LGBT and the Universal Enjoyment of Human Rights

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ABSTRACT

The human rights of LGBT individuals are often ignored, if not deprived, by the world community. The LGBT rights consist of a full set of rights but the exercise of those rights depends according to which jurisdiction of state the LGBT person is subjected to. This essay explores the human rights of LGBT individuals in relation to the principle of universality of human rights. The core focus is on non-discrimination, specifically regarding the right to marry and family rights for LGBT persons. A crucial question examined here is; why are the Human Rights Committee and the European Court of Human Rights interpreting the right to marry as an exclusive right for heterosexual spouses, and why are LGBT individuals excluded from such interpretation? The essay in a comparative method provides for the similarities of LGBT rights and other vulnerable groups, including the right to marry as a universal human right. Further, the need for a specific treaty regarding LGBT rights is analysed.

Key words: LGBT, transsexual, universality, human rights, right to marry, parental rights, gender reassignment, vulnerable groups protection, discrimination.
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*For the one who colours my world. Thank you*
ABREVIATIONS

CEDAW – Committee on the Elimination of Discrimination against Women
CESCR – Committee on Economic, Social and Cultural Rights
CRC- Committee on the Rights of the Child
CRPD- The Convention on the Rights of Persons with Disabilities
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
HRC – UN Human Rights Committee
ICCPR – International Covenant on Civil and Political Rights
ICESCR- International Covenant on Economic, Social and Cultural Rights
LGBT – Lesbian, Gay, Bisexual and Transgender
NGO – Non-Governmental Organization
OHCHR – Office of the High Commissioner for Human Rights
UN – United Nations
UDHR – Universal Declaration of Human Rights
UNHCHR – United Nations High Commissioner for Human Rights
PART 1

1. Introduction

Lesbian, gay, bisexual and transgender (LGBT) individuals are an important group in our society. If not identifying ourselves in this group it is likely that someone among our children, parents, friends or colleagues are persons whom secretly or openly identify themselves as homosexual, bisexual, or transgender. Yet there are still several states where homosexuality is illegal and states where death penalty is imposed for same sex partners engaging in sodomy.\(^1\) The legal progress and understanding of LGBT rights is something that affect us all no matter our own sexual orientation or gender identity. LGBT is a vulnerable group carrying a risk of being subjected to discrimination and physical violence. Furthermore, LGBT individuals are all over the world being denied their human rights and not only by states considered as conservative regimes by the human rights society, but also by modern democracies. Such an example is the rights to marry, a human right which in many states is not accessible for LGBT individuals.

Through the human rights history we have seen how vulnerable groups have received special protection through treaty law, which has resulted in conventions such as the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. It is still a fact that there is no treaty law regarding the protection of LGBT rights and it is still a fact that the European Court of Human Rights does not impose the member states to grant access to marriage for same sex couples. Where is the universality when it comes to human rights for LGBT individuals?

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\(^1\) Homosexual conduct can lead to death penalty in Iran, Mauritania, Saudi Arabia, Sudan, Yemen and in parts of Nigeria and Somalia. See A/HRC/29/23, 2015 “Discrimination and violence against individuals based on their sexual orientation and gender identity” Report of the Office of the United Nations High Commissioner for Human Rights, p 13
1.2 Purpose
The purpose of this essay is to prove that all human rights should apply to LGBT individuals to the same extent as for heterosexual individuals, recognising the specific nature of human rights jurisprudence and its universality. Furthermore, the aim is to investigate whether there is a need for a binding human rights treaty concerning LGBT human rights. In order to investigate these statements, this essay will focus on the right to marry and the right to protection of family life in their context as human rights for LGBT individuals. It will also focus on parental rights and the right of transsexual individuals to obtain gender reassignment and official recognition of their new sex.

1.3 Thesis and Research Question
My basic presumption is that all human rights should apply to LGBT individuals to the same extent as for heterosexual individuals due to the core of universality of the human rights. Further, my presumption is that discrimination among humans based on sexual orientation is wrong as well as unacceptable and therefore is illegal. In order to prove this assertion, this work will analyze the relevant sources of law relating human rights. The leading question of exploration set for this research is whether or not the existing human rights legal instruments specifically supports the logic of my assertion and if not, whether there is a need for a specific treaty law concerning LGBT human rights. My research also aims to investigate these questions specifically in relation to the right to marry and the right to protection of family life in LGBT-families.

1.4 Method and Material
The fact that LGBT human rights is a relatively new subject within the legal debate complicates the access to relevant material within the legal doctrine. Therefore some of the sources used in this essay are related more to the philosophical or political science area than purely legal doctrine. This investigation about the legal situation for LGBT individuals will include legal aspects of LGBT legal issues as it is today, de lege lata, as well as a scenario of how it should be, de lege ferenda. The relevant international legal instruments of human rights, starting from the Universal Declaration of Human Rights in 1948 and the different legal instruments since then to the date, will be discussed and analyzed in view of the equality before the law and equal protection of law concerning LGBT individuals.
Case studies will be used to identify the critical issues for the purpose of this essay. Further, this essay will be based on a comparative analysis in order to identify the similarities of LGBT rights and the rights of other vulnerable groups and their protection by the human rights society. In order to pursue such comparative method the drafting of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities will be analysed. Also, a historical view on the right to marry under anti-miscegenation laws will be presented in order to compare the right to marry of today’s LGBT individuals.

This essay may convey a Western bias which is not my intention. However I need to confess that I am a Swedish student progressing my studies in one of the most progressive states in the development of LGBT rights, which might affect my bias on the subject. Hence, my intention is to adopt an independent approach to the issues.

1.5 Delimitation and Clarifications
The research questions of this thesis is investigated in relation to the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The UDHR and its Covenants compose the worldwide, international perspective on human rights. Comparing the ICCPR with the European Convention on Human Rights (ECHR) the research question is further explored. The ECHR is chosen to be further explored due to the various human rights cases regarding marriage and family rights for LGBT individuals which has been brought before the European Court of Human Rights (ECtHR). Due to the limited scope of this essay there is no chapter covering the African, Asian and American specific human rights treaties in relation to the research question of this essay.

1.6 Definition of terms
$LGBT, sexual orientation and gender identity$ are phrases frequently used in this essay. LGBT stands for lesbian, gay, bisexual, transgender. Gay is a person who is attracted primarily to members of the same sex, a person who is homosexual. Gay can refer both to a person of male or female gender. The term lesbian is specifically for women who are attracted to women. Transgender is a term frequently used for people who do not identify themselves with their assigned gender at birth or the binary gender system. A group commonly included under the
term transgendered are **transsexual** individuals. A transsexual is a person who have, (or often wish to) correct his/her gender discrepancy through gender reassignment (medical surgery) meaning that the transsexual is medically corrected to his/her real gender identity.²

The following definitions of *gender identity* and *sexual orientation* can be find in the Yogyakarta Principles.³

**Gender identity**: “to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.

**Sexual orientation**: “to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”

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³ The Yogyakarta Principles is a framework of international principles relating to sexual orientation and gender identity, see http://www.yogyakartaprininciples.org
PART 2

UNIVERSALITY, PHILOSOPHY AND SOURCES OF HUMAN RIGHTS

2.1 The Universality of Human Rights

The human rights of our time are often described as universal and equal for all individuals. Human rights are seen as inalienable rights which all humans have inherited by their birth. The universality idea shines through all the human rights treaties of today and has its background long back in history. Concepts of today’s human rights could be traced back to thousands of years ago developing from ancient civilisations. The Magna Carta is considered to be one of the oldest and most important findings proving the existence of early ideas about the freedom of man. Far later in history the enlightenment thinkers started to speak up about human rights. John Locke spoke of natural rights in words of equality of men and their natural liberty. The US Declaration of Independence was the first constitutional document which in 1776 presented the idea of universality in the words of

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the Pursuit of Happiness.”

The first ten amendments to the Constitution became known as The (US) Bill of rights and contain several rights of man. At this time in history, human rights were something only spoken of regarding the own nation. There was basically no recognition of human rights protection under international law and quite unimaginable that a state would interfere in other states treatment of its own citizens.

When the Second World War had come to an end in 1945, the international society realized the need for modern international law regarding human rights and international relations. This common will resulted in the UN Charter, signed 1945, recognizing the UN as an intergovernmental organization and requiring the contracting states to promote human rights.

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5 Ibid, pp 15-21
6 The US Declaration of Independence, 1776, second sentence
7 Moeckli, Supra pp 21-23
To guarantee the human rights of all individuals and never let a conflict like the Second World War happen again, the Universal Declaration of Human Rights (UDHR) was drafted in 1948.\(^8\) UDHR expresses the concept of universality in its preamble in words of

“…in recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person…” \(^9\)

The UDHR is not a treaty and does not impose legal obligations on the member states. However, the UDHR was supplemented with two binding treaties which did not come into force until 1976. The binding treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UDHR together with the covenants are known as the International Bill of Human Rights.\(^10\)

The effects of the Second World War had naturally a profound effect on Europe as a region. A European initiative to promote interdependence and conformity in security and identity resulted in the founding of The Council of Europe in 1949. The Council drafted the European Convention of the Human rights (ECHR) which came into force in 1953. ECHR is a binding treaty for the ratifying member states covering human rights, most of them civil and political rights.\(^11\) In the preamble of the ECHR it is stated that the European nations want to take the first step of collective enforcement and universal recognition of the rights in the UDHR.\(^12\)

2.1.2 Relative Universality

Although international human rights treaties describe universality as inalienable and equal for all human beings the legal effect of universalism is not universal. For example depending on whether or not a state has ratified and chosen to comply with the UDHR and the covenants (or other human rights treaties such as the ECHR) as authorities the legal effect and application will be shown in every specific human rights case.\(^13\) When states are endorsing human rights

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\(^8\) Ibid, pp 28-31
\(^9\) The UDHR, preamble
\(^10\) Moecckli, Supra pp 28-31
\(^11\) Ibid, Supra pp 28-31
\(^12\) See the ECHR, preamble
as a political conception of justice the legal effect of universalism is sensitive to political changes in a sovereign state. The autonomy and sovereignty of a state creates a core of relativity regarding whether or not universality of human rights will have a legal effect to the state's citizens. Therefore the legal universalism can be seen as relative and contingent, due to the conflict between self-determination and the respect of human rights. To intervene against human rights violation can result in violent conflicts between states, and consequently there is a decreasing risk of conflict between states if there is a non-intervention in other states human rights violations. The self-determination and sovereignty of each state can be seen as a high moral principle of the society of states which leads us to values of mutual respect regarding equality and autonomy of each state. Intervention in human rights breaches is a political difficult balance between respect for each state's sovereignty and the protection of universal human rights.\textsuperscript{14}

2.1.3 Double legitimization
The human rights of today can also be seen as positive rights with double legitimization. First, there is the profound theory of natural rights of a human, the core of the universality of human rights. Then, there is the procedural right which require democratic recognition and where the sovereignty of a state is disclosed, meaning that the universality is restricted through society’s recognition. If the double legitimization is ignored there is a risk for “value imperialism” when relating to other communities with their specific view of the best interpretation of human rights. Also, some argue that abstract universalism in the sense of absolute human rights must be avoided in order to respect cultural diversity. One the other hand, political actions should not be legitimate if violating human rights.\textsuperscript{15}

2.1.4 Cultural Relativism
Cultural relativism is a principle which is sometimes argued to stand in the way for the universality of human rights law. The term refers to a precept where the local cultural traditions are the authority of determine which are the political and civil rights belonging to the individuals of a particular society. This view reflects how one state can see a violation of human rights in the conduct of another state, while the accused state argues their conduct not to be breaching human rights referring to its own cultural traditions which might be very different

\textsuperscript{14} Ibid, pp 95-98
from the other state. References to cultural relativism have been used to accuse the Western society for imposing human rights to non-western states. Arguments have been raised against this view saying that human rights are a part of customary international law and that human rights protect individuals and not the cultural tradition of a state.\textsuperscript{16}

### 2.2 Philosophical view on universality and LGBT perspective

The philosophical view on universality is often pure and absolute universalism of human rights, resulting in total equality between humans. Human rights are obtained by the fact that one is a human. There is no other requirement than being born as a human for obtaining human rights. One is or is not a human equals to one has or has not human rights. The equality of all human beings should reflect in all individuals’ right to protection against discrimination.\textsuperscript{17}

Naturally there is an existence of legitimate discrimination occurring everywhere. Such an example is restriction of children’s rights and limitations due to mental capacity. Prisoners are also subjected to limitation of their human rights such as the right to freedom of movement, which is a legitimate restrictions due to a person's criminal behaviour in the past.\textsuperscript{18} Except from this kind of, often temporarily, restrictions of human rights the core of human rights is that every human is born with her rights. Humans have inherited these rights due to them belonging to the human race. By existing as a human being we have the same universal rights belonging to us.\textsuperscript{19}

Natural rights philosophers have often spoken of two specified core universal human rights, equality and freedom. The fundamental sense of equality is that humans are equal since they have the same universal rights, which stipulate equal treatment and respect. Freedom equals to the liberty of acting on our own choices. However, absolute freedom is not compatible with the protection of everyone’s equal rights. Minimal restrictions must exist in order to protect the rights of everyone.

\textsuperscript{18} Ibid pp.550-554
Regarding LGBT individuals they must be seen as equal to any other human being considering the statement that human rights are universal. During the history, LGBT individuals have often been subjected to non-sanctioned discrimination and violence. This behaviour can be seen as a dominant social group (in this case heterosexuals) targeting a group which they consider “less human”. This behaviour from a dominating group is not exclusive for LGBT discrimination. We can easily recognize the same type of discrimination of other vulnerable groups, for example groups subjected to racism and women subjected to gender discrimination.²⁰

The discrimination against homosexual individuals is very often characterized by the opinion that homosexuality is unnatural or against nature and therefore considered immoral. The same condescending arguments are often heard regarding transgenderism. There are multiple advanced studies and evidences claiming that homosexuality and transgenderisms are very old types of human orientations. However, those evidence are not necessary when it comes to the enjoyment of human rights, since there is no hierarchy between humans. The enjoyment of human right is not depending on the behaviour of the human, meaning that even if homosexuality is considered as immoral a homosexual person have exactly the same human rights as a person considered living a moral life. Therefore, discrimination of individuals human rights based on their sexual orientation or gender identity results in those individuals being seen as “less human” by the rest of the society.²¹

2.3 Sources of human rights
The origin of human rights lays in the concept of natural law doctrine. The theory of natural law is the existence of immutable laws of nature. These laws are a higher creation of laws often seen as a divine law constituting norms of the right moral conduct. Since the human is a reasoning creature the human have the ability to distinguish right from wrong and therefore understand the nature law of morality.²²

During the history the definition of human rights have varied. For the modern human of today, the UDHR is serving as defining those rights we refer to as human rights. The UDHR has,

²⁰ Donnelly, Jack, Supra “Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime” pp.553-558
²¹ Ibid, pp.553-557
²² Hayden, Supra, pp 3-4
according to many, become international customary law.\textsuperscript{23} The sources of today’s international law have a clear embodiment of positivism. This is clearly seen in the Statue of the International Court of Justice, Article 38, in which the sources of international law are listed. The Statue declares the primary source of international law to be international conventions recognized by contracting states. The second source is listed as international customs in the meaning of general practice accepted as law. Thirdly, general principles of law are listed. The last listed source is case law and highly qualified publications of international doctrine.\textsuperscript{24}

An essential part of international law is \textit{jus cogens}, a peremptory norm which is so fundamental that it interferes with states sovereignty. Hence, states cannot choose to accept these norms, but have to follow them. There is no explicit list of jus cogens actions but an example of prohibited actions under jus cogens is the prohibition of genocide, apartheid and torture. Jus cogens is generally considered to have its roots in natural law, rising from moral principles such as “the common good for humanity.”\textsuperscript{25}

\section*{2.4 Conclusion}
There is no doubt that the human rights treaties of today carry the words of equality, inability and universalism and it is clear that human rights have the special status such as universal in international law. When it comes to human rights, universality is supposed to mean equality and inclusion of all. The human rights instruments and treaties of today describes universalism in that kind of wording. Hence, the roots of the universality idea are traced back to ancient history but has little to do with how many of us see universality today. What we call the sources of the human rights was a construction which gave value to one type of person, the white man in the west who created slavery, colonialism and imperialism.

The UDHR and its covenants which we refer to as the International Bill of Human Rights, has little to do with the interpretation of the Bill of Rights created by the congress of US in 1789. Back then, the Bill of Rights were of no help to slaves or those suffering under colonialism.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} Moeckli, Supra pp 76-83
\item \textsuperscript{24} See the Statue of the International Court of Justice, Article 38.
\item \textsuperscript{25} Nieto-Navia, Rafael, “International Peremptory Norms (Jus Cogens) and International Humanitarian law” 2001, http://www.iccnow.org/documents/WritingColombiaEng.pdf, pp 1-5
\end{itemize}
\end{footnotesize}
Also, there is no need to go hundreds of years back in history to see a lack of equality regarding the application of universality to all human beings. One example is the discrimination of black people in the United States during the 1900th century. The UDHR was adopted in 1948 but it was not until 1967 the Supreme Court made interracial marriage fully legal by ruling the Anti-miscegenation laws as unconstitutional.26

This chapter has described why there should not be any need to argue why LGBT individuals should have the same access to human rights as heterosexual persons. The philosophy behind the concept of human rights speaks for itself. It does not matter if someone believes that the concept of gay relationships are by nature wrong and immoral. A gay person is still a human being and therefore entitled to her human rights due to the fact that she was born into the human race. However, the equality of rights and equal protection of rights is not yet applied universally regarding LGBT individuals.

So what are the consequences if we reject LGBT individuals the enjoyment of all human rights? As presented, one conclusion is that these individuals are then seen as less humans since the society does not let them access the same rights as heterosexuals. The question one have to think about is that if a human is considered less human does she then have the same value as the rest of human beings? And does she have the same access to justice and legal protection from the society? Further, what kind of treatment from full valued humans can a less human individual expect? A transgender person is still a human no matter how that person identifies her own gender and no matter how that individual expresses her gender identity. Discrimination of transgender individuals must therefore also results in a view on the individual as less human than a person with a gender identity which is not in conflict with the birth sex.

It is clear that the international law generally is in accordance with positive law, hence, human rights still have their origin in natural law. However, we have chosen to interpret our human rights with the legal theory of positivism and we have a great respect of other states sovereignty. We have to recall that not all states in the world are parties to the ICCPR. That leaves the citizens of the non-contracting states to only be subjected to protection from Jus cogens actions. Jus cogens itself has an obvious connection to natural law which takes us back to the complicated phenomena of natural law being interpreted by positivism.

26 See the ruling of Loving V. Virginia, 388 U.S. 1, (US Supreme Court, 1967)
The reality of today's human rights seem to be Relative universality. Self-determination and the fear of interference are putting human rights into the risk of severe abuse. The fact that states ratifies the same binding convention does not seem to enable an interconvertible interpretation and protection of human rights. For example, human rights for LGBT individuals are not the same in France as they are in Nigeria. In Nigeria homosexual activities are illegal and can be punished by death in some of the states. What is the fear of interference that is stopping other states from intervening? Is the respect for self-determination more important than the right to life in a situation where LGBT persons are facing death penalty because of their sexual orientation or gender identity?

However, it is still important to try not to adopt a western bias in this discussion. Discrimination of LGBT persons can be seen in the light of cultural relativism. Of course, nations should respect the national culture of other nations, but perhaps not to the extent that states can punish and even kill LGBT individuals (because of their sexual orientation or gender identity) and defend their actions by referring to the culture of their society. As already presented, human rights are aiming at protecting the human rights of the individual and not the state’s opinion of its own culture. We also have to remember that what a state has to say about its own culture might not reflect the public view on the subject, this must especially be the case when citizens are not allowed to political opposition ideas under regimes states. A presumption that the LGBT agenda is creating value imperialism could also be seen as an ignorance of the human rights of a very vulnerable and stigmatized group. When lives are at stake one has to dare to speak up about violations of human rights even if those violations concerns a, in many societies, condemned group of people. The human rights society of today is already sacrificing lives due to the respect of cultural relativism.

PART 3
LEGAL INSTRUMENTS, FRAMEWORKS AND RECOMMENDATIONS

3.1 The United Nations
The human rights are protected under the UDHR and their covenants. There are also several
other biding UN human right treaties aiming to put specific focus and on the rights of
vulnerable groups. However, there is no binding treaty on the protection of LGBT individual’s
human rights. The monitoring body of the covenants is the Human Rights Committee which
has been dealing with very few cases concerning the human rights of LGBT individuals. The
UN has during the past years drafted two resolutions concerning discrimination based on sexual
orientation or gender identity.

3.1.2. Article 2 of UDHR and Article 26 of ICCPR
Article 2 of the UDHR specifically declares that the rights set in the declaration is

“...without distinction of any kind, such as race, colour, sex, language, religion, political or
other opinion, national or social origin, property, birth or other status.”28

while Article 26 of the ICCPR sets out that

“...the law shall prohibit any discrimination and guarantee to all persons equal and effective
protection against discrimination on any ground such as race, colour, sex, language, religion,
political or other opinion, national or social origin, property, birth or other status.”29

Sexual orientation is not expressed as a special distinction in the articles. In 1994 the case of
Toonen v. Australia was presented by the HRC. Since the case concerned discrimination based
on sexual orientation the HRC had to examine whether sexual orientation was a protected
distinction within the meaning of Article 26. The Committee found that sexual orientation is to
be included as a distinction under “sex”.30 Hence, there is no legal reasoning explaining why
sexual orientation is included. The reasoning is simply made by the following finding:

28 See UDHR Art. 2
29 See ICCPR Art. 26
“The State party has sought the Committee’s guidance as to whether sexual orientation may be considered an "other status" for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”

Nothing is declared to be the ground to this finding which is a move by the court that has been criticised, partly because the intention when writing the covenant is unlikely to have been to include sexual orientation under “sex” in Article 2. Also, to include sexual orientation under “sex” could be problematic in other ways. “Sex” in the article is primarily referring to gender discrimination against women. The correlation between sex and sexual orientation is not clear. For example, a homosexual man might find himself has more in common with a minority than with women as a possible discriminated group.

After all, the HRC decision on including sexual orientation as protected under article 26 ICCPR was a milestone in the human rights society and also reflects the current view of the Committee.

3.1.3 UN Resolution 17/19 and 27/32 of the Human Rights Council

There are two resolutions about sexual orientation and gender identity adopted by the Human Rights Council, resolution 17/19 from 2011 and resolution 27/32 from 2014. Both are targeting the grave problems of discrimination and violence against LGBT-individuals. The first resolution resulted in the first UN report on sexual orientation and identity named Discriminatory laws and violence against individuals based on their sexual orientation and gender identity. The report is a study which examines discriminatory legislation and acts of targeted violence towards LGBT individuals. In 2012 the Council held a panel discussion concerning the finding of the report. The second resolution resulted 2015 in an updated report,

31 Ibid, Para 8.7
32 Donnelly, Jack, Supra “Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime” pp.553-558
35 Supra "Combating discrimination based on sexual orientation and gender identity"
named *Discrimination and violence against individuals based on their sexual orientation and gender identity*. Both reports express the universality, equality and non-discrimination the states should apply concerning LGBT-rights.

### 3.1.3.2 Recognition of relationships

The reports identify current issues regarding recognition of same-sex relationships. It acknowledges the fact that states are not required to make marriage accessible for same-sex couples under international law. However, the later report is enlightening the fact that the Committee on Economic, Social, and Cultural Rights, has urged states to legalise same-sex marriages in its report to the Human Right Council in 2015.  

The later report states that the treatment between unmarried heterosexual couples and unmarried homosexual couples should be equal without any discrimination concerning such as insurance and other benefits. It also identified the lack of legal recognition regarding same-sex couples has resulted in expressed concern from UNICEF, the Committee on the Rights of the Child and the Inter-American Court of Human Rights. These actors submitted their concerns that children with same-sex parents might be subjected to lack of protection and unfair treatment if their parent’s relationship is not officially recognized.  

### 3.2 The Council of Europe

The Council of Europe has established its own regional human rights protection through the European Convention on Human Rights. The monitoring body of the Convention is the European Court of Human Rights (ECtHR). The ECtHR has the highest number of LGBT cases compared to other human right courts. The Committee of Ministers drafted in 2012 recommendation to the member states on measures to combat discrimination against LGBT individuals.  

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37 A/HRC/29/23, Supra, p18  
38 Recommendation Cm/Rec (2010)5
3.2.1 The European Convention on Human Rights

Article 14 of the ECHR consist of a similar explicit declaration of prohibited discrimination distinctions as the UDHR. Article 14 declares

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Sexual orientation is not mentioned as a specific distinction in the article but the case law of the ECtHR has shown that sexual orientation is protected under Article 14 and often seen as falling under the concept of “other status”.

3.2.2 Recommendation of the Committee of Ministers Cm/Rec (2010)5

In 2010 The Committee of Ministers made a recommendation to the member states on measures to combat discrimination on ground of sexual orientation or gender identity. The recommendation describes human rights as universal rights applying to all humans and that the Committee has a commitment to guarantee equality in the enjoyment of rights and freedoms of all human without discrimination, in accordance with the ECHR.

In the recommendations, the Committee recognizes the intolerance and discriminatory treatment that LGBT individuals have and are still subjected to, such as homophobia and transphobia, resulting in marginalisation, criminalisation, social exclusion and violence. The Committee points out that sexual orientation is a prohibited ground for discrimination which has been set out in the case law of the ECtHR and that the Court has contributed to the advancement of transgender individuals protection of rights. The Committee recalls that ECtHR has also set out its case law regarding the fact that

39 See ECHR Article 14
40 See Fretté v. France and Karner v. Austria
41 Cm/Rec (2010)5 preamble
42 Cm/Rec (2010)5 preamble
“…any difference in treatment, in order not to be discriminatory, must have an objective and reasonable justification, that is, pursue a legitimate aim and employ means which are reasonably proportionate to the aim pursued”.

The Committee also states that discrimination on grounds of sexual orientation or gender equality cannot be justified considering religious, cultural and traditional values, or according to the rules of a “dominant culture”.

The Committee recommends the member states to examine their juridictive and other measures in order to monitor and supervise discrimination based on sexual orientation and gender identity and in order to do so collect and evaluate relevant information. The state should also ensure that legislative and other measures are effectively implemented and promoted to work against discrimination of LGBT individuals. Further, states should ensure that victims of discrimination have access to effective national remedies and are aware of the accessibility. The national authority should also, where appropriate, apply sanctions for violations and provide suitable reparation for the victim.

The Committee has authored an appendix to the recommendation which the states should use as guidance for their legislation, practices, guidelines and other measures. The appendix consists of recommendations for equal treatment and non-discrimination in different parts of life, consisting of Right to life, security and protection from violence, Freedom of association, Freedom of expression and peaceful assembly, Right to respect for private and family life, Employment, Education, Health, Housing, Sports, Right to seek asylum, National human rights structures and Discrimination on multiple grounds.

3.2.2.1. Recommendations regarding same-sex relationships and parenting

The Committee does some specific recommendations regarding same-sex relationship, family life and parenting under chapter IV Right to respect for private and family life. The Committee says that rights and obligations for unmarried couples should apply in a non-discriminatory way to same-sex couples. Further, it says that if the contracting state recognizes same-sex

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43 Ibid, preamble
44 Ibid, preamble
45 Ibid, preamble
46 Appendix to Recommendation CM/Rec(2010)5
partnerships the state should ensure that their legal status are equal to heterosexual couples in similar situations. The Committee recommends the member states which do not recognise rights or obligations for same sex couples and unmarried couples to, or in the exact words “invite them to consider”, the possibility of making same-sex partnerships legally accessible without discrimination in order to address the social reality of same-sex couples and the practical problems related to it.47

The Committee moves on to recommendations regarding parenting saying that the child's best interest should be the primary consideration when legal questions arise concerning parental responsibility, meaning that states should make such decisions without discriminating LGBT individuals. Regarding adoption the Committee says that if a state allows single persons to adopt children it should ensure that the national law is accessible without discrimination of LGBT individuals. Also, when a state permits assisted reproductive treatment for single women, this right must be accessible without discrimination based on sexual orientation.48

3.2 The Yogyakarta Principles

In 2006, a group of international human rights experts gathered in Yogyakarta, Indonesia, to draft a set of principles concerning sexual orientation and gender identity. The professionals wanted to address the abuse and violation of the rights of LGBT-individuals by creating the principles as a legal standard for all nations. The Principles also aim to awaken action from the UN human rights system and to making violence and abuse of LGBT individuals a global priority for nations.49

The Yogyakarta Principles were presented in 2007 at different launch-related events, among them at the UN headquarters in New York. The impact of the Yogyakarta principles have been describes as successful. The Principles have received positive reactions from States and NGOs, and several nations have referred to them in their own juridical proceedings. The fact that the experts drafting the Principles included one former UN High Commissioner for Human rights (Mary Robins) and 13 other UN human rights experts (among the total amount of 29 experts),

47 Ibid, chapter IV
48 Ibid, chapter IV
49 http://www.yogyakartaprinicples.org/
might have amounted to the impact of the Principles. However, the principles are not binding and have no legal force, but have to be considered as an influential framework on LGBT human rights.\textsuperscript{50}

The Yogyakarta Principles declares the principle of universality in its first, second and third principles. The following principles regards fundamental freedoms (civil and political rights), non-discrimination and social-economical rights. The principles are also concerning the right to express one’s sexuality and gender identity without governmental interference.\textsuperscript{51}

3.2.1 The Right to found a family
In its 24th principle the Yogyakarta Principles declare the right to found a family. The preamble says as follows

“Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.”\textsuperscript{52}

Under the 24th principles states must take any necessary measures to guarantee the right to found a family without discriminating LGBT individuals. This right also includes access to adoption or assisted procreation. Further, laws and guidelines of a state must recognize the diversity of family forms and protect LGBT individuals from being subjected to discrimination. This includes public benefits such as, social welfare, employment and immigration.\textsuperscript{53}

Regarding parenting the best interest of the child should always be the priority in all decisions concerning children undertaken by legislative bodies, authorities and social welfare institutions. When considering the child's best interest the sexual orientation or gender identity of the child, the child's family members or any other person must not be considered to conflict the child's best interests. A child must be permitted to give its own view when subjected to


\textsuperscript{51} http://www.yogyakartaprinciples.org

\textsuperscript{52} The Yogyakarta Principles, Principle 24

\textsuperscript{53} Ibid
actions or decisions from authorities if the child has the age and maturity to form personal views.\textsuperscript{54}

The 24\textsuperscript{th} principle also says that States which recognise same-sex marriage or registered partnership should assure that the benefits and obligations are equally accessible for homosexual and heterosexual couples. Further, all benefits and obligations should be equally accessible for homosexual unmarried couples and heterosexual unmarried couples.\textsuperscript{55}

### 3.4 Conclusion

Both the UDHR and the ECHR protect discrimination based on sexual orientation. The move of the HRC in Toonen v. Austria was a necessary step towards human rights recognition of LGBT individuals, although the choice of using the term “sex” could be seen as problematic. Especially since the Committee does not explain how the legal reasoning went when deciding to include sexual orientation under “sex”. Anyhow, the affirmation of sexual orientation as a distinction was a ground breaking step for the HRC.

The UN Resolutions, The Recommendations of the Committee of Ministers and the Yogyakarta Principles have one important joint factor, they are not constituting any binding obligations for any state. However, enlightenment always has to start somewhere and is unlikely to start with compulsion. The drafting of these frame works also shows that the LGBT agenda is important to the Human rights society. Regarding the Yogyakarta Principles it has been welcomed by many states which must reflect a common concern about LGBT-rights.
PART 4
MARRIAGE, FAMILY LIFE, PARENTING AND GENDER REASIGNMENT

4.1 Inequality

International law protects the right of intimate relations, especially through human rights law. This protection is often seen in assuring the right to marriage and the right to private life through the prohibition of discrimination. The wish to live in an intimate relationship is often gendered, (if a person is not bisexual) meaning that a person either desires to live with a person of the opposite sex or to live with a person of the same sex. Despite the fact that intimate relationships happens between same sex couples or different-sex couples, the first group have had problems access protection of their intimate relationships since the human rights treaties have been interpreted as only protecting different-sex couple’s rights.\(^{56}\)

During the past years there has been an increasing number of states legalizing marriage between same sex spouses in national domestic law, but LGBT individuals are still facing a significant inequality compared to heterosexual persons when it comes to the access to marriage and recognition of their family life.\(^{57}\) The international view on the subject is far from being coherent and the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) do not impose an obligation for the contracting states to legalize same sex marriage.\(^{58}\) The fact that the matrimonial status for LGBT persons is not protected is also creating difficulties for LGBT people to found a family and affects the legal recognition of their family life, especially concerning parental rights.

Transgender persons are also a vulnerable group when it comes to protection of the right to marry and legal recognition of family life. Transgender persons rights often depends on whether their state officially recognises their new gender and whether they have the possibility to undergo gender reassignment. Also, a married transgender person might not be able to undergo gender reassignment without divorcing or turning the present marriage into a civil union.\(^{59}\)

\(^{57}\) Ibid, pp 2-8
4.2 Marriage as institution

Marriage is one of the oldest social institutions, and was often considered a union between a man and a woman with the central purpose of having and raising children. Marriage has often, and still does in many societies, stipulate economic benefits and created stronger family relationships. There is no doubt that marriage sometimes have very little to do with love between the spouses and rather happens for economic and cultural reasons. Legally, there are various benefits which come with marriage. Examples are insurance status, favourable tax payment, custody rights of children and immigration rights. One of the more important benefits of marriage are inheritance rights, such as spousal privileges in all matters concerning the death of one of the spouses. Marriage is also considered to be a moral and emotional engagement which publicly declares the spouse's intention to live in a committed relationship. A marriage which is entered and recognized legally stipulates public recognition of the spouses union.

The right to marry is a human right. It is expressed in Article 16 of the UDHR, Article 23 of the ICCPR and Article 12 of the ECtHR. Both articles describes marriage as a right for men and women, and does not explicitly say that a man should marry a woman or a women should marry a man. The following part of this chapter illustrates some of the most clarifying and important human right cases regarding the right for LGBT persons marry, brought before the HCR and ECtHR.

4.2.1 Joslin v. New Zealand (2002, HRC)

Joslin v. New Zealand constitutes the current view of the HRC regarding same-sex marriages. The authors were two lesbian couples alleging that the government of New Zealand, by denying them access to marriage, violated the right to marry under Article 23, paragraph 2 of ICCPR (among other articles). The Committee said that by using the term “men and women” and not a gender neutral term (such as everyone, all persons, every human being) the article must be understood as a recognition of marriage only for heterosexual couples. This was especially understood in regard to the fact that the term “men and women” is the only substantive provision in the Covenant which is gendered and therefore by the HRC interpreted as a right

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60 Hayden, Supra, pp 579-583
61 Ibid, pp 584-586
only for a matrimonial union between a man and a women. The Committee found no violation of Article 23, paragraph 2.\textsuperscript{62}

4.2.2 Schalk and Kopf v. Austria (2010, ECtHR)

In Schalk and Kopf v. Austria the ECtHR stated that the ECHR does not oblige the contracting states to legislate same-sex marriages. It is also the first case where the ECtHR recognize that same-sex couples can enjoy the protection of family life under Article 8 of the Convention. The applicants were an Austrian same-sex couple requesting to marry each other but denied to do so by the Austrian authorities due the fact that they were both men. The couples argued that Article 12 had been violated and also argued a breach of Article 14 taken in conjunction with Article 8 complaining that they were discriminated since they did not have the right to get married which heterosexual had.\textsuperscript{63} Regarding the protection of family life the Court stated that

“…the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.”\textsuperscript{64}

Further, the ECtHR looked at the choice of wording in article 12 in contrast to the wording in the other substantive articles of the ECHR. The Court found that Article 12 as isolated might not exclude marriage for homosexual couples but seen in the context of the chosen wording of the other articles in the Convention, the article must be concerned as referring to a marriage between a heterosexual couples. The use of the words “men and women” in Article 12 was different to the wording in the other substantive articles of the convention where the terms “everyone or no one” is used instead.\textsuperscript{65} The Court did also concluded that Article 12 could not be including homosexual couples due the view on marriage as an institution of a man and women in the 1950\textsuperscript{th} century when the Convention was drafted. Furthermore the ECtHR observed that marriage and its social and cultural tradition and meaning differs widely in the

\textsuperscript{62} Joslin v. New Zealand, 2002, (HRC)
\textsuperscript{63} Schalk and Kopf v. Austria, para. 7-12
\textsuperscript{64} Ibid, paragraph 94
\textsuperscript{65} Ibid, paragraph 61
union following that Article 12 does not oblige the member states to grant access to marriage for same sex couples.\textsuperscript{66} However, the Court did take a step towards recognizing the legal capacity of same-sex marriages stating that “…the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex.”\textsuperscript{67}

4.2.3 Hämäläinen v. Finland (2014, ECtHR)

The case of Hämäläinen v. Finland, concerned a case where a transsexual woman was told by the Finish authorities to turn her marriage into a civil partnership to obtain official recognition of her new gender. She had married her wife several years before going through gender reassignment surgery (male to female). To indicate her new female gender identity her identity number had to be changed in her official documents, but to change the identity number her marriage had to be turned into a civil partnership or she would have to divorce her wife. The married couple argued that a divorce was not an option due to their religious beliefs and that a civil partnership was not equal to marriage regarding security for them and their child.\textsuperscript{68}

The applicant argued a breach of Article 18, 12 and 14 of the ECHR. The ECtHR found that if a state provide legal protection for same-sex couples which is mostly identical to marriage between heterosexual, it is not disproportionate to demand the conversion of marriage into a civil partnership if that is a precondition to legal recognition of a gender. There were also minor differences between marriage and civil partnership in Finnish domestic law and none of them would affect the applicant's paternity of her child. The court choose to uphold the non-obligation for states to grant access to marriage for same-sex couples, referring to Schalk and Kopf v. Austria.\textsuperscript{69}

4.2.4 Christine Goodwin v. The United Kingdom (2002, ECtHR)

The applicant in Goodwin v. The United Kingdom, was a transsexual woman who had gone through gender reassignment (male to female). She brought her case before the ECHR arguing that Article 8, 12, 13 and 14 of the Convention had been violated, which had been possible

\textsuperscript{66} Schalk and Kopf v. Austria, para 61
\textsuperscript{67} Ibid, para 61
\textsuperscript{68} Hämäläinen v. Finland, para 13-18
\textsuperscript{69} Ibid, para 69-76
since the UK did not legally recognize her new gender. She had to keep her national insurance number, which identified her gender as male. Regarding Article 12 the applicant argued that she was unable to marry her partner of male gender since she was still legally considered to be a man and same-sex marriage were not allowed in the UK.\(^{70}\)

The ECtHR had earlier in similar cases found no breach of Article 12 concerning transsexuals being denied to marry a person of their original sex. The main argument for those findings were that the article referred to marriage as a traditional constitution between two persons of the opposite biological sex. The Court had said that to use a biological criteria in domestic law for determining a person's sex for marriage purpose was concerned as a regulation which the national law could restrict and did not constitute a breach of article 12. However, in the current case, the court declared that the biological ability to conceive and raise a child is not depending on weather they have the fundamental right to marry as a man and women under Article 12.\(^{71}\) Also, the court referred to social changes in marriage as an institution and developments in medicine and science concerning transsexuality as some of the factors leading to the conclusion that testing of biological factors should not be determining the legal recognition of gender change. Instead, there are other factors that should be more important, such as the medical recognition and treatment for transsexuals and their assimilation to the gender they wish to belong to.\(^{72}\)

The ECtHR concluded that although the exercise of the right to marry is subjected to the member states national laws the contracting state cannot “restrict or reduce the right in such way or to such extent that the essence of the right is impaired”. The court found that Article 12 had been breached. It also found that there had been a violation of Article 8, the right to respect of private life.\(^{73}\)

\(^{70}\) Christine Goodwin v. The United Kingdom, para 12-19

\(^{71}\) Ibid, para 97-103

\(^{72}\) Ibid, para 97-103

\(^{73}\) Ibid, para 97-103
4.2.5 Gas and Dubois v. France (2012, ECtHR)

In 2012 the ECtHR issued obiter dicta to the effect that the ECHR does not oblige contracting states to legalize marriage to same-sex couples.\(^\text{74}\) This was declared in the case Gas and Dubois v France.\(^\text{75}\) The applicants were a lesbian couple who had entered into civil partnership under French domestic law. The couple had a child who had been conceived in Belgium through medical insemination from an anonymous donor, meaning that only one of the women was the biological mother of the child. The non-biological mother applied for an adoption of the child but her application was denied by the national remedies. According to French law an adoption of the child could only have resulted in the parental rights being transferred from the biological mother to the non-biological mother and not being shared between both of them. Parental authority could only be shared between heterosexual spouses and the French tribunal did not consider the applicants as spouses since they were not married and could not get married under French law, due to their homosexuality. The applicants argued a breach of article 8 and 14 of the Convention.\(^\text{76}\)

The Court referred to the decision in Schalk and Kopf v. Austria and once again pointed out that article 12 under the convention does not impose or oblige contracting states to allow same-sex couples to marry. The Court stated that there had been no discrimination grounds in this case. It compared the applicant's situation to an unmarried heterosexual couple regarding adoption applications and found that an unmarried heterosexual couple would also have been unable to adopt a child under the French law, and therefore the court concluded no discrimination on the basis of sexual orientation.\(^\text{77}\)

Regarding indirect discrimination (there was no legal possibility for the applicants to get married) the court simply referred to its earlier statement regarding Article 12 and concluded that the special status of marriage was not a status the contracting states were imposed to grant homosexual couples. The Court considered the legal status of the applicants as a non-analogous situation compared to a married heterosexual couple. The Court also declared that

\(^{74}\) Gas and Dubois v. France, para 8-13
\(^{75}\) Ibid, para 61-69
\(^{77}\) Ibid, para 61-69
“Where a State chooses to provide same-sex couples with an alternative means of recognition, it enjoys a certain margin of appreciation as regards the exact status conferred”

No violation of Article 8 or 14 of the Convention was found.\textsuperscript{78}

### 4.3 Civil Union and other forms of recognized relationships

In some states where same-sex marriage is not allowed there are other options available for legal recognition of same-sex relationships. This status have been named differently by different states but some of the most common names are civil union, civil partnership and registered partnerships (all of them hereinafter referred to as civil union). A civil union can hold equal status to marriage in almost every aspects, but does not necessarily do so. In some states there are important distinction in domestic law between marriage and civil unions, except from the fact that marriage is exclusively provided for heterosexual spouses.\textsuperscript{79}

On example where rights differs widely between these two statues is the parental status for couples with children. Children of same sex parents are at risk when states does not recognize parental authority of both same-sex parents. The distinction between marriage and civil union can result in a hierarchy of family rights where children of homosexual parents does not have the same legal recognition as children of heterosexual married parents which might be seen as a discriminatory matter.\textsuperscript{80} Since civil union is a relatively new concept its status compared to marriage might be questioned in the public eyes since it does not carry the same cultural legacy as marriage do.\textsuperscript{81}

The HRC has in its General Comment No 18 declared that State parties have an obligation to “diminish or eliminate conditions which causes or help perpetuate discrimination by the Covenant”. \textsuperscript{82}Some legal professionals are of the opinion that by upholding a distinction between marriage and civil unions there is a risk of reinforcing prejudice against LGBT

\textsuperscript{78} Ibid, para 69-73
\textsuperscript{79} Waaldijk, Supra, pp 2-8
\textsuperscript{81} Waaldijk, Supra, pp 2-8
\textsuperscript{82} See CCPR General Comment No. 18: Non-discrimination
individuals, a risk which would cause a negative effect on the view of LGBT relationship. The public debate concerning LGBT individual’s right to marriage shows the special status and cultural significance of marriage as an institution. Civil union can be seen as a semi or quasi-marriage which has started to gain more international recognition. If same sex marriages is not enforced by the spousal benefits equal to marriage for civil union partners,83

4.3.1 Young v. Australia (2003, HRC)
The applicant in Young v. Australia was a gay man who had been in a relationship with his partner for 38 years. When his partner (a war veteran) died, Mr Young applied for pension as a veterans dependent. The national remedies rejected his request on the ground of the request concerning a homosexual relationship. The author argued that Article 26 of the ICCPR had been breached.84 The Committee pointed out its earlier case law, Toonen v. New Zealand, where it had declared sexual orientation as a prohibited ground for discrimination. Further, the Court also pointed out that not every distinction is to be considered as prohibited discrimination. However, the state had not been able to explain the distinction between a same-sex couple and an unmarried heterosexual couple who would have been entitled to the pension benefits. In that context the Committee found that article 26 had been violated by the Australian government when not accepting the surviving partner as a beneficiary.85

4.3.2 Oliari and Others v. Italy (ECtHR, 2015)
In the case of Oliari and Others v. Italy six Italian men (three homosexual couples) submitted their cases arguing that Italy did not provide any opportunity for them to marry or to have their relationships legally recognized as a civil union and that this impracticability was a violation of Articles 12 and Article 8 in 14 of the ECHR.86 The ECtHR found that the protection submitted by the Italian government did not provide the core needs for couples in a stable and committed relationship. Same-sex partners were allowed to register as cohabitants but the registration could only serve for statistical record purpose and gave no civil status or legal benefit for same-sex couples. The Court analysed the discrepancy between the couple’s social

83 Waaldijk, Supra pp, 3-7
84 Young v. Australia para. 2.1
85 Ibid, para. 10.1-13
86 Oliari and Others v. Italy, para 10-31
reality and the non-recognition the law contained and pointed out that the Italian law was silent regarding the reality of the couples living in committed homosexual relationships. The court mentioned that homosexuals in Italy are often open with their relationship and official statistics show that about a million of homosexual and bisexual persons live in central Italy. Further, in the Courts view, the Italian government would serve a social need by providing a civil union status for homosexuals and it would not create any specific burden on the Italian government to make such status accessible.87

The Court stated that

“In the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance”88

Further, The Court emphasised on the situation for homosexuals in Italy, the public interest of their recognition and the Italian legal systems ongoing discussion about same sex partnership. The Court found that a violation of Article 8 had occurred saying that

“…the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions”89

4.4 Parental Rights

LGBT persons sometimes face inequality and legal issues regarding their parental rights or possibility to obtain such rights. One example is adoption. Adoption is a process which is today primarily understood to provide the child with a caring and stable family under the best interest of the child. There is no human right to adopt a child, hence, most nations allow adoption and

87 Ibid, para 151-186
88 Ibid, para 174
89 Ibid, para 185
the legal process varies.\textsuperscript{90} There is often a connection between marriage statues and the possibility to adopt a child, meaning that where same-sex marriage are not recognized it is sometimes impossible for a same-sex couple to adopt a child.\textsuperscript{91}

The UN Convention on the Rights of the Child protects the child’s right to have his/her family relations recognised by law “without unlawful interference”. It does also state that the child should not be discriminated on the grounds of the parent’s distinctions.\textsuperscript{92} There is also another convention worth mentioning, the European Convention on the Adoption of children. This Convention is from 1967 but was revised in 2008. One of the changes is found in Article 7 concerning the conditions for adoption. The 2\textsuperscript{nd} paragraph of the article says that states are allowed to make adoption available for same-sex couples if the couple is married or in a registered partnership together.\textsuperscript{93} In the following, some relevant human rights cases concerning LGBT parental rights are presented.

\subsection*{4.4.1 EB v. France (2008, ECtHR)}

In EB v France a lesbian woman sued France for denying her to adopt a child on her own. Single parents were allowed to adopt according to the French civil law but the applicant was denied adoption because of her “lifestyle”.\textsuperscript{94} The applicant argued that Article 8 and 14 had been violated. The court identified that the applicants homosexuality was the decisive factor to the French authorities when denying her to adopt.\textsuperscript{95} The court declared that

\begin{quote}
\textit{“...where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8.”}\textsuperscript{96}
\end{quote}

and found that the discrimination in the case did not pursue a legitimate aim. ECtHR found that Article 14 taken in conjunction with article 8 had been violated.\textsuperscript{97}

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\textsuperscript{90} Kohm L.M, Lindsey M, Supra, pp 238-241
\textsuperscript{91} Waaldijk, Supra pp 4-5
\textsuperscript{92} See the preamble on the Convention on the Rights of the Child and Art. 2.1
\textsuperscript{93} See the European Convention on the Adoption of children, Art. 17
\textsuperscript{94} EB v. France para 7-25
\textsuperscript{95} Ibid, para 89
\textsuperscript{96} Ibid, para 91
\textsuperscript{97} Ibid, para 96-98
\end{flushright}
4.4.2 Salgueiro Da Silva Mouta v. Portugal (1999 ECtHR)

In Salgueiro Da Silva Mouta v. Portugal the applicant sued Portugal arguing that the government denied him custody of his child based on his sexual orientation. The applicant had been married to a woman and they had a child together. The couple divorced and the applicant engaged in a relationship with a man. After the divorce the applicant and his ex-wife agreed that the parental responsibility should be given to the ex-wife and that the applicant had the right of contact. By leaving the child to live with her maternal grandparents the applicant argued that the child’s mother did not comply with the terms of the parental agreement and sought an order to have the parental responsibility transferred to him but was denied the custody by the national remedies.\(^98\)

The ECtHR discovered that the national court had treated the parents differently based on the applicant’s sexual orientation. The Court referred to its earlier case law and said that

“…a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification that is if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized”\(^99\)

The Court concluded that the protection of the best interest of the child pursued a legitimate aim. However, it was clear that the homosexuality of the applicant was decisive in the decision of the national court and this distinction was not acceptable under the Convention. Concluding the Court said that it could not see that a “…reasonable relationship of proportionality existed between the means employed and the aim sought to be realized” and found that Article 8 taken in conjunction with Article 14 had been breached.\(^100\)

\(^{98}\) Salgueiro Da Silva Mouta v. Portugal 1999, para 9-14
\(^{99}\) Ibid, para 29
\(^{100}\) Ibid, para 36
4.4.3 X and Others v. Austria (2013. ECtHR)

In this case the ECtHR faced the question whether a biological parent has the right to preserve the status of a parent if he/she is in a stable homosexual relationship and his/her partner seek to adopt the biological child of him/her. In Austria this type of adoption was permitted regarding heterosexual couples which did not have to be married to obtain this right. For homosexuals this adoption right was not accessible under Austrian law. In this case, the child had been living with her biological mothers and the mother’s partner for several years and still did.101 The ECtHR found that the relationship between the birth mother, her partner and the child amounted to the meaning of “family life” found in Article 8 of the Convention.102 The Court referred to its case law stating that

“just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons.”103

The Court emphasised on the fact that the applicants did not wish to obtain a right preserved for married couples, but a right which unmarried heterosexual couples could obtain. Further, the Court did also point out that the question was by no matter about the right to adopt, but completely about a right which Austria had chosen to grant its citizens but upheld a difference treatment between heterosexual non-married couples and same-sex couples.104

The Court identified the “protection of the family in the traditional way” as a legitimate aim which could justify difference in treatment, but also pointed out the interest of the child as a protecting worth legitimate aim. The Court found that the government had not proven in which way the difference in treatment between heterosexual and same-sex couples was proportional, necessary and had a legitimate aim. The Court said that its jurisprudence presented the burden of proof to be for the government to show that kind of justification. Conclusively, the Court found that Article 14 in conjunction with article 8 had been violated. 105

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101 X and Others v. Austria, para 9-20
102 Ibid, para 95-96
103 Ibid, 99
104 Ibid, 102-105
105 Ibid, 138-153
4.4.4 X, Y and Z v. The United Kingdom (ECtHR)

This case regarded a transgender man (female to male) who, for many years, had been living in a stable relationship with a woman. In 1990 the couple applied for artificial insemination by donor. Their application was passed to a hospital ethics committee which decided not to allow the artificial insemination. The couple appealed the decision with references to studies about transgender parents and the committee agreed to provide the artificial insemination asking the transgender man to acknowledge himself as the father of the child in accordance with the Human Fertility and Embryology Act. The women was inseminated and the couple had their child in 1992. The same year the Minister of Health decided not to register the transgender parent as the father of the child based on their opinion that only a biological father could obtain such registration. The Minister did only allow the child to obtain the surname of the transgender parent. The applicants sued the UK arguing that Article 8 of the Convention had been breached through the lack of recognition of the family relationship between the biological mother, the transgender father and the child.106

The Court said that the legal disadvantages the man had by not being able to register as the father of the child was unlikely to cause “undue hardship” in the present case. There were measures available for the couple to ensure the interest of the child such as the possibility to write a will concerning the inheritance in the family. The Court did also say that the social feeling and status of the child, regarding the fact that her father was not recognized at her birth certificate, did not establish any particular stigma and that pointed out the fact that the information on the birth certificate was not public.107

Concerning the child’s emotional feeling and development in relation to the fact that one of her parents was not legally recognized as her father the Court said that there was nothing that prevented the non-recognized father to act and live like as if he would have been the biological father of the child. The Court mentioned that there is no certainty on how the non-recognition of her parent will affect her development and the Court “should not adopt or impose any single viewpoint”.108 The Court moved on to describing transsexuality as a scientifically complex status concerning legal, moral and social issues, pointing out that there is no existing general approach of the member states regarding complex legal questions concerning transsexualism.

106 X, Y and Z v. The United Kingdom, para. 12-19
107 Ibid, para 45-48
108 Ibid, para 45-51
In that context the Court found that there was no obligation for the state to recognize a person as a father to a child if that person is not the biological father.\textsuperscript{109} The Court added that the law of the state did not allow legal recognition between the transgender man and the woman, and the non-recognition could not amount to proving a failure of protection of respect of family given in article 8 of the Convention.\textsuperscript{110}

4.5 Gender reassignment and its official recognition

As figured by the cases earlier presented, transgender person’s right to marry and access parental rights appears to sometimes be dependent on whether or not that person has gone through medical gender reassignment and have been officially recognized as his/her new gender. Judging from that, it is important to know the current legal situation regarding transgender person’s legal possibility to obtain such rights. There is no existing international legislation on the right to obtain gender reassignment. However, many states have made gender reassignment accessible. It is worth mentioning that gender reassignment treatment can be non-accessible for some persons depending on the cost of the medical treatment. The right to obtain gender reassignment has been argued by professionals to be protected by the right to privacy under Article 17 of the ICCPR and the right to physical and mental health under Article 12 of the ICSCR.\textsuperscript{111}

If a person undergoes gender reassignment it is crucial that the new sex of the person is officially recognized. Many nations do not recognize such a right resulting in complex difficulties for the transgender person. To not be recognized as your present sex can result in a serious interference with the personal identity and have a deep impact on a person’s life.\textsuperscript{112}

The case of \textit{B v. France} was the first case were the ECtHR found a violation of Article 8 concerning the legal recognition of a transsexual person. The applicant was a woman who complained that the French government had violated her right to respect and private life by not officially recognizing her new gender.\textsuperscript{113} The ECtHR had in its earlier case law, \textit{Rees v. The

\begin{itemize}
  \item \textsuperscript{109} Ibid, para 37-52
  \item \textsuperscript{110} Ibid, para 52
  \item \textsuperscript{111} Walker, Kristen, 2006, Transexuals and Transgenders, “International Protection” Max Planck Encyclopedia of Public International Law, pp 1-5
  \item \textsuperscript{112} Ibid, pp 4-7
  \item \textsuperscript{113} Ibid, pp 1-5
\end{itemize}
United Kingdom and Cossey v The United Kingdom, not obliged the state to change the sex in the applicant’s birth certificate.\textsuperscript{114} However, in the present case, the Court said that there were major differences in the civil status system of the UK and France and while it was legally complicated to amend a birth certificate in the UK so was not the case in France. The Court said that the rejection of recognizing the applicant new sex was resulting in placing her in a daily situation which was not compatible with the respect due to her private life, and there had been a violation of Article 8.\textsuperscript{115}

As presented earlier, regarding the case of Christine Goodwin v. The United Kingdom the ECtHR has later found that also the rejection from the UK to officially recognize a transgender person’s new gender was a breach of Article 14 taken in conjunction with Article 8.

Even if a person is allowed to undergo gender reassignment it is not unusual for the state to present complicated requirements for obtaining such medical assistance. One requirement has in several states been that the transsexual must be unable to procreate, resulting in many transsexuals having to undergo sterilizations to obtain medical assistance.\textsuperscript{116} The ECtHR did in 2015 process the case of Y.Y v. Turkey concerning a transsexual applicant who was denied gender reassignment based on, as one of the denial grounds, him being able to procreate. This was the first time the Court had processed a case regarding domestic requirements for obtaining gender reassignment.\textsuperscript{117} The court found that Article 8 had been breached saying that the Turkish authorities requirements for obtaining medical assistance (one of them not being able to procreate), was an interference with the applicants right to respect for his private life and that kind of the interference was not necessary in a democratic society.

No case regarding transgender individuals have been processes by the HRC. Comparing the similarity between Art 8 of the ECHR and Article 17 of the ICCPR professionals have argued that it is reasonable to believe that the HCR would adopt a similar approach as the ECtHR.

\textsuperscript{114} B v. France, para 10-16
\textsuperscript{115} Ibid 58-63
\textsuperscript{116} Walker, Supra pp 3-7
\textsuperscript{117} Y. Y v. Turkey
4.6 Conclusion

It is clear that the ECtHR or the HRC is still not willing to oblige the member state to allow their homosexual citizens to enjoy the right to marry. Conclusively, marriage is today a human right exclusive for heterosexual individuals (including transsexual individuals wishing to marry a partner of their birth gender). Or it could be said that the right to marry is a human right which the international human rights bodies does not oblige the contracting states to make accessible for same-sex couples.

The core of both the HCR and the ECtHR reasoning on why marriage is seen as an exclusive human right for heterosexual, is the wording in the treaties. It is the fact that the subjects are gendered. ECtHR does also mention the non-intention of the drafter to include same-sex spouses, referring to the decade when the convention was drafted. Regarding transsexual individuals’ right to marry the ECtHR has stated that contracting states cannot “restrict or reduce the right in such way or to such extent that the essence of the right is impaired”. The reasoning is referring to the biological criteria of determining gender and the fact the transsexual had changed her sex.

The current case law from the ECtHR says that determination of gender must not only be based on biological criteria. It can be said that the ECtHR and the HRC have already determine that the essence of the right to marry lies in gender determination, a commitment between a man and a women. Many might oppose to that, arguing that the essence of the right to marry must contain higher and more crucial elements than gender determination. For example the essence of marriage can be seen as a union and commitment entailing legal duties between two spouses, or even be seen as an act of love.

Even if the intention when drafting the treaties was not to include same-sex couples it can be difficult to see how that non-intention should effect the interpretation of the essence of the right today. Also, the ECtHR concludes that transsexual should be able to marry a person of their birth.gender. Based on the condescending view on LGBT individuals which was dominant in the 1950ths, it is unlikely that the drafter’s intention was to include transsexuals in the right to marry (despite medical treatments). Yet, the case law presents gender determination as the essence of the right to marry, without the biological criteria lying in that essence.
By upholding marriage as an exclusive right for heterosexuals the bodies are ignoring the fact that a bisexual person becomes a holder of different rights depending on her sexual behaviour. The bisexual dilemma illustrate how sexuality is a decisive factor in the interpretation of human rights. Why is sexuality and gender so important to the human rights bodies? A way of desexualising our human rights could be to redraft the articles and make them non-gendered. That would also result in better rights for transsexuals and better protection of children to same-sex parents or transgender parents. In this case, ignorance is costly and recognition is not.

The recognition of civil unions have in several nations led to the right to marry for same-sex couples. Hence, civil unions can be seen as a natural step in the way towards recognizing same sex marriages. However, if the human rights society does not recognize the right to marry for same-sex couples the civil unions might not develop into same-sex marriage. Even if the status of marriage and the status of a civil union sometimes have the exact same recognition of rights it is problematic to separate groups due to their sexual behaviour. It also stipulates as stigma when one group has to be separated from another. And why separate if the rights are the same? Civil unions is a quite new phenomena and even if legally containing the same rights as marriage, it is unlikely to carry the same authority as marriage in the eye of the society. Therefore a civil union can be seen as an institution created for a society where universality does not apply to homosexuals but where the sanity of humanity is trying to protect a vulnerable and stigmatized group of individuals.

The case of Gas and Dubois v. France show how homosexual couples without the right to marry is compared legally to a non-married same-sex couple. Although the ECtHR concludes that there is no indirect discrimination when doing such comparison it is quite obvious that such view indirect discriminates all same-sex couples wishing to get married but not being able to obtain such right. In the present case such indirect discrimination lead to a child having only one of her parents legally recognized, an effect which does not by any means reflect or protect the child’s social reality.

Regarding parental rights, if a child has two parents caring for him/her, why is the biological criteria so important? It seems like some states are ignoring the best interests of the child in order to uphold non-rights for same-sex parents. Also, If the human right bodies had a honest interest of the best interest of the child the natural approach in same-sex parent-cases would be to primarily focus on the right of the child (who obviously also is a human rights holder, as
much as any other human) and subsidiary regard the status of the parents as LGBT-individuals. It is very hard to see how it is in the best interest of a child to not recognize its relation to a non-biological parent who has cared and raised the child, based on the fact that the parents are homosexual.

PART 5 COMPARATIVE ANALYSIS
This part aims to give some comparative views regarding the international human rights protections of vulnerable groups, and also to give a comparative view on the right to marry.

5.1 The Convention on the Elimination of All Forms of Discrimination against Women
The UDHR and its covenants sets out a profound set of universal rights entitled to all human beings. It is no doubt that both men and women are such human beings and discrimination based on sex is prohibited under article 2 of ICCP. The UN Charter describes the fundamental rights to be enjoyed by everyone “without distinction as to...sex”. However, women have during the history been subjected to discrimination and marginalisation on grounds of their gender. The Covenants have proved to be insufficient in guaranteeing women their full enjoyment of human rights.118

The Commission on the Status of Women (CSW) was founded in 1946 as a sub commission of the Commission on Human Rights. The CSW worked on enlightening the issues of discrimination against women and soon became its own full Commission. The main objectives of the CSW were to compose recommendations regarding women's rights in order to implement the fundamental precept of equality between men and women. Under ten years of time, 1949-1959, the effort of CSW resulted in several influential declarations and conventions concerning the protection and promotion of women's human rights in areas which the Commission thought such rights to be especially at risk. Despite the fact of CSW profound work, it was still (during this time) a common opinion that the general human rights treaties provided the best protection and promotion of women's human rights. The declarations and conventions from CSW was a sign of the refinement of the UN system, but failed to illuminate the deep societal problems concerning discrimination against women.119

118 “Short history of CEDAW Convention” http://www.un.org/womenwatch/daw/cedaw/history.htm
119 Ibid
During the 1960-70s the rights of women started to gain new international consciousness and the discrimination against women started to become a priority for the human rights society. In 1965 the Declaration on the Elimination of Discrimination of women was adopted by the General Assembly. The Declaration was drafted by a committee of CSW after a request from the General Assembly and had no binding force. Some years after the adoption of the Declaration, the Committee took the decision to prepare and draft one international binding treaty to draw attention to women's inequality and give normative force to equal treatment. This treaty became known as the Convention on the Elimination of All Forms of Discrimination against Women. In 1979 the CEDAW was adopted by the General assembly. The voting of the adoption of CEDAW resulted in 10 abstentions. Some of this reservations was based on specific conservative views on women's equality with men.

5.1.2 Why a special treaty for women?

Women rights have for a long time, and are sometimes still, being treated as a subcategory of human rights. CEDAW is one of the successful efforts of addressing discrimination against women. However, the Convention is not creating any new human rights for women, it is simply affirming the rights they are already entitled to through the universality of human rights. The convention's aim is to ensure that the contracting states take all appropriate measures in order to assure women’s rights to enjoy their human rights. Although the human rights of women is already included in the UDHR the CEDAW specifies rights of women that are not specified in general human rights treaties. Nonetheless, special recognition of women as a vulnerable group can carry a risk of resulting in a reproductive view on women a secondary status holders.

5.2 The Convention on the Rights of Persons with Disabilities (CRPD)

Persons with disabilities have for many years been subjected to patterns of exclusion. Throughout the history they have been seen as secondary right holders or only as passive recipients of assistance. The marginalisation of disabled persons increases the risk of them being subjected to human rights violations. In 2001 the UN General Assembly established an Ad Hoc Committee with the purpose of negotiating a convention concerning the human

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120 Ibid
121 Moeckli, Supra pp 316-319
122 Supra, “Short history of CEDAW Convention”
rights of disabled persons. The drafting resulted in the CRPD which was adopted by the General Assembly in 2006. The Convention was signed in 2007 by the remarkable number of 81 states. The UDHR and its covenants did already address disability before the CRPDs existence. Naturally, disabled persons are also entitled to enjoy all the freedoms and rights set out in the International Bill of Human Rights.¹²⁴

5.2.1 Why a special treaty for disable persons?
The UN answer this question by referring to a necessity to “reaffirm the human rights of persons with disabilities and to ensure their participation in society as equal members and subjects of rights.” The CRDP does not create any new rights, instead it expresses already existing rights with the aim to enlighten the problems disabled persons are facing regarding their equal access to human rights. The Convention is specifying obligations that the contracting state has regarding the protection of disable person’s human rights, rights that are not specified in other human rights treaties.¹²⁵

5.3 Marriage under anti-miscegenation laws
Anti-miscegenation laws are laws which prohibit interracial marriage and interracial intimate relationships, and enforces racial segregation. Throughout the history, different nations have created their own Anti-miscegenation laws, for example France, the United States of America, Germany and South Africa. Anti-miscegenation laws are today a part of the history but did exist in the US until 1967 and in South Africa until 1985. In the following part, the practice of anti-miscegenation laws in the US and South Africa will shortly be presented.

5.3.1 The United States
Interracial marriage was for hundreds of years (until 1965) prohibited in several states of the US. The anti-miscegenation laws constituted racial legislation and were understood to regulate sexual and marital decency. The laws served to define racial difference and marked with

¹²⁴ Ibid
persons as inferior to coloured persons. The use of the laws supported the racial inequality in the society and justified a profound discrimination against coloured persons.\textsuperscript{126}

The end of the anti-miscegenation laws came with the case \textit{Loving v Virginia}. Loving was an interracial couple, a white man and a black woman, from Virginia who got married in Washington in 1958. At that time, Virginia (and 17 other states) were still practicing anti-miscegenation laws. Thus, the couple had committed the crime of miscegenation under the law of Virginia no matter the fact that the actual married had taken place in a state allowing interracial marriage. When the couple had returned home to Virginia they were arrested and faced with felony charges. Under the threat of imprisonment the loving plead guilty and were instead punished by a 25 year ban from the state. However, the loving took their case to the US Supreme Court.\textsuperscript{127} The question for the Court was if the anti-miscegenation laws of Virginia violated the Equal Protection Clause of the Fourteenth Amendment. The Court came to an unanimous decision, holding that “the freedom to marry, or not to marry, a person of another race resides with the individual, and cannot be infringed by the State.” The Court found that the prohibition of interracial marriage was unconstitutional and violating the Fourteenth amendment. The decision of the court resulted in the ending of anti-miscegenation laws in the US.\textsuperscript{128}

\textbf{5.3.2 South Africa}

During the Apartheid regime in South Africa a distinctive system of racial segregation was developed. Black and coloured people were subjected to denial of their human rights and suffered grave discrimination compared to/from the white population. Interracial intimate relations and marriage were prohibited under the 1949 Prohibition of Mixed Marriages Act and the 1957 Amendment of the 1927 Immorality Act. Approximately 11,500 persons were convicted for committing such prohibited interracial engagements, between the year of 1957 and 1980. Other laws settled out areas for the purpose of separating persons based on their ethnicity resulting in non-interaction between racial groups.\textsuperscript{129}

\textsuperscript{126} Moran, Rachel F “Love with a proper stranger: what anti-miscegenation laws can tell us about the meaning of race, sex and marriage” Hofstra Law Review, Volume 32, Issue 4, Article 22, 2004, pp 25-32
\textsuperscript{127} “Loving v. Virginia, the case over interracial marriage” https://www.aclu.org/loving-v-virginia-case-over-interracial-marriage
\textsuperscript{128} Ibid
\textsuperscript{129} Gebhard, Julia, “Apartheid” Max Planck Encyclopedia of Public International Law, 2010, pp 2-8
In the 1980ths, the apartheid regime began to weaken. There was a huge both internal and external opposition against the system, and the world community imposed sanctions against the nation. This lead to the weakening of several apartheid laws and the 1949 Prohibition of Mixed Marriages Act and the 1957 Amendment of the 1927 Immorality Act were repealed in 1985. In 1990 the ban of anti-apartheid organizations was lifted and in 1994 the first free and equal elections were held in South Africa.\textsuperscript{130}

Apartheid is a crime against humanity, under article 1, International Convention on the Suppression and Punishment of the Crime of Apartheid (which was established in 1973). It is also considered to be prohibited as jus cogens.\textsuperscript{131}

5.4 Conclusion

The comparative part has shown how vulnerable groups can receive special protection through treaty law, although this protection and rights are already said to be included in the general human rights treaties like the UDHR and the ECHR. One might perhaps rather say that it is not special protection but special attention the treaties are providing. The reasons for drafting such treaty laws as the CEDAW and the CRPD seem to be the wish to assure and affirm the rights of a group that has been suffering from discrimination and marginalization. Such wish can be interpreted as covering a joint moral between states regarding the equality of a specific group they wish to give special attention. It would therefore be reasonable to think that there are no major cultural obstacles regarding states wish to jointly protect the specific group. However, as mentioned earlier, such cultural obstacles have been seen concerning the drafting of the CEDAW when some states expressed their concern over cultural differences in the view on the equality between men and women.

LGBT individuals are a stigmatised and vulnerable group, especially regarding the fact that their sexuality cannot only result in discrimination but also (in some jurisdictions) in imprisonment, torture and death penalty. Hence, there is no international treaty affirming the human rights of LGBT people.

\textsuperscript{130} Ibid, pp. 5.9
\textsuperscript{131} See the International Convention on the Suppression and Punishment of the Crime of Apartheid. Adopted by the General Assembly of the United Nations on 30 November 1973
If arguing in favour for a special LGBT human rights treaty it is likely that voices would be raised saying that the human rights are already including LGBT individuals due to the universality of human rights. As a matter of fact the UN Human Rights Office of the High Commissioner has said that:

“Protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards. The legal obligations of States to safeguard the human rights of LGBT people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights treaties”

One must here reflect over this statement in relation to all those other groups for whom new human rights standards have been established. Concerning the positive effects of the Yogyakarta Principles and the already existing national protection in some states, it is likely to think that a LGBT non–discrimination treaty would be ratified by several states. Even if not officially creating new rights, such treaty would be crucial to identify and specify already existing rights. As we have seen, that kind of specification is a move that has benefitted vulnerable groups before.

As seen in the comparative chapter, the right to marry is a right that has been limited in an awful way of racism. However, the aim here is not to compare discrimination against LGBT individuals with racisms, but to give a view on marriage as a limited human right. The anti-miscegenation laws were racism justified by the thought of interracial sexual relations as something “against nature”. The discrimination that LGBT individuals are facing today is also often justified by the assumption that this group is committing actions which are “against nature”. The human rights courts of today would not use the type of wording “against nature” but they have in many cases used wording such as “traditional values” when rejecting same-sex couples the right to marry. Fortunately, anti-miscegenation laws are a part of our history. The society has realised that there is no superior race. Perhaps, 100 years from now, ban of

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same-sex marriage will be a part of history and the society will have understood that the essence of the right to marry does not require specific gender identifications.

Worth acknowledging is also the love factor when it comes to intimate relations between humans whom are prohibited to engage in loving relationships. Nowadays in many societies marriage is considered a love engagement and no longer considered to be a primarily reproductive engagement. Being prohibited to have a loving relationship with a human of the same sex or different colour and still engaging in commitment is showing a strong core of love factor, which is a factor that many would consider as the core of today’s marriage institution.

**FINAL REMARKS**

The main purpose of this essay was to prove that all human rights should apply to LGBT individuals to the same extent as for heterosexual individuals. Through the idea of universality that enshrines our human rights treaties and document it must be clear that universality should apply to all human individuals, including those that are homosexual, bisexual or transgender. There is actually not that much to prove here, what makes the question difficult is that the universality is relative and not absolute. This results in different treatment of equal human beings. The public international law of our time is often interpreted on a positivist ground with profound respect of the state’s sovereignty. To respect the self determination of other states is also to respect states different cultural values. Hence, an important issue here is the principle of cultural relativism and the fact that the ignorance of cultural relativism can be considered as a type of imperialism.

LGBT-rights have mainly developed in western states, and if western states try to force their view on LGBT-rights upon non-western states, there is a high risk for that action being seen as a new type of imperialism (cultural imperialism). Perhaps there is no need to try to enforce non-western states to recognize all human rights of LGBT individuals, but is it still imperialism to condemn the practice of torture and death penalty of LGBT persons? Accusing LGBT right defenders of cultural imperialism can also be seen as a way of sacrificing an unwanted group in the society, LGBT individuals. Most persons around the world consider themselves to be heterosexuals, but there is a significant percentage of the world populations who are instead LGBT-persons. Are we willing to sacrifice this smaller group out of fear of cultural
imperialism? What has the highest value, cultural relativism or lives of human beings? That is a question which would need to be discussed in the light of utilitarianism which is a theory not covered here.

While the ECtHR does not talk about cultural relativism it is using the term social reality. The use of this term has led to conclusions such as the prohibition to discriminate LGBT-individuals where the actual culture of the state is not categorized by homophobia or transphobia but instead categorized by quite positive opinions about LGBT recognition. If the case of Oliari and Others v. Italy would have been regarding Russia instead of Italy, it is likely to believe that the social reality would have been considered different and thereby leading to another ruling by the ECtHR.

However, The Committee of Ministers have stated that discrimination on grounds of sexual orientation or gender equality cannot be justified considering religious, cultural and traditional values, or according to the rules of a “dominant culture”. This is a statement which can be considered as quite confusing regarding the principle of cultural relativism and how the ECtHR sometimes is unwilling to enforce non-discrimination of LGBT persons depending on the contracting states citizens “social reality”.

The idea of focusing on the right to marry in this essay was to show that not all human rights seem accessible for LGBT individuals, and that the human rights instrument allows such non-accessibility for LGBT individuals. Why focus on the right to marry when lives are at stake? The most important question concerning LGBT individuals is without doubt the fact that there are still nations criminalizing homosexuality and some of them practicing death sentence for same-sex engagements. However, if not all human rights are interpreted by human rights bodies as including LGBT individuals such non recognition feeds stigmas and marginalization which can result in acceptance and ignorance of violence subjected to LGBT individuals. When our human rights instruments indirectly are denying LGBT the basic right of getting married it sends out a message. A human which is denied her basic rights must be considered less human. When the core of the right can take a different shape depending on a person’s sexuality or gender identity something can be wrong with the system, or the interpretation of the system.

Civil unions are a step in the direction towards same-sex marriage and can be seen as an example of a crucial right (or recognition of right) in development. Civil unions can also be
seen as a security blanket when nations are growing in recognizing same sex marriage, and most nations will probably need to use that security blanket before they are full grown.

Regarding Parental rights it can be surprising how much focus a human rights body can put on the rights of LGBT-individual instead of the core factor, the best interest of the child. Such interest would naturally be to recognize parental rights of those individuals whom are caring for a child without regarding the sexual orientation or gender identity of the parents.

The purpose of this essay was also to investigate if there is a need for a human rights treaty recognising the human rights of LGBT individuals. Of course, many would say that LGBT rights are human rights due to the universality of human rights. However, there are today several human rights treaties putting special focus on vulnerable group and affirming their rights. Why would not LGBT individuals deserve such affirmation? Hence, some mean that it can be problematic to highlighting the risk of a vulnerable group. It can contribute to more stigmas and marginalization. Nonetheless, that risk has already been implemented in the human rights society. We already drafted treaties that specifies rights which should already be (or are already) existing in our human rights treaties. That drafting might not have been wrong since the new conventions seems to have served their purpose.

So, conclusively, should LGBT rights be obvious human rights because of the idea of universality? Of course, at least in a world much older than the present one. One important hold back is the cultural relativism, the world is still young when it comes to real and pure universality of human rights. Hence, there must be a limit on how much the human rights society can intervene with states of “dominant culture” or else more differences and conflicts might be created. As the history has shown us, condemned groups have walked their way through history reaching more and more human rights recognition. The same walk must be done by the LGBT community, a walk which will cost lives. Being different from the dominant group always costs. Since the universality is not interpreted equally for all, a treaty concerning LGBT human rights would be a huge step on the walk towards full universality applying to LGBT individuals.
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