident citizens are given a platform to demonstrate an alternative lived reality. This self-expression serves to contradict or agitate the dominant structures; the public claiming of this identity creates social consciousness and demands a response – positive or negative. Public discourse, fueled by opposing and disparate opinions and perspectives, can serve to alter definitions of the good life, as well as, mobilize the public to participate in the redefinition and reconstruction of society's norms and values. Dialogical exchange helps determine whose rights should be included and what these rights should include. Accordingly, the role of law and legislated inclusion is to encourage enhanced social receptivity and facilitate greater public discourse.

The findings of this research emphasize the intensely political character of a very personal choice; by the very nature of the radical context of same-sex marriage, couples were plunged, willingly or unwillingly, into the political realm. While seeking access to a most conventional

and conformist institution, same-sex couples inadvertently become conscientized and politicized in the event of public discourse. The Charter challenge served a communicative function in elevating marginal voices to increased parity with more prevailing and powerful voices – creating not just a space of jurisgenerative politics, but a place of jurisgenerative praxis. In the case of LGBTQ politics, and equal marriage in particular, it is understandable that public discourse will take conflicting and divergent tactics to both destabilize the status quo and, maintain the current balance and order. It is in this public display, vying for supremacy and authority, where opinions are formed and ideas are tested. Accordingly, the challenge to the status quo and, the subsequent discourse arising from that challenge initiated by the equal marriage debate, has been crucial to the formation and identification of values and ideals central to public ideology. In dialogue lies the possibility of transformation.

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