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**The Subject of Women's Rights**  
An Investigation of CEDAW's (*Straight*) Construction  
of Family-Related Human Rights

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# Abstract

*The history of international human rights law shows that the articulation of human rights has often been scripted around the experiences of some rather than all. For example: men. As the creation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has tried to address specifically the oppression of women, has this fragmentation of some rather than all repeated itself? This study focuses on CEDAW's family-related provisions and assesses whether they consider women of all sexual orientations as proper human rights subjects. That is, it is investigated whether CEDAW takes into account differences amongst women in regard to their sexual orientation and/or the sexual relation they are in. The method employed in this study is a feminist and queer critique of human rights, focusing on the socially and legally created norm and its assigned deviants. This analytical strategy is applied to the family-related provisions of CEDAW as well as the interpretive and monitoring work of CEDAW's monitoring body, the CEDAW Committee. The key findings of the study show that CEDAW's provisions relating to family issues do not value the diversity of women. Instead they are mostly scripted around the lives of heterosexual women, rendering heterosexual women the invisible norm as well as the main subject of women's rights. It is moreover maintained that CEDAW is complicit in reinforcing a certain type of family (the monogamous heterosexual family) and in rendering this unit central to a woman's life. While the CEDAW Committee has sometimes tried to include in the scope of CEDAW the experiences of lesbian, bisexual and queer women, its understanding of intersectional discrimination in regard to women's sexual orientations has not yet infiltrated its ideas about the family. The main conclusion drawn from this research is that, in focusing on eliminating discrimination against women within the monogamous heterosexual family, CEDAW is complicit in legitimising this specific family unit, leaving unnoticed the wider oppressive aspects of it. The study recommends that the Committee adopts a general recommendation, reconceptualising the chapeau of Article 16(1) of CEDAW so as to instruct states to allow and enable women to develop freely their own understanding of family and to value and respect different forms of families, without discriminating amongst them.*

# Preface

This thesis found its inspiration and realisation in my interactions with people I hold dear.

Amongst these, my family, and especially my parents, who show unconditional trust in my endeavours. Thank you for never teaching me how to think straight.

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# Abbreviations

<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CEDAW Committee</b>	Committee on the Elimination of Discrimination against Women
<b>CO</b>	Concluding Observations
<b>CSW</b>	Commission on the Status of Women
<b>Committee</b>	Committee on the Elimination of Discrimination against Women
<b>ECtHR</b>	European Court of Human Rights
<b>DEDAW</b>	Declaration on the Elimination of Discrimination against Women
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IPV</b>	intimate-partner violence
<b>LBQ</b>	lesbian, bisexual and queer
<b>NGO</b>	non-governmental organisation
<b>SRVAW</b>	United Nations Special Rapporteur on violence against women, its causes and consequences
<b>the Charter</b>	Charter of the United Nation
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>VCLT</b>	Vienna Convention on the Law of Treaties

“Clearly, the category of women is internally fragmented by class, color, age, and ethnic lines, to name but a few; in this sense, honoring the diversity of the category and insisting upon its definitional non-closure appears to be a necessary safeguard against substituting a reification of women's experience for the diversity that exists.”

Judith Butler<sup>1</sup>

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<sup>1</sup> ‘Gender Trouble, Feminist Theory, and Psychoanalytic Discourse’, in Linda J. Nicholson (eds), *FEMINISM/ POSTMODERNISM* (1990) 324, 327.

# 1 Introduction

## 1.1 Background

In 1789, at the height of the French Revolution, a legal document was passed by France's National Constituent Assembly, giving men (quite literally men) rights vis-à-vis the State.<sup>2</sup> This, of course, was the *Déclaration des droits de l'homme et du citoyen*, or the Declaration of the Rights of Men and of the Citizen. It is not only seen as a fundamental document of the French Revolution, but also as a significant part of the history of the development of human rights, imagining a community of equal citizens and declaring that human rights are universal.<sup>3</sup> Two years later, in 1781, a new Constitution was ratified in France, containing the Declaration of the Rights of Men and of the Citizen in its preamble. As a response to the exclusion of women from the scope the Declaration, Olympe de Gouges published her own *Déclaration des droits de la femme et de la citoyenne*, or the Declaration of the Rights of Woman and of the Citizen, applying the rights contained in the Declaration to women and thereby exposing the exclusionary and discriminatory nature of rights of men.<sup>4</sup>

On an international level, and more than 165 years later, human rights were set out to apply to both sexes equally, as stated, *inter alia*, in Article 2 of the Universal Declaration of Human Rights (UDHR): "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [emphasis added]".<sup>5</sup> However, employing a western liberal approach to international law, the Declaration (and, later, the two relating Covenants<sup>6</sup>) focused mainly on rights within the public sphere, from which women were mostly excluded, having had their 'proper' role in society assigned to the private sphere. It therefore arguably did also not set out to break down public / private dichotomy.<sup>7</sup> While setting out to apply to men and women equally, the scope of the instruments was designed around the lives of men, often not

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<sup>2</sup> Lynn Hunt (translation and eds), *The French Revolution and Human Rights: A Brief Documentary History* (St. Martin's Press 1996) 77-9.

<sup>3</sup> Hunt (n 2) 77-9.

<sup>4</sup> Olympe De Gouges, 'The Declaration of the Rights of Woman and Citizen' in Hunt (n 2) 124-9.

<sup>5</sup> Adopted by the United Nations General Assembly in 1948.

<sup>6</sup> The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted by the General Assembly in 1966.

<sup>7</sup> For a discussion of the normative structure of international law, including international human rights law, and the private / public dichotomy, see: Hilary Charlesworth, Christine Chinkin, and Shelly Wright, 'Feminist Approaches to International Law' in Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt, *International Rules: Approaches from International Law and International Relations* (Oxford University Press 1996) 256, 265-76, esp. 267.

actually reaching the experiences of women and hence operated on an exclusionary level also.<sup>8</sup>

A more refined attempt to include the lives of women in the scope of international human rights law was made with the adoption of the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1979, and its entry into force in 1981, exactly 200 years after Olympe de Gouges wrote her *Déclaration des droits de la femme et de la citoyenne*.<sup>9</sup> This move had been influenced and driven by demands – not least by the UN Commission on the Status of Women<sup>10</sup> (CSW) – for “a more comprehensive and well-targeted international focus on women, including development of a norm of non-discrimination against women within the emerging human rights legal framework.”<sup>11</sup> Hence, CEDAW sought to render women the subject of a human rights framework created to expressly tackle forms of discrimination and human rights issues that are specific to women’s experiences. By doing so CEDAW even went so far as to introduce provisions on collective rights: “CEDAW in this respect seeks, not to liberate women one at a time by vindicating the legal rights of each, but to transform conditions affecting women collectively”<sup>12</sup>. Further breaking with the liberal legal tradition through entering into the private sphere, CEDAW sought not only to end discrimination against women within the private sphere, but equally sought to unlock doors for women to enter the public sphere.<sup>13</sup>

However, the historical exclusion of the experiences and lives of women from the scope of (national and international) human rights law should produce a certain weariness in regard to another human rights’ claim to equality today, and even in relation to legislation that seeks to remedy such exclusions. Whom, despite its great ambitions, does human rights law protect and whom does it exclude from the scope of subjects of rights? These questions apply to CEDAW in the same way as they applied to the Declaration of the Rights of Men and of the Citizen, to the UDHR, to the ICCPR, and to the ICESCR.

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<sup>8</sup> Brad R Roth, ‘The CEDAW as a Collective Approach to Women’s Rights’, (2002-3) 24 Michigan Journal of International Law 187, 191-2.

<sup>9</sup> General Assembly resolution 34/180 of 18 December 1979.

<sup>10</sup> UN Women, ‘Short History of CEDAW Convention’ (United Nations Department of Public Information) <<http://www.un.org/womenwatch/daw/cedaw/history.htm>> accessed 16 May 2015.

<sup>11</sup> Christine Chinkin and Marsha A. Freeman, ‘Introduction’ in Marsha A. Freeman, Christine Chinkin, and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2013) 5.

<sup>12</sup> Roth, (n 8) 192.

<sup>13</sup> For instance, Article 3 of CEDAW states: “States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.” Note that the private / public dichotomy itself can be and has been questioned as it appears to be a construct that helps to maintain unequal power relations, see Charlesworth, Chinkin, and Wright (n 7) 268-9.



## 1.2 Object of Study: The Subject of Women's Rights

Accepting the premise that, in its attempt to remedy the shortcomings of previously existing international human rights law and to target situations specific to 'women', CEDAW applies only to women (as opposed to women *and* men or as opposed to questioning the categories of women and men altogether), the question still remains whether CEDAW in fact considers *all* women as proper rights subjects? While seeking the elimination of discrimination against women, does CEDAW also account for their differences or do CEDAW's provisions, and the interpretation thereof, themselves presuppose a certain idea of womanhood that one needs to fulfil in order to be afforded full protection? These are issues that this thesis seeks to touch upon by virtue of asking whether CEDAW's family-related provisions afford the same protection to women in same-sex and different-sex relations.

This analysis is motivated by an assumption that CEDAW's provisions relating to family and marriage focus on a liberation of women from ties binding them to the private sphere through the deconstruction of socially and culturally assigned roles of a woman and her (male) partner or husband and that such focus may therefore exclude from the topic of discussion women in same-sex relations. This is because whereas women in different-sex relations have often been expected to pursue a specific type of family life, women in same-sex relations are often barred from doing so. Has CEDAW been able to, or will CEDAW be able to, accommodate both types of relations within its scope of protection? In this sense, this thesis involves a similar task which Olympe de Gouges undertook during the French revolution, that is, the task of exposing the exclusionary and discriminatory nature of a legal *human* rights instrument. In doing so, the concepts of family and marriage themselves will also be under interrogation. Who is the actual family that is ensconced in law, why is it this family that is afforded special protection, and how does it affect women in regard to the diversity of sexual relations they may be in? And further, how does it affect women who are in no sexual relations at all?

## 1.3 Theoretical Considerations

In chapter two of the thesis, I will put forward my analytical strategy, which constitutes a feminist critique and is inspired by several viewpoints within the feminist/queer conversation. It has as its underlying notion the understanding that 'feminism' is not solely the study of women as an oppressed group, but rather a study of how that oppression affects women differently and intersects with other forms of oppression. The inspiration for the analysis this thesis performs originates from the works of several academics and writers, as will be outlined. Influencing my analytical strategy, they will be drawn upon in discovering the silences, assumptions, and prescriptions within CEDAW, and within the work of the Committee on

the Elimination of Discrimination against Women (CEDAW Committee, or the Committee).

The core of my analytical strategy consists of explorations of the *natural* and the *deviant*. These concepts are used in order to detect whether CEDAW itself defines a *natural* form of family and therefore allows regulation and discrimination against *deviant* families, and are further used in order to explore the institution of marriage itself within a women's rights setting. Since queer theorists have sometimes criticised feminism to be concerned only with the lives of heterosexual women, the tenets of queer theory, especially in regard to the family, have influenced the analytical approach taken. In particular, the queer exercise of questioning the norm or the *normal* is utilised, as well as queer studies' revelations of heterosexuality as an organizing institution.

The explorations of queer theory of the *natural* and the *deviant* have influenced particular areas within feminism, while feminism too has influenced queer theory (as will be seen in chapter two). While the two strands of thought hence do not flow separately alongside each other, but instead intermingle, the present analysis firstly looks at how queer theorists have developed queer/feminist tools that detect social structures of exclusion, here with a particular focus on heteronormativity. It then moves on to take inspiration in the work of feminists' who have worked with queer/feminist tools within a setting that has a particular focus on the oppression or exclusion of women. Two feminist scholars in particular have influenced my analytical strategy, both of whom focus on gender as well as heterosexuality and heteronormativity. Stevi Jackson views heterosexuality as a vital topic for feminism, maintaining that both gender and sexuality are social phenomena.<sup>14</sup> Jackson argues that feminism's focus on gender and queer study's focus on heteronormativity both need to be taken into account for an effective critique of heterosexuality, as gender as a social hierarchical division is inherent in heterosexuality.<sup>15</sup> Also drawn upon is the work of Martha Albertson Fineman that focuses on the 'sexual family' and how it is defined, especially in law, with the result of defining the normal family and thus allowing for regulation and discrimination against deviant families.<sup>16</sup> Her focus, while not deviating much from the queer strategy outlined above, influences my strategy in that she places this strategy within a particular family setting.

As part of my analytical approach, Rebecca Cook's and Simone Cusack's *Gender Stereotyping*<sup>17</sup> will be used as a tool to detect how laws and policies

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<sup>14</sup> Stevi Jackson, 'Sexuality, Heterosexuality, and Gender Hierarchy: Getting Our Priorities Straight' in Chrys Ingraham (eds) *Thinking Straight: the Power, the Promise, and the Paradox of Heterosexuality* (Routledge 2005) 16.

<sup>15</sup> *Ibid.*, 22.

<sup>16</sup> Martha Albertson Fineman, 'The Sexual Family' in Martha Albertson Fineman, Jack E. Jackson, and Adam P. Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate 2009) 45-63.

<sup>17</sup> Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010).

employ stereotypes to reproduce the oppression of women and subgroups of women, and how the normal is defined and the deviant is designated through harmful gender stereotypes. Cook and Cusack discuss sex stereotypes, sexual stereotypes, sex role stereotypes, and compounded stereotypes. Of particular interest will be implications of stereotypes for the exclusion or otherwise of certain women from the scope of protection of CEDAW.

In light of the variety of concepts and viewpoints that have influenced my analytical approach, it is apparent that I do not subscribe to a ‘grand theory’ of feminism, seeking to expose a single truth concerning the oppression and liberation of women. Rather, my analytical approach aligns with the method described by Hilary Charlesworth:

“Within feminist scholarship there is a tendency to pigeonhole theorists into fixed categories such as ‘liberal’, ‘cultural’, ‘radical’, ‘postmodern’ and ‘postcolonial’. But when confronted with a concrete issue, no single theoretical approach or method seems adequate. A range of feminist theories and methods are necessary to excavate the issues. In this sense, feminist explorations can be likened to an archaeological dig. There are various layers of practices, procedures, symbols and assumptions to uncover and different tools and techniques may be relevant at each level”<sup>18</sup>.

Parts of the theories mentioned above will be used as such tools and techniques; employed in order to analyse and provide an answer to the question posed.

## 1.4 Chapters

Chapter three will present CEDAW, its legal framework and the CEDAW Committee. In addition to a general presentation of CEDAW, its place in the international legal framework and its objective and purpose, CEDAW’s provisions will be outlined. The CEDAW Committee will also be the subject of discussion, describing its composition and mandate as well as its role and influence in ending discrimination against women.

Chapter four and five employ a two-step analysis, seeking to answer the question whether CEDAW’s provisions on family and marriage afford equal protection to women in same-sex and different-sex relations. Firstly, chapter four will investigate the wording of Article 1 of CEDAW, which defines discrimination against women, while chapter five will investigate the wording of family-related provisions of CEDAW, primarily those contained in Article 16. A second step within these chapters will look at some of the Committee’s interpretive work in the form of general recommendations. The exploration of these provisions and texts will employ my analytical

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<sup>18</sup> Hilary Charlesworth, 'Feminist methods in international law' (1999) 93 *American Journal of International Law* 379, 381.

strategy outlined above and therefore will be a search for references to, and silences surrounding, sexual orientation as well as varying forms of relationships. Due to CEDAW's age it will be particularly interesting to investigate how the Committee has applied or interpreted CEDAW's provisions more recently and to answer the question of whether it has been able to remedy any constructions of womanhood that the bare provisions, adopted in 1979, entailed. Due to this reason, chapter six will analyse the Committee's conversation on violence against women. Violence against women is not expressly addressed in CEDAW, but has been placed within the scope of the Convention through the Committee's work.<sup>19</sup>

The subject of analysis in chapter seven will be the communication exchange between the Committee and Germany in the context of Germany's sixth periodic reporting under CEDAW. While according to 'The Global Gender Gap Report 2014,' Germany is the twelfth most gender-equal country out of the 142 States examined,<sup>20</sup> inequalities between women in same-sex and different-sex relationships exist, *inter alia*, within the areas of family and marriage: women in same-sex relations do not enjoy the same domestic family and marriage rights as women in different-sex relations.<sup>21</sup> It will therefore be of interest to analyse whether and how the CEDAW Committee has addressed or ignored family-related discrimination against lesbian, bisexual and queer (LBQ) women. The most recent concluding observations from other States will be mentioned in order to draw several comparisons. A few assumptions will lastly be made as to why the Committee addresses some issues concerning LBQ women while ignoring others.

In the last chapter it will be concluded that CEDAW's provisions relating to family issues do not value the diversity of women and instead are mostly scripted around the lives of heterosexual women, rendering heterosexual women the invisible norm as well as the main subject of women's rights. It will moreover be maintained that CEDAW is complicit in reinforcing the stereotypical heterosexual monogamous family and in rendering this unit central to a woman's life. While the Committee has not yet been able or willing to remedy the found discrimination against women who deviate from the created norm, an idea of a reconstruction of Article 16 will be put forward in the conclusion.

## 1.5 Sources

The thesis draws on several primary and secondary sources. Within the category of primary sources will be legal instruments, both international and

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<sup>19</sup> Especially through general recommendation no. 19: CEDAW Committee, 'General Recommendation No. 19' (1992) contained in UN Doc HRI/GEN/1/Rev.9.

<sup>20</sup> World Economic Forum, *The Global Gender Gap Report 2014* (World Economic Forum, 2014).

<sup>21</sup> See for instance: 'Act on Registered Life Partnerships' (Bundesministerium der Justiz und für Verbraucherschutz, 20 June 2014) <[http://www.gesetze-im-internet.de/englisch\\_lpartg/index.html](http://www.gesetze-im-internet.de/englisch_lpartg/index.html)> accessed 11 February 2015.

national. The most important and relevant of which will of course be CEDAW, but other instruments, such as the Optional Protocol to CEDAW, and German family law legislations will also be used. Further primary sources include various works of the CEDAW Committee, such as its general recommendations and concluding observations. Additionally, CEDAW's *travaux préparatoires* will be used. The category of secondary sources will mostly be occupied by feminist articles and texts, both in terms of feminist or queer theories and feminist assessments of international law and CEDAW specifically. A state reports as well as a report from non-governmental organisations (NGOs), in the form of a 'Shadow Report' to CEDAW, will also be drawn upon in the case study.

## 1.6 Delimitations

Although a study of all the constructions and silences regarding women's different lives and experiences within CEDAW, including all of CEDAW's articles, would provide a fuller picture of whom CEDAW does and does not protect, this is only a limited study, focusing on CEDAW's family-related provisions and a relating comparison between women in same-sex and different-sex relations. While of course most of CEDAW's provisions can, in on way or another, be related to family life, as one's family life is influenced by many factors, this analysis looks at mostly at CEDAW's Articles 16, 2 and 5, as well as at the topic of violence against women.

The study is further limited to exploring the Committee's exchange with, and views on, one country, namely Germany. It may therefore be limited in that it employs a somewhat Western European analysis. Also removed from the scope of study is the relevant question (as mentioned earlier) to what extend it is useful to limit the scope of CEDAW to 'women'.<sup>22</sup> Lastly, despite its general claim to investigate the subject of women's rights, the investigation is limited to the scope of CEDAW as the main international legal women's rights instrument, though a further investigation of other documents, such as the non-binding Beijing Declaration and Platform for Action<sup>23</sup>, or CEDAW's relation to the Yogyakarta Principles<sup>24</sup> would also be relevant.

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<sup>22</sup> See, Darren Rosenblum, 'Unsex CEDAW: What's Wrong with "Women's Rights"' (2011) 20.2 Columbia Journal of Gender and Law 98-194; and Berta Esperanza Hernandez-Truyol, 'Unsex CEDAW? No! Super-Sex it!' (2011) 20 Columbia Journal of Gender & Law 195.

<sup>23</sup> United Nations, 'Report of the Fourth World Conference on Women' (1995).

<sup>24</sup> The Yogyakarta Principles were established by group of international human rights experts in 2006 and address principles of international human rights law in their application to issues of sexual orientation and gender identity. See: 'The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity' (2006) <[http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)> accessed 23 May 2015.

# 2 Theory and Methodological Considerations

## 2.1 Introduction

This chapter outlines my analytical strategy through mapping the theoretical considerations that have influenced the way in which CEDAW's family-related provisions and the Committee's related work shall be investigated in chapters four to seven. My analytical strategy, a feminist critique of CEDAW, finds its inspirations in relevant feminist and queer deliberations and explores the topic under consideration in the light of these. By doing so, it seeks to fulfil one of feminism's main tasks, that is, as put by Adrienne Rich, "[t]o question everything. To remember what it has been forbidden to even mention."<sup>25</sup> Further, Catherine MacKinnon has defined feminist jurisprudence as "an examination of the relationship between law and society from the point of view of all women"<sup>26</sup>. While the current analysis does indeed seek to partake in the task of exploring the relationship between law and society from the point of view of all women, unlike MacKinnon whose theory is rather essentialist, focusing on men's sexual domination over women and therefore focusing on the experience of heterosexual women, this analysis deems it necessary to explore the term *all women* differently<sup>27</sup>. All women are not seen as a homogenous group, but rather the interest lies in their diverse identities and, for the purposes of the present analysis, in their diverse sexual relations. Lastly, while the current analysis does not claim or seek to be a closed conversation, offering a clear solution to a clear problem, it does anticipate to be forward looking in the spirit of Heather Ruth Wishik's words: "Feminist jurisprudence (...) inquires not only into the harms of patriarchal law, but also into the possibility and characteristics of a world without patriarchal law, and of a non-patriarchal system."<sup>28</sup> Patriarchy, a system of male dominance over women, will be further conceptualized below.

The field of feminist scholarship is wide and multifaceted, running not only in three – more or less temporal – waves<sup>29</sup>, but also in various theoretical

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<sup>25</sup> Adrienne Rich, *On Lies, Secrets, and Silence: Selected Prose, 1966-1978* (Norton 1980) 13.

<sup>26</sup> Cited in Heather Ruth Wishik, 'To Question Everything: The Inquiries of Feminist Jurisprudence' in D. Kelly Weisberg (eds), *Feminist Legal Theory: Foundations* (Temple University Press 1993) 22.

<sup>27</sup> Though, as will later be argued, the discrimination against LBQ women often relates to men's sexual domination over women in that the discrimination is employed as a tool to bring women within the sexual domination of men, or to punish them for escaping from the scope of it.

<sup>28</sup> Wishik (n 26) 23.

<sup>29</sup> First wave feminism, the focus of which was on *de jure* inequalities or officially mandated inequalities, began in the UK and the USA around the nineteenth century and lasted until the early twentieth century; second wave feminism, the focus of which was on

approaches, such as liberal feminism, radical feminism, cultural feminism, black feminism, marxist and socialist feminism, third world feminism, and post-modern feminism, to name but a few.<sup>30</sup> Even within these different theoretical approaches, numerous viewpoints are offered. Rather than to place my analysis neatly within a particular theoretical approach, my analytical strategy draws upon several selected viewpoints from the intersecting fields of feminism and queer theory, identifying two common elements and connecting them. Firstly, these viewpoints seek to improve women's conditions of life and, secondly, they set out to abolish categories and the categorization of women.

Believing that queer theory and feminist conversations have informed, influenced and collaborated with one another, my analytical strategy is influenced by aspects of both. The chapter outlines and explores the basic ideas and relevant aspects of, firstly, queer theory and, secondly, feminism that have influenced and inspired my analytical approach and sets out how they are drawn upon throughout the study. While, as mentioned in the introduction, queer theory and feminism are not clearly separated fields, they will nevertheless be dealt with in different sections of this chapter. This is partly the case in order to pay attention to the different principal emphases of these fields, with queer theory having their *main* focus on heteronormativity and feminism having their *main* focus on patriarchy (though it will also be argued that a strong interdependent link exists between heteronormativity and patriarchy). The division is further justified by practical reasons, that is, in order to generate a structured presentation of the theoretical influences. It is therefore not implied that this division is obvious and indisputable. The chapter ends by briefly outlining the method of treaty interpretation that is required by my analytical strategy and which will be employed in chapters four to six.

## 2.2 Queer Influences

Of great influence to queer theory are Judith Butler's notions of the performative gender and the heterosexual matrix, which she develops in *Gender Trouble*, upon which many queer theorists (and feminists) draw.<sup>31</sup> Butler maintains that, in order to be regarded a woman or a man, one has to

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*de facto* inequalities or substantive inequality, took place from the 1960s to the 1980s (though some argue that it is still taking place), and urged women to understand that parts of their personal lives in fact reflected sexist structures of power but was later criticized for its essentialist approach; third wave feminism, which started in the 1990s, felt a failure of second wave feminism, and hence focuses on intersectionality and the deconstruction of categories: for instance, see: Rosemarie Tong, *Feminist Thought: A More Comprehensive Introduction* (third edn., Westview Press 2009); for second and third wave feminism, see: Patricia A. Cain, 'Feminist Jurisprudence: Grounding the Theories', in D. Kelly Weissberg (eds), *Feminist Legal Theory Foundations* (Temple University Press 1993) 359, 359-63.

<sup>30</sup> For a brief overview of different feminist approaches see, for example: Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law* (Manchester University Press 2000) 23-59.

<sup>31</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (First published 1990, Routledge 1999).

be of a certain sex, perform a certain gender that is assigned to that sex, and have sexual desires towards a person with the opposite sex and gender.<sup>32</sup> It is important to note that Butler argued that gender is not a being, not a noun, but rather a doing.<sup>33</sup> One is not a free agent, able to choose one's gender but instead one is *done by* gender. As Sara Salih explains in a commentary on Butler's work, this is because "there is no 'natural body' which pre-exists culture and discourse, since all bodies are gendered from the beginning of their social existence"<sup>34</sup>. Though not being a free agent, one can still have agency.<sup>35</sup> Then, if one falls outside of one of the three categories of the heterosexual matrix, society employs certain forceful means in trying to keep one within this heterosexual matrix:

"Butler points out that people who fail to 'do' their gender correctly [for instance, who do not desire a person of the opposite sex and assigned gender], or who do it in ways which accentuate its genealogy and construction, are punished by cultures and laws which have vested interests in maintaining a stable distinction between surface and depth, sex and gender, the body and the psyche, homosexual and heterosexual, masculine and feminine."<sup>36</sup>

Rather than focusing on exclusions by studying only the excluded, the deviant, the margins, or the periphery, queer theory hence focuses on the presupposed natural core itself as well as on the construction of categories. In the words of S. Crawley and K. Broad, queer theory sees the world as "composed of falsely bounded categories that give the impression of fixity and permanence where none 'naturally' exists"<sup>37</sup>. A queer analysis, then, is concerned with deconstructing such categories, which often exist in the form of binaries that are in fact power relations.<sup>38</sup>

Within the queer exercise of the deconstruction of binaries and categories, queer studies focus on heterosexuality and heteronormativity. Heteronormativity has been described as being "an ideological code that promotes rigidly defined conventional gender norms, heterosexuality, and 'traditional family values'".<sup>39</sup> It is the institutionalization of heterosexuality and may act as an invisible means of organising society. Chrys Ingraham engages with the concept of heteronormativity through the introduction of her concept of *thinking straight*. She explains: "Historically, the phrase

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<sup>32</sup> Judith Butler, 'Subjects of Sex/Gender/Desire' in Joanne Connagan, *Feminist Legal Studies* (vol. I, Routledge 2009) 267, 272-3.

<sup>33</sup> *Ibid.*, 288-9.

<sup>34</sup> Sara Salih and Judith Butler (eds), *The Judith Butler Reader* (Blackwell Publishing 2004) 91.

<sup>35</sup> Butler 'Subjects of Sex/Gender/Desire' (n 32) 289-96.

<sup>36</sup> Salih and Butler (n 34) 93.

<sup>37</sup> S. Crawley and K. L. Broad, 'The Construction of Sex and Sexualities' in J. Holstein and J. Gubrium (eds), *Handbook of Constructionist Research* (Guilford Press 2008) 545, 551.

<sup>38</sup> Ramona Faith Oswald, Katherine A. Kovalanka, Libby Balter Blume, and Dana Berkowitz, 'Queering "The Family"', in Sally A. Lloyd, April L. Few and Katherine R. Allen, *Handbook of Feminist Family Studies* (SAGE publications 2009) 43, 44.

<sup>39</sup> *Ibid.*, 44.



‘thinking straight’ meant thinking clearly or logically. The paradox in the use of this metaphor to describe heterosexuality is that thinking straight rearranges the original meaning by embracing the logical incoherence, in this case, of institutionalized heterosexuality.”<sup>40</sup> She further describes that *thinking straight* is a way of thinking which hides the institutionalized character of heterosexuality and creates the image of heterosexuality as being natural and given.<sup>41</sup> As Chrys Ingraham argues, “[c]onstructed notions of sexual behaviour and sexual identity have become primary organizing categories for many key aspects of social life including but not limited to, marriage, family, politics, religion, work and education.”<sup>42</sup>

These deliberations have influenced parts of the feminist conversation in several ways, *inter alia*, through engaging in the task of eradicating categories, as will be seen below. Having made significant revelations in the areas of norms and deviants and the reproduction of heterosexuality, the above described aspects of queer theory informed my analytical strategy and will be drawn upon in order to explore the relation between CEDAW’s family-related provisions and heteronormativity, straight thinking, and the heterosexual matrix.

## 2.3 Feminist Influences

Reiterating that there is no clear-cut division between queer theory and feminism, many feminist scholars have corresponded with the tenants of queer theory outlined above. Such feminist works have influenced my analytical approach, as they too have detected heteronormativity and heterosexuality as a social construct. They are most valuable for an analysis within a women’s rights setting in that they also focus on the relationship between heteronormativity and patriarchy.

One of the feminist scholars who has influenced my approach is Stevi Jackson. In her chapter “Sexuality, Heterosexuality, and Gender Hierarchies: Getting our Priorities Straight”, Jackson draws attention to heterosexuality as a vital topic within feminism.<sup>43</sup> Jackson, who maintains that her work derives from materialist feminism<sup>44</sup>, argues that both gender and sexuality are social phenomena.<sup>45</sup> She defines gender as “a hierarchical social division between women and men embedded both in social institutions and social practices. Gender is thus a social structural phenomenon, part of the social order, but is also lived by embodied individuals who ‘do gender’ in their daily lives, constantly (re)producing it through habitual, everyday interaction”.<sup>46</sup> While Jackson distinguishes

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<sup>40</sup> Chrys Ingraham, ‘Introduction’ in Chrys Ingraham (eds) *Thinking Straight: the Power, the Promise, and the Paradox of Heterosexuality* (Routledge 2005) 1, 3.

<sup>41</sup> *Ibid.*, 4.

<sup>42</sup> *Ibid.*, 2.

<sup>43</sup> Jackson (n 14) 15-37.

<sup>44</sup> *Ibid.*, 16.

<sup>45</sup> *Ibid.*, 16.

<sup>46</sup> *Ibid.*, 16.

between gender and sex, defining gender as stated above, she maintains that biological sex, and seeing biological differences, are also connected to social acts, since “[i]t is gender that enables us to see biological sex”<sup>47 48</sup>.

Importantly, Jackson does not see the categories produced by the binary gender division as homogenous, thus taking into account the diversity of other distinctions that may intersect with gender.<sup>49</sup> One such distinction is sexuality. Jackson sees a need to challenge the “taken-for-granted view of heterosexuality as a natural, uncontested fact of human nature”<sup>50</sup>. However, she views heterosexuality as an institution not only concerned with sexuality, but also with non-sexual elements that are seen as *normal* and are used to define the *deviant*: “While heterosexual desire, practices, and relations are socially defined as ‘normal’ and normative, serving to marginalize other sexualities as abnormal and deviant, the coercive power of compulsory heterosexuality derives from its institutionalization as more than merely a sexual relation”<sup>51</sup>.

While Jackson detects shared concerns between feminism and queer theory, such as both assess and challenge the ways in which male-dominated heterosexuality is seen as normal, she also maintains that the focus of feminism has traditionally been that of male-dominance whereas the focus of queer studies has been that of heteronormativity. According to Jackson, however, an effective critique of heterosexuality (as defined by her) ought to take into account the focuses of both feminism and queer studies. She states: “Such a critique involves more than simply a synthesis of queer and feminism: it necessarily entails an understanding of gender as a hierarchical social division since this is intrinsic to heterosexuality”<sup>52</sup>. She urges for a study that takes into account social structures and the material conditions under which sexualities are lived rather than a study that merely focuses on texts, discourses and social practices.<sup>53</sup>

It is within this context that Jackson criticises Butler. She accuses Butler of being interested in gender and heterosexuality solely in terms of “norms against which the destabilizing possibilities of gender and sexual transgression can be asserted”<sup>54</sup> and thereby leaves out of the discussion the gender hierarchy, which is internal to heterosexuality.<sup>55</sup> Here, Jackson appears to be pointing towards a tension between the two elements that

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<sup>47</sup> Ibid., 17.

<sup>48</sup> While the distinction between sex and gender, sex referring to the biological and gender referring to the social construct assigned to each of the sexes, has been an important revelation to feminist scholarship, this distinction has long been called under question. For instance, see Butler as above; and Dianne Otto, ‘Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law’ in Dianne Otto, *Gender Issues and Human Rights Volume I* (Edward Elgar Publishing Limited 2013) 241.

<sup>49</sup> Jackson (n 14) 17.

<sup>50</sup> Ibid., 16.

<sup>51</sup> Ibid., 18.

<sup>52</sup> Ibid., 22.

<sup>53</sup> Ibid., 22.

<sup>54</sup> Ibid., 25.

<sup>55</sup> Ibid., 24-5.

connect the viewpoints influencing my analytical strategy, that is, the improvement of women's condition of life and the abolishment of categories. Perhaps, though, this tension is not necessarily fatal. A political strategy might at times require the maintenance or acknowledgment of categories, such as 'women', as a momentary social fact in order to achieve the improvement of 'women's' conditions of life. While many – queer and feminist theorists – would perhaps agree with this, it is not to say that the deconstruction of categories cannot simultaneously exist on an academic level, influencing the political strategy where appropriate and possible.

Still, Jackson's revelations are useful for the current analysis in that they enable me to maintain that patriarchal and heteronormative structures necessarily depend on, and reinforce each other. This assumption will find support in considerations made throughout this thesis and relies on the line of thought that patriarchy is in fact strongest where heterosexuality is an essential part of the situation. This is specifically the case with the subordination of the woman in a stereotypical heterosexual family (see below, chapter 5.1). Patriarchy's strong collaboration with a heterosexual component in some sites then also creates the basis for discrimination in other sites, rendering heterosexuality an essential part of patriarchy's structures. For instance, the 2008 financial crisis caused both women and men to lose their jobs, however, as discussed by the CSW, women were often first to be fired due to an assumption that not women but men were the breadwinners of the family and hence were more entitled to keep their jobs.<sup>56</sup> Women were therefore fired based on the assumption that they were part of a sexual family, in which their husbands/male partners would care for them financially. Due to this interdependency of patriarchy and heteronormativity, where I refer to heteronormativity or patriarchy, these terms include an understanding of one another and, unless the context indicates otherwise, could be substituted with the term *heteropatriarchy*.

A second feminist scholar who intersects notions of gender and heterosexuality, and who has influenced my analytical approach, is Martha Albertson Fineman, in regard to her work on the 'sexual family'.<sup>57</sup> Focusing on the family, and how it and its deviants are protected or regulated by law, her work is in line with the queer/feminist line as described above and is relevant for the purpose of the present analysis. Albertson Fineman explains that she has modified the word 'family' to 'sexual family' in order to expose that both society and law view and expect a family to be arranged around a sexual affiliation between a man and a woman.<sup>58</sup> She explains: "The sexual family is the traditional or nuclear family, a unit with a heterosexual, formally celebrated union at its core."<sup>59</sup> She then argues that the reflection of the sexual family in law, which is mostly in the form of marriage,

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<sup>56</sup> Commission on the Status of Women, 'Emerging issues, trends and new approaches to issues affecting the situation of women or equality between women and men: Gender perspectives of the financial crisis' (2009) UN Doc E/CN.6/2009/CRP.7, 6.

<sup>57</sup> Albertson Fineman 'The Sexual Family' (n 16) 45-63.

<sup>58</sup> *Ibid.*, 45.

<sup>59</sup> *Ibid.*, 45.

constitutes the basis for state regulation. By defining the appropriate family in law, granting it protection and benefits, the normal is defined, through which the deviant can then be designated. In turn, Albertson Fineman explains, “[t]he characterization of some family groupings as deviant legitimizes state intervention and the regulation of relationships well beyond what would be socially tolerated if directed at more traditional family forms”<sup>60</sup>. In law, it is assumed that the family in the form of a sexual affiliation between a man and a woman is *natural*. Through the sexual family, it is also ensured that men are seen as essential to the family; the persistence of the sexual family as the idealized union both in social and legal thought has forced us to recreate patriarchy.<sup>61</sup>

Challenges to the sexual family in terms of legal changes that we have seen, for instance in the form of same-sex marriage, are also viewed as problematic by Albertson Fineman: “By duplicating the privileged form, alternative relationships merely affirm the centrality of sexuality to the fundamental ordering of society and the nature of intimacy”<sup>62</sup>. Instead, feminist revelations about marriage and family issues and practices, such as domestic violence, “call into question the whole concept of the nuclear family as a legally privileged unit that is entitled to special status as an essential form of social organization”<sup>63</sup>.

Albertson Fineman’s revelations have influenced my analytical strategy in that they focus on the family itself, exposing how its inscription into law produces deviants and allows for the regulation of and discrimination against such deviants. Albertson Fineman further exposes negative implications of simply extending the legally protected form of family (marriage) to same-sex couples. Her theory then, has already laid groundwork on how the law and society intersect in regard to the *sexual* family. This thesis will draw upon her revelations, placing them within a *women’s rights* setting, that is, CEDAW’s provisions on family and marriage.

## 2.4 Gender Stereotyping

Stereotypes have a great impact on the way in which society perceives, maintains and reproduces ideas about family life and marriage. As a tool of my theoretical approach, Rebecca Cook’s and Simone Cusack’s work on harmful gender stereotyping will be drawn upon to detect how laws and policies employ stereotypes to reproduce the oppression of women and subgroups of women, and how the normal is defined and the deviant is designated through harmful gender stereotypes.

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<sup>60</sup> Ibid., 46.

<sup>61</sup> Ibid., 47-8.

<sup>62</sup> Ibid., 45.

<sup>63</sup> Ibid., 55-6.

With their work, *Gender Stereotyping: Transnational Legal Perspectives*, Cook and Cusack have started an important dialogue on gender stereotyping and its harmful consequences, focusing on the role of law and its application. According to Cook and Cusack, stereotypes are widely accepted beliefs about the characteristics of certain groups of people. Stereotyping, then, is the action of directly or indirectly, consciously or unconsciously applying such stereotypes to individuals belonging to that group, and through it forming an opinion, presumption, or expectation in connection with the individual.<sup>64</sup> While gender stereotypes may be both positive and negative, they are always dangerous as they prevent individuals as being seen as such, and rather are judged according to the group they belong to.<sup>65</sup> Stereotypes can therefore be harmful; they do not only lead to misrecognition but also force individuals into certain behaviour.<sup>66</sup>

While on the one hand, people use stereotyping in order to make the world understandable to them, stereotypes are also employed in order to assign differences and in order to script identities. Stereotyping can have the purpose and effect of assigning differences, as it allows people to deviate members of certain groups from themselves and see them as ‘others,’ without having to understand differences and without having to see people belonging to that group as individuals. Members of that group can be marginalised through the assignment of differences and the group can be further subordinated.<sup>67</sup> A third reason for which stereotypes are employed is in order to script identities, that is, the prescription of certain characteristics, roles and behaviours that people belonging to that group ought to conform to. Cook and Cusack name these prescriptive or normative stereotypes.<sup>68</sup>

*Gender* stereotyping is the process of stereotyping based on a “social and cultural construction or understanding of men and women, due to their different physical, biological, sexual and social functions”.<sup>69</sup> Cook and Cusack maintain that the term ‘gender stereotype’ is a reflection of the social and cultural construction of ‘women’ and ‘men’ and can therefore differ and evolve temporally, depending on culture and society.<sup>70</sup> It also not only includes stereotypes about men and women, but also sub-groups of women and men<sup>71</sup>, such as LBQ women. Cook and Cusack subscribe to the position that the elimination of gender stereotypes (especially of women, on whom their work focuses) is vital for the emancipation of women. This claim is based on a social construction thesis, holding that the roles, characteristics and attributes people assign to women, are socially constructed in a way that are inferior to those of men, thereby maintaining unequal power relationships.<sup>72</sup>

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<sup>64</sup> Cook and Cusack (n 17) 1.

<sup>65</sup> Ibid., 12.

<sup>66</sup> Ibid., 18.

<sup>67</sup> Ibid., 16-8.

<sup>68</sup> Ibid., 18-20.

<sup>69</sup> Ibid., 1-2.

<sup>70</sup> Ibid., 2.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

Within the category of gender stereotypes, Cook and Cursack explore four specific forms they may take (although it is not argued for the exhaustiveness of the list). Firstly, gender stereotypes may take the form of sex stereotypes. These are stereotypes connected to physical and biological attributes or characteristics of men and women<sup>73</sup>, such as the stereotype that men are physically stronger than women (or, one may add, the very stereotype that all women have a vagina as their reproductive organ). A second form is that of sexual stereotypes, which “endow men and/or women with specific sexual characteristics or qualities that play a role in sexual attraction and desire, sexual initiation and intercourse, sexual intimacy, sexual possession, sexual assault, transactional sex and sexual objectification and exploitation”<sup>74</sup>. For instance, women are often stereotyped as men’s sexual property.<sup>75</sup> The third form of gender stereotypes identified by Cook and Cursack is that of sex role stereotypes, which entail a normative view of roles and behaviour that are regarded as appropriate for women and men.<sup>76</sup> An example of this could be that a woman ought to behave in a certain way so as to be regarded a good mother. Lastly, compounded stereotypes are stereotypes that result from the 'membership' of different groups, such as ‘women’ and ‘homosexual women’.<sup>77</sup> Such compounded stereotypes often convey (wrong) messages about the roles people belonging to the subgroup should play in society.<sup>78</sup>

Cook and Cursack argue that it is vital for States to understand why and how gender stereotyping is used as it helps them to detect assumptions about women upon which their laws, policies, and practices are based.<sup>79</sup> While *Gender Stereotyping* addresses the roles various state and non-state actors can and should take in the dismantling of harmful gender stereotypes, of specific interest is Cook and Cursack’s focus on the CEDAW Committee and their instructions for states on this matter.<sup>80</sup> I additionally argue that CEDAW itself as well as the work of the Committee ought to undergo a gender stereotyping assessment. As such, Cook and Cursack’s claims fit in well with the queer and feminist considerations discussed above, as they address intersectional oppression of women (through compounded stereotypes) and the creation of deviants. They further argue for an exposure and eradication of such in order to improve the conditions of women’s lives. They therefore form important archaeological tools to discover harmful gender stereotypes that are at work in CEDAW’s family-related provisions in order to favour, reproduce, and maintain the heterosexual woman.

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<sup>73</sup> Ibid., 25.

<sup>74</sup> Ibid., 27.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid., 28.

<sup>77</sup> Ibid., 29-30.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid., 139.

<sup>80</sup> Ibid., 137.

## 2.5 Treaty Interpretation

It ought to be noted that my analytical approach does not at all times follow the rules of interpretation contained in the Vienna Convention on the Laws of the Treaties (VCLT), when analysing and interpreting CEDAW's family-related provisions. Article 31 of VCLT states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", whereas Article 32 provides that supplementary means of interpretation are to be used only to confirm the result of the ordinary interpretation,<sup>81</sup> or when such interpretation leaves the terms ambiguous,<sup>82</sup> or absurd or unreasonable<sup>83</sup>. The approach followed in the current analysis requires a slight departure from these rules, as the purpose of the reading differs from that of general treaty interpretation. While general treaty interpretation seeks to answer *lex lata* questions, my analysis is geared towards revealing certain social presuppositions in which CEDAW's provisions are embedded. In interpreting the relevant provisions, the ordinary meaning of the words used will be looked behind in order to discover whether CEDAW and its provisions are *thinking straight*, to borrow Ingraham's terminology. Further, the *travaux preparatoires* are made use of in order to analyse the heteronormative, or otherwise, narrative in the process leading up to the adoption of CEDAW.

Bringing together the different influences outlined in this chapter, my analytical strategy seeks to detect a created norm, and its assigned deviants, in legal texts and social practices. The focus of this task will be on different sexual orientations of women. The strategy also seeks to analyse the norms' tangible effects on women's lives. These aims are achieved through using the tools provided by the academic writings of Butler, Jackson, Ingraham, Albertson Fineman and Cook and Cusack.

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<sup>81</sup> Article 32, VCLT.

<sup>82</sup> Article 32(a), VCLT.

<sup>83</sup> Article 32(b), VCLT.

## 3 CEDAW: Placement and Substance

This chapter provides insight into the legal instrument under investigation in this study, namely CEDAW. By providing such insight it enables a deeper understanding of the content and functioning of CEDAW and therefore places the analysis contained in chapters four to seven in a specific context. The chapter starts by outlining the history leading to the adoption of CEDAW and then moves on to present the content of CEDAW. It does so by giving a summary of both the structure and general content of its articles, as well as the core special features that have been identified by several commentators. Lastly, the chapter is concerned with the role CEDAW gives to its monitoring body, the Committee, by critically describing both its composition and mandate. This is especially important as the Committee's work will be under interrogation throughout the rest of the study and therefore knowledge of its abilities and limitations are of vital importance.

### 3.1 History Leading to CEDAW

With the birth of the Charter of the United Nation ("the Charter"), which is often said (at least from a Western perspective) to have triggered the birth of the legal international human rights framework, came the first sex-equality provision in international law.<sup>84</sup> The Preamble of the Charter refers to "equal rights of men and women", while Article 1(3) of the Charter provides for the promotion and encouragement of human rights and fundamental freedoms "for all without distinction as to (...) sex". As described above, the Article of the later UDHR also entailed a non-discrimination provision, as did the two legally binding Covenants that derived from it.

The ICCPR provides for civil and political rights. It entails several provisions attempting to tackle discrimination (see Articles 2(1); 3; and 26) but – except for an arguable case in parts of Article 26, which obliges States Parties to "guarantee (...) equal and effective protection against discrimination" based on sex – academics such as Brad Roth have argued that the Covenant mostly employs an approach of formal equality, providing men and women with the same rights and the same enforcement of those rights.<sup>85</sup> Noteworthy is Article 23 on family, which provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State" (Article 23(1)), while also noting that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized" (Article 23(2)) and obliging States Parties to

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<sup>84</sup> Article 1(3) prohibits discrimination based on "race, sex, language or religion".

<sup>85</sup> Brad R Roth, 'The CEDAW as a Collective Approach to Women's Rights', (2002-3) 24 Michigan Journal of International Law 187, 191. Note that the notion of formal equality will be elaborated upon further in chapter four's discussion of CEDAW's definition of equality, see below chapter 4.1.3.



“take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution” (Article 23(4)). ICCPR’s counter-part, the ICESCR, provides for economic, social and cultural rights. It equally contains an anti- (sex) discrimination provision in Article 2(2), and a provision for the equal enjoyment of rights of men and women in Article 3. However, the ICESCR has also been criticized for being built on men’s life experiences.<sup>86</sup> Hilary Charlesworth argues that the ICESCR assumes all power vests with the state, not acknowledging that women’s indirect subjection to the state’s power is filtered through their direct subjection to the power of individual men or groups of men.<sup>87</sup> Charlesworth concludes: “The Covenant, then, does not touch on the economic, social, and cultural context in which most women live”.<sup>88</sup>

In addition to the (limited) provisions contained in these instruments, the development of women’s human rights was simultaneously occurring on other fronts. The CSW, a UN Charter body at first operating as a sub-commission of the Commission on Human Rights and from 1946 onwards as a separate Commission of the Economic and Social Council (ECOSOC), was given the responsibility to work for the promotion of women’s rights.<sup>89</sup> The CSW was, *inter alia*, responsible for the drafting of conventions such as the Convention on Consent of Marriage, Minimum Age for Marriage and Registration of Marriage of 1962.<sup>90</sup>

In their commentary on CEDAW, Christine Chinkin and Marsha Freeman argue that it became apparent by the 1960s that, notwithstanding the principle of non-discrimination in regard to women’s enjoyment of their rights as contained in the UN Charter and the UDHR, discrimination against women persistently continued to exist.<sup>91</sup> Demands for a stronger and better-suited human rights approach for women then lead to the adoption of the non-binding Declaration on the Elimination of Discrimination against Women in 1967 (DEDAW). DEDAW, following the general structure of the UDHR, had been drafted by the CSW and debated in the UN General Assembly’s Third Committee.<sup>92</sup> In 1972, the CSW further pressured for an “International Women’s Year”, which then took place in 1975 and included the First UN World Conference on Women, carried out in Mexico City. Delegations at the Conference expressed support for the CSW’s view that the time had come for a legally-binding instrument on women’s human rights and further supported its drafting efforts of such Convention that had

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<sup>86</sup> Here, Charlesworth draws on the work of Shelley Wright, see: Hilary Charlesworth, ‘What are ‘Women’s International Human Rights’?’ in Rebecca J. Cook, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 58, 59.

<sup>87</sup> *Ibid.*, 74.

<sup>88</sup> *Ibid.*

<sup>89</sup> Chinkin and Freeman (n 11) 4.

<sup>90</sup> *Ibid.*, 4-5.

<sup>91</sup> *Ibid.*, 5.

<sup>92</sup> *Ibid.*

begun in 1974 and that would eventually lead to the adoption of CEDAW.<sup>93</sup> Negotiations took place in the CSW and within various working groups of the UN General Assembly's Third Committee before CEDAW was finally adopted on December 18 in 1979. It entered into force on September 3 1980, thirty days after the twentieth State had submitted its instrument of accession.<sup>94</sup> As of February 21, 2015, 188 States have become States Party to the Convention,<sup>95</sup> rendering it the second most widely ratified UN human rights convention, after the Convention on the Rights of the Child.

## 3.2 Substance of CEDAW

### 3.2.1 CEDAW's Structure

While the Convention itself is divided into six untitled parts, Chinkin and Freeman suggest an alternative division for the purpose of understanding the Convention and its application.<sup>96</sup> This is: the structure of CEDAW can generally be described as being divided into the preamble and three main parts. The preamble acknowledges that despite existing non-discrimination and equality provisions in other international human rights instruments, discrimination continues to exist and recalls that discrimination against women *inter alia* "hampers the growth of the prosperity of society and the family". It further specifically mentions the need for a change in tradition regarding the roles of women and men in society and the family in order to achieve full equality between the sexes.

The first main part of the Convention (Articles 1-5) can be understood as formulating general obligations and forming an interpretive basis for the more substantive Articles of the Convention. These are contained in the second part (Articles 6-16), covering "the suppression of traffic in women and of the exploitation of prostitution of women" (Article 6); the abolition of discrimination against women in political and public life, including at the international level (Articles 7 and 8); in nationality laws and regulations (Article 9); in education (Article 10); in employment and work in the formal and informal labour market sectors (Article 11); in health care (Article 12); in all areas of economic and social life (Article 13); in women's legal capacity (Article 15); and in marriage and family relations (Article 16)<sup>97</sup>. The particular struggle rural women face in the discrimination against them is dealt with in Article 14. The third part of the Convention, Articles 17-22 institute CEDAW's monitoring mechanism *inter alia* setting out the composition and mandate of the CEDAW Committee. The fourth part,

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<sup>93</sup> Hanna Beate Schöpp-Schilling and Cees Flinterman (eds), *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (The Feminist Press at the University of New York 2007) 11.

<sup>94</sup> The country was St Vincent and the Grenadines: Chinkin and Freeman (n 11) 7.

<sup>95</sup> United Nations Treaty Collection (status at 09 May 2015)  
<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en)> accessed 09 May 2015.

<sup>96</sup> Chinkin and Freeman (n 11) 8.

<sup>97</sup> *Ibid.*, 23.

comprising of Articles 23-30 contain administrative and final provisions and are less important for the purposes of this thesis.

### **3.2.2 CEDAW's Special Characteristics**

In terms of the substance of CEDAW, commentators have identified several features that are set out to reach the realities of discrimination against women and that render the Convention “innovative”<sup>98</sup>, at least when placing it historically. The first of those features is that CEDAW covers social, economic and cultural rights as well as civil and political rights and places those two (traditionally often separated) branches of human rights law under a common normative framework of non-discrimination and equality between women and men. Another ‘innovate’ characteristic derives from CEDAW’s provisions obliging States to abolish and modify social and cultural attitudes, norms and practices that discriminate against women. As argued by Brad Roth, this creates collective norms within CEDAW and therefore breaks with the liberal individualistic approach that instruments such as the ICCPR have taken in their focus on specific acts of discrimination rather than underlying conditions.<sup>99</sup> This characteristic is especially evident in provisions such as Article 5, which *inter alia* provides for the modification of discriminatory patterns and stereotypes.

In relation to this, importantly, stands another feature, namely that CEDAW obliges States Parties not only to respect its norms in their laws, policies and practices but also “like the earlier [International Convention on the Elimination of All Forms of Racial Discrimination] it extends the understanding of human rights by requiring the State party to prevent or impose sanctions on acts of discrimination by non-State (private) actors, including within the family, the community, and the commercial sector”<sup>100</sup>. Further, the Convention allows for special measures. One type of special measure aims to create equality in situations which are specific to women due to their biology, for instance, women’s ability to give birth (see Article 4(2)). Another type is that of *temporary* special measures that seem to privilege women only but are aimed at creating *de facto* equality between women and men. Such measures are to be discontinued once “the objectives of equality of opportunity and treatment have been achieved” (Article 4(1)).

## **3.3 The CEDAW Committee**

### **3.3.1 Establishment and Composition of the Committee**

Article 17 of the Convention establishes the CEDAW Committee as its treaty body, rendering it responsible for the monitoring of the implementation of CEDAW into national systems. The provision provides

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<sup>98</sup> Ibid., 16.

<sup>99</sup> Roth (n 8) 192.

<sup>100</sup> Chinkin and Freeman (n 11) 2.

for the CEDAW Committee to consist of twenty-three experts (Article 17(1)).<sup>101</sup> While the members of the Committee are elected on a four-year term by States Parties from a list of candidates nominated by States Parties (Article 17(2)), the experts are said to be independent in that they serve their mandate in their personal capacity (Article 17(1)). Members have to declare their independence upon their election and re-election,<sup>102</sup> however, commentators have questioned the extent of the effectiveness of experts' independence, given that CEDAW's provisions do not provide for incompatibility criteria, such as work in a governmental capacity.<sup>103</sup> Further, Hanna Beate Schöpp-Schilling has commented that "there have been instances when pronouncements on States Parties Reports by some experts sounded remarkably like their governments' official policies, although of course these statements may also have been completely in accordance with their own beliefs"<sup>104</sup>.

Article 17 further requires experts to be of "high moral standing and competence in the field" and that the election should give consideration to the diversity of experts. That is to say, the provision requires both "equitable geographic distribution", reflecting the geographical variety of CEDAW's States Parties, as well as different "forms of civilisation" and "principle legal systems", reflecting different stages of development, different cultures, as well as political and legal systems.<sup>105</sup> It has been noted that the CEDAW Committee is the only UN human rights treaty body that has been dominated by women, with only three men serving as experts until 2010. However, the expert positions have been occupied by women (and men) from various professional disciplines and personal backgrounds.<sup>106</sup>

### **3.3.2 The Committee's Mandate and Functions**

The Committee's mandate reaches over several monitoring and interpretive functions, although the effectiveness of those functions has been questioned, in particular in its early years and before the adoption of the Additional Protocol in October 1999.<sup>107</sup>

As the only monitoring procedure flowing from the text of the Convention itself, Article 18 establishes a reporting procedure, common to other UN human rights treaties, obliging States Parties to submit regular reports to the Secretary-General of the United Nations for consideration by the Committee. The reports which States Parties ought to submit within one year of the entry into force of CEDAW in regard to the specific State, and at a four year basis thereafter, as well as at request of the Committee, ought to

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<sup>101</sup> Before the ratification of or accession to CEDAW, Article 17(1) dictated the Committee to exist of eighteen members.

<sup>102</sup> Rules of Procedure 15.

<sup>103</sup> Ineke Boerefijn, 'Article 17' in Freeman, Chinkin, and Rudolf (n 11)481.

<sup>104</sup> Schöpp-Schilling and Flinterman (n 93) 250.

<sup>105</sup> *Ibid.*, 249.

<sup>106</sup> *Ibid.*, 249-50.

<sup>107</sup> For instance, see generally, Elizabeth Evatt, 'Finding a Voice for Women's Rights: The Early Days of CEDAW' (2002-3) 34 *George Washington International Law Review* 515.

cover legislative, judicial, administrative and other measures taken by the State in order to fulfil the provisions of CEDAW as well as the progress made in this respect as provided for by Article 18(1). Article 18(2) further provides that “[r]eports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the (...) Convention”. In its first session in 1982 and its second session in 1983, the Committee adopted its Rules of Procedures and Guidelines for States Parties in their reporting respectively, both of which have subsequently been amended and extended on several occasions.<sup>108</sup>

The Committee, in trying to overcome the restraints of Article 20(1), which imposes limits of the frequency and length of Committee meetings, has established a practice of splitting up in smaller groups that prepare for the dialogue with States Parties in pre-sessions several months before the meeting. As preparation and on the basis of their reports and other available information, such as shadow reports by civil society, the sub-groups create a list of questions to be sent to and answered by the States Party under review before the next session.<sup>109</sup> The dialogue with the States Parties’ delegations at the session has been described as “constructive”.<sup>110</sup> The Concluding Comments, which the Committee drafts and subsequently adopts in a closed meeting, are usually structured in a way so as to firstly acknowledge the achievements the State Party has made in regard its fulfilment of CEDAW’s obligations, secondly describe concerns thereto and lastly provide recommendations.<sup>111</sup> This reporting procedure is subject to analysis in chapter seven of the study. There it is looked at the dialogue between the Committee and Germany.

The mandate of the Committee further provides for the right of the Committee to formulate suggestions and general recommendations (Article 21(1)). While suggestions are ordinarily directed to UN organs, general recommendations are directed at States Parties. After initial disagreement on whether Article 21(1) provided the Committee with the ability to formulate interpretations of Articles of CEDAW, and latter advice by the UN Secretariat in regard to this end, the Committee finally started adopting general recommendations in 1986.<sup>112</sup> Since then the Committee has adopted 29 general recommendations, interpreting the Convention.<sup>113</sup> Of special importance for the purposes of the present analysis have been the Committee’s general recommendations on violence against women (No. 12 and 19), equality in marriage and family relations (No. 21), the core obligations of States Parties under Article 2 of CEDAW (No. 28), and on Article 16 in regard to economic consequences of marriage, family relations

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<sup>108</sup> Schöpp-Schilling and Flinterman (n 93) 251.

<sup>109</sup> *Ibid.*, 253.

<sup>110</sup> Evatt (n 107) 530.

<sup>111</sup> Schöpp-Schilling and Flinterman (n 93) 253-4.

<sup>112</sup> *Ibid.*, 255.

<sup>113</sup> See for a full list of the general recommendations, CEDAW Committee, ‘General Recommendations’ (Office of the United Nations High Commissioner for Human Rights) <<http://www2.ohchr.org/english/bodies/cedaw/comments.htm>> accessed 09 May 2015.

and their dissolution (No. 29). These will be under scrutiny in chapters four to seven.

It should, however, be noted that general recommendations or general comments of treaty bodies (such as those of the CEDAW Committee) do not enjoy a formal legal status and are not legally binding on states.<sup>114</sup> It may therefore be argued that states will be the final interpreter of CEDAW's provisions. While the precise status or influence of general recommendations may be subject to debate, they are undeniably of significance. For instance, other international and national bodies have referred to them as authoritative.<sup>115</sup> On the other hand, states such as the UK and the USA have "rejected the idea that the Committee is 'the' authoritative interpreter of the Covenant" (here in relation to the Human Rights Committee and the ICCPR).<sup>116</sup> The non-binding status of general recommendations may therefore decelerate but not stop the Committee's ventures: "Using general [recommendations] to break new grounds to [strengthen the effectiveness of human rights treaties] can be a risky undertaking but may overtime be vindicated if a sufficient number of relevant actors subscribe to the treaty bodies' position, which in turn generates momentum to follow."<sup>117</sup>

The Optional Protocol to CEDAW, which came into force on 22 December 2000 after receiving its tenth ratification<sup>118</sup>, expanded the Committee's mandate to include two further monitoring mechanisms. This is to say, it firstly established a Communications Procedure (Article 2) under which individuals and groups of individuals subject to the jurisdiction of State Parties to the Protocol may submit complaints to the CEDAW Committee, and which provides the CEDAW Committee with the competence to receive and consider such Communications (Article 1). The CEDAW Committee may then adopt (non-binding) views and recommendations.<sup>119</sup> The Protocol further established an Inquiry Procedure under which "allows the Committee to initiate a confidential investigation by one or more of its members where it has received reliable information of grave or systematic violations by a State Party of rights established in the Convention" (Article 8).

The findings of the present chapter show that the understanding of the need to address the specific discrimination against women in the human rights

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<sup>114</sup> See Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP 2013) 199; and in relation to the UN Human Rights Committee see Y. Tyagi, *The UN Human Rights Committee* (CUP 2011) 301.

<sup>115</sup> Bantekas and Lutz (n 114) 199.

<sup>116</sup> H. Keller and L. Grover, 'General Comments of the Human Rights Committee and their Legitimacy' in Keller and Ulfsteil, *UN Human Rights Treaty Bodies* (CUP 2012) 133.

<sup>117</sup> Bantekas and Lutz (n 114) 200.

<sup>118</sup> UN Press Release 'Optional Protocol to Women's Convention Comes into Force' (21 December 2000) UN Press Release Doc WOM/1242.

<sup>119</sup> Committee on the Elimination of Discrimination against Women, 'Rules of procedure of the Committee on the Elimination of Discrimination against Women' (2001) UN Doc CEDAW/C/ROP, Rule 72.

context led to several innovative features of CEDAW. These include the obligation of states to address underlying conditions that foster discrimination against women, as well as the reach of CEDAW into the family and private sphere. In how far these features are able to reach conditions underlying *intersecting* forms of discrimination will be subject to analysis in the following chapters. The present chapter also described the different tasks the Committee is burdened with under its mandate to monitor the implementation of CEDAW. The following chapters will, in this regard, interrogate the Committee's functions to adopt general recommendations and engage in the reporting procedure.

## 4 CEDAW's Definition of Discrimination

Having understood the purpose, construction, and monitoring mechanisms of the Convention as such, this chapter moves to the analysis CEDAW's definition of discrimination against women. In answering the question of whether CEDAW's family-related provisions provide equal protection to LBQ and heterosexual women, the meaning of discrimination against women is of vital importance. This is the case as it determines upon which basis and in which field discrimination against women falls under the scope of CEDAW. It therefore also heavily influences the subject and scope of Article 16 of CEDAW, which is analysed in chapter five below. The current chapter starts by looking at the subject and scope of the text of Article 1 of CEDAW and then moves on to consider the Committee's interpretation thereof.

### 4.1 The Subject and Scope of Article 1

Providing the definition of "discrimination against women", CEDAW's Article 1 is essential for mapping the scope of CEDAW's provisions, and beyond, in regard to women in diverse sexual relations. Article 1 provides:

"For the purposes of the present Convention, the term 'discrimination against women' shall mean 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."

#### 4.1.1 'on the basis of sex'

As stated in Article 1, for a distinction, exclusion or restriction to qualify as discriminatory under CEDAW, it needs to be based on sex, and have a negative impact on a woman's enjoyment of her human rights. While the term 'sex' may be subject to interpretation, it ought to be noted that the definition of discrimination is based only on sex, rather than on an intersectional definition, focusing explicitly also on intersections between sex and other categories such as race, ethnicity, or sexuality/sexual orientation.<sup>120</sup>

By appearing to focus solely on sex, the Convention effectively applies an essentialist and universalist approach, reducing the complex oppression of,

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<sup>120</sup> The only Article expressly focusing on intersectional discrimination is Article 14 of CEDAW, responding particularly to discrimination against rural women.



and discrimination against, women to their sex as the decisive factor, assuming that all women victims of human rights abuses experience these in the same way.<sup>121</sup> As described by Johanna E. Bond, “essentialism precludes a complex analysis of the self that recognizes the intersection of, *inter alia*, racism, classism, sexism, and heterosexism in peoples' lives”.<sup>122</sup> Bond further argues that the entire UN human rights system precludes intersectional analyses of discrimination, having created several Conventions that focus on different grounds of discrimination without meaningful intersection of these factors: “The structure of the treaty-based system within the United Nations has thus itself contributed to a fractured understanding of the nature of discrimination, failing to recognize it as an often inextricable mixture of factors, including race, ethnicity, religion, gender, class, and sexual orientation.”<sup>123</sup>

Such a fractured understanding of discrimination does not account for the fact that LBQ women's family-related human rights may not be violated because the subject is a woman and then again discriminated against because of the non-heterosexual sexual orientation of the subject, but are instead often discriminated against because the subject is a non-heterosexual woman. Such discrimination may be motivated by compounded gender stereotypes. For instance, in a case concerning adoption, the European Court of Human Rights ruled that the homosexuality of the applicant had influenced the refusal of her adoption application.<sup>124</sup> A reading of the case that is sensitive to gender stereotypes further shows that compounded gender stereotypes were at play when discriminating against the woman: the public officials were motivated by a stereotypical understanding of good motherhood, an intrinsic element of which was heterosexuality.<sup>125</sup>

Moreover, since there currently exists no Convention expressly dealing with discrimination based on sexual orientation, LBQ women are left with no express remedy for discrimination they face based on their sexual orientation.<sup>126</sup> Even though CEDAW's definition of discrimination focuses

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<sup>121</sup> Johanna E. Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights' (2003) 52 *Emory Law Journal* 71, 80.

<sup>122</sup> *Ibid.*, 76.

<sup>123</sup> *Ibid.*, 93.

<sup>124</sup> *E.B. v. France*, Application no. 43546/02, 22 January 2008.

<sup>125</sup> Consider the following statement: "The 'appropriate' mother is the heterosexual woman existing in the nuclear family. The 'marginal' mother is the heterosexual woman who operates in a non-nuclear family. Finally, the lesbian mother is relegated to the bottom tier of the hierarchy. She is the 'inappropriate' mother as she exists outside of the patriarchal and heterosexist social order.": Cassandra M. Wilson 'The Creation of Motherhood: Exploring the Experience of Lesbian Co-Mothers' (2000) 12:1 *Journal of Feminist Family Therapy* 21, 22.

<sup>126</sup> Although some human rights instruments refer to “other status” in their definitions of discrimination, which could be interpreted to include sexual orientation. For instance, Article 14 of the European Convention of Human Rights states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status*” [Emphasis added].

on sex and therefore should not presume the subject's sexual orientation, that sexed subject is not born into a social vacuum and, as described by Butler, is forced into the heterosexual matrix. It is therefore even more urgent to analyse whether CEDAW's substantial provisions are phrased around the lives of heterosexual women, as will be done in chapter five.

#### **4.1.2 'irrespective of their marital status'**

Article 1 further states that practices will be considered discriminatory irrespective of a woman's marital status. Despite the criticism posed above, this statement included in the definition of discrimination against women indeed appears to take into account diversity amongst women, though to a limited extent. It appears that the drafters' intentions had been to ensure that single mothers were to be protected and could not be discriminated against based on that ground.<sup>127</sup> While of importance for the lives of heterosexual women, who often were discriminated against based on their status as unmarried, the narrative of the drafting of this term is therefore heterosexual and hence marginalizes equally important discrimination faced by women in same-sex relationships.

If interpreted broadly, however, the reference to marital status could potentially have an impact on the scope of the Convention in terms of its protection on women in same-sex relationships. As explained by Andrew Byrnes in his commentary on Article 1, the phrase,

“could protect married women against discrimination on the ground of their marital status as compared to women who are not married, as well as by comparison with married men. Conversely, it could protect women who are not married from being discriminated against on that basis, both as regards men who are not married and women who are married. If the phrase extended this far, the Convention would in effect cover marital status discrimination between different categories of women, as well as discriminatory treatment clearly based on sex between the categories of married/unmarried women and married/unmarried men”<sup>128</sup>.

Such interpretation could allow non-married women in same-sex relationships to claim that they are discriminated against in comparison with married women in different-sex relationships. However, even if interpreted broadly, the fact remains true that it would be an attempt to fit non-heterosexual women into protection that has been created specifically for heterosexual women, instead of an initial creation of norms that take into

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<sup>127</sup> Byrnes notes that the addition of this formulation to the draft was partly based on a proposal to include in Article 16 that unmarried mothers and children of unmarried parents are not be discriminated against based on that ground: Andrew Byrnes, 'Article 1' in in Freeman, Chinkin, and Rudolf (n 11) 59; and Working Group of the Whole on the Drafting of the Convention on the Elimination of Discrimination against Women, 'Draft Convention on the Elimination of Discrimination against Women' (1978) A/C.3/33/L.47/Add.2, paras 258-62.

<sup>128</sup> Byrnes (n 127) 51, 61.

account different identities of women. A non-heteronormative approach that would have taken into account varying forms of (homo-, bi-, heterosexual or queer) families, while exposing that marriage is a social construct rather than the natural form of family, would have been phrased in a way that does not put the focus on marriage.

### 4.1.3 ‘on a basis of equality of men and women’

While on the face of it the reference to “equality of men and women” in Article 1 seems to point towards a sameness approach to equality (women should get what men are already entitled to), this is not necessarily the case. As has been pointed out by several scholars<sup>129</sup>, the scope of this phrase within the definition of “discrimination against women” depends on one’s approach to equality. This section will offer a brief overview over three approaches to equality (though more exist) in order to enable an understanding of the scope created by the Committee as well as the future potential thereof.

A sole *formal equality* approach, which “embodies the presumption that equality means that all persons are to be treated identically, and a failure to do so amounts to discrimination or denial of equality”<sup>130</sup>, would of course overlook legislation, practices etc. that discriminate against women indirectly, as was the case with the UDHR.

*Substantive equality*, on the other hand, refers to the actual impact laws have on their subjects and may require differential treatment in order to achieve *de facto* equality between men and women.<sup>131</sup> Yet, the substantial equality approach is still based upon a comparison between what men (already) factually have and what women therefore deserve to receive. And, as Byrnes notes further “[o]bligations to avoid indirect discrimination are generally qualified by the existence of exceptions based on justifiability or reasonableness that reflect prevailing social arrangements. This approach, therefore, tends to leave intact social and institutional structures that are exclusionary and based on androcentric assumption models”<sup>132</sup>.

The third approach is that of *transformative equality*, which requires a transformation of social structures of hierarchy, oppression and subordination that are based on gender and sex for true equality to be achieved.<sup>133</sup> Byrnes argues that this form of equality could be seen as substantive equality that also expands to structural dimensions.<sup>134</sup>

A point should be added to the model of transformative equality, as the model described above only takes into account hierarchical structures based

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<sup>129</sup> For instance, see Byrnes (n 127) 61.

<sup>130</sup> *Ibid.*, 53.

<sup>131</sup> *Ibid.*, 54.

<sup>132</sup> *Ibid.*, 55.

<sup>133</sup> *Ibid.*, 55.

<sup>134</sup> *Ibid.*, 55.

on sex and gender. This fails to see the interdependency of patriarchy and heteronormativity. It is my argument, therefore, that a transformative equality model employed by the Committee must to be restructured to require transformation of social structures of hierarchy, oppression and subordination that are based on sex, gender, *and* sexual orientation (and their intersections) for true equality to be achieved.

#### 4.1.4 ‘or any other field’

As stated above, for a distinction, exclusion or restriction to qualify as discriminatory under CEDAW it ought to impair or nullify a woman’s enjoyment of her human rights and fundamental freedoms. That is, as stated in the Convention, not only in the political, economic, social, cultural, and civil fields but also in “any other field”. The earlier draft by the CSW had instead stated “any other field of public life”.<sup>135</sup> This reference was later removed following suggestions from Portugal<sup>136</sup>, UNESCO<sup>137</sup>, and the International Federation of University Women,<sup>138</sup> with the aim of extending CEDAW’s protection to the domestic sphere. This, as previously addressed in chapters one and three, was of great importance as it allowed CEDAW’s scope to reach the vast forms of discrimination that women suffer in the private sphere and which the previous UN human rights conventions did not address. Acknowledging the domestic sphere to be one field in which discrimination against women can exist under CEDAW allows the current analysis of the acknowledgment of intersecting forms of discrimination within this field. It is also of importance here that the definition, and therefore the scope, of discrimination against women under CEDAW is not limited to the rights set forth in the Convention itself, but also extends to other recognized human rights.<sup>139</sup>

From the above it seems clear that an analysis of discrimination against women based on sexual orientation was not a matter of concern when CEDAW emerged. It is however not the case that sexual orientation did not at all play a role in the creation of this definition; a heterosexual woman can, in many places, be found as the proper subject of Article 1 (heterosexuality being one form of sexual orientation). Her experiences seem to be treated as the norm, deviating the specific discrimination non-heterosexual women may face. Despite these findings, the section further identified factors that either enable or hinder a present or future inclusion of intersectional discrimination within the scope of Article 1. The main factor that hinders the inclusion of discrimination specifically directed against LBQ women is of course the apparent essentialist view of women, with Article 1 lacking any reference to intersectional forms of discrimination. However, other factors could enable the Committee and states to include intersectional discrimination against LBQ women in their interpretation of Article 1 of

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<sup>135</sup> UN Doc. E/CN.6/L.683/Add.1.

<sup>136</sup> UN Doc. E/CN.6/591, page 52.

<sup>137</sup> *Ibid.*, 11.

<sup>138</sup> UN Doc. E/CN.6/591, page 53.

<sup>139</sup> Byrnes (n 127) 67.

CEDAW. Such factors include possibilities for a wide interpretation of the term ‘sex’, so as to include gender and sexual orientation, as well as the phrase ‘irrespective of marital status’, so as to allow for diverse forms of comparisons between married and non-married women and men. The specific approach of equality adopted further influences the ability of Article 1 to include the specific discrimination LBQ women may face. The Committee’s interpretive work in this respect will be subject to analysis in the following section.

## 4.2 The Committee’s Interpretation

Considering the limitations of CEDAW’s definition of discrimination, as well as its hindering and enabling factors as identified above, this section addresses how the Committee has dealt with the reality of discrimination LBQ women face *as* LBQ women. Of special importance in this regard is that the general recommendations looked upon in this section were adopted by the Committee within the past eleven years and therefore were born in a context in which the feminist and queer discourses that form the basis for the current study were widely known or available. Furthermore, the addressing of particular struggles of LBQ women in relation to human rights law had taken shape on an international basis, not least through the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity in 2006<sup>140</sup>. The discourse on women’s rights and the pitfalls of essentialism had therefore evolved enormously since the adoption of CEDAW in 1979.

In its general recommendation no. 28, adopted more than thirty years after the birth of CEDAW, the Committee addresses the Convention’s reference to sex-based discrimination.<sup>141</sup> The Committee defines *sex* as “biological differences between men and women” and *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.”<sup>142</sup> It also clarifies that the scope of the Convention covers gender-based discrimination against women,<sup>143</sup> though it does not seem to include sexual orientation within its concept of gender-based discrimination *as such*. Instead, the Committee addresses sexual orientation as an intersecting factor:

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<sup>140</sup> Yogyakarta Principles (n 24).

<sup>141</sup> CEDAW Committee ‘General Recommendation No. 28’ (2010) CEDAW/C/GC/28, para 5. Note that this general recommendation is concerned with the core obligations of States parties under Article 2 of CEDAW.

<sup>142</sup> *Ibid.*, para 5.

<sup>143</sup> The Committee arrives at this conclusion by interpreting Article 1 together with Articles 2(f), which provides for the States parties’ obligation to undertake “appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”, and Article 5(a), which concerns stereotyping: See *Ibid.*, para 5.

“The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrence.”<sup>144</sup>

In the same general recommendation, the Committee further recognises that “[c]ertain groups of women, including (...) lesbian women (...) are particularly vulnerable to discrimination through civil and penal laws, regulations and customary law and practices”<sup>145</sup>. It therefore acknowledges certain forms of specific discrimination lesbian women face and seems to place those within the scope of Article 1 and the Convention generally. Though one might wonder why the Committee first lists sexual orientation as a potential intersectional factor and later deals only with lesbian women. Lastly, the Committee has requested in its Reporting Guidelines that States parties submit information on the “implementation of the Convention with respect to different groups of women, in particular those subject to multiple forms of discrimination”<sup>146</sup>.

Such acknowledgments and clarifications are an important step in expressly and effectively extending the scope of CEDAW to protect women in same sex relationships from discrimination. They also move away from an essentialist view of women, no longer assuming that all women experience human rights abuses in the same ways, and at the same time seem to move towards an understanding of Article 1 envisioned by tan beng hui. In asking whether CEDAW’s framework allows for protection of a woman’s right to determine and control her sexuality, tan beng hui notes that CEDAW’s underlying principles of substantive equality, non-discrimination, and state obligation have allowed the Convention to be extended beyond its literal text: “In this manner, the CEDAW Committee has been – and continues to be – able to address matters that fall under the ambit of sexuality rights.”<sup>147</sup> She notes that nothing within CEDAW prevents the Committee from acknowledging sexuality rights, including sexual orientation, under CEDAW<sup>148</sup> and that based on Article 1, women who are discriminated against because of their sexuality can in theory claim protection under CEDAW if they can show that such discrimination “has been used to

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<sup>144</sup> para 18. While GC is on Article 2, it also clarifies the scope of Article 1.

<sup>145</sup> para 31.

<sup>146</sup> CEDAW Committee Decision 40/I, ‘Convention Specific Reporting Guidelines of the Committee on the Elimination of Discrimination against Women’, (2008) A/63/38 (Supp) part I, Annex I, para 21.

<sup>147</sup> tan beng hui, *Exploring the potential of the UN Treaty Body System in Addressing Sexuality Rights* (International Women’s Rights Action Watch Asia Pacific Occasional Paper Series, No 11, 2007) 7.

<sup>148</sup> *Ibid.*, 11.

subordinate women and reinforce male superiority”.<sup>149</sup> This goes hand in hand with the understanding of patriarchy and heteronormativity being intrinsically linked, as described earlier (see above, chapter 2.3). One example of how the oppression of non-heterosexual women can be framed as a matter of reinforcing male superiority is the practice of ‘corrective rape’ as it occurs, *inter alia*, in South Africa.<sup>150</sup> Thereby men rape lesbian women in order to ‘cure’ their lesbianism. They hence oppress lesbian women by exercising rape with the aim of bringing them under the control (sexual and otherwise) of men. This issue of violence against LBQ women will be further investigated in chapter six below.

Another important consideration is as to the Committee’s approach to equality, fearing that a model of equality that relies heavily on a comparison between the rights men have and the rights women have would once again deviate non-heterosexual women, as the rights of men too have been centred around heterosexual lives and experiences. The Committee seems to have adopted a fluid approach.<sup>151</sup> For instance, in general recommendation 28, the Committee seems to reject an understanding of Article 1 as referring to formal equality only: “This would mean that an identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face.”<sup>152</sup> In general recommendation no. 25, which was adopted in 2004, the Committee further addresses the necessity of transformative equality to achieve de facto equality between men and women: “The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.”<sup>153</sup>

Bond, writing before the adoption of general recommendations 25 and 28, criticized the opinion of other commentators, who argued that the Committee had adopted a substantive approach to equality and countered that, with a few exceptions, the Convention did not consider intersectional discrimination.<sup>154</sup> It appears, though, that the Committee has now taken into account diversity amongst women to some extent and has started its way to a more meaningful understanding of equality. This could lead to a move

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<sup>149</sup> Ibid., 8.

<sup>150</sup> CEDAW Committee, Concluding Observations South Africa (2011) CEDAW/C/ZAF/CO/4 paras 39-40.

<sup>151</sup> CEDAW Committee, ‘General Recommendation No. 29’ (2013) CEDAW/C/GC/29, para 8: “The Committee has consistently concluded that the elimination of discrimination against women requires States parties to provide for substantive as well as formal equality.”

<sup>152</sup> CEDAW/C/GC/28, para 5.

<sup>153</sup> CEDAW Committee, ‘General Recommendation No. 25’ (2004) contained in UN Doc HRI/GEN/1/Rev.9, para 10.

<sup>154</sup> Bond (n 121) 96-7.

away from the form of equality described and criticized by Dianne Otto: “The unidimensional paradigm of gender equality promotes the uncritical embrace of the inequitable foundations of the status quo despite purporting to create emancipatory alternatives for women”<sup>155</sup>. The Committee’s statements seem to also move closer to the understanding of discrimination against women envisioned by tan beng hui. However, there is a real need for consistency in the Committee’s understanding of equality and non-discrimination. An intersectional understanding of discrimination should not only be employed in designated sections but should flow through every step of the Committee’s work. If intersectionality is only sometimes incorporated, or if LBQ women are only mentioned through the occasional section specifically designated to LBQ women, the experiences of LBQ women would be further marginalized and the created norm of heterosexual women would be reinforced while its structures would remaining largely invisible.

This chapter has shown that the text and drafting of Article 1 were not in themselves concerned with aspects of sexual orientation. However, especially in recent years, the Committee has made important steps towards an intersectional approach to the definition of discrimination against women. This approach, *inter alia*, takes into account the sexual orientation of women. The Committee has been able make such steps through certain enabling factors of Article 1, such as the room for various approaches to equality. As has been discussed, there is a need for consistency as to the inclusion of such line in regard to the other provisions of CEDAW. The question whether the Committee has in fact shown consistency will form part of the investigation in the following chapters.

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<sup>155</sup> Dianne Otto, ‘Holding up Half the Sky, but for Whose Benefit: A Critical Analysis of the Fourth World Conference on Women’ (1996) 6 Australian Feminist Law Journal 7, 12.



# 5 Family and the Construct of Marriage under CEDAW

Having explored CEDAW's definition of discrimination, and the Committee's current interpretation thereof, this chapter moves on to investigate the Convention's family-related provisions in the light of my analytical strategy. Through identifying in which areas of family life CEDAW seeks to eliminate discrimination against women, and what CEDAW presupposes about women, this chapter forms a core part of the study. The chapter starts by describing the form and content of the stereotypical or *normal* family. Article 16 of CEDAW, concerning family life and marriage, is then scrutinised closely. Firstly, in regard to its text and drafting and, secondly, in regard to the Committee's interpretation thereof. Lastly, a few other provisions will be subject to brief discussion.

## 5.1 The Stereotypical Family and its *raison d'être*

While it has been acknowledged that family structures and dynamics are subject to change in time, culture and location<sup>156</sup>, there nevertheless exists a basic idea about the *normal* family, both in society and in law. In the global West, this family, described as the sexual family by Albertson Fineman<sup>157</sup>, exists in the form of a man and a woman, who maintain a sexual bond, and who may have one or more children. The most valued form of this unit, then, is its inscription in law through marriage.<sup>158</sup> Through its existence in law, and the benefits attached to the form, both tangible and intangible, individuals may not only consider this the *normal* unit, but also may be, knowingly or unknowingly, pressured into such form, due to societal, economic, or religious reasons.

Within the *normal* family, women and men have different roles, assigned, controlled and maintained through gender stereotypes (hence it will at times be referred to as 'stereotypical family' or 'stereotypical heterosexual family'). The woman's role as the care-taker is usually assigned less

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<sup>156</sup> See, for instance, United Nations Department of Economic and Social Affairs, 'Major Trends Affecting Families' (2003) <<http://undesadspd.org/Family/Publications/MajorTrendsAffectingFamilies.aspx>> accessed 09 May 2015. This publication deals assesses changes in family structures in different regions across the world.

<sup>157</sup> Albertson Fineman (n 16) 45.

<sup>158</sup> Note the discussion on (heterosexual) marriage as being a necessary component of full and first-class citizenship and a relating discourse on whether the possibility of homosexual marriage is therefore a desirable goal. For instance, see Amy L. Brandzel, 'Queering Citizenship? Same-Sex Marriage and the State' (2005) 2 GLQ: A Journal of Lesbian and Gay Studies 171; and Jyl Josephson, 'Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage' (2005) 3:2 Perspectives on Politics 269-84.

value<sup>159</sup>, while the man's role as the bread-winner is appreciated more highly. Moreover, the *normal* family has been a site of oppression over women, not only in regard to women's assigned roles as care-givers. As Marsha A. Freeman points out, "[i]n the name of protecting the family, States have supported male authority over the actions of wives, daughters, and other family members and over the accumulation and use of property. Divorce has been made extraordinarily difficult for women to initiate, and upon divorce women experience far greater negative financial and social consequences than men. Patriarchal traditions and attitudes inform laws, policies, and customs relating to all aspects of marriage and family life".<sup>160</sup> As such the stereotypical heterosexual family also forms a basis though which discrimination against women has been enabled and legitimized in other spheres, for instance the exclusion of women from the workforce, education etc.

The *normal* family and its oppressing aspects, however, do not merely exist in regard to the power imbalance of its two oppositely-sexed subjects. As stated before, it must be understood that patriarchy is inevitably linked to heteronormativity: "The most blatant transgression of the patriarchal female gender identity and her fixed gender (motherly) role is 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 and control of her life."<sup>161</sup> It further ought to be understood that the stereotypical family has different effects on women with different sexual orientations and family preferences. For instance, while the heterosexual woman who finds herself heading a heterosexual monogamous family might be oppressed by the stereotypical roles assigned to and expected from women within such unit, the homosexual woman who wishes for a monogamous homosexual family is not afforded the same rights as a heterosexual woman would be, for instance the right to marry. A queer, homo-, hetero-, or bisexual woman who does not wish for a monogamous relationship but for a more complex family model, or no (sexual) family model at all might then again be discriminated against by society and the law for deviating from the created norm.

Hence, especially in regard to CEDAW, which is based on a principle of equality of men and women, it is vital to understand that discrimination against women in regard to the family is not only present in the form of power-imbalances within the heterosexual family and marriage, but also that laws and practices discriminating same-sex couples stand in direct relation to the inequality between men and women and men's oppression over women.<sup>162</sup> In any honest attempt to free the family from discrimination

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<sup>159</sup> CEDAW Committee, 'General Recommendation No. 21' (1994) contained in UN Doc HRI/GEN/1/Rev.9, para 11.

<sup>160</sup> Rikki Holtmaat, 'Article 5' in Freeman, Chinkin and Rudolf (n 11) 414, 417.

<sup>161</sup> *Ibid.*, 419.

<sup>162</sup> Similarly, tan beng hui argues that women's sexuality rights, including her right to determine her own sexuality, fall within the scope of CEDAW, "as long as it can be shown how they are disadvantaged and discriminated against because of this, e.g. how has

against women, CEDAW therefore ought to tackle not only inequalities between women and men *inside* the stereotypical family, but also ought to look at how the *form* of the stereotypical family discriminates against women in same-sex relationships. Anything else would be to say that a man ought to be present in a family for a woman to be afforded human rights in relation to her family life.

Having set out this prevalently Western construct of the *normal* family, it should be noted that this conceptualization of the *normal* family is not universal. For instance, as explained by Janice Wood Wetzel, “[t]he more traditional extended family, long the norm in many developing countries, consists of two or more nuclear families affiliated through parent-child relationships, sometimes extending for four generations”.<sup>163</sup> The varying conceptualisations of the family can further be detected in ECOSOC’s failed attempt in 1988 and 1989 to find a definition of ‘family’ upon which all states would agree.<sup>164</sup> It is important to note, however, that “[o]nly The Netherlands wanted to define the family as a flexible concept that would include other than the traditional nuclear and extended family constellations”.<sup>165</sup> In regard to CEDAW, as will be seen below in the exploration of Article 16 on family and marriage relations, much focus is on the (in)equality between, and in regard to, the two partners forming the core of the family and in regard to their children. That the *normal* family was an operative idea in the formulation of CEDAW is further indicated through a careful reading of Lars Adam Rehof’s study on the *travaux préparatoires* of CEDAW. It appears that no meaningful discussion of specific aspects of discrimination of women in regard to the more traditional extended family took place as such in the drafting of Article 16.<sup>166</sup> Merely the Byelorussian SSR stressed the need for a provision providing for “equal rights and responsibilities for fathers and mothers”<sup>167</sup>, somewhat trying to reach the more traditional extended family forms.<sup>168</sup> As will be seen below, this suggestion was not adopted (while a similar provision on children is to be found in Article 16(1)(f), mirroring parental roles of the *normal* family).

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sexuality been used to subordinate women and reinforce male superiority”: tan beng hui (n 147) 8.

<sup>163</sup> Janice Wood Wetzel, *The World of Women in Pursuit of Human Rights* (Macmillan 1993) 156.

<sup>164</sup> *Ibid.*, 156.

<sup>165</sup> *Ibid.*, 156-7.

<sup>166</sup> Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Martinus Nijhoff Publishers, 1993) 168-86.

<sup>167</sup> *Ibid.*, 170.

<sup>168</sup> The fact that such suggestion reflects more accurately (non-Western) traditional extended family forms may be deduced from its similarities with Article 29 of the African Charter on Human and Peoples Rights as well as Article 32 of the American Convention on Human Rights.

## 5.2 Content, Scope, and Subject of Article 16

Article 16 of CEDAW, concerning marriage and family relations, has its roots in Article 16 of the UDHR, which speaks of the “right to marry and to found a family”. However, the UDHR, despite the reference to women and men’s entitlement to “equal rights as to marriage”, also states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State” (Article 16(1)), somewhat shielding the institution from state intervention through regulation. Freeman describes the language of the UDHR as presenting “a potential tension between traditional concepts of ‘protecting’ the family unit and the concept that spouses individually have ‘equal rights to marriage, during marriage, and at its dissolution’”.<sup>169</sup> Unlike its parent provision, however, CEDAW omits a provision on the protection of the family unit and instead aims more rigorously at changing specific gender equality issues *within* marriage and/or the family.

Then, one ought to ask oneself, does CEDAW’s omission of this provision mean that a *natural* family unit is no longer presupposed, and is the non-heterosexual couple no longer seen as the deviant? Article 16 of CEDAW provides:

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. 2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of

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<sup>169</sup> Marsha A. Freeman, ‘Article 16’ in Freeman, Chinkin, and Rudolf (n 11) 409, 411.

marriages in an official registry compulsory.”

Several initial observations can be made based on this text. The first part of the chapeau is phrased in a rather general way, speaking of an eradication of discrimination “in all matters relating to marriage and family relations”. Though it puts emphasis on marriage, not least by placing it before other family relations, this part of Article 16 allows for room to be interpreted broadly by the Committee so as to enable women to live the family life they envision without any discrimination against them. An interpretation among such lines would cover forms of families that are not the *normal* family described above. Noticing the intersectional definition of “discrimination against women” that the Committee has put forward in recent years (see above, chapter four), one could indeed argue that the chapeau of Article 16 can no longer be interpreted differently.

However, the latter part of the chapeau, introducing a non-exhaustive list of rights in regard to marriage and family relations, instructs these rights to be had “on a basis of equality of men and women”. This provision, crossed with any understanding of equality that is less extensive than the substantive equality model taking into account heteropatriarchy, could be problematic for same-sex couples, as the exercise would require some sort of comparison between the rights of men and those of women. For instance, one ought to wonder whether Article 16(1)(a) gives women merely the right to marry a person of opposite sex if that is the right given to men. In that way Article 16(1)(a) may be qualified rather than enhanced by Article 16(1)’s reference to the equality of men and women.

Even without this reference, the provisions (a) to (h) appear mostly centred around the lives of women in monogamous different-sex relationships, rendering the subject of the provision heteronormative. The right to freely choose a spouse and enter into marriage with full consent (Article 16(1)(b)) appears to deal with different types of forced and arranged marriages usually concerning heterosexual marriages. Of course, forced and arranged marriages can also affect non-heterosexual women, who may be forced into marriage with a man despite, or because of, their sexual orientation.<sup>170</sup> Further, the right to “freely choose a spouse,” when interpreted in that way, could open doors for non-heterosexual relations (although, again, it may be qualified by the reference to equality of men and women). Provisions (c) - (d) and (f) concern women’s “rights and responsibilities” during marriage and its dissolution and in regard to children. Even though the language of the provisions seems to be sex-neutral, they seem to target the separated and unequal roles and positions of women and men within the family or marriage. This seems obvious due to the different roles that were/are assigned to women and men in the family and the hierarchy attached to such roles. Provision (g) then directly refers to the husband and wife, calling for equality of their personal rights. The *normal* family often adopts the family

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<sup>170</sup> United Nations High Commissioner of Human Rights, ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ (2011) A/HRC/19/41, para 66.

name of the men and women have lesser or no right to choose their occupation due to their role as the caretakers.

Lastly, Article 16(1)(h) is concerned with ownership rights, tackling the issue that women often do not have ownership rights over the property of the family or what could be their personal property. This again is centred around the lives of heterosexual families, since it addresses situations in which only the man/husband enjoys property rights and therefore a man somewhat is a necessary prerequisite for the application of this provision.

Article 16(2) concerns child marriage and calls for a minimum age for marriage as well as for compulsory registration of marriage. The latter part of the provision ensures that family rights of women in regard to marriage can actually be guaranteed by the state, but it does not mention that this includes same-sex marriages if they are not provided for in national law.

It can be observed, then, that, even though CEDAW does not explicitly define the terms marriage, family and family relations, Article 16 certainly draws a picture of a stereotypical family unit between one man and one woman, in its attempt to eliminate discrimination against the woman within this specific unit. Certainly, an acknowledgment of the rights of women within such family unit, as well as resulting state obligations are of huge importance to many women: “[B]ecause [heterosexual] marriage remains the norm for the vast majority of women at some point in their lives, the impact on women’s lives of inequality between men and women within the construct of marriage is deep and broad.”<sup>171</sup> While this may certainly be the case, one ought to pose the question whether CEDAW’s emphasis on marriage is complicit in the perpetuation of marriage as the norm.

Furthermore, knowing about the connection between patriarchy and heteronormativity, it should be clear that merely because no man is necessarily present in female same-sex relationships, does not mean that there is no discrimination against women in regard to such unit which originates from patriarchy. However, the forms of discrimination against women in same-sex relationships, often originating from the form and/or exclusiveness of the *normal* family unit, are not directly addressed in Article 16. While to some extent, it can be argued that the provisions of Article 16 *extend* to women in same sex relationships, such line must necessarily be criticized for failing to address how Article 16 itself contributes to reinforcing the *normal* family, thereby assigning the deviant family. For only those same-sex couples that copy the stereotypical family unit would be able to make this argument. For instance, it could be argued that the strong focus of gay and lesbian rights movements on the right to marry is heavily influenced by the access to (human) rights that flow from

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<sup>171</sup> Freeman (n 169) 411.

marriage, and therefore these movements often fail/forget to include the needs of LBQ, gay and transsexual people who do not fit into this unit.<sup>172</sup>

One commentator, Stanlie M. James, describes Article 16 as a “profound challenge to normative systems of gender-based oppression”, having become a “critical site of struggle to defenders of patriarchal privilege.”<sup>173</sup> According to James, this struggle has expressed itself through the high number of reservations to CEDAW.<sup>174</sup> While it is certainly true that CEDAW has suffered, and continues to suffer, from the high number of reservations, based on the above examination of Article 16, James’ view cannot be shared. Rather than to truly challenge the core of normative systems of gender-based oppression, Article 16 affords rights only to subjects that conform to the gender-normative systems in many other ways. Because Article 16 pretends to pose a challenge to patriarchy by addressing patriarchal structures *within* the stereotypical family, it actually legitimizes this unit and therefore strengthens it, despite its inherently exclusive nature. James argues that patriarchy employs creative ways to keep in power.<sup>175</sup> This is accurate in my opinion also. Only while he states that reservations are such creative measures, I argue that the giving up of some oppression in order to protect the system in a wider sense is what constitutes such creative measures.

### **5.3 The Committee’s Interpretation and Consideration of Article 16**

The above considerations suggest that, while not excluding same-sex couples expressly, much of Article 16 is tailored around the concerns of women in different-sex relationships and marriages. Many factors seem to hinder Article 16 from being interpreted in a way so as to shift this focus. These hindering factors are the provisions that appear to address only discrimination against women *within* the stereotypical heterosexual family, such as Article 16(1)(g) calling for the “same personal rights as husband and wife”. However, other provisions, notably the chapeau of Article 16(1), seem to enable an interpretation that focuses on discrimination against women in relation to different forms of families. The purpose of this section is to investigate how the CEDAW Committee has interpreted Article 16 in relation to the family lives of LBQ women. In light of the factors identified, has an inclusion of their lives under the provisions of CEDAW been possible, and how far is such an inclusion desirable?

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<sup>172</sup> For instance, this failure has been explored and discussed in, Ben Anderson-Nathe, ‘We Are Not Like Everyone Else’ in Carter Sickels (eds), *Untangling the Knot: Queer Voices on Marriage, Relationships and Identity* (Ooligan Press 2015).

<sup>173</sup> Stanlie M. James, ‘Challenging Patriarchal Privilege through the Development of International Human Rights’ (1994) 17:6 Women’s Studies International Forum 563, 569.

<sup>174</sup> Meeting of States Parties to the CEDAW, ‘Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women’ (2006) CEDAW/SP/2006/2.

<sup>175</sup> James (n 173) 569.

In answering these questions, the general recommendations produced by the Committee are once again looked at. There is, perhaps unsurprisingly, no general recommendation expressly dealing with families headed by LBQ women and therefore general recommendations dealing generally with family-related issues are consulted. The most recent general recommendation up to date (general recommendation no. 29) concerns economic consequences of marriage, family relations and their dissolution.<sup>176</sup> Referring to the UDHR, it restates that “the family is the basic unit of society”.<sup>177</sup> However, the Committee then defines family as a social, legal, economic and sometimes religious ‘construct’, explicitly moving away from the Declaration’s notion of the family (read: stereotypical family) being the *natural* and hence given unit of society.<sup>178</sup> This is an important statement that could open doors for an investigation of numerous aspects of the family that, by many, are considered normal and natural.

In its general recommendation no. 28 on the core obligations of states parties under Article 2 of CEDAW, the Committee states that states ought to

“enact legislation that prohibits discrimination in all fields of women’s lives under the Convention and throughout their lifespan. States parties have an obligation to take steps to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Certain groups of women, including (...) lesbian women, (...) are particularly vulnerable to discrimination through civil and penal laws, regulations and customary law and practices.”<sup>179</sup>

It will be interesting to see in how far CEDAW has taken into account its own understanding of the particular ‘vulnerability’ of lesbian women in its considerations on family issues, at least in general recommendation No. 29, which was adopted after this consideration. Simultaneously, it ought to be pointed out that the word ‘vulnerability’ as used by the Committee is somewhat problematic. It appears to conceal the fact that LBQ women’s vulnerability is not inherent in women’s sexual orientation but rather created by LBQ women’s marginalisation.

### 5.3.1 Various Forms of Families

General recommendations no. 21<sup>180</sup> and no. 29 deal with equality in marriage and family relations, and with economic consequences of marriage, family relations and their dissolution respectively. Both contain sections on ‘various form of families’ and therewith recognise that more forms than the stereotypical family unit exist and that such forms vary from state to state as well as within states. General recommendation no. 21 states

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<sup>176</sup> CEDAW Committee, ‘General Recommendation No. 29’ (n 151).

<sup>177</sup> Ibid., para 1.

<sup>178</sup> Ibid.

<sup>179</sup> CEDAW Committee, ‘General Recommendation No. 28’ (n 141).

<sup>180</sup> CEDAW Committee, ‘General Recommendation No. 21’ (n 159).



that, whatever form the family takes, the treatment of women in the family ought to accord with principles of equality and justice.<sup>181</sup> Two main factors prevent this statement from extending protection sufficiently to women in same-sex relationships. Firstly, the Committee fails to address or even mention same-sex headed families expressly and therefore leaves room for the argument that only differences in forms of different-sex families are considered. Secondly, the reference to “treatment of women *in* the family” appears to mean the equality between a woman and a man in the heterosexual family, and therefore mirrors the heterosexual provisions of CEDAW without critically analysing outside intervention as to different forms of families based on the sexual orientation of partners.

Even more stunning, perhaps, is the reference to same-sex couples under the same heading in general recommendation no. 29, which states: “Certain forms of relationships (i.e. same sex relationships) are not legally, socially or culturally accepted in a considerable number of States parties. However, *where* they are recognized, whether as a de facto union, registered partnership or marriage, the State party should ensure protection of economic rights of the women in these relationships [emphasis added].”<sup>182</sup> This statement appears to express that CEDAW does not compel states to accept same-sex relationships and therefore provide women in same-sex relationships with its protection, but rather that if, and only if, the state decides to recognize such families are they to be afforded with protection of economic rights. Whether such protection is to the same standard as that of women in heterosexual unions is left unmentioned. The general recommendations therefore seem to view Article 16(1)(a) and (b), the right to enter into marriage and the right to freely choose a spouse, to be provisions that apply to the heterosexual subject, unless the state decides to open it up to other subjects as well. The whole subject matter therefore is looked at under a heterosexual light, with general recommendation no. 21 not considering same-sex relationships at all, while general recommendation no. 29 leaves it open to states whether or not to recognise same-sex unions. Furthermore the Committee does not involve itself in any discussion as to the varieties of forms of families within the category of same-sex couples and how some of these, i.e. those deviating in various forms from the heterosexual monogamous couple, may be excluded from the institution of marriage or other forms of recognized unions even in places where they are available for *some* same-sex couples.

A lack of understanding of varieties of same-sex relationships is furthermore mirrored in their discussion on polygamy, which the Committee seems to regard as a man’s right to be married to more than one woman and which it therefore condemns in the name of equality of men and women.<sup>183</sup> Many queer families, however, do not mirror the monogamous heterosexual couple. Especially where children are part of the family, more than two adult members may belong to the unit, some of them having sexual ties with

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<sup>181</sup> At para 13.

<sup>182</sup> At para 24.

<sup>183</sup> CEDAW Committee, ‘General Recommendation No. 21’ (n 159) para 14.

one another, whereas others do not.<sup>184</sup> A simplistic narrative that focuses on polygamy only in terms of a man, who may be married to more than one woman, denies recognition and appearance of such families and thereby denies them family protection under CEDAW.

The Committee's narrative surrounding marital property and inheritance is also centred on the problems heterosexual, and mostly married, women face, based on the equality with their direct male counterpart.<sup>185</sup> The Committee does not, however, deal with issues that concern many same-sex couples, such as the distribution of property after the death of one spouse in states that do not acknowledge same-sex unions and once again does not take into account the diversity of women.

### **5.3.2 Children & Family Planning**

Due to biological reasons, family planning for same-sex couples and different sex-couples can entail very different aspects, and mothers in same-sex relationships may face discrimination that is directly related to their motherhood intersecting with their sexual orientation. The Committee has not yet addressed these aspects in their general recommendations. In general recommendation no. 21, the Committee lists reasons as to why it is vital for women to decide on the number and spacing of their children, this is in terms of the effect it can have on their rights to education, employment and other personal rights.<sup>186</sup> It also speaks of the importance of voluntary regulation of fertility to a woman's health, development and wellbeing.<sup>187</sup> These elaborations on the Convention's Article 16(1)(e) appear to presuppose the sexual affiliation with a man and do not cover aspects of family planning that women in same-sex relationships face.<sup>188</sup> There is furthermore no discussion as to whether Article 16(1)(e) can be interpreted in a way so as to impose an obligation not to prevent LBQ women from jointly having children.

Legislation that discriminates against women in this way can also have a serious impact on their, and their children's, family lives after dissolution of the relationship, union, or marriage (see below, chapter seven). If the law

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<sup>184</sup> For instance, see Anderson-Nathe (n 172).

<sup>185</sup> CEDAW Committee, 'General Recommendation No. 21' (n 159) paras 30-35, deals with women's right to equal property during marriage and in de facto relationships and after their dissolution. It also deals with the division of labours within the family unit and women's often non-financial contributions in discharging their household and care duties, as well as with inheritance rights that discriminate against the widow at the death of her husband or father. CEDAW Committee, 'General Recommendation No. 29' (n 151), which elaborates on the economic dimensions of marriage and its dissolution further, also focuses on the issues faced by women in heterosexual relationships, even though it addresses more forms of such relationships, such as registered partnerships and de facto unions.

<sup>186</sup> At para 21.

<sup>187</sup> At para 23.

<sup>188</sup> Also in its discussion on information for family planning, the Committee does not explicitly say that this should include information for family planning for same-sex couples: CEDAW Committee, 'General Recommendation No. 24' (1999) Contained in document A/54/38/Rev.1, para 28.

prevents both mothers from sharing custody over the child during their relationship (for instance through adoption), there will be no consideration of custody after dissolution, which can also be detrimental to the child's best interests. While the CEDAW Committee has not addressed the issue of the best interests of the child in custody cases after divorce, the Committee on the Rights of the Child has stated that practices that passed the custody to fathers in some societies, or to the parent with greatest financial resources in others, did not meet the 'best interest' criteria.<sup>189</sup> Arguably, it is hence not in the best interests of the child to not afford both women shared custody over their child.

### **5.3.3 Recommendations on other Disadvantaged Groups of Women**

The CEDAW Committee has produced two general recommendations on specific disadvantaged groups of women. That is, firstly, general recommendation No. 26<sup>190</sup> on women migrant workers, and secondly, general recommendation No. 27<sup>191</sup> on older women and protection of their human rights. The former deals with obstacles and discrimination faced specifically by migrant women workers, in their country of origin, before departure and upon return, in the country of transit, as well as the country of destination. While it is of course to be welcomed that the Committee has with this recommendation shown a willingness and ability to place the specific situation of women in disadvantaged groups within CEDAW's scope, and while it has within this group detected and addressed further forms of intersectional discrimination<sup>192</sup>, it has again left untouched the specific needs of LBQ women migrant workers in general, and discrimination relating to their families more specifically. For instance, the Committee addresses issues relating to family reunification, without addressing that same-sex couples may be placed in a particularly disadvantaged position in states that do not recognize same-sex unions or relationships. Similar issues, also left unaddressed in general recommendation No. 26, are family employment benefits that, in some states, require marriage between a man and a woman and do not recognise same-sex unions,<sup>193</sup> even if they are recognised in the country of origin. This can leave same-sex couples in a serious economic and social

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<sup>189</sup> Freeman (n 169) 428-9.

<sup>190</sup> CEDAW Committee, 'General Recommendation No. 26' (2009) CEDAW/C/2009/WP.1/R.

<sup>191</sup> CEDAW Committee, 'General Recommendation No. 27' (2010) CEDAW/C/2010/47/GC.1.

<sup>192</sup> In para 14, the Committee states: "Moreover, women migrant workers often experience intersecting forms of discrimination, suffering not only sex- and gender-based discrimination, but also xenophobia and racism. Discrimination based on race, ethnicity, cultural particularities, nationality, language, religion or other status may be expressed in sex- and gender-specific ways."

<sup>193</sup> See, for instance, Human Rights Campaign, 'Family and Medical Leave Act: FMLA-Equivalent Benefit for LGBT Workers' < <http://www.hrc.org/resources/entry/family-and-medical-leave-act-fmla-equivalent-benefit-for-lgbt-workers>> accessed 09 May 2015.

disadvantage<sup>194</sup> and furthermore tells a story about the exclusionary nature of the institution of marriage, enabling states to provide certain benefits only to ‘members’ of that institution.

General recommendation No. 27 appears more observant as to women’s diverse identities. It states: “The discrimination older women experience is often multidimensional, with age discrimination, compounding other forms of discrimination based on sex, gender, ethnic origin, disability, levels of poverty, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds.”<sup>195</sup> In regard to the topic of marriage and family life, however, this revelation then disappears and the Committee once again falls into its often-used heterosexual rhetoric.<sup>196</sup>

Overall, while making some references to same-sex couples, in its general recommendation the Committee has not yet made a real attempt at applying CEDAW’s Article 16 to same-sex couples, or to even use Article 16’s chapeau, perhaps in combination with Article 5, to address issues specific to same-sex couples or *deviant* families more generally. Oddly enough, even under an international human rights instrument that seeks to address the oppression of men over women, the (sexual) relation to a man still seems to be a pre-requisite for women to be afforded full human rights. The initial excitement about the Committee’s definition of the family being a construct and about the analyses that could flow from it, seems hampered. Rather than to challenge the form of the accepted construct, the Committee seems to address only discrimination within it.

## 5.4 Other Relevant Articles

CEDAW’s family-related provisions are not only to be found in Article 16. This section provides a brief investigation of some of CEDAW’s other provisions relating to family issues.

Article 5 deals with gender stereotypes and fixed parental gender-roles and interacts with Article 16 heavily. Article 5(a) aims at the transformation of social and cultural patterns. It appears that the provision could be employed in a way so as to detach assigned stereotypes from men and women as well as to remove the attached hierarchy from such attributes. One could therefore argue that it indeed aims at modifying what is perceived as the norm. Interesting also is the evident understanding that both gender stereotypes of women and men need to be transformed in order to achieve equality between men and women. It seems as if the aim of the provision could be the collapse of the gender binary. As argued for by Cook and Cursack, this is a very strong provision for which a general recommendation

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<sup>194</sup> See for instance: Stuart Lau, ‘Lesbian challenges Hong Kong’s decision to refuse her a dependant visa in court’ (South China Morning Post, 13 May 2015) <<http://www.scmp.com/news/hong-kong/law-crime/article/1794647/lesbian-challenges-hong-kongs-decision-refuse-her-dependant>> accessed 20 May 2015.

<sup>195</sup> At para 13.

<sup>196</sup> At paras 51-53.

clarifying the scope and meaning of and obligations originating from Article 5(a) should be created by the Committee, so as to also address compounded stereotypes.<sup>197</sup>

Article 5(b) focuses more explicitly on the role of women in regard to the family, or rather in regard to maternity, by addressing “the most universalist traditionalist cultural norm that disadvantages women, which is the stereotypical assignment of sole or major responsibility for childcare to women”.<sup>198</sup> This provision, though, appears to be centred around the heterosexual woman as its subject, who often has been left with this sole responsibility without receiving any recognition from society. By expressly mentioning the “common responsibility of men and women in the upbringing and development of their children [emphasis added]” rather than that of parents, the provision firstly seems to presuppose the existence of a woman and a man as parents, thereby deviating the experience of a non-heterosexual parent. This observation is also reflected in the *travaux préparatoires*, showing that the issues of discussion were the status of maternity within society as well as the roles of mothers and fathers.<sup>199</sup> One temporal amendment of the CSW working draft indicates the heterosexual view of parenthood in particular. It reads: “Suitable family education, which should include a proper understanding of parenthood as a social function and the recognition of the complementary roles of men and women in bearing responsibility for children [...]”.<sup>200</sup>

Several other articles deal with different aspects of family planning, for instance: Article 10(h), in regard to access to education information “to help to ensure the health and well-being of families, including information and advice on family planning”; Article 12(1), which calls, on a basis of equality of men and women, for “access to health care services where necessary, including those related to family planning”; and Article 14, in regard to rural women, again providing for access to services in family planning. These provisions remain silent on whether these rights relate to family planning of same-sex couples.

Several observations can be made in conclusion of this chapter. It seems as though the protection that flows from Article 16 is largely tailored around the lives of women that are part of the *normal* family. Article 16 as such does not seem to question the discrimination that flows from the form of the *normal* family itself. It is this discrimination which often harms LBQ women and which is unaddressed by Article 16. There are a few factors, such as the chapeau of Article 16(1), which could enable the Committee to change the Article’s heteronormative focus. However, the Committee has

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<sup>197</sup> Cook and Cusack (n 17) 139-41.

<sup>198</sup> Frances Raday, ‘Culture, Religion, and CEDAW’s Article 5(a)’ in Beate Schöpp-Schilling and Flinterman (n 93) 68, 74.

<sup>199</sup> Rehof (n 166) 86-7.

<sup>200</sup> UN Doc. E/CN.6/SR.636, paras 17, 43-44, 48-49. This amendment was initiated by India, Sweden, and the UK, widening the scope of “family education” to focus not only on motherhood: Rehof (n 166) 86.

not been consistent in its approach and where it does refer to same-sex couples, no real attempt is made to include LBQ women as full and proper rights subjects of Article 16. Other family-related provisions are discussed only briefly. Article 5, concerning gender stereotypes, in particular, has the potential to allow for a more Article 16 to tackle discrimination flowing from the form of the *normal* family. However, the Committee has not yet addressed this issue sufficiently in its general recommendations.

## 6 Violence against Women

Violence against women as a form of discrimination against women occupies the focus of study in the present chapter. This topic is highly relevant to the investigation of CEDAW's construction of family-related human rights in regard to a woman's sexual orientation, as violence against women can seriously impact upon their family-related human rights. Violence against LBQ women specifically, like violence against women generally, takes different forms and occurs on various sites<sup>201</sup>. While violence against LBQ women might be directed at a woman as a woman, regardless of her sexual orientation, it can also be directed against her, or affect LBQ women disproportionately, due to her being a woman in combination with her sexual orientation. It is such latter violence against women that is addressed in this chapter, in an attempt to firstly outline the violence faced by LBQ women specifically. Since CEDAW itself does not address violence against women, the chapter secondly investigates how the CEDAW Committee has brought this topic within the scope of the Convention and whether it attends to the specific concerns of heterosexual and non-heterosexual women with equal caution.

### 6.1 Violence against LBQ Women

It is argued here that not only domestic violence<sup>202</sup> impacts upon the family lives of LBQ women, but also other forms of violence that are directed against them as LBQ women. In many countries, and regions within them, same-sex couples cannot display their affection and family lives in public due to fear of violence from the general public, groups as well as public bodies<sup>203</sup> (and, where homosexuality is sanctioned, persecution). In her report on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity in 2011, the United Nations High Commissioner of Human Rights identified several forms and sites of violence faced by LBQ women.<sup>204</sup> Importantly, inexplicitly supporting the thesis of the interdependence of patriarchy and heteronormativity, she identified such violence as gender-based violence, thereby placing it within CEDAW's scope:

“Homophobic and transphobic violence has been recorded in all regions. Such violence may be physical (including murder, beatings, kidnappings, rape and sexual assault) or psychological (including threats, coercion and

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<sup>201</sup> In regard to violence against women generally, this was stated by the CEDAW Committee in its General Recommendation No. 19 (n 19) and is elaborated upon below.

<sup>202</sup> The term domestic violence is used here, as it reflects the terminology of the CEDAW Committee. It encompasses both family violence and intimate-partner violence, to which might subsequently be referred to if such precision is needed in context.

<sup>203</sup> For instance by police and prison guards, see: United Nations High Commissioner of Human Rights (n 170) para 36.

<sup>204</sup> *Ibid.*, para 4.

arbitrary deprivations of liberty). These attacks constitute a form of gender-based violence, driven by a desire to punish those seen as defying gender norms.”<sup>205</sup>

Additionally, despite discriminatory practices in the family and community, such as exclusion from the family home, forced marriages and disinheritance, to name but a few<sup>206</sup>, LBQ women may furthermore experience violence inside their family and community that is aimed at enforcing gender norms and punishing deviation.<sup>207</sup> In 1997, the UN Special Rapporteur on violence against women, its causes and consequences (SRVAW) identified that communities can be the “site of restrictions on and regulations of female sexuality.”<sup>208</sup> Noting that many such restrictions are sanctioned by the state through laws and policies, the SRVAW also identified the community itself as policing women’s sexuality through violence: “Women who choose options which are disapproved of by the community, [such as] [...] to live out their sexuality in ways other than heterosexuality, are often subjected to violence and degrading treatment.”<sup>209</sup> This can also be explained in terms of Butler’s heterosexual matrix; violence is one of the forceful means employed in trying to keep within the heterosexual matrix the woman who does not do her gender correctly, that is, in the present context, the LBQ woman.

Despite the public, public bodies, communities and families, LBQ women may also face violence from their intimate partners. This is apparent in academic writing<sup>210</sup>, even though a considerable silence surrounds the issue generally.<sup>211</sup> Within the area of intimate-partner violence (IPV), some characteristics are shared between abused women in same-sex and different-sex relationships. That is the form the violence may take<sup>212</sup>, as well as the

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<sup>205</sup> Ibid., para 20.

<sup>206</sup> For a fuller account, see: Ibid., para 66.

<sup>207</sup> Ibid., para 67.

<sup>208</sup> SRVAW ‘Report’ (1997) E/CN.4/1997/47, para. 8.

<sup>209</sup> Ibid. Although, of course, the Special Rapporteur’s choice of the word ‘choose’ can be further problematized.

<sup>210</sup> See, for instance, Natalie E. Serra, ‘Queering International Human Rights: LBGT Access to Domestic Remedies’ (2012-2013) 21:3 *Journal of Gender, Social Policy and the Law* 583, 585 & 601. Serra suggests that domestic violence occurs at the same rate of frequency in same-sex and different-sex relations. Also see, Kathleen Finley Duthu, ‘Why Doesn’t Anyone Talk About Gay and Lesbian Domestic Violence?’ (1996) 18:1 *Thomas Jefferson Law Review* 23, 24. Though note that much of the academic debate takes place in the US American context.

<sup>211</sup> Note, for instance, that the report of the High Commissioner of Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (n 170) does not mention domestic or intimate-partner violence.

<sup>212</sup> Namely, “physical abuse, such as punching, kicking, biting, slapping, scratching, strangling, burning, hair-pulling, striking with heavy or sharp objects, using weapons, or “withholding access to medication, medical care, food, fluids, and/or sleep”; sexual abuse; psychological abuse, such as the use of harassment, blackmail, isolation, religious or cultural justifications, or the threat of harm to the survivor, loved ones, or pets; verbal abuse; the destruction of property; the use of finances, immigration status, or HIV status to



motivation of the perpetrator, namely, the maintenance and control by that partner over the other.<sup>213</sup> However, same-sex IPV also possesses unique characteristics. The violence directed against the victim does not occur in a social vacuum, but rather in a social setting within which the victim will additionally have to deal with homophobia in general. This can lead to the victim being unable to leave the site of abuse or to seek help, for instance, because homosexuality is not considered legal in that state, because the abuser threatens to out her partner's sexual orientation, or because of further discrimination the victim would have to face from an untrained police force, to name but a few.<sup>214</sup> Others might not want to report the violence due to a fear that addressing domestic violence within same-sex couples could further stigmatise the LBQ community.<sup>215</sup> It ought to be understood, then, that “[s]ociety's fear and hatred of homosexuality causes isolation and increases the vulnerability of [...] lesbians to domestic abuse”<sup>216</sup>. The same applies, of course, to bisexual and queer women.

## 6.2 CEDAW and Violence against Women

The issue of violence against women does not find a formal and explicit place in any of CEDAW's articles. Instead, the Committee has, in its general recommendations No. 12<sup>217</sup> and, especially, No. 19<sup>218</sup>, brought the issue within the ambit of CEDAW's anti-discrimination and equality framework and has outlined relating state party obligations. This is particularly interesting in that the debate surrounding discrimination against women, including the debate on intersectionality, had moved on ten years in regard to general recommendation No. 12 and thirteen years in regard to general recommendation No. 19, since the creation of CEDAW. While being somewhat restricted by the interpretive limitations that were outlined in chapter three, the creator of the general recommendations, i.e. the Committee, as an independent expert body was not to the same degree restricted by the political difficulties that may have surrounded the creation of CEDAW itself. This opportunity to be attentive to women's different identities, and to address women other than the heterosexual woman, especially in regard to intimate-partner violence, was, however, missed. As expressed by Christine Chinkin, the Committee “has not explicitly addressed violence within same-sex relationships.”<sup>219</sup>

While general recommendation No. 12 instructs states parties to include in their periodic reports certain information about violence against women,

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manipulate or control the survivor; and levying false criminal or civil complaints against the survivor”: Serra (n 210) 586.

<sup>213</sup> Ibid., 586; Finley Duthu (n 210) 25-6.

<sup>214</sup> Serra (n 210) 586-7.

<sup>215</sup> Finley Duthu (n 210) 33.

<sup>216</sup> Ibid., 31.

<sup>217</sup> CEDAW Committee, ‘General Recommendation No. 12 on violence against women’ (1989) Contained in document A/44/38.

<sup>218</sup> CEDAW Committee, ‘General Recommendation No. 19’ (n 19).

<sup>219</sup> Christine Chinkin, ‘Violence against Women’ in Freeman, Chinkin, and Rudolf (n 11) 443, 455.

general recommendation No. 19 expands upon the understanding and obligations regarding gender-based violence against women. It makes clear that “[g]ender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”<sup>220</sup>. The Committee proceeds to state that the elimination of all forms of violence is required of states parties for a full implementation of the Convention.<sup>221</sup> In doing so states parties are not only under an obligation to eliminate gender-based violence against women committed by or on behalf of state bodies, but are further under an obligation to prevent, investigate, and punish private acts of gender-based violence against women.<sup>222</sup>

The Committee defines gender-based violence, as “violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>223</sup> As such it is included within CEDAW’s definition of discrimination against women generally.<sup>224</sup> While speaking of ‘gender-based violence’, which as such does not refer only to women,<sup>225</sup> the Committee connects such violence to women, and hence, in the context of CEDAW, gender-based violence refers only to gender-based violence against women. Chinkin further explains the Committee’s use of the term ‘gender-based violence’ in that it is violence against women that is motivated by gender-related factors.<sup>226</sup> It is for example exercised in order to punish what is seemingly deviant female behaviour or to exercise male control.<sup>227</sup> However, neither does the Committee make direct reference to diversity of women, nor does it refer to the effect intersectionality might have on violence exercised against certain groups of women. This seems fatal for women in same-sex relationships, who experience specifically motivated forms of violence exercised against them as LBQ women, or who cannot leave the site of violence due to homophobic attitudes in society as discussed above. By not addressing such intersectional discrimination, the Committee is complicit in silencing the issue of violence against LBQ women.

Arguably, the experiences of LBQ women in regard to violence against them may still be included within the scope of the general recommendation, not least did the High Commissioner of Human Rights call homophobic and transphobic violence ‘gender-based violence’.<sup>228</sup> Furthermore, while the Committee does not elaborate upon the meaning of ‘disproportionately’, Chinkin argues that “it is apparent that it applies both to forms of violence

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<sup>220</sup> CEDAW Committee, ‘General Recommendation No. 19’ (n 19) para 1.

<sup>221</sup> *Ibid.*, para 4.

<sup>222</sup> *Ibid.*, para 9.

<sup>223</sup> *Ibid.*, para 6.

<sup>224</sup> *Ibid.*

<sup>225</sup> For instance, the Committee on Economic, Social and Cultural rights has referred to ‘gender-based violence’ as applicable to both women and men: Committee on Economic, Social and Cultural, ‘General Comment No. 16’ (2005) E/C.12/2005/3.

<sup>226</sup> Chinkin (n 219) 452.

<sup>227</sup> *Ibid.*, 452.

<sup>228</sup> See above, n 205.

that are committed against women in greater numbers than against men, and violence that has a disproportionate effect upon women's lives".<sup>229</sup> In this way, IPV against women in same-sex relationships could be incorporated under the scope of the definition, even if the violence is not exercised by a man. However, it is a vast disappointment that once again it needs to be argued for CEDAW's protection to apply beyond the created norm (i.e. the heterosexual woman) to the deviant. It seems that even in one of the Committee's more creative works a heterosexual woman is presupposed, whose human rights protection may later be extended to LBQ women by way of interpretation.

Arguing that gender-based violence against women "includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty",<sup>230</sup> the Committee follows the structure of the Convention to incorporate aspects of gender-based violence against women within CEDAW's articles, maintaining that "[g]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence"<sup>231</sup>. Of specific interest to the current analysis are the Committee's comments on CEDAW's Articles 2(f), 5 and 10(c) (combined) and on CEDAW's Article 16 and 5, also combined.

In the former, the Committee comments that traditional attitudes and stereotypes that view women as subordinate to men perpetuate gender-based violence against women, involving different types of violence and coercion.<sup>232</sup> While the Committee identifies that "[s]uch prejudices and practices may justify gender-based violence as a form of protection or control of women"<sup>233</sup>, no connection is made explicitly to intersecting practices and prejudice. Therefore, while addressing the role of gender stereotypes in perpetuating gender-based violence against women, the Committee does not acknowledge compounded gender stereotypes and hence deviates to a certain extent the experiences of women who are subject to violence due to them being LBQ women. For instance the Committee states that the underlying consequence of such gender-based violence against women is to keep women in subordinate roles<sup>234</sup>, but in regard to LBQ women it is often more specific than that. Namely, such violence is used to keep women within men's (sexual) control and power.<sup>235</sup> A further example is that the Committee does not address the effect that the gender stereotype of women being submissive to men translates into the

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<sup>229</sup> Chinkin (n 219) 452.

<sup>230</sup> CEDAW Committee, 'General Recommendation No. 19' (n 19) para 6.

<sup>231</sup> *Ibid.*, para 6.

<sup>232</sup> *Ibid.*, para 11.

<sup>233</sup> *Ibid.*, para 11.

<sup>234</sup> *Ibid.*, para 11.

<sup>235</sup> For instance, in South Africa the practice of 'corrective rape' is exercised by some in order to 'cure' lesbian women from their homosexuality. Note however, that it has indeed been addressed by the Committee in its Concluding Observations (CO): CO South Africa (2011) CEDAW/C/ZAF/CO/4 paras 39-40.

compounded stereotype that women in same-sex relationship are not submissive to their partners and hence never experience IPV.

In regard to the latter, the Committee comments that family violence exists in all societies and that “[w]ithin family relationships women of all ages are subjected to violence of all kinds”. While here the Committee does not explicitly refer to the sex of the abuser, hence rendering this comment applicable to women experiencing IPV in same-sex and different-sex relationships, it nonetheless seems to focus on heterosexual women. For instance, the Committee names lack of economic independence as a reason for not being able to leave a violent relationship<sup>236</sup>, inexplicitly referring to the economic imbalance between women and men, but not to other factors, such as the ones most relevant to women in violent same-sex relationships, as discussed above (see chapter 6.1).

Furthermore, the specific recommendations made by the Committee in general recommendation No. 19 do not refer explicitly to gender-based violence against women affecting LBQ women. While one could argue that the obligations relate to LBQ women as they relate to heterosexual women (despite them being tailored around the lives of heterosexual women in the first place), this does not seem reflected in the constructive dialogue between states parties and the Committee in the form of the periodic reviews of states. While in its Concluding Observations the Committee does, at times, refer to violence against LBQ women,<sup>237</sup> an analysis of the Committee’s Concluding Observations of the year 2015 to date show an inconsistent and inadequate approach. In the eight Concluding Observations adopted in March 2015, only one addresses LBQ women expressly in regard to violence against women. The Concluding Observations regarding Ecuador’s eighth and ninth periodic reports, the Committee states its concern regarding “[i]nformation on violence against women, including lesbian, bisexual and transgender women”<sup>238</sup> and recommends the adoption of a specific system combatting violence against women, again including LBT women<sup>239</sup>. The fact that only one out of eight Concluding Observations in the same month of the Committee’s work included comments on gender-based violence against LBT women<sup>240</sup>, points to the deficit created by not

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<sup>236</sup> CEDAW Committee, ‘General Recommendation No. 19’ (n 19) para 23.

<sup>237</sup> For instance, in its Concluding Observations regarding Sweden, the Committee congratulated Sweden for “the adoption, in November 2007, of the action plan to combat men’s violence against women, violence and oppression in the name of honour and violence in same-sex relationships.” Though, it is to be noted that the Committee does not enter a further discussion on violence in same-sex relationships or against LBTQ women generally in when discussing violence against women under the heading ‘Principal areas of concern and recommendations’: CEDAW Committee, Concluding Observations, Sweden (2008) CEDAW/C/SWE/CO/7, paras 9, 28-29.

<sup>238</sup> CEDAW Committee, CO Ecuador (2015) CEDAW/C/ECU/CO/8-9, para 20.

<sup>239</sup> CO Ecuador (n 238) para 21.

<sup>240</sup> For those lacking such reference, see CEDAW Committee, CO Azerbaijan (2015) CEDAW/C/AZE/CO/5, paras 22-23; CEDAW Committee, CO Denmark (2015) CEDAW/C/DNK/CO/8, paras 17-18; CEDAW Committee, CO Eritrea (2015) CEDAW/C/ERI/CO/5, paras 20-21; CEDAW Committee, CO Gabon (2015) CEDAW/C/GAB/CO/6, paras 22-23; CEDAW Committee, CO Kyrgyzstan (2015)

stating in the general recommendation No. 19 specifically that states parties have to report on the gender-based violence against LGBTQ women, including domestic violence. Considering that homophobic violence occurs in all regions<sup>241</sup> and considering the lack of general knowledge and information about intimate partner violence in same-sex relationships, the Committee should have instructed the state parties specifically to report on this issue and incorporate specific aspects in its strategy to eliminate gender-based violence against women.

This chapter found that LBQ women face violence from the public and public bodies as well as their families, communities and intimate partners. Their non-heterosexual sexual orientation can play a decisive role in the motive for this violence and/or in the victims' inability to access help. However, the Committee has not addressed these concerns in its general recommendations when placing violence against women within the scope of CEDAW. Again inconsistencies appear in regard to their handling of intersectional discrimination against women, which is further reflected in the concluding observations; most of them do not address violence against LBQ women. As was largely the case with Article 16, the issue of violence against women, as it relates to CEDAW, too seems to presuppose a heterosexual woman.

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CEDAW/C/KGZ/CO/4, paras 17-18; CEDAW Committee, CO Maldives (2015)  
CEDAW/C/MDV/CO/4-5, paras 44-45; CEDAW Committee, CO Tuvalu (2015)  
CEDAW/C/TUV/CO/3-4, paras 21-22.

<sup>241</sup> UN High Commissioner of Human Rights (n 170) para 20.

## 7 German Case Study

This chapter provides insight into the communication exchange between the Committee and Germany, focusing on family-related issues of LBQ women in Germany's implementation of CEDAW. This is done in the context of Germany's sixth round of periodic reporting under CEDAW. Such investigation is deemed necessary as the periodic reviews of states parties to CEDAW constitute a big part of the Committee's work and hence may reveal the significance (or otherwise) the Committee allocates to the family-related human rights of LBQ women. It is further interesting to look at the Committee's interaction with states since, and as explained in chapter three, the Committee does not have the power to legally order states to implement certain measures, but instead can only urge and recommend the state to do so. How then does the Committee handle the issue of LBQ women's family-related human rights, that by many is deemed a 'sensitive issue'?<sup>242</sup>

It is, *inter alia*, for this reason that Germany has been chosen as a case study. Germany is one of the states that, while affording *some* rights to same-sex couples, does not afford women in same-sex relations the *same* domestic family and marriage rights as women in different-sex relations.<sup>243</sup> While it has yet a long way to go in order to attend appropriately to the feminist/queer critique of *normal* and *deviant* families, it has gone some way towards a transition of the normal family as recognized by law. The CEDAW Committee should hence feel comfortable in making further recommendations towards this. It is therefore of interest to analyse whether and how the CEDAW Committee has addressed or ignored family-related issues of LBQ women in Germany. The sixth periodic report submitted by Germany in 2007<sup>244</sup>, a civil society shadow report, the subsequent dialog between the Committee and Germany, as well as the Committee's resulting concluding observations in 2009<sup>245</sup> are all looked at. The most recent concluding observations from other States are also mentioned in order to draw several comparisons. Lastly, a few assumptions are made as to why the Committee addresses some issues concerning LBQ women while ignoring others.

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<sup>242</sup> For instance, UN Secretary-General Ban Ki-moon stated: "Some say that sexual orientation and gender identity are sensitive issues. I understand. Like many of my generation, I did not grow up talking about these issues. But I learned to speak out because lives are at stake, and because it is our duty under the United Nations Charter and the Universal Declaration of Human Rights to protect the rights of everyone, everywhere." See: 'Speak Up Stop Discrimination' (OHCHR 2012) <<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>> accessed 23 May 2015.

<sup>243</sup> Act on Registered Life Partnerships (n 21).

<sup>244</sup> Federal Republic of Germany, 'Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Sixth periodic report of Germany' (2007) CEDAW/C/DEU/6.

<sup>245</sup> See CEDAW Committee, CO Germany (2009) CEDAW/C/DEU/CO/6.

## 7.1 The Constructive Dialogue

In its sixth periodic report, submitted to the Committee in October 2007 and thereby starting another round constructive dialogue concerning the implementation of CEDAW, Germany considers the lives of lesbian women (“homosexual partners”) in its reporting on Article 16, that is in regard to equality of women and men in marriage and family relations.<sup>246</sup> While the formation of marriage is reserved only for monogamous different-sex relationships in Germany, monogamous same-sex partners may form a registered life partnership under the Act on Registered Life Partnerships.<sup>247</sup> Reporting on the revisions made to the Act on Registered Life Partnerships in 2004<sup>248</sup>, Germany states in its periodic report to CEDAW that the Act seeks to “bring more into line” the laws governing registered partnerships with those governing marriage, especially in regard to maintenance payments, matrimonial property and grounds for suspension.<sup>249</sup> This is to be done “with a view to regulating maintenance payments, matrimonial property, the grounds for suspension, by introducing a process of distributing pension claims, survivors’ maintenance in the statutory insurance system, allowing registered partners to adopt stepchildren”.<sup>250</sup> While this certainly indicates to the Committee that Germany, firstly, considers the issue of same-sex relationships to fall within the scope of CEDAW and, secondly, is working towards equality between same-sex and different-sex couples, it is nevertheless a half-hearted attempt. Especially the phrase to “bring *more* into line” shows that differences in regulations do continue to exist, though they are not elaborated upon by the state. Hence, Germany appears to be presenting in a positive light legislative changes that maintain differential treatment perhaps amounting to discrimination against women in same-sex relationships.

In their shadow reports, women’s and other organisations dimmed this light however. An alliance of German women’s organisations, including the Organisation of Lesbians and Gays in Germany (Lesben- und Schwulenverband in Deutschland e.V.), submitted a joint report dedicating a whole section on what they call “rainbow families”, that is, families headed by same-sex partners.<sup>251</sup> The main critique of this shadow report over Germany’s periodic report provides that the Act on Registered Life Partnerships provides for equality of duties between registered partnerships and married couples but not for equality of rights. According to the report,

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<sup>246</sup> Federal Republic of Germany, ‘Sixth periodic report of Germany’ (n 244) 71.

<sup>247</sup> Act on Registered Life Partnerships (n 21).

<sup>248</sup> Act to Revise the Registered Partnership Act (2004). Note that the Act on Registered Life Partnerships has since been further revised, but due to the interest in the dialogue between the Committee and Germany, the Act on Registered Life Partnerships as it was at the time will be considered.

<sup>249</sup> Federal Republic of Germany, ‘Sixth periodic report of Germany’ (n 244) 71.

<sup>250</sup> Ibid.

<sup>251</sup> Alliance of German Women’s Organizations, ‘CEDAW Alternative Report’ (2008) <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/DEU/INT\\_CEDAW\\_NGO\\_DEU\\_43\\_8531\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/DEU/INT_CEDAW_NGO_DEU_43_8531_E.pdf)> accessed 10 May 2015.

differences exist in several areas such as that of taxation. While married couples are able to pool their tax returns, same-sex families are unable to do so, resulting in a disadvantage of around EUR 300 where the both partners earn a gross income of EUR 3.000 per month.<sup>252</sup> The report further considers the existing differences in regard to children of same-sex and different-sex parents. Disparities exist in regard to the law of descent as well as adoption. In cases of artificial insemination, a married partner who wanted the child but has no biological connection to the child is still automatically considered the child's parent, while a registered life partner parent without biological connection would have to adopt the child.<sup>253</sup> Joint adoption, too, is available only to different-sex parents while same-sex parents need to adopt the child individually. The alternative report stresses that the chances of success of such individual adoptions are small, however.<sup>254</sup> If, then, the child is not the legal child of both parents, which can happen even if the parents are in a registered partnership and care for the child jointly, the social (as opposed to legal) parent is legally regarded as being childless in regard to that child. The report maintains that “[f]or children this constellation leaves a large gap in protection with regard to maintenance rights, inheritance or in the event that the legal parent should die”<sup>255</sup>.

Importantly, the alternative report therefore uncovers the actual differential treatment of women in same-sex and different-sex relationships. However, it should be noted that what is addressed is mostly the legal situation of women in registered life partnerships and, at the same time, the entire section is structured in a way so as to argue that this differential / discriminatory treatment is disadvantageous to children of same-sex mothers. One ought to wonder whether this assimilationist way of framing family-related human rights of LBQ women is due to the authors' lack of will to include families that do not copy the stereotypical heterosexual family, or whether it is a strategic move in order to include at least some same-sex partners within the narrow heteronormative way in which CEDAW itself has formulated these rights? In either case, it prevents the opening up of the discussion to include other equally important aspects of family lives of women in same-sex relationships, such as domestic violence and migration.

Regardless of the force behind it, the alternative report seems to have impacted the Committee in taking up the issue. In its list of issues and questions with regard to the consideration of the periodic reports, which predated the alternative report, the Committee did not raise the issue of the registered partnerships at all.<sup>256</sup> However, it did ask related questions during

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<sup>252</sup> Ibid., 36.

<sup>253</sup> Ibid., 36.

<sup>254</sup> Ibid., 37.

<sup>255</sup> Ibid., 36.

<sup>256</sup> CEDAW Committee 'List of issues and questions with regard to the consideration of the periodic reports: Germany' (2008) CEDAW/C/DEU/Q/6.



its subsequent meeting with the German delegation.<sup>257</sup> Having been asked about the issues raised in the alternative report, namely taxation, adoption and fertilization treatment<sup>258</sup>, the German delegation provided an answer that, while the language used attempted to soften the problems that existed, suggest unequal treatment of married couples and registered partnership couples: “Couples in registered partnerships were mostly treated in the same way as married couples in terms of family, inheritance and almost all other legislation. Maintenance provisions, social security and provisions for foreign nationals were the same in both cases. There were some tax differences, but in general the treatment of civil partnerships compared favourably to that of other countries. In the case of a civil partnership, only one partner could adopt a child, as the European adoption agreement of 1976 specified that only married couples could adopt a child as a couple. No time frame has yet been set for the adoption of a planned amendment which would enable individual Länder [states] to decide whether both civil partners could be adoptive parents”.<sup>259</sup>

Despite Germany’s admission to disfavoured treatment of registered partnership couples, the Committee did not bring up the issue in its concluding observations on Germany and hence did not make relating recommendations.<sup>260</sup> It does not address women in same-sex relations when discussing taxation of married couples (splitting) in regard to reconciliation of family and work life<sup>261</sup>, and neither are LBQ women addressed in the Committee’s discussion on vulnerable groups of women. One can thus conclude that the dialogue was rather destructive for women in same-sex relationships: while Germany confirmed the issues raised in the alternative report, the Committee does not seem to consider it worthy of being raised in the concluding observations and hence appears to legitimise the practice by not declaring it contrary to CEDAW’s provisions. This observation further calls into question the transparency of the ‘constructive’ dialogue-process, as one does not know why the Committee did not consider the discriminatory practice as relevant.

## 7.2 Other Concluding Observations

It is an interesting undertaking to compare the concluding observations for Germany in 2009 with recent concluding observations where the lives of LBQ women have actually been addressed by the Committee.

The concluding observations on Ecuador in 2015<sup>262</sup> address LBQ women in regard to several issues. Firstly, in regard to stereotypes and harmful

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<sup>257</sup> CEDAW Committee, ‘Consideration of reports submitted by States parties under article 18 of the Convention: Sixth periodic report of Germany’ (2009) CEDAW/C/SR.881.

<sup>258</sup> Ibid., at para 18.

<sup>259</sup> Ibid., at para 38.

<sup>260</sup> CO Germany (n 245). Also note that specific recommendations had been suggested in alternative report: Alliance of German Women’s Organizations (n 251) 37.

<sup>261</sup> CO Germany (n 245) at 29.

<sup>262</sup> CO Ecuador (n 238).

practices, the Committee expresses concern over the continuation of “de-homosexualization” practices in clinics established for treatment of drug-addiction, and recommends the implementation of the criminal code prohibiting such practices and to adopt relating mechanisms ensuring its implementation.<sup>263</sup> The Committee further expresses concerns as to information on the gender-based violence against, *inter alia*, lesbian and bisexual women, “including reports of mistreatment by the police, and the absence of official statistics on complaints and cases brought to the criminal justice system.”<sup>264</sup> It correspondingly recommends the establishment of a monitoring system as well as training for judges, police and others.<sup>265</sup> The Committee does not, however, address LBQ women when discussing equality in marriage and family relations.<sup>266</sup>

The Committee further addressed LBQ women in its concluding observations on Kyrgyzstan in 2015, showing concern over a proposed law that “introduces criminal and administrative sanctions for the ‘formation of a positive attitude to non-traditional sexual relations’, which may discriminate against certain groups of women, including lesbian, bisexual, transgender and intersex women”.<sup>267</sup> The Committee urges Kyrgyzstan not to adopt the draft law and to instead adopt comprehensive anti-discrimination legislation.<sup>268</sup> The Committee also expresses concern over of persisting discrimination over, *inter alia*, lesbian and bisexual women in health care services legislation.<sup>269</sup> Lastly, the Committee addresses intersecting forms of discrimination that disadvantaged groups of women, including lesbian and bisexual women, face and recommends the state party to undertake specific measures to this end.<sup>270</sup> LBQ women are not addressed specifically in the Committee’s discussion on marriage and family relations.<sup>271</sup>

In its concluding observations on Denmark in 2015, the Committee notes the inadequacy of support services for lesbian, bisexual and transgender women, recommending Denmark to “consider assessing the difficulties faced by lesbian, bisexual and transgender women with the aim of ensuring that they fully enjoy their rights”.<sup>272</sup> These broad statements find no more specific counterparts in sections on family relations, family reunifications or violence against women, however.

While it has to be noted that any comparative observations on these are necessarily restricted due to the small number of concluding observations

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<sup>263</sup> Ibid., paras. 18-19.

<sup>264</sup> Ibid., para. 20.

<sup>265</sup> Ibid., para. 21.

<sup>266</sup> Ibid., paras. 42-43.

<sup>267</sup> CO Kyrgyzstan (n 240) para 9.

<sup>268</sup> Ibid., para. 10.

<sup>269</sup> Ibid., para. 29(d).

<sup>270</sup> Ibid., paras. 33-34. Note that none of the proposed measures address family life issues directly, although violence against women is addressed.

<sup>271</sup> Ibid., paras. 35-36.

<sup>272</sup> CO Denmark (n 240) paras 35-36.

considered, some critical remarks will be made nevertheless. For it is puzzling that the Committee seems to address the rights of LBQ women in some areas but not others. That is to say, the Committee does not seem to shy away from addressing discrimination in the form of criminalisation of non-heterosexual sexual activities, gender-based violence against lesbian and bisexual women, harmful practices and general discrimination against lesbian and bisexual women (while it does not address queer women). In none of the concluding observations considered does the Committee address family relations in regard to LBQ women, however.

It appears that the Committee affords LBQ women some anti-discrimination rights under CEDAW on the basis of them being discriminated as LBQ women, but not all. As is evident from the German case study, discrimination exists against LBQ women in regard to their family lives. LBQ women in registered life partnerships do not enjoy the same rights as married heterosexual women. The Committee, however does not address this in its concluding observations. One needs to wonder why and how this is the case? Is the extent to which non-discrimination rights under CEDAW apply to LBQ women as LBQ women at the discretion of the Committee, or is this determined by the formulation of CEDAW's articles? Noting the particularly heteronormative language of Article 16 as discussed in chapter five and the more progressive interpretations of Article 1 as discussed in chapter four, perhaps it is less surprising that the Committee does not address equality of family relations of women in same-sex relationships but does address discrimination against lesbian and bisexual women more generally. However, it seems somewhat contradictory that discrimination against women includes LBQ women, yet this definition does not infiltrate marriage and family relations. Even where the Committee does show interest in the family relations of LBQ women, as was the case with the questions posed to Germany, it is only to the extent with which same-sex partners copy married different-sex couples.<sup>273</sup>

### **7.3 Analysis of the Committee's Stance**

While the Committee seems to have gradually become more attentive to intersectional discrimination against women, it nevertheless does not address discrimination issues specific to LBQ women's family lives. This was shown in chapters four to six in regard to the Committee's general recommendations. Furthermore, this seems to be the case with the Committee's concluding observations, as was seen in the current chapter. The question hence arises as to why the Committee takes such a somewhat arbitrary position? This section ties together the influencing factors that were mentioned throughout the thesis.

To begin with, it cannot be stated for sure why the Committee has taken the positions it has taken due to a lack of transparency in this regard. For

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<sup>273</sup> Although admittedly this was influenced by the way the alternative report by the Alliance of German Women's Organizations had formulated the issue.

instance, the Committee did not clarify why it has not taken up the issue of same sex registered partnerships in its concluding observations on Germany. Only assumptions can hence be made.

It was mentioned in chapter three that the Committee is not a clearly authoritative body. It can therefore be argued that the Committee has to be strategic in its interpretation of CEDAW for states parties not to disregard its work. It was also mentioned in the current chapter that issues concerning LBQ women are often seen as ‘sensitive’ matters. Taking into account also the interest of states to maintain the normal family, being the unit upon which much of society is built (see chapter five), perhaps the Committee does not feel able to address specific family related discrimination against LBQ women. For it may fear that states parties would not accept statements in this regard. On the one hand, this points towards the fragile nature of the human rights framework. Should human rights not be able to protect especially the most marginalised? On the other hand, the non-authoritative character of the Committee does not seem to be the only influencing factor. This seems evident in the German case study. Since Germany had already provided same-sex couples with some rights similar to married couples, the Committee did not have to fear that Germany would be entirely unreceptive in this regard.

It seems to be arguable that members of the Committee themselves may be influenced – perhaps unknowingly – by stereotypes concerning the normal family unit. This would point towards a lack of expertise or awareness in regard to intersectional discrimination against women, especially in regard to LBQ women. As has been outlined in chapter three, it is states parties that propose and elect members of the CEDAW Committee. This, once again, seems to create somewhat of a contradictory situation. If states have no interest to challenge the normal family as largely protected by CEDAW, why would they appoint members of the Committee with special expertise in the area?

It was shown in this chapter that the Committee has adopted an inconsistent approach in including issues specific to LBQ women in the scope of CEDAW. It must be concluded that the stereotypical heterosexual family prevails in the Committee’s ‘constructive’ dialogue with states. It can be argued that several factors influence the Committee’s arbitrary position. On the one hand this situation might exist due to the Committee’s non-authoritative character. On the other hand, it can also be argued that the Committee itself is influenced by stereotypes in regard to the normal family unit.

## 8 Conclusion

Analysing CEDAW through my analytical approach has shown that the category of ‘women’ as protected by CEDAW does not always honour the diversity that exists within it. At least some of CEDAW’s provisions seem to insist on a certain notion of womanhood, and those provisions and obligations relating to family issues undoubtedly form part of this group. Problematic from the beginning is CEDAW’s lack of acknowledging the intersection between discrimination against women based on sex and other systems of oppression and subordination. As has been argued, LBQ women often face discrimination in order to compel them to oblige by, or punish them for deviating from, male (sexual) domination. These struggles affect women as LBQ women and are hence particular struggles that are not expressly acknowledged by Article 1 of the Convention. While the CEDAW Committee has to some extent remedied the absence of intersectional forms of discrimination in Article 1 through its recent general recommendations, this revelation has not infiltrated the understanding of the family, sadly.

This was shown not only through the investigation of general recommendations relating to Article 16, but also through the dialogue between the Committee and Germany in which the differences that existed in the treatment of same-sex and different-sex couples were not expressly considered to be contrary to CEDAW’s understanding of equality. While sceptics could argue that the Committee is bound to CEDAW’s heteronormative formulation of family-related provisions, my analysis shows that the Committee appears generally unwilling/inattentive to include the particular struggles of LBQ women in the family sphere: The obligations in regard to gender-based violence against women, which were formulated by the Committee, also largely presuppose a heterosexual woman, especially in regard to domestic violence and, hence, disregard the particular discrimination LBQ women face. Furthermore, there is room for the argument that with the Committee’s current understanding of discrimination including forms of intersecting discrimination, it could place the family-related struggles of LBQ women within the chapeau of Article 16. Instead, however, the Committee itself seems influenced by compounded gender stereotypes that exist in regard to womanhood and the family.

These observations concerning the subject of CEDAW result from an examination of the category of women as perceived through CEDAW’s family-related provisions. Within the theoretical framework used, one necessarily encounters a tension between arguing for diversity within the category of women on the one hand, while arguing against categorisations generally. It is important, however, to distinguish between ontology and political strategy. In order to improve women’s conditions of life, strategically the existence of a category of women ought to be accepted. This is the case since, as a social, though not natural, fact the category of women does exist and is oppressed as such. Being a social fact, however,

the category of women is not only diverse but also unclosed and it should be recognised as such. Since CEDAW was established at a point in time where the exercise of questioning categories was yet to be born<sup>274</sup>, the Convention is set out to improve conditions of women's lives without being concerned with the existence of categories, not to mention the move towards the abolishment of such categories. As a result, CEDAW itself often contributes to the creation of a norm and its deviants, for instance the heterosexual woman as the norm and the categories of lesbian and bisexual women as its deviants. Instead of valuing the diversity of women, it is complicit in creating categories of women, extending through the notion of equality with those rights that men enjoy to the category of the woman that is deemed the appropriate woman. In relation to CEDAW's family provision, is the appropriate woman is the heterosexual woman in a monogamous relationship.

Despite the creation of different categories of women, CEDAW is further complicit in reinforcing the *normal* family and in rendering this family central to a woman's life. While it was pushed by women's rights movements towards an infiltration of human rights into the private sphere in order to reach women's lives there, CEDAW gave into this pressure by putting emphasis only on a certain type of family, namely the sexual family. The notion of the family, the Committee has itself admitted, is a construct.<sup>275</sup> However, through trying to create equality within the heterosexual form of this construct, rather than to enable women to live the family life (or otherwise) they themselves envision, CEDAW too is complicit in concealing the fact that the heterosexual family as framed by human rights law is in fact a construct. Instead it legitimises states in providing preferential treatment to women who fall under this construct, who act seemingly *normal*, as opposed to women who do not. CEDAW therefore on the one hand discriminates against women, who, through their agency, do not place their lives within the heterosexual form of this construct (the *normal* family). On the other hand, it oppresses women in trying to restrict their agency of choosing a life that is compelling to them. Even where the Committee has tried to broaden the family to which CEDAW refers, it has only been able (or willing) to do so in relation to same-sex couples who copy the traditional/sexual family in form.

Another consideration to be had is whether it is authentic to believe that the well-oiled machine of heteropatriarchy has simply given in to the pressure created through women's rights movements by weakening itself? A reading of CEDAW's Article 16 as undertaken in this thesis suggests otherwise. Through the pressure heteropatriarchy faced in the lead-up to the creation of CEDAW, it saw a threat to its existence that needed to be dealt with. As is known from Article 16 of the UDHR, the construct of the family is the unit upon which society is built, that is the heteropatriarchal society. Dissolving

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<sup>274</sup> For a brief history of emergence of queer theory, see, for instance: Martha Albertson Fineman, 'Introduction: Feminist and Queer Legal Theory' in Albertson Fineman, Jackson, and Romero (n 16) 1, 4-6.

<sup>275</sup> CEDAW Committee, 'General Recommendation No. 29' (n 151) para 1.

the special protection surrounding this unit, assembled to control and suppress, and therefore questioning the unit itself, could hence mean a threat to the entire heteropatriarchal society, the structure of which relies on its support. Having analysed Article 16 of CEDAW it appears, however, that heteropatriarchy has dealt with this threat efficiently. It seems that through CEDAW, the family unit has in fact grown stronger as it leads women to believe that it has removed discrimination against women from the scope of the family, thereby once again legitimizing the *normal* family unit. Having regained legitimacy, the family unit as envisioned and protected by CEDAW in turn reinforces heteropatriarchy as it is inherently exclusionary and limits women's ability to shape their own lives.

The Committee has taken limited action to remedy this situation or to expose the privilege Article 16 passes to heterosexual women. A new approach is needed, an approach that requires bold Committee members, dedicated to intersectional transformative equality and skilled to recognize and circumvent the heteropatriarchal attitudes of states and their attached political pressure. Such an approach, which could take shape in a general recommendation, would require a reconceptualization of and focus on Article 16's chapeau. A broad and enabling understanding of the words "states parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations" would oblige states to allow and enable women to develop freely their own understanding of family and to value and respect different forms of families, without discriminating amongst them. Such an understanding of family relations and the choice of women thereto would then also inform other provisions of CEDAW, other general recommendations and the constructive dialogue between the Committee and states parties. While this, of course, cannot remedy the heteronormative focus of the rest of Article 16 and other provisions, it would nevertheless be a step towards rendering the Convention less discriminatory and more effective in its attempt to eliminate all forms of discrimination against women.

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### **III. Legislation**

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