

Finding Sexual Minorities in United Nation's Sustainable Development Goals: Towards the Deconstruction of Gender Binary in International Development Policies

Warisa Ongsupankul*

ABSTRACT

'Leave No One Behind' is an underlying principle enshrined in United Nation's Sustainable Development Goals (SDGs), among which Goal 5 aims to achieve 'gender equality and empower all women and girls'. The question remains as to the manner in which the term 'gender' is interpreted. Does it accommodate the sexual orientation, gender identity and expression, and sex characteristics (SOGIESC) of non-conforming individuals? This paper will examine the gender politics within the United Nations which resulted in the failure of SDGs to explicitly recognise the rights of sexual minorities in its agenda. Bearing in mind that all Goals are interrelated and that marginalisation by oppressive institutions is often interconnected and cannot be examined separately from one another, this paper will also consider how such exclusion has had a negative impact not only on the achievement of Goal 5 but also on the overall success of the SDGs. Harnessing the insights of feminist legal theories, this paper will address the challenges as well as propose a more inclusive framework that goes beyond the sex/gender binary to promote gender equality in all of its manifestations.

* PhD Candidate at Monash University and a casual research assistant at the School of Humanities and Social Sciences, Deakin University. The idea of writing this paper came from the field work the author undertook in 2018 at Association Shams, an NGO defending the rights of sexual minorities in Tunisia. This paper is also developed from her conference presentation at the 3rd International Conference of the NIDA Law for Development on 23 November 2018 at National Institute of Development Administration (NIDA) in Bangkok, Thailand.

“If the immutable character of sex is contested, perhaps this construct called ‘sex’ is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all.”

Judith Butler in *Gender Trouble: Feminism and the Subversion of Identity*

INTRODUCTION

In 2015, all United Nations member states adopted the 2030 Agenda for Sustainable Development, a shared blueprint for peace and prosperity for people and the planet, and the 17 Sustainable Development Goals (SDGs), which reflect global efforts ‘to end all forms of poverty, fight inequalities and tackle climate change, while ensuring that no one is left behind’.¹ The 17 SDGs carry on the work begun by the Millennium Development Goals (MDGs), which globalised an international effort between 2000-2015 to end poverty in its various dimensions. However, unlike the MDGs which only concerned developing countries, the SDGs apply universally to all United Nations member states and are considered by advocacy groups to be more comprehensive and ambitious than the MDGs.²

In addition, although SDGs are non-binding in nature and states are expected to implement the SDGs by establishing a national framework, monitoring progress, and arranging follow-ups and reviews to ensure the achievement of all 17 Goals, the SDGs are considered to not only reflect existing commitments expressed in various international legal instruments, but also have the potential to fill the gaps in fragmented international law.³

¹ United Nations Sustainable Development Goals, The Sustainable Development Agenda <<https://www.un.org/sustainabledevelopment/development-agenda/>> accessed 25 October 2019.

² ICLEI Briefing Sheet, ‘From MDGs to SDGs: What are the Sustainable Development Goals?’ (2015) 1 Urban Issues 2, contrasting MDGs and SDGs in that the latter are ‘uniformly applicable to all countries of the world, removing the ‘developing’ versus ‘developed’ dichotomy that left the MDGs open to criticism’; Jon Coonrods, From MDGs to SDGs: Top 10 Differences (August 2014) <<https://advocacy.thp.org/2014/08/08/mdgs-to-sdgs/>> accessed 4 April 2019.

³ Rakhyun Kim, ‘The Nexus between International Law and the Sustainable Development Goals’ (2016) 25 Review of European, Comparative and International Environmental Law 15.

Among the important challenges mentioned in the SDGs is gender inequality. Goal 5 seeks to ‘achieve gender equality and empower all women and girls’.⁴ Nevertheless, the wording of Goal 5 focuses exclusively on the equality between men and women or boys and girls. In other words, the experiences of sexualities minorities whose sexual orientation, gender identity and expression, or sex characteristics (SOGIESC⁵) do not conform to cultural norms or expectations, are nowhere to be seen in the Targets and Indicators of Goal 5 or in the other 16 Goals. The silence of the international community towards the oppression of sexual minorities is alarming, considering that those individuals have been subjected to patterns of violence similar to women, if not greater.⁶

Questions arise as to how the drafters of SDGs decide whether or not to protect particular genders. Whose gender is likely to be treated equally, and whose gender is not? In other words, what genders count as genders worthy of protection in the eye of international development policies remains controversial. In an attempt answer these questions, the title of this paper, ‘Finding Sexual Minorities in the United Nations Sustainable Development Goals’ deliberately resonates with Doris Buss’s paper titled ‘Finding Homosexuals in Women’s Rights’.⁷

Therefore, this paper aims at examining the context, cause, and consequences of the exclusion of sexual minorities from the SDGs. Section II will start by looking at Goal 5, as it explicitly concerns gender, and examine its

⁴ United Nations Sustainable Development Goals, Goal 5: Achieve Gender Equality and Empower All Women and Girls <<https://www.un.org/sustainabledevelopment/development-agenda/>> accessed 25 October 2019.

⁵ The paper follows the definitions provided by the Yogyakarta Principles and other documents such as International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) reports.

⁶ OutRight UN Program, Commission on the Status of Women (CSW) Civil Society (CSO) Guide (April 2018) <www.outrightinternational.org/content/commission-status-women-civil-society-guide> accessed 4 April 2019 explaining that although LGBTI women, trans and gender non-conforming persons face gender-based violence and discrimination, they are often excluded from the benefits of many international development investments and have also suffered from a foreclosed definition of ‘women’ in the CSW.

⁷ Doris Buss, ‘Finding the Homosexual in Women’s Rights’ (2004) 6 International Feminist Journal of Politics 257.

exclusion of sexual minorities. Section III will then consider the impacts that such exclusion has on the SDGs more broadly. Finally, Section IV will discuss some strategies and challenges, from the perspective of feminist legal scholarship, in using SDGs and human rights law to promote gender equality.

I. EXCLUSION OF SEXUAL MINORITIES

In 1948, United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR), with a Preamble starting with the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’.⁸ However, it remains unclear as to what qualifies an individual to be regarded as a member of the human family. When a government or the international community decide that a certain population cannot effectively enjoy certain human rights or that their rights do not fall under the scope of human rights due to their sexual orientation or gender identity, does this imply that they deserve a lower place in a society?

It was not until 1994 – fifty years after the adoption of the UDHR – that the United Nations Human Rights Committee agreed that anti-sodomy laws were in violation of the right to privacy enshrined in Article 17 of the International Covenant on Civil and Political Rights.⁹ Even in the 21st century, the lives of sexual minorities, in many parts of the world, are so undervalued that they are subject to social exclusion, discrimination and severe criminal punishments. In the political organs of the United Nations, the question as to whether violence, restriction on sexual freedom, and discrimination more broadly suffered by

⁸ Universal Declaration of Human Rights (adopted 10 December 1948) General Asseble Resolution 217A (UDHR).

⁹ Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994); See International Covenant on Civil and Political rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 17(1) states that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”.

SOGIESC non-conforming individuals, are human rights issues is highly debated.¹⁰

Thus, this Section begins by outlining the contested scope and definition of 'gender' within the United Nations system to shed light on which identities the term 'gender' stipulated in Goal 5 aims to embrace. It will then elaborate on how Goal 5 fails to capture the lived experiences of sexual minorities.

Definition and Scope of Gender in Relation to SDGs

The effort to achieve gender equality and the empowerment of women was on the agenda of the Millennium Development Goals (MDGs) before it was absorbed into the SDGs.¹¹ This comes as no surprise given that the elaborated details in both MDGs' Goal 3 and SDGs Goal 5 both reveal how women in different parts of the world continue to experience violence and inequality in education, employment, and decision-making.

Since Goal 5 does not give us a clear definition as to the term 'gender' and does not provide the extent to which the term includes sexual minorities, attention should be given to the historical context so as to examine the discussions regarding such term within the UN system from which the SDGs derive.¹² In tracing the history of sex/gender notion in international law, Dianne Otto discusses two problems of international human rights law's approach to gender: the understanding of gender as binary system (i.e. male/female), and the asymmetric assumption that women are in a disadvantaged position (i.e. male>female), resulting in women's vulnerability, dependency and the need for

¹⁰ See International Lesbian, Gay, Bisexual, Trans and Intersex Association ('ILGA'), *Sexual Orientation Laws in the World — Overview* (May 2017) <<https://ilga.org/maps-sexual-orientation-laws>> accessed 14 January 2019; Dianne Otto, 'Gender and Sexual Diversity: A Question of Humanity?' (2016) 17(2) *Melbourne Journal of International Law* 477.

¹¹ See <http://www.un.org/millenniumgoals/gender.shtml>.

¹² See Jane Adolphe, "'Gender' Wars at the United Nations' (2012) 11 *Ave Maria Law Review* 1 (considering four possible understandings of the concept of gender within the U.N. system: (1) gender as a social construct; (2) gender as a cultural aspect of femininity and masculinity, but based on the biological sexes, male and female; (3) gender as synonymous with women and sex, or women and children; and (4) gender meaning the two sexes, male and female, within the context of society).

special protections.¹³

It was not until 1995, at the Fourth World Conference on Women in Beijing, that a distinction was made between sex, which relates to biology, and gender, which relates to socially constructed category. Although this distinction has not changed the perception that biological bases determined social conceptions of man and woman, and that gender was a dualistic construction, it served as a means to challenge culturally constructed notions of gender roles that limit women from exercising rights and freedoms such as health and reproductive rights.¹⁴ Moreover, the draft agreement in Beijing included the term 'sexual orientation' primarily to refer to discrimination of women's rights on the basis of sexual identity. However, this was deleted on the last day of negotiations.¹⁵

According to Doris Buss, the key opponents were from the Christian Right, who are defined as 'a broad range of American organizations that have tended to form coalitions, both domestic and international, around an orthodox Christian vision and a defense of nuclear family formation'¹⁶ and the Holy See, both of which saw the nexus between 'radical' feminist activism and homosexual activism whose end can be achieved through the international recognition of women's rights. These entities feared the sex/gender distinction would threaten the sanctified status of the 'natural family' by changing the existing social division of labour. Moreover, given that women are no longer necessarily just mothers and wives, and the move towards universal access to abortion as a human right, these entities feared this distinction would also legitimise a host of so-called 'unnatural'

¹³ Diane Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism' (2013) *The Ashgate Research Companion to Feminist Legal Theory* 197.

¹⁴ *ibid* 204.

¹⁵ Buss (n 7) 266 stating that 'the phrase 'sexual orientation' was kept bracketed – and subject to negotiation – until the early hours of the morning on the last day of negotiations when it was struck out'.

¹⁶ Doris Buss and Didi Herman, *Globalizing Family Values: The Christian Right in International Politics*, (University of Minnesota Press, 2003) xviii. See also Doris E Buss, 'Finding the Homosexual in Women's Rights' (2004) 6 *International Feminist Journal of Politics* 257 (Buss also refers to Christian Rights as groups which self-define as 'orthodox religious believers' who are active, to varying degrees, in the 'natural family' politics at the UN, whereas the Holy See is a permanent observer at the UN, and thus can vote on the final document, add reservations to conference agreements, access state only meetings and rooms and negotiate alongside other states).

practices like homosexuality, lesbianism, bisexuality and trans-genderism.¹⁷

Afterwards, the next significant change came with the adoption of ‘gender mainstreaming’ as a UN system-wide strategy for achieving women’s equality. This involved providing room for interpretations by treaty monitoring bodies to disrupt the normalisation of sex/gender hierarchies and break the gender binary system as well as presumed heterosexuality. For example, the Committee Against Torture included ‘gender, sexual orientation [and] transgender identity’ in its non-exhaustive list of characteristics and factors that may increase the risk of torture or cruel, inhuman or degrading treatment.¹⁸ Moreover, the United Nations High Commissioner for Refugees has acknowledged that ‘refugee claims based on differing sexual orientation contain a gender element’ and thereby, claims of ‘homosexuals, transsexuals or transvestites who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination’ could be considered as a refugee claim.¹⁹ Lastly, the Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism provides that ‘gender is not synonymous with women but rather encompasses the social constructions that underlie how women’s and men’s roles, functions and responsibilities, including in relation to sexual orientation and gender identity, are defined and understood.’²⁰

However, when it came to international policy requiring global partnership as in the case of the SDGs, there seemed to be difficulty in reaching a consensus regarding the approach towards sexual minorities. On the one hand, Deputy

¹⁷ Doris Buss, ‘Robes, Relics and Rights: The Vatican and the Beijing Conference on Women’ (1998) 7 *Social & Legal Studies* 339. See also Holy See, ‘Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons’ (2003) Congregation for the Doctrine of the Faith.

¹⁸ CATC. CAT Committee ‘General Comment No. 2: Implementation of article 2 by States parties’ (2008), CAT/C/GC/2, 24 January 2008, 21.

¹⁹ United Nations High Commissioner for Refugees, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (2002) U.N. Doc. HCR/GIP/02/01, 16.

²⁰ Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, transmitted by Note of the Secretary-General’ (2009) U.N. Doc. A/64/211, 20.

Director of Human Rights Campaign Global Jean Freedberg observed that, despite the efforts of the lesbian, gay, bisexual and transgender (LGBT) community during the SDGs' three-year negotiation process to add the terms sexual orientation and gender identity wherever marginalized and vulnerable groups were specified, "it became clear, when a lead U.N. official said [in September 2014] that LGBT rights 'were off the table,' [and] that efforts to include specific identity-based language might even backfire."²¹ Thus, we can assume the failure of the SDG to include sexual minorities in its agenda was due to the need to compromise with countries whose cultural norms made it impossible to include issues of gender and sexual diversity in international settlements.

On the other hand, United Nations bodies still attempted to assure sexual minorities that they were indeed included in the SDGs. For example, in 2015, the first year in which SDGs come into effect, United Nations entities²² adopted a joint statement calling on states to act urgently to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex adults, adolescents and children. The aforementioned Joint Statement clearly recognized that guaranteeing the human rights of sexual minorities would be essential to the achievement of SDGs.²³ This was followed by the then-United Nations Secretary General Ban Ki Moon's speech at the High-Level LGBT Core Group Event

²¹ Human Rights Campaign, 'Op-ed: What Does the UN's Agenda 2030 Mean for LGBT People?' (September 2015) <www.hrc.org/blog/op-ed-what-does-the-uns-agenda-2030-mean-for-lgbt-people> accessed 11 January 2019, reporting that "in the face of opposition from a bloc of countries, including Russia and most African, Middle Eastern, Asian, and Caribbean countries, as well as the Vatican and religious groups, a consensus emerged to ease up on those efforts rather than risk derailing negotiations or rolling back previously agreed-upon language".

²² Namely, the United Nations entities included in the Joint Statement are International Labour Organization, Office of the United Nations High Commissioner for Human Rights, United Nations Development Program, United Nations Office on Drugs and Crime, United Nations Women, United Nations Educational, Scientific and Cultural Organization, United Nations World Food Programme, World Health Organization, United Nations High Commissioner for Refugees, United Nations Children's Fund, Joint United Nations Programme on HIV and AIDS.

²³ Office of the United Nations High Commissioner for Human Rights, 'Joint UN statement on Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people' <https://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF> accessed 11 January 2019.

stating that “there are 17 sustainable development goals all based on a single, guiding principle: to leave no one behind. We will only realize this vision if we reach all people regardless of their sexual orientation or gender identity.”²⁴

Nevertheless, Section III demonstrates that if Goal 5 is to be understood literally and independently, the SDGs can be seen to adopt a conservative notion of gender, through its selective language and limited narratives, and therefore fail to address the conditions of sexual minorities.

The Forgotten Victims

During the Nazi regime, homosexuals comprised a separate category of prisoners in concentration camps and were marked with a pink triangle – which has become the symbol of today’s gay rights movement. After the war, however, the treatment of homosexuals in concentration camps went unacknowledged by most countries. It was not until 2002 that the German government formally apologised to the gay community, and not until 2005 that the European Parliament adopted a resolution on the Holocaust that included the persecution of homosexuals.²⁵ This exclusion of the homosexuals from historical narratives is arguably one of the reasons why the persecution of sexual minorities persists around the world today.

Regardless, the wordings of all targets and indicators of Goal 5 focus exclusively on women and girls, and thus exclude the lived experiences of sexual minorities. For example, although seventy-three states still criminalise homosexuality by punishments ranging from imprisonment, lashes to the death penalty²⁶ and transgender youths are considered to be ‘among the most vulnerable

²⁴ United Nations, ‘Secretary-General’s remarks at the High-Level LGBT Core Group Event Leaving No-One Behind: Equality & Inclusion in the Post-2015 Development Agenda’ (September 2015) <<https://www.un.org/sg/en/content/sg/statement/2015-09-29/secretary-generals-remarks-high-level-lgbt-core-group-event-leaving>> accessed 11 January 2019.

²⁵ See Maria Kucia, ‘The Europeanization of Holocaust Memory and Eastern Europe’ (2016) 30(1) *East European Politics and Societies and Cultures* 97; United States Memorial Holocaust Museums, ‘Homosexuals: Victims of the Nazi Era’ <www.ushmm.org/m/pdfs/2000926-Homosexuals.pdf> accessed 14 January 2019.

²⁶ See <https://antigaylaws.org/all-countries-alphabetical>.

and marginalised young people in society',²⁷ these urgent matters are not included within Target 5.1 and Target 5.2 which instead aim at ending all forms of discrimination and violence against all 'women and girls'. Moreover, Target 5.3 and its indicators recognise female genital mutilation as an example of harmful practices but overlooks the detrimental effects of intersex genital mutilation (IGM) done to intersex children without their consent,²⁸ the existence of forced male circumcision,²⁹ and anal examination performed in some countries to verify male's homosexuality, even though such practices may lack medical necessity and may amount to torture.³⁰

Furthermore, both Target 5.4 and Target 5.5 promote women's effective participation in professional and public life. Yet, the problem of securing employment faced by sexual minorities is equally alarming, if not more. For instance, in Tunisia, if a person has been convicted of crimes relating to homosexuality, the conviction will be recorded in the individual's Criminal Record No.3 (*bulletin judiciaire*) for five years. During this time, disclosure is required when applying for jobs or identity control throughout the country. Where an individual has offences on this criminal record, potential employers tend to automatically reject the application. As a consequence, those convicted of homosexuality crime often resort to sex work, having little possibility of securing lawful employment. Since sex work is illegal, these people are excluded even more so from mechanisms of social protection.³¹

²⁷Report of the Special Rapporteur on the sale of children, child prostitution and child pornography (E/CN.4/2004/9, 5 January 2004) para 123.

²⁸ See <http://stop.genitalmutilation.org>.

²⁹ See, for example, Mark Lamont, 'Forced Male Circumcision and the Politics of Foreskin in Kenya' (2018) 77 *African Studies* 293.

³⁰ Human Rights Watch, 'Dignity Debased: Forced Anal Examinations in Homosexuality Prosecutions' (2016) <www.hrw.org/sites/default/files/report_pdf/globalgbtanalextams0716web.pdf> accessed 24 September 2018. See also Committee Against Torture, 'Concluding observations on the third periodic report of Tunisia' (CAT/C/TUN/CO/3, 10 June 2016) 10.

³¹ Interview with Bouhdid Belhadi, Director Executive of Association Shams for Decriminalisation of Homosexuality in Tunisia (Tunis, Tunisia, 9 April 2018); For other countries, see e.g. Colectivo Ovejas Negras, Center for International Human Rights of Northwestern University School of Law, and Heartland Alliance for Human Needs & Human Rights, Global Initiative for Sexuality and Human Rights, 'Human Rights Violations Against Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) People in

Last but not least, Target 5.6 aims to achieve universal access to sexual and reproductive health and reproductive rights by highlighting the importance of information, education and women's ability to make informed decisions. Once again, sexual minorities and their particular concerns are excluded from specific mention. There are, for example, lesbians who are victims of hate crimes such as corrective rape arranged by the family to 'cure' their lesbianism. It is interesting to note that this practice persists even in countries where same-sex marriage is legal, such as South Africa. This demonstrates that homophobic attitudes can be persist despite progressive legislation.³² As for sex education, anti-gay curriculum laws (also known as 'no promo homo' laws) which prohibit or restrict the discussion of homosexuality in US public schools result in LGBTQ youth not only being marginalised, but also exposed to bullying and stigmatisation.³³

Therefore, it is clear that discrimination based on SOGIESC can be faced by any individual depending on that person's particular context such as where they live, what socio-economic situation they are in, etc. By focusing exclusively on 'women' broadly, Goal 5 represents neither an inclusive nor an accurate perception of gender inequality.

II. IMPACTS OF THE EXCLUSION OF SEXUAL MINORITIES ON THE SDGS

The United Nations recognises the three core elements the SDGs encompass: economic growth, social inclusion and environmental protection, all of which are interconnected and essential for the achievement of sustainable

Uruguay: a Shadow Report' (2013) 7 stating that 'transgender people face automatic rejection in applying for jobs nearly 100 percent of the time, which leads them to resort to sex work'.

³² Rene Koraan and Allison Geduld, "'Corrective Rape' of Lesbians in the Era of Transformative Constitutionalism in South Africa' (2015) 18 Potchefstroom Electronic Law Journal 1931

<https://journals.co.za/docserver/fulltext/perblad/18/5/perblad_v18_n5_a23.pdf?expires=1537694467&id=id&accname=guest&checksum=86161A1C2DB9830D2B44C403C7E797AD> accessed 24 September 2018.

³³ Brian Barrett and Arron M Bound, 'A Critical Discourse Analysis of No Promo Homo Policies in US Schools' (2015) 51 Educational Studies: A Journal of the American Educational Studies Association 267; Clifford Rosky, 'Anti-Gay Curriculum Laws' (2017) 117 Columbia Law Review 1461.

development agenda.³⁴ In this respect, the SDGs can be said to reflect the United Nations Development Programme's continuous effort to advance human security, as opposed to the traditional notion of state security which is primarily seen through political and military perspectives. This new understanding of human vulnerabilities highlights seven areas most vulnerable to threats: economic security, environmental security, food security, personal security, health security, political security, and community security.³⁵ This section will outline the link between the exclusion of sexual minorities and other SDGs through the aforementioned framework of seven areas of human security concepts.

Economic Security

Economic security can be said to encompass Goal 1 (No Poverty), Goal 2 (Zero Hunger), Goal 4 (Quality Education), and Goal 8 (Decent Work and Economic Growth). Studies have shown a causal link between the social exclusion of sexual minorities and the economy of the country. In 2014, the World Bank published a study titled 'The Economic Cost of Homophobia', examining a case study of homophobia in India and its impact on the economy. The study illustrates how homophobia as a basis for social exclusion (violence, prison, job loss, discrimination, family rejection, harassment in school, and pressure to marry) leads to certain individual-level outcomes (less education, lower productivity, lower earnings (i.e. more poverty), poorer health (i.e. shorter lives), and lower labour force participation). This in turn results in poorer economic-level outcomes: higher health care and social program costs, lower economic output, fewer incentives to invest in human capital. The report concluded that homophobia and the exclusion of LGBT people cost the Indian economy between 0.1 percent and 1.7 percent of its GDP in 2012.³⁶

³⁴ *United Nations* (n 1).

³⁵ United Nations Development Program, 'Human Development Report 1994' (Oxford University Press, 1994) 24. See also 'Human security approach 'central' to achieving sustainable development – UN officials' (UN News, 7 July 2017) <<https://news.un.org/en/story/2017/07/561142-human-security-approach-central-achieving-sustainable-development-un-officials>> accessed 24 September 2018.

³⁶ M.V. Lee Badgett, 'The Economic Cost of Homophobia and the Exclusion of LGBT People: A Case Study of India' (World Bank 2014). <<http://transglobalactivism.org/library/the-economic-cost-of-homophobia-and-the-exclusion-of-lgbt-people-a-case-study-of-india/>> accessed 11 January 2019.

Earlier that year, the World Bank postponed a US\$90 million loan to Uganda after the country enacted a law institutionalising the punishment of homosexuality. The Bank considered that such a law would adversely affect health programmes that the loan was intended to support. Bank president Jim Kim also argued that ‘when societies enact laws that prevent productive people from fully participating in the workforce, economies suffer’.³⁷ More recently, Brazil confirmed the World Bank’s case study of India, concluding that exclusion from access to educational opportunities can exacerbate the precarious economic situation of sexual minorities. For instance, many LGBT people have stopped attending schools after suffering violence there. As a result, they were unable to attain adequate levels of schooling in order to access employment.³⁸ Moreover, familial rejection of a youth’s sexual orientation and gender identity is an important reason for increased rates of homelessness and needs to enter the child welfare system faced by LGBT youth.³⁹

Therefore, it cannot be denied that the SDGs’ effort to secure economic security including quality education cannot be achieved without addressing the discrimination and social exclusion faced by sexual minorities around the world.

Health Security

Goal 3 (Good Health and Well-Being) has been linked with disease prevention and education. What remains problematic is the way in which the medical community qualifies and evaluates sexual minorities according to its established sets of psychological definitions and assessment such as the Diagnostic and Statistical Manual (DSM). Homosexuality was previously regarded as a condition deviating from ‘normal, heterosexual development’ and it was not until 1973 that the American Psychiatric Association (APA) removed the diagnosis of ‘homosexuality’ from the DSM.⁴⁰ Even then, same-sex attraction

³⁷ Rahul Rao, ‘Global Homocapitalism’ (2015) 194 *Radical Philosophy* 38.

³⁸ Aimen Majeedullah, Kimberly Wied and Elizabeth Mills, ‘Gender, Sexuality and the Sustainable Development Goals: A Meta-Analysis of Mechanisms of Exclusion and Avenues for Inclusive Development’ (Institute of Development Studies 2016) 13.

³⁹ Martha Albertson Fineman, ‘Vulnerability, Resilience, and LGBT Youth’ (2014) 23 *Temple Political & Civil Rights Law Review* 307, 322.

⁴⁰ Jack Drescher, ‘Out of DSM: Depathologizing Homosexuality’ (2015) 5 *Behavioral Sciences* 565.

continues to be pathologised by some national medical associations. Sometimes, these medical associations also cooperate with the police to perform forced anal examination to verify proof of anal sex despite the fact that such tests lack scientific validity and medical necessity.⁴¹

The lack of sexual interest or desire that asexual people experience has also been historically pathologised as a disorder. A recent study shows there is no evidence to suggest that asexuality is a psychiatric disorder, sexual dysfunction, or paraphilia, but rather a recognisable sexual orientation.⁴² Furthermore, at present, transgenderism is often understood to be the manifestation of 'gender dysphoria', the diagnosis of which is crucial for individual seeking insurance support for sex reassignment surgery or treatment, or who seek a legal change in status.⁴³ Lastly, sex characteristic variations are still largely referred to as a disorder of sex development (DSD) which justifies coerced medical intervention to 'normalise' the intersex body into one of two genders.⁴⁴

As a group of United Nations and international human rights experts recognised, such 'forced, coercive and otherwise involuntary treatments and procedures can lead to severe and life-long physical and mental pain and suffering and can violate the right to be free from torture and other cruel, inhuman or degrading treatment or punishment'.⁴⁵ Thus, it is clear that if the pathologisation of sexual minorities and these discriminatory practice continue, Goal 3 cannot be universally achieved.

⁴¹ *Human Rights Watch* (n 30).

⁴² Brenna Conley-Fonda and Taylor Leisher, 'Asexuality: Sexual Health Does Not Require Sex' (2018) 0 Sexual Addiction & Compulsivity 4; The Asexual Visibility and Education Network (AVEN) suggests asexual people seek to inform clinicians and society-at-large that their sexual orientation is not a sexual desire disorder needing to be treated.

⁴³ Judith Butler, *Undoing Gender* (Routledge 2004) 5.

⁴⁴ Ariel G Mekler, 'LGBTIQ (In)Visibility: A Human Security Approach to SOGIESC' in Corinne L Mason (ed), *Routledge Handbook of Queer Development Studies* (Routledge, Taylor & Francis 2018) 160.

⁴⁵ Office of the United Nations High Commissioner for Human Rights, 'Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness For International Day against Homophobia, Transphobia and Biphobia' <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E> accessed 11 January 2019.

Environmental Security

Environmental security may concern a combination of threats related to global ecosystems and thus can be linked with Goal 6, 7, 11, 13. Although such natural threats can affect anyone regardless of their gender or sexuality, the way in which humans deal with these threats through relevant organisations and capacity can be discriminatory. Therefore, the marginalisation of sexual minorities is also evident during times of natural and environmental disasters.

State institutions or NGOs may be discriminatory through their own arrangements and practices. For example, since the categorisations of affected groups in Disaster Risk Reduction (DRR) are usually limited to only male and female, transgender individuals are not documented as an affected group and are therefore denied relief services including temporary housing, health access and even basic sanitation services.⁴⁶ Moreover, as ‘family’ is generally defined in nuclear heterosexual terms of man, woman, and children, sexual minorities whose family compositions might not correspond with such terms risk being excluded from security relief efforts.⁴⁷

Personal Security, Political Security and Community Security

Finally, personal security, political security and community security⁴⁸ can be translated into Goal 16 (Peace, Justice, and Strong Institutions) which seeks to ‘reduce all forms of violence’ (Target 16.1), ‘promote the rule of law... and ensure equal access to justice’ (Target 16.3), develop effective, accountable and

⁴⁶ Mekler (n 44) 162, Mekler gives examples as follows: after the 2005 tsunami in India, Aravanis, India’s gender variant people, experienced systematic discrimination when it came to health care, housing, and sanitation. In Pakistan, transgender people were denied access to internally displaced person (IDP) camps after disaster flooding because they had no proper identification cards (citations omitted).

⁴⁷ Mekler (n 44) 162, During the 2008 earthquake in Haiti, MSM were systematically denied food because rations were directed at women. MSM had no registered women in their home and were thus not eligible to receive rations.

⁴⁸ Human Development Report 1994 (n 35) 30, Community security invokes a reassuring set of values providing a cultural identity through membership within a group, family, organization, ethnicity, and so forth.

transparent institutions (Target 16.6), and 'promote and enforce non-discriminatory laws' (Target 16.B), all of which cannot be achieved if SOGIESC issues are not taken into account seriously.

This can be clearly seen in countries where the oppression of non-normative sexualities is systematically perpetuated by the state. For example, in the Chechen Republic, (a part of Russia) real and perceived gay men have been abducted, held prisoner, tortured, and killed by authorities in what witnesses have called concentration camps.⁴⁹ Unfortunately, the state-sponsored abuse and detention of gay men in the Chechen Republic is not exceptional. Drawing from the author's experience in working at an LGBTQ activist NGO in Tunisia, where same-sex relations are criminalised under Article 230 of the Tunisian Penal Code,⁵⁰ it is clear that the Tunisian democratic transition (which inspired Arab Spring) did not contribute to the protection of sexual minorities to the degree one might expect. This is because the problem was and still remains due to deep-rooted patriarchal attitudes and homophobic socio-cultural norms, which have been used and perpetuated by elected politicians as arguments to justify the preservation of Article 230 of the Penal Code.

In this regard, sexual minorities in Tunisia can neither invoke rights and freedoms as guaranteed in the new constitution nor seek protection from family, state institutions, or the justice system, due to those institutions being the source of their marginalisation in the first place. When being physically or verbally harassed by others, these minorities prefer not to report the incidents to the police for fear of being arrested under Article 230 and are consequently denied access to the justice system. Moreover, their right to privacy is often violated through police raids at their houses and surveillance conducted over their telephonic and electronic communications in order to find evidence to prosecute them under Article 230. In correctional facilities, they are exposed to verbal and physical

⁴⁹ Office of the United Nations High Commissioner for Human Rights, 'End abuse and detention of gay men in Chechnya, UN human rights experts tell Russia' (April 2017) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21501> accessed 14 January 2019.

⁵⁰ See Wahid Al Farchichi and Nizar Saghiyeh, 'Homosexual Relations in the Penal Codes: General Study Regarding the Laws in the Arab Countries with a Report on Lebanon and Tunisia' (2009).

violence, such as rape from the fellow inmates.⁵¹ There is both selectivity and discrimination in their treatment, as illustrated by when the police choose to arrest certain homosexuals, and the arbitrariness when courts pronounce the sentence for the offences, which can range from one day to one month without reference to any standardised criteria.⁵²

One might argue that the discrimination faced by sexual minorities in Tunisia is caused by Tunisian religious traditions and cultural values and attempts should be on changing public opinion, rather than state institutions.⁵³ However, this paper argues that unless those individuals are certain they could be themselves in public without being persecuted by state-sponsored homophobic/transphobic institutions, and that their human dignity is regarded as equal to others' in the eyes of the law, it is more likely that the society will take for granted the status quo of those discriminatory laws and its consequent implications. Therefore, the state institutions and civil society should work hand in hand, and unconditional upon the other's participation, in order for the transformative dialogue and institutional reform to start.

III. POSSIBLE STRATEGIES USING FEMINIST LEGAL THEORIES

What we can conclude from the previous sections is that despite aiming to promote 'gender equality', the SDGs' silence on other gender identities is by no means an accident and carries on the international community's long struggle over the notion of sex and gender. At this point, it is unlikely that the wording of Goal 5 would be revised. Nevertheless, since the SDGs are not a binding legal instrument, it is dependent on states and NGOs to decide how they will implement the recommended policies to meet the targets. Therefore, this section

⁵¹ Interview with Bouhdid Belhadi, Director Executive of Association Shams for Decriminalisation of Homosexuality in Tunisia (Tunis, Tunisia, 9 April 2018); Interview with Abbaessatar Khowldi, asylum applicant seeking protection from sexuality-based persecution (Tunis, Tunisia, 14 April 2018). See also Tunisian Coalition for the Rights of LGBTIQI People, 'Stakeholders Report Universal Periodic Review of Tunisia' (2017).

⁵² The punishment is in fact deemed to be life-imprisonment as it cannot change an individual's sexual orientation. Thus, homosexuals in Tunisia face the constant risk of being arrested and being put into prison.

⁵³ Guillaume Allusson, 'Social Repression in a Democracy: A Case of Tunisia' (Turkish Policy Quarterly, 21 March 2018) <http://turkishpolicy.com/article/901/social-repression-in-a-democracy-the-case-of-tunisia#_ftn27> accessed 15 October 2018.

will propose strategies utilising feminist legal theories which could be adopted so that SDGs can be used to achieve true gender equality.

To justify my choice of methodology, it is therefore essential to understand what feminist legal theories are and how they are relevant in the context of this paper. It is generally accepted that there is no single, stable, and fixed body of thought characterising feminism. Instead, feminist methodology, rather than containing a uniform substantive agenda, is a methodological description.⁵⁴ Nevertheless, it can be said that all feminist methods appeal to a central question: 'how to understand gender from a critical and equality-driven perspective'.⁵⁵

Moreover, the reason for incorporating a 'legal theory' element is because law is important to both feminist projects and SOGIESC considerations since women and sexual minorities share similar struggles caused by structural inequalities, whether they be in the form of patriarchy, heteronormativity, cis-normativity, or compulsory sexuality which are embedded in law and legal institutions. As Jill Marshall puts it, 'law defines; it both includes and excludes entities as human beings to be protected by human rights law. It allows, permits, protects and provides; it also recognises, misrecognises and ignores identities. In doing so, it conditions the formation of certain types of identity'.⁵⁶

Like any legal field, international law is said to hold a vision of autonomous legal rationality, separating legal fields and political fields, as there is the need for law to provide an objective and neutral basis for governing self-interested individual States.⁵⁷ However, as Section II (1) of this essay has shown, gender politics seems to be incapable of being dealt with by a legal method because we cannot guarantee the objectivity and impartiality of the result. Yet, a critical position towards the illusion of objectivity in legal argument does not have to lead us to legal nihilism, according to Martti Koskenniemi. Instead, we should lower

⁵⁴ Adam Romeno, 'Methodological Descriptions: "Feminist" and "Queer" Legal Theories' in Martha Fineman et al (ed), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate 2009) 197.

⁵⁵ Martha Fineman et al (ed), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate 2009) 2.

⁵⁶ Jill Marshall, *Human Rights Law and Personal Identity* (Routledge 2014) 18.

⁵⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, Cambridge University Press 2005) 534.

our expectations of certainty and take the moral-political choices seriously even when arguing ‘within the law’.⁵⁸

With that in mind, this section will adopt various insights from feminist legal theorists and as well as those who might not self-define as feminist but whose critical engagement with the law helps us to understand how gender equality could be achieved more effectively in the context of the SDGs. In this regard, the possible strategies can be categorised into three sub-sections: recognising the limits of rights discourse; improving existing anti-discrimination doctrine; and fixing structural inequalities which are the source of the discrimination of women, sexual minorities, and any other gender.

Recognising the Limits of Rights Discourse

When it comes to advancing gender equality, the most prevalent approach at both national and international levels seems to be the equality doctrine as manifested in anti-discrimination laws. In this regard, it can be seen from the elaboration of Goal 5 that it aims to tackle gender-based discrimination. Nevertheless, the particulars of Goal 5 are enumerated in binary terms: boys/girls and men/women. This poses two challenges to the achievement of gender equality itself.

The first challenge lies in SDGs’ presumed universality as an international development policy. However, as we have seen from the previous Section, the notion of ‘gender’ is by no means universal, and neither is the term ‘women’. Both notions differ across society due to them being products of socioeconomic construction.⁵⁹ For example, in a minority of countries, e.g. Denmark and Argentina, one can change one’s gender in the official documents without prior medical intervention, whereas in most countries, including Thailand, it is not legal to change the gender status even after the sex reassignment surgery.⁶⁰

⁵⁸ *ibid* 536.

⁵⁹ Darren Rosenblum, ‘Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods’ (2007) 45 *Columbia Journal of Transnational Law* 759.

⁶⁰ National Geographic ‘The Legality of Gender change’ (National Geographic Magazine, October 2016) <www.nationalgeographic.com/magazine/2017/01/gender-identity-map-where-you-can-change-your-gender-on-legal-documents/> accessed 25 October 2018.

Moreover, Goal 5's narratives of child marriage, forced marriage, and female genital mutilation might reflect a controversial image of feminised and infantilised developing countries in desperate need of assistance from the developed countries.⁶¹ The question, then, is how to accommodate specificities in our cultural diversity. This is particularly pertinent considering the various levels of acceptance for non-normative sexualities among different countries, not to mention the resistance of many non-western countries arising from the view of women's and LGBT rights as a western invention.⁶²

The other challenge concerns the nature of the subject itself. In international law, gender continues to be understood as closely linked to biological sex. It serves as a social meaning given to the biological differences of male and female bodies.⁶³ However, this is problematic as sex, in nature, is not a dichotomy but rather a continuum. It is society that imposes a bipolarity.⁶⁴

The aforementioned example reveals the paradoxes and limits of the law, especially in human rights discourse, in advancing gender equality. The more rights are catered to women, the more likely they are to institutionalise certain assumptions regarding women, such as their vulnerability, violability, heterosexuality, etc. Furthermore, such specialisation ignores the other differences within the group such as race, class, age, and disability which intersect with gender to shape our individual experience,⁶⁵ since it is hard for anti-discrimination laws to capture the multiplicity of social powers pressures. As Wendy Brown questions:

⁶¹ Erica Burman, 'Innocents Abroad: Western Fantasies of Childhood and the Iconography of Emergencies' (1994) 18 *Disasters* 238.

⁶² Moya Lloyd, '(Women's) Human Rights: Paradoxes and Possibilities' (2007) 33 *International Studies Review* 91, 93; For example, Chechen leader Ramzan Kadyrov denies allegation of gay persecution in Chechen republic because he contends that there are no gay men in Chechnya, and if there are, they should move to Canada.

⁶³ Brenda Crossman, 'Gender Performance, Sexual Subjects and International Law' (2002) 15 *Canada Journal of Law & Jurisprudence* 281, 281.

⁶⁴ Catharine MacKinnon, 'Difference and Dominance: On Sex Discrimination', *Feminism unmodified: discourses on life and law* (Harvard University Press 1987). See also Anne Fausto-Sterling, 'The Five Sexes: Why Male and Female Are Not Enough' [1993] *The Sciences* 20.

⁶⁵ For the discussion on intersectionality theory, see Sumi Cho, Kimberlé Williams Crenshaw and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38 *Signs* 785.

“[H]ow can rights be procured that free particular subjects of the harms that porn, hate speech, and a history of discrimination are said to produce without reifying the identities that these harms themselves produce? Second, how to navigate the difficulty of differences among marked groups – this woman feels oppressed while that one feels liberated by pornography.”⁶⁶

The ‘sameness/difference’ dilemma has long been embedded in the jurisprudence on feminist legal theory as shown in the persistent need to choose, depending on circumstances, either to claim equality for women on the basis of similarities between the sexes, or argue for special treatment for women on the basis of fundamental sexual differences.⁶⁷

For example, Target 5.4 seeks to ‘recognize and value unpaid care and domestic work [performed by women] through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate’. This came from the statistical survey that most of unpaid care work such as cooking, cleaning, washing clothes and kitchenware, water collection, fuel management, pet care, taking care of sick and elderly is done by women and girls in families and communities.⁶⁸

Thus, one could argue that women who bear disproportionate child-care responsibilities should not receive additional support from the labor market if the law is to be gender-neutral, whereas others might contend that ‘female workers’ should be given special protection as marriage may have a detrimental impact on women’s careers.⁶⁹ While the former argument leads to indifference towards the specific disadvantages faced by women, the latter assumes a strict dichotomy of sex, i.e. maleness and femaleness, requiring disadvantages produced by gender to

⁶⁶ Wendy Brown, ‘Suffering Rights as Paradoxes’ (2000) 7 *Constellations: An International Journal of Critical & Democratic Theory* 230, 233.

⁶⁷ See Katharine T Bartlett and Rosanna Kennedy (ed.), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991) 5.

⁶⁸ Laxmi Narayan, ‘Contextualising unpaid care work and women empowerment’ (2017) 3(7) *International Journal of Applied Research* 654, 654.

⁶⁹ Catharine Mackinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press 1979).

be remedied by reference to sex. It also ignores the diversity within the group and those in between such as male workers who assume the primary child-care and domestic responsibilities, female workers who take the role of an ideal worker, and heterosexual or homosexual couples who might arrange their responsibilities in other ways.

Therefore, if we seek to rectify such inequalities by only giving economic value to the unpaid care and domestic work done by women and not by challenging social attitudes towards the distribution of labour in the society, such measures, even though well-intended, can reproduce the stereotype that childrearing and domestic work are naturally a women's roles.⁷⁰ Instead, a preferable alternative is to address the disadvantage as it is – 'anyone [not mothers], who has eschewed ideal worker status to fulfill child-care responsibilities'.⁷¹

As a consequence, it could be said that in order for the SDGs, or any policy promoting gender equality, to be implemented effectively across societies, it should not be limited to a rights discourse. A transformative dialogue which goes beyond the rigidity of language is needed so as to empower the local community as an agent of change. For example, there exists initiatives from progressive Muslim communities to spread the understanding that Islam indeed supports many kinds of diversity. In particular, the view that sexual and gender diversity were acknowledged in the Quran and therefore, common punishments for homosexuality in Islamic countries have no basis in the Islamic scriptures.⁷² As some scholars rightly suggested, the efforts of LGBTQ activists and NGOs should not be based solely on the implementation of human rights standards, but equally on a thoughtful and matured understanding of the Islamic religion as well as other culturally based reasonings.⁷³

⁷⁰ See Katharine T Bartlett and Rosanna Kennedy (ed.) (n 67) 5.

⁷¹ Joan C Williams, 'Deconstructing Gender' (1989) 87 Michigan Law Review 797, 839.

⁷² See e.g. Scott al-Haq Kugle, 'Sexual Diversity in Islam: Is There Room For Lesbian, Gay, Bisexual, and Transgender Muslims?' (Muslims for Progressive Values, 2010) <www.mpvusa.org/sexuality-diversity/> accessed 12 January 2019.

⁷³ Javaid Rehman and Eleni Polymenopoulou, 'Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World' (2013) 37(1) Fordham International Law Journal 1, 52.

In addition, the language of the SDGs is broad and flexible enough to be employed as a means to address the situation of sexual minorities. Hence, by recognising Goal 5's limits in promoting gender equality and its effect on the overall achievement of SDGs, and by having awareness of the fact that the language of law or policy is susceptible to societal and political power dynamics, we can encourage the relevant stakeholders to interpret and implement SDGs in a more inclusive way.⁷⁴

For example, Goal 4 (Quality Education) can be used to reform school curriculums to promote LGBTQ-inclusive education. This would make the school a safer place for LGBTQ youth and empower youths with autonomy and a respect for difference.⁷⁵ With regard to Goal 3, states and NGOs should ensure that the socially accepted standards of 'good health and well-being', which may be discriminatory to sexual minorities, are not used by national medical associations or other institutions as a tool to reinforce discrimination and stigmatisation of these individuals. In this way, the SDGs can provide new opportunities to protect and empower sexual minorities around the world.

Rethinking Anti-Discrimination Doctrine

Despite the aforementioned challenges and the importance of non-legal measures, we should not give up law as a site for struggle. Instead, Otto advises us to accept the categorical approach of law for it enables us to communicate and to act; 'without categories, classifications and comparisons, we are left with a world of infinite *sui generis* items and without a basis for making judgments of justice, ethics or rights'.⁷⁶ It is only by engaging critically with the language and

⁷⁴ See e.g. Stonewall International, 'The Sustainable Development Goals and LGBT Inclusion' <www.stonewall.org.uk/sites/default/files/sdg-guide_2.pdf> accessed 12 January 2019.

⁷⁵ See e.g. LGBTI Inclusive Education Working Group, 'Report to the Scottish Ministers' (Scottish Government, November 2018); Hugo Greenhalgh, 'Overhaul of sex education in England could elevate LGBT rights' (Reuters 2018) <www.reuters.com/article/us-britain-education-lgbt/overhaul-of-sex-education-in-england-could-elevate-lgbt-rights-idUSKBN1K92TH> accessed 12 January 2019.

⁷⁶ Dianne Otto, 'Rethinking the Universality of Human Rights Law' (1997) 29 Columbia Human Rights Law Review 1, 26-27.

practices of law that law and rights-based rhetoric can empower marginalised groups to challenge the forces that cause their subordination in the first place.⁷⁷

This is particularly true in the present era where law functions as a modern expression of collective ideals and is thus an essential element in promoting social reforms.⁷⁸ For example, the law can serve as a source of discrimination, as in the case of sodomy laws, or of protection, as in the case of anti-discrimination laws. Moreover, the previous Sections have shown that the power of language is undoubtedly acknowledged by relevant stakeholders at the United Nations. As Cushman rightly observes:

Language is the weapon of choice at the United Nations – where politicians ‘negotiate’ instead of vote, where battles are fought with words instead of bullets and where victory is won with syllables not swords. That’s because U.N. delegates, charged with protecting human rights worldwide, understand that words communicate ideas and ideas have powerful consequences.⁷⁹

The question is thus how the language of the law should be framed and understood to effectively protect women and sexual minorities. In this regard, attention can be given to the two different forms of anti-discrimination policies described by Darren Rosenblum: identity-based and category-based protection. Rosenblum criticised Convention on the Elimination of all Forms of Discrimination against Women’s (CEDAW) framing on women, in that ignoring other identities and the broader power disparities related to sex can only serve to marginalise the Convention itself.⁸⁰

Goal 5 and CEDAW are therefore identity-based as they concern only a particular group of fixed ‘women’s’ identity and not on systems of oppression, whereas the Convention on the Elimination of All Forms of Racial Discrimination (CERD), for example, is category-based as it prohibits all

⁷⁷ Dianne Otto (ed), *Gender Issues and Human Rights* (Elgar Research Review in Law 2013).

⁷⁸ Kathryn L. Power, ‘Sex Segregation and the Ambivalent Directions of Sex Discrimination Law’ (1979) 1 Wisconsin Law Review 55, 63.

⁷⁹ Candi Cushman, ‘A World of Difference’ (2002), Citizen Magazine: A Web-Site of Focus on the Family, cited in Buss (n 7) 267.

⁸⁰ Darren Rosenblum, ‘Unsex CEDAW, or What’s Wrong With Women’s Rights’ (2011) 20 Columbia Journal of Gender and Law 98, 141.

discriminations on the basis of race but ‘does not limit the range of victims who can be subject to discrimination or consequent protections.’⁸¹

Hence, what Goal 5 could have done is adopt a categorical framework condemning all forms of discrimination based on sex, gender, and sexuality. In that case, examples like intersex genital mutilation and forced male circumcision in Kenya would then be qualified as sex/gender-based violence falling under the scope of Goal 5. Such articulation could draw a model from the Yogyakarta Principles adopted in 2006, which lay down principles on the application of international human rights law in relation to SOGIESC. As explained by the interpretative guide to the Principles:

*“[T]he drafters sought to uphold the universal nature of human rights by avoiding wording that would limit rights to particular groups. Thus, instead of speaking about the rights of heterosexuals, homosexuals, lesbians, gay men, bisexuals, or transgender people, each Principle is said to apply to all people regardless of the characteristic of actual or perceived sexual orientation or gender identity.”*⁸²

Therefore, by expressing the rights in this way, individuals would not be required by Goal 5 to categorise themselves through identity labels which might not conform with what they genuinely self-identify. This should be done together with making explicit the varied experiences of people facing gender-based violence across different socio-cultural backgrounds so as to balance the universality of human rights and the particularity of gender inequality.

On the other hand, taking into account the limits of law and paradoxes of human rights discourse – especially the contestable nature of category and the indeterminacy of sex/gender construction as elaborated in Section VI (1) – this paper suggests that Judith Butler’s theory of gender performance could serve as a

⁸¹ *ibid* 145 (Rosenblum further clarifies that whereas approximately half of all humans are women, all individuals may be construed as having a racialised identity. Thus, race is a category, not an identity).

⁸² ARC International, ‘An Activist’s Guide to The Yogyakarta Principles’ (2010) 23 <www.ypinaction.org/content/activists_guide> accessed 23 September 2018. See also Michael O Flaherty, ‘The Yogyakarta Principles at Ten’ (2015) 33 *Nordic Journal of Human Rights* 280.

framework which allows for a more politically sensitive understanding of how individuals are sexed and gendered by state institutions through law. The theory of gender performance asserts that gender is not a noun, i.e. something we have, but a verb, i.e. something we do, and that our gender performance contributes to the construction of the binary of male and female sex that it is said to reflect within a dominant heterosexual matrix.⁸³

Such an understanding of gender is liberating in that it does not force us to adhere to a fixed empirical identity of 'man', 'woman', 'gay', 'lesbian', etc. In contrast, it allows us to disrupt the rigid dominant cultural narrative, to accommodate gender fluidity and subjectivities, and to regard those whose modes of doing gender do not conform to social norms as equal in dignity and freedom, not merely as individuals for whom others have to have tolerance.

Thus, when it comes to gender equality, the law or a policy should refuse to institutionalize gender in any form. This does not mean that the law should be gender-blind as it can still recognize the expression gender self-determination of each individual whether as a man, woman, non-binary, or any other gender. The point, as argued by Christopher Hutton, is that the law should not 'constitute its subjects as sexed in particular ways; nor should it appeal to language, theology, science, psychology or medicine for some underlying, legally operationalizable truth about sexual identity'.⁸⁴ Nor should it presume commonalities among all groups as this might lead to the generalization about women based on the situation of a certain culture or exaggeration of the gender bias as compared to other forms of oppression inflicted upon person of any sex or gender.⁸⁵

Fixing Structural Inequalities

As Section IV (1) showed, one of the law's limits, due to its function to preserve institutional stability and continuity, is its conservative force. Activists are thus forced to work within and even strengthen the very structures they must

⁸³ Judith Butler, 'Gender Trouble: Feminism and the Subversion of Identity' (Routledge 1990) 1.

⁸⁴ Christopher Hutton, 'Legal Sex, Self-Classification and Gender Self-Determination' (2017) 11 *Law and Humanities* 64, 80.

⁸⁵ Martha Chamallas, *Introduction to Feminist Legal Theory* (Wolters Kluwer Law & Business, 3rd ed. 2013) 29.

dismantle.⁸⁶ In other words, the attempt to utilise SDGs to tackle inequality solely based on group identity will not rectify sexist policies and practices, since Goal 5's focus on 'women' enshrines the male/female binary and reinforces the rigidity of the permitted categories while erasing other identities in between.

As a consequence, it might be preferable to shift the attention from the application of law to the analysis of law as a technology of gender. As Carol Smart notes, 'instead of asking 'how law can transcend gender?', the more fruitful question has become, 'how does gender work in law and how does law work to produce gender?'⁸⁷ Similarly, Deborah Rhode concludes that feminist legal critics, by challenging both structural inequalities and the normative assumptions that underlie them, focus more on undermining the role that gender plays in a society than on predicting the precise role that gender would play in a good society.⁸⁸

Following this line of logic, the role of law in tackling inequality should no longer focus primarily on discrimination against defined groups at an individual level, but rather on 'fixing systems of power and privilege that interact to produce webs of advantages and disadvantages.'⁸⁹ Taking the issue of sex and gender, the constraint of law lies in its inability to reflect the full spectra of sex and gender. Therefore, instead of seeking to create a more inclusive set of legal categories to cover a wide range of sexual identities, it should aim to de-institutionalise the gendered structure of society, shifting from women's rights and LGBTQ rights paradigms to ones which interrogate the institutional practices that produce the identities and inequalities in the first place.

In this respect, it is important to identify the structural flaws of what Martha Fineman called 'foundational myths' according to which the equality doctrine, upon which anti-discrimination law is grounded, derives the liberal notion that each individual is an autonomous and independent subject, born free and endowed with the same inalienable rights, and can exercise his/her freewill and

⁸⁶ Katharine T. Bartlett and Rosanna Kennedy (ed.), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991) 3.

⁸⁷ Carol Smart, 'The Woman of Legal Discourse' (1992) 1 Social & Legal Studies 29, 34

⁸⁸ Deborah L. Rhode, 'Feminist Critical Theories' (1990) 42 Stanford Law Review 617, 637.

⁸⁹ *ibid.*

be held responsible for it. As a consequence, the argument requires the state to limit its intervention, especially in field of the free market and the private family.⁹⁰

On the contrary, Martha Fineman challenges the passive role of state based on public/private dichotomy by invoking an alternative concept of 'shared, inevitable vulnerability' which is inherent in the human condition through our bodily needs and the messy dependencies they carry. Accordingly, the reality of our shared vulnerability inevitably influence how we construct our societal institutions and how such institutions provide us with physical assets, human assets, and social assets.⁹¹ In this sense, the same-sex marriage debates, according to Fineman, are a good example of the attempt to reveal how the state, through laws governing the institution of marriage, privileges some while leaving others outside of its protective structure.⁹²

Such a shift in attitude encourages a more responsive political culture in that each and every individual in the society to has an interest to disprove the existence of inequalities, regardless of whom such inequalities are inflicted upon, since all of us, being in a constant state of possible harm varying in every aspect of life as elaborated in the SDGs, cannot escape our shared vulnerability and thus are interdependent on one another.

This concept also corresponds with the interconnected nature of the SDGs in which the challenges and solutions contained in the agenda are interrelated and thus require integrated approach which go into fixing the structural flaws, rather than merely fixing the individual problem at the superficial level. Moreover, this will facilitate forming coalitions which need not be organized around differing

⁹⁰ See Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New York, The New Press 2004).

⁹¹ Martha Fineman, 'The Vulnerable Subject: Anchoring Quality in the Human Condition' (2008) 20 *Yale Journal of Law & Feminism* 1, 12-14, explaining that "institutions that provide us with physical assets are those that impart physical or material goods through the distribution of wealth and property. Human assets are innate or developed abilities to make the most of a given situation such as health and education. Social assets are networks of relationships from which we gain support and strength, including the family and other cultural groupings and associations, such as trade union and political parties."

⁹² *ibid* 22.

identities but among those who have not benefited as fully as others from current societal organization.⁹³

Therefore, it can be seen that since both sexual minorities and women struggle for autonomy over one's body and right to non-discrimination, women's rights activists should consider sexual minorities as political allies in challenging the structural inequalities and social biases which prevent them from exercising their rights and freedoms.

CONCLUSION

By criticising the SDGs' exclusion of sexual minorities, this paper does not contest Goal 5's descriptive assessment of women's situation, nor does it attempt to undermine the international effort to improve women's lives. Women's present conditions deserve greater attention and a central place in the international agenda, but this centrality does not necessitate or justify their placement as the sole gender or sex identity meriting protection from discrimination.

On the contrary, this paper argues that gender equality could not truly be achieved, if Goal 5 focuses exclusively on women, adopting an essentialist identity-based approach, thereby ignoring differences within 'women' and other identities. Instead, we should adopt an inclusive category-based approach while acknowledging the indeterminate, fluctuating, and socially-constructed character of those categories pertaining to sex, gender, and sexuality. This can be done only if we also challenge the heteronormative and cis-normative assumptions that underlie structural inequalities at both the international and national levels.

The exclusion of SOGIESC considerations from a widely adhered international agenda such as SDGs does not concern only those who self-identify as such. Calling for remedial actions and socio-legal reform with regards to unequal institutional arrangements concerning sexual minorities will pave the way for addressing and correcting the disadvantage and power imbalances that persist in society in other areas of human security.

⁹³ *ibid* 17.

Therefore, by addressing gender inequality in all of its manifestations, any effort to implement SDGs would be better positioned to accomplish not only Goal 5, but also other SDGs as a whole, and thus genuinely fulfilling its promise of 'leaving no one behind'.