

Sexual Rights: Much has been said, much remains to be resolved

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This paper takes the opportunity to re-visit the ongoing debate on human rights and sexuality; to briefly recapture the trajectory of the global policy debate on sex as it has expressed itself in United Nation negotiations; to examine what we have achieved in this process; and also to explore missing pieces and challenges ahead.

Western civilisation has always been concerned with, and produced discourse on, sex. In the course of the past decade, however, discourse on sexuality has taken a new detour: we have started to speak of sexual rights, and considering the critique of law and rights that characterises contemporary theories of sexuality, this is a rather daring step. The main expression of this new trend is the troubled saga that evolved at the level of the United Nations, starting with the debate on systematic rape in conflict situations that took place in Human Rights Conference of Vienna in 1993. In 1994, during the International Conference on Population and Development (ICPD) in Cairo, I heard a male African delegate saying emphatically to a colleague: "*There is too much sex in this document*". This was not actually the case, as Cairo language is predominantly on "reproductive rights" (even if sexual rights was in brackets in the text). But a year later, in Beijing, a paragraph (96) was adopted that defines the human rights of women in matters related to sexuality. In addition, the very last debate of the Beijing conference (negotiated at 3am) concerned the inclusion of sexual orientation in a list of unjustified grounds for discrimination against women. Even though the majority of member states expressed their support for the text, sexual orientation was dropped because Islamic countries, the Holy See and few other delegations did not accept it.

Four years later, during the Five Year Review of the Cairo conference, a great polemic arose once again in regard to sex education and adolescents' access to sexual and reproductive services (even though consensus on those matters had been reached before). In Beijing+5 in 2000, conservative forces made insidious efforts until the very last moment to avoid reaffirming Paragraph 96. Once again, it proved impossible to include sexual orientation as an unjustified ground for discrimination, and at each and every mention of

“gender-sensitive” or “diversity of women”, Islamic countries requested a “precise definition” of the terms.

This was followed by the Durban Conference on HIV/AIDS, when South African President Thabo Mbeki supported the so called dissident scientific group, a position that emphasises the social and environmental causes of AIDS, while avoiding the gender and sexuality-related factors of the epidemic. In March 2001, when the Commission on the Status of Women debated ‘Women and AIDS’ in preparation for the General Assembly Special Session on HIV-AIDs, the US delegation -- under the Bush administration -- was already strongly proposing sexual abstinence as a solution, a trend that would subsequently plague the US UNAIDS discourse. In May, during the informal session for the same HIV-AIDS UNGASS, Islamic countries rejected the proposal that groups affected by HIV/AIDS -- sex workers, drug users, men who have sex with men (MSM) -- be named openly in the text. In June, right before the Special Session, nine member States objected to the participation of a representative of the International Gay and Lesbian Human Rights Commission (IGLHRC) in a roundtable discussion organised by UNAIDS. The crisis led to a vote -- a very unusual procedure in this type of negotiation. But two weeks later in Geneva, voting took place once again because at the Preparatory Committee for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), Islamic countries objected to the accreditation of the International Lesbian and Gay Association (ILGA). During WCAR in August 2001, it was yet again impossible to gain approval for a mention of sexual orientation as an unjustifiable basis of discrimination.

In 2002, sexuality-related controversies appeared in the Ten Year Reviews of the Child Summit (May) and the Rio Environment Conference (August-September) in direct relation to the contents of health policy. In Rio+10 a harsh polemic unfolded around Paragraph 47, in which health policy definitions were subordinated to religious and cultural values (for instance, the practice of female genital mutilation).

Negotiations leading towards the creation of the International Criminal Court must also be mentioned in parallel, as throughout this process various members states refused to include systematic rape during armed conflict on the list of crimes against humanity. Despite this strong resistance it was finally accepted, leading some feminists to believe that one of the reasons underlying the US's persistent rejection of the ICC is the “rape crime” (as this law is known to be frequently infringed by US soldiers based abroad).

Superficial analyses may interpret this “sex saga” as a sideline debate fuelled by extreme positions: Feminism vs. The Vatican or Gay Men vs. Jihad. In my own view, this endless struggle is just the tip of an iceberg whose composition, meaning and implications have yet to be fully analysed and understood. In short, the UN debates must be analysed in light of the rapid process of change that has become known as globalisation: its impacts on economies, States, societies and particularly the destabilisation of institutional patriarchal structures, gender systems and family formations. The UN debates were originally set in motion by rather conventional approaches to global public health concerns, particularly family planning and the HIV-AIDS pandemic. But they were clearly transformed under the political impact of a range of “sexual subjects” who have gained access to the public sphere and discourses in the past three decades in both North and South. At the same time, the UN political dynamics in relation to sexuality cannot be fully understood if we do not take into account politics of ethnic and national identities and various forms of fundamentalism, which also include a search for reassurance in times of deep economic and political uncertainty and risk. It is also crucial to remember that these forces had been targeting women’s rights, sexualities, condoms, contraceptives -- as a means to attack “Western values” -- long before September 11th (DAWN 1984).

Another aspect to be underlined is that in UN negotiations, gender and sexuality issues have been systematically interwoven (or have been traded-off) with economics. In the early period of these debates at the Cairo and Beijing conferences, the best strategy to circumvent resistance by the G77 group in relation to gender and sexuality was to lobby developed countries make some concessions on the economic/development agenda.. Very probably the stalemate that developed in the HIV-AIDS Special Session in 2001 was only overcome when a formal commitment was made to G77 members that resources would be found to meet the target of US\$10 billion for the Global Fund for TB, malaria and AIDS (even if afterwards this target was not met). But by the end of the decade this mode of negotiation had already moved beyond economics. In Beijing+5 sexuality-related issues were discussed at the same time as hard trade-offs were being made in relation to military budgets, arms control (including nuclear power) and land mines. In retrospect, those difficult late night negotiations in many ways presaged the dramatic geo-political realities we face now.

Nevertheless, complex and difficult as these “sexual battles” have been, as they evolved a clear consensus emerged that human rights constitute an appropriate ethical foundation for addressing sexuality within the broader agenda of development. Paragraph 96 of the Beijing Platform of Action became the icon of this new era. After it was adopted in 1995, some voices called attention to the fact that the text in which it has been enshrined is not binding and that it is urgent to craft stronger human rights instruments to address sexuality-related issues. Taking action along this line of thought, CLADEM is sponsoring a public campaign in Latin America for a Convention on Sexual and Reproductive Rights. My own view is, however, that it is to our advantage that Paragraph 96 has not yet become a norm fixed in stone. As it is, it provides a good basis for interpreting existing human rights instruments (there are a few examples from CEDAW and other human rights committees), giving enough time, space and flexibility to further explore the many challenges involved in articulating human rights and sexuality.

A first challenge I want to emphasise is the need to go beyond a conceptualisation of “sexual rights” that is still fundamentally framed in terms of reproduction, health and violence, which is what prevails in UN documents and their interpretation. Sexual rights were first proposed in a population conference. This is unsurprising if we bear in mind Foucault's concept of sex as a pivot that articulates individual bodies and the administration of the life of the species. A definition of sexual rights cannot be fully developed if contained within the disciplinary frame implied by ideas aimed at the administration of societies. Some voices would say that sexual rights have not been defined in relation to population, but rather as a health-related right. Certainly Paragraph 96 of the Beijing Platform of Action is in the health section of the document, not in the human rights section where ideally it should have been placed.

However, the health connection does not exactly provide for sexual rights as an end in themselves. Rather, this concept of sexual rights tends to be transformed to a means to achieve better health or to resolve health-related crises. For instance the UNFPA's 2000 Report states: *If women had the power to make decisions about sexual activity and its consequences, they could avoid many of the 80 million unwanted pregnancies each year, 20 million unsafe abortions, some 750,000 maternal deaths and many times that number of infections and injuries.*

As relevant as it is to properly link sexuality, health, reproduction and violence, it is different to call for rights in sexuality as a protection (against pregnancy, rape disease and violence). And to call for sexual rights as a protection against pregnancy, rape, disease and violence, is a different matter from affirming these rights in relation to eroticism, recreation and pleasure. This second interpretation was in the minds of many of those who struggled for Paragraph 96. But there are political and conceptual obstacles that make it difficult for the discourse on sexual rights to shift towards this "positive concept" interpretation. In the political domain, persistent attacks by conservative forces on sexuality-related issues constantly push them back under the cover of more acceptable (well-behaved) reproductive, health and violence agendas. In addition, within the health field the dominance of biomedical frameworks constantly pressures "sexual subjects" to remain contained in disciplinary domains (particularly epidemiology and behaviorist frames). At the conceptual level the emphasis on a "negative interpretation" of sexual rights (as necessary protection in the risky domain of sexuality) can be traced back to the fusion of gender and sexuality within a perspective that views opposition to the sexual objectification of women as the core element of feminist theory. The call for conceptually differentiating between gender and sexuality – as distinct domains of social and normative practices - is not new. But it assumes new contours at this critical turning point of daring to propose **normative frames** to address human experience in sexuality.

This leads me to a second challenge. Whose sexual rights? Who is to be involved in these conversations? Who has a stake in the debate? Very clearly the notion of sexual rights achieved institutional legitimisation through the agency of feminists and of some sectors of the global lesbian movement. This resulted from the long institutional road that feminism has taken since the 1940s, which included direct engagement with the UN. On the other hand, except in relation to the HIV/AIDS agenda, gay communities and other "sexual subjects" do not interact systematically with global human rights and development debates. The HIV/AIDS UNGASS in 2001 was the first experience of close involvement by gay men, male sex workers and People Living With HIV/AIDS, PLWHA, in a full UN negotiation. Significantly in that particular engagement the feminist presence was very scarce. Another important opportunity for alliance and interaction between the feminist, lesbian and gay movements in global debates was the World Conference Against Racism, which was immediately followed by September 11th. Given this fragmentation, it is not

surprising that Paragraph 96 – which starts with a principle asserting women’s right to exercise their sexuality free of coercion, discrimination and violence but unfolds into a formulation that restricts this principle to heterosexual relationships – has been widely criticised by gay and lesbian scholars and activists. Last but not least, many other voices have not been heard in the process leading to Para 96, such as those of sex workers, transvestites, transgender individuals and hijras (traditional Indian transvestites), to mention just a few.

The fragmentation and “exclusion” of voices should be matters of concern. From the political point of view they make the fabric of sexual rights still more fragile in the face of conservative forces whose strength has clearly grown since we last achieved progressive definitions of sexuality in UN documents. But most importantly, I do not think we will be able to precisely define a fully democratic meaning of human rights in sexuality -- and positively reframe the current sexual rights discourse -- if these other “ sexual voices” are not fully involved in the conversation. Within this large and diverse community of individuals and groups there are both divergent and convergent perspectives on crucial components of a “sexual rights agenda”, just as there is tension between criminal codes and civil regulations, violence, eroticism and pleasure, right to privacy and intimacy vs state intervention, bodily integrity, just to quote a few instances. Therefore a critical in achieving a potential global consensus on sexual rights is to map, spell out and process – politically and conceptually - these positions.

Concurrently we are also challenged to respond to another difficult question: what human rights are we talking about? This interrogation derives from the fact that human rights debates and institutionalities are informed by contradictory epistemological frames. It is critical to identify those human rights conceptual strands that would be more appropriate to the sexuality domain, in its diversity, complexity and instability. Following the Mexican researcher Alejandro Cervantes I will bring to the debate four major conceptual and moral trends that express different positions on the validity and universality of human rights :

- The moral perspective recognises that a debate exists on whether or not human rights are morally necessary or good, while strongly affirming that it should be universally agreed that human rights are good and necessary.
- The second strand searches for a philosophical basis that would validate the premise of the universality of rights. Within it there are essentialists who base their inquiry on

what is essential about the human condition, but there are also theorists who ask what social conditions could be used as universalising arguments.

- The practical-political perspective, which argues that human rights are relevant and universal insofar as they are internationally accepted and subsequently disseminated.
- The procedural strand that basically interrogates what makes a discourse universal. It emphasises coalitions and consensus building. The problem does not lie in the content of human rights agreements, but in the process through which the agreements are reached. This view is that to the extent that an open, reciprocal and communicative discourse is constructed on human rights, they may become universal.

In a preliminary assessment it appears to me that the various actors involved in advocacy for sexual rights have been using, somewhat randomly, several of these strands. The moral and essentialist perspective are not very influential, and the search for social conditions as the foundation of the universality of sexual rights is not entirely absent. By and large the sexual rights debate is being framed by the other two philosophical perspectives. There are relevant strands – particularly feminist approaches -- that invest in defining sexual rights as state obligations, efforts that are openly aligned with the political-pragmatic perspective. But I would say that most actors, voices and constituencies that are potentially part of this scene view sexual rights as a discursive strategy to enhance the potential of individuals in relation to the State (and other agents) and the law itself; and to create multiple “spaces” in which their own identities and the meanings of these rights can be refined. If we have in mind the premises that inform contemporary theories of sexuality the procedural perspective appears to be our best choice. It is cautious with respect to the genuine spirit and truth of the law and it converges with the emphasis on plural public spheres and the situatedness of moral debates devised by some authors as requisites to further refine the meaning of sexual rights. However, we should also ask ourselves if preference for the procedural approach automatically excludes other pathways? To put it another way, a debate is urgently required with respect to the unanticipated implications of our choices in terms of human rights philosophical approaches.

Another critical task in this area is to identify human rights principles that could be used to define an adequate normative basis for entitlements in relation to sexuality. I offer here a short list that encompasses principles that are fully enshrined in international

instruments, such as **freedom, non-discrimination, equality, equal treatment under the law, right to privacy and safety of the person**, the premises of **personhood** and **diversity**, and also long-standing but somehow forgotten premises of rights such as **the absence of fear and want, or the ability to be able to appear in public without shame**. Last but not least I propose we preserve the core content of the Beijing sexual rights **language: freedom from coercion, discrimination and violence in matters relating to sexuality**. Theoretically, the articulation of these principles and premises can become an exploratory frame to address the multiple dimensions involved in the proposal for rights in the domain of sexuality. But this approach will not automatically dissolve thorny conceptual and political questions that remain nor the many others that will arise concerning interpretation and application of these rights.

To illustrate some of the difficulties that lie ahead I call attention to a question raised in a seminar on sexual rights held in Mexico two years ago: *How far are we prepared to open the doors to private affairs for public discussion and regulation?* It is relatively simple to visualise sexual rights as non-discrimination and equal treatment under law. Advances have been made also in expanding protection from fear and abuse, even when it occurs in the private sphere. Currently, this approach is being used not only in cases of gender-based violence, but also to address violations of the human rights of “sexual dissidents”, with the best illustration being the 2001 Amnesty International Global Report on Torture and Sexual Identity. But the framing of a positive approach to sexual rights will require a re-thinking of our conceptions of private/public boundaries. Two decades ago we called for the full disclosure of the private sphere as the locus of sexual violence and abuse, and this premise must be retained. But at this new stage we also call for the preservation and re-creation of privacy and intimacy to enable *“sexuality as a practice of freedom, as a legitimate domain [for the] search for pleasure”*. (Mexico Seminar Minutes, 2001)

In discussions on the subject over the last two years we have not heard a clear response to this call. The closest we have been able to come is a strong recommendation that subjective transformation is needed to enhance – at the personal, household, community and institutional levels – a deeper sense of entitlements and responsibilities in relation to sexuality. While there is recognition that punishment of “sexual violations” may play a strong role in transforming attitudes, many voices have also said that other strategies

must be devised to overcome the “terror of difference” that underlies homophobia, misogyny, discrimination and intolerance, as well as other forms of sexual violence.

My second example concerns the difficult articulation of sexuality, equality and freedom. Regarding specifically the linkage between sexuality and equality, important steps have been taken in recent years in human rights in relation to HIV/AIDS. This is exemplified by the United Nations Commission on Human Rights resolution defining HIV/AIDS as a human rights issue and the final document of HIV/AIDS UNGASS, which combines strong recommendations against discrimination with measures aimed at ensuring support, care and treatment. By and large, however, global and national policy debates remain caught in the false dilemma between the “seriousness” of the problems of health, violence and poverty and the “frivolity” of sexuality. Within this view, sexuality-related problems are seen as irrelevant because they are a private matter, or because they exclusively affect “minorities”. The only way to overcome this discourse is to document what remains invisible, such as the linkages between sexual exclusion and poverty and vice-versa; economic deprivation, sexual division of labour and violence; compulsory heterosexuality, homophobia, hegemonic masculinity and various forms of violence. I also agree with Altman that Nancy Fraser’s theoretical frame, combining injustices of distribution and injustices of recognition, can be an important reference to move ~~into~~ that direction as “*it goes beyond the crude idea that we need to choose between distributive and identity politics*” (Altman, 2000). But a second problem to be tackled is this: the strange absence of strong references to freedom in the sexual rights construct of the 1990s. This may be explained by a combination of apparently isolated factors: the HIV/AIDS pandemics which deflected the “sexual liberation” agenda towards “sexual risk”; the emphasis on victimisation that prevailed in sexual rights discourses after 1995; AND last but not least, the predominant approaches to poverty and inequality that by and large tend to reinstate the 19th century Marxist critique of formal liberties: freedom has little value for those that live in poverty.

Once again there are no easy ways to move beyond these obstacles. However, I would like to propose that the conceptualisation of sexuality as a practice of freedom may, in fact, contribute to de-constructing the given assumptions about sex that underlie much of the abuse and violence that is presently experienced in the domain of sexuality. Another theory that may guide us in our efforts to better articulate sexuality, equality and freedom is that of Amartya Sen, who moved beyond the conventional understanding of freedom as

political liberty to view it as empowerment, as greater individual and collective autonomy that contributes to development in its broadest sense, and enlarges freedom in the private and public spheres.

As inspiring as these ideas may be, much additional research and conceptual-striving are still needed to properly link sexuality, equality and freedom. This would include studies to show evidence that enabling political and economic environments do favour sexual freedom and happiness (or erotic justice), and research that would aim to demonstrate the positive economic and social impacts of freedom from coercion, discrimination and violence in sexual matters. The need for this conceptual breakthrough becomes increasingly relevant in light of the current global scenario. On the one hand, the runaway world of global capitalism in the 21st century favours a market-consumer frame to legitimise entitlements to sexual diversity. On the other hand, it is clearly intensifying the structural factors at work behind complex threats to human security that derive from sexual violence, oppression and discrimination. Such threats as the call for war, as we well know, affect a majority of persons and groups who will benefit little from a market-consumer approach to sexual rights.

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