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SYMPOSIUM ON QUEERING INTERNATIONAL LAW

ABANDONING GENDER "IDENTITY"

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International instruments fail to specify the meaning of gender identity. Yet gender identity has been invoked as a prohibited ground of discrimination, particularly in cases concerning trans persons.[1] Trans existences fall outside the expectation of a correspondence between sex and gender. "Trans" is an umbrella term referring to people who do not identify with the sex attributed to them at birth. This broad definition encompasses pre-operative and post-operative transsexuals, as well as persons who have not undergone any medical intervention and do not conform to the social norms of expression and self-identification imposing the binary. Regional conventions do not define the concept of gender identity either. Documents issued by the United Nations (UN) and regional human rights bodies frequently rely on the category, without any clear explanation of the notion, or of what makes gender identity different from gender as such. Relying on Lacanian psychoanalysis, this essay argues that gender is an identity *per se* and challenges international law's treatment of gender and gender identity as distinct categories. Underlying this essay is the view that questioning the shape that the law gives to "gender identity" is the preliminary step to evaluating what protections human rights law can or cannot offer to individuals.

A Quest for a Legal Definition

In the absence of a definition of gender identity contained in "hard" sources of international human rights law, the Yogyakarta Principles[2] have become a major source of guidance for international bodies. The Yogyakarta Principles were drafted by a group of international human rights experts in Yogyakarta in 2007. While the Yogyakarta Principles and the Yogyakarta Principles plus 10 (YP+10)[3] are considered sources of "soft" law, they nevertheless constitute a significant development in the international legal understanding of sex/gender-related concepts.[4] I use "sex/gender" throughout this essay, except where the examined source of law refers to a single notion of "sex" or "gender." I therefore reject the common opposition between sex (nature) and gender

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[1] *Cf.* Paisley Currah, *The Transgender Rights Imaginary*, *in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 246, n. 2 (Martha Fineman, Jack E. Jackson & Adam P. Romero eds., 2009).

[2] International Commission of Jurists, *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007).

[3] International Commission of Jurists, *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (2017).

[4] *Cf.* Anne Fausto-Sterling, *Gender/Sex, Sexual Orientation, and Identity Are in the Body: How Did They Get There?*, 56 J. SEX RESEARCH 529 (2019).

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(culture). Indeed, both sex and gender are constructs, and neither is innate or pre-given. Gender is not the social side to the strictly biological side of sex: the designation of sex is also subject to cultural conditionalities.

The Principles mirror binding international human rights law protecting individuals from violations based on sexual orientation, gender identity, and, in the case of YP+10, gender expression and sex characteristics. The documents collate and clarify an array of positive and negative state obligations, including, but not limited to, the principles of universality of human rights, non-discrimination, and equality before the law. The YP+10 address additional rights and corresponding state obligations, such as the rights to legal recognition, to bodily and mental integrity, to cultural diversity, and to freedom from criminalization.

Under the Yogyakarta Principles, gender identity is:

> 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.[5]

This definition also applies to the additional provisions enshrined in the YP+10. The UN Committee on Economic, Social and Cultural Rights (CESCR) relied on the Yogyakarta Principles and YP+10 for the definition of gender identity in its General Comment 20.[6] Other international and regional entities, including the UN High Commissioner for Refugees (UNHCR),[7] the Joint UN Programme for AIDS (UNAIDS),[8] and the Council of Europe Commissioner for Human Rights,[9] have referred to the Principles to define the concept of gender identity.

In addition, in its advisory opinion *OC-24/17,* the Inter-American Court of Human Rights (IACtHR) defined gender identity by drawing largely on the Yogyakarta Principles and the YP+10. The IACtHR stipulated that "[g]ender identity is a broad concept which allows for *auto-identification* and refers to the *individual experience* of one's own gender" (emphasis added).[10] For both the IACtHR and its source of inspiration in this opinion, gender identity is anchored in certain innate characteristics. By emphasizing the "individual experience of one's own gender" and "deeply felt internal . . . experience of gender," the IACtHR and the drafting committee of the Yogyakarta Principles acknowledge that each individual lives their own gender differently.

However, the IACtHR's definition is more sophisticated than the one contained in the Yogyakarta Principles, as it adds a notable nuance to the notion of gender identity through the concept of "auto-identification." The IACtHR clearly endorses multiple ways of living and auto-identifying with (a) certain gender(s): "gender identity and its expression take many shapes, certain persons do not identify themselves as men nor women, or they identify themselves as both."[11] It follows that, not only do gender identifications vary across cultures and times—as the

[5] International Commission of Jurists, *supra* note 2, at Introduction n. 2.

[6] CESCR, General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), n. 25, para. 32 (2009).

[7] UNHCR, Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, n. 1 (2008).

[8] Carlos F. Cáceres, et al., *Review of Legal Frameworks and the Situation of Human Rights related to Sexual Diversity in Low and Middle Income Countries* 44–46 (Study commissioned by UNAIDS, 2009).

[9] Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity* 3 (2009).

[10] Author's translation; Opinión Consultiva Solicitada Por la República de Costa Rica: Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo, Corte Interamericana de Derechos Humanos, OC-24/17, 32(f) (2017).

[11] Author's translation; *id.* at 32(f).

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IACtHR argues in the same advisory opinion[12]—but they may also simultaneously manifest themselves variously within the same societal context, and within the same person at different times in life.[13]

Reference to "auto-identification" in the context of gender identity is particularly significant because it allows for a conceptual leap that reveals the redundancy of "gender identity." "Auto-identification" is the concept through which the IACtHR signals the possibility of a plurality of ways of being and acting that fall under unpredictable gender categories. Precisely, auto-identification is the term through which the IACtHR (consciously or unconsciously) embraces the psychoanalytical theory of "sexuation" as a lens to understand the indeterminacy of gender. Jacques Lacan, a French psychoanalyst, introduced the term "sexuation" to describe the unconscious process of identification with a certain gender.

Gender identification is the result of two different yet intertwined processes. Auto-identification, as used by the IACtHR, is the first, conscious process that follows the second, unconscious process of sexuation. Auto-identification happens in the socio-legal realm. As such, it pertains to the human rights realm in that it describes the relation between the legal categories of gender and the individual sense of gender. Sexuation is, instead, an object of study of (Lacanian) psychoanalysis, as the next section will further explain. It is the unconscious choice that one makes concerning their gender preceding the conscious realization underlying auto-identification.

Sexuation, or What Makes "Gender Identity" Unnecessary

The notion of "auto-identification" used by the IACtHR can be better understood through the prism of sexuation. For Lacan, gender does not derive directly from anatomy or cultural expectations. "Sexuation" is the process through which the individual reinvents the socio-culturally conditioned body. It is therefore a mode of inhabiting the body forged by social expectations.[14] Sexuation comprises three interconnected elements: (1) the anatomical difference of sexes, upon which (2) society superimposes a sexed/gendered discourse; and (3) the subject's choice of sex/gender that is influenced by (1) and (2).[15] This "choice" belongs to the unconscious and may or may not correspond to the sex/gender assigned by society. For Lacan, sexuation is another metaphorical birth. Neither the fact of anatomical sex, nor socio-cultural conditioning, is able to determine unconscious gender identity. It is the subjective mediation between the fact of the individual's anatomical sex and their socio-cultural conditioning which makes them (unconsciously) choose a certain gender.

Identification with a certain gender, and auto-identification with a certain gender legal category, rely on the prior process of individual sexuation. The individual recognizes a certain gender identity as their own: identity constitutes the result of the process of identification with a certain gender. As long as we have a gender, we have a gender identity. "Gender identity" as a separate category is redundant. Rather, gender is an identity *per se*.[16]

[12] "[E]n diferentes culturas pueden utilizarse otros términos para describir a las personas del mismo sexo que tienen relaciones sexuales y a las que se auto identifican o exhiben identidades de género no binarias (como, entre otros, los hijra, meti, lala, skesana, motsoalle, mithli, kuchu, kawein, queer, muxé, fa'afafine, fakaleiti, hamjensgara o dos-espíritus)." *Id.* at 32(v).

[13] *Cf.* Stuart Hall, *Introduction: Who Needs "Identity"?*, *in* Questions of Cultural Identity (Paul Du Gay & Stuart Hall eds., 1996).

[14] Jacques Lacan, Il Seminario. Libro XVIII: Di un Discorso che Non Sarebbe del Sembiante 26 (Antonio Di Ciaccia & Jacques-Alain Miller eds., Antonio Di Ciaccia trans., 2010 [1976]); *cf.* Massimo Recalcati, Jacques Lacan: Desiderio, Godimento e Soggettivazione, Vol. 1, 481, 470 (2012).

[15] Geneviève Morel, Ambiguïtés sexuelles: Sexuation et psychose 143 (2000).

[16] Dianne Otto, *Queering Gender [Identity] in International Law*, 33 Nord. J. Hum. Rts. 299, 301 (2015). Some scholars prefer to distinguish between "gender" and "gender identity," stressing that these are two distinct concepts and analytical tools, namely gender is a time- and space-contingent socio-cultural construct while gender identity refers to one's self-perception, self-recognition and self-identification with

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The search for a unique gender through the process of sexuation is thus not peculiar to certain categories of persons, such as non-binary persons, but rather a universal phenomenon that concerns each and every individual. The use of the legal category of gender identity in relation to trans individuals' rights, however, conveys the inaccurate idea that gender identity is something that only trans people have, that only "false, unreal and unintelligible"[17] bodies have a gender identity, that gender identity is a relevant component of human existence only where it does not conform to prevailing conceptions of gender performance.

The interdependency of the different concepts related to gender is especially clear beyond the Global North. The notion of gender identity varies greatly across cultures. Many traditions feature an array of identities and expressions, frequently transcending Western notions of sexual orientation, gender identity, and gender expression. These cultures mix the concepts under unique signifiers that are difficult to translate into other languages, including, for example: *okule* and *agule* (Democratic Republic of the Congo and Uganda), *muxe* (Mexico), *travesti* (Argentina and Brazil), *hijra* (Bangladesh, India and Pakistan), *two-spirit* (Indigenous North Americans), *waria* (Indonesia), *fa'afafine* (Samoa), and *kathoey* (Thailand).[18] In these, and other cases where no demarcation exists between gender and gender identity, the legal choice of treating gender and gender identity as distinct categories is, therefore, questionable.

Identity and Expression: A Fuzzy Line

Gender (identity) becomes controversial precisely in the moment of expression. The external dimension of certain genders attracts contestation, discrimination, and violence.[19]

The YP+10 introduce the notion of gender expression by specifying that the definition of "gender identity" contained in the Yogyakarta Principles incorporates gender expression, and thereby any reference to gender identity should be interpreted to include gender expression.[20] Gender expression is:

> 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.[21]

The IACtHR's advisory opinion *OC-24/17* adopts a similar definition, which is modeled on the YP+10.[22] While distinguishing between two potential grounds of discrimination, "identity" (internal) and "expression" (external), both the IACtHR and the drafters of the YP+10 recognize that one's gender expression is necessary for one's gender identity. Gender identity and gender expression are not separate from gender. Rather, gender expression refers to the multiple ways in which the internal gendered sense of the self manifests itself externally. The internal dimension ("identity") cannot exist independently from the external performance ("expression") because gender (identity) is shaped by discursive practices. To borrow from Judith Butler, "identity is

one (or more, or none) of the gender constructs: see, among others, Michela Balocchi, *Introduzione: Le ragioni di un'antologia multidisciplinare*, *in* Intersex: Antologia Multidisciplinare 22 (Michela Balocchi ed., 2019).

[17] Judith Butler, Gender Trouble: Feminism and the Subversion of Identity xxv (1990).

[18] Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, 3, UN Doc. A/HRC/38/43 (2018).

[19] Rikki Holtmaat & Paul Post, *Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?*, 33 Nord. J. Hum. Rts. 319, 320, n. 5 (2015).

[20] International Commission of Jurists, *supra* note 3, pmbl.

[21] *Id.*

[22] Author's translation: OC-24/17, *supra* note 10, at 32(g).

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performatively constituted by the very 'expressions' that are said to be its result."[23] While we decide both consciously and unconsciously, what we wish to express externally, we cannot escape the system of language that includes gendered expectations in which we are immersed. We interact with the outside world by merging our own subjective experiences with the discourses of the "outside world."

The world is, indeed, never really outside of us. We internalize the discourses of, for example, society, family, law, and, more generally, culture to the extent that we express ourselves using the codes we learn and are subject to (in the external world) and reinterpret (in our subjective way). The formation of one's identity is a collective, rather than individual, endeavor. This is why the inner dimension (gender identity) is never isolated but always influenced by the external dimension (gender expression). What we express outside (gender expression) is determined by both individual choice and the discourses on gender that unfold in that outside world. Any gender identity simultaneously needs, presumes, and incorporates its gender expression.

The Materiality of Language

This essay started by arguing that "gender identity" is frequently referred to as a prohibited ground of discrimination in cases concerning trans persons. Although the legal category is often used in international and legal documents, only the Yogyakarta Principles provide a definition of it. The comparison between the definitions of gender identity contained in the Yogyakarta Principles and in the IACtHR's advisory opinion *OC-24/17* showed that gender identity signifies a sense of being and acting according to a certain gender that each of us performs differently. By referring to the concept of "auto-identification," however, the IACtHR embraces an understanding of the plurality of human experiences that is more nuanced than the one contained in the Yogyakarta Principles. "Auto-identification" is the legal conscious twin of the psychoanalytical concept of unconscious "sexuation." Both refer to the complex process of subjective identification with a certain gender. Gender is an identity *per se*. The term "gender identity" as used in human rights law is a result of the division of the concept of gender into fragmented legal elements. This essay has emphasized that conceptual clarity matters, and that it necessarily passes through language. This especially applies to law and psychoanalysis: "the word is a gift of language," Lacan once argued, "and language is not immaterial."[24] Clarifying the contours of "gender identity" is the precondition for understanding the real impact that human rights law can or cannot have on individuals.

[23] Butler, *supra* note 17 at 34.

[24] "La parole en effet est un don de langage, et le langage n'est pas immatériel." Jacques Lacan, Écrits 301 (1966).

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