



## Advancement of human rights standards for LGBT people through the perspective of international human rights law

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### **Abstract**

*The article addresses the issue how various religious and legal systems cope with current developments that undermine binary opposition of man and woman including definition of their sexual and cultural identities. More concretely, it tries to explain, how concrete societies and legislations deal with claims of lesbians, gays, bisexuals, and transsexuals (LGBT) that claim broader recognition. It elucidates differences among Western provisions and policies of the relevant legal bodies such as the General Assembly of the United Nations, the European Court of Human Rights and the Supreme Court concerning these issues. It also points to the nature and real impact of international civil society forces such as Yogyakarta principles that formulate extension of rights concerning lesbians, gays, bisexuals, and transsexuals. On the basis of comparison of various legal and religious discourses it explains current practices of direct and indirect discrimination and in some non-European national systems even extra-judicial killings, torture and ill-treatment, sexual assault, rape and other violations of human rights. When emphasizing substantial differences among current European states and non-European ones concerning policies toward lesbian, gay, bisexual and transgender people (LGBT), it shows current tendencies of advancement in the field by common policies of Council of Europe, recent judgments issued by the European Court of Human Rights as well as civil society efforts such as Yogyakarta principles. Swedish standards have been introduced in order to emphasize existing progressive attitudes to LGBT people concerning gay marriages and adoption procedures.*

### **Keywords**

*Case law, homosexuality, LGBT people, religion, Sweden, Yogyakarta principles*

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## Introduction

How do various religious and legal systems cope with current developments that undermine the binary opposition of men and women that implies definitions of their sexual and cultural identities as well as their roles? More concretely, how do concrete societies and legislations deal with claims of lesbians, gays, bisexuals and transsexuals (LGBT) that would like to gain broader recognition? What are the differences among Western provisions and policies of the relevant legal bodies such as the European Court of Human Rights or the Supreme Court concerning these issues? Could one find common policies in Western societies and Christian churches or can one identify substantial distinctions among these entities? What is the nature and real impact on international civil society forces such as Yogyakarta principles that formulate extension of rights concerning lesbians, gays, bisexuals and transsexuals (LGBT)?

Issues of gender identity and sexual orientation have been reflected and integrated in Western scholarship focusing on gender arrangements and have been regulated by black letter laws, soft laws and social customs. For example French philosopher Michel Foucault has argued that a different understanding of sexual austerity has been a consistent and common feature from Antiquity through the texts of Christianity to the modern epoch, but the terms in which it has been expressed have been frequently reformulated in very different ways; in Western civilization there has undoubtedly been a tendency to associate the theme of sexual austerity with various social, civil and religious taboos and prohibitions (Foucault, 1990). For example moral considerations of sexual condition were subject to a fundamental gender dissymmetry and the moral system was produced by and addressed purely to free men, to the exclusion of women, children and slaves.<sup>2</sup>

Thus the system did not attempt to define a field of conduct and an area of valid rules for relations between men and women but provided an “elaboration” of male point of view in order to give shape to their conduct. The emergence of Christianity did not transform people’s relationship to their own sexual activity but gender arrangements were marked by an introduction of a novel code of sexual behaviour. There was established a new type of relationship between sex and subjectivity in which the emphasis fell less upon the need to exercise a mastery of control over oneself and more upon the necessity of discovering the truth in oneself through a permanent diagnosis or hermeneutics of the self as a sexual being.<sup>3</sup> Interdependence among sexuality,

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<sup>2</sup> In pre-modern Europe same-sex unions were named as divine and in the ancient Greco-Roman world both Gods and people were very often engaged in same-sex relations. While the union in marriage of heterosexual couples had started due to economical and parenting priorities, the homosexual ones were created only for love. Despite the fact that there was no legal relationship between homosexual partners, both were free men united by love and they did not hesitate to manifest this fact in public.

<sup>3</sup> Christianity created a dramatic impact on modes of coupling starting from the first centuries. Monogamy and sexual fidelity in marriage was encouraged and legislated penalties for violations were adopted. Divorce was discouraged and later became impossible. Homosexual acts were deemed as dangerous distractions from “the right way”, and sodomy was considered as one of the most perverse sins. Women could become only wives and mothers and lost their former public privileges.

subjectivity and truth formed within Christianity has been present in a more secular condition to exercise a considerable influence not only over the formation of the subject but also over scientific methods of analysis and inquiry; the telling example has become discourse and “confessional” practices of psychoanalysis. Under the modern condition there was the increasing categorisation of the perverts where previously a man who engaged in same-sex activities would be labelled as an individual who succumbed to the sin of sodomy. Under the current condition these subjects would be categorised or labelled as homosexual (Rabinow, 1984).

Feminist scholar Judith Butler deconstructs presuppositions of various streams of feminist theory that aim at the construction of gender identity and a subject supposed to be represented at the linguistic as well as at the political level; she emphasizes the fact that sex is a biological category on one hand, and gender is culturally constructed on the other. She draws on Foucault’s thesis that “real” or “true” or “original” sexual identity is an illusion and that “sex” is only one component of omnipresent power mechanisms. When using certain Foucauldian arguments she claims that the paternal law/the symbolic defines the category “feminine” and the particularly notion of maternity; women are thus purely a product of discourse (Butler, 1990).

When criticizing Simone de Beauvoir for phallogentric language and Luce Irigaray for a female “self-identical being” that has to be represented, Butler argues that gender is performed and that no identity exists behind the acts that supposedly express gender and that the gender “woman” as well as the gender “man” is contingent; these categories could become subject of interpretation and further signification, based on the critical appropriation of intellectual heritage of Claude Lévi-Strauss, Joan Riviere and Sigmund Freud. She is critical of the fact that the feminist scholars conceive non-oppressive society solely as an elimination of the supposed pre-patriarchal order, and this points to productive and performed aspects of gender. More concretely, she calls for the transformation of binary opposition “men” and “women” and argues that heterosexual melancholy is culturally instituted as the price of stable gender identities. To put it differently, misunderstandings between the majority of society and subjects with different gender identity can be explained by the fact that the body is itself a consequence of taboos having been caused by heterosexual stable boundaries (Butler, 1990). She definitively abandons biological determination of gender and suggests that all gender is rehearsed and performed and that practice of drags is an ideal solution to demonstrate these processes for the sake of understanding among actors with different gender identity and sexual orientation. According to Butler it is necessary to abandon the binary subject/object division and efforts to emancipate it as well as feminist efforts to constitute common female identity and she calls for such a subject that would be formed through repetition and through a “practice of signification” (Butler, 1990: 144).

When using methodology of legal analysis - and particularly case law - the following article tries to grasp evolution of international human rights law concerning improvement of misunderstanding among actors based on differences regarding gender identity and sexual orientation that can be documented by civil society efforts such as Yogyakarta principles. On the basis of comparison of various legal and religious

discourses it explains current practices of direct and indirect discrimination and in some non-European national systems even extra-judicial killings, torture and ill-treatment, sexual assault, rape and other violations of human rights. When emphasizing substantial legal differences among current European states and non-European ones concerning policies towards lesbian, gay, bisexual and transgender people (LGBT), it shows current tendencies of advancement in the field by common policies of Council of Europe, judgments issued by the European Court of Human Rights and civil society efforts such as Yogyakarta principles.

### **Developments of international and European legal aspects concerning LGBT**

The current preoccupation with problems of misunderstandings based on sexual orientation and gender identity, as well as patterns of abuse related to these issues can be documented not only by the evolution of the black letter approach and relevant landmark cases analysed below but also by the establishment of Yogyakarta Principles. More concretely, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity can be characterized as a set of principles that aim at the application of international human rights law standards to address the abuse of the human rights of LGBT people as well as issues of intersexuality.

The Yogyakarta Principles claim that people are born free and in dignity including LGBT people. These principles were formulated by International Commission of Jurists, the International Service for Human Rights and human rights experts from around the world at Gadjah Mada University on Java<sup>4</sup>. The aim of these principles is to improve the interpretation of human rights treaties but, they have not become part of international human rights law yet. The signatories made efforts that the Yogyakarta Principles should become international legal standard with which all States must comply, but some states have expressed reservations<sup>5</sup>. Furthermore, in the interim report on the human rights to comprehensive sexual education presented by Special Reporter on the Right of Education to the United Nations General Assembly were cited the Yogyakarta Principles as a Human rights standard but the majority of General Assembly. Third Committee members recommended against adopting the principles. For example the Special Reporter was criticized by the representatives of Mauretania that he interpreted human rights more broadly by promoting controversial doctrines that did not enjoy universal recognition and by redefining established concepts of sexual and reproductive health education. Moreover, a US-based conservative pressure group, the Catholic Family and

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<sup>4</sup> These principles are named after Yogyakarta, the smallest province of Indonesia located on the island of Java.

<sup>5</sup> The finalised Yogyakarta Principles was launched as a global charter for gay rights on 26 March 2007 at the United Nations Human Rights Council in Geneva and later on at the United Nations event in New York on 7 November 2007. These meetings were seen as effort to de-criminalise homosexuality in 77 countries that still carry legal penalties for people in same-sex relationships, and repeal of the death penalty in the seven countries that still have the death penalty for such sexual practice.

Human Rights Institute claimed that the Principles could devalue the concept of the family and could be used to restrict freedom of speech.

Nevertheless, perspectives of international and European legal institutions concerning Yogyakarta principles differ; the Council of Europe has concluded that particularly the Principle 3 of the Yogyakarta Principles is relevant. It has been argued that same sex marriage is legal only in several members states of the Council of Europe and therefore many married transgender persons have to divorce prior to their new gender being officially recognised. Nevertheless, they would prefer to remain a legally recognised family unit since in their view such enforced divorces may have a negative impact on the children of the marriage. The Council of Europe also criticised legal practices of sterilisation and other compulsory medical treatment as necessary legal requirement to recognise person's gender identity in laws regulating the process for name and sex change, etc. The members of the Council of Europe also claimed that gender reassignment procedures, such as hormone treatment, surgery and psychological support should be accessible for transgender persons and that they are also supposed to be reimbursed by public health insurance schemes related to sex and name change (Yogyakarta Principles, 2012).

### **Invalidation of sodomy laws in the United States and in the European context**

Christianity, Judaism and Islam have been advocating sex strictly for reproductive reasons and they have made systematic efforts to fight against sexual deviations. Christian disagreements on homosexuality matters today constitute divisions among conservatives and liberals, and their major disagreements stem from textual interpretations of the Bible, as well weighing the significance and effects of historical changes on Biblical understanding. Christianity regulated social life for a very long period, and the line between church and the state of any kind was always very tenuous; even today the relationship between church and state is very complicated. The leading passage against it in the Bible is the paragraph in Genesis concerning the people of Lot and their sexual practices: They were destroyed because of massive public sexually perverted acts. The main passage in the Bible condemning male homosexuality says that: *"If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death and their blood will be on their own heads."* (Book of Leviticus, 2012).

Negative attitudes towards homosexuality that occurred several decades ago can be documented by the United States Supreme Court decision *Bowers v. Hardwick* that upheld the constitutionality of a Georgia sodomy law criminalizing oral and anal sex in private between consenting adults when applied to homosexuals. In fact, *Bowers* signalled the reluctance by the Court to recognize a general constitutional right to privacy, or to extend such a right further than it already had. Only seventeen years after *Bowers v. Hardwick* did the Supreme Court directly overrule its decision in *Lawrence v. Texas*. It insisted that anti-sodomy laws are unconstitutional and stated that *Bowers* was not correct when it was decided. The officer Torick had to contact Hardwick and

accounts differ whether one of the guests opened the door to the officer and allowed him into the apartment or if the front door was already open. Officer Torick found the door to Hardwick's bedroom door slightly ajar and then entered the room where Hardwick and a male companion were engaged in mutual, consensual oral sex. He placed both men under the arrest for sodomy which was defined in Georgia law to include both oral sex and anal sex between members of the same or opposite sex. The case had been adjudicated by the United States District Court for the Northern District of Georgia and after Hardwick appealed by the United States Court of Appeals for the Eleventh Circuit that reversed the lower court finding that the Georgia sodomy statute was indeed an infringement upon Hardwick's Constitutional rights. The Court had upheld that a right to privacy was implicit in the due process clause of the Fourteenth Amendment to the United States Constitution. Despite these assumptions in *Bowers* the Court held that this right did not extend to private, consensual sexual conduct, at least insofar as it involved homosexual sex. One of the justices concluded *"To hold that the fact of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching"* (*Bowers v. Hardwick*).

While the European Court of Human Rights invalidated the Sodomy laws in most European countries by beginning of the 1980s with *Dudgeon v. United Kingdom* (McLoughlin, 1994), these measures are in contradiction with the vast majority of conservative Middle East countries, and Iran is the ruling country in criminalizing homosexual acts. The case *Dudgeon v. United Kingdom* was the first successful case before the European Court of Human Rights on the criminalisation of male homosexuality and was important for setting the legal precedent that ultimately resulted in the Council of Europe requiring that no member state could criminalise male or female homosexual behaviour. The European Court of Human Rights held that legislation passed in the nineteenth century to criminalize male homosexual acts in England, Wales and Ireland, violated the European Convention on Human Rights. While female homosexual behaviour was never criminal anywhere in the United Kingdom, male homosexual behaviour was previously decriminalised in England and Wales in 1967, in Scotland in 1980 and as the consequence of the judgment in Northern Ireland in 1982.

Jeff Dudgeon was a gay activist in Belfast, Northern Ireland who was interrogated by the Royal Ulster Constabulary about his sexual activities. Later on he filed a complaint with the European Commission of Human Rights and after several rounds of hearings held by judges of the European Court of Human Rights the Court agreed with the Commission that Northern Ireland's criminalisation of homosexual acts between consenting adults was a violation of Article 8 of the ECHR. The Court stated that *"once it has been held that the restriction on the applicant's right to respect for his private sexual life give rise to a breach of Article 8 by reason of its breadth and absolute character, there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons"* (*Dudgeon v. United Kingdom*.)

The Court stated the *"restriction imposed on Mr. Dudgeon under Northern Ireland law, by reasons of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved"*

(Dudgeon v. United Kingdom) However, the ruling continued, *it was for countries to fix for themselves...any appropriate extension of the age of consent in relation to such conduct*" (Dudgeon v. United Kingdom.)

### **Diversity of policies among Christian Churches towards LGBT issues**

Under the current condition homosexuality is perceived differently by the fifteen main churches of modern Christianity and there is no common view related to the topic. Many Christians agree that homosexuals should be admitted to the church and that their civil rights should be protected while other churches who claim that homosexual performance and acts are serious crimes. Religious hostility towards homosexuality and homosexuals can be found not only in the public and religious sphere, but also in the sexual and private areas, and the church's hate speech against gays is considered a legitimate right of the church given by—in America, for example—the first amendment's free exercise of religion. Homosexuals are considered unforgivable sinners and dangerous criminals and most of the Catholic Church used to call homosexuality a mental disorder. In the best case, homosexuality is considered to be a forgivable sin and the church and its members are supposed to provide help to overcome it.

The Catholic Church has historically opposed same-sex unions of any kind and the Vatican has opened an official website where there are several articles against the acceptance of homosexual behaviour in the social and legal sphere. For example, Pope John Paul II was very concerned about the countries allowing same-sex marriages and The Administrative Committee of the U.S. Conference of Catholic Bishops has asked for a constitutional amendment to protect the unique social and legal status of marriage. According to the Southern Baptist Church, the matter of homosexuality is an unforgiving sin and the sacred union of marriage is only the one between a man and women and gay clergy are not allowed. Nevertheless, one can find several other Baptist churches which are more inclusive toward LGBT people. For example the Presbyterian Church (U.S.A.) has made a remarkable step toward accepting homosexuality, and from May 2011 it allows for the ordination of gay clergy and accepts homosexuals' civil rights as a matter of equality within society.

In 1979 Sweden was the first country in Europe to disqualify homosexuality as an illness (Gustaffson, 2003). From this time till 2007 the gay community has gained a lot of acceptance not only in social and public life but also in the legal domain. The church is very open to gay people and their freedoms and within the church the gay marriage debate has been going on for a long time (Hamberg, Pettersson, 1994). The Church of Sweden has Lutheran beliefs and was separated from the state in 2000. Civil unions of gay and lesbian couples were already possible in Sweden from 2001 and in 2007. On the 30th anniversary of the disqualification of homosexuality as a disease, the Synod, the church's governing board, made gay marriages subject to vote, and the Synod's decision was 176 votes in favour out of 249 voting members.

Eva Brunne, Dean of the Bishop of Stockholm, has agreed to equal rights for gay people and has claimed that the church should become more open concerning the

matter. Homosexuality is considered an acceptable alternative lifestyle and Brunne has been in a registered partnership from 2001: there is no reason for homosexual marriages to be blessed by the church if society has become very open to them. To put it differently, the Church of Sweden has decided to support state law on same sex unions and is relaxed in using the “marriage” terminology when referring to the earlier so-called “registered partnership” in Sweden. Nevertheless, debate on the terminology of the union still constitutes a debate within the sacred walls of the Church, and pastors have an individual right to refuse to perform the marriage ceremonies of gay couples. As to terminology, the church would replace the “husband and wife” with “lawfully wedded spouses” for a homosexual marriage. By now, 75% of the church members have offered to bless gay couples during their union ceremony in church.

In spite of the fact that the Church of England had written a strongly worded letter to Archbishop Anders Wejryd stating that the next step of gay marriage in church could lead to “an impairment of the relationship between the churches” the Church of Sweden has ignored the concerns of the Church of England and moved ahead on performing same-sex marriage ceremonies. The church had allowed same-sex marriage, before the respective measures were adopted by official laws and therefore Sweden should be listed among the first world countries performing a religious union between same-sex couples in a major church: As recently as in May 2009, Swedish parliament has voted to legalize same-sex marriages.

### **LGBT issues in selected non-European religious and legal systems**

Homosexuality was common in pre-modern societies and there existed a whole tradition of rituals celebrating and manifesting same-sex unions in ancient society (Boswell, 1994). Ancient Egyptians, Greeks and Romans have generally accepted homosexuality as not only a biologically possible pattern, but also a potential means of spiritual union between two partners of the same sex (Karras, 2000). Compared to these ideas and practices in ancient world Jewish, Christian and Muslim religion consider homosexuality as a sin and even today in various parts of the world homosexual acts are punishable crimes (Manniche, 1987).

Despite the fact that in the last centuries various conceptions as well as legislations put the cult of the family in a more liberal perspective, religion has played an important role to keep “family” traditional and strictly heterosexual. For example, homosexuals in Islam are called *qum lut* (people of Lot) and in Islamic law homosexuality is a crime: punishment for this crime could be fine, torture and death penalty (Habib, 2010). The basis for such an attitude towards homosexuality in the Islamic jurisprudence is either the Quran or the Hadiths (The prophet’s saying and deeds when alive)<sup>6</sup>. Several passages in the Quran condemn homosexuality and homosexual acts and the most tolerant passage in the Quran regarding the matter is: “If two men

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<sup>6</sup> There is a consensus between the four main legal schools that the same sex intercourse has violated the Islamic law and concrete opinions differ only concerning the concrete nature of punishment.



*among you are guilty of lewdness, punish them both. If they repent and amend, leave them alone” (Quaran 4: 16).*

There are just a few notes naming a punishment concerning female homosexuality; since there is no penetration there is no death penalty for female homosexuals, but the punishment is flogging (Roscoe, 1997). Various scholars from the four schools differentiate the two males engaged in a homosexual act between the active and the passive partners: the active partner is to be lashed 100 times if not married, while an adulterer sodomite should be killed; while the passive partner is to be killed, married or not (Seidman, 2006). Criminalization of consensual homosexuality is very common and cruel in the Islamic world and criminal statutes that provide corporal punishment of homosexual acts can be found in the penal codes of more than thirty Islamic countries (Masad, 2002). For example, cruel and unusual punishment such as stoning to death, 100 lashes or throwing from a high building are among the measures taken by judges loyal to a textual interpretation of Sharia law in Iran and Saudi Arabia (Modirzadeh, 2006). Criminalization has been an ongoing practice despite the fact that it has contradicted the Universal Declaration of Human Rights and several other international covenants, and the sentence is very disproportionate for the crime of homosexuality in most of the countries where sodomy acts are present in national legislation.

In Islamic law, punishments for crimes such as homosexuality, adultery and fornication require four witnesses, and all the schools require physical presence at the moment of the act (DNA tests can be accepted as proof). There are thirty six Islamic countries which give severe punishments to homosexuals and ten of them apply the death penalty. For example, Iran has given death penalty to four thousand homosexuals from the end of the Islamic Revolution in 1979. In the Islamic world international law is perceived as an imposed foreigner of western legal reasoning: religion is taken as the only source of law and constitutionality matters meet very primitive standards.

Sexual suppression in Iran is a state mission and homosexuality constitutes a crime subject to cruel punishment. Under the Iranian penal code, Sodomy and Lesbianism are to be judged differently from each other in several circumstances (Intisar, 1988). If a mature man of sound mind is engaged in sexual intercourse with an immature man, the mature man shall be killed, while the immature one will be subject of 74 lashes if not under duress. If both immature they will be subject of 74 lashes each. The rubbing of the thighs or buttocks, called Tafhiz, shall be punished with 100 lashes; if repeated three times, the fourth punishment is death. If an active non-Muslim sodomite is engaged in the act with a passive Muslim sodomite, the Muslim one is to be put to death. If two men not related by blood are naked under any cover without any necessity, they are subject to 99 lashes, and two men kissing each other in the mouth is subject of 60 lashes. Concerning Lesbianism (Mosaheqeh), there is no distinction between the passive and active partner, or between Muslim and non-Muslim. Both will be subject of flogging, each of them with 100 lashes. If the act is repeated three times and punishment is given accordingly three times, the fourth time they shall be killed.

Ways of proving homosexuality are the same both for sodomy and lesbianism, and the standard of proof is either by confession or witnesses. The third method is by the discretion of the judges, and confession requires admitting four times of being engaged in a homosexual act. If the confessions have been less than four times, then the punishment will be as for Tafhiz. The confessor should be mature, of sound mind, with free will and intention, and if the person confesses and repents, the judge can ask from the leader, Valie Amr, for the person to be forgiven. Only a few Islamic nations such as Afganistan, Bahrain, Maldives, Algeria and Qatar punish homosexual acts with fines and jail time instead of corporal punishment; in Iran such punishments for sodomy or lesbianism are the results of a very conservative and arbitrary government imposing on legislatures to put a burden on a specific minority. Iran and most Islamic countries do not have a legal culture of gender equality and women are perceived to have half the authority and credibility of a man in economical and witnessing procedures. The privacy of the bedroom of homosexuals is the starting point of a crime potentially deserving the death penalty, and when the sentence is death penalty, and when that person has no other legal civil procedures to stop these unconstitutional measures, the only way out is exile.

Thus this issue has become an international problem having been addressed by United Nations institutions attempting to include a minority that has been excluded and charged with the death penalty. For example, the United States, England and other western European countries are faced with an average of hundred applications each year. In April 2011 the European Parliament voted for measures to strengthen the applications from LGBT people asking for asylum in the European Union, and they have been included in a special section as “asylum seekers in special needs”. However, just 30% of these applications have finished successfully because of the lack of proof from the applications for any possible execution if they go back in their countries.

According to the European Union requirement, the applicant is supposed to be a citizen of the EU member state, but the EU Immigration doctrine for gay asylum seekers applies to the “reasonable probability” of execution if they are deported, and this fact makes it easier to be accepted in the case of lack of documentation (Morgan, 2006). Unfortunately, at least four asylum seekers are officially known to have committed suicide in fears of being deported after their asylum claim was refused in England and Netherlands.

### **The positive rights perspective of gay law**

Hans Ytterberg would be the first ombudsman on the new Swedish initiative against discrimination on the basis of sexual orientation on May 1, 1999, and the new ombudsman office in Swedish is called the “Homosexual’s Ombudsman” (Rydström, 2011). The office was created to ensure non-discrimination for gays and lesbians at the workplace, but its authority has also included other aspects of public life. Simultaneously to the creation of the office, new laws were adopted which were supposed to regulate the discrimination of gay individuals at the workplace, job market and other welfare

statutes. The role of the ombudsman is the observation of the laws in public life, and support during the legal process; his or her role is not only to act in the court room but also to influence public opinion and provide recommendations in relation to laws regarding gay matters. Among the biggest of the ombudsman's achievements is his appointment by the state to review regulations that govern state pensions. Now that in Sweden same sex marriage is recognized both by church and state, the latest concern of the Swedish Ombudsman for Gays and Lesbians has become adoption rights. Prohibiting gay couples from parenting was always based on the pillars of natural laws, and the marriage of gay people was opposed by society and jurisprudence because national law perceived marriage to be the union of men and women. The sad tradition of denying custody to a gay parent is attached to the tradition of criminalizing gay intimacy.

There are never ending debates between liberals and conservatives whether opposing somebody's choice to build a family is unconstitutional, and one of the main arguments against gay couples marrying and having children is the perspective concerning lack of the parenting skills of the partners to raise a child in healthy conditions. Nevertheless, studies have proved that parenting abilities are not related to sexual orientation, and the commitment of a parent comes from his or her love towards the child or from the educational background of the parent him/herself, but not from his or her sexual orientation. Brazil, Argentina, Uruguay, Canada, South Africa, the Scandinavian countries, United Kingdom, fourteen states in the USA, as well as other European countries such as Andorra, Spain and the Netherlands that allow married gay couples to adopt; in other countries such as Germany, Finland, Israel, Greenland, and the state of Tasmania in Australia, step-child adoption is legal, meaning that you can adopt the biological child of your partner (Wardle, 2008). One can also legitimize claims for adoption rights by the research results of Lawrence Kurdek, who, in 1977, started a comparative social research study on 239 heterosexual couples, 79 male gay couples, and 51 lesbian couples (Kurdek, 1998). According to his findings, the heterosexual and gay couples were comparable, and the long-term lesbian relationships had a significantly higher quality than the first two. According to Susan Golombok's study on children raised by 27 families with a heterosexual single mother and 27 families with two lesbian partners, there was found no difference concerning a child's sexual behaviour, nor his or her ability to form committed relationships (Golombok, 1983).

These studies have shown that in the future same-sex families could be an accepted example of parenting, and it seems that either heterosexual fear related to social environment or the security of the children raised in gay families should no longer constitute a legal argument at the courts or become a legitimate basis of legislation. Despite the fact that the right to adopt has not yet been recognized as a fundamental right comparable to the right to raise one's biological child, current conceptualizations of parenting, at least in certain scientific discourses, have abandoned the simple definition of gender conceived as a dichotomy between men and women.

For example in *Bottoms v. Bottoms* (Ronner, 1995) a lesbian mother was denied custody of her son because of her sexual orientation and she was allowed to visit her son only twice per week, but not allowed to take him home or introduce him to her partner.

Kay Bottoms sued her daughter, Sharon Bottoms, for custody of Sharon Bottom's son, Tyler Doustou; the Court decided that Sharon Bottoms was an unfit parent and Kay Bottoms was awarded custody of her grandson. The verdict issued by the Virginia Circuit Court was based on the fact that homosexual sex was illegal in Virginia; Sharon Bottoms was a criminal because she admitted in this court that she is living in an active homosexual relationship. At the circuit court appeal hearing in April 1993, Sharon Bottoms admitted that she hadn't been the best mother: she had hit Tyler twice, she cursed in front of him and for a year and she lived on welfare. Nevertheless, the Virginia Court of Appeals reversed the ruling and granted Sharon Bottoms custody of her son, saying *"The fact that a mother is a lesbian and has engaged in illegal sexual acts does not alone justify taking custody of a child from her and awarding the child to a non-parent"* (Bottoms v. Bottoms). However, on further appeal, the Virginia Supreme Court returned custody to the grandmother.

### **Importance of Yogyakarta principles for prospective international standards regarding LGBT rights**

A uniform system of law governing human rights at the international level in the field of sexual orientation and gender identity as a subject of non-discrimination would be a very good means of ensuring the fundamental freedoms of all the gay minorities. Despite the fact that this state of affairs could not occur immediately, the existence of this uniform system of laws would help as a resource for all those countries that are ready to adopt antidiscrimination laws toward LGBT people. For the sake of advancing these issues, UN independent representatives, human rights treaty bodies and human rights experts met to adopt the Yogyakarta Principles which aim at the application of international human rights law in relation to sexual orientation and gender identity (Yogyakarta Principles, 2012).

The reasons for the initiative were to remind the UN members that they have been signatory to the international norm. At the time, 84 UN member states criminalized same-sex acts and in 7 of them homosexuals could become subject to the death penalty. The main idea of the meeting was to use international documents that are ratified by most UN member states, such as Universal Declaration of Human Rights (UDHR), International Convention on Civil and Political Rights (ICCPR) and the Committee on the Elimination of Discrimination against Women (CEDAW), and apply them to situations of discrimination and violence (O'Flaherty, Fisher 2008). Twenty nine Yogyakarta Principles cover areas of abuse such as torture, rape, and medical abuse, denial of free speech and assembly, as well as forms of discrimination such as immigration, discrimination at work, housing, education and access to justice.

“4. ...The Right to Life. Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.5. The Right to

Security of the Person. Everyone regardless of sexual orientation or gender identity has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group...” (Yogyakarta Principles, 2012).

The Yogyakarta document also includes 16 recommendations to the national states—to actors at the national level such as human rights institutions, NGOs, UN agencies, the High Commissioner for Human Rights, etc. Elementary principles include the right to universal enjoyment of human rights, non-discrimination and recognition before the law and other principles that ensure the right to human and personal security and abolish corporal and psychological torture of any kind. In addition, economical, social and cultural rights are also enforceable by principles 12 to 18, including the right to employment, education, accommodation, social security and health. Freedom of movement and asylum is one of the most important for the gay communities of the Islamic countries, and rights of participation in family life would guarantee the partnership benefits such as marriage, parenthood or specific rights such as survivor’s pensions.

“E.The United Nations Human Rights Treaty Bodies vigorously integrate these Principles into the implementation of their respective mandates, including their case law and the examination of State reports, and where appropriate, adopt General Comments or other interpretive texts on the application of human rights law to persons of diverse sexual orientations and gender identities. I. National human rights institutions promote respect for these Principles by State and non-State actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities...” (Yogyakarta Principles, 2012).

For example, principle 27 recognizes the right to defend and promote human rights without discrimination on the basis of sexual orientation or gender identity, e.g. the Swedish Homosexual’s Ombudsman. Rights to expression, opinion and association shall be guaranteed by the national laws and local authorities for the sake of assemblies and other events that need for LGBT people to associate in community with others; finally, principles 28 and 29 ensure the rights of redress and accountability, the importance of which affirms holding responsible those who violate the above mentioned rights. For good reason, the principles were adopted, of all places, in Indonesia—in an Islamic country which has been governed by a sultan—in order to draw attention to an awareness of the countries that are known for discrimination against the minority.

The majority of the Yogyakarta principles had already existed in international documents or in the legal regulations of liberal countries toward LGBT, and what they met for was to construct the principles within a positive rights perspective. Negative rights protection of gay people has already been known, and therefore Yogyakarta principles help to underline the importance of the positive rights of gays which have been violated, together with their fundamental rights. In another words, while global phenomena involving transportation, communication, an international economy, and

migration have been taking place, changes should also take place within our own boundaries.

## **Conclusion**

The analysis provided in this exploratory essay determined by the evolutionary perspective on human rights has demonstrated substantial differences among various legal and religious systems and also differences among legal norms concerning LGBT rights at the national level. Firstly the difficulties to implement common legal norms or civil society efforts such as above mentioned Yogyakarta principles into international human rights law can be explained by complete fragmentation of national legislation and very often by its opposite logics. Secondly they can also be demonstrated by differences among regional bodies responsible for human rights such as Organization of American States (OSA), Council of Europe and by their rejection at the international bodies such as the General Assembly of the United Nations.

Religion and homophobia have been tied together for centuries. The stronger the power of religious institutions are in the state, the more the rights of homosexuals are suppressed. Islam is the most telling example of violations of human rights of gays and lesbians: not only with the criminalization of the respective activities, but also with the cruelty of the punishments. Punishment can vary from lashing to the death penalty and in only a few countries where Sharia is the state legislation, steps have been made to decrease the punishment. There have been presented different timings concerning verdicts of the European Court of Human Rights and the Supreme Court that invalidated the Sodomy laws as well as diverse attitudes of concrete Christian churches concerning issues of homosexuality.

For example, Sweden is the country that has held a totally different position toward homosexuals by recognition of their basic freedoms and non-discrimination policies, and where religious institutions became more progressive than municipal ones concerning the recognition of same-sex marriage. Several aspects of adoption issues have been introduced as the crucial element that has been neglected in a gay-family law and highlighted differences among respective regulations in concrete national systems. It could be said that the future of the child does not depend on his/her parent's sexual orientation: numerous studies have proven that a gay family could provide a healthy social environment for a child comparable to heterosexual one.

The Yogyakarta principles, as an example of civil society efforts, forces a mobilization that could be considered a useful means to remind the UN member states that they are all signatory members of international documents such as UDHR and ICCPR, and therefore that they should pay more attention to the discriminated sexual minority, as well as to remind the gay minority that it is not enough to struggle for their negative rights, but also to make efforts to ensure their positive rights be compared to those of heterosexual men and women.

The positive rights perspective creates a framework of the legal environment in which gays and lesbians would like to live in. Although not strictly binding, international

laws have provided explanations why and how the rights of gay people and lesbians should be protected. While adoption and labour discrimination have been the most important issues related to legal situation of homosexuals and lesbians in Sweden, Islamic countries seem to be far from adopting any laws that could lead to the enjoyment of the same rights heterosexual couples enjoy. The positive rights perspective creates a framework of the legal environment in which gays and lesbians would like to live in. Although not strictly binding, international laws have provided explanations why and how the rights of gay people and lesbians should be protected. While adoption and labour discrimination have been the most important issues related to legal situation of homosexuals and lesbians in Sweden, Islamic countries seem to be far from adopting any laws that could lead to the enjoyment of the same rights heterosexual couples enjoy.

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