



Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?

Rikki Holtmaat & Paul Post

To cite this article: Rikki Holtmaat & Paul Post (2015) Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?, Nordic Journal of Human Rights, 33:4, 319-336, DOI: [10.1080/18918131.2016.1123502](https://doi.org/10.1080/18918131.2016.1123502)

To link to this article: <https://doi.org/10.1080/18918131.2016.1123502>



© 2015 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 30 Jan 2016.



[Submit your article to this journal](#)



Article views: 4971



[View related articles](#)



[View Crossmark data](#)



Citing articles: 2 [View citing articles](#)

Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?

Rikki Holtmaat^a and Paul Post^b

^aProfessor in International Non-Discrimination Law at Leiden University, The Netherlands; ^bStudent at University College London, UK, and Student Assistant at the Department of European Law of Leiden University, The Netherlands

ABSTRACT

At first sight, it seems clear that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) aims to eliminate discrimination against (only) *women*. However, a legal analysis of the object and purpose of the Convention reveals that CEDAW, in particular article 5a (which requires modification of 'cultural patterns of conduct'), could be instrumental in addressing at least some aspects of LGBTI rights. Nevertheless, an analysis of Concluding Observations adopted by the Committee since 2010 reveals that the Committee, the body entrusted both with monitoring the implementation of the Convention and acting as its principal interpreter, does not yet use the possibility offered under article 5a to interpret the Convention in such a way. This article argues that the most realistic (albeit slow) way to enhance LGBTI rights within the framework of the CEDAW Convention seems to be to encourage state parties and non-governmental organisations to include discussions of discrimination against LGBTI persons in their Country Reports and Shadow Reports to the Committee, thereby inviting the Committee to reflect on LGBTI discrimination.

ARTICLE HISTORY

Received 23 June 2015
Revised 16 September 2015
Accepted 9 November 2015

KEYWORDS

CEDAW Convention; LGBTI; Lesbian; Gay; Bisexual; Transgender; Intersex; Discrimination; Equality; (A) Symmetry; Gender Stereotyping

I. Introduction

In contrast to other non-discrimination grounds like sex, race/ethnicity, and disability, there is no one particular international legal instrument that expressly and explicitly obliges state parties to respect the human rights of lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons and prohibits all forms of discrimination against these persons.¹ How then can the enhancement of the human rights of LGBTI persons be

CONTACT Rikki Holtmaat  h.m.t.holtmaat@law.leidenuniv.nl; p.w.post@law.leidenuniv.nl.

We thank members of the Dutch Feminist Legal Theory Reading Group and the anonymous reviewers of this paper for their constructive comments. All websites were last accessed 15 September.

¹A recent overview of existing legal and non-legal instruments that do address the human rights of LGBTI persons can be found in M O'Flaherty's contribution in this special issue. See also Gemma MacArthur, 'Securing Sexual Orientation and Gender Identity Rights within the United Nations Framework and System: Past, Present and Future' (2015) 15 *Equal Rights Rev* 25–54; available at: <http://www.equalrightstrust.org/ertdocumentbank/Securing%20Sexual%20Orientation%20and>

advanced, and, in particular, their rights to sexual freedom and gender identity? This question was at the heart of the discussions at the conference held in Oslo in December 2014.² The right to sexual freedom and gender identity are of crucial importance for each and every human being, regardless of his or her sexual orientation or gender identity, but are most fiercely contested when it concerns LGBTI persons.³ *Sexual freedom* refers to the freedom of people to choose with which other person(s) they want to establish relationships of a sexual nature and whether or not they can or should formalise these relations in any legal construction provided for by the state.⁴ *Gender identity*, on the other hand, refers to the freedom of people to express the way they experience a particular gendered identity.⁵ Gendered, in this context, means that the sense of self (identity) is co-determined (among many other factors) by the biological or genetic 'sex' features that persons have, in interaction with the socially and culturally constructed meanings and normative regulations of sex and sexuality that are attached to this 'sex'. Sex, sexuality, and gender, therefore, come together in the notion of gender identity. The question we address in our contribution to this special issue is whether the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) can in some way be instrumental to the goal of enhancing the rights to sexual freedom and gender identity of LGBTI persons. We shall approach this question primarily from a positivist legal perspective. Section II contains a legal analysis of the object and purpose of the Convention in so far as it relates to the issue of LGBTI rights. We argue that, in particular, article 5a, which requires modification of 'cultural patterns of conduct', could in theory be instrumental in addressing at least some aspects of LGBTI rights.⁶ But, as will be shown in section III on the basis of a systematic analysis of Concluding Observations communicated since 2010, while the CEDAW Committee gives considerable attention to LGBTI issues, article 5a has thus far not been the road taken by the Committee in its authoritative interpretations of the Convention to expand the interpretation therein. Although some people have set high hopes on the CEDAW as a possible way of enhancing the human rights of LGBTI

[%20Gender%20Identity%20Rights%20within%20the%20United%20Nations%20Framework%20and%20System%20Past%2C%20Present%20and%20Future.pdf](#).

²University of Oslo, 'Sexual Freedom and the Right to Gender Identity as a Site of Legal and Political Struggle', Oslo, House of Literature, 11–12 December 2014.

³Sexual freedom and gender identity are not catalogued in any of the existing international human rights treaties and therefore formally do not exist as explicitly guaranteed and established human rights. Rather, as the title of the Oslo Conference indicates, these (normative) concepts are sites of legal and political debate, over their very existence as rights, over their meaning, as well as over their consequences.

⁴In so far as this freedom is recognised as a right, it is immediately restricted to being only applicable to adult human beings who (can) give their free and conscious consent to having particular sexual relationships. Pedophilia, bestiality, sexual assault, and rape are not deemed to be protected by this (presumed) freedom to have sexual relationships of one's own choice. It is also contested whether persons have the freedom to choose to engage in sexual relationships of a purely commercial or economic nature, either as a provider, as a customer, or both.

⁵The right to gender identity, therefore, is not only about something that people experience 'internally', but in fact is most contested when people express their gender identity, in particular, when this identity deviates from what are perceived as 'normal' expressions along the bipolar axes of the 'male' and 'female' sexes and of heterosexuality.

⁶In this article, we have chosen to focus on the potential of article 5a CEDAW. Other substantive articles in this Convention could (and should) also be investigated as regards their potential to contribute to the enhancement of the human rights of LGBTI persons. The same applies for the potential of other international and regional human rights instruments, eg the UN ICCPR and the European Convention on Human Rights, which include substantive rights, like the right to marriage and the right to private life that have great relevance for LGTI persons. However, time and space are too limited to include all such possibilities for progressive interpretation and implementation of these instruments in this article.

people, we are therefore not particularly optimistic about the Convention's actual contribution in this respect.

The question raised at the Conference in Oslo also calls for a theoretical and strategic analysis of the pros and cons, or the opportunities and obstacles, of using this Convention to enhance LGBTI (human) rights.⁷ In the concluding section IV, we briefly raise some of the most important concerns regarding these problems. We argue that the most realistic (albeit slow) way forward seems to be to urge state parties and NGOs to include discussions of discrimination against LGBTI persons in Country Reports and Shadow Reports to the Committee and thus invite the Committee to reflect on LGBTI discrimination.

II. The Object and Purpose of the CEDAW Convention: A Holistic Approach to Equality⁸

In order to answer the question of whether CEDAW can be instrumental in enhancing LGBTI rights, it is necessary to consider the object and purpose of the Convention. At first sight it seems clear that the Convention aims to eliminate discrimination against *women*, ie discrimination on the ground of the female sex (and not sexuality or gender identity). The object and purpose of the Convention are, however, less clear-cut and more contested than may be expected on the basis of its name. In this section, we shall consider whether there are any theoretical pegs on which to hang claims that move beyond that understanding of the Convention as exclusively aimed at women's equality. We first discuss the main object of the Convention, which is to provide international legal standards to combat all forms of discrimination against *women*. Subsequently, the Convention's definition of *discrimination* against women is considered. Thirdly, we shall analyse *the three main objectives of CEDAW* and assess whether there is – at least in theory – space for including LGBTI rights within the scope of this Convention.

II.i. For women only? CEDAW's asymmetrical approach to equality

The preamble of CEDAW expressly recognises that, despite the international obligations to put an end to discrimination between men and women that were laid down in the previously adopted human rights treaties,⁹ extensive discrimination against women continues to exist. The drafters recognised that in reality it is predominantly women who suffer from sex discrimination and that therefore a Convention specifically aiming at the elimination of this discrimination was necessary.¹⁰ In the view of some commentators, CEDAW's asymmetrical nature is seen as a great advantage over sex-equality laws that are symmetrical, ie those which protect both sexes equally from differential treatment.¹¹ In the words of Brown, referring to McKinnon: 'the more gender-neutral or gender-blind a particular

⁷These issues are also addressed in Dianne Otto's contribution to this issue.

⁸For a more detailed discussion see R Holtmaat, 'CEDAW: A Holistic Approach to Women's Equality and Freedom', in A Hellum and H Sinding-Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2013).

⁹Universal Declaration of Human Rights, articles 2 and 7; International Covenant on Civil and Political Rights, articles 2, 3 and 26; International Covenant on Economic, Social and Cultural Rights, article 3.

¹⁰See for a critical assessment D Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry', in M Davies and V Munro (eds), *A Research Companion to Feminist Legal Theory* (Ashgate, 2013), available as Melbourne Legal Studies Research Paper No 620, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178769.

right (or any law or public policy) is, the more likely it is to enhance the privilege of men and eclipse the needs of women as subordinates.¹² This is also applicable to the right to equality: ‘The person who has the power of definition, who succeeds at defining discrimination against women as sex discrimination, takes the sting out of the matter and at the same time does not have to fear much from it anymore.’¹³ CEDAW’s asymmetrical approach fits well with its substantive approach to equality:¹⁴ it means that the ultimate aim of non-discrimination law is not only to put an end to unfair or unjustifiable classifications of individuals on the basis of a particular characteristic, but also to put an end to oppression and exclusion of groups that are subordinated in society.¹⁵ Although the Convention in most of its substantive articles provides that women have rights of ‘on a basis of equality between men and women’, it clearly includes the obligation of state parties to enhance *de facto* equality of women by means of both special measures and eradicating the causes of women’s oppression and violence against women.¹⁶

The women-only approach of the CEDAW Convention has also been fiercely criticised. First, it is argued that the Convention falls into the trap of essentialising ‘women’, thereby neglecting the fact that the unequal relations between the sexes are socially constructed. The Convention, in other words, (supposedly) fails to address or redress *gender* inequality. Secondly, it is argued that the effect of the asymmetrical approach is that women are further stigmatised as victims *per se* of discrimination and of (sexual) violence. Thirdly, the approach is said to disregard the possibility that men too may be victims of gender discrimination, such as gender stereotypes and fixed parental roles.¹⁷ The solution to these problems would, at least in theory, be to expand the scope of the Convention to also cover men. While some arguments have been presented in favour of such an interpretation, it is still commonly understood that it is a ‘women’s only’ Convention.¹⁸

¹¹This consequences of this difference are explained in more detail in R Holtmaat and C Tobler, ‘CEDAW and the European Union’s Policy in the Field of Combating Gender Discrimination’ (2005) 12 *Maastricht J of Eur and Comparative L* 399.

¹²W Brown, ‘Suffering Rights as Paradoxes’ (2000) 7 *Constellations* 230, 231.

¹³H van Maarseveen, ‘Internationaal vrouwenrecht. Een afzonderlijk rechtsgebied?’, in H. van Maarseveen et al (eds), *Internationaal recht en vrouwen* (Tjeenk Willink, 1987) at 74–75 (translation RH). See also C Smart, *Feminism and the Power of Law* (Routledge, 1989) at 2.

¹⁴In other words, that the general abstract equality of all human beings is not the starting point for the construction of legal norms, but the fact that, in reality of social life, large differences in power and differences in the actual situation and capacities of human beings exist. The goal of realising more *de facto* equality is therefore the core of the substantive approach to legal equality.

¹⁵This refers to the difference between non-discrimination as an anti-classification or as an anti-subordination principle. See J Balkin and R Siegel, ‘The American Civil Rights Tradition: Anticlassification or Antisubordination?’ (2003) 58 *U of Miami L Rev* 9; A McColgan, *Discrimination, Equality and the Law* (Hart Publishers, 2014).

¹⁶This is evidently from the way the Convention conceives of temporary special measures and the way the Committee in General Recommendation 19 has elaborated on women’s right to be free from violence. See I Boerfijn et al (eds), *Temporary Special Measures. Accelerating De Facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia, 2003); F Raday, ‘Article 4’ and C Chinkin, ‘Violence Against Women’, both in M. Freeman et al (eds), *The Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press, 2012).

¹⁷See eg D Otto, ‘Lost in Translation: Re-sexing the Sexed Subjects of International Human Rights Law’, in A Orford (ed), *International Law and its Others* (Cambridge University Press, 2006), and D Otto (n 10).

¹⁸The Convention’s focus on women (instead of the neutral category ‘sex’) is expressed in its title and in the definition of discrimination in article 1. See A Byrnes, ‘Article 1’, in M Freeman et al (eds) (n 16). For an argument in favour of expanding the Convention’s scope to include men, also see T Loenen, ‘Het discriminatiebegrip’, in A. Heringa et al (eds), *Het Vrouwenverdrag. Een beeld van een verdrag* (Maklu 1994) 3. ‘Nothing seems to stand in the way of men invoking CEDAW, provided that they are equally disadvantaged by something that qualifies as discrimination against women’ (translation RH). Loenen gives the example of granting pensions only to widows, which prevents a change of roles between men and women and as such is also detrimental for women (ie discriminatory for women).

The asymmetrical approach of CEDAW is also debated in relation to LGBTI rights. In 2011, Rosenblum proposed that the Convention should be ‘unisexual’, ie that it would be better to prohibit all discrimination on the ground of sex and/or gender, instead of discrimination against women.¹⁹ Rosenblum presents an important argument in favour of such an amendment of the Convention: the word ‘sex’ might be understood to include not only the male and female sex but all kinds of sexes, including transgender, intersex and other differently-sexed and gendered people.²⁰ We shall return to this discussion in section IV, where we briefly address some strategic aspects of whether or not to explicitly include LGBTI people’s rights under the scope of CEDAW.

II.ii. Defining discrimination under the Convention

Article 1 of the Convention defines discrimination against women as:

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

The Convention requires that *all forms* of discrimination against women that lead to an infringement of their human rights be eliminated. The words ‘distinction, exclusion or restriction’ are interpreted in an extensive way.²¹ Such a broad interpretation of the non-discrimination principle moves beyond the mere formal equality principle,²² indicating a human rights approach to combating discrimination.²³ In such an approach, discrimination against women is seen as an instance of their oppression.²⁴ The notion of oppression goes beyond mere *unequal* treatment, but also includes instances of marginalisation, powerlessness, cultural imperialism, and violence.²⁵ Byrnes, in this respect, notes that there is no reason why the Convention should not be applied to provide protection for women who are discriminated against because of their sexuality where this ‘has been used to subordinate women and reinforce male superiority’, for example, where ‘a lesbian’s right to life is violated when she is subjected to death threats for not conforming to dictated heterosexual norms’.²⁶ It could therefore be argued that the phrase ‘all forms of discrimination against women’ in the Convention’s title also includes oppression that is related to women’s sex, sexuality, gender roles, and/or gender identity.

¹⁹D Rosenblum, ‘Unisex CEDAW, or What’s Wrong with Women’s Rights’ (2011) 20 *Columbia J of Gender and L* 98; B Hernández-Trujol, ‘Unsex CEDAW? No! Super-sex it!’ (2011) 20 *Columbia J of Gender and L* 195.

²⁰Rosenblum, *ibid*, 125.

²¹See A Byrnes (n 18).

²²For such an approach the definition of equal treatment, see Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *O.J. L* 204,23.

²³M Winston, ‘Human Rights as Moral Rebellion and Social Construction’, (2007) 6 *J of Human Rights* 279.

²⁴M Winston, *ibid*, argues that one should keep in mind that all human rights law is meant to put an end to the oppression of certain people or groups of people by their government or by other people.

²⁵Young, *Justice and the Politics of Difference* (Princeton University Press, 1990) from 40.

²⁶A Byrnes (n 18) 64 (footnotes omitted).

II.iii. *The objectives of the Convention: space for the inclusion of LGBTI issues?*

The interpretation that the Convention also covers oppression that is related to women's sex, sexuality, gender roles, and gender identity can further be underscored when the overall objectives of the Convention are taken into account. It is now widely acknowledged that CEDAW has three main objectives, which are shortly indicated here as: (a) to realise full legal equality between men and women; (b) to enhance *de facto* equality of women; and (c) to take away the cultural and social roots of gender inequality.²⁷ The third objective, which is in particular expressed in articles 2(f) and 5a CEDAW, implies that state parties must address gender roles and gender stereotypes that lie at the basis of women's discrimination.²⁸ According to the CEDAW Committee, article 5a, in conjunction with article 2(f), means that the Convention acknowledges that gender stereotypes and fixed parental gender roles 'affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions'.²⁹ Therefore, the Convention not only addresses personal convictions, cultural practices, and traditional values, but also addresses systemic and structural discrimination against women,³⁰ and – in order to overcome the structural discrimination that results from that inequality – calls for transformative equality or 'equality as transformation'.³¹

The CEDAW Committee has made it clear that a correct implementation of the Convention requires 'the recognition that women can have various roles in society, not only the important role of mother and wife, exclusively responsible for children and the family, but also as an individual person and actor in her community and in the society in general'.³² In this way, the Convention recognises that all human beings are equal, have equal rights and deserve respect for their human dignity, but at the same time may have divergent ideas about the way they want to spend their life.³³ Therefore, the concepts of individual autonomy, freedom, and diversity are crucial for a correct understanding of the content and scope of article 5a and of the Convention as a whole.

Women's sexuality and their reproductive capacity are crucial for the construction of gender stereotypes and fixed parental gender roles. This means that the construction of human sexuality as (exclusively) heterosexual forms part of the construction of patriarchal gender relations.³⁴ The most blatant transgression of the patriarchal female gender

²⁷See CEDAW Committee, General Recommendation 25, paras 6 and 7.

²⁸An analysis of the scope of the obligation under this article may be found in R Holtmaat, 'Article 5' in M Freeman et al (eds) (n 16).

²⁹CEDAW Committee, General Recommendation 25, para 7. See also CEDAW Committee, Luxembourg (2000), A/55/38, CEDAW/C/SR.446 and 447, para 404. Although state parties do have specific obligations under article 5a as such, it is not a standalone article. It forms part of the general provisions of the Convention, thereby offering the general interpretative framework for all substantive articles. See C Chinkin and M Freeman, *Introduction*. In Freeman, Chinkin and Rudolf, *CEDAW Commentary* (OUP, 2012) 8.

³⁰This means that all laws and legal constructs must be subjected to an in-depth gender analysis. See R Holtmaat, 'The Power of Legal Concepts: the Development of a Feminist Theory of Law' (1989) 5 *Int J of the Sociology of L* 481; R Holtmaat, 'Gender, the Analytical Concept that Tackles the Hidden Structural Bias of Law', in Verein ProFri (ed) *Recht Richtung Frauen; Beiträge zur feministischen Rechtswissenschaft* (Dike Verlag, 2001). A methodology for such an analysis has been developed in R Holtmaat, *Towards Different Law and Public Policy; The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination*, research undertaken on behalf of the Ministry of Social Affairs and Employment, the Netherlands (Reed Business Information, 2004).

³¹S Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality. Towards New Definitions of Equal Rights', in I Boerefijn et al (eds) (n 16) at 116.

³²CEDAW Committee, CO Suriname (2002), A/57/38 (part II), CEDAW/C/SR. 557, 558 and 566, para 48. See also CEDAW Committee, CO Uzbekistan (2001), A/56/38, CEDAW/C/SR.500, 501 and 507, para 169.

³³L Lijnzaad, 'Over rollenpatronen en de rol van het Verdrag' in A. Heringa et al (eds) (n 18) 57.

identity and her fixed gender 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 on and control of her life.³⁵ The obligation to modify gender stereotypes and fixed parental gender roles is also of great importance to men who do not want to conform to their assigned heterosexual masculine identity and male gender role. Beyond that, this obligation is equally important for different from male/female sexed persons (intersex and transgender) and persons with a different from heterosexual sexuality (lesbian, gay, and bisexual).³⁶ Gender stereotypes and fixed parental gender roles directly affect the lives of all persons who renounce traditional heterosexual and patriarchal feminine and masculine gender identities and gender roles. Through an expansive interpretation of article 5a, all of these situations may be brought under the scope of the Convention.

Violations of LGBTI human rights that are based on gender stereotypes and fixed parental gender roles and sexual roles, therefore, could (at least in theory) be addressed in the framework of the third objective of the Convention, more specifically on the basis of article 5a CEDAW.³⁷ Examples of such violations that are, in our view, covered under CEDAW and could (and should) be condemned by the Committee are practices such as forced marriages of lesbian, bisexual or transgender persons; taking away their children and placing them under the custody of male relatives or their (former) husbands; denying these persons the right to healthcare, reproductive care, housing, education and employment; and (gang) rape and other forms of violence because of these persons' sexual or gender identity. The Committee's interpretation shows that it, at least partially and cautiously, is going in this direction, at least as far as bisexual and lesbian women and transgender persons are concerned. The question remains whether the Committee does indeed use article 5a for that purpose; ie is it constructing the issue of discrimination against lesbian women (and TBI women) as an issue that falls under the obligation on state parties to change all traditions, practices, and beliefs that somehow contribute to the construction of unequal and oppressive gender relations and heteronormativity?

III. The CEDAW Committee's Position as Regards LGBTI Rights

The CEDAW Committee is the main authority that can interpret the Convention. Its views are not binding, but its monitoring has proven valuable because it allows for

³⁴See J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990) 1–34 and 110–128; J Butler, 'Imitation and Gender Subordination' in D. Fuss (ed.), *Inside/Out: Lesbian Theories, Gay Theories* (Routledge, 1991) 13. See also A Gross, 'Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law' (2008) 21 *Leiden J of Int L* 235. At 251, Gross summarises Butler's position as follows: 'the division in two genders as part of the institution of compulsory heterosexuality, (which) requires a binary polarised gender system since patriarchy and compulsory heterosexuality are only possible in a world built on such a hierarchised division'. Real liberation or emancipation of women and gay and lesbian people, according to this author, requires 'undoing gender', instead of accepting the thus pre-fixed gender categories and identities. Another way of expressing this principle is saying that a *transformation* of gender and sexuality needs to take place.

³⁵Lesbian women being gang-raped in order 'to cure them' from their outrageous 'abnormal' sexual preference, is an example of this kind of 'correction'. See for example, Report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Commission on Human Rights March 2006, UN Doc E/CN.4/2006/6/Add.1, para 180 and 183.

³⁶That is, different from the heterosexual norm and other than the binary male-female scheme.

³⁷It is therefore in our view not necessary to 'unisex' CEDAW, as is argued by Rosenblum (n 19). Rosenblum does mention article 5 of the CEDAW, but does not appear to see the full potential of this provision in relation to enhancing LGBTI rights. See also section III of this article.

dialogue and a critical analysis of the anti-discrimination policies in the various state parties. This section discusses whether the Committee uses the possibility offered by article 5a to interpret the Convention in a way which allows various forms of discrimination against LGBTI persons (either male or female) to fall under the scope of the Convention. Do the Committee's Concluding (Country) Observations and General Recommendations,³⁸ its Decisions and Views on Individual Communications submitted under the Optional Protocol, or its Report of investigations under the Protocol's inquiry procedure³⁹ contain any references to the position of LGBTI-persons and the obligations of state parties of CEDAW with respect to their rights? If so, which rights are being given to LGBTI persons on the basis of the Convention? Or, to put it the other way around: what obligations do state parties to the Convention have to respect, protect, and fulfil the human rights of LGBTI persons, specifically connected to their sexual orientation and gender identity?

III.i. Quantitative analysis

For the purpose of this contribution, we carried out a systematic analysis of the Concluding Observations adopted by the CEDAW Committee from 1 January 2010 until 31 December 2014. A total of 110 Concluding Observations were considered in this period. We undertook a full-text search of this material, using the search terms gay, lesbian, transgender, transsexual, LGBT, same-sex, and sexual orientation, in order to determine whether the Committee mentioned (discrimination on the grounds of) sexual orientation or gender identity. In 37 cases, ie in roughly one third of all Concluding Observations included in the analysis, a reference was made to one or more of these categories. Noteworthy examples discussed below include the Committee's Concluding Observations on reports of countries from all continents, for example those of Argentina, Finland, Georgia, Guyana, India, the Netherlands, New Zealand, Norway, Panama, Paraguay, the Russian Federation, Singapore, South Africa, Uganda, Venezuela, and Zimbabwe.⁴⁰

Since 1986, the Committee has also published 29 General Recommendations.⁴¹ Sexual orientation is mentioned in only two of these documents: General Recommendations 27 and 28 (both published in 2010),⁴² while General Recommendation 21 [1994] underlines

³⁸Under article 18, all states which ratify the Convention must report to the Committee. The Committee examines the report, also relying on information sent in by non-governmental organisations, and subsequently publishes Concluding Observations on the state party. Along with offering advice to reporting states in the Concluding Observations, the Committee has the ability to issue General Recommendations on its views on matters concerning the elimination of discrimination against women.

³⁹Opened for signature 10 December 1999, 2131 UNTS 83 (entered into force on 22 December 2000). States ratifying this Protocol recognise the competence of the Committee to consider complaints from individuals or groups. In addition, article 8 of the Optional Protocol establishes an inquiry procedure that allows the Committee to initiate an investigation where it has received reliable information of grave or systematic violations by a state party of rights established in the Convention. See also F Isa, 'The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination against Women: Strengthening the Protection Mechanisms of Women's Human Rights' (2003) 20 *Arizona J of Int and Comparative L* 291.

⁴⁰See the qualitative analysis below for references to these Observations.

⁴¹The Committee's General Recommendations may be found at <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx><http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.

⁴²CEDAW/C/GC/27, para 13 and CEDAW/C/GC/28, para 18.

women's autonomy in relation to marriage and family matters, recognising 'various forms of family'.⁴³ In the Committee's case-law regarding complaints by individuals, sexual orientation is mentioned only once.⁴⁴ In the three inquiry procedures that were concluded before June 2015, there was no mention of sexual orientation or any of the other search terms used in our analysis.⁴⁵ From a quantitative perspective, therefore, the attention the Committee devotes to LGBTI issues seems to remain limited in all categories of documents except for the Concluding Observations. As such, in the next section we turn to a detailed analysis that primarily deals with this category of Committee output.

III.ii. *Qualitative analysis: Pre-2010*

Our analysis did not include the period before 2010,⁴⁶ but it is important to note that the question whether the term 'sex', as employed in the Convention, covers issues concerning women's sexual orientation or sexuality has been a contentious issue for years, as is the extent to which the Convention provides protection to transgender and intersexual persons.⁴⁷ Byrnes, in the leading Commentary on the Convention, holds that 'there is, in principle, no reason why the Convention should not be applied to provide protection for women who are discriminated against because of their sexuality'.⁴⁸ However, the Committee's approach to this subject in the years up to 2010 is best characterised as vague and cautious. It has not taken a clear stance, although prior to 2010, the Committee had expressed its concern about the criminalisation of same-sex partnerships,⁴⁹ while also mentioning discrimination on the grounds of sexual orientation in the two aforementioned General Recommendations published in 2010.⁵⁰

III.iii. *Qualitative analysis: Post-2010 Concluding Observations*

The following are noteworthy findings resulting from our analysis of the quantitative data. First, lesbian women and transsexual, transgender, or intersex persons are most often mentioned by the Committee in relation to the issue of intersectionality, or mentioned in a list of particularly disadvantaged or vulnerable groups of women who need special protection. The categories of sexual orientation and trans- and intersex are apparently 'special' in the sense that they need to be included in such lists. An example of this approach can be found in General Recommendation 28:

⁴³CEDAW/C/GC/21, para 16.

⁴⁴In case *Lourdes da Silva Pimentel v Brazil*, CEDAW/C/49/D/17/2008.

⁴⁵CEDAW/C/OP.8/CAN/1 (summary of the inquiry concerning the Philippines, April 2015), CEDAW/C/OP.8/CAN/1 (report on the inquiry concerning Canada, March 2015) and CEDAW/C/2005/OP.2008/MEXICO. Documentation related to the Committee's Inquiry Procedures may be found at <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/InquiryProcedure.aspx>.

⁴⁶This period is covered in the analysis of these documents in various chapters of the CEDAW Commentary (M Freeman et al, n 14.). Therefore we have investigated in depth the period after 2010, in order to see whether major changes took place since that time.

⁴⁷A Byrnes (n 18) 60. See also C Chinkin and M Freeman, 'Introduction', in M. Freeman et al (eds) (n 16) 15–16; . Ernst, 'Review Essay: The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary' (2012) 13 *Melbourne J of Int L* 890, 906–909.

⁴⁸A Byrnes (n 18) 64.

⁴⁹A Byrnes (n 18) 64, mentions a few pre-2010 examples, such as CO Mexico, A/53/38 (Supp) Part I, 18th session (1998) para 420; CO Kyrgyzstan, A/54/38 (Supp) Part I, 20th session (1999) paras 127–128.

⁵⁰General Recommendations 27 and 28: CEDAW/C/GC/27, para 13 and CEDAW/C/GC/28, para 18.

Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. 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.⁵¹

Secondly, LGBTI issues are often addressed in the section of the Concluding Observations that deals with violence against women. In some of these Concluding Observations, these categories of women are mentioned in the context of violence against women belonging to vulnerable and disadvantaged groups. The Concluding Observations on Venezuela provide a typical example:

36. The Committee regrets the lack of effective measures taken to address discrimination and violence faced by disadvantaged groups of women, such as indigenous and Afro-descendant women, migrant women, older women, women with disabilities as well as lesbian, bisexual, transgender women and intersex persons, and other women facing multiple and intersecting forms of discrimination.

37. The Committee recommends that the State party adopt appropriate measures to address the particular needs of disadvantaged groups of women. The State party should provide comprehensive information and disaggregated data in its next periodic report on the situation of these women and the measures adopted to address their specific needs.⁵²

In other Concluding Observations, however, the Committee specifically addresses acts of violence against women on grounds of sexual orientation or transgender identities. The Concluding Observations on Albania are an example of this:

42. While welcoming the adoption of the Law on Protection from Discrimination, which expressly prohibits discrimination on the grounds of gender identity and sexual orientation, the Committee expresses concern about discrimination and acts of violence against women on such grounds.

43. The Committee calls on the State party to implement fully the Law on Protection from Discrimination in relation to discrimination based on gender identity and sexual orientation by providing effective protection against discrimination and violence against women on such grounds.⁵³

Similarly, in the Observations on Georgia, the Committee calls upon the state to take measures, specifically addressing ‘violence against and harassment of lesbian, bisexual and transsexual women’.⁵⁴ The examples of Albania and Georgia show that the Committee devotes particular attention to the protection of women who are discriminated against on the basis of their sexual orientation or gender identity. This notwithstanding, it should

⁵¹CEDAW/C/GC/28, para 18.

⁵²CO Venezuela, CEDAW/C/VEN/CO/7/8 (2014), paras 36–37; see also CO Argentina, CEDAW/C/ARG/CO/6 (2010), paras 43–44; CO Belarus, CEDAW/C/BLR/CO/7 (2011), paras 41–42; CO Paraguay, CEDAW/C/PRY/CO/6 (2011), para 12; CO Peru, CEDAW/C/PER/CO/7-8 (2014), paras 39–40.

⁵³CO Albania, CEDAW/C/ALB/CO/3 (2010), para 42–43; see also CO Georgia, CEDAW/C/GEO/4-5 (2014), paras 34–35; CO Uganda, CEDAW/C/UGA/CO/7 (2010), paras 43–44; CO Russian Federation, CEDAW/C/USR/CO/7 (2010), para 40; CO Zimbabwe, CEDAW/C/ZWE/CO/2-5 (2012) paras 23–24.

⁵⁴CO Georgia, CEDAW/C/GEO/4-5 (2014), para 35(e).

be noted that this attention is still dependent on the Committee's determination to combat violence against women *per se*, rather than on a broader equality-based approach.

Moreover, while mentioning discrimination or violence against LGBTI persons illustrates the concerns of the Committee on this topic, these references remain fairly gratuitous if they are not coupled with recommendations on how to actually end such discrimination. Most often, the Committee does not offer any such recommendation but merely declares that all women should be able to live without fear of violence.⁵⁵

Even considering the constraints under which the Committee needs to operate (such as the sensitivity of the issues it addresses), and while taking into account the cautious and respectful approach that it normally adopts in its recommendations to the state parties, still, the 'recommendations' seem to have the character of a formulaic recitation rather than specifically tailored to the circumstances of the particular state party. A recurring recommendation relates to the enactment of comprehensive anti-discrimination legislation that includes the prohibition of discrimination on the grounds of sexual orientation;⁵⁶ sometimes, the Committee (also) recommends the decriminalisation of same-sex relations as an additional measure.⁵⁷

Such advice is very broad and accordingly less likely to be effective than concrete, tailored and detailed recommendations. More concrete recommendations can, for example, be found in the Concluding Observations on the Russian Federation, Uganda, South Africa, and Zimbabwe. The Committee's (identical) advice in those instances includes 'launching a sensitization campaign aimed at the general public, as well as providing appropriate training to law enforcement officials'.⁵⁸ In the Concluding Observations on Panama, the Committee recommends fighting 'gender stereotypes . . . and violence on grounds such as sexual orientation and gender identity' with 'awareness-raising programmes in school curricula, the training of teachers and the sensitization of the media and the public at large, including actions specifically targeting men and boys'.⁵⁹

Other more specific advice can be found in the Concluding Observations on Singapore, where the country is invited to put in place 'a comprehensive strategy to modify or eliminate patriarchal attitudes and stereotypes that discriminate against women, including those based on sexual orientation and gender identity';⁶⁰ or in the observations on Norway, where the state is called upon to take 'specific measures to address difficulties faced by lesbian and transgendered asylum seekers'.⁶¹ These examples all go to show that there are indeed Concluding Observations in which the Committee, instead of mentioning only the rights of women who are discriminated against on grounds of sexual

⁵⁵See eg CO Argentina, CEDAW/C/ARG/CO/6 (2010), para 44. In the CO on Venezuela (CEDAW/C/VEN/CO/7/8 (2014), in para 37), the Committee asks the state party to adopt 'appropriate measures to address the particular needs of disadvantaged groups of women.'

⁵⁶CO Guyana, CEDAW/C/GUY/7-8 (2012), para 23(f); CO Paraguay, CEDAW/C/PRY/CO/6 (2011), para 13; CO Republic of Korea, CEDAW/C/KOR/7 (2011), para 15; CO Russian Federation, CEDAW/C/USR/CO/7 (2010), para 40; CO South Africa, C/ZAF/CO/4 (2011), para 40.

⁵⁷Eg CO Guyana, CEDAW/C/GUY/7-8 (2012), para 23(f); CO India, CEDAW/C/IND/4-5 (2014), para 11. The Committee also calls on Uganda to decriminalise 'homosexual behaviour': see CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 44.

⁵⁸CO Russian Federation, CEDAW/C/USR/CO/7 (2010), para 41; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 44; CO South Africa, C/ZAF/CO/4 (2011), para 40; CO Zimbabwe, CEDAW/C/ZWE/CO/2-5 (2012) para 24.

⁵⁹CO Panama, CEDAW/C/PAN/7 (2010), paras 22–23.

⁶⁰CO Singapore, CEDAW/C/SGP/CO/4 (2012), para 21(a).

⁶¹CO Norway, CEDAW/C/NOR/CO/8 (2012), para 36(d).

orientation or gender identity as a kind of *obiter dictum*, goes some way to provide state parties with specific recommendations aiming at eliminating discrimination on grounds of sexual orientation.

As regards the question of whether the Committee uses the normative framework of article 5a to address the discrimination or violence against LGBTI persons or to clarify the obligations of state parties in this regard, our findings hold that this is rarely the case. We have found six Concluding Observations in which the role of stereotypes in relation to the situation of lesbian women, bisexual, intersex or transgender persons was mentioned;⁶² in two of these a reference was made to articles 5a and 2(f).⁶³ An excellent example may be found in the Concluding Observations on Panama, in which the Committee writes that:

23. The Committee urges the State party to increase its efforts to design and strengthen comprehensive awareness-raising programmes to foster a better understanding of, and support for, equality between women and men at all levels of society. Such efforts should aim to modify stereotypical attitudes and cultural norms about the responsibilities and roles of women and men in the family, workplace, political life and society, as required under articles 2 (f) and 5 (a) of the Convention. The Committee also urges the State party to transform its recognition of the problem of multiple forms of discrimination into an overall strategy for eliminating gender stereotypes relating to women in general and, in particular, to discrimination against women as specified in paragraph 22. This strategy could include awareness-raising programmes in school curricula, the training of teachers and the sensitization of the media and the public at large, including actions specifically targeting men and boys.

III.iv. Preliminary conclusion

The attention that the CEDAW Committee devotes to LGBTI issues remains scarce in all categories of documents except for the Concluding Observations. Our analysis of the Committee's Concluding Observations since 2010 shows that sexual orientation and some forms of gender identity (most notably transgender) are mentioned in over one third of the documents concerning countries from all continents. The Committee, however, continues its cautious approach and has so far refused to take a clear stance on the question of whether the discrimination ground 'sex' in the Convention includes all identities captured under the LGBTI initialism. This notwithstanding, the Committee has at the same time gradually expanded the protection to lesbian, transgender, transsexual and intersexual persons by means of frequent references to discrimination or violence on these grounds. While many of these references are formulaic recitations rather than specific recommendations, this exploration does however also purport to show that some Concluding Observations do contain concrete recommendations that are specifically intended to help state parties combat discrimination on grounds of sexual orientation and gender identity. Such examples go to show that the Convention, to an increasing extent, is applied by the Committee to provide protection for women who are discriminated against because of their sexuality or gender identity.

⁶²CO Chile, CEDAW/C/CHI/5-6 (2012), para 17b; CO Finland, CEDAW/C/FIN/7 (2014), para 29; CO Netherlands, CEDAW/C/NLD/5 (2010), para 25; CO Panama CEDAW/C/PAN/7 (2010), paras 22–23; CO Serbia, CEDAW/C/SER/2-3 (2013), para 20; CO Singapore, CEDAW/C/SGP/CO/4 (2012), para 21.

⁶³Namely the Concluding Observations on the Netherlands and Panama.

Although the Committee rarely mentions article 5a in relation to discrimination or violence against these women, it does occasionally mention that the causes of such discrimination and violence lie in gender stereotypes that assign particular roles to women or that conceive of women as subordinate or inferior to men.⁶⁴ However, the Committee could make its Concluding Observations and General Recommendations much more persuasive, in our view, by exploring more deeply this link between discrimination against LGBTI persons and gender stereotyping and by developing specific guidelines as regards the obligations that state parties have to ‘eliminate’ these causes of oppression of and discrimination against LGBTI persons.

The question remains how the Committee could achieve a less erratic and ad hoc approach to this topic. Ernst proposes the adoption of a General Recommendation focusing on discrimination against women based on sexual orientation and gender identity, arguing that the Convention’s ‘prohibition of discrimination “in any field” ought to apply to their choice of life partner as well, and that they should not be forced by traditional gender roles into having a male partner.’⁶⁵ Another suggestion would be the elaboration by the Committee of a General Recommendation on article 5a in which it pays attention to the close link between gender stereotypes and traditional gender roles and the oppression of lesbian, bi-sexual, transgender, intersex and bisexual persons.⁶⁶

IV. Conclusion: Is It Wise to Use the Convention to Enhance LGBTI Rights?

In section II of this contribution, we argued that, from a legal point of view, it is possible to interpret the Convention in such a way that the discrimination and violence against LGTBI persons is brought within its scope. The analysis of the existing ‘jurisprudence’ of the Committee in section III shows that this possibility has not yet been fully utilised. The choice to use CEDAW (or not) for the purpose of enhancing LGBTI rights is also of a political and ideological nature. It is therefore important to also take the theoretical and strategic perspectives into account. We therefore conclude this article with a brief discussion of the pros and cons, or possibilities and problems, of trying to enhance LGBTI rights by means of bringing these categories under the scope of CEDAW.

IV.i. Some theoretical considerations

Although at a theoretical level it is acknowledged that CEDAW covers not only unequal treatment, but all forms of oppression that women experience in life because of their sex and gender,⁶⁷ the Convention aims at the elimination of *discrimination* (against women). The term discrimination in CEDAW has a wider meaning than merely *unequal* treatment of women as compared to men. Other forms of oppression, exclusion, and violence that are related to sex (ie to being a woman) are covered as well.⁶⁸ However, equality, equal

⁶⁴See CO Chile, CEDAW/C/CHI/5-6 (2012), para 17b; CO Finland, CEDAW/C/FIN/7 (2014), para 29; CO Netherlands, CEDAW/C/NLD/5 (2010), para 25; CO Panama CEDAW/C/PAN/7 (2010), paras 22–23; CO Serbia, CEDAW/C/SER/2-3 (2013), para 20; CO Singapore, CEDAW/C/SGP/CO/4 (2012), para 21.

⁶⁵J Ernst (n 47), 19.

⁶⁶A new General Recommendation on Article 5 is called for because General Recommendation 3 dates from 1987 and does not contain any clarification of States parties’ obligations under this provision. See R Holtmaat (n 8), 109.

⁶⁷See I Young (n 25).

treatment and non-discrimination remain central concepts in the interpretation and application of CEDAW.⁶⁹ This means that with any attempt to bring LGBTI rights concerning sexuality and gender identity under CEDAW, implicitly, a choice is being made to conceive of these rights mainly through the prism of ‘equality’ and ‘non-discrimination’. The demand for *equal* rights of the LGBTI movement once again shows that equality or the right to equal treatment continue to have a strong appeal to all organisations that strive to emancipate their constituency.⁷⁰ For example, the demands for the right to marriage, the right to custody over children or to establish family law ties with children, and the right to protection of private life of LGBTI persons, are often phrased as demands for *equal* rights in that regard. Is non-discrimination law indeed something that ‘we cannot *not* want to have’?⁷¹ Many legal theorists have profoundly doubted whether ‘rights can be rearticulated outside the traditional liberal legal framework without drawing us back into that framework.’⁷² When rights are constructed as equal rights, or rights based on the principle of non-discrimination, regardless of whether legal equality is seen as an anti-classification or an anti-subordination principle, it is most problematic⁷³ that this law is constructed around the notion of non-discrimination grounds. What then, are the classifications or groups that are thus reinstated and confirmed by this law?

Some considerations concerning ‘non-discrimination grounds’

Non-discrimination grounds are so-called identity factors: they refer to characteristics of (groups of) persons that, for various reasons, make these persons particularly vulnerable to oppression and exclusion. In non-discrimination law, the characteristics that are thus protected or that deserve strict (judicial) scrutiny are much debated. Various lists of criteria exist, in which most often the factors ‘history of persistent past and present discrimination’, ‘innate or immutable aspect of personal identity’, and ‘dignity’ are mentioned.⁷⁴ In particular, the notion of ‘innate or immutable characteristics’, like sex, race, colour, sexual orientation, is most problematic. Non-discrimination law, through that criterion, instead of conceiving of differences as features arising out of the inter-group relationships, considers them as inherent characteristics of the non-dominant group.⁷⁵ In that way, non-discrimination law is a ‘regulatory power’ that contributes to the creation of these (often submissive) identities and makes them even more inescapable for human beings.⁷⁶

In regard to LGBTI as a prohibited ground of non-discrimination, it is important to discuss to what extent a distinction can or should be made between sex as a non-discrimination ground and other categories or identities, such as gender, sexuality, and gender identity.⁷⁷ Is it at all possible to distinguish between these ‘identity factors’, or are they in fact so

⁶⁸See section II of this contribution.

⁶⁹This is illustrated in the text of the Convention where each substantive article stresses that the rights that women have under this Convention should be granted to them ‘on a basis of equality with men’. See on this issue A Byrnes (n 18), 61.

⁷⁰R Hunter, ‘Introduction: Feminism and Equality’, in R Hunter, *Rethinking Equality Projects in Law. Feminist Challenges* (Hart Publishing 2008), 8.

⁷¹In relation to claiming rights in the framework of liberal Western legal systems, Brown (n 12), 231 argues that – although being a mixed blessing and leading to many paradoxes – we cannot *not* want to have rights.

⁷²A Gross (n 34), 241.

⁷³On this difference between non-discrimination as an anti-classification and an anti-subordination principle, see J Balkin and R Siegel (n 15), from 9. See also A McColgan (n 15).

⁷⁴A McColgan (n 15), chapter 2.

⁷⁵See C Bacchi, ‘The Practice of Affirmative Action Policies; Explaining Resistances and how these affect Results’, in I Boer-eijn et al (eds) (n 16).

⁷⁶W Brown (n 12), 230–231.

closely related that they are inseparable, in as far as human beings' own experience of their personal identity is concerned? Do the categories of sex, intersexuality, and transgender refer to purely biological categories of 'being' of a particular 'kind' (and 'having' particular features like hormones and chromosomes – situated in the body), and does sexuality refer to 'feeling' and 'acting' or 'doing' (ie to behaviour)? Or does this distinction lead us away from the real issue, because all denominations of particular features of human existence are human 'acts' and 'performative', ie continuously contributing to their own (re)construction in a particular social, cultural, and economic context? In that regard, the question must be raised whether this division between *being* and *behaving* is not a false distinction in itself, denying that both categories are the result of and subjected to social and cultural constructions of the categories that are captured under the LGBTI initialism.

The discussion surrounding the construction of LGBTI persons' *equal* rights therefore requires a continuous, critical assessment of the meaning of the words ('grounds') that are central in that discussion, like 'sex', 'woman', 'man', 'sexuality', and 'gender'. How are these concepts constructed in social, cultural, legal, and political life, and in what 'power play' are feminist and LGBTI activists involved in when trying to shift the meanings and workings of these concepts? And, just as discussed above, it is not the case that human beings can never be pinned to just one clearly demarcated 'identity factor', but that subordination, exclusion, oppression, and discrimination, are determined by multiple factors, including wider cultural, social, and economic structures that determine people's life chances?⁷⁸

Some considerations concerning 'comparability', 'disadvantage' and 'justifications'

Apart from these theoretical problems concerning the choice, construction, and delineation of discrimination grounds, the application of existing equality or non-discrimination law also leads to complicated issues regarding the comparability, disadvantage, and possible justification of the unequal treatment. A whole legal doctrine has emerged over the past 50 years in which the 'equality analysis' or 'equality test' is developed in great detail.⁷⁹ The application of the equality principle, through the possibility of bringing forward justifications for the unequal treatment, opens the door for a discourse on conflicting rights and often results in the right to equality having to give way to other rights, most notably the right to religious freedom.⁸⁰

Claiming equal rights or, most importantly, the right to non-discrimination, also runs the risk of leading to assimilation to the existing dominant (in this case: heterosexual)

⁷⁷In European Union equal treatment law, the categories sex (including transsexuals) and sexual orientation are clearly distinguished and regulated in separate Directives with distinctive scopes of application and possibilities to justify inequality of treatment. Sexual harassment is regulated only in the context of European Union sex equality law, which leaves LGB persons unprotected against this form of discrimination. See R Holtmaat, 'Sexual Harassment and Harassment on the Ground of Sex in EU Law: a Conceptual Clarification' (2011) 2 *Eur Gender Equality L Rev* 4.

⁷⁸On intersectionality see K Crenshaw: 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine' (1989) *Feminist Theory and Antiracist Politics* 139.

⁷⁹See for a detailed analysis of this test J Gerards, *Judicial Review in Equal Treatment Cases* (Martinus Nijhoff Publishers, 2005).

⁸⁰See A Stuart, 'Without Distinction – A Defining Principle?', in E. Brems (ed), *Conflicts between Fundamental Rights* (Intersentia, 2008), 102; J Goldschmidt 'Het grotere gelijk: alternatieven voor een destructieve verabsolutering van het gelijkheidsbeginsel' (2004) 29 *NJCM-Bulletin* 782. The negative consequences of this discourse of conflicting rights have been examined by R Holtmaat: 'The Head of the Woman is the Man; The Failure to Address Gender Stereotypes in the Legal Procedures around the Dutch SGP', in Eva Brems and Alexandra Timmer (eds), *Stereotyping as a Human Rights Issue* (Antwerp, Intersentia forthcoming 2016).

norms.⁸¹ As Rubin points out, demands for equal rights of persons with a ‘different sexuality’, instead of creating real sexual liberty, at best leads to giving them the right to have sex in a safe surrounding of registered partnership or marriage, leaving all sexual relations outside these legal constructions in the categories of ‘deviant’, ‘abnormal’, or even ‘criminal’ forms of behaviour.⁸² This leads to the urgent question of whether it is necessary or desirable at all to use this existing legal equality or non-discrimination framework to enhance the protection of the (already existing!) human rights of LGBTI persons. In other words: why claim that LGBTI persons have an *equal* right to marry, instead of simply claiming that they have the right to marry *as such*?⁸³ Is it not true that *all* human beings have the right to marry, the right to family life, the right to be free from violence, the right to freedom of expression – including expression of their sexual and gender identity, etc? Why not continue on the road of the Yogyakarta Principles and claim that these existing human rights will finally be applied to all human beings?⁸⁴

IV.ii. *Some strategic issues*

A last, but certainly not least important, dimension of the question of the instrumental value of CEDAW for the purposes of enhancing LGBTI rights is strategic: what are the possible positive and negative effects of such a strategy? Theoretical concepts and constructs like ‘gender’ or ‘gender identity’ are developed as tools for a critical assessment of existing unequal power relations between the sexes and of forced heteronormativity and can be used in the context of emancipatory projects. Our main concern at this juncture is that they can also be used by powerful (often religious) groups to organise resistance against any changes in the unequal relationships between the sexes and against changes regarding forced heteronormativity, and thus can become useless or even damaging for these same emancipatory projects. What repression or opposition may be expected, in particular from the religious right in the world, when any such an attempt is made?⁸⁵ Would that opposition also damage the enhancement of ‘women’s human rights’ to such an extent that we should not go down this route? Or is it more important that we can escape from the detrimental effects of the asymmetrical approach when we leave the paradigm of ‘women’s rights’ behind us?⁸⁶ On the other hand: would a shift to a symmetrical approach not bring us from bad to worse, as this would mean that the m/f comparator model of sex equality is thereby adopted, with all its assimilationist effects? Answering these questions is beyond the

⁸¹A Gross (n 34), 246–247, who discusses this problem in relation to demanding same-sex marriage.

⁸²G Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’, in CS Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge 1984) 267. See also A Gross (n 34) 246–247, who holds that demanding the equal right to marry ‘reinforces the message that marriage is the ultimate form of human relationship, whether different sex or same-sex’, and that ‘this message is discriminatory towards all who do not participate in it.’

⁸³Of course, these rights have to be expressly claimed by LGBTI persons because they have historically been, and still continue to be, denied to them in all cultures and all legal systems. There is an important role to be fulfilled by the judiciary and the treaty bodies in interpreting these (universal) rights in such a way that they are truly inclusive, ie are truly granted to *all* human beings. An overview of ways in which courts and treaty bodies have done so can be found in A Byrnes, ‘Gender Challenges for International Human Rights’, in S Shearan and N Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge, 2014) 631–633.

⁸⁴The Yogyakarta Principles have been described in detail in M O’Flaherty’s contribution to this issue.

⁸⁵For a discussion of this resistance in relation to the concept of gender, see J Scott, ‘The Uses and Abuses of Gender’ (2013) 16 *Tijdschrift voor Genderstudies* 63.

⁸⁶The argument was advanced by D Otto (n 10).

exclusive competence of lawyers, and requires an in-depth study from political scientists and other social science disciplines as well. We hope that this article contributes to having this discussion.

We would also like to devote a few final words to the proposals that were made in order to either shift from an asymmetrical to a symmetrical approach ('unisexing CEDAW'; Rosenblum⁸⁷) or to explicitly extend the scope of CEDAW to cover the elimination of all forms of discrimination against LGBTI persons ('supersexing CEDAW'; Hernández-Truyol⁸⁸). In our view, Rosenblum's main reason to unisex CEDAW (ie in order to give rights to LGBTI persons), is not a convincing argument to change the non-discrimination ground of the Convention from 'women' to 'sex'. A prohibition of discrimination on the grounds of sex is commonly interpreted in a strictly binary or bipolar scheme in which the (presumably essential) male and female sexes are compared with one another; only when one of the two sexes suffers a certain disadvantage for which there is no objective justification, this non-discrimination norm becomes applicable. The vast (feminist) literature in the area of sex equality rights shows the strong tendency towards assimilation to the male norm that is inherent in any formal sex-equality norm.⁸⁹ Besides, a 'gender neutral' sex equality norm suffers from the danger – exemplified in eg the practice of EU sex equality law – that very often men appeal to this norm in order to claim the advantages women might have over them (eg in the area of protection of motherhood).⁹⁰ The result of such legal actions then is to water down these entitlements, leaving men and women without these advantages. Apart from this practical problem, there is also the ideological obstacle which holds that changing the understanding of sex to include 'other sexes' and sexualities, as is suggested as the solution to this problem by Rosenblum, might appear to be as difficult and controversial as acknowledging that differences between men and women are culturally and socially constructed instead of 'natural' or 'God-given'.

In reaction to Rosenblum's proposal, Hernández-Truyol suggests the adoption of a second optional protocol to CEDAW in which principles similar to the Yogyakarta Principles are laid down in order to 'super-sex' CEDAW, thereby expressly including the rights of LGBTI persons under the Convention.⁹¹ To our mind, this proposal is also rather unrealistic. Progress in the area of creating international instruments that guarantee the human rights of LGBTI persons is very slow. Like Garvey has demonstrated in his article on the history of the Brazilian Resolution that aimed to enhance LGBTI rights, any such attempt may invoke so much resistance that progress is blocked, instead of enhanced.⁹² Garvey therefore argues in favour of enhancing these rights through the slow and piecemeal judicial process, instead of through the creation of new international law documents.

⁸⁷D Rosenblum (n 19).

⁸⁸B Hernández-Truyol (n 19).

⁸⁹Critical assessments of the very limited or adverse instrumental value of liberal and formal equality law are abundant. See eg S Fredman, *Discrimination Law* (OUP, 2011), in particular from 8. Increasingly, it is acknowledged that replacing the notion of formal equality with that of substantive equality will also 'not deliver the goods'. See eg R Hunter, 'Introduction: Feminism and Equality' 8; R Hunter, 'Alternatives to Equality', and K van Marle, 'Haunting (In)equalities', all in R Hunter (n 70).

⁹⁰See above in section II, where we discuss the effect of a symmetrical sex equality norm.

⁹¹B Hernández-Truyol (n 19) 220.

⁹²T Garvey, 'God v. Gays? The Rights of Sexual Minorities In international Law as seen through the Doomed Existence of the Brazilian Resolution' (2010) 38 *Denver J of Int L and Policy* 659.

An Optional Protocol to CEDAW would have to be negotiated at the highest level within the UN and would take years and years – if ever – to materialise. More realistic proposals are to adopt a CEDAW General Recommendation on this topic or – perhaps even more feasibly – to adopt a General Recommendation specifically on article 5a and include an analysis of the link between gender stereotypes and gender roles and LGBT-discrimination into that document. However, as was testified by former Committee vice chair Neubauer at the Oslo Conference, also within the CEDAW Committee itself, it is very difficult to overcome the strong and persistent resistance against using the concept of gender and, even more so, to explicitly address LGBTI issues. Hence, an adoption of such a General Recommendation will probably also take years. To us, the most realistic (though slow) way forward therefore seems to be to encourage state parties and non-governmental organisations to include discussions of discrimination against LGBTI persons in Country Reports and Shadow Reports to the Committee, thereby inviting the Committee to reflect on LGBTI discrimination. The Committee can (and should) more often and more openly acknowledge in its Concluding Observations that discrimination of LGBTI persons is structurally connected to women's discrimination, in particular through the phenomenon of gender stereotyping and gender roles. Reports of such discrimination can be used by the Committee to address this problem in its Concluding Observations.

One example of how this can be done is a shadow report on Singapore that was submitted to the Committee in 2010. In the report, written by Singaporean gay rights' NGO Sayoni, the problems faced by lesbian, bisexual, and transsexual women were addressed.⁹³ This resulted in numerous questions by members of the Committee,⁹⁴ and, eventually, in the aforementioned call on the country to put in place 'a comprehensive strategy to modify or eliminate patriarchal attitudes and stereotypes that discriminate against women, including those based on sexual orientation and gender identity'.⁹⁵ This is just one example indicative of the instrumentality of shadow reports in addressing LGBTI discrimination. Based on such Concluding Observations, the Committee can then in the future prepare a General Recommendation on this topic, along the lines suggested above.

Circling back to our position on the question of whether it is desirable and/or feasible to enhance the human rights of LGBTI persons by means of an extensive interpretation of CEDAW, we tend to be rather cautious. CEDAW does, in theory, offer some possibilities to do so. But the end result of such a strategy might be contra productive or regressive, both in terms of the rights of women and those of LGBTI persons. A step-by-step recognition by the CEDAW Committee that there is a crucial connection between gender discrimination and discrimination of LGBTI persons seems to be the best way forward.

⁹³This shadow report is available at the organisation's website, see http://www.sayoni.com/index.php?option=com_jdownloads&Itemid=97&task=viewcategory&catid=5http://www.sayoni.com/index.php?option=com_jdownloads&Itemid=97&task=viewcategory&catid=5.

⁹⁴CEDAW Committee, 39th Session, Summary Record of the 803rd meeting. Consideration of reports submitted by States parties under article 18 of the Convention (third periodic report on Singapore). Cedaw/C/SR.803 (A).

⁹⁵CO Singapore, CEDAW/C/SGP/CO/4 (2012), para 21(a).