



Duffy, S. A. (2021). Contested Subjects of Human Rights: Trans- and Gender-variant Subjects of International Human Rights Law. *Modern Law Review*, 84(5), 1041-1065. <https://doi.org/10.1111/1468-2230.12633>

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# Contested Subjects of Human Rights: Trans- and Gender-variant Subjects of International Human Rights Law

Sandra Duffy\* 

Gendered identities and gender variance have become a regular subject of the discourse of the United Nations human rights protection mechanisms. This article explores the manner in which gender identities are discussed, constructed, and regulated by the international human rights law system. Through use of postcolonial and feminist theoretical lenses, it argues that the emergence of multiple gendered identities into the legal mainstream has required the United Nations human rights bodies to expand their concepts of gender and to develop a new vocabulary and jurisprudence of gender variance. The article examines the language used in the construction of gendered subjects and its relationship to dynamics of state and postcolonial power. It also introduces the concept of the 'cisgender matrix' to international human rights law, expressing the hierarchical social privilege given to binary, stable gendered identities over gender-variant ones.

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## INTRODUCTION

In 2018, the United Nations Independent Expert on Sexual Orientation and Gender Identity issued a report on the human rights of gender-diverse communities and persons, stating that, '[s]elf-determined gender is a fundamental part of a person's free and autonomous choice in relation to roles, feelings, forms of expression and behaviours, and a cornerstone of the person's identity.'<sup>1</sup> The Independent Expert was, in this report, giving voice to the growing movement advocating for the recognition and rights of gender-variant persons. Gender recognition laws and the auxiliary rights of gender-variant persons have become the subject of intense debate in many domestic jurisdictions, as expanding conceptions of gendered identity and its permutations reach the arena of the courts.<sup>2</sup> The varying approaches taken by members of the international community of states pose an additional challenge to the institutions of international

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- 1 UN Independent Expert on Sexual Orientation and Gender Identity, 'Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity' (UN General Assembly 2018) A/73/152, para 21.
- 2 This has not been a universal experience, but it has been prominent in some jurisdictions such as the media-led reaction to the Gender Recognition Act 2004 in the United Kingdom and in the 'gender ideology' backlash currently being experienced by Eastern European jurisdictions such as Poland, Hungary, and Bulgaria.

human rights. The disparities of recognition among states have contributed to the slow uptake of gender identity issues among the Treaty Bodies and Special Procedures of the United Nations human rights system; however, since the adoption of the Yogyakarta Principles (the Principles) in 2007 and their identification of a comprehensive right to the recognition of gender, the international human rights law bodies have come to more broadly acknowledge the existence of gender-diverse identities and the rights of gender-variant persons. However, this uptake has not been without its problems, some of which form the basis of the analysis in this article.

Although it is noted most frequently in the context of transgender rights and identities, gender identity is a universal attribute; across cultures, temporalities, and spatial horizons, societies create and reiterate concepts of gender roles and expressions. These categories are shaped by many factors, including culture, religion, law, language, and sexuality. Gendered identities should be understood as the set of all identities, both binary-conforming and non-conforming. The recognition of, or failure to recognise, gender, can be extremely important for the gender-variant subject in particular. Access to medical, educational, employment, or social services can be impacted by a failure to present identity documents which conform to the gender presentation of the individual. The importance of appropriate gender recognition to the life of every individual means that its implementation is a pressing human rights concern. As the United Nations human rights Treaty Bodies and Special Procedures have begun to be conversant in the language and practical facets of gender recognition and the related rights of gender-variant persons, attention has turned to the manner in which this discourse is enacted, with particular attention to the ways in which gender-variant persons are constructed and understood as legal actors or as the subjects of law through such processes. This article will explore the terms in which gender variance is discussed within the United Nations human rights system, as well as the frames of references used to construct gendered identities in international human rights law.

No small amount of commentary exists on the mainstreaming of Sexual Orientation and Gender Identity (SOGI) as a human rights issue. However, relatively little of this attention has been dedicated to gender diversity in and of itself, as it is frequently overshadowed by the combined weight and history of advocacy around non-heterosexual sexual orientations. If gender diversity is not visible, if it only appears in generalisations or as a subheading of a larger category, there is no means to represent the nuances of identities. Thus, we continue to see gender diversity discussed in broad strokes; attention directed to answering what are believed to be systemic patterns of rights violations rather than the lived experience of individuals; and the retention of binarist normative attitudes and language even among those who are attempting to rectify oppressions imposed by society at large.

This article presents an analysis of the ‘contested terrain’<sup>3</sup> of gender-variant subject formation in international human rights law. Informed by queer,

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3 R. Kapur, ‘Human Rights in the 21st Century: Take a Walk on the Dark Side’ (2008) 28 *Sydney Law Review* 665.

post-colonial, feminist, and post-structuralist theories more generally, it discusses the manner in which international human rights law categorises trans and gender-variant persons and thereby de/humanises them. This article does not propose to engage in a deconstruction of the term ‘gender identity’ as used in international human rights law; rather, it examines the understanding which the institutions of international human rights law have of the term and of the persons with whom the term is related. A framework for viewing the manner in which certain gender identities are privileged above others and therefore are more likely to be viewed as legitimate subjects of human rights is proposed in the first part of the article. Secondly, the history of the relationship between international human rights law and the gendered subject is examined, showing the growth of the potential subject as prompted by the interventions of feminist and queer theories to international human rights law. The third part focuses on the construction of transgender and gender-variant subjects in particular, while the fourth part elaborates on the problematic elements of the United Nations bodies’ discourse in relation to these subjects, including pathologisation, hegemonic protectionism, and normative Westernisation.

This article also explores some of the linguistic and conceptual influences that emanated from the adoption of the Principles and were adopted into the practice of international human rights law. It acknowledges the power of international human rights law in the creation of norms on gender identity, before moving on to discuss the construction of the gender-variant subject in international human rights law. In particular, it examines the constitutive language used to describe and categorise gender variance at the UN Treaty Bodies and Special Procedures, arguing that the use of a ‘term of inclusion’ may actually operate in an exclusionary manner when it comes to the most marginalised gender-diverse communities. The influence of European or North American discourse on gender variance in the global South is also discussed, and attention is drawn to the potential neo-colonial harm that can stem from the wholesale adoption of concepts of ‘sexual orientation and gender identity’

## **GENDER IDENTITY, GENDER MODALITY, AND THE CISGENDER MATRIX**

The generally accepted definition of gender identity in international human rights law is that given by the 2007 Yogyakarta Principles:

each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>4</sup>

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<sup>4</sup> Conference of International Legal Scholars, Yogyakarta, Indonesia, 6–9 November 2006, *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007), Introduction to the Yogyakarta Principles.

Further to this, ‘gender modality’ is the manner in which the individual’s experience of gender relates to that which was assigned to them at birth: in the main, cisgender persons experience a gender identity congruent with that assigned at birth,<sup>5</sup> while transgender persons experience a different gender identity from their assigned gender.<sup>6</sup>

Gender diversity, as Hines writes, describes persons who ‘[do] not conform to their society’s norms or values when it comes to their gendered physicality, gender identity, gender expression, or a combination of these factors.’<sup>7</sup> In this article, gender-diverse (for communities) and gender-variant (for individuals) are used to denote persons who identify outside of the cisgender norm in any way, including those who may not see themselves as falling within the ‘transgender’ paradigm for reasons such as gender fluidity, non-binary identity, or non-Western cultural identity. In this, these terms seek to be inclusive of persons who are both within the ‘transgender’ identity category, and outside or beyond it. The umbrella term ‘trans’ is often used similarly, although more particularly in relation to Western cultural identities such as transgender, genderqueer, agender, etc.

In their landmark book, *Gender Trouble*, Butler describes gender as a series of performative acts – speech, expressions, social interactions, repeated and given power in that repetition. This power ‘not only acts upon a preexisting subject but also shapes and forms that subject.’<sup>8</sup> The act of inscribing terms for ‘legitimate’ gender identities in law is a binding form of this constitutive act.

Gender, as ‘the cultural meanings that the sexed body assumes’<sup>9</sup> belies the theory of biological essentialism – the assumption that social gender roles will map neatly onto bodies sexed male or female. The ‘gendered matrix’ or the ‘heterosexual matrix,’<sup>10</sup> through which sex is read, confers meaning onto the material body, naming it as one or other category in accordance with the matrix of intelligibility constructed by our society. This ‘heterosexual matrix’ suggests that the ‘bodies that make sense are those presented as reflecting a stable sex.’<sup>11</sup> This stability is defined ‘through the practice of heterosexuality’: that is to say, through a system of hierarchical and oppositional binary identities: male/female, masculine/feminine, straight/gay.<sup>12</sup> In terms of theorising gender variance and the law, it is possible to conceive of a *cisgender matrix*: a system of intelligibility in which identities are privileged which perform a binary, stable, mono-identity. The formulation of human rights standards reflect this preference for bounded, finite identity categories: the United Nations human rights treaties thus far incorporate only two gendered subjects (binary male/female), while even the

5 S. Stryker, *Transgender History* (Berkeley, CA: Seal Press, 2008) 22. Furthermore, see J. Serano, *Whipping Girl* (Berkeley, CA: Seal Press, 2016) for contestations on the term ‘cisgender’.

6 F. Ashley, “‘Trans’ is my Gender Modality: A Modest Terminological Proposal” at [https://www.florenceashley.com/uploads/1/2/4/4/124439164/florence\\_ashley\\_trans\\_is\\_my\\_gender\\_modality.pdf](https://www.florenceashley.com/uploads/1/2/4/4/124439164/florence_ashley_trans_is_my_gender_modality.pdf) (last accessed 2 March 2021).

7 S. Hines, *Is Gender Fluid?: A Primer for the 21st Century* (London: Thames and Hudson, 2018) 16.

8 J. Butler, *Undoing Gender* (Abingdon: Routledge: 2004) 41.

9 J. Butler, *Gender Trouble* (Abingdon: Routledge: 1990) 6.

10 *ibid.*, 5.

11 B. Cossman, ‘Gender Performance, Sexual Subjects and International Law’ in D. Otto, *Gender Issues and Human Rights Volume III* (Cheltenham: Edward Elgar: 2013) 793.

12 *ibid.*

Yogyakarta Principles consider gender identity to be ‘deeply felt,’ thereby implying a unitary, non-fluid part of the individual’s personality.

Congruence with observable sexual characteristics is the lens through which the cisgender matrix frames its subjects. Those who transgress the binary, go through gender transition (particularly without medical interventions), or shift between fluid identities are rendered less or non-intelligible. These identities are also most frequently those which are rendered invisible in discussions of the human rights of gender-variant persons, rendering them doubly marginalised. It is important to note, following Hines’ work, that some trans persons do not wish to be considered gender-variant; that they inhabit the cisgender matrix following gender transition without troubling it further in their presentation or expression.<sup>13</sup> However, some trans and gender-variant persons are not, and do not wish to be, intelligible to the matrix. Even within international human rights law, those persons often find themselves marginalised and removed from discourse. This will be further explored in the discussion of the formation of gendered subjects in international human rights law, below.

Sex characteristics, both primary and secondary, are some of the most basic indicators from which gender is read. However, the existence of persons with intersex or variant sex characteristics further destabilises the idea that biology is destiny, as sex characteristics can be empirically shown not to be universally dyadic. Persons with intersex variations are often subjected to non-consensual surgeries, frequently as infants, in order to render their sex characteristics more congruent with the norm. This insistence on coherence causes irreparable harm to many people and displays the coercive power of the cisgender matrix on the lives and bodies of individuals.

The gendered subject, then, to remain intelligible, must display coherent physical gender-related characteristics, and must physically embody and materially perform constitutive acts of gender with their own bodily presentation. As Cabral and Viturro write,

the language of rights for trans persons yields a prescriptive set of demands placed on trans persons, particularly in corporeal terms, as a requirement for achieving legal recognition of their gender identities. The affirmation of such rights, predicated on the demand for such corporeal requirements, creates a diminished ethical-political status.<sup>14</sup>

This need for physical congruence is also a factor underpinning the medical diagnoses imposed on trans and other gender-variant persons. In many instances, a medical diagnosis is required for access to legal gender recognition procedures; some laws mandate particular interventions, often surgical and irreversible.<sup>15</sup> Such laws demand the physical construction of a congruent subject before the

13 See S. Hines, *Gender Diversity, Recognition and Citizenship: Towards a Politics of Difference* (Basingstoke: Palgrave Macmillan: 2013).

14 M. Cabral and P. Viturro, ‘(Trans)Sexual Citizens in Contemporary Argentina’ in P. Currah, S. Minter and R. Juang, *Transgender Rights* (Minneapolis, MN: University of Minnesota Press, 2006).

15 See Z. Chiam, S. Duffy and M. Gonzalez Gil, *Trans Legal Mapping Report* (Geneva: ILGA World: 2020) for a global survey of gender recognition laws and conditions thereon.

human right to gender recognition can be accessed. It is evident that, in order to vindicate the human rights of gender-variant persons, then, the rights-bearer needs be constructed in a manner which does not rely on the cisgender matrix for its intelligibility, and which accepts the varying physical and psychological presentations of diverse genders to be found in communities around the world.

## EMERGING GENDERED SUBJECTS IN INTERNATIONAL HUMAN RIGHTS LAW

Accepting that gendered identities are a universal, socially constructed attribute, this section illustrates how the gender-variant subject is but one of a series of constructed gendered subjects in international human rights law. Women's rights famously became human rights in Beijing in 1995,<sup>16</sup> but the Convention on the Elimination of all forms of Discrimination Against Women had been adopted in 1979, marking the first time that a subject that was specifically other-than male had had its rights recognised explicitly in a comprehensive international human rights treaty. In the 1990s and 2000s, the queer subject became a topic of discussion, with gay and lesbian rights the first to be identified, and discourse on the rights of 'LGBT' subjects proliferated at the United Nations human rights institutions during the first decades of the twenty-first century. In more recent times, the United Nations human rights bodies have seen the terms of discourse pivot away from the monolithic 'LGBT' and toward 'SOGI' (Sexual Orientation and Gender Identity), a phrasing which aims to broaden the scope of the identities contained thereunder and to move away from status-based rights claims limited to narrowly-defined identities.

### CEDAW and the construction of women

Although the right to formal equality of the two binary sexes was written into the formative texts of the United Nations itself,<sup>17</sup> the Women's Convention or the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW; the Convention) was signed only in 1979. Motivated by the 'failure of existing conventions to take into account the specific human rights concerns of women,'<sup>18</sup> CEDAW was an attempt to create a human rights discourse particular to the needs of women. Article 1 of the Convention states that the term 'discrimination against women' includes 'any distinction, exclusion or

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16 'If there is one message that echoes forth from this conference, let it be that human rights are women's rights and women's rights are human rights, once and for all.' Hillary Rodham Clinton, remarks to the United Nations Fourth World Conference on Women, Beijing, 1995.

17 Preamble to the Charter of the United Nations: 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'; Charter of the United Nations, Article 1: 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'

18 R. Mandhane, 'The Use of Human Rights Discourse to Secure Women's Interests: Critical Analysis of the Implications' in Otto (ed), n 11 above, 87.

restriction made on the basis of sex' while rights should be enjoyed 'on a basis of equality of men and women.'

CEDAW is the first comprehensive United Nations Convention which places the female subject apart from the universal, presumed-male, subject of previous Conventions. Until 'the advent of international human rights law,' as Otto writes,

sex/gender in international law was understood as m/f dichotomy ... Women were invariably produced as the dependents, property or extensions of men and therefore in need of legal 'protection' rather than legal 'rights.' Like colonized peoples, women were considered, by nature, incapable of full autonomy and agency.<sup>19</sup>

This began to change as feminist activists started to challenge the rhetoric and philosophy of protectionism, citing their ability to be actors under the law with agency and autonomy as people. However, this was a challenge to the male/female binary as hierarchy – the supremacy of men over women – rather than the duality itself.<sup>20</sup> Moreover, the majority of 'third world' women are still often constructed in scholarship as automatic victims incapable of agency, a lasting mischaracterisation which has not been eradicated by the rise of global women's human rights law.<sup>21</sup>

The advent of women's rights as a field ensured that there were now two gendered subjects in international human rights law, albeit two subjects in a presumed asymmetrical hierarchy. Rosenblum has challenged CEDAW's reliance on this strict gender binary on several grounds, among them being the uncertainty of 'women' as a discrete category.<sup>22</sup> The existence and knowledge of multiple gender identities means that a clear binary split between men and women is no longer a defensible basis for comparison. Indeed, Otto reads CEDAW itself as open to an interpretation which validates social gender identities, as seen in the Introduction and Article 2(f), which both refer to gender roles and customs and practice as social constructions which must be changed in order to create meaningful equality between men and women. Article 2(f) places an obligation on states parties to actively work against discrimination based on these social roles and practices.<sup>23</sup> Although these passages do not themselves disrupt the sex binary, they form a clear acknowledgement that 'men' and 'women' are identities which have, and are governed by, social roles rather than being purely biologically based. Holtmaat refers to the Article 5 CEDAW recognition of

19 D. Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry' in M. Davies and V. Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Farnham: Ashgate, 2013) 5.

20 Otto, *ibid*; also D. Otto, 'Queering Gender [Identity] in International Human Rights Law' (2015) 33 *Nordic Journal of Human Rights* 299.

21 See C. Talpade Mohanty, 'Under Western Eyes' in C. Talpade Mohanty, A. Russo and L. Torres (eds), *Third World Women and the Politics of Feminism* (Bloomington, IN: Indiana University Press 1991).

22 D. Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' in Otto (ed), n 11 above.

23 Otto, 'Queering Gender [Identity]' n 20 above, 303.

'social roles' as the basis for CEDAW's potential for 'transformative equality,'<sup>24</sup> allowing for subjectivities beyond 'male' and 'female' to be recognised.

### **A myriad of genders: the emergence of queer and gender-variant identities in IHRL**

A shift away from binary sex as the means of categorisation allows for the possibility of further gendered identities asserting themselves as subjects within international human rights law. As sexuality in the fundamental human rights Conventions is primarily located within a heteronormative family structure,<sup>25</sup> the case of *Toonen v Australia* in 1994,<sup>26</sup> wherein the UN Human Rights Committee ruled that the prohibition of discrimination based on sex in the International Covenant on Civil and Political Rights also applied to sexual orientation and same-sex sexual behaviour, was a radical affirmation of the rights of queer subjects. *Toonen* was the first juridical recognition of gay rights on the level of international human rights law.<sup>27</sup> 1994 also saw the first recognition of sexual and sexuality rights at the World Conference on Human Rights in Vienna and the UN Cairo Conference on Population and Development.<sup>28</sup>

Sexuality had, therefore, been a subject of discourse for some time before gender identity came to the attention of the United Nations human rights bodies as a characteristic in its own right. The earliest reference to gender variance from the Treaty Bodies and Special Procedures came in the 2001 Report to the General Assembly from the Special Rapporteur on Torture, wherein he noted that many 'sexual minorities' experience sexual violence in detention and in encounters with law enforcement 'in order to "punish" them for transgressing gender barriers or for challenging predominant conceptions of gender roles.' The Rapporteur went on to write that

... it appears that members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations. Indeed, discrimination on the grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place.<sup>29</sup>

24 R. Holtmaat, 'The CEDAW: a Holistic Approach to Women's Equality and Freedom' in A. Hellum and H. Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge: Cambridge University Press, 2013) 95.

25 M. Waites, 'Critique of 'sexual orientation' and 'gender identity' in human rights discourse: global queer politics beyond the Yogyakarta Principles' (2009) 15 *Contemporary Politics* 137, 139-140.

26 *Toonen v Australia* [1994] UN Human Rights Committee Communication No 488/1992.

27 S. Joseph, 'Gay Rights Under the ICCPR: Commentary on *Toonen v Australia*' (1994) 13 *University of Tasmania Law Review* 392, 410.

28 J. McGill, 'SOGI ... So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations' (2014) 3 *Canadian Journal of Human Rights* 1, 10.

29 UN Special Rapporteur on Torture, 'Question of torture and other cruel, inhuman or degrading treatment or punishment' Report to the General Assembly (2001) A/56/156, 17 and following.

The first citation of gender identity before the Human Rights Council occurred in the Joint Statement on Human Rights Violations based on Sexual Orientation and Gender Identity, in 2006.<sup>30</sup> This was followed in 2008 by the first citation of gender identity before the General Assembly, in the Statement on Human Rights, Sexual Orientation, and Gender Identity.<sup>31</sup> The Statement included an acknowledgement ‘that human rights apply equally to every human being regardless of sexual orientation or gender identity,’ along with concern over violence, discrimination, and prejudice, over the vulnerability to torture and arbitrary arrest of gender-variant and queer persons, and of deprivation of economic, social and cultural rights, including the right to health. The Statement also includes the provision that ‘sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.’ The Universal Declaration of Human Rights is cited in the Statement, relating the protection of rights regarding sexual orientation and gender identity to the foundational principles of international human rights law.

### **The Yogyakarta Principles and queering IHRL**

References to sexual orientation and/or gender identity were rare in the publications of the Treaty Bodies and Special Procedures before the signing of the Yogyakarta Principles in 2007.<sup>32</sup> The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexuality and Gender Identity<sup>33</sup> are a non-binding but highly influential document drafted by an international group of academics, experts, and human rights leaders.<sup>34</sup> The Principles, along with the 2017 addition of the YP+10 document, are considered the most comprehensive document on the human rights of queer and gender-variant subjects. They are particularly notable for their attention to gender variance, as is visible in their definition of gender identity, previously cited.

Waites notes that this attention was the express result of the two transgender-identified authors in the drafting process, Mauro Cabral and Stephen Whittle, working through the necessary balance between juridical legibility and inclusive representation.<sup>35</sup> ‘Gender identity’, although potentially a more restrictive category than they would have preferred, was useful as a companion term to ‘sexual orientation’; however, the use of ‘expressions of gender’ rendered the

30 Joint Statement on Human Rights Violations based on Sexual Orientation and Gender Identity, 3rd Session of the Human Rights Council, 1 December 2006.

31 Joint Statement on Human Rights, Sexual Orientation and Gender Identity, General Assembly, 18 December 2008.

32 Examples: Special Rapporteur on the situation of human rights defenders, country visit to Colombia, 2002, E/CN.4/2002/106/Add.2; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 2004, E/CN.4/2004/49.

33 n 4 above.

34 M. O’Flaherty and J. Fisher, ‘Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles’ (2008) 8 *Human Rights Law Review* 207.

35 Waites, n 25 above, 148.

statement more inclusive of all the ways in which gender diversity manifests itself. However, this definition may still be viewed as exclusionary on the grounds of describing gender identity as an ‘inherent characteristic – both innate and unitary,<sup>36</sup> which ‘excludes those who experience their gender as shifting or multiple, as well as those who identify as some combination or blurring of male and female.’ In the YP+10 document, gender expression is itself defined as:

each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person’s gender identity.<sup>37</sup>

An additional comment is added stating that ‘all references to gender identity should be understood to be inclusive of gender expression as a ground for protection,’ as well as defining sex characteristics as: ‘each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.’<sup>38</sup>

Furthermore, it cited sex characteristics as a prohibited ground for discrimination, meaning that persons with intersex variations or other non-normative sexual characteristics cannot be subjected to ill-treatment based on their physical characteristics. These references, particularly those to gender expression and to the non-dyadic forms of sexual characteristics, help to disrupt the operation of the cisgender matrix by complicating the elements of an individual’s gender identity. However, as yet their influence has not extended to the gender discourse of international human rights law, which continues to privilege stable expressions of sexuality and gender identity even as it purports to become more open on the subject.

Following the publication of the Yogyakarta Principles, issues around sexual orientation and gender identity began to appear more frequently in the discourse of international human rights law.<sup>39</sup> An immediate result was the citation of the Principles multiple times during the first sessions of the Universal Periodic Review, beginning in 2008. 2008 also saw the first year in which the Treaty Bodies and Special Procedures approached gender identity as its own concern: for example, the first Human Rights Committee (CCPR) citation of gender identity occurred in its 2008 review of Ireland.<sup>40</sup> The review noted Ireland’s lack of a legal gender recognition procedure, and recommended that one be implemented. The Committee Against Torture also first addressed the vulnerability of gender-variant persons to ill-treatment in 2008, in its review of

36 Otto, ‘Queering Gender [Identity]’ n 20 above, 313.

37 Preamble to the Yogyakarta Principles +10, 2017.

38 *ibid.* Note that this primarily emerged from the inclusion of intersex activist Morgan Carpenter in the YP+10 drafting process.

39 See M. O’Flaherty, ‘The Yogyakarta Principles at 10’ (2015) 33 *Nordic Journal of Human Rights* 280, for extensive recounting of the impact of the Principles at regional and international level.

40 Human Rights Committee, Concluding Observations on Ireland, 2008, CCPR/C/IRL/CO/3.

Latvia.<sup>41</sup> Similarly, in the same year, the Committee on the Rights of the Child commented on the vulnerability of gender-variant children within the United Kingdom.<sup>42</sup> The work of human rights NGOs was also vital in continuing to keep issues of sexual rights and gender identity alive at the Treaty Bodies and Special Procedures. As Correa et al state, ‘the treaty bodies have rendered dozens of comments and reports recognizing the obligations of states to respect sexual and reproductive rights.’<sup>43</sup>

In 2011, the Office of the High Commissioner on Human Rights was mandated to report on human rights violations based on sexual orientation and gender identity by the General Assembly.<sup>44</sup> In this report,<sup>45</sup> once more, the protection of persons of non-normative sexuality and gender identity is stated to be ‘guided by the principles of universality and non-discrimination.’<sup>46</sup> Sexual orientation and gender identity are compared to ‘disability, age and health status,’ as characteristics which are protected under ‘other status’ provisions in the Conventions.<sup>47</sup> Although most of the report deals with violations based on sexual orientation, or sexual orientation and gender identity as a bloc, the report does dedicate a section to gender recognition and related issues, including the necessity of sterilisation and/or divorce for applicants for legal gender recognition in many jurisdictions.<sup>48</sup>

The Office of the High Commissioner for Human Rights published a follow-up report on discrimination on the basis of sexual orientation and gender identity in 2015,<sup>49</sup> noting developments in the legal and policy systems of UN Member States in the four years since the previous Report. It noted that,

14 States have adopted or strengthened anti-discrimination and hate crime laws, extending protection on grounds of sexual orientation and/or gender identity and, in two cases, also introducing legal protections for intersex persons ... and 10 have introduced reforms that, to varying degrees, make it easier for transgender persons to obtain legal recognition of their gender identity.<sup>50</sup>

Furthermore, it notes the particular vulnerability of gender-variant persons with regard to access to healthcare and autonomy in healthcare decisions.<sup>51</sup>

41 Committee Against Torture, Concluding Observations on Latvia, 2008, A/63/44, 19.

42 Committee on the Rights of the Child, Concluding Observations on the United Kingdom, 2008, CRC/C/GBR/CO/4

43 S. Corrêa, R. Petchesky and R. Parker, ‘Sexual Rights within the UN’ in *Sexuality, Health and Human Rights* (London, New York, NY: Routledge 2008) 172.

44 Resolution 17/19 on Human rights, sexual orientation and gender identity; A/HRC/RES/17/19.

45 Office of the High Commissioner for Human Rights, ‘Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity’ (UN General Assembly 2011) A/HRC/19/41.

46 *ibid*, para 5.

47 *ibid*, para 7.

48 *ibid*, para 72.

49 Office of the High Commissioner for Human Rights, ‘Update of Report A/HRC/19/41 (on Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity)’ (UN Human Rights Council 2015) A/HRC/29/23, pursuant to Human Rights Council Resolution 27/32.

50 *ibid*, para 3.

51 *ibid*, para 54.

The Office of the High Commissioner for Human Rights also created the Free and Equal campaign, dedicated to the promotion of the human rights of gender-variant persons and those of non-heteronormative sexualities. The campaign has produced two reports, 2011's Born Free and Equal, and 2015's Living Free and Equal. In 2016, the mandate of the Independent Expert on Sexual Orientation and Gender Identity was established. The mandate has released several reports during the tenure of its first two holders, including its most recent, July 2019, report which,

examines how discriminatory laws and sociocultural norms continue to marginalize and exclude lesbian, gay, bisexual, trans and gender-diverse persons from education, health care, housing, employment and occupation, and other sectors ... [and] looks at the inclusion and access to these rights through the lens of intersectionality and analyses compounded discrimination, which leads to exclusion and marginalization.<sup>52</sup>

With regard to gender variance, however, its most relevant publication is the July 2018 report to the UN General Assembly, which 'examines the process of abandoning the classification of certain forms of gender as a pathology and the full scope of the duty of the State to respect and promote respect of gender recognition as a component of identity.'<sup>53</sup> This report is worth examining in some detail, as it is the clearest statement of the rights and societal position of gender-variant persons in all of the United Nations' jurisprudence and publications. It uses the Yogyakarta Principles definition of gender identity, as extracted above, as well as 'tak[ing] into account the distinct life experience of individuals based on the interlinkage of their gender identity with other factors, such as race, ethnicity, migrant status, education and economic status'<sup>54</sup> to form a complete picture of the lives of gender-variant individuals. It also acknowledges the breadth of culturally-specific gender identities across the globe, 'including *hijra* (Bangladesh, India and Pakistan), *travesti* (Argentina and Brazil), *waria* (Indonesia), *okule* and *agule* (Democratic Republic of the Congo and Uganda), *muxe* (Mexico), *fa'afafine* (Samoa), *kathoey* (Thailand) and *two-spirit* (indigenous North Americans).'<sup>55</sup>

The Report acknowledges the oppression of the gender-variant individual by unofficial regimes of power such as culture, religion, and tradition<sup>56</sup> before going on to explore the deep pathologisation of gender-diverse communities. It recognises trans and gender-variant persons as legal subjects and actors, who should be allowed to make a free and autonomous choice of their gender identity and expression.<sup>57</sup> It also addresses the obligation of States to provide legal recognition of trans persons' gender, stating that, 'lack of legal recognition

52 UN Independent Expert on Sexual Orientation and Gender Identity, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN General Assembly, A/74/181, 17 July 2019.

53 UN Independent Expert on Sexual Orientation and Gender Identity, n 1 above.

54 *ibid*, para 2.

55 *ibid*, para 3.

56 *ibid*, para 7.

57 *ibid*, para 21.

negates the identity of the concerned persons to such an extent that it provokes what can be described as a fundamental rupture of State obligations.<sup>58</sup>

Continuing on the theme of conflict between the laws of a State and its gender-diverse communities, the report addresses the criminalisation, de facto and de jure, of variant gender expression, and goes on to discuss the abusive requirements put in place by some States for access to legal gender recognition procedures, including

forced, coerced or otherwise involuntary sterilization; medical procedures related to transition, including surgeries and hormonal therapies; undergoing medical diagnosis, psychological appraisals or other medical procedures or treatment; as well as third-party consent for adults, forced divorce and age-of-offspring restrictions.<sup>59</sup>

The Independent Expert also refers to the European Court of Human Rights judgment in *A.P., Garçon, and Nicot v France*,<sup>60</sup> which required that sterilisation requirements be removed from the gender recognition laws of Council of Europe Member States<sup>61</sup> and the case of *G v Australia*<sup>62</sup> before the UN Human Rights Council, wherein it was held that a transgender woman's rights had been breached when she was forced by Australian law to choose between preserving her marriage and having her gender legally recognised. Furthermore, the Report states the legal gender recognition conditions it believes to be human-rights compliant.<sup>63</sup>

This Report lays out a comprehensive statement of the rights of gender-variant legal subjects and the obligations of States in their regard. It is the first publication of a United Nations Special Procedure – or indeed, Treaty Body – to do so. In so doing, it has set out a clear position which will inform its future interactions with, and assessment of, States Parties.

## CONSTRUCTING THE GENDER-VARIANT SUBJECT IN IHRL

This section examines the construction of the gender-variant subject in international human rights law with reference to the jurisprudence and outcomes of the United Nations Treaty Bodies, Special Procedures, and Universal Periodic Review process. This material is invaluable in tracking the genesis and progress of international human rights norms, and their effects on domestic and regional legal systems – whether through direct effect, such as a finding against a State Party to a Convention by a Treaty Body, or by the formation of regulatory norms which influence law-making in Member States. This history is intended

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58 *ibid*, para 23.

59 *ibid*, para 28.

60 *A.P., Garçon and Nicot v France* Applications Nos 79885/12, 52471/13 and 52596/13, European Court of Human Rights, 6 April 2017 at [131] and [135].

61 UN Independent Expert on Sexual Orientation and Gender Identity, n 1 above.

62 UN Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 2172/2012, CCPR/C/119/D/2172/2012, 28 June 2017.

63 UN Independent Expert on Sexual Orientation and Gender Identity, n 1 above.

to serve as both a record of the interactions of the international human rights bodies with gender identity and gender variance, and a critical assessment of the manner in which this takes place.

In examining the ways in which variant gender identity is represented and interacted with in the international human rights system, there are two strands of analysis which are inescapably intertwined: the formation of the subject of human rights law, and the formation of legal or sociolegal norms. In setting out parameters by which States should regulate their legal practice in order to ensure the human rights of their citizens, the United Nations bodies create a normative legal regime; at the same time, however, the assigning of human rights to certain subjects creates those subjects as humans – and excludes as non-human those who are not granted rights. The construction of gender-variant subjects in international human rights law becomes constitutive of those identities that will be legible as rights-bearers to State governments and policy-makers. As the meanings of gender-variant subjects before the UN Treaty Bodies and Special Procedures evolve, therefore, they create moments of inclusion and exclusion for gender-variant persons, some of whom will be recognised as legitimate bearers of human rights and some of whom will be relegated to the liminal spaces beyond the definitions of the law.

### **Terms of inclusion: language and the subject**

The linguistic categories into which subjects are placed have real consequences in terms of which subjects are considered legitimate and read as rights-bearers by human rights policy-makers and State governments. Because the way the gender-variant subject is formed in legal discourse is constitutive of the legal personhood of that subject, the language used to describe and delimit it is of crucial importance in the legitimacy and legibility of the subject.<sup>64</sup> Equally, every act of constitution of identity is simultaneously an act of exclusion of those who do not fall within the given standards: male/female, cisgender/transgender, binary/non-binary. ‘The construction of these dualisms,’ writes Dreyfus, ‘enables international human rights law to identify an implicit ‘standard’ against which to measure discrimination and other breaches of human rights.’<sup>65</sup>

Gender diversity is represented most often in discourse under the umbrella term SOGI, or Sexual Orientation and Gender Identity.<sup>66</sup> SOGI has become the internationally assumed ‘term of inclusion;’ ‘the discursive category through which sexual and gender diversity is being introduced, interpreted, and regulated in the UN forum,’<sup>67</sup> replacing the more limited ‘LGBT,’ or Lesbian, Gay,

64 See discussion of the work of Judith Butler on intelligibility, above.

65 T. Dreyfus, ‘The “Half-Invention” of Gender Identity in International Human Rights Law’ (2012) 37 *Australian Feminist Law Journal* 33, 37.

66 See for example: D. Brown, ‘Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles’ (2009) 31 *Michigan Journal of International Law* 821; O’Flaherty and Fisher, n 34 above; United Nations Office of the High Commissioner for Human Rights, ‘Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law’ (2012).

67 McGill, n 28 above, 21.

Bisexual, and Transgender. In the existing scholarship on the use of the term SOGI, and its component part, 'gender identity,' repeat reference is made to Kapur's description of human rights as contested terrain,<sup>68</sup> and how the meaning of SOGI itself, its use and its categorisation, are equally contested terrain.

The popularisation of 'SOGI' denotes dissatisfaction with the rigid and potentially exclusionary identity categories presented by 'LGBT'. 'LGBT' assumes familiarity and identification with identity groups formulated among Anglophone, Eurocentric cultural referents. This carries with it twin risks: that of alienation of persons from different cultural backgrounds, or those who claim identities indigenous to their religious or demographic background; and that of the imposition of Western norms on societies which may still be in the process of decolonisation.<sup>69</sup> In particular, the use of the term 'transgender' is problematic, as it signifies a particular paradigm for the origination of the subject in question. The Anglophone understanding of 'transgender' implies a narrative of passage from one binary gender to another. This implies a boundary, between two genders; a male/female duality and a subject who has transitioned from an identifiable A to an equally identifiable B. As a category, it is sometimes rejected by persons of non-binary identification, as their lives, not corresponding to male or female, may not fit within its boundaries.<sup>70</sup> Furthermore, persons of culturally specific gender identities can find that 'transgender' does not comprehend their experiences or their particular expressions of gender. Lastly, the neat divisions drawn between identities – the L, G, B, and T – does not allow for the blurring of identities for persons who experience sexuality and gender identity as fluid or intertwined, a factor which again most often affects persons of non-Western, non-normative gender identities most prevalent in the global South.<sup>71</sup>

The shift away from LGBT and toward SOGI was intended to ameliorate some of these difficulties; however, it has itself attracted criticism. The construction of 'sexual orientation' and 'gender identity' as unitary, monolithic categories privileges binary modes of gender and expressions of sexuality which are themselves unitary. It does not allow for the fluidity and multiplicity of genders and sexualities that exist. Therefore, as Waites writes, SOGI does not so much give us a new way to regard gender and sexuality so much as it reconfigures the heterosexual matrix, creating an 'emergent grid of intelligibility [which] continues to be subject to dominant [normative] interpretations.'<sup>72</sup> This cisgender matrix, therefore, continues to privilege certain subjects under the category of

68 See Kapur, n 3 above.

69 'Western' is used here in a similar manner to Mohanty's usage in 'Under Western Eyes': 'attempting to draw attention to the similar effects of various textual strategies used by writers which codify Others as non-Western and hence themselves as (implicitly) Western.' Talpade Mohanty, n 21 above, 52.

70 On non-binary identities, see C. Richards, M.J. Barker, and W.P. Bouman (eds), *Genderqueer and Non-Binary Genders* (London: Palgrave Macmillan, 2017).

71 On these cultural identities, see for example S. Woltmann, 'Third Gender Politics: Hijra Identity Construction in India and Beyond' (2020) 41 *South Asian Review* 3; N. Besnier and K. Alexeyeff (eds), *Gender on the Edge: Transgender, Gay, and Other Pacific Islanders* (Honolulu, HI: University of Hawaii Press, 2014).

72 Waites, n 25 above, 138.

‘SOGI,’ while others are excluded. McGill adds that SOGI, the discursive category through which gender variance is constituted, is ‘often relied on as a largely coherent global descriptor, but carries specificities of time and place and assumptions on inclusion.’<sup>73</sup> She cites three main criticisms of the manner in which SOGI is constructed and utilised: the marginalisation of gender variance; the privileging of Western identity concepts, and the fragmented results which can come from adding ‘SOGI issues’ to existing human rights framework and in particular, to the dominant treatment of sexual orientation in international human rights law.

‘LGBT’ itself maintains an influence on the way the UN institutions view gender variance, as can be seen in their concentration on transgender subjects – usually binary-identified and non-fluid transgender persons, in the Western model – in discourse around these issues. The exclusion of non-binary, genderfluid, agender, and non-Western cultural identities from the discourse contributes to their marginalisation and risks reinforcing the coercive force of the cisgender matrix. While this article wishes to be as inclusive as possible, it is difficult to find examples of these more marginalised gender-variant identities in UN publications, and therefore many of the examples in the following analysis concentrate on transgender persons.

## CONSTRUCTED AND EXCLUDED SUBJECTS

In order to problematise the manner in which the international human rights system encounters gender-variant subjects, it is necessary to look for the silences; to look for the exclusions produced by law’s regulatory force. The differential production of subjects means that every act of inclusion also creates an exclusion; as previously mentioned, McGill cites several difficulties with using SOGI as a term of inclusion, among which are the risk of ‘losing’ gender identity by having it subsumed into a category which foregrounds issues of sexual orientation, and the creeping Westernisation of international legal norms on gender and sexuality.<sup>74</sup> This section explores each of these concerns, asking how the law meets gender-variant subjects and whether its approach should take into consideration more the silences produced thereby.

### Protectionism and the hegemonic victim-subject

Analysis of the practice and jurisprudence of the UN Treaty Bodies and Special Procedures shows that among their main concerns with regard to the ‘SOGI-related’ category of issues are discrimination and stigma based on gender diversity. Discrimination is seen as a cause for concern both in and of itself, and as a root cause which leads to the risk of violence against gender-variant persons. The first Report from the mandate of the Independent Expert on

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73 McGill, n 28 above, 21.

74 See McGill, *ibid.*

Sexual Orientation and Gender Identity addressed violence and discrimination against gender- and sexuality-based minority groups, stating that ‘violence and discrimination often appear not as singular events but as part of a prolonged vicious circle. They are multiple and multiplied – inextricably linked emotionally, psychologically, physically and structurally.’<sup>75</sup> Both stem from the same structural causes in society: stigma around gender nonconformity, lack of education regarding diversity, socioeconomic marginalisation, and intersectional oppressions wherein an individual falls into multiple categories of disadvantage (for example, gender variance and race, disability, citizenship status). Homophobia- and transphobia-related crimes of violence are seen as a consequence of the discriminatory and stigmatising attitudes of society as a whole; a tangible manifestation of the alienation suffered by sexuality- and gender-based minorities. Non-normative gender expression is a factor which increases vulnerability to individual attacks and killings, to hate speech, threats, and hate-motivated assaults, and to victimisation by state actors. This approach means that the right to non-discrimination is considered to be almost a condition precedent to the rights to bodily autonomy, to dignity, to freedom of speech and association, etc.

The presence of intersectional forms of discrimination is also often highlighted, particularly by the more specialised mandates, as seen in the CEDAW Committee’s 2017 Concluding Observations on Ukraine.<sup>76</sup> Here, also, the malfeasance and inaction of law enforcement and medical professionals are cited as aggravating factors in the mistreatment of transgender women and transfeminine persons.<sup>77</sup>

Of course, it is not argued that trans and gender-variant persons do not suffer from discrimination, stigma, and the violence which is the largely inevitable end result of this societal marginalisation; non-normative gender expression is a factor that increases vulnerability to individual attacks and killings, to hate speech, threats, and hate-motivated assaults, and to victimisation by state actors. Furthermore, a legal climate in which discrimination is legitimised renders gender-variant existence more difficult, both because of the risk of criminalisation for self-expression and because retention of such laws is a clear marker that the State considers some forms of marginalisation of its gender-diverse citizens to be legitimate – thereby lending support to discriminatory attitudes among the public at large.<sup>78</sup> Juang sums up the importance of recognition, ‘by the consequences of its absence: an unvalued person readily becomes a target or a scapegoat for the hatred of others and begins to see himself or herself only through the lens of such hatred.’<sup>79</sup>

75 Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2017) A/HRC/35/36, para 39.

76 CEDAW Committee, Concluding Observations on Ukraine (2017) CEDAW/C/UKR/8.

77 See also Report of the Special Rapporteur on Torture (2001) A/56/156 wherein the Rapporteur discusses the torture of sexuality- and gender-based minorities by law enforcement.

78 See also Concluding Observations of the Human Rights Committee to Kuwait (2011) CCPR/C/KWT/CO/2, which comments on the criminalisation of ‘imitating the opposite sex’ in the State.

79 R.M. Juang, ‘Transgendering the Politics of Recognition’ in Currah, Minter and Juang (eds), n 14 above, 242.

Rather, it is argued that the concentration of the institutions of international human rights law on this violence and discrimination risks configuring – in fact, does configure, the gender-variant person as what Kapur terms the ‘hegemonic victim-subject.’<sup>80</sup> Although Kapur is writing in the context of narratives of violence against women, it is possible to map the concept across to queer and gender-variant subjects also. In constructing a subject solely through reference to the hardships they particularly suffer, international human rights law risks forming an exclusionary picture of gender-variant subjects, defined by having experienced a certain kind of discrimination and/or stigma; conversely, therefore, delegitimising those subjects who do not fit this formula. Furthermore, if the gender-variant subject is constituted as a liminal, marginalised, figure, they are seen as victims rather than as rights-bearers, increasing their alienation from the law.

Another example of this constructionist rhetoric is seen in the CEDAW Committee’s 2019 Concluding Observations on Colombia, wherein they state that:

The Committee is concerned about reports of widespread discrimination, threats and attacks directed against lesbian, bisexual and transgender women. The Committee is further concerned that, despite the fact that the Constitutional Court has ordered the legal recognition of same-sex marriages, lesbian, bisexual and transgender women continue to face unjustified delays, discriminatory interpretations and unforeseen requirements when exercising their rights.<sup>81</sup>

Queer and transgender women are portrayed as the victims of ‘discrimination, threats and attacks.’ Furthermore, they are treated as a monolith who are attempting to exercise rights despite this – but the needs of queer women, and the needs of transgender women, are often very different. Gender-variant persons may be affected by issues such as a lack of marriage equality in a jurisdiction, but often their more immediate concerns are related to healthcare access<sup>82</sup> or to protection for marginalised occupations such as sex work or entertainment. Lastly, ‘transgender,’ as previously discussed, is not an identity shared by all gender-variant persons in the global South, and it may not be applicable for many of the most marginalised gender-variant persons in Colombia.<sup>83</sup>

80 R. Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15 *Harv Hum Rts J* 1

81 CEDAW Committee, Concluding Observations on Colombia (2019) CEDAW/C/COL/9.

82 See C. Dietz, ‘Jurisdiction in Trans Health’ (2020) 47 *Journal of Law and Society* 60 on the accessibility of trans-related healthcare.

83 This attention to transgender women to the exclusion of other gender identities is also seen in the medical field, for example R.A. Aguayo-Romero and others, ‘Gender Affirmation and Body Modification Among Transgender Persons in Bogotá, Colombia’ (2015) 16 *International Journal of Transgenderism* 103.

## Pathologisation and biological essentialism

Pathologisation is frequently a central concern in the lives of gender-variant persons. From medicalised requirements to access legal gender recognition, to requirements for psychiatric diagnosis before a person can access transition-related surgical or hormonal interventions, many aspects of life are governed by medical prerequisites. It is not surprising that medical issues feature prominently in the discourse of the UN human rights bodies when discussing gender diversity, as interactions between gender-variant persons and medical institutions are frequent sites of human rights abuses. However, international human rights law itself can also be a site of further entrenched pathologisation, and it is argued that an underlying biological essentialism renders it difficult for international human rights law to effectively vindicate the rights of gender-variant subjects.

Although the psychiatric Diagnostic and Statistical Manual and the World Health Organisation's International Classification of Diseases have both moved toward depathologisation of gender-variant identity, removing it from classification as a disorder, many United Nations Member States continue to add medical requirements to their conditions for legal gender recognition. In Europe, the European Court of Human Rights, in *A.P., Garçon, and Nicot v France*,<sup>84</sup> held that permanent sterilisation could no longer be a requirement for having one's gender legally recognised.<sup>85</sup> In its reasoning, the European Court found that obliging trans and gender-variant persons to undergo sterilisation or other permanent physical changes before accessing legal gender recognition placed them in the impossible position of attempting to choose between their physical integrity and their true identity.<sup>86</sup> However, it is still legal to require that a person undergo psychiatric evaluation to establish the veracity of their identity. In 2017, the Human Rights Committee commented on Australia's medicolegal requirements related to gender transition and gender recognition, noting that Family Court authorisation was required before young people diagnosed with gender dysphoria could access hormonal treatment. The HRC expressed concern that this could be harmful to the young people in question with regard to the efficacy of the treatments and the potential damage to mental health caused by a delay in beginning medical treatment. It also cited potential breaches of Articles 7, 17, and 26 of the ICCPR (on torture, cruel, inhuman, and degrading treatment, privacy, and non-discrimination, respectively) owing to the requirement that most Australian states and territories required compulsory medical treatment to be undergone before legal gender recognition can be accessed.<sup>87</sup>

Furthermore, General Comment 22 of the Committee on Economic, Social, and Cultural Rights is explicitly supportive of the right to accessible and respectful health care for gender-variant persons. It notes that 'States must reform laws that impede the exercise of the right to sexual and reproductive health. Examples include laws criminalizing abortion, HIV non-disclosure, exposure and

84 *AP, Garçon, and Nicot v France* n 60 above.

85 *ibid* at [135].

86 *ibid* at [131].

87 Human Rights Committee, Concluding Observations on Australia (2017) CCPR/C/AUS/CO/6.

transmission, consensual sexual activities between adults or transgender identity or expression.<sup>88</sup> In stating that the criminalisation of non-normative gender identity or expression is a known barrier to access to healthcare, the CESCR Committee makes explicit the relationship between stigma, pathologisation, and the pro-active right to health. The manner in which it is stated, which prioritises the desire of the person in question to surmount those barriers in order to exercise the right, is both attentive to the needs of the community and a reflection of the gender-variant subject as rights-bearer, as opposed to the passive object of mistreatment. The Committee on Economic, Social, and Cultural Rights has also recently noted the absence of legal gender recognition mechanisms as a factor in rendering healthcare inaccessible for gender-variant persons,<sup>89</sup> and specifically cited 'transgender'/gender-variant status as a factor increasing vulnerability in a failing healthcare system.<sup>90</sup>

However, scholars have cited criticisms of the United Nations' and international human rights law's approach to medical interventions and pathologised status among gender-diverse communities. O'Brien, writing on intersex rights, cites the intractable binary<sup>91</sup> at the heart of international human rights law as a stumbling block to achieving equality. By retaining a naturalised sex binary in human rights law, she argues, it is impossible to imagine bodies which are not sexed binary male or female. The gender-variant body, transgressing these boundaries, is also rendered unreal, existing outside the regulatory regime. At no point has a United Nations Human Rights body commented on the effects of pathologisation or medicalised requirements for gender recognition on the growing number of persons identifying outside of the male/female binary.

O'Brien also argues that attempts to secure rights for persons with non-normative bodies risks embedding difference – creating a subject which is medicalised by default and subject to further protectionist discourse as a victim Other.

Bodies with transgender or intersex characteristics that are forcibly 'sexed' are seen to accrue intelligibility only by virtue of surgical, chemical and psychological manipulations ... Technologies of power demonstrate a paranoid need to efface all traces of sexed ambiguity.<sup>92</sup>

88 UN Committee on Economic, Social and Cultural Rights, General comment No 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), para 40.

89 Committee on Economic, Social, and Cultural Rights, Concluding Observations on Costa Rica (2016) E/C.12/CRI/CO/5.

90 Committee on Economic, Social, and Cultural Rights, Concluding Observations on Kyrgyzstan (2015) E/C.12/KGZ/CO/2-3.

91 W. O'Brien, 'Can International Human Rights Law Accommodate Bodily Diversity?' (2015) 15 *Human Rights Law Review* 1, 4.

92 O'Brien, *ibid*, 15.

## Disaggregating SO + GI

The archives of ‘SOGI’ and ‘LGBT’ jurisprudence among the United Nations Treaty Bodies display an inconsistent attitude toward gender identity. Gender identity is a more recent concern of discourse at the United Nations level than sexual orientation, which as a category of rights-claim and a characteristic particular to a community, has been an established part of UN jurisprudence since the 1994 decision of the Human Rights Committee in *Toonen v Australia*.<sup>93</sup> Gender identity, as has been shown in the second section above did not begin receiving mainstream attention until a decade or more following this, and has therefore somewhat lagged behind in terms of consideration and inclusion. There remains a risk that gender identity, or more accurately, the rights claims of gender-variant persons, will be subsumed into the larger category and thereby, intentionally or accidentally, disregarded. As McGill states, ‘[t]reating “SO” and “GI” as a unified discursive category poses a significant risk that trans people and human rights issues related to gender identity and expression will simply disappear from human rights discourse, or be included only as an afterthought.’<sup>94</sup> This is a question of exclusions; of who is silenced and omitted from discussion.<sup>95</sup>

Many examples of the sidelining of the rights of gender-variant persons are visible in the practice of the Treaty Bodies and Special Procedures. The Human Rights Committee’s 2014 review of Japan cites its concern at ‘discrimination against lesbian, gay, bisexual and transgender persons in employment, housing, social security, health care, education and other fields regulated by law’; however, the recommendation stemming from this cites only ‘amending its legislation, with a view to including sexual orientation among the prohibited grounds of discrimination, and ensure that benefits granted to unmarried cohabiting opposite-sex couples are equally granted to unmarried cohabiting same-sex couples.’<sup>96</sup>

In this example, although the word ‘transgender’ was used in the observation and recommendation, the effect was to advise the State Party to take measures that would principally benefit the situations of non-heterosexual persons rather than those with non-normative gender identities. The citation of gender identity as a characteristic is a positive development, but unless accompanied by substantive protection in its own right, it will remain merely a citation.

This is not to say that there are not many shared experiences that affect both non-heterosexual and gender-variant subjects, and, of course, many individuals who unite both categories. ‘Homophobia and transphobia are tightly intertwined, and ... anti-gay bias ... often takes the form of violence and discrimination against those who are seen as transgressing gender norms.’<sup>97</sup> Likewise,

93 *Toonen v Australia* [1994] UN Human Rights Committee Communication No 488/1992.

94 McGill, n 28 above, 23.

95 Corrêa, Petchesky and Parker, n 43 above, 161.

96 Human Rights Committee, Concluding Observations on Japan, 2008, CCPR/C/JPN/CO/5. See also Committee on Economic, Social, and Cultural Rights, Concluding Observations on Peru, 2012, E/C.12/PER/CO/2-4.

97 S. Minter, ‘Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion’ in Currah, Minter and Juang (eds), n 14 above, 142.

sexual orientation and gender identity are not separable concepts in respect of many identity claims, particularly those localised to cultures in the global South. However, gender variance often raises rights claims in and of itself which are specific to gender-variant subjects. Calls to combat discrimination and violence can be useful to all parties under the umbrella term, all of whom may experience marginalisations due to their non-normative gender or sexual expression. However, specific rights claims such as the right to adequate, trans-literate<sup>98</sup> healthcare provision, or the ability to change one's gender on civil status documents without undergoing involuntary medical interventions, need more particular attention than can proceed from cursory or token mentions as part of the larger SOGI category. An example of a United Nations Special Procedure mandate taking heed of the specific needs of some gender-variant persons is seen in the Report of the Special Rapporteur on Health following his country visit to Malaysia in 2014 (it is to be noted that the Rapporteur focuses on the experience of transgender women in particular in this Report):

84. Malaysia has become one of the few countries where transgender people are criminalized. Since the 1980s, a series of legislative initiatives, mostly undertaken under sharia enactments, prohibited 'cross dressing' and forced transgender people, who had historically enjoyed a certain degree of acceptance in society, to go underground. In 1982, a fatwa issued by the National Fatwa Council, prohibited Muslims from undergoing sex reassignment surgery and since then very few hospitals have performed such surgery. The National Registration Department does not allow the gender indicator on identity cards to be changed, and this applies both to Muslims and non-Muslims.

87. Transgender women also face serious discrimination in public health-care facilities. They are often associated with sex work, which is a crime, and they are forcibly tested for HIV/AIDS. They are identified on the basis of their identity card and, unless they have undergone sex reassignment surgery, are often housed in male wards where they can be exposed to violence and abuse. The fear of stigma and discrimination deters transgender women, and other LGBT people, from seeking health care, with the consequent devastating effects that this can have.<sup>99</sup>

This particular attention to gender-variant persons is more often seen in the Reports and practice of the Special Procedures, perhaps owing to their more specialised mandates. In order for the same attention to emanate from the Treaty Bodies, it may be necessary to ensure that international human rights law can disaggregate sexual orientation and gender identity,<sup>100</sup> and use the space thereby created to create a new and more expansive concept of the rights of gender-diverse communities, to ensure that they do not lose out in the intersections.<sup>101</sup>

98 'Trans-literate' is used here as an umbrella term, signifying healthcare which is open to, knowledgeable on, and accepting of persons of all gender identities and expressions.

99 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Puras – Addendum – Visit to Malaysia (19 November – 2 December 2014); A/HRC/29/33/Add.1.

100 McGill, n 28 above, 24.

101 K. Sheill, 'Losing out in the Intersections: Lesbians, Human Rights, Law and Activism' (2009) 15 *Contemporary Politics* 55.

## Normative Westernisation

International human rights law faces difficulties arising from its international scope and claim to universality. In attempting to address a global population, the terms of inclusion used in human rights discourse can form exclusionary boundaries, or unintentionally render some subjects illegible. We need therefore to challenge and question the categories of human rights discourse, and their associated exercise of power through their potential for exclusionary definition of the gender-variant legal subject.

By framing rights-bearing subjects in terms of sexual orientation and gender identity, it is possible that international human rights law is imposing constructed and potentially unwelcome norms on queer and gender-variant subjects from non-Western cultural backgrounds. Indeed, although the framing in this article aims to remain as inclusionary as possible, it must be noted that 'queer' and 'gender-variant', along with 'trans,' are themselves terms formulated with a Western bias and deployed here by a Western scholar.

International human rights law can at times be said to fall victim to a 'fixed and rigid deployment of gender.'<sup>102</sup> This leads to an erasure of gender identities and expressions which lie beyond the margins of discourse, effectively silencing and 'disappearing' them from the conversation on legal recognition of identity. This fixed and rigid view of gender identity also treats it as a characteristic which is innate and unitary in the person's selfhood. This, of course, does not hold true for all persons of non-normative sexual and gender identities around the world. For many persons of culturally located genders and sexualities, the Western categories of 'sexual orientation' and 'gender identity' are too narrow or restrictive to capture their subjectivity. Similarly, how can arguing for equality under the banner of 'transgender rights' read to an Indian hijra or a Native American Two-Spirit person, who may not identify as binary male or female, but equally not fit the Eurocentric transgender narrative? Equally, how can the traditional 'wrong body' European narrative – roundly and rightly decried by many trans and feminist writers<sup>103</sup> – account for persons born and living outside of a Western gender binary paradigm?

Speaking on scholarship in the United States, Juang states that, 'the danger of misrepresentation [of non-Western subjects] is compounded by the problem of taking on an imperialistic approach to political and intellectual work.'<sup>104</sup> To combat this, Corrêa et al challenge us to locate the human identity in 'the poor, black Brazilian travesti's body ... the transgender migrant sex worker ... or the

<sup>102</sup> Cossman, n 11 above, 800.

<sup>103</sup> For example T.M. Bettcher, 'Trapped in the Wrong Theory: Rethinking Trans Oppression and Resistance' (2014) 39 *Signs: Journal of Women in Culture and Society* 383; C. Lester, *Trans like me: A journey for all of us* (London: Virago Press: 2017); S. Davidmann, 'Beyond Borders: Lived Experience of Atypically Gendered People' in S. Hines and T. Sanger (eds), *Transgender Identities: Toward a Social Analysis of Gender Diversity* (Abingdon, New York, NY: Routledge: 2010).

<sup>104</sup> Juang, n 79 above, 256.

intersex body<sup>105</sup> – to disrupt the narrative of the cisgender heterosexual White person as standard. They ask, in effect, for the sexual subaltern to speak.<sup>106</sup>

In seeking to support the rights-claims of gender-variant subjects in the global South, it is imperative that human rights law does not replicate the colonial project by imposing norms on them. An instructive example lies in the Human Rights Committee's 2017 review of Bangladesh, which notes

stigmatization, harassment and violence against lesbian, gay, bisexual and transgender persons, barriers to assistance in seeking employment of 'hijras', who are considered as transgender persons, by the administration of invasive and humiliating medical examinations to prove transgender status.<sup>107</sup>

Hijras are persons usually male-assigned at birth or exhibiting intersex characteristics, whose gender identity is binary-identified female, transfeminine, or third-gender.<sup>108</sup> Some are celibate, but many are sexually active with male partners, and the non-normative sexuality inherent in that activity also forms a component of the identity. Many do not identify as 'transgender.' However, a growing sector of the gender-variant population in South Asian societies are young persons who find 'transgender', as it is read in a Eurocentric fashion, both personally resonant and a juridically legible identity category on which to advocate for rights.<sup>109</sup> Defining both communities as 'transgender', as the Human Rights Committee did, is unintentionally exclusionary and does not allow 'the subversive potential of [non-Western] gender outlaws and their discursively produced erotically charged bodies'<sup>110</sup> to shape the character of the international laws through which they are subjectivated.<sup>111</sup>

## CONCLUSION

This article illustrates how the emergence of variant gender identities into mainstream United Nations human rights discourse has forced the international human rights law bodies to expand their definitions of the gendered subject. International human rights law, and in particular the United Nations human rights treaty bodies and Special Procedures, has historically provided a platform on which the rights of minority groups could be represented and

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105 Corrêa, Petchesky and Parker, n 43 above, 205.

106 R. Kapur, 'Law and the Sexual Subaltern: A Comparative Perspective' (2000) 48 *Cleveland State Law Review* 15.

107 Human Rights Committee, Concluding Observations on Bangladesh, 2017, CCPR/C/BGD/CO/1.

108 See G. Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (New Delhi: Yoda Press, 2006).

109 See G. Reddy, 'Crossing "Lines" of Subjectivity: Transnational Movements and Gay Identifications' in Reddy *ibid*, 211.

110 Cossman, n 11 above, 802.

111 It is important to note that this may not be entirely the fault of the Human Rights Committee: they may be mirroring State- or NGO-based terminology submitted to them. Nevertheless, it is worth noting, as the actions and the jurisprudence of UN Committees can have important normative effects.

upheld. The review of states' compliance with their international human rights law obligations also allows for open criticism of unfair, discriminatory, or illegal state practice. This oversight also makes international human rights law a useful tool for activists and advocates for marginalised communities or those living in particularly restrictive States.

The CEDAW Convention established a differently gendered subject in the legal mainstream and consolidated the place of women in international human rights law, although scholars have latterly problematised the manner in which CEDAW challenges male/female hierarchies, but leaves in place an assumed male/female binary gender separation. The adoption of the non-binding but highly influential Yogyakarta Principles in 2007 proved to be another moment of rupture for gender in international human rights law. The Principles were the first document that acknowledged that gender identity did not exist in a pure binary form, and they gave human rights law a working definition of gender identity on which claims to rights could be based. This was a paradigm shift for international human rights law, and the increase in references to gender identity at the United Nations Treaty Bodies and Special Procedures from 2007/2008 onwards is testament to the impact of the Yogyakarta Principles.

However, the Yogyakarta Principles were not without their own problems. The definition of 'gender identity' given in the Principles has itself been problematised for its quasi-essentialist nature, and it can be argued that the wholesale adoption of the terminology, 'sexual orientation and gender identity,' by the UN Treaty Bodies and Special Procedures has proved to be something of a blunt legal instrument in the discussion of marginalised and variant gender identities.