

Volume 4, Issue 1, March 2020

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Research Articles*

DOI:

10.14658/pupj-phrg-2020-1-1

How to cite:

Greif, E. (2020) 'Upward Translations – The Role of NGOs in promoting LGBTI*-Human Rights under the Convention on All Forms of Discrimination Against Women (CEDAW)', *Peace Human Rights Governance*, 4(1), 9-34.

Article first published online

March 2020

*All research articles published in PHRG undergo a rigorous double-blind review process by at least two independent, anonymous expert reviewers

Upward Translations - The Role of NGOs in promoting LGBTI*-Human Rights under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

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Abstract

People with a sexual orientation other than heterosexual and/or a non cis-gender identity (i.e. people whose current gender identity does not match the sex they were assigned at birth), non-binary gender expression, or sex characteristics which do not fit the normative definitions of female and male frequently face human rights violations ranging from physical violence to discrimination. There is no international legal instrument protecting human rights related to sexual orientation, gender identity, gender expression, or sexual characteristics: LGBTI*-people must frame their claims under existing human rights. They have to translate the violations on grounds of sexual orientation, gender identity, gender expression, and sexual characteristics into the language of international human rights. The attempt to translate LGBTI*-rights claims into the language of global human rights can be read as 'upward translation'. During this process of upward translation, recognition of LGBTI*-human rights is negotiated between human rights treaty bodies, States Parties to human rights treaties and LGBTI*-NGOs. Although the recognition of LGBTI*-human rights advances rather slowly – this opens up a space for a diverse and enlarged understanding of human rights. I suggest understanding the process of translating human rights claims of LGBTI*-people into the language of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as an example of 'upward translation'. In this paper, I will show how this culture of translation may change the language of human rights.

Keywords: *Convention on the Elimination of All Forms of Discrimination Against Women, gender, NGOs, reporting cycle, sexual orientation*

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Introduction

On 10 October 2017 the First Senate of the German Federal Constitutional Court ruled that the general right of personality also protects the gender identity¹ of those who cannot be assigned either the gender ‘male’ or ‘female’ permanently and that civil law status must allow a third gender option – beyond the male/female binary². A good year later, the German legislator introduced a third gender option (‘divers’) for intersex people who do not identify as either male or female³. Almost a decade earlier, in 2009, the Committee on the Elimination of Discrimination Against Women (hereafter: the CEDAW-Committee or the Committee) already criticised the German State for not having engaged in a dialogue with non-governmental organizations (NGOs) of intersex people. The Committee explicitly requested the German State to enter into dialogue with Intersex-NGOs in order to better understand their claims and to take effective action to protect the human rights of intersex people (Committee on the Elimination of Discrimination against Women 2009, paras 61-62). This criticism was followed in Germany by newspaper articles and discussions in newspaper’s online fora. During one of these discussions one person asked why the Committee especially criticised Germany: Did the German State treat intersex people so much worse than other countries?⁴ Why – one might feel inclined to expand this question – did the Committee on the Elimination of Discrimination against Women deal with the human rights of intersex people *at all*?

As for the first question, the answer seems quite simple: The Committee dealt in particular with the human rights of intersex people in Germany because during the reporting cycle an Intersex-NGO filed a so called ‘shadow report’ with the Committee pointing to human rights violations intersex people in Germany are facing in everyday life (Verein Intersexuelle Menschen e.V./XY-Frauen 2008). In its concluding observations to the German State the Committee has responded to this shadow report. The second question addresses the fact that so far, on the international level no legally binding document exists that protects human rights related to sexual orientation, gender identity, gender expression, or sexual characteristics

¹ I.e. one’s *deeply felt internal and individual experience of gender*.

² BVerfG, Order of the First Senate of 10 October 2017 - 1 BvR 2019/16.

³ In this paper, the term ‘intersex’ is used as a general term for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male. Intersex is understood as a socially constructed category that reflects real biological variation. For further explanation see http://www.isna.org/faq/what_is_intersex (accessed: 25/11/2019).

⁴ See <https://blogs.faz.net/biopolitik/2009/02/20/deutschland-ger-252-gt-menschenrechte-von-zwintern-werden-ignoriert-51/> (accessed: 25/11/2019).

or sexual practice. In order to obtain protection for the human rights of intersex people, the NGO therefore had to frame their rights claims as claims under an existing human rights instrument. In this case, the instrument of choice has been the Convention on the Elimination of All Forms of Discrimination Against Women (hereafter: CEDAW or the Convention) whose implementation is monitored by the CEDAW-Committee. In other words: The Intersex-NGO had to translate intersex human rights claims into the language of CEDAW to render them not only understandable but legitimate. The German NGO did so by stating that according to their legal point of view, 'CEDAW embraces the protection against discrimination, of all persons who are physically and clearly not belonging to a male gender.' (Verein Intersexuelle Menschen e.V./XY-Frauen 2008, 5). Other NGOs translate their claims as human rights claims under CEDAW by referring to, for example, 'lesbian, bisexual, and transgender women' as a group of women facing a special risk of discrimination.

This paper seeks to provide a better understanding of the role of international and national LGBTI*-NGOs as translators of LGBTI*-human rights under CEDAW and the legal relevance of their interventions. In the first section I address the concept of human rights translation in more detail and introduce the concept of 'upward translation' of LGBTI*-claims. I will then briefly outline the core aims and the content of the Convention, before analysing the strategies by which LGBTI*-NGOs translate LGBTI*-human rights into claims under CEDAW (section 2). Then, I will give an overview of the mechanisms through which the Committee can enter into a dialogue with the States Parties (section 3). In the second half of the paper, I will focus on the dialogue on LGBTI*-rights under CEDAW more specifically. I will systematize the strategies and frameworks of translations used by LGBTI*-NGOs in making their claims, analyse how the Committee responds to these attempts, and argue how this process impacts on the language of human rights (sections 4-6).

1. Human Rights Translation

NGOs play an important role in the process of human rights norm localization 'during which actors build congruence between international norms and local practices and beliefs' (Och 2018, 428). Most notably, NGOs act as norm brokers mediating 'between often-divergent [...] international norms and domestic norms.' (Ayoub 2016, 34). Norm brokerage plays a crucial role for the dissemination of international human rights as it is through norm brokerage that international norms are framed in a way corresponding

to local concerns, cultures, or rules (Ayoub 2016, 201). In a similar way, the concept of ‘vernacularization’ introduced by legal anthropologists Sally Engle Merry and Peggy Levitt in their study on transnational human rights and local activism addresses the appropriation and local adoption of global ideas of human rights: ‘As ideas from transnational sources travel to small communities, they are typically vernacularized, or adapted to local institutions and meanings. [...] Human rights language is similarly extracted from the universal and adapted to national and local communities’ (Merry 2006, 39).

Merry and Levitt emphasize how globally produced ideas of human rights, their underlying values and philosophy are translated into a language and form that makes sense in a particular culture through the process of vernacularization. This is not a process of direct translation but one that can be fragmented and diffuse and takes different forms according to the specific social settings: ‘As women’s human rights ideas connect with a locality, they take on some of the ideological and social attributes of the place, but also retain some of their original formulation’ (Levitt and Merry 2009, 446). Local agents and NGOs making international human rights applicable in a local context play an important role in the process of vernacularization.

However, vernacularization is not the only form of translation necessary for implementing and enforcing human rights. In the context of LGBTI*-rights, Ayoub defines translation as ‘the interactive top-down and bottom-up process in which actors package dominant conceptions of sexual rights for distinct audiences.’ (Ayoub 2019, 88). As the example of Germany illustrates, NGOs have to translate local experiences of abuse and discrimination into the language of (international) human rights in order to make them heard in the first place. This is a form of translation that takes place, so to speak, exactly in the opposite direction to vernacularization. In this paper, I suggest understanding the process of translating not only intersex human rights claims but human rights claims of LGBTI*-people in a broader sense into the language of CEDAW as such a form of ‘upward translation’. It is during this translation process that the recognition of LGBTI*-human rights is negotiated between the Committee, the States Parties, and (LGBTI*-)NGOs. Over the last decades, the CEDAW-Committee has been confronted with LGBTI*-rights claims time and again (Holtmaat and Post 2016, 319; Thoreson 2014, 191). Not all of these claims resulted in an open request by the Committee as it was the case with Germany: In many cases the Committee seemed reluctant to explicitly recognize LGBTI*-human rights. Nevertheless, in recent years the Committee has shown an increasing willingness to at least mention the concerns of LGBTI*-people, or, more frequently, LBTI-people. My hypothesis is that the process of upward translation plays a decisive role

in encouraging this willingness and at the same time allows for opening up a space for a diverse and enlarged understanding of human rights. I draw my conclusion from a discourse analysis of Articles of the Convention, the different instruments of the dialogical process concerning LGBTI⁺-rights under CEDAW, i.e. country reports and additional NGO-reports to the Committee, comments as well as recommendations issued by the Committee in response to these reports, and material provided by transnational NGOs in order to support local actors in making human rights claims, as, for example, handbooks and reports.⁵

2. Aim and Content of CEDAW – An Overview

CEDAW is frequently described as the international ‘bill of human rights for women’ (The United Nations 1996, 5) or the ‘magna charta of women’ (Neuhold, Pirstner-Ebner and Ulrich 2003, 49). The Convention provides the basis for realizing equality between women and men in a broad sense. It guarantees women equal access to and equal opportunities in political and public life as well as in private life. Among international human rights treaties CEDAW is unique insofar as it does not prohibit discrimination on grounds of sex in general but focuses on the discrimination of women and girls. The object and purpose of CEDAW is threefold: to ensure full equality between men and women; to improve the de facto position of women; and to address dominant gender relations and the persistence of gender-based stereotypes. The CEDAW-Committee calls for the States Parties to implement these obligations ‘in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men’ (Committee on the Elimination of Discrimination against Women 2004, paras 6-7).

Article 1 of the Convention defines discrimination against women as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms, in the political, economic, social, cultural, civil or any other field.

CEDAW covers discrimination in its broadest sense, including both direct and indirect discrimination. Article 5 of the Convention pays special attention to gender stereotypes: Gender stereotypes are a global source of

⁵ The empirical material includes 107 NGO-reports, 26 comments and 37 recommendations issued by the Committee. Most of this material has been accessed through the UN-Treaty Body Database.

structural inequality and one of the main reasons for gender hierarchy. They negatively affect women – and men – by reducing their chances and possibilities. Very often, gender stereotypes are used to ‘justify’ human rights abuses or violence against women (Cook and Cusack 2010). One of the most important aims of CEDAW is to combat and to eliminate gender stereotypes.

CEDAW is one of the most successful human rights treaties in terms of the number of State Parties. As of today, 189 states have signed and ratified CEDAW. Among the states that have not signed CEDAW are the Vatican, Iran and Somalia. The United States of America and Palau signed CEDAW but have not ratified the Convention so far. The high number of ratifications of CEDAW, however, cannot hide the fact that upon ratification a large number of States Parties entered reservations to the Convention.⁶ A significant number of reservations concerned individual articles of the Convention on the ground that national law, tradition, religion or culture are not compatible with Convention principles (Connors 2012, 567-575).

3. Monitoring the Implementation of CEDAW – The Mechanisms of the CEDAW-Committee

The effectiveness of an international treaty depends to a significant degree on how its implementation is monitored. The implementation of CEDAW is monitored by the aforementioned Committee on the Elimination of Discrimination Against Women. The Committee has several mechanisms to monitor compliance with CEDAW: concluding observations, general recommendations, and an (optional) complaints and inquiry procedure.⁷

The *concluding observations* are part of a reporting cycle which forms the core mechanism of the Committee in monitoring the implementation of CEDAW by States Parties. Every fourth year, States Parties to the Convention are obliged to submit reports to the Committee on how the rights of the Convention are implemented. During its sessions the Committee considers each States Party report and addresses its concerns and recommendations to the States Party in the form of concluding observations. In addition to the

⁶ A list of State Parties and reservations can be found here https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed: 25/11/2019).

⁷ On 6 October 1999 the General Assembly adopted the Optional Protocol to CEDAW and called on all States Parties to the Convention to become party to this instrument. The Optional Protocol mandates the Committee to receive complaints about a breach of the rights under CEDAW from individuals or groups of individuals and to initiate inquiries into situations of grave or systematic violations of women’s rights. Both procedures are optional and only available when the State concerned has accepted them.

State reports, the CEDAW-Committee is frequently provided with country-specific information by NGOs in form of ‘alternative reports’ or ‘shadow reports’. The effectiveness of the monitoring process benefits significantly from such participation of NGOs. Shadow reports contribute in particular to the Committee’s knowledge on the status of implementation of CEDAW in a particular state. In their reports NGOs frequently expose violations of women’s rights that would otherwise go unnoticed. Malaysian women’s human rights advocate and former member to the CEDAW Committee Mary Shanthi Dairiam considers the participation of NGOs in the treaty monitoring process and the possibility of NGOs to demand compliance from the States Parties with the rights guaranteed in the Convention among the most important gains of CEDAW. It furthers the dialogue between the international and the national level and allows for changes in law and policy (Dairiam 2015, 386).

While concluding observations are part of a regular reporting cycle and deal with the implementation of CEDAW by a specific States Party, in its *general recommendations* the Committee addresses any issue affecting women to which it believes the States Parties should devote more attention (Nisuke 2012, 335).⁸ General recommendations serve as guidance to all States Parties on the interpretation of the Convention. Expertise provided by NGOs contributes not only to concluding observations but also to general recommendations (Chinkin and Freeman 2012, 21).

Neither the concluding observations nor the general recommendations by the CEDAW-Committee are among the legally binding sources of international law listed in Article 38 para 1 of the Statute of the International Court of Justice (Pellet 2006, 700-714). Still, in its various documents the Committee also takes a position on essential questions of interpretation of the Convention. The Committee explains the significance of individual provisions of the Convention and the resulting States Parties’ obligations and contributes to their further development. If the interpretative practice of the Committee is taken up by the States Parties or other international organizations and institutions, it can generate subsequent practice (Article 31 para 3 lit b Vienna Convention on the Law of Treaties) that is relevant for the future interpretation and application of the Convention (Chinkin and Freeman 2012, 15; Dörr 2012, 554–570).

Against the background of this procedural setting, the following parts of the paper analyse the process of human rights translations LGBTI*-NGOs

⁸ As of today, the Committee has issued 37 general recommendations. A list of all general recommendations can be found here <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx> (accessed: 25/11/2019).

engage in when formulating human rights claims under CEDAW. The next section of the paper highlights some general difficulties of the rhetorical framework that activists and NGOs use to formulate claims under the Convention and seeks to develop a doctrinal basis for expanding the scope of the convention to LGBTI.

4. LGBTI*-Human Rights Claims under CEDAW

4.1 LGBTI*-Human Rights and the Question of Terminology

Given the focus of the Convention on the human rights of women it is not self-evident that the CEDAW-Committee is repeatedly confronted with LGBTI*-human rights claims in recent decades. LGBTI*-claims under CEDAW are born of necessity. In many regions of the world, people with a sexual orientation other than heterosexual and/or a non cis-gender identity (i.e. people whose current gender identity does not match the sex they were assigned at birth), non-binary gender expression, or sex characteristics which do not fit the normative definitions of female and male face human rights violations by both state and private actors. These violations range from killings and severe physical violence to less violent forms of discrimination. Yet, there is no legally binding instrument on the international level which explicitly protects human rights related to sexual orientation, gender identity, gender expression, or sexual characteristics (MacArthur 2015, 25). Initiatives to recognise sexual orientation as a prohibited ground of discrimination within the UN were routinely met with strong resistance by conservative forces (McGoldrick 2016). However, especially the terms 'sexual orientation' and 'gender identity' as well as the LGBTI-acronym and its various variants and abbreviations have received criticism not only by conservative forces but also by academics and activists engaging in LGBTI*-human rights issues. The descriptors sexual orientation, gender identity, and LGBTI were accused of relying on 'particular concepts of orientation and identity that find origins in the Western world' (McGill 2014, 25). Not only can these terms not claim universal validity, there is also a danger that they will produce new forms of inclusion and exclusion. Aeyal Gross discusses the global promotion both of this specific terminology and of LGBTI*-rights in 'anti-gay states' under the term 'homoglobalism'. He points to the risks associated with the export of Western concepts of identity, namely backlash and the violation of human rights of others in the name of LGBTI*-rights for example, if financial support is made dependent on compliance with LGBTI* rights (Gross 2019). Many activists and NGOs are well aware of the

shortcomings and risks related to the terms 'sexual orientation' and 'gender identity' and the LGBTI-acronym and of the imposition of these identity concepts outside the global north (Budhiraja et al. 2010; Thoreson 2014, 100-102). Still, in order to obtain protection against discrimination on the ground of sexual orientation, gender identity, gender expression, or sexual characteristics through an established human rights scheme, LGBTI*-people must frame their claims under existing human rights instruments (Baisley 2016, 138), and '[b]ecause of the receptivity of the UN human rights system to arguments that a discernible group with a shared identity requires human rights protection and entitlements, mobilization around categories is a logical strategy choice' (McGill 2014, 31).

If they want to make use of the human rights framework and human rights strategies LGBTI*-activists and LGBTI*-NGOs have to translate the discrimination and the oppression experienced on grounds of sexual or gender non-conformity into the language of international human rights.

4.2. Gender and the Intersectional Approach

CEDAW proved to be especially receptive to LGBTI*-rights claims. Historically, the aim of CEDAW seemed rather clear cut: The Convention guarantees the human rights of women and girls only. CEDAW does not define who counts as a 'woman' with regard to the rights enshrined in the Convention (Meyer 2016). Since the adoption of the Convention, however, the understanding of the term 'woman' has changed opening up the way for a broader understanding. Two developments have been particularly decisive for this change and have been accompanied by a growing number of LGBTI*-rights claims under CEDAW: First, women of colour stressed the intersectionality of various social divisions and differences between women (Yuval-Davis 2006; Kapur 2002). The intersectional approach was taken up by the CEDAW-Committee in several general recommendations pathing the way for an intersectional transformation of CEDAW (Atrey 2018, 872-873). General Recommendation No 28 contains the strongest commitment to intersectionality declaring it 'a basic concept for understanding the scope of the general obligations of States parties contained in article 2' (Committee on the Elimination of Discrimination against Women 2010b, para 18). Second, scholars in feminism and gender studies started to use the term 'gender' to refer to the social construction of both 'women' and 'men' and to the power relations between them (Chinkin and Freeman 2012, 15). The CEDAW-Committee nowadays defines 'gender' as 'socially constructed identities, attributes, and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical

relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women' (Committee on the Elimination of Discrimination against Women 2010b, para 5). This changed understanding of 'gender' plays an important role concerning the State obligation to address gender roles and gender stereotypes. It also represents a gateway for LGBTI*-rights claims under CEDAW.

4.3 Gender Stereotypes as Violation of LGBTI*-Human Rights

Gender stereotypes are a major cause of human rights violations and discrimination of LGBTI*-people. In their book 'Gender Stereotyping' Rebecca Cook and Simone Cusack describe gender stereotypes as stereotypes that are 'concerned with the social and cultural construction or understanding of men and women, due to their different physical, biological, sexual, and social functions. The term 'gender stereotype' is an overarching generic term that includes stereotypes of women and subgroups of women, and stereotypes of men and subgroups of men' (Cook and Cusack 2010, 1-2).

Although the authors focus primarily on stereotypes of women they assert that 'stereotypes of both men and women need to be changed in order to liberate both men and women to be all that they can be' (Cook and Cusack 2010, 2). Stereotypes of femininity and stereotypes of masculinity form two sides of the same coin. Furthermore, they are inextricably linked to heteronormativity. Gender stereotypes affect all people. In case of people who disagree – or seemingly disagree – with them, the effect is a particular negative one. This is especially true for those who do not conform to societal expectations of gender expression and sexuality (Budhiraja et al. 2010, 137). As a shadow report written by two Cameroon NGOs states, gender stereotypes

justify[...] discrimination and abuse against those who do not conform to the stereotyped gender roles. Such discriminatory stereotyping has an impact on all women, but is particularly damaging to those who visibly do not conform to prevailing gender norms or expressions, such as – for example – trans individuals, and those who are thought to be lesbian or bisexual (Cameroonian Foundation for AIDS, International Gay and Lesbian Human Rights Commission and Lady's Cooperation 2014, 2).

Both the violation and the discrimination LGBTI*-people experience are deeply rooted in stereotype ideas of femininity and masculinity going hand in hand with the assumption that heterosexuality is just 'natural'. In its shadow report to the CEDAW-Committee Ugandan NGO Freedom and Roam Uganda concludes that strict gender stereotypes 'are used to negatively stereotype

lesbian, bisexual or transgender people' (Freedom and Roam Uganda and International Gay and Lesbian Human Rights Commission 2010, 8 and 16). Legal scholars Rikki Holtmaat and Paul Post describe the lesbian woman 'who chooses to renounce a male sexual partner and thereby also rejects the protection of the male head of household, and all other forms of male supervision on and control of her life [as] the most blatant transgression of the patriarchal female gender identity' (Holtmaat and Post 2016, 325).

LGBTI*-people are considered a threat to conventional gender stereotypes and heteronormative structures. The discrimination of LGBTI*-people thus has a decisive share in the mechanisms that keep the discrimination of women up and going.

4.4 Transformative Potential of CEDAW

Due to its strong focus on the discriminatory effects of gender stereotypes, CEDAW seems particularly suitable for an extension towards LGBTI*-human rights. In scholarship, there is an increasing number of voices arguing for extending the scope of CEDAW to LGBTI*-rights. In this respect, Rosenblum takes a particularly broad approach: He advocates for replacing CEDAW's focus on 'women' by a focus on 'gender' thus making it possible to combat the disadvantages suffered by men because of stereotypical ideas of masculinity (Rosenblum 2011). Hernández-Truyol, on the other hand, emphasizes that the worldwide situation of women does not allow for a renunciation of the explicit reference to 'women' in the Convention. Instead, the scope of the Convention should be extended to gender, gender identity, sex, and sexual identity (Hernández-Truyol 2011). However, both proposals would require either an amendment to the text of the Convention or the adoption of an additional protocol. Both variants do not seem very likely at the moment.

A third path therefore seems more promising: The CEDAW-Committee considers the Convention to be a 'dynamic instrument' (Committee on the Elimination of Discrimination against Women 2010b, para 2). By this, the Committee means that the Convention can and should be interpreted in a way that is responsive to current challenges and developments. Against this background American law professor Johanna Bond advocates 'for an expansive definition of gender within human rights discourse, one that reflects the interconnectedness and contingent nature of gender and sexuality' (Bond 2016, 68).

Doctrinally, human rights claims of LGBTI*-people can best be based on Article 5 of the Convention. With its focus on culture and gender stereotypes Article 5 does not only aim at formal and substantive equality but also at 'transformative equality'. Transformative equality aims at changing society.

It requires ‘a redistribution of power and resources and a change in the institutional structures which perpetuate women’s oppression’ (Fredman 2003, 115). Transformative equality also ‘takes into account a wide range of intersectional needs’ (Raday 2012, 529). This obligation to modify gender stereotypes is of great importance for people with a sexual orientation other than heterosexual and/or a non cis-gender identity, non-binary gender expression, or sex characteristics. By explicitly calling for the States Parties to eliminate ‘stereotyped roles for men and women’ Article 5 of the Convention functions as a basis for transformative equality and as ‘vehicle for cultural change’ (Holtmaat 2013, 111-112). Holtmaat and Post argue that Article 5 of CEDAW could at least address some aspects of LGBTI*-rights by obliging States Parties to modify gender stereotypes. This includes an obligation to scrutinize laws, policies and practices but also to protect against damaging gender stereotypes produced by private actors (Holtmaat and Post 2016, 325). With regard to Article 5 gender refers both to the social construction of differences between women and men and to ideas of femininity and masculinity (Holtmaat 2012, 147). The CEDAW-Committee considers gender as a socially constructed category: Gender is seen as a product of culture and society that can likewise be changed by culture and society (Committee on the Elimination of Discrimination against Women 2010b, para 5). Although the CEDAW-Committee mentions the rights of lesbian, bisexual and transgender women and girls as well as intersex persons increasingly, it is still reluctant to exploit the full potential of Article 5 to include LGBTI*-rights under CEDAW.

The following parts of the paper argue that by including discussions of discrimination of LGBTI*-people in their shadow reports and other submissions to the CEDAW-Committee, NGOs play an important role in enhancing LGBTI*-rights under CEDAW. This strategy may encourage the Committee to engage more closely in a dialogue on LGBTI*-rights.

5. NGO-Engagement for LGBTI*-Rights in the Reporting Cycle

5.1 LGBTI*-Rights on the International Agenda

A closer look on the reporting cycle illustrates where a dialogue between NGOs, the CEDAW-Committee and States Parties concerning the guarantee and the protection of LGBTI*-rights under CEDAW already – if slowly – emerges. Today, the claim for LGBTI*-rights can be described as a globalization process in which a broad coalition of actors plays an active

role (Paternotte and Seckinelgin 2016, 212-219). In addition to transnational NGOs and local LGBTI*-groups focusing exclusively on the human rights of LGBTI*-people, human rights with regard to sexual orientation and/or gender identity are nowadays also on the agenda of important and powerful transnational human rights groups like Amnesty International (AI) or Human Rights Watch (HRW) (Thoreson 2014, 51; Mertus 2007, 1045-1047). In making LGBTI*-rights claims at the CEDAW-Committee, they engage in a translation process trying to make LGBTI*-human rights claims understandable as claims under CEDAW. Within this process two main types can be identified. The first group are submissions by NGOs which do not have a special focus on LGBTI*-rights. This can be NGOs operating on a transnational level – like AI or HRW – or national NGOs. Submissions by national NGOs are very often joint submissions which have been put together by various NGOs – including LGBTI*-NGOs. These submissions normally try to point to all forms of discrimination of women that occur in the reporting country in all areas covered by CEDAW. A joint submission might just point to the fact that its accounts for discrimination also ‘include[s] lesbian, trans- and bisexual women’s rights’ (Executive Committee for NGO Forum on CEDAW 2015). More frequently, though, joint shadow reports nowadays apply an intersectional approach and include LGBTI*-people – or an abbreviation of this acronym (e.g. lesbian and bisexual women and trans people) – in their list of people who face a special risk of discrimination (Netwerk VN-Vrouwenverdrag 2016). Other joint submissions provide information on discrimination of LGBTI*-people in a particular chapter of the shadow report (Joint Submission 2014) or use a combination of these approaches (Coalition of Civil Society Organisations 2017).

The second group consists of NGOs with a special focus on LGBTI*-rights. This group includes NGOs identifying as LGBTI*-organizations as well as those who do not aim to cover the whole LGBTI*- rights range but focus, for example, on LGB-rights or trans-rights or intersex-rights only. Among this second group, it has been especially LGBTI*-NGOs with an international or transnational mandate which started to frame the claim for LGBTI*-rights as human rights claim in the first place.

5.2 International NGOs with a Special Focus on LGBTI*-Rights

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) and Outright Action International are two LGBTI*-NGOs operating on an international and transnational level with a strong focus on the human rights of LGBTI*-people. Both NGOs function as norm brokers providing information and support to national and regional NGOs making human

rights claims to various UN treaty bodies and play an active role in the struggle for the recognition of LGBTI*-rights as human rights.

International Lesbian, Gay, Bisexual, Trans and Intersex Association

ILGA is one of the main transnational LGBTI groups and the oldest one still in existence. It describes itself as ‘the word foundation of national and local organizations dedicated to achieve equal rights for LGBTI*-people around the globe’.⁹ From the very beginning ILGA had a focus on human rights and international institutions with whom the organization sought to cooperate (Paternotte 2016, 392). ILGA conducts work in various UN fora and was instrumental in putting LGBTI issues on the international agenda. ILGA provides support and guidance to (local) NGOs engaging with treaty bodies amongst them the CEDAW-Committee. The organization not only supports other NGOs in making LGBTI*-rights claims to UN treaty bodies: It also monitors whether and how the recognition of LGBTI*-rights as human rights progresses. Since 2014, ILGA publishes an annual treaty bodies report. These reports lists all references made to sexual orientation, gender identity, gender expression, intersex and/or sex characteristics by one of the seven UN treaty bodies throughout the year.¹⁰ They investigate the treaty bodies general comments (or ‘general recommendations’ as they are called by the CEDAW-Committee); individual communications (i.e. complaints brought by individuals or organizations); lists of issues (i.e. issues and questions sent to the States Parties by a treaty body before the main review throughout the reporting cycle), and concluding observations. An annex to each annual report provides a list of resources to assist NGOs in their engagement with the treaty bodies as well as a list of shadow reports referring to sexual orientation, gender identity, gender expression, intersex and/or sex characteristics. The 2016 edition of the annual report – which is the last edition that is available so far – also includes quantitative data on references to LGBTI*-issues in treaty bodies’ concluding observations made from 2014 to 2016. This data shows that the CEDAW-Committee increased its references to LGBTI*-issues significantly in 2016 after a slight decrease in 2015.¹¹ The treaty body report also documents that the CEDAW-Committee addressed LGBTI*-issues in its concluding observations only when the topic was raised by NGOs in their

⁹ This description can be found on the organization’s website: <https://ilga.org/about-us> (accessed 25/11/2019).

¹⁰ The annual report concerns the work of the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee on the Elimination of Discrimination against Women; the Committee against Torture; the Committee on the Rights of Persons with Disabilities; the Committee on the Elimination of Racial Discrimination.

¹¹ In 2014, 36 % of the concluding observations included references to LGBTI*-issues. In 2015, the number was only 33 %, but increased to 59 % in 2016.

shadow reports. So far, the Committee never referred to LGBTI*-issues on its own initiative (International Gay and Lesbian Association 2016, 16).

OutRight Action International / International Gay and Lesbian Human Rights Commission

For the recognition of LGBTI*-rights under CEDAW, the engagement of NGOs in the reporting cycle proves to be decisive. Practical advice for NGOs to draft a shadow report for the CEDAW-Committee is provided by OutRight Action International. OutRight was founded in 1990 as the International Gay and Lesbian Human Rights Commission (IGLHRC). In 2015, the organization changed its name to reflect its longstanding commitment to advancing the human rights concerns of all LGBTI and queer people. OutRight was among the first organizations devoted to transnational human rights work on behalf of gay and lesbian people. OutRight provides support and training to national and regional LGBTI*-NGOs and LGBTI*-activists to advance basic human rights. From early on the CEDAW-Committee was a prime target for intervention and OutRight routinely addressed the Committee. In 2009, OutRight published 'Equal and Indivisible' – a handbook for writing shadow reports that include human rights issues related to sexual orientation, gender identity, and gender expression for CEDAW. The foreword to the handbook deals with the dilemma of definition and translation. It gives credit to more recent developments in gender theory and queer theory – including the social construction of 'sex' and 'gender' and intersectional approaches. For the sake of effective advocacy, however, the authors explain that they decided to adopt what they call an 'early second-wave feminist' distinction between sex and gender. They express their hope that the Committee's understanding of issues related to sexual orientation and gender identity will grow and that this might enable activists to adopt a different strategy and to incorporate definitions of sex and gender that are more fluid (International Gay and Lesbian Human Rights Commission 2009, 3).

The question of language and the translation of LGBTI*-rights issues into the language of CEDAW plays an important role in the handbook. The handbook offers activists suggestions on language, frameworks, and issues to highlight to the CEDAW-Committee. While its glossary of key terms is much more extensive, the handbook itself mostly speaks about including 'lesbian, bisexual and transgender women' into shadow reports addressed at the CEDAW-Committee. It gives advice to NGOs and activists to clearly define and differentiate between the terms 'sex' and 'gender' and to refer to the Yogyakarta principles. The Yogyakarta principles is a set of 29 principles on the application of international human rights law in relation to sexual orientation and gender identity created by an international group of human

rights experts in 2007 (O’Flaherty and Fisher 2008). The principles have been updated in 2017 by supplemental principles (the Yogyakarta Principles Plus 10) including not only sexual orientation and gender identity but also gender expression and sex characteristics (Park 2019, 247). The Yogyakarta principles show that LGBTI*-human rights activists are not calling for ‘new’ rights but for the mere application of existing international human rights law. As for transgender women the handbook advises NGOs and activists to point to the fact that de facto discrimination against all women can only be eliminated when the principle of non-discrimination and equality applies without distinction on grounds of sex, sexual orientation, and gender identity (International Gay and Lesbian Human Rights Commission 2009, 15 and 18).

Many but by far not all shadow reports adopt the framework suggested in the handbook. To assess the full potential of shadow reports a closer look into the content of the shadow reports is appropriate in order to analyse if and how they use the described framework in a way potentially broadening our understanding of human rights.

6. LGBTI*-Human Rights Claims in Practice

The vast majority of shadow reports submitted to the CEDAW-Committee by NGOs frames human rights claims of LGBTI*-people by referring to the terms sexual orientation and/or gender identity or by using the LGBTI*-acronym or a variation of it. Frequently, reports take on the advice provided in the OutRight-handbook and make claims in the name of ‘lesbian, bisexual and transgender women’ or in the name of ‘lesbian and bisexual women and transgender people’. This approach is most common to – but not limited to – shadow reports which have no special focus on but include LGBTI*-human rights. Less often, shadow reports amend the LGBTI*-acronym or any of its abbreviations by referring in addition to specific identities or practices that exist in local cultures and might not correspond to Western notions of identity or sexual orientation. An early example is the 2010 shadow report filed by Ugandan NGO Freedom and Roam Uganda (FARUG) with the support of OutRight (by then still known as IGLHRC). Established in 1999, FARUG is one of the oldest LGBT organizations in Africa and the first lesbian organization in Uganda (Lusimbo and Bryan 2018, 330). When crafting a shadow report to the CEDAW-Committee, FARUG made human rights claims not only in the name of lesbian, bisexual, and transgender persons, but also in the name of kuchu people and women who have sex with women. ‘kuchu’ comes from Swahili meaning ‘same’ (Lusimbo and Bryan 2018, 323). The shadow report explains that ‘kuchu’ is used by the lesbian, gay, bisexual,

and transgender community in Uganda as a self-identifying term. *kuchu* not only describes multi-faceted identities but is a term that is in itself fluid: Like the term 'queer' *kuchu* was originally 'a slang word, adopted by the Ugandan LGBTI*-community. Today, it is used by the LGBTI community to secretly identify themselves and easily talk about issues affecting them in public without giving out much information as LGBTI issues are still highly stigmatized'.¹²

In its shadow report, FARUG uses this local expression to make (official) claims for inclusion into a human rights body. Although the CEDAW-Committee did not take up the term '*kuchu*', it has nevertheless expressed its grave concern about the ongoing discrimination against women based on their sexual orientation and gender identity (Committee on the Elimination of Discrimination against Women 2010, paras 43-44).

Similarly, in its 2016 submission to the CEDAW-Committee concerning the State report of Bangladesh, Human Rights Watch not only dealt with the human rights of lesbian, bisexual, and transgender women: It also included a paragraph on the discrimination of hijras, explaining that hijras are 'people who, assigned 'male' at birth, identify as feminine later in life and prefer to be recognized as hijra or a third gender' (Human Rights Watch 2017, 13). Same-year's joint shadow report submitted by a number of trans* and other NGOs concerning the state report of Argentina specifically drew the Committee's attention to the human rights situation of travesti and trans persons. A previous shadow report explained 'travesti' as

the term by which most trans individuals in Argentina name themselves. Travestis are usually assigned to the male gender at birth, on the basis of their anatomy, and later in life (mostly in early childhood but it can also be later) identify themselves with a female gender identity, in which they live full time. They usually resort to cosmetic surgery and hormone treatments to adjust their bodies to their inner perception of themselves but rarely choose to have genital surgery (Cero en Conducta and International Gay and Lesbian Human Rights Commission 2010, 3).

The 2016 report amends this definition pointing to the fact that the term 'travesti' has a meaning that goes beyond mere gender identity or expression but 'has a political connotation linked to 'struggle, resistance, dignity and happiness'' (Joint Submission 2016, 2). Similarly, Egale Canada Human Rights Trust filed a shadow report in partnership with the International Lesbian, Gay, Bisexual, Trans and Intersex Association North America (ILGA-NA)

¹² Explanation see the webpage 'Kuchu Times' <https://www.kuchutimes.com/about/> (access 25/11/2019).

including 'gender diverse and Two Spirit (indigenous) people' in their list of people facing a special risk of gender-based discrimination (Egale Canada Human Rights Trust 2016).

What these examples have in common is that they foreground whom Ratna Kapur calls 'peripheral subjects', those 'who have remained unaddressed' in human rights politics (Kapur 2002, 30-31) and can thus be read as attempts to translate LGBTI*-human rights claims into human rights claims under CEDAW. Where shadow reports add specific local expressions for certain (sexual) practices or (gender) identities two translation processes take place: The first one is the attempt to make LGBTI*-human rights claims understandable as human rights claims under the existing international human rights framework. The second one is the attempt to include identities or experiences which might differ considerably from the Western-coined understanding of sexual orientation and/or gender identity and the LGBTI*-acronym into the (likewise Western-coined) human rights framework. Foregrounding peripheral subjects like kuchu, hijras, travesty, and Two Spirit people challenges and potentially 'disrupt[s] the sexed and imperial order of human rights law' (Otto 2006, 355). Of course, not all of these attempts are immediately successful: The Committee's concluding observations on Bangladesh's 2016 state report mention neither hijras nor the human rights situation of lesbian, bisexual, and transgender women. However, in its concluding observations the Committee indeed called on Argentina to '[d]enounce attacks on the human dignity and integrity of LGBTI persons' (Committee on the Elimination of Discrimination against Women 2016a, para 21g) and requested Canada to '[d]evelop a national gender strategy [...] addressing the structural factors that cause persistent inequalities [...] with a special focus on disadvantaged groups such as [...] lesbian and bisexual women and girls, and transsexual and intersex persons' (Committee on the Elimination of Discrimination against Women 2016b, para 21b). These concluding observation document that the interventions through NGO-shadow reports have the potential to increase the awareness of the Committee for LGBTI*-human rights issues.

The dialogue between the Committee, NGOs, and States Parties on LGBTI*-human rights does not only affect the concluding observations: a broader understanding of the Convention is also reflected in the more recent general recommendations issued by the Committee. Starting with General Recommendation No. 27 (Committee on the Elimination of Discrimination against Women 2010a) two out of three general recommendations mention lesbian and bisexual and transgender women or people, some of them even adding intersex people or speaking about lesbian, bisexual, transgender and intersex children (Committee on the Elimination of Discrimination

against Women 2017, para 66). This is of particular importance as general recommendations serve as authoritative interpretations of the Convention and signal to States Parties which goals shall be achieved (Nisuke 2012, 342). Through the impact on general recommendations and concluding observations the argumentation presented in the shadow reports significantly contributes to the further understanding of core categories of human rights protection in the field of gender discrimination.

Upward Translation – A Conclusion

Up to the present day, no legally binding instrument exists on the international level addressing human rights violations and discrimination based on sexual orientation, sexual practice, gender identity, or gender expression. As a result, in order to make human rights claims LGBTI*-human rights activists and NGOs have to translate rights abuses and rights violations experienced especially by LGBTI*-people into the language of existing international human rights. In doing so they engage in a bottom-up process I refer to as upward translation, during which the recognition of human rights related to sexual orientation, sexual practice, gender identity, or gender expression is negotiated between UN treaty bodies, the States Parties, and (LGBTI*-)NGOs.

One possibility for NGOs to translate LGBTI*-rights claims into legitimate claims under an existing human rights framework is to craft a shadow report to a UN treaty body. As I have shown, due to its focus on the discriminatory effects of gender stereotypes, CEDAW has been considered an apt addressee for such attempts of translation and from an early stage on, the CEDAW-Committee has been met with LGBTI*-rights claims. Even so only few examples prove to be as successful as the attempt of the German Intersex-NGO I described in the introduction, the Committee nowadays shows an increasing awareness for LGBTI*-human rights issues both in its concluding observations and in its general recommendations. Nevertheless, the translation of rights violations and discriminations based on sexual orientation, sexual practice, gender identity, or gender expression into the language of human rights continues to be a source of many difficulties and struggles. I discussed the – partly justified – critique that both the ‘sexual orientation and/or gender identity’ framework and the LGBTI*-framework received: One concern is that the terms sexual orientation and gender identity as well as references to LGBTI* run the risk of producing (new and) unintended forms of exclusion. Another critique targets sexual orientation, gender identity, and the LGBTI*-acronym as relying on concepts of sexuality

and identity deeply rooted in Western society. Drawing on these framings with their foundations in Western (binary) categories limits the notion of identities, experiences, or practices of desire in the non-Western world which are related to sexuality and gender but might as well go beyond.

An important venue for attempts of upward translation of LGBTI*-human rights is the reporting cycle. I identified different actors who engage in translating human rights claims related to sexual orientation, sexual practice, gender identity, or gender expression into the language of CEDAW: transnational NGOs and local LGBTI*-groups with a sole focus on LGBTI*-rights as well as transnational human rights organizations focusing on human rights in general. Within the translation process these actors use different strategies. Joint submissions by various NGOs show a tendency to either state that all forms of discrimination listed include the discrimination of lesbian, trans, and bisexual women or to apply an intersectional approach defining LGBTI*-people or LBT-women and intersex people as facing a special risk of discrimination. Some NGOs, however, even go a step further in their attempts of translating LGBTI*-human rights claims. NGOs making claims to the CEDAW-Committee not only in the name of lesbian and bisexual women or transgender people but also in the name of kuchu, hijras, travestis and Two Spirit people point to the fact that other communities may have an understanding of sexuality and identity that differs from hegemonic Western notions. I argue that by foregrounding 'peripheral subjects' these NGOs engage in a second translation process as they attempt to translate specific forms of discrimination and oppression people experience in a particular geographical and social context into the language of international human rights. These references to local notions of sexual and/or gendered identities, experiences, and practices of desire within a shadow report to the CEDAW-Committee can be understood as part of a two-stage translation process with the potential to change and to broaden traditional understandings of human rights.

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