

Comment on the Definition of Sexual Orientation and Gender Identity
Submitted to
The Drafting Committee, Yogyakarta Principles on the Application of International Human
Rights Law to Sexual Orientation and Gender Identity

Submitted by
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I am pleased to submit to you this comment in response to the January 5, 2017 call for comments regarding a review of the Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity (the Principles). This comment recommends a modification of the definition of Sexual Orientation and Gender Identity.¹ The definition of sexual orientation and gender identity in the Yogyakarta Principles serves the purpose of identifying the characteristics by which people can be classified. Human rights violations can occur when governments and non-state actors unjustly treat people differently based on such characteristics, or where governments and non-state actors do not adequately take such characteristics into account when responding to the needs of individuals. These definitions should be assessed in light of the purpose of the Yogyakarta Principles, which is to establish “a consistent understanding of how the comprehensive regime of international human rights law”² is applied to issues of sexual orientation and gender identity.

A. Currently, the principles define sexual orientation and gender identity as follows:

Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. **Gender identity** is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. (emphasis added).³

¹ It is likely that the drafting committee will be asked to consider the addition of sex characteristics in order to include intersex people within the scope of the Principles. Sex characteristics refer to each person’s physical characteristics relating to sex, including genitalia, chromosomes and hormones, and also secondary physical characteristics emerging from puberty. Sex characteristics may or may not correspond to any legal classification assigned at birth, and may develop innately or be acquired (definition provided by Morgan Carpenter, Organization Intersex International Australia). Based on the expectation that another commentator will make such a recommendation, this comment does not explore sex characteristics as an additional term, except to note that sex characteristics can easily be combined with the terms sexual orientation and gender identity as recommended herein.

² Yogyakarta Principles, Introduction, 7.

³ Yogyakarta Principles, Introduction, 6.

B. Assessment of the current definition.

The current definition helps to accomplish this purpose in several ways. First, the authors created a definition specifically for the purposes of the Yogyakarta Principles.⁴ The authors recognized that, regarding sexuality and gender, there exist a number of different definitions⁵ but that a specific definition was needed in order to accomplish the purposes of this document.

Secondly, the authors adhered to the principle that “[a]ll human rights are universal, interdependent, indivisible and interrelated” by using the sexual orientation and gender identity (SOGI) framework. At the time of the drafting of the principles, LGBTI advocates and human rights experts were most concerned with stigma and prejudice directed toward populations around the world who did not conform to majority norms of sexuality and gender. These minorities identified themselves in number of ways, using terms that are specific to cultures, language, and legal context. It is these minorities to which the authors refer to when they recognize that “human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern... [and] the international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent.”

However, a definition which only identifies these minorities would be antithetical to the notion that human rights are universal, interdependent, indivisible and interrelated. Human rights apply to all human beings; as the Principles state, “[s]exual orientation and gender identity are integral to every person’s dignity and humanity and must not be the basis for discrimination or abuse.” Thus even though the motivation was a concern for a specific marginalized group, the definition was crafted to encompass all people.

Thirdly, the SOGI framework reflects the frameworks increasingly used by UN bodies and member states. A global survey of LGBT leaders found that the Principles have “played a crucial role in establishing a language on SOGI that is now used by a growing number of UN actors and States.”⁶

Fourth, the definition clarifies gender identity and sexual orientation as independent concepts. This clarification is important as many people conflate sexual orientation and gender identity based on the assumption that same-sex desire steers, or is steered by, an individual’s gender identity. This conflation is compounded by the fact that the structural logic of the popular moniker LGBTI implies that a person can be either lesbian, or gay, or bisexual or transgender or intersex, but not more than one of these identities. In actuality, an individual’s sexual orientation does not determine or limit an individual’s gender identity, and vice versa.

⁴ The term “disability” remains undefined in the International Convention on the Rights of People with Disabilities. UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106. Many definitions have been used by governments, medical organizations, and advocates.

⁵ “The insistence of diverse groups on naming themselves and achieving recognition of their distinctness and variety will go on as long as aspirations for democracy exist...” Rosalind Petchesky, “Language of Sexual Minorities and the Politics of Identity: a Position Paper,” *Reproductive Health Matters* 17, no. 33 (2009): 105-110, 105.

⁶ Dodo Karsay, *How Far has SOGI Advocacy Come at the UN and Where is it Heading? Assessing Sexual Orientation, Gender Identity, and Intersex Activism and Key Developments at the UN, 2003-2014* (ARC International, 2014), 8.

Last, the definitions avoid a reliance on a binary of gender options. While the definition embraces the concept of gender, as does most every culture and legal system, it avoids references to male, female, opposite gender, or any other category which would invoke a gender binary. Thus, the definition reflects the lives of individuals who may seek to live outside a gender binary as well as the evolving legal regimes recognize more than two genders.

Nevertheless, the definition has several limitations, primarily in the manner in which it reflects the diversity of sexual orientation and gender identity. First, it does not recognize that an individual's sexual orientation is heavily influenced by how they choose to identify themselves, separately and apart from their actual experience of attraction to, and relations with, other people. The definition includes the two latter, but not the former. From a personal perspective, labeling one's own self identity, and disclosing it to others, is recognized by psychologists as an important step in healthy personal development of one's sexual orientation and gender identity.⁷ From a cross-cultural perspective, the identity expressed by individuals is most often one that is specific to their culture, and is sometimes bound to other identities of religion, caste, ethnicity, nationhood and sometimes (though not always) gender. Examples of identity terms include straight, gay, lesbian, bisexual, pansexual, queer, etc. (in English), methis (Nepali), kathoey (Thai), bakla (Tagalog), kuchu (Swahili). And finally from a legal perspective, the right to express an identity lies at the heart of human rights.

Identity, attraction, and relations with other people are each separate components which make up sexual orientation. The definition should make it clear that one does not necessarily predict or correspond to another. Studies in Senegal, Uganda, and South Africa looked at how men identified themselves (according to local language) and whether those identities corresponded to their sexual practice in terms of the gender of their partners. The study found an "absence of systemic links between practice and identity."⁸ In response to a survey in Nepal, 33.1% of respondents who said that they most strongly identified with the term "Gay" also reported attraction to females. In a group of males that most strongly identified as heterosexual and bisexual, 63% reported attraction to *Metis*, a Nepali term for people assigned male at birth who have a feminine gender identity, 57.1% reported attraction to *Kothis*, a term similar to *Meti*, and 48.6% reported attraction to other males.⁹

Additionally, while the definition recognizes that attraction and relationships can be components of sexual orientation, it limits the kinds of attractions and relationships that can be considered when assessing someone's sexual orientation. The definition specifies that a "person's capacity for profound emotional, affectional and sexual attraction" can contribute to a person sexual orientation. This definition excludes individuals whose sexual orientation may be constituted of attraction that is simple, fleeting, or in the case of some asexuals, non-existent.

⁷ Aaron H. Devor, "Witnessing and Mirroring: A Fourteen Stage Model of Transsexual Identity Formation," *Journal of Gay and Lesbian Psychotherapy* 8, no. 1-2 (2004): 41-67; Eliason, Schope, R., "Shifting Sands or Solid Foundation? Lesbian, Gay, Bisexual, and Transgender Identity Formation" in *The Health of Sexual Minorities Public Health Perspectives on Lesbian, Gay, Bisexual and Transgender Populations*, Ilan Meyer and Mary Northridge, eds. (New York: Springer, 2007).

⁸ Joseph Larmarange et al., "Homosexuality and Bisexuality in Senegal: A Multiform Reality," *Population* 64, no. 4 (2009): 635-66, 64.

⁹ UNDP, Williams Institute, *Surveying Nepal's Sexual and Gender Minorities: An Inclusive Approach* (Bangkok: UNDP, 2014), <http://williamsinstitute.law.ucla.edu/research/international/surveying-nepals-sexual-and-gender-minorities/>.

Similarly, the definition looks to relations that are “intimate and sexual.” This definition excludes individuals whose relations may be superficial.

Lastly, the definition of gender identity does not provide sufficient clarity about the various components that comprise gender. Almost without exception, children very quickly develop an internal capacity to experience gender which is maintained throughout life. At the same time, babies are assigned a gender at birth by those around them, and as they journey through life gender continues to be socially assigned to them. These internal and external formations, though related, may not correspond to each other. Additionally, given that gender shifts throughout one’s life, the relative influence that internal and external factors have may be different from moment to moment. At any given point in a person’s life, shifts in gender identity may be driven by internal feelings, bodily changes, external expression, or even changes in surrounding circumstance.

The fact that this is a human rights document means that we should account for the roles that internal, external and social components of gender identity have in the situations involving human rights violations. An individual’s inner experience of gender may produce a hostile response in others. Just as likely, however, human rights violations are in response not by an individual’s internal feeling about gender, but rather by what they do (gender expression) or what other people think about them (socially assigned gender). Thus, the definition of gender identity must include both internal and external components of gender identity.

The current definition centers heavily on an individual’s internal feelings about their gender, and external gender expression is subsumed within this internal feeling: Gender identity refers to “each person’s deeply felt internal and individual experience of gender ... including the personal sense of the body ... and other expressions of gender, including dress, speech and mannerisms.” (dependent clauses removed).¹⁰ The recommendations below are an attempt to broaden this definition.

C. Recommendation.

Accordingly, I propose the following definition:

Sexual Orientation can be assessed according to how an individual identifies themselves, the gender of person(s) with whom they have engaged in sexual activity, if any, and the gender of person(s) for whom they have felt attraction. **Gender identity and expression** is comprised of each person’s internal experience of their own gender, how they express themselves to others through appearance, dress, style, and mannerisms, as well as socially assigned gender.

According to this definition, the term sexual orientation incorporates three elements¹¹:

¹⁰ Yogyakarta Principles, Introduction, p.6.

¹¹ For sexual orientation, the definition consists of a broadened version of the classification system initially developed by Sociologist Edward Laumann used to identify sexual minority populations. Laumann’s definition has become the standard framework to classify individuals in the social sciences. Edward Laumann, *The Social Organization of Sexuality, Sexual Practices in the United States* (Chicago: The University of Chicago Press, 1994), 290.

1. Identity. An individual may define their sexual orientation in any way they want. In addition to the well-known western identities of homosexual, heterosexual, bisexual, and asexual, individuals could choose culturally specific terms, or terms that also indicate their gender identity (methis (Nepali), kathoey (Thai), and bakla (Tagalog), hijra (hindi)). For example, in India, the term Hijra can be used to describe sexual orientation, gender identity, caste, religion and language.
2. Sexual behavior. An individual's sexual orientation may be assessed by looking at sexual partners. The category of men who has sex with men (MSM) is an example of behavior -based classification.
3. Sexual attraction. Sexual attraction and sexual behavior often, though not always, correspond. It is important when dealing with issues of health and personality development to understand the distinctions.

Figure 1, Venn diagram of sexual orientation, illustrates how these three aspects of sexual orientation interact. An individual can fall into one of several groups depending on their identity, attraction and behavior. This definition encompasses distinct groups of sexual minorities, including a hijra who identifies her sexual orientation as hijra, a young bisexual who has not yet had sex, a straight woman in prison who has sex with other women, not out of desire for them but simply for human contact and sexual release, a queer woman who desires and has sex with men but who seeks a non-conforming identity, an asexual man who does not experience sexual desire, a gay male sex worker who has different-sex clients (and does not feel sexual desire for women), and many others.

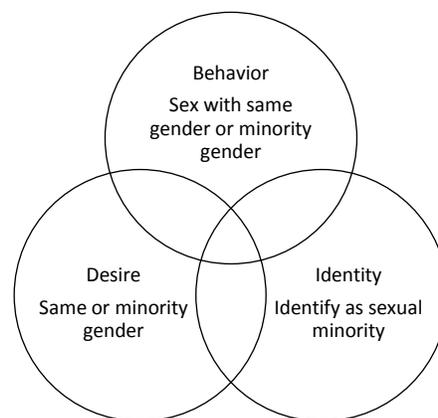


Figure 1. Venn Diagram of Sexual Orientation

The definition of gender identity and expression also incorporates several aspects that can make up gender.

1. A person's internal experience of their own gender. Thus, an individual may internally feel they are a different gender than that assigned at birth even if they do not express or disclose their gender to anyone else.
2. A persons expression of gender through speech, appearance, dress, style, and mannerisms. This is how an individual intends their gender to come across to others.

3. Socially assigned gender. This is how they are perceived by others. When speaking about stigma, prejudice, and hostility, one of the most important aspects of socially assigned gender is whether others perceive the individual to be transgendered at all, or whether, the individual 'passes,' to use a colloquial term.

Similarly, this definition encompasses a multiple gender configurations, including, for example, a person who expressed gender is the same as their gender assigned at birth but who feels internally that their gender is different, a person whose expression and internal perception of gender are both discordant with their birth gender, and a person who feels their internal perception and outward expression is the same as their gender at birth, yet their socially assigned gender is different. All of these individuals would be included in this definition.

