SEXUAL ORIENTATION, GENDER IDENTITY & CEDAW ARTICLE 16: AN ANTI-ESSENTIALIST PROPOSAL

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ABSTRACT

Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") addresses women's rights to make decisions regarding marriage and family life, including reproductive choices. Article 16 is controversial, as many countries which have adopted CEDAW posit that Article 16 infringes on cultural and religious beliefs. Although Article 16 makes positive strides toward broadening women's autonomy, it may fall short in failing to account for sexual orientation and gender identity. This article proposes efforts to make Article 16 more inclusive of LGBTI issues.

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I. INTRODUCTION

In the four decades since the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), Article 16, which concerns women's rights in marriage and family matters, remains controversial. States parties to the treaty most frequently reserve Article 16, typically citing conflict with religion, culture and family codes.[1] For example, some states criminalize abortion and contraception, and maintain that acceptance of Article 16 would provide women with the freedom to use either method to engage in reproductive choices.[2] The reluctance of traditional or fundamentalist governments to extend these rights can result in grave consequences for women who face discrimination due to

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[1] *See* United Nations Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13. [hereinafter CEDAW].

[2] *See, e.g.*, United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations at 7, 9, 11, 13 (Apr. 10, 2006), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/309/97/PDF/N0630997.pdf?OpenElement (listing state reservations to Article 16 based on religion and family codes) [hereinafter *CEDAW Declarations, Objections and Notifications of Withdrawal of Reservations*].

sexual orientation or gender identity. Gender and sexuality discrimination are born of the patriarchal structures which CEDAW aspires to combat, and must not be swept aside in efforts to expand ratification of Article 16.

CEDAW is an international treaty adopted by the United Nations ("UN") General Assembly, which provisions are binding upon states that ratify the treaty ("states parties").[3] CEDAW defines practices that constitute discrimination against women and promulgates recommendations for states parties to counter this discrimination.[4] CEDAW further endeavors to extend human rights to women through the removal of barriers to participation in society due to gender inequality.[5] It advises states parties to take affirmative measures to identify gender discrimination in their societies and address the issue through legislation and community initiatives.[6]

CEDAW also enumerates areas in which states parties should ensure women's equal access and freedom.[7] For example, CEDAW broadly addresses access to employment, the right to political participation, and the right to make marital and family choices.[8] Article 16 advises states parties to take measures to ensure that women and men have equal rights in choosing a spouse and ending a marriage, equal rights and responsibilities in childrearing, guardianship, wardship and adoption of children, and equal property rights to their male partners.[9] It further mandates that states parties set a minimum legal age for marriage, outlaw child marriage, and maintain a registry of records of all marriages within the state.[10]

Although Article 16 expands women's autonomy and undercuts gender discrimination, it falls short in countering discrimination based on sexual orientation and gender identity. This article argues that CEDAW must be construed to more effectively encompass the rights of lesbian, gay, bisexual, transgender and intersex ("LGBTI") individuals. It further posits that Article 16 currently skews toward heteronormativity by contemplating a traditional nuclear family, monogamous couples, and a gender binary, which runs counter to CEDAW's goals of inclusivity, considering lesbian, bisexual and non-monogamous women. It concludes by proposing that the UN revise the language of CEDAW through another convention, or, in the alternative, promulgate recommendations advocating for more explicit implementation of measures which protect lesbian and bisexual women, and those who otherwise do not conform to the traditional family structure. The Yogyakarta Principles, which address human rights with respect to sexual orientation and gender

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[3] CEDAW, *supra* note 1.
[4] *See id.*
[5] *See id.*
[6] *See id.*
[7] *See id.*
[8] *See id.*
[9] *Id.*
[10] *Id.*

identity, offer guidance for drafting and implementing measure in a way that adequately accounts for these marginalized groups.

Part II provides an overview of CEDAW's history, states parties' reactions to Article 16, and the state of LGBTI rights in international human rights law. Part III analyzes CEDAW's shortcomings in countering discrimination based on sexual orientation and gender identity. Part IV explores potential solutions to expand Article 16's reach with respect to issues of sexual orientation and gender identity. Part V concludes with a call to action for the CEDAW Committee to begin considering LGBTI issues in drafting and implementation of anti-discrimination treaties.

II. BACKGROUND

A. Illustration of CEDAW and Article 16

1. History of CEDAW

The UN General Assembly adopted CEDAW in 1979, defining discrimination against women and committing to its elimination.[11] It defined discrimination as the distinction, exclusion or restriction on the basis of sex, with the purpose or effect of impairing women's exercise of fundamental rights.[12] This extends to activities in the "political, economic, social, cultural, civil, or any other field."[13] CEDAW focuses largely on formal equality, encouraging measures such as voting and property rights for women.[14] Currently, 189 countries have ratified the treaty.[15]

The Committee on the Elimination of Discrimination Against Women ("Committee") monitors the implementation of CEDAW, as laid out in Articles 17 to 30 of the Convention. It is comprised of twenty-three experts nominated by their governments and elected by the states parties to CEDAW.[16] Pursuant to this authority, the Committee requires states parties to submit reports indicating measures they have taken to effectuate CEDAW, analyzes these reports, and makes general recommendations to states parties as to implementation.[17]

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[11] *See id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* Notably, the United States is not one of these countries.
[16] *See id.*
[17] *See id.*

In 1999, the UN General Assembly revisited CEDAW with a conference to institute further mechanisms to effectuate it. [18] This resulted in the promulgation of the Optional Protocol. [19] The Optional Protocol contains twenty-one articles, providing for private causes of action for victims of violations of CEDAW.[20] Specifically, an individual may submit a complaint to the Committee, claiming that a state party has violated CEDAW.[21] If all domestic remedies have been exhausted, the Committee may review the complaint.[22] If the Committee finds that the state has committed a violation, it may invite the state to submit a written response or demonstrate the measures it has taken to address the violation.[23] While states may not reserve any portion of the Optional Protocol, they may denounce it by submitting a written notification to the Committee.[24] The Optional Protocol attempts to bridge a gap left by the initial provisions of CEDAW, under which governments could be held accountable, but the actions of private individuals were largely unchecked.[25]

By creating an avenue for submission of complaints, the Optional Protocol allows women challenge state inaction with respect to private parties. [26] This remedy recognizes that a significant aspect of women's subordination is a result of abuse by men, rather than a result of the formal limitations placed by the government. For example, women have submitted complaints regarding domestic violence, asserting that the state party failed to take measures to address the issue through the criminal justice system.[27]

The Committee also revisited its General Recommendations in 2017.[28] It updated the Recommendations, adding No. 35, which addressed gender-based violence.[29] Notably, the Committee stated that prohibition of gender-based violence was customary international law, and thus applies to

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[18] *See* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Oct. 6, 1999, 2131 U.N.T.S. 83, https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx.
[19] *See id.*
[20] *See id.*
[21] *See id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *See Why an Optional Protocol?*, UN WOMEN, https://www.un.org/womenwatch/daw/cedaw/protocol/why.htm (last visited Oct. 26, 2020).
[26] *Id.*
[27] *See, e.g.*, AT v. Hungary, CEDAW Communication No. 2/2003 (Jan. 26, 2005), https://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/Case2_2003.pdf.
[28] *See Launch of CEDAW General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, https://www.ohchr.org/en/hrbodies/cedaw/pages/gr35.aspx (last visited Apr. 10, 2020).
[29] *See id.*

all states and not solely those parties to CEDAW.[30] Like the Optional Protocol, this advancement identifies violence against women as a human rights violation, irrespective of whether it occurs in the private sphere or at the hands of the government.[31] It similarly calls for states to provide remedies for women and girls who are victims of gendered violence, and for the repeal of laws and policies which excuse, condone, or facilitate such violence.[32]

2. Article 16

As noted, Article 16 of CEDAW pertains to women's freedom of choice in matters of marriage, family and reproduction.[33] This is a key focus, as the preamble to CEDAW expressly notes women's role in procreation as vital.[34]

Article 16 provides:[35]

> 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;

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[30] *Id.*
[31] *See id.*
[32] *Id.*
[33] *See* CEDAW, *supra* note 1, at art. 16.
[34] *See* CEDAW, *supra* note 1, at prmbl.
[35] CEDAW, *supra* note 1, at art. 16.

> (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 marriages in an official registry compulsory.

Article 16 has led some states parties to revise or repeal laws in order to comport with its obligations. Morocco's family code, for example, initially made married women legally subordinate to their husbands.[36] Morocco ratified CEDAW in 1993, but maintained several reservations to Article 16 based on this conceptualization of marital relationships.[37] After years of efforts by women's rights activists, Morocco began making changes to its laws, such as raising the legal age of marriage from fifteen to eighteen years old, restricting polygamy, and establishing family courts to enforce these laws.[38] In 2008, the king of Morocco officially lifted all reservations to CEDAW.[39] This action indicates Article 16's influence on political change.

3. Critiques and Effect of Reservations

CEDAW faces critiques from both ends of the political spectrum. Advocates of traditional family structure and gender roles may view women's liberation as a threat, while some progressive gender scholars argue that an asymmetrical approach to women's equality does not adequately address gender- and sexuality-based oppression.[40] Due to the clash between some provisions of CEDAW and states parties' cultures, states may opt to reserve certain provisions. A reservation means that the state does not agree to be bound by the provision. For example, many states reserve Article 29, paragraph 1, which provides that a dispute between two or more states parties regarding the application of CEDAW may be submitted for arbitration or

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[36] *See* INT'L CTR. FOR RSCH. ON WOMEN, THE GLOBAL IMPACT OF THE CONVENTION OF THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 15 (2010), https://www.icrw.org/wp-content/uploads/2016/10/Recognizing-Rights-Promoting-Progress-CEDAW.pdf.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *See generally* Darren Rosenblum, *Unsex CEDAW, or What's Wrong with Women's Rights*, 20 COLUM. J. GENDER & L. 98, 99 (2011).

heard by the International Court of Justice at the request of any party involved.[41] States which reserve this article thereby exempt themselves from enforcement of CEDAW by other states.[42]

Article 16 is the most frequently reserved provision of CEDAW.[43] States reserve this article for a range of reasons. For example, Article 16 may conflict with religious systems of law by which certain states are governed.[44] Other states may reserve Article 16 because women already receive preferential treatment under certain family laws, and they view elevating the rights of men as inconsistent with the purpose of CEDAW.[45]

A. International LGBTI Rights

1. History and Current Jurisprudence

The recognition of LGBTI rights as universal human rights remains controversial, as many states resist extending existing human rights to groups that they deem immoral or contrary to their culture. Currently, no UN human rights treaty contains an express reference to sexual orientation.[46] This means that any treaty obligation with respect to sexual orientation must be based on interpretations by Human Rights Committee ("HRC"), which are regarded as authoritative, though not legally binding.[47]

The HRC noted that discrimination on the basis of sexual orientation is impermissible to some extent, adopting a resolution in 2011 expressing concern regarding violence due to sexual orientation.[48] However, this recognition has not translated into equivalent rights in all realms. For example, while the HRC has not explicitly addressed whether same-sex couples can establish a family, it held in a 2002 decision, *Joslin et al. v. New Zealand*, that states are not required to allow same-sex couples to marry.[49] LGBTI rights are thus sparse in the realm of home and family. In general, the HRC has interpreted the concept of "family" broadly, acknowledging unmarried couples and single parents with children as families.[50] Article 23 of the International Covenant on Cultural and Political Rights ("ICCPR") provides

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[41] CEDAW, *supra* note 1, at art. 16.
[42] *See id.*
[43] *See id.*
[44] *Id.*
[45] *Id.*
[46] *See* Dominic McGoldrick, *The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law*, 16 HUM. RTS. L. REV. 613, 627 (2016).
[47] *See id.*
[48] *See id.* at 619.
[49] *See id.* at 629.
[50] *Id.*

that when a group is recognized as a family, society and the state must provide protections for that group.[51]

2. Yogyakarta Principles

In 2007, a group of human rights experts established the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity ("Yogyakarta Principles").[52] These experts recognized that many individuals around the world experienced human rights violations such as violence, criminalization and death due to gender identity or sexual orientation.[53] Many perpetrators of these violations were agents of the state, or went unpunished by the state.[54] The drafters intended the Principles to thoroughly outline the human rights violations experienced by persons of diverse sexual orientations and gender identities, and to advise states of their obligations in this realm.[55]

There were initially twenty-nine Principles.[56] Principles 1 through 3 reinforce the universality of human rights law, reiterating that it applies to all persons without discrimination.[57] Principles 4 through 11 note the fundamental rights to life, freedom from torture, privacy, access to justice and freedom from arbitrary detention.[58] The remaining Principles cover a range of rights, including the right to services such as education, healthcare and social security, the right to participate in family life and cultural affairs free from discrimination, and the right to association and assembly with others.[59] They conclude by calling for redress for victims of human rights violations based on gender identity and sexual orientation.[60]

In 2017, ten years after the adoption of the original twenty-nine principles, the International Service for Human Rights and ARC International collaborated to select a committee to draft an addition to the Yogyakarta

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[51] *Id.*
[52] *See Introduction to the Yogyakarta Principles*, THE YOGYAKARTA PRINCIPLES, https://yogyakartaprinciples.org/introduction/ (last visited Apr. 10, 2020).
[53] *See id.*
[54] *See id.*
[55] *See id.*; Michael O'Flaherty, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles,* 8 HUM. RTS. L. REV. 207, 231-33 (2008).
[56] *See Introduction to the Yogyakarta Principles, supra* note 52.
[57] *See id.*
[58] *Id.*
[59] *Id.*
[60] *See id.*

Principles.[61] The committee, comprised of selected experts, met in Geneva, Switzerland to add nine more Principles and reiterate state obligations.[62]

The panel began with a preamble, noting that the development of human rights law and jurisprudence relating to gender identity and sexual orientation will require ongoing revisions and additions to the principles.[63] The new principles were the rights to state protection, legal recognition, bodily and mental integrity, freedom from criminalization and sanction on the basis of sexual orientation or gender identity, protection from poverty, sanitation, enjoyment of human rights in relation to information and communication technologies, truth, and cultural diversity.[64] The update also includes additional obligations of states in order to comply with the original twenty-nine principles.[65] It concludes by recommending that human rights institutions ensure that issues relating to sexual orientation and gender identity are brought into mainstream programs and education.[66]

The Yogyakarta Principles tie established human rights such as health, education and participation in society to sexual orientation and gender identity.[67] They identify ways in which LGBTI individuals may be deprived of these rights, and propose that this is impermissible in light of the idea of universal human rights.[68] They further advise states to take measures to eliminate formal inequality, hold perpetrators of human rights abuses accountable, and promote public awareness of the issue through comprehensive education and training.[69]

Upon the initial launch of the Yogyakarta Principles, many states expressed support.[70] More than thirty states made positive interventions at the UN Human Rights Council ("HRC") regarding sexual orientation and gender identity issues.[71] Seven states specifically urged UN bodies to consult the Yogyakarta Principles.[72]

The Yogyakarta Principles have also attracted criticism from conservative and religious groups. For example, the Catholic Family and Human Rights Institute provided briefing to the UN, contending that the

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[61] *See The Yogyakarta Principles Plus Ten*, THE YOGYAKARTA PRINCIPLES (Nov. 10, 2017), https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf. [hereinafter *Yogyakarta Principles Plus Ten*]

[62] *See id.*

[63] *See id.*

[64] *Id.* at princ. 8-16.

[65] *See Yogyakarta Principles Plus Ten, supra* note 61.

[66] *Id.*

[67] O'Flaherty, *supra* note 55.

[68] *See id.* at 235.

[69] *See id.*

[70] *Report on the Launch of the Yogyakarta Principles*, ARC INT'L, http://arc-international.net/yogyakarta-principles/report-yp-launch/ (last visited Apr. 10, 2020).

[71] *Id.*

[72] *Id.*

Yogyakarta Principles would undermine families, freedom of speech, religious freedom and national sovereignty, and encourage sexual immorality.[73] Additionally, states have objected to the citation of the Principles in certain UN body reports.[74] Egypt, for example, argued that the incorporation of the Yogyakarta Principles into mainstream human rights law conflicts with the national religion and culture of many states.[75] Issues of sexual orientation and gender identity remain controversial in the international community as a whole, which is comprised of many states in which religion plays a significant role in government.

Feminist groups have similarly critiqued the Yogyakarta Principles. Namely, women's rights activists have claimed that the Principles should expressly mention women, as lesbian women face specific forms of discrimination and mistreatment based on their sexual orientation.[76] They argue that the erasure of women and their specific challenges makes the Principles insufficiently inclusive.[77] Additionally, the Principles may not extend broadly enough in their protection of LGBTI people. For example, they contain no right to non-heterosexual marriage.[78] As marriage carries significant weight in many societies, exclusion from the institution can result in social stigmatization and lack of access to certain benefits.

III. ANALYSIS: ARTICLE 16'S CONSTRUCTION AND INFLUENCE ON LGBTI INDIVIDUALS

Article 16 of CEDAW undeniably addresses issues that impact women as a whole, as decisions relating to marriage and family can dramatically impact women's lives and liberty. Recognizing its advancements, however, it still may fall short of CEDAW's goals of inclusion and liberation for all women. Specifically, Article 16 fails to adequately account for the experiences of queer[79] women, and how they may face unique challenges in matters of marriage and family life.

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[73] *See* O'Flaherty, *supra* note 55, at 247.

[74] *See* McGoldrick, *supra* note 46, at 632.

[75] *See id.*

[76] O'Flaherty, *supra* note 55 (noting that the omission of women from the Principles may "detract[] from the capacity of the document to forcefully address problems confronting lesbians in numerous countries").

[77] *See id.* Note that such critiques tend to stem from trans-exclusionary radical feminist groups. *See, e.g.*, *Yogyakarta Principles: International Threat to Women's Rights*, OBJECT (July 27, 2018), https://objectnow.org/2018-7-27-yogyakarta-principles-international-threat-to-womens-rights/. These groups do not advance progressive or intersectional ideals, but rather endeavor to delegitimize transgender and non-binary individuals through misinformation and unfounded fear-mongering. *See id.*

[78] *See generally Yogyakarta Principles Plus Ten, supra* note 61.

[79] "Queer" here is used an inclusive, umbrella term for identities such as lesbian, bisexual, pansexual, and asexual.

Section III.A begins by outlining common problems faced by queer women, such as inability to marry a partner of their choosing, preclusion from adoption, and prevention from safe participation in society due to anti-LGBTI laws.[80] Section III.B analyzes how the plain text of Article 16 fails to account for these particular issues but rather contemplates heterosexual, monogamous marriage and a nuclear family.[81] It proceeds to analyze how even gender-neutral provisions, which could be construed to benefit queer women, are not implemented in an inclusive way.[82] Section III.C acknowledges the efforts of right-wing fundamentalists to prevent inclusion of LGBTI individuals in human rights, and counters that exclusion on this ground is incompatible with the UN Human Rights Charter.[83]

A. Home and Family Issues Through LGBTI Lens

As noted, LGBTI individuals may face barriers to attainment of certain human rights relating to family life, due to states' failure to recognize certain relationships as legitimate. For example, the HRC's decision to allow states to prohibit same-sex marriage means that states may divest non-heterosexual couples of the right to qualify as a family, and thus to be subject to rights protecting family units.[84] The prohibition of marriage impacts the freedom to choose whether to have children as well, as states also may prohibit adoption by unmarried individuals. Thus, states need not explicitly discriminate on the basis of sexual orientation in order to limit the rights of this group.

The absence of treaty obligations mandating comprehensive rights for LGBTI individuals has created a gap in human rights law with respect to marriage and family. This is an opportunity for the CEDAW Committee to take steps toward bridging this gap, by explicitly noting the inequality that results from exclusive contemplation of heterosexual marital relationships when drafting human rights law. The goal of CEDAW is to counter discrimination against women, which includes queer women. The Committee has a duty to continuously consider how to further women's human rights. This requires confronting intersectional issues.

B. Article 16 Limitations

The interplay of women's human rights and LGBTI rights is nuanced. While many women's rights advocates support LGBTI rights, asserting that

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[80] *See infra* Section III.A.
[81] *See infra* Section III.B.
[82] *See id.*
[83] *See infra* Section IV.C.
[84] *See* McGoldrick, *supra* note 46, at 629.

sex-based discrimination encompasses sexual orientation and gender identity, others do not adopt such a broad view. This may be due to fears that extending women's rights to more groups will minimize the unique struggles of women, or simply that the inclusion of LGBTI rights will alienate states which would otherwise accept women's rights treaties. For example, in the Fourth World Conference on Women in 1995, the drafting committee for the Platform for Action expressly referenced sexual orientation discrimination, due largely to the efforts of lesbian human rights advocates.[85] However, this language was eventually removed in the final draft, leaving sexual orientation status to be read into other expressly mentioned protections.[86]

Article 16, as drafted and in the context of CEDAW as a whole, falls short of serving queer women in several key ways. Namely, it maintains essentialist notions of gender, tying women to maternity, and contemplates traditional two-parent, heterosexual family structures. CEDAW's Preamble explicitly refers to the "social significance of maternity" and the "role of women in procreation" as qualities which should not be a basis for discrimination.[87] While true that women's role in procreation and childrearing should not disadvantage them, this language tends to reinforce essentialist attitudes toward womanhood. In particular, it echoes traditional sentiments that women have a natural role in procreation, which glosses over not only women who cannot reproduce with their partners, but also women who do not wish to have children.[88] In addition, Article 16 refers to granting the same rights "as husband and wife," and "both spouses," again tending to reinforce the heterosexual two-parent family.[89]

While Article 16 grants equality to women in matters of marriage, procreation and childrearing, some states have reserved it on the basis that their current laws provide more power to mothers in certain situations. Ireland, for example, reserved subsections (1)(d) and (f) of Article 16 to maintain its laws with respect to the guardianship, adoption and custody children born out of wedlock.[90] Ireland stated that the extension of identical rights to men was not necessary to further the objectives of the Convention.[91] Other states, such as Micronesia, reserved Article 16 to the extent that it would require the government to interfere with individuals' private and consensual conduct in

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[85] *See* Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 89 (1996).
[86] *See id.*
[87] CEDAW, *supra* note 1, at prmbl.
[88] *See generally* Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J. L. & GENDER 57 (2012).
[89] *See* CEDAW, *supra* note 1.
[90] *See id.*
[91] *See* CEDAW Declarations, Objections and Notifications of Withdrawal of Reservations, *supra* note 2.

continuing traditional marital roles.[92] These reservations evidence a trend of states declining to extend international law into the private sphere, which continues to pose a barrier to women's rights. Irrespective of whether the reservations grant women more or fewer rights, they are based on traditions and stereotypes as to women's appropriate role in a family. Reservation of Article 16 reflects traditional views toward women as natural caregivers of children and does not translate to families that diverge from the heterosexual nuclear structure.

Finally, Article 16, and CEDAW as a whole, measures women's rights through a touchstone of equality to men. Specifically, Article 16 states that the enumerated rights relating to marriage and family shall be conferred "on a basis of equality of men and women."[93] This framing is troubling in two ways. First, it reinforces a gender binary by contemplating only men and women, overlooking the existence of individuals who identify as another gender, or no gender at all. Second, it does not guarantee rights to queer women, because they are contingent on whether the same rights are extended to men. For example, the freedom to choose a spouse may be limited to heterosexual relationships because men may have no right to a same-sex spouse either. Such an outcome arises in HRC's interpretation of other treaties, such as the ICCPR, which found that states need not allow same-sex marriage.[94] In particular, the HRC interpreted Article 23, which grants protection to groups regarded as families, as encompassing only heterosexual marriage because it refers "men and women" rather than a gender-neutral term.[95] The HRC determined that this language created a state obligation only to recognize unions between a man and a woman. This interpretation is one illustration of the way that women's liberation may be hindered by tying it to the rights of men.

C. Opposition to Broadening Article 16

Scholars have recognized the challenges resulting from the conceptualization of women's human rights within this binary.[96] They stress that although CEDAW largely frames women's rights in the context of equality to men, the whole of the treaty strives for eradication of the causes of women's oppression.[97] Consistent with the goal of eliminating discrimination against women is the shift toward gender-neutral drafting of treaties.

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[92] *See id.*
[93] CEDAW, *supra* note 1.
[94] *See* McGoldrick, *supra* note 46, at 628.
[95] *See id.* at 629.
[96] Rikki Holtmaat & Paul Post, *Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?*, 33 NORDIC J. HUM. RTS. 319, 322 (2015).
[97] *See id.*

Some women's rights advocates have pushed back against a gender-neutral remedy, arguing that women's progress requires an asymmetrical approach. They posit, as recognized in CEDAW's preamble, that sex discrimination impacts primarily women. Accordingly, "the more gender-neutral or gender-blind a particular 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."[98] This idea stems in part from the realities of power dynamics, in particular, that because women tend to be the marginalized group, laws must specifically target the structures which subordinate them.[99]

While gender inequality may primarily impact women, it also extends to individuals of other gender identities. Gender stereotypes in home and family life disadvantage both men and women by cementing gender roles.[100] For example, the stereotype that men should not be involved in childrearing is damaging to women. These issues are compounded in non-traditional family situations, such as those with same-sex parents, single parents, or more than two parents. In recognition of the limitations of the asymmetrical, binary framework, some scholars propose "unsexing" the language of CEDAW, making it gender-neutral.[101] This approach would further CEDAW's goals of eliminating gender-based discrimination and more effectively include LGBTI individuals.

IV. LOOKING FORWARD

There are several potential avenues to address the inequity resulting from Article 16's drafting and implementation. This section discusses the options of redrafting the article, and the issuance of recommendations by the CEDAW Committee that states parties implement CEDAW in a way that accounts for the circumstances of queer women. This section concludes by briefly reviewing potential challenges to these solutions.

A. Redrafting Article 16

The CEDAW Committee has recognized it must revisit the Convention to ensure that it reflects progress in societal values. The 2017 conference and resulting Recommendations to states parties reflects the Committee's efforts to this end. The Committee may hold another world conference on women in order to examine the current state of CEDAW's provisions and update those which no longer adequately further its overall goals.

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[98] Wendy Brown, *Suffering Rights as Paradoxes*, 7 CONSTELLATIONS 230, 231 (2000).
[99] *See id.*
[100] *See generally* Rosenblum, *supra* note 88.
[101] *See id.* at 59.

Article 16 is a candidate for redrafting in light of the advances in LGBTI rights, and growing recognition of non-traditional families. One aspect to consider is a statement that women are free to marry a spouse of their choosing, which would encompass non-male partners. This language would further shift Article 16's focus from equating the rights of women with the rights of men. Redrafting this portion to allow all persons to marry someone of their choosing, rather than using heterosexual standards as the baseline, would have repercussions in other parts of the article as well. For example, it would expand subsection (f)'s rights as to guardianship, wardship, trusteeship and adoption of children, advocating for non-heterosexual couples to have access to parenthood. Further, subsection (e)'s provision for equal access to reproductive choices could encompass access to alternative reproductive technologies (ART). This type of expansion is consistent with CEDAW's principles by responding to the unique situations of queer women.

B. Recommendations to States Parties for Implementation of CEDAW

International law scholars have posited ways of interpreting and implementing certain provisions of CEDAW to further the rights of LGBTI individuals. For example, Rikki Holtmaat and Paul Post suggest that the Committee could rely on Article 5(a) of CEDAW to enhance LGBTI rights.[102] Article 5(a) requires states to modify "cultural patterns of conduct," meaning that they must take steps to address the societal and cultural roots of gender inequality. This could encompass challenging traditional gender roles and stereotypes which limit women's choices and participation in society. Holtmaat and Post argue that cultural attitudes such as gender stereotypes similarly impact LGBTI individuals. Thus, deconstructing certain gender roles would benefit men and gender non-conforming persons by allowing them the freedom to participate in society, choose a partner, adopt or maintain custody of children, and many other key human rights.

Advocates of LGBTI rights have faced challenges in attempting to establish novel, substantive human rights. There has been more success in this area in focusing on the application and interpretation of existing human rights documents.[103] Specifically, they have argued that certain human rights treaties encompass a prohibition on discrimination on the basis of sexual orientation, binding states parties to these treaties. For example, in its 1994 decision in *Toonen v. Australia*, the HRC found that states parties to the ICCPR were obligated to protect individuals from discrimination based on sexual

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[102] Holtmaat & Post, *supra* note 97, at 320.

[103] *See* McGoldrick, *supra* note 46, at 617; UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, BORN FREE AND EQUAL: SEXUAL ORIENTATION AND GENDER IDENTITY IN INTERNATIONAL HUMAN RIGHTS LAW (2012), https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf.

orientation.[104] Specifically, it interpreted the prohibition of discrimination on the basis of sex, contained in Articles (2)1 and 26 of the ICCPR, as encompassing sexual orientation.[105]

Even as drafted originally, Article 16 may be an avenue to integrate and address the unique challenges faced by LGBTI individuals. Although the provision contemplates women's equality with respect to men, its gender-neutral aspects can be extended to women in non-heterosexual relationships. States may rely on the Yogyakarta Principles to interpret Article 16 in an LGBTI-inclusive way. Because the Principles call for elimination of discrimination against LGBTI individuals, they comport with the goals of CEDAW, which aims to eliminate discrimination against all women.[106] If the CEDAW Committee calls for states parties to interpret CEDAW's provisions in light of these Principles, there will be pressure to implement the Convention in a more inclusive way.

C. Challenges to Implementation

Notably, no portion of CEDAW has previously been redrafted. Thus, this option is likely the most onerous course of action. The issuance of new recommendations may be a more plausible route, particularly given that the Committee has done so as recently as 2017. The Committee may be reluctant to revisit CEDAW so immediately, however, for fear of overwhelming states that are still in the process of implementing the new recommendations.

Attempts to include LGBTI rights in a global human rights framework have been met with opposition. Some opponents characterize the freedom from discrimination based on sexual orientation and gender identity as a new, or additional right, which cannot be subsumed in the existing body of human rights law.[107] For example, many states opposed a 2011 resolution by the HRC, which addressed violence and discrimination based on sexual orientation.[108] They argued that other states were "seeking to enforce their cultural values abroad," claiming that recognition of these rights did not comport with international norms in human rights law.[109]

Finally, CEDAW, particularly Article 16, remains controversial among states parties with strong religious, fundamentalist and culturally conservative societies. Many states have been slow to withdraw reservations to Article 16 as drafted. It is likely that the explicit inclusion of LGBTI rights would result in states parties' failure to ratify the revised provision. This

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[104] *Toonen v. Australia*, Comm'n No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).
[105] *See* McGoldrick, *supra* note 46, at 627; International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, 999 U.N.T.S. 171.
[106] *See* CEDAW, *supra* note 1; *Yogyakarta Principles Plus Ten, supra* note 61.
[107] *See* McGoldrick, *supra* note 46, at 613-14.
[108] *See id.* at 619.
[109] *See id.* at 620.

would counter progress by women's human rights advocates who have worked toward the withdrawal of reservations to Article 16. Thus, on either side of the political spectrum, there is pressure to avoid any shift that would make Article 16 more radical and therefore more likely to lose support of some states parties.

While there are practical concerns to asking states to recognize the impermissibility of discrimination on the basis of sexual orientation and gender identity, these challenges do not defeat the necessity of doing so. States have long relied on religion and cultural norms to deprive marginalized groups of human rights.[110] For example, the apartheid system in South Africa was defended based on the claim that Christianity supported white supremacy.[111] The International Court of Justice held that this was impermissible under the UN Human Rights Charter, finding that systematic racial discrimination was unjustifiable regardless of the government's motives or intent.[112] Similarly, religious freedom should not be an acceptable defense to discrimination on the basis of sex, sexual orientation, or gender identity, in violation of treaty obligations.

Despite these concerns, cultural attitudes have shifted in recent decades, indicating promise for recognition of rights relating to sexual orientation and gender identity. In 2006, fifty-four states submitted a joint statement to the HRC discussing discrimination based on sexual orientation and gender identity.[113] In 2011, eighty-five states submitted a similar statement, directed at ending acts of violence against individuals based on sexual orientation or gender identity.[114] This statement received support from states in every region of the world, illustrating the global shift toward supporting rights based on sexual orientation and gender identity.

V. CONCLUSION

With increasing access to education and the diligent efforts of activists and organizers, more human rights advocates recognize the necessity of extending women's rights to all women. The position that LGBTI rights are too controversial to include in mainstream human rights treaties to evade the protests of conservative states parties is no longer a convincing contest. For decades, scholars have noted that anti-LGBTI sentiment stems from the same roots as discrimination against women—namely, patriarchy and

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[110] *See* Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 347-49 (1997).
[111] *Id.* at 347.
[112] *See id.* at 348-49.
[113] McGoldrick, *supra* note 46, at 619.
[114] *Id.*

misogyny.[115] Efforts to combat discrimination against women cannot be disentangled from the struggle for LGBTI rights. Further, queer women should not be erased from the discussion of women's human rights. Article 16's failure to explicitly or implicitly provide for their unique circumstances, in conjunction with the CEDAW Preamble's emphasis on the biological role of women in procreation, tends to reinforce rather than deconstruct traditional gender roles. It is time for the CEDAW Committee to take the bold step toward inclusivity, in conformity with its responsibility to advance the rights of all women. It should conduct a holistic analysis of CEDAW, with the guidance of the Yogyakarta Principles, to revisit any ways that the Convention perpetuates harmful ideas regarding sexual orientation and gender roles, and issue recommendations to states parties accordingly.

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[115] *See generally* Rosenblum, *supra* note 88.