

Recognizing Gender and Sexuality at the United Nations

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Published in 'Habemus gender! Déconstruction d'une riposte religieuse', *Sextant* (Revue de la structure de recherche interdisciplinaire sur le genre et la sexualité) 2015 - 31, Editions de l'Université de Bruxelles, pp. 25-41

Abstract

'Gender' appeared on the international stage in the 1980s, a decade after its 'invention' by feminist scholars. Accepted language at the UN Conference on Women in Nairobi (1985), gender became controversial in the preparation for the Beijing Conference (1995). The term survived, but its meaning is still contested. The debates around gender and around sexual identities (i.e. sexual orientation and gender identity. 'SOGI') have become two sides of the same coin.

'Sexual orientation' was addressed for the first time at Nairobi (1985). It was put between 'square brackets' in the lead up to Beijing (1995); as an issue officially on the agenda, it was formally debated – but in the end deleted. There followed a long struggle in the Commission on Human Rights /Human Rights Council. Since 2006 all 'joint statements' from delegations in favour of taking the issue on board have used 'sexual orientation and gender identity' as standard terminology. The adoption of resolution 17/19 at the Human Rights Council on 11 June 2011 was a milestone. The fight for 'SOGI' rights at the UN continues and has achieved most of its victories in the human rights 'corner' of the organization, while the women's 'corner' – especially the Commission on the Status of Women (CSW) – still remains 'hard to get'.

Introduction

In this contribution I sketch the debates surrounding the gender concept which have taken place in the international arena, especially at the United Nations (UN), from the 1990s until today, in the context of the fight for both women's rights and Lesbian, Gay, Bisexual and Transgender (LGBT) rights. These debates may be considered the forerunners of the controversies about the so-called gender theories, the main subject of this issue of *Sextant*. My main research questions are (a) why did this term become so controversial, and (b) why did

the UN become the focus of this strife. My starting point is that it is not the *term* gender that crystallized these debates, but the assumed or even hidden meaning of the gender concept and the theories and strategies which different actors supposed to be behind it. Therefore, after the term gender had become accepted, the conceptual disputes did not cease, but continued on a new battleground, i.e. on sexual orientation and gender identity. The debates about gender and about sexuality or sexual identities are two sides of the same coin.

This paper proceeds as follows. The first section traces how gender reached the UN agenda and sketches the first battles between those who tried to push the term off the agenda and those who defended it. These battles unfolded in the UN forums that dealt with women's issues. The second section deals with the fight to get gay and lesbian rights on the UN agenda. This struggle started in the women's 'corner' of the UN, but came to full development in the UN human rights arena. The third section highlights how, in the first decade of the twenty-first century, the issue was broadened from sexual orientation to sexual orientation and gender identity, and I will analyse the arguments and counter-arguments in this regard. The fourth section contains, by way of comparison, a small digression on the use of the gender concept in the European Union. The last section contains a conclusion and a suggestion for further research.

This article is based on public sources and documents in my personal archives, as well as on my experience as a participant and eyewitness.¹

Gender and the fight for women's rights

In the 1970s, 'gender' – first only a technical term in grammar and biology – became a new catchword, indispensable for the feminist agenda, to indicate the quintessence of the women's issue. The concept was 'invented'² to highlight that women's and men's roles are not given or fixed, but may vary across time and place and can be chosen. These roles are social constructions and do not stem from one's biological sex. Of course, this idea was not new.

¹ The author was head of the Netherlands' government delegation to the UN Commission on the Status of Women (Vienna/ New York, 1988–95); a member of the Netherlands' government delegation to the Third and the Fourth World Conferences on Women (Nairobi, 1985; Beijing, 1995); and Member of the European Parliament (Brussels/Strasbourg, 1999–2004). All internet sites were last accessed on 5 July 2015.

² See the pioneering works by, among others, N. Chodorow, 'Being and Doing: A cross-cultural examination of the socialization of males and females', in V. Gornick and B. K. Moran (eds.), *Women in Sexist Society: Studies in power and powerlessness*, New York, Basic Books, 1971, p. 259–92; A. Oakley, *Sex, Gender and Society*, London, Temple Smith, 1972; G. Rubin, 'The Traffic in Women: Notes on the "political economy" of sex', in R.R. Reiter (ed.), *Towards an Anthropology of Women*, New York, Monthly Review Press, 1975, p. 157–211.

Simone de Beauvoir's axiom is well known: 'One is not born, but rather becomes, a woman.'³ Also, the so-called first wave of feminism proclaimed that one's physical sex has nothing to do with the right to vote, to get an education or to choose a profession. Gender proved to be a useful device in feminist academic theory, since it turned the women's issue into an autonomous and respectable field of study, while legitimizing it and making it sound more neutral than 'women's oppression' or 'patriarchy'. Most importantly, it included men, as both objects of study and potential allies.⁴

Until the mid1980s, the term gender was non-existent at the UN. Catchwords included the status of women, the advancement of women and the elimination of discrimination against women.⁵ Gender did not figure in the outcome documents of the first two UN World Conferences on Women, held in Mexico City (1975) and Copenhagen (1980), although both documents comprised many references to the elimination of stereotyped roles of men and women. In addition, the idea behind the gender concept was firmly established in article 5 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), adopted in 1979:

States Parties shall take all appropriate measures ... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women ...⁶

The first key document in which the term gender was used was 'Forward-Looking Strategies' (FLS), the outcome document of the Third Conference on Women, held in Nairobi (Kenya) in 1985.⁷ Apparently, it had taken the gender concept, born somewhere between the feminist movement and academic women's studies, a decade to enter the world of multilateral diplomacy. In this FLS document – and in many subsequent UN documents – we find the term gender being used in two senses: first, in the context of gender roles, which have to be

³ Simone de Beauvoir, *Le Deuxième Sexe*, Paris, Gallimard, 1949.

⁴ J. Outshoorn, *Een irriterend onderwerp: verschuivende conceptualisering van het sekseverschil* (An irritating subject; shifting conceptualizations of the sex difference), Nijmegen, Sun, 1989.

⁵ This is reflected in names such as the Commission on the Status of Women (CSW), the relevant intergovernmental body, established in 1946; the Division for the Advancement of Women (DAW), part of the UN Secretariat until 2010, now merged into UN Women; the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), treaty adopted in 1979.

⁶ CEDAW, New York, 18 Dec. 1979, UN doc. A/RES/34/180.

⁷ The Nairobi 'Forward-Looking Strategies for the Advancement of Women', in: *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, development and peace*, New York, 1986, UN doc. A/CONF 116/28/Rev. 1.

modified and made more flexible; second, as an equivalent or synonym of the two sexes, such as in paragraphs about gender-specific statistics.

As in academia, we see here a twofold development. Gender remained an explosive and potentially revolutionary concept, as gender roles were under attack – a move not liked by advocates of a conservative worldview who preferred women to be kept in their place. On the other hand, gender became a more civilized term for the two sexes, less offensive and easier to incorporate in standard academic and bureaucratic procedures. Sometimes the revolutionary message was lost, as were the notions of hierarchy and unequal power relations and such. What followed was, to name just a few: gender analysis, gender desk, gender in development, gender gap, gender mainstreaming, gender statistics and gender training.

In the lead up to the Fourth World Conference on Women (Beijing, 1995), gender was accepted terminology, including all its ambiguities. However, at the March 1995 session of the Commission on the Status of Women (CSW), acting as preparatory body for the World Conference, the Holy See – or rather its mouthpiece, the delegation of Guatemala – challenged the word ‘gender’ and asked that it be put between square brackets. (Square brackets in UN working documents indicate draft texts which are not yet agreed). Western delegations and NGOs were taken by surprise. The discussion revealed that the Holy See and its allies⁸ could not accept sexual identities that are not based on biological identities, male or female. The Holy See and its allies asserted that ‘the use of the word “gender” was an attempt by Western countries to reclassify different sexual orientations into heterosexuality, homosexuality, lesbianism, bisexuality and transsexuality’. They argued that ‘the draft document would give this reclassification a stamp of approval’.⁹ It might also be seen as ‘a pre-emptive move by the Holy See against future claims based on gender identity and gender expression’.¹⁰ The Vatican, however, no longer sent women back to the kitchen. They proclaimed a modern version of their old ideas: women’s roles were no longer thought to be fixed – e.g. women could be gainfully employed – but their main role was to be wives and mothers. Heterosexuality and complementarity (to men) were to be beyond any doubt. This

⁸ Countries such as Honduras and Malta, but also Egypt, Iran, Pakistan and Sudan.

⁹ M.J. Dañguilan, *Women in Brackets: A chronicle of Vatican power and control*, Manila, Philippine Centre for Investigative Journalism, 1997, p. 159.

¹⁰ F. Girard, ‘Negotiating Sexual Rights and Sexual Orientation at the UN’, in R. Parker, R. Petchesky and R. Sember (eds.), *SexPolitics: Reports from the front lines*, Sexuality Policy Watch, 2007, p. 335; available at <http://www.sxpolitics.org/frontlines/book/pdf/sexpolitics.pdf>

move did not stand alone. As many analysts¹¹ have pointed out, this was part of a broader (post-Cairo) Vatican strategy. After the Vatican's dogged opposition to paragraphs on abortion and birth control at the International (UN) Conference on Population and Development (Cairo, September 1994) had almost caused a breakdown of that conference, the Vatican reconsidered its approach. Instead of attacking feminism and its demands head-on (especially reproductive and sexual rights), it started to play a different game. The Holy See tried to marginalize feminism, by constructing it as Western-dominated, unrepresentative of women in the South, overemphasizing sexual rights issues and neglecting issues like poverty and tropical diseases, and presenting it as old-fashioned, with its stress on equality at the expense of 'the right to be different, i.e. the right to be a woman'. The Holy See tried to picture itself as a better defender of women's interests than the feminist movement and the governments that shared – at least to a large extent – the movement's demands. In doing so, it smartly (mis)used the discussions inside the feminist movement on issues such as diversity among women, and tried to steal the debates inside the feminist movement inspired by scholars and writers such as Carol Gilligan and Luce Irigaray, who celebrated 'women's voice' and the difference between men and women.¹²

The attack on gender was followed by a typical UN solution. The Commission on the Status of Women decided to establish 'an informal contact group on gender' to 'seek agreement on the commonly understood meaning of the term "gender"'.¹³ This group, made up of New York-based diplomats - the gender experts from the capitals conspicuously lacking - devised a solution that entailed little more than a repetition of its mandate. This amounted to the message that 'gender' has always been and always will be 'understood in its ordinary, accepted usage', with no further explanation being given.¹⁴ Both sides could claim victory. On the one hand, gender was not put in brackets and remained in the text of the outcome document of the Beijing Conference, the 'Platform for Action'.¹⁵ On the other, the Vatican could repeat that, in so far as gender means that 'sexual identity could freely be adapted' and

¹¹ D.E. Buss, 'Robes, Relics and Rights: The Vatican and the Beijing Conference on Women', *Social and Legal Studies*, 7/3, 1998, p. 351; Dañguilan, op. cit., p. 151.

¹² Carol Gilligan, *In a Different Voice: Psychological theory and women's development*, Cambridge, Harvard UP, 1993; Luce Irigaray, *Éthique de la Différence Sexuelle*, Paris, Minuit, 1984.

¹³ Commission on the Status of Women, *Report of the 39th Session (15 March - 7 April 1995)*, New York, , 1995, UN doc. E/CN.6/1995/14, p. 73.

¹⁴ *Report of the Informal Contact Group on Gender*, 7 July 1995, UN doc. A/CONF.177/L.2.

¹⁵ 'Platform for Action', in: *Report of the Fourth World Conference on Women*, 4–15 Sept. 1995, UN doc. A/CONF.177/20, Ch. I, Annex II p. 4 ff.

be dissociated from ‘what is specific to being male and female’, it would reject that meaning.¹⁶

With the gender issue resolved before Beijing, the fight in Beijing itself focused on other but related issues, such as the equality versus equity controversy and the issue of the so-called cultural particularities.¹⁷ Another bone of contention, sexual rights, was largely and vehemently debated in the preparatory process and at the conference itself. In the end, a compromise was struck. This resulted in the now famous paragraph 96 of the ‘Platform for Action’: ‘The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.’¹⁸ So, sexual rights survived, i.e. the definition survived but the term had to be dropped; sexual rights could not be called sexual rights. This compromise had another dire consequence: the mention of ‘sexual orientation’ was a bridge too far. It was deleted from the text. How to look at this issue, I will discuss in the next paragraph.

The texts on gender and sexuality agreed in Beijing turned out to be the maximum results feasible. At the five-yearly follow-up meetings (Beijing + 5, + 10, + 15 and + 20) and at the annual sessions of the Commission on the Status of Women, it has never been possible to go one step further. On the contrary, it has taken a lot of energy not to lose what was won in Beijing. In this way, the ‘Platform for Action’ remains a landmark, standing lonely at the top. The fight about the word ‘gender’ is definitively over, as shown for instance by the official name of UN Women, the new entity at the UN Secretariat, established in 2010: UN Entity for Gender Equality and the Empowerment of Women.¹⁹ The fight about the meaning of the gender concept and the underlying theories/ideologies, however, is still on the agenda. The gender fight was about autonomy: the right to decide freely for yourself what it means to be a man or a woman, or to reject this question altogether; the right to decide freely in matters related to your sexuality. The idea that sexual identities might be a question of personal choice and could be framed as a human rights issue is anathema to conservative member states and NGOs. Individual freedom on matters related to gender and sexuality clash with specific and complementary roles of men and women, with cultural particularities and

¹⁶ ‘Reservations and Interpretative Statements on the Beijing Declaration and Platform for Action’, in: idem, p. 164–5 (ch. V, para 11).

¹⁷ ‘Platform for Action’, op.cit., para 9.

¹⁸ Ibid., para 96.

¹⁹ See <www.unwomen.org>

traditional values. After Beijing, this struggle has surfaced most visibly in the conflicts on the issue of ‘sexual orientation’, the subject of the next paragraph.

Gender and the fight for gay and lesbian rights²⁰

The first attempt to put the issue of sexual orientation on stage at the UN took place at the Third World Conference on Women (Nairobi 1985). It was Ms Annelien Kappeyne van de Coppello, junior minister in charge of women’s rights in the Netherlands, who pleaded for lesbian rights; she was the first delegate at an official UN meeting to raise the issue.²¹ This was an important breaking of the silence, foreshadowing the hot debate at the Beijing Conference, ten years later. In the meantime, gay NGO activists had been making themselves heard in Geneva since the early 1990s, at the sessions of the (then) Commission on Human Rights; they also lobbied government delegations to support the request of gay and lesbian NGOs to get consultative status at the UN. While these actions – at that time mainly by men – were framed in standard human rights language, stressing equality and non-discrimination, the women in the governmental and non-governmental delegations preparing for the Fourth World Conference on Women, to be held in Beijing in 1995, linked their demands to eliminate sexual orientation discrimination to the ongoing debate about sexual rights, as an issue of freedom and autonomy in sexual matters. In this sense, it might be said that the fight to put the sexual orientation issue on the UN agenda took place in two different contexts and was gendered.

Technically, the sexual orientation issue reached the UN agenda when, in February/March 1995, the delegations of the Netherlands and Sweden moved the EU to table this new language in various places in the draft text, co-sponsored by Canada. Immediately, the Holy See and its followers as well as some Islamic member states had these words put into square

²⁰ J. Swiebel, ‘Lesbian, Gay, Bisexual and Transgender Human Rights: The search for an international strategy’, *Contemporary Politics*, 15/1, 2009, p. 19–35; J. Swiebel and D. van der Veur, ‘Hate Crimes against Lesbian, Gay, Bisexual and Transgender Persons and the Policy Response of International Governmental Organisations’, *Netherlands Quarterly of Human Rights*, 27/4, 2009, p. 485–524.

²¹ A. Kappeyne van de Coppello, ‘Address to the UN Conference to Review and Appraise the Achievements of the Decade for Women’, in: *Toekomstgerichte strategieën voor de verbetering van de positieve van vrouwen* (Forward-looking strategies for the advancement of women), The Hague, Ministry of Social Affairs and Employment, 1986, Annex 3; R. Rosenbloom (ed.), *Unspoken Rules: Sexual orientation and women’s human rights*, San Francisco, International Gay and Lesbian Human Rights Commission, 1995, p. v.

brackets.²² In practice, the issue was on the agenda, as the Main Committee of the Beijing Conference debated the issue for hours during the last night of the conference. No official minutes were taken. For many, it was a huge victory that sexual orientation had, at last, been discussed at all; for some, it was ‘a central success of the conference’.²³ Politically, however, the decision to delete the bracketed texts meant that sexual orientation was effectively pushed off the agenda. Many participants had the impression that the deletion of the words ‘sexual orientation’ was the price to be paid for the partial victory of keeping paragraph 96, that spelled out women’s control and autonomy in sexual matters. However, these two things taken together amounted to a contradiction in terms. The delegation of South Africa officially put on record that for them paragraph 96 also implied the right to be free from coercion, discrimination and violence based on sexual orientation.²⁴ This position was also expressed orally by more (Western) delegations during the debates, but not officially put on record.

After Beijing, it took almost a decade before the first substantial results were obtained in the struggle to get access to the UN machinery and to put the sexual orientation issue explicitly on the agenda. These actions took four different forms: (a) the requests of (I)NGOs to be granted consultative status at the UN; (b) the systematic introduction of cases of sexual orientation discrimination in the deliberations and documents of treaty bodies and other independent UN bodies; (c) the (long) struggle to have the Commission on Human Rights and its successor the Human Rights Council adopt a resolution affirming sexual orientation as a human rights issue and as such a subject that belongs on the UN agenda; (d) the systematic introduction of the issue into the process of the so-called Universal Periodic Review.

(a) Consultative status

As of 2006, several gay and lesbian NGOs got consultative status, after having lobbied government delegations at the relevant ECOSOC committee and in ECOSOC itself. The most visible victory was reached in 2011, when the International Gay and Lesbian Association

²² ‘Proposals for consideration in the preparation of a draft declaration [and] draft platform for action’, UN doc. A/CONF.177/L.1, 14 May 1995, § 48, 180 b, 226 and 232h. The main controversy in these paragraphs was a call to combat discrimination of women based, among other things, on their sexual orientation.

²³ C. Rothschild, *Written Out: How sexuality is used to attack women’s organizing*, San Francisco, International Gay and Lesbian Human Rights Commission, and New Brunswick, Center for Women’s Global Leadership, 2000, p. 53.

²⁴ ‘Reservations and interpretative statements on the Beijing Declaration and Platform for Action’, in: *Report of the Fourth World Conference on Women*, 4–15 Sept. 1995, UN doc. A/CONF.177/20, p. 172 (ch. V, para 28).

(ILGA), the oldest international NGO in this field, got consultative status at last.²⁵ Although activists from NGOs without consultative status could in many cases get a little help from their friends – like-minded NGOs with consultative status – which put them on their delegation lists so they could obtain the badges that gave them access to the corridors of power, getting a consultative status of their own no doubt enlarged their room for manoeuvre and added to their visibility.

(b) Treaty bodies and independent experts, working groups and the like

A next step was alerting and informing the many (independent) experts and committees working for the UN human rights institutions. In the last decade, various treaty bodies as well as the so-called special procedures of the Commission on Human Rights and its successor the Human Rights Council (special rapporteurs, independent experts, working groups and the like) have increasingly dealt with cases of human rights violations based on sexual orientation.²⁶ We do not have a systematic overview evaluating the impact of these statements on the situation on the ground. They might have contributed to international pressure to redress the situation and might have strengthened the confidence and influence of the LGBT human rights defenders. In some cases, these statements from independent UN experts had a spillover effect on the Commission on Human Rights itself, leading to a heated debate.²⁷

(c) Resolutions adopted at the Commission on Human Rights/Human Rights Council

A third and most important way to break the wall of silence consisted in the actions of the member states in the Commission on Human Rights and its successor the Human Rights Council to introduce the subject of sexual orientation as a human rights issue in a separate resolution. After a first attempt by Brazil proved unsuccessful²⁸, progressive member states and like-minded NGOs got their act together and worked over the years to build support from more and more delegations demanding that the UN would take LGBT issues on board. This

²⁵ This fight had a long and controversial history. ILGA got consultative status in 1993, but this was suspended again in 1994. New applications in 2002 and 2006 failed. For the other NGO applications, see <<http://arc-international.net/global-advocacy/ecosoc>>. Arc International was finally granted consultative status in July 2014.

²⁶ The International Commission of Jurists has collected these references in print and online: *Sexual Orientation and Gender Identity in Human Rights Law: References in jurisprudence and doctrine of the United Nations human rights system*, 3rd updated ed., Geneva, ICJ, 2007; <<http://www.icj.org/advanced-search-for-sogi-un-database/>>.

²⁷ Swiebel and Van der Veur, op. cit. (see note 20), p. 516.

²⁸ More details can be found in Girard, op. cit. (see note 10), p. 341.

resulted in a series of so-called Joint Statements,²⁹ beginning in 2005 with the statement in the Commission on Human Rights by New Zealand, supported by 32 member states³⁰, followed by the statement by Norway in the Human Rights Council in 2006 supported by 54 member states. In March 2008 this number rose to 60 when Slovenia and Argentina made a similar statement. In December 2008, Argentina delivered a joint statement at the UN General Assembly, this time on behalf of 66 member states. After a last Joint Statement in the Human Rights Council, delivered in March 2011 by Colombia on behalf of 85 member states, time was ripe for the adoption of a resolution by the Council. Titled ‘Human Rights, Sexual Orientation and Gender Identity’, the resolution was adopted on 17 June 2011 with 23 against 19 votes and 3 abstentions.³¹ Although the operational paragraphs were rather modest, the adoption stands out as a landmark. The resolution expressed grave concern about acts of violence and discrimination based on sexual orientation and gender identity and asked the High Commissioner for Human Rights to commission a study of laws and practices, and a panel to discuss this report during a later session of the Council. This study was published in 2012.³² In September 2014, the Human Rights Council adopted a second resolution on human rights, sexual orientation and gender identity.³³ Tabled by Chile, Uruguay, Brazil and Colombia, with 42 additional co-sponsors, the resolution asked the High Commissioner for Human Rights to update the 2012 study on violence and discrimination on the basis of sexual orientation and gender identity, with a view to sharing good practices and ways to overcome violence and discrimination. Already before the formal mandate established by the 2011 Human Rights Council resolution, both Secretary-General Ban Ki-Moon and especially High Commissioner for Human Rights Navi Pillay have spoken out on many occasions on the fight against discrimination and violence based on sexual orientation.³⁴ In 2012 a leaflet³⁵ was published and in 2013 Ms Pillay started an information campaign.³⁶ Despite the modest wording of the original mandate, all these actions have made it crystal clear that the UN as such underlines that the obligations of member states to safeguard the rights of LGBT people

²⁹ <<http://arc-international.net/global-advocacy/sogi-statements>>

³⁰ According to the rules of procedure of UN commissions, UN member states that are not members of a commission may support statements and co-sponsor draft resolutions; but they cannot participate in the vote.

³¹ UN doc. A/HRC/RES/17/19.

³² ‘Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity’, UN doc. A/HRC/19/41, see

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-41_en.pdf>

³³ UN doc. A/HRC/RES/27/32.

³⁴ See <<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>>

³⁵ *Born Free and Equal: Sexual orientation and gender identity in international human rights law*, New York, UN, 2012; see also <<http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>>

³⁶ <<https://www.unfe.org/en>>

are nothing new, but follow directly from existing international human rights law. The ‘five core legal obligations of states with respect to protecting the human rights of LGBT persons’ are: ‘(1) Protect individuals from homophobic and transphobic violence; (2) Prevent torture and cruel, inhuman and degrading treatment of LGBT persons; (3) Decriminalize homosexuality; (4) Prohibit discrimination based on sexual orientation and gender identity; (5) Respect freedom of expression, association and peaceful assembly.’³⁷

(d) Universal Periodic Review

The transformation of the Commission on Human Rights into the Human Rights Council had entailed an important addition to the existing UN human rights toolbox: the Universal Periodic Review (UPR). This process subjects all UN member states periodically to a peer review of their human rights record, regardless of whether they have ratified the UN human rights treaties or not. In this process member states are the main actors, but information from the UN secretariat and from the other UN human rights bodies as well as from NGOs plays an important role. An international coalition of NGOs working on sexual orientation issues is actively following the process and delivering input and lobbying government delegations.³⁸ The UPR mechanism may have changed the UN human rights discourse. A recent study concluded that ‘the UPR has been transformative in engaging both local, grassroots actors and peer UN Member States in the language or discourse of human rights in ways that are not possible in expert mechanisms or individual complaint procedures’.³⁹ We do not have an independent evaluation of what UPR has brought in the field that is the subject of this article. It seems plausible that this mechanism has facilitated more accurate monitoring of issues in the area of sexual rights and has mobilized more local activists.

From sexual orientation to sexual orientation and gender identity: counterarguments and counter-attacks

Looking back, it took more than a quarter of a century after the first attempt at the Nairobi Conference (1985) until the UN formally decided in one of its main intergovernmental bodies to take the issue of sexual orientation on board. This tells us something about the depth of the

³⁷ *Born Free and Equal*, op.cit.

³⁸ See <<http://arc-international.net/global-advocacy/universal-periodic-review>> and the SOGI mailing list.

³⁹ T.M. Lewis Arredondo, *The Universal Periodic Review Mechanism of the United Nations Human Rights Council*, PhD Thesis, Maastricht University, 2013, p. 173.

ideological cleavage on the issue of individual freedom in matters related to gender and sexuality. This decision was taken by a majority of UN member states voting in the Human Rights Council, but a minority of member states was and is against it. Before we turn to their line of argumentation and their countermoves, we must first point out another interesting fact.

Somewhere in the course of events just mentioned, the expression ‘sexual orientation’ was replaced by ‘sexual orientation and gender identity’. While the first Joint Statement, delivered by New Zealand in 2005 only evoked sexual orientation, the next statement, delivered by Norway in December 2006 dealt with sexual orientation and gender identity. I have not found any explanation from the side of the UN delegations for this addition to their standard jargon. It might be doubted whether all government delegations that sponsored the relevant statements and resolutions then and later fully grasped the meaning of this new terminology. Gender identity is mostly understood as a person’s subjective experience of being a man or a woman, regardless of the sex assigned at birth.⁴⁰ An explanation for the emergence of this new jargon might be that in these years the transgender movement had become more visible as a relatively independent force, and no longer only as an annex to the gay and lesbian movement – also at the international level – and voiced its demand in an increasingly professional manner.⁴¹ As a result, the demand for gay and lesbian human rights was replaced with the demand for LGBT human rights. This change could also be seen at the International Conference on LGBT Human Rights of the First World Outgames (Montreal, July 2006)⁴² and its outcome document the Declaration of Montreal,⁴³ and at the expert meeting (November 2006) that drafted the Yogyakarta principles.⁴⁴

So, ‘gender identity’ was tacitly annexed to ‘sexual orientation’. In other words: *Habemus Gender* again! Gender was standard language and had been accepted after the Beijing controversy, even by its adversaries, be it with the utmost aversion, given the threats that, according to these adversaries, were implied for their own values such as heteronormativity, complementarity of the sexes and the family as the so-called basic unit of society. One might therefore expect that, where gender was in their view anathema, they would combat the concept of gender identity with even more fire. Nothing of the kind happened. When the new

⁴⁰ For a more elaborate definition, see *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity*, n.p. [Geneva], 2007, p. 6; available at <<http://www.yogyakartaprinciples.org/>>

⁴¹ Cf. the founding of Transgender Europe (TGEU) at the first European Transgender Council (Vienna, 2005), see <www.tgeu.org>

⁴² See <<http://montreal2006.info/home.html>>

⁴³ <<http://www.declarationofmontreal.org/declaration/DeclarationofMontreal.pdf>>

⁴⁴ Op. cit. (see note 40).

language – sexual orientation and gender identity – was introduced the adversaries did not change or add new elements to their arguments. For them, apparently, it was all more of the same.

The most clear-cut objections came from the Islamic countries. Summarized⁴⁵, these objections are: (1) sexual orientation and gender identity are new concepts that have no foundation in international human rights law; (2) an attempt is made with these concepts to create new standards and new rights;⁴⁶ (3) it runs counter to the agreement reached at the World Conference of Human Rights, held in Vienna in 1993, that ‘while considering the issue of human rights, national and regional particularities and various historical, cultural and religious backgrounds must be born in mind’⁴⁷; (4) it diverts attention from other more pressing problems, such as ‘discrimination ... on the basis of race, gender or religion’.⁴⁸ It is remarkable that ‘gender’ is no longer contested in this context. (Replace it by sex, and the meaning is not changed.) The Holy See also opposed the new concept of sexual orientation and gender identity, as they ‘find no recognition or clear and agreed definition in international law’ and it ‘gives rise to uncertainty in the law and challenges existing human rights norms’. But contrary to the Islamic states, the Holy See spoke out against ‘unjust discrimination’ and all forms of violence against homosexual persons and urges to put an end to all criminal penalties against them.⁴⁹ The words ‘unjust discrimination’ raise some doubts: would the Holy See endorse *just* discrimination of homosexuals? One cannot help thinking of the Holy See’s fierce opposition to same-sex marriage. Surely, in the Vatican’s view, ruling out gay marriage would not amount to discrimination.

In recent years a new counter-attack has been launched. In 2009 the Human Rights Council adopted a resolution, tabled by the Russian Federation, pleading for a better understanding of

⁴⁵ Taken from *The Explanation of Vote by Pakistan, on Behalf of the OIC Member States*, on resolution A/HRC/17/L.9 on 17 June 2011; *Response to SOGI Human Rights Statement, Read by Syria*, UNGA, 18 Dec. 2008, <<http://arc-international.net/global-advocacy/sogi-statements/syrian-statement>>

⁴⁶ These first two assertions have effectively been countered by M. O’Flaherty and J. Fisher, ‘Sexual Orientation, Gender Identity and Human Rights Law: Contextualizing the Yogyakarta Principles’, *Human Rights Law Review*, vol. 8, no. 2, 2008, p. 207–48;

⁴⁷ The relevant sentence is only partially quoted. The correct citation is: ‘While the significance of national, cultural and regional particularities and various historical, cultural and religious backgrounds must be born in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’ *Vienna Declaration and Programme of Action, adopted 25 June 1993 by the World Conference on Human Rights*, n.p. [Vienna], UN doc. A/CONF.157/23; available at <<http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>>

⁴⁸ *The Explanation of Vote by Pakistan*, op. cit., see note 45

⁴⁹ ‘Statement of the Holy See delegation at the 63rd session of the General Assembly of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity’, 18 Dec. 2008, available at: <http://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081218_statement-sexual-orientation_en.html>

the contribution of ‘traditional values’ to the promotion and protection of human rights and requested the convening of an expert panel to discuss this.⁵⁰ This panel made abundantly clear that the ambiguity of the concept of traditional values could undermine international human rights law.⁵¹ In 2011, the Russian Federation introduced a follow-up resolution and got it adopted.⁵² The resolution affirmed that ‘dignity, freedom and responsibility are traditional values, shared by all mankind and embodied in universal human rights instruments’, but omitted equality.⁵³ The resolution also tasked the Advisory Committee to conduct a study on how these traditional values could contribute to human rights. The first draft by the Russian member of the Advisory Committee was so extreme that it provoked a storm of protest and it all ended with a much more balanced report.⁵⁴ The Russian Federation, however, did not wait for that (in their view, disappointing) outcome and tabled a new resolution, again adopted with 25 votes out of 47.⁵⁵ This resolution called for states to submit ‘best practices in the application of traditional values’, to be summarized by the High Commissioner for Human Rights. That report was published in June 2013, showing again the grave concern of member states and NGOs that making human rights conditional on traditional values could seriously undermine existing international human rights law.⁵⁶

And so it continues, with the Russian Federation as the new (come-back) kid on the block. Russia did not play any role of importance in the gender controversy at Beijing and in the subsequent skirmishes at various places within the UN. Since the first decade of the new century, Russia has made its comeback on the world stage, wanting to re-assert itself as the successor of the Czarist Empire and the Soviet Union. No doubt this move for traditional values is meant to fill the ideological gap left after the demise of Communism; together with nationalism and religion it is not only the perfect alibi to suppress political dissent and keep

⁵⁰ ‘Resolution [on] Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind, adopted by the Human Rights Council’, 2 Oct. 2009, UN doc. A/HRC/RES/12/21.

⁵¹ ‘Workshop on traditional values of humankind; Report of the United Nations High Commissioner for Human Rights’, 2010, UN doc. A/HRC/16/37.

⁵² Resolution adopted 24 Mar. 2011, UN doc. A/HRC/RES/16/3.

⁵³ For a critical comment, see M. Murphy, ‘Traditional Values vs Human Rights at the UN’, 2013, available at: <<https://www.opendemocracy.net/5050/maggie-murphy/traditional-values-vs-human-rights-at-un>>

⁵⁴ ‘Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind’, 6 Dec. 2012, UN doc., A/HRC/22/71.

⁵⁵ Resolution adopted on 27 Sept. 2012, UN doc. A/HRC/RES/21/3

⁵⁶ ‘Summary of Information from States Members of the United Nations and Other Relevant Stakeholders on Best Practices in the Application of Traditional Values while Promoting and Protecting Human Rights and Upholding Human Dignity – Report of the United Nations High Commissioner for Human Rights’, 17 June 2013, UN doc. A/HRC/24/22.

(sexual) minorities in their place, but also to underpin Russia's new geo-political ambitions.⁵⁷ The Russian moves at the Human Rights Council are supported by most Islamic states, while the Holy See is here keeping a low profile. C-FAM, an active conservative Catholic NGO, applauded 'the awakening of the Russian social policy bear', pleased that Russia's leading role helped 'take the pressure off of the Holy See'.⁵⁸

The European Union – a small digression

Did the EU witness similar debates as took place at the UN? The word gender does not figure in the EU, at least not in the treaties or in secondary legislation such as directives and regulations. There, we only find the words men and women in the context of provisions of equality or equal treatment between men and women, and the word sex in the context of combating discrimination based on sex. These terminologies go back to the 1957 Treaty of Rome, which incorporated the principle of equal pay for equal work by men and women, at that time not so much a human rights demand but more a matter of maintaining the conditions of fair competition necessary in a common market.⁵⁹ After gender was introduced (by the EU!) in the preparations for the Beijing Conference, and gender mainstreaming had been accepted as a landmark in the 'Platform for Action', the European Commission came up with its first Communication on gender mainstreaming.⁶⁰ In soft law documents the word gender nowadays is often used, e.g. in the context of gender-balance in decision-making or gender-based violence; gender equality is used as a synonym for equality between men and women.⁶¹ I have never heard of any controversy surrounding the use of these words. The EU even has a European Institute for Gender Equality (EIGE).⁶² But gender issues do become controversial

⁵⁷ James Kirchick, 'Why Putin's Defense of "Traditional Values" Is really a War on Freedom', *Foreign Policy*, 3 Jan. 2014, available at <<http://foreignpolicy.com/2014/01/03/why-putins-defense-of-traditional-values-is-really-a-war-on-freedom/>>; Oleg Riabov and Tatiana Riabova, 'The Decline of Gayropa? How Russia intends to save the world', *Eurozine*, 2 May 2014, available at <<http://www.eurozine.com/articles/2014-02-05-riabova-en.html#>>

⁵⁸ Administrator [Austin Ruse], 'Following - the Russians?', 5 Oct. 2012, available at <<http://www.thecatholicthing.org/2012/10/05/following-the-russians/>>

⁵⁹ C. Hoskyns, *Integrating Gender: Women, law and politics in the European Union*, London, Verso, 1996; Anna van der Vleuten, *The Price of Gender Equality: Member states and governance in the European Union*, Aldershot, Ashgate, 2007.

⁶⁰ Although this was not reflected in the title, see: *Incorporating Equal Opportunities for Women and Men into all Community Policies and Programmes*, COM(96) 67 final. Undoubtedly, the text had been drafted in French and French-speaking *fonctionnaires* and translators, relatively dominant at the Commission, would have protested against 'gender mainstreaming'.

⁶¹ For an overview, see <http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-5>

⁶² The official French name, however, is *Institut européen pour l'égalité entre les hommes et les femmes*. See Règlement (CE) 1922/2006, *Journal officiel de l'Union Européenne*, L 403, 30.12.2006. See also note 60.

the moment they touch on reproductive and sexual rights, questions that mainly lie outside formal EU competence. The latest example of this controversy coming into the open was the European Parliament's rejection of the 'Report on Sexual and Reproductive Health Rights' drafted by Edite Estrella.⁶³ Europe is not a paradise of peace when it comes to the worldwide struggle about these rights. The EU as an institution has difficulties practising what it preached in Beijing.⁶⁴

Introducing sexual orientation was a different story. Although the gay and lesbian movement in the 1990s gained access to the European Commission and to the European Parliament relatively easily, getting their issue on the intergovernmental agenda was not that simple. This demanded a mandate based in EU law. After a long period in which the fight against sex discrimination was the main issue in this field, in the 1990s various forces helped get more non-discrimination issues on board. In the course of the political processes leading up to the Treaty of Amsterdam (1997), a coalition of NGOs, MEPs and national politicians succeeded against all odds in adding 'sexual orientation' to a list of new anti-discrimination grounds to be inserted in the EC Treaty.⁶⁵ The new treaty mandated the EU to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.⁶⁶ This success seems at least partly caused by a bandwagon effect and by the shame factor: no EU member state wanted to be exposed as the country that opposed measures against discrimination of one or other group. This legal base has become the stepping stone for new secondary legislation and soft law programmes that have given a substantial boost to the fight against sexual orientation discrimination. Although the development of these policies over the last 15 years is remarkable, many policy gaps remain. EU legislation outlaws discrimination on sexual orientation in employment – yet in education, social protection, healthcare, and access to goods and services this is still not the case. EU law forbids racist and xenophobic hate crimes since 2008, but it sets no standards for homophobic or transphobic hate crimes.⁶⁷ Moreover, a systematic policy approach is seriously lacking. The demand for a so-called LGBT road map has not yet been answered.⁶⁸ All these are signs that

⁶³ Report on sexual and reproductive health rights, 2 Dec. 2013, EP doc. A7-0426/2013.

⁶⁴ Joke Swiebel, 'Seksuele rechten in Europa: een zoekplaatje [Sexual Rights in Europe: a Puzzle Picture]', *Lover: Tijdschrift over feminisme, cultuur en wetenschap*, vol. 32, no. 3, 2005, p. 16–9.

⁶⁵ M. Bell, *Anti-Discrimination Law and the European Union*, Oxford York, Oxford UP, 2002, p. 106–7; M. Mos, 'Of Gay Rights and Christmas Ornaments: The political history of sexual orientation non-discrimination in the Treaty of Amsterdam', *Journal of Common Market Studies*, vol. 52, no. 3, 2004, p. 632–49.

⁶⁶ Article 13 TEC (EC Treaty), now article 19 TFEU (Treaty on the Functioning of the European Union).

⁶⁷ Swiebel and Van der Veur, op. cit., (see note 20), p. 497–504.

⁶⁸ European Parliament resolution of 4 Feb. 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, P7_TA(2014)0062; see also M. Mos, 'Conflicted

sexual orientation as a political issue at the EU is not taken for granted but is still heavily contested. Gender identity remains a bridge too far for EU legislation. When sexual orientation reached the EU agenda in the 1990s, sexual identity as a political issue was not 'ripe' to make the same move. Nowadays, the lacking legal base in the EU treaties prevents direct legal action. The EU Fundamental Rights Agency has nevertheless published important research and studies that included sexual identity.⁶⁹ In 2011, an elaborate report sponsored by the European Commission concluded that:

Where an extension of the EU's competences through a formal Treaty revision is unlikely, the only pragmatic approach at the level of EU law itself is to argue that the term 'discrimination on grounds of sex' should be interpreted even wider, so as to include more forms of discrimination on grounds of gender identity as well as discrimination on grounds of gender expression and discrimination against intersex people.⁷⁰

As this short overview makes clear, both agenda-setting and policymaking at the EU on gender-related issues is a complicated and controversial game, in which many actors play a role. It is well documented how the Vatican plays this game.⁷¹ Every step facilitating or establishing a better safeguarding of sexual rights is closely watched and if possible blocked. Unlike the UN, the EU political arena does not offer possibilities of alliances with Islamic countries, while orthodox countries play a relatively minor role. The Vatican must do with the support of like-minded NGOs and like-minded politicians in the EU institutions.

Conclusion

The research questions of the essay were: (a) why did the term gender become so controversial, and (b) why did the UN become the focus of this strife.

Normative Power Europe: The European Union and sexual minority rights', *Journal of Contemporary European Research*, 9/1, 2013, p. 78–93.

⁶⁹ See e.g. Fundamental Rights Agency, *EU LGBT Survey: European Union lesbian, gay, bisexual and transgender survey: Results at a glance*, Vienna, Fundamental Rights Agency, 2013.

⁷⁰ S. Agius and Ch. Tobler, *Trans and Intersex People: Discrimination on the grounds of sex, gender identity and gender expression*, European Network of Legal Experts in the non-discrimination field, European Commission Directorate-General for Justice, 2012, p. 87.

⁷¹ Catholics for a Free Choice, *Preserving Power and Privilege: The Vatican's agenda in the European Union*, Washington DC, Catholics for a Free Choice, 2003.

The second question is the easiest to answer: ‘Because it’s there!’⁷² The series of UN World Conferences in the 1990s on the environment (Rio de Janeiro, 1992), population (Cairo, 1994) social development and women’s issues (Copenhagen and Beijing, 1995) offered an arena for worldwide debate. Both governments and social movements deployed various ‘boomerang strategies’⁷³ to put their demands on the world stage and take the outcomes home to be used in a national or regional context. And so did the Holy See. The near debacle of Cairo, where the Vatican’s fierce resistance against abortion and contraception almost backfired on them, led to a more refined strategy that included a sometimes subtle undermining of the basic principles of feminism and the movement for sexual rights. Trying to ‘debunk’ gender was the quintessence of this strategy.

This brings us to the first question. The gender controversy at the UN and the ongoing fights – at the UN and in other international forums – about sexual orientation (and, in its slipstream, gender identity) are two sides of the same coin. In both cases the issue at stake is the right of any individual to define what your sex and/or your sexuality mean to you and to decide freely how to deal with it, accept or reject a sexual identity, or ignore the pressure to do so. In addition, the safeguarding of such an individual right demands that states protect these freedoms and facilitate the equal participation of all citizens regardless of their sexual identity and/or behaviour, provided they respect the rights of others. Many religions and other conservative worldviews have difficulties with these ideas. Instead of personal choice, free from discrimination and violence, they put forward a curtailing view, based on bipolarity of the two sexes, complementarity and heteronormativity. Inevitably, such principles underline the unequal power relations between men and women and consolidate that men are the norm and women are ‘the other’. It is no coincidence that in the countries that most loudly defend these views, women are often second-class citizens. This includes the Vatican. In short, the gender issue is not a harmless debate about women’s and men’s ‘roles’, but an issue of political power.

In the meantime, there is an anomaly that deserves further exploration. As we have seen, by adopting two resolutions the Human Rights Council, the main intergovernmental UN body, has put issues of sexual orientation and gender identity firmly on the UN agenda. Moreover, in the human rights ‘business’ at the UN, ‘SOGI’ – i.e. sexual orientation and gender identity

⁷² Legend has it that mountaineer George Mallory gave this reply when asked why he was so eager to climb Mount Everest.

⁷³ M.E. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy networks in international politics*, Ithaca, Cornell UP, 1998.

- have become a more or less standard part of the processes of scrutinizing the human rights records of countries. The Human Rights Committee, the supervising mechanism of the International Covenant on Civil and Political Rights, so far has referred to SOGI issues in 93 ‘concluding observations’ and in seven cases of ‘jurisprudence’. CEDAW, the supervising body of the International Convention on the Elimination of All Forms of Discrimination against Women, has after a fierce debate mentioned sexual orientation and gender identity as well as ‘lesbian women’ in two of its General Recommendations and in 49 of its concluding observations on the reporting of States Parties to CEDAW.⁷⁴ The UPR procedures have led to a multitude of recommendations on these issues to UN member states.⁷⁵

On the other hand, the Commission on the Status of Women (CSW), including at its meetings dedicated to reviews of the implementation of the results of the Beijing Conference, so far has never been able to adopt any formal statement dedicated to this issue. What is the reason of this discrepancy? One might guess that conservative governmental and NGO delegations invest more energy and manpower in CSW debates, because the issues at stake are considered to be higher than elsewhere at the UN. In the end, keeping women in their place and thwarting their sexual autonomy may be more important for the (male) powers that be than the more general discussions about sexual orientation and so on, which do not focus especially on women and therefore might be understood to deal mainly with the sexual freedom of men.⁷⁶ Moreover, opinion leaders at CSW and at the secretariat in UN Women might be particularly eager to preserve their good reputation as ‘still real women’: they might be fighting for women’s equality but embracing lesbian rights would be a bridge too far. This aspect of the history of CSW may be an intriguing subject for further research.

⁷⁴ SOGI UN database, International Commission of Jurists, Geneva, available at <<http://www.icj.org/sogi-un-database/>>

⁷⁵ See data collected by Arc International at <<http://arc-international.net/global-advocacy/universal-periodic-review/>>

⁷⁶ If this explanation makes sense, then we must still explain why and how CEDAW went beyond their control. The reason may be that at CEDAW, governments pull the strings only indirectly, namely through the appointment of the Committee members.