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Female Autonomy vs Gender Identity

A critical analysis of gender identity in CEDAW jurisprudence and the Yogyakarta Principles

Candidate number: 7004

Submission deadline: 1 December 2016

Number of words: 17,520



1 Introduction

This paper undertakes to address an emerging conflict between women's human rights and gender identity rights, using tools provided by the human rights framework and by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹ and its associated jurisprudence. CEDAW jurisprudence is divided, with support for gender identity rights coexisting alongside a theoretical approach to equality and non-discrimination that supports the self-understanding of women as a political class that experiences both sex-based and gender-based discrimination. This paper begins with a brief overview, then moves to a discussion of the term *women* in the CEDAW text. It next turns to critical analysis of the Yogyakarta Principles on Sexual Orientation and Gender identity,² a civil society document that is widely referenced for its articulation of a rights-based framework in this area. Finally it examines gender identity under CEDAW and posits that women's human rights rests on a principle of female autonomy, or the existential independence of women from men in all areas of life, such that neither the class of women nor their rights can be unilaterally redefined without their assent. The paper concludes with recommendations for an approach to gender identity under CEDAW as an expressive right that should be promoted as part of the obligation to eliminate sex-role stereotyping, without according rights under CEDAW to male persons.

2 Overview

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which monitors the eponymous treaty, has accepted that transgender women are a disadvantaged group of women, viewing gender identity as a ground of discrimination intersectional to sex and gender.³ The term *transgender women* as used by the Committee appears to refer to male transgender persons who identify as women, who may have undergone body modification treatments to appear more female or alternatively may assert their gender identity without undergoing body modification.

¹ Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1979, U.N.T.S. vol. 1249, p. 13, entered into force 3 September 1981, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en.

² The Yogyakarta Principles: Principles on the Application of International Human Right Law in Relation to Sexual Orientation and Gender Identity (March 2007), http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

³ See below section 5.1.

The CEDAW Committee joins a growing consensus in this regard that is set out most fully in the Yogyakarta Principles. Gender-critical feminists have raised concerns about the conflict between gender identity and sexual orientation, and between gender identity and the human rights of women and girls.⁴ However, aside from my own submission, these concerns do not appear to have been directed to the CEDAW Committee.

CEDAW is unique among instruments dealing with sex-based discrimination because of its asymmetry, addressing only women as subjects of human rights violations.⁵ Among other obligations, CEDAW requires states to take measures to eliminate ‘stereotyped roles for men and women.’⁶ CEDAW jurisprudence on sex, gender, and sex-role stereotyping has addressed the relationship between sex and gender in terms that appear congruent to views held by gender-critical feminists.⁷ This jurisprudence acknowledges the differential experiences of men and women related to their sexed bodies, as well as the harm caused to women by prevailing gender relations based on differential roles for men and women associated respectively with domination and subordination. These features of CEDAW, as well as the application of canons of treaty interpretation to the definition of *women* and related terms,⁸ provide tools for a critical examination of gender identity rights to the extent that they may interfere with the rights of women and girls.

Examination of the logic of gender identity itself, as articulated in the Yogyakarta Principles, provides additional support for a critical appraisal.⁹ While gender identity is commonly pre-

⁴ Cathy Brennan and Elizabeth Hungerford, Letter to UN Women (1 August 2011), <https://www.scribd.com/document/72976111/UN-BrennanHungerford-08012011>; Erinyes Autonomous Activist Lesbians, Submission to the Australian Human Rights Commission’s Consultation on Protection from Discrimination on the Basis of Sexual Orientation and Sex and/or Gender Identity (2010), <http://www.erinyes.org.au/wp-content/uploads/Erinyes-Submission-to-SOGI-AHRC-2010.pdf>; Elizabeth Hungerford, Letter to UN Women (26 July 2012), https://gendertrender.files.wordpress.com/2012/08/hungerford_csw_communication_2012_8-28-2012.pdf; Written Evidence Submitted by Sheila Jeffreys to the Transgender Equality Inquiry (20 August 2015), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19512.html>; Tina Minkowitz, Individual Submission to the Committee on the Elimination of All Forms of Discrimination Against Women for its Update of General Recommendation No. 19 (30 September 2016), <http://www.ohchr.org/Documents/HRBodies/CEDAW/GR19/TinaMinkowitzJD.pdf>.

⁵ See Andrew Byrnes, ‘Article 1,’ in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, ed. Marsha A. Freeman, Christine Chinkin and Beate Rudolf (Oxford: Oxford University Press, 2012), 57; Lars Adam Redof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of Discrimination Against Women* (Dordrecht: Martinus Nijhoff Publishers, 1993), 44.

⁶ CEDAW Articles 5(a) and 10(c).

⁷ See below section 5.2 and 5.4.

⁸ See below section 3.

⁹ See below section 4.

sented as a ground of discrimination that intersects with others, it is not truly intersectional with respect to sex and gender; rather, rights associated with gender identity require that it supersede or replace sex/gender classifications.

This paper will examine the implications of gender identity, as framed in CEDAW jurisprudence and the Yogyakarta Principles, for the human rights of girls and women, including lesbians and bisexual women, who have been grouped in CEDAW jurisprudence with male transgender persons as an amalgamated constituency based on sexual orientation and gender identity. It will consult CEDAW text and jurisprudence, analyze key elements of the Yogyakarta Principles, and propose a way forward for the CEDAW Committee to affirm the human rights of transgender persons without giving preference to the rights of male transgender persons over those of women and girls. It will argue that the core obligations of CEDAW and foundational principles underlying the recognition of women's rights as human rights require a reframing of gender identity that does not adversely affect women's and girls' human rights. It will further argue that women's self-constitution as a political class is an essential element of equality and non-discrimination that is both implicit in CEDAW and necessary to achieve its aims.

In this paper, the term *women* will refer to female persons. The terms *male transgender persons* and *female transgender persons* will be used to indicate respectively, male persons who identify as women, and female persons who identify as men. This use of language, although contested by gender identity advocates, is grounded in the autonomy of women to self-define as a political class discriminated against based on their sex, and to distinguish sameness and difference of sex, which is relevant to women in many areas of life in which their exercise of human rights is protected.

3 The definition of *women* and related terms under CEDAW

CEDAW does not define *women*, *men*, *sex*, *male*, or *female*, and there is no evidence that the meaning of these terms was debated during the drafting and negotiation process.¹⁰ As these are key terms in view of the stated aim of the treaty to eliminate all forms of sex-based discrimination against women, the absence of debate suggests that these terms were understood according to their plain meaning, and that this meaning was not viewed as ambiguous.

¹⁰ Christine Chinkin and Martha A. Freeman, 'Introduction,' in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, ed. Marsha A. Freeman, Christine Chinkin and Beate Rudolf (Oxford: Oxford University Press, 2012), 14-16. Redof reports no discussion of the meaning of *women* in his *Guide to the Travaux*.

3.1 Interpretation by the Treaty Body

The CEDAW Committee, as the treaty-based expert body that oversees compliance with its obligations, has a pre-eminent role in resolving conflicts about interpretation. Although treaty bodies' jurisprudence is not enforceable, it plays a significant role in the evolution of human rights norms and is widely accepted as authoritative. The CEDAW Committee has interpreted the obligation of non-discrimination to include elimination of both sex-based discrimination that is directly related to biological differences between men and women. The Committee views as gender-based discrimination that relates to stereotypes about males and females respectively, or to the disadvantages created for women as a consequence of socially constructed relations.¹¹

The Committee has, however, asserted in the same General Recommendation that gender identity is an intersectional factor in discrimination against women,¹² raising questions as to its view of the relationship between all three terms. In GR28, the Committee named lesbians but not transgender women among disadvantaged groups, but in subsequent General Recommendations and Concluding Observations, it has included transgender women in that enumeration. The Committee has furthermore asserted in Concluding Observations that transgender women are entitled to obtain legal documents recognizing their 'gender',¹³ in other words, male transgender persons are recognized as having the right under CEDAW to obtain legal documents that classify them as women. The implication is that gender identity supersedes sex/gender classification such that individuals have an absolute right to determine their gender which must be respected for all legal and social purposes by public and private actors, as framed in the Yogyakarta Principles. This principle, if applied transversally to the provisions of CEDAW, and/or to women's human rights as guaranteed under other international instruments and in domestic law, would circumscribe and impair women's human rights. The result is a new form of discrimination, consisting of the deprivation of women's right to self-definition, political self-organization, and sexual self-determination.

¹¹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2, U.N. Doc. No. CEDAW/C/GC/28 (16 December 2010), paras. 3-5, 16, 18, 19, 37(d).

¹² General Recommendation 28, para. 18.

¹³ Committee on the Elimination of Discrimination Against Women, Concluding Observations on Belgium, U.N. Doc. No. CEDAW/C/BEL/CO/7 (14 November 2014), paras. 44-45; Concluding Observations on Finland, U.N. Doc. No. CEDAW/C/FIN/CO/7 (10 March 2014), para. 29; Concluding Observations on France, U.N. Doc. No. CEDAW/C/FRA/CO/7-8 (22 July 2016), para. 46; Concluding Observations on Georgia, U.N. Doc. No. CEDAW/C/GEO/CO/4-5 (24 July 2014), para. 37; Concluding Observations on Kyrgyzstan, U.N. Doc. No. CEDAW/C/KGZ/CO/4 (11 March 2015), para. 34; Concluding Observations on Slovakia, U.N. Doc. No. CEDAW/C/SVK/CO/5-6 (26 November 2015), para. 37.

Notwithstanding the position currently held by the CEDAW Committee, CEDAW text and other facets of the Committee's jurisprudence provide a basis to contest the merits of gender identity rights that grant male transgender persons the legal status of women under international and domestic law.

3.2 Plain meaning and other interpretive factors

Women, in its denotative meaning referring to a group of persons, indicates adult female human beings. Although the term also has connotations derived from social roles and stereotypes applied to women, and/or from cultural values created by women themselves, the plain meaning for the purpose of determining the rights holders under a treaty on elimination of discrimination against women would necessarily be the denotative one. Although the same term is used in both connotative and denotative senses, a shift in meaning such that the connotations related to social role and stereotypes also play a denotative role has implications that should not be casually accepted.

That this plain meaning of *women* is not altered by CEDAW is confirmed by its usage in the treaty, textual provisions that shed light on women's physical and social reality as distinct from that of men, and the treaty's asymmetrical object and purpose to eliminate sex-based discrimination against women in particular as rights holders. CEDAW textual provisions and jurisprudence on sex-role stereotyping, redistribution of power and resources, and transformation of prevailing gender relations support an alternative approach that addresses the rights of male transgender persons and intersex persons as part of the obligation to eliminate sex-role stereotyping but denies them legal recognition as women in light of women's distinctive identity as a specific political class defined based on sex and gender as a social construct imposed on biological sex differences. Denial of membership in the class of women to males is furthermore supported by general international law regarding membership in disadvantaged groups.

3.2.1 Plain meaning in context

Dictionaries from before the time of CEDAW's adoption to the present day define the term *woman* as some variant of 'adult female human being.'¹⁴ They define *female* and *male* by the

¹⁴ *Collins Dictionary of the English Language* (London: William Collins Sons, 1979); Woman: Definition, Meaning, and More: Collins Dictionary, http://www.collinsdictionary.com/dictionary/english/woman_1, last visited 21 September 2016; Woman: Definition of Woman by Merriam-Webster, <http://www.merriam-webster.com/dictionary/woman>, last visited 21 September 2016; Woman – Definition of Woman in English: Oxford Dictionaries, <https://en.oxforddictionaries.com/definition/woman>, last visited 1 December 2016;

type of gamete produced and/or the capacity to bear offspring as in the following definition of *female*: ‘of or denoting the sex that can bear offspring or produce eggs, distinguished biologically by the production of gametes (ova) which can be fertilized by male gametes.’¹⁵ *Sex* when referring to persons and not the activity of engaging in sexual relations, means ‘either of the two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions.’¹⁶

Although some dictionaries give alternative meanings for *woman* or *man* that refer to persons of the opposite sex displaying qualities thought to be womanly or manly, these are derivative and do not imply that these qualities override the ordinary classification,¹⁷ for example the 1979 Collins lists as a sixth meaning of *woman*, ‘a man considered as having female characteristics, such as meekness or cowardliness.’ The ‘female characteristics’ attributed to men in this definition are pejorative not only towards the individual man but towards all women, while another dictionary’s subsidiary definition of *man* as ‘a person associated with the qualities of males, such as bravery, spirit or toughness,’ with the example, ‘she was more a man than any of them,’ is clearly complimentary.

CEDAW refers to men and women as *the sexes* and speaks of women’s physical capacities to become pregnant, give birth, and lactate.¹⁸ These capacities are unique to women and not shared by men. The text treats ‘women’s role in procreation’ as an uncontrovertible fact, and establishes substantive norms to provide for women in relation to these life experiences that otherwise might be neglected due to women’s inferior position in society; the Committee views these obligations as an instance of substantive equality rights.¹⁹ That is to say, women’s biological experiences that are unique to them as women must be provided for in law and policy, on a permanent basis, and not marginalized because they pertain only to women and not to men.

Webster’s Dictionary 1828 Online Edition, <http://www.webstersdictionary1828.com/Dictionary/woman>, last visited 21 September 2016.

¹⁵ Female: Definition of Female in English: Oxford Dictionaries, <https://www.en.oxforddictionaries.com/definition/female>, last visited 22 October 2016.

¹⁶ Sex: Definition of Sex in English: Oxford Dictionaries, <https://www.en.oxforddictionaries.com/definition/sex>, last visited 1 December 2016.

¹⁷ Cf. Darren Rosenblum, ‘Unsex CEDAW, Or What’s Wrong with Women’s Rights,’ *Colum. J. Gender & L.*, 20:98 (2011), 124n88.

¹⁸ Article 5(a); Articles 11 and 12.

¹⁹ Preamble; Articles 4.2, 11 and 12; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24: Article 12 of the Convention (Women and Health), U.N. Doc. No. A/54/38 at 5 (1999), paras. 2, 12, 26-27; General Recommendation No. 25: Article 4, Paragraph 1 of the Convention (Temporary Special Measures), U.N. Doc. No. HRI/GEN/1/rev.7 at 282 (2004), paras. 8 and 16.

Although the text is somewhat heteronormative, viewing women's biology as relevant with respect to their procreative capacities that are of use to society, and that men have sought to control by restricting women's sexuality and reproductive freedom, the Committee has addressed the implications of women's sexual differences from men for their health needs throughout life, irrespective of differences among women.²⁰ Furthermore, all females are the class of persons viewed by the class of males as rapable, inferior and capable of being objectified and exploited, irrespective of differences among women and among men as to internalization, embrace or resistance to prescribed sex-roles that inculcate male dominance. Male violence and discrimination target lesbians based on both sex and sexual orientation.²¹

These contextual references indicate that *women* under CEDAW are human beings whose bodies are female, and who have been disadvantaged not only by having their experiences related to this sexed embodiment neglected, but by the imposition on them of socially constructed roles, stereotypes, and limitations based on their membership in the class of persons who have female bodies.

3.2.2 Asymmetric object and purpose

The object and purpose of CEDAW is to eliminate sex-based discrimination against women so as to achieve equality between the sexes in the enjoyment of human rights. This aim is linked to 'the development of women's potentialities' and 'the growth of prosperity of society and the family' and is said to require 'a change in the traditional role of men as well as the role of women in society and in the family.'²² Men are not rights holders under CEDAW and are viewed as the comparator class, raising questions as to whether women are limited to the rights and level of enjoyment attained by men; however, CEDAW jurisprudence on transformative equality supports the 'engendering' of rights, 'reconceptualizing the rights themselves' where needed.²³ States are obligated to take measures to transform patterns of behavior of both sexes in order to eliminate stereotyped roles and harmful practices;²⁴ although both sexes are viewed as replicating the patterns, they are positioned differently with respect to the discriminatory effect that is experienced by women. The CEDAW Committee addresses the need to change men's stereotyped attitudes that lead to violence against women, and encour-

²⁰ See General Recommendation 24, paras. 11, 12 and 18.

²¹ Committee on the Elimination of Discrimination Against Women, Concluding Observations on South Africa, U.N. Doc. No. CEDAW/C/ZAF/CO/4 (5 April 2011), paras. 39-40.

²² CEDAW Preamble.

²³ Byrnes, 'Article 1,' 61; Sandra Fredman, 'Engendering Socio-Economic Rights,' in *Women's Human Rights: CEDAW in International, Regional and National Law*, Anne Hellum and Henriette Sinding Aasen, eds. (Cambridge: Cambridge University Press, 2013), 218.

²⁴ CEDAW Article 5(a).

ages states to promote men's equal involvement in family responsibilities, in contrast to traditional roles that apportion family responsibilities to women and public activity to men.²⁵ Although equality of the sexes is anticipated to be of benefit to families and societies, only women are rights holders, and CEDAW requires the 'redistribution of power and resources' between men and women.²⁶ If the two classes are incoherently composed of members that belong based on opposite criteria (sex/gender identity), the distribution of power and resources and other indicators of comparative advantage and disadvantage cannot be reliably assessed and may become meaningless, without the objectives of equalization and substantive improvement of women's enjoyment of human rights having been accomplished. Both the transformation of prevailing gender relations and the adoption of substantive equality measures are undermined if *women* is deemed to include males as well as females.

3.2.3 General international law

For general purposes in international law, membership in a disadvantaged group is determined by self-identification 'if no justification exists to the contrary.'²⁷ Departure from this principle by enshrining self-identification with regard to sex/gender as a legal right of individuals should merit considerable scrutiny. As with other classifications, there may be good reason to question the validity of an identity that is held based on a sense of affinity rather than actual membership in the class. The asymmetric purposes of CEDAW provide sufficient justification to question the self-identification of male persons as women either generally or as individuals under this treaty. If a male person is perceived as female and discriminated against on this basis, it may be warranted to extend the protection of sex discrimination law to provide a remedy. But the person's status as a male should not mean that such misdirected discrimination is viewed as more egregious than the identical discrimination meted out to a woman.

3.3 Elimination of Sex-Role Stereotypes

In recent years the CEDAW Committee has established a practice of addressing stereotypes and harmful practices in the review of nearly every country, based on Article 5(a), which states:

²⁵ See, e.g. Committee on the Elimination of Discrimination Against Women, Concluding Observations on Bosnia and Herzegovina, U.N. Doc. No. CEDAW/C/BIH/CO/4-5 (30 July 2013), para. 19; Concluding Observations on Spain, U.N. Doc. No. CEDAW/C/ESP/CO/7-8 (29 July 2015), para. 18.

²⁶ General Recommendation 25, paras. 8, 33, 36 and 39.

²⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights: Article 2, Paragraph 2 of the Covenant, U.N. Doc. E/C.12/GC/20 (2 July 2009), para. 16.

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

The Committee has addressed stereotypes related to a wide range of areas in private and public life, and their harmful and discriminatory impact against women, in areas such as the perpetuation of women's traditional role as wives and mothers,²⁸ rape and other sexual violence,²⁹ the sexualization of women in media,³⁰ subordination of women to men in the family setting (designation of men as head of household),³¹ harmful customary practices that enact violence against women and customary norms that privilege men and disadvantage women (honor killings, female genital mutilation),³² and stereotypes in the fields of education, employment, and political participation that prevent women's full development and advancement and opportunities to contribute to society.³³ The Committee has included in its discussion of harmful stereotypes discrimination against lesbians and intersex, transsexual and transgender persons and stereotypes regarding these persons in particular,³⁴ and has characterized stereotypes based on sexual orientation and gender identity both as discrimination against women and as an independent ground of discrimination that intersects with gender stereotypes.³⁵ The Committee has expressed concern regarding surgery performed on intersex children and aesthetic surgery for women and girls, in the latter case recommending counseling for those wishing to resort to such operations.³⁶

²⁸ Concluding Observations on Uruguay, paras. 16-17. For this series of notes see complete citations below in section 5.1 if not otherwise provided.

²⁹ Concluding Observations on Bosnia and Herzegovina, U.N. Doc. No. CEDAW/C/BIH/CO/4-5 (30 July 2013), para 19.

³⁰ Concluding Observations on Uruguay, paras. 16-17; Concluding Observations on France, paras. 17-18.

³¹ Concluding Observations on Singapore, paras. 21-22.

³² Concluding Observations on Indonesia, U.N. Doc. No. CEDAW/C/IND/CO/4-5 (24 July 2014), paras. 23-24.

³³ Concluding Observations on Bosnia and Herzegovina, U.N. Doc. No. CEDAW/C/BIH/CO/4-5 (30 July 2013), para 19.

³⁴ See section 5.1 below.

³⁵ Concluding Observations on Singapore and Peru, respectively.

³⁶ Concluding Observations on France (intersex children) and Concluding Observations on Austria, U.N. Doc. No. CEDAW/C/AUT/CO/7-8 (22 March 2013), paras. 22-23 (aesthetic surgery); see also Concluding Observations on Singapore regarding 'advertising of products and services to improve body image and conform to societal expectations' in particular 'aesthetic clinics, beauty clinics and spas' operating without clear guidelines.

The stereotypes addressed reflect a wide range of concerns, from men's domination of women in the family, to sexualized portrayals of women in the media, to practices of violent subordination and control, to negative value judgments about women that impede their leadership in public life. Stereotypes against lesbians, and against gay men and intersex and transgender persons, have been addressed in CEDAW jurisprudence as intersectional without a clear linkage of their relationship to the overall project of eliminating discrimination against women. This tension will be revisited in sections 5.1 and 5.4.

3.4 Conclusion to Section 3

The CEDAW Committee's position that male transgender persons are women, that they are disadvantaged compared with women, and that they have a right to obtain legal documents classifying them as women, conflicts with the plain meaning of *women* and related terms used in CEDAW and with key components of the treaty's object and purpose. To the extent that it disallows questioning of the status of male transgender persons as women generally or of any individual male person's claim to be a woman, this position diverges from general international law on membership in disadvantaged groups, which allows for justification to be shown to reject a person's self-identification. Section 5 will turn to a critical discussion of CEDAW jurisprudence on gender identity and alternative approaches, following a detailed examination in section 4 of the Yogyakarta Principles, which make explicit a number of points that are left unexplained in CEDAW jurisprudence as to the reasoning behind gender identity law and policy.

4 Yogyakarta Principles and gender identity rights

The Yogyakarta Principles (hereafter YP) are the most developed exposition of gender identity as a human rights issue. Despite their non-legal status as the product of a civil society expert meeting, they are used as a reference point by international and local NGOs that work on sexual orientation and gender identity, and by a number of human rights mechanisms.³⁷ NGOs have used the Principles' terminology, concepts, approach to gender identity and the linkage of gender identity with sexual orientation in their advocacy to the CEDAW Committee.³⁸ While the CEDAW Committee has not mentioned the YP as such, studying this docu-

³⁷ Michael O'Flaherty, 'The Yogyakarta Principles at Ten,' *Nordic Journal of Human Rights*, 33:4, 280-298, doi: 10.1080/18918131.2015.1127009, 287-293.

³⁸ International Lesbian and Gay Human Rights Commission, *Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW* (2009?), <http://ilga.org/wp-content/uploads/2016/02/Equal-and-Indivisible-Crafting-Inclusive-Shadow-Reports-for-CEDAW.pdf>, last visited 1 December 2016; see also Chinkin and Freeman, 'Introduction,' 16.

ment offers a window into the framework that is implicit in the Committee's approach to gender identity at the present time. This part will critically analyze elements of the YP in light of a commitment to women's human rights, keeping in mind that lesbians, bisexual women, and female transgender persons along with heterosexual women are presumptively protected under CEDAW if 'women' are understood to be female persons.

4.1 Gender identity and sex in Yogyakarta Principles

In the Yogyakarta Principles, gender identity is understood to mean:

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.

4.1.1 Elevation of gender identity over sex

Several features of this definition are worth noting. Gender itself is not defined, but is situated in relation to 'sex assigned at birth,' with which a person's internal experience of gender may or may not correspond. Gender is said to be expressed through dress, speech and mannerisms, 'modification of bodily appearance and function,' and other possible means. The reference to 'sex' is the only indication that we are not talking about personality traits in general. There is a curious reticence about what kind of personality traits we are talking about and how they come to relate to sex, such that their correspondence or non-correspondence with sex would be noticed. The casual treatment of body modification – bodily function as well as appearance – as a means of personal expression is also unusual.

Sex is not defined either. The open-ended linkage between 'sex assigned at birth' and 'modification of bodily appearance and function' suggests that YP either treats sex, along with gender, as a mutable social construct that can change by modifying bodily structure and function or by redefining it to accommodate an individual's 'personal sense of the body,'³⁹ or views it as irrelevant to personal identity, human rights and non-discrimination. Both premises warrant scrutiny.

³⁹ Cf. Dianne Otto, 'Queering Gender [Identity] in International Law,' *Nordic Journal of Human Rights*, 33:4, 299-318 (2015), 312-313.

Is it intended that all aspects of bodily structure and function are to be approached as nothing more than parts to be modified according to personal self-image? What does this view of the body, and self-image, imply for values such as human dignity and worth, resource equity, and promotion of the highest attainable standard of health? Does such a view elevate individualist pursuit of personal aesthetic values about the body to a human rights principle while suppressing criticism of sexist, racist and ableist stereotypes that may be embedded in such practices?⁴⁰

If the body can be redefined without modification – by accepting apparent self-contradictions like ‘a woman with a penis’ or renaming parts to center transgender preferences, such as calling the vagina a ‘front hole’ and the constructed cavity of male transgender persons a ‘vagina,’ calling the penis a ‘strapless’ in mockery and appropriation of lesbian sexual practices⁴¹ – how does that affect our understanding of sameness and difference, our ability to promote sexual self-understanding and self-respect and sexual and reproductive health? Renaming to center transgender persons’ self-images and sense of their bodies affects our common language; already there is both fragmentation and disruption of lesbian socializing and dating, lesbian and feminist political organizing, and feminist women’s health care and spirituality.⁴²

Women are differentially and disproportionately affected by these politico-linguistic moves for several reasons. The disparity of power and resources between males and females does not disappear when males identify as transgender or as women. At the conceptual level, it is women whose sex is marked and not men, who can view themselves as sexually neutral, as the default human being.⁴³ Furthermore, contesting the hierarchical gender relations between

⁴⁰ See, e.g. Sheila Jeffreys, *Beauty and Misogyny: Harmful Cultural Practices in the West* (London: Routledge, 2005).

⁴¹ *Safer Sex for Trans Bodies* (Whitman Walker Health and Human Rights Campaign Foundation, n.d.), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Trans_Safer_Sex_Guide_FINAL.pdf, 4-5. This pamphlet is self-described as being for ‘transgender and gender-expansive people, and for our partners and lovers.’ The intended reach is broadly defined, and in light of the common spaces occupied by lesbians together with transgender persons, and the likelihood of many lesbians’ self-perception as ‘gender-expansive,’ such definitions are sure to affect lesbians’ self-perception if not actively resisted.

⁴² Ruth Barrett, ed., *Female Erasure* (Lebec, CA: Tidal Time Publishing, 2016), and the following chapters: Ruth Barrett, ‘The Attack on Female Sovereign Space in Pagan Community,’ 357-378; Alix Dobkin and Sally Tatnall, ‘The Erasure of Lesbians,’ 225-227; Mara Lake, ‘The Undoing of a Unique Sisterhood,’ 379-392; Julia Long, ‘Transgenderism and the Power of Naming,’ 213-224; Mary Lou Singleton and a Collective of Many Midwives, ‘Open Letter to the Midwives Alliance of North America Regarding the Recent Revisions to the Organization’s Standing Core Competencies,’ 266-270; Sara St. Martin Lynne, ‘#ApologizeToMichigan,’ 396-402.

⁴³ Deborah Tannen, ‘Marked Women, Unmarked Men,’ *The New York Times Magazine* (20 June 1993), http://www2.bakersfieldcollege.edu/driess/Readings_files/Marked%20Women.pdf, last visited 1 December 2016.

men and women that prevail throughout the world requires an ability to identify members of the advantaged and disadvantaged classes. This work is disrupted and fragmented when we cannot reliably know whether *woman* refers to someone who is female or male, and when a rape by a penis-wielding individual can be reported and classified as rape by a woman. Fragmentation affects women's relationships with each other as well as the ability to name violence and discrimination committed by men. Abuse between females (e.g. lesbian domestic violence, mother-daughter incest and other abuse, forced treatment by female psychiatrists and staff) has been a difficult issue to address without seeming to promote misogyny;⁴⁴ when male violence against a woman is misnamed as female, it becomes even harder.

4.1.2 Intersex persons

Intersex persons occupy a different position with respect to sex compared with males and females. According to the Intersex Society of North America,

“Intersex” is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male.... Intersex is a socially constructed category that reflects real biological variation.⁴⁵

Although intersex is considered to be an inborn condition, some anomalies may only be discovered at puberty, in adulthood upon discovering oneself to be infertile, or after death through an autopsy.⁴⁶ While ISNA distinguishes between intersex and transgender persons, in that designation as intersex is based on observation of the body and not internal experience of gender, Organization Intersex International blurs the distinction by relying on self-definition and incorporating under the intersex umbrella ‘anyone who is born with a body that is not considered typical according to the norms in effect for standard male or female.’⁴⁷ It should be noted that this includes people who are neither transgender nor intersex according to other definitions, and who would not view themselves in that light. Both ISNA and OII oppose the

⁴⁴ See, e.g., Claudia Card, *Lesbian Choices* (New York: Columbia University Press, 1995).

⁴⁵ Intersex Society of North America, ‘What is Intersex?’, http://www.isna.org/faq/what_is_intersex, last visited 1 December 2016.

⁴⁶ Id.

⁴⁷ OII Intersex Network, ‘On a Third Sex,’ <http://oiiinternational.com/2614/on-third-sex/>, last visited 1 December 2016.

creation of a third sex category and instead advocate for intersex persons to be accepted within the binary gender system.⁴⁸

Intersex persons pose a similar challenge to our understanding of sex and gender as disabled persons pose to our understanding of any socially constructed idea of the normative human body and mind. Although impairments may be from birth or acquired, impairment and disability are generally not acquired as a result of deliberate choice to achieve the social status of a disabled person, but due to forces beyond the person's control.⁴⁹ A person who self-injures for this purpose does acquire impairment and disability, based on objective criteria, however, there is no serious assertion within a disability rights framework of a right to modify one's body to acquire desired status in this manner.

The Committee on the Rights of Persons with Disabilities has addressed the situation of intersex persons in response to NGO advocacy, within the social model of disability that rejects medical normalization and requires social accommodation of people with diverse bodies, minds, needs and challenges.⁵⁰ The difference between sex/gender and disability appears to be the significance of sex and gender as a relational category, relevant to sexuality and procreation and the centrality of these relational needs and challenges in human life and culture. Although disability also has relational implications for social solidarity, and for the reframing of certain relational expectations and ethics, constructs of disability do not carry the emotional significance or sense of necessity that either sex, gender or both hold for persons on all sides of the debate.

4.1.3 Gender and sex-role stereotyping

The Yogyakarta Principles invoke a linkage with the aims of CEDAW, and with elimination of dominance and sex-roles in particular:

[R]espect for sexual rights, sexual orientation and gender identity is integral to the realisation of equality between men and women and ... States must take measures to

⁴⁸ Intersex Society of North America, 'What's the Difference Between Being Transsexual or Transgender and Having an Intersex Condition?', <http://www.isna.org/faq/transgender>, and OII Intersex Network, 'On a Third Sex,' <http://oiiinternational.com/2614/on-third-sex/>, both last visited 1 December 2016.

⁴⁹ But see Body Integrity Identity Disorder, <http://www.biid.org>.

⁵⁰ Committee on the Rights of Persons with Disabilities, Concluding Observations on Germany, U.N. Doc. No. CRPD/C/DEU/CO/1 (13 May 2015), paras. 37-38.

seek to eliminate roles and customs based on the idea of the inferiority or superiority of one sex or on stereotyped roles for men and women....⁵¹

Nevertheless, by linking gender to personal expression with respect to dress, mannerisms and speech that may or may not be associated with a person's sex at birth, YP implicitly accepts a concept of gender as equivalent to stereotypes.⁵² When beliefs about mannerisms, dress and speech appropriate to one sex or the other are abstracted and made to serve as a ground for personal identity, they are shielded from challenge. This is equally true when such beliefs are held by transgender persons as when they are held by cultural traditionalists. As the aim of eliminating sex-role stereotypes and harmful practices represents an increasingly strong theme in CEDAW jurisprudence, and has been invoked by both gender-critical feminists and gender-identity advocates, this area may be productive for an understanding of claims and disagreements. Conflicts and potential resolution will be revisited in section 5.

4.2 Sexual orientation, gender identity, and female separatism

The Yogyakarta Principles contain valuable protection against discrimination based on sexual orientation; however, the definition of sexual orientation and the resulting protections are fragmented by the concept of gender identity. The Yogyakarta Principles refer to same-sex sexual activity and same-sex marriage in the context of the rights to non-discrimination, privacy, and marriage and partnerships (Principles 2, 6, and 24, respectively). However, the term 'sexual orientation' as such, which is a central concept of the document that features throughout its substantive provisions, is understood to mean:

each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

Notably, profound attraction and intimate and sexual relations are said to be linked to gender rather than sex. Given the YP approach to gender as an internal identity, this cannot be a simple substitution of one word for another; it reflects an approach to sexual orientation that has been adopted in practice in organizations serving lesbian, gay, bisexual and transgender persons, whereby the definitions have been shifted so that lesbian no longer has the uncomplicated meaning of a female person attracted to other females, and gay man no longer means a male person attracted to other males. The terms lesbian and gay can refer to individuals who

⁵¹ The language deviates slightly from CEDAW Article 5(a), which refers to 'prejudices and customary and all other practices' rather than 'roles and customs'.

⁵² See above note 3.

may in ordinary language be bisexual or heterosexual, female or male, but who are called *lesbian* or *gay* by virtue of their gender identity and that of their desired or actual partner. The fragmentation of the concept of sexual orientation is not merely an abstract amusement but is presented as an obligation of non-discrimination, and has had a severe impact on lesbians' safety, ability to find one another, and ability to socialize and politically organize independent of men.⁵³ The impact has been felt most by younger lesbians who do not have pre-existing friendship networks and rely on campus or community spaces that are dominated by gender identity ideology. It has also affected established lesbian and feminist organizations, leading to bitter divisions, compromises, strategies of avoidance, defiance, and persistence in the face of threats and intimidation.

Similarly, individuals who may in ordinary language be lesbians or gay men can be known as *heterosexual* if they or their actual or prospective partner(s) declare a gender identity as the opposite sex, and if both declare an opposite-sex gender identity then lesbians can be known as *gay men* and vice versa. This is also far from theoretical. As acknowledged in UN reports, a homophobic regime can tolerate same-sex relationships if one of the partners transitions and is reclassified so the relationship can be called *heterosexual*.⁵⁴ The report rightly condemns this as forced transition, but a milder variation may exist in countries that have liberal policies on same-sex relationships but where homophobia persists in social attitudes within families and schools, among psychological and medical professionals, and in many religious communities. A growing number of parents, professionals, and individuals who experience dysphoria are sounding an alarm about protocols that promote transition of children and teenagers, and question the role played by homophobia as well as other aspects of sex-role rigidity in this phenomenon.⁵⁵

Transition has an impact on current spouses and partners, who are faced with unilateral change to their relationship and pressure to conform even if they do not agree, both to accept a change in their own ascribed sexual orientation and to facilitate their partner's transition. Female partners of males who transition are particularly impacted due to the power imbalance

⁵³ See Dobkin and Tatnall, 'Erasure of Lesbians'; Ellena Rosenthal, 'Who Crushed the Lesbian Bars? A Minefield of Identity Politics,' *Willamette Week* (30 November 2016), <http://www.wweek.com/culture/2016/11/30/who-crushed-the-lesbian-bars-a-new-minefield-of-sexual-politics/>, last visited 1 December 2016.

⁵⁴ Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran, U.N. Doc. No. A/HRC/25/61, Annex II pp. 86 and 89. Similar instances are cited in *Discrimination and Violence Against Individuals Based on Sexual Orientation and Gender Identity: Report of the Office of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/29/23 (4 May 2015).

⁵⁵ 4thWaveNow: A Community of Parents and Friends Skeptical of the "Transgender Child/Teen" Trend, <https://4thwavenow.com>, last visited 1 December 2016.

between men and women.⁵⁶ The increase in practices of transition among lesbians, that is, of lesbians undergoing transition and identifying as male heterosexuals, has an impact on lesbian communities from within that combines with the impact of males entering lesbian community and appropriating lesbian identity. Some women who have desisted from transition point out the absence visible butch role models, as lesbians who visibly do not conform to norms prescribed for women's appearance and demeanor, and take space in the world as women rather than identifying as men.⁵⁷

From early on in modern lesbian organizing, there have been instances of male transgender persons identifying as lesbians, causing controversy in organizations as some lesbians accepted the presence of an isolated male among them while others refused.⁵⁸ This phenomenon could be ignored by most lesbians so long as it was uncommon and remained on the level of individuals, but this was no longer possible as transgender advocacy developed politically and became enshrined in law and policy as it is in many countries today. Lesbian politics and culture, because lesbians are women who resist gender norms, overlaps with feminist politics and culture, which is similarly affected.

Assertion of women's existential separatism from men has been foundational to feminism and is implicit in political organizing of any disadvantaged or oppressed population.⁵⁹ A popular slogan of second wave feminism, 'A woman needs like a man like a fish needs a bicycle,'⁶⁰ expressed this sentiment, which was made real in the creation of women-only festivals, bookstores and other cultural institutions, living arrangements, spiritual practices, and services such as rape crisis centers and domestic violence shelters.⁶¹ This separatist strain of organizing and community-building continued alongside advocacy for breaking professional barriers in the mainstream, reforming laws and making systemic changes wherever possible. Wom-

⁵⁶ Max Robinson, 'I Am Not a Waste of a Woman,' in *Female Erasure*, 411-421; Crash, 'Reclaiming Female: Speaking Back,' in *Female Erasure*, 422-431, Devorah Zahav, 'The Goddess of Autonomy,' in *Female Erasure*, 432-442.

⁵⁷ 'The Disappearing Butch,' workshop by jona olsson at 2015 Michigan Womyn's Music Festival. See also Temple Ardinger, "Neighbor Boy", in *Female Erasure*, 469-472; Nedra Johnson, 'The WANTED Project,' in *Female Erasure*, 528-534; Falcon River, 'The Bathroom,' in *Female Erasure*, 473-478.

⁵⁸ Marcia M. Gallo, *Different Daughters: A History of the Daughters of Bilitis and the Rise of the Lesbian Rights Movement* (Emeryville, CA: Seal Press, 2007), 190-192; and Janice Raymond, *Transsexual Empire: The Making of the She-Male* (New York: Teachers College Press, 1994), originally published in 1979 by Beacon Press, 99-119.

⁵⁹ Marilyn Frye, 'Some Reflections on Separatism and Power,' in *The Politics of Reality: Essays in Feminist Theory* (n.p.: Crossing Press, 1983), <http://www.feminist-reprise.org/docs/fryesep.htm>, last visited 1 December 2016. See also in the area of international law, with respect to women's self-determination, Gina Heathcote, *The Law on the Use of Force: A Feminist Analysis* (New York: Routledge, 2013), 109-133.

⁶⁰ Irina Dunn: Wikipedia, https://en.wikipedia.org/wiki/Irina_Dunn, last visited 1 December 2016.

⁶¹ See note 33.

en's studies in academia, and feminist stances within professions such as psychotherapy and pregnancy services (e.g. midwifery, along with contraception and abortion services) drew on both separatism and mainstreaming, creating spaces in the mainstream that could be a haven for women and nurture the development of female-centered culture, theory and politics. Women's sports and women's colleges were also known to be spaces where women's capabilities and strengths could be nurtured in the absence of men. Female-only space has always met opposition from men and women who condemn it as divisive or scorn its necessity. Gender identity laws take this opposition further and give it the appearance of a non-discrimination mandate, ignoring the discrimination against women in the form of deprivation of the ability to define and control their own identity, boundaries, spaces, affiliation and association. These practices of female autonomy and self-determination demonstrate and enact the possibility of evolution beyond dominant patriarchal constructs of gender to the construction of cultural meaning about femaleness, maleness, intra-female relations, intra-male relations, and female-male relations, individually and collectively, that do not enact domination-subordination and do not require any person to fit into predetermined roles.⁶²

Lesbians and the possibility of lesbian relationships are always present in practices of female autonomy and separatism, and represent a political and ideological continuum with them.⁶³ It is crucial for both feminism and for lesbians' rights that law and politics respect women's rights to maintain autonomous political, social, personal and sexual relations with other women, and to set boundaries and establish the term on which they will individually and collectively relate to men on any of these levels. The discussion of female autonomy will be returned to in sections 5.3 and 5.4, as a principle inherent to the concept of women's human rights that holds potential for renewing the gender perspective.

4.3 Subjective gender identification as dimension of legal personhood

Yogyakarta Principles, Principle 3 on Right to recognition before the law states:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dig-

⁶² Barbara Alice Mann describes gender in Iroquois culture as based on duality that is neither hierarchical nor originally linked to sex. Iroquoian women have held public power as women that is different than the public power held by men. Indigenous North American cultures have inspired their settler neighbors in both first and second wave feminism. Mann, *Iroquoian Women: The Gantowisas* (New York: Peter Lang, 2000), 59-184; Sally Roesch Wagner, *Sisters in Spirit* (Summertown, TN: Native Voices, 2001).

⁶³ Giti Thadani, *Sakhiyani: Lesbian Desire in Ancient and Modern India* (London: Cassell, 1996), 16-32.

nity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

- a. ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
- b. take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;
- c. take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all state-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — respect the person's profound self-defined gender identity;
- d. ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
- e. ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;
- f. undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

Principle 3 engages in complex moves to derive a right to gender identity as such from a basic civil right that establishes the individual's recognition as a subject of rights and duties in a particular legal system. Overlapping with the development of the Yogyakarta Principles, the right to recognition before the law was the subject of intense debate and normative develop-

ment in the Convention on the Rights of Person with Disabilities.⁶⁴ CRPD reaffirms the right of persons with disabilities to be recognized as persons before the law, and this right leads to the obligation to recognize the legal capacity of persons with disabilities on an equal basis with others. Legal capacity has an active dimension of exercising rights and duties, in addition to a passive dimension of merely being a holder of rights and duties. The provision in CRPD was necessary to provide redress against the denial or limitation of the legal capacity of some groups of persons with disabilities, with respect to the active dimension of exercising rights and duties. Such denials and limitations have been enforced through domestic law against those who are said to have poor decision-making skills. CRPD Article 12, as interpreted by the Committee on the Rights of Persons with Disabilities, rejects the view that actual or perceived difficulties warrant restriction of a person's decision-making, and provides for support to be made available that respects the person's autonomy, will and preferences.⁶⁵

Debates about Article 12, both before and after its adoption, highlighted the fundamental character of legal capacity as a right that makes possible the exercise and enjoyment of other rights and operationalizes the principle of individual autonomy that is implicit in the human rights framework. Under the CRPD, legal capacity is, contrary to centuries of legal tradition, implicit in legal personhood and can be denied to no adult; children's capacities are said to be evolving and they have participatory rights under both CRPD and the Convention on the Rights of the Child.⁶⁶ CRPD debates invoked the abolition of slavery and other subordinate legal statuses applied to any racial or ethnic group or social caste, and abolition of the inferior legal capacity accorded to women based on sex and/or marital status, as precedent for abolition of institutions of legal incapacitation, guardianship and substitute decision-making, which are based explicitly or implicitly on disability. People with disabilities who had been subjected to legal capacity denials condemned the injustice of laws that treated them as inferior decision-makers whose will and preferences could be disrespected with impunity. The necessity for legal protection of decision-making was viewed as both a substantive good and as an equality right; so long as society and law constructed personal freedom via legal capacity, persons with disabilities have a right to enjoy the same legal capacity as others to exercise rights and freedoms and to engage in transactions and relationships in all spheres of life.

⁶⁴ Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, U.N.T.S. vol. 2515 p. 3, adopted by the General Assembly A/RES/61/106, entered into force 3 May 2008, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

⁶⁵ Committee on the Rights of Persons with Disabilities, General Comment No. 1, CRPD/C/GC/1 (19 May 2014), paras. 13-15, 16-19, 26, and 29.

⁶⁶ CRPD General Comment 1, para. 8 (universal attribute); CRPD Articles 3(h) and 7.3; Convention on the Rights of the Child, New York, 20 November 1989, U.N.T.S. vol. 1577 p. 3, adopted by General Assembly resolution 44/25, entered into force 2 September 1990, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en, Article 12.

Whereas the CRPD highlights the right to legal agency as fundamental to personhood, YP Principle 3 applies the principle of legal agency reflexively to the right to another aspect of legal personhood, legal identity. Recognition of an individual's unique identity is linked to the issuance of identity documents that establish the person's existence as a legal subject.⁶⁷ Principle 3 draws on both the right to agency and self-determination, and legal identity as recognition of the unique existence of any person, to support a right to exercise agency with respect to the details recorded in identity documents. Legal personality, as the positing of unique identity as a legal subject, is made to serve personality understood as internal sense of self and its outward expression, such that the law must recognize sexual orientation and gender identity as fundamental components, and in the case of gender identity, a determinant, of legal identity.

As discussed above in section 3.2.3, it is not ordinarily the case that legally relevant aspects of identity are subject to an absolute right of personal agency and self-determination. Identities that confer differential status can become the subject of legal entitlement, such as membership in a national or ethnic group for purposes of group rights or affirmative action, or sex/gender for non-discrimination against women, affirmative action, and assignment to single-sex spaces where bodily privacy is at issue. Such identities do not emanate from personal self-expression, although they may have deep personal meaning for the individuals concerned.

The recognition of 'sexual orientation' as a fundamental aspect of personality does no more than underscore the protection against discrimination on that ground. It is not asserted that sexual orientation entails an obligation of legal recognition, merely that it must be respected. Furthermore, the rights associated with being a legal subject and exercising legal agency cannot be deprived or limited based on sexual orientation; this is relevant to marriage as a right to create a particular kind of legal relationship that has been deprived to same-sex couples, and any situation involving legal rights and duties where discrimination may occur based on a person's known identity as a lesbian, gay men or bisexual woman or man, or their same-sex relationship.

Gender identity, on the other hand, plays a dual role, as an aspect of personality that confers a right to non-discrimination, in the same way as sexual orientation, and as the substitution of this identity for another legal classification, the sex that was recorded at the person's birth. It is not gender identity as such that is being protected, but the substitution of internal identity

⁶⁷ CRC Article 7; see also International Convention on the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, U.N.T.S. vol. 2716, p. 3, Doc. A/61/448, C.N.737.2008 and C.N.1040.2008 Corrections, entered into force 23 December 2010, Article 25.

for recorded sex, upon the request of any person. As noted above in sections 3.2.2 and 4.1.1, this substitution renders the class of women incoherent and fragmented, blurring the distinction between sex and the social construct of gender, which allows males, at their discretion, to contend that there is no difference between themselves and females, and disallows females from asserting that difference within the bounds of polite discourse.⁶⁸ It may well be that there is a need to respect deeply held internal identities related to gender, but this cannot entail the erasure of sex; as developed below in sections 4.4, 5.4, and 5.5, women's human rights cannot be erased by the device of rendering them unintelligible.

There are good pragmatic reasons to seek legal identity documents that do not raise questions about a person's appearance from the perspective of authorities who may be unaware or prejudiced against persons who do not conform to gender stereotypes. Similarly, it may have been desirable to allow instances of same-sex marriage by the device of one partner adopting a cross-sex gender identity. However, these measures provide individual solutions that assume the persistence of discrimination based on heteronormativity and sex-role stereotyping. They cannot be enshrined as an ultimate goal, and furthermore need to be reconsidered in light of the conflicts that have emerged in principle and practice between gender identity as social policy and women's human rights.

The framing of gender identity as a component of the right to legal personhood can be subjected to further criticism in light of the history and current reality of women's experience of legal personhood, in contrast to that of men. This includes the relationship between public and private spheres of life, the relationship between political theory, particularly theories of democracy, and legal capacity, and the sexually subordinated status of women in both traditional and modern patriarchal societies, including liberal democratic societies, which retain their patriarchal underpinnings.⁶⁹

Strategies need to be explored to combat the human rights violations experienced by male and female transgender persons and intersex persons, which may also affect lesbians and gay men and other women and men whose appearance does not conform to stereotypes applied to their sex. Such strategies must not infringe on the rights of women to maintain their own identities, separate spaces, bodily privacy, and exclusive use of the positive measures needed to protect their rights, including temporary special measures to accelerate de facto equality, all of which are protected under CEDAW. The impact on women individually and collectively of social expectations of passivity, receptivity, and putting others first needs to be taken fully into ac-

⁶⁸ This dimension will be developed further below in section 4.4.

⁶⁹ See generally Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

count in such consultations. Women should be understood as political actors whose self-determination as a fundamental right and principle necessary for equality of the sexes pre-exists any recognition women have achieved in patriarchal legal systems.⁷⁰

4.4 Conflict between women's self-determination and that of male transgender persons

The ability of the feminist movement to name and combat sexism and to constitute itself as a political movement by and for women, is stymied by gender identity norms as set out in the YP. Following from mandated incoherence in language and legal classification that undermine hard-won rights protection and positive measures for women and girls, principles in the YP on the right to privacy and freedom of expression directly endanger women's right to express themselves freely regarding the politics of sex, gender, and gender identity.

Principle 6 on the right to privacy says, in relevant part:

States shall:

- a) ... ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference; ...

- f) ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

The protection of information pertaining to gender identity, in paragraph (f), could be understood as preventing unwanted disclosure of one's internally held gender, in which case it would be a noncontroversial protection against intrusion or harassment, as the provision functions with respect to sexual orientation. However, as gender identity also operates as a substitution for legal sex classification, the right to non-disclosure is presumably intended to prevent others from questioning, revealing, or discussing an individual's sex and to require them instead to accept at face value the person's self-declared gender identity. This has an impact in the public sphere so as to enforce the right of males to enter spaces set aside for females,

⁷⁰ This point will be developed further in section 5.3. Cf. Heathcote, *Use of Force*, 109-142.

including those that have been deliberately constructed with a view to women's advancement, safety, or cultural and political self-determination in a male-dominated society. While the reverse would also hold in principle, to enforce females' right to enter male spaces in which they expect privacy, the threat of male violence against women acts as a deterrent, and there is correspondingly less justification for men's separate space.

The provision may also have an impact in the private sphere as it pertains to sexual relations, reading paragraph (a) in combination with paragraph (f). While relations are specified to be 'consensual,' it would be a matter of interpretation whether the right to non-disclosure of gender identity means that it is not obligatory to divulge one's sex and any modified sex characteristics to a potential partner before beginning to engage in sexual relations, as part of free and informed consent. There may be different views as to the level of personal trust sought and desired in sexual intimacy, but in light of the legacy of public protection of male violence against women in the so-called private sphere, disclosure of such information should be considered obligatory so that women in particular are not put in positions where they are faced with unwanted sex.

Principle 6, in combination with Principles 19 and 21, also infringes women's freedom of expression and political self-organization. Principle 19 says:

States shall...

e) ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities.

Principle 21 says:

Everyone has the right to freedom of thought, conscience and religion, regardless of sexual orientation or gender identity. These rights may not be invoked by the State to justify laws, policies or practices which deny equal protection of the law, or discriminate, on the basis of sexual orientation or gender identity.

States shall: ...

b) ensure that the expression, practice and promotion of different opinions, conviction and beliefs with regard to issues of sexual orientation or gender identity is not undertaken in a manner incompatible with human rights.

On the surface, these provisions do no more than reaffirm the duty to refrain from violating the rights of others when engaging in freedom of expression. However, if it is impermissible to critically analyze the relationship between sex and gender identity or to name the sex of individual males who have violated the rights of women while holding a view of themselves a women (or who adopt such a view after committing such violations),⁷¹ women are hamstrung in important political and human rights work. As the state is called upon to refrain from enacting policies that discriminate based on gender, the possibility arises that states following the YP will consider themselves precluded from protecting women's freedom of expression in this regard.

The obligation to refrain from violating others' human rights when promoting views regarding gender identity could equally be read to protect women against misogynist slurs, rape and death threats, and other forms of harassment on the part of gender identity advocates or apparently in their behalf. These instances are commonplace in social media and in campus and community spaces where gender identity ideology is seen as uncomplicatedly progressive.⁷² However, the women against whom such harassment is directed have little reason to expect that their rights will be protected, in a law and policy environment that treats their discussion of sex and gender as tantamount to hate speech.

YP opens limited space for discussion of differing views on matters of sexual orientation and gender identity under Principle 26, right to participate in cultural life, which reads in relevant part:

States shall:

- b. foster dialogue between, and mutual respect among, proponents of the various cultural groups present within the state, including among groups that hold different views on matters of sexual orientation and gender identity, consistently with respect for the human rights referred to in these Principles.

While this may be an avenue for contestation within the YP framework, it appears to be designed for ethnic group rather than women's human rights activists. Although lesbians and feminists could be viewed as a group whose culture is negatively impacted by the YP, this is far too limited to allow for the needed debate, which furthermore would be hamstrung by the

⁷¹ Trans Male Violence: The Politics of Gender, <https://thepoliticsofgender.wordpress.com/category/male-violence/>, last visited 1 December 2016.

⁷² TERF is a Slur: Documenting the abuse, harassment and misogyny of transgender identity politics, <https://terfisaslur.com>, last visited 1 December 2016.

constraints of the YP itself as discussed immediately above. As women's human rights, political identities and relational identities, and struggle against male domination, have not been taken into account in the YP, Principle 26 cannot contain the necessary dialogue. Elements of the YP that impede women's free expression of views critical of gender identity ideology must first be rejected by public officials and relevant civil society actors, in order for women to be heard.

4.5 Gender identity, body stereotypes, and health

Principle 17 on the right to the highest attainable standard of health states in relevant part:

Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.

States shall:

- g. facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support.

Principle 17 situates body modification procedures within the right to health, presumably in recognition that any such procedures have an impact on health and need to be carried out with great care. Having established in the preamble and in Principle 3 that body modification may be involved in a person's expression of gender identity, and that legal reclassification can proceed based on internal identity alone, Principle 17 presents body modification procedures as an affirmative right deriving ultimately from the right to legal personality⁷³ but addressed under the right to health in light of the health impact and the desirability of medical standards and control. This approach to health and medical services resists the imposition of medical authority on personal identity, similar to the social model of disability that contrasts with the medical model and supports individual self-determination and choice.

Principle 3 incorporates a right to 'social support for all persons experiencing gender transitioning or reassignment.' Such support, set apart from health care and situated within the right to recognition before the law, parallels the social form of support that are provided for in CRPD Articles 12 and Article 19. This type of support is not medical in nature and is designed to facilitate personal self-determination.

⁷³ See discussion above in section 4.3.

Both social and medical support for transition are predicated on a particular view of the nature of gender and sex, and what it means to transition or be reassigned from one gender or sex to another. Gender identity, as defined in the YP, has a dynamic dimension that is similar to sexual orientation in that it emanates from within and may or may not be outwardly manifested. Transition however differs from coming out as lesbian or gay because it involves in effect the concealment of one's sex and in many cases the alteration of sex characteristics by means that require ongoing maintenance.

Considering the process of transition from a social policy perspective needs to be undertaken with sensitivity to those who experience it, and for whom it is a deeply significant aspect of their personality. As mentioned above in section 4.2, serious concerns have been raised about the impact of transition on the health and well-being of those concerned, particularly those who begin transition in childhood or adolescence, and the need for research and protocols that take account of these concerns. The right to 'genuinely informed' consent to medical treatment, recognized in Principle 17 paragraph (e), has value if it results in the provision of accurate information about the nature of procedures and their adverse effects, and if non-medical perspectives on gender identity and gender dysphoria are made available with equivalent supports. Discussion of the meaning of transition that allows for debate on views about sex and gender is needed in order to protect the right to health in the face of procedures that carry significant adverse effects.

Medical treatments for transition administer to healthy bodies exogenous sex-related hormones, genital surgeries, breast removal, and surgeries on the face and other parts of the body, to create the appearance of sexual characteristics that differ from the person's chromosomal makeup and the gametes their body would produce in the absence of intervention.⁷⁴ The human body is a whole organism, and seeks homeostasis; interventions whether surgical or hormonal cannot reproduce or recreate sex but can only modify to some degree the appearance and functioning of sexed bodies. It cannot be assumed that a female body modified by exogenous testosterone is equivalent to a male body, or that a male body modified by exogenous estrogen is equivalent to a female body. These treatments have complex effects on the body, some of which entail adverse health consequences, and include the need for continuous usage of the hormones and reliance on medical care in order to maintain the desired appear-

⁷⁴ Madeline B. Deutsch, 'Overview of Gender Affirming Treatments and Procedures,' (Center for Excellence in Transgender Health, University of California, San Francisco, 2016?), <http://transhealth.ucsf.edu/trans?page=guidelines-overview>, last visited 1 December 2016.

ance, and, if the gonads have been removed, in order to prevent deterioration of health.⁷⁵ The surgeries can result in loss of sensation and other complications.⁷⁶ Surgery on male bodies to create a simulated vagina requires ongoing dilation in order to keep the cavity from closing. Moreover, transition-related treatments are conceptualized according to a heteronormative, patriarchal view of sexual function, with the goals being creation of a pseudo-penis capable of penetrating a vagina (for female persons transitioning to identify as men), or a cavity capable of being penetrated by a penis along with pseudo-labia constructed according to male-defined aesthetics (for male persons transitioning to identify as women).⁷⁷ Some doctors have prescribed puberty blockers to self-identified transgender children, with the result that of sterility if they begin cross-sex hormones without having begun puberty on their own.⁷⁸

The objectification and dissociation of sex-related body parts is gendered. In addition to the general patriarchal identification of the body with women, as a ground for male intervention, the aesthetic standards promoted by sex-related surgery have particular consequences for women and girls, who have always been subjected to shaming and sexual objectification irrespective of their body type, and who are now told that male transgender persons represent a standard to which they should aspire.⁷⁹ Meanwhile the male body is valorized as desirable

⁷⁵ Madeline B. Deutsch, 'Overview of Feminizing Hormone Therapy,' (Center for Excellence in Transgender Health, University of California, San Francisco, 2016?), <http://transhealth.ucsf.edu/trans?page=guidelines-feminizing-therapy>, last visited 1 December 2016; Madeline B. Deutsch, 'Overview of Masculinizing Hormone Therapy,' (Center for Excellence in Transgender Health, University of California, San Francisco, 2016?), <http://transhealth.ucsf.edu/trans?page=guidelines-masculinizing-therapy>, last visited 1 December 2016; Juno Obedin-Maliver, 'Pelvic Pain and Persistent Menses in Transgender Men,' (Center for Excellence in Transgender Health, University of California, San Francisco, 2016?), <http://transhealth.ucsf.edu/trans?page=guidelines-pain-transmen>, last visited 1 December 2016.

⁷⁶ Eric D. Wang and Esther A. Kim, 'Perioperative and Postoperative Care for Feminizing Augmentation Mammoplasty,' (Center for Excellence in Transgender Health, University of California, San Francisco, 2016?), <http://transhealth.ucsf.edu/trans?page=guidelines-chest-surgery-feminizing>, last visited 1 December 2016; Eric D. Wang and Esther A. Kim, 'Postoperative Care and Common Issues After Masculinizing Chest Surgery,' (Center for Excellence in Transgender Health, University of California, San Francisco, 2016?), <http://transhealth.ucsf.edu/trans?page=guidelines-chest-surgery-masculinizing>, last visited 1 December 2016.

⁷⁷ Curtis Crane, 'Phalloplasty and Metaoidioplasty – Overview and Postoperative Complications,' (Center for Excellence in Transgender Health, University of California, San Francisco, 2016?), <http://transhealth.ucsf.edu/trans?page=guidelines-phalloplasty>, last visited 1 December 2016; Toby Meltzer, 'Vaginoplasty Procedures, Complications, and Aftercare,' (Center for Excellence in Transgender Health, University of California, San Francisco, 2016?), <http://transhealth.ucsf.edu/trans?page=guidelines-vaginoplasty>, last visited 1 December 2016.

⁷⁸ Karin Selva, 'Puberty Blockers and Puberty Inhibitors,' (Portland, OR: TransActive Gender Center, n.d.), <https://www.transactiveonline.org/resources/youth/puberty-blockers.php>, last visited 1 December 2016.

⁷⁹ For example, see JamesMichael Nichols, 'Trans Woman Asks: Do You Really Want Me in the Same Bathroom As Your Husband?', *Huffington Post* (5 November 2015), http://www.huffingtonpost.com/entry/this-trans-woman-asks-you-really-want-me-in-the-same-bathroom-as-your-husband_us_563b997fe4b0411d3070003a.

because it is viewed as ‘unmarked’;⁸⁰ male anonymity and invulnerability can be tempting for a woman or girl who has already learned to dissociate from parts of her body associated with trauma and abuse. Women may seek breast removal for its own sake even without wanting to be fully identified as a man. Male transgender persons continue to enjoy male privilege in dealing with everyday misogyny that is directed at them by mistake.⁸¹

The obligation of non-discrimination based on gender identity in the context of health care also has a detrimental impact on the health care needs and rights of women and girls. Gender identity advocates promote the inclusion of male transgender persons in women’s health care, both as clients and as providers. This undermines the feminist women’s movement for empowered health care including body knowledge, sexual knowledge, self-respect and celebration, and quality health services including sexual and reproductive health provided by women for women, and centering women’s bodies and health needs in a context where men’s bodies and needs are still seen as a human default and those of women as an afterthought.⁸²

Social transition and the concept of gender dysphoria as a condition for which treatment can be prescribed also have implications that may be ill-considered from the perspective of individual health and well-being, and from a societal perspective with regard to women’s and girls’ human rights. A number of detransitioned women have reported that sexual abuse and related trauma contributed to their gender dysphoria; some also found that learning about radical feminism and/or the existence of butch lesbians, who live proudly in the world despite serious discrimination, allowed them to find a place in the world and accept themselves as female.⁸³ The narrative of gender dysphoria, while it gives voice to the intense suffering many women and men experience in relation to sex and gender, can convey a sense of powerlessness and fragility by locating the distress entirely in the individual and their inability to adjust to a predetermined society and culture. While the YP superficially resists a medical narrative, by providing for sex/gender reclassification without prior medical assessment or intervention, it is hard to see as anything other than medicalization the administration of treatments and procedures to change a person’s sex characteristics in response to their experi-

⁸⁰ See note 34.

⁸¹ Kat Callahan, ‘What Sexual Harassment is Like for Me as a Trans Woman,’ *ROYGBIV* (16 November 2014), <http://roygbiv.jezebel.com/what-street-harassment-is-like-for-me-as-a-trans-woman-1659488352>, last visited 1 December 2016.

⁸² See Singleton and a Collective of Many Midwives, ‘Open Letter’; Women’s Health Movement: Our Bodies Ourselves, n.d., <http://www.ourbodiesourselves.org/history/womens-health-movement/>, last visited 1 December 2016. The CEDAW Committee addressed the specificity and marginalization of women’s health needs in General Recommendation 24, see especially paras. 10, 11, 12, 14, 22, and 24.

⁸³ Cari, ‘Female Detransition and Reidentification: Survey Results and Interpretation,’ (3 September 2016), <http://guideonragingstars.tumblr.com/post/149877706175/female-detransition-and-reidentification-survey>, last visited 1 December 2016.

ence of incongruence between their sex and their internally held identity. Although medicalization responds in part to the demand for these treatments to be administered by trained professionals and funded as health care, rather than using more dangerous means, it is not promoted primarily as a form of harm reduction but rather as a clinical protocol for persons who experience gender dysphoria.

Concerns raised about the adverse effects medical treatments related to gender identity, as well as social transition, should be addressed as health policy and not only by ensuring that individuals seeking treatment for gender dysphoria are given pertinent information about risks. The principle of informed consent, while valuable to provide minimal safeguards against the imposition of treatment against a person's will, is not sufficient to counter systemic attitudes and beliefs that may lead individuals to consent to harmful treatments. As feminists have advocated in other areas, harm cannot be shielded behind the principle of protection of privacy, here in the form of individual consent as the limit of policy regarding any form of treatment. At the same time, feminist standpoint theory must remind us that the perspectives of transgender persons who are satisfied and enthusiastic about their transition need to be present equally with that of detransitioned and dysphoric persons who advocate for alternative care, support and perspectives to be made available, while concerns about the effects on all women and girls about social and medical policy related to gender identity also need to be heard.

4.6 Conclusion

The Yogyakarta Principles serve an important purpose of bringing both sexual orientation and gender identity into mainstream human rights normative standards and advocacy. Nevertheless, their framing of gender identity as an exercise of individual agency that demands the societal acceptance of its substitution for sex must be rejected. The following section will discuss how CEDAW can support the work of restoring and reinvigorating women's human rights, as a key focal point in international human rights law that, by its terms, exclusively centers women.

5 CEDAW and gender identity

The acceptance of male transgender persons as a disadvantaged group of women under CEDAW surely represented a milestone for gender identity rights. As CEDAW is an asymmetrical non-discrimination treaty under which only women qualify as rights holders, its availability for use by male transgender persons both presupposes and appears to presumptively establish that gender identity supersedes the identities of individuals as male or female based on their sex as observed and recorded at birth. Furthermore, as a result of the Commit-

tee's position that gender identity intersects with sex- and gender-based discrimination to create additional disadvantage, such males apparently have superior claims under CEDAW in case of any conflict between their rights and those of women and girls.

5.1 CEDAW jurisprudence on gender identity and sexual orientation

The CEDAW Committee's increasing attention to gender identity and its approach to normative content has responded to NGO advocacy led by the International Gay and Lesbian Human Rights Commission.⁸⁴ IGLHRC set out a strategy and template for 'crafting inclusive shadow reports to CEDAW' dealing with 'sexual orientation, gender identity and gender expression' in a handbook that appears to have been issued in 2009, and has submitted a number of these reports in collaboration with national-level NGOs and organizers.

The CEDAW Committee's jurisprudence on gender identity began with a cautious recommendation to consult with organizations of transsexual and intersex persons in Concluding Observations on Germany in 2009,⁸⁵ and its attention to gender identity in Concluding Observations has increased steadily since 2010. The year 2010 also marked the first references to gender identity and sexual orientation in CEDAW General Recommendations. General Recommendations 27 on older women and 28 on Article 2 both referred to 'sexual orientation and gender identity' as intersecting factors compounding the discrimination experienced by women.⁸⁶ This formulation was relatively ambiguous, as it left indeterminate the question of whether male or female transgender persons are the 'women' who experience compound discrimination related to gender identity.

GR28 includes lesbians among disadvantaged groups of women, but omits any mention of transgender persons in that paragraph. Prior to 2010, the Committee had sporadically addressed women's sexual orientation or sexuality, and lesbianism in Concluding Observations.⁸⁷ After that date, most Concluding Observations that address sexual orientation or lesbians do so as part of a conglomerate group identity, in formulations such as 'lesbian, bisexual and transgender women' and 'sexual orientation and gender identity' separated out from other

⁸⁴ See note 29.

⁸⁵ Committee on the Elimination of Discrimination Against Women, Concluding Observations on Germany, U.N. Doc. No. CEDAW/C/DEU/CO/6 (12 February 2009), paras. 61-62.

⁸⁶ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 27 on Older Women and Protection of Their Human Rights, U.N. Doc. No. CEDAW/C/GC/27 (16 December 2010), para 13; General Recommendation 28, para. 18.

⁸⁷ See 'Appendix: CEDAW References,' in IGLHRC, *Equal and Indivisible*, 37-38.

identities or intersectional factors.⁸⁸ Concluding Observations condemn violence against this population and call for non-discrimination based on sexual orientation and gender identity both generally and in connection with areas such as access to justice, marriage and family relations, refugee and asylum status, and health care.⁸⁹ Some explicitly call for ‘transgender

⁸⁸ Committee on the Elimination of Discrimination Against Women, Concluding Observations on Albania, U.N. Doc. No. CEDAW/C/ALB/CO/3 (16 September 2010), paras. 8, 19, 42-43 (sexual orientation and gender identity) and CEDAW/C/ALB/CO/4 (22 July 2016), para. 38; Concluding Observation on Argentina (46th Session, 12-30 July 2010), paras. 43-44; Concluding Observations on Chile, U.N. Doc. No. CEDAW/C/CHL/CO/5-6 (12 November 2012), paras. 10 and 16; Concluding Observations on China, U.N. Doc. No. CEDAW/C/CHN/CO/7-8 (14 November 2014), paras. 68-69; Concluding Observations on Comoros, U.N. Doc. No. CEDAW/C/CMR/CO/4-5 (28 February 2014), para. 36; Concluding Observations on Costa Rica, U.N. Doc. No. CEDAW/C/CRI/CO/5-6 (2 August 2011), paras. 40-41; Concluding Observations on Croatia, CEDAW/C/HRV/CO/4-5 (28 July 2015), paras. 38-39; Concluding Observations on Denmark, U.N. Doc. No. CEDAW/C/DNK/CO/8 (11 March 2015), paras. 35-36; Concluding Observations on Ecuador, U.N. Doc. No. CEDAW/C/ECU/CO/8-9 (11 March 2015), paras. 20-21 (see also paras. 18-19; recommendation to end ‘de-homosexualization’ campaign); Concluding Observations on the Former Yugoslav Republic of Macedonia, U.N. Doc. No. CEDAW/C/MKD/CO/4-5 (22 March 2013), para. 10; Concluding Observations on Georgia, paras. 34-35; Concluding Observations on Gambia, U.N. Doc. No. CEDAW/C/GMB/CO/4-5 (28 July 2015), paras. 44-45; Concluding Observations on Haiti, U.N. Doc. No. CEDAW/C/HTI/CO/8-9 (4 March 2016), paras. 47-48; Concluding Observations on Kyrgyzstan, paras. 9, 29, and 33; Concluding Observations on Malta, U.N. Doc. No. CEDAW/C/MLT/CO/4 (9 November 2010), para. 14 (ambiguously, ‘sexual identity’); Concluding Observations on Mongolia, U.N. Doc. No. CEDAW/C/MNG/CO/8-9 (10 March 2016), paras. 28-29; Concluding Observations on New Zealand, U.N. Doc. No. CEDAW/C/NZL/CO/7 (6 August 2012), paras. 34-35; Concluding Observations on Norway, U.N. Doc. No. CEDAW/C/NOR/CO/8 (23 March 2012), paras. 33, 35-36; Concluding Observations on Paraguay, U.N. Doc. No. CEDAW/C/PRY/CO/6 (8 November 2011), para. 12; Concluding Observation on Peru, U.N. Doc. No. CEDAW/C/PER/CO/7-8 (24 July 2014), paras. 17-18 and 39-40; Concluding Observations on Philippines, U.N. Doc. No. CEDAW/C/PHL/CO/7-8 (22 July 2016), paras. 14 and 45; Concluding Observations on Poland, U.N. Doc. No. CEDAW/C/POL/CO/7-8 (14 November 2014), paras. 22-23; Concluding Observations on Russia, U.N. Doc. No. U.N. Doc. No. CEDAW/C/USR/CO/7 (16 August 2010), paras. 40-41 and CEDAW/C/RUS/CO/8 (20 November 2015), paras. 41-42; Concluding Observations on Singapore, U.N. Doc. No. CEDAW/C/SGP/CO/4/Rev.1 (16 January 2012), para. 22 (sexual orientation and gender identity); Concluding Observations on Slovakia, paras. 38-39; Concluding Observations on Turkey, U.N. Doc. No. CEDAW/C/TUR/CO/7 (21 July 2016), paras. 32-33; concluding Observations on Uganda, U.N. Doc. No. CEDAW/C/UGA/CO/7 (5 November 2010), paras. 43-44 (sexual orientation and gender identity); Concluding Observations on Uruguay, U.N. Doc. No. CEDAW/C/URY/CO/8-9 (22 July 2016), para. 16 (slightly different ‘lesbian, trans-gender, trans-sexual and intersex persons’); Concluding Observations on Venezuela, U.N. Doc. No. CEDAW/C/VEN/CO/7-8 (14 November 2014), para. 36; Concluding Observations on Zimbabwe, U.N. Doc. No. CEDAW/C/ZWE/CO/2-5 (23 March 2012), paras. 23-24. The situation of lesbians alone was addressed in Concluding Observations on Belarus, U.N. Doc. No. CEDAW/C/BLR/CO/7 (6 April 2011), paras. 41-42; Concluding Observations on Dominican Republic, U.N. Doc. No. CEDAW/C/DOM/CO/6-7 (30 July 2013), paras. 36-37; Concluding Observations on Republic of Korea, U.N. Doc. No. CEDAW/C/KOR/CO/7 (1 August 2011), para. 15; Concluding Observations on Serbia, U.N. Doc. No. CEDAW/C/SRB/CO/2-3 (30 July 2013), paras. 16-17 and 20-21; Concluding Observations on South Africa, paras. 39-40.

⁸⁹ Health care is of particular interest, since the inclusion of male transgender persons in women’s health care causes fragmentation as discussed above note 77 and accompanying text. See Concluding Observations on China, Kyrgyzstan, Mongolia, New Zealand and Norway.

women' to be provided with legal documents reflecting their gender, without requiring psychiatric assessment, sterilization or surgery prior to such recognition.⁹⁰

Subsequent General Recommendations have been inconsistent in addressing sexual orientation or gender identity. General Recommendation 29 on Article 16 calls for protection of women's economic rights in same-sex relationships where recognized by the state party, but defers to states as to whether to grant such recognition.⁹¹ Departing from the Committee's usual criticism of discriminatory practices, GR29 observes without judgment that same-sex relationships 'are not legally, socially or culturally accepted in a considerable number of States parties.' General Recommendations 30, 31 and 34, on conflict, harmful practices, and rural women respectively, referred to the intersectional discrimination as elaborated in GR28 but did not specify sexual orientation or gender identity.⁹² GR31 and GR34 both enumerate certain other intersectional factors. General Recommendations 32 and 33, on refugees and asylum seekers, and access to justice, respectively, formulate the intersecting factor(s) as the state of 'being lesbian, bisexual or transgender' and 'identity as a lesbian, bisexual or transgender woman or intersex person.'⁹³ The Committee's draft Update of General Recommendation 19 on violence against women returns to 'being lesbian, bisexual, transgender or intersex.'⁹⁴

The treatment of gender identity under CEDAW has been inconsistent but at present has converged on acceptance of male transgender persons as a disadvantaged group of women. Concluding Observations have called for the reclassification of male transgender persons as women under domestic law. Lesbians and bisexual women have been grouped together with male transgender persons, treating nonconformity with sex-role stereotypes with respect to sexuality and gender identity as a master status that obliterates distinctions of sex and gender. This approach portrays lesbian and bisexual women as outsiders to womanhood, and allows the remainder of CEDAW jurisprudence to be perceived as heteronormative. However, there are

⁹⁰ See note 13.

⁹¹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 29, U.N. Doc. No. CEDAW/C/GC/29 (30 October 2013), para. 24.

⁹² Committee on the Elimination of Discrimination Against Women, General Recommendation No. 30, U.N. Doc. No. CEDAW/C/GC/30 (1 November 2013), paras 7, 57(b), 58; General Recommendation No. 31, U.N. Doc. No. CEDAW/C/GC/31-CRC/C/GC/18 (14 November 2014), paras. 6, 15, 16(c), 55(e); General Recommendation No. 34, U.N. Doc. No. CEDAW/C/GC/34 (7 March 2016) paras. 14, 15, 94.

⁹³ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 32, U.N. Doc. No. CEDAW/C/GC/32 (14 November 2014), paras. 6, 16, 38; General Recommendation No. 33, U.N. Doc. No. CEDAW/C/GC/33 (3 August 2015), paras. 8 & 49.

⁹⁴ Committee on the Elimination of Discrimination Against Women, Draft update of General Recommendation No. 19, <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/DraftUpdateGR19.aspx>, last visited 1 December 2016, para 11.

counter-indications of an alternative approach to gender in the Committee's theory of equality that can support the work of solidarity between women, including cross-sexuality and across other intersectional divides.

5.2 CEDAW theoretical jurisprudence in tension with gender identity

The CEDAW Committee's stance on both sexual orientation and gender identity is under-theorized in the context of General Recommendations and responsive to NGO advocacy and country circumstances in Concluding Observations. The Committee has not supplied an analysis of sexual orientation and gender identity in light of the core aim of eliminating sex-based discrimination against women and the obligations to modify prevailing gender relations based on sex-role stereotypes and to redistribute power and resources between men and women. Although the Committee has in a number of instances treated discrimination against lesbian, bisexual, transgender or intersex persons as a form of sex-role stereotyping,⁹⁵ this has remained at the level of intersectionality, addressing the stereotypes that pertain to these groups in view of their divergence from traditional roles. No connection has been made with theoretical jurisprudence on sex and gender, articulated in General Recommendation 25 and to a lesser extent in General Recommendation 28.

General Recommendation 25 sets out a theory of equality and non-discrimination as applied to women's human rights that supports the obligation in Article 4.1 to adopt temporary special measures to accelerate women's de facto equality with men. GR25 takes a holistic view that responds to women's lived reality, and does not allow women's equality to be boxed in by the permanence of biological differences, the protection of women's reproductive functions, the qualification that certain measures are to be 'temporary,' or limited view of non-discrimination as formal equality of rights or equality of opportunity. The unifying concept of gender as an 'ideological and cultural construct' that is 'reproduced in the realm of practices [and] in turn ... influences the outcomes of such practices' helps make sense of the totality and pervasiveness of discrimination against women in public and private spheres of life and the necessity for a wide range of remedial and systemic measures.⁹⁶

General Recommendation 25 establishes a three-prong framework for women's equality rights, consisting of formal equality before and under the law; substantive equality, requiring measures to improve women's de facto position and redistribute resources and power between women and men; and the obligation to transform 'prevailing gender relations and the persis-

⁹⁵ See Concluding Observations on Chile, Ecuador, France, Haiti, Peru, Philippines, Poland, Serbia (lesbians), Singapore, Russia, Uruguay,

⁹⁶ General Recommendation 25, n2.

tence of gender-based stereotypes' that operate not only on the individual level but also 'in law, and legal and societal structures and institutions.'⁹⁷ Addressing the causes of women's inequality requires 'the transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.' GR25 may not declare outright that men oppress women, but it describes the operation of a system of oppression that replicates itself and that is centered on the relationship between men and women.

General Recommendation 28 restates the relationship between sex and gender:

The term "sex" here refers to biological differences between men and women. The term "gender" refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community.⁹⁸

Again the Committee emphasizes the hierarchical relationships and power inequality resulting from gender, as the social and cultural meaning ascribed to biological differences. This strong statement on gender as inequality, contrasts with a view that gender identity can reverse an individual's positionality by mere operation of self-declaration.

Gender identity advocates may believe that individuals can choose their positions within a binary gender system, and that by doing so they either reverse the power inequality that they were born into (i.e. a male enters the oppressed class of women, and a female enters the oppressor class of men) or transform it through the cognitive dissonance of differently sexed bodies living out stereotyped identities and roles. This has not been the case in practice, as male transgender persons have disrupted women's identities and spaces by insisting on centering themselves within those identities and spaces.⁹⁹ Resistance to gender identity ideology, and not its enactment, has reinvigorated feminist theory and practice, for the most part outside academia and mainstream institutions.

⁹⁷ General Recommendation 25, paras. 7 and 8.

⁹⁸ General Recommendation 28, para. 5.

⁹⁹ See above section 4.

5.3 Female autonomy as principle of women's human rights

If women's protagonism in resistance to male domination is necessary to achieve the aim of CEDAW to eliminate all forms of discrimination against women, a link appears with sexual orientation and an alternative approach to contextually address gender identity and gender expression. Women's liberation theorists and activists posit the principle of women's autonomous existence separate from men, the possibility of women's separation from men at the personal, sexual, social and political levels, as both a legitimate option and a basis for transforming relations between men and women.¹⁰⁰ Complementary to the potential to establish relations with men on terms acceptable to women is the freedom to develop personal, sexual, social and political relations with other women free from men's interference. These freedoms, exercised in all dimensions of life, reproduce for women an autonomous standpoint from which to interact with legal and societal institutions that are currently constructed based on male paradigms and life patterns. Recognition of the principle of female autonomy existing along the full spectrum of private and public life domains, confers a political status on women's self-organized movements that recognizes that such movements are more than mere NGOs or stakeholder constituencies, that they play a transformative role directly and not only through their advocacy campaigns or programmatic partnerships with government. The same principle affirms the rights of lesbians not only as a matter of sexual freedom and non-discrimination but as integral to a re-ordering of gender relations. Whereas lesbians are marginalized and punished in patriarchal orders, in which women are seen as women primarily in relation to men and families, lesbians are visible as leaders, teachers, workers, mothers, and more in social orders constructed from a standpoint of female autonomy.¹⁰¹

The standpoint of female autonomy does not imply that women are monolithic in their political opinions or other beliefs, or that all women in a given nation or community must constitute themselves in a political grouping apart from men. It does not mean that women should stop attending mixed educational institutions, working in all kinds of government and businesses and cultural institutions together with men, or being heterosexually involved with men and relating to men companionably. It does not mean that women must become like the stereotype of men from a liberal individualist standpoint, self-seeking without a sense of their connection to others, and it does not mean that anything a woman chooses to do is immune from criticism. It is ultimately a principle of mutual respect that has a gendered dimension in

¹⁰⁰ See Frye, 'Separatism.'

¹⁰¹ Lesbian and female separatist institutions have worked at creating such social orders, whether in living collectives or in temporary gatherings. The Michigan Womyn's Music Festival, which operated for 40 years, gave generations of women the experience of becoming visible to themselves and each other. Voices from the Land, <http://www.michfestmatters.com>, last visited 1 December 2016.

response to the liberal construction of the individual as a contractual unit in public and private domains, to which women have always had a dual relationship as both object and qualified or unequal subject.¹⁰² As such it challenges male supremacy not only in public and private spheres of life, including law and societal institutions, but also in international law insofar as it remains both male-centric and state-centric.¹⁰³ This may be the same as the assertion that women's claims to equality and non-discrimination are human rights claims, that they emanate from challenges to state sovereignty that do not depend on positive law and that positive law must recognize. However it also entails that human rights law in its work of rights recognition must take account of the principle of equality of the sexes as a claim for interactive balance in definitional power that, when it has not been met, requires the restoration of women to their rightful place. The adoption of CEDAW fulfills in part this more basic obligation, which needs to be recalled in the course of its evolution and application.

The fundamental character of the principle of equality of the sexes in international law is supported by its inclusion in the United Nations Charter and in the Universal Declaration of Human Rights, as well as the position of the Inter-American Court on Human Rights that the principle has *jus cogens* status.¹⁰⁴ Doubts about the status of the principle from a state-centric perspective can be addressed by democratic theory; a state that refuses to acknowledge the equality of the sexes is exercising tyranny over the female half of its population. Adopting the ordinary approach to human rights law whereby rights are recognized rather than created, such recognition must be given to equality of the sexes even at the point where it challenges state legitimacy, so that human rights can be fully human.

The principle of female autonomy and political equality with men, as both a fundamental condition for human rights and as a necessity for the redistribution of power required by CEDAW, supports a reassessment of gender identity rights insofar as they deny women the right to their sex identity by unilaterally redefining the class. The contestation of identity in CEDAW is the clearest instance in which gender identity advocates have targeted women while leaving men, and their definitional power, in place.

5.4 A new gender perspective

¹⁰² Pateman, *Sexual Contract*.

¹⁰³ Heathcote, *Use of Force*; Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1991).

¹⁰⁴ Chinkin and Freeman, 'Introduction,' 28. Charter of the United Nations, San Francisco, 1945, entered into force 24 October 1945, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>, Articles 1, 15, 55; Universal Declaration of Human Rights, proclaimed by UN General Assembly in Paris, 10 December 1948, Res. 217A, <http://www.un.org/en/universal-declaration-human-rights/>, Article 2.

Miller describes the contestation between women's human rights advocates and advocates for sexual orientation and gender identity rights, over the 'ownership' of gender, in the context of UN conferences on AIDS where funding was at stake for the constituencies represented.¹⁰⁵ Did a 'gender perspective' mean paying attention to women, or paying attention to men and women who fall outside stereotypical gender norms? The framing of such a debate misses the possibility of a gender perspective that takes a politicized view of gender relations and stereotypes, and of the ways they reinforce one another.

Both gender-critical feminists and proponents of gender identity have appealed to CEDAW Article 5(a) in support of their claims.¹⁰⁶ As discussed above, gender identity cannot exist without an understanding of gender as 'the social meaning given to biological sex differences,' yet advocates claim that gender identity exists in some sense both logically and preferentially prior to sex. Otto would like to solve that problem by treating sex, as well as gender, as a 'performative' social construct.¹⁰⁷ Otto rejects the premise of CEDAW asymmetry, legitimately criticizes the heteronormativity of CEDAW jurisprudence, and dismisses the analysis of male-female power relations as reinscribing a victimization narrative. Otto refers favorably to queer theorist Judith Butler, who views women as incapable of constituting a political class and maintains that only through parody and pastiche of patriarchal gender relations, including both stereotypes and relations of domination and subordination, can we find a measure of freedom¹⁰⁸. Jeffreys and Nussbaum each render blistering critiques of Butler's nihilistic view.¹⁰⁹

Jeffreys, on the other hand, views gender identity as clearly contravening Article 5(a) by reinforcing sex-role stereotypes.¹¹⁰ Jeffreys criticizes both the designation of gender as a protected component of personality and the substitution of a liberal individualist paradigm of personal choice from a range of options in place of resistance to material conditions of oppression and the ideological constructs that reinforce them. She maintains that 'women do not occupy low status on the basis of their 'gender', i.e. aspects of appearance and behaviour, but on the

¹⁰⁵ Ali Miller, 'Fighting Over the Figure of Gender,' *Pace L. Rev.* 31:837 (2011), 844-849.

¹⁰⁶ Otto, *Queering Gender [Identity]*; see also above note 3.

¹⁰⁷ Otto, *Queering Gender [Identity]*, 316-318.

¹⁰⁸ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), 1-6, 128-149.

¹⁰⁹ Martha Nussbaum, 'The Professor of Parody,' *The New Republic Online*, Post Date: 28 November 2000, Issue Date: 22 February 1999, <http://www.tnr.com/index.mhtml>, also available at: <http://faculty.georgetown.edu/irvinem/theory/Nussbaum-Butler-Critique-NR-2-99.pdf>, last visited 1 December 2016; Sheila Jeffreys, *Unpacking Queer Politics* (Cambridge: Polity Press, 2003), 38-42.

¹¹⁰ Written Evidence by Jeffreys, see above note 3.

basis of sex.’¹¹¹ Gender in this view is inseparable from, if not identical to, ‘ideas about inferiority or superiority’ and ‘stereotyped roles for men and women,’ and needs to be eliminated and not multiplied.

Holtmaat takes a middle ground, supporting both gender identity and the separation between sex and gender, that remains unsatisfactory from both perspectives identified by Miller.¹¹² The kinds of stereotypes that lesbians need to be freed from are separated from those that are perceived as affecting presumptively heterosexual women.

The CEDAW Committee’s approach is closest to that of Holtmaat. As described above in section 5.1 and 5.2, the acceptance of male transgender persons as a disadvantaged group of women opens the door to conflict with the human rights of women and girls and appears to pre-empt challenge.

By separating out lesbians and bisexual women from ordinary women presumed to be heterosexual, as a separate sex/gender category joined to male transgender persons, CEDAW retains its heteronormative cast. This separation does a disservice to all women, not only by reinforcing stereotypes in the area of sexuality (‘compulsory heterosexuality’), but also by perpetuating a view of female identity and existence as inextricable from that of males and making invisible the specificity of relations between and among females in any area of life, while males are self-defined and viewed as the human norm.

A new gender perspective would view female existence as holistic and emphasize women’s relationships with other women, sororal and political and spiritual as well as potentially sexual if the women concerned are lesbian, and women’s bases of potential power. It would require women and the state to create new relationships, so that women’s protagonism is given space to develop culturally as well as socially and politically. The elimination of stereotypes would require the state to look within at its male-centric nature and to look outward to what women do. A state that treats women as the objects for its policymaking cannot stop rape and other harmful practices by individual men or communities, because it is complicit in disrespecting women.

6 Conclusion

¹¹¹ Id.

¹¹² Rikki Holtmaat, ‘Article 5,’ in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, ed. Marsha A. Freeman, Christine Chinkin and Beate Rudolf (Oxford: Oxford University Press, 2012), 141-167, 146-150.

The CEDAW Committee has a pivotal role to play in answering the challenges posed by gender identity. CEDAW is an asymmetric treaty that centers the human rights of women and girls, and that requires states parties to take measures to transform prevailing gender relations rooted in ideas of inferiority and superiority and stereotyped roles for men and women.

The approach taken by the Committee to date, which has accepted the view that male transgender persons are women and have the right to obtain legal documents reflecting their identity as women, endangers the human rights of women and girls in all dimensions of equality. Their formal equality rights are endangered when gender identity comes to subsume the category of sex in domestic law, leaving women unprotected as a class facing a particular axis of discrimination. Their substantive equality rights are endangered when statistics on the enjoyment of human rights may not distinguish reliably between female and male persons.¹¹³ Their transformational equality rights are endangered when women are denied the right to exercise self-definition and political protagonism as women to resist male domination and subordinated sex-roles, and when governmental policy prioritizes gender choice over dismantling, together with the women and men concerned, the constructs that sustain inequality. The Committee can and should adopt a both/and approach to sex and gender but this cannot be accomplished at the expense of women in general or at the expense of lesbians who are caught in the cross-hairs.

The Committee should first of all retreat from its view of gender identity as simultaneously intersectional with sex/gender and unilaterally altering and replacing sex/gender. Male transgender persons should not be considered women, nor should they be considered disadvantaged compared with women. They should be viewed as a disadvantaged group of males entitled to their own human rights protections in view of their gender identity and expression. Female transgender persons should be acknowledged under CEDAW, as a disadvantaged group of women whose gender identity and expression should be recognized without disrupting the language and concepts that name female biology as pertaining to women. Lesbians and other women who experience discrimination based on resistance to or divergence from gender stereotypes need to have their rights protected as part of sex and gender equality, and for their life paths to be honored equally with those of women who face discrimination in relation to their exercise of traditional roles. The Committee should address matters of stereotyping affecting both males and females, including transgender persons, as well as intersex

¹¹³ Statistics New Zealand/Tatauranga Aotearoa, *Gender Identity: Developing a Statistical Standard: Classifications and Standards: Standards and Design* (Wellington: Statistics New Zealand/Tatauranga Aotearoa, July 2014), <http://www.stats.govt.nz/methods/classifications-and-standards/classification-related-stats-standards/gender-identity.aspx>, last visited 1 December 2016 (includes survey of approach to gender identity in Australia, Canada, United Kingdom, United States, Germany, India, Nepal, Pakistan, Bangladesh).

persons, under Article 5(a) and refrain from according male persons the status of women or addressing their situation under other articles.

The Committee should reconsider its view, expressed in Concluding Observations, that states must reclassify transgender persons according to their nominated sex/gender identity. States should be encouraged to assess the necessity of indicating sex in legal documents and the possibility of alternative means to reliably distinguish between males and females for relevant purposes relating to women's and girls' human rights, such as data collection, access to sex-segregated spaces, and inclusion in measures designed for women. Such assessments should be mindful of the need to distinguish between sex and gender identity, so that if transgender persons wish to have their gender identities as such recognized this should be done in ways that do not confuse the two.

Policies with regard to body modification related to gender identity, and supports and services for those who experience gender dysphoria, should be developed with sensitivity to all relevant perspectives and information, including those of women and men who detransition and those who experience dysphoria and do not transition, and the gendered impact of both male supremacy and sexual assault on women's experiences of gender dysphoria. Relevant information includes research that challenges the narrative of transition as a necessary protocol for gender dysphoria, such as data showing similar rates of self-harm and suicidality among all teenagers including those experiencing gender dysphoria, and data on the numbers of children and teenagers experiencing dysphoria who go on to develop a lesbian or gay sexual orientation and identity rather than being transgender. CEDAW obligations with regard to women's equality, the transformation of gender relations and elimination of sex-role stereotypes need to be in ongoing dialogue with such policymaking. The aim should not be to shut down information and availability of supports and services needed by transgender persons, but to widen the discussion and ensure a gender perspective grounded in an understanding of women's human rights and female autonomy as fundamental.

The principle of female autonomy articulates a reason and necessity for CEDAW duality and asymmetry that can inform a renewed examination by the CEDAW Committee and other human rights mechanisms of the validity and merits of treating gender identity as a category that subsumes and displaces sex and gender while also intersecting it. This principle comprises all women and allows for their mutual recognition and debate, and for their exercise of autonomy within different contextualized circumstances, including in the context of cultures, politics and relationships they share with men. In this way it can potentially renew and reinvigorate feminism, and rescue feminism from the nihilism and erasure of identity politics.

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