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Pre-existing Rights and Future Articulations

Temporal Rhetoric in the Struggle for Trans Rights

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15.1 INTRODUCTION: TEMPORALITIES OF STRUGGLE

For decades now, trans activists have been struggling to make human rights law more inclusive of trans persons – from early efforts at the national level in various countries, over first successes in litigation regarding a right to legal gender recognition at the regional and global levels, to broader campaigns concerning depathologisation, access to health care, housing, education, employment, and so much more. While general tendencies can of course be made out,[1] struggles such as these are complex and non-linear.[2] Not only are there events commonly classified as victories or defeats (applications to human rights bodies being vindicated or rejected, say), but each will involve elements of the other to the point of making them sometimes indistinguishable: for example, even successful applications might include trade-offs in the kind of reasoning deployed to convince legal institutions of the applicants' cause,[3] and even judgments in favour of trans applicants will build on and reinforce societal notions of gender, and indeed humanity, which condition how reality becomes intelligible to us.[4]

Complex and non-linear the temporalities of struggle may be, but it seems clear to me that there is, in any case, a sense of struggle *over time*. One way in which this sense is rendered tangible within legal discourse on trans rights – and human rights more generally – is through the

* Topics covered in this chapter formed part of presentations at various conferences: The New Legal Temporalities (University of Kent, September 2016), Rights for the 21st Century? Exploring the Need for 'New' Human Rights (Tallinn University, September 2017) and Human Rights and the Humanities: Culture and Critique (Royal Irish Academy, December 2017). I would like to thank all those who offered feedback during the discussions at these conferences, as well as several friends and colleagues who were kind enough to comment on drafts of this chapter: Andreas von Arnauld, Pieter Cannoot, Stefan Martini, Katharina Wommelsdorff and particularly Kay Lalor.

1 J. M. Scherpe and P. Dunne, 'Comparative Analysis and Recommendations', in J. M. Scherpe (ed.), *The Legal Status of Transsexual and Transgender Persons* (Cambridge: Intersentia, 2015), pp. 618–624.

2 See generally J. T. Theilen, I. Hassfurther and W. Staff, 'Towards Utopia – Rethinking International Law' (2017) 60 *German Yearbook of International Law* 315 at 331–332; and, specifically on queer rights, K. Lalor, 'Making Different Differences: Representation and Rights in Sexuality Activism' (2015) 23 *Feminist Legal Studies* 7 at 8.

3 See D. Spade, 'Resisting Medicine, Re/Modeling Gender' (2003) 18 *Berkeley Women's Law Journal* 15.

4 I am thinking here primarily of regulation in the sense used by Judith Butler (as 'making regular'); see J. Butler, 'Gender Regulations', *Undoing Gender* (New York and London: Routledge, 2004), p. 40 and, for the connection between gender and humanity, e.g. J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York and London: Routledge, 1999), p. xxiii; in the context of human rights, see C. Weber, *Queer International Relations: Sovereignty, Sexuality and the Will to Knowledge* (Oxford: Oxford University Press, 2016), pp. 118–119; for a more broadly Foucauldian approach, see e.g. E. Bjorge, 'Sexuality Rights under the European Convention on Human Rights' (2011) 29 *Nordic Journal of Human Rights* 158.

notion of *novelty*:[5] for example, Holning Lau's contribution to this volume asks whether the human right to legal gender recognition is 'new'.[6] But what does this mean, and why does it matter? On a highly formalised approach, one might call any given judgment or declaration on human rights new in the sense that it did not exist prior to being announced – but that hardly seems interesting or worth arguing over. In a more loaded sense, one might attempt to place the substantive content of, say, the human right to legal gender recognition in relation to *previous* judgments or declarations. One might propose a nuanced taxonomy of, for example, affirmation, reformulation, extension and innovation.[7] But why do so, and why imbue the relation between different legal norms with the *temporal* dimension of novelty – all the more so when the complexity of rights' development over time casts doubt on any simple answer as to a right's novelty or lack thereof?

It is this question that I would like to pursue in this brief comment by reference to the example of trans rights: my aim is to provoke a shift in perspective from the question of novelty as such to the *effects* of presenting the right to legal gender recognition as new (or not new). I will focus, in particular, on the way in which representations of temporality relate to the way in which trans persons are constituted as subjects of human rights law by presenting certain understandings of gender and humanity as unquestionably 'true'. As Judith Butler puts it, human rights are 'always in the process of subjecting the human to redefinition and renegotiation',[8] but any given understanding of the human is bolstered and legitimated in various ways: my argument is simply that temporal rhetoric can be one of them.[9] Succinctly put, I am not interested in establishing truth about novelty (or lack thereof), but rather in how novelty (or lack thereof) establishes truth about gender. I will leave aside other effects of temporal rhetoric, such as its relation to the possible retroactivity of legal norms.[10]

I begin with an analysis of the case law of the ECtHR on the right to legal gender recognition, which provides a prime example not only of trans persons being admitted into the category of the 'human' on narrow terms, but also of temporal rhetoric as a way of legitimising the ECtHR's approach. Here, the right to legal gender recognition is presented as 'new' in the sense of newly found truth, part of a progress narrative which presents the boundaries of the 'human' as closed even as it reconstitutes them (Section 15.2). In other instances, often in the course of advocacy for trans rights, a diametrically opposed form of temporal rhetoric is found: trans rights are presented as pre-existing rather than new. While understandable as a strategy within legal reasoning, this move leads to a depoliticised understanding of human rights and, again, the constitution of static boundaries of the 'human' (Section 15.3). I therefore conclude that, in order to engage with trans rights in a way that maximises the space of emancipatory possibility, we should treat both forms of temporal rhetoric with caution. Instead, I will turn back to the

[5] Often building on Alston's famous call for quality control for 'new' rights: P. Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 607.

[6] H. Lau, in this volume, p. 193.

[7] F. Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 *Human Rights Quarterly* 494.

[8] J. Butler, 'On the Limits of Sexual Autonomy', *Undoing Gender* (New York and London: Routledge, 2004), p. 33.

[9] Susan Marks calls this 'narrativization'; for this and other forms of legitimation through the lens of ideology critique, see S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford: Oxford University Press, 2000), pp. 19–22; see also ibid., pp. 10–11 for the connection between meaning and power.

[10] Though this, too, is a relevant aspect in the case of trans rights: see ECtHR, *Grant* v. *the United Kingdom* (Appl. no. 32570/03), judgment, 23 May 2006, paras. 41–42.

idea of a complex and non-linear struggle for human rights – a struggle with no clear end-point and no clear, unquestioned understanding of the 'human'. On this approach, the point is not to establish whether or not trans rights are 'new', but rather how we can continuously rethink them in such a way as to render them as inclusive as possible (Section 15.4).

15.2 EMPHASISING NOVELTY: THE CASE LAW OF THE ECTHR

The ECtHR's acknowledgement of gender identity rights took some time to develop. In judgments spanning over a decade, it began by insisting repeatedly that lack of legal gender recognition does not constitute a human rights violation.[11] It was not until 2002, in the landmark judgment of *Christine Goodwin* v. *the United Kingdom*,[12] that it changed its approach. Now arguing in favour of the trans applicant, the ECtHR made reference – as other courts have done in this context[13] – to broad principles or what Lau calls 'basic rights' from which gender identity rights can be derived.[14] In particular, it argued in a crucial and much-quoted passage that 'the very essence of the Convention is respect for human dignity and human freedom' and that for the right to private life, in particular, 'the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'.[15]

In light of its previous judgments on the issue, however, it was also clear that the interpretation of these principles in *Goodwin* constituted a paradigm shift of sorts, an instance of the 'reversible aspect of the law'.[16] I will mostly leave aside the technical legal arguments that the Court used to justify its change of interpretation – in particular, the role assigned to precedent, evolutive interpretation, and evolving European and international consensus – and instead foreground its temporal rhetoric. A key passage in that regard goes as follows:

> *In the twenty first century* the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society *cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light* on the issues involved.[17]

By referring to the newly begun twenty-first century and connecting its new reasoning to images of 'clearer light', the ECtHR invokes a sense of new-found enlightenment.[18] This kind of rhetoric has been described as 'ascending periodisation': two periods are distinguished within legal development – separated, in this case, by the dawn of a new millennium – and the more recent

[11] ECtHR, *Rees* v. *the United Kingdom* (Appl. no. 9532/81), judgment, 17 October 1986; ECtHR, *Cossey* v. *the United Kingdom* (Appl. no. 10843/84), judgment, 27 September 1990; ECtHR, *Sheffield and Horsham* v. *the United Kingdom* (Appl. nos. 22985/93 and 23390/94), judgment, 30 July 1998.

[12] ECtHR, *Christine Goodwin* v. *the United Kingdom* (Appl. no. 28957/95), judgment, 11 July 2002.

[13] E.g. Supreme Court of India, *National Legal Services Authority* v. *Union of India and others*, Writ Petition (Civil) No. 400 of 2012, e.g. paras. 20, 68 and 74 (and quoting the ECtHR passage mentioned above at para. 32); German Federal Constitutional Court, Decision of 11 January 2011, BVerfGE 128, 109, at 124.

[14] Lau, in this volume, p. 194.

[15] ECtHR, *Christine Goodwin* v. *the United Kingdom*, para. 90; self-determination is cited by the Court in *van Kück* v. *Germany* (Appl. no. 35968/97), judgment, 12 June 2003, para. 73.

[16] C. J. Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1989) 98 *Yale Law Journal* 1631 at 1643.

[17] ECtHR, *Christine Goodwin* v. *the United Kingdom*, para. 90 (emphasis added).

[18] *Goodwin* is not a stand-alone case in this regard; see, for example, the recent French law which amends the civil code to make provision for legal gender recognition, entitled Law for the Modernisation of Justice for the Twenty-First Century (Loi no. 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle); see also, more generally on the pernicious effects of claiming enlightenment in the context of global queer politics, Weber, *Queer International Relations*, pp. 111 and 135.

is described in more favourable terms.[19] The time was out of joint, but now it claims to have found its remedy.

With the development vis-à-vis its previous judgments thus declared, the ECtHR concluded that lack of legal gender recognition constitutes a violation of, inter alia, the right to private life.[20] In light of this result, *Goodwin* is largely celebrated as a major step forward in the legal acknowledgement of gender identity rights – and rightly so. However, it also evinced significant limitations, and my argument is that these are not unrelated to the temporal rhetoric just discussed. The ascending periodisation which it employs builds up a historical teleology that aims to legitimise its new, henceforth enlightened stance as what David Valentine has termed a narrative of 'coming-to-truth',[21] in which a certain development is presented in such a way as to constitute the final step necessary (rather than, say, as part of an ongoing and non-linear process). Since the truth of the twenty-first century has already been discovered – so the story goes – there is no need for further revision. Indeed, Sir Nicolas Bratza, former president of the ECtHR, has opined extra-judicially that, with *Goodwin*, '[t]he long road to establishing the Convention rights of transsexuals … was at last *at an end*'.[22]

Many would disagree with this assessment: among other things, several European states retain various oppressive preconditions to legal gender recognition which could be challenged by giving the right to legal gender recognition a broader scope than that in *Goodwin*. Yet that judgment decreed that the particulars of *how* legal gender recognition should be granted remain within the states parties' margin of appreciation,[23] thus limiting its transformative potential. The ECtHR's narrative of coming-to-truth as coming-to-an-end was borne out in its subsequent judgments, which have progressed little since 2002.[24] Accordingly, only some trans persons have been admitted into the category of the 'human' as the ECtHR conceives of it – others, such as those who do not view their gender identity in terms of a mental illness[25] – have been actively excluded from it.[26] The ECtHR's temporal rhetoric helps to legitimate this state of affairs: even

[19] T. Altwicker and O. Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 *European Journal of International Law* 425 at 432.

[20] ECtHR, *Christine Goodwin* v. *the United Kingdom*, para. 93.

[21] D. Valentine, *Imagining Transgender: An Ethnography of a Category* (Durham, NC and London: Duke University Press, 2007), p. 245; see generally on grand narratives in the context of queer rights K. Lalor, 'Encountering the Past: Grand Narratives, Fragmented Histories and LGBTI Rights "Progress"' (2019) 30 *Law and Critique* 24–25; and for human rights as a whole, see B. Authers and H. Charlesworth, 'The Crisis and the Quotidian in International Human Rights Law' (2013) 44 *Netherlands Yearbook of International Law* 19 at 26.

[22] N. Bratza, 'The Christine Goodwin Case. The Long Road to Transsexual Rights in the United Kingdom' (2014) 34 *Human Rights Law Journal* 245 (emphasis added). I have criticised this spatial metaphor and its limits in J. T. Theilen, 'The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe', in G. Schreiber (ed.), *Transsexualität in Theologie und Neurowissenschaften: Ergebnisse, Kontroversen, Perspektiven* (Berlin and Boston: de Gruyter, 2016), p. 373.

[23] ECtHR, *Christine Goodwin* v. *the United Kingdom*, para. 93.

[24] See ECtHR, *Parry* v. *the United Kingdom* (Appl. no. 42971/05), decision, 28 November 2006; ECtHR, *Stella Nuñez* v. *France* (Appl. no. 18367/06), decision, 27 May 2008; and ECtHR, *Hämäläinen* v. *Finland* (Appl. no. 37359/09), judgment, 16 July 2014, none of which found a violation. ECtHR, *A.P., Garçon and Nicot* v. *France* (Appl. nos. 79885/12, 52471/13, 52596/13), judgment, 6 April 2017, declared that sterilisation is not a permissible precondition for legal gender recognition, but rubber-stamped other preconditions such as a medical diagnosis or medical examination.

[25] See most recently D. A. Gonzalez-Salzberg, 'An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France' (2018) 81 *Modern Law Review* 526; and more generally J. T. Theilen, 'Depathologisation of Transgenderism and International Human Rights Law' (2014) 14 *Human Rights Law Review* 327.

[26] D. A. Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2014) 29 *American University International Law Review* 797.

as it renders certain forms of gender intelligible, the progress narrative offered by the move into the enlightened twenty-first century reconstitutes the new boundaries of the 'human' as truth.

15.3 AGAINST NOVELTY: THE FOCUS ON PRE-EXISTING RIGHTS

If the ECtHR's presentation of the right to legal gender recognition as 'new' has exclusionary effects, then one option is to offer a counter-narrative which contests its temporal rhetoric. Holning Lau's contribution to this volume can, I think, be read in that light. Gender identity rights such as the right to legal gender recognition, according to him, are 'only *new* in the sense that they are newly recognised aspects of existing rights'[27] – but they are not *truly* new, for they can be *derived* from various 'basic rights' which are already uncontroversially recognised within human rights law.[28] In a sense, this kind of derivation is performed by the ECtHR as well: its conclusions in *Christine Goodwin* were, after all, based on an interpretation of the human right to private life as well as the invocation of broad principles such as human dignity and autonomy.[29] What sets Lau's account apart from that of the ECtHR is the use of differing temporal rhetoric to accompany his interpretations of basic rights, i.e. the denial of novelty as opposed to its invocation as part of a grand narrative of progress.

This denial of novelty could even be heightened: consider, for example, the way in which George Letsas frames the process of interpretation as one of 'moral discovery'. On his account, the ECtHR 'discovers what … human rights always meant to protect'.[30] Elsewhere, he clarifies that when the ECtHR finds a violation, this implies that 'the complained-of behaviour has *always* constituted a violation, even when it was not considered to be so'.[31] One might think of this as a kind of temporal rhetoric at the opposite end of the spectrum from the kind described in the preceding section: rather than building a narrative of novelty, the insistence on an 'always' valid interpretation makes the element of novelty fade entirely into the background, focusing instead on the interpretation of 'pre-existing rights'.[32]

Paradoxically, this kind of temporal rhetoric may have a naturalising effect quite similar to that of the ECtHR's narrative of coming-to-truth. Particularly against the background of queer theory, one cannot help but think of Eve Kosofsky Sedgwick's phrase: the 'commanding, *atemporal* adverb "always"'.[33] Specifically in response to Letsas, Ben Golder has further elaborated the discursive effects of this kind of assumed atemporality: he describes it as a 'depoliticising move' which presents human rights 'as if there were some original principle or logic installed in the Convention'.[34] Once again, then, we are faced with a kind of temporal rhetoric which

[27] Lau, in this volume, p. 193 (original emphasis).
[28] Ibid., p. 194.
[29] Above, note 15.
[30] G. Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', in A. Føllesdal, B. Peters and G. Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press, 2013), p. 125 (emphasis omitted).
[31] G. Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law* 509 at 530 (emphasis added).
[32] Lau, in this volume, p. 206. Where Letsas builds on Dworkin, Lau refers to Raz (p. 194); while thus clearly distinct in theory, Lau's use of temporal rhetoric, I think, brings them into proximity.
[33] E. K. Sedgwick, 'Paranoid Reading and Reparative Reading, or, You're So Paranoid, You Probably Think this Essay Is about You', *Touching Feeling: Affect, Pedagogy, Performativity* (Durham, NC: Duke University Press, 2002), p. 125 (emphasis added); see also Weber, *Queer International Relations*, p. 125.
[34] B. Golder, 'On the Varieties of Universalism in Human Rights Discourse', in P. Agha (ed.), *Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts* (London: Hart, 2017), p. 49.

legitimises the interpretation advocated for in a manner which, by virtue of depoliticising it, impedes contestation.

In some contexts this aspect of depoliticisation may appear welcome. The first report of Vitit Muntarbhorn, former United Nations Independent Expert on violence and discrimination based on sexual orientation and gender identity, provides an example. It is said to be 'based on existing international human rights law and its interrelationship with … gender identity; there is *no advocacy of new rights* for particular groups'.[35] Such a sweeping statement is explained by a glance at Muntarbhorn's mandate, which referred only to the 'implementation of *existing* international human rights instruments' with regard to gender identity.[36]

Denying novelty thus relates to the institutional backdrop, and can be understood as an attempt to make Muntarbhorn's conclusions seem more acceptable to the states which he addresses – all the more understandable in light of the many controversies surrounding the creation of a mandate dealing with sexual orientation and gender identity in the first place. Presumably, this kind of mindset is also what leads Holning Lau to claim that 'the argument that gender recognition is a radically *new* right' constitutes a 'threat' to the momentum in favour of broad legal gender recognition which he takes to be building across legal systems.[37] As a strategic move within legal reasoning, then, the denial of novelty may be helpful in some contexts, particularly when faced with conservative and transphobic opposition; one might think of Spivak's notion of 'strategic essentialism' as a conceptual backdrop.[38]

However, such an approach carries significant risks. It is telling that Spivak herself has disavowed the term 'strategic essentialism' because the element of strategy tends to be forgotten, and only essentialism remains.[39] In Kay Lalor's words, the reference to only timeless and abstract rights that are 'disembedded from historical and temporal locations' will 'struggle to move beyond problematic and static representations'[40] – it threatens to obscure questions of epistemic authority[41] and to shift the focus away from contestation,[42] from grass-roots struggles[43] and from the voices of trans persons themselves.[44] My point is not that we should avoid reference to 'basic rights' such as human dignity, freedom and autonomy entirely, but rather that over-focusing on a temporal narrative which emphasises the timelessness of their interpretations understands human rights as founded on a notion of the 'human' which, as Judith Butler puts it, 'is already known, already defined'.[45]

[35] HRC, Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, 19 April 2017, UN Doc. A/HRC/35/36, para. 17 (emphasis added); in the meantime, the first report of the new independent expert, V. Madrigal-Borloz, is also available (HRC, Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, 11 May 2018, UN Doc. A/HRC/38/43).

[36] HRC, Resolution on Protection against violence and discrimination based on sexual orientation and gender identity, 15 July 2016, UN Doc. A/HRC/RES/32/2, para. 3(a) (emphasis added).

[37] Lau, in this volume, p. 206 (original emphasis).

[38] G. C. Spivak, *In Other Worlds: Essays in Cultural Politics* (Abingdon: Routledge, 1998), chapter 12.

[39] S. Danius, S. Jonsson and G. C. Spivak, 'An Interview with Gayatri Chakravorty Spivak' (1993) 20 *boundary* 2 24 at 35.

[40] Lalor, 'Making Different Differences', 12.

[41] See generally B. A. Ackerly, *Universal Human Rights in a World of Difference* (Cambridge: Cambridge University Press, 2008), particularly chapter 3.

[42] M. Waites, 'Critique of "Sexual Orientation" and "Gender Identity" in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles' (2009) 15 *Contemporary Politics* 137 at 153.

[43] D. Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (New York: South End Press, 2011).

[44] V. Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (Chicago: University of Chicago Press, 2000).

[45] Butler, 'On the Limits of Sexual Autonomy', p. 37.

15.4 OUTLOOK: FUTURE ARTICULATIONS OF HUMAN RIGHTS

Representations of temporality may have many different purposes and effects. In this chapter I have argued that they relate, inter alia, to the way in which trans persons are constituted as subjects of human rights law by presenting certain understandings of gender and humanity as unquestionably 'true'. I have considered two different forms of temporal rhetoric: the presentation of the right to legal gender recognition as new in the sense of new-found enlightenment, the final step in a narrative of coming-to-truth; and, conversely, the denial of novelty which claims atemporal truth for its interpretations of pre-existing rights.

While diametrically opposed on the surface – in the sense that they constitute opposing views as to whether the right to legal gender recognition is 'new' or not – there are also manifold connections between these forms of temporal rhetoric. For one thing, they both serve to legitimise fixed and static understandings of the 'human' in 'human rights'. For another, they are less mutually exclusive than one might at first assume. By way of an example, consider Lau's argument that the right to legal gender recognition should not be considered new so as not to impede the 'momentum' in its favour which has 'grown in recent years':[46] while invoking atemporality on one level (lack of novelty), this approach *also* involves a kind of progress narrative (momentum towards a fixed goal, a 'teleological narrative of emancipation'[47]). This way of framing the issue thus makes simultaneous use of what Cynthia Weber has called 'universal temporality' and 'progressive temporality'.[48]

I am reminded here of Carol Greenhouse's description of the law's 'mythical dimension': its 'quality of being in time (in that it is a human product) but also out of time (where did it or does it begin or end?)'.[49] This mythical dimension is paradigmatically in evidence within human rights law – marked by constant struggle and thus clearly a human product 'in time' and developing over time, but always pointing beyond the present in its promise of justice, and in that sense 'out of time'. I labour the point because, while the interplay between different temporalities *could* perhaps provide a space for subversion and contestation, the mythical dimension of law instead provides an important legitimising factor for its ostensible objectivity – as Kay Lalor has put it, 'law uses its own myth to deny the very subjectivity of that mythmaking process'.[50] *Both* forms of temporal rhetoric discussed above contribute to this obfuscation.[51]

Both forms of temporal rhetoric may also relate to substantive claims which, to some, seem worthy of support – broadening the scope of trans rights so as to break down exclusionary preconditions to legal gender recognition as Lau suggests, for example, seems to me to be an appropriate and indeed urgent task, all the more so in light of transphobic backlash in several countries. But any such orientation towards a certain goal does involve an orientation away from other possibilities.[52] As I mentioned in the introduction, legal norms form part of the larger societal processes which shape our understanding of gender and humanity.[53] The very notions

[46] Lau, in this volume, p. 206.
[47] Lalor, 'Making Different Differences', 8.
[48] Weber, *Queer International Relations*, p. 125; Weber's perceptive analysis of Hilary Clinton's 'gay rights are human rights' speech through this lens lays bare clear parallels to the discourse surrounding trans rights; her third, 'historical' form of temporality is arguably also in evidence, though not my focus here for lack of space.
[49] Greenhouse, 'Just in Time', 1640.
[50] Lalor, 'Encountering the Past', 25.
[51] See also Marks, *The Riddle of All Constitutions*, p. 20, citing similar forms of temporal rhetoric (venerable claims denying novelty and progressive claims invoking it) side by side as part of the legitimising strategy of narrativisation.
[52] See generally on orientation S. Ahmed, *Queer Phenomenology* (Durham, NC: Duke University Press, 2007).
[53] See above, note 4.

of 'transgender' persons or 'gender identity' as distinct from sexual orientation, for example, are Western products with potentially hegemonic effects if invested with global reach within human rights law:[54] they produce some identities while erasing others[55] and ignore intersections with other lived experiences based, for example, on religion, class or caste.[56] This is not to say that we should abandon these terms: they remain important signifiers for many trans people on a personal level and important tools in the struggle against cisnormativity on a political level. For all this, however, they do not exhaust the space of possible human subjectivities, and their blind spots should not be ignored.

Against this backdrop, I would suggest that it is more productive to grapple with the complex and non-linear temporalities of the struggle for trans rights in a way which maximises the space for contestation, rather than reverting to forms of temporal rhetoric which chime with the law's mythological dimension and help to simultaneously produce and naturalise subjects of human rights law.[57] Even as we use human rights to intervene in political processes, we should remain alert to the exclusionary effects of any particular rights claim, aiming for 'a rights politics that questions the very categories that it uses'.[58] To speak once again with Judith Butler, 'keeping our notion of the human open to a future articulation is essential to the project of international human rights discourse and politics'.[59]

[54] See generally J. Puar, 'Rethinking Homonationalism' (2013) 45 *International Journal of Middle East Studies* 336 at 338.

[55] The classic text here is Valentine, *Imagining Transgender*; for a specifically postcolonial take, see A. Dutta and R. Roy, 'Decolonizing Transgender in India: Some Reflections' (2014) 1 *Transgender Studies Quarterly*, 320; on the category of 'gender identity' in human rights discourse, see Waites, 'Critique of "Sexual Orientation" and "Gender Identity" '. The connection between non-Western identities and the contingency of Western categories is also highlighted, though in a different context, by H. Lau, 'Law, Sexuality, and Transnational Perspectives' (2013) 5 *Drexel Law Review* 479 at 484–488.

[56] For a critical view, see Weber, *Queer International Relations*, p. 137.

[57] See generally Butler, *Gender Trouble*, p. 3.

[58] Lalor, 'Making Different Differences', 22.

[59] Butler, 'On the Limits of Sexual Autonomy', p. 36.