Multisexual Citizenship and Human Rights: Questioning the Space of Citizenship of LGBTI Persons beyond Liberty and Equality

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This is to certify that this thesis comprises only my original work and due acknowledgement has been made in the text to all other material used.

Acknowledgments

Don't Live in the world as if you were renting
or here only for the summer,
but act as if it was your father's house...
Believe in seeds, earth and the sea,
but people above all.
Love clouds, machines and books,
but people above all.
Grieve,
for the withering branch,
the dying star,
and the hurt animal,
but feel for people above all.
Rejoice in all the earth's blessings -
darkness and light,
the four seasons,
but people above all.

(Nazim Hikmet 1955, Moscow)

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Abstract

The emergence of the human rights of individuals defined as lesbian, gay, bisexual, transgender and intersexual (LGBTI) has caused a questioning of the reliability of a system of protection of human rights resting on heteronormativity and the enforcement of a strict male-female dichotomy. It has also pushed scholars to ask who is the contemporary subject of human rights.

This thesis builds on the acknowledgement of this tension in order to investigate, in the context of the Council of Europe, the process by which LGBTI individuals are created as subjects of human rights. It is argued that law and politics play a concerted productive role in constituting the subjects that they wish to protect, thus promoting adherence to rigid identity categories in order to become intelligible before the law. This endeavour will be carried out by analysing both outstanding case law from the European Court of Human Rights (ECtHR) concerning sexual orientation and gender identity, as well as using ethnographic observation carried out at the Office of the Commissioner for Human Rights of the Council of Europe in 2010.

The thesis analyses the process by which the subject of human rights is produced and granted legal intelligibility in Strasbourg. Simultaneously, it also explores viable alternatives to the categorisation of individuals in terms of sexual orientation and/or gender identities in the socio-juridical field. In this regard, citizenship represents the privileged domain of inquiry, where identities are articulated, rights are allocated and

exclusionary practices are enacted. The concept of “multisexual citizenship” serves to explore models of citizenship that can transcend national borders, also encompassing multiple forms of identification and socio-political and cultural allegiances. As a result of this process of transformation of citizenship, an inevitable and radical metamorphosis of human rights is also anticipated, beyond the current narrow framework of formal equality and freedom.

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Introduction

Lesbian, gay, bisexual, transgender, and intersexual (LGBTI) persons have for a long time been labelled as being "against nature" (Foucault 1998) or as "gender outlaw(s)" (Bornstein 1994). Increasingly, however, discourse concerning the rights associated with individuals' sexual orientation and/or gender identity are proliferating and intensifying in various geo-political and legal contexts. Social, legal, and political recognition of the legitimacy of these rights claims is happening both at the level of nation-states and in international fora.

Structural invisibility, and political, social, and economic marginalisation of this heterogeneous – and fictitious – group of individuals have for a long time been the norm. It could be argued that, in the 1948 Universal Declaration of Human Rights, the typical rights-holder in the collective imaginary was not just *male*, *white,* and *middle-class*, he was also *heterosexual* and *cisgendered*. Same-sex sexual and sentimental attractions, as well as the defiance of gender norms, have been enshrouded in silence, shame, and reprobation in different social, cultural, and political contexts. While the legacy of this transversal stigma has far from vanished, many of the claims advanced by LGBTI persons in the past few decades, starting from the late seventies, have been legitimately included into the "repertoire" of human rights both at the national and international level.

Although with different aims and intensity, international organisations such as the United Nations, the European Union, and the Council of Europe have officially started to include sexual orientation and gender identity among the "human rights issues" in need of being addressed. Furthermore, especially in Europe, and in some of the countries of the American continent, national legislation has moved from the

criminalisation of homosexuality and gender non-conformity to the enactment of provisions that allow LGB persons to marry, to become adoptive parents, and protect individuals from discrimination in the workplace and in other contexts such as the provision of services, healthcare, education, and so forth. Similarly, legislative measures aimed at allowing individuals to have their preferred gender legally recognised are in place in various legal systems, although the terms by which this recognition can be achieved may vary significantly from one country to another. Lastly, there is also an intensification of debates concerning the rights of individuals whose hormonal, gonadal, or anatomical characteristics at birth may not be in line with expected notions of masculinity or femininity and who come to be defined, in medical terms, as being "intersexual" (Fausto-Sterling 2000).

This process of increased recognition of rights of a formerly stigmatised and marginalised group of individuals, however, is not deprived of grey areas that directly call into question the interrelationship between law and politics. LGBTI-friendly human rights policies promoted both at the level of nation-states and at the level of supra-national international organisations, engender, to some extent, the suspicion that such an enthusiasm may well hide more subtle political purposes pursued by these actors, for instance in connection with the promotion of a specific concept of nationhood or citizenship. In a context in which human rights may lose their aura of almost sacred universality and become the object of various political negotiations (Douzinas 2000; Dembour 2006), the emergence of rights claims concerning individuals' sexual orientation and gender identity represents a unique opportunity to explore the ways in which the boundaries of human rights can be stretched and new rights-holders can be created.

The Focus of this Research

By focusing on the European continent – and more specifically on the work of the Council of Europe (CoE), the largest and most influential intra-governmental human rights organisation – this thesis tries to read the process of creation and recognition of LGBTI socio-legal subjectivities as being partly informed by complex political motivations that span across different dimensions. On the one hand, the emergence of these rights claims, and their consequent recognition on the part of institutional actors, has led to the creation of new lines of exclusion between "respectable" and "non-respectable" LGBTI individuals. In becoming included into societal institutions such as the army or marriage, the former *outcasts* have been assimilated and normalised, and their claims have lost their allure as occasions for intense and radical social and political critique (Duggan 2003; Stychin 2004). Furthermore, this process of formal inclusion into mainstream societal structures has also led to the substitution of old lines of socio-political and economic marginalisation with new lines of exclusion that target a smaller, but still significant, sub-group of individuals (such as gender non-conformists, sado-masochists, people living with the social stigma of HIV, people living in marginalised socio-economic conditions or subject to racial, ethnic, and religious discrimination).

On the other hand, issues relating to the human rights of LGBTI persons have been transferred to the international arena and deployed as part of civilisational discourses targeting presumably homo- and transphobic countries. A phenomenon such as "homonationalism" (Puar 2007), by which a racialised segment of the queer population is mobilised for narrow nationalist purposes, calls into question the role of nation-states, but also of supra-national entities, in the articulation of political strategies

for the promotion of specific human rights issues. The deployment of "LGBTI rights" as the most advanced benchmark of civilisation (Stychin 2004, 951) is, therefore, problematic, as it can produce effects that are detrimental for the individuals concerned, by objectifying them and exposing them to further vulnerability, violence, and discrimination.

What has Been Done Already?

Particularly during the last two decades, there has been a growing interest in the process by which human rights claims advanced by LGBTI persons have been discussed and addressed in various legal fora. In the context of Europe, scholars have specifically focused on the historical evolution of the case law of the European Court of Human Rights (ECtHR), the main institution of the CoE, on issues concerning sexual orientation (Heinze 1995; Waaldijk 1992 and 2005; Wintemute 1995 and 2001; Johnson 2012) and gender identity (Whittle 2002). Although this immensely valuable strand of scholarship has been of primary importance in mapping out the developments in this field and in helping the LGBTI activists to navigate the complex process of litigation in Strasbourg, at the same time, it presents important limitations. These limitations appear even more obvious after the sedimentation of the consistent body of case law produced on these issues by the ECtHR in the last few decades. The most apparent of these limitations is represented by the fact that this body of work tends to describe the progressive recognition made by the ECtHR of the various human rights claims made by LGBTI persons, as a neutral process, deprived of political connotations.

Recently, Johnson (2012) has attempted to overcome the limitations of a purely legalistic approach by providing a socio-legal analysis of the ECtHR's case law on

sexual orientation. The achievement of this objective, however, has been partial, as the author's arguments rested entirely within the space of a "liberal" human rights agenda for LGB persons, formally based on the assimilation of LGB persons into societal institutions, such as marriage or the army, rather than on a critical questioning of the patterns of exclusion that these institutions may continue to foster in the first place. Equally, while critical voices concerning the socially and legally "conservative" role of the ECtHR in relation to issues concerning gender identity (Sandland 2003; Dembour 2005) have slowly started to emerge, the predominant framework of analysis for the ECtHR's case law on issues concerning gender identity seems to remain one which still takes for granted the necessity of a binary organisation of gender around the normative categories of *male* and *female*.

An Alternative Framework of Analysis of LGBTI Rights

This research acknowledges the inadequacy of the predominant descriptive approach to the ECtHR's case law on sexual orientation and gender identity. In this regard it posits the necessity of highlighting the hidden dynamics leading to the creation of specific LGBTI socio-legal identities visible in the case law of the ECtHR. However, the thesis also introduces a further layer of complexity, as it is not limited to a mere re-interpretation of the case law from a different perspective. It seeks, rather, to redimension the current predominant role ascribed to the ECtHR as the main voice that articulates continental views on a vast array of human rights issues. By complementing the analysis of the case law with participant observation carried out at the Office of the Commissioner for Human Rights of the CoE, this project seeks to demonstrate that there are other actors, not necessarily judicial, who contribute to the shaping of the

CoE's agenda on human rights. More specifically, the project seeks to compare and contrast the partially different approaches that inform the work of the ECtHR and that of the Commissioner on issues relating to sexual orientation and gender identity. Bringing to the surface the differences between these two approaches helps to demonstrate how pervasive political considerations are in the process of the construction of LGBTI socio-juridical identities and how complex negotiations about the meaning and reach of certain rights claims may be.

Connected to this endeavour of critical comparison between these two internal institutions of the CoE, however, is also a further dimension of this work. What this thesis also tries to do is transfer the discussion on the specific human rights of LGBTI persons into the terrain of citizenship, a terrain, it is argued, that is in a relationship of ideal contiguity to that concerning the protection of human rights in general. Among the many functions it fulfils, citizenship acts as the main *access gate* for the enjoyment of human rights protected by the state (Bhabha 1999, 12). Individuals resort to international human rights institutions only if they have not been able to obtain redress for human rights violations in their domestic legal and political system. Different scholars have debated the extent to which citizenship represents a crucial domain where important symbolic battles on human rights can be carried out by LGBTI persons (Bell and Binnie 2000; Richardson 2000; Phelan 2001; Grabham 2007). Nonetheless, the concept of "citizenship" employed here transcends the dimension of the nation-state and refers more broadly to dynamics of supra-national citizenship such as those proposed by authors such as Soysal (1994), Balibar (2004), and Stychin (2004).

Because of the European perspective that it adopts, this project requires an engagement with broader forms of communitarian identification which transcend national borders. It is suggested, therefore, that in the context of the emerging debates

on “European citizenship”, there is space to debate and frame different ways of conceiving the human rights of LGBTI persons, ways that are less prone to political instrumentalisation and break with the pattern of the “normalisation” of certain individuals into mainstream social institutions, with the exclusion and stigmatisation of others.

Because of its predominant focus on human rights, rather than on economic integration, the Council of Europe, rather than the European Union, has been identified in this context as the crucial actor in the process of the creation of a European notion of “human rights”, characterised by a complex synthesis of national juridical and socio-political traditions. The focus on the Council of Europe, however, is not deprived of problematic aspects. In fact, notwithstanding the institution's predominant focus on the respect, promotion and dissemination of human rights principles in the European continent, the institution has relatively limited power in enforcing human rights standards in the various member states. While the “moral” influence of the ECtHR's judgements may be recognised by the various member states, the political impact of these judgements often remains limited. This is firstly because the CoE was born as a result of a political decision by various European states and, as such, cannot escape the *Realpolitik* of human rights as pawns used by states in order to keep in check other national entities and influence their actions. Secondly, although the decisions of the ECtHR are binding on member states, parties sometimes refuse to comply to the Court's decisions or put into question the legitimacy of the Convention in the first place. The current debate in the UK on opting out the ECHR is a paradigmatic example of the existing challenges to the legitimacy of the work of the CoE in the field of human rights. As a “creature” of nation states, therefore, the CoE suffers a fundamental weakness: it can be destroyed by those same actors from which it originated.

As a result of the CoE's fundamental weakness as a political product of World War Two aftermath, the politics of human rights largely remains in the hands of nation states which have strong leverage in deciding how to adjust the ECHR's principles in a way that is compatible with their own legal systems. This, however, does not completely downplay the importance of this unique human rights institution. Notwithstanding the important limitations outlined above, the CoE nonetheless fulfills an important function, insofar as it carries out the utopian objective of creating and strengthening a "European" model of human rights. Because of this peculiar function, it is the privileged terrain where to investigate the emergence of new subjects of human rights, such as LGBTI rights-holders. In the context of the CoE, in fact, the contradictions between the theory and the politics of human rights converge, and the creation of new subjects of human rights – such as LGBTI rights-holders – represents a fascinating opportunity to both observe these contradictions and unveil the productive processes by which some individuals are endowed with entitlements, while others are sealed off the political community. The research focus on the CoE, therefore, reflects the researcher's awareness of the highly political nature of this institution and it is in line with the necessity of highlighting the crucial ideological function that the work of the CoE fulfills in contributing to the creation of seemingly homogeneous conceptions of "human rights" which can be framed as crucial elements of an emerging "European identity".

In this regard, therefore, by acknowledging the limitations that the setting of the CoE offers, this research, therefore, aims to investigate the extent to which LGBTI identities in Europe can be understood as being legal, political, and social fictions, and what implications this process presents in relation to the existence of specific forms of gendered and sexual citizenship, both at the level of the various member states of the

CoE and at the continental level. Far from being conceived as a mere critical reappraisal of the work of the CoE, this project seeks to problematise the notion of "LGBTI rights" in the European context, in order to provide alternative models of non-national citizenship, such as "multisexual citizenship", based on active political participation and challenges given to normative categories of sexual orientation and gender identity. The ideal terrain for discussion is one in which it is possible to unpack these claims in order to transcend the rhetoric of "equality" and "freedom", which may often hide discourses of normalisation of difference and neutralisation of political challenges coming from the periphery of the multifarious plethora of human rights actors and subjects.

The Structure of this Thesis

The thesis is introduced by a tripartite literature review which delves into the complex interrelationship between three core terms: *humanness*, *identity,* and *citizenship*. The discussion of this multi-layered theoretical framework is followed by an exploration of the methodological approach used for this research. The bulk of the work is constituted of four chapters containing the substantial analysis of the jurisprudential material as well as an account of the ethnographic observation. Each chapter revolves around a particular set of sub-themes. Three of these chapters pertain to human rights claims relating to sexual orientation. The fourth chapter is entirely dedicated to the discussion of various issues touching on gender identity and intersexuality. The concluding chapter builds on a synthesis of the material discussed in order to trace a new trajectory that connects the protection of the rights of LGBTI persons in Europe to the emerging and fascinating debate on "European citizenship".

Chapter one provides a discussion on the relationship between the definition of *humanness* and the relevance that this debate has for the creation and definition of rights-holders. "What counts as human?" is a recurring and inescapable ontological question that has a pivotal importance for the definition of those who are deserving of human rights. By discussing both the socio-legal (Baxi 2000; Douzinas 2000; Donnelly 2003; Dembour 2006) and the philosophical (Arendt 1976; Agamben 1998 and 2000; Butler 2004 and 2009) constructions of *humanness*, this chapter maps out the various ways in which rights-holders can be constituted through exclusionary methods. The chapter, therefore, questions the extent to which human rights can be solely based on the assumption that all human beings possess human rights by the sole virtue of their

humanness. In relation to the claims of LGBTI persons, it is argued that these exclusionary dynamics in the creation of the *human being* can go as far as justifying the complete erasure of some socio-legal subjectivities at the advantage of others, hence foreclosing the possibility of enjoying fundamental human rights to significant groups of individuals.

Chapter two begins with the idea that *humanness* is not sufficient to claim human rights and explores the importance of identity in the process of becoming intelligible social and legal subjects. In the first instance, the chapter explores the constructed character of sexual (Foucault 1998) and gendered identities (Butler 1990 and 2004) and the importance that these fictional constructions have for the obtainment and recognition of human rights claims. The discussion then is broadened to encompass an overview of the different ways in which identities are mobilised instrumentally for political purposes (Spivak 1988; Hall 1990 and 1996; Bernstein 1997). Complementary to this overview is a critical assessment of the limitations of this identity-based approach to human rights, building on Nietzsche's (1967 and 2003) notion of *ressentiment* and Brown's (1995) later discussion of the German philosopher's contentious concept.

Chapter three builds on the interrelationship between *humanness*, *identity,* and human rights in order to introduce a further layer of analysis: the one concerning the domain of citizenship. Citizenship, it is argued, represents the site where human rights and LGBTI identities intersect. This is presented as the sphere in which human rights claims of LGBTI persons can be reconfigured by positing new forms of what Evans (1993) described as “sexual citizenship”. While the chapter highlights the intrinsic tension existing between citizenship and human rights (Isin and Wood 2000; Tambakaki 2010), it also considers emerging models of non-national citizenship in the context of

Europe (Soysal 1994; Balibar 2004; Stychin 2004) as a unique opportunity to rethink exclusionary practices in the allocation of political membership and human rights entitlements in the European continent. The chapter also considers the issue of belonging to a national community from the perspective of "homonationalism" (Puar 2007), as a phenomenon by which some queer identities become mobilised for the purpose of portraying and promoting national liberal values, to the detriment of other sexual and racial identities. This last theoretical chapter has the broad goal of opening up the question of how the "LGBTI other" is constructed in Europe through the active deployment of intertwined concepts such as *humanness*, *identity,* and *citizenship*.

Chapter four lays out the methodological framework for this analysis. Starting from a discussion concerning my positioning as a researcher, as well as the motivations that have led me to investigate this topic, the chapter delves deeply into the preliminary question concerning the possibility of researching queerly in the field of law. The limitations of Queer Legal Theory (Fineman, Jackson and Romero 2009) are then explained and a justification for the chosen methodological tools is provided in the remainder of the chapter. In particular, the chapter contains a discussion on the rationale for combining a critical deconstruction of the ECtHR, informed by Critical Legal Theory, with participant observation carried out at the Office of the Commissioner for Human Rights of the CoE. In the last section, the chapter will analyse the way in which power relations are played out in the context of empirical research conducted in institutional settings, as well as provide considerations on the role of the researcher in these types of settings.

Chapter five is the first of four chapters in which both the case law and the work of the Commissioner, on issues concerning sexual orientation and gender identity, are analysed. The chapter, focusing in particular on sexual orientation, contains a

preliminary semiotic exploration of the language employed to define the socio-legal subjectivities of LGBTI persons by the ECtHR and the Commissioner. The first half of the chapter is also complemented by a discussion on authorship and narration from the part of LGBT(I) plaintiffs before the ECtHR in order to illustrate how language is crucial in shaping socio-legal subjects. This set of observations will serve as an important tool of interpretation for both the jurisprudential and the ethnographic data. The second part of the chapter analyses some of the issues the ECtHR has dealt with, particularly those concerning the criminalisation of same-sex consensual sexual activity, sado-masochistic practices, and the issue of discrimination of LGB personnel in the armed forces. The red thread connecting these issues is the emergence of a strong narrative of *respectability* which comes to represent the focus of the institutional actors such as the ECtHR or the Commissioner, but it is also the predominant narrative adopted by the plaintiffs in order to be successful with their claims in Strasbourg.

Chapter six is entirely dedicated to the discussion of the work of the two institutions of the CoE concerning the recognition of the family life of same-sex couples. In the first instance, the chapter contextualises the increasing importance acquired by this human rights issue, in both national and international contexts, within the framework of neoliberal pushes towards the autonomy and self-sufficiency of family structures and kinship arrangements. Both the case law of the ECtHR and the work of the Commissioner are read through the lens of this growing dynamics of "homonormativity" (Duggan 2003) by which same-sex couples are encouraged to sign up to institutions such as marriage in order to gain formal equality and inclusion within society. Both recent debates on the interpretation of Article 12 of the European Convention on Human Rights protecting the "right to marry and found a family" and the possibility to adopt for same-sex couples will be used as an illustration of this

growing tendency both in political and judicial fora. As it was for the previous chapter, the role of narratives of *respectability* for LGB persons appear to be fundamental in shaping claims made by stakeholders and engendering responses from institutional actors.

Chapter seven is the last of the chapters in which issues relating to the human rights of LGB persons will be considered. This chapter focuses in particular on the relationship between nationalism, belonging, and identity, expressed in the form of "homonationalist" tendencies cross cutting both the politics of human rights in member states of the CoE, and also at the level of the institution itself. By analysing issues relating to the freedom of expression, freedom of assembly, and freedom of association for LGBTI persons, specifically in the context of Eastern Europe, this chapter analyses the way in which a geography of queer-friendly versus homo- and transphobic member states of the CoE is created both in the case law of the ECtHR and, to a different extent, in the context of the political work of other bodies of the CoE. Additionally, the emerging debate and jurisprudential data concerning the asylum claims of LGBTI applicants in member states of the CoE is used to demonstrate how LGBTI issues can be instrumentalised politically in order to create narratives about human rights building on a dichotomy between a queer-friendly European continent and a presumably homo-transphobic non-Western "rest of the world". Lastly, the chapter analyses the limitations of the current human rights strategies aimed at sanctioning and preventing the occurrence of hate-motivated acts and speeches. In particular it seeks to show how limited these approaches can be in addressing the structural conditions that favour the emergence of these violent phenomena. Taken together, these three strands of analysis contained in the chapter highlight the difficult process by which LGBTI socio-legal subjectivities are productively created as subject-positions which strongly limit the

individuals' possibilities in expression and articulation of rights claims regardless of political negotiations and interests.

Chapter eight has a predominant focus on gender identity and the rights claims arising on the part of transgender and intersexual persons. While rights claims concerning intersexuality are only recently developing, the ECtHR has issued several judgements on the recognition of one's preferred gender, the right to marry for transgender persons, discrimination in the welfare and healthcare sectors, as well as on the issue of compulsory divorce for married individuals who wish to have their preferred gender recognised in countries in which same-sex unions are not recognised. This complex range of issues presents many challenges for both the ECtHR and the Commissioner. Many of these challenges are analysed here, particularly in relation to the temptation to frame the human rights claims of transgender persons as claims to "normalisation" within cisgendered and heterosexual society. The chapter will, in fact, discuss the current limited possibilities existing for opening up a radical deconstruction of gender in these fora. At the same time, however, it will also highlight the existence of an important shift from a medicalised model of transgender identity to a more empowering model that emphasises the self-determination of the individual. As for the rights claims of intersexual persons, the chapter contains some reflections on the emerging debate at the level of the CoE, as well as a discussion on the possible future developments in this field.

The concluding chapter starts from the discussion of the case law of the ECtHR and the work of the Commissioner in order to trace alternative routes for the discussion, configuration and recognition of rights claims concerning sexual orientation and gender identity beyond the framework of formal equality and freedom. In particular, in transferring the terms of the debate into the field of citizenship, this chapter seeks to

demonstrate that opening up the current predominant model of national citizenship to dynamics of a layering of allegiances, modes of belonging, and forms of identification permits a radical challenge in the current framework of European protection of human rights for LGBTI persons, but also to the concept of human rights more broadly. In proposing a model of "multisexual citizenship", this chapter tries to bridge the gap between the single-issue approach to human rights currently dominating both judicial and political practice, and the often conflicting multiple forms of identification that individuals possess, and that they may have to give up in order to acquire socio-legal subjectivity. The chapter discusses the possibility of re-framing citizenship in order to render it more flexible, open-ended, and apt to contain different layers of identification and belonging, and the subsequent modifications that this change of approach would entrain in the way in which human rights, and rights-holders, are constructed. Hence, the European "multisexual citizen", described in the final section of the chapter, is presented as a citizen who is able to simultaneously mobilise multiple sexual, gendered, ethnic, religious, political and cultural allegiances in order to make human rights claims as an active agent, rather than a passive recipient of protection on the part of a national or supra-national politico-legal authority.

Chapter One - LGBTI Persons and the Protection of Human Rights: a Socio-legal and Political Challenge

Human rights can be seen as participating in the ambitious promise of *eudaimonia*[1], the effort to encourage the full flourishing of human happiness. This promise rests, however, on the straightforward assumption that *humanness* is a characteristic proper to all individuals, the recognisable marker of a distinct "form of life". From an historical perspective, however, the notion of the *human* may prove to be the artificial product of specific intellectual, political and social phenomena. Slavery, colonialism, imperialism, religious wars, the position of women across cultures and historical eras, could be listed as examples of how certain individuals can systematically be excluded from the notion of *humanness*. In the context of this research investigating the sociological significance of the process of recognition of the human rights of LGBTI persons in Europe, the question of what counts as *human* appears inescapable, as this concept has often been used in order to distinguish members of the political community from outsiders.

While it has currently become more difficult than in the past to recognise forms of arbitrary exclusio*n* from *humanness*, the there still are countless situations in which this happens. Entire groups of individuals remain at the margins of this definition, regardless of the formal constraining web of international norms guaranteeing fundamental human rights. The discrimination and social, political and economic marginalisation often experienced by LGBTI persons clearly exemplifies what shape this dynamic of exclusion can take. Indeed, the tortuous legal and social history of the

[1] Ackrill (1974, 7) describes the Aristotelian concept of *eudaimonia* as "(...) not, […], the result of a lifetime's effort, (…) not something to look forward to (like a contented retirement), [but] a life, enjoyable and worthwhile through".

recognition of the rights of LGBTI persons is a demonstration of the significant theoretical and practical limitations of contemporary human rights in ensuring that all individuals are treated as having the same – presumably – inalienable human rights.

International Human Rights Law is one of the crucial domains in which the idea of the *human* is formulated and acquires a material dimension. However, the meaning and reach of this juridico-philosophical concept is far from being absolute. As far as LGBTI persons are concerned, it can be argued as a provocation, that the number or type of rights recognised are directly proportional to the degree of *humanness* ascribed to these individuals. At the same time, whenever rights are recognised, this process is predominantly framed in terms of a "check list" whose items have to be ticked off. Some of the most popular items to be found on this ideal list would be the so-called *gay marriage*, adoption for same-sex couples, the possibility for non-heterosexual persons to openly serve in the army, the possibility to change one's name and/or gender for transgender persons, and so forth.

Nonetheless, framing the issue of the human rights of LGBTI persons in terms of a check-list hides a deeper problem concerning the actions of most mainstream LGBT organisations, which may predominantly focus on the acquisition of specific rights (for instance same-sex marriage), therefore reducing the discourse of human rights to a mere issue of granting inclusiveness into extant societal institutions. Little is usually said, on the contrary, about structural inequality, poverty, and the marginalisation of LGBTI persons as phenomena that require a questioning of the viability and fairness of these institutions for some individuals in the first place. In this sense, the framework of human rights can be used in a complaisant way, in order to strengthen state institutions, such as the army or marriage, rather than as a potential instrument of critique of the role of institutions in encouraging more people to be

included in order to share and embody the *status quo*.

Looking into the creation of seemingly universal categories, such as that of the *human*, is a necessary endeavour in order to analyse the way in which human rights function and have an impact in people's lives and accounts of themselves. Similarly to the concept of the *human, sexual orientation* and *gender identity* are not absolute trans-historical and trans-cultural concepts. Their genesis is part of that relatively recent effort of systematisation of sexual knowledge suggested by Foucault (1998), by which *personages* with specific sexual characteristics, traits and behaviours are created. The recognition of the socially constructed character of these concepts, which will be thoroughly addressed in this research, casts doubts on the crystallisation of certain identities in the context of human rights and well beyond that normative sphere. For instance, the process by which individuals are artificially regrouped under the "LGBTI" acronym[2], or the deployment of terms such as "sexual minorities" (Phelan 2001), signal a certain understanding of sexual and gender arrangements within society as being organised around the binary of heterosexuality/homosexuality and femininity/masculinity. Hence, the fact of labeling non-heterosexual and gender-non conforming persons as a "minority" already points to the existence of a process of anthropological and sociological allocation of powerful conceptual categories to individuals, which almost take the form of taxonomies.

Starting from the contingent character of both *sexual orientation* and *gender identity* as specific socio-historical concepts, it is interesting to investigate how, and to what extent, the circulation, development and reinforcement of human rights principles in Europe affect not only the inclusion of lesbian, gay, bisexual, transgender and

[2] Efforts to reject these labels and adopt alternative terms, such as *queer*, go in the direction of refusing such categorisation. This endeavour, however, in some respects still participates to the logic of the attribution of labels to individuals since a similar process of "reification" of personal characteristics are put into place. The queer subject becomes as identifiable as the "gay" or "homosexual" subject, and therefore, in a sense, perpetuates symbolically the significance of the sharp division between normative and non-normative identities.

intersexual persons into mainstream human rights discourses, but shape the very "creation" of these individuals as intelligible socio-legal subjects. Apart from Johnson's (2012) recent work "Homosexuality and the European Court of Human Rights", which will be critically addressed in this research, to date there has not been an extensive study of the case law of the European Court of Human Rights (ECtHR), as well as the practices of the Council of Europe (CoE), from a socio-legal standpoint. While the Court's decisions have been analysed from a legal perspective (Heinze 1995; Wintemute 1997; Beger 2009), there has not been a systematic effort of linking them to the social notions of LGBTI identities and their intersections with issues of citizenship from both a national and supra-national perspective.

This research explores the extent to which international regimes of human rights, such as the European one established under the aegis of the Council of Europe, can work in order to co-opt into the system the respectable segments of LGBTI individuals, while leaving outside those who do are not willing to ascribe to societal institutions, or are prevented from doing so for various socio-economic reasons. This sub-category of "others within the others" does not make it into the colourful posters of human rights campaigns that depict healthy, happy and respectable LGBTI persons. Hence, it is important to recognise how the lines of demarcation between those who can and those who cannot become intelligible before the law, and more specifically the law of human rights, are often disregarded in the assessment of the evolution of the system of protection of the human rights of LGBTI persons.

This chapter begins with a discussion of the concept of the *human* in the context of human rights, to show how the human rights system bears a precise responsibility in the definition of intelligible subjects who can subsequently seek and enjoy protection. Within the Western/European socio-legal arena, human rights definitions subtly promote

the delineation of proper "gay", "lesbian", and "transgender" persons as specifically white and middle-class. Notable exceptions to this capability to adhere to liberal(ised) LGBTI identities are the cases of LGBTI asylum seekers, as the individuals struggle to inhabit simultaneously the domain of *respect* and *respectability* without being entirely recognised as bearers of full human rights.

Unveiling the "Human" of Human Rights: the Case of LGBTI Persons

Dramatic changes have occurred since issues concerning the protection of the rights of LGBTI persons first emerged in the legal, social and political arena in the second half of the XX century. Events such as the Stonewall Riots of 1969 in New York certainly paved the way for this process, insofar as they allowed hundreds of individuals, both in the United States and in Europe, to gain consciousness about the violations of fundamental rights that they had been experiencing. The decriminalisation of same-sex sexual activity, the adoption of anti-discrimination legislation, the introduction of gender-neutral marriage or different forms of registered partnership, as well as access to gender confirmation surgery for transgender persons, are a few examples of the rights that have been claimed and obtained in many countries worldwide. Considering the socio-political and legal developments around these issues as a linear trajectory of progress, however, downplays the extent to which human rights always imply a prior definition of a well-defined subject bearer of rights and the extent to which LGBTI persons' *humanness*, whether directly or indirectly, has been extensively scrutinised and critically questioned.

It is difficult to detach human rights as aspirational principles from their

articulation as social and political artifacts. Habermas (1998, 91) has proposed an interesting synthesis of the underlying tension existing between human rights, the individual and the political entity responsible for their protection:

> Human rights are Janus-faced, looking simultaneously toward morality and the law. Their moral content notwithstanding, they have the form of legal rights. *Like* moral norms, they refer to every creature 'that bears a human countenance', but *as* legal norms they protect individual persons only insofar as the latter belong to a particular legal community – normally the citizens of a nation state (Habermas 1998, 91).

It is tempting to trace back human rights to moral imperatives, as Habermas[3] does. Morality, however, already presupposes individuals, the existence of that "human countenance". Moreover, morality also presupposes the existence of a natural order of things, as proper to the doctrine of "natural law" which leaves little margin of manoeuvre to understand how these presumed over-arching, everlasting, unalienable entitlements of individuals have been interpreted as encompassing only limited portions of the population across times and places throughout history.

Furthermore, its etymological derivation, from the Latin word "mos" for "one's disposition, humour, custom[4]" (Barhart, 1988), also indicates how the use of morality can be a double-edged sword: on the one hand it can be used in order to indicate the existence of a "higher order", but on the other it can foster confusion between "rules" and customs which, for their very role, are far from being universal and are, instead,

[3] Habermas, defined by Fraser (1985, 177) as "a non-utilitarian humanist", has engaged with such issues in a critique on Foucault's anti-humanism.

[4] Even the Ancient Greek corresponding word for "moral", *ēthikós*, ultimately derives from *éthos* (custom) (Barhart 1988).

relative in meaning, reach and validity. Hence, when Habermas traces back human rights to moral norms he makes a difficult claim to sustain, since a definition of morality as the product of a commingling between *natural* and *social* prescriptions constitutes a shaky basis on which to ground presumably timeless and absolute rights claims. While he rightly recognises the extent to which the possession of rights can only happen within the borders of a political community, he seems to privilege the idea for which human rights have, indeed, a specific inborn character that can be attributed to a vague form of trans-cultural or trans-historical "morality".

To this extent, a narrow focus on the dichotomy between either a legal or a moral legitimation of human rights, risks to divert attention from the political dynamics underlying the allocation of *humanness* that is at play in specific settings. For instance, the definition of the subject bearer of rights as a legitimate member of a political community (and therefore a *citizen*), always entails a theoretical and practical exclusionary process which constantly reshapes what it means to be *human*. In this regard, LGBTI persons often undergo that process of *cauterization*[5] *of the other* that Simmons describes, insofar as they are rendered inoffensive, non-treathening:

> "the other is branded as beneath humanity, below those who deserve rights. Then those that are deemed inferior or rightless are sealed off from the polis or the courtroom, in effect treating the voice of the rightless as an infection that must be stopped from spreading" (Simmons 2011, 10).

In an ambivalent way it can be maintained that LGBTI persons are simultaneously

[5] Simmons describes "cauterization" as a concept with a threefold meaning: in the first place that of branding an individual (from the ancient Greek *kauteriazein*); secondly that of removing a part of the body with the intention of stopping an infection and thirdly as a way to render one's desensitised to the suffering of someone else (Simmons 2011, 10).

sealed off the polis as “others”, but also included into the institutions and rendered invisible as “equals”. On the one hand, contentious statements such as that of associating “gay marriage” to bestiality, or incest, or polygamy, that is to say facts that are all ascribed outside the acceptable dimension of the *human*, work in the direction of creating an idea of radical otherness, an otherness that is not informed by *humanness*. On the other hand, Simmons' process of *cauterisation* also takes the form of a process of normalisation: rendering institutions more inclusive also contributes to the erasure of the specificity of LGBTI experiences. Such has been the claim of authors such as Stychin (2000) and Duggan (2003) who have talked about the de-politicisation of the gay movement following the focus on the obtainment of the recognition of same-sex relationships. The recognition of *humanness*, therefore, is far from a fully transparent process by which rights are allocated to individuals by virtue of their status *qua* human beings. It is, rather, the product of a social, political and legal negotiation concerning the place to assign to different categories of individuals within a hierarchical architecture of human rights.

As it has already been hinted at, the process of allocation and the guarantee of human rights presents an inescapable ontological dimension. Legislators define the endowments and characteristics of the individual, in order to evaluate the circumstances in which the dignity of the subject, both physical and psychological, has been infringed. Therefore, the conceptual categories adopted to define what (or who) is human/inhuman, act as *access gates*. To decide on *humanness* implies the capacity to shape and articulate ideas on whom to protect, victimise or neglect. Hence, the definition of this ephemeral subject of human rights oscillates between humanism's passionate articulations of the sentient and concrete being and postmodernism's de-constructed and fluid perceptions of the individual.

The "Human" as a Socially and Legally Constructed Concept

The point of departure to address the question of what counts as *human* in the context of human rights entails a discussion of the presumed natural derivation of human rights as inalienable principles, as scholars such as Douzinas (2000 and 2007) or Baxi (2008) have done. In particular, while sceptical of the practical usefulness of human rights, their critiques are founded mostly upon the hypocritical enactment of human rights principles in national and international politics. Douzinas, for instance, is adamant in maintaining that humanity does not lay at the origins of human rights: "humanity cannot act as an a priori normative principle and is mute in the matter of legal and moral rules" (Douzinas 2000, 188). There is no prior mythological humanity from which every entitlement to rights is said to originate (Douzinas 2007, 290). For the author, humanity does not have an essence, it is rather characterised as a non-essence, that is to say, an effort of constant redefinition which is simultaneously meant to escape fixed determination (Douzinas 2007, 290). In this regard, there is an evident tension between human rights as a fragile and volatile entity and human rights as an extremely flexible and accommodating legal instrument. Therefore, as a unit that is not *unified,* human rights are a field in constant change in which different notions of both socio-political and legal subjectivity are played out.

Adopting a post-colonial perspective, Baxi also questions the presumed "robust ontological validity" (Baxi 2008, 81) of human rights and the existence of a fully recognisable subject of human rights. In the author's view the presence of "exclusionary criteria" represent the constant characteristics of modern human rights (Baxi 2008, 42), having gone as far as providing a justification for all sorts of colonialist and imperialist endeavours – the "unjustifiable" (Baxi 2008, 42). Precisely on this contentious point he

comments that the "monoculture of human rights" is continuing the "cultural imperialism of Colonialism" (Baxi 2008, 142). Here Baxi refers to the fact that human rights can be used (or better used instrumentally) as the banner under which other violations are perpetrated and other neo-imperialist projects can be carried out. Similarly to Douzinas, Baxi does not recognise the existence of a presumed ideal "bearer of right". He posits, instead, that such a figure is "born with a right to invent practices of identification" (Baxi 2008, 149). For these authors, therefore, human rights subjects are not primordial sentient beings to whom rights are naturally ascribed, but the creatures of social, political and juridical intervention.

Douzinas' and Baxi's arguments offer important hints to reflect on the process by which the allocation of humanness to LGBTI persons falls outside the borders of the domain of "universally given human rights". If human rights applied equally and universally to all human beings by virtue of one's belonging to "humanity", the presumed immorality of gay marriage could be swiftly overcome by using the "natural rights" argument. This expectation is, however, a fallacy engendered by legally and socially constructed fiction for which all individuals have, from the outset, the same entitlements. The reliance on a paradigm of the "natural" derivation of human rights has, however, strengthened rather than weakened the process by which individuals have been placed into a hierarchy and arranged fictitiously into categories and taxonomies. Indeed, the acceptance of the existence of an "immutable superior order" has for a long time made it easier for individuals to accept their position within it, accounting for an almost fatalistic view of their existence. In the case of the "gay" marriage, this has practically been translated into the idea that the *natural* model of kinship is the heterosexual one codified by means of marriage. Those falling outside that model have, for a long time, accepted their different role in the ecology of the world and have

accepted, or more poignantly internalised, their "fate" of not having sentimental bonds and attachments that could be held legitimate.

Donnelly (2003) has also engaged with the analysis of the "raw material" of human rights, although he reaches a different conclusion from Douzinas and Baxi. The author seems uncomfortable with taking for granted notions such as "human needs" or "human nature" and describes the latter as the "(...) *prescriptive* [original emphasis] moral account of human possibility". (Donnelly 2003, 14). This expression is framed as a threshold concept: it is not possible to go beyond the descriptive terms of humanity without creating a detriment to people's dignity. Donnelly's definition, therefore, does not completely rule out the existence of a "core" upon which human rights are founded and he assigns a crucial importance to the concept of "man's moral nature" (Parekh 2008, 126), thus echoing Habermas in this regard. One criticism of Donnelly's position could be that he still places a significant emphasis on concepts of "morality" and "dignity" which have an unavoidable subjective dimension that cannot account for human rights' presumed universality. "Morality" and "dignity" may rest on inaccurate descriptions of behaviours, acts and facts that are evaluated on the basis of relative cultural or social presumptions but that are masked as having universal applicability and validity.

Questioning human rights in their presumed universal validity, however, requires a thorough engagement with the politics of human rights in the first place. Another author that has contributed to this debate has been Dembour (2006), who has expressed her scepticism in relation to the concreteness and tangibility of human rights. For this scholar, human rights would almost have a *ghostly* appearance, as they can be said to exist only to the extent to which they are talked about and represent an "article of faith" (Dembour 2006, 2). Hence, human rights cannot be legitimised on the grounds of that

presumed universality, they do not exist outside social recognition. Insofar as the author talks about an almost religious "belief" in human rights, her arguments echo Ignatieff's (2001) claim of human rights as "idolatry". The author's self-proclaimed position is one endorsing a *nihilist* account of human rights. Here, a sort of Weberian process of *disenchantment* is at work: in a world in which human rights have often failed to achieve their goals, the "magic" aura that human rights possessed when they were originally inscribed into the Universal Declaration of Human Rights of 1948, has been stripped away and the world has seen the limits of a system in which victims and their executioners are often difficult to distinguish. The world has become disenchanted with the effectiveness of human rights in redressing injustice, but it is not clear what course of action should be undertaken in order to counter this disappointment.

However, it is necessary to consider to what extent the possibility that human rights may lack a natural legitimation could weaken the role that human rights as an intellectual product and practical tool of action. While the negotiation around what constitutes a human being can easily become a political operation, it can also represent a fascinating enterprise in the direction of pushing the boundaries beyond the idea of an unchangeable entity. If there is no such thing as a natural justification for human rights, there may be in principle more danger associated with the manipulation of human rights principles, but also more freedom to imagine life arrangements, more freedom to break those categories that have been held as universal conventions, more freedom to reshape and abandon allegiances, identities and labels. In this regard, it is possible to echo Rorty's (2001, 244) question when he maintains that increasingly the question of "what is our nature?" is being substituted by the question "what can we make of ourselves?"

If one wants to retain human rights as a useful tool that helps addressing and redressing injustice, a mere description of human rights as "highly artificial constructs"

(Douzinas 2007, 55), will obviously not suffice. How can the claims of the above-mentioned authors be supported without lapsing into a sterile philosophical exercise on the foundations of human rights? Is it possible to advocate for the respect of the rights of LGBTI persons by stressing their belonging to the category of the *human*? If so, which difficulties does this inclusion present? One way to build a bridge between non-humanist and humanist accounts of human rights, would be that of emphasising the vulnerability of human beings as a common trait that confers to everyone the status of *humanness*. While this possibility is also addressed by Douzinas (2007, 62) and Baxi (2008, 26), it nonetheless gives rise to a problem of definition and quantification of the concept of "vulnerability" that, similarly to "morality" and "dignity", may prove to be an unstable source on which to ground the ontology of the *human*.

A useful illustration of how difficult it is to define "vulnerability", is the fact that article 3 on the prohibition of torture, inhuman or degrading treatment or punishment, of the European Convention of Human Rights (ECHR) has always been considered in connection to the degree to which the violence was perpetrated. From this descends the *De minimis* rule, under which the ill-treatment of an individual, in order to be considered as such, has to attain a "minimum level of severity if it is to fall within the scope of article 3" (Reidy 2003, 10). Another example, that directly relates to torture, is Puar's discussion (2007) of US soldiers' assumptions, during the 2003 war in Iraq, that humiliating prisoners in Abu Ghraib by asking them to perform homosexual practices could be considered as the highest degree of torture ever attainable in that particular cultural and religious context. Here, again, what is deemed to be proper to human dignity, to be (un)bearable, is entirely subjected to human scrutiny. Similarly what amounts to a breach of one's dignity – *in extenso* of one's humanity – seems to be part of a process of measurement which assigns various thresholds that can or should not be

franchised. The concept of "vulnerability", therefore, becomes quantifiable and subject to various social and cultural interpretations. If connected to human rights, this combination clearly shows how difficult it becomes to frame *humanness* if notions of vulnerability may shift and individuals' suffering may be considered not to attain a "minimum degree" of severity as to require action and redress.

Does Vulnerable Stand for Human?

The works of some authors, such as Arendt (1976), Agamben (1998 and 2000) and the later works of Butler (2004 and 2009), help to explore the boundaries of humanism and its complicated relationship to notions of "vulnerability". In general terms Davies (1997) traces back the origin of modern humanism to the revolutionary discourses on rights. There seems to be, therefore, a direct link between the need to establish human rights and that of coextensively defining the notion of the *human*. As has already been discussed, however, the law is far from adopting a neutral stance in relation to the question of what counts as *human* and plays, instead, an eminently productive role in relation to it.

Writing about the painful experience of the various refugees in the aftermath of the First World War, Arendt (1976) expressed strong doubts about the presumed equation between the "rights of man" and the notion of the *human*. While the aspiration governing human rights was to be that of attaining the highest possible moral goal in order to reach an *optimum* of universality, the system easily met its limits when confronted with the reality of refugees, who fell outside the category of the "citizen" (Arendt 1976, 295-296). For Arendt the refugee should be the perfect subject of human rights due to the vulnerability experienced, which subsequently would entail the

protection of his *humanness*. The figure of the refugee, however, came to embody precisely the incongruity of the system of human rights based on the "abstract[6] man" (Arendt 1976, 291), but was incapable of protecting human life as such. Refugees, who have only preserved their humanness and have lost any other supplementary characteristics (such as the fact of belonging to a state or their national identity) directly challenged what it meant to be *human*.

Humanity for Arendt (1976, 297), therefore, is tightly connected to the realm of the political, as expulsion from the polity entails exit from humanity. Nonetheless one does not cease to be human *tout court*. In Arendt's formulation there is a paradox: refugees have preserved only their humanness but, because of their exclusion from the polity, they have irremediably lost it at the same time. There is a sort of circular reference, in Arendt's account, that somehow links the acquisition of humanness as being guaranteed by humanity itself. Arendt describes this as a dynamics by which: "(...) the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself[7]" (Arendt 1976, 298). Ultimately, this "right to have rights" is configured for Arendt as a right to belong to a community (Parekh 2008, 29), which is radically different from merely holding civil or political rights as a citizen. Parekh (2008, 69) proposes an analysis of Arendt's theory of human rights as being informed by a phenomenological approach that posits human rights in relation to their sphere of manifestation and embodiment, rather than in their presumed transcendental dimension.

Although sceptical on the practical usefulness of the system for the protection of human rights because of its ineffectiveness both within and beyond national borders,

[6] In the definition of the abstract man she echoes Burke, by referring to the "abstract nakedness of being human" (Arendt 1976, 299).

[7] Ingram (2008), commenting on Arendt's enigmatic "right to have rights", points out how mutual recognition between human beings, is the basis of Arendt's politics of rights (Ingram 2008, 410). This "active practice of those who recognise each other as equals" (Ingram 2008, 410) would be antecedent to the state, the law, and morality.

Arendt focuses nonetheless on the concept of the *human*. Her *Weltanschauung* contemplates the existence of a *quid* of humanness, a *quid* that is lost once a person is relegated outside the sphere of belonging to a political community and, as an extension, the possibility of being *active* in the world. Birmingham (2006) however, maintains that Arendt traces back the ontological foundation of human rights not to the existence of a common humanity, but to the event of "natality" as a universal common experience. In general, Arendt's theory of human rights can be said to privilege the political over the juridical sphere, where the possibility of action is more crucial than the mere entitlement. While extremely lucid and poignant, her analysis presents an important limit, since it rests on the assumption that political participation, in the form of the possibility of *action*, automatically implies the full inclusion in the political community. Her thought-provoking contribution, therefore, seems to be too optimistic, insofar as it looks at politics as the domain in which those who are included into the polity automatically enjoy the possibility of action in order to form their identities beyond their mere *humanness*, although, in practice within the citizenry, this opportunity may be foreclosed to some.

In relation to inclusion into the polity as a pre-requisite to become the bearer of human rights, it is possible to read Arendt's work through the lenses of the current debate on the rights of LGBTI persons. In most member states of the CoE, LGBTI persons are not formally denied the right to political participation. Their formal political participation, however, does not necessarily entail a capability of action aimed at having their rights guaranteed. The marginal position they occupy, within society, as a "sexual minority", is shaped according to precise political negotiation which neutralises the potentially subversive character of their requests and assimilates them within a reassuring framework of existing and consolidated institutions.

Individuals who refuse to comply with this sort of reassuring image of LGBTI persons, as non-white, non-middle class persons, polyamorous, BDSM practitioners, or individuals who refuse any gender categorisation, end up occupying a dimension of non-*humanness*: they are simultaneously included in and excluded from the juridical and political realm. Far from representing the standard "gay" plaintiff in Strasbourg, they stand for the exception, the eccentric case. Hence, the possibility to *act one's humanness*, as Arendt seems to suggest within the polity, may not necessarily imply an equal membership into the polity itself. Political action may well remain structured and informed by external constraints which are decided prior the admission of the "newcomers". Formal political inclusion may, therefore, go as far as representing a symbolic instrument that overshadows the existence of structural limitation to the access to claim and exercise one's rights, both at the national and international level.

If Arendt's arguments on the relationship between the concept of the *human* and law and politics appear to maintain a focus on the possibility of action in the *polis*, the work of Agamben (1998) aims at analysing the role of the law in defining what counts as *human*, according to dynamics of arbitrariness. In contrasting Agamben's work with Arendt's thought, Lechte and Newman (2013, IX) suggest that the mere inscription into the *polis*, as Arendt had maintained, was by no means a guarantee that the individuals will be protected. In order to establish the link between *humanness* and the pervasiveness of legal power, Agamben devotes some time to the definition and history of what he calls the "politicisation of bare life[8]" (Agamben 1998, 4) or, in other words, "the entry of *zoē* into the sphere of the polis" (Agamben 1998, 4). Man, while being in the sphere of politics, differentiates himself from, but also entertains a relationship with, his *bare life*, in what Agamben calls an "inclusive exclusion" (Agamben 1998, 8). The

[8] "Bare life" does not describe the concept of a *natural life*, but rather a notion of life already at the border of the political (Agamben 1998, 9).

concept of “bare” life comes to represent, therefore, the naked essence of the human, not deprived of political connotations. A crucial event in Agamben's analysis is the instatement of the so-called “state of exception” (Agamben 1998, 17) which suspends the rule of law and exposes the *bare life* of the subject more overtly to the state's discretion in deciding what falls *inside/outside* the legal order (Agamben 1998, p. 19). In this state of exception what violates the norm and what reinforces the law becomes indistinguishable and the existence of a “subject” before the law is not a prerequisite for the validity of the rule. The law comes in a pure form in the state of exception and self-sustains and reinforces its own structure (Agamben 1998, 27). The power of the law becomes omni-pervasive as in Kafka's story of the doorkeeper (Agamben 1998, 52) and human rights participate to this inscription of “bare life” into citizenship (Lechte and Newman 2013, IX), thus reinforcing the powerlessness of the individual in front of sovereign power.

In his analysis, Agamben introduces the central concept of *sacredness*[9] which acts as a defining feature for the allocation of the status of *humanness* to a subject. Compared to Arendt's concept of the abstract essence of the *human*, Agamben's discussion assigns more prominence to the impact that the law has in defining the essence and fate of individuals. The law assumes almost an anthropomorphic dimension. It is hulking, overwhelming, it almost seems to be informed by a transcendental force. Agamben, however, is not interested in “mere factual existence”. Humanity is articulated and considered to be co-essential, to a certain extent, to the political understanding of natural life. “Bare life” is, at the same time, immersed and taken out from humanity, it is indeed a cursed state.

[9] In its classical meaning (descending from Roman law), the sacredness of life is a twofold concept representing both the life that has the capacity of being killed and, on the other hand, a life that cannot be sacrificed (Agamben 1998, 73). The word *sacer* means both “sacred” and “doomed” (Agamben 1998, 75) and this implies that the man who is defined as such lives in his own skin a double fate: he embodies both the paradox of the law and his reinforcement through its very suspension.

Arendt's and Agamben's arguments present points of contiguity in the intention of establishing a link between the subject and the political authority and, at the same time, they posit the existence of an ambivalent pre-political dimension of *humanness*. The refugees, as well as the *homo sacer*, deprived of their political potential to *act* in the world, are *acted upon* by politics (Arendt) and by politics and law (Agamben) because they are not deemed to be *human*. However, at the same time, they can never cease to be human as such. In this there is almost a sense of eternal possibility. Taking the example of non-heterosexual kinship, and forms of kinship that go even beyond the concept of "family" as such, the concept of "kinship" does not cease to exist because it has been denied a legitimate status. It continues to have its course; bonds and ties are still formed between individuals. Only they constitute an invisible texture in the social world, they are not *human* in the social sense, but in their manifestation, in the value and concreteness that they have in the actors' lives, they are *human* as such. While they are formally denied *humanness*, they never cease to be *human* as such, if one wants to adopt Arendt's phenomenological perspective as Parekh (2008) has suggested. They participate in the definition of what is by tacit agreement of the individuals recognised as *human*, without being publicly recognised as officially contributing to this definition.

The paradox of the denied – yet overwhelming – humanness of some individuals, described by Arendt and Agamben with different outcomes, also comprises the object of Judith Butler's recent works, such as "Precarious Life" (2004) and "Frames of War" (2009). In these books, Butler shows a certain fascination with themes cognate to humanism. While discussing the so-called "war on terror", she touches on the mechanisms regulating the process of creation and recognition of *humanness* as an ontological status. For Butler, two core concepts are interconnected and participate in the very definition of the *human*: that of *grievability* (Butler 2004, 20 and 2009, 2) and

that of *vulnerability* (Butler 2004, 20 and 2009, p. 2). The link between *grievability* and *vulnerability* is established by means of the word *loss* (Butler 2004, 20). *Loss* is understood as a common human experience implying grief, but it is also the symptom of our physical and bodily vulnerability (Butler 2004, 20). If someone's death is not recognised as *grievable* (Butler uses the example of Guantanamo prisoners), then the subject is deprived of fundamental humanness and therefore can disappear[10].

Butler's arguments seem to suggest that vulnerability is a pre-requisite for the allocation of *humanness*, as the author considers it to precede the formation of the "I" (Butler 2004, 31). Such an understanding of the concept of vulnerability, however, seems in partial dissonance with the arguments of Butler's seminal works on the performative nature of gender and the radical possibility of its deconstruction (Butler 1990). If the body, in all its physical precariousness, loses the public character of its construction, the whole idea of the "person" evaporates. But since neither sexuality nor gender are considered by Butler to be primary endowments of individuals, how can the notion of "vulnerability" escape this logic? In "Precarious Life", Butler retains a notion of the "human" that is never a singular one[11] (Butler 2004, 90) while at the same time attributing to it a full ontological status which nonetheless, can be paradoxically perpetually in flux.

In the difficult endeavour to make sense of *humanness* and vulnerability, Butler discusses directly the situation of LGBTI persons who may face violence because of their supposed challenge to what counts as "normatively human"[12] (Butler 2004, 33).

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[10] In her words: "(...) the differential allocation of grievability that decides what kind of subject can be grieved, and which kind of subject must not, operates to produce and maintain certain exclusionary conceptions of who is normatively human: what counts as a livable life?" (Butler, 2004 XIV-XV).

[11] Later on, in "Frames of War" she comes back to this notion by stating that *human* can be considered as" [a] value and a morphology that may be allocated and retracted, aggrandized, personified, degraded and disavowed, elevated and affirmed" (Butler 2009, 76).

[12] Butler (2004, 33) describes the effort to combat this violence is in affinity with the broader aim of "counter[ing] the normative human morphologies and capacities that condemn or efface those who are physically challenged".

Butler starts from the assumption for which homo/transphobic violence often fails to be considered as a social emergence, let alone as violence as such in the first place. This lack of recognition amounts to a radical denial of humanness of LGBTI persons who challenge the idea of the respectable "body". Violence inflicted to certain "bodies" such as to transgender persons, gay couples holding hands in public or the bodies of sex workers, seems to be less deplorable, less immediate than the same kind of violence inflicted to a middle-aged middle-class white woman. This is not because these two "categories" differ in any objective way. The effect of violence on bodies can be said to be fairly similar. It is the symbolic amount of violence that the person is expected to be able to bear and undergo that differ. Some bodies, the *queer* bodies, are inexplicably expected to receive a higher amount of symbolic or, in some cases physical, violence than heterosexual bodies. For Butler bodies are grieved differently, giving rise to a sort of hierarchy of victimisation.

The works of the authors presented so far seem to share a common pessimistic undertone regarding the interplay between power and the allocation of *humanness*. Both those who trace back the notion of humanity to socio-legal constructs such as Dembour, Douzinas, Donnelly or Baxi or, on the other hand, those who try to envisage the existence of a "core" of humanity – for how problematic and abused by politics this may be – such as Arendt, Agamben or Butler; all have in common the acknowledgment of the existence of a possible discrepancy between an idealistic view on human rights and the actual reality of them. Either the stance of considering the *human* as a fiction, or that of believing it to be the inescapable and fundamental essence of human rights, imply a recognition of the fact that the achievements of human rights are fragile and precarious, needing a constant supporting political and legal apparatus in order to function and be continuously guaranteed and preserved.

Humanness is Not Enough: the LGBTI Subject of Human Rights Beyond Ontology

The articulation of the different authors' positions presented in this chapter has allowed for discussion of the extent to which the concept of the *human* can be used to advocate universal, inalienable human rights. Far from depicting a rosy picture of the status of human rights today, all the authors acknowledge the extent to which human rights often fall short of delivering the promised results. Although the explanations for this failure to realise equality and justice differ, the common element among these authors is the recognition of a mismatch between the ideal dimension of human rights principles, and their concrete legal and political articulation. It has been argued here that LGBTI persons represent a perfect example of such a failure of human rights to be truly universal, as their recognition as *human* may be problematic or their inclusion may be framed in terms of an exception to the heteronormativity and the male/female dichotomy. A discussion on the ontology of the *human* in human rights, therefore, has served the purpose of stripping away the aura of naturalness that human rights possesses, in order to consider how human rights are political, legal and social artifacts.

An exegesis of the concept of the *human*, however, does not explain how LGBTI persons become simultaneously inscribed and excluded from the social, legal and political arena. In order to acquire the instruments that will allow a thorough analysis of the judicial and non-judicial work of the CoE on issues of sexual orientation and gender identity, it is necessary to sketch a much more complicated picture. Such an overview is one that takes into account different dimensions, such as processes of identity formation in relation to one's sexual orientation and/or gender identity and the recognition or denial of one's right to membership into a national community through citizenship.

While the discussion on what describes a human being remains as an underlying theoretical discussion, this research moves on to consider the practical inscription of such *humanness* into human rights and elaborates on it, in order to take into account the formation of (LGBTI) identities and the participation of individuals, as citizens, in political life. Through a combined analysis of concepts of *humanness*, *identity* and *citizenship*, this research tries to overcome a merely theoretical discussion of how the subjects of human rights are talked about, and seeks to explain how to change the way in which human rights are employed, at least in the context of Europe, to translate the law into judgments, legislation and policy measures.

Chapter Two - LGBTI Identities and Human Rights: Mobilisation or Rejection of Labels?

Building on the discussion relating to the artificial character of the concept of the *human* in the context of human rights, it is possible to broaden the theoretical framework as to encompass a discussion on the creation of LGBTI identities in the social, political, and juridical sphere. This endeavour is crucial in order to understand how identity traits connected to one's sexual orientation and/or gender identity do not arise as natural manifestations of a pre-existent human subjectivity, but are rather the specific product of the interaction between various cultural, social, and juridical factors. It is, therefore, possible to ask whether LGBTI identities represent the crystallisation, in temporal, spatial, socio-political, and juridical terms, of contingent subjective positions that are functional to the preservation of the heteronormative and cisgendered societal structures. A related question is how the law, and particularly human rights law, enhances this process of preservation by helping to create, foster, and perpetuate these identities in the juridical field and beyond it.

A preliminary and central observation, to be made in relation to the ways in which LGBTI identities emerge in modernity, is the one concerning the pervasive role of power in its broadest meaning. In this regard, the work of Foucault (1998) and Butler (1990) are crucial to understanding that the presumably natural identity categories of "gay", "lesbian", "transgender" or "man" and "woman", may be the product of a subtle productive operation. It seems obvious to locate these authors' contributions in the field of queer theory because of their fundamental anti-identitarian theoretical framework. While, following Halperin, queer theory can be defined as "an identity without essence" (Halperin in Jagose 1996, 96), it can also become bridled in the form of an identity

whenever it tries to give voice to individuals who reject the normative identitarian labels of "LGBTI". It could be argued, therefore, that processes of identification may become, in many cases, inescapable since they represent the pre-requisite for the acquisition of political, social, and juridical intelligibility and the possible recognition and allocation of specific rights.

This chapter will touch on the intricate process of identity construction relating to the individual's sexual orientation and gender identity. It proposes a vision of identity as a fundamental instrument by which the Arendtian capability to act is mediated in the social, political, and juridical sphere, thus enabling individuals to make meaningful claims and statements from often multiple, even conflicting, subjective positions. At the same time, the chapter has the goal of critically assessing the limitations of human rights strategies based on the existence of discrete identity categories that acquire a semi-prescriptive character. It is argued that the very process of the recognition of these identities in the juridical field is built on a process of the creation of the subjects that human rights seek to protect. The critical appraisal of these dynamics helps to prepare the terrain for the substantive analysis of this research, which builds on the hypothesis that in the context of the Council of Europe specific LGBTI identities are created, reinforced, and promoted both in the activity of the ECtHR and in the work of the Commissioner.

Sexuality, Gender and the Possibility of Deconstruction

It would not be possible to debate the process of the construction of LGBTI identities in the socio-juridical sphere without first exploring the hypothesis that notions such as *sexuality* and *gender* are socio-cultural artefacts. The endeavour of

deconstructing these presumably natural concepts represents the initial step towards understanding the current limitations of the existing framework for the protection of human rights. These limitations, as has already been hinted at, relate to the process of the ascription of identity labels to right-holders, thus limiting the possibility of having intersecting – or sometimes conflicting – forms of identification in terms of sexuality, gender, age, ethnicity, religion, nationality, and disability status. This, in turn, limits the possibility of mobilising these multifarious forms of identification in order to claim one's rights.

Michel Foucault and the Homosexual as Personage

Foucault's "The History of Sexuality" (1998) has shed an entirely new light on the construction of modern sexuality in Western culture and history. Foucault maintained that, from the nineteenth century onwards, a new conception of sexuality arose. The acquisition of a specific sexual identity was not due to the individual's recognition of a presumably true self, but to the productive operation of power by which the subject was created in the first place. As Wilkins (2004, 48) has commented, in Foucault's work the individual is considered as a "conduit of power, something it acts on and through". Refusing the premises of humanism (Fraser 1999, 6), Foucault was determined to demonstrate that individuals did not possess an "essence", but that they came to be constructed through discourse and that sexuality was a central element of this operation. Thus, for instance, the "homosexual" was created as a *personage* as the direct result of the workings of a specific configuration of power: "bio-power". Bio-power, is "(...) what brought life and its mechanisms into the realm of explicit calculations and made knowledge-power an agent of transformation in human life"

(Foucault 1998, 143).

Foucault's crucial intuition, therefore, is considering sexuality not as the locus of primordial transgression and the liberation of unleashed instincts and desires. Rather, it is the crucial site in which power can unfold, in order to create an intelligible, systematised, and controllable sexuality that effectively serves economic and political purposes; it is functional to societal needs and it is disguised as being natural and spontaneous. At the same time, it would be inaccurate to describe Foucault's theory as suggesting the existence of a merely passive subject acted upon by bio-power. In his words: "(…) the individual is not a pre-given entity which is seized on by the exercise of power. The individual (...) is the product of a relation of power exercised over bodies, multiplicities, movements, desires, forces" (Foucault 1980, 73-74). It is through the process of *assujettisement* (subjectification) that Foucault explains the way in which power works in order to create, and simultaneously displace, any form of individualisation, ruling out the possibility of a pre-existent *self* (Fraser 1999, 8-9).

Sexuality plays the crucial role of catalysing power relations (Foucault 1998, 103), by means of the enforcement of norms and legal regulations controlling licit/illicit behaviours and actions, but also through the deployment of disciplinary measures. Early in life, individuals are socialised in terms of what constitutes appropriate and non-threatening sexual behaviour with respect to peers and adults. The ability to distinguish between appropriate or inappropriate behaviours relating to sexual and gender expression is internalised from an early age, to the point that the individual becomes capable of policing her/his own acts and thoughts in order to avoid social stigma and disapproval. It is precisely this process of internalisation that Foucault sought to highlight in order to demonstrate how pervasive operations of power could be in the very moment in which they, modern sexual identities, were created.

It would be wrong to maintain, however, that for Foucault (1998, 10-12) sexual expression has been subjected to constant repression. On the contrary, he suggested that, from the XVII century onwards, there has been an encouragement of the proliferation of discourses about sex (Foucault 1998, 18). In particular, the multiplication of discourses about sex led to the creation of "peripheral sexualities" of which the "homosexual" as a *personage* is an example. The identification of the homosexual as a *personage* fell within the context of a process of accumulation of sexual knowledge as the privileged way to exercise power and regulate lives. This could be achieved thanks to a crucial intellectual shift from *ars erotica* to the so-called *scientia sexualis* (Foucault 1998, 67), which then employed story-telling techniques that resembled to the Christian confession as the privileged method to create a truth on sex (Foucault 1998, 68). The narratives of these *personages* were not self-evident, and they needed to be framed in order to become visible and be recognised (Foucault 1998, 39).

The scientific creation of these *personages* helped to craft a new kind of knowledge on sexuality, rather than merely registering the existence of given forms of identification. As Dabhoiwala (2012) points out, referring to Foucault's work:

> Rather than as sinful actions, they were increasingly likely to be viewed as the marks of a deviant personality […]. The typology of 'natural' or 'unnatural' behaviour thus came to be mapped on to a medicalized pathology of character-types – the homosexual 'invert', the 'nymphomaniac', the 'criminal woman' and so on (Dabhoiwala 2012, p. 358).

Dabhoiwala's observation suggests that identity – and in particular sexual identity as

homosexual – arose as a result of this effort of specification, rather than stemming from a self-ascription, from the part of the individual concerned, of a specific label. This connects directly to Foucault's theory, for whom the cognation between sexual *behaviour* and *identity* seemed to respond to a logic of regimentation of individuals with the purpose of ensuring a much stringent and effective form of social control. This social control, however, was not exercised solely by external agents. The novelty in this modern conception of sexuality resided in the fact that the individuals controlled their own behaviours. As Wilkins (2004, 52) has commented on Foucault's work, this scientific approach to sexuality took the form of "(...) a new form of self-knowledge that burdened each of us with a sense of our selves as harboring an inner drive that must be watched, explained and understood".

Foucault, Law, and Sexuality

Foucault's account of the creation of homosexuality as a category helps in assessing the process by which homosexuality is created as a socio-legal category in Strasbourg, both by judicial and non-judicial bodies of the Council of Europe. Furthermore, his interest in the role of the law in producing knowledge about sexuality and gender is crucial in this context, as it contributes to clarify how socially established truths on sexuality and gender come to acquire a normative status.

In particular, Foucault (1998, 85) identified five ways in which power, understood in its juridical form, has acted as a productive force in relation to the sphere of sexuality. In the first instance, power and sex are placed in a dialectic relationship of negation which entails refusal and denial of pleasure as the standard rule (Foucault 1998, 83). Secondly, sex has been deeply intertwined with legal reasoning, having been

constructed according to the dichotomy licit/illicit (Foucault 1998, 83), in which the law has a central position in regulating "access" to the domain of sexuality. At the same time, a strong pattern of prohibition, induced and sustained by the threat of punishment, has emerged, leading to a self-suppression of sexuality for fear of disappearing (Foucault 1998, 84). Fourthly, a strong logic of censorship exists creating a paradox by which, contemporaneously, sex does not exist, does not appear, and is enshrouded by silence (Foucault 1998, 84). Lastly, these mechanisms are all applied with a high degree of homogeneity in all domains (Foucault 1998, 84).

The numbering of the ways in which the law acts on sexuality in order to foster compliance to norms of acceptable sexual behaviours and acts, serves as a useful guidance for the interpretation of case law of the European Court of Human Rights concerning sexual orientation and gender identity. The theme of the *licit/illicit* sexual behaviour, for instance, is recurrent and could relate both to the case law concerning the age of consent for same-sex sexual acts, to the case law concerning the legalisation of consensual same-sex sexual acts, and to the case law on consensual same-sex sado-masochistic practices (whose regulation seems to differ with regard to BDSM practices by heterosexual individuals)[13]. The distinction between licit and illicit sexual activities may also be understood as enforcing those "hierarchies of sexual values" indicated by Rubin (2011, 152-155). Other forms of suppression or denial of sexuality concern, for instance, the gendered and sexual(ised) bodies of transgender and transsexual persons, heavily subjected to that *normalising gaze* which ensures tacit compliance with the norm without the need to articulate publicly the proposition of sexual and gender "normality". These and other instances in which these five techniques are deployed will become evident in the analysis of the case law in which language performs a crucial role in policing the gates of socio-legal intelligibility and subtly guarantees a reproduction of

[13] *Laskey, Jaggard an Brown v. United Kingdom*, 1999.

narratives of assimilation and normalisation of individuals.

Performing Gender: Judith Butler and the Question of Identity

The creation of modern forms of sexuality is deeply intertwined with the question of *what is gender?* As the work of Judith Butler (1990 and 2004) suggests, there is a conflation between the de-construction of gender and the process by which identities are formed. In "Gender Trouble" (Butler 1990) the author is adamant in refusing the idea that gender and sex would be primary endowments of individuals. Sex and gender would stem, rather, from a "violent circumscription of reality" (Butler 1990, XXVI). The allocation of gender, therefore, would serve the purpose of constructing a gendered being in harmony with some bodily and anatomical characteristics (Butler 1990, 11).

In her famous discussion on the *performativity of gender*, that is to say a "reenactment and reexperiencing of meanings already socially established" (Butler 1990, 191), Butler clearly identifies the existence of a normative dimension. The question of intelligibility (Butler 2004, p. 35) comes to the forefront. The inscription of gender in one's body guarantees access into society. In turn gender becomes a norm (Butler 2004, 41), and it is transformed into an apparatus: "[…] by which the production and normalisation of the masculine and the feminine take place along with the interstitial forms of hormonal, chromosomal, psychic, and performative that gender assumes" (Butler 2004, 42). Performing one's gender is an operation that cannot be escaped. Everyone seems to be compelled to have one (and only one!) gender. Butler, however, does not think that gender is imposed upon the individual (Butler 1988, 526). Neither does she think that the gendered body pre-exists the cultural conventions that

give meanings to them. Performing gender is akin to a theatre performance in which "the gendered body acts its part in a culturally restricted corporeal space and enacts interpretations within the confines of already existing directives" (Butler 1988, 526).

The performance of gender brings to the surface the existence of social conventions, it "renders social laws explicit" (Butler 1998, 526). Performing gender correctly requires constant effort on the "stage" on the part of the individual. Thus, for instance, the anxiety connected to the allocation of gender is one of the earliest concerns parents have when a child comes into the world. Children who are born with ambiguous genitalia are subject to so-called "normalising surgical practices" aimed at bringing their bodies in line with standard anatomical standards of masculinity or femininity. It is possible to consider the proactive attitude of medical practitioners and parents as an illustration of the crucial importance assigned to a correct performance of gender. A child with ambiguous genitalia defies the social norm and cannot be read as a member of either the male or female group. The act of performing one's gender, therefore, could appear as a grotesque form of masquerade and plays a crucial role in opening up the gate of social intelligibility. The "mask" however, as Lawler (2008, 114) comments, does not hide, in Butler's intention, a real subject. There is no subject behind the mask for Butler, as the mask itself is constitutive of the individual.

The Normative Implications of Sexual and Gendered Identities

Although a definition of the concept of "identity" may be difficult to attempt (Lawler 2008, 1), Stuart Hall's (1990, 225) contribution may be helpful in this context. In his discussion of the cultural identities of the Caribbean as being informed by the colonial legacy, he describes identities as being "the names we give to the different

ways we are positioned by, and position ourselves within, the narratives of the past". Central to his definition is the concept of *positioning*, connected to a crucial process through which the acquisition of identity can take place: *identification* (Hall 1990, 226). Positioning oneself in order to embrace an identity is an act by which both one's difference and one's sameness with regards to different types of groups or individuals are proclaimed.

Starting from Hall's contribution, it is possible to reflect on the ways in which identities are constructed in order to ensure uniformity and simplify the complexity of subject positions or *positionings*. In this regard, it is possible to suggest that identities such as *lesbian*, *gay,* or *transgender* are not merely descriptive. They contain an undeniable normative dimension pertaining to the existence of certain gender characteristics, performance of sexual acts, and socio-cultural forms of identification. What is missing from these categories, however, is the acknowledgement of the fact that bodies, feelings, desires, and fantasies can be said to change at different times, ages, or circumstances, or that individuals may not subscribe to all the aspects of a particular identity (Lawler 2008, 2). Desire, for instance is multifarious and difficult to harness as a coherent entity. Hocquenghem (in Weeks 1991, 30) has gone as far as arguing that homosexual desire "like hetero desire is [an] arbitrary division of desire which in itself is polyvocal and undifferentiated, so that the notion of exclusive homosexuality is a fallacy of the imaginary". Bodies can also be multiple, incoherent, and non-congruent within a given notion of masculinity or femininity, and defy societal norms on sexual dimorphism. To this extent, therefore, identities already contain in themselves the possibility of the transgression of their own limits, because they work as a framework within which the individual has to situate herself/himself.

The process of harnessing the individual into specific identities entails important

consequences in the field of human rights. In fact, while human rights principles are considered to equally apply to all individuals, in many cases they are obtained through the mobilisation of identity categories. As will be discussed in the context of the analysis of the data for this research, the mobilisation of LGBTI identities for the purpose of obtaining human rights may not always prove to be beneficial to the rights-holder. The motivation could relate to the fact that, in becoming intelligible before the law as having a specific identity, individuals subscribe to the judicial authorities' creation of these legal categories in the first place and are placed into a narrow conceptual box.

One notable example of the limited usefulness of the mobilisation of LGBTI identities, which will be thoroughly addressed at a later stage, is the imposition of divorce for those transgender persons who are married and wish to have their preferred gender legally recognised[14]. This example well illustrates how categories of "transgender" or "homosexual" limit the possibility of having one's rights recognised regardless of the identity category to which one could belong in principle. In particular, the *aut aut* between marriage/recognition has a double function. Apart from reinstating marriage as the core societal institution, it is also functional to the narrow description of what a "transgender" is expected to be. For instance, one of the relevant taxonomies would include the labels of *MtF (male to female)* and *heterosexual*. Changing the person's legal gender without requiring the person to end a "heterosexual marriage" would entrain, as a consequence, a transformation of the marriage itself, now between two individuals of the same gender. This conflict between two distinct identities is solved by asking the plaintiff to give up one of these controversial aspects of her/his

[14] This happens mostly in countries which do not recognise same-sex partnerships in any form. In fact, in the absence of the possibility of marrying for individuals who belong to the same gender, a marriage between a transgender person who has amended his/her legal gender and his/her spouse would be considered in breach of the national laws that only allow persons of the opposite gender to be married.

identity, in order to ensure the coherence of the legal system. This process of the reduction of multiplicity into unity ensures the regularity of the law and brings coherence and systematicity in the socio-juridical sphere.

The Political Promises and Deceptions of Identity: Using it Strategically?

If gendered and sexual identities, as Foucault and Butler suggest, are not primordial endowments of the individual, can they be used as instruments to claim one's fundamental human rights? Does the adoption of fictional categories only lead to the acquisition of equally fictional human rights? This question opens up another field of inquiry crucial to this research, since the social movements based on shared collective sexual or gendered identities have acted, during the last three decades, as pivotal actors in the process of the articulation of rights claims. Although tensions obviously exist between the different "letters" of the LGBTI acronym (Monro 2005), there is, nonetheless, a sense of unity acquired through experiences such as common stigma, discrimination, marginalisation for one's sexual behaviour, sentimental or emotional attachment, gender presentation or gender representation.

Plummer (in Weeks 1991, 75) has suggested that while on the one hand the identity formation process may have elements of control, restriction, and inhibition, at the same time identities provide "comfort, security and assuredness" (Plummer in Weeks 1991, 75). However, the appropriation of identity categories in the context of the formulation of human rights claims corresponds to another specular process. In particular, judicial institutions, such as the European Court of Human Rights, allow the subject to speak only from some specific subject positions ("homosexual",

“transsexual” plaintiff), further fostering the idea that the primary access gate to one's entitlement is the preliminary possession of an “identity”.

Hall: the Necessity and the Impossibility of “Identity”

In asking “who needs 'identity'”, Stuart Hall (1996, 1) has suggested that, so far, there has not been a satisfying substitute for the concept of “identity”. Hence, in his opinion, the concept should be retained and placed within the context of a “subjectification of discourse practices” (Hall 1996, 1). What this entails, in practice, is formulating an alternative to the effort of radical deconstruction which scholars such as Foucault have embarked on. For Hall, identities have a character of contingence: 'identities are (...) points of temporary attachment to the subject positions which discursive practices construct for us' (Hall 1996, 19). The use of identity, therefore, is not entirely rejected, but becomes embedded in a much narrower temporal/spatial/cognitive framework. Hall advocates for a strategic use of identity which, nonetheless is far from being grounded in a specific notion of the “self”. There are, on the contrary, multiple and sometimes conflicting “discourses, practices and positions” (Hall 1996, 4) that characterise identities as being fundamentally open-ended and fragmented.

In his attempt to understand identities as “positional” (Hall 1996, 4), the author engages with a critical appraisal of Foucault's process of radical de-construction which, ultimately, seems to deny the existence of the body (Hall 1996, 11). In pursuing this endeavour, Hall has in mind Foucault's quote from “Nietzsche, Genealogy and Morality” (Foucault 1984) in which the French theorist affirms: “nothing in man – not even his body – is sufficiently stable to serve as the basis for self-recognition or for

understanding other men". Hall is not persuaded that the subject is completely incapable of articulating a response to discursive formations. Rather, he is convinced that Foucault has not provided an explanation for those instances in which individuals articulate a response to discursive formations.

Hall's (1996, 16) engagement with the work of Judith Butler is equally fascinating. In interpreting Butler's work, Hall argues that she has gone further than Foucault on the issue of identity formation, because of the introduction of a psychoanalytical framework of analysis. Butler's important contribution highlights, on the one hand, the fact that identities inevitably lead to forms of exclusion and require the existence of the "discursive construction of a constitutive inside" (Hall 1996, 15). On the other hand, however, Hall is convinced that Butler does not totally dismiss identity politics because of this theoretical weakness. Ultimately, therefore, Hall (1996, 16) uses both Foucault's and Butler's work in order to demonstrate that, regardless of the theoretical limitations, the framework of "identity" is at the same time necessary and impossible in the domain of politics.

Spivak's "Strategic Essentialism" and its Limits

Similar to the "strategic" understanding of identity supported by Hall, Spivak's (1988) famous concept of "strategic essentialism" represents another important contribution to the debate on the usefulness of "identity". While the author maintains that this concept seems to have often been misunderstood as a "union ticket for essentialism" (Spivak in Danius and Jonsson 1993, 35), her theory has sparked intense debate. At the core of Spivak's reasoning is the idea that identity can be temporarily appropriated – as a known constructed object – for political purposes or to enact a

"*strategic* use of positivist essentialism in a scrupulously visible political interest" (Spivak 1988, 13).

Danius and Jonsson (1993, 34) who interviewed Spivak, pointed out that the strategic character of essentialism in her work resides in the fact that the process of being understood presupposes the existence of a "community of listeners". In this concept, implicitly, the notion of intelligibility comes back. Intelligibility is here in association with a strategic – not utilitarian or instrumental *per se* – notion of essentialism which exists in relationship with the possibility for entrance into hegemony. In this regard, Spivak comments: "[...] the arena of the subaltern's persistent emergence into hegemony must always and by definition remain heterogeneous to the efforts of the disciplinary historian" (Spivak 1988, 16). The subalterns' appropriation of essentialism therefore, seems to preserve them from entering hegemony *de facto,* but allows them, nonetheless, to advance their political claims.

"Strategic Essentialism" and LGBTI Identities

Reading LGBTI identity politics with the lenses of Spivak's "strategic essentialism" or Hall's conception of identity as "positioning", seems to suggest that lesbian, gay, bisexual, transgender, and intersexual persons, while refusing the hegemonic discourse attached to the production of the identities by which they come to be defined, can nonetheless make use of them by engaging openly with their connotations and limitations. What specifically are the terms of essentialism for sexuality and gender? Epstein (Stein 1992, 241) describes essentialists as "(...) treat[ing] sexuality as a biological force and consider sexual identities to be cognitive realisations of genuine, underlying differences (...)". Under these terms, sexual orientation and

gender identity could be used "strategically" insofar as they can be presented as being at the core of the process of subject formation. The ramifications of this process may extend as far as implying a conflation of identities with biological theories on gender and sexuality. This possibility, however, is not deprived of ambiguous connotations, as it could also function as an instrument to justify the "radical difference" of LGBTI persons with regard to the gender-conforming and heterosexual majority.

Commenting on the use of "strategic essentialism" in relation to the quest for viable political strategies to counter the political right, Lisa Duggan has expressed doubts on the usefulness of this concept. A strategic deployment of identities would reinstate sexual differences and queer desires in "homosexualised bodies" (Duggan 1994, 6). She has suggested that queer interventions in the domain of politics should become more systematic and not only limited to "(...) claiming public and cultural space in imaginative new ways (...)" (Duggan 1994, 6). For Duggan, "strategic essentialism" is a way backwards, rather than forwards, as it crystallises the subject into a static position, ruling out the possibility of real political empowerment.

Mary Bernstein (1997) has also contributed to the analysis of the strategies used by lesbian and gay movements to claim human rights. She has focused on the strategic deployment of identities to an extent which can be said to be contiguous to Spivak's. Bernstein (1997, 533) defined identities as characterised by "(...) the goals they seek, and the strategies they use, as by the fact that they are based on shared characteristics such as ethnicity or sex". Identities, therefore, can be mobilised for different purposes. On the one hand, identity can be used for *empowerment;* on the other, identity is configured as a *goal* (Bernstein 2002, 539). In addition to these two traditional forms, Bernstein has also suggested a third form: identity as *strategy* (Bernstein 2002, 539). In this instance, identity could be used both for carrying out a *critique* or for *education*

(Bernstein 2002, 539). In the first case its deployment shows the differences between the majority and the minority, while in the second it seeks to highlight the similarities between the majority and the minority (Bernstein 2002, p. 539). Bernstein, therefore, has dismissed the claim for which the recourse to the so-called "identity politics" has impeded the realisation of fruitful alliances or has led the movements into a substantial subscription of the *status quo* (Bernstein 2002, 570). Her position indicates an inclination to consider the appropriation and deployment of identity as harbouring a transformative potential, possibly beyond the specific articulation and content that these identities may have. What Bernstein might have underestimated in her analysis of lesbian and gay identity politics is the extent to which, in some circumstances, the act of appropriating an LGBTI identity may be seen as requiring an implicit act of surrender to that same system of sexual and gender categorisation that individuals may want to subvert.

Precisely on the eminent political reach of identities, Young (1990, 98) has considered the *reductio ad unum* enacted by "the logic of identity" as giving rise to a fundamental repression of difference. In positioning herself against the predicament of identity politics, Young (1990, 157) has suggested instead a focus on a "politics of difference", by which it is possible to adopt a fluid and relational approach to diversity without creating sharp divisions for the sole purpose of creating systematicity and unity. This vision of politics for the achievement of justice is based on a possibility of enacting different treatment for disadvantaged groups (Young 1990, 158), at the expense of a formal view of equality which promotes 'assimilation'.

Young's reflections highlight the tight relationship existing between the process of identity formation and the acquisition of human rights, especially for individuals considered to be "vulnerable" (Young 1990, 169). At the same time, she has emphasised

how difference should be reappropriated beyond essentialist temptations. This perspective, however, seems to underestimate the terrain of "identity politics" as a terrain of antagonism, in which the actors are neither innocent nor politically naïve. It is for this reason that an over-reliance on the role of the law in guaranteeing protection to the most vulnerable, as Young seems to suggest, may leave out the antagonist dimension of identity formation in which the so-called "vulnerable individuals" may play a crucial role in the definition of a notion of equality that may be based more on resentment, rather than on a true interest in the pursuit of justice.

LGBTI Persons, Human Rights and the Politics of Resentment?

As partly illustrated by the above-sketched debate, the terrain of "identity politics" is a slippery one. Incongruities between narratives of *equality* and narratives of *difference* for LGBTI persons powerfully come to the forefront and lead to an interrogation of the dynamics by which rights claims are formulated. This section explores the inclusion of LGBTI persons into the so-called mainstream social, political, cultural, economic, and legal domain from the perspective of an opposition between *resentment* and *belonging*. The aim is that of exploring the relationship existing between a push towards integration of 'sexual minorities' into the domain of politics and the law, and the strategies of resistance employed in order to escape assimilation and normalisation. As Wendy Brown phrased it: "even as the margins assert themselves as margins, the denaturalising assault they perform on coherent collective identity in the centre turns back on them to trouble their own identities" (Brown 1995, 53). The tension between "becoming part" and "being the other", therefore, inevitably impacts on groups' and individuals' identity formation.

A corollary to this is the observation concerning the different roles of various human rights actors. The depiction of human rights as an instrument through which the "weak" can speak, be heard, and become recognised socially and politically builds on the existence of *powerful* and *powerless* actors. While Spivak argues that it is not possible to apply *Social Darwinism* to the redress of injustices, by which "(...) the fittest must shoulder the burden of righting the wrongs of the unfit (...)" (Spivak 2003, 169); it is nonetheless true that narratives of sharp divisions between victims and perpetrators still strongly permeate the rhetoric of human rights. This sharp division, however, may go as far as suggesting the existence of a process of political colonisation of the domain of human rights in which the quest for power, rather than the creation of a just and equal society, may be the ultimate objective.

Nietzsche's (2003) notion of *resentment* and Wendy Brown's (1995) discussion of it in "States of Injury", shed light on the possible, and controversial, enmeshment of politics and human rights. The concept of *resentment* is the expression of what Nietzsche, in the 'Genealogy of Morals', called a *slave morality* (Nietzsche 2003, 19). This would consist in the superior moral stance that slaves, or those subjected to someone else's power, articulate in relation to those by whom they are dominated. These individuals who are weak, under the yoke of a master, become morally superior to the aristocratic, to the noble, by virtue of their suffering. The notion of *resentment*, which Nietzsche traced back to Judaism and Christianity, is akin to the feeling of "revenge". *Resentment* is experienced by "(...) creatures who, deprived as they are of the proper outlet of action, are forced to find their compensation in an imaginary revenge" (Nietzsche 2003, 19). The philosopher described the *resentful man* as a man who is powerless and that makes use of morality in order to elevate himself above the powerful to whom he is subjected. Nietzsche suggested that the claims to justice advanced by

these subjugated individuals are not the manifestation of a profound and sincere desire to achieve the *just.* Rather, they are motivated by the will to seize that very portion of power which is foreclosed to them. To this extent, therefore, *resentment* gives rise to a sort of symbolic revenge with strong moral contours.

Nietzsche (1967) explored further the concept of *resentment* in "The Will to Power" where he argued that the idea of the weak as being willing to renounce their share of power is deceitful. The weak do not despise power in Nietzsche's opinion. On the one hand, morality has pushed this category of individuals to hate their "will to power" (Nietzsche 1967, 37). On the other hand, however, morality has allowed this "will to power" to emerge under another form, notably under the form of the concept of "justice" (Nietzsche 1967, 40). Hence, the "will to power" is considered as a drive. For Nietzsche the very act of claiming rights participates in the deployment of this will: it is part of an attempt, from those who are in a position of inferiority, to prevent those who are stronger to grow in power even more (Nietzsche 1967, 53-54). By reading Nietzsche, it would appear that the *esprit de corps* of minorities is shaped by an underlying feeling of frustration, a latent dissatisfaction with their minority status – hence of powerlessness.

After having heard what Nietzsche has to say on the notion of "justice" in the mind of the oppressed, is it still possible to think about the appropriation of identity, as a political tool, beyond the framework of *resentment*? The Nietzschean idea of *resentment* has found some space in contemporary discussions on minorities' rights. Chambers (2003, 149) describes *resentment* as

> the claim for rights [that] is understood not as a specific political demand, but as a moralising claim, which is based on a history of prior injury. This

> claim, quite paradoxically, serves not to contest a larger political battle, but merely to instantiate in the law the very minority status of the group (Chambers 2003, 149).

Wendy Brown (1995) has explored the question of identity politics, also touching on lesbian and gay social movements, through the Nietzschean concept of *resentment*. Brown (1995, 26-27) has suggested the existence of a sort of "moralising politics" which deviates from the pursuit of freedom. One example would be the inscription of social phenomena such as sexism, racism, and homophobia in the law as being "heinous". The process by which these phenomena come to be proscribed thanks to "anti-discrimination" or "hate-crime" legislation, for Brown (1995, 27), could be seen as being influenced by a Nietzschean understanding of *resentment*. The way in which resentment is articulated, in this case, is through a fixation of identities into dichotomic positions: "it fixes the identities of the injured and the injuring as social positions, and codifies as well the meanings of their actions against all possibilities of indeterminacy, ambiguity, and struggle for resignification or repositioning" (Brown 1995, 27). *Resentment* politics, instead of allowing the discarding of those dynamics of subjection that hamper the enjoyment of one's rights, crystallises the positioning of the actors in terms of either passive or active agents.

Furthermore, in this context, the resolution of the conflict is completely subtracted from the socio-political sphere of action and entirely delegated to the competent legal authority. This delegation to law, Brown (1995, 27) has argued, deprives the subject of the possibility of political action. The implications of Brown's position, however, appear quite problematic. If the law is not the privileged terrain where these (political) claims can be formulated, what is the legitimate area to do so? Is

citizenship the ideal arena to carry out this crucial negotiation? Or could the request to fully become part of the citizenry, as is the case for LGBTI persons (Phelan 2001), be informed by an equal resentful stance towards "society" at large? This thorny question still remains at the centre of discussion as the current framework for the recognition of human rights remains profoundly permeated by a legalistic approach, rather than being part of a broader political discourse in which the right-holders themselves play a role. It is, therefore, precisely in the sphere of citizenship, the space where rights are concretely articulated and guaranteed, that a thorough investigation needs to be carried out. This would permit exploration of the extent to which a possible transformation of the founding principles, methods, and linguistic performances of human rights is possible, in order to overcome the rigid categorisation of the subjects of human rights.

So far, the discussion on the creation of gendered and sexual identities has been organised along two main axes. Firstly, an exploration of the ways in which identities can be considered to be political, social, and legal artefacts which are grounded in equally artificial concepts such as 'gender' and 'sexuality'. Secondly, there has been an attempt to illustrate the advantages and disadvantages of mobilising identities in order to claim and obtain human rights. This overview will help to describe the role of identity in the case law of the European Court of Human Rights as implying a complex process of specification of individuals that takes place in the juridical domain, by which the fictitious socio-legal categories of "LGBTI" are recognised as possessing legal intelligibility by virtue of specific characteristics ascribable to them. At the same time, the concept of "identity" also plays an important role in the work of the Commissioner for Human Rights of the Council of Europe on issues concerning sexual orientation and gender identity. In particular this overview will be helpful in assessing the use of LGBTI identities in the work of this independent body of the Council of Europe.

Furthermore, it will also prove to be useful in the endeavour of describing the process by which encounters and exchanges between the Commissioner and activists and human rights practitioners can help in modifying rigid socio-legal codifications of sexual and gender identities, beyond the rigid sphere of action of the law.

Chapter Three - Identity, Human Rights and Citizenship: at the Crossroad of a Difficult Negotiation

Negotiating Human Rights Between Identity and Citizenship

This chapter explores the domain of citizenship as the privileged site in which human rights and LGBTI identities intersect. It also presents a discussion of the extent to which new forms of citizenship – such as the concept of "European citizenship" – may contribute to radically transforming not just the current notion of national citizenship but also human rights. The contributions from authors across several disciplines will help to provide an overview of the rapid process of change that the concept of "citizenship" is currently undergoing, and assess the extent to which this transformation can impact the recognition of the rights of LGBTI persons in Europe. This overview will provide a solid theoretical background for understanding the different layers of complexity informing the social, political, and judicial practices of the Council of Europe in relation to the creation of LGBTI identities and of the rights of LGBTI persons.

Choosing Between Citizenship and Human Rights?

In "The Origins of Totalitarianism" Arendt (1976) presented human rights as a paradox: universally proclaimed, yet only applicable to those who had a form of belonging to the polity. Those who needed human rights the most (the stateless refugees of World War I), Arendt argued, were the first to be excluded from their enjoyment.

Arendt's compelling argument still has profound reverberations in the current analysis of the critical interplay between citizenship, politics, and human rights. The authors included in this review have all engaged, from different perspectives, with Arendt's thought-provoking argument in order to appraise the contemporary configurations of this interplay between political membership and universal principles of protection of the *human* being. In this section of the chapter, different accounts of the intricate relationship between political membership and the enjoyment of human rights are explored. On the one hand, Tambakaki's (2010) reflections on the possible mutually exclusive relationship existing between *human rights* and *citizenship*; on the other hand, Dembour and Kelly's (2011) investigation on the extent to which human rights can be said to fully apply to migrants. These two perspectives shed light on the existing tension between these two spheres and help to open up a discussion on how to overcome this problem.

In “Human Rights or Citizenship?”, Tambakaki (2010, 6) has sought to explore the tension existing between human rights and citizenship. This tension, the author argues, is due to the different positions that these inhabit with regard to politics. While citizenship is embedded in the context of the creation of political community, human rights are conceived precisely as a way to overcome the limitations of politics in guaranteeing entitlements and protection to all human beings (Tambakaki 2010, 7). It would be possible, therefore, to give in to the temptation of privileging human rights over citizenship, because their codification into international law would assign them a supranational status. Tambakaki (2010, 4) argues, however, that thinking in terms of mutual exclusion would have significant – negative – implications for democratic political practice.

Tambakaki (2010, 11) further identifies another crucial aspect of the tension

between human rights and citizenship. Notwithstanding the fact that they operate on two distinct levels (the former on the level of *symbolism* and the latter on the level of *exercise*), the promise of maximum individual freedom implicit in human rights hampers the unity of common intents required by citizenship. In turn, however, citizenship could also be seen as constraining individual freedom (Tambakaki 2010, 11). The solution the author hopes for is, therefore, a re-appropriation of the *agonistic* role of citizenship within politics. Hence, it would be the political arena, rather than the Courtroom, that is the privileged site to enhance and promote participation in democratic processes.

Dembour and Kelly (2011) have explored the intricate relationship between human rights and citizenship from a different perspective. By asking "are human rights for migrants?", the authors have sought to demonstrate the existence of a gap between the universal proclamation of human rights principles and their concrete recognition within the borders of nation-states. Contrarily to what Arendt had suggested, Dembour and Kelly do not think that the possibility of mere political membership entails an automatic enjoyment of human rights for the individual. There are, rather, dynamics of exclusion from the enjoyment of human rights that fall entirely within the sphere of citizenship (Dembour and Kelly 2011, 9-10). Migrants, therefore, may not solely be vulnerable because they lack citizenship, but also because of political and social marginalisation. While the paradox described by Arendt is still valid for Dembour and Kelly, citizenship loses that ideal role that the German philosopher had attributed to it as the privileged sphere where individuals can act.

In the context of this research, it will be possible to establish a parallel between Dembour and Kelly's analysis and the citizenship status of LGBTI persons. More specifically, building on the acknowledgement of the internal dynamics of the

hierarchisation of rights-holders within the borders of the nation-states (but also at the level of the Council of Europe), it is possible to trace back the process by which LGBTI individuals are constructed as human rights subjects in ways that ensure their normalisation and assimilation. The existence of blurred lines between the inside and outside of human rights within nation-states, as Dembour and Kelly suggest (2011, 9) could help to explain how LGBTI persons may be constituted, at the same time, as being both members and outcasts of political communities. It will be argued, however, that it is not only in the context of nation-states that this process takes place, as it can be observed, although with a different configuration, in the context of the work of the Council of Europe on human rights. This supra-national dimension inevitably implies the existence of new models of citizenship which transgress the boundaries of national sovereignty but which, nonetheless, are informed by exclusionary practices, rather than by the accomplishment of a universal application of human rights across the European continent.

Before delving into the possible alternative forms of non-national citizenship within which human rights can or cannot be realised, it is necessary to pay attention to another important facet. More specifically, it is necessary to ask what role does identity play in this existing interplay between citizenship and human rights. To do so, the idea of "group rights" will be briefly discussed in order to assess the extent to which LGBTI persons can, for the purpose of having their rights recognised, be considered as a 'group' and what consequences this would entail.

Citizens with an Identity: LGBTI Persons and Political Membership

Although citizenship implies specific forms of identities, or "positionings" as

Hall (1996) would describe them, not all forms of identification are viable within a polity. Isin and Wood (1999) have explored the interplay between citizenship and identity, specifically in relation to the question of "group rights". Group rights represent a cornerstone of the heated debates on multiculturalism (Kymlicka 1994; Okin 1999; Kukathas 2003; Modood 2007). Contested by many for privileging the collective, rather than the individual, group rights may be said to rest on the assumption that common features constitute the ground for the definition of certain entitlements.

The question to ask in this context is whether "LGBTI rights" can be said to possess a collective dimension akin to that of "groups". The answer to this question would seem to be negative since, ultimately, the rights of LGBTI persons are the rights of individuals. It is necessary, however, to question whether understanding the "LGBTI" acronym as akin to a group may have some relevance in relation to the formulation of specific human rights within the polity. While Isin and Wood (1999, 20) consider identity and citizenship as both being "group markers", they recognise the often exclusionary character of citizenship. For this reason, they consider the emergence of a "diasporic citizenship" (Isin and Wood 1999, 48) as a solution to the problem of multiple, sometimes perceptively conflicting, personal allegiances. In the opinion of the authors, in fact, this change would facilitate the adoption of a radical practice of citizenship that would eschew both questions of "accomodation" or "belonging" (Isin and Wood 1999, 48).

Isin and Wood's model of citizenship interrogates directly the role of identity in the process of obtaining political membership. This concept seems particularly interesting as far as LGBTI persons are concerned. On the one hand, people with various sexual orientations and/or gender identities have used the umbrella term "LGBTI" in order to engage with identity politics strategically; on the other hand there

is an entire constellation of other identities that differentiate each and every participant, relating to ethnicity, age, religion, disability, or other personal conditions. Isin and Wood's suggest that citizenship is strongly influenced by the ways identities – both individual and collective – are shaped in relation to the rights claims they advance. Building on this assumption, it is necessary to address the specific patterns of sexual and gendered forms of citizenship of LGBTI persons in the context of Europe, and how these dynamics are also the product of specific narratives on human rights originating from the Council of Europe.

Seen as being either the product of essentialism saturated with power (such as in the analysis of Foucault or Butler) or as a *relational concept* entailing the recognition of the other (Isin and Wood 1999, 19); identities directly inform the very notion of human rights from the start, resting on prior assumptions of what is *human*. In the case of LGBTI persons, the question of identity is also connected to a history of marginalisation. This shared history of political and social marginalisation, as well as other contributing social factors, establish identities that represent an important framework through which individuals read their entitlements to rights and their participation to politics. Although the viability of "LGBTI" identities can be dismantled by adopting the lens of Queer Theory, the point here is on emphasising how the "LGBTI" acronym still plays a relevant role as a social and political signpost. It can be considered as a liminal concept that can be de-constructed, criticised, and polemically embraced or contested. Moreover, while the promises of queer theory are fascinating, its ability to concretely establish a dialogue with the legal field, characterised by notions of regularity and systematisation, has proven to be weak up until now. The "LGBTI" acronym, therefore, remains the predominant framework for the articulation of discourses on the rights pertaining to one's sexual orientation or gender identity both in

the national and in the international arena.

Sexual Citizenship: a Resistant Integration

The role of gender and sexuality in the definition of citizenship has not always been recognised. Increasingly, however, scholars in different fields have started to explore and study the gendered and sexual dimensions of citizenship. Mosse (1997) for instance, has given an interesting account of the entanglement between sexuality and nationalism in Europe. Stychin (1998, 8) has argued that gender represents one of the "historically central relations of domination in the construction of national identity". Pateman (1988) has read the "social contract" from a feminist perspective, highlighting the way in which women were radically excluded from this original pact. The gendered and sexual dimensions of citizenship, therefore, are of enormous importance in understanding political participation; they are also significant to having fundamental rights guaranteed, for both citizens and non-citizens alike for.

As suggested in the previous sections, the polity contains hierarchies of citizenship which are established according to forms of sexual and gender categorisation. Phelan (2001) has suggested, for instance, that LGB individuals inhabit a sub-optimal form of citizenship as "second-class citizens". While being asked to contribute to the national community – by means of economic obligation or political participation – these individuals are excluded from the enjoyment of a full array of entitlements. Their political membership, therefore, seems to imply an unequal balance between the duties they are required to fulfil and the rights they are granted. Precisely on the issue of citizenship for LGB persons, Brandzel (2005, 176) has made an interesting point:

> Citizenship [...] functions as a double discourse: it serves as a source of political organising and national belonging and as a claim to equality, on the one hand, while it erases and denies its own exclusionary and differentiating nature, on the other (Brandzel 2005, 176).

As early as 1993, the concept of "sexual citizenship" was formulated by Evans (1993) in order to describe the connection between citizenship and the structure of capitalism, which entailed a commodification of sexual and gender identities while maintaining the exclusion of some individuals from the full enjoyment of the rights connected to their membership into the polity. Far from seeing citizenship as a positive instrument for the construction of an inclusive community, Evans (1993, 9) looked at the history of citizenship as a history of

> fundamental formal heterosexist patriarchal principles and practices ostensibly progressively 'liberalised' towards and through the rhetoric of 'equality' but in practice to effect unequal differentiation (Evans 1993, 9).

The citizenship of these minorities for Evans (1993, 8) is only expressed in relation to the *commodification* of their sexual/gender identities, aimed at creating specific market *niches* for the immoral individuals within "(…) segregated, privatised social and economic territories (…)". Bell and Binnie (2000, 11) see Evans' work as fundamentally requiring a split between morality and legality, which entails the fact that individuals are granted rights while being, at the same time, subject to a *moralising gaze*. The existence of legitimate spaces of expression, as well as sites where capitalist desire can be fulfilled, contribute to this dynamics, thus fostering the illusion that one is really taking

part in the liberal system. The process of the commodification of sexual and gendered identities may take different forms[15], some of which will be explored in this context.

Evans' work, however, has encountered the criticism of several scholars, such as Richardson (2000, 262) who condemns Evans for obliterating the "lesbian citizen". In her work on sexual and lesbian citizenship, Richardson employs lesbian and feminist theory to indicate sexual citizenship as both a site of normalisation and of stigmatisation for some individuals. In particular the author describes the way in which definitions of bad and good citizenship are framed, specifically in relation to the adherence to the model of the heterosexual family (Richardson 2000, 269).

Bell and Binnie (2000, 26), in continuity with Richardson's argument about bad/good citizenship, have pointed out the danger of fostering a notion of "respectability" within the domain of citizenship. The heterosexual matrix of citizenship, in fact, seems to be strengthened by the inclusion of sexual "dissidents" within the national community, by their very determination to adhere to certain institutions, such as the family or the army, for instance. Weeks (in Bell and Binnie 2000, 27), echoed also by Grabham (2007) among others, has described the tension existing around the strategies of *acceptance* or of *subversion* that sexual minorities adopt. In particular, he has maintained that strategies of acceptance are characterised by a *moment of citizenship*, while strategies of subversion are enacted through a *moment of transgression* (Weeks in Bell and Binnie 2000, 27).

In relation to the process of categorisation that citizenship entails, Stychin (1998, 13) has asked: [can] "national identity […] be reconceived in a contingent and flexible fashion that does not depend on the construction of the other?" His answer to this interrogative is ambivalent because if rights represent a way to absorb and validate

[15] One interesting example in this regard is Grabham's (2007, 44) description of intersex corporeality and how it relates to the medicalisation of intersexual persons as a commodified relationship with medical practitioners.

minorities “in terms of prevailing national norms”, at the same time, they allow minorities to participate in imagining another nation (Stychin 1998, 13). This research will address Stychin's question and there will be an attempt to explore alternative ways in which rights and political membership can be configured as to allow an open-ended and dynamic appropriation of contingent subjective positions.

The Council of Europe: LGBTI Identities and Models of “European Citizenship”

The Council of Europe (CoE) is considered the most successful and effective human rights supranational institution at the international level. Since its creation after the Second World War, the CoE has succeeded in creating and fostering the idea of a common European culture of human rights which is also shared by the member states of the European Union (EU). Specifically in relation to the rights of LGBTI persons, the CoE, and especially the European Court of Human Rights, has played a pioneering role, having addressed several issues relating to sexual orientation and gender identity far more often than any other human rights institution worldwide.

Because of the significant number of member states (47), the CoE is also a crucial site to investigate the ways in which domestic perspectives on human rights in the European continent participate in the production of international standards, and also to the dissemination of human rights principles back in its member states. This investigation is not limited to the analysis of the case law of the Court. Rather, it also takes into account the work of the Commissioner for Human Rights in order to investigate how diplomacy and national politics enter the forum of discussion on human rights and allow the construction of specific discourses of human rights of LGBTI

persons to the detriment of others.

The necessity of embarking on a multi-dimensional analysis stems from the swift changes occurring in the field of human rights for LGBTI persons that also pervade the sphere of citizenship. Bell and Binnie (2000, 5) maintain that sexual citizenship needs to be re-evaluated in the light of several phenomena such as 1) the "Europeanisation" of human rights law; 2) the regulation of immigration policies; and 3) the globalisation of gay identities. To bear in mind the centrality of citizenship – and of sexual citizenship in particular – while both analysing the case law of the ECtHR and the activities of the CoE on LGBTI rights, helps to move understanding beyond the literal meaning of each judgement and to evaluate the extent to which the European system of protection of human rights perpetuates limited normative definitions of LGBTI subjects as substantially domesticated as sexual citizens.

The Council of Europe at the Heart of the Protection of Human Rights in Europe

Compared to the 28 member states of the European Union, the 47 member states of the Council of Europe share a much broader notion of "Europe" in terms of geographical, socio-political, and cultural configuration. Benoît-Rohmer and Klebes (2005, 37) have argued that the expansion of the Council of Europe has been grounded in a criterion of membership based on the "sense of belonging to Europe". The implications are significant: eight hundred million people from the coasts of Iceland to the seashore in Vladivostok, Russia are nominally protected under the European Convention on Human Rights. Potentially these numbers are even higher, since non-nationals are also afforded a certain degree of protection under the ECHR.

The European Court of Human Rights prides itself for being the "conscience of Europe" (CoE 2010), and Jacobson (1996, 81) sees in the Court the "realisation of human rights in Europe". It can also be suggested, moreover, that the Court's work has an impact well beyond its European borders, acting as a reference for many other regional human rights systems. For LGBTI persons, and their right claims, this has a tremendous impact: it provides them with a tool to oppose their nation states which may be engaging in human rights violations against them and it also works in the direction of establishing a common culture of human rights on LGBTI rights in Europe. Some commentators, however, express scepticism of the fact that the CoE represents such a thrilling example of the practical achievement of human rights in the continent. Douzinas (2007), for instance, is convinced that the case law of the Court, rather than being the product of the independent process of adjudication, is better understood if one refers to the political positioning of the judges:

> (...) barristers appearing before international bodies such as the ECtHR quickly learn that it is better preparation to research the political affiliations of the government-appointed judges rather than to read the Court's case law (Douzinas 2007, 25).

Is Douzinas too pessimistic in relation to the role of the ECtHR? Is he exaggerating the extent to which politics influences the orientation of the Court? His analysis induces thought about the interplay between the administration of justice and the potential political interferences in this process. Why should an inter-*governmental* human rights organisation be exempt from *Realpolitik*? Dembour (2006) has adopted a similarly sceptical approach, expressing affinities with Douzinas on the effectiveness of the

institution. One example she mentions is the high rate of applications rejected in a preliminary phase, as much as 90% of the total (Dembour 2006, 13), together with the significant loopholes existing in the implementation of such rights, such as the substantial by-passing of women or the derogation from the rights protected in the Convention that states have in case of emergencies (Dembour 2006, 13). In exposing her self-proclaimed *nihilism* on the effectiveness of human rights, Dembour endorses a sort of Nietzschean position, for which a connection can be said to exist between human rights and the will to power (Dembour 2006, 275).

This research takes into account Douzinas' and Dembour's criticisms but, at the same time, tries to identify the extent to which human rights can be radically transformed beyond political appropriation. In this regard, citizenship could represent the crucial domain in which new meanings of human rights, as well as new practices, can be negotiated. To effect this change, however, citizenship itself has to be re-founded on a more egalitarian and non-elitist basis in order to be transformed from an instrument serving nationalist projects, to an element that can affect political participation and identification in a community. Trans-national challenges to citizenship, especially in the context of Europe, provide an interesting point of departure for this investigation.

Human Rights and Citizenship: "the European Way"? Challenges to National Understandings of Citizenship

Human rights have increasingly become the yardstick to measure the presumed morality of nation-states' hierarchy and, to this extent, they perform an undeniably important ideological function in the context of international relations. Furthermore, deployed at the international level, human rights discourses transmit the illusion that an

effective supra-national *moral conscience* exists and it informs the actions of the international community.

To say that a common shared notion of moral duty to protect human rights worldwide is a socio-political construction is a tautology. It is more interesting, rather, to explore the ways in which human rights expose the frailty or the strength of nation-states and the consistency of the process of the creation of the "other", the "alien", the "outsider". Is it possible to talk about a non-national conception of citizenship that puts into question – and possibly into crisis – the nation-state? Do Europe and European institutions in this sense foster and promote a non-national concept of citizenship based on broader shared values? Do LGBTI persons participate in the deployment of these presumably unbound notions of citizenship?

The creation of otherness and its compatibility with modern notions of citizenship, which surpass or challenge nation-states on the one hand, and the influence of an international rhetoric of human rights on the other, are equally parts of this analysis. Jacobson (1996, 76) has asked whether it is possible for individuals to make demands on the states by grounding their requests on international rights codes. If this happens and is successful, Jacobson maintains, it is possible to witness a change in the structure of international society, with states' legitimacy less rooted in popular sovereignty and more in "transnational human rights" (Jacobson 1996, 76). Furthermore, he posits that, after the waves of immigration during the seventies and the eighties, the radical distinction between *national* and *alien* has been weakened (Jacobson 1996, 73).

Dembour and Kelly (2011, 9), in trying to understand why migrants do not have access to rights in Europe, maintain, instead, that human rights seem to be more at the service of the powerful, rather than an instrument in the hands of the powerless. The

situation of migrants in accessing rights is embedded in a system of hierarchies of access to entitlements (Dembour and Kelly 2011, 9). While for Jacobson the *other* is becoming progressively an insider thanks to human rights, for Dembour and Kelly this figure, particularly embodied by the migrant, is still framed as a radical outsider. For the latter, therefore, citizenship still seems to possess a discriminatory character which narrowly limits access to the enjoyment of rights.

Scholars interested in alternative configurations of citizenship have tried to solve the enigma of how to conceptualise and reduce the exclusionary dynamics of citizenship in order to ensure a more universal guarantee of human rights. Butler and Spivak's essay "Who sings the nation state?" (2007) as well as the works of Soysal (1994) and Balibar (2004), are particularly interesting in this regard. Butler and Spivak (2007, 40) begin with the Arendtian notion of *statelessness* in order to analyse the ways in which the nation-state instrumentalises citizenship against individuals. One of the core assumptions is that nation-states create the premises for their legitimation by creating the nation in the first place (Butler and Spivak 2007, 31). States, therefore, create both the conditions for belonging and for dispossession. This twofold dynamics is contextualised, by the authors, within the broad framework of European governance, which they see as creating further borders and boundaries (Butler and Spivak 2007, 86). The creation of these fractures, furthermore, increasingly responds to logics of neoliberal economic globalisation rather than global democratisation of the states (Butler and Spivak 2007, 84-85). Butler and Spivak, therefore, explore the exclusionary character of citizenship without, however, suggesting that decoupling citizenship from the nation-state would entail a radical configuration of the dynamics of belonging to the political community.

While Butler and Spivak only briefly touch on the existence of new

configurations of citizenship beyond the framework of the nation-state, the works of Soysal (1994) and Balibar (2004) constitute a direct interrogation of the limits of national citizenship and engage with the possibility of alternative configurations not limited to the sphere of the nation. The conclusions reached by the two authors, however, significantly differ. In particular, Soysal (1994, 3) articulates a notion of "postnational citizenship" centred around the idea that there are effective ways to by-pass the state sovereignty in allocating human rights to individuals. The author gives the example of guestworkers in Europe in order to demonstrate how the guarantee of rights does not always necessarily require an inclusion of the individuals into the national community (Soysal 1994, 3). This is rendered possible, according to Soysal (1994, 3) by virtue of a change in the process of the legitimisation of rights: from a legitimisation founded in the nation to a legitimisation rooted in the concept of *personhood*.

In the discussion on the notion of the *human*, it has already been discussed how unstable it can be to rely on notions of humanity – hence of *personhood* –for the guarantee of human rights. Soysal's argument, therefore, can be said to rest on a false tautology, as personhood can still be subjected to those exclusionary criteria that continue to mark the allocation of rights to different "minorities". Soysal seems to be confident in the fact that universalistic discourses will be used in positive terms in order to foster inclusiveness. What is left out of this picture are the ways in which individuals are allowed to inhabit national spaces; but they are, nonetheless, in a liminal position.

Balibar (2004) has analysed the current dynamics of democratisation in Europe and has proposed a model of "transnational citizenship". This model of citizenship differs from both postnational and supranational models, because of the lack of concrete structures and anticipations on the outcomes (Balibar 2004, VIII). One fundamental point of departure for Balibar is the idea that borders are dispersed everywhere, rather

than being solely located at the "limit" (Balibar 2004, 1). The "displacement" of the border, Balibar maintains, plays a fundamental role in the construction of European citizenship configured as a "citizenship of borders" (Balibar 2004, 6). More precisely for the author, this implies that the deployment of "European citizenship" in order to foster a united continent, inevitably creates another inclusion/exclusion divide (Balibar 2004, 44 and 47). This divide concerns those that are not considered European and it amounts to a form of "European racism". In this regard, therefore, European citizenship would be "(…) a development of quasi-apartheid social structures and institutions" (Balibar 2004, 116). In comparison to Soysal, Balibar appears clearly less convinced about the possibility of by-passing citizenship in order to guarantee human rights for those currently excluded from their enjoyment within the polity.

The establishment of (new) borders, therefore, is considered by Balibar to be still crucial to the creation of a trans-national model of citizenship. The only way in which "European citizenship" could be disjointed from the process of creating "others", would be in the case of a process of the "democratisation of justice" (Balibar 2004, 121). What is meant by Balibar with this expression is the possibility of overcoming exclusionary practices by broadening the sphere of transnational democracy in which more individuals can actively participate to the detriment of the power of the nation-states. While Soysal seems more optimistic on the transformation of human rights beyond national borders, Balibar analyses the way in which the creation of a transnational political community, such as "Europe", can still powerfully create its "others". In this regard, the use of human rights as a rhetorical instrument to create a divide between compliant and non-compliant states cannot be overlooked. In the case of the rights of LGBTI persons, this instrumentalisation seems to be increasingly connected to the creation of a "European queer friendly" continent opposed to the

homophobic and transphobic "others". It is interesting, therefore, to discuss the extent to which discourses on the rights of LGBTI persons in Europe participate in the reproduction of new borders both at the level of single nation-states and, more broadly, in the context of a regional human rights institution such as the Council of Europe.

The "Pink Agenda": Promoting LGBTI Rights Beyond European Borders

In June 2010 Judith Butler refused the "Civil Courage Prize" at the Christopher Street Day in Berlin because of the racist tones used by spokespersons of the German LGBT movement. Commenting few weeks later she explained:

> So if we fight for the rights of gay people to walk the street freely, we have to realize first that some significant number of those people are also in jeopardy because of anti-immigrant violence - this is what we call "double jeopardy" in English. Secondly, we have to consider that if we object to the illegitimate and subjugating use of violence against one community, we cannot condone it in relation to another! In this way, the queer movement has to be committed to social equality, and to pursuing freedom under conditions of social equality. This is very different from the new libertarianism that cares only for personal liberty, is dedicated to defending individualism, and often allies with police and state power, including new forms of nationalism, European purity, and militarism.[16]

[16] From "AVIVA-Interview with Judith Butler", available at: http://www.aviva-berlin.de/aviva/content_Interviews.php?id=1427323 , accessed on 26th November 2012.

Butler's statement raises interesting questions in relation to the often unacknowledged process by which the promotion of specific human rights is advocated through a process of scapegoating that fosters further forms of discrimination and marginalisation of some groups or individuals. In this regard, the work of Puar (2007) is interesting in illustrating the process by which sexual identities become inscribed within the nation and are actively deployed in the construction of the racial and sexual "other". Puar (2007, 2) has coined the term *homonationalism* in order to describe a form of "sexual exceptionalism" that functions at the level of normative inscription of both sexual and racial norms into sexual subjects. In terms close to Said's anti-orientalist critique, it could be argued that Puar describes the depiction of the exotic (sexual) other as successfully serving nationalist purposes. This process by which some queer sexualities become legitimate within the nation-state, together with the production of a Manichean discourse about liberal and illiberal countries (these latter often identified with Islamic traditions), obviously obliterates the existence of individuals who are subtracted from the hegemonic aesthetics and ontogenesis of *gayness* and *queerness*. *Homonationalism* would be aligned, therefore, to a (c)overt racist discourse.

The rise of this sort of "homonormative Islamophobia" that Puar describes as a phenomenon of the global North, is accompanied by similar processes described by authors such as Massad (2007) or Altman (1996). In coining the term of the "Gay International" Massad (2007, 160) describes a process of the global transposition of Western gay identities outside of the West. For the author this enterprise has an important missionary dimension (Massad 2007, 190). Seen at a glance, therefore, Puar's and Massad's work highlight the existence of multiple trajectories in the deployment of sexuality as an instrument to create sharp divisions and borders, and to exert cultural and political influence on non-Western countries.

While Puar and Massad depict the rise of these phenomena as having a global reach, it is important to recognise that it is at the micro-level, at the level of national(ist) rhetoric, that the deployment of these arguments is possible in the first place. Zangherlini (2012) offers a specification of Puar's arguments. Far from dismissing the analytical framework of *homonationalism*, he is not convinced that all the representations of Muslim queerness are subject to the same degree of hegemonic discourse (Zangherlini 2012, 366). For the author it is not possible to regroup under the banner of *homonationalism* all the critical engagements which involve Islam and the 'radical' others, since they cannot all uncritically be the outcome of an outright hostility. Zangherlini's contribution challenges Puar's work, insofar as it seems to ask for a nuanced approach to the analysis of the process by which different categories of sexual subjects are created as being antithetical to one another. Puar's argument, nonetheless, remains powerful and challenging, insofar as it deprives human rights discourses in the West, about the rights of LGBTI persons, of an aura of idealism that often masks unavowed political objectives. *Homonationalism*, therefore, could be said to function both as an omni-comprehensive corollary to human rights rhetoric, and, at the same time, as an undeniable *ideological glue*, which allows nation-states to proactively promote their *values* abroad.

There are some illustrations of the way in which homonationalism may be practically articulated at the level of the nation-state. The first is the case of the Netherlands, often cited in relation to the prominent place of discourses on gay rights and sexual freedom in the country (Mepschen, Duyvendak and Tonkens 2010, 963). Jivraj and de Jong (2011, 143) define this proactive promotion of the rights of LGBTI persons both in domestic and international politics as the “Dutch homo-emancipation policy” (Jivraj and de Jong 2011, 143). With this term, the authors want to emphasise

the way in which tolerance of homosexuality has gained legitimacy into Dutch nationalist discourse and identity (Jivraj and de Jong 2011, 145). What they describe is the way in which strategies for promoting this tolerance strongly target the Muslim population, who are considered to be homophobic by default.

Mepschen, Duyvendak and Tonkens (2010, 966) read this process of active promotion of the rights of LGBTI persons in the Netherlands in the context of the 'rampant secularisation' that the country is undergoing. Moreover, they also contextualise the image of the gay man in the Dutch narrative of human rights as the "ideal citizen of neoliberal modernity" (Mepschen, Duyvendak and Tonkens 2010, 970) because of his autonomy. Dutch Nationalism, therefore, has managed to appropriate the rhetoric of human rights for LGBTI persons in order to create the *homophobic other*. Jivraj and de Jong (2011, 148) define it as "capitalisation of sexuality in relation to the perceived multicultural crisis". It is possible to read the Dutch example, therefore, as generating two outcomes: on the one hand the domestication of formerly dissident sexualities and gender(s); on the other hand, the racial stigmatisation of presumably illiberal segments of the political community.

Collateral to *homonationalism*, although placed in a somewhat different geo-politically specific context, is the phenomenon of *pinkwashing* applied to the creation of a gay-friendly image of Israel which stands in opposition to a presumed "Palestinian Homophobia" (Puar 2011, p. 137). *Pinkwashing* strategies are broadly framed in terms of a re-branding of Israel (Schulman 2011) whose aim would be that of concealing Israel's violations of the rights of the Palestinians behind an image of a tolerant, open country for gay persons. This phenomenon has undeniable and complex implications in the context of the Israeli-Palestinian conflict. While the exploration of these ramifications is obviously beyond the scope of this analysis, what is interesting in this

context is the omni-presence of the nation-state as the promoter or obstacle to human rights. The re-branding of Israel as gay-friendly, therefore, is problematic because of the process of essentialisation of the Palestinians as homophobic, and also in the context of the process of the construction of a national identity.

Both the case of the Netherlands and the case of Israel, therefore, illustrate the thin line existing between a selfless defence of universal human rights principles and the danger of instrumentalising the rights of some individuals in order to potentially exclude and marginalise others. In the context of this research, the framework of *homonationalism* will be applied, in an experimental way, to a non-national context, that of the Council of Europe. The objective is that of investigating the extent to which there may be a form of undetected "European racism", as Balibar has suggested, that fosters the creation of the "other" in terms of sexual and gender identities, and functions not at the level of each and every member state of the organisation, but is structured as a powerful supranational meta-narrative on human rights.

Chapter Four - Researching Critically Human Rights between Actions and Meanings

It could provocatively be argued that human rights have become one of the most sophisticated discourses of modernity. Because of the ever-growing importance of 'human rights' in political discourse, the meaning associated with this concept often seems to be taken for granted. Individuals and states seem to tacitly agree on both the general idea and intrinsic value of human rights, to the point that those who refuse to speak the language of 'human rights' or who doubt their legitimacy or efficacy are often labelled as illiberal or reactionary. However, the meaning of the concept of 'human rights' is far from being fixed. In this regard, the incessant proliferation of rights claims and new forms of entitlements, constitute fascinating material for critical analysis. Against the background of unproblematic endorsement and promotion – and sometimes exportation – of "universal human rights", the adoption of a critical outlook in the analysis of human rights law and practice appears crucial, as it can both help to appraise the social component of law and law-making, as well as shedding light on the inconsistencies underpinning contemporary human rights discourses.

In the context of this research, which engages with the existence of a productive process at the Council of Europe, whereby specific LGBTI identities are created, circulated and reinforced, a critical approach to the case law of the European Court of Human Rights seems the most suited. In fact, a critical approach fits best with the task of unveiling the unspoken ways in which some individuals are framed as legitimate rights-holders, while others are symbolically expelled from the courtroom, the juridical sphere and – by extension –the social and political sphere.

The chosen methodological framework for this research will combine a critical

deconstruction of the relevant case law of the European Court of Human Rights, with an account of a period of participant observation carried out at the Office of the Commissioner for Human Rights of the Council of Europe in 2010. The combination of these two methods certainly presents some challenges, as the textual analysis occupies a much more central place in comparison to the account deriving from the participant observation. The decision to allocate unequal space to these two methods, however, reflects the current overwhelming importance of judicial discourses on human rights with respect to political, diplomatic, sociological and philosophical discourses on the same topics and issues. In the context of this project, the rampant process of juridification of LGBTI identities will be acknowledged in conjunction with a discussion of the negative implications that this over-legalisation of LGBTI identities entails for the rights-holders.

Contextually, a critical analysis of the various forms that the recognition of the human rights of LGBTI persons currently takes in the European continent presents other challenges. Firstly, because of the potential of human rights to engender compassion, empathy and understanding, it is important to discuss the researcher's positioning – and questions of reflexivity – with respect to the object of inquiry. Secondly, socio-legal research on LGBTI issues requires a discussion of the possibility of "queering the law" and the implications and potentialities that this methodological approach entails. Thirdly, the decision to conduct participant observation in an institutional setting such as the Council of Europe requires a discussion of the power relations at play during this process and the influence that a possible power imbalance may have on the researcher's positioning and outlook. Seen together, these three challenges are crucial corollary aspects of the description of the methodological approach and the methods adopted for this research. A detailed discussion of the chosen methods of investigation (a critical

deconstruction of relevant case law and participant observation) will be complemented, in this chapter, by a critical engagement with the theoretical problems arising from the choice of these methods, as well as a description of the research setting, the Council of Europe and the Office of the Commissioner for Human Rights.

The Researcher's Positioning

Describing the positioning of the researcher with regard to the object of this research is essential. For someone who endorses a socio-political identity as a lesbian woman, doing research from the "inside", or doing research in a *familiar* field, can be problematic. In engaging in a continuous dialogue with "partial truths", one could be tempted to agree with personal convictions or intellectual sensibilities with regard to some of the arguments presented. While a significant distance is established between the researcher and the object of the research in order to minimise biased interferences, it would be incorrect to disregard the influence that the researcher's identification as a lesbian woman has on her outlook on issues of equal rights and justice. My research was motivated partly by the need to understand how it is possible for a lesbian, gay, bisexual, transgender or intersexual person to be excluded from the enjoyment of human rights through the articulation of legal and political reasoning, but it also stemmed from the fact that identities do not originate entirely from within the subject.

Moreover, my personal experiences have endowed me with interesting material for reflection on what it means to be a subject of "human rights". As a lesbian woman with a disability who comes from an Italian middle-class family, I have always felt characterised by different sub-identities. However, it is not the mere awareness of these multiple intersecting lines that has been important for me. My experience has, rather,

been shaped by recognition of the fact that, at various stages of my life, these identitarian traits have played different roles in the construction of my social and political identity. In the context of socialisation with my peers during my school years and in my choice of employment, my disability has given me occasion to reflect on my rights and entitlements. When I “came out”, I realised that this new “identity” implied the existence of a limitation to my rights that had not seemed relevant to me before. Later on, when my family underwent important changes in its financial situation, I had the time to reflect on my class and on the rights and privileges attached to a certain economic status. Still today the socio-political position from which I speak is not always the same, and does not necessarily always encompass all of the characteristics that define me. The combination of these different parts, which endow me with a social and political awareness, have pushed me to think about how it is difficult to detach different sets of rights and requests attributed to the same person, as many of these rights and requests are often deeply intertwined and intersect with one's gender, sexuality, class, ethnicity, and so forth.

I decided to focus on issues pertaining to the sphere of gender and sexuality because of their peripheral position within human rights scholarship and because of the profoundly fascinating challenges that these issues present for different human rights actors. I carried out this research while bearing in mind the often-conflicting identities that each person possesses and valuing the social and political significance of these complex combinations.

In order to investigate the socio-legal construction and reproduction of LGBTI identities in the political and legal arena of the Council of Europe, questions arise regarding the appropriate methods to employ. In order to gain “entrance” into the juridical field a set of highly sophisticated skills is needed. This renders problematic

access to both legal texts and rhetorical devices, as well as the pre-existing body of legal literature and case law specific to the sub-field object of the research. Therefore, the complexity of the position in which the socio-legal researcher finds her/himself cannot be solely unravelled and explained by means of the reflexive approach.

To Queer or Not to Queer the Law? Methodological Dilemmas

Far from aiming to reveal an immanent universal truth regarding legal constructions of LGBTI identities, this research tries to shed light on existing patterns of the crystallisation of identities in the juridical field that are also inextricably connected to the political articulation of these same identities in other domains. This research, therefore, is informed by an attempt to move beyond the narrow concepts of both *structure* and *fluidity,* which are typical of the polemical interaction between the Law and Queer Theory, in order to explore the opening up of alternative – yet not completely oppositional – ways in which sexual orientation and gender identity may be framed beyond rigid normative prescriptions.

Going beyond the framework of Queer Theory in social research concerning LGBTI identities is, to some extent, risky. Applying Queer Theory as a methodology to a highly institutionalised and structured context such as the juridical one is – at best – problematic. Kepros' (in Fineman et al. 2009, 5) definition of Queer Theory as trying to "foster [...] social change by keeping its own status as a theory undefined, its techniques post-modern, and its membership open", evidences how difficult it can be to establish a dialogue between legal discourses and Queer Theory.

"Queer Legal Theory" has been conceived as a synthesis between the normative domain and the open network of extremely diversified queer experiences. Queer Theory

Scholars engaging with this very ambitious project of synthesis, however, consider it to harbour a certain degree of criticality amounting, to a certain extent, to a paradoxical juxtaposition of terms. On the one hand, there is the rejection of dominant social norms regarding sexuality, gender, intimacy and kinship; on the other hand there is the legal articulation of these same predominant social norms (Romero in Fineman et al. 2009, p. 190). The result is a partial overcoming of the respective weaknesses of the two, which, in turn, may disorient the researcher and fail to provide practical analytical tools for the study of both the theory and practice of human rights concerning LGBTI persons.

This project, however, does not depart entirely from Queer Theory, as it adopts the theoretical perspectives of authors such as Judith Butler and Michel Foucault. This is not seen as being contradictory, since the attempt at deconstruction and problematisation of sex, sexuality and gender is conceived here, not as the point of arrival, but rather as the point of departure, in order to carry out a further deconstruction and critique of the law. In this sense, tenets of Queer Theory are deployed *strategically* rather than systematically. This strategic deployment can help to avoid the insidious loop of endless dematerialisation and deconstruction of lesbian, gay, bisexual, transgender or intersexual identities that Queer Theory could encourage. In this regard, Morgan (1995) has proposed an interesting analysis of Queer Theory's relationship with legal scholarship. In dismissing the hypothesis that Queer Theory may take an interest in legal reform(s), Morgan claims that the ultimate goal of Queer encounters with the legal domain is that of operating "transgressive readings of the corpus of legal knowledge; its tenets and other forms of discourse" (1995, 40). Hence, Morgan (1995, 41) conceives of "deconstruction" as a method as an analytical tool, rather than a synthesising tool. This last aspect of Queer Theory's problematic relationship with the legal sphere represents precisely the reason while tenets of Queer Legal Theory are

deployed *strategically* rather than *systematically* in the context of this research. While sharing most of the assumptions made by Queer (Legal) Theory about the productive role of the law with respect to sexual and gendered identities, a mere process of deconstruction is insufficient to imagine alternative ways in which human rights can be radically reconfigured and re-appropriated by rights-holders themselves. In this regard, therefore, queer vocabulary and concepts will be employed in the context of this analysis, which considers human rights as potentially useful instruments of protection, rather than solely artificial political proclamations whose nature and features cannot be radically altered. Furthermore, the strategic deployment of the fundamental tenets of Queer Legal Theory and Queer Theory allows more freedom in exploring the ways in which 'human rights' can be reworked, radically altered and modified, rather than simplistically being dismissed as useless and obsolete devices of power.

Mixing Methodologies for Studying Human Rights between Texts and Practices

Researching human rights from a socio-legal perspective requires more than a mere engagement with the black letter of the European Convention on Human Rights or the judgements of the European Court of Human Rights. It would be reductive to think that a purely textual analysis of the case law of the ECtHR is sufficient to unveil the social component of human rights law and practice that actively shapes and somehow constrains legal LGBTI subjectivities in the context of the Council of Europe. On the contrary, this operation requires a multi-layered methodological approach that can allow the research to simultaneously expose and analyse the crucial textual subtleties present in the legal texts contributing to the creation of specific LGBTI identities, as well as describing similar productive processes happening in the extra-legal sphere within the

Council of Europe.

Therefore, for this research, a critical deconstruction of the case law of the ECtHR on issues relating to sexual orientation and gender identity is combined with participant observation carried out in 2010 at the Office of the Commissioner of Human Rights of the Council of Europe. The participant observation, which lasted four months, took place at a crucial moment in which the Commissioner was carrying out what could somehow be defined as "pioneering work" on the rights of LGBTI persons. The implications of the innovative initiatives undertaken by the Commissioner will be thoroughly addressed in the remainder of this research. The combination of the two chosen methodological components is aimed at offering a multi-faceted account of the various ways in which some LGBTI rights-holders are legitimated through the language and practice of human rights, while others are silenced and framed as outsiders. In this regard, therefore, while the critical deconstruction of the ECtHR case law brings to the forefront the question of legal language as being inherently productive, rather than merely descriptive, the participant observation enables the observation of the related ways in which non-judicial actors within the Council of Europe – and in particular the Commissioner – contribute to fostering specific models of LGBTI rights-holders, which are fundamentally attuned to the descriptions offered by the case law of the ECtHR.

Critical Legal Theory, Human Rights and the Deconstruction of ECtHR Case Law

When discussing the appropriate method for undertaking a critical analysis of the social and political components of the case law of the ECtHR on sexual orientation and gender identity, it is not possible to eschew a discussion of the researcher's choice of jurisprudential approach. The researcher is implicitly asked to choose between

relying on a liberal conception of jurisprudence, attuned with the tradition of legal positivism (Hunt 1986, 4), or espousing the critical legal approach of the so-called "Critical Legal Theory" movement, which emerged in the late 1970s in the United States as an alternative to the liberal tradition of legal thought and scholarship. Legal positivism, based on the "scientific" study of the law, as advocated by leading scholars such as Kelsen and Hart (Douzinas and Gearey 2005, 6), is premised on the idea that the legitimacy of the law is beyond discussion, as it is based on formal reason and deprived of ethical concerns (Douzinas and Gearey 2005, 6). Hunt (1986, 4) describes the key features of legal positivism as encompassing the claim to law's uniqueness in comparison to other forms of "social control"; the claim that law is made up of rules that also define the domain in which they need to be applied; the affirmation of the inherent legitimate and objective character of legal rules; and the possibility of predicting the result of a legal process based on the application of specific rules.

Critical Legal Theory emerges in sharp contrast to this depiction of the law as inherently objective, legitimate and characterised by rationality and predictability. Echoing the intuition of American legal pragmatists such as Dewey (Ward 1998), Critical Legal Scholars (CLS) propose an alternative model of jurisprudence that breaks with the liberal legal tradition, insofar as they depict the law as a domain in which principles of indeterminacy and contingency characterise the legal process and inform legal outcomes. The idea of indeterminacy refutes the assumption that legal disputes can be solved without controversy or with absolute certainty. A "false sense of determinacy", instead, can be said to be conveyed whenever reference is made or implied from the existence of a presumable societal consensus on specific topics, issues or values (Kairs 1982, 3). The concept of contingency, instead, refers to the fact that the law has to take into account the situated, the particular and the existence of innumerable

differences between individual cases and experiences. The acknowledgement of the existence of differences that cannot be ignored in the legal field gives rise to the fact that it is not possible to attribute "absolute stable meaning" to any concept – such as "law" or "justice" – within the legal domain (Ward 1998, 178) as their interpretation may differ depending on the context (be it social, political, historical or so forth). Hence, the principles of indeterminacy and contingency are intended as instruments to undermine the claim to the (political) neutrality of the law that characterises liberal jurisprudence. As will be illustrated in the remainder of this section, this operation becomes possible through the process of "deconstruction" of the legal text, which is analysed beyond its self-evident character and is symbolically *dissected* in order to reveal rhetorical artifices and devices that hide fundamental social and political productive operations of legal language.

Generally speaking, while Critical Legal Theory cannot be described as a coherent body of scholarship (Gordon 1982, 642), the idea that the law, as has been briefly hinted at, does not possess the characteristics of objectivity, aprioristic legitimacy and predictability as legal positivists would suggest, represents a cornerstone of Critical Legal Theory. On the contrary, the law can be said to "manufacture (...) its own conditions of legitimacy and then attempts to legislate them as a priori universals that have a legitimising effect through their appeal to reason" (Douzinas and Gearey 2005, 40). Hiding behind its presumed neutrality and objectivity, the law for CLS is inevitably political. In this regard, therefore, Critical Legal Theory seeks to bring to the surface the dynamics of selection and suppression of specific legal principles, which can be used to legitimise, uphold and preserve the status quo (Gordon 1982, 650-651).

Critical Legal Theory and Human Rights

As Ward (1998, 156) has observed, many CLS have concerned themselves with the question of "human rights" and in particular have attempted a "critique of the rights thesis". It is easy to understand why the question of human rights represents such an appealing object of interest for Critical Legal Theory: promoted as being objective, universal and the product of a presumed collective morality, human rights represent the perfect target for those who wish to critically engage with one of the most paradigmatic products of liberalism. In his critique of rights, Tushnet (1984) has engaged with both the question of indeterminacy and contingency. With regard to the former, the author has claimed that the language of rights can be used interchangeably by both those who wish to promote and those who oppose, human rights, in virtue of the open and indeterminate character of this specific form of legal language (Tushnet 1984, 1364). As for the concept of contingency, Tushnet has affirmed that the meaning of "human rights" is unstable, because it depends on the specific setting, rather than on abstract formulations (Tushnet 1984, 1363). His suggestion, therefore, is to abandon altogether the language of rights, given its inability to emphasise the importance of individuals' experiences as opposed to abstract human rights proclamations.

Among CLS, Unger (1983) has also engaged with the question of rights. In pointing out the necessity of finding an alternative "proper" relation between law and society, Unger has described human rights as an area in which democratic reform can be carried out, by means of what he calls "superliberalism" (Unger 1983, 41). In contrast to other CLS, who advocate the "trashing" of liberal legalism (Ward 1998, 156), Unger's work contains a call to engage with liberalism, not by dismissing it, but by overcoming its current form. The distinction between those advocating "trashing" any existent liberal legal framework and those advocating reform from within, pushes us to reflect

on Critical Legal Theory's ability to combine a critique with measures to address and redress the status quo. In this regard, Douzinas and Gearey (2005, 179) have argued that one of the problematic aspects of critical theory has been precisely that of conciliating the necessity of criticising the current system of human rights with what they call "radical lawyering", which resorts to the language of human rights. This inability has been pointed out more extensively by Critical Race Theory scholars, such as the American legal scholar Patricia Williams, who maintains that the complete dismissal of the language of human rights proposed by radical critiques of human rights may in the end be detrimental to the interests of subordinate groups, as it may deprive them of protection (Gordon 1982, 657).

Seen in the context of this research, the dialectic confrontation between Critical Legal Theory and Critical Race Theory on the question of human rights, appears to be of crucial importance, as the adoption of a Critical Legal Theory approach could suggest that the language of human rights should be abandoned altogether in favour of other forms of political engagement with individuals and communal needs and requests for protection. The reality is, however, more nuanced, as this research seeks to retain the concept of human rights without remaining within the domain of liberalism as Unger's "superliberalism" suggests. In order to do so, however, it is necessary to adopt a critical methodological approach aimed at highlighting the productive – political and social – processes hidden in human rights discourses and language. The following section will illustrate the central interest of CLS in the deconstruction of legal texts as a methodological tool to expose the social and political components of law and law-making. The limitations and implications of this methodological approach will also be addressed in relation to its adoption in the context of this research.

Critical Legal Theory and the Deconstruction of Legal Texts: the Politics of Legal Language

For CLS the question of legal language is inescapable: the law is *made up of* linguistic utterances. Furthermore, the law also possesses a highly specialised vocabulary (Baron and Epstein 1982, 662). In this regard, Goodrich (1987, 126) has maintained that, as a form of social discourse, the law, like religion, heavily relies on writing for the "interpretation and control of social practice in relation to a series of texts". This acknowledgement of the crucial importance of the linguistic element of the law by CLS, leads to a critical engagement with questions of legal hermeneutics. The law is seen as encompassing values and principles as well as a "rich thesaurus of meanings" (Douzinas and Gearey 2005, 7). Paying attention to the structure, forms and specific linguistic choices in legal contexts – following what can be called a "linguistic turn" – serves to understand how the legal language both "embod[ies] and implement[s] power" (Baron and Epstein 1982, 673). The inextricable relationship between legal language and power crucially involves individuals who may possess or who may be deprived of the linguistic abilities to access the law or master legal language (Baron and Epstein 1982, 673; Douzinas and Gearey 2005, 72). Without the necessary linguistic endowments, therefore, individuals may become *subjected to the law*, rather than *subjects of law.*

The theory of interpretation of legal language, which will be adopted for this research, draws on the work of Ronald Dworkin. Although Dworkin cannot be numbered among CLS, his theory of interpretation – particularly the idea that legal rules are informed by ethical values – has been accepted by Critical Legal theorists (Altman 1986, 189) and can, therefore, be useful to understand how to critically deconstruct the legal text. In contrast to what was held by the legal positivist scholar Hart, for whom the

law was purely descriptive (Coleman 2002, 314), Dworkin characterised the law as being an interpretive concept in which principles and values occupy an important role (Dworkin 1982, 179). Dworkin's position descended from his consideration of law as a "political enterprise" (1982, 194), which serves various purposes, among which are the resolution of disputes, the coordination of individual efforts and the adjudication of justice.

Dworkin's theory of interpretation of law is premised on the idea that judges confront one another not only on "empirical disagreements" but, more significantly, on the ground of "theoretical disagreements" (1986, 1), which concern the very concept of what the law is. Contrary to the positivist assumption that the law cannot contain disagreements of the latter sort, Dworkin maintained that judges' decisions (specifically referring to common law) are informed by a number of factors, among which their own understanding of what the law is plays an important role (1986, 1). In undertaking their duties, judges embark on an interpretative process that draws from their own ethical and moral considerations, as well as from their own conception of integrity and coherence in the legal field (Dworkin 1982, 195). In order to illustrate his argument, Dworkin resorted to literary critique. For him, in the context of common law, the judge is asked to interpret what was done by his predecessors (other judges), as if he were to write a chapter of a novel in a chain (Dworkin 1982, 192). In interpreting what has already been written, the judge makes an evaluation, which implicitly refers to his own opinion about what ensures that the integrity and coherence of the law are preserved.

Dworkin, however, ultimately appeared in opposition to CLS because he presumed that judges can make use of their interpretive criteria in order to arrive at a "correct" notion of law's integrity and coherence. Hence, while Dworkin's emphasis on the role of principles and rights can be seen in opposition to positivist jurisprudence

(Douzinas and Gearey 2005, 15), at the same time, his work is seen as an attempt to "rescue legal determinacy" (Altman 1986, 189). In this regard, the dispute between CLS and Dworkin shows the different expectations held by the representatives of the two fronts: while Dworkin was convinced of the possibility of interpreting the law as the "best work (…) that it can be", CLS point out the ultimate irreconcilability between different principles and ideals as the illustration of the necessity of undertaking a radical deconstruction of legal texts. Seen in the context of this research, the question of how to critically deconstruct a legal text without lapsing into a nihilist exercise that ultimately denies the possibility of retaining the concept of "human rights" can be configured as a methodological challenge. The remainder of this section will address the methodological usefulness of the concept of "deconstruction" of the legal text by also indicating how such a process of deconstruction is compatible with a radical reconfiguration of the concept of "human rights" beyond its current liberal characterisation.

While Minkinnen (2013, 120) maintains that it is not possible to talk about a unified "critical legal method" and that it is more appropriate to talk about a "critical attitude" in legal research, the deconstruction of legal texts is one of the methods commonly associated with Critical Legal Theory. The usefulness of this method in the context of critical legal analysis descends from the fact that, by unveiling the politics of language in legal texts, deconstruction simultaneously reveals the politics of the law, thus calling into question the presumed universality of concepts such as "ethics", "morality" or "justice" (Ward 1998, 179). In radically calling into question notions and concepts that were taken for granted by legal positivists, deconstruction represents a sort of Nietzschean hammer, by means of which the multiplicity and contingency of the legal text is revealed and the intricacy of political motivations within the legal text itself

is exposed. Adopting deconstruction as a methodological approach, therefore, requires a willingness to systematically identify the hidden narratives of existing power relations within the legal text, or to "de-sediment(..) the superstructures of law that both hide and reflect the economic and political interests of the dominant forces of society" (Douzinas and Gearey 2005, 70).

The most significant proponent of deconstruction as a critical method for legal research is Jacques Derrida (1992). Derrida associated himself with CLS and made central to his speculation the question of deconstruction of legal texts in connection with the question of justice. Crucial to his analysis was the concept of "différ*a*nce", a neologism that he coined to highlight the way in which language is essentially made up of differences that are also present in the legal domain. More specifically, Derrida intended to address the question of the "foundation of law" and affirmed that the law is fundamentally deconstructible because it is constituted by "interpretable and transformable textual strata" (1992, 14). Hence, the crucial recognition of the différ*a*nce of the law is what rendered, in Derrida's opinion, the possibility of justice feasible: justice can only be achieved by recognising the constructed character of the legal text or, as the French author put it, "deconstruction is justice" (Derrida 1992, 15).

Derrida's concept of deconstruction fits very well the purpose of this research, which seeks to highlight the socially and politically constructed character of the case law of the ECtHR on sexual orientation and gender identity. By highlighting the way in which each legal case is *different* and requires a *different* interpretation (1992, 23), Derrida exposes the role of legal language as the fundamental instrument through which the law appears to be neutral and to possess an autonomous "foundation" but also, as the instrument that reveals the impossibility that such a foundation exists in the first place, given the inevitable traces of différ*a*nce that language contains in the first place. The

process of deconstruction of legal texts, therefore, acquires a prominent political dimension, insofar as it aims to deny the existence of a presumed “political neutrality” of legal language (Ward 1998, 179). Once legal language has been stripped of this aura of “neutrality”, it is possible to analyse the ways in which this form of language can both reflect power relations and be deployed to articulate specific moral views.

For the purpose of this research, the method employed to critically deconstruct the judgements of the ECtHR consists of a thorough examination of the terminology and lexicon employed by the ECtHR to describe LGBTI plaintiffs, and their experiences and identities. Particular attention, for instance, will be paid to the choices operated by the ECtHR in order to “describe” a specific sexual orientation and/or gender identity, in conjunction with both the use of other specific legal terms, as well as in connection with the consolidated case law of the ECtHR regarding these specific issues. Furthermore, attention will be paid to the ways in which the ECtHR narrates the plaintiffs' stories, since the judgements contain a synthesis, operated by the ECtHR itself, of the parts' submissions to the Court. In this regard, therefore, it will be important to highlight similarities and differences existing between different judgements of the ECtHR concerning issues relating to sexual orientation and gender identity. These comparisons can shed light not only on the possibility that the language employed by the ECtHR on these matters may have evolved over time, but also on the possibility that the ECtHR may deploy some terms strategically depending on the specific legal outcome for a given judgement. Unveiling the existence of these dynamics will help to demonstrate the productive role played by the judges in Strasbourg in actively defining and shaping LGBTI legal subjectivities in the European human rights arena.

Queering Critical Legal Theory?

As has already been argued, this research deploys Queer theory in a strategic way: in trying to deconstruct the legal texts it also attempts to imagine alternative modalities of formulation of human rights principles. In relation to the methodological choice to use the deconstruction of the ECtHR's judgements, it is important to highlight the intersections between Critical Legal Theory and Queer Legal Theory. Among those who have attempted to "queer" the law, one interesting contribution is Moran's (1996) critical legal analysis of the Wolfenden Report – a report issued in 1957 by the British Departmental Committee on Homosexual Offences and Prostitution, which contained some recommendations for the decriminalisation of homosexual behaviour in the UK. Moran, who described his affiliation with Critical Legal Theory, devised in his research a sophisticated analysis of the Committee's deployment of the term "homosexual", following a Foucaultian approach. In analysing the ways in which the linguistic formulations employed by the Committee contributed to the institutionalisation of the term "homosexual" – and by extension *homosexual* identities – Moran's work represents an interesting example of a critical deconstruction of legal texts focusing on the issue of sexual orientation. In this regard, therefore, it is very pertinent to this research. Moran's work sheds light on the ontological construction of the "homosexual" subject by the law, by virtue of a delimitation of possible meanings attributed to the terms (1996, 4).

Furthermore, Moran's contribution appears very important in the light of this research, because it emphasises the role of legal language in producing the identities that it seeks to describe. In particular, Moran claims that the Wolfenden Report, in extensively resorting to the term "homosexual", had a twofold productive effect: on the one hand it established who was allowed to utter the term "homosexual"; on the other hand, it permitted the emergence of specific linguistic codes associated with a

homosexual identity (1996, 102). Moran's conclusion about the productive role of the Wolfenden Report appears strikingly important in this context, as a similar approach to the strategic deployment of specific words ("homosexual", "transsexual", etc.) together with other linguistic elements that do not mark aspects of gender or sexuality will be adopted in order to highlight the existence of productive processes of LGBTI identities taking place at the Council of Europe, and within the ECtHR and the Office of the Commissioner for Human Rights more specifically. In this context, therefore, Moran's work, can be referred to as an example of how to analyse legal documents concerning sexual orientation and/or gender identity by bringing to the forefront the productive potential of legal language.

A last observation within this context should be made in connection with the work of Francisco Valdes (1999 and 2009). Valdes is interested in showing what "Outcrit" scholars can bring to the field of Critical Legal Studies. Defined as scholars who are aligned with "outgroups", which broadly encompass all sorts of outsiders (sexual or gender dissidents, members of ethnic minorities and so forth), "Outcrits", for Valdes, have the objective of overcoming what he calls "Euroheteropatriarchy" (1999, 840). Valdes' work emphasises the necessity of resorting to critical legal analysis in order to overcome subordination and showing the limitation of legal practices by introducing new tools for analysis such as the concepts of multiplicity, intersectionality, and multidimensionality (2009, 103). These concepts, Valdes argues, are working tools that help to break with a monolithic and mono-dimensional reproduction of legal cultures (2009, 102). Furthermore, they appear crucial for scholars who are interested in questioning "the racialised and ethnicised dynamics of sexual orientation and issues" (2009, 93).

This current project acknowledges the importance of Valdes' contribution, as it

employs an analytical framework of the case law of the ECtHR based on the concept of multiplicity and multi-dimensionality of sexual and gendered identities, in order to highlight the current limitations of the definitions of the identities of LGBTI rights-holders by this judicial institution. Furthermore, this research deploys the categories of multiplicity and multi-dimensionality in connection with the analysis of the ways in which the contemporary (European) sexual citizen is constructed. Valdes' work, therefore, can be referred to as an important working tool to be employed in the context of the present analysis in order to bring to the forefront the lack of representation of multiple LGBTI realities and experiences within the field of human rights in Europe.

Ethnography and the Law: Encounters at the Borders of the Normative

A complex phenomenon like the European theory and practice of human rights on sexual orientation and gender identity cannot be investigated by relying only on textual analysis. As Goodrich points out:

> ”(...) the study of law as discourse is only ever a partial analysis of law; it would be erroneous in the extreme to suppose that the entire ambit of legislation, legal institutions and juridical practice could, in their entirety be reduced to an analysis of discourse” (1987, 158).

Actions are fundamental parts of the promotion and circulation of human rights discourses and ethnography is grounded in the observation of actions and the meanings that actors attribute to them. Institutional actors, such as those working in the Council of Europe, are constantly confronted with issues of interpretation, re-appropriation and

promotion of both the founding texts and the case law on human rights. Their actions, therefore, are informed by political, social and cultural factors. As an object of research, moreover, these actions outside of the juridical field are fascinating, insofar as they permit one to discover spaces in which actors make sense of their work and express both their doubts and their convictions regarding the usefulness of their work in redressing and raising awareness of human rights violations. Furthermore, the peculiarity of the specific setting of the Office of the Commissioner for Human Rights of the Council of Europe provides a unique perspective on European human rights discourses on sexual orientation and gender identity. Ethnography can help to describe the intersection between political, diplomatic, social, cultural and economic factors in the negotiation of specific narratives of human rights. At the same time, however, due to existing constraints relating to access to the various decisional processes at the Office of the Commissioner, the analysis contained in this research cannot be described as a full-blown ethnography, but rather as a form of participant observation. While the researcher had access to the field and interacted with various actors at the Office, the ability to become fully immersed in the work of the institution was somehow limited by the hierarchical structure of the Office. As far as possible, therefore, observations were carried out on the actions and behaviours of the various actors involved, while trying to overcome the negative impact caused by the limited access to various decisional processes and respect for the code of confidentiality between the parts.

Describing the Setting: the Council of Europe and the Commissioner for Human Rights

The Council of Europe (CoE) is one of the most interesting international organisations for many reasons. Established in the aftermath of the Second World War

(1949), the institution was created to promote democracy and the rule of law and create unity among its member states. However, it was the product of different political interests. On the one hand it continued, to some extent, on European soil, the idealist tradition of Woodrow Wilson and presented an "ideological stance against communism" (Steiner, Alston and Goodman, 2007, 936). On the other hand, however, it was conceived as an instrument to contain the aspirations of post-war Germany (Steiner, Alston and Goodman, 2007, 933).

To date the Council of Europe has 47 member states in Europe, with nearly 800 million people from Reykjavik to Vladivostok under the European Court of Human Rights' jurisdiction. The European Convention on Human Rights and Fundamental Freedoms (ECtHR) was drafted and adopted in 1950 (but officially entered into force on 3 September 1953) and it protects a series of fundamental rights and freedoms (which were later extended by the introduction of additional Protocols) such as:

the right to life (Article 2);

the right not to be subjected to torture, inhuman or degrading treatment or punishment (Article 3);

freedom from slavery (Article 4);

the right to liberty, security of person (Article 5), and due process of law (Article 6);

the right not to be held guilty for acts that were not criminal offences at the time of their perpetration (Article 7);

the right to a private and family life (Article 8);

freedom of thought, conscience and religion (Article 9);

freedom of expression (Article 10) and of peaceful assembly and association (Article 11);

the right to marry and to found a family (Article 12);

a non-autonomous clause on non-discrimination (Article 14);

The Convention is binding in its entirety on the contracting parties and, under Article 19, two institutions (the *Commission of Human Rights* and the *European Court of Human Rights*) were created to observe compliance with the above-mentioned standards. These adjudicatory bodies, however, were ineffective due to the steadily increasing number of applications they received over the years; in 1998, Protocol 11 substituted them with a new full-time European Court of Human Rights (ECtHR). In fact, the "new" ECtHR became the only adjudicatory body in charge of all of the competences of both the Commission and the "old" ECtHR (De Salvia 2006, 62). The fulcrum of the Council of Europe is, indeed, the ECtHR. Its prestigious and influential role is not only *quantitatively*, but also *qualitatively* determined. The Court saw the amount of applications increase enormously and exponentially to nearly 90,000 pending cases in 2006 (Steiner, Alston and Goodman, 2007, 964), and the range of human rights issues that it has dealt with thus far constitutes the really interesting aspect of its activity:

> "(...) in qualitative terms, the jurisdiction of the Court now spans a diverse array of cultural contexts, political systems, social perspectives and levels of economic development. (…) today it is confronted on a daily basis with virtually the full range of human rights challenges of the utmost importance within the societies concerned" (Steiner, Alston and Goodman 2007, 964).

The other main bodies of the Council of Europe are the Committee of Ministers (CM) (the decisional and executive organ), the Parliamentary Assembly (PACE) (a forum of discussion for member states without binding powers), and the Commissioner for Human Rights (a non-judicial institution established in 1999[17] and elected by the Parliamentary Assembly every six years).

The figure of the Commissioner for Human Rights represents the focal point of inquiry for this participant observation. The first Commissioner, Mr. Álvaro Gil Robles, held the post from October 1999 to March 2006. He was followed, in April 2006, by Mr. Thomas Hammarberg[18]. Resolution (99) 50 defines the mandate of the Commissioner by establishing his independence and setting his tasks in the promotion of education, awareness and respect of human rights. As a non-judicial institution, the Commissioner cannot deal with individual cases but can establish strong and ongoing contacts with national governments in order to provide advice and information on the protection and prevention of human rights violations, as well as identifying shortcomings in the implementation of human rights standards by member states set by the Council of Europe. Although he does not systematically engage in monitoring each member state, he can make visits and missions, draft reports, and offer opinions and viewpoints concerning specific issues, either for a specific member state or based on a theme. The Office of the Commissioner is of a relatively small size in comparison with the staff allocated to other bodies such as the Committee of Ministers or the Parliamentary Assembly. The staff, at the end of 2010, comprised 36 persons, 24 of whom were advisers, each of whom worked on specific member states and on specific themes (children's rights, disability, sexual orientation and gender identity, or the rights

[17] Committee of Ministers of the Council of Europe, *Resolution (99) 50 on the Council of Europe Commissioner for Human Rights*, adopted on 7 May 1999.

[18] The third Commissioner, currently in office, is Mr. Nils Muižnieks and he was nominated on 1st April 2012.

of Roma persons, for instance). The Office is a very dynamic environment and its small size lessens the impression that it is part of a bigger bureaucratic apparatus involving different levels of decision-making.

Conducting participant observation at the Office of the Commissioner was interesting for four main reasons. Firstly, it is an innovative and recent institution whose mandate is largely promotional and preventive, and, therefore, it is highly dynamic in the interpretation and dissemination of human rights principles and the priorities of the Council of Europe in different political and diplomatic contexts. Secondly, as an "independent" figure, the Commissioner has a different way of articulating human rights concerns and raising the awareness of the political bodies of the institutions such as the Committee of Ministers and the Parliamentary Assembly. The differences and the interactions between the political/non-political practices of human rights are fascinating in the context of the protection and/or promotion of the rights of LGBTI persons, because they reveal the contradictory patterns of emergence, in the legal arena, of the rights of LGBTI persons *as human rights*. Thirdly, given the relatively small size of the office, it is suitable for ethnographic research in which the researcher and the "researched" are in close proximity; establishing relations with the "researched" is particularly important and becomes more difficult if the research environment presents large groups of individuals to be observed.

Lastly, the reason why it was also most interesting is that during his mandate Mr. Hammarberg has devoted significant energy to the promotion of specific rights issues concerning LGBTI persons. He has, in fact, published several documents on the topic, which, while non-binding due to the non-judicial nature of his mandate, have been increasingly influential in shaping the European debate on various LGBTI persons' human rights issues and claims. This effort reached its peak in 2011 with the publication

of the first pan-European report on homophobia and transphobia in the 47 member states. The process of editing and revising this report was part of the observed activity in the Commissioner's office during this research and it generated extremely valuable data to be analysed. It is important to note that, as a general trend, the Council of Europe has proven to be more responsive to the emergence of rights claims on the part of LGBTI persons in comparison with other human rights systems, such as that of the United Nations (Tahmindjis 2005, 17). The developing body of case law, as well as other non-strictly "legal" practice, within the context of such a highly important human rights institution, constitutes, therefore, a perfect object of analysis for socio-legal research aimed at discovering the patterns of the creation of LGBTI identities in the international human rights arena.

Participant Observation: Estranged Intimacy and the Creation of a Reflexive *Institutional Self*

One of the most important challenges of ethnographic research is the question of "access" to the fieldwork. Issues of trust are fundamental (Brewer 2001, 84), as gaining respect as an "insider" can be hard and may require lengthy negotiation. In some contexts, access can be granted on the basis of perceived affinity or belonging to the "natives"[19]. In other settings, the process can be formal and it may even be that skills, competences and credentials are required in order to gain access. The latter is the case for research carried out in institutional contexts, such as government agencies (either political or judicial) and international organisations, as well as in the corporate sector. In the case of socio-legal research conducted with ethnographic methods, the likelihood of being denied access needs to be taken into account. In the case of this project, the

[19] see Muñoz's research on queer Latina/o communities in Los Angeles (Muñoz 2010, p. 55)

original research design (in relation to the fieldwork) was modified precisely because of a "denial" of access. The original planning of the fieldwork included a three-month internship at the Permanent Representation of Italy at the Council of Europe in Strasbourg, followed by a three-month internship at the European Commission against Racism and Intolerance (ECRI), which is part of the Council of Europe. The rationale for this was based on the idea of splitting the fieldwork into two phases: the first was aimed at analysing the process leading to the formulation and shaping of a national human rights agenda in relation to international developments in the field of human rights for LGBTI persons. The second phase was based on a contrasting move, that is to say starting from the institution in order to verify whether the dynamics informing the Italian human rights agenda applied to the ECRI, or whether the lack of systematic address of the violation of rights of LGBTI persons within the Council of Europe was motivated by different reasons.

The change in the above-described planning occurred because of a failure to obtain access at the Permanent Representation of Italy, which led me to send a speculative application as a visiting scholar to the Council of Europe. The success of my application was, to a large extent, due to the fact that the Office of the Commissioner for Human Rights was at the time working on the above-mentioned report on homophobia and transphobia in Council of Europe member states, and they were happy for me to collaborate with them in order to carry out tasks in the finalisation and quality-checking of the outcomes of the research. When my time as a visiting scholar ended (the end of October 2010), I was offered the possibility of continuing to work on the project as a temporary staff member for a period of two months (November-December 2010).

Reflections on ethnographic practice shaped my access to the field, as well as my expectations. Aware of the necessity of becoming "immersed" in the context of the

Council of Europe, I had to devise an ethnographic practice that achieved three main objectives. Firstly, it had to be non-invasive and discreet, as the institutional setting required a high level of integration in the highly dynamic and fast-paced environment of the office. Secondly, it had to be compatible with the creation of a bond of trust with the actors involved. Formal and invasive interviews were likely to create more distance than proximity. I considered that interviews, in particular, provided too rigid and systematic a way of arranging "meanings" expressed by actors regarding their actions as opposed to the more spontaneous and natural observation of the actors' daily activities.

As a practice, ethnography – and in this case more specifically participant observation – can involve the use of different methods. There is, however, an understanding of ethnography as fundamentally involving the active presence of the researcher in a specific site, or "field". In this regard, Hammersley and Atkinson (1995, 1) have offered a general, and well-known, description of the practice of ethnography as:

> involv[ing] the ethnographer participating, overtly or covertly, in people's daily lives for an extended period of time, watching what happens, listening to what is said, asking questions – in fact collecting whatever data are available to throw light on the issues that are the focus of the research.

With this definition in mind, it is possible to say, therefore, that the ethnographer has a wide choice of methods to collect the data in the field. As for my research, I opted for participant observation with the objective of being as discreet as possible and to "observe with a focus", as Palmer (2010, 141) has suggested. In particular, given the

limited opportunities that I had to access all meetings, my strategies for gathering data included participation in meetings whenever possible and note-taking, informal conversations with the members of staff involved in the report – as well as gathering insights from those not directly involved – together with detached observation of their actions and public performances in the context of meanings with third parties (when I was allowed to assist with events). I did not engage systematically in note-taking, as on some occasions this was not possible. However, at the end of the day, if there significant events had occurred at the office, I made a note of what had happened and added my personal reflections on the episode. In collecting the data I was always extremely aware of the necessity of not breaching the confidentiality agreement that I had signed. This constituted, in fact, an important factor in the choice of the material to be included in this research. Although it did not dramatically impact the quality of the data provided in this context, it did, nonetheless, shape my interactions in the field.

In entering the field, therefore, I tried to immerse myself in the "emic perspective" (Fetterman cited in Brewer 2009, 39); that is I tried to adopt the insiders' perspective – in this case the standpoint of the members of the Commissioner's office and the Commissioner himself – in order to describe the observed phenomena as if I were a permanent member of staff. In taking an active role in the work of the office, I tried to gain proximity in order to acquire a privileged standpoint so that I could observe participants' decisions, statements and behaviours.

As has already been hinted at, this research is not traditionally "ethnographic", insofar as it contains a relatively limited set of ethnographic observations. It is, therefore, more correct to define it as employing participant observation as a method in order to gain insights into the actions of the actors at the Office of the Commissioner, and trying to bypass the difficulties engendered by the lack of full access to the

activities of the observed actors. Of the four levels of participation in the field identified by Gold (in Brewer 2001, 84), the one chosen here was the *participant-as-observer*, through which the researcher conducts their investigation without concealing it and fully participating in the field. In the context of the Office, this level of participation was beneficial because it allowed me to obtain first-hand material concerning the operational and decisional processes regarding the actions of the Commissioner on LGBTI issues, by means of direct collaboration. While, of course, I had to sign, upon my arrival, a statement of confidentiality, which implied a strong ethical positioning with regard to both the "researched" and the object of my research, at the same time building a trusting relationship was facilitated to some extent by my relative degree of expertise on LGBTI issues. This determined a high degree of acceptance of my presence and my role and also influenced the actors in the way that they perceived me as an "external" researcher.

From the start, I was not perceived as a dangerous outsider interfering with the office's activities, but as a member of staff and a valuable asset in the revision of the report. This created a sort of intimate relationship, which, according to Brewer (2001, 11), is an important attribute of ethnographic research. A form of i*ntimacy* in institutional settings, although it may seem unlikely, can be established whenever the researcher and the "researched" establish a fruitful dialogue and cooperate on certain daily activities. The intimate character of the relationship can be fostered by the attainment of a common operational goal, or by participation in events or activities to which both sides attribute meaning.

The concept of *intimacy* in the field, however, is also complex, and requires a sort of detachment from the object of research and from personal values or the positioning of the researcher. For this reason, intimacy must, in a way, be *estranged*, by

means of a reflexive consideration of the researcher's interactions in the field. In fact, a strong reflexive stance is also present in this research in relation to issues of validity and the reliability of the data. While on the one hand ethnographic research is more *ideographic* than *nomothetic* (Steier 1991; Brewer 2001) in the sense that it focuses on the specific exploration of a case rather than aiming at theoretical abstraction or general statements, it is also true that issues of reliability and validity are always present in the process. To this extent, it is important to understand in what way engaging in self-reflection can enhance the validity of the data. In the case of this research, the position adopted is that of the "validity-as-reflexive-accounting" (Denzin and Lincoln in Brewer 2001, 130).

The reflexive outlook of the research, therefore, helps in identifying those patterns of interpretation and observation of the phenomena in the field, which are informed by the researcher's own positioning. Dewalt (2010, 68) observes, in this regard, that what constitutes the object of observation in the field is also "shaped by the interests of the researcher". In particular, both the fact of having a background in International Relations and the fact of identifying as a lesbian woman had an impact on my way of entering the field and carrying out my research. These elements obviously pertain to two different spheres (one professional and the other more "personal"). However, I have never underestimated the impact that my background could have on my method of conducting research.

My background in International Relations shaped my attitude in approaching the field in relation to a sort of latent disenchantment with the usefulness of international cooperation beyond the framework of Realism. As a matter of fact, international institutions could be seen as mainly promoting the mere national interests of the contracting parts in a quest for power. This classic Realist tenet was likely to remain

dormant in my considerations about the effectiveness in promoting human rights for an institution like the Council of Europe. On the other hand the fact of identifying as, somehow, belonging to the "L" segment of the LGBTI acronym, also had an important role in my positioning in the field. In the collection of essays *Queer Methods and Methodologies* (ed. Browne and Nash 2010), several authors discuss the extent to which it is possible to talk about "queer methods" and how they are used practically in social research. Their point of departure (queer methods) and the point of arrival (a queer object of study) therefore coincide and are congruent.

While this research cannot be defined as being "queer" in a straightforward way, this reasoning still applies. While I prefer to identify as a lesbian for cultural and political affinities with the term, I also think that a queer approach to ethnography does not collide with my own identity in terms of sexual orientation. The problem arises, however, in connection to the question of how to research "queerly" a non-queer (and therefore fictitiously *straight* by default) environment like the Council of Europe. Such a question has a tight and, hence, fundamental connection to the issue of reflexivity because being able to cast a queer gaze on the activities of the Commissioner could be both an advantage in terms of grasping very subtle details and aspects of his work, and also a drawback if this ultimately affects the capability of the researcher to evaluate with detachment the actions and processes observed. Valocchi (in Browne and Nash 2010, 10) draws a line of continuity between ethnography and queer theory, since ethnography "enables the intersections of sociological and queer theories, (...) allow[ing] for openness, flexibility and change".

As a methodology, therefore, ethnography – and participant observation as a method – is already cognate to queer theory due to its exploratory and open-ended nature and practice. However, the question stretches beyond these terms and forces one

to take into account the way in which the researcher perceives her/his being queer as somehow constituting a "lens" through which phenomena are observed, or the way in which personal positioning is also shaped and changed once in the field. The dilemma with which the participant observer is confronted concerns the risk of leaning back on a safe and already *secure* sense of self. In entering a highly institutional setting like the Council of Europe, I had in mind a code of conduct that did not allow the expression of *queerness*. At the same time, however, I was a lesbian researcher willing to do research on how actors in the field of human rights approach issues concerning the rights of LGBTI persons. While I was striving to position myself in a sort of objective way, I was aware that I had expectations regarding the way in which these issues would be tackled and I somehow foresaw the existence of an almost prim way of addressing these issues. The reality of the field, of course, proved to be much more nuanced and complex than this and, as a result, the way I conceived of my role as an outsider was modified during the period I spent in Strasbourg.

Abandoning my subjective position, therefore, was not required, let alone desirable. On the contrary, the approach adopted corresponds to what Donna Haraway calls a "doctrine of embodied objectivity" (Haraway 1988, 581), for whom the body and the position of the subject with regard to the research acquire central importance. For Haraway, objectivity is achieved only in terms of an awareness of one's point of observation, because it is precisely such a point of observation that guarantees the possibility of embracing "vision". Vision is conceived of not as an all-encompassing passive endeavour aiming at disembodiment (Haraway 1988, 582), but more as a critical encounter with embodied realities. Objectivity is to be found in the particular and in the specific embodiment (Haraway, p.582) and, as for the form of knowledge for which the researcher should strive, Haraway defines this form of knowledge as a form of "situated

knowledge" (Haraway 1988, 590).

The questions of objectivity and self-reflection, however, are also connected to the *creation of an institutional self*; that is to say the construction of a credible status as an insider in the Council of Europe. If "going native" in ethnographic research (especially in anthropology) often requires adopting (partially and sympathetically) the customs and routines of the social groups that are the object of the study, the same is true in highly institutionalised contexts, where there are no customs as such to adapt to, but in which one has to learn how to negotiate a dual position as both a researcher and a member of staff, therefore learning conventions, symbols of power and hierarchies, and modes of interaction with peers and superiors. Both the position of visiting scholar and that of administrative assistant at the Council of Europe implied a high level of commitment and daily work. I had to learn in order to make the best of my research process, find time to construct my professional self, establish collaborative relations with the members of the staff, and, at the same time, observe those processes and interactions with the eye of the researcher.

In this endeavour there is also a need to overcome the imbalance of power relations. Whilst these are usually established in favour of the researcher in ethnographic fieldwork, in institutional settings they can instead favour the persons positioned high in the hierarchy. My superiors could choose, given their authority, not to disclose information or to deny me access to some events or meetings. These verbal exchanges (or lack thereof) participate in the definition, in terms of power, of linguistic relations proposed by Bourdieu and Wacquant (1992). For them, linguistic relations "are always relations of symbolic power through which relations of force between the speakers and their respective groups are actualised in a transfigured form" (Bourdieu and Wacquant 1992, 142). In this context, therefore, the persons in the institution have

the power to exercise the "statutory ability" (Bourdieu and Wacquant 1992, 146), which is understood as a linguistic ability. The creation of an *institutional self* (and its coexistence with the self of the researcher) ultimately depends on these linguistic relations because they act as a point of access to participation in the setting and therefore influence the extent to which the researcher can effectively carry out participant observation.

The methodological framework illustrated above is complex and articulated. It was necessary to present a varied array of instruments in order to explore the different dimensions of a phenomenon such as the protection of human rights for LGBTI persons in Europe, which still occupies an eccentric position in the scholarship on human rights. While it could be argued that a "hierarchy" for human rights violations is, at best, an underlying symptom of a partial failure of international human rights law to fully include all individuals, at the same time it is the product of specific political and social processes that need to be thoroughly investigated. Even when the rights of LGBTI persons are recognised and addressed, heteronormativity – and to some extent homonormativity (Duggan 2003) – as well as the binary organisation of gender still strongly permeate these discourses.

By deploying the methods discussed above, it is possible to investigate the macro-dynamics regulating the expression of sexuality and gender, and the interplay between them, and the creation of identities in a highly hierarchical and regulated space like the juridical one. To analyse in depth the social constructions behind the current framework of protection of the rights of LGBTI persons in Europe, it is necessary to resort to instruments that allow one to discover the concealed workings of dominant institutions and societal arrangements that work in the direction of the normalisation of multifarious expressions of sexuality and gender.

Chapter Five - Against Nature: Defining, Discussing and Judging Homosexuality in the Legal Context

Current human rights discourses tend to approach the complex web of injustices and human rights violations following a "single-issue" strategy. In 2008 the famous US gay magazine *The Advocate*, put on the cover the following title: "Gay is the new black. The last great civil struggle"[20]. This title shows an investment in a temporality of tangible progress in the field of human rights struggles (as if one could say "we are done with *racism*, let's tackle *homophobia* now") and dismisses all the interrelated issues such as class, ethnicity, and religion, as Eng (2010) has also observed. Although this is still the prevalent – and problematic – model for framing human rights discourses, it is necessary to ask whether it represents a satisfying framework for redressing violations and protection from abuse and injustice.

In his 2012 analysis of the case law of the ECtHR relating to sexual orientation, Johnson (2012, 1) has maintained that the role of the law has significantly shifted from discouraging the perpetration of homosexual acts, to the protection and enhancement of the "sexual citizenship" of *homosexuals*[21]. In this passage, it can be argued, the role played by respectability[22] is crucial. Respectability has framed the entrance of former *outlaws* into a domain made of normalised identities, viable alternative kinship

[20] The Advocate, *Gay is the New Black?*, available at : http://www.advocate.com/news/2008/11/16/gay-new-black , accessed 16 April 2013.

[21] Johnson defends his use of this *essentialist* vocabulary, the same employed by the Court, by defining it as an "analytical expediency" (Johnson 2012, 15). The adoption of such language, however, cannot be taken as a mere "expediency". On the contrary it seems to be more of an "analytical complacency" with the Court. Johnson mildly recognises the limitations of such language. Nonetheless, he is not able to distance himself from it thereby adopting a substantial critical standpoint: a questioning of such language would have added a layer of complexity to his analysis. This lack of discussion is also due to the fact that one of the conclusions that Johnson reaches is that the essentialist strategies have had, over the years, the advantage of having led to substantial success in the rights campaign and of the complaints on grounds of sexual orientation.

[22] Beger (2004, 95) discusses human rights and respectability as being interrelated: human rights confer respectability to individuals who are recognised to have undergone violation of their rights. This aspect, he maintains, is important in lobbying for gay rights but it is also characterised by a high degree of instability.

arrangements to heterosexual marriage, and non-threatening forms of sexual expression. It is common to look back and see how "gay", "lesbian", or "bisexual" individuals have been defined: *outlaws*, *perverts*, *criminals*, but what have they *become*? This analysis will suggest that the creation of LGB identities at the Council of Europe coincides, to a significant extent, with the definition of the liberal European subject as a free, self-determined, and autonomous citizen simultaneously attached to, and emancipated from, the nation-state.

The ambiguous positioning of LGB persons with respect to the political and social structure, however, needs to be analysed beyond the framework of heteronormativity. An equally powerful framework by which LGB individuals' citizenship is defined is that of "homonormativity". Duggan (2003, 50) has coined the term "homonormativity" to describe a politics that on the one hand supports the existing institutions (such as marriage, the army, and so forth), instead of challenging them; and on the other clearly de-politicises gay culture. Heteronormativity and homonormativity, therefore, are not antithetical. It is ironic that the two can coexist together and operate within the same structures, sometimes in the legal system, as a double-binding system of regimentation for individuals. Standards of behaviour, identities, and social arrangements concerning sexuality are produced in the domain of the utterance of the norm, but also within the abstract space of the unsaid. The hetero- and homonormative frameworks operate in a condition of *distant synchronicity*, trying to achieve, by different means, the same underlying objective of normalisation and, consequently, uniformity.

A preliminary discussion on the language chosen by the actors/objects of this research, the ECtHR and the Commissioner for Human Rights, is aimed at investigating how LGBTI identities are constructed in the first place by linguistic choices and infused

with meaning(s) that may vary from actor to actor. The chapter will then consider the narratives of LGB identities and discrimination related to the expression of one's sexual orientation, including the age of consent for consensual sexual activity, criminalisation of homosexuality, the criminalisation of sado-masochistic sexual practices, and the discrimination of LGB individuals in the armed forces.

Words Matter: Legal Understanding of Embodied Sexualities and Identities

To enter the space of the law means to speak and master its language. It is important to point out that the authoritativeness of the law can be transmitted and reinforced by the content itself, and not merely by its formal structures. Some linguistic choices enhance and preserve this authoritativeness in the legal field, and for this there are two main levels of analysis. The first level concerns the linguistic choices made by the institutional actors, such as the judges of the ECtHR and the Commissioner for Human Rights, in relation to the vocabulary employed in the definition of issues relating to sexual orientation and/or gender identity. The second level of analysis is that of authorship as a crucial aspect in the process of the allocation or endorsement of specific LGBTI identities.

What's in a Name? Nouns and Adjectives for Describing Sexuality and Gender

The line between a derogatory or neutral use of a term can be thin. The word *homosexual* is a paramount example of this. Notwithstanding the attempts of freeing it

from its original medical connotations, the word has substantially retained its pathologising aura. Yet, the term is still commonly used and, in relation to this analysis, it appears as the privileged term employed by the ECtHR when referring to an individual with a specific sexual orientation (either ascribed or self-assumed). It is striking that since the first complaints in the fifties relating to the criminalisation of same-sex sexual acts in the Federal German Republic, the vocabulary of the ECtHR has not been transformed at all. From their part, complainants have substantially subscribed – if not encouraged in the first place, as Johnson argues (2012, 33) – to the circulation of the essentialist view of homosexuality, leading to the creation of a direct link between the humanness of the *homosexual* plaintiff and the humanness of the subjects of human rights.

The ECtHR, however, is not the only body at the CoE involved in the negotiation of vocabulary concerning sexual orientation and gender identity. During the drafting of the 2011 report on homophobia and transphobia in the member states of the CoE, the choice of words was a crucial problem for the team at the office of Commissioner Hammarberg. In its preliminary phase, the process of editing required an effort to bring linguistic coherence to the text. The team sought to carry out, in particular, a process of de-essentialisation of homosexuality, in favour of a different understanding of the interplay between sexuality and personhood. In the few instances in which the term had been retained in the report, the word *homosexual* was used as an adjective, rather than as a noun. The same applied to *lesbian* (a *lesbian* woman), as well as to *bisexual* (a *bisexual* person / man / woman) or *transgender* and *intersexual* (a *transgender* / *intersexual* person). While the difference between *homosexual* (noun) and *homosexual* (adjective) may seem trivial, it has, instead, a profound impact on the construction of the arguments: *homosexual* as a noun is self-sufficient and self-standing.

It may work in order to promote an essentialist conception of sexual orientation. Zwicky (in Livia and Hall 1997, 22) attributes the preference for adjectives rather than nouns to the fact that nouns reduce the individual to that single property, while adjectives designate one characteristic out of many. *Homosexual* (or *lesbian*, *bisexual,* and so forth) as an adjective, therefore, is used as an *addition,* a non-essential part of the speech, not a substitute for the individual himself.

As for the work of the Commissioner, complementary to this effort of de-essentialisation has been the decision to prefer the word *persons* rather than *people* after adjectives such as *LGBT* / *gay* / *lesbian* / *bisexual* / *transgender* and *intersexual*. The *persons* v. *people* issue here signals an important move: from a collective anonymous and unspecified group of subjects, to an empowering depiction of active individual agents. Perfectly fitted with the demands of liberal human rights rhetoric, the *persons* v. *people* issue signals the need to move from an essentialist conception of sexual orientation and/or gender identity to a non-essentialist conception. It is aimed at putting at the forefront the individual in all her/his humanness. At the same time, this process implicitly reduces the symbolic significance and powerfulness of a term that stands for collective empowerment such as "people". The effects of this linguistic choice are controversial, since it contemporaneously de-materialises LGBTI identities as collective and re-materialises them as individual positions with relatively weaker communal and cultural ties.

There are significant differences between the language in use at the ECtHR and at the Office of the Commissioner. In the work of the latter, there has been almost a complete substitution of the word *homosexual* with the word *gay* (always used as an adjective, as in *gay man* or *gay men*). Zwicky (In Livia and Hall 2007, 22) sums up the difference by pointing to the *behaviour v. identity* dichotomy. In the case of the ECtHR,

the Peircean *interpretant* for the word *homosexual* is the taxonomic description of the medicalised homosexual, the Foucauldian *personage*. The Commissioner's choice to use *homosexual* rather than *gay*, seems to suggest the abandonment of a taxonomic description. *Gay* points to different relations with other fields of life rather than simply sexual desire or behaviour. More specifically, it is linked to the existence of relationships with the public sphere, to cultural phenomena and understandings and appropriations of homosexuality. While *gay* is not the same as *queer,* as for all its disruptive potential it is still immersed in the (hetero)normative framework, it nonetheless has significant political connotations.

Power relations play a significant role in the choices adopted by different actors at the CoE. Contrarily to the austere image of the ECtHR, the role of the Commissioner is a dynamic institution and his dialogue with NGOs, as well as national authorities, represents a vital element of his work. He has no interest in employing "scientific" (hence reliable, neutral, objective) terms, as it is in the case of the ECtHR. The Commissioner's authority derives not from rigorous legal reasoning, but from his capability of interpreting with empathy the requests of those with whom he interacts. The success of his work resides in persuading his interlocutors (members of national governments, ambassadors, Ombudsmen) by crafting convincing arguments about a specific human rights issue. The Commissioner's work, moreover, can be said to be partly informed by an "epidermic approach" to human rights, by which emotions are mobilised with the objective of raising awareness and persuading the intended audiences. Therefore, a linguistic choice such as that of using the word *gay* can be said to work in the direction of building a bridge between the aseptic version of homosexuality produced by the ECtHR, and the kaleidoscope of sexual expression.

In his 2011 report, the Commissioner goes further in trying to connect the legal

and social domains. The acronym "LGBT" is widely employed throughout the text, including a preliminary reference to the possibility of including "Q" for *queer* and "I" for *intersexual.* This choice signals a relative interest and familiarity, on the part of the Commissioner, with the world of human rights activism as well as an interest in communicating the existence and worth of these organised networks to his main intended audience: national authorities. The language adopted by the Commissioner, therefore, seems to stand partially in opposition[23] to choices made by the ECtHR which seeks to achieve a rhetoric and style that are immaculately *objective*. While the language of the ECtHR remains strictly confined to the legal domain, the Commissioner seeks precisely to overcome this rigid articulation of language by broadening his vocabulary and looking at different human rights actors.

The differences between the linguistic choices of the ECtHR and the Commissioner are not limited, however, to words concerning sexual orientation. There is, instead, an interesting point to be made about the different uses of the terms *transgender* / *transsexual* (either as adjectives or nouns). While the former is more inclusive in terms of persons who can fall within the process of crossing gender lines, the latter, highly medically connoted, defines a much narrower group of individuals[24] who have undergone some form of gender reassignment procedure in order to cross the "line" of *sex*. All the case law of the ECtHR to date has invariably adopted this "psychomedical construction" (Roen 2002, 502). Even in *Goodwin v. the UK* (2002) considered by many a landmark case[25] of ECtHR's case law on gender identity, the

[23] In addition to that it can be added that the political bodies of the institution, namely the Parliamentary Assembly and the Committee of Ministers, tend to adopt the language adopted by the ECtHR (mainly the use of *homosexual* as a noun) but that occasionally it slips into a language more similar to the one employed by the Commissioner.

[24] Both Bornstein (1995) and Stryker (2008) problematise the two terms from a postmodernist perspective.

[25] In this case, the ECtHR had conceded that the "biological criteria" in the definition of the gender of the spouse had to be overcome, thus allowing transgender persons to marry to someone of the opposite gender.

language employed is heavily connoted in medical terms. In considering the "applicant's situation as a transsexual" (*Goodwin v. the UK,* 2002: para. 76) the ECtHR reinstates the importance of *passing* and, indirectly, of *respectability*. This is in accordance to what Roen (2002, 502) defines as part of "liberal transsexual politics" for which:

> (...) legal rights to access medical services are central issues. (…) One does not proclaim oneself proudly as a lifelong 'transsexual'. One moves into progressively less threatening identity states such as 'formerly transsexual' and, ultimately, 'woman' or 'man'. Here, it is assumed that the transsexual person will want to seek sex reassignment surgery, that s/he will want to pass full time as a woman or as a man, and that s/he deserves the legal rights (such as access to identification papers and marriage licenses) of any other woman or man (Roen 2002, 502).

"Liberal transsexual politics" appears to be the dominant framework in human rights discourses, standing in opposition to forms of transgression and transcendence that could be defined as "radical politics of gender transgression" (Roen 2002, 502). The ECtHR, therefore, by exclusively employing the word *transsexual* as a noun, promotes a strong objectification of individuals who cross the lines of sex and/or of gender, thus re-inscribing individuals into the framework of "transsesuxual liberal politics".

The work of the Commissioner on issues relating to gender identity seems to be informed by a non-essentialist, although cautious, approach with respect to the case law of the ECtHR. In both his 2009 Issue Paper on "Human Rights and Gender Identity" and in the above-mentioned 2011 report, the Commissioner has questioned the requirement, in many member states of the CoE, of undergoing gender reassignment –

and complete sterilisation – in order to have one's preferred name and/or gender recognised. Nonetheless, in both these Commissioner's documents, the emphasis remains on the crucial importance of having an appropriate allocation of gender. The impression is that a substantial departure from the male/female binary has not happened in this context. Documents are central in allowing individuals to have autonomy and freedom of movement. Nonetheless, they also stand for the most immediate form of legitimation before authorities and the law. Absence of documents often coincides with absence of humanness.Their symbolic value, therefore, transcends their function. Hence, on the one hand documents are the key for recognition and the guarantee against fraud and illegal status; on the other hand they confer an inescapable personal "status" that inevitably confers worth to individuals.

The non-essentialist approach to gender and gender identity endorsed by the Office of the Commissioner can also be said to be the product of a close collaboration established with the European transgender activist network (like the umbrella organisation Transgender Europe - TGEU). At the operational level, however, it is difficult for the actors involved to translate this commitment into an institutional report, such as the one issued in 2011. A significant reason for this incomplete endorsement of a non-essentialist outlook on gender and gender identity derives from the difficulty in bringing together the requirements of the law and the disruptive potential of queer theory. In the work of the Commissioner, the *transgender* (person), while not treated as the medical *transsexual* portrayed by the ECtHR, remains, therefore, still partially embedded in the binary system of gender, a system highly functional to the workings of the law and the sole taxonomic language that the ECtHR understands and employs.

Who is Speaking? Authorship, Narrative, and Respectability

The process of the creation of LGBTI identities at the CoE is not solely determined by specific linguistic choices of either the ECtHR or the Commissioner. Johnson (2012) has argued that complainants wishing to persuade the ECtHR have actively adopted narratives concerning the innateness of their homosexual sexual orientation. It can be suggested, therefore, that complainants themselves decide to adapt strategically to the language of the ECtHR, thus framing their "story" coherently with essentialist accounts of homosexuality employed by the judicial institution. In describing this process, however, Johnson does not explore the motivations triggering this complacency with the ECtHR. Nonetheless, he offers interesting examples that illustrate the complainants' strategies. It was in *Dudgeon v. the United Kingdom* (1981) that the ECtHR recognised for the first time homosexuality as an "essentially private manifestation of human personality" (Johnson 2012, 47). From that moment onwards, in Johnson's opinion, plaintiffs have increasingly *played* the "essentialist" card in order to succeed with their claims. He quotes statements such as

> "he had been consciously homosexual from the age of 14 years " (*Dudgeon v. the UK*, 1987: 118)
>
> "he had realised at a young age that he was irreversibly homosexual" (*Norris v. Ireland*, 1988: para. 33)
>
> "the [applicant's] avowed homosexuality" (*Fretté v. France*, 2002: para. 37)

These examples show how much the essentialist argument has permeated the

descriptive process at the ECtHR and how willing individuals have been to subscribe to this process of essentialisation of their identities. Johnson's analysis, however, is limited insofar as it seems to focus exclusively on the positive outcomes that this "strategy" has engendered for gay identity politics. What he overlooks is the way in which this almost passive subscription to the essentialist narratives of the ECtHR on sexual orientation has resulted in counter-productive effects on the plaintiffs themselves, whose possibilities of expression have been incredibly reduced.

Can the plaintiffs start speaking of themselves instead of being spoken of by ECtHR? What if all those "homosexuals" and "transsexuals" of whom the ECtHR speaks could start describing themselves in other terms for the purpose of their recognition as viable legal subjects? Strategically speaking, Johnson (2012, 61) is right when he says that *essentialism* allows one to "articulate a form of humanness that requires permanent protection". However, it is important to ask whether this essentialisation only works to the advantage of a limited group of individuals, namely those that are able to mobilise resources, either in terms of cultural or material capital, in order to make their claims, through *strategic litigation*[26] for instance.

A crucial question that is often overlooked is who can successfully resort to the ECtHR. Is that the person who can narrate the story well or the person who can mobilise material and immaterial support (NGOs or legal scholars) in order to bring the case to Strasbourg? Whilst the possession of the appropriate cultural capital can be said to be crucial in framing one's claim, essentialist strategies may facilitate the emergence of specific claims, rather than others. More specifically, individuals who are able to present themselves as having a non-ambiguous sexual orientation or gender identity may find it easier to respond to the – unspoken – expectations of the ECtHR concerning the plaintiffs' identity.

[26] The meaning and analytical usefulness of this concept will be explored in the following section.

Johnson's analysis, however, also offers the occasion to shed light on the plaintiffs' constant effort to become respectable before the ECtHR. Individuals are harnessed into normative (either hetero- or homonormative) structures that inform the conceptual categories employed by the ECtHR and influence the narrative standpoint adopted. Highlighting the inborn character of one's homosexuality, describing one's same-sex relationship in terms of stability and commitment, underlying one's suitability as a parent/ foster carer of a child, showing one's good record as a member of the armed forces, affirming one's intention to be(come) a man or a woman: these statements all go in the direction of showing one's respectability as a key to receive entitlements in return. Is it possible, though, to narrow down rights claims to a matter of entitlement? To some extent, respectability and acquisition of privilege (rather than a right) can be seen as participating in the problematic liberal dream of infinite autonomy and personal freedom.

The Narration of Lesbian, Gay, and Bisexual Identities at the European Court of Human Rights and at the Council of Europe

The case law of the ECtHR and the (political) work of the Council of Europe, in particular from the second half of the nineties, has been important in getting the discussion of the rights of LGBTI persons on the human rights agenda. The official entrance into the domain of legitimate human rights discourses, however, has also led to a taming of those radical claims formulated by various social movements in the late sixties and seventies which questioned the very foundations of the nation-states, such as their core institutions. As a consequence, these movements have been institutionalised and have adhered to mainstream human rights language, rhetoric, and tactics. In this

regard, Grigolo (2003, 1023) has described an existing "process of minoritisation within a 'private' juridical space of toleration". The case law of the ECtHR, as well as the practices of the CoE, shows the patterns of *essentialisation* and *privatisation* concerning LGBTI persons. The following analysis highlights these patterns of *essentialisation* and *privatisation* of sexuality and gender, but it also compares and contrasts the case law of the ECtHR with the practices of the Commissioner.

The European Convention On Human Rights: Instruments of Interpretation and their Shortcomings

An analysis of the case law of the ECtHR must be preceded by a preliminary introduction to the interpreting criteria employed by the ECtHR and to other crucial concepts. These are fundamental for understanding how the ECtHR reasons and assesses the violations to the Convention, but they also show how the ECtHR, the complainants, and the third-parties position themselves within the judicial process. The first preliminary observation to make is the one concerning the possibility of resorting to the ECtHR. This is only possible, in fact, after all the domestic remedies have been exhausted, under Article 26 ECHR.

As has already been discussed in the methodology chapter, it is significant to note that more than 90% of applications fail to be admitted before the ECtHR. In order to be declared admissible, in fact, an application does not only have to satisfy some technical requirements, it also has to be rigorous and coherent. In this regard, third-parties are acquiring an increasingly important role in participating in the litigation before the ECtHR. The concerted participation of various NGOs falls under the framework of "strategic litigation" defined by ILGA-Europe, (one of these NGOs), as

"being about using a legal case to advance the rights of LGBTI people, usually as a part of a wider advocacy campaign"[27]. It is clear how the help of third-parties, in the drafting of the complaint, helps in maximising the persuasive impact of the claim. Furthermore NGOs put at the service of the complainants the specific know-how that human rights NGOs have accumulated during their years of activity. In order to succeed in Strasborug, concerted action and some investment, in terms of economic and cultural capital, is indeed important. The direct consequence is that applications that can enjoy the support of third-parties, and also of good lawyers in general, are more likely to succeed before the ECtHR because they can avoid either the procedural or substantial mistakes in the drafting of the application.

Furthermore, every judgement is articulated as a tripartite document in which the applicant makes her/his claims, the Government responds to them, and the ECtHR operates the evaluation and assesses the merits of the case after having done an overview of the national legislation on the instant matter. This structure, however, does not merely replicate the submissions of the parts, but it is the product of the ECtHR's re-construction of the submissions. In this regard, the absence of hearings, unless special circumstances require them, shows how the judgement is the written product of a synthesis that the ECtHR carries out in absence of a true "trial" in the Courtroom.

In deciding on the cases, the ECtHR employs a set of crucial interpretative criteria: the margin of appreciation, the consensus analysis, and the "living instrument" principle. In relation to these criteria, Johnson (2012, 69-70) has suggested that the ECtHR often employs them without consistency. The principle of the margin of appreciation has its origin in *Handyside v. the United Kingdom* (1975) and it is based on the notion that, in relation to particular issues, national authorities are better placed to

[27] A Factsheet on Strategic Litigation to promote LGBTI Rights in Europe, available at: http://ilga-europe.org/home/how_we_work/litigation/resources , accessed 30 April 2013.

evaluate the restrictive measures that are necessary in order to protect and ensure the respect of the rights of their societies. Hence, in some cases, states are entrusted with a high degree of autonomy in assessing whether an interference by national authorities pursued a legitimate aim and whether it did it in a proportionate way. In relation to issues touching on morality, such as sexuality, marriage, and so forth, this principle has had a determinant impact in the case law of the ECtHR, which has always proved to be extremely cautious in overstepping this margin of manoeuvre granted to member states.

The second important principle is the "consensus analysis" based on an often sketchy overview of the status of national legislation in all the member states on a specific matter. As Johnson (2012, 77) has also reminded, the "consensus analysis" principle seems to lack systematicity and methodological coherence, [and has] been often base[d] on either a substantial lack of data or on a selective use of the data gathered (Johnson 2012, 80-81). This implies, in turn, that the ECtHR may ground its reasoning more on perceptions or reconstructions of the consensus on a specific topic, rather than on legal overviews or sociological evidence on attitudes and perceptions in the different member states' societies.

Thirdly, the ECtHR relies on the "evolutive principle", also defined as the "living instrument principle" (*Tyrer v. the United Kingdom*, 1978). This principle concerns the necessity, for the ECtHR, to interpret the Convention (ECHR) under the light of present-day conditions, which is to say as an instrument that is malleable and whose principles can be used in order to assess human rights violations in the present. This principle, in particular, is said to represent that "element of dynamism and development that represents the essential characteristic of the European system of protection of human rights" (De Salvia 2006, 69). Similarly to the above-mentioned principles, this principle also has a strong impact in the work of the ECtHR, especially

when presumably "sensitive" issues are at stake, such as the objects of this research. Taken together, these three principles provide extremely useful guidance in order to undertake the following analysis of the case law.

Discriminating Behaviours, Discriminating Identities: Beyond Essentialism, Privatisation and Victimisation?

Fighting discrimination on different grounds is a core preoccupation for human rights practitioners and institutions. However, laws and policies to combat discrimination are often insufficient to protect individuals if these fail to address the removal of structural inequalities. Furthermore, some forms of discrimination are difficult to substantiate in juridical terms, often going, therefore, undetected. In relation to discrimination on the grounds of sexual orientation and gender identity, the anti-discrimination rhetoric may be said to only marginally tackle the problem. Beger (2004, 108) has well defined the rationale behind the promotion of effective anti-discrimination legislation and other measures:

> this quest for anti-discrimination legislation is premised upon a particular understanding of society; namely that it contains a variety of diverse minority-like populations, each of which suffers a kind of antiquated prejudice no longer tolerable in liberal democracies. The state or the pan-European institution then acts as a neutral protector, facilitating the eradication of what is seen to be *individual* aberrations through the passage and enforcement of anti-discrimination measures (Beger 2004, 108).

This argument highlights the way in which considering individuals as victims of discrimination crystallises power positions, and renders individuals dependent on the actions of institutions for their safety. The case law of the ECtHR, as well as the practice of the Commissioner, seems to fall within this logic by which the dichotomy between victim/perpetrator is strengthened. This section analyses some of the major developments in the case law of the ECtHR on sexual orientation, such as the decriminalisation of same-sex sexual practices (or of some specific practices such as S/M practices or group sex), the equalisation for the age of consent, and the discrimination against LG personnel in the armed forces, from this perspective.

The first complaints to reach the ECtHR in the fifties concerned the de-criminalisation of same-sex sexual practices[28] between consenting men. However, it was not before *Dudgeon v. the United Kingdom* (1981) that the ECtHR ascertained a violation of the right to private life (Article 8 ECHR) while rejecting the complaint connected to a violation of Article 14 ECHR on discrimination. Together with the above-mentioned case, two other cases (*Norris v. Ireland,* 1988 and *Modinos v. Cyprus,* 1993) are of interest for this analysis. In *Dudgeon v. the United Kingdom* the complainant alleged that the criminalisation of homosexual acts (mostly unenforced in practice) in Northern Ireland constituted a violation of his right to respect of private life. He also alleged a breach of the non free-standing article 14 ECHR, insofar as the above-mentioned legislation was discriminatory against men[29] in relation to both heterosexual individuals and homosexual women (who were not criminalised for same-sex sexual activity).

[28] For Johnson (2012, 19-20) these early complaints are important insofar as they help illustrate how the reasoning of the Court (at the time of the *Commission*) has been built and consolidated over the years, in particular in relation to its ontological approach to homosexuality. They are also useful in highlighting the ways in which complainants have made use of certain "strategies" to advance their claims.

[29] In the national legislation the crime of "gross indecency" or "buggery" was only referred to men.

The warp and weft of the judgement are the terms *priva(cy)* and *morality,* It is difficult, however, to say whether the two can be woven together without contradictions. In the judgement, the ECtHR reiterated the importance of the "moral ethos of a society as a whole" (*Dudgeon v. the UK*, 1981: para. 49) in order to evaluate the existence of an interference in the enjoyment of Article 8 ECHR. This formulation points to the idea of a community, to a common and shared moral legacy that the state has the duty to protect and preserve. However, in the judgement the ECtHR also recognises that the case concerns a "most intimate aspect of private life" (*Dudgeon v. the UK*, 1981: para. 52). Hence, if the "moral ethos" pertains to the public sphere, can it invade the presumed *privacy* of sexual life? In its decision, the ECtHR ruled out that this "moral ethos" could permeate the private sphere so deeply as to cause an interference in the sexual life of consenting adults. It ascertained, therefore, a violation of the right to respect of private life under Article 8 ECHR. At the same time, however, it did it in an ambiguous way when it stated that:

> Decriminalisation does not imply *approval* [my emphasis], and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features (*Dudgeon v. the UK*, 1981: para. 61).

This passage highlights the philosophy of tolerance (*Dudgeon v. the UK*, 1981: para. 60) that seems to foreground the reasoning of the ECtHR on these issues. The statement "'decriminalisation' does not imply *approval"* is the paramount example of a presupposition of a form of moral superiority by the ECtHR; a superiority that cannot

only be traced back to the heteronormative matrix of the nation-states, but points more broadly to the triangular relationship between a "guardian" (the ECtHR), a paternalistic state, and the individuals.

Another interesting aspect of this judgement is the concept expressed by Judge Matscher in his dissenting opinion. The ECtHR had found that no violation of the anti-discrimination provision (Article 14 ECHR) subsisted in this case. The Judge concurred with it, but added that the absence of a breach of the anti-discrimination article in the case of the criminalisation of male homosexuality could be ascertained neither in relation to heterosexuality nor in relation to female homosexuality, because of the "genuine difference, of character as well as of degree, between the moral and social problems raised by the two forms of homosexuality, male and female" (*Dudgeon v. the UK*, 1981: 32). Even more interesting is the fact that he did not specify what the different "moral" and "social" consequences of either male or female homosexuality were. It could be argued, that the Judge was implicitly associating male homosexuality with the idea of penetration and, therefore, of dangerousness – an idea that is not evoked by the harmless (invisible) homosexual woman. This rhetoric of "dangerousness" points to the hidden power relations in the world of men, where only male homosexuality can destabilise society. The principle of non-discrimination here is understood to be applicable only in the presence of a *victim* (*Dudgeon v. the UK*, 1981: 32). However, the "homosexual" man is denied the status of *victim*[30] since, in the first instance, he is taken as a *perpetrator*. This example highlights the way in which the essentialist argument can be twisted: the "male homosexual" becomes solely identified by his penetrative potential, his subjectivity reduced to sexual behaviour. The "female homosexual" is

[30] Beger (2004, 115) argues that anti-discrimination policies participate in the reinstatement of the wrong that it seeks to redress: "(...) the protection granted participates in re-establishing, as injured or discriminate, the very individual subject that it seeks to protect. Anti-discrimination involves a permanent leap in logic from identity as a marker of a group to the individual subject as a historically injured subject".

innocent and *unarmed* and this facilitates her erasure from the legal discourse.

Dudgeon v. the United Kingdom (1981) has many points of contact with the subsequent case law, especially with *Norris v. Ireland (*1988) and *Modinos v. Cyprus* (1993). Firstly, in Northern Ireland, Ireland, and Cyprus, theref was non-enforced[31] legislation aimed at condemning male homosexuality. Secondly, in these cases the three applicants were activists from gay organisations seeking to obtain de-criminalisation not just in the practice (or in the policies), but also in the criminal law. As for the lack of enforcement of criminal provisions, this aspect is interesting insofar as it determined a situation of uncertainty that, in the words of the applicants, produced a situation of continuous interference in their right to private life. Maintaining an uncertain enforcement of the legislation is, evidently, an unspoken disciplinary technique. It points to the regimentation of bodies by threatening them with the possibility of prosecution. In all three above-mentioned cases, the applicants alleged a strong psychological distress (*Dudgeon v. the UK* 1981: para. 37; *Norris v. Ireland* 1988: para. 10; *Modinos v. Cyprus* 1993: para. 7), later recognised by the ECtHR. The subtle, but pervasive, state of uncertainty produced, indeed, a state of vigilance on the part of the individuals and on the part of the State.

Complementary to this aspect is the status of the applicants as human rights activists who ascribed to themselves the status of *victims*. To claim the status of *victim* one has to have suffered a personal injury, as there is no *actio popularis* available under the ECHR. At the same time, they plaintiffs used their "activism" as a tool to demolish the (already weakened) national legislation on homosexual contact between adults. Against this background, the ECtHR was in the position of judging the degree of

[31] In *Modinos v. Cyprus*, the Court notes that following *Dudgeon v. the United Kingdom*, the Cypriot Attorney General had not instituted any prosecution for homosexual conduct that could be in breach of Article 8 ECHR. The legislation, as in the case of Northern Ireland, however, remained on the statute books.

severity attained by the State's behaviour or acts. Privacy proved to be central in these cases. Had it not been for the recognition that sexual activity was an "intimate" aspect of one's life, no interference would have been detected. At the same time, the state can indicate what is the standard for proper sexual intercourse between consenting adults. This example illustrates the discretionary criteria employed by the ECtHR in deciding whether states' actions amount to a violation of individuals' fundamental rights. In this regard, the decision in *Dudgeon v. the United Kingdom* (1981) produced a successful "domino effect" on those member states which still criminalised some forms of consensual sexual activities between individuals of the same sex, but it did not dismiss the principle of a paternalistic and voyeuristic gaze of the state monitoring and evaluating the appropriateness of some behaviours as having not just personal, but social, consequences.

The partial condoning by the ECtHR of the paternalistic and voyeuristic gaze deployed by member states, is also evident in two important judgements: *Laskey, Jaggard and Brown v. the United Kingdom* (1997) and *A.D.T. v. the United Kingdom* (2000), concerning respectively sadomasochistic practices and group sex. As for the first, the circumstances were of non-specified number of men (out of forty four participants) charged by British national authorities with offences including assault and wounding (*Laskey, Jaggard and Brown v. the United Kingdom,* 1997: para. 8) for having committed sadomasochistic practices[32] that had been filmed over a period of ten years. The applicants alleged a violation of the right to private life (Article 8 ECHR) that was rejected by the ECtHR. The second case involved the seizure, by police officers, of video tapes at the applicant's house which depicted him engaging in sexual intercourse

[32]In the description of the Court these consensual practices included various forms of maltreatment of genitalia, ritualistic beatings with bare hands or other instruments, as well as forms of branding that left no serious injuries to the participants *Laskey, Jaggard and Brown v. the United Kingdom* 1997: para 8).

with up to four adult men. The charge against him was of "gross indecency"[33]. Before the ECtHR, the applicant alleged a violation of Article8 ECHR and of Article 14 ECHR in conjunction with Article8 ECHR. In this case, the applicant's complaint was successful.

Califia (2000, 144), commenting directly on the decision in *Laskey, Jaggard and Brown v. the United Kingdom* (1997), has provided an interesting synthesis of the relationship between the ECtHR and the complainants and the different positions they may or may not occupy:

> homosexuals and transsexuals have convinced ECHR to see them as vulnerable minority groups which need protection from a bigoted state. Sadomasochists are a long way from winning a similar status, partly because we don't often think of ourselves that way, and don't represent ourselves as such in front of the general public (Califia 2000, 144).

Califia's statement highlights a strong polemical tone against "assimilationist" identity politics based on the status of the "injured" victim. The statement is also crucial to understanding the failure of the above mentioned case before the ECtHR, where the applicants alleged a violation of Article 8 ECHR. Since sadomasochists refuse to speak about themselves as *victims*, the ECtHR is incapable of recognising a coherent narrative of victimisation leading to a limitation of the public interferences of state authorities on health and moral grounds. The refusal to be seen as victims entails a symbolic exit from that negotiated terrain of subjectivity which is played out in the juridical pantomime before the ECtHR. Furthermore, if the ECtHR finds legitimate the prosecution of the

[33] For the Sexual Offences Act 1967, section 1(7) an act was not to be considered private if more than two persons were taking part or were present. This only applied to "gross indecency" committed by men.

member state under Article8 (2) ECHR for the purpose of protecting "health" (*Laskey, Jaggard and Brown v. the United Kingdom,*1997: para. 50), the image of the complainants as *perpetrators*, rather than *victims*, is more likely to represent the robust interpretative framework for the judges.

In the case of *A.D.T. v. the United Kingdom* (2000), instead, the narrative of the complainant was successful in ensuring that he was perceived by the ECtHR as being a *victim* of the state's interference by terms of Article 8 ECHR. This is, in the reasoning of the ECtHR, highlighted by the fact that although the acts had been filmed, the complainant had shown a significant preoccupation for his anonymity (*A.D.T. v. the United Kingdom*, 2000: para. 36). This request for anonymity seems to point directly to the vulnerability of the complainant. Therefore, beyond the necessity of assessing whether group sex fell within common moral standards of the member state, the ECtHR implicitly made an evaluation on the inoffensiveness of the complainant who engaged in activities which were "genuinely 'private'" (*A.D.T. v. the United Kingdom*, 2000: para. 37). *A.D.T. v. the United Kingdom* is often compared in legal analysis (Grigolo 2003) (Johnson 2102) with *Laskey and others v. the United Kingdom* (1997), mainly for the different margin of appreciation (narrower in the former, wider in the latter) afforded by the ECtHR to the nation state, but also because the applicant had made clear that in the seized videotapes no trace of sado-masochistic activity was recorded (*A.D.T. v. the United Kingdom*, 2000: para. 10), therefore implicitly suggesting that the ECtHR should consider (or did actually consider) sado-masochistic activities as being more serious and in need of closer scrutiny than group sex.

So far, this analysis has shed light on the issue of decriminalisation of same-sex sexual activity, but it has also highlighted the centrality, in the work of the ECtHR, of assessing the "victim status" of the complainant. While the Commissioner does not pay

specific attention[34] to decriminalisation (since it has been enacted across all member states of the CoE) there are corollary issues relating to it that are addressed in his work. In particular, there is an interest in patterns of criminalisation occurring outside the borders of the CoE, in countries that still criminalise some forms of sexual expression and that, consequently, *force* individuals to flee from their homeland and seek protection in Europe. In this case the narrative of victimisation is very powerful and the joint work carried out together with the UNHCR goes in the direction of suggesting to member states to improve their policies concerning asylum claims on grounds of sexual orientation and gender identity. In this regard, the Commissioner's commitment is very strong, as it will be shown in the next chapter.

The work of the Commissioner, in general terms, builds on the concept of the presumed universal character of human rights as the following passage shows:

> In debates on the human rights of LGBT persons it is sometimes assumed that the protection of the human rights of lesbian, gay, bisexual and transgender people amounts to introducing new rights or 'special' rights. This line of thinking is misleading, as international human rights law clearly recognises that all human beings, irrespective of their sexual orientation or gender identity, are entitled to rights and freedoms deriving from the inherent dignity of the human person without discrimination (Commissioner for Human Rights of the Council of Europe 2011, 35).

This passage on the "sameness" and intrinsic equality of LGBT[35] persons is interesting

[34] He observes, nonetheless, that together with pathologising discourses on homosexuality and gender identity, criminalisation partly accounts for the reluctance of some member states to address the specific human rights violation of LGBT persons (Commissioner for Human Rights of the Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity,* 2011, 25).

[35] The "I" for "Intersexual" has not been included since it does not appear in the Commissioner's comment. Although the difference may seem trivial, the inclusion or exclusion of a specific letter in

if contrasted with the case law analysed so far. It is not difficult to affirm that the LGBT persons on whom the work of the Commissioner concentrates are far from being sadomasochists or those engaging in group sex. This is not due to the Commissioner's antipathy towards them, but to the way in which homosexuality is thought of and spoken of, in institutional settings such as the CoE. At no point, during the process of drafting the 2011 report, did issues of sadomasochism come up. Undeniably, sadomasochistic activities do not represent a mainstream human rights topic. Nonetheless, when forms of regulation of private consensual sexual practices are enacted, human rights institutional actors are required to engage directly with the possible human rights violations arising from these forms of regulation. Hence, while decriminalisation of homosexuality may not be an issue at the CoE, sadomasochism is a domain with which institutional human rights actors have been reluctant to engage. Such avoidance, clear in the case of the Commissioner, but not limited to his work, may be read as a further indication of the necessity for normalising LGBTI individuals in institutional human rights contexts.

Because of his peculiar role as mediator between civil society, national authorities, and the CoE, the Commissioner grounds his work in specific strategies aimed at enhancing the persuasive character of his actions or statements. Implicitly, therefore, the work of the Commissioner consists of an effort to demonstrate the "sameness" of LGBT persons by implicitly constructing them as being *normal.* In this regard, therefore, insisting on the "normality" of LGBTI persons is coherent with his efforts to approach national authorities who may be reluctant to discuss topics of sexual orientation and/or gender identity in the first place. It could even be argued that this is possibly the only depiction of LGBT persons that is likely to convince reluctant member states. Furthermore, it can also be seen as the depiction which is most congenial to the

the acronym has a strong symbolic value.

more “liberal” member states. The Commissioner's implicit investment in narratives of “normality” for LGBTI persons obviously does not discredit his image or diminish the innovative character of his role. Nonetheless, the adherence to a process of normalisation for LGBTI individuals for the purpose of establishing meaningful diplomatic negotiations with national authorities restates the creation of fictional, respectable rights-holders whose concrete existence remains out of the sight of the various institutional actors.

Respectability is an undeniably important framework in the context of the human rights of LGB persons. The case law of the ECtHR on the dismissal of members of the armed forces (all in the United Kingdom) on grounds of their homosexuality, further illustrates this point from a different perspective. Two cases, in particular, are analysed here: *Lustig-Prean and Beckett v. the United Kingdom* (1999) and *Smith and Grady v. the United Kingdom* (1999). In both of the cases, all four applicants had been discharged from the armed forces after extensive and intrusive investigations had been carried out in order to ascertain the applicants' sexual orientations. As a consequence of their dismissal, the four applicants alleged a violation of Article 8 ECHR and of Article 8 in conjunction with Article 14. ECHR. This strand of case law is important, insofar as it concerns the process by which, in the military, a denial of homosexuality is enacted by means of the construction of a paradoxical “homosexual military subject”[36] (Cooper in Bell and Binnie 2000, 64). This process has inevitably led to the emergence of patterns of disavowal, secrecy, and shame. The case law is also important in relation to the crucial role of the military as the depository of national identity and pride. In fact, the possibility of ascertaining the *respectability* of LGB personnel as capable of “serving the nation” acts as the access gate to the granting of full citizenship status for lesbian,

[36] This consists in the attempt within the military to enhance “sex talk” so that the creation of a public dimension of homosexuality has as its direct effect that of confining this same aspect in the private sphere, therefore paradoxically denying it.

gay, and bisexual persons.

There are intersecting narrative lines in the above-mentioned two judgements. In their submissions[37] all the parties (the applicants, the Government, and the ECtHR) referred to the same ideas of *excellence*, *professionalism,* and *security*. The invisible red thread that connects them is the notion of respectability for LGB persons as members of the military. The reason for the discharge of lesbian, gay, or bisexual personnel in the United Kingdom derived from the 1994 Guidelines that questioned the *professionalism* of these members of the military. The Guidelines suggested that these individuals could "damage the morale and unit effectiveness" (*Lustig-Prean and Beckett v. the UK*, 1999: para. 42), causing a breach in the protection of national *security*. As a way to counter this argument, all of the four applicants in the two cases submitted their records of service as proof not just of their suitability, but of their *excellence* in their work. In its assessment of the alleged violation of the right to private life, the ECtHR reinstated the existence of such an excellent record of service for the applicants (*Lustig-Prean and Beckett v. the UK*, 1999: para. 85 and *Smith and Grady v. the UK* 1999: para. 95). While this is important for the ECtHR to ascertain whether the sole reason for their discharge was their homosexuality, it nonetheless represents an effective way to affirm that lesbian, gay, and bisexual individuals in the military are capable of serving the country in an irreprehensible way. The question therefore is: what if these individuals had had a rather *mediocre* record of service? Would their claim have been as strong as it proved to be before the ECtHR?

The logic of the role-model, by which exceptional achievements of LGBTI persons are highlighted in different fields, is enlightening in this case. LGBTI role-models are identified in order to demonstrate and inspire other LGBTI persons, but

[37] The judgements were issued on the same date (27 December 1999) and in them the Court substantially replicates its arguments, apart from the specific circumstances of the cases submitted by the applicants.

implicitly also to show to the public their normality, their productive potential, as well as their contribution to the society of which they are members. Applied to the above-mentioned cases, this process reinstates, on the one hand, the importance of having an effective and cohesive institution that guarantees national *security*, and on the other hand concedes publicly that LGB persons can be *respectable* soldiers, who do not lurk suspiciously in the barracks trying to seduce their colleagues. This sanitised image of LGB military personnel is even more significant if read against the background of the unacknowledged and widespread phenomenon of rape in the military[38] (of both female and male personnel) documented, but not limited to, the United States[39]. Seen from this perspective, the issue transcends the question of whether a right of the ECHR was violated in the specific instance, but points to the broader issue of how to understand the role and "identity" of such an institution under the light of a more inclusive policy as far as LGBT persons are concerned.

Conclusion

This chapter has sought to provide a critical overview on some of the crucial issues relating to sexual orientation that have been adjudicated by the ECtHR in the last three decades. These issues include the criminalisation of consensual sexual activity, the criminalisation of sado-masochistic activities, and the discrimination of LGB persons in the army. Far from trying to provide an historical account of the evolution of the case law of the ECtHR, the chapter has been built around the idea that these strands of the case law offer an incredible opportunity to analyse the process of the creation of "homosexual" legal subjects in Strasbourg. This analysis has been preceded by a

[38] See the 2012 documentary *The Invisible War* (directed by Kirby Dick).
[39] Evidence suggests that this phenomenon also occurs in other countries, such as the United Kingdom: http://www.publicservice.co.uk/news_story.asp?id=22010, accessed on 24 April 2013.

discussion concerning the linguistic choices of the ECtHR in relation to the description of LGBT legal subjects. It has been argued in this regard, that the fact of privileging certain terms, rather than others, can be understood in the context of an attempt, from the part of this judicial institution, to give juridical legitimacy only to a portion of the various forms of sexual and gender expression available to individuals. The chapter, however, has not only considered the work of the ECtHR on these issues. It has, on the contrary, also compared the work of this human rights Court with the independent work of the Commissioner. While the Commissioner is a truly innovative figure who tries to push the linguistic and legal boundaries set by the ECtHR on homosexuality and transgenderism, he nonetheless participates – to an important extent – in a process of normalisation of sexual and gender identities within the juridico-political sphere of the CoE. Nonetheless in his role, he appears to be far more receptive than the ECtHR towards the narratives of the LGBT persons themselves, beyond their legal status as "plaintiffs".

The comparison between the case law of the ECtHR and the work of the Commissioner has, therefore, highlighted the existence of a fundamental framework of creation of "respectable" LGB subjects informing the work of both of these human rights actors, although with different modalities, different aims, and different outcomes. This represents a key finding for this research, as it will be possible to analyse, in the remainder of this study, the extent to which the narrative of "respectability" of LGBTI persons permeates current European discourses on human rights, and how these present a connection with the construction of specific models of "European citizenship". This chapter, therefore, is in continuity with the one that follows, which will begin with the notion of "respectability" in order to analyse the case law of the ECtHR and the work of the Commissioner on the issue of the legal recognition of same-sex couples. The

following chapter will take the themes developed in this section further, trying to establish a connection between the process of the creation of respectable "homosexual" subjects and the economic, social, and political cornerstones of neoliberalism.

Chapter Six - The Privilege of Being Included: Same-sex Couples and the Politics of Homonormativity

The recognition of same-sex partnerships and the right to marry for same-sex couples constitutes one of the most divisive human rights issues. Easily instrumentalised at the political level, the discussion on whether states should recognise these relationships has been framed as either a threat for the "traditional heterosexual marriage" or as breakthrough in the field of human rights. The reality is much more nuanced, as the recognition of same-sex partnerships and the right to marry may also be seen as entailing a substantial process of normalisation by which, those who were formerly excluded from the enjoyment of some rights, are granted access to societal institutions such as marriage. This dynamic, described by Duggan (2003) as "homonormativity" requires a portion of the formerly marginalised gay, lesbian and bisexual populaition to be included in institutions such as the army or marriage, thus creating new lines of fracture between those who become part of society and a new cohort of outcasts who fail to be included.

In this regard, therefore, the introduction of same-sex partnerships or marriage can reinforce the importance of heterosexual marriage as an institution in the first place, rather than challenge it radically as Johnson (2012, 147) has suggested. By adopting the analytical framework proposed by Duggan, this chapter constitutes an attempt to critically appraise the case law of the ECtHR and the work of the Commissioner for Human Rights engaging with the concept of "family" applied to same-sex couples. The objective is to demonstrate how the CoE indirectly promotes a neo-liberal paradigm of equality for LGB persons whose crowning achievement is represented, in fact, by the

acquisition of the “right to marry”.

Same-sex Couples and the Re-definition of the “Family” in the Courtroom: an Incomplete Transformation?

The situation of invisibility before the state and the law has been conceived by individuals in same-sex relationships as a severe curtailment not only of their human rights, but also of their citizenship status. The symbolic seal of state legitimation allows individuals to enter the political community and become full and respectable members of society. In this regard, Butler (2002, 17) has highlighted the importance of this official act of recognition by which individuals accept to be defined by a specific lexicon which also directly affects the definition of their public identity. The lack of recognition of same-sex partnerships and families is framed, therefore, as a denial of political and social viability which relegates LGB persons to a position of subalternity with respect to the rest of the population.

Historically, however, the emphasis on the recognition of same-sex relationships is a relatively new phenomenon. Several authors have argued, in fact, that there has been an important shift in the priorities of the LGB movement (Kandaswamy 2008; Polikoff 2005). The movement is seen as having abandoned its “longstanding commitment to defining and evaluating families based on function rather than form, distancing [itself] from single-parents and divorced families, extended families, and other stigmatised child-rearing units” (Polikoff 2005, 918). The result of this shift has been the promotion of a narrower human rights agenda based on a liberal-conservative paradigm of equality and freedom. The consequence is an ambiguous strategy which

simultaneously contains elements of both heteronormative and homonormative regulatory frameworks. Heteronormativity, in fact, is not completely neutralised by the emergence of homonormative dynamics of normalisation of LGB individuals into societal institutions. In heteronormative terms, the heterosexual couple is described as "white, middle-class, child rearing and materialistic" (Brandzel 2005, 196), thus constituting the terms of ultimate comparison for those non-heterosexual couples who wish to become recognised.

Hence, far from being mutually exclusive, heteronormativity and homonormativity work in synergy in order to promote a specific respectable image of couples, regardless of their sexual orientation. In the practice, this synergy can take the form of encouraging same-sex couples to both become like "other families" whilst simultaneously remaining distinct from them. One example, in this regard, can well illustrate the issue at stake in this case. In 2011, as part of an unfinished project about LGBT families in Europe, I interviewed a British couple formed by two men and a daughter born through surrogacy. When asked about whether they felt part of the "LGBT community", the two men adamantly admitted that they did not want to be associated with that kind of world. They described themselves as not being "partygoers" or sharing the practices of socialisation commonly associated with the gay community in London, the city where they lived. In fact – they commented – they felt they had much more in common with other heterosexual families with children they met at the nursery, rather than with the gay men socialising in a bar in Soho or Vauxall. Obviously, the fact of feeling "detached" from the LGBT community does not represent a negative fact in itself. However, the family narrative of this couple was inserted into a context of relative wealth, in which the two were somehow perfecting the idea of a respectable, clean-cut same-sex couple with a small daughter. It is, therefore, by simultaneously

positing one's similarity and difference with heterosexual families, that same-sex couples may carve for themselves a space of normality in which the obvious political and social ramifications of adhering to an exclusionary institution such as marriage, are inevitably de-problematised.

In the socio-legal and legal scholarship in the last two decades, the predominant framework of analysis has been one informed by the idea that the ever-increasing number of states worldwide offering the possibility to same-sex couples to validate their relationship before the law, represented a clear advancement in the context of the recognition of the rights of LGB persons. The emphasis on this sort of linear temporality, evident in the work of scholars such as Waaldijk (1994, 2000, 2003), Wintemute (1997, 2001) and Johnson (2012) has been coupled with an intensification of individuals' applications to national courts and to the ECtHR. At the level of the ECtHR, in particular, this has resulted in a multiplication, in the last five years, of applications concerning the interpretation of Article 12 of the European Convention on Human Rights on the right to marry and found a family by both lesbian and gay couples. On the one hand, applicants have tried to encourage the ECtHR to adopt a more inclusive interpretation of the wording of Article 12 ECHR, while on the other they have also sought to transfer their request to become respectable from the national to the international juridical and political forum, making recourse, therefore, to a symbolic investment in their intelligibility as bearers of human rights.

Increasingly, the ECtHR is perceived by applicants both as a last resort and a sounding board for their requests. In the past decades, the ECtHR has acted as the gatekeeper of the concept of family in Europe, substantially upholding the heteronormative description of the concept of marriage. In the 1980s and in the 1990s, LGB applicants sought to challenge the formulation of the provision enshrined in

Article 12 ECHR and to connect it with the "family life" limb of Article 8 ECHR, without success. The intensification of applications on this issue during the last decade,[40] however, has determined a renewed interest in the specific strand of case law on the right to marry and found a family under Article 12 ECHR for individuals in a same-sex relationship. This strand of case law, in particular, has acquired a systematic character and the advent of concerted litigation has activated a process aimed at shifting the balance in favour of a more inclusive interpretation of Article 8 ECHR and, possibly, of Article 12 ECHR.

In this regard, the 2010 landmark case of *Schalk and Kopf v. Austria* has seen the ECtHR partially adopt new epistemological criteria in the interpretation of the concept of "family". The case concerned two men who were refused the right to marry by the Austrian authorities, and consequently alleged a violation of Article 14 in conjunction with Article 8, of Article 12 and Article 1 of Protocol 1 ECHR before the ECtHR. Whilst the ECtHR denied the existence of a violation of the above-listed articles, it nonetheless presented interesting arguments. In the first instance the ECtHR answered in the negative to the applicants' request to read the wording of Article 12 ECHR "men and women of marriageable age" in the light of present day conditions. Applicants had resorted to the linguistic expedient of describing men *and* women as two separate categories in order to try to drive a wedge between the traditional concept of marriage and the ECtHR's interpretation of it. Whilst this expedient was destined to fail in the instant case, it nonetheless determined an ambiguous positioning of the ECtHR in relation to the controversial definition of the concept of "family life" under Article 8 ECHR.

Schalk and Kopf v. Austria was the first case in which the ECtHR partially made

[40] At the moment two applications are pending before the Court: *Chapin and Charpentier v. France*, Application No. 40183/07, lodged 6 September 2007, and *Ferguson and Others v. the United Kingdom*, lodged 2 February 2011.

a concession to the possibility that two persons of the same gender living together could be considered a *family*. The terms on which that concession was made in this judgment were, nonetheless, ambiguous. The ECtHR simultaneously winked to both heteronormative and homonormative narratives. While the ECtHR conceded that same-sex couples could enjoy "family life", this can only happen provided that some conditions were fulfilled. In this regard, the intervention of non-governmental organisations (NGOs) proved to be important, insofar as they sought to convince the ECtHR that individuals in same-sex relationships were capable of forming "long-term emotional and sexual relationships" (*Schalk and Kopf v. Austria*, 2010: para. 84). Whilst on the one hand couples need to resort to the rhetoric of commitment in order to demonstrate the solidity of their relationship, this quest for respectability as a "family" also entails an outright exclusion for those couples whose relationship does not comply with the set standards of the romanticised vision of love. Indirectly, therefore, the NGOs' intervention can be seen as enhancing the homonormative narrative on same-sex couples before the ECtHR.

Despite conceding that same-sex couples could be assimilable to a "family", the ECtHR did not abandon the heteronormative framework of analysis of marital relationships, thus refusing to state that the right to marry and found a family applies equally to *all* men and women regardless of their sexual orientation. In turn, this led to an appraisal of the "family life" of same-sex couples according to criteria inherently informed by heteronormative standards. Furthermore, this partial opening of the ECtHR also had the effect of implicitly creating a hierarchy between different "families": heteronormativity indicates the form of the proper "family", whilst families shaped around the "homonormative" call to inclusion, represent a sub-optimal model of kinship with respect to heterosexual marriage. Paradoxically, therefore, in *Schalk and Kopf v.*

Austria, the ECtHR admits that non-heterosexual couples can qualify as a "family", but nonetheless implicitly maintains a qualitative difference between them and heterosexual families.

Schalk and Kopf v. Austria is also interesting in relation to the exclusion from the benefits and entitlements associated with marriage received by same-sex couples. The applicants, in fact, alleged a violation of Article 1 of Protocol 1 ECHR on the "peaceful enjoyment of possessions", as well as a violation of Article 8 in conjunction with Article 14 ECHR. In this case, the ECtHR had to evaluate whether it was possible for the state to treat individuals in similar situations, namely same-sex and different-sex couples, in a different way. In denying the existence of a violation of the above-listed articles, the ECtHR made it clear that a wide *margin of appreciation* is granted to member states when "it comes to general measures of economic and social strategy" (*Schalk and Kopf v. Austria,* 2010: para. 21). Member states are, therefore, granted discretion in deciding how to distribute benefits and entitlements, if this complies with precise socio-economic criteria and objectives. The ECtHR's affirmation of member states' freedom in the allocation of resources and benefits, moreover, is coupled with an important distinction introduced, in the same judgement, between the various legal consequences of recognised same-sex partnerships: material,[41] parental[42] and other consequences[43] (*Schalk and Kopf v. Austria*, 2010: paras 32-34). In this regard, the remainder of this chapter will thoroughly consider these various legal consequences with the objective of demonstrating how these are fundamentally framed to support a

[41] "Material consequences cover (…) different kinds of tax, health insurance, social security payments and pensions. (…) This also applies to other material consequences, such as regulations on joint property and debt, application of rules of alimony upon break-up, entitlement to compensation on wrongful death of partner and inheritance rights", (*Schalk and Kopf v. Austria*, 2010: para. 32).

[42] Parental consequences include the opportunity to undergo medically assisted insemination or to foster or adopt children. (*Schalk and Kopf v. Austria*, 2010: para. 33).

[43] "Other consequences include the use of the partner's surname, the impact on a foreign partner obtaining a residence permit and citizenship, refusal to testify, next-of-kin status for medical purposes, continued status as tenant upon death of the partner, and lawful donation of organs". (*Schalk and Kopf v. Austria*, 2010: para. 34).

liberal-conservative paradigm of marriage equality for same-sex couples based on the notion of economic, political and social privilege, rather than mere enunciation of a human right.

The Commissioner for Human Rights of the Council of Europe: an Independent Approach to the Recognition of Same-sex Couples?

Concepts such as those of *family* or *marriage* represent thorny issues for international human rights organisations such as the CoE. Whilst the ECtHR has extensively engaged with various claims by LGB applicants in relation to the legal recognition of their relationships, the openings by this judicial institution on these issues have always been extremely cautious. Similarly, the political bodies of the CoE have ambiguously recognised the existence of non-heterosexual forms of kinship with two Recommendations. In their non-binding documents, the Committee of Ministers (CM) (Recommendation CM/Rec(2010)5) and the Parliamentary Assembly (PACE) (Resolution 1728(2010)) have only gone as far as to suggest that states are free to extend marriage to same-sex couples, ruling out the possibility of imposing such recognition, or re-interpretation of the concept of "marriage", on member states.

In comparison to both the judicial and political bodies of the CoE, the Commissioner can have more independence in articulating his position on the issue of marriage equality for LGB persons. In his 2011 report the Commissioner showed a strong interest, although not preeminent, in the subject. At the time of the drafting of the report, during which these ethnographic observations were carried out, the Commissioner and his staff were closely following the work of the ECtHR, as the

judicial body had just issued *Schalk and Kopf v. Austria* (2010), which was promptly included in the section of the report dedicated to partnership and family life.

In acknowledging both the ECtHR's and the CM's and PACE's position on the matter, the Commissioner did not radically depart from these bodies' statements. On the contrary, he found a nuanced, and therefore not explicit, way to endorse marriage equality. This is particularly visible in one of the Recommendations to member states contained in his report:

> [member states should] (e)nact legislation recognising same-sex partnerships by granting such partnerships the same rights and benefits as different-sex partnerships or marriage, for example in the area of social security, employment and pension benefits, freedom of movement, family reunification, parental rights and inheritance (Commissioner for Human Rights of the Council of Europe 2011, 13).

In this passage, the Commissioner asked for a recognition equivalent to marriage without, however, proposing a straightforward equation (same-sex partnership = marriage). This convoluted formulation is not just a rhetorical exercise, as it enabled the Commissioner to align himself with the other political bodies of the institution – the CM and the PACE – but, at the same time, to send to member states a clear message about the necessity of ensuring equal treatment of different types of couples. The adoption of a cautious approach, however, was also visible in the Commissioner's activity concerning the recognition of same-sex relationships. In particular, the Commissioner possessed an impressive diplomatic ability in effectively raising awareness with national authorities on these issues. One notable occasion, in which this

ability became particularly useful, was at the official launch report in June 2011 in Strasbourg. This official event was a gathering of different personalities, from delegates of national governments, national judicial institutions, NGOs activists, as well as representatives of the Organisation for the Security and Cooperation in Europe (OSCE), the United Nations Commissioner for Human Rights and the Fundamental Rights Agency (FRA) of the European Union.

From the way the event had been framed, it was possible to realise soon that the focus of the launch was to be on issues of discrimination (in employment, in the exercise of freedom of expression and freedom of assembly and association), hate speech and hate crime against LGBT persons, rather than marriage equality, let alone parenting rights. It was almost as if all the participants in the room were aware of the fact that the consensus on issues touching on kinship and family life was fragile. A low profile on such topics was, indeed, chosen for the event. As a part of strategic-diplomatic effort to bring to the table different actors from civil society, institutions and governmental and non-governmental actors, the Commissioner tried to identify a "common denominator" that could serve as a first shared point of departure in order to approach these issues – controversial for some member states – in the first place. It was apparent that the issue of "family life" was a contentious one which could lessen the likelihood of reaching broad convergence between the different parties involved.

The Commissioner's work in the direction of "strategically" promoting the legal recognition of same-sex relationships can be evaluated in relation to dynamics of homonormativity, suggesting the existence of a healthy, happy, monogamous homosexual couple. Whilst aimed at raising awareness with member states on the necessity of finding some forms of recognition for non-heterosexual couples, the strategy adopted by his office shows a substantial alignment with a homonormative call

to full inclusion of same-sex couples into societal institutions. There is, in fact, no critical evaluation of the exclusionary social and economic aspects of marriage as potentially creating new lines of division and worth between different groups of LGB persons. Therefore, although the Commissioner is a truly independent figure inside the CoE, his discourse remains nonetheless embedded in the dynamics of respectability and "normality" of same-sex couples with respect to their heterosexual equivalents. In his report there was a strong suggestion that same-sex couples should receive the same "rights and benefits granted to different-sex couples" (Commissioner for Human Rights of the Council of Europe 2011, 9) without, however, questioning the criteria that govern the allocation of these rights and benefits in the first place. Hence, the Commissioner's crucial work in the direction of persuading member states to broaden their conception of marriage in national legislation seems to follow the logic of the concession of a privilege to a formerly excluded portion of the population, rather than a radical re-configuration of kinship structures and policies of distribution of material resources.

From their side, member states have great leverage in deciding to what extent homonormativity can be used in order to strengthen a specific model of citizenship based on the co-optation of respectable same-sex couples. In this regard, each member state may attach a particular value and a particular set of entitlements and privileges to the institution of marriage, as well as a different ideological and political value. To this extent, the call for a "normalisation" of same-sex couples on the part of international human rights actors, such as the ECtHR or the Commissioner, may be favourably welcomed by some member states whilst being opposed by others, because of a contrast with their national human rights agenda or with national interests. It is important, therefore, for the remainder of this chapter, to bear in mind the importance of national interests – economic interests in specific cases of the next section, for instance – in the

context of the process of “normalisation” of LGB persons in the social and political national fabric.

The Economics of Same-sex Marriage and the Promise of Privileges

From a neoliberal perspective, marriage is undeniably associated with the acquisition of specific economic benefits. The existence of these material advantages, of course, partially overshadows the principle of formal equality heralded by many as the main reason for the need for legal recognition of same-sex couples. Authors such as Badgett (2008) and Black, Sanders and Taylor (2007), building on Becker's (1973) analysis of the economics of family, have explored the economic principles underpinning the choice of getting married for same-sex couples, identifying a series of material gains that can be obtained through marriage. In this regard, other authors have gone as far as to suggest the existence of a link between marriage equality for same-sex couples and neoliberal political and economic policies. Scholars such as Kandaswamy (2008), Fineman (2009), McCluskey (2009) and Eng (2010) have argued that the model of equality sought by the proponents of same-sex marriage is fundamentally attuned with a neoliberal concept of “autonomy”.

The idea of marriage equality, therefore, can be framed as an economic problem, investing the choices of the spouses: how to pay less tax? How to legitimately receive welfare benefits from the state? How is it possible to inherit from a partner without significant losses in one's patrimony? Warner (1999) and Robson (2009), in this regard, go as far as to suggest that the 'choice' to get married available to same-sex couples may be dictated by a promise of a series of gains otherwise inaccessible to them without the acquisition of a particular marital status. This aspect of marriage equality seems to call

into question directly Weston's (1998) concept of "'families of choice", which becomes invested with issues of agency and symbolic and material power. Taylor (2009, 5) to this respect, has suggested that it is necessary to also ask who can afford to make the choice to have a family. Similarly, Spade (2011, 62) has argued that the narrow focus on the issue of same-sex marriage risks overshadowing other structural factors of inequality:

> The framing of marriage as the most essential legal need of queer people, and as the method through which queer people can obtain key benefits in many realms, ignores how race, class, ability, indigeneity and immigration status determine access to those benefits and reduces the gay rights agenda to a project of restoring race, class, ability and immigration status privilege to the most privileged gays and lesbians.

In contrast with Johnson's (2012, 162) definition of marriage as a "vital social institution", Franke (2006, 248) has argued that the marriage debate is often a "distraction" used to divert attention from the existence of broader and more complex underlying political issues, such as entanglements of policies touching on race, class and choices in domestic and foreign policy (Puar 2007). Marriage, in fact cannot always represent the solution to redress some conditions of structural inequality. In this regard, Brandzel (2005, 188) has indicated that the advantages of same-sex marriage are tangible for the middle and upper classes, already possessing some forms of economic security, but are less tangible for poor or socially marginalised same-sex couples. Therefore, the mere focus on the importance of marriage for same-sex couples may overshadow inequalities based on race, class, ability, education that have an undeniable impact on life chances and personal development. To this extent, the case law of the

ECtHR on the opportunity for same-sex couples to access marriage can help to illustrate the interrelationship between material and symbolic aspects of marriage. The three cases chosen, *C. and L. M. v. the United Kingdom* (1989), *Mata Estevez v. Spain* (2001) and *Karner v. Austria* (2003), bring to the forefront issues relating to the economic significance of marriage and to the benefits associated with it.

C.and L. M. v. the United Kingdom offers interesting insights into the way the material enjoyment of human rights may differ radically from the formal assertion of universal principles. The case concerned an Australian national (the first applicant) who gave birth to a daughter (the second applicant) via artificial insemination and had been living in a stable relationship with a British national in the United Kingdom. Since the first applicant's employer did not confirm her permanent employment in the country, both applicants (mother and daughter) were to be deported to Australia. After having exhausted all internal remedies, the applicants lodged a complaint alleging the violation of articles 8, 12 and 8 in conjunction with 14 ECHR. In its decision, the Commission declared the application inadmissible.

Although the ECtHR judged the relationship between the two women as qualifying as “private life” under Article 8, it denied that it could also qualify as “family life”. Hence, for the purposes of British immigration law, it was not relevant whether the applicants were enjoying private life in the United Kingdom if it could not also be considered as family life:

> the Commission finds that a lesbian partnership involves private life, within the meaning of Art. 8 (…) of the Convention. However, although lawful deportation will have repercussions on such relationships, it cannot, in principle, be regarded as an interference with this Convention

> provision, given the State's right to impose immigration controls and limits (*C. and L. M. v. the United Kingdom*, 1989).

In this excerpt from the Commission's decision, national interests and national security, broadly defined, appear quite prominent. It is also striking because the Commission recalls the fact that, in previous cases, the ECtHR found instances in which Article 8 ECHR had been violated in relation to the deportation of individuals from countries where their close family resided. However, in the instant case, two women and a child living under the same roof were considered only capable of having a *private* – therefore hidden from the public – life.

In the decision, the Commission also maintained that immigration law had the priority of protecting the traditional family, thus implicitly affirming the existence of a trade-off between protecting the state and allowing individuals to take advantage of their immigration status. The narrative concerning a "possible fraud" represented a concern also for the applicants, who tried to persuade the Commission that they did not intend to take advantage of public funds, public housing or other benefits. On the one hand, the applicants were trying to demonstrate the genuineness of their family project; on the other hand, they were claiming a status of respectability with regard to possible allegations of fraudulent conduct in the enjoyment of social and economic benefits.

In the instant case the narrative of the "respectable couple" was crucial in the construction of the applicants' complaint. The plaintiffs were advancing the argument that it would have been in the best interests of the child[44] to grow in a "stable monogamous relationship of two persons", playing on the homonormative paradigm of familial normality. However, the Commission declared application inadmissible, implicitly suggesting that the deportation of the applicant helped, to some extent, to

[44] Under principles 2 and 6 of the United Nations Convention on the Rights of the Child.

protect both the traditional (heterosexual) family and national interests. Nothing is known about whether the applicants and C's partner were able to maintain or restore their family life after the deportation to Australia. Yet, this situation is all too common when bi-national couples face separation because of immigration policies. The possibility of accessing means and instruments, either material or symbolic, with which to resort to the ECtHR in Strasbourg are crucial in these instances. Couples in similar situations, whether heterosexual or homosexual, may not necessarily possess the cultural capital and economic means to seek justice and, even when they do, their claims are screened with extreme severity, as demonstrated by the ECtHR's case law on scam marriages (*O'Donoughue v. the United Kingdom* 2010).

C. and L.M. v. the United Kingdom suggests that it is difficult for the ECtHR to sharply distinguish between "private life" and "family life", partly because of its attempt to protect (heterosexual) marriage as a privilege. From a trans-historical perspective, the cases of *Mata Estevez v. Spain* and *Karner v. Austria* further illustrate the crucial importance played by economic issues in the context of the recognition of same-sex couples before the ECtHR. The two cases concern respectively the request for social security allowances for a surviving spouse (*Mata Estevez v. Spain*) and the succession to a tenancy agreement after the death of the applicant's partner (*Karner v. Austria*). Considering these cases jointly helps to demonstrate how the public distribution of financial or economic resources is dependent on a specific interpretation of "family life". Bringing the economic dimension of marriage to the forefront, therefore, helps to investigate the hypothesis that the rationale for denying the right to marry to some individuals could be motivated by the intention to maintain a system of privileges, rather than by eminent ideological, moral or religious motives.

The right of member states to regulate issues that have a broad economic and

social significance by resorting to the margin of appreciation principle has been extensively affirmed during the years by the ECtHR (and the Commission in the case of *Mata Estevez v. Spain*). In *Mata Estevez v. Spain* the Commission confirmed its previous case law (*X. and Y. v. the United Kingdom* 1983 and *S. v. the United Kingdom* 1986) excluding the possibility that a homosexual relationship could fall within the notion of "family life" under Article 8 ECHR. In 2001 same-sex marriage was not yet available in Spain, leaving same-sex couples without legal means to have their partnerships recognised. In declaring the applicant's claim for a violation of Article 8 in conjunction with Article 14 ECHR inadmissible, the Commission found that the difference in treatment between non-married heterosexual couples and same-sex couples was not discriminatory, since the decision to limit the enjoyment of survivors' pensions to married couples was aimed at pursuing a legitimate objective, namely "the protection of the family based on marriage bonds" (*Mata Estevez v. Spain*, 2001: p. 5).

The rhetoric of the "protection of the traditional family" forms also the bulk of the ECtHR's decision in *Karner v. Austria.* There are, of course, differences with the previous case. The first difference between *Mata Estevez v. Spain* and *Karner v. Austria* is the magnitude of the economic interests at stake: while the former concerned a social policy (survivor's pension), the latter involved the succession in a tenancy (hence it could be argued that its national strategic economic importance was negligible). *Karner v. Austria*, furthermore, is innovative from another perspective, namely the fact that, in the judgment, the ECtHR conceded that "protecting the traditional family" was quite a vague statement (*Karner v. Austria* 2003, para. 35). This has to be read in conjunction with the marginal importance that the ECtHR attributed to the issue of whether a homosexual relationship fell within the notion of either "private life" and or "family life" under Article 8 ECHR. For the ECtHR, in fact, the alleged violation of Article 8

ECHR was only to be analysed under the profile of the "right to respect for [one's] home" (*Karner v. Austria*, 2003: para. 31).

The assessment of the principle of proportionality in the two cases, however, shows the inconsistency of the ECtHR's approach. On the one hand, the ECtHR held that is was proportional, in order to *protect* the traditional family, for a member state to discriminate against individuals in a same-sex relationship if a structural social or economic policy was at stake (such as in *Mata Estevez v. Spain*). On the other hand, it found it disproportionate for states to enact such discrimination when there was the danger that one could become homeless after the death of one's partner. Such a distinction appears problematic, as the discrimination would seem more significant if a portion of the population was experiencing an outright exclusion from a structural and economic policy without a robust justification for it.

The three cases analysed so far highlight the existence of a preoccupation on the part of member states to preserve the economic privileges attached to marriage and the ECtHR substantial upholding of states' claims on this regard. Same-sex couples, conversely, insist on an improvement in their financial and symbolic position but also ask to be recognised as social and legal actors. In adopting this strategy aimed at gaining formal equality, however, they implicitly contribute to the re-instatement of marriage as an inescapable and fundamental societal institution which grants access to benefits and entitlements. From a broader perspective, wishing to be included in exclusionary institutions, such as marriage, may have a negative impact on those who do not wish to marry, as Warner (1999, 108) has maintained.

In his work, the Commissioner for human rights of the CoE has recognised the existence of economic implications for the lack of legal recognition of same-sex couples. In his 2011 report, a dedicated section ("The Impact of Non-Recognition")

numbers the challenges encountered by same-sex couples in terms of financial and socio-economic issues. In its intentions, the section serves to illustrate the disadvantages experienced by same-sex couples. However, it also implicitly restates the idea that the solution to the existence of these disadvantages is to extend marriage to a formerly excluded part of the populace. At no point is there a discussion on the extent to which member states have discretion in deciding which privileges are accessible through marriage. At a glance, therefore, it could be maintained that the Commissioner's work on this issue follows a homonormative pattern in the recognition of non-heterosexual kinship. Although the vulnerability, both material and symbolic, of LGBT persons is thoroughly acknowledged, the individuals who experience these difficulties and hardships are de-racialised, de-gendered and deprived of a specific connotation in terms of social class. The Commissioner's suggestion to member states to broaden the concept of marriage so as to include same-sex couples, therefore, does not aim at putting into question the distributive issues around marriage that exist in different member states. Rather, it points directly to the recognition of the symbolic value of this institution and the strategic role that it fulfils within member states.

Becoming Respectable Parents: LGB Persons and Adoption

Often presented and framed as a corollary to the issue of marriage equality, the recognition of parental rights of lesbian, gay and bisexual persons has come to the forefront in political and legal, national and international, fora. The possibility of becoming parents for LGB persons, however, is inextricably bound to the existence of a homonormative conception of the family. In this regard, Schroeder (2004, 104) describes how even non-heterosexual parenthood can become normalised:

> I do know that the normalising factor (…) is noticeable in MY life. (…) I got more than my share of approval and attention. Hey, I was a lady with a baby. My relationships with people changed (…). Even being a lesbian didn't throw most people off, since I was now a legitimate woman, a MOTHER. At work, in the store, in the street, the moment anyone found out I had a child, I was accepted, taken for granted as a 'normal' individual. That I am lesbian, queer, was secondary.

Schroeder's statement is deliberately polemical and it points directly to the notion of respectability. More specifically, it suggests considering the extent to which the desire for parenthood can be an assimilationist move. In the last decade, there has been a visible acceleration regarding adoption by lesbian, gay and bisexual persons in the ECtHR's case law[45]. This notwithstanding the fact that neither international instruments nor the case law of the ECtHR recognise a "right to adoption" (*Di Lazzaro v. Italy* 1997). In order to successfully articulate their claims to parenthood, applicants in various cases have resorted to alleged violation of their right to respect for "family life" under the terms of Article 8 ECHR, which also obviously implied a subsequent demand for a re-definition of the concept of "family".

The first opening of the ECtHR in relation to the question of LGB parenthood was in the landmark case of *Salgueiro da Silva Mouta v. Portugal* (1999), in which it was implicitly recognised that a lesbian, gay or bisexual parent could be as good as a heterosexual parent. Contextually the ECtHR also established a dichotomy between *good* and *bad* examples of parenthood. In the following years, applicants used this

[45] The previous landmark case, although unsuccessful for the applicants, had been *Kerkhoven, Hinke and Hinke v. the Netherlands* (1992). On a similar note, also the request of a transsexual man to be recognised as father failed before the Court in *X, Y and Z v. the United Kingdom* (1997).

dichotomy as their point of departure in constructing a legal argument which would persuade the ECtHR of their suitability as parents. The applicants' effort to recreate and foster an idea(l) of respectability and irreprehensibility of LGB individuals as parents, however, has been welcomed by the ECtHR's restatement of a model of "traditional family life" that has left little space for the negotiation of given meanings.

Strategic litigation on this issue has been intensified in the past few years, with various human rights NGOs acting as *amicus curiae*. The result, overall, is that the centrality of the family is once again restated by activists, national authorities and international organisations (such as the CoE) against the background of the pauperisation and marginalisation of some families or other forms of kinship (working class, with unemployed members and/or non-white, and/or mono-parental) that do not match the spotless image of the modern family. Furthermore, during the last decade, the case law of the ECtHR on adoption has been characterised by a marked inconsistency which will become more evident after a comparison of the two cases concerning respectively adoption by a single person (*Fretté v. France*, 2002 and *E.B. v. France,* 2008) and the two cases concerning adoption by same-sex couples (*Gas and Dubois v. France*, 2012 and *X and Others v. Austria*, 2013).

Fretté v. France (2002) concerned the case of a single man who wished to adopt. During the interviews with the French social services, the man had *avowed* (the ECtHR's words) his homosexuality. However, the French social services had refused the man's request to adopt. After having exhausted all internal remedies, the applicant resorted to the ECtHR alleging a violation of Article 8 ECHR in conjunction with Article 14 ECHR. In his application he maintained that regardless of the excellent report by the social services as to his suitability as a parent, the French social services had considered "his emotional and sexual lifestyle" (*Fretté v. France*, 2002: para. 10) as a

decisive factor in the final decision to strike down his application.

In the ECtHR's analysis of *Fretté v. France,* the concept of the “best interests of the child” appeared in a prominent position. The ECtHR was called to assess whether the decision of the French social services was motivated by the intention of protecting the “best interests of the child”. To undertake this endeavour, the ECtHR relied on the existence of contrasting opinions within the scientific community (*Fretté v. France*, 2002: para. 42) in relation to the effects on children of adoption by gay or lesbian individuals. Given the existence of inconclusive scientific data, the ECtHR judged the government's difference of treatment to be objective and reasonable and dismissed the applicant's complaint. The decision reached in *Fretté v. France* was overturned, however, in 2008. *E.B. v. France*, also concerning a single lesbian woman wishing to adopt, in fact saw the ECtHR ascertaining the existence of an infringement of Article 8 in conjunction with Article 14 ECHR.

Both *Fretté v. France* and *E.B. v. France* concerned individuals who had disclosed their sexual orientation. However, in the case of *E.B. v. France*, the applicant's partner did not wish to be involved in the adoption process. In evaluating the case, the French social services had brought forward two main impediments as to E.B.'s suitability as parent: on the one hand the lack of a paternal figure and on the other lack of commitment on the part of her partner. Contrarily to *Fretté v. France,* however, in this case the ECtHR gave more importance to the the test of the 'legitimate aim' pursued by the French government. Departing drastically its 2002 judgement, the ECtHR denied that the French government pursued a legitimate aim, namely the protection of the child's best interests, by rejecting the applicant's request to adopt merely on the basis of inconclusive opinions of the “scientific community” on the impact on children's well-being of having LGB parents. At a glance, it appears obvious how, in fairly similar

cases, the ECtHR made a quite different and inconsistent use of the experts' opinions.

There is, however, another reason why the two judgements need to be compared; namely the fact that, within six years, the ECtHR radically revised its evaluation of what it meant to protect the "health and rights of children" (*Fretté v. France,* 2002, para. 38). This radical change in the ECtHR's approach foregrounds the shaky basis on which the ECtHR's assessment may be based in relation to the recognition of parenting rights of LGB persons. Furthermore, it suggests the use of discretionary criteria employed by the ECtHR when assessing the existence of a possible "European consensus" on these issues. Contrasting *Fretté v. France* with *E.B. v. France* highlights the lack of legal justification behind the ECtHR's 2002 decision affirming that the French social services were right in considering Mr. Fretté unsuitable as an adoptive parent, and the consequent 2008 judgement by the same Court which found Miss E.B. to be victim of discrimination in a similar situation to Mr. Fretté's. The underlying narrative of respectability, in terms of which of the two applicants had sought to persuade the ECtHR of their outstanding profile as adoptive parents, led to different outcomes in the two cases. This disparity points to the existence of an inconsistent approach of the ECtHR's on the issue of adoption which may be based on changeable conceptions about good and bad models of parenthood, often acquired through scientific expertise whose ultimate reliability should also be scrutinised in the courtroom.

As has been argued, the trajectory of the ECtHR's case law has been characterised by an often incongruous approach to the issue of adoption by LGB individuals. In fact, although in *E.B. v. France* the ECtHR had implicitly admitted that single LGB individuals were suitable to become parents, it demonstrated reluctance to apply the same logic to same-sex couples. *Gas and Dubois v. France* (2012) and *X and*

Others v. Austria (2013) are the two most recent cases concerning couples in which the non-biological parent had made a request to gain full parental responsibility for their partner's child. Once more, the joint analysis of these two cases serves to discuss the inconsistency of the positions adopted by the ECtHR on this topic, torn between the need to preserve the heteronormativity of parenthood and the necessity to regulate non-heterosexual parenthood within the boundaries of homonormative narratives.

In *Gas and Dubois v. France* the ECtHR recognised the existence of a "family life" between the applicants (*Gas and Dubois*, 2012: para. 37). At the same time, however, it considered that under French law the possibility to grant simple adoption to a non-biological parent was only available to married couples. Hence, the ECtHR dismissed the applicants' alleged violation of Article 8 in conjunction with Article 14 ECHR. In adopting this position, the ECtHR also refused to uphold the applicants' claim concerning the impossibility to get married in the first place, because of their sexual orientation, as a discriminating factor.

In this case again the "best interests of the child" occupied an important place. However, the ECtHR had also emphasised the uniqueness of marriage as an institution conferring a particular status. The applicants in *Gas and Dubois v. France,* however, were *not* asking to get married (2012: para. 42). The applicants' lack of interest in opting for the marital institution led to a short circuit in the reasoning of the ECtHR (*Gas and Dubois v. France*, 2012: para. 42). In the ECtHR's comparison between themselves and unmarried heterosexual couples the underlying question was why the applicants were not seeking marriage, although they considered themselves to be a *family?* Why were they advancing claims if they did not want to subscribe to social institutions? For the ECtHR the adherence to the familial institution and parenthood could not be easily decoupled. Also for this inability of conceiving kinship outside the boundaries of the

state's recognition, the ECtHR affirmed that it was left to the member states to decide the criteria to be employed in order to define a prospective adoptive parent.

As had already happened for single LGB individuals wishing to adopt, the ECtHR enacted a swift change of approach in a short period of time. One year later, in *X and Others v. Austria* (2013), the ECtHR practically overturned *Gas and Dubois v. France.* The case concerned a couple formed by two women. One of the applicants had a son to whom she had given birth without being married. The child's father had recognised his paternity and had regular contact with the child. However, the biological mother's female partner wanted to gain second-parent adoption. The Austrian Court had refused to grant it because the child already had two parents and also because the two women were not married (although marriage was not available for same-sex couples in Austria).

For the ECtHR the stable character of the applicants' relationship (*X and Others v. Austria*, 2013: para. 26) constituted a sufficient reason to declare the concept of "family life" applicable to the instant case. Similarly to *Gas and Dubois v. France*, however, the applicants had neither expressed interest in entering a civil partnership (available in Austria but without effects upon "second-parent" adoption), nor in marrying (not available in Austria for same-sex couples).

How has the applicants' lack of interest in the legal recognition of their relationship affected the ECtHR's judgement? It could be argued that the refusal to seek a form of official recognition may have represented for the ECtHR a diminished level of commitment on the part of the applicants. The lack of a strong sign of the applicants' mutual commitment could have been considered by the ECtHR as weakening, in principle, the applicants' request to become parents. On the other hand, however, in *X and Others v. Austria* (2013), the ECtHR reached a decision in favour of the applicants,

by ascertaining a violation of Article 8 in conjunction with Article 14 ECHR. In the judgement the ECtHR maintained that the two women had been discriminated against in comparison to a non-married heterosexual couple, contextually emphasising, in an unprecedented way, the juridical necessity of recognising these type of families. This is particularly interesting, as in its previous case law the ECtHR had always been reluctant to admit the existence of such pressing need for regulation in relation to same-sex couples. It is, therefore, both striking and peculiar that the ECtHR's position in relation to adoption claims by LGB couples has radically changed in the time frame of one year.

X and Others v. Austria, however, is also innovative in other respects of particular interest for socio-legal scholars. In particular, the ECtHR made an interesting use of sociological analysis in order to survey the issue of same-sex couples wishing to adopt. In order to provide a socio-legal overview of the situation for LGB parents in the 47 member states, the ECtHR had offered a detailed description of comparative law on the issue of "second-parent" adoption but had also referred to the above-mentioned Commissioner's 2011 report. Such a reference signals the emerging awareness of the ECtHR of having to pay more attention to the available sociological data on a specific issue on which it is called to settle. In the case of adoption by same-sex couples, this would imply grounding its reasoning on more a solid sociological basis than mere abstract legal speculation on the value of "alternative families". This opening operated by the ECtHR also represents the proof that, in the context of the CoE, non-judicial institutions such as the Commissioner, can play an important role in supporting and complementing the judgements of the ECtHR, especially when there is a swift and dynamic evolution in European societies on some specific issues, such as changing attitudes toward same-sex relationship, and the emergence of alternative models of kinship beyond the heteronormative framework.

The attention paid by the ECtHR on the issue of same-sex couples wishing to adopt, however, is not unidirectional. The Commissioner and his team, in fact, at the time of the drafting of the report were closely following the then pending case of *Gas and Dubois v. France* (2012). There were, in the office, high expectations regarding this particular case before the ECtHR. In fact, it was thought that a positive outcome for the applicants could be used by the Commissioner to strengthen the legitimacy of the claims contained in the report, which could then be used to persuade national authorities to enact changes in national legislation. In the light of the ECtHR's reliance in *X and Others v. Austria,* on the socio-legal work provided by the Commissioner, this aspect appears particularly striking. Whilst the ECtHR starts to realise the importance of sociological data in order to back up its decision to broaden the concept of "family life", the Commissioner needs the ECtHR's judgements in order to encourage member states to revise their human rights agenda. Such a mutual relationship surely represents an interesting development in the context of ECtHR-Commissioner cooperation, and could form the object of future speculation.

There is, however, another interesting aspect concerning this strand of case law, namely the increasingly important third parties in the litigation process. Ten different human rights NGOs, as well as other actors, intervened as *amicus curiae* in *X and Others v. Austria*. This aspect is likely to become increasingly important, given the capability of different non-governmental actors to build networks and share information, as well as devising common European strategies in order to litigate both in Strasbourg and in national Courts. However, the increasing reliance on this type of actor, also points to the phenomenon of a spasmodic necessity to seek regulation of one's status predominantly through the law, which falls entirely into the logic of homonormativity. To some extent, therefore, strategic litigation could bring to the

forefront of the human rights agenda normative issues to the detriment of material and structural problems connected with the lack of official recognition.

Lastly, however, it is also necessary to point out the existence of other critical aspects of the quest for adoption on the part of same-sex couples. This often under-researched aspect is the one regarding the extent to which adoption may not be a neutral process in the first place. As Smith (2009, 345) has argued, the insistence on the issue of adoption may hide the dynamics of economic deprivation that bring children to be placed in foster care or to be adopted. Smith offers the example of the United States and maintains that a considerable number of the children there placed in foster care, for instance, have not experienced abuses, but have been removed from their families because of the inability of their parents to provide for them. For obvious reasons, the data presented by Smith is not directly translatable into the European context. However, Smith's argument is powerful, insofar as it highlights the possibility that the legal "battle" for parenthood may become almost an ideological one that overlooks the structural inequalities that lead to children being adopted in the first place. In the context of a homonormative call to inclusion of same-sex couples, reflecting critically on this possibility should be unavoidable as it would persuade those who are involved to re-evaluate their desire for parenthood and to promote critical reflections on the implications of parenthood in relation to economic and social deprivation experienced by the children who are the object of the adoption process.

Conclusion

The purpose of this chapter has been that of showing that the ECtHR case law concerning the "family life" of LGB persons is characterised by a strong degree of

inconsistency in relation to who can qualify or not as being part of a "family" and that this assessment is often informed simultaneously by both heteronormative and homonormative assumptions about a standard model of kinship. At the same time, there are also cases, such as *X and Others v. Austria*, which are likely to have a strong impact on national audiences and reverberations at the legislative level in various member states in the future. Whilst, the impact of the decisions of the ECtHR, therefore, should not be underestimated in terms of developments across Europe; at the same time, the analysis of these judgements has also suggested that the ECtHR adopts a quite narrow framework for the definition of the "family". It is undeniable that the domain of the law fulfils the fundamental role of enabling individuals to acquire legitimation and become intelligible (Beger, 2000, 265). For this reason, the legal construction of the concept of the "family" transcends the boundaries of the law and has profound implications in social terms. In this regard, there is a need for a critical assessment of the work of human rights institutions such as the CoE – and of the ECtHR specifically – in order to investigate the complicity of the law with the various national and supra-national interests at stake in relation to the recognition of same-sex partnerships.

Recognising same-sex relationships seems to be particularly problematic from the political, as well as financial and economic point of view. The analysis of the case law of the ECtHR and the work of the Commissioner on this topic seem to confirm the current configuration of these specific human rights claims as being inevitably linked to the existence of precise economic positions of privilege for which individuals can or cannot qualify. Following Duggan (2003) it has been argued, in relation to this aspect, that the recognition of same-sex relationships entails the reinforcement, rather than the weakening, of structures of exclusion that marginalise LGB persons who cannot be subsumed under the problematic concept of "normality". It has furthermore been

suggested that the narrow focus on the issue of marriage equality for LGB persons in the European context, represents a good illustration of the neoliberal concept of "autonomy" whereby the family becomes the primary structure of reference for individuals and a self-sufficient unit perfectly integrated in the globalised economic landscape from which the state shies away.

What should be discussed contextually to the inclusion of same-sex couples in the familial institution, is why marriage is the only point of access to the enjoyment of some benefits or privileges (Gómez in Motta and Motta 2011, 27) and it is not possible to think about a fairer distribution of resources based on actual life conditions, rather than on formal prerequisites. The uncritical endorsement of marriage equality risks leaving the status quo unchallenged and unquestioned. Hence, without downplaying the importance for same-sex couples to have their relationships legally recognised, exaggerating the symbolic importance of marriage equality for the attainment of full equality is smoke and mirrors.

Chapter Seven - Between Liberty and Control: Expressing Identities, Repressing Gender, and Sexuality

The acquisition of visibility for LGBTI persons is a fundamental condition for the inclusion in human rights discourses. Whilst on the one hand becoming visible may entail recognition and increased acceptance, on the other it may also be accompanied by a higher degree of vulnerability to hostility or violence. Becoming visible, moreover, is intimately connected to the possibility of action in the public sphere. The political significance of this process can be assessed through an analysis of a specific strand of case law of the ECtHR and the work of the Commissioner on issues relating to freedom of expression, freedom of association and assembly, and the rights of LGBT(I) asylum seekers.

The rationale for the choice of topics reflects the timeliness of these debates: in Eastern Europe and in the Balkan countries, an increasing number of demonstrations and gatherings organised by LGBT associations are taking place (Davydova 2012; Gruszczynska 2012). Some of these have been banned by governments or disrupted by violent – often racist and homophobic – counter-demonstrators. At the same time, an increasing number of asylum seekers are framing their requests in terms of persecution they have suffered in their home countries because of their sexual orientation or gender identity. The thorny issue of their "credibility" as genuine asylum seekers has emerged and is currently debated in different fora (Morgan 2006; Jenkins 2009). Alongside these two emerging phenomena, a growing number of applications have been lodged in Strasbourg which have given the Court the opportunity to elaborate its case law and, indirectly, connect it to European exceptionalism on human rights. The Commissioner has also engaged thoroughly with these issues and his work provides interesting

material for reflection.

Contiguous to the themes illustrated above, is also the issue of the monitoring and sanctioning of homophobic and transphobic hate crimes and hate speech, specifically in relation to the extent to which verbal or physical violence are seen to curtail the possibility of "being in public" for LGBTI persons. Furthermore, the prosecution of hate crimes or hate speech is often considered as the main instrument to redress specific forms of virulent discrimination and verbal and physical violence. This chapter will consider different facets concerning the expression of one's sexual orientation and/or gender identity, trying to identify and discuss both the shortcomings of the current approaches of maximising participation and condemning homo/transphobia, as well as the broader socio-political implications that these approaches present in relation to the formal framework of human rights protection of the Council of Europe.

Homonationalism, the Heterosexual Nation, and the Resurgence of Identity

Human rights discourses are articulated in a world characterised by a strict policing of national borders and a widespread paranoia about illegal migration. Yet, these same human rights discourses are part of a universalist discourse about equality, applicable, in theory, to every human being. Because of this tension, human rights are undeniably political. In this regard Douzinas (2007, 56) has suggested that human rights may have "ontological consequences" insofar as they can directly modify one's legal status or impact on daily life. In relation to the recognition of the rights claims of LGBTI persons, these consequences are exemplified by the existence of a twofold dynamic. On the one hand, these new rights-holders are admitted to become part of the

nation. On the other hand, however, the political membership of these individuals is instrumentally mobilised by nation-states beyond their own borders in order to foster an image of themselves characterised by moral exceptionalism vis-à-vis other states.

Human rights discourses are also characterised by processes entailing the racialisation of sexual identities or the sexualisation of racial identities. Apart from rendering individuals intelligible legally and socially, human rights are also at the heart of the definition of the nation-state. LGBTI persons, in particular, become co-opted into the political and legal domain and may indicate the tangible proof of a nation-states' record in respect of human rights. Puar's concept of "homonationalism" (2007) offers an interesting illustration of this complex phenomenon by which sexual identities can be mobilised, in an arguably instrumental way, in favour of the nation-state and its liberal political agenda. Originally conceived and applied in the context of the United States and the international "war on terror", homonationalism is defined as a "(...) brand of homosexuality [that] operates as a regulatory script not only of normative gayness, queerness or homosexuality, but also of the racial and national norms that reinforce these sexual subjects" (Puar 2007, 2).

Homonationalism[46] may be said to function as a mechanism of co-optation of acceptable racialised segments of the queer population within the nation[47]. This operation has the direct effect of defining who inevitably falls out of this definition and also those subjects who, as *sexual-racial others* (Puar 2007, 2), are in opposition to the virtuous, integrated homosexual citizen[48]. Interestingly, homonationalist dynamics become more

[46] According to Puar, (2007, 51) the nation is strengthened by at least three deployments of homonationalism : a) the reiteration of heterosexuality as the norm; b) the fostering of national homosexual positionalities; c) the emergence of a transnational discourse of U.S. sexual exceptionalism.

[47] Puar explains how homonationalism is fundamentally a way to proclaim liberal attitudes towards sexuality, without fundamentally questioning the structures of power, oppression, and discrimination that participate in the functioning of the nation-state: "Thus the nation state maintains its homophobic and xenophobic stances, while capitalising on its untarnished image of inclusion, diversity and tolerance" (Puar 2007, p. 26).

[48] Homonationalism seems to work almost as a two-way dynamic: on the one hand as a *centripetal* movement bringing the respectable and white segment of the queer population towards the core of the

visible when the issue concerning the protection of the human rights of LGBTI persons starts to be recognised as legitimate by national governments or international organisations. In this regard, the process of *scapegoating* of the Black, Latino and Mormon communities after the infamous Proposition n.8 was voted in California in 2008, well illustrates how the attempt to protect the human rights of a group can be accompanied with the potential "demonisation" of other groups. More specifically, when the overwhelming majority of Californians voted against the reintroduction of the right to marry for same-sex couples in the State, various liberal lesbian and gay commentators started to blame the Black, Latino and Mormon communities for the negative result, on the presumption of the high level of religiosity in these communities. While the numerous and problematic ramifications of this episode cannot be illustrated in this context, what happened in California in 2008 poignantly illustrates what is at stake when one talks about "homonationalism": how is it possible to catalyse the feelings of belonging to the state of newly admitted citizens such as LGBTI persons, while simultaneously marginalising other citizens (or non-citizens) who are perceived as a "threat" to the liberal state?

The introduction of this framework of analysis helps to explore further the process of transnational mobilisation of sexualised and gendered identities. Adapted to Europe, this framework can highlight dynamics of the racialisation of sexual and gendered identities happening in the context of the Council of Europe, both in the case law of the ECtHR and, to a lesser extent, in the work of the Commissioner. In fact, in Europe, assumptions about the "whiteness" of LGBTI persons are not uncommon. LGBTI citizens who belong to non-white ethnic groups, or migrants and asylum seekers, are subjected to close scrutiny of their stories – often asked to "prove" that they

nation state; and on the other hand as a *centrifugal* movement which equally distances from that same ideal core of the nation-state non-respectable queer and non-queer altogether, according to blatant racial lines.

are truly LGBTI. Usually believed to be "heterosexual" by default, individuals belonging to these ethnic and/or religious groups, are often assumed to be inherently homophobic and/or transphobic by virtue of their cultural background or religious convictions. This gross simplification, of course, has profound implications. On the one hand, it denies the possibility that some of these individuals may themselves be LGBTI. On the other hand, labelling various ethnic and/or religious groups as "homophobic" or "transphobic", may directly lead to a mobilisation of white LGBTI persons inside the nation-state against these presumed "homophobic" racial others. The result, in in many European countries discourses about the inherent homophobia or transphobia of specific racial, ethnic and/or religious groups are proliferating, and are used instrumentally by various political leaders. The case of the Netherlands, which will be briefly illustrated in the remainder of this chapter, represents a good example of the way in which a dichotomy is created between the liberal "LGBTI citizens" as opposed to those who are believed to pose a real threat to liberal societies, because of the inherent homo-transphobia ascribed to them.

"Homonationalism", however, is used here, beyond the mere context of the nation-state. It is applied, instead, to the difficult process of the creation of a European sexual citizenship for the establishment of which outsiders need to be created. In the following analysis, the two-fold ramifications of homonationalism in the context of the Council of Europe will be illustrated. Firstly, there is a process of singling out homophobic/transphobic member states of the CoE as opposed to queer-friendly ones. This is exemplified by the recent strand of case law of the ECtHR concerning freedom of expression and freedom of assembly and association in some member states of the CoE, especially in Eastern Europe, the Balkans, and the Russian Federation. Secondly, this model of sexual citizenship is also framed by the discourses and policy practices, as

well as public rhetoric, concerning the homophobic countries outside of Europe, as well as the existence of non-tolerant racial and/or religious minorities within the national borders themselves. The emerging strand of case law of the ECtHR concerning LGBT(I) asylum seekers illustrates this point.

The "Pink Agenda" and European Citizenship: Tolerant Europeans and Intolerant Others?

An emerging concept of European sexual citizenship needs to be supported by a political apparatus that fosters an ideal of cohesion and belonging to a political community. In this regard, it is possible to speak about a European "Pink Agenda" on the rights of LGBTI persons that promotes a specific kind of European sexual citizenship which is strongly homonationalist in nature. The "Pink Agenda" consists of a set of legal, social, and political instruments employed both by nation-states and by international human rights institutions, such as the CoE, to promote, in a proactive way, specific LGBT(I) identities beyond the borders of Europe. At the same time, it also helps to single out anti-LGBT(I) positions within these same borders. This process results in a model of European sexual citizenship that creates sexual and racial others while, simultaneously, allowing a limited portion of non-heterosexual/non-cisgendered[49] people to become fully legitimised as part of the citizenry.

The creation of the "Pink Agenda" on the rights of LGBT(I) persons on the part of nation-states, has the purpose of subtly exploiting the citizenship of these newly included subjects in order to articulate national political discourses vis-à-vis other national actors. This process not only takes take place in bilateral foreign policy

[49] The word 'cisgender(ed)' is used in opposition to 'transgender' to define Individuals whose sexual and gender identity is in accordance with the gender assigned at birth (Schilt and Westbrook, 2009).

settings; it is also enacted in international fora, such as the Council of Europe, with the aim of "spotting" non-compliant, hence by definition *homophobic* and *transphobic*, states. Furthermore, far from having repercussions only on inter-state relations, this process of inscribing LGBT(I) persons into the fabric of the nation also has profound consequences for the ways in which they exercise their citizenship. Through access to to institutions such as marriage or the army, LGBT(I) persons substantially become normalised as queer citizens, rather than challenging the exclusionary character of these institutions. The most visible implication of this process is a normalisation of national(ised) LGBT(I) identities that fosters new lines of exclusion and the emergence of the *good* [homosexual] citizen (Smith 1994), as opposed to the "citizen pervert" described by Bell (1995).

With the purpose of letting individuals fit into the system, this human rights agenda inevitably creates lines of fracture between those who can afford to integrate and those who remain at the borders of the normative sphere – both within the nation and also in the international arena. The "Pink Agenda" can, in fact, be used as a yardstick in order to measure the progress of other states (both members and non-members of the CoE) in the context of the protection of the rights of LGBT(I) persons. This specific human rights agenda, furthermore, is based on normalised LGBT(I) identities that are de-racialised and deprived of class connotations. Furthermore, in order to function as a mechanism of control of individuals, the "Pink Agenda" is embedded in a structural strategy aimed at continuously creating the subject position of "the other" outside of the geo-political borders of the continent.

Confessing One's Queerness: LGBTI Asylum Seekers and the Space of Legal Acceptability

Asylum seekers can be described as a marginal, invisible group of people with almost no entitlement in the country in which they reside, or in which they are detained while they wait for their case to be heard. Their precariousness and vulnerability are the result of political and legal regimes that regulate their entitlements and obligations on foreign soil. Yet, the heavy scrutiny to which they are subjected can be de-humanising. Every asylum seeker needs to be a good storyteller: the better the story, the more likely it will be considered credible. It was not until 2008 that the United Nations High Commissioner for Refugees (UNHCR) issued a Guidance Note on asylum claims related to sexual orientation and gender identity that allowed LGBT persons to be recognised as asylum seekers, as members of a "particular social group" under the 1951 UNHCR Convention Relating to the Status of Refugees ("the 1951 Geneva Convention").

In countries in which homosexuality, transgender identities, or cross-dressing are criminalised, individuals may be subject to harassment, persecution, and violence, often state-sponsored, resulting in a decision to leave their country of origin and seek protection elsewhere. While it is necessary to include sexual orientation and gender identity among the legitimate grounds on which an asylum claim can be based, this inclusion can also be instrumentalised politically. It is precisely with this ambiguity in mind that Bracke (2012, 245) has talked about the "saving gays rescuing narrative", by which European states articulate a civilisational politics that posits tolerance of sexual and gender diversity as a marker of the "civilised West" which enables these countries to save persecuted queers around the world in the name of these civilisational values. Torn between the need to create a global geography of "homo-transphobic countries"

and protect those fleeing from fear and persecution, Europe (framed as both the EU and the CoE) tries to capitalise on its image as a tolerant, liberal, and *queer-friendly* continent, not without ambiguities. When the Russian Federation criminalised the so-called "gay propaganda" in 2013, both at the level of the CoE and the EU there were strong counter-reactions aiming at emphasising the radical difference between Russia's and Europe's human rights policies. Similarly, the European Union often criticised countries like Iran for executing individuals accused of being gay, implicitly assuming the role of a beacon of democracy, freedom and guarantor of human rights for all individuals.

As a result of this attempt to rescue persecuted queers, individuals may find themselves, paradoxically, in a vulnerable position: as the *trophy* of the West, yet treated with suspicion when they have to substantiate their "gayness" in the asylum process (Berg and Millbank, 2009, 200; Bennett and Thomas, 2013, 25-29). Extensive and intrusive questioning is not uncommon in this process and stereotypes about homosexuality and transgenderism often place the applicants in vulnerable positions (Morgan 2006). Individuals may be asked uncomfortable questions about the nature of their sexual relations or their preferred sexual practices, as well as being scrutinised in cases in which they have married, or they have children, in order to divert attention from their presumed homosexuality. Often times, moreover, LGB applicants are deported to their home countries with the suggestion that they should be '"discreet" and avoid flaunting their homosexuality (Millbank 2009).

When a claim is successful, however, it can be said that the condition of the "refugee" is far from being ideal, as it entails a problematic relationship with the nation. As Butler and Spivak (2011, 6) have suggested, the condition of the refugee is one of otherness with regard to the host state and their freedom is mostly illusory (Schuster

2003). Against this background, the "saving gay rescuing narratives" appear as a powerful political instrument that can enhance European human rights exceptionalism by essentialising homophobic others in non-Western contexts. The creation of "queer refugees" allows the specular creation of the "queer citizen". The dialectical relationship between these two "strangers" is important insofar as it reinforces the heteronormative character of the nation, while simultaneously providing a space of mild tolerance for the others.

The role of the CoE in the enhancement of this process aimed at rescuing persecuted queers worldwide is ambiguous. If in principle the political bodies of the organisation, such as the Committee of Ministers (CM) and the Parliamentary Assembly (PACE), as well as the Commissioner himself, have urged member states to take seriously asylum applications filed on the grounds of sexual orientation and gender identity, in the courtroom the logic of suspicion prevails and great leverage is given to the respondent states in assessing which asylum seekers' stories are credible. A limited number of cases have been heard by the ECtHR in which the applicants alleged a violation of Article 3 of the ECHR on the prohibition of torture, inhuman and degrading treatment, or punishment.[50] In particular, the ECtHR has been called to evaluate whether national courts had been wrong in their assessment of the criteria to determine the danger of persecution to which individuals were subjected in their home countries. The focus in this section is not so much on the (negative) decision itself, rather than on the fact that the judgements contribute to enhancing the idea of Europe as an actor to which it is possible to turn to for "protection".

The cases analysed here are *F. v. the United Kingdom* (2004) and *I.N.N. v. the*

[50] This allegation is based on the landmark 1989 case of *Soering v. the United Kingdom*, in which the ECtHR declared that returning an individual to a country in which she/he would suffer a treatment amounting to torture and inhuman and degrading treatment or punishment amounted to a violation of Article 3 of the ECHR.

Netherlands (2004), both concerning two male applicants from Iran who reported having fled the country because of the danger to them owing to their homosexuality. Having both already been subjected to harassment and violence on the part of the Iranian police on several occasions, they had escaped to avoid harsher punishment such as a death sentence.[51] Together with a third case, *Ayegh v. Sweden* (2006), which touches incidentally on the issue of homosexuality, these two cases see the exposure of the "hypervisible Iranian queer" (Shakhsari 2012), an increasingly popular stylised figure in the repertoire of human rights violations. Both applicants, F. and I.I.N., anonymous for fear of having their identities disclosed, staged a *Foucaultian confession* in the process of avowing their homosexuality. They ascribed to themselves an identity that might render their asylum claim successful. In recalling their experiences of abuse and violence, the instances in which they have been raped by police officers, and the climate of fear in which they have led their lives, they confessed and exposed their humanity in all its vulnerability before the ECtHR. The assessment of their credibility, however, remains crucial.

What does a "persecuted Iranian queer" look like? While it was primarily the responsibility of the national authorities (the British and the Dutch) to decide whether the applicants' stories fitted the "typical" confession of the Iranian homosexual, it was the duty of the ECtHR in Strasbourg to verify whether these authorities were right in their assessment. In both judgements the ECtHR produced an extensive array of arguments in order to assess the seriousness of the episodes recalled by the applicants. It reached the conclusion that the national authorities were right: neither F. nor I.N.N. were at risk of capital punishment were they to be returned to Iran. What is striking is the dissonance between the personal experiences confessed by the applicants, and the

[51] Sharia law in Iran officially punishes 'sodomy' with capital punishment upon production of the testimony of four (male) witnesses (*F. v. the United Kingdom*, p. 3).

existence, in the background, of a narrative of Iran as the “grand prison and death chamber for queers” (Shakhsari, 2012, 15).

While national authorities tried to demonstrate how in reality homosexual behaviour is tolerated in Iran, rather than harshly punished, the ECtHR was called to either uphold or dismiss the national authorities' findings. As a result, this narrative of “homophobic versus homophile” countries is reinforced, by means of the work of the ECtHR. Paradoxically, while the ECtHR stated that the conditions for queers in Iran were not as bad as the applicants sought to demonstrate, at the same time, it reinforced the dichotomy between the Western observer and the Oriental observed. It is not, hence, solely the verdict of the ECtHR itself that matters, but the very process of scrutinising the applicants' intimate confessions. It produces a logic of suspicion and stylisation of sexual personages which are recognised as being alien to the citizenry of Europe but which, at the same time, aspire to become sheltered in its midst.

In deciding on these cases, the ECtHR embarks on two operations. On the one hand it sees the individual cases through the lens of suspicion, in order to detect possible frauds from non-genuine asylum seekers. On the other hand, it implicitly reinforces the moralising judgement between liberal countries that grant asylum and illiberal countries that, because of their behaviour towards their citizens, force people to seek asylum elsewhere. It becomes visible, therefore, how the work of the ECtHR may indirectly contribute to the construction of a common European identity based on respect for human rights, from a higher moral perspective than that of the countries whose actions it is called to evaluate. As Reddy (2008, 2859) has suggested, it is possible to see the creation of legal narratives as being characterised by the law's “unique dependence on historical narratives – on narrating the history of a social group as an inextricable aspect of the justice the law promotes”. In this case, the ECtHR helps

to maintain the abstract narrative on persecuted Iranian queers, while simultaneously it gives more weight to the suspicions of national authorities regarding the genuineness of the applicants' claims. The abstract symbol of the persecution – the Islamic Republic of Iran – remains intact as a powerful reminder of what human rights violations look like in practice. The persecuted, however, has not suffered "enough" in order to be admitted to a privileged geo-political space such as that of tolerant and liberal Europe.

Beyond the inevitable degree of continuity between the actions of the judicial and the political bodies of the CoE, there are slightly different stances in relation to the issue of LGBT asylum seekers. Non-judicial bodies such as the Committee of Ministers (CM) or the Parliamentary Assembly of the Council of Europe (PACE) have issued recent recommendations (Committee of Ministers 2010) and resolutions (Parliamentary Assembly 2010), in which they called member states to recognise sexual orientation and gender identity as legitimate grounds for an asylum claim. Both bodies emphasised the "well-founded fear of persecution", one of the tenets of the 1951 Geneva Convention, and, hence, the necessity for the applicants to be credible in framing their asylum claim. The irony is that the members of the CM and the PACE are also members of national governments that systematically scrutinise, with intrusive questions, those same applicants whose rights they are trying to protect in Strasbourg.

Seen jointly, these two sides of the same coin reinforce the perception that in the European arena of human rights, the "Pink Agenda" is more an ideological toolkit, than a concrete working plan. If there was a genuine interest in defending individuals – either citizens or non-citizens – from human rights abuses, applicants would not have to demonstrate a threat of death or an extreme punishment. Demonstrating the existence of a potential danger to them as LGBTI persons, should be enough of a proof. The paradox is, therefore, that while the discourse of LGBT refugees enhances "civilisational

politics" (Bracke 2012), it also hides a fundamental aversion to migration flows in Europe, which are considered to endanger the socio-cultural and economic stability of the continent. The result is, therefore, the juxtaposition of a formal proclamation of the need to "rescue" persecuted queers and the enhanced protection of the integrity of national borders.

While the idea of American exceptionalism on human rights is well discussed in the literature (Fitzpatrick 2003; Ignatieff 2009), the idea of a "European exceptionalism" on human rights issues is less widespread. Nonetheless, it is a strong rhetorical element in the construction of the concept of European citizenship. In the tailoring of this "us versus them" rhetoric, the role of international actors is crucial. Moving away from the CoE and looking for a moment at the EU, statements such as the one issued by the President of the European Council of the EU, Van Rompuy (2010), on the occasion of the International Day Against Homophobia, indicate how LGBT issues might come to the forefront as a new – and problematic – benchmark of European civilisation:

> (…) discrimination on the basis of gender and sexual orientation has ceased to constitute a political cleavage, and is enshrined in the EU's founding act and statement of values. It is something that *distinguishes* [my emphasis] Europe from many other parts of the world (Van Rompuy 2010).

The disturbing aspect of this statement is precisely its presumptuous character in positing the respect of LGBT persons as a founding value of the EU. Van Rompuy himself must know that these issues are currently highly politicised and used, by national governments, in order to promote their queer-friendly image vis-à-vis other

states. The emergence of this continental Euro-nationalist agenda on the rights of LGBT persons seems to emerge as a concerted political effort to establish dichotomies in the international arena, rather than from a genuine commitment to achieve substantial equality of all citizens.

The discussion on the situation of LGBT asylum seekers, however, is not limited to the ECtHR or the eminently political bodies of the CoE such as the Committee of Ministers or the Parliamentary Assembly. The Commissioner[52] has recognised, in his 2011 report, the saliency of the issue of asylum in the context of the protection of LGBTI persons and has called on member states to recognise sexual orientation and gender identity as legitimate grounds on which to grant asylum without the requirement for invasive tests. The work of the Commissioner is interesting from many aspects. Firstly the section of the report concerning the situation of LGBT(I) asylum seekers in the member states of the CoE was based on a close collaboration with UNHCR officers in Strasbourg who could give insights on the agency's guidelines and their reception on the part of national governments. Secondly, the Commissioner was particularly interested in the conditions under which asylum seekers' claims were assessed. In most cases, these conditions were not judged by the Commissioner and his team to be acceptable in terms of respecting the dignity and rights of the claimant. The Commissioner, in particular, put a lot of emphasis on the necessity for training the personnel in charge of assessing asylum claims in order to guarantee that individuals were questioned in a sensitive, appropriate, and non-judgemental way. The Commissioner sought to highlight, specifically, the fact that every asylum seeker's story may be informed by a different set of cultural, religious, or personal motivations that may not immediately be legible to the officer in charge of the case. At the same time,

[52] Commissioner for Human Rights of the Council of Europe, 2011, *Discrimination on Grounds of Sexual Orientation and Gender Identity*, Council of Europe Publishing, Strasbourg, p. 12.

however, an underlying distinction between the rhetoric of “us” and “them” was still visible in the Commissioner's approach. While not as profound as in the work of the political actors of the CoE such as the CM or the PACe, the work of the Commissioner is still informed by a notion of Europe as a “safe haven” for LGBTI migrants in which they can hope for a better future far from discrimination and violence. This notion, true to a certain extent, certainly overshadows the existence of profound inequalities in the treatment of LGBTI asylum seekers across the continent but, also, goes in the direction of strengthening their “otherness” in relation to their host country.

Whilst it can be maintained that the work of the Commissioner on this topic is innovative it still remains informed by a degree of characterisation of asylum seekers as the “vulnerable others”. At the same time, however, the Commissioner's work is important, insofar as it is aimed at raising the awareness of national authorities on the necessity of broadening the spectrum of possibilities existing in narrating human rights violations on the part of “vulnerable subjects” such as LGBT(I) asylum seekers. To some extent, moreover, this approach can be seen as being partially in opposition to the idea of the “normalisation” of LGBTI asylum seekers who have to respond, in the context of their claim, in a way that is intelligible to border authorities. Placing the emphasis on the difference between claimants' accounts, rather than on their presumed similarities, is more likely to counter the stereotypical image of the asylum seeker, as was the case for the archetypical “Iranian queer” described above in the analysis of the case law of the ECtHR. Hence, while still embedded in the normalising narratives of the CoE, the work of the Commissioner can be said to stand out in relation to the possibility of broadening categories of gender and sexuality, trying to substitute stereotypes with actual portrayals of real lived experiences of the individuals involved. This important attempt, however, cannot be said to be always matched with an equally proactive

attitude of national authorities, whose policies often remain strongly informed by a dynamic of systematic suspicion towards asylum seekers' stories that do not seem convincing or "credible" enough in relation to the sexual orientation and/or gender identity of the claimant. This is particularly true, for instance, in cases in which applicants have been already been married or have children, or cannot furnish evidence of having had prior homosexual experiences, or of having cross-dressed or lived as a member of the chosen gender.

Pride Goes East: Tales of Freedom from the "Other Europe"

The mobilisation of LGBTI identities for political purposes in the European arena, however, is not only used in the process of singling out homophobic and transphobic countries outside Europe. Within the context of the CoE, the articulation of specific human rights policies going under the name of the "Pink Agenda" also targets member states in order to expose their structural lack of compliance with the most basic human rights principles. Some of these rights could be, for instance, the right to freedom of expression (Article 10 ECHR) and to freedom of assembly and association (Article 11 ECHR) in relation to the rights of LGBTI persons. A specific, relatively recent, strand of case law has emerged in Strasbourg concerning various instances in which the rights protected by these articles have been violated by national authorities in different member states.

The last few years have seen a proliferation of events, and the establishment of associations, connected with the defence of the rights of LGBT persons, particularly in Eastern Europe. These events or venues, however, have often become the object of attacks or limitations of their activities on the part of both governmental and non-governmental actors in the last decade (Commissioner for Human Rights of the Council of Europe 2011). By means of outright bans, bureaucratic impediments, and/or failure,

on the part of national authorities, to ensure the safety of the participants or members of associations, LGBT persons' enjoyment of the rights to freedom of expression, and freedom of assembly and association, have been seriously curtailed in these countries. This emerging phenomenon, while genuinely requiring attention from political and judicial actors both in domestic contexts and in the context of the CoE, can also be prone, to a certain extent, to different forms of instrumentalisation.

It would be reductive to consider the "Pink Agenda" as only encompassing access to societal institutions such as marriage or the army, or rescuing "persecuted queers" as discussed. This range of diverse queer-friendly policies and actions can be said also to help the cross-cultural transposition of the "Anglo-American identity politics" defined by Stychin[53] (1998, 134). What is meant by this is the creation, across various European cultural contexts, of seemingly "global gays" (Altman 1997) or queers. In this regard, therefore, it appears important to ask to what extent the emphasis on the importance of Gay Pride Parades and similar events across member states can be said to correspond to this process of transposition identified by both Stychin (1998), and in different contexts, by Altman (1997).

The analysis of two recent judgments of the ECtHR, *Bączkowski v. Poland* (2007) and *Alekseyev v. Russia* (2010) can help to shed some light on the possible existence of these dynamics. Since 2007 the ECtHR in Strasbourg has issued three[54] judgements on the banning of Gay Pride Parades and other similar events. The increasing number of applications is due mainly to the existence of a problem in the enjoyment of freedom of expression and freedom of assembly and association in some

[53] Stychin (1998, p. 135) comments on the "narrow" conception of sexual orientation within Europe: "The historical and cultural specificity of sexual identities must also be considered. Within Europe (however defined), the existence and role of lesbian and gay identities, and the relationship between sexual acts and sexual identities, varies greatly. The experience of being a middle-class white gay, professional man living in central London is a world apart from being a working class woman who lives in rural Greece with another woman, or of being a married man who has sex with men in Spain".

[54] The third case is *Genderdoc-M v. Moldova* (2012).

countries, but also to the increasing effectiveness of non-governmental actors at networking and litigating strategically in order to achieve a political goal before the ECtHR.

The possibility of so-called "sexual minorities" carrying out peaceful demonstrations is often considered as a litmus test for countries needing to prove their democratic character or for those aspiring to gain access to the EU (for instance in the case of Serbia[55]). Gay Pride Parades in Eastern Europe become, therefore, invested with a symbolic importance as markers of democracy in these countries. However, this strategic importance attributed to Gay Pride Parades is likely to oversimplify national debates on these issues and favour the radicalisation of these debates and the occurrence of political backlashes in order to counter the various attempts of externally driven "Europeanisation"[56] (O'Dwyer and Schwartz, 2010, 222).

In the two above-mentioned cases the Polish and the Russian authorities had either banned or put into place administrative impediments aimed at preventing the organisation of Gay Pride Parades or similar events. Both applications were successful before the ECtHR, as it was ascertained that the national authorities had infringed Article 11 ECHR. Beyond the verdict itself, however, these two judgements include other interesting characteristics. In *Bączkowski v. Poland*, for instance, the ECtHR implicitly carried out a judgement on the democratic character of the Polish state and society, by measuring the events in Poland against the background of a trio of well-rehearsed terms from its previous case law that describe every democratic state: *pluralism*, *tolerance* and *broadmindedness* (*Bączkowski v. Poland*, para. 63). The use of these terms is far from merely representing a rhetorical exercise for the ECtHR. The

[55] The banning of the Gay Pride Parade in 2013 for the third year in a row sparked protest from the part of the EU, as the country was getting ready to open EU membership talks with the organisation.

[56] O'Dwyer and Schwartz (2010: 222) define 'Europeanisation' as a process by which European norms are internalised.

term *broadmindedness* is fundamentally ambiguous, because of its vagueness – what does it mean to be broadminded? About what? It also points to a space, either physical or symbolic, where *tolerance* can happen. There is a connection between *broadmindedness* and *tolerance*: in this space someone's presence can be endured, while not necessarily accepted. It would be possible, hence, to imagine that the streets, the squares where LGBT persons gather, are considered as appropriate urban sites of tolerance.

The concept of *broadmindedness*, however, is also connected to an evaluation of Polish society in terms of being a "society that functions in a *healthy* [my emphasis] manner" (*Bączkowski v. Poland* 2007: para. 62). In implicitly defining Poland as narrow-minded, the ECtHR places its emphasis on the malfunctioning of its society. The implication is that its narrow-mindedness is caused by a *democratically ill* society that prevents people from freely associating and marching in the street. It is not the reach of the judgment itself that is at stake here, namely the fact that banning peaceful demonstration is undemocratic, but rather the evaluative process that the ECtHR embarks on, that brings to the forefront mechanisms of moral assessment and contrast with 'established' democracies in the rest of the CoE. The picture is that of a dangerous country: a society that does not function in a healthy manner is automatically associated with the existence of a danger, a danger which does not exist in other 'democratic' states where Gay Pride Parades take place.

Another interesting aspect is found in the comment that Johnson (2012, 18) gives of ECtHR's definition of *pluralism*[57]. The author in particular maintains:

[57] "pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion" (European Court of Human Rights, *Baczkowski v. Poland*, 2007: para. 62).

> the recognition of the importance of freedom of assembly on the grounds of 'cultural identity', and its centrality for achieving the 'harmonious interaction of persons', in respect of sexual orientation was an important first step in expanding the Court's Article 11 jurisprudence on homosexuality (Johnson 2012, 187).

While this could be useful in order to define LGBT persons as a sort of "social actor", at the same time, it signals the incapability of the ECtHR of understanding sexual orientation and gender identity as transversal aspects of individuals' lives that cross-cut ethnicity, religion, class, age, and other characteristics. Homosexuality or queerness 'as culture' are problematic concepts, especially if they are employed as an attempt to categorise a group of rights-holders. What is commonly considered as "gay culture" or "subculture", is a specific product of Western – and especially North American - societies. Hence, while the use of "cultural identity" in relation to LGBT persons is a short cut for the ECtHR in order to broaden its concept of "pluralism", it nonetheless contributes to the enhancement of a socio-political dichotomy between the well-protected LGBT Western Europeans and the oppressed LGBT Eastern Europeans.

Gay Pride Parades are increasingly becoming the yardstick to measure the democratic character of European societies. This was evident not only in *Bączkowski v. Poland*, but also by the more recent case of *Alekseyev v. Russia,* in which authorities had banned the marches organised by the plaintiff, a famous Russian gay activist, for several years. It is telling that in the judgement, the ECtHR reiterates the trio of terms *pluralism*, *broadmindedness* and *tolerance* used in the previous judgement (*Alekseyev v. Russia*, 2010: para. 70). This self-referentiality presents a strong normative character, since it reinforces the previous case law and creates an effect of legal circularity. If

analysed under the profile of the emerging “Pink Agenda” on the rights of LGBT persons, it is easy to see how dynamics of qualitative differentiation between Western/Eastern social practices in relation to the organisation of Gay Pride Parades are sketched in the judgment.

Furthermore, throughout the text there is a pattern of “respectability” that emerges in both the arguments of the plaintiff and those of the ECtHR. As for Alekseyev, he maintained in his written submission to the ECtHR that “the participants had not intended to exhibit nudity, engage in sexually provocative behaviour or criticise public moral or religious views” (*Alekseyev v. Russia* 2010: para. 82). This argument seems to echo Davydova's (2012, 33) analysis, in which the author tries to distinguish between Eastern European Pride Parades and the “disturbingly carnivalesque and glamorous Gay Pride Parades of Western European and North American cities”. The sketching of this difference demonstrates how, in Eastern Europe, activists simultaneously try to *embrace* and *resist* the cultural heritage of Western LGBT movements. While Davydova (2012, 33) attempts somehow to *sanitise* the image of these events, at the same time, she recognises that Western partners (both institutional and non-institutional) are crucial in the organisation and the logistics of Gay Pride Parades and rallies in Eastern Europe. In recalling the organisation of the 2012 Lithuanian Gay Pride Parade, in fact, she explains how some of the Lithuanian participants were prevented from physically taking part in the march, because half of the number of spaces allocated by the Vilnius municipality (400 persons in total) were taken up by guests from other Baltic and international LGBT Associations, foreign ambassadors and members of the European Parliament. This small-scale episode shows how, to a certain extent, the oversight of some of these events, may rest in the hand of the more 'experienced' or more 'liberal' Western organisers and defenders of democracy.

The case of *Alekseyev v. Russia* is not an isolated episode regarding the rights of LGBT persons in Russia. It can be said to represent the tip of the iceberg of an international confrontation between the country and Western states, in relation to the harsh stance adopted by the Russian Parliament and President Putin against homosexuality, culminating with the introduction of the bill banning 'homosexual propaganda' in June 2013. While Russia had already been condemned in *Alekseyev v. Russia*, it continued to ban Gay Pride Parades after 2010, and its Parliament had tried to introduce the above-mentioned bill in the national legislation on several occasions. Russia was soon put under surveillance, particularly by the CoE (Johnson 2012, 191). The political reach of this confrontation soon became evident, as the concerted efforts to ostracise and silence Russian LGBT organisations and individuals were met with critical comments from several European institutional actors, both at the EU and at the CoE.

Some comments highlight the extent to which reactions to the Russian crackdown on LGBT persons was framed, by Western European commentators, as an item falling under the "Pink Agenda". The Dutch member of the European Parliament, Sophie in 't Veld (2012), who is very active on issues concerning the rights of LGBT persons, stated:

> such laws are simply unacceptable; if Russia isn't serious about respecting the European Convention on Human Rights, it should simply call the bluff and leave the Council of Europe altogether. And more than statements, these grave human rights abuses must have consequences for the EU-Russia relationship! (Sophie in 't Veld 2012)

in 't Veld's comment is clearly intended as a provocation, as membership in an

organisation, rather than the exclusion of a non-compliant state, is deemed more efficacious in persuading a country like Russia to conform to norms (Jordan, 2003: 660). At the same time, in 't Veld also portrays a partial picture of the CoE and the EU as institutions founded upon the respect of the rights of LGBT persons. At the time of the accession of Russia to the CoE, in 1996, this was far from being the case. There was no broad consensus, among member states, on the importance of rights relating to sexual orientation or gender identity. It was only from the 2000s that systematic attention started to be paid to these issues, by means of resolutions issued by the two main political bodies, the CM and the PACE. The same could be said for the EU.

Furthermore, the "Ban the Homosexual Propaganda" bill becomes the paramount example of how far homophobia can go. Labelling Russia as homophobic and transphobic has ambivalent results. On the one hand, it strengthens the dichotomy between liberal (queer-friendly) and illiberal (homo/transphobic) members of the CoE. At the same time, it is also likely to strengthen political resistance to values and norms seen as being imposed on Russia (or on other countries) directly by the "West".

Even the rhetoric used to condemn the bill, contains problematic elements. Andreas Gross[58], Special Rapporteur for the PACE, commenting on the "Ban the Gay Propaganda" Bill, has stated: "by adopting it, the Duma would demonstrate its hostility to social progress – joining those who, in the past, have argued for slavery or opposed women's right to vote". This statement is problematic for at least two reasons. On the one hand, because it associates Russia with a radical idea of backwardness, therefore positing that liberal member states of the CoE are more advanced because they have long ago abandoned practices assimilable to slavery, or impediments to the enjoyment of political rights by women. On the other hand, this statement also contains a sort of

[58] "PACE Rapporteur calls on Russian Duma not to support Law banning "Gay Propaganda", available at: http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=8383, accessed on 24th February 2013.

psychological repression of Europe's fundamental role in the slave trade in the first place. It masks Europe's history of discrimination behind the human rights violations committed by "others". Gross' statement, therefore, is fundamentally paternalistic and moralistic. In relation to this dynamic, Kulpa (in Kulpa and Mizieliñska 2011, 46) has affirmed: "the hegemonic position of the 'West' in its supposed 'advancement' is taken for granted, a trajectory of modernist civilisation set up. All Eastern Europe needs to do is to 'catch up' with Western modernity, with the gracious help of the 'West'". The result of this harsh dialectic confrontation between two presumed geo-political blocks such as a "West" and an "East", highlights the existence of a *Euro-nationalist* response to a fundamentally nationalist argument of the Russian Parliament against homosexuality. This full-frontal confrontation, however, cannot be said to benefit LGBT(I) persons neither in Western or in non-Western Europe. Rather, it positions LGBT(I) persons contemporaneously as *co-opted subjects* in homonormative terms, and as *outcasts* in heteronormative terms, for instrumental political purposes.

The curtailment of freedom of expression, and freedom of assembly and association in Eastern and Central Europe, have been at the forefront of the work of the Commissioner of Human Rights as well. The Commissioner has put a significant and genuine effort into listening to the instances of the different local NGOs whose activities were seriously impinged on. Furthermore, at the office of the Commissioner, Mr. Alekseyev, the Russian human rights activist and plaintiff in the above-discussed case of *Alekseyev v. Russia* (2010), was a known figure. The Commissioner, and in particular his adviser on LGBT(I) issues, Mr. Van Der Veur, had an incredible network of contacts with activists in almost all the member states, including Mr. Alekseyev. This aspect enormously facilitated the acquisition of first-hand knowledge, by the Commissioner, on the situation in different critical contexts.

At the same time, however, at least in the case of the Russian Federation, not even the mediation of independent actors such as the Commissioner managed to convince the Government to comply with *Alekseyev v. Russia.* Following the judgement of the ECtHR, instead, the country pursued a strong "backlash" towards LGB persons. It is true, at the same time, that the Commissioner has constantly raised, with the authorities he has met, the issue of freedom of expression and freedom of assembly and association. This has been achieved through a monitoring of the developments in relation to this issue in different national contexts. His first viewpoint[59] on this issue dates back to 2006 when bans, in cities like Moscow or Riga, had occurred. The involvement of the Commissioner is part of his duty to monitor the situation in member states, but also to point out violations of human rights standards. However, since there exists a fundamentally political tension on issues concerning sexuality that cross-cut member states, such a top-down approach may be perceived as an external imposition (not just on the part of the Commissioner) and, therefore, lead to a stiffening of national positions, such as in the case of Russia. A passage in the 2006 Commissioner viewpoint highlights an important point in this respect:

> Politicians themselves are also key in this awareness campaign. Former Canadian Prime Minister Paul Martin set a good example when welcoming the conference in Montreal:
>
> "Today's Canada is proud to espouse and promote the inherent values of tolerance and inclusion. I am certain you also share my hope that the discussions at this important event will help change attitudes in our society. You can take pride in your participation in this gathering, which

[59] Commissioner for Human Rights of the Council of Europe, "Gay Pride Marches should be allowed – and protected" , available at: http://www.coe.int/t/commissioner/Viewpoints/060724_en.asp , accessed 30 April 2013.

> demonstrates your solidarity and commitment to eliminating all forms of discrimination related to sexual orientation" (Commissioner for Human Rights of the Council of Europe 2006).

In quoting the former Prime Minister of Canada, one of the countries that has been heralding tolerance of LGBTI persons as a national value, the Commissioner implicitly reinforces, although maybe unconsciously, the potentially divisive character of some statements that may reinforce the us/them dichotomy in terms of queer- friendly and non-queer friendly member states of the CoE. While the intentions of these statements are often noble, their immediate effect is often politically challenging for the addressees, who may perceive a direct critique to their human rights standards, and indirectly, to their national identity. These dynamics appear increasingly influential in determining sharp divisions between different sets of states which can be said to be respectful of the rights of LGBTI persons and those who are not. The consequences of these harsh confrontations are often negative to the "vulnerable subjects" whose protection is at stake, thus paradoxically engendering a form of visibility that enhances violent backlashes and reactions on the part of other social and/or political actors at the domestic level. In the aftermath of this harsh confrontation between Russia and the so-called "West", there was an intensification of episodes of homophobic and transphobic hate crime and speech. Furthermore, a strong rhetoric of Russian nationalism emerged in connection to the presumed Western attempt to "export" homosexuality, which led to a further marginalisation of the LGBTI population in Russia which is still ongoing at the present moment.

Harmful Intentions: Interrogating Homophobic and Transphobic Hate Speech and Hate Crime

Hate-motivated violence and speech against LGBTI persons represent an emerging field of analysis for both human rights activists and human rights institutions. From a theoretical perspective, these phenomena question directly the way in which the "human" is constructed and who may be excluded from its definition. As has already been shown, the work of Butler (2004 and 2009) has highlighted the way in which some lives, including "queer" lives, may not be considered to be *grievable* and how the violence to which they are subjected can be denied. This argument is crucial in this context, as it can be used to explore the way in which some violent acts or utterances are framed, produced, and re-produced, in the linguistic form, in the juridical and political field. Furthermore, the question of what counts as "human" can help one to understand how the subjective positions of the "victim" and the "perpetrator" are created, and how dynamics of de-humanisation of some individuals may take place.

The Council of Europe is an interesting setting for this analysis. Although the case law of the ECtHR on homophobic and transphobic hate crime and hate speech is not particularly developed, there is a growing ferment both at the level of the political bodies of the CoE (the CM and the PACE) and at the office of the Commissioner, concerning the possible strategies to adopt to counter violent demonstrations of hostility. Apart from the inescapable question of how to eliminate the harm inflicted upon individuals, both in a physical and symbolic way, the issue at stake in the debate on hate crime and hate speech is the effectiveness of sanctioning measures and the impact that they may have on structural conditions of deprivation, vulnerability, and discrimination of LGBTI persons.

Some commentators, such as Butler[60] (1997, 36) and Spade[61] (2011, 85), display a complex, often suspicious, attitude towards the inscription in the law of hate crime and/or hate speech. In particular, these authors emphasise the existence of a problematic gap between the level of the juridical and the political condemnation of these acts and utterances. From this perspective, therefore, strategies merely focusing on the punishment of the "perpetrators" of these acts or utterances may be insufficient if they are not supported by an acknowledgement of their *historicity* (Butler 1997) or a structural account concerning the accessory conditions for these incidents to take place (Spade 2011).

Therefore, the problem with hate crime and hate speech does not only reside in the question of what actually counts or not as offensive or abusive. While the mainstream LGBT(I) organisations work on the introduction of provisions in national legislation (especially in the penal code) that consider homophobic and/or transphobic intent in the commission of a fact/act of speech as an aggravating factor, these approaches seem to leave out the broader context in which such episodes maturate and occur. Furthermore, they do not necessarily recognise the often existing connivances between different state/non-state actors who participate (not openly) in the mutual constitution of the dyad victim/perpetrator, thus crystallising the existence of a power relation which is ultimately difficult to act upon. This analysis takes into account the limitations of this approach to hate-motivated crime and speech against LGBTI persons

[60] Butler offers an extremely interesting analysis of the issue of hate speech by calling into direct question dynamics of power giving rise, in the first place, to offensive statements, or statements that are perceived as such. The utterances of hate speech, Butler (1997, 27) argues "are part of the continuous and uninterrupted process to which we are subjected, an on-going subjection (Assujetissement) that is the very operation of interpellation, that continually repeated action of discourse by which subjects are formed in subjugation".

[61] Spade's work and analysis of hate crime and anti-discriminatory legislative measures has to be placed in context of his project of "Critical Trans Politics", by which he seeks to open up the strategies, beyond the mere legal framework, that could engender a substantive change in the quality of life of transgender persons. While his focus is the U.S., many of his arguments have a much broader resonance in current debates on how best to protect "vulnerable" groups that are disproportionately the target of violence in various instances.

not from a purely legal perspective but also considering the broader political and social implications connected to this issue.

A concise genealogy of the concept of "hate" can help one to understand the controversial limits of legislation against hate-motivated crime and speech. Starting from both psychological and sociological, as well as historical and political, accounts of "hate", it is possible to demonstrate its close relationship with notions of "power" on the one hand, and its fundamental indeterminacy and slipperiness as an operational concept. This analysis will also take into account the important role of emotions in the context of the law. In this regard Karstedt (in Greco and Stenner 2008, 418) has argued that "legal institutions and in particular the criminal justice system are the very institutions in society that are designed to deal with the most intense emotion and emotional conflicts, with individual as well as collective emotions". The acknowledgement of the role of emotions in the context of criminal law (and therefore in the context of "hate crime" and "hate speech") can help to assess the extent to which these emotions can also be detrimental to the adjudication of justice, when the rhetoric of victimisation is not coupled with an equally demanding effort to address the conditions that favour the occurrence of these events.

A discussion on the perpetration of "hate crimes" (as well as hate speech acts) should take into account the issue of *motivation* (Green, McFalls and Smith 2001, p. 482). The search for *motivation* is important, in fact, as it sheds lights on the existing link between one's prejudice towards either a "minority" or "target group", and the actual commission of an act or the utterance of a statement. *Motivation*, therefore, is a pre-existent and pondered element to the perpetration of the proscribed act/utterance. In ruling out the possibility of an act/utterance that is the product of an accident, it brings to the forefront the intention to harm. To this extent, therefore, hate crime and hate

speech are an expression of power with its ubiquitous potential to hurt.

At the same time, however, the concept of *motivation*, beyond the most immediate psychological roots, may also have broader sociological underpinnings. The traditional definition of hate which seems to focus on the "intense desire for the annihilation of its object" (Royzman, Mccauley and Rozin in Sternberg 2005, 12) exists, nonetheless, in an ambivalent relationship with the necessity of the survival of the target in order to become the object of hate. Such ambivalence leaves room for a focus on power relations and imbalances of power in relation to the articulation of the victim/perpetrator dyad both within and outside the sphere of the law.

However, a narrow focus on the micro-level or subjective domain of action is not sufficient to account for the way in which these acts/utterances take place in a broader social, cultural, and political context. Who decides what and when something is offensive? Is it possible to have a universal definition of "hate crime" and "hate speech" that actually also contemplates the description of the content or range of proscribed facts/utterances? More narrowly, is it possible to speak about European definitions of "hate crime" and "hate speech"? Green, McFalls, and Smith (2001, 486) suggest that historical perspectives on hate crimes, for instance, may shed a different light on the same act that is committed: "the manner in which societies define and debate hate crime depends on their political-cultural tradition, so that a similar occurrence might be termed a racial incident in Britain, an attack on republican values in France, and a problem with refugee policy in Germany".

At the level of distinct nation-states, therefore, some events may be interpreted in different ways, not just on the grounds of a presumably "neutral" political and cultural tradition, as Green, McFalls, and Smith affirm, but also depending on the strategic and – maybe instrumental – use that states want to make of these events. Far

from endorsing a cynical stance on the genuine efforts undertaken in order to tackle violent attacks or utterances, this section will try to analyse anti-"hate crime" and anti-"hate speech" policies and legal instruments from a critical perspective. This outlook will be useful in considering to what extent legislative measures against hate crime and hate speech may often be informed by the existence of hidden political agendas that aim to foster unequal distribution of chances and power between different subjects or groups in the population.

That's Offending! Defining and Challenging the Concept of Hate Speech

Defining "hate speech" may amount to a much more complicated operation than merely trying to classify utterances according to the degree of injury that they cause to individuals. In "Excitable Speech" Judith Butler (1997) has suggested, somewhat provocatively, that hate speech "becomes the legal instrument through which to produce and further a discourse on race and sexuality under the rubric of combatting racism and sexism" (Butler 1997, 97). Her argument calls into direct question the role of the law as *productive* of hate speech in the first place. The question to ask, in the context of this analysis, is whether a supra-national institution, such as the CoE, can have a productive role in the definition of hate speech as a (punishable) phenomenon that can be tackled, or, in defining what it is, do they deliberately operate a *selection* (as Butler suggests) of what is held to be offensive or not?

As has already been illustrated, hate speech and hate crime in relation to sexual orientation and gender identity, have been addressed only very recently. The first comprehensive study of homo- and transphobic hate crime and hate speech has only been undertaken by the Fundamental Rights Agency (FRA)[62] of the European Union in

[62] Presenting the Findings from the Largest-ever LGBT Hate Crime and Discrimination Survey,

2013. Furthermore, while a significant number[63] of judgments have been issued on the possibility of "anti-gay" discourses falling within the scope of Article 10 ECHR on freedom of expression, an explicit discussion on the presumed existence of homophobic hate speech has only been addressed, by the ECtHR, in 2012 with the case *Vjedeland and Others v. Sweden*. This case is interesting insofar as it shows how difficult it is for the ECtHR to contextualise and define hate speech in the first place. *Vjedeland and Others v. Sweden* originated in Sweden where the five applicants (belonging to an organisation called *National Youth*) had distributed, in an upper secondary school, some leaflets in students' lockers. These leaflets defined homosexuality as a "deviant sexual proclivity", as well as linking it to the diffusion of HIV and AIDS and to the attempt to lobby in favour of paedophilia (*Vjedeland and Others v. Sweden,* 2012: para. 8). After having been found guilty of "agitation against a national or ethnic group" by the Swedish Supreme Court, they submitted an application to the ECtHR alleging a violation of their right to freedom of expression (Article 10 ECHR). The ECtHR ascertained the existence of interference on the part of the Swedish authorities with their freedom of expression, but considered that this interference was a justified restriction under paragraph 2 of Article 10 ECHR, motivated by the necessity to protect the "rights and reputation of others" (*Vjedeland and Others v. Sweden,* 2012: para. 49).

In his analysis of the case, Johnson (2012, 179) has argued, by referring to the dissenting opinions of Judges Spielmann and Nussberger, that the ECtHR has substantially failed in its detailed definition of what "offensive statements" are. The passage Johsnson refers to is the following: "(...) although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial

available at: http://fra.europa.eu/en/event/2013/presenting-findings-largest-ever-lgbt-hate-crime-and-discrimination-survey , accessed 03 June 2013.

[63] One important case to this respect is European Court of Human Rights, *Jersild v. Denmark*, Application No, 15890/89, Judgment 23 September 1994.

allegations" (*Vjedeland and Others v. Sweden*, 2012: para. 54). The ECtHR has, therefore, adopted a very prudent approach in defining what can "directly incite to hate" and what, instead, could be defined under the rubric of an "allegation". Furthermore, in judging the severity of the act of distributing leaflets, the ECtHR placed a strong emphasis on the intended audience for the leaflets, namely students (*Vjedeland and Others v. Sweden*, 2012: para. 56).

This case shows how the question of language, and the semiotic of language, is crucial in the definition and acknowledgement of "hate speech". Does a combination of specific words create offensive language? Can the utterance of some words determine the likelihood that certain acts will be committed? In their concurring opinion on this judgement, Judges Yudkivska and and Villiger (*Vjedeland and Others v. Sweden*, 2012: p, 20) quote the U.S. constitutionalist Bickel who, referring to hate speech, affirms: "where nothing is unspeakable, nothing is undoable". This quote invites one to reflect on the possibility of adopting objective criteria to evaluate the harmful potential of words. This problem is akin to the one encountered in relation to Article 3 ECHR, and the definition of the "degree of severity" that certain behaviours or utterances have to attain in order to constitute a violation of the above-mentioned provision. The interpretation of the degree of severity that some behaviours may have attained can be subjected to heavy scrutiny and, hence, be subtracted from the logics of "objectivity".

It is possible to affirm, therefore, that the definition of a homophobic "offence" may partially depend on the interpretation of the judges of the ECtHR in this case. It is important to ask, in this regard, why the ECtHR did not engage with the content of such homophobic speech acts and has, instead, tried to skip the substantial analysis of the "serious and prejudicial allegations". It could be suggested that in relation to specific issues, such as the protection of the right to freedom of expression, the margin of

appreciation left to the States is particularly wide and a strong autonomy is given to them to decide whether facts or acts are attuned to their specific national cultural and political environment. This sort of "cultural relativism", however, may sometimes serve political purposes, rather than being motivated by a sincere desire to protect the rights of individuals.

It is, therefore, possible to read *Vjedeland and Others v. Sweden* (2012) as an attempt, on the part of the ECtHR, of substantially by-passing this thorny question and leaving unchanged the margin of manoeuvre afforded to the states in deciding what could be offensive or hateful under specific cultural circumstances. Obviously this does not imply that an absolute discretion is afforded to member states. Yet, in contexts in which often official discourses on homosexuality are produced in accordance with different nationalist, religious, as well as political actors, it is easy to see how hate speech may be seen as imposing limitations on the exercise of a disciplinary power, broadly speaking, that regulated mores and costumes, as well as promoting – predominantly at the formal level – freedom of expression.

If so far the case law of the ECtHR on homophobic hate speech is only limited to *Vjedeland and Others v. Sweden* (2012) concerning homophobic hate speech, the political bodies of the Council of Europe, namely the PACE[64] and the CM[65] have endorsed a zero-tolerance policy on hate speech and hate crime, at least in their official acts. Often, however, scepticism about the usefulness and effectiveness of human rights involves a recognition of the existence of a significant gap between official proclaimations made on these topics and the actual practice of human rights found in

[64] Parliamentary Assembly of the Council of Europe, Resolution 1728 (2010), *Discrimination on the Basis of Sexual Orientation and Gender Identity*, available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1728.htm , accessed 04 June 2013.

[65] Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation and Gender Identity, available at: https://wcd.coe.int/ViewDoc.jsp?id=1606669 , accessed 04 June 2013.

member states of the CoE. In many instances, the official condemnation of hate speech and hate crime, in fact, fails to be coupled with human rights strategies or policies that address the factors contributing to the perpetration of some acts. There is, therefore, no complete correspondence between the intention to eradicate violent acts and utterances, and the efforts undertaken by the states to actually address the social, economic, cultural, and political factors that allow this violence to take place.

As for the structural factors enhancing the creation of a socio-political environment that increases the chances that violent acts or speeches are made, it is important to stress that, in some cases, hostility towards a specific group may be influenced, among other factors, by unequal chances of access to employment, entitlements, and other forms of socio-economic support. Identifying minority groups as "scapegoats" can be an easy strategy on the part of political parties, as well as other organised groups. To this extent, merely intervening at the end of the causal chain, that is to say once the hate speech or the hate crime has been perpetrated, is a superficial countermeasure and a palliative for a situation of profound frustration and social malaise. It would be different if those acts and utterances were also placed in the context of their occurrence. Human Rights campaigns and strategies aimed at combating anti-Roma prejudices and violence, for instance, will have little effect if they are not coupled with interventions that try to address poverty, social exclusion, and marginalisation. Similarly, trying to combat homophobic and transphobic violence without addressing the ways in which gender non-conformity is still highly stigmatised and heterosexuality is treated as the "default" characteristic, is problematic at the very least. Questioning the gender binary or discarding the heterosexual matrix of society, at the same time, requires a much stronger engagement at both a symbolic and operational level.

While the ECtHR does not have a direct say in what the state should do, it could

nonetheless begin to address this important aspect in its case law. This approach, however, requires a questioning, on the part of national institutions, but also on the part of human rights institutions run by members of governments, of the way in which they favour – or omit to condemn – the perpetration of injustices against some sectors of the population on the part of other actors. The ways in which authorities may contribute to enhancing these fractures may vary, ranging from differential allocation of economic resources, unequal enforcement of criminal sanctions, and through an unequal distribution of conditions of security and insecurity across space and time.

It could be anticipated, judging from the increasing attention paid to these issues by different institutional and non-institutional actors, that issues of hate crime and hate speech will be increasingly brought before the ECtHR in the future, leading to a consolidation of the case law on this matter. In the following section, concise considerations on the concept of hate crime and possible future developments at the ECtHR, and also the work of the Commissioner on these two topics, will be analysed. In fact, it is possible to speak of a concerted strategy that the Commissioner has devised in order to address both hate crime and hate speech in the context of his awareness-raising efforts. Furthermore, the actions undertaken by his office have also found resonance in the subsequent work of the Fundamental Rights Agency (FRA) of the European Union that has undertaken the largest-ever survey on both themes in 2013. This collaboration has been characterised by a synergic approach to the "urgent" problems that LGBTI persons are currently living with in Europe. The emphasis on the existence of widespread patterns of violence is one of the prominent preoccupations of these two actors and will be addressed in the remainder of the chapter.

The Limits of Legal Protection from Homo- Transphobic Hate Crime: a Critical Assessment

The recognition of homophobic and transphobic acts is a very recent political and legal phenomenon. It is suggested here, however, that specific power dynamics are at work in the way in which institutional actors define the "victims" of these acts, and the solutions they propose to address the problem. Far from dismissing the urgency of preventing hate crimes or overlooking the problematic relationship between hate crimes and state-sponsored violence against specific groups, this analysis seeks to shed light on the ambiguities in the advocacy of anti-hate crime legislation. On the one hand, this section of the analysis is aimed at showing how the creation of victims and perpetrators follows a logic of differential empowerment between them. On the other hand, this research also indicates that there is a minimisation of the importance of structural factors enhancing the likelihood of a hate crime to occur and placing some individuals in the position of becoming prone to harassment or other forms of physical and psychological abuse.

In the 47 member states of the Council of Europe, there is no homogeneous recognition of hate crime in the criminal law. Less than a half of the member states[66] have provisions that condemn incitement to hatred and violence on the grounds of sexual orientation, and an even smaller number of states considers the homophobic intent an aggravating factor. The figures are dramatically lower for transphobic intent or incitement to hatred. This disparity across Europe highlights the existence of a problem in the recognition of the gravity of the phenomenon. As Phillips and Grattet (2000, 567-568) have suggested, some legal categories, such as "hate crime" are of difficult definition in the domain of the law. In the process of "meaning-making" (Phillips and

[66] Commissioner for Human Rights of the Council of Europe, 2011, *Discrimination on Grounds of Sexual Orientation and Gender Identity*, Council of Europe Publishing, Strasbourg, p. 52.

Grattet, 568), in fact, social factors that participate in such a definition are often neglected in favour of a purely legal account of the production of legal meaning. Furthermore, while the national legislator may proscribe "hate crimes" in the criminal law, it is up to the different Courts to fill this provision with content, by means of a judgement on the extant case, potentially opening the way to different interpretations.

Transcending the domain of the nation-state, this dynamics can be applied to the work of the ECtHR. To date, no complaints exist under this specific rubric, but it could be anticipated that cases will reach the ECtHR in the future, thanks also to the efforts of third-parties (mainly NGOs) intervening as *amicus curiae*. The challenge will be, therefore, how to use the ECHR in order to encompass human rights violations resulting from hate crimes for which the state has not provided adequate redress or protection. As the situation stands now, in fact, neither hate speech nor hate crime could be connected directly to any provision of the ECHR. Would it be possible to encompass hate crime under the scope of Article 3 ECHR against torture? While it may seem adventurous to frame this issue under this particular angle, such speculation is needed against the background of the increased attention to homophobic hate crime and hate speech. So far, in fact, the Recommendations issued by the political actors at the CoE (the CM and the PACE) predominantly target member states, and they take for granted the states' willingness to improve the situation and effectively counter various forms of violence.

It is important, however, to try to glimpse beyond the current situation and try to anticipate whether the ECtHR will become a prominent actor in the fight against "hate crime" or will act as an observer and adjudicator in the last instance. This presumably predictable role of the ECtHR, however, should not to be confused as being the only legitimate voice existing within the institution. Political actors such as the CM and the PACE have an important role in the "meaning-making" process. At the same time,

independent actors at the CoE, such as the Commissioner, may play an important role in debating and broadening the concept of hate crime "from below", trying to involve human rights defenders and activists in the definition of the priorities and critical issues to address at an institutional level.

In relation to the issue of homophobic and transphobic hate crime, the Commissioner has devoted significant attention both in his 2011 report and in other public statements prior to this publication. As has already been illustrated in the previous chapter, the official launch conference of the report in June 2011 was characterised by a strong emphasis on the existence of extremely high rates of violence (either verbal or physical) against LGBTI persons and also a dramatic – and quite paradoxical – lack of data across the 47 member states. The stubbornness with which the office of the Commissioner has tried to collect data on the rates of homophobic/transphobic violence across the continent and to map different kinds of incidents is surely admirable in light of the reluctance of many member states to collect or share their figures. In this regard, the collaboration of the Commissioner with the Organisation for Security and Co-operation in Europe (OSCE) during the drafting of the 2010 Report, in order to gain such data, has undeniably contributed to putting in the forefront the issue of how member states ensure protection from discrimination and violence for LGBTI persons.

This endeavour, however, has proved to be a difficult terrain of action because of the problematic negotiations with national governments concerning the necessity to alter their actions and strategies in order to eradicate hate crime. The Commissioner, in fact, had to strategically negotiate the necessity of giving a complete picture of the phenomenon, with the necessity of not engaging in a "naming and shaming" of the states that complied the least, seemed accomplices, or actively engaged in the

perpetration of these acts. It was very clear, during the drafting of the report, that the "naming and shaming" had to be avoided. At the same time, however, there was also an intention to be as comprehensive as possible in the analysis, and also recognise the work of the different NGOs that had been consulted during the empirical research, and which had contributed by pointing out the cases in which state actors had omitted to respond to acts of homophobic and transphobic violence or had a somewhat indirect form of responsibility in their perpetration. The dedicated section in the report to these examples[67] gives an account of some of the episodes which occurred in countries such as Turkey, Austria, the United Kingdom, Ukraine, and Azerbaijan. However, this very sketchy summary is the result of both a lack of systematic data collection/provision on the one hand, and the effort to avoid the exposure of some states standing out as being "homophobic" on the other.

There is, therefore, an impression of an uncomfortable juxtaposition between different sets of data which highlights the embarrassing silence surrounding LGBTI persons and violent acts perpetrated against them across the member states of the CoE. This odd effect of juxtaposition shows the difficulty in categorising specific events as "hate crimes", depending on the national authorities that register them. This difficulty originated, in fact, at the level of the single member states. The slipperiness of the concepts of "hate crime" and "hate speech" is, therefore, reflected also in the empirical research carried out by the Commissioner meant precisely to fill this gap. Accounts of different NGOs throughout Europe may flesh out different episodes as being "hate crime" or "hate speech" while leaving others outside. Coupled with the reluctance of authorities to categorise such episodes as being motivated by homophobic or transphobic intent, it is possible to see how these become very unstable legal categories

[67] Commissioner for Human Rights of the Council of Europe, 2011, *Discrimination on Grounds of Sexual Orientation and Gender Identity*, Council of Europe Publishing, Strasbourg, p. 54-56.

that need to be addressed in a critical and multi-dimensional way.

Conclusion

These brief considerations on the concepts of "hate crime" and "hate speech" are far from providing a complete discussion of the issues at stake when violence motivated by a prejudice, a bias, or a hostility towards a specific group or minority takes place. These issues would, in fact, deserve a much more thorough and in-depth analysis. However, the intention has been that of highlighting how difficult and misleading it could be to merely rely on the legal definition of such terms, as the reality of different national contexts may hide a reluctance to recognise, define, and combat such types of violence that call into direct question state actors. The 47 member states of the Council of Europe represent a diverse field of inquiry, in which different social, cultural, political, and legal factors play a role in the definition of specific human rights issues and their consequent protection – or refusal to do so – on the part of institutional actors. To this extent, therefore, while it is not possible to anticipate whether substantive developments will take place at the level of the European Court of Human Rights on these issues, it is nonetheless possible to discuss their strategic importance in terms of constituting a powerful instrument of critique, on the part of more "queer friendly" states towards those states perceived as displaying patterns of homo- and transphobic violence. Throughout the chapter an argument has been advanced regarding the extent to which member states (usually Western European) may be proactive in trying to "set the pace" for other member states on their human rights policies and legislative measures. The sets of issues discussed, ranging from freedom of expression, of association and assembly, the entitlements of LGBTI asylum seekers, and the emerging issues of "hate crime" and "hate speech", have in various ways highlighted the existence of this tension between a "civilising West" and a "rest of Europe" that seems to be in

need of being civilised. The political instrumentalisation of the rights of LGBTI persons, therefore, seems an inescapable dimension of analysis that sheds light on the necessity of devising a more effective system of protection that gives more voice to the individuals concerned, rather than leaving the monopoly of speech to institutional (both national and international) actors on these human rights matters.

So far, the analysis has been limited to sexual orientation and the way in which it is framed in the case law of the ECtHR and in the work of the Commissioner. However, it would be inexact to consider sexual orientation and gender identity separately, since in each individual there is an interpenetration of sexual orientation and gender identity. Considering them separately would mean applying that compartmental view on human rights, which has been criticised so far. At the same time, however, for the rigour of the analysis itself, there is some usefulness in distinguishing the case law on sexual orientation from the one on gender identity. This does not rule out the possibility that between these two strands of analysis exists a line of continuity or some points of contact. In fact, as will become apparent in the next chapter, there are many similarities in the construction of legal arguments by the ECtHR and the language employed.

Similarly, the work on gender identity by the Commissioner is carried out in a concerted way with that concerning issues relating to sexual orientation. Bearing in mind such interrelatedness between sexual orientation and gender identity is crucial in carrying out an analysis that also investigates the assumptions on which the binary system of gender rests and to single out the inconsistencies or shortcomings in the reasoning of both the ECtHR and other institutional human rights actors, such as the Commissioner. The lack of a substantial questioning of the binary organisation of gender(s) can be said to be, in fact, one of the current limitations of the CoE's approach to issues relating to gender identity. The following chapter will address the critical

issues at stake in the attempts to go beyond the biological criteria of "gender" (both at the legal and political level) and will identify the possible developments in the case law of the ECtHR and in the work of the political bodies of the Council of Europe.

Chapter Eight - Disciplining Bodies through Indifference: Transgender and Intersexual Persons Facing the Silence of the Law

Gender and sex play a fundamental role in the description of what counts as "human" and can be understood as both a *descriptive* and *prescriptive* category. In the normative domain, these descriptive and prescriptive dimensions are deeply intertwined: a legal subject is inevitably gendered and with specific sexual "characteristics". Particularly in relation to the importance of *possessing* a biological sex, in his introduction to the memoirs of Herculine Barbin[68], Foucault (Barbin 1980, VII) grasps well the anxiety revolving around the quest for stable gender categories:

> Do we truly need a true sex? With a persistence that borders stubbornness, modern Western societies have answered in the affirmative. They have obstinately brought into play this question of a 'true sex' in an order of things where one might have imagined that all that counted was the reality of the body and the intensity of its pleasures (Barbin 1980, VII).

Starting from the symbolic and material importance assigned to the determination of a true "sex", as well as the consequent attribution of a gender and a gender identity[69], this chapter offers a chance to explore the ways in which transgender and intersexual persons and their rights claims radically challenge the law by defying and destabilising the binary categories of *male* and *female*. In this regard, the case law of the ECtHR offers an interesting insight into this problematic relationship between gender non-

[68] Hercule Barbin was a French "hermaphrodite" living in the nineteenth century, whose memoires had been found by Michel Foucault in the archives of the French Department of Public Health.

[69] Whittle (2002, 6) defines 'gender identity' as: "(...) the total perception of an individual about his or her own gender. It includes a basic personal identity as a boy or girl, man or woman, as well as personal judgments about the individual's level of conformity to the societal norms of masculinity and femininity."

conforming individuals and the protection of human rights. A thorough discussion of the rights of intersexual persons has not yet occurred in Strasbourg. It can be expected, however, that interesting developments will take place within the CoE.

As has been illustrated for the case law on sexual orientation, language is an important instrument, employed by the ECtHR, for the definition of the legitimate rights-bearer. In its case law, in particular, the ECtHR exclusively employs the term "transsexual" (post-operative[70], willing to identify with one gender), thus *de facto* denying legal subjectivity to the broader category of transgender persons. The exclusion of those who have not irreversibly "crossed" the line of gender highlights the disruptive potential that these forms of identification represent for the clear definitions of genders within the domain of the law. Furthermore, this implicit erasure of transgender persons in the case law of the ECtHR undeniably marginalises those individuals who refuse to fall entirely into one gender category.

This chapter focuses on an analysis not just of the utterances, but also of the "unsaid" of the ECtHR in relation to the rights of transgender and intersexual persons. In the context of human rights, sometimes the "unsaid" speaks more loudly than clear proclamations. In the case of the rights of transgender persons this is even more significant, given their long-standing social, political, and legal invisibility. However, the obliteration of the existence of gender non-conforming individuals has also broader implications for society as a whole, since it confirms the crucial importance of gender, and the anxiety connected with the compliance to gender norms, that invests every individual.

The analysis of the case law that will comprise the object of this chapter is

[70] The expression "post-operative" refers to individuals that have undergone different sets of irreversible surgical procedures, aimed at modifying their secondary sexual characteristics, in order to bring coherence with their preferred gender. They may involve various genital surgeries, as well as sterilisation procedures.

organised around three main axes. Firstly, the issue of the recognition of one's preferred gender is approached, with a thorough socio-legal and semiotic analysis of some landmark cases such as *B.v. France* (1992), *Goodwin v. the United Kingdom* (2002) and *L. v. Lithuania* (2007) as well as references to earlier case law. Secondly, the analysis will consider another strand of the case law of the ECtHR, touching on the relationship existing between the recognition of one's gender and the economic and financial implications descending from such recognition (*Van Kück v. Germany, Grant v. the United Kingdom* 2006, *Schlumpf v. Switzerland* 2009). As was the case for the recognition of same-sex couples, it will be suggested that the recognition of specific sets of rights for transgender persons has an undeniable, and often problematic, financial dimension that directly calls into question the interests of the responding states. Thirdly, time is devoted to the discussion of those cases, decided by the ECtHR, that deal with the family life of transgender (transsexual) persons (*Parry v. the United Kingdom* 2006*, H. v. Finland* 2012). These cases raise similar issues in relation to (hetero)normativity that has already been encountered in the analysis of the case law of the family life of LGB individuals. While talking about a trans-normativity (as compared to "homonormativity") would be theoretically adventurous, at the same time, various configurations of normativity for transgender persons can be explored in relation to the recognition of different models of family. A separate sub-section will explore the socio-legal aspect of the regulation of intersexual identities and traces possible profiles in this field in regard to the role of the CoE.

This socio-legal analysis will also be coupled with observations undertaken at the Office of the Commissioner for Human Rights of the CoE, who has carried out extensive work on issues concerning the rights of transgender persons and, to a smaller extent, on the rights of intersexual persons. The work of the Commissioner on the rights

of transgender persons is fascinating and important, as it represents a true breakthrough in the history of the CoE. By building a steady co-operation with the network of European, as well as non-European, transgender activists, the Commissioner demonstrates how it is possible to broaden institutional understandings of human rights by giving voice to human rights advocates. The limitations and constraints of this approach will also be demonstrated, showing how the institutionalisation of transgender activism may lead to new forms of normalisation within the context of the CoE.

Blurring the Lines of Sex and Gender: a Radical Challenge to the Law?

Transgender and intersexual experiences and identities are connected by a sort of specular relation, according to Ben-Asher (2006, 55), in relation to the different roles played by medical intervention and expertise. While transgender activists seek to promote the right to have surgery performed (and recognised as necessary), intersexual activists are lobbying for a moratorium on paediatric genital surgeries on intersexual children and new-borns, seen as harmful and unnecessary (Chase 1998). While these claims seem to be antithetical, they actually have in common the same goal: a radical disruption of gender norms. In this regard, Butler (2004, 6) has suggested that both interesexual and transgender persons "challenge the principle that a natural dimorphism should be established at all costs".

In this overt challenge to the law, the body occupies a central position. As the locus in which the "problem" can be said to have origin, it is, simultaneously, the place where a solution can be found. As such, however, the body is also the object of continuous and incessant reconfigurations, both in the legal and in the social domain. As Hyde (1997, 6) has maintained, there is no single understanding of the body:

> The very ease with which we construct the body as machine, as property, as consumer commodity, as bearer of privacy rights or narratives, as inviolable, as sacred, as object of desire, as threat to society, demonstrates that there is no knowledge of the body unmediated by discourse. And those constructions (…) are never innocent (Hyde 1997, 6).

Given these multiple, and sometimes conflicting, discourses on the value and characteristics of bodies, it is important, for the purpose of this analysis, to understand why transgender and intersexual bodies are seen to transgress so radically the boundaries of the normative, and why the regulation of bodies along the lines of the sexual binarism, is a paramount preoccupation of both nation-states (Boyd 2006, 421) and, by reflex, human rights actors, such as the CoE.

The Normative Creation of Transgender Identities

The creation of legal transgender/intersexual identities serves the purpose of preserving normative structures of gender and ensuring uniformity and compliance (Garfinkel 2006, 158; Spade 2006, 136). The existence of a transgressor to the norms of gender symbolically reinstates the importance of the binary categories of *male* and *female*. Furthermore, complying with the tacit norms of gender guarantees the acquisition of legal and social intelligibility (Boyd 2006, 421). Through this compliance, individuals are "read" as members of the desired – or ascribed, in the case of intersexual persons – gender. Gender fulfils, therefore, various crucial social and legal purposes. Rothblatt (1995, 58) has identified at least four reasons that justify such tight classification:

[the] allocation of rights and responsibilities;

[the] maintenance of civil order (morality);

[the] identification of its members;

[the] aggregation of demographic statistics (census);

All these functions provide a snapshot of the population and facilitate the distribution of rights and responsibilities, as well as ensure the conservation of a stable social (and moral) order. On the other hand, however, it has also been suggested that the strict enforcement of gender norms is not as straightforward as it might seem. Faithful (2010, 102) has observed that the pervasive and imperative character of gender norms, as well as the severity with which they are enforced, derives from a fundamentally shaky basis on which they rest. Hence, the enforcement of gender norms is said to require "severe regulation in order to ensure uniformity" and a constant policing on the part of the various institutional and non-institutional actors entrusted with this responsibility.

The pathologisation of transgender identities is an important historical and medical phenomenon, whose relevance will become apparent in the context of discussing the case law. For this reason it is useful to make a quick reference to the emergence of this as a healthcare issue. It was only during the 1950s that medical professionals[71] started to take interest in the definition of "transsexualism" as a pathological category. To these early categorisations followed an inclusion of "transsexualism" in the Diagnostic and Statistical Manual III (DSM), under the rubric of "Gender Identity Disorders (GID)" which was only removed in the fifth edition issued in 2012[72]. According to this description contained in the DSM III and IV,

[71] David Cauldwell is the first to have used the term "transsexual" in 1949, while Harry Benjamin wrote the first academic paper on "transsexualism" in 1953 (Whittle 2002, 21).

[72] Transgender activists had campaigned for the removal of transsexualism as GID in the DSM V which could signify a departure from the pathologisation to which transgender persons were subjected. The DSM V, in practice, has replaced the "GID" diagnosis, with a diagnosis of "Gender Dysphoria" (incongruence between one's experience of gender and gender assigned at birth). This change,

"transsexualism" was to be defined, substantially, as a mental illness.

As will be discussed later, the issue of the pathologisation of transgender and transsexual persons has important social and legal implications. While retaining the diagnosis of "mental disorder" may be useful in some contexts such as when healthcare procedures and reimbursements are concerned (Whittle 2002, 20), it may well prove to be a counterproductive approach under other profiles, mainly because it fosters and reproduces a pathological understanding of trans identities (Butler 2004, 76). Furthermore, medico-legal alliances are seen as being problematic (Sharpe 2002; Spade 2006; Cruz 2010; Davy 2011), especially when the boundaries between the competences of the law and those of medicine become blurred (Sharpe 2002, 8; Spade 2008, 37) and medicine is invested with an authority that becomes quasi-normative.

It is precisely in relation to the interrelationship between the law and medicine that a last set of considerations needs to be brought forward. An under-researched aspect of the process that leads to having one's gender change recognised is the widespread requirement that the person become totally sterile. Surgery leading to irreversible sterility, as Whittle (2002, 162) has suggested, can be harmful and dangerous for some people, because of existing health conditions or because of the invasive character of some surgical interventions, such as hysterectomy, which satisfy the requirements of national legislation without real benefit for the person concerned. While a great number of transgender persons decide to undergo such procedures, others feel compelled to do so by virtue of the requirements imposed by law in order to have one's official records and documents amended. Enormous disparities exist in national legislation across Europe on change of gender and the controversial topic of compulsory sterilisation for transgender persons, which has been framed as a human rights issue in front of the

however, is far from being unproblematic, as it raises other concerns in relation to litigation strategies in the Courtrooms and in relation to healthcare provisions.

ECtHR (Sivonen 2011; Cojocariu 2013) and is starting to be debated in various fora.

Gender Identity in the Case Law of the European Court of Human Rights: Just Restating the "Normal"?

The ECtHR has been a real battleground for the rights claims advanced by transgender and transsexual persons during the last three decades. Sandland (2003, 201) has argued, however, that rights to transgender persons still seem to be conceded by the heterosexual majority according to a process of normalisation. This entails a subsequent effort to "reinstate and affirm the proper" on the part of the ECtHR (Sandland 2003, 201). The analysis of different strands of case law on the rights of transgender persons can be said to confirm Sandland's intuition insofar as it highlights the contorted approach to these issues that the ECtHR has adopted, also demonstrating a limited knowledge of the sociological data available on the different experiences, identities, and kinship and life arrangements of transgender persons across Europe.

Recognising Gender, Normalising Individuals

It could be argued, provocatively, that the case law of the ECtHR concerning transgender persons is a case law on the "right to pass" as a member of the sex opposite to the one assigned at birth, falling entirely within the boundaries of "liberal transsexual politics" (2002, 502). Beyond the provocations, as well as the political implications of the "passing strategy", it is important to recognise how this discourse about being fully accepted as a member of the preferred gender has strongly permeated the narratives of the ECtHR. In this regard, narratives on one's preferred gender in the courtroom are made the object of close judicial scrutiny according to what Sharpe (2002, 31) has described as the "hermeneutics of suspicion"[73], aimed at verifying the authenticity of the

[73] The "hermeneutics of suspicion" is an expression coined by Ricoeur (Pepa 2004) and indicates a way of interpreting things aimed at unveiling the hidden political interests concealed by the superficial

applicants' gender identity.

This analysis tries to break from the traditional approach to the case law of the ECtHR based on an assessment of the "evolution" of the judgements of this judicial institution. For this reason, the early cases decided during the eighties[74] have been omitted. The three chosen cases, instead, concern the legal recognition of the gender of post-operative transsexual persons, and exemplify very well that process of *hyper-regulation* and *erasure* of transgender persons described by Spade (2009, 289), by which conflicting legal norms and administrative policies and measures create an "incoherent regulatory matrix" that renders individuals vulnerable in terms of discrimination, violence, and economic instability. What is striking, however, is that while the ECtHR strongly calls on member states to solve the various implications of this incongruence, it nonetheless reproduces this situation of vulnerability through its judgements.

The first of these cases, *B. v. France* (1992), is considered the first partially successful judgement in terms of the recognition of the right of trans(sexual) persons to have their preferred gender recognised. After the failures of applicants in *Rees v. the United Kingdom* (1986) and *Cossey v. the United Kingdom* (1990), the ECtHR substantially overturned its previous case law on this subject. While this change is surely surprising, the most interesting aspect is the presence of a thorough speculation on the authenticity of the applicant's transsexuality and a strong rhetoric of opposition between "true" and "false" transsexual persons. It can be argued, in fact, that the above-mentioned "hermeneutics of suspicion" (Sharpe 2002, 31) permeating the case law of the ECtHR on transgender rights is particularly strong in the instant case.

The case concerned a male to female (MtF) post-operative transsexual person

level of a text. In Sharpe's use of this expression, the text is represented by the personal narratives of transgender applicants.

[74] *Rees v. the United Kingdom* (1986), *Cossey v. the United Kingdom* (1990).

who had undergone gender-confirming[75] surgery in Morocco (vaginoplasty) and had, consequently, sought amendment to her civil status in France, her country of origin. The refusal to the amendment had been motivated by the French Court of Cassation, with the claim that the appellant could not be considered as a "real" transsexual (*B. v. France*, 1992: para. 16) because she had not been under medical control in France that could have confirmed the genuineness of her "transsexualism". To this refusal, followed B.'s application at the ECtHR, in which she claimed the violation of Articles 3, 8 and 12 ECHR. From the start, in the "background to the case" (*B. v. France*, 1992: para. 10) is present a strong narrative of authenticity that permeates the applicant's self-presentation. The applicant, in fact, explains how, since her early stages of life, she was perceived by her brothers as a "girl" and how throughout the years she had been experiencing this discrepancy between the assigned and the desired gender with extreme distress which led to depression. The purpose of this narrative was to convince the ECtHR that her claim was genuine and to counter "suspicions" as to what her *true* gender was.

The strategy of the applicant, however, also pursued another objective. Prior to *B. v. France*, the ECtHR's case law did not oblige member states to recognise one's preferred gender. In order to avoid having her case dismissed, the applicant had to convince the ECtHR that her case was innovative with respect to the past case law. Apart from highlighting the differences between the French and the British legal system[76], the applicant emphasised developments in the scientific field regarding transsexualism[77]. Hence, B. combined her narrative of authenticity with a narrative of rigorous scientific legitimacy. She constructed her legal intelligibility by referring to two different sets of "truth telling" (one experiential, one scientific) that could respond

[75] This terminology has recently been adopted by trans activists, as a more accurate way of describing the process by which individuals alter their gender.

[76] All the cases previously decided by the Court saw the United Kingdom as respondent state.

[77] In particular the applicant refers to the fact that different strands of scientific research had put into question the reliability of a person's chromosomal endowment in order to determine one's gender (*B. v. France*, 1992: para. 46).

to the ECtHR's request to prove the genuine nature of her identity.

The applicant's narrative eventually proved to be successful, as the ECtHR recognised the truthfulness of her claim and a violation of Article 8. While France did not consider her as a '"true" transsexual, the ECtHR found that the applicant's "manifest determination'" of wanting to be a transsexual (*B. v. France*, 1992: para. 55) was enough to fall under the scope of Article 8. The ECtHR's formulation is interesting. By making reference to the applicant's "manifest determination" the ECtHR opens up a new dimension that had been foreclosed up to that moment: that of the possibility of one's self-determination. However, since this opening can be potentially dangerous, as it could trigger a consequent recognition of "pre-operative" transgender persons, the ECtHR also needed to affirm, contextually, that the surgery had entailed an "irreversible abandonment of the external marks of Miss B.'s original sex" (*B. v. France*, 1992: para. 55). The "manifest determination", in this case, can be considered to be understood within the context of "transsexual liberal politics" (Roen, 2002) as a sort of assimilationist move in order to fit into a gender category rather than questioning it radically. It would be inaccurate, however, to describe applicants as being deprived of agency. In various instances, transgender persons may decide to narrate strategically their experiences of being transsexual or transgender, by devising strategies that minimise disruption of their daily lives (Spade 2006, 328).

The narrative of the "true transsexual" is an important and problematic one. In the case just discussed, this model is articulated beyond the verdict of the ECtHR, as the six dissenting judges (Pinheiro Farina, Petitti, Valticos, Loizou, and Morenilla) motivated their opposition to the decision of the Court in terms of having not been convinced about the genuineness of the applicant's transsexualism. In particular, Judge Pinheiro Farina's[78] intervention clearly adopts transphobic language:

[78] *B. v. France* (1992), Dissenting Opinion of Judge Pinheiro Farinha, para. 5.

> As for the applicant (whom I will not refer to [in] the feminine, as I do not know the concept of social sex and I do not recognise the right of a person to change sex at will), he is not a true transsexual (Pinheiro Farina 1992).

This statement is problematic under two profiles. On the one hand, it is contradictory. How can Judge Pinheiro Farinha recognise a "true transsexual" if he does not recognise the right to change one's gender in the first place? On the other hand, the Judge demonstrates a narrow-mindedness in wanting to delegate the discussion of what counts as gender to the purely legal sphere ("I do not know the concept of social sex"). This statement suggests that the sociological factors in the determination of gender identity are completely overlooked by ECtHR. In this regard, the ECtHR shows a fragmented and stereotypical knowledge about "proper" gender and places the applicants in the position of having to "prove" their level of compliance to dictates of the sought-after gender. It can be argued, then, that the erasure does not only involve pre-operative transgender persons, but is a total obliteration of the experience itself of transgenderism as something deprived of meaning that is only useful insofar as it determines the passage from one gender to the other. As the following cases will show, the approach of the ECtHR is strongly permeated by this "hermeneutics of suspicion" coupled with a strong effort at the normalisation of transgender identities.

In 2002, ten years after *B. v. France*, the ECtHR, recognised formally the obligation on member states to recognise one's preferred gender regardless of biological criteria. In *Goodwin v. the United Kingdom* (2002), to some extent rightly considered as a landmark judgement, the obligation for member states to rectify documents of

individuals that wanted to change their gender was affirmed. This obligation, however, was formulated in a way that allowed member states to apply a wide margin of appreciation in setting up the criteria for the recognition of one's preferred gender. Hence, burdensome requirements such as surgery, psychiatric assessment, and compulsory sterilisation were not proscribed, leaving out the transgender persons who refused to have their gender identity defined by medical intervention.

Goodwin v. the United Kingdom (2002) concerned a British applicant who had not obtained the amendment of her gender on her birth certificate. In the opinion of the applicant, the refusal to amend her birth certificate had entailed a level of disruption in her life, particularly in relation to her right to marry, her employment, social security, and state pension, as well as in relation to an episode of sexual harassment she had experienced in her workplace. She alleged a violation of Articles[79] 8, 12, 13 and 14 of the ECHR. The applicant's narrative touched on elements concerning her diagnosis of transsexualism and the ability or failure to "pass" as a female individual. It was, furthermore, supported by an intervention by the British NGO "Liberty", highlighting the existence of sociological data that showed an increasing acceptance of transsexual individuals[80] (only post-operative). It is interesting to notice how pre-operative transgender persons are erased not just by the ECtHR, but also by the intervening third party, who could be seen as strategically focusing only on post-operative transsexual persons for the sake of persuading the ECtHR.

In reading Goodwin's arguments, the impression is one of the relative powerlessness of the individual with respect to the omnipervasive character of the law and of administrative procedures, rather than empowerment. Goodwin, as with many

[79] Article 13 ECHR protects the right to an effective remedy before national courts; Article 14 ECHR is the non-free-standing article concerning the prohibition of discrimination. It is not free-standing because its violation can only be claimed in conjunction with another right set forth by the Convention. Article 8 ECHR is the right protecting private and family life, while Article 12 ECHR protects the right to marry and found a family.

[80] *Goodwin v. the United Kingdom*, para. 55.

other transgender applicants, seems to stand, in relation to the law, in the same position as the man in Kafka's (2005) “Before the Law”, who asks the gatekeeper whether he would be granted “entry to the law” and receives the answer “it is possible (…) but not now”. In fact, although the ECtHR in the instant case recognised member states' obligation to rectify trans(sexual) persons' gender on official records, it overlooked the existence of important collateral issues, such as the requirement of compulsory divorce for married individuals wanting to have their gender amended, or the compulsory sterilisation of transgender persons, as Cojocariu (2013, 118) has highlighted.

The vagueness on the most controversial issues relating to legal gender recognition could be said to stem from the ECtHR's crucial preoccupation with having to preserve consistency within its case law, trying not to depart from previous cases without a “good reason” (*Goodwin v. the UK*, 2002: para. 74), rather than from a thorough reconsideration of the legal and social status of transgender persons (either pre-operative or post-operative). The ECtHR seems, in fact, to have shied away, in *Goodwin v. the UK*, from justifying why the obligation for states to recognise one's preferred gender only applied to “transsexual” persons as opposed to “transgender” (Cojocariu 2013, 118). To this extent, the ECtHR was adamant in denying that a “third zone” between *male* and *female* (*Goodwin v. the UK*, 2002: para. 90) could be allowed. This voluntary omission, this silence, equals an ontological erasure that has not been lifted with subsequent judgements.

Several commentators (Whittle 2002, Sandland 2003, Dembour 2005 and Cojocariu 2013) have expressed ambivalence towards the judgement and sought to address its limitations. They have addressed, in particular, the reinstatement of the binarism of gender that helps the ECtHR to shun all possible expansive interpretations of the process of gender recognition as also encompassing “pre-operative” transgender

persons. This approach has been read by both Sandland (2003, 192) and Dembour[81] (2005, 40) as a demonstration of the "conservative" role of the ECtHR.

Goodwin v. the UK (2002) established clear boundaries between "legitimate" and "illegitimate" positions for transgender persons as human rights holders. This seems to confirm Sandland's hypothesis that rights are afforded to transgender persons as a "concession" of the majority. This aspect seems also to be confirmed by the ECtHR's formulation on states' obligation to recognise gender:

> society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost (*Goodwin v. the UK*, 2002: para. 90).

The most striking aspect of this passage is the fact that the ECtHR frames "society" as being opposed to transgender persons, as if they were not part of it. This is even more problematic since it is coupled with a rhetoric of "'tolerance" enacted by the benevolent majority. Moreover, the vague reference about the distress encountered by transgender persons in their quest for dignity ("at great personal cost"), also seems to contain an element of compassion and paternalism in the wording of the judgement, contributing to the creation of hierarchies of "humanness" between cisgendered and transgender individuals.

Goodwin v. the UK (2002) has left many grey areas in relation to the process of gender recognition by member states. In this regard, the subsequent case of *L. v. Lithuania* (2007) highlighted the existence of some loopholes existing in the legislation of member states. The case, concerning a transgender applicant who was defined as

[81] Dembour (2005, 41), however, is equally uncertain about whether a 'proactive' Court could have been equally, or more, dangerous than a "conservative" one.

"female" at birth, dealt with the lack of provision in Lithuania regulating access to gender-confirming surgery. The applicant had received hormonal treatment and underwent a bilateral mastectomy. However, in Lithuania, no legislation regulated the possibility of undergoing genital surgery. The applicant considered this legislative gap[82] as having caused distress and discomfort, as well as suicidal tendencies. In his application before the ECtHR he alleged a violation of Articles 3, 8, 12 and 14 ECHR.

The case presents various interesting aspects. On the one hand the ECtHR decided to consider the application only in relation to the alleged violation of Article 8 ECHR the respect for "private life". It dismissed, therefore, the public dimension of the application, that is to say the violation of the right to marry (Article 12 ECHR) or the prohibition on discrimination (Article 14 ECHR), together with allegations of "inhuman and degrading treatment" (Article 3 ECHR). This decision builds on the necessity for ensuring that the applicant can "pass" as a man. Implicitly, the emphasis of the ECtHR on this aspect of the application reinforces the aura of stigma and secrecy associated with the process of gender transition.

In the instant case, the ECtHR considered that the gap in the Lithuanian legislation regulating gender confirmation amounted to a violation of Article 8 ECHR. The problem, however, was not the mere absence of regulation in the legal system. It was, rather, the process of the erasure of transgender identity operated by the Lithuanian legal system that should have been addressed. However, the ECtHR, by dismissing the applicant's claim about the infringement of his right to marry (Article 12 ECHR) his partner of ten years, contributed to enhancing this erasure of the transgender identity of the applicant. This part of the complaint was considered by the ECtHR to be "premature" (*L. v. Lithuania*, 2007: para. 64), because of the lack of recognition of the

[82] The ECtHR had already stressed in *Goodwin v. the UK* (2002: para.78) the importance of the consistency between administrative and legal practices. Five years later, in *L. v. Lithuania* (2007),this issue was addressed again by the ECtHR.

applicant as a “man” for the purposes of law. Therefore, while it tried to push Lithuania to solve the inconsistency existing in the national legislation concerning access to surgical procedures, the ECtHR contributed indirectly to reasserting and reinforcing the importance of the sexual dimorphism of the spouses. Furthermore, labelling a ten-year-relationship as giving rise to a “premature” complaint, ironically echoes the main character's fate in Kafka's short story. The man, in fact, is not refused entry to the law. He is simply asked to wait, patiently. Maybe endlessly.

The use of the doctrine of the “margin of appreciation” offers further hints for reflection on the “indeterminacy” of transgender persons' legal status. This doctrine, less prominent in *L. v. Lithuania* (2007), permeates most of the ECtHR's case law on the rights of transgender persons and relates to member states' wide margin of discretion in establishing the procedures for gender confirmation. While states have an obligation to recognise one's preferred gender, the criteria to meet in order to be recognised are at the total discretion of the member state. In this regard, it could be suggested that by favouring an extensive use of the margin of appreciation doctrine, the ECtHR upholds, rather than rejects, the existence of an inconsistency between administrative and legal practice. This, in turns, gives great leverage to national governments in deciding the terms of recognition for a “transsexual” person.

Contested Reimbursements: Transgender Healthcare, Pathologisation and the Enjoyment of Human Rights

The preliminary reference made in this chapter to the issue of the pathologisation of transgender identities becomes useful in introducing another strand of the case law of the ECtHR. One of the issues arising in the court during these years is the one concerning the extent to which defining “transgenderism” as a medical

condition can help those who want to undergo surgical procedures to have them paid for by the public healthcare system or by their private insurance. Against the claim that these medical treatments may fall under the category of "cosmetic surgery", Spade (2008, 38) has claimed that there is a *myth* asserting that gender-confirming healthcare is not "legitimate medicine". For Spade[83] the lack of provision for treatments (both hormonal and surgical) often push the most deprived segments of the transgender population towards the black market of transgender healthcare or to participate in criminalised activities, such as prostitution (Spade 2008, 38).

Cultural and economic capital play an important role in navigating the complex socio-legal reality of gender recognition, as Davy[84] (2011, 57) and Cojocariu have suggested (2013, 122). Beyond the question of ontological visibility, in fact, the recognition of one's gender has a clear impact on daily life and on life decisions. Surgical procedures to confirm one's gender, as well as other treatments may be very expensive. Should the state pay for these treatments? Across Europe there is no established consensus (Cojocariu 2013, 121) and the issue is particularly sensitive, as it touches both on the individuals' interests and on states' (and private companies') interests.

As has been shown in relation to the case law of the ECtHR on sexual orientation and the enjoyment of certain benefits, states are granted a wide margin of appreciation when national socio-economic interests are at stake. Both cases examined in this part of the analysis, *Van Kück v. Germany* (2003) and *Schlumpf v. Switzerland* (2009), concern the request to have gender-confirming surgery and other treatments

[83] Spade carries out his evaluations in the context of the United States where a universal system of healthcare, similar to that existing in many European countries, is not in place. Beyond the obvious differences between these two contexts, it is nonetheless possible to find points of commonality, as there are transgender persons who may not officially qualify for treatment in accordance with the healthcare standards and may try to find alternative channels.

[84] Davy (2011, 57) suggests that the aesthetics of gender of transgender persons can be considered as a 'form of generative cultural capital'.

reimbursed by both private and public healthcare systems, which were refused by domestic courts in the two countries of origin.

In the discussion of these cases, the ECtHR cautiously tries to preserve states' margin of appreciation on socio-economic issues while, at the same time, tries to make some openings on the rights of transgender persons. In both cases the interplay between the law and medicine is fundamental and indissoluble, as medical opinion on the genuineness of the applicant's "transsexualism" is deemed crucial for national courts and the ECthR itself. In having a quasi-normative status, medicine almost seems to prescribe the legal measures to be undertaken after surgery or other treatments are performed. Since medicine has been granted a monopoly over the establishment of the criteria to detect the "true" transsexual applicant, these criteria become automatically translated into the juridical forum. An illustration of this problematic relationship between the legal and the medical sphere is illustrated by the ECtHR's comment, in both of the instant cases, on the fact that national courts had to avoid substituting themselves with the medical authorities in determining whether some treatments were necessary for transgender persons (*Van Kück v. Germany*, 2003: para. 54 and *Schlumpf v. Switzerland*, 2009: para. 57).

How does this relate to the question of reimbursement? Paradoxically, the more "pathological" the applicant appears, the more likely it is for the reimbursement of medical expenses to take place. For this purpose, the medical expertise proving the existence of an "illness" is crucial. In this regard, both national courts, and also the ECtHR, widely employ Sharpe's (2002) "hermeneutics of suspicion". In assessing the claims made by the member states' Government, the ECtHR tries to ascertain the entitlement to reimbursement by virtue of the applicant's *genuine* transsexualism. Framing transgenderism and transsexualism as an "illness", however, has ambiguous

social and legal effects, especially in relation to efforts aimed at de-stigmatising trans identities.

In both the above-mentioned cases the ECtHR recognised the violation of the right to a fair trial (Article 6 ECHR) of the applicants who had been prevented from effectively being heard before national courts in relation to their requests for reimbursement. Moreover, the ECtHR made a strong reference to the necessity for "self-determination" (*Van Kück v. Germany*, 2003: para. 78 and *Schlumpf v. Switzerland*, 2009: para. 77). This statement, however, is far from meaning that transgender persons could be granted recognition of their gender without having to undergo surgery. In fact, the ECtHR explained the principle of self-determination[85] as entailing the possibility for the individual to freely opt for surgery in order to have their preferred gender recognised, rather than self-determining one's gender without surgical intervention. As it was for Goodwin, the self-determination, for the ECtHR, only applied to decisions falling within the boundaries of the normative, excluding de facto "pre-operative" transgender persons.

Moreover, the subtle socio-economic criteria employed to ascertain the genuineness of transgender individuals contributes to enhancing the pathologisation and stigmatisation of these persons. Equally, this also pushes transgender persons who would like to undergo these medical procedures to frame their requests in pathological terms, as if the rhetoric of compassion was the only instrument they have to convince the judicial authorities that they are not "taking advantage of the system". As it was for lesbian, gay, and bisexual persons having to prove that they were not trying to gain advantage from the welfare system, similarly, transgender persons have to rely almost exclusively on the pathologising model of gender identity in order to gain their legal

[85] The ECtHR specifies in *Van Kück v. Germany* (2003: para. 69) that the case law of the Court does not present cases that deal with the issue of the right to self-determination per se.

and social intelligibility as human rights subjects. How is it possible to balance the need to de-stigmatise transgender identity with the need to have access to healthcare treatments that are not extremely burdensome for individuals? The ECtHR does not address the question, limiting itself to monitoring the access gate to transgender healthcare treatments.

In another strand of the case law concerning the issue of paying pensions according to the applicant's acquired gender, however, the ECtHR has recognised the violation of socio-economic rights. In both *Goodwin v. the United Kingdom* (2002) and *Grant v. the United Kingdom* (2006), the ECtHR ascertained a violation of Article 8 ECHR. Both applicants had alleged that while they had paid female contributions, they had been refused retirement at the age of 60 (until 2010 the retirement age for women in the United Kingdom) and had been treated as males for the purposes of pensions payments.

The interesting aspect of these two judgements is that the ECtHR evaluated the negative repercussions that would affect the general public if the pensions were to be paid to the applicants at the female age for retirement. However, the language of the ECtHR appears vague and abstract, without specifying the detrimental effects that the recognition of the applicants' rights would entail. The expressions employed are "concrete or substantial hardship or detriment to the public interest" (*Goodwin v. the UK*, 2002: para. 91) and "unfairness to the general public" (*Grant v. the UK*, 2006: para. 24). The reach of these expressions is clearly ambiguous and could be used and interpreted differently by the ECtHR depending on the circumstances. In the two instant cases the Court assessed that the level for damaging the "public" had not been reached, consequently recognising the violation of the applicants' rights. The problem, however, remains in theory, whenever the ECtHR is called to strike a balance between the

individual and the "public interests", whose definition is highly debatable and may also be interpreted differently across the member states of the CoE.

Hence, the shaky sociological (and legal) reach of a concept such as "public interests", reflects the partial inadequacy of the epistemological criteria employed by the ECtHR in its evaluation of the context in which the applicants' claims arise. In the case of often socially and economically marginalised groups, such as transgender persons, this process of weighting individual interests against public ones – as if transgender applicants only had "individual" interests and were not part of the "public" – further enhances the situation of social estrangement and separation that gender non-conforming individuals experience.

The Invisible Spouse: "Family Life" and Transgender Persons

Gender is an unavoidable element in the definition of what constitutes a "family" or what defines "parenthood", as Flynn (2003, 212) has observed. Because of this central role of gender, it is difficult for any judicial authority to make an exercise of abstraction[86] in imagining kinship arrangements that contravene the rule of sexual dimorphism of the spouses. The ECtHR makes no exception to this lack of inventiveness in portraying different models of "families". Hence, many of the limitations of the ECtHR's approach to the question of the guarantee of the rights of transgender persons are particularly visible in relation to the right to marry and found a family guaranteed by Article 12 ECHR. In a time-frame of more than two decades, the Court has always shown a certain reluctance in recognising the violation of Article 12 ECHR in relation to claims made by transgender applicants. This may be due to the fact that the enforcement of gender dimorphism of the spouses is a way to patrol the borders

[86] Robson (1998) describes two different views on gender identity adopted on the part of the Courts when analysing cases concerning marriage rights of transgender persons. The former, the formalist view, "relies upon formal relationships dictated by law"; the latter, the functionalist view, "emphasises the functions as attributes or 'realities' that are deemed to be operative".

of the heterosexual institution of marriage from an "unnatural homosexual incursion" (Sharpe 2002, 87). The Courts, in particular, want to avoid that the recognition of marriages that are not between two persons of the "same" biological sex, may be seen as opening the door to same-sex marriages in those jurisdictions in which this is not possible.

The family arrangements of transgender persons can be subjected to intrusive and invasive scrutiny on the part of judicial authorities, and the authorities' results are often based on stereotypical ideas of the "characteristics" of the family itself. As Hines (2006, 354) has observed, little attention has been paid to the question of intimacy and family relations in the context of gender transition from a sociological perspective. This lack of interest and knowledge can also be said to include the perspectives of legal practitioners and judicial authorities. The predominance of a formalist approach (Robson 1998) in relation to gender identity and the right to marry is exemplified by some judgements of the ECtHR. Although there are several[87] cases concerning transgender applicants alleging the right to marry and found a family, this part of the analysis will focus on the controversial question of compulsory divorce for individuals who are already married at the time they decide to undergo gender-confirming surgery and who live in member states in which same-sex marriage is not available.

Before starting a discussion of the relevant case law of the ECtHR on the issue of divorce for transgender persons, a preliminary clarification must be made. The chapter concerning the family life of LGB persons contained a strong element of critique of the institution of marriage in the first place. The "defence" of marriage by state institutions and – in some cases – by human rights institutions, has been described by the author of this research as an attempt to foster an exclusionary conception of kinship which only

[87] *Rees v. the United Kingdom* (1986), *Cossey v. the United Kingdom* (1990), *Sheffield and Horsham v. the United Kingdom* (1998), *Goodwin v. the United Kingdom* (2002), *L .v. Lithuania* (2007), *Cassar v. Malta* (2013), *H. v. Finland* (2012).

encompasses those who possess the material, cultural and symbolic resources. Furthermore, the chapter on LGB family life strongly highlighted the economic – rather than social – significance of marriage and the existence of state's interests in fostering some types of marriages at the detriment of others. In this regard, the following analysis concerning the imposition of divorce for a specific portion of transgender persons by some member states of the CoE, may appear as a defence for the right of transgender persons to marry. This is not the case, as the crucial argument of this chapter is not to reiterate the exclusionary principles foregrounding the institution of marriage. Rather, this chapter acknowledges the social and economic limitations of marriage as an institution, and moves to discuss how – within the boundaries of this exclusionary institution – further lines of distinction between viable and non-viable spouses arise. Hence, this chapter does not contain a praise of marriage for transgender persons *per se*, as much as it is an occasion to point out the inconsistency in the strategies of promotion of "normalcy" for those who do not fit the male/female gender dichotomy. In this context, therefore, it is perfectly possible to uphold the claims made in relation to the limitations of marriage for LGB persons, whilst simultaneously investigating the problematic configurations that the "right to marry" for transgender persons may take.

In the literature (Sharpe 2002; Whittle 2002; Robson 2007; Cruz 2010) there has been more attention paid to cases concerning the annulment (*ab initio*)[88], rather than the invalidation of marriages in which one of the spouses is transgender. Rarer is a discussion of the cases and socio-legal implications of those marriages which are not dissolved because of a unilateral decision of one of the spouses. The issue of "compulsory divorce", however, is extremely interesting, as it intersects with the recognition of same-sex relationships.

[88] As in the infamous British case of *Corbett v. Corbett* ([1971] 2 All ER 33) in which the plaintiff sought to have his marriage declared void because his partner was transsexual.

In *Parry v. the United Kingdom* (2006) and *H. v. Finland* (2012) the ECtHR had to assess whether the requirement of divorcing in order to have one's preferred gender recognised, constituted an infringement of the rights of the applicants. Could the ECtHR corroborate the position of national governments (in this case the British and the Finnish governments), forcing the individual to choose between two equally important rights, namely the right to have one's private life respected (by means of the recognition of one's preferred gender) and the right to marry (by means of respect for one's already existing marriage regardless of the gender of the spouses)?

In both judgements, it appears obvious how the legitimate "borders" of marriage are policed both in national courts and at the ECtHR. In *Parry v. the United Kingdom* (2006) the ECtHR was confronted with the case of a married couple with three children, in which one of the spouses had undergone gender-confirming surgery in order to be recognised as female. While the couple intended to remain together, the only way to have formal recognition of the acquired gender of the transgender spouse would have been to dissolve their marriage, as British law did not allow same-sex marriages. The application resulted in a claim for an alleged violation of several Articles of the ECHR, among which were Article 8 and 12. In order to convince the ECtHR, the applicants highlighted their condition as a "loving and married couple" (*Parry v. the UK*, 2006: 2) as well as highlighting the religious importance of their marriage and the consequent breach of Article 9 ECHR (*Parry v. the UK*, 2006: 6). The way in which the applicants presented themselves before the ECtHR raises an important question: "are families with trans persons socially assimilationist and normative, or counter normative?" (Pfeffer 2012, 77).

In their attempt to convince the ECtHR about their love and commitment, the Parry spouses were, implicitly, trying to demonstrate to the ECtHR the "normality" of

their relationship. Similar to cases concerning same-sex couples, couples with a transgender spouse are subject to the heavy scrutiny of the Courts, aimed at ascertaining whether these relationships can negatively affect marriage as an institution. While the applicants rightly highlighted their high level of mutual commitment, they indirectly participated in the enhancement of the concept of the "proper" family before the ECtHR. The efforts of the applicants, however, did not prove to be sufficient to persuade the ECtHR, and the application was declared to be manifestly ill-founded.

Regardless of the negative outcome for the applicants, it is interesting to analyse the judgement in more detail. In verifying whether national authorities had struck a fair balance between collective and individual interests, the ECtHR considered the prohibition of same-sex marriages existing in British law as requiring the applicants to find an alternative arrangement:

> (...) it is apparent that the applicants may continue their relationship in all its current essentials and may also give it a legal status akin, if not identical to marriage, through a civil partnership which carries with it almost all the same legal rights and obligations. (*Parry v. the UK*, 2006: 10)

This passage highlights the extent to which the preservation of the legal order (and of heterosexual marriage) is achieved by asking the applicants to seek a suboptimal arrangement to make their relationship official once they had obtained a divorce. What about the right to marry? The applicants maintained that having a "right to marry" should also include the "right to remain married" (*Parry v. the UK*, 2006: 10). The ECtHR, however, failed to answer this question and reinstated the principle by which the Convention (ECHR) only protects the right between a man and a woman to get

married. Hence, implicitly, if Parry decides to seek full recognition of her "new" gender, she places herself and her partner outside the borders of heterosexual, therefore lawful, marriage.

The above-illustrated case seems to suggest that protecting marriage as an institution by forcing some (transgender) individuals to divorce is clearly disproportionate. In commenting on the issue of compulsory divorce for transgender persons, Whittle (2002, 156) has maintained that marriages with a transgender spouse have existed for awhile without causing substantial harm to society, the only problem being that of modifying some administrative practices in relation to taxes and social security arrangements. In the instant case, however, the ECtHR maintained that a state could not be required to "make allowances for the small number of marriages where both partners wish to continue notwithstanding the change in gender of one of them" (*Parry v. the UK*, 2006: 12-13). The expression "make allowances" can be understood here as implying that the state cannot be expected to derogate from the prohibition on same-sex marriage, only because a small number of families have different *needs*. As for the previous judgements, the ECtHR reinstated in this case a hierarchy, in qualitative terms, between heterosexual (legitimate) and non-heterosexual families (either same-sex or with a transgender spouse).

Parry v. the United Kingdom (2006) shows that families with transgender members face a problem of invisibility in the context of an attempt to label the individuals as either being in a "heterosexual" or "homosexual" relationship for legal purposes. Hence, the denial of the specificity of the experience of couples with a transgender spouse, can be said to go so far as representing a forced assimilation into the heteronormative structure of society (Robson 2007, 59), where one has to prove the adherence to the institution of marriage. At the same time, while the quest for

recognition and preservation of one's relationship is legitimate and undeniable, it is nonetheless important to question the role of the institution of marriage itself, which is the main locus in which lesbian, gay, bisexual, and transgender rights advocates may sign up to that "conservative egalitarianism" criticised by Spade (2011, 60).

The discussion of the other judgement, *H. v. Finland* (2012), further helps to shed light on the existence of an important gap in the enjoyment of human rights on the part of transgender persons. Two aspects, in particular, are addressed here. The first concerns the problematic relationship between the issue of "compulsory divorce" and the regulation of same-sex marriages in the member states of the CoE. The second concerns the existing synergy between the normative domain and administrative practices that render the fruition of human rights, on the part of transgender persons, often only theoretical and incomplete, as was already shown in the beginning of this chapter.

In the case of *H. v. Finland*, (2012), the applicant, registered as male at birth, had been married to a woman for seventeen years. After having undergone gender-confirming surgery, she made a request to obtain an amendment of her identification number that ratified her female gender. As it was for Parry, the obtaining of such a change could only happen provided the applicant had obtained a divorce from her spouse. Unwilling to bring her legal relationship to an end, the applicant claimed before the ECtHR a violation of both Articles[89] 8 and 14. The ECtHR ascertained that there had not been a violation of the Convention. This negative outcome led the applicant to ask that the case should be heard by the Great Chamber. However, in its final judgement, the Great Chamber upheld the Court's decision.

As has already been hinted at, the relationship between the issue of "compulsory divorce" for transgender persons and the recognition of same-sex marriage is

[89] The ECtHR decided, in the course of the hearing, to evaluate a complaint also under Article 12 ECHR.

particularly problematic. Sharpe (2002, 2) has suggested that the behaviour of the Courts deciding on the validity of marriages in which one of the spouses is transgender (or transsexual), is characterised by a "judicial anxiety", namely a fear that the judicial recognition of these marriages would constitute an expedient to allow same-sex marriages. In this case the ECtHR has considered the recognition of one's preferred gender and the possibility of remaining married after gender-confirming surgery, to be two mutually exclusive rights. In fact, their contemporary fruition seems to be considered, by both the Finnish government and the ECtHR, as entailing the existence of a same-sex marriage. In the referral to the Great Chamber, the legal representatives of H. contested the fact that the ECtHR had not considered the status of the legislation in the rest of the member states, thus refusing to consider alternative solutions not entailing compulsory divorce for the spouses, available in at least 24 member states of the CoE (Cojocariu and Vandova 2013, 4).

The striking aspect of this judgement is the fact that, in order to avoid a "domino effect" that would affect the protection of the "traditional institution of marriage" (*H. v. Finland*, 2012: para. 48), the ECtHR went as far as saying that the dissolution of the applicant's marriage served the purpose of defending the general interests. Is it possible to protect marriage in general terms by imposing the cessation of a right that has already been enjoyed? In this regard, the decision of the ECtHR seems to descend directly from that "judicial anxiety" described by Sharpe.

Another interesting aspect is the fact that in evaluating the case of H., the ECtHR made an assumption about the sexual orientation of the applicant and her partner. This, however, raises a question: is a spouse's change of gender enough to radically transform the nature and form of a marriage from *heterosexual* to *homosexual*? In its reasoning, the ECtHR implicitly evaluated the affective and sexual behaviour of

the spouses as being inevitably conditioned, if one could argue that, by the "lack" of the fundamental prerequisite for marriage: sexual dimorphism. However, dimorphism in itself cannot guarantee the heterosexual character of marriage or sexual intercourse between spouses. As Butler (2004, 54) also reminds us, it would be necessary to disentangle gender from sexuality, as the fact of having a gender does not necessarily entail that one engages in sexual activity. The ECtHR, however, automatically ascribed to the applicant the legal position of same-sex spouse, placing her outside the boundaries of the "traditional marriage". In its judgement, therefore, the ECtHR has proved to be incapable of thinking beyond the categories of heterosexual/homosexual marriage, thus substantially downsizing the rights available to couples with a transgender spouse.

H. v. Finland (2012) is also useful in providing hints of reflection on the process of hyper-regulation and erasure indicated by Spade (2009, 289). As a disciplinary and regulatory technique, this two-fold process creates a situation of vulnerability for the social and legal subject. From a Foucaultian perspective, as Spade has suggested, it is not the mere introduction of certain juridical norms that act as a regulating mechanism of the social order. Rather, it is the juxtaposition of these norms with other administrative practices, inconsistent with the former, that are more efficacious in pushing individuals to internalise important rules such as the binarism of gender or the heteronormative character of the institution of marriage. In *H. v. Finland* (2012) the applicant had to choose between two equally important rights in order to obtain the social and juridical recognition of her gender identity. Presenting the applicant with an *aut aut* places her in a situation of vulnerability with respect to the enjoyment of her rights, and drastically reduces her choices to two equally problematic alternatives. On the one hand, invisibility as an intelligible subject before law and society; on the other

hand, ceasing to be in a valid marriage with her spouse. These two forms of invisibility are equally destabilising as they deny a part of her social and juridical subjectivity. *H. v. Finland* (2012), therefore, seems to confirm the conservative character that Sandland (2003, 192) and Dembour (Shaw and Ardener 2005, 40) ascribed to the ECtHR. It is possible to say that in the future the ECtHR will be unwilling to modify its attitude and may, therefore, keep on operating through "strategic positionings" (Sandland 2003, 192) with respect to issues relating to sexual orientation and gender identity.

A last interesting reflection on this case is the one concerning the existence of a semiotic short circuit that concerns the ECtHR and the concept of the "spouse". In the ECtHR's evaluation of the case of H., the spouse can no longer be recognised as such if the signified has changed and does not correspond any more to the signifier. This semiotic short circuit gives rise to a paradox that invests the meaning of marriage itself. Paradoxically, the "traditional marriage" is protected by asking those that subscribed to the institution and contributed to the accrual of its symbolic and material value, to divorce because they have placed themselves outside of the boundaries of the institution to which they have signed up. In this regard, it could be asked, borrowing from Butler's vocabulary, "what marriages are viable?" What marriages are worth protecting and what marriages can be rendered invisible and obliterated? The answers to these questions remain unanswered, but some reflections on how to address this problem can be found outside the purely legal sphere, as the work of the Commissioner on the rights of transgender persons seems to suggest.

Defining the Rights of Transgender Persons at the Office of the Commissioner

Since the 2000s discussion on the rights of transgender persons has ceased to be the monopoly of the judicial work of the ECtHR and has become more prominent in other institutions of the CoE, such as its political bodies (the CM and the PACE) but also at the office of the Commissioner. In particular, with the advent of Commissioner Hammarberg in 2005, these human rights issues have received an incredible boost and several interesting developments have occurred. In 2010, when the ethnographic observation for this research was carried out at his office, a difference was palpable between the ECtHR's approach and the Commissioner's opinion on human rights issues concerning transgender persons. On the one hand, the ECtHR had expressed many reservations on the possible outcomes of a recognition of one's preferred gender regardless of biological criteria. On the other hand, the Commissioner was trying to completely disentangle the question of the recognition of gender from the established medico-legal normative narratives.

The Commissioner, in particular, interpreted his work as requiring an effort to bridge the gap between the ECtHR and civil society. This endeavour was pursued by favouring the emergence of a constant dialogue between legal actors, human rights activists, and national authorities. It can be argued that the rights of transgender persons, together with the rights of Roma people, were the items at the forefront of the Commissioner's working agenda. The Commissioner himself made clear, on several occasions, that the time had come to address some among the “most neglected” human rights issues. Apart from highlighting the existence of an informal hierarchy between different categories of rights-holders within the CoE, this statement illustrates, once again, how the CoE participates in the construction of human rights issues according to

the logic of the "single-issue" strategy, as if there could not be, for instance, a Roma person who also identifies as "gay", or "transgender". This approach, of course, is not confined to the work of the Commissioner, as it permeates, broadly, human rights discourses in general.

The first significant act the Commissioner undertook in the direction of raising awareness on the discrimination experienced by transgender persons was the publication, in 2009, of an Issue Paper entitled "Human Rights and Gender Identity". For this publication, the team of the Commissioner had sought close collaboration with various transgender activists across Europe. The aim was that to furnish an account, as accurate as possible, on the real experiences of discrimination that transgender persons were facing in Europe. When I arrived in the office, they asked me to read the paper and asked me what I thought of it. They told me that, although it could have been improved, they were really happy with the result, since it was one of the first attempts, within the institution, to bring to the forefront these human rights issues. This effort was even more significant, given the fact that in the paper the Commissioner was strongly advocating the de-pathologisation of transgender identities. As the analysis of the case law has indicated, this remains one of the most problematic issues for the ECtHR. Seeking guidance and building relationships of trust with transgender human rights activists was an innovative and successful move on the part of the Commissioner, who was able to gain first-hand accounts and expertise on issues that had been, in fact, substantially overlooked in the various political fora concerning human rights up to that point.

It was, in particular, the attention to the perspective of the "story telling" that proved to be a successful element in the work of the Commissioner on the rights of transgender persons. Whenever narrating the struggles and problems faced by a particular group, the status of "outsider" is not always beneficial, as it can be perceived

by the stakeholders as a non-authentic perspective. What does a cisgendered person know about the problems and discrimination encountered by a transgendered person? I could clearly perceive this preoccupation in the office of the Commissioner. They were trying to "get the perspective right" and to have, as much as possible, an insider's perspective. Building close collaborations with various actors, especially with associations such as TGEU (Transgender Europe) and GATE (Global Action for Trans Equality), as well as scholars working in the field, proved to be crucial in order to construct the right narrative. In this regard, in particular, the fact that the Commissioner's Adviser on LGBTI issues, Mr. Dennis Van der Veur, had relationships of collaboration with LGBTI activists from almost all of the 47 member states of the CoE, was an incredibly helpful element in achieving this goal. The purpose of this collaboration was to help the Commissioner address the issues that mattered the most to transgender activists – and supposedly transgender persons more broadly – by using the correct language. The issue of the language employed was, indeed, crucial. I remember the preoccupation of the team in trying to ensure that the language was as sensitive and respectful as possible to the multitude of transgender experiences. As I was doing the editing of some of the texts of the report, one of my tasks was that of making sure that the language was consistent and respectful of LGBTI persons. Far from talking of *transsexuals*, as the ECtHR is used to doing, the Commissioner adopted a more nuanced linguistic vocabulary, finely attuned to the vocabulary that transgender activists themselves would adopt. I would tend to think that because the Commissioner's team also interacted repeatedly with the activists who defined the issues at stake regarding "transgender" persons, that interaction would have made it almost impossible for them to go back to the medicalised vocabulary employed by the ECtHR. In this regard, the possibility of defining the "subject" of human rights from the stakeholder's perspective

helped the activists to strategically bring transgender identities to the core of European human rights discourses in order to give them an unprecedented visibility.

The Commissioner's intention to establish a structured and consistent collaboration with transgender actors was pivotal, in a sense, in order to get "unspoken" permission to speak on behalf of transgender persons and adopt their perspective. It could also be perceived as a way to create an alternative narrative on transgender experiences within the CoE, whose human rights strategies are overwhelmingly associated with the judgements issued by the ECtHR. In trying to provide a more "human" account of transgender persons, the Commissioner was indeed trying to bridge a gap between the judicial discourse on transgender persons and the reluctance of member state to engage on these topics. I attributed this effort, in part, to the intention of overcoming the stigma surrounding transgender persons still existing within the CoE itself. While this may well have been my impression, I felt that somehow the Commissioner was venturing into a domain which had been overlooked by the institution up to that point. In this regard, his actions went in the direction of raising awareness with member states' authorities, but also, it could be argued, within the institution itself. At the same time, however, in gaining the permission to speak on behalf of transgender persons themselves, it could be asked whether the Commissioner was speaking for all of them or whether the accounts proposed by the NGOs contributing to the Commissioner's report only represented the views or experiences of a portion of the European transgender population.

As for the specific issues raised by the Commissioner, the bulk of his work on the rights of transgender persons consisted of persuading the member states of changing national policies negatively affecting these individuals in various instances of daily life. The emphasis on the de-pathologisation, in particular, was on the one hand aimed at

fostering more respect and protection of transgender persons, but on the other was framed in a way that did not rule out the right of access to medical treatment for transgender persons that wished to undergo these procedures. At the same time, the Commissioner also placed a lot of emphasis on the issue of transphobic hate crime and hate speech, trying to gather information on this topic and on the data across Europe. He was genuinely motivated by his awareness that the marginalisation and violence to which transgender persons were subjected was intolerable. I remember several occasions in which I was told, by my superior, that the Commissioner had received letters from transgender persons that described the discrimination to which they had been subjected. From the denial to board a plane because of identity documents, to lack of medical treatment or situations of economic marginalisation, the Commissioner had access to first-hand accounts of what it meant to be discriminated against as a transgender person in Europe. My perception was that of a profound intellectual commitment on the part of the Commissioner to these issues, as if it was crucial for him to leave the office at the end of his mandate knowing that he had contributed to shifting the perception of transgender issues both at the level of member states and within the CoE itself.

Was the Commissioner happy with the body of transgender case law of the ECtHR? As I have suggested, there seemed to be a strong divergence between the position of the Commissioner and the position of the ECtHR. The latter, that has been crystallised during the last three decades, is of course the product of judicial exercises aimed at fostering both respect for human rights but also consistency within the system of the ECHR itself. The Commissioner, on the contrary, as an independent figure, can adopt more pragmatic positions on various human rights issues that take into account not just the form that human rights take, but also their practical implications in daily

life. In particular, in the case of the Commissioner, the close relationship that developed with transgender networks of activists and scholars has allowed a process of exchange of information and expertise aimed at reducing the gap between the theory of human rights and the real experiences of the subject bearers of those rights.

The 2011 Report issued by the Commissioner on discrimination on grounds of sexual orientation and gender identity in member states confirmed the Commissioner's priorities as to respect of the rights of transgender persons. In the report, the Commissioner built on the 2009 Issue Paper to systematically address the shortcomings of the level of protection afforded to transgender persons across Europe, and he did so in order to generate a debate with national authorities and stakeholders, as well as local activists in the 47 member states. The report was perceived, by these non-institutional actors, in particular, as an instrument of leverage and influence to wield on national authorities which could finally help to "open" their eyes and encourage them to realise the conditions of structural marginalisation and socio-economic deprivation under which some individuals were living.

The Commissioner had a broad and all-encompassing perspective on the rights of transgender persons that rendered him particularly well-regarded by transgender activists themselves. His open approach and willingness to engage with all the issues presented by the activists meant that he could easily gain the trust of these non-institutional actors. The building of such relationship of trust is, indeed, one of the most valuable assets developed during his term in office and a fascinating example of how narratives of human rights can be transformed outside of the legal sphere. One of the Commissioner's strengths was that he was willing to put at the centre of attention issues that really mattered for these activists: healthcare assistance for imprisoned transgender persons or for asylum seekers, problems relating to discrimination in housing, family

life, and parenting rights. While, in fact, the most debated topic is the recognition of one's preferred gender, little attention is paid to the multiple difficulties faced in day to day life by different transgender persons, who may lack the social, economic, and cultural capital needed in order to lessen the circumstances in which they can be discriminated against. The work of the Commissioner, in this regard, has definitely raised the standards of attention on this topic in the institution, as the issue of the protection of the rights of transgender persons has made more of an official entry on the political agenda of the institution.

The crucial role of the Commissioner in bringing to the forefront transgender issues and daring to speak of rights beyond the gender binary is definitely a brave attempt. As an independent figure, the Commissioner enjoys, in general, more freedom in deciding which topics need priority over others. Hence, he has called on states to allow gender transition regardless of the performing of surgery, to stop forced sterilisation, and to end the practice of "compulsory divorce" for those who are married and wish to change their gender. All these suggestions made to member states do not find an echo in the case law of the ECtHR. They are, therefore, an exclusive initiative of the Commissioner that tries to persuade states by offering them the tangible proof, in his report, on the reasons why some practices, policies, or laws go against the rights of a portion of the population. This discrepancy between the positions of the Commissioner and the judgements of the ECtHR prompts one to ask how it is possible to have, in the same institution, different positions on the same issue? If the Commissioner and the ECtHR express different ideas on a topic, what is the official position of the CoE on that particular matter? Given the overwhelming political importance of the ECtHR, it is easy to say that it is the judicial perspective that prevails, by virtue, one could presume, of its authoritativeness and solemnity.

Moreover, differently from the approach taken with sexual orientation, in relation to issues concerning the rights of transgender persons, the position of the Commissioner seems to stretch beyond the concept of normativity and focuses more on the respect of the individual's bodily and emotional integrity. It can be argued, therefore, that if the Commissioner articulated his action within the context of homonormativity when talking about lesbian, gay, and bisexual individuals, he was willing to endorse a more queer perspective on issues pertaining to gender identity that necessarily pose a challenge to the gendered organisation of the legal system. This perspective did not rule out a substantial reproduction of the framework of "transsexual liberal politics" (Roen 2002) with regard to specific issues. Nonetheless, it represented a real breakthrough in the context of the human rights narratives of the CoE.

The acknowledgement of the existence of "queer issues" on the part of the Commissioner has surely had positive effects, as it has enabled a dialogue between actors at the CoE and national authorities on these issues. One good illustration of the successful collaboration between the Commissioner and national authorities has been, for instance, the approval of a Portuguese law in 2011 that included the recommendations made by the Commissioner in 2009 with his Issue Paper on Gender Identity[90]. Following the efforts of activists and the collaboration with the Commissioner, Portugal removed the mandatory requirement of medical procedures in order to have one's gender amended or the requirement of compulsory divorce for married transgender persons. This achievement shows how strong the power of leverage of the Commissioner can be if articulated as part of a broader effort for civil society.

At the same time, however, the importance of gender for the legal and social domain remains so crucial that, in order to glimpse a significant change in the way

[90] ILGA-Europe, *Gender Identity Legislation Signed by the President*, 04 March 2011, available at: http://www.ilga-europe.org/home/guide_europe/country_by_country/portugal/Gender-identity-legislation-signed-by-the-President, accessed 01 March 2014.

gender influences one's ability to claim rights, more time needs to pass and more knowledge needs to be articulated in relation to the dynamics that produce and re-produce hierarchies of bearers of rights in the broad context of Europe and in each specific national context. Notwithstanding this, the role of institutions, such as that of the Commissioner, productively engaging in a dialogue with civil society, are likely to catalyse and speed up this process, as can be argued in relation to the emerging debate on the rights of intersexual persons which will be the object of the last section of this chapter.

Intersexuality and Gender Categories: Ticking the Right Box

One does not do gender for oneself "but always with/for another" (Butler 2004, 1). The price to pay when one does not do gender "correctly" is often social marginalisation and lack of recognition in various spheres of life. Struggles in order to do gender "correctly" may concern different groups of individuals. Intersexual persons, in particular, face important problems in the social, political, and legal domains. Intersexuality is a complex phenomenon concerning individuals born with chromosomal, gonadal, and anatomical characteristics that appear in contrast to given notions of male and female gender. The estimates about the percentage of the population with an intersex[91] condition vary[92] significantly (Fausto-Sterling 2000, 51; Davidian 2011, 4). Similar to the process of medicalisation of transgender identities, medical evaluation and intervention is a fundamental element in the definition of the concept of "intersexuality", which can be historically located in the XIX century in Europe. The medicalisation of intersexual identities has entailed the proliferation of surgical

[91] Fausto-Sterling (2002, 52) lists the different types of intersexual conditions, the most statistically common being the Turner Syndrome, the Klinefelter Syndrome, the Congenital Adrenal Hyperplasia, the Androgen Insensitivity Syndrome and the 5 Alpha Reductase Hermaphroditism.

[92] Fausto-Sterling (2000, 51) gives a figure of 1.7% of the population, while Davidian (2011, 4) talks about different authors providing estimates between 4% and 0.0018% of the population.

procedures aimed at "normalising" new-borns in order to redress what is usually defined as a "psycho-social emergency" (Chase 1998, 302). Ambiguous gender characteristics are, in fact, deemed to entrain important psycho-social consequences in the lives of both the parents and the children. For this reason, surgical procedures are seen as the remedy for bringing coherence between aesthetics and gender. Some authors, however, have pointed out that both in the case of transgender and intersexual persons, medical interventions are motivated and deeply shaped by dynamics of "phallocentrism" (Sharpe 2001, 621; Ehrenreich and Barr 2005, 121), positing masculinity – hence the *phallus* – as being superior to femininity. This approach is practically translated into surgical intervention on intersexual children primarily aimed at enabling the subjects to live a heterosexual life and engage in heterosexual relationships (either being able to "penetrate" or "being penetrated" sexually).

The issue of intersexuality, however, is far from being confined to the medical sphere, as there are undeniable legal profiles concerning the rights of the new-born and children that undergo these procedures. As Kessler (1998, 32) has argued, in fact, the reason why surgical interventions are performed is not because genital ambiguity is detrimental to the child's life, but because it is deemed to be "threatening to the infant's culture". Moreover, the paradox of the medical treatment, and the cultural and social outcomes of genital surgery on interesexual children, is that it restores a fictitious natural *status quo*, so that:

> intersex bodies that are produced in nature are seen as unnatural, while reconstructed bodies produced with human technology are seen as "natural", even when they bear little similarity to "normal" human bodies (Ehrenreich and Barr, 118).

The problem with corrective surgical procedures may be, furthermore, that they present significant health risks for the child (Davidian 2011, 8) in addition to the fact that the bodily integrity of the child (and future adult) is compromised in order to restore a "true sex". Oftentimes individuals, in growing up, experience a psychological discomfort with the gender assigned with the surgery, as well as an irreversible loss of the possibility to experience sexual pleasure.

From the legal perspective, the issue of the parents' consent (Parlett, Weston-Scheuber 2004, 376) to surgery seems to be coming to the forefront when talking about the rights of children. While Bird (in Hermer 2007, 261) goes as far as saying that these surgical interventions represent a violation of Article 19 of the Convention of the Rights of the Child (CRC)[93], the reality in facts is that there are neither international nor national legal instruments that address this issue, and doctors performing these medical interventions act out of their beliefs in relation to the "true sex" of the new-born (Fausto-Sterling 2000, 48). There is, therefore, a legal silence – an "unsaid" – surrounding the lives of intersexual persons whose rights claims are difficult to articulate in the existing human rights arena. It could be argued that the stronger the pressure to conform to gender norms, the stronger the erasure of intersexuality that is carried out. Davidian (2011, 21) has highlighted the necessity of considering the usefulness of corrective surgery in conjunction with reflections on the extent to which intersexual babies are considered to be "human" within a human rights framework:

> (…) provides a way for calling into question what counts as reality and human life and remaking that reality. Asserting rights through legal means is a way of

[93] Article 19 recites "States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation".

> intervening in the socio-medical process by which the human is defined and articulated, subjecting it to renegotiation and imagining it differently (Davidian 2011, 21).

It is, hence, precisely this lack of imagination about "what counts as human" that currently informs legal theory and practice concerning gender and gender regulation. Is one human only insofar as the "right" sexual organs have the right shape, size, and function? Framed in these terms, the question is pressing and requires legal and political answers. Beyond the absence from human rights discourse, in fact, there is also an undeniable political and social obliteration of intersexual and transgender persons altogether. As for intersexual persons this marginality is of a greater symbolic magnitude, given the fact that, to date, an extremely limited number of national courts[94] have dealt with issues related to parents' consent to surgery (Davidian 2011; Larson 2011, 225), thus reducing the public fora in which these important human rights issues can be raised and debated.

In relation to these issues, there are some developments in Europe[95] and, particularly, at the Council of Europe. As of October 2013, the Parliamentary Assembly of the institution (PACE) has adopted a Resolution (Res. 1952(2013)) on the "Children's Right to Physical Integrity" which also addresses other issues such as female genital

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[94] The most famous case, described by Davidian (2011), is that concerning an opinion of the Colombian Constitutional Court in the judgment SU-337/99 which disputed the parents' absolute authority in consenting to a corrective surgery on an 8-year-old child. In Europe, the European Commission and ILGA Europe report two cases in Germany. (http://www.ilga-europe.org/media_library/ilga_europe/publications/reports_and_other_publications/ec_trans_intersex_report_cover

[95] In 2013, the German Parliament also passed a law that allowed the registration of a child as having "indeterminate" gender at birth, particularly for intersexual children. This law, however, was criticised by LGBTI activists, who affirmed that the provision was not coupled with an opening up of the rights that individuals registered as "non-gendered" could enjoy, such as the right to marry or the possibility of having insurance. See: Viloria, H. (2013) Op-ed: Germany's Third Gender Law Fails on Equality, *The Advocate*, available at: http://www.advocate.com/commentary/2013/11/06/op-ed-germany%E2%80%99s-third-gender-law-fails-equality. Accessed 28 February 2014.

mutilation (FGM)[96], circumcision of boys for religious reasons, as well as other medical treatments performed on children. Although the Resolution is not binding on member states, it signals the emergence of an unprecedented interest in the issue of intersexuality. The overarching principle put forward by the PACE, is that of the ”best interests of the child”. These interests, as have been briefly illustrated, are difficult to define as far as the issue of intersexuality is concerned, and tend, sometimes, to be confused with broader societal interests in relation to the perpetuation of the gender binary. One passage of the Resolution, in particular, is particularly interesting, in relation to the PACE's call for member states to:

> ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to persons concerned, and provide families with intersex children with adequate counselling and support [97].

Surprisingly, in the document the language employed is very close to the language used by intersexual activists themselves. In the first place the distinction between *cosmetic* and *vital* surgery allows one to reflect on the climate of “emergency” surrounding the decisions on corrective surgery and the social pressure experienced by parents of intersexual children. The second important aspect is the recognition of a right to autonomy and self-determination that takes precedence over the necessity of

[96] The issue of FGM in particular had been compared to the treatment of intersexual children as an example of a different approach to the notion of 'bodily integrity' of children. Chase (1998) Kessler (1998) and Ehrenreich and Barr (2005), in particular, had maintained that there was hypocrisy in the West considering these two issues that rendered FGM unacceptable but allowed surgeries on intersexual babies as legitimate.

[97] Parliamentary Assembly of the Council of Europe, Resolution 1952(2013) on *Children's Right to Physical Integrity*, 3 October 2013, § 7.5.3.

establishing the proper gender as soon as possible. In this regard, the parental authority with relation to the decision to perform these surgical interventions seems to be put into question. Thirdly, the Resolution also highlights the need for informing and helping parents more efficaciously. Lack of information or support, in fact, may significantly hamper the ability of the parents to make sensible decisions in their long-term interests. It is important to observe, however, that the decision of the PACE of putting together different issues such as surgery on intersexual new-borns, FGM, and circumcision can be quite problematic as these issues are often invested with different political connotations on the part of different actors (Chase 1998).

In relation to the issue of intersexuality and the rights of the children concerned, the action of Commissioner Hammarberg can be said to be sensitive and well-informed. However, while he wanted to include a discussion of these issues in the report he issued in 2011, the overwhelming lack of knowledge and discourses on issues of intersexuality in the European arena of human rights made it very difficult for him and his team to approach the issue systematically. At the time of the drafting of his 2011 report, there was an attempt to gather information and a collaboration between the Office of the Commissioner and the NGOs "Transgender Europe" and "ILGA-Europe" was established. Notwithstanding these efforts, however, it was not possible to gather enough information to be included in the final version of the report. In the office there was a strong feeling of impotence in relation to what could be done to raise the issue. In contrast with the high degree of awareness on the importance of the issue, there was little margin of action and few empirical instruments that could be used in order to fill this gap in knowledge. Although the 2013 PACE Resolution represents an important improvement in the direction of recognising the rights of intersexual persons, changes will not be effective if they are not coupled with an effort to re-think the role of gender

in European societies, as a factor that limits personal expression in various fields of life and often represents an obstacle to the fulfilment of one's personality and personal integrity.

Conclusion

This chapter has sought to consider the complicated issue of gender identity from a socio-legal perspective. In trying to encompass as many facets as possible of the complex body of human rights claims of transgender and intersexual persons, it has proposed an analysis that departs from the traditional legal overview of the case law of the ECtHR, adopting instead a "cluster" approach by which the most critical – and partially unresolved – problems currently existing in this case law are broken down in order to highlight the sociological value of the debates happening in Strasbourg. Far from being an exhaustive analysis from the point of view of the "evolution" of the body of rights, the chapter has sought to provide hints for reflection in relation to the ultimate question of how the concrete articulation of "humanness" requires a simplification of the real world and a circumscription of the entitlements of specific segments of the population in order to respond to dynamics of categorisation and regulation of individuals. Moreover, as will be shown in the concluding chapter, what happens in Strasbourg cannot be seen as being merely the judicial exercise of a ghostly supra-national human rights Court such as the ECtHR. On the contrary, it plays a crucial role in the definition of tangible models of citizenship that work both at the domestic and at the European level, therefore translating that process of "ascription of humanness'" from a socio-legal to a socio-political domain.

Chapter Nine - The Multisexual Citizen: Challenging the Existing Framework of Human Rights Protection in Europe

The analysis carried out for this research, on the case law of the ECtHR and the work of the Commissioner for Human Rights regarding issues of sexual orientation and gender identity, has shown the two sides of the protection of human rights on the European continent. On the one hand there is a judicial body, the ECtHR, which predominantly promotes a rigid understanding of LGBTI identities as being exclusively shaped by the rights claims advanced. On the other hand, there is an independent body, the Commissioner, whose work engages, not without limitations, but sociological data and knowledge about LGBTI persons throughout the continent in order to encompass the multiple facets of human rights violations that may not be perceived in purely legal terms. The juxtaposition of the work of the Court and that of the Commissioner has made it possible to reflect on the two-fold dynamics at play. Firstly, LGBTI identities are normalised and the individuals are assimilated into the social fabric of the different European nation-states; and secondly, the recognition of these presumably new actors of human rights leads to the emergence of new lines of exclusion for those who cannot be subsumed under the current paradigms of human rights, because of their challenge to normative models of kinship, gender norms, or societal institutions more broadly.

A further layer of complexity in this process of recognition of human rights is represented by the ambiguous relationship of LGBTI persons with the international legal, political and social arena. While nation-states remain the main enforcers and guarantors of human rights (Bhabha 1999, 12), at the same time the *idea* itself of human rights, in its universal aspiration, transcends these national borders. In the previous

chapters there has been an acknowledgment of the inconsistency between a global – or preferably *Western* – abstract discourse on LGBTI rights, and the practical articulation of these claims at both the level of the ECtHR and the office of the Commissioner for Human Rights of the Council of Europe. The work carried out has highlighted the existence of a tension between the specific location of the human rights subject in a spatial, legal, cultural, social and political context, and the broader – and often unacknowledged – problematic narratives of universalisation of the "human being" as the de-materialised, trans-historical object of legal and sociological speculation.

It would be reductive, however, to narrow down the scope of this research to a descriptive analysis of the role of these different actors of the Council of Europe in the construction and promotion of specific liberal, rights-centred, LGBTI identities and their circulation across the European continent. Rather, it is essential to point out the necessity to connect their work to the emergence of models of European sexual citizenship, whereby the concept of "Europe" is not limited to the context of the European Union, but has a broader reach; that is to say the one represented by the 47 member states of the Council of Europe. Looking beyond the borders of the European Union is useful insofar as it allows one to understand the extent to which human rights claims relating to sexual orientation and gender identity fall within the process of the "globalisation of human rights" described by Stychin (2004, 951), through which human rights standards become a sort of civilisational benchmark that is used to assess nation-states' progress. Therefore, by focusing on the emergence of a "European sexual citizenship" it is possible to describe the process by which, at the continental level, narratives about what counts and who does not count as an "LGBTI citizen" can be interpreted both as giving rise to a neoliberal, standardised model of citizenship and as allowing the emergence of more critical forms of citizenship in which multiple

allegiances, spatial locations and forms of identifications are at play.

While discussions of *good* and *bad* queer citizenship have ignited the debate both in the United States (Smith 1994; Warner 2000; Phelan 2001; Duggan, 2003; Franke 2006) and in Europe (Richardson 2000; Bell and Binnie 2004; Stychin 2004), the focus on citizenship could appear to some to be anachronistic, as individuals' allegiances are increasingly shifting and are less and less attached to the nation-state (Soysal 1994; Turner and Isin 2002; Balibar 2004; Stychin 2004). Although patterns of globalisation and the emergence of the international human rights regime seem to have facilitated – and somehow catalysed – the erosion of states' sovereignty (Bhabha 1999, 11; Sassen 2002, 288), human rights nonetheless remain enforced at the national level and work as the "key opening up [of] the political realm of full citizenship" (Stychin 2000, 968). This element is crucial in the articulation of social, political and legal subjectivity, as it allows inclusion or exclusion from the polity or from other national communities. As Bhabha (1999, 13) has observed, in fact:

> given the escalation in migration, transnational relationships, dual affiliations and regional associations, the relationship between the nation-state and citizen's rights is as much a question about who is not included within the notion of citizenship, as it is about the 'hallmarks' or attributes of citizenship itself (Bhabha 1999, 13).

The existence of multiple trajectories, in individuals' lives, which cross-cut the mere possession of a passport, hence represents both a factor related to the deconstruction of citizenship and also an instrument that strengthens the importance of it as an access gate to socio-political and economic privilege.

Moreover, as has already been briefly hinted at, the emergence of alternative modalities of citizenship is partially informed by the existence of an informal geography of states that are compliant with human rights principles and states that are not. The fact that supranational institutions such as the EU and the CoE foster an appealing idea of "Europeanness" is far from being a harmless operation. On the contrary, it presents huge political and social implications. One practical illustration of this tendency could be, for instance, the multiplication of the so-called "Rainbow Maps" drawn by LGBTI associations such as ILGA or by governmental organisations such as the EU and the CoE, which show the progress achieved in different fields of human rights protection (e.g. maps showing countries that allow same-sex couples to marry, adopt and so forth). Although these maps obviously respond to the necessity of monitoring and providing a continental overview on the degree of protection of LGBTI persons in different countries, they are also problematic. Apart from offering a simplified and dichotomic division between virtuous and non-virtuous states, they also narrow down the concept of "human rights" to a set of measurable criteria or policies whose implementation is taken as automatically entailing an immediate improvement in the life of the individuals concerned. In this regard, a mechanistic understanding of human rights decoupled from a critical appraisal of the political and social conditions favouring the emergence, implementation and circulation of specific sets of rights and identities fails to acknowledge the constructed character of human rights as a presumably coherent and well-bounded universal body of principles.

As a result of this simplified process of monitoring human rights compliance, the predominant focus of commentators, on piecemeal legislation, policy-oriented strategies for the protection of human rights, or single judgements by either national or international courts (such as the ECtHR), overshadows the complex normalising and

disciplinary role of the law – and of international human rights institutions such as the CoE – in defining LGBTI persons as a homogeneous group of individuals in need of protection. This does not mean that policies or legal provisions aimed at improving people's lives are redundant or trivial. Rather, it suggests that the focus on realising a framework of formal equality for LGBTI persons, unaccompanied by a critical discussion of the very criteria employed to define human rights holders – and citizens as a consequence – represents only a partial outlook on patterns of injustice, inequality and marginalisation.

In this regard, this final chapter is conceived as a space in which to take further the findings of the substantive analysis and establish a connection between the protection of the rights of LGBTI persons in Europe and the possibility of thinking about citizenship in a way that radically transcends the national dimension of this institution. Moreover, this discussion also aims to challenge the current paradigms of sexual and gendered citizenship as rigidly framed socio-political instruments whose usefulness is mostly limited to the acquisition of certain gains, privileges and entitlements, rather than being a way to access the political arena as fully participating members of a polity in the Arendtian sense. This necessity for "action" is understood as being in continuity with the claim advanced by Stychin (2000) and Duggan (2003), who have highlighted how, paradoxically, the concession of some human rights to LGB persons – in particular the possibility of getting married – has led directly to a depoliticisation[98] of the gay movement.

In order to discuss a "multisexual" paradigm of citizenship that transcends national borders and is informed by a dynamic appropriation of labels, identities and

[98] Stychin (2000, 965) describes the problem of the depoliticisation of the gay movement in a poignant way: "it becomes far too tempting for the 'citizen gay' to consume human rights and then withdraw from any kind of progressive politics, especially when those who have bestowed the rights are also pursuing policies that are eviscerating the human rights of others on issues from migration to counterterrorism".

identifications, citizenship will be posited as a performative and transformative practice, rather than as a static endowment of some individuals within nation-states. Europe is an extremely interesting setting in which to conduct such research, precisely because of the relatively high level of political integration –unparalleled elsewhere –and the simultaneous existence of a myriad of multiple lines of allegiances[99] and identities that destabilise both the concept of the nation-state and the concept of Europe itself. This multidimensional, layered, and ever-changing model of European citizenship – with obvious problematic political contours – is understood here as a challenge to the current framework of sexual and gendered citizenship, which is narrowly tailored around specific rights claims that frame the individual as a "passive" rather than an "active" agent.

Citizenship as a Performative and Transformative Act: Beyond Static Conceptions of Socio-legal Subjectivities

Understood as a practice (Oldfield 1990, 79), citizenship becomes a precarious endeavour. The line between being a *good* or *bad* citizen, in fact, may prove to be very thin when actions, behaviours or even identities are under scrutiny, and individuals may be required to demonstrate their adherence to the functioning principles of the political community to which they belong or which they aspire to join. As Patton (1993, 148) has suggested: "competing rhetorics of identity interpellate individuals to moral positions that carry with them the requirements for action. Identity is an issue of deontology, not ontology; it is a matter of duties and ethics, not of being". This close relationship

[99] Sassen (2002, 279) claims that it is precisely the existence of multiple allegiances of individuals that "parallel the devaluation of nation-state-based sovereignty".

between citizenship and the possibility of action, implies that, as far as LGBTI persons are concerned, it is possible to draw a line between a *good queer citizen* (tax payer, married, child-rearing, patriot, productive) and a *bad queer citizen* (polyamorous, kinky, HIV-positive, with an ambiguous gender presentation, or at the margins of societal institutions). The dyad citizenship-action also appears relevant to the situation of those individuals who cannot participate in citizenship (economic migrants, asylum seekers, "persecuted queers") and whose presence is perceived as both a symbolic threat to the demo-economic stability of the nation, as well as a powerful interrogation of the limits and function of citizenship itself in a globalised world. In directly interrogating the extent to which citizenship can be a *practice*, rather than a nominal entitlement, the *bad queer citizens* and the *queer non-citizens* directly challenge conceptions of citizenship that rest on static membership of a polity, and suggest a configuration of citizenship as simultaneously transformative and performative.

The idea of a "performative model of citizenship" can clearly be traced back to Butler's (1990, XV) concept of the "performativity" of gender, insofar as it implies "(...) not a singular act, but a repetition and a ritual, which achieves its effects through naturalisation in the context of a body, understood, in part, as a culturally sustained temporal duration". The existence of a specific temporality of "being a citizen" contributes to rendering citizenship performative. In fact, it is always possible, by means of one's actions, behaviours or self-ascribed identities, to cross the line between good/bad citizenship or to fall short of qualifying as a citizen in the first place. Furthermore, while the attributes of citizenship are enunciated in the abstract, it is the enactment of actions that concretely shapes citizenship. This continuous enactment and creation of citizenship happens thanks to the performance of those small daily acts that confirm one's right to belong to the national community.

The idea of creating citizenship by endlessly performing it may be considered to sit well with the existence of an ideal of progress in the recognition of the rights claims of LGBTI persons in juridical and political fora. In fact, the trajectory of achievements in relation to the human rights of LGBTI persons in the Western context, from Stonewall onwards, can be seen as slow progress by which former outlaws enact a sort of ascension to the acceptable ranks of citizenship, thanks to the acquisition of specific sets of rights (marriage, the right to non-discrimination, adoption, gender confirmation surgery, and so forth) and an attached status of respectability within the political community.

An illustration of the trajectory of progress regarding the human rights of LGBTI persons is the already mentioned "law of small change" (Waaldijk 2003), which posited a smooth transition from the decriminalisation of sexual activity to the recognition of same-sex marriages and adoption rights, by the LGB citizen who could climb up the ladder of citizenship and try to reach the optimum of social recognition as a married, child-rearing individual. As for transgender and intersexual persons, instead, the idea of a (irreversible) trajectory of transition from one gender to the other, could also be seen as entailing a sort of "improvement", as if the fact of inhabiting an ambiguous gendered space could be associated with a bad practice of citizenship.

The idea of "progress" can also be applied to those LGBTI "non-citizens" who seek some form of limited recognition of their human rights entitlements on foreign soil. The case of LGBTI asylum seekers, in this regard, is particularly telling, as the kind of extensive questioning they have to undergo in order to be considered credible can be seen as an attempt to assimilate them, albeit in a very limited way, to the good citizenry with which they will be allowed to live in the host state. The experiences of these "outsiders" who have to demonstrate in different ways that they are worthy to

receive citizenship, point to the fact that citizenship should be articulated as something more than simply the prize for "good citizens". Because individuals perform acts of citizenship on a daily basis, by engaging in the community in which they live, contributing to the economic prosperity of a specific country through their work, or sharing cultural affiliations with a country of their choice, citizenship should be understood more as a bottom-up process than as a top-down concession.

Moreover, thinking about citizenship as a performative practice breaks with the idea of citizenship as a static mark in a person's life. It entails both an idea of precariousness and the possibility of continuous transformation and multiple crossing, from one gender to another at different points of one's life, or from one gendered erotico-sentimental relationship to another, closely tied to strategic repositionings in terms of race, ethnicity, class or ability/disability status and age. Citizenship can be *done* differently at different stages of one's life, due to the various stages of life and possible changes in circumstances (economic, personal, political or social) in one's life. In order to preserve her/his membership of the community, therefore, the citizen adjusts her/his practices to the changing circumstances, in order to make sure that she/he does not cross the line of "bad citizenship".

Rather than merely being symbolised by obtaining a passport, the fact of "having" citizenship means having an agentic role, one by which duties and rights – human rights – can be not only exercised but also questioned and rephrased, as in the model of "radical democratic citizenship" proposed by Mouffe[100] (1992). Mouffe, in particular, suggested that identities, which are themselves the product of multiple allegiances, are active sites of political struggle, and citizenship is far from being conceived of as a passive status characterised by the acquisition of some entitlements.

[100] Chantal Mouffe (1992, 235) gives a definition of citizenship as: "(...) an articulating principle that affects the different subject positions of the social agent (…) while allowing for a plurality of specific allegiances and for the respect of individual liberty".

Clearly, this way of understanding citizenship is in opposition to neo(liberal) and widespread conceptions of citizenship, which posit the individual as entirely self-sufficient and, to some extent, also atomised and highly problematic for sociological analysis, as Dahlgren (2006, 268-269) has suggested:

> the individual is seen implicitly as emerging as a fully-formed citizen, devoid of social bonds, out of some sociocultural black box, ready to play his or her role in democracy. Citizenship becomes an activity where 'no experience is necessary'; there is a sense in which the citizen is just 'acting naturally' in pursuing their own interests (Dahlgren 2006, 268-269).

Dahlgren's description of neoliberal citizenship is fascinating and compelling, insofar as it calls into question the issue of the "naturalness" of citizenship, as if one, by default, possesses an identity and gives shape to specific forms of civic behaviour that result in a good performance as a citizen. This discourse, of an "inborn" way of inhabiting citizenship, can be said to be attuned to the idea of the universality of human rights principles. Both assumptions start, in fact, from the idea that there is an identifiable "core" that describes both the citizen *and* the human rights holder. Discarding this deterministic view about a prototype of the citizen/rights holder allows for a de-essentialised and temporally multidirectional, as opposed to temporally linear, approach to LGBTI identities and the process of the negotiation of legitimate socio-legal positions. The rights-holder, as well as the citizen, do not exist in perfect autonomy and isolation, but construct their multiple identities in connection with others. From this relational aspect of identity-building descends the necessity of adapting human rights to

the intricate trajectories of individuals' personal lives and stories, even if this signifies adding a further layer of complexity to the existing architecture of human rights and to the rules for obtaining citizenship.

Moreover, performing one's citizenship may also entail a continuous crossing between lines of good and bad citizenship not only to call into question the parameters by which *good* and *bad* citizens are assessed, but also to challenge the instrumentalisation of sexual orientation and gender identity as new civilisational yardsticks employed to evaluate, across borders, different nation-states and their human rights agendas. This reconfiguration of citizenship in radical terms, however, cannot be confined solely to models of citizenship based on nationality, as the increasing and relentless globalisation of LGBTI identities requires the adoption of a broader socio-political and geographical perspective that sheds light on the creation of trans-national solidarities and forms of identification under the structure of an emerging "European sexual citizenship".

European Sexual Citizenship: a Concept in Continuous Transformation

In their discussions about an emerging "European Citizenship" most scholars have used the European Union as a reference (Helfer 1991, Tassin 1992, Bhabha 1999, Painter 2002, Stychin 2000, 2001 and 2004, Todorov 2010). The European Union is seen as the privileged locus for the analysis of new forms of citizenship. It is detached from the nation-state by virtue of its unique attempt to constitute a trans-national political community based on shared (European) values. As Stychin has highlighted (2004, 963) "the EU becomes the civilised version of nationhood, while simultaneously

transcending the idea of nationhood". If on the one hand the EU acquires its legitimacy from its member states, on the other hand it sets the ambitious goal of producing a synthesis of the European *Geist*. For this research, however, the framework of the EU has been deemed to be, relatively, too narrow.

From a political perspective, it could be argued that the Council of Europe as an analytical framework is less significant than the EU, because of its lack of instruments in fostering a political community (Benoît-Rohmer and Klebes 2005) and that the EU should be preferred when discussing the concept of "European citizenship". Nonetheless, it could also be argued that the idea of "Europe" and "Europeanness" can be better grasped by understanding them as an aspiration, rather than an acquired fact or a mere by-product of the freedom of movement enjoyed by citizens of the European Union. Moreover, the fact that the EU, in contrast to the CoE, was not founded for the protection of human rights, makes it more of an economic organisation that struggles to develop a unified political identity, than a transnational community that finds profound agreement on specific sociocultural and political values. While the creation of a "political Europe" remains the EU's ultimate goal, strong resistance still exists on the part of the various member states. On the contrary, because of its specific focus on human rights, the CoE shows interesting dynamics in terms of the attempt to create a "European moral community". Overwhelmed by the necessity of integrating the various member states' economies, especially in times of economic crisis, the EU sometimes seems not to mobilise enough resources to discuss how to build a common political identity. Furthermore, broadening the spectrum of analysis beyond the borders of the European Union allows one not only to perceive more neatly the divide between *moral* and *immoral* European states in relation to issues pertaining to gender and sexuality, but also to critically discuss the concept of "Europe" as polysemic and subject to continuous

change.

Currently, the image of Europe as the continent with the most efficient system of human rights protection in the world, thanks to the role of the ECtHR, is also, indirectly, boosted by the recognition of LGBTI persons as legitimate human rights actors. Human rights can be considered to be, on the one hand, a fundamental element in the construction of a peculiar European identity and, on the other hand, a crucial factor in the emergence of a model of sexual citizenship (Grundy 2005, 393). This two-fold process shows how human rights directly inform European exceptionalism with regard to both human rights in general and matters concerning sex, sexuality, and gender more specifically. The result of this intersection between these two strands of exceptionalism is the emergence of a "European Sexual Citizenship", characterised by the centrality of the recognition of human rights for LGBTI persons as an access gate to full membership of these individuals in the political community of "Europe".

Retrospectively, it can be argued that a certain idea of "Europe" is omnipresent in the analysis carried out for this research. Both in the various judgements of the ECtHR and in the work of the Commissioner, there is a precise idea of "Europe" in the background that directly or indirectly informs the evaluations expressed by these actors in relation to human rights violations in different member states. As has been shown in relation to the case law of the ECtHR on freedom of expression and freedom of assembly and association of LGBTI persons, European democracies are encouraged to function in a "healthy manner" and to display signs of tolerance and broadmindedness. These requirements of open-mindedness and tolerance are also found in the case law concerning the rights of transgender persons in relation to the recognition of their preferred gender, where the general public is encouraged to adopt a more tolerant attitude towards those who "transgress" the boundaries of sex and gender.

In this regard, therefore, “Europe” ceases to describe a geo-political area and becomes a prescriptive and normative idea, almost an aspiration. Hence, in order to truly become “European”, some countries have to embark on a process that radically transforms their legal, social and political structures[101]. This process, however, not only invests the national institutions, it also informs LGBTI persons' attitudes as well, insofar as it implicitly requires them to become more “European” by adopting specific sexual and gendered identities such as lesbian, gay, bisexual, transgender and intersexual. The aspiration to become “European”, therefore, is part of a broader and overarching process of construction of European citizenship, by which both states, and individuals in these states, are promised entrance into the European arena, provided that they fulfil certain criteria in terms of respect for human rights. Human rights, therefore, become the core of a European identity, insofar as they play the role of a “fault line on which Europe's internal and external borders are being inscribed” (Bhabha 1999, 21). If one considers the rights of LGBTI persons as the latecomers into this European panorama of human rights, it is easy to see how they can be effectively mobilised, together with other strands of human rights discourses, in order to foster an even more rigorous concept of “Europeanness”.

The concept of “European sexual citizenship” obviously retains an Anglo-American matrix, insofar as it is the direct product of post-Stonewall discourses on the need to acknowledge and protect the human rights of LGBTI persons. This universalising discourse, however, has been met with a variety of reactions, ranging from cautious endorsements to outright backlashes against these presumably externally imposed human rights agendas. In this regard, Stychin (2004, 951) has maintained that

[101] It should not be forgotten that membership in the Council of Europe is a formal pre-requisite for accession into the European Union and that respect of human rights is one of the pillars of the Copenhagen Criteria used to assess eligibility of candidate member states in order to join the EU (Börzel and Risse, 2004).

the most effective results in terms of the recognition of human rights have been achieved in cases in which activists have been able to debate these issues in local politics, rather than by adopting a top-down approach that has taken for granted the universality of human rights. He illustrates this point by referring to examples from countries like Romania or Zimbabwe, in which activists have tried to connect issues relating to sexual orientation and gender identity to a national common past. These strategies, for Stychin (2004, 954), respond to a need to counter the movement of the globalisation of sexual identities that is built upon a hegemonic Western matrix. The analysis carried out for this project has tried to highlight the extent to which the protection of the human rights of LGBTI persons in Europe presents several limitations, insofar as it is heavily indebted to civilisational discourses that favour the establishment of a neoliberal model of European citizenship across the continent, by positing respect for the rights of the individual as a self-sufficient unit, cut off from the broader social context in which the persons are embedded.

Thus, promoting the recognition of the rights of LGBTI persons across Europe without engaging in political dialogues that go beyond the "us versus them" rhetoric is, at best, a civilisational endeavour, devoid of traits that favour the opening-up of a debate on what "European citizenship" should be in practice for individuals across the continent. In this regard, therefore, it is necessary to unpack the concept of "European sexual citizenship" and re-discuss some of the entitlements that this concept entails, such as access to marriage and adoption, and irreversible transition from one gender to the other, which serves a very narrow (neo)liberal agenda and does little to address structural problems, such as intersecting forms of inequality and discrimination connected to the attribution to individuals of various categories of gender, race, class and economic status, and ability or disability which, consequently, give rise to endemic

forms of socio-economic and socio-political vulnerability. It is precisely the idea of a "one-size-fits-all" model of the recognition of human rights that is applied blindly across the European continent that runs counter to the idea of Europe itself as an ideal *forge* in which concrete and dynamic forms of transnational solidarity are put into place against the atomising tendencies of economic and financial globalisation.

Current rights-based discourses on the equality of all individuals often have the limitation of approaching different strands of inequalities as if they were watertight compartments in individuals' lives and as if one could embark on a description of a neat geography of differences. Such a limitation can also be found in relation to emerging discourses on the rights of LGBTI persons. For instance, even if marriage were open to all same-sex couples in the 47 member states of the CoE, it would prove beneficial to those couples who already have some economic and cultural capital to benefit from through access to such an institution, while their inclusion implicitly traces new lines of exclusion for different portions of the population. Similarly, the harmonisation of legislation on gender recognition across the different states would not reduce the existence of transphobia, sexism or violence. Rather, it would scratch the surface of the problem without addressing the root causes of discrimination and hostility towards those who seem not to comply with gender norms.

It is precisely for this reason, therefore, that the fact of adopting a conception of "Europe" as an entity that continuously questions its own borders, is an excellent occasion to also question the very *content* that Europe as a socio-political entity should have, trying to break away from the creation of a self-sufficient, perfectly liberal and productive European citizen. Hence, it is the combination of the right to freely express one's sexual orientation and gender identity, together with the possibility of freely expressing other aspects of one's life (not necessarily crystallised in terms of

"identities") and other sets of socio-economic rights, which has the potential to engender a dialogue on the role and reach of a European citizenship that is really considered valuable and meaningful by individuals (Stychin 2004, 292).

Multisexual Citizenship as a Challenge for the Protection of Human Rights in Europe

The analysis of the case law of the ECtHR and the work of the Commissioner regarding issues relating to sexual orientation and gender identity has suggested that it is not enough for LGBTI persons in Europe to become the passive recipients or beneficiaries of human rights entitlements embedded in a neoliberal socio-economic framework. This principle of the passive reception of rights lessens the possibilities of debating the content and reach of human rights provisions as being connected to other spheres of individuals' lives. Hence, the need to consider a multisexual model of citizenship stems from the necessity to recognise the embodied and multidirectional trajectories of the life of individuals. This implies that crafting or "performing" one's citizenship as an LGBTI person means, in the first place, contributing to reshaping and building Europe as a community with variable boundaries and numerous – and potentially shifting – combinations of sexual and gendered identities. The role of LGBTI persons is particularly important in this regard, because it touches on sex and gender, upon which social control, power and sovereignty are based, and can also be crucial in the process of admitting that the mere recognition of rights does not entail automatic entrance into the domain of citizenship (Phelan 2001, 147). *Upgrading* one's citizenship status from "second-class" to "first-class" can be seen as merely entailing access to a set of privileges, rather than the possibility of shaping one's citizenship by

truly recognising the equality of LGBTI persons.

In recent years, an increasing number of scholars from various fields, (Yuval-Davis 1999, Painter 2002, Ehrkamp and Leitner 2003, Grundy and Smith 2005) have engaged in the definition of models that break with the traditional mono-dimensional conception of citizenship, in order to recognise the various, sometimes conflicting, factors that account for the creation of the "citizen". In most cases, the new models that have been proposed start from the recognition of different geographical, political and sociological layers that participate in the emergence of the modern citizen and, in some cases, they also touch on issues of sex, sexuality and gender (Grundy and Smith 2002). The concept of "Europe" plays a fundamental role here, as it is referred to by various scholars in order to demonstrate how current accounts of citizenship are increasingly detached from the nation-state and develop according to transnational trajectories.

Through an acknowledgement of the process of the "globalisation of same-sexualities as identities" described by Stychin (2004, 951), it is possible to explore the intersection between new conceptions of European citizenship and new conceptions of sexual citizenship that are multi-layered. In their study on multiscalar citizenship and LGBT politics in Canada, Grundy and Smith (2002, 390), for instance, have pointed out how LGBT activists tend to perform citizenship differently at different local and national scales[102] and at the same time they question the horizon of the nation-state as the sole arena in which to talk about citizenship in the first place. In their account, citizenship is understood to be adaptive to circumstances and constantly in flux, since it can be attuned to different contingent exigencies, particularly in relation to the notion of space and the crossing of borders.

The idea of "scale" is particularly relevant in the context of this research and in

[102] The authors define the concept of "scale" as socially constructed through state processes, rather than being a geographical given (Grundy and Smith 2002, 391).

the formulation of a “multisexual” conception of citizenship, because it points to the fact that individuals may perform their gendered or sexual citizenship differently, sometimes even inconsistently, in different spaces or at different times. For instance, concepts such as that of “coming out” or “passing” or the concept of what constitutes “private life”, which have been addressed in the previous substantive chapters of the analysis, necessitate an interrogation of the interrelationship between space, time and citizenship, insofar as they involve decisions that individuals make in their daily lives in relation to actions that are socially and politically relevant to themselves and others, such as endorsing an identity that may be associated with a specific set of rights claims or that can be used to fulfil a certain social role (parent/spouse). Furthermore, phenomena such as “coming out” or “passing” strategies, or shifting notions of “privacy”, may also be adopted selectively, depending on the usefulness of concealing or revealing one's sexual orientation or gender identity in the given circumstance.

One interesting illustration of the possibility of enacting sexual and gendered citizenship performatively and at various “scales” is represented by the issue of disclosing one's gender identity. For individuals who identify as transgender or whose gender differs from the one assigned at birth, the disclosure of gender identity may not be relevant at all “scales”. In the context of healthcare provision, disclosing one's status as transgender could be helpful in obtaining reimbursement for specific medical expenses. In relation to one's marital or parental status, instead, one's gender identity should not become determinant in the allocation of specific rights to each and every person. Therefore, an individual may strategically make use of the identitarian label of “transgender” to obtain a legitimate benefit, while adopting more open-ended self-descriptions in other spheres of life (e.g. when defining personal relationships, when undertaking parenting duties and so forth). Similarly, when considering the claims of

LGBTI asylum seekers, attention should be paid to the fact that individuals are not always open about their sexuality across time and space, so it is not possible to ask someone to "prove" her/his gayness in order to rule out possible frauds. Individuals' experiences of sexuality may not entail full disclosure, or the existence of "proof" of one's sexual or romantic engagement. In situations of danger, individuals may dissimulate or hide their sexual orientation and/or gender identity, negotiating at different "scales" or levels their public identity and their membership of specific political and social communities. Recognising the complexity and, sometimes, the incongruity of individuals' experiences in the exercise of their citizenship is, therefore, crucial, in order to ground human rights in something other than the mere attribution of one-size-fits-all labels that open up the possibility of receiving specific entitlements.

If one wants to elaborate in more detail on the concept of "scale", citizenship could be conceived of as being "multisexual" whenever the individual has the possibility of enacting different combinations of gender and sexuality depending on the circumstance and the relevance that these aspects have for the actions performed. Far from being merely a form of promotion of one's self-interests, the fact of being able to adjust one's identity to the specific circumstance, can be linked to the possibility of participating in the fate of a community, rather than finding oneself in a community as an outsider.

Moreover, since citizenship has already been posited in this chapter as a practice, it is easy to see how this variable geometry of gender and sexuality fits with a model of citizenship that departs from the consideration of subjective and identitarian positions – such as "lesbian", "gay", "bisexual", "transgender" or "intersexual" – as pre-given labels to which only one type of behaviour or one prototype of law-abiding citizen may correspond. Painter (2002, 93) considers Europe as the perfect place to imagine new

forms of citizenship that dissolve that intimate relationship with the nation-state and recognise the convergence of different spatial dimensions, as well as simultaneous membership of what he calls "various non-territorial social groups" (Painter 2002, 93), such as religions, sexual minorities, or ethnic diasporas. Painter's intuition is that of dismantling the myth of a "unified European identity" (Painter 2002, 94), a problem that has also been the basis of Balibar's (2004) and Todorov's (2010) speculation regarding the specific characteristics that should form a "European identity". The alternative to the endless enumeration of criteria to define "Europeanness" is the recognition of Europe as continuously in flux and difficult to capture in a single snapshot. In this regard, issues of sexuality and gender become crucial to understand emerging models of citizenship involving a re-sizing of the importance of the nation-state as the sole actor of human rights and citizenship. This is not only because of the performative character of sexuality and gender (Butler 1990), but also by virtue of their potential as vehicles of power and regulation (Foucault 1978). A citizen (or a *wannabe* citizen) who embraces various sexual orientations and/or gender identities simultaneously – or in fact none of them –directly challenges the state, insofar as they displace the attribution of a specific identity as a marker of one's societal role. When this same individual also claims for her/himself the fact of belonging to various political, cultural or religious communities she/he takes the challenge further, contributing to the deconstruction of the ideal type of what a citizen should look like in a given nation-state.

Furthermore, this intention to decouple citizenship from crystallised sexual and gendered conceptions of citizenship, presents the advantage of revealing how the system of protection for human rights in relation to the recognition of LGBTI persons as legitimate human rights subjects, rests on a fixed set of assumptions about individuals' lives, which are seen as being characterised by events such as getting married,

becoming parents, receiving benefits, or fitting (irreversibly) into the appropriate gender category. In this regard, both national citizenship and human rights practice tend to rigidly articulate individuals' identities. This common attempt to rigidly articulate subjective positions can be traced back to the common regulatory and disciplinary functions that both citizenship and human rights fulfil. For this reason, proposing a multi-dimensional conception of citizenship can also help to discard a system of protection of human rights that establishes a perfect correspondence between the provision of the law and the recipients of such provision, without addressing the broader socio-economic and political context in which human rights violations occur. For instance, many individuals in the same position as *C. and L. M. v. the UK*, are deported, notwithstanding the fact that they may be (or they may claim to be) in long-standing same-sex relationships that are not officially recognised by the law. Whether their claims can be verified or not should not be of paramount importance. Rather, what is at stake is that often those who are to be deported may also be in the most vulnerable economic and political position, by being deported to a home country that may not offer them the same quality of life (in terms of protection from homo/transphobia) or work opportunities. Hence, in cases like this, it should not become burdensome for the individual to demonstrate that she/he has the right to enjoy her/his "family life". The system of human rights protection in place should encompass those who present fewer credentials or have weak claims, since the fact that they find themselves in such a vulnerable legal position may well be the reason why they need to be protected the most, as with the figure of the "Arendtian refugee".

The proposals advanced in this chapter in relation to a "multisexual citizenship" are closely linked to the work of Stychin (2004), among others. One passage, in particular, is crucial to understanding how the combination of European citizenship and

sexual citizenship can represent a new possibility, of envisioning individuals as active participants in the construction of a more dynamic and politically engaged Europe, in which rights are discussed, rather than only being claimed:

> the possibilities of European citizenship lie in the potential to synthesise rights and belonging, in the creation of opportunities for democratic contestation in the interstices between liberal rights, the disciplinarity of the free market, and across differences between and within national identifications (Stychin 2004, 299).

It is possible to suggest that in order to realise the "democratic contestation" that he advocates, it is more appropriate to take the Council of Europe, rather than the European Union, as the legitimate domain of action for individuals across the continent. More specifically, some new forms of European sexual citizenship that build on the importance of the recognition of human rights, can be tried out by contributing to a call to strengthen the sociological competences of the institution, whose work is currently dominated by a strictly legal framework. While the judicial role of the ECtHR is fundamental and immensely valuable, it is somehow reductive to consider this as the main and sole instrument to promote the respect of human rights in Europe. It is true that the Court is starting to take into account the work of the Commissioner in order to ground its decisions on more solid sociological facts, such as in the 2013 case concerning adoption by a same sex couple in Austria (*X. and Others v. Austria*). At the same time, however, it would be an exaggeration to posit that the ECtHR has thoroughly acknowledged the need for a shift in its rigid legalistic approach, which still constitutes the bulk of its action.

Furthermore, in order to counter the phenomenon of European (Western)

exceptionalism with regard to human rights, which may lead to new forms of cultural imperialism (Linklater 2002, 317), it is necessary to allow individuals, in the different geo-political and social contexts, to have a say on the human rights campaigns and initiatives that are promoted. Processes of consultation with both local activists and human rights observers could be beneficial in order to rephrase the "vocabulary" of human rights, following a bottom-up perspective. The instrumental use of the concept of the universality of human rights, in this regard, should be minimised by the CoE. The existence of these subtle hidden political objectives undermines the presumed genuineness and universal applicability of those principles that are set forth and continuously restated by the different bodies of the organisation, among which the ECtHR surely plays a unique role.

The Rights of LGBTI Persons in Europe: the Need for a New Agenda or of a New Approach to Inequalities?

In his book "the End of Human Rights", Douzinas (2000) called for a transformation of the role of human rights beyond the current instrumental use that is made of them by different political actors. Far from having the intention of describing human rights as superfluous or obsolete, Douzinas' critique of the current system of protection of human rights rested on the idea of an ongoing process of debasement, for merely political purposes, of human rights' ideal moral reach and required a thorough reconsideration of both their role and the means by which human rights are promoted, protected and guaranteed. A call similar to Douzinas' is echoed in this research: human rights should be advocated and strengthened, but beyond political appropriation. If subtracted from the colonising logic of petty political calculations, human rights are

valuable because of their potential to be used as living instruments to monitor patterns of injustice and inequality and to articulate proposals for social change. They should, however, rest on a less defined vision of the human being and be more flexible in order to accommodate the lives of individuals.

During the last three decades, the slow but steady appearance on the international "stage" of human rights, of new human rights actors that (directly or indirectly) challenge the norms of heterosexuality and the duality of gender, has resulted in a new vital push for the theory and practice of universal human rights. In fact, it has introduced the necessity for a profound reconsideration of two of the major tenets of modern societies: sexuality and gender. The enormously disruptive character of the rights claims of these new human rights actors has almost taken the shape of a theoretical earthquake, insofar as it has forced legal scholars to question the rooted heterosexual character of the nation, as well as the role and function of various societal institutions (kinship, marriage, the army, the nation) in the light of the existence of former gender or sexual *outlaws*. The radical potential associated with the emergence of these new human rights actors, however, can be said to have been underestimated by the new actors themselves who, to some extent, have acquiescently subscribed to a model of recognition of their rights – also conceived as a way to gain access to full citizenship – that has posited them as passive recipients of benefits or entitlements, rather than as active protagonists in the critical process of questioning the heterosexual and cisgendered foundations of the nation and societal structures.

Precisely because of this predominant passive framework of the articulation of legal and social subjectivities by these actors, which is clearly visible in the construction of LGBTI identities by both the ECtHR and the Commissioner for Human Rights of the CoE, the current research has engaged in a quest for alternative models of citizenship.

These models of citizenship acknowledge the reality of multiple allegiances and forms of identification that individuals experience during their lifetime.

Furthermore, these new modalities of citizenship permit a radical re-conception of the role of human rights in ensuring the acquisition of the "privilege" of citizenship both within and outside the boundaries of the nation-state. On the one hand, the classic paradigm sees human rights and citizenship as being in a univocal relationship with the nation-state as the sole source of legitimacy, protection and recognition. On the other hand, to radically abandon the horizon of the nation-state in favour of a universalist model of human rights or a cosmopolitan model of citizenship can harbour the danger of promoting new forms of cultural or political imperialism. This clear tension, between the national and the transnational dimensions of human rights and citizenship, cannot be resolved merely by an abstract exercise of political will by the actors concerned. On the contrary, the tension can only be solved if actors continuously re-enact and perform those acts of citizenship, which can, precisely by virtue of their incessant repetition, favour the crystallisation of new cross-dimensional models of belonging to different spatial, social and political realities. By continuously acting as citizens who cross the lines of sex, gender and heterosexuality, together with a whole constellation of other ethnic, religious and multi-national affiliations, LGBTI persons can truly change the content of "European citizenship and identity" from within.

Moreover, it is also possible to broaden the perspective so as to encompass Tassin's (1992, 189) suggestion to consider entrance into the public sphere of citizenship as "elective" rather than "native". This proposal to abandon a conception of citizenship that builds on a natural derivation of one's membership of the (national) political community, allows the inclusion of those individuals that do not possess the characteristics to become citizens in the first place, such as LGBTI asylum seekers and

economic migrants. Using the example of Europe as an illustration of the possibility of discarding the national model of citizenship, Tassin (1992, 189) is adamant in proposing a model of European citizenship that breaks away from the univocal correspondence between the individual and the nation-state, and places significant emphasis on the notion of "choice". Choice is understood in terms of the possibility, for each person to "select" their citizenship and, hence, participate in the decisions concerning the destiny of that community.

It may appear odd to link Tassin's notion of "choice" to the situation of LGBTI asylum seekers or economic migrants who cannot qualify as citizens in the first place. However, it is precisely because of the fact that their rights claims are not evenly recognised across the international arena, that their case is the most significant in illustrating the usefulness of broadening the concept of citizenship so as to encompass an element of "choice". In fact, it appears more significant to start from the periphery in order to illustrate what needs to be changed at the core of the current system by which rights are granted and citizenship is recognised. As this research has shown, LGBTI asylum seekers or economic migrants are often treated with suspicion by their prospective host states, because of the possibility of "fraud" that they can enact by claiming to have undergone persecution in their home country on the grounds of their sexual orientation or gender identity. Their ambiguous position as both "unwanted" guests and a symbol of the intrinsic benevolence of Europe, creates a situation in which they oftenembody the situation of figurative "statelessness", insofar as they are unwilling to endorse their home countries' citizenship but, at the same time, they do not meet the criteria to become members of the host states' political communities. The strengthening of "Fortress Europe" only exacerbates the creation of outsiders who are denied the possibility of participating in the fate and decisions of a political community

that perceives them as “threats” or “impostors”, while simultaneously instrumentalising politically their presence and experiences on the national soil.

Connecting the situation lived by LGBTI asylum seekers and economic migrants to the lack of an element of “choice” in the definition of one's citizenship is necessary in order to understand the limitations of the concept of citizenship in the first place. When some passports are deemed to be more valuable than others and some sexual orientations, gender presentations, religious, ethnic or racial profiles, and class statuses are more valued than others for the acquisition of citizenship it becomes imperative to ask whether it is possible to introduce an element of “choice” into the concept of citizenship. If applied to the context of Europe, in which human rights are at the core of the continental identity, it becomes even more pressing to ask, to what extent European (sexual) citizenship can be constructed on specific notions of racial, economic, sexual and gender privileges. The recognition of the rights of LGBTI persons in Europe, and their access to full national and European citizenship, requires a radical interrogation of the dynamics that make membership of the political community possible. Why is that possibility of political action that Hannah Arendt advocated, only reserved for an extremely tiny minority that possesses all of the moral, economic, cultural and social characteristics to be a “good” citizen? Is it possible for Europe to praise itself and its achievements by tacitly luring others to have the same aspirations, while simultaneously denying them access? Is it not precisely Europe's ability to absorb difference that constitutes both its uniqueness and its potential? Why not, then, dare to allow these “differences” to speak for themselves in deciding what type of citizens different people wish to become?

Equally, in terms of the performativity of citizenship, it is possible to suggest that the repeated acts of those LGBTI non-citizens that reside in a host state, be they

asylum seekers or economic migrants, constitute a new challenge to the static notion of national citizenship still largely in place. By selectively choosing, within the host state, which elements of LGBTI identities they want to appropriate for themselves, together with other identitarian traits connected to ethnicity, language, religion, culture, or other forms of belonging, these individuals demonstrate that citizenship can be continuously *done* from below, because it can be mobilised in order to obtain formal recognition beyond the description of what a citizen ought to be. What if the ideal space of citizenship was conceived of as a domain in which self-determination could be realised beyond both communitarian and liberal models? This possibility, of course, would be to consider "choice" as something more than neoliberalism considers it to be: a mere possibility of choosing for oneself in order to pursue one's interests. Under these terms, the process of choosing one's citizenship, therefore, cannot be equated to the "flexible citizenship" of the diasporic Chinese economic elite described by Ong (1991), in which individuals adopt a strategic and opportunistic attitude towards citizenship because of the changing political and economic conditions. Rather, the notion of "choice" employed here takes political action as a fundamental aspect, as it connects it to the possibility of also advancing one's human rights claims as an agent rather than as a recipient. Giving more voice to those who are part of or wish to be included in the citizenry, also represents a countermeasure to the phenomenon by which individuals become entrenched in sectarian positions, while they lose the existence of a "common fate" or refuse to define what a common fate should be in the first place.

Hence, debating the rights claims of LGBTI non-citizens and LGBTI citizens in the context of the Council of Europe brings an immense contribution to the definition of European (sexual) citizenship as a phenomenon that not only concerns the so-called "sexual minorities", but also appeals more broadly to the whole of the European

population. The intricate relationship between citizenship and human rights claims relating to sexuality and gender is not merely the interest of a minority. Sexuality and gender inform everyone's citizenship and contribute to shaping one's participation in different spheres of public life. In fact, far from being confined to the private sphere, sexuality and gender have a public dimension that also informs one's way of doing citizenship. If the material and symbolic membership of Europe is also measured by the degree to which human rights are respected and promoted, then sexuality and gender need to be included in this discussion, but clearly not as instruments in order to foster exclusionary models of Europe based on moral exceptionalism.

The discussion of alternative models of citizenship that admit a plurality of sexual and gender positions, together with other layers informing one's identity as a citizen, can be transformative for the definition of "Europe" in the first place. A more dynamic conception of citizenship would help to conceive of Europe as something more than an economic space with bland dynamics of social and political cohesion. In this regard, the work of the Council of Europe can be strategic, insofar as the institution can dissociate itself from its current image as a distant and bureaucratic giant, and can start to employ instruments to attune its work more finely to the complexity of the lives of the individuals across the continent. The ability to respond to this transformative challenge could also, potentially, lead to the accrued prestige of this institution as a true interlocutor for individuals across the continent on matters of human rights protection.

Moreover, the rights claims of those who appropriate the label of "LGBTI" for themselves, need to be decoupled from mechanistic notions of both "equality" and "freedom", which narrow down the possibility of having one's rights recognised by becoming equal to heterosexual and cisgendered counterparts or as free as them. It is this sort of comparative endeavour on which human rights theory and practice has

embarked, up to this moment, which has simplistically blurred the lines between becoming a subject of human rights and becoming an actor of human rights.

As has been illustrated in the analysis carried out for this research, the recognition of LGBTI persons' formal equality or formal freedom (accessing societal institutions on an equal footing, having one's privacy respected, being tolerated because of one's status as a member of a minority), does very little to favour a re-discussion of the reasons behind the existence of structural inequalities. To be treated equally as gay in the workplace while gaining a wage below the subsistence level should not be perceived solely as an instance in which the person's sexual orientation is at stake. To ask for the recognition of one's equality while disregarding the other intersecting factors that contribute to the definition of a situation of inequality is, at best, a Pyrrhic victory. A piecemeal approach to the protection of human rights does little to improve, in real, material terms, the life of the individual concerned.

The human rights not only of LGBTI individuals, but more broadly of all individuals, need to be understood beyond the current predominant framework of formal equality and freedom, which, very often, serves narrow interests in both domestic and international politics and only scratches the surface of the structural inequalities affecting LGBTI persons. If coupled with the attempt to build forms of transnational citizenship, such as in the case of Europe, the recognition of the current limitations of the system of protection that is in place helps to seize the momentum in order to bring to the table alternative models that give more space to “European citizens”, to debate the real human rights struggles that matter to them in terms of how their lives can be improved. This, in turn, allows one to distance oneself from an abstract formulation of human beings as all being born equal and free, and requires a political and social engagement with the roots of inequality in a continent that

increasingly and relentlessly builds its reputation on its record of protection and respect for human rights standards.

While the case law of the ECtHR represents an incredible instrument to foster common European standards of human rights and its analysis allows one to unveil many of the social and cultural policies at play in the construction of human rights subjects in the first place, it should not be taken as the sole crowning achievement of all human rights struggles of LGBTI persons in Europe. The delivery of the ECtHR's judgements is currently taken as the most authoritative source on the continent, regarding what the human rights standards should be in the 47 member states of the CoE. However, it is far from being an all-encompassing perspective that takes into account the multi-faceted aspects of complex issues such as marriage, parenting, gender expression and gender presentation, as well as sexual behaviour and sentimental relationships. The significant bulk of the work produced by the ECtHR on issues relating to sexual orientation and gender identity should be complemented by paying more systematic attention to the social fabric in the different member states from which these human rights claims originate. While the law requires simplification and categorisation in order to function and ensure equal treatment, it is nonetheless true that the current predominant legalistic approach that it adopts in relation to rights claims, paradoxically, often strips the individuals of the dignity and integrity that the law seeks to protect, by reducing them to a shapeless and voiceless crowd.

Bringing to the surface the ways in which human rights institutions, such as the CoE, rely on the simplification of the experiences of sex and gender in daily life, and their multiple intersections with many other characteristics and conditions, serves to establish a fruitful critical dialogue with these institutions, and can also help activists in framing their requests to these institutions so as to ground their action on a more

accurate sociological basis rather than merely on neoliberal stereotypes about same-sex families, same-sex parents, sexual behaviour, gender conformity, and so forth. A process of rebalancing the way in which human rights are constructed and advocated, would be precisely aimed at establishing a synergy between the black letter of the law and the extremely variable and fluid object of inquiry of sociological scholarship on gender, sex and sexuality. This endeavour is not merely an ideal, since the work of the Commissioner, although limited in its reach so far, has demonstrated that such a negotiation is possible, and that the judgments of the ECtHR can be enriched by being complemented by contributions from sociological research.

The field of the rights of LGBTI persons represents a perfect location in which this experience of "pioneering" new forms of human rights advocacy and protection can be tried out. Because of their peripheral position in the panorama of international human rights, the rights claims of LGBTI persons also represent the most vivid example of how often the acquisition of legal, social and political intelligibility is enacted through the existence of a compromise that curtails the possibility of self-determination. Moreover, the process by which "new" human rights actors are allowed into the international and domestic arenas also sheds light on the crucial process of the reconfiguration of forms of citizenship and socio-political belonging in a European continent that currently hesitates between two ambiguous positions in world politics: on the one hand, the possibility of becoming a tranquil international moral hegemon, and on the other, that of acting as a reluctant but assertive international political actor.

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