Confronting the universality of the UDHR with the intersex reality

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Presentation of the Association Henri Capitant
Presentation of the Association Henri Capitant

An association of Francophile lawyers

An association of reformist lawyers

National reforms

- Property law, Security rights,
- Law of obligations and special contracts

International reforms

- European law of contract
- Caribbean commercial law

An association of comparative lawyers – “International Days”

2015: Third parties, Panama

2016: Globalization, Germany

2017: Legal interpretation, Italy

2018: Vulnerability, Québec
La solidarité
Bordeaux et Paris, lundi 3 juin 2019

- Solidarity and family
- Solidarity and solidarity economy
- Solidarity and compensation
- Solidarity and fiscal policies
Introduction

-The Universality of the UDHR: a self-evidence?
-During the writing?
-Afterwards?
-Analyzing its effects
Introduction

Who are intersex?

They are not transgender; they are not people with sex characteristics that do not fit typical binary notions of male or female bodies. They are not just people with sex characteristics that differ from the expected sex assigned at birth (gender identity consistent with sex assigned at birth). They have a unique condition that may involve different combinations of sex characteristics and sex chromosomes.

Examples:

- Caster Semenya, an intersex athlete
- Anne Gaby Odile, an intersex model
- Pol Naidenov, a Bulgarian intersex
Introduction

Are we aware of their existence?

“When I started as High Commissioner a year ago, I knew little about intersex people. I don’t think I was alone in this: it reflects a general lack of awareness.

Too many people assume, without really thinking about it, that everyone can be fitted into two distinct and mutually exclusive categories: male or female.”

Opening Remarks at the Expert meeting on ending human rights violations against intersex persons, 15 September 2015

Zeid Ra'ad Al Hussein
United Nations
High Commissioner
for Human Rights
Introduction

Problematic:

How can UDHR benefit to intersex, if no one is aware of their existence?

Plan:

I. Understanding the problem
II. Finding solutions
I. Understanding the problem
I. Understanding the problem

Overview

A. A universalism universally violated

B. Understanding this violation: a French perspective
A. A universalism universally violated

- The main violation of intersex human rights:
  - The facts: non consented sex surgeries on infans
  - The legal analysis:
    - Violation of art. 5 of the UDHR
    - Torture or inhuman and degrading treatment?
A. A universalism universally violated

- A violation documented by UN treaty bodies: CAT, CRC, CRPH, CEDAW, HRC

- A worldwide violation:
  - All continents
  - “Developed” Nations / “Developing” Nations

C. Kraus, “« Garçons sous-virilisés » et « filles élevées en garçons »”, *Socio*, vol. 9, 2017
B. Understanding this violation: a French perspective

- In theory, a good protection of intersex under the law
  - A general respect for human rights
  - A strong regulation of medical relationships
  - An effective penalty system

- In practice, a massive violation of intersex human rights
  - Many infra-legislative norms promote directly or indirectly non consented surgeries on intersex
  - Judicial officers are not pro-active
II. Finding solutions
II. Finding solutions

-The paradox of Olympes de Gouges

Overview

- Adopting UN special treaties?
- Applying existing norms?
Adopting UN special treaties?

1. A difficult process

The link between intersex and LGBT minorities

The reluctance of many states to recognize LGBT rights

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President: Mr. D’Escoto Brockmann (Nicaragua)

In the absence of the President, Mr. Tanin (Afghanistan), Vice-President, took the Chair.

The meeting was called to order at 10.30 a.m.

Agenda item 104

Elections to fill vacancies in subsidiary organs and other elections

(b) Election of seven members of the Organizational Committee of the Peacebuilding Commission

Draft resolution A/63/L.58

The Acting President: The Assembly will now take a decision on draft resolution A/63/L.58, entitled “Election by the General Assembly of seven members of the Organizational Committee of the Peacebuilding Commission demonstrated maximum flexibility to reach an agreement on the allocation of a seat for members of the Peacebuilding Commission. This arrangement will enable the Peacebuilding Commission to continue its effective work.

I would like to take this opportunity to record the two understandings. The first understanding is that this arrangement is of a provisional nature, applicable for the next two years, 2009 and 2010. Any arrangement beyond 2011 will be reviewed in conjunction with the general review of the Peacebuilding Commission to take place in 2010. The other understanding is that the chairmanship of the country-specific configuration of the Peacebuilding Commission will be determined by the first meeting of the Organizational Committee of the Peacebuilding Commission next year. The provisional rules of procedure of the Peacebuilding Commission state that the Organizational Committee
Statement made by Syria on behalf of 59 other States

Legal arguments

“We are seriously concerned by the attempt to introduce into the United Nations some notions that have no legal foundation in any international human rights instrument.”

“[T]he [previous] statement [does], counter […] the sovereignty of States and the principle of non-intervention.”

“We also call upon all Member States to refrain from attempting to give priority to the rights of certain individuals, which could result in positive discrimination at the expense of others’ rights and thus contradict the principle of non-discrimination and equality.”

“We urge all Member States, the United Nations system and non-governmental organizations to continue to devote special attention and resources to protect the family as the natural and fundamental group unit of society, in accordance with article 16 of the Universal Declaration of Human Rights.”

Extra-legal arguments

“We are even more disturbed at the attempt to focus on certain persons on the grounds of their sexual interests and behaviour while ignoring that intolerance and discrimination regrettably exist in various parts of the world, be it on the basis of colour, race, gender or religion, to mention only a few.”

“We believe that people are not inherently vulnerable but that some individuals are made vulnerable due to the socio-economic setting in which they live.”

(UN document A/63/PV.70, p. 30-32)
A. Adopting UN special treaties?

2. An inefficient process

- A low level of protection due to the majority principle
- The risk of withdrawal of other UN bodies regarding intersex protection


A former active Henri Capitant’s member!

27 July 2018, Decision of the Bulgarian’s Supreme Court on the Istanbul convention
B. Applying existing norms?

1. The vector: the universality principle

- An unchallenged principle

- A principle reaffirmed during the World conference on human rights

- A principle reaffirmed in the previous 2008 statement against LGBT rights

On 10 December 2008, the human rights family celebrated the sixtieth anniversary of
the adoption of the Universal Declaration of Human Rights and once again made an
emphatic commitment to the principles enshrined therein.

On that august occasion, we reiterated that all human rights are universal.

1. The universal nature of these rights [...] is beyond question.

Mr. Hallak, on behalf of 59 States
B. Applying existing norms?

1. The vector: the universality principle

   A principle applicable to intersex despite reference to men and women in the UDHR

   Reference to men and women in the UDHR

   Preamble: "Whereas the peoples of the United Nations have [...]
   reaffirmed [...]
   the equal rights of men and women"

   Art. 16: "Men and women of full age [...]
   have the right to marry"

   Are those reference a limit to intersex's human rights?

   Primacy of the idea of universality:

   1st idea of the preamble: "Whereas recognition [...]
   of the equal [...]
   rights of all members of the human family"

   1st article: "All human beings are born free and equal in dignity and rights"

   Allusion to woman's and men's right were made in order:

   To promote universality

   Not to exclude intersex whose situation was never discussed
B. Applying existing norms

2. Existing manifestation of this application

☞ In the UN

☞ Campaign of the OHCHR on LGBTI rights: “free and equal” (since 2011)


☞ Outside the UN?

☞ Before the ECHR?

“The right to self-determination has not been separately and expressly included in the Convention, but is at the basis of several of the rights laid down therein, especially the right to liberty under Article 5 and the right to respect for private life under Article 8. Moreover, it is a vital element of the “inherent dignity” which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.”

ECHR, Sheffield and Horsham v. The United Kingdom, 30 Juill. 1998, Dissenting opinion of Judge Van Dijk
Thank you for your attention!