

Research Note: Justice and the Unseen: An Introduction to Queer Criminology in Theory and Practice

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ABSTRACT

The study of criminology and criminal justice traces its roots in Europe in the 1800's. Since its genesis, huge strides have been made in its development. At present, the study of criminology has split into different subdivisions: among them are biocriminology, criminalistics, and feminist criminology. Queer criminology is a new branch in this area of study that aims to make the criminal justice system more inclusive towards minorities particularly the LGBTQIA+ community. This paper aims to give an overview of this nascent field from the vantage point of queer and feminist theories. It is also an attempt to call for a deeper study of queer criminology in relation to the Philippine context as there is a considerable number of persons who identify as LGBT that are detained and incarcerated in the Philippine penal system. This work aims to give a voice to a community that is largely unseen and unheard in the criminal justice system.

Keywords: Criminological Theory, Gender Identity, Intersectionality, Critical Criminology

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1. INTRODUCTION

Gender sexism and gender equality versus the established patriarchy is one of the most divisive of social issues. Like women members of the LGBT community are what is referred to by socio-anthropologists as the “unseen” and the “unheard” (Hussey, 2010). However, a cursory survey of academic resources shows that there is a huge body of research that discusses the Cisgender Women's experience with the Criminal Justice System and the Law. Academic studies dealing with members of the LGBT community with the Criminal Justice System however is not as exhaustive or readily available.

A considerable number of LGBTs have had encounters with the law, both as victims and offenders. However, there are little or no systems that address the needs of these individuals in the Criminal Justice System. Laws and policies are mainly tailored for our cisgendered persons which puts LGBT members at a disadvantage and violates their constitutional rights. In the prison system, conjugal visits are not available to LGBT persons and their partners. Also, the segregation of prison facilities as either exclusively for men or women, makes LGBT persons prone to sexual and physical abuses as due to the prevalence of “situational homosexuality” (National Center for Transgender Equality [NCTE], 2018). The lack of access to contraceptive devices in penal and detention centers makes Sexually Transmitted Diseases rampant.

Another concern is that Queer Criminology as a nascent and emerging subtopic in Criminal Law. Hence this work draws heavily on studies by foreign authors and organizations.

Further, the theories that will be mentioned here might be at a dissonance with Queer Criminology in the Philippine setting. The concepts of Criminological studies and the Criminal System though largely universal has varied strains in different jurisdictions. Diversity of cultures, values, customs, and mores, imbues different countries with their own socio-cultural nuances and experiences.

Defining Queer Criminology

Queer Criminology is defined by them as “a theoretical and practical approach that seeks to highlight ... the stigmatization, the criminalization and in many ways the rejection of the Queer community, which is to say the LGBTQ (lesbians, gay, bisexual, transgender and queer) population as both victims and offenders by the academe and the criminal legal system” (Buist and Lenning, 2016). The word Queer is also considered a verb that denotes a position or attitude that serves as a disruption and deconstruction of knowledge. Thus, Queer Criminology aims to radically change and define the role of LGBT members in relation to the field of Criminology and the Criminal Justice System.

2. THEORETICAL PERSPECTIVES

For us to gain a better understanding of Queer Criminology, we must draw on theories and concepts from different fields such as socio-anthropology, Development Communication, and gender studies. JB Woods posited that one of the main goals of Queer Criminology, is “to advance the field beyond the sexual deviance framework to consider how sexual orientation and gender identity/expression as non-deviant differences—in combination with other differences, such as race/ethnicity, class, and religion—may influence victimization, involvement in crime, and experiences in the criminal justice system more broadly (Peterson & Panfil, 2013).

2.1 Intersectionality

Kimberly Crenshaw defined Intersectionality as an analytical framework for understanding how a person's various social and political identities combine to create different modes of discrimination and privilege (What Is Intersectionality and Why Is It Important?, 2019). Intersectionality explains how a person's gender, sex, race, caste, ethnicity, sexuality, disability, weight, and physical appearance, overlaps, and shapes their identity and image. It attempts to mitigate or if not eliminate biases in viewing persons from different sectors of society. In feminist studies, intersectionality became critical in advancing the view that a human being's sexuality is not a peg that fits neatly and perfectly to clear cut holes. Rather, it is imperative that “intersectionality should be used to understand how structures of advantage (as well as disadvantage) mold the experience of individuals engaging with the criminal justice system” (Garg, 2020).

2.2 Queer Theory

Queer Theory is defined as “a framework of ideas that suggests identities are not stable or deterministic, particularly in regard to an individual's gender, sex, and/or sexuality” (Giesecking, 2008).

Genderqueers are persons who “exist in a way that may not align with heterosexual or homosexual norms” (Clements, 2018). It is anchored on the accepted premise that sexuality is fluid; thus, can swing differently in the opposite directions of the gender spectrum.

Queer and Criminological scholars have agreed that both disciplines deal with the “‘embrace of a politics of stigma’ and ‘reliance on a general category of social marginality’” (Lamble et al., 2020). Thus, criminological issues, such as fraud and theft, state-corporate crime, border controls as well as policing and prisons are influenced by the politics of sexuality.

2.3 The Concept of The Other, Othering and Otherness

The Concept of The Other and that of Otherness is axiomatic to the sociological analysis of how majority and minority identities are formed. In the history of human development, the representation of diverse groups within any given society is controlled by a ruling class. The Other is a member of a dominated out-group who may be subject to discrimination by the in-group.

Othering is transforming a difference into otherness to create an ingroup and out-group. Whereas the Otherness is the characteristic of the other (AbdulMagied, 2020).

Akin to Intersectionality, The Other, Othering and Otherness through its focus on social identities of the participants in such a structure “reflect the way individuals and groups internalize established social categories within their societies, such as their cultural (or ethnic) identities, gender identities, class identities, and so on” (What is Otherness?, 2020). These social constructs give form to our image of who we think we are, how we want to be seen by others and the groups to which we belong.

2.4 Critical Criminology

“Critical criminology is a perspective in criminology that challenges traditional beliefs about crime and criminal justice, often by taking a conflict perspective such as Marxism, feminism, or critical theory. Critical criminology examines the genesis of crime and the nature of justice in relation to factors such as class and status, Law and the penal system are viewed as founded on social inequality and meant to perpetuate such inequality” (Online Dictionary of the Social Sciences, n.d.) This field of study also strives to look for biases in traditional criminological research.

Critical Criminology posits that different stakeholders in the Criminal Justice System must recognize that crime is rooted and interlaced on the social impacts of race, gender, femininity/masculinity ideals, sexuality, and socio-economic class.

In prisons for example, prisoners should be treated equally. In certain situations, the poor prisoners live in squalor while the rich inmates live like kings (Dizon, 2011). Applying a Critical approach to traditional Criminology will be able to address and rectify the socio-economic divide that permeates the world’s penal systems.

3. KEY ISSUES IN QUEER CRIMINOLOGY

3.1 Hate Crimes and Bias-Motivated Violence Against LGBTQ+ Individuals

Considerable progress has been made in the field of LGBTQIA+ rights in recent decades. This can be attributed to the increased visibility of openly gay characters in the media and lifting on the ban of LGBTs on serving in the military and the legalization of same sex marriage in different countries around the world.

However, violence against sexual minorities remains a major problem in the United States and Internationally (Parrot, 2016). It is estimated that fifty (50) percent of LGBT adults in the US experience bias-motivated aggression. Occurrences of physical and verbal assaults and property damage remain unreported for fear of payback.

3.2 LGBTQIA+ Aggression in the Philippine Experience

Like in the west, LGBT persons in the Philippines have experienced similar aggression in their daily lives. Top of mind are the cases of Madonna “Donna” Nierra, a 23-year-old transexual from Caloocan and that of 29-year-old Jessa Remiendo of Patar, Pangasinan. Donna’s lifeless body was found floating in an estero merely two miles away from her home. While Jessa’s body was found on the white sand “with her neck almost completely cut through” (Redfern, 2022). Most notable is the case of Pinay transexual Jennifer Laude who was strangled to death by US Corporal Joseph Pemberton in Subic, Olongapo on October 11, 2014.

In the absence of a national law, and with the Sexual Orientation Gender Identity and Expression or SOGIE bill languishing in Congress, various local government units have taken upon themselves of crafting local laws that aim to protect the SOGIE of all persons, both for those who identify as queer and cisgender. To date there are thirty municipal and provincial governments that have passed local legislation against homophobic and transphobic abuse within their borders. These laws however cover only 25 percent of the country’s population.

The Philippines as a country is considered as one of the most progressive in terms of gender equality legislation. We are one of the first to ratify treaties with the Philippines being a “signatory to the Universal Declaration of Human Rights which establishes women’s rights as human rights; conventions of the International Labor Organization (ILO) such as the Equal Remuneration Convention and Discrimination (Employment and Occupation) Convention; and other international human rights treaties that promote and protect women’s rights. These include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), among others” (Philippine Commission on Women, 2020). However, there is a huge gap in enforcing these mandates especially to persons who identify as queer. Academics refer to this as an abstract rather than a concrete utopia, where human rights laws serve as mere window dressing (Copson & Bookli, 2020).

3.3 Policing and Criminalization of LGBTQ+ Identities and Behaviors

Historically, the relationship between law enforcement and LGBT Communities has been fraught with conflict. This can be attributed to the view that LGBT persons are perverts and deviants (Peterson & Panfil, 2013) Law enforcement forces have been known to run operations against LGBT activities such as cottaging (gay sex in public restrooms), gay bathhouses and bars, while often ignoring similar “recreational” activities or

establishments frequented by straight men. This led to the Stonewall riots in the 1960's. Led by Harvey Milk, the Stonewall Uprisings is accepted as the start of the modern Gay liberation movement (Blakemore, 2021). The professionalization of the Police and peacekeeping forces as curbed such practices.

3.4 LGBT and Police Relations in the Philippines.

The Armed Forces of the Philippines is now allowing LGBT persons to openly serve in the different branches of the uniformed service. This act repeals the ethics code set by the National Police Commission (NAPOLCOM) Memorandum Circular No 2005-002 which states that a police officer can be discharged for sexual perversion, including “latent and overt homosexuality,” placing homosexuality under “neurological and psychiatric disorders” disqualifying a person as suitable for service.”

However, the leadership of the Armed Forces of the Philippines still requires that LGBT persons must promise to “behave properly” and the conduct themselves befitting the uniform of the armed service.

This negative attitude can also be gleaned from reports of abuses by Police forces on suspected LGBT criminals. In a specific case, a 55-year-old transgender woman from Zamboanga City, identified as ‘Erlinda’, “was accused to have committed theft. She was brought to a police station and was physically abused and tortured through electrocution” (“Universal Periodic Review,” 2017).

3.5 Incarceration and Detention of LGBTQ+ Individuals and the Impact on Their Physical and Mental Health

LGBTQ+ Individuals who are incarcerated face additional challenges vis-a-vis to that of their cisgendered brethren, especially those who identify as transgender. Transsexual persons due of their unique social identity have distinct psychosocial needs (O’Donoghue et al., 2021). Further, their outwardly female appearance and demeanor despite being assigned male at birth is seen with disdain by traditionalist views of the larger population. This makes them likely to be the subject of physical, sexual, and psychological abuse. New developments in modern penology, however, aims to address this iniquity.

The Cook County jail in Chicago, Illinois for example as adopted policies, guidelines, and procedures which allows for transgendered inmates to be housed, dressed, and searched according to gender the identify with and express rather than their assigned sex at birth. A Gender Identity Committee reviews each case where an inmate identifies to be transgender (Peterson & Panfil, 2013).

3.6 Access to Justice for LGBTQ+ Survivors of Sexual Assault and Intimate Partner Violence

Sexual Violence is seen in most notably among LGBTIQ+ persons. The Center for Disease Control and Prevention (CDC) posits that queer people experience sexual violence at similar or often higher rates to that of cisgendered persons (Sexual Assault and the LGBTQ Community, n.d.). Queer persons are more likely to face higher rates of poverty, stigma, marginalization, and homelessness making them vulnerable to sexual assault.

Further, “ways in which society both hypersexualizes LGBTQ people and stigmatizes our relationships can lead to intimate partner violence that stems from internalized homophobia and shame” (Sexual Assault and the LGBTQ Community, n.d.).

4. GENDER RELATED JURISPRUDENCE IN THE PHILIPPINES

Philippine Law recognizes only two sexes: Male and Female. This is reflected in government issued identity cards and the options indicating a person’s sex in government issued forms. “This is evidenced by the fact that the New Family Code as well as the Civil Code is replete with words of such heterosexual import ‘husband and wife’, and ‘father and mother” (Sta. Maria, 2019). Paragraph 2 of Article 2 of the Family Code of the Philippines specifically requires that contracting parties in a marriage must be male and female.

The Supreme Court however in certain cases have dealt with emerging issues on gender in the following cases:

Case	Description
Silverio v. Republic <ul style="list-style-type: none"> • GR No. 174689 • October 19, 2007 	The petitioner, Rommel Jacinto Dantes Silverio who underwent a gender reassignment surgery petitioned to amend his gender in his birth certificate from male to female to marry his partner. The Supreme Court however denied his petition and ruled that sex to be determined visually by the genitals of the infant at birth.
Republic v. Cagandahan <ul style="list-style-type: none"> • GR No. 166676 • September 12, 2008 	The respondent Jennifer Cagandahan was found to have Congenital Adrenal Hyperplasia, a condition where a person manifests characteristics of both male and female sexes as intersex. The court considered the preference of Jennifer to be recognized as male. The Court ruled that it respected (1) the diversity of nature; and (2) how an individual deals with what nature has handed out.
Falcis III v. Civil Registrar General <ul style="list-style-type: none"> • GR No. 217910 • September 3, 2019 	It was case filed by a group led by openly gay lawyer Jesus Nicardo M. Falcis III, which sought to petition the High Court to declare Article 1 and 2 of the Family Code which requires that a valid marriage can only be contracted between a male and female. The case was dismissed on procedural grounds and the issue is a matter for Congress. However, in this case, the Supreme Court ruled that the 1987 Constitution does not limit marriage between a man and a woman.
Republic v. Unabia <ul style="list-style-type: none"> • GR No. 213346 • February 11, 2019 	This case involves a petition for correction on entries on the birth certificate of respondent Miller Omandam Unabia due to the errors in his name, gender and middle initial. In a separate opinion in this case, Associate Justice Leonen expounded on the meaning of “sex’ and “gender”. Where sex is a biological concept and gender is a social concept.

The above cases shows the evolution of the Supreme Court’s reading on cases involving gender and sexuality. This is mirrored in Justice Marvic Leonen’s separate opinion in the case of Republic v. Unabia, to wit: *“Conversely, gender is the result of the norms and standards imposed by society. It is a changing concept that differs in every society. While most individuals are biologically born as male or female, the behavioral standard enforced in a given society affects one’s gender identity. Exactly how one is taught how to interact with others of the same or opposite sex usually defines one’s gender identity.”*

5. QUEER RELATED STATISTICS IN THE PHILIPPINES¹

The following are importance numbers give a picture about the LGBT Community in the Philippines.

Number	Fact
18	The age of legal consent of sex in the Philippines.
73%	Percentage of Filipinos who say that homosexuality should be accepted.
78%	Percentage of Filipinos between the ages of 18 – 29 who says that homosexuality should be accepted.
28	Number of LGBT related crimes in the country reported in 2011.

6. FUTURE DIRECTIONS

6.1 The Need for More Research and Data on LGBTQ+ Experiences within the Criminal Justice System

Based on available sources, the members of the LGBTQIA+ community are underrepresented within the criminal justice system. There is also evidence to support that queer persons suffer harsher penalties because of the lack of understanding of their unique need. The following may be considered for further research:

- The impact of discrimination on persons who identify as LGBT;
- Current statistics of LGBT members who have contact with the criminal justice system, both as victims and offenders;
- The impact of sexual minority status on criminal justice outcomes with particular focus on their experiences on discrimination, violence as well as access to rehabilitation and re-entry services; and

¹ Adapted from BEING LGBT IN ASIA: The Philippines Country Report, Bangkok (2014).

- The LGBTQ specific policies that may be incorporated to facilitate the mitigation, if not elimination of abuses within the criminal justice system and to provide for better re-integration post incarceration or detention.

6.2 The Need for Training and Education for Criminal Justice Professionals

It can be argued that the criminal justice system at its present state has failed to assist queer persons in a fair and equitable fashion. This can be rooted in an existing vacuum in criminal justice professionals who are professionally trained and educated in the unique needs and diversity of the LGBTQIA+ community. This includes an understanding of the vulnerabilities encountered by queer persons within the criminal justice system such as increased risk of violence, victimization, and discrimination as well as lack of support services that uniquely address the psychological and social needs of LGBT persons. At best, being properly informed of these unique challenges, Criminal Justice professionals will develop compassion and empathy towards all minorities and not limited just to the LGBTQIA+ community.

6.3 The Importance of LGBTQ+ Representation in Criminal Justice Reform

JB Woods, one of the leading authorities in the field of Queer Criminology posits that for us to achieve inclusion of LGBT persons in the Criminal Justice System, “a queered understanding of crime” must begin (Peterson & Panfil, 2013). This can only be achieved if LGBT+ persons are considered as stakeholders and play a crucial role in Criminal Justice Reform. Scholars, academicians, and practitioners can draw on the experiences and even particular skillsets of the queer community to formulate policies and create initiatives to make the Criminal Justice System more responsive to the needs of sexual minorities. One of the venues where this can be accomplished is in the classroom. The concept of Queer Criminology can be incorporated in the curricula of Criminology and Law schools. The young, as students are at a better position to see past biases and are therefore more receptive to new knowledge and more importantly a new way of thinking.

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