Are human rights capable of liberation? The case of sex and gender diversity

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This article analyses the international human rights case law in the area of sex and gender diversity. While recognising the limitations in securing human rights through a solely legal process and the weakness in securing rights under privacy, the article argues that there are opportunities to further the human rights of people who are sex and gender diverse. In particular, claims based on the right to freedom of expression before the United Nations treaty bodies or the regional human rights courts would advance the human rights of people who are sex and gender diverse. Ultimately, arguments based on freedom of expression would enable people who are sex and gender diverse to challenge the structures of knowledge about sex and gender, as well as safeguard liberal and democratic principles on which human rights are founded. By ensuring that minority ideas, which are held by people in minority and majority communities alike, can challenge mainstream and oppressive public and social views, the liberating potential of human rights will be preserved.

Introduction

What are little girls made of?
Sugar and spice,
And everything nice,
That's what little girls are made of.

What are little boys made of?
Snips and snails,
And puppy dog tails,
That's what little boys are made of.

— Nursery rhyme

Stereotyping about sex or gender along male and female lines is one of the most pervasive and entrenched forms of discrimination. As demonstrated by this children's rhyme, knowledge about what constitutes male or female identities occurs

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virtually unconsciously. However, for people who are sex and gender diverse,[1] this discrimination, even if unintentional, renders their identity and experience as deviant and socially unacceptable.

International human rights law has provided only notional successes in the struggle for dignity for people who are sex and gender diverse. Although people who are sex and gender diverse are entitled to the protection of international human rights laws, recognition of their rights has progressed gradually and has not comprehensively challenged mainstream knowledge about sex and gender. The human rights of people who are sex and gender diverse will not be realised until the discrimination implicit in that knowledge is exposed and held to account.

This article will begin with a short analysis of the way that sex and gender are understood before reviewing the international human rights case law in the area of sex and gender diversity. The article will then analyse the successful and unsuccessful cases in the context of the movement for securing the entirety of human rights for people who are sex and gender diverse. While recognising the limitations in securing human rights through a solely legal process, the article argues that there are opportunities to further the human rights of people who are sex and gender diverse through claims based on the right to freedom of expression before the United Nations treaty bodies or the regional human rights courts.

Arguments based on freedom of expression would better enable people who are sex and gender diverse to have their rights recognised without having to placate existing legal, medical and social knowledge and definitions about sex and gender. Ultimately, arguments based on freedom of expression would enable people who are sex and gender diverse to challenge the structures of knowledge about sex and gender. Until these structures of knowledge are challenged, they will continue to plague the realisation of all rights by people who are sex and gender diverse.

Defining sex and gender

There are various legal, social, medical and scientific opinions and theories about what constitutes sex and what constitutes gender (Fausto-Sterling 2000; Gooren

1 This article uses the phrase 'sex and gender diversity' to refer to the experience of sex or gender identity beyond biological and binary notions of male and female, man and woman. Some authors refer to people who experience sex and gender diversity as transsexuals, transgenders or intersex, or simply refer to issues of gender identity. I advocate 'sex and gender diversity' as a term because it better celebrates the diversity in sex and gender identities, rather than defining particular categories of people. This article will use the word 'transsexual' in relation to decisions of courts if that is the precise language used by the court.

2006; Grenfell 2003; Hausman 1995; Shaw and Ardener 2005; Butler 1990). This article does not purport to engage critically with each of the different opinions about sex and gender knowledge; however, it is important to consider how the very knowledge about sex and gender discriminates against people who are sex and gender diverse. Sex is commonly viewed as a fixed concept that is biologically determined by factors such as physical attributes, chromosomes, genitals, gonads, hormones and 'brain-sex'. However, not all of these factors are accepted as being biologically determined. There are different views about which of these specific factors actually biologically determine sex. Indeed, it is a common community attitude that a person's sex can be determined by sole reference to their genital makeup. The biological definition of sex usually defines a person as male or female. However, there are also people who are born not exclusively male or female and are intersex. The phrase 'sex diversity' recognises and celebrates the complete spectrum of sex identity and expression.

When sex is defined as biologically determined, gender is often viewed as being socially constructed. From this perspective, gender can be determined by how a person looks, dresses or acts. People can express a gender identity that is masculine, feminine or something else entirely. Gender identity does not necessarily match with sex. For example, while most females will have a gender identity that is feminine, some males also have a gender identity that is feminine. The phrase 'gender diversity' as a term recognises and celebrates that all people express a gender identity and that gender identity and expression are not necessarily linked to a person's sex.

Judith Butler has challenged this dichotomy of sex as a biological determination and gender as a social construction and advocates a definition of sex that is based on social and cultural factors (Butler 1990). This perspective collapses the distinction between sex and gender by arguing that sex is historically and politically specific. This perspective sees sex as a variable concept and gender diversity is built into the very nature of sex. Despite this lack of consensus over the exact meaning and definition, sex and/or gender is an important part of a person's personal identity and personal expression. This article seeks greater opportunities for people who are sex and gender diverse to self-identify and express their sex and/or gender and promotes a role for human rights in liberating the communication of knowledge about sex and gender from community attitudes and an overbearing medical discourse.

The development of human rights jurisprudence relating to sex and gender diversity

People who are sex and gender diverse are entitled to the same human rights as everyone else. This simple statement might seem unremarkable. However, the

simplicity of the statement belies the fact that people who are sex and gender diverse experience great difficulty and opposition in being treated with dignity, respect and equality (International Commission of Jurists 2006; Amnesty International 2001). One of the reasons for such difficulty is that people who are sex and gender diverse — unlike women[2] people of different races,[3] children and young people,[4] and people with disabilities[5] — do not have a specific human rights treaty that relates the application of human rights to their particular needs and situations (O'Flaherty and Fisher 2008, 207). Although the mere existence of a human rights treaty does not ensure that people are treated with dignity and respect, these human rights treaties do create normative values that guide and direct social change. In addition, these laws can be used by people to seek redress for violations of their human rights. Without this specific and formal level of recognition, people who are sex and gender diverse continue to struggle in having their rights respected. Nonetheless, like all people, they can rely on existing human rights treaties. In particular, people who are sex and gender diverse can hold states bound to the human rights obligations in the two general human rights treaties — the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

One of the difficulties in relying on the ICCPR and ICESCR is that these general principles require application in circumstances that are unique to people who are sex and gender diverse. This creates additional problems for these people in advancing their human rights because of the perception that they transgress socially accepted norms about the human condition. For example, many of the human rights issues concerning sex and gender diversity arise out of rigid adherence to binary notions of sex and gender by social and political institutions. Society has acknowledged certain human rights for 'men' and 'women', but not necessarily for people who transgress those categories. This view relies on an incomplete picture of the human condition where people are either male or female, and those categories are determined by physical genital anatomy at birth. In reality, all human rights require some level of customisation to the particular needs of an individual person. For human rights to have a meaningful impact, the boundaries of human rights must be open to new assertions about what is minimally necessary to live a dignified life as a human (Smith 2004, 414). For example, the right to health will require a government to implement different policies and services to ensure this right is enjoyed by people who are male, female, older, younger or with disabilities. Similarly, for a person who is sex and

2 Convention of the Elimination of All Forms of Discrimination Against Women.

3 International Convention for the Elimination of All Forms of Racial Discrimination.

4 Convention on the Rights of the Child.

5 Convention of the Rights of Persons with Disabilities.

gender diverse to experience all civil, political, economic, social and cultural rights requires particular recognition of the experiences of people who are sex and gender diverse. People who are sex and gender diverse do not usually have their specific needs recognised. At best, a person may be able to access their human rights as a man or a woman, but that person will need to satisfy institutional definitions of man or woman (Cowan 2005, 72).

It is this last point that also demonstrates the difficulties or unattractiveness for people who are sex and gender diverse in pursing human rights through the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) or the Convention on the Rights of Persons with Disabilities (CRPD). One of the purposes of CEDAW is to ensure that women are treated equally to men. The difficulty for people who are sex and gender diverse is that the discrimination they suffer is not demonstrated by comparing the situation of men and women, but in their ability to express and identify as a man or a woman. It is also potentially possible for people who are sex and gender diverse to place their experience as one of disability in order to pursue their human rights. While pursuing human rights for people who are sex and gender diverse under the CRPD may have some benefits in terms of making clear that in some instances medical treatment must be provided, some people who are sex and gender diverse reject the notion that their identification and expression be seen as a medical condition (Australian Human Rights Commission 2009). Since the CRPD is still in its infancy, it will be interesting to watch the extent to which people who are sex and gender diverse choose to use those provisions to advance their realisation of human rights.

The Yogyakarta Principles sought to address these concerns. Confirming the application of international human rights law to people who are sex and gender diverse was the predominant purpose of the Yogyakarta Principles (O'Flaherty and Fisher 2008, 233), although the precise terminology used to describe the principles is the application of international human rights law in relation to 'sexual orientation' and 'gender identity'. The Yogyakarta Principles were adopted in March 2007 by a group of human rights experts. They provide specific guidance on how already existing international human rights treaties should be interpreted in relation to the protection of 'sexual orientation' and 'gender identity'. The Yogyakarta Principles do not create a new set of rights or a new treaty and are not legally binding themselves. Nonetheless, they draw some authority from the calibre of experts who adopted the principles. These experts included a former United Nations High Commissioner for Human Rights, several current or former United Nations special rapporteurs or treaty body members, judges, academics and activists (O'Flaherty and Fisher 2008, 233). The Yogyakarta Principles have been endorsed by several states in sessions of the Human Rights Council (O'Flaherty and Fisher 2008, 233), but are yet to be relied upon in international human rights litigation.

The simple message of the Yogyakarta Principles is that people who are sex and gender diverse are entitled to all human rights. The Yogyakarta Principles also confirm that people who are sex and gender diverse have always been entitled to all human rights upon effect of relevant international human rights treaties. One benefit of this approach over advocating a completely new treaty to cover people who are sex and gender diverse is because of the difficulties in obtaining political will to support the claims of this minority group in treaty form. Further, highlighting the humanness of people who are sex and gender diverse as the prerequisite for already being entitled to human rights makes an important statement about inclusion. Despite the claim of the Yogyakarta Principles, the international human rights jurisprudence concerning sex and gender diversity demonstrates that people who are sex and gender diverse have had limited success in their difficulties being recognised as human rights breaches. The success has been limited mainly because of the overwhelming focus by human rights courts to view sex and gender diversity issues though the lens of privacy rights and a failure to acknowledge equality rights.

In addition, human rights jurisprudence for people who are sex and gender diverse remains in its infancy. The lack of progress for people who are sex and gender diverse is partly illustrated by the lack of international legal attention to these issues. The United Nations Human Rights Committee is yet to consider a human rights complaint relating to a person who is sex and gender diverse. The African Court of Human Rights and the Inter-American Court of Human Rights also have never specifically issued judgment in a case relating to a person who is sex and gender diverse. The European Court of Human Rights (European Court) has specifically considered the rights of people who are sex and gender diverse in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). This article does not seek to understand why human rights legal processes have not been better utilised by people who are sex and gender diverse. Rather, it seeks to review and analyse the gradual process of legal acknowledgement of discrimination and violations experienced by people who are sex and gender diverse and offers suggestions to advance advocacy for the realisation of all human rights for people who are sex and gender diverse. Consequently, the article relies heavily on the European Court jurisprudence.

European Court jurisprudence

Eleven cases have been considered by the European Court concerning sex and gender diversity. The majority of these cases concern the typical human rights issues faced by people in the developed world who are sex and gender diverse: recognition of sex

identity; the right to change the sex noted on a birth certificate; and the right to marry in the new sex identity (Whittle 2002, 188).

The first case deemed admissible by the European Court was the case of *Van Oosterwijck v Belgium* in 1980. Although the European Court was presented with evidence about the applicant's desire to be legally recognised as male, the failure to exhaust domestic remedies by the applicant meant the European Court was unable to take cognisance of the merits of the case.

In 1990, the judgment of the first case determined in full by the European Court was issued in the case of *Rees v United Kingdom*. In this case, the applicant claimed a breach of the right to private life under Art 8 of the European Convention. In *Rees*, the applicant had undergone surgical reassignment so his body conformed more readily to a masculine appearance, but he was unable to amend the sex noted in the register of births or obtain official documentation noting a new gender of male. The European Court held in *Rees* that there was little common ground between the states to the European Convention on whether persons who are transsexual could obtain amended official documents noting a new gender and, therefore, a wide 'margin of appreciation' must be afforded to states in considering this matter (Hudson J at [36]). The margin of appreciation doctrine is used by the European Court to enable judges to take into account cultural, historical and philosophical contexts of states (Benvenisti 1999, 843). A similar case followed with *Cossey v United Kingdom*, decided in 1990. In *Cossey*, the applicant sought to have her sex and gender identity legally recognised for the purpose of marriage. Relying on its decision in *Rees*, the European Court found that there was no breach of Art 8 (Hudson J at [36]). In addition, the applicant alleged a breach of Art 12 of the European Convention, which concerned the right to marriage. The European Court also found that there was no breach in relation to Art 12.

In 1992, the first human rights victory for people who are sex and gender diverse was won. In *B v France*, the European Court found that the refusal of the French government to allow a person who had undergone surgical reassignment to change her legal sex and name constituted a breach of the right to private life as established by Art 8 of the European Convention. The court considered that due to the increasing number of official documents indicating sex, a transsexual could not cross a frontier, undergo an identity check, or carry out one of the many transactions of daily life where proof of identity is necessary, without disclosing the discrepancy between their legal sex and their apparent sex. The court relied on the fact that attitudes had changed and that science had progressed understanding about sex identity and expression, demonstrating the reliance of law on attitudes or medical knowledge about an individual person's identity. As a consequence, the court recognised a breach

of the right to private life. Despite this apparent legal victory, the French government simply refused any medical reassignment treatment in France which was required to legally identify as another sex, refused to recognise treatment performed abroad, and insisted that transsexual people apply to the French courts every time they wished a piece of documentation to be changed (Whittle 2002, 188). The French government's refusal to acknowledge the decision in practical terms demonstrates the difficulty in challenging ingrained knowledge about sex and gender.

Ten years later, another legal victory was recorded in the cases of *Goodwin v United Kingdom,* 2002 and *I v United Kingdom,* 2003. *Goodwin* concerned a married person who, after marriage, transitioned from a male identity to a female identity and sought to have her documents reflect her female identity. The current law of England at the time required that a person undergo surgery to physically alter their body to appear more like the sex in which the person wished to identify. In this case, the applicant had undergone such surgery, but was prevented from amending her official documents to reflect her sex because she was married. In *Goodwin*, the European Court reiterated its opinion in *B v France* that the refusal of the state to allow the amendment of the birth certificate of the post-operative transsexual constituted a violation of Art 8 of the European Convention. The court also found that the additional requirement that a person be unmarried to change their official sex identity constituted a violation of the right to marry established by Art 12 of the European Convention. The court noted that serious interference with private life can arise when domestic law conflicts with an important aspect of personal identity. In this case, the court recognised the stress and alienation experienced by people who are sex and gender diverse arising from a discordance between gender presentation in society and the status imposed by law. In its judgment, the court held that a conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

In *Goodwin*, the court noted that transsexualism has gained wide international recognition as a medical condition known as gender identity disorder, which potentially lends itself to understanding sex and gender diversity more as a physical differentiation to sex in the pre-natal brain than as a psychological issue. The court also noted that the current state of medical and scientific knowledge does not provide determining clarity on sex and gender issues. Such statements are significant because they demonstrate the court's desire to use science and medicine as a legitimating source of knowledge, even if to promote the idea of a lack of true knowledge about sex and gender diversity. While medical knowledge is used by the court to demonstrate the reality of sex and gender diversity and to challenge prejudicial social and institutional views, reliance on medical knowledge about sex and gender subjugates the individual's freedom and autonomy in self-determining their identity.

Despite the legal success in *Goodwin*, as in *B v France*, the case has not led to the comprehensive political and social change within the United Kingdom required to more fully recognise the dignity of people who are sex and gender diverse. Since *Goodwin*, the United Kingdom has not changed its laws to allow a married person who has transitioned from one sex to another to obtain documents in their new sex. However, as a result of *Goodwin*, the United Kingdom's *Gender Recognition Act 2004* was enacted to better recognise people who are sex and gender diverse. Under ss 4 and 5 of the *Gender Recognition Act*, a person is still required to annul their marriage if they wish to change their legal sex identity permanently. However, a couple is able to effectively transfer their marriage to a civil partnership recognised under British law. Despite this reform, the ability to preserve marriage and change official sex identity remains a key issue for people who are sex and gender diverse. Since the enactment of the *Gender Recognition Act*, applicants in the cases of *Parry v United Kingdom*, 2006 and *R and F v United Kingdom*, 2006 have brought cases before the European Court based on alleged violation of rights due to the forced dissolution of marriage. The court determined both those applications inadmissible as being manifestly ill founded because the United Kingdom was entitled, under the margin of appreciation doctrine, to consider how to regulate the effects of a change in gender in the context of marriage, and did not engage fully with the issues raised in those cases.

Two of the most recent and successful cases determined by the European Court concern *Van Kuck v Germany*, 2003, and *L v Lithuania*, 2007. These cases looked beyond the legal recognition of identity issues that had been considered in previous cases. Both cases concerned health aspects of sex and gender diversity; however, like previous cases, both were won by relying on Art 8 of the European Convention. In *Van Kuck*, the European Court considered the case of a transsexual woman whose health insurance company had denied her reimbursement for costs associated with sex reassignment surgery. The decision of the health insurance company had been upheld by German civil courts. The court found violations of the right to a fair hearing under Art 6.1 and of the right to private life under Art 8 of the European Convention. The court held that the German civil courts had failed to respect the applicant's freedom to define herself as a female person, which was one of the most basic essentials of self-determination. The court also stated that the essence of the European Convention is to respect human dignity and human freedom and that protection is given to the right of transsexuals to personal development and to physical and moral security. *Van Kuck* demonstrates the progression of the European Court's jurisprudence in terms of increased sensitivity and recognition of issues concerning people who are sex and gender diverse.

This judicial recognition was also applied in *L v Lithuania*, where the European Court considered that the state was required to provide surgery so a person could complete

surgical reassignment and be registered with the appropriate sex identity. These cases positively demonstrate the evolution of the European Court in terms of recognising and providing relief to sex and gender diverse applicants. Importantly, the cases also demonstrate that it is not sufficient to enable people who are sex and gender diverse to live a private dignified life as a legal recognised man or woman, but that public institutions need to consider the specific needs and support required by a person who is sex and gender diverse prior to and after official recognition. The evolution is one that moves from recognising an individual's actions to fit into legal categories of male/man or female/woman, to the role of a state in supporting a person to undertake those actions.

Aside from the right to private life, many applications brought before the European Court by people who are sex and gender diverse have also alleged a breach of the right to equality and freedom from discrimination under Art 14 of the European Convention, including in the cases of *Goodwin*, *Van Kuck*, *I v United Kingdom*, *L v Lithuania*, *Grant v United Kingdom,* 2006, *Sheffield and Horsham v United Kingdom,* 1998 and *X, Y and Z v United Kingdom,* 1997. In these cases, the European Court has either not found breaches of the right, or not considered it necessary to consider Art 14. In *Goodwin*, *Van Kuck*, *I v United Kingdom* and *Grant*, the court provided relief to applicants by finding violations of the right to private life under Art 8.

One case in which the court specifically considered Art 14 was *X, Y and Z v United Kingdom*. This case concerned a transsexual man, X, his partner and her birth child, who had been conceived by donor insemination. The family had been refused permission to register the husband as the father of the child because he was not considered a biological male. Although the European Court found the right to privacy was applicable in this case, a breach was not found because the court determined that there was little common ground by member states of the Council of Europe with regard to parental rights for transsexuals and that states must be accorded a wide margin of appreciation. The court also held that transsexuality raised difficult moral, scientific and social issues (Whittle 2002, 192). The majority judgment of the court did not completely address Art 14. However, Judge Foighal's dissenting opinion did refer to Art 14 and found the United Kingdom had breached that Article by treating X differently (Foighal J at [10]).

The case law of the European Court demonstrates that human rights law regarding sex and gender diversity remains in its infancy and relatively unchartered. Nonetheless, the European Court's jurisprudence has gradually evolved to recognise different circumstances of discrimination and violations of rights. In these instances of finding violations of the European Convention, the European Court has largely relied on Art 8 concerning a person's right to private life.

Importantly, all cases demonstrate the heavy reliance of law on other norm-creating institutions (such as social, moral or scientific knowledge) to create legitimacy or to argue consensus for a human rights norm. While the European Court has sought to promote the human rights of people who are sex and gender diverse in some cases and believed that external legitimacy of those decisions was required, this represents a missed opportunity for the court. Human rights laws should be able to determine the legality and ethical considerations of contentious moral, scientific or social issues without needing to rely on external consensus or resolution about those contentious issues. There would be no role for human rights law if it only affirmed a majority viewpoint. Rather, human rights law should be able to challenge the legitimacy and legality of accepted or contentious mainstream knowledge — including about sex and gender — when claims about discrimination, prejudice and violence are made.

Critical analysis of human rights jurisprudence in relation to people who are sex and gender diverse

An overview of sex and gender diversity jurisprudence emerging from the European Court demonstrates that, despite successes, there are significant limitations and inadequacies in using legal processes to advance human rights. Analysis of the jurisprudence reveals, positively, that situations once considered not to raise human rights issues, such as in *Rees* and *Cossey*, have later been considered by the European Court as human rights violations, demonstrated in the case of *Goodwin*. Although in several cases the European Court has found human rights violations and has provided some gains for people who are sex and gender diverse, the normative value of those gains has been curtailed by the court's reliance on the right to private life. In addition, the margin of appreciation doctrine and the need for consensus before rights can be acknowledged demonstrate the inadequacy of securing human rights protection for misunderstood or unpopular minorities.

The right to private life or privacy is undoubtedly a fundamental human right recognised in Art 17 of the ICCPR as well as the European Convention. Nonetheless, the right can operate in such a way that it obscures and diminishes the personal experiences and identities of violated people. Wayne Morgan has written a comprehensive analysis of some of the negative consequences in advancing human rights in relation to sexual orientation through the lens of privacy by the United Nations Human Rights Committee (Morgan 1994, 740). Although sex and gender raise different issues to sexuality — mainly because sex and gender diversity is focused internally and concerns a person's self-view, whereas sexuality is more externally focused on the object of desire — people who are gay and lesbian, and people who are sex and gender diverse, often face similar discrimination because of rigid views about sex, gender and sexuality by social and political institutions. These

views make possible direct and indirect discrimination against all those who are not heterosexual men or heterosexual women. People who are sex, gender or sexuality diverse are encompassed by this discrimination. Many of the consequences identified by Morgan in relation to sexual orientation human rights jurisprudence are therefore also true for sex and gender diversity jurisprudence.

In his analysis, Morgan argues that sexuality privacy cases do not challenge the power relations in society that set up dichotomies about what is normal or natural sexual orientation (Morgan 1994, 751). He explains that governments are sources of power which influence and normalise populations through a vast variety of popular and institutional discourses and practices about sexuality. According to Morgan, privacy cases do not recognise the very public ways that state institutions participate in demonising sexual difference and legitimate discrimination and violence. In addition, privacy cases, by focusing on what 'happens in the bedroom', effectively relegate the experience of people who are gay or lesbian to the private realm and prevent homosexuality from having a public face. Privacy is a concept that legitimates boundaries between different forms of regulation — public as the sphere of government regulation and private as the sphere of personal freedom. Shaping human rights discourse through a lens of privacy implies that the issues relating to sexuality have no public ramifications. Naming sexuality as an issue of privacy reinforces the view that sexuality — especially diverse sexuality — is taboo and not to be spoken about. This effectively disempowers people who are gay or lesbian as their identity has no acceptable public face (Morgan 1994, 754). Without an acknowledgement of public ramifications of a particular issue, governments do not have to respond to arguments that public, social and political institutions are partly responsible for condoning discriminatory ideas and norms. In the case of sex and gender diversity, it is particularly ironic that diverse sex or gender identities have been recognised through the right to privacy, but the determination and identification of an individual's sex remains firmly a public issue (Bird 2001, 14). The concerns identified by Morgan demonstrate the inadequacy of advancing human rights through the lens of privacy, especially because of the way states have sought to control issues related to sex and gender diversity. This article does not argue that states have no role regarding sex and gender diversity issues. To the contrary, states have an important role in giving sex and gender diversity a 'public face' by capturing data about their population's identity so that they can develop appropriate laws, policies, practices and services. However, states should not have a role in the determination of identity and expression.

Furthermore, not only do sex and gender diversity privacy cases diminish necessary public attention to the issue, but the very nature of the right to privacy is limiting in itself. In deciding the extent of the rights to private life in cases concerning sex

and gender diverse people, the European Court has considered the extent to which the right requires positive obligations on behalf of the state or merely negative obligations that the state should not interfere (Whittle 2002, 190). Although the court has considered that the right does give rise to positive obligations, in *Cossey* the court considered that positive obligations in relation to privacy are subject to a wide margin of appreciation by states in order to strike a balance between the interests of the general public and the interests of the individual. The margin of appreciation doctrine is a concept employed by the court which allows it to take into account that signatory states will interpret the European Convention differently (Benvenisti 1999, 843). Under the doctrine, judges are obliged to take into account the cultural, historical and philosophical contexts of states.

The margin of appreciation doctrine reflects a broader concept in human rights law — that states are only bound to principles by which they have voluntarily agreed to be bound. For example, in the case of *Parry*, the court, in determining the admissibility of the application, considered that social change does not necessarily affect the legality of the fundamental human rights to which parties have previously agreed. In *Parry*, the court held that although a number of states party to the European Convention had extended marriage to same-sex partners, this reflected their own vision of the role of marriage in their societies and did not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the states in the European Convention in 1950. In lieu of precise and particular enumeration of what a human right entails, the European Court has specified that it must strike a fair balance between the general interest of the community and the interests of the individual.

This concept of legal human rights relying on consensus and 'fair balance' is particularly problematic for people who are sex and gender diverse because they transgress the social expectations about the boundaries of male or female. A judge of the European Court recognised this view in *XYZ*, stating that sex and gender diversity issues raise 'scientific, moral and legal questions' of which there is no consensus. Yet, when human rights are linked to notions of majority consensus, the liberating potential of human rights is diminished and the promise of universalism compromised (Benvenisti 1999, 843). Human rights are most needed by minorities who are unable to garner public opinion and apply political pressure to have discrimination against them addressed. Although the foundation of human rights law relies on states voluntarily accepting such obligations, states must recognise the diversity of humanity to which those rights relate. This is especially important to people who are sex and gender diverse, who are an often misunderstood and unpopular minority (Benvenisti 1999, 848–51).

The difficulties faced by people who are sex and gender diverse in gaining mainstream consensus about their rights is demonstrated by the European Court's failure to recognise all claims made under Art 14 concerning the prohibition of discrimination of the European Convention. One of the problems demonstrated by the case law in using Art 14 is that although sex is listed as a prohibited ground, it is used in a way that only recognises discrimination of biological women when compared to the treatment of biological men. Further, the list of prohibited grounds of discrimination under Art 14 is a non-exhaustive list and so the court is able to recognise other forms of discrimination, such as discrimination based on sex and/or gender diversity, identity or expression. Prominent academic and advocate Stephen Whittle argues that in order for their rights to progress, people who are sex and gender diverse have sought to claim a new category of civil status as something other than male and female (Whittle 2002, 192), so that their discrimination and specific needs can be addressed. However, the failure of the court to recognise any Art 14 cased demonstrates the court's unwillingness to recognise such a civil status category.

In response to the unwillingness of the European Court to specifically acknowledge people who are sex and gender diverse as a separate category of persons to whom equality applies under Art 14, the International Lesbian and Gay Association (ILGA) made submissions to the Steering Committee on Human Rights of the European Council in 1999 (ILGA 1999). As part of the European's Council review of Art 14, the ILGA drew attention to the failure of international human rights laws to offer explicit and specific protection to people who are sex and gender diverse. The ILGA argued that a ground of 'gender identity' which would include, but not be limited to, male and female forms of identity should be included in Art 14. The submission acknowledged that there may not be international consensus that 'gender identity' be treated like sex or race, but there is a growing awareness of, and a trend towards acknowledging, the extent of discrimination faced by people who are sex and gender diverse. The submission also referred to the fact that the European Convention was adopted at a time when issues relating to sex and gender diversity were only just emerging in medical discourse. As with the court's reliance on medical discourse, the ILGA submission uses medicine and science to legitimate its claim. It is interesting that medical knowledge is seen as neutral or de-politicised and as being able to reduce the strength of adverse social or moral norms in a way that law is unable to do.

The push for explicit recognition of equality in the European Convention for people who are sex and gender diverse is understandable. However, the European Court's interpretation of Art 14 in sex and gender diversity cases demonstrates that seeking to categorise people in human rights law will not necessarily be accepted by the court without consensus and mainstream approval. A further difficulty with articulating

categories of people to whom human rights relate is that categories can become outdated and exclude people who should, by default, already have access to the entirety of human rights. To seek to continue to add future categories of persons once consensus has been reached on the status of those people as human for the purpose of rights greatly limits the liberating potential of human rights. This also amounts to a legal fallacy, because certainly in the case of people who are sex and gender diverse, the issue is the need not for a new category of humans, but for the recognition of new ideas about humanity and human personality. This position is supported by the goal of the Yogyakarta Principles to confirm that people who are sex and gender diverse do not need new rights because they already are entitled to all human rights (O'Flaherty and Fisher 2008, 233). This is also demonstrated by the move away from the term of 'gender identity' as a category. Gender identity as a category for the purposes of equality is not as broad as it needs to be to adequately protect all people who are sex and gender diverse — a position which is advocated by the International Gay and Lesbian Human Rights Commission (IGLHRC). The IGLHRC in its *Statement of Gender Expression and Human Rights* prefers the term 'gender expression' to 'gender identity' because the former highlights a wider variety of human rights violations that are committed on account of the way in which people express themselves socially in terms of gender, regardless of their identity (IGLHRC 2007). Changing the category from gender identity to gender expression does not necessarily solve the problem that these categories can and will become outdated and fail to protect the human beings who are already entitled to human rights protection without discrimination based on any status under Art 2 of the ICCPR and ICESCR. Therefore, it is more appropriate that the knowledge that people who are sex and gender diverse communicate through their lived experience be protected under freedom of expression laws.

Using freedom of expression to liberate people who are sex and gender diverse

Freedom of expression is a fundamental human right found in Art 19 of the ICCPR. The right can be considered the lynchpin of societies because it ultimately concerns the exchange of ideas and the development of knowledge (Steiner, Alston and Goodman 2008, 640). The Office of the High Commissioner for Human Rights has also recognised that the effective exercise of the right to freedom of expression is an important indicator of the level of protection of other rights (Office of the High Commissioner for Human Rights, 2005). Although freedom of expression cases brought before the United Nations Human Rights Committee all consider traditional forms of media, such as press or books, or expression issues related to association or protest, this does not mean that sex and gender diversity issues cannot be seen in terms of freedom of expression.

Freedom of expression is ultimately about the exchange of ideas in any media, as articulated in Art 19.2 of the ICCPR. In General Comment No 10, the United Nations Human Rights Committee confirms that a person can express ideas in any media of choice. Although the Human Rights Committee does not specifically refer to the body as a media site, arguably the body is the most important medium for exchanging ideas concerning the realisation of the individual human personality, and for the development of personal and social knowledge (Bird 2001, 55). If the body can be considered as a media site, then people who are sex and gender diverse can be seen to communicate and express important ideas about sex and gender identity and expression. Such ideas and knowledge should be protected by the human right of freedom of expression and can add considerable value to the struggle to liberate sex and gender diversity from a disapproving or unaware majority and their discriminatory social and moral norms.

Freedom of expression and sex and gender diversity have been considered once by the European Commission on Human Rights in its decision concerning the admissibility of an application by Paul Kara in 1998. *Kara v United Kingdom* concerned a man who did not desire to formally identify as a woman, but sought to express himself from time to time through feminine dress and attire. The complaint arose out of Kara's employer's direction that his feminine dress was inappropriate for the workplace. In that case, the European Commission on Human Rights found that the right to freedom of expression under Art 10 of the European Convention can include the right for a person to express his ideas through the way he dresses. However, the Commission also found that it was not established on the facts that the applicant had been prevented from expressing a particular opinion or idea by means of his clothing. According to the judgment, the applicant submitted his complaint regarding Art 10 in terms of being 'prevented from expressing himself as he wished'. In considering the extent of freedom and liberty, the Commission noted that Kara's liberty was not completely curtailed, as he was at liberty to dress how he liked when not at work. The application was rejected as being manifestly ill founded within the terms of the European Convention. This case demonstrates the impact of power on shaping knowledge. In *Kara*, the employer is placed in a powerful position where the employer has control over the way Kara presents and expresses himself and therefore over the way that ideas and knowledge about sex and gender are communicated. Again, the difficulties for people who are sex and gender diverse in challenging the multiple sources of power that control knowledge about sex and gender are apparent.

Kara does usefully demonstrates that dress can be considered as a form of expression. It is my argument that not only dress but all forms of gender presentation and expression should be considered media for the purpose of freedom of expression. It is plainly obvious by the discrimination and violence faced by people who are sex and

gender diverse that personal expression does signify important and controversial ideas about sex and gender roles within society (International Commission of Jurists 2006; Amnesty International 2001). Recognition of those ideas and the way they challenge mainstream knowledge about sex and gender should be safeguarded and protected by the human right to freedom of expression. Future claims based on freedom of expression could more expressly make this point and pursue the development of human rights law in the area of sex and gender diversity. In particular, Article 19, an organisation dedicate to freedom of expression, has encouraged issues of sex and gender diversity to be progressed through freedom of expression. In a 2008 statement, Article 19 recommended that states ensure that no one is denied the right to express sexual or gender identity, information or ideas through speech, deportment, dress, bodily characteristics or choice of name in accordance with existing human rights obligations (Article 19 2008).

This emerging interest among human rights advocates to using freedom of expression to further advance the human rights of people who are sex and gender diverse should be supported. Freedom of expression is particularly important for the cause of sex and gender diversity because it shifts the focus from fitting people into binary categories of sex and gender towards greater acknowledgement of medical and biological realities, as well as greater respect for choice. Therefore, the problem is reframed not as one of a minority seeking to upend society, but as one of society upending a certain group of people because they do not fit with a majority perception (Livingston 2004). Reframing the problem in this way recognises the freedom and liberty of a person in determining their identity. This is an important shift because issues relating to people who are sex and gender diverse are often medicalised in a way that is disempowering. For example, state laws which require medical intervention and genital surgery before a person can identify as another sex have been considered legitimate in some European Court decisions and in decisions by the European Commission of Human Rights.[6] Therefore, medical and political institutions have almost total control in determining the official identity of a person. In addition, 'transsexualism' and 'gender identity disorder' are medical conditions which explain the experience of people who are sex and gender diverse. These medical conditions remain in the *Diagnostic and Statistical Manual of Mental Disorders,* published by the American Psychiatric Association (Istar Lev 2005, 35). When cross-dressing or presenting as another sex is deemed as a mental illness, it sends a strong message to society about normal and abnormal male and female behaviour. Certainly in the past, this medical discourse has resulted in tragic social experiments where medical practitioners have attempted to cure people experiencing these conditions of the recognised medical affliction (Grennberg 2006). This is not to say that there is

6 See *Roetzheim v Germany*, 1997.

not a legitimate role for medical treatment in the area of sex and gender diversity — including, in certain circumstances, surgical reassignment or psychological treatment of people who are sex and gender diverse. However, what must be avoided is the hegemonic prescription of the experience of sex and gender diversity by the medical profession alone. It is useful to remember that homosexuality was for many years also included in the *Diagnostic and Statistical Manual of Mental Disorders* before it was recognised as a normal, even if minority, expression of sexuality.

Freedom of expression can also solve some of the problems experienced in advocating for a new category of equality based on gender identity. Freedom of expression is a right to which people who are sex and gender diverse are already entitled. Although — under Art 19(3) of the ICCPR and Art 10(2) of the European Convention — the right can be limited to protect public morality, it is not legitimate to restrict freedom of expression simply on the ground that it might shock, offend or disturb others (Article 19 2008). Most importantly, freedom of expression is capable of covering the entire spectrum of people who are sex and gender diverse because expression, as a concept, is broader than identity. The IGLHRC has expressed this sentiment in its policy on gender expression and human rights (IGLHRC 2007). One reason for the IGLHRC's preference for advancing gender expression over gender identity is because gender identity can be narrowly construed as legal recognition which does not capture all the discrimination faced by people who are sex and gender diverse. For example, the majority of all admissible cases of the European Court deal with legal recognition issues of obtaining appropriate documents or official recognition by the state. However, as several reports have made clear, people who are sex and gender diverse experience employment discrimination, violence, harassment and abuse (International Commission of Jurists 2006; Amnesty International 2001; Australian Human Rights Commission 2009). Since sex and gender expression is eminently social in nature and constitutes a fundamental part of the way in which people are perceived and the way in which people perceive others, freedom of expression is the most appropriate path to illuminate these issues in the legal process. In this way, freedom of expression can expose how social and institutional norms and ideas negatively affect people and implicitly condone discrimination against people who are sex and gender diverse. Importantly, freedom of expression will promote understanding and tolerance of the complete diversity of sex and gender and the related social, medical and surgical requirements.

Conclusion

In this article, I have made reference to the legal subjugation of sex and gender diverse people by relegating their human rights struggles to the realm of privacy. In order to begin to overcome the ongoing denial of basic human rights to people

who are sex and gender diverse, it is important that governments and societies are aware of how the very concepts of sex and gender oppress people who transgress or challenge those boundaries.

The article advocates that freedom of expression provides an opportunity for people who are sex and gender diverse to liberate the understanding of sex and gender in the context of securing their human rights. Ultimately, greater utilisation of freedom of expression laws will challenge power, ideas and knowledge about sex and gender — not just in human rights law, but in medical texts and playground rhymes too. It is these latter hidden sources of power which are the root causes of many of the difficulties faced by people who are sex and gender diverse.

It is not snips, snails, sugar or spice that should determine a person's sex or gender, but rather deep respect for the personal experience and choices, and the inherent dignity, of all humans. Human rights law provides a discourse and legal process where diverse experiences of sex and gender should flourish. The liberation of sex and gender diversity through freedom of expression would not only redress the wrongs done to those individuals who are sex and gender diverse, but also preserve the liberating potential of human rights by ensuring that minority ideas — which are held by people in minority and majority communities alike — can challenge mainstream and oppressive public and social views. ●

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