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JUDICIAL INTERPRETATION, HUMAN RIGHTS, SEXUAL ORIENTATION: A SOCIO-LEGAL
STUDY OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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INTRODUCTION

“Gay rights are human rights, and human rights are gay rights”
H. Clinton, 2011

The contemporaneity has been famously defined as “the age of rights” (Bobbio 1995), and the logic of rights has become “the principal language that we use in public settings to discuss weighty questions of both right and wrong” (Glendon 1991, 63). If human rights give voice to minorities and marginalized groups in society, and they can do so with powerful legal and symbolic resources, the tendency to frame almost every social conflict in terms of a clash of rights also favours absolute formulations and the activation of judiciary.

The rhetoric of human rights, the language of fundamental freedoms, and the appeal to intangible values represent the linguistic code through which divergent interests contrast; when scratching beneath the surface, the Universalist pretence of international human rights law starts to creak. The Universal Declaration of Human Rights may even state that “all human beings are born free and equal in dignity and rights” (UDHR, Article 1), but for decades the segregation of blacks/natives/aborigines and whites has been a consistent reality, tolerated by the international community; States may have even been prevented from discriminating against or from denying the enjoyment of rights because of “sex” (UDHR, Article 2), but until the drafting of the Convention on the Elimination of all Forms of Discrimination Against Women, in 1979, the violence perpetrated against women has been treated as representing a minor form of inhuman treatment, somehow justified by traditional cultural practices.

Likewise, the opening quote from the former US Secretary of State, at the UN Assembly in Geneva, encapsulates the ideal for which generations of lgbt activists have been fighting over the past decades, and to whose enforcement several NGOs worldwide still devote all their efforts.

Clinton’s statement might seem almost redundant and pleonastic, when recalling the human rights’ Universalist yearnings.

Yet, it is not; as extensively demonstrated by a large stream of literature, the drafting of the UN Declaration of Human Rights mantled with neutrality a catalogue of Western-centered values, and it took the image of a subject which is tacitly presumed to be, among all other things, white, male, adult, and heterosexual as a reference model (Glendon 1991; Dembour 2006; Douzinas 2007; MacKinmon 2006).

In fact, until very recent times, homosexuals did not enjoy any rights at all, and they were even unable to claim freedoms which were recognized as being basic and essential for heterosexual people.

Until the latter half of the XX century sexual orientation drew a distinction between the normal and the so-called abnormal groups in society, such as the homosexuals for example.

The following abrogation of criminal sanctions against same-sex acts did not dismantle the prejudices rooted in tradition. Rather, these policies represented a liberal attitude, and they supported tolerance for private acts committed behind the veil of decency, but it was generally still considered inappropriate that homosexual people should enter the public arena and claim rights on the grounds of their sexual orientation.

Only thanks to the homosexual movements' efforts, the unstated heterosexual premises of the Western legal system have been challenged and partially breached; obviously, this process is still ongoing, it combines innovative hints with moments of backlash, and its trajectory has become intertwined with the experience of other social and political movements, such as the feminist one and the US movement for civil rights.

The judiciary plays an essential role: thanks to the interpretation laid down by national and international judges, homosexual claims can be dignified, framed as relating to not only the interests of a minority, but, also the compliance with the actual law and the enforcement of values enshrined in Western theoretical foundations.

Hence, in many contexts the emergence of human rights related to sexual orientation is tightly interwoven with the judiciary, and strategic litigation recurring in all national and international judicial venues.

Under such premises, this dissertation provides a qualitative socio-legal analysis of the jurisprudence on sexual orientation of the European Court of Human Rights (hereinafter ECtHR).

More in detail, I focus on the arguments produced by the judges, and I analyze the legal controversies, the normative framing, the social perspectives, and the moral standpoints that orient the interpretation of the European Convention on Human Rights (hereinafter ECHR)

The aim is twofold; on one hand, I investigate how the aforementioned arguments influence the evaluation, the acceptance, or the refusal of claims grounded on sexual orientation. On the other, the purpose is to critically engage in the asserted neutral character of judicial reasoning, in order to reveal the clash of perspectives underpinned to the interpretation of human rights.

To appreciate the relevance of this issue, it suffices to recall the kinds of questions that it raises: how do situated standpoints, moral and cultural assumptions influence judicial reasoning on sexual orientation? Has the ECtHR developed a unitary legal culture on this theme? If any,

how do you explain internal disagreement, be it on the claims advanced or on the role performed by the Court? Which element might explain the caution of the ECtHR in respect to certain issues, such as same-sex marriage, and which, instead, the activism shown in relation to other themes, such as the presence of homosexuals in the army? What role does the ECtHR play in shaping, restricting, transforming, or rejecting the rights claimed? Is there a discrepancy between the tenure of the ECtHR's reasoning and its effective innovative potential?

Again, does the ECtHR's approach to sexual orientation depend on pre-determined evaluations or it is the Court to be entrusted with expectations that can't be met, which are not however related to a negative evaluation of homosexuality? If, instead, prejudice is effectively conveyed by judicial interpretation, to what extent and in which cases does it affect the final outcome?

I focus on the case of the European Court of Human Rights, because it provides a unique environment in order to study judicial law-making in the context of human rights. In fact, the ECtHR is entrusted with the task to interpret a text, which, on the one hand, has remained substantially unaltered since its drafting, in 1950, but which, on the other, still continues to be a beacon for the enforcement of human rights.

Sexual orientation is not mentioned in the ECHR and the entire ECtHR's case law on this theme lies in the creative reading at the hands of the judges.

By applying the 'living instrument' doctrine, and by interpreting the ECHR in relation to the Council of Europe's socio-legal context, the ECtHR has greatly contributed to the shaping of new rights, new meanings and new interpretations, never previously even been discussed.

Against this background, the study of ECtHR's judgments allows us to investigate the argumentative paths followed by the Court and to assess the role played by this institution, in legitimizing new claims and in acknowledging homosexuality as being worthy of legal protection. As far as creative hints can actually be traced also in the jurisprudence of other Courts (Andersen 2004; Richards 2009), the ECtHR offers the clearest example, in that it opposes the static nature of the Convention to the dynamic performance of the only Court appointed to interpret it.

Generally speaking, sexual orientation for the ECtHR is strained by divergent perspectives, which can generally be expressed in contraposing terms between stances supporting judicial activism and stances supporting self-restraint. National authorities generally back the latter perspective and emphasize the pre-eminence of domestic authority, according to the famous principle of subsidiarity. Conversely, homosexual movements constantly press for the opposite outcome; thanks to international coordination supported by Ilga Europe - the European branch of the International Lesbian, Gay, Bisexual, Trans, and Intersex Association - judicial litigation is

intended to impose lgbt issues on the international agenda, to expand and to strengthen the set of demands related to sexual orientation falling into the cluster of human rights¹.

Hence, given both the vagueness and openness of the ECHR, judges are called to give actual meaning to general provisions, enjoying a large room for discretion.

The theoretical framework that informs my qualitative analysis consists of three guidelines.

Firstly, the institution of the ECtHR and the ECHR system which are defined and characterized according to the seminal theories of Jhering, Holmes, Pound, Friedman and Ferrari, on the permeability between the social and legal sphere, on the clashes between opposing interests in the judicial arena, on the creativity in the hands of the judges, and on the phenomenon of judicial law-making.

Indeed, the ECtHR can be framed as a venue where social and legal inputs become intertwined (Friedman 1975, 11 and fol.), where interaction between the applicants and the judges mirrors the mutual influence between the social and the legal sphere (Ferrari 2004).

If strategic litigation stems from the social dimension to then go on to affect the legal realm, judicial interpretation spreads effects outside the juridical sphere, in a circular dynamic (Ferrari 2004, 161). Far from being merely a mechanic process, judicial interpretation stands at the crossroads of social, political, legal, and moral assumptions, embodying the complexity and the contradictions of reality.

Secondly, I filter the interpretations of the ECtHR according to anti-formalist paradigms, to Friedman's and Cotterrell's studies on internal legal culture and to Cotterrell's critique; hence I emphasize the social meaning of judicial reasoning and I study how extra-judicial standpoints, values, or considerations influence the reasoning of the ECtHR and shape the final meaning attached to the human rights declared in the ECHR. This frame is then further enriched by Gordon's critical proposal to scrutinize legal reasoning in order to challenge the apparent neutrality of the law and legal discourse.

In more detail, I proceed to question ECtHR's jurisprudence by considering judicial reasoning as the result of contingent and subjective determinants; as a device of secondary, derivative, legitimacy, whose main aim is to justify the decisions made by the Court in light of superior

¹ For instance, Ilga-Europe's plan 2011-2013 described strategic litigation as a resource to guarantee the "promotion of GLBTI rights"; in the Ilga-Europe plan for period 2014-2018 judicial litigation is described as one of the most relevant strategies for each and every realm addressed. All Ilga-Europe' strategic plans can be accessed at this address: <http://www.ilga-europe.org/who-we-are/organisational-documents/strategic-plans/strategic-plan-2011-2013> .

sources of law. As Friedman argues (1975, 237), judicial decisions have to be consistent with relevant premises, and the opinion released by the Court provides such a link.

The argumentative process whereby this connection is set, is neither univocal nor infrequent, in that different judges may reach differing conclusions, even relating to the same case, or that they may overrule past jurisprudence, tracing a new linking path with primary legitimacy.

If the judge is integrated in a specific cultural, social, and political environment, then there are many factors which are likely to affect her reasoning they can be loosely gathered under the conceptual label of internal legal culture, a notion that, as explored throughout this dissertation, includes subjective standpoints deriving “from the experience of social relations in which we are situated” (Bourdieu 2000, 139), as well as the attitude towards the law, and the judicial role itself.

Thirdly, the documental analysis is built on qualitative criteria deduced from a specific branch of studies critical to the neutrality of the law and to the impartiality of judicial reasoning: feminist jurisprudence, gay and lesbian studies, and legal *queer* theory.

Eminent feminist jurists and authors ascribable to gay, lesbian, and *queer* legal studies deeply investigate how bias affects and shapes both the theorization and the enforcement of legal perceptions and human rights; having this angle as their starting point, they call for widespread legal reform in order to guarantee substantial actualization of the principle of equality and to promote existing ‘differences’ as a valuable subjective element (Minow 1987; Bartlett 1989; Harding 1997; Morgan 2001; Stychin 2003; Moran 1996).

By departing from relevant themes emerged in this field of I start by considering the ability and the willingness of the ECtHR either to detach from a heteronormative understanding of human rights or to reinforce it; then, I move on to consider how the ECtHR weighs and balances majoritarian and minorities’ interests. Lastly, judges’ wording and arguments are thoroughly questioned, precisely in order to assess whether the ECtHR subordinates the recognition of rights of homosexual people to a condition of secrecy, privacy, and invisibility. Public and private often represent a crucial distinction: being relegated to the private sphere means to be condemned to public silence and invisibility, to be deprived of the possibility of influencing public debate and orienting the political agenda.

Critical Discourse Analysis and specific studies on ECtHR’s reasoning have set the methodological frame in order to unravel the extremely vast cluster of judgments and decisions.

The very structure of ECtHR’s judgments facilitates documental analysis: the majority opinion is composite but, usually, structured in recurrent sections, such as the description of the circumstances of the case, the analysis of relevant domestic and international laws and practice, and, when filed, also the submission by third parties as *amici curiae*. Moreover, as Lasser remarks,

the open argumentative structure of the Court is marked by frequent separate opinions, individually or jointly filed, and they enrich the picture of the ECtHR's internal legal culture, highlighting tensions and contrasted interpretations (Lasser 2004).

Before explaining in more details the structure of this work, I shall put forward few *caveats*. Firstly, I have narrowed the theme so as to only touch sexual orientation, and I have excluded those judgments which incidentally might relate to homosexuality, but whose main concern fall outside the subject of my research. This means that I have not analyzed complaints related to gender identity; as far as being interesting and relevant, they introduce standpoints, tensions, and interests that are not necessarily referable to sexual orientation. Moreover, as extensively illustrated in chapter I, the legal treatment of homosexuality has been quite peculiar for centuries, and it has significantly differed from that implemented for transgenders; consequently also the demands and attitudes towards the law within the lgbt community have been long fragmented. Secondly, it could be contended that the theoretical frame I have adopted is just one of the many possible; this is undoubtedly true, and the ECtHR's jurisprudence might have been read through different lens. However, I have built the present frame by choosing the approaches that provide the conceptual and the methodological tools which appear most suitable to answer the limited number of questions outlined above, and I shall extensively account for this decision in the forthcoming pages and chapters.

The sample consists of 81 judgments and decisions made by the ECtHR and by the European Commission of Human Rights (hereafter EComHR).

This dissertation is divided into five chapters, and it is structured as follows: chapter I reconstructs the various legal perspectives that have emerged in the Western homosexual movement, analyzing the multifaceted standpoints underpinned to each approach and emphasizing internal tensions; the aim is to contextualize the recent emergence of claims related to sexual orientation, and to observe how strategic litigation is perceived by the heterogeneous homosexual movement's trends.

Relevant literature is extensively reviewed in chapters II and III: in the first, socio-legal theories are carefully analyzed in order to develop a sound theoretical and methodological framework; in the latter the ECHR's system and the relevant legal literature on the ECtHR are addressed, with particular emphasis placed on the tensions and the inconsistencies related to the ECtHR's functioning.

The results of documental analysis are discussed in the chapters IV and V.

In chapter IV the judgments are divided according to the rights claimed, and diachronic analysis is conducted within such thematic clusters. By this, it's possible to understand how judicial attitude has evolved over time, and to assess which are the issues perceived by the ECtHR as being more problematic and, conversely, which appear to raise less concerns or doubts.

Chapter V presents conclusive considerations of the overall jurisprudence of the ECtHR in respect to sexual orientation, by focusing on the social meaning of judgments and also by considering whether the innovative breadth of ECtHR's judgments actually mirrors the expectations of lgbt strategic litigation.

Appendix I contains the European Convention on Human Rights and Article 1 of Protocol 1, being the latter invoked quite frequently in complaints.

Appendix II contains brief summaries of cases analyzed: for each complaint it is offered a concise but exhaustive description of the facts at stake, the points at issue, and the final decision.

CHAPTER I. WESTERN HOMOSEXUAL PERSPECTIVES ON LAW: A HISTORICAL REVIEW

“It takes no compromise to give people their rights,
It takes no money to respect the individual.
It takes no political deal to give people freedom.
It takes no survey to remove oppression.”
Harvey Milk

1.0 Foreword

In this chapter the features of legal perspectives emerging throughout the Western homosexual movement will be described, highlighting internal tensions due to different conceptions of the law, and delving into the multifaceted political and legal standpoints held by each approach.

I will specifically look into the theoretical contribution that could be described as being exclusively dependent on homosexual reflection. Therefore, I will mainly focus on the male gay movement, since it enables us to better isolate the multiple paths of homosexual legal attitudes. During the late 1960s and 1970s, lesbian groups thrived in feminist organizations, generally sharing several similar themes, goals, and social practices of self-consciousness. Lesbian activists retained the overwhelming male majority in the gay movement as being highly problematic, in that it would reproduce a sexist conception of gender roles, and they argued that a common homosexual identity would be unable to overcome the influence of gender stereotypes relating to the perception of social and sexual relations.

Moreover, criminal sanctions historically prosecuted only same-sex acts between males, whilst the repression of female homosexuality relied on diffused informal sanctions, which led to the public invisibility of lesbian women. On the other hand, gay men devoted their efforts to bringing about a reform of the criminal law, lesbians were far more concerned with strategies that challenged social and familiar oppression. Lesbian thinking, *videlicet*, mostly addressed the double nature of discrimination, emphasizing the overlapping of issues related to gender and sexual orientation, and disputing that gay leaders ignored this crucial issue and were blinded by interiorized sexism. Thus, a rather notable theoretical and organizational separatism divided gay and lesbian groups, at least up until the HIV crisis. From the early 1980s the mainstream movement achieved a partial congruence, focusing on certain goals common to both gays and lesbians, such as the demand for the public recognition of same-sex couples, the claim in favour of anti-discrimination laws and social security schemes, the opportunity to serve in the army and

the case ensuring access to heterologous insemination and joint/second parent adoption for same sex couples. Meanwhile, the pre-eminence of lesbian philosophers in *queer* thinking weakened divergences caused by gender issues, leading to a stronger cohesion, described in paragraphs 1.4 and 1.7².

The purpose of this chapter is: a) to present a historical account of the most relevant events that marked the emergence of the Western lgbt³ movement b) to reconstruct internal legal trends, so as to describe the original outcome of homosexual reflection in the legal system and c) to contextualize the dynamics that led to the primacy of ‘rights language’ and to the massive activation of law, especially in the context of the European Court of Human Rights (hereafter ECtHR).

It could be suggested that in order to distinguish the many theoretical perspectives, epistemological choices and strategic goals underlying homosexual activism, it would be appropriate to refer to the existence of multiple movements. Firstly, a number of heterogeneous, sometimes incompatible, standpoints coexist between the common criticism against models shaped by discriminatory assumptions and beyond the public claiming on behalf of traditionally oppressed sexual outsiders (Morgan, 2000, 208).

Secondly, the emergence of homosexual movements outside Western Countries surely enriches the overall reflection and generates new legal, social, and anthropological perspectives that in the near future are likely to lead to an internal discussion and a multicultural approach to the definition of gayness⁴.

However, for the purposes of this research I suggest narrowing the field and to only refer to the Western homosexual movement. Western Europe and the United States of America represent the historical, cultural, and legal frame in which the homosexual movement both appeared and evolved. Not only did Western philosophy lay the theoretical foundations in favour of the decriminalization of homosexuality (Leroy-Forgeot, 1997) but, it was, in Europe and the USA that

² For further discussion, see throughout chapter I and II. For an in-depth account of the disagreement between gays and lesbians see, among the others, Johnson (1973), Lee (1986), Blasius (1994); Vaid (1995).

³ From the early 1990s the collective term lgbt frequently found in academic journals and in media language used to indicate the lesbian, gay, bisexual and transgender community. This acronym refers to major social components which refuse both the heterosexual norm and the definition of one’s identity based on his/her biological gender. In recent years some activists have proposed adopting lgbtqi and lgbtaqi, in order to include new sexual minorities that claim relevance and recognition; as far as being used by homosexual activists, at the present time, these definitions don’t yet consistently recur in public or academic debate.

⁴ For a sociological account of non-Western gay communities see Martel (2014); for an introduction to post-colonial perspectives on lgbt issues see Assad (2002); Pullen (2012).

words such as 'gay', at first, and then 'queer', acquired political meaningfulness and a positive identitarian value.

Foundational elements of the present lgbt identity lie deeply in the context in which they were established, to the extent that comparable trajectories recur in Western countries. Throughout chapter I will, however, stress local peculiarities, so as to report the richness and the multiplicity of national experiences of the Western homosexual movement.

1.1 Law and Homosexuality: A Complex Relationship

For centuries the relationship between law and homosexuality in Western societies has been multifaceted, complex, and rather ambiguous.

During the middle-ages and early modern times, despite the severe sanctions against sodomy spreading throughout Europe, spaces of social and legal tolerance remained quite open, and the enforcement of criminal sanctions was not at all systematical (Boswell 1980, 3).

Moreover, as Eskridge aptly points out (2010, 1337-1338), legal provisions referred to sodomy regardless of the sex of the partners involved and, at the same time, this signifier included all sexual activities in contrast with Christian morality, among which *buggery* wasn't the worst (Ivi, 169-180). The crime of *buggery* applied, thus, to a very specific type of intercourse whereas other sexual acts, considered at a later stage as criminal offences, were not even mentioned.

Effectively in most of Europe the law left consistent grey areas where males, especially influential political and religious ones, could engage in same-sex acts without necessarily being exposed to the threat of torture and death.

However, such informal strategies were shaped hugely by the law itself, and the boundaries of personal freedom depended on the continent flaws in the criminal system. The degree of enforcement was fairly unstable, fluctuating according to the attitude of political and religious rulers towards this issue; the risk of blackmailing was also relevant and elites quite frequently brought the charge of buggery against their opponents, so as to destroy and debunk their public reputation.

I do not intend to delve further into this discussion, as it is far beyond the scope of this research, but there are a few relevant features from a socio-legal perspective that I would like to discuss.

Regardless of the effective number of condemns, from the late Roman Empire onwards laws and judges mentioned male same-sex acts just to prosecute them (Cantarella 1988, ch. V-VI). The absence of any formal regulation implied that religious and political institutions denied such practices without any kind of legitimacy and tolerability. Popular culture also heavily mocked homosexual practices⁵, absorbing and reinforcing negative prejudices.

⁵ Mockery of same-sex acts has been a *topos* from Greek theatre and literature onwards; in medieval and modern times men depicted as being 'catamite' and 'effeminate' were polemically addressed. (Boswell 1980, 235). Furthermore, as Boswell demonstrates, this image was common to many European cultures and legal codes; for instance, in Iceland, during the high middle age, "Common Proverbs equated male sexual passivity with failure to defend oneself in battle, and a Law prohibited the depiction of one's enemies in carvings of homosexual intercourse, presumably because of this association" (Ibidem). Cru-

In order to grasp the standpoints underpinned to the modern European legal attitude towards homosexuality, it's necessary to take distance from present categories of sexual orientation and gender identity. As a rich seam of literature attests⁶, at least until the second half of the XVIII century, sexuality was legally defined by acts and not by personal inclinations. The Law prosecuted conduct while it did not take into account the potential deviant nature of one's sexual desires, so long as he didn't breach the law; moreover, the scope of criminal punishments was mainly oriented towards a retributive and restorative function, with little emphasis on preventive purpose.

As Bobbio argues (1995, 190), retributive function relies on "the rule of justice as equality", namely the rule according to which he who commits a specific crime, has to suffer punishment of the same kind. Since Scriptures mention the famous burning rain that destroyed Sodoma, fire was understood as being both the appropriate element to purify the community of sodomites, and as the appropriate form of punishment for *buggery*. Hence, the criminal system was not structured to identify those who were likely to commit offences, but it inflicted punishments in order to restore the moral balance altered by crime.

The distinction between legal and illegal sexual acts evidently depended on the bodily parts involved⁷; however, those who did not conform to dominant precepts suffered from social stigma and marginalization.

Between the XIX and XX century new paradigms invaded Western society and heavily influenced many aspects of European culture: the scientific or rational approach affected the emerg-

sades and hostility against Muslims, however, significantly altered the antecedent satirical, but quite tolerant attitude; the chronicles at that time, began to depict Muslims as sodomites, without any respect for women, men, nuns, or even dead bodies. Generally speaking sodomy was soon equated to betrayal and, consequently, those who engaged in such acts, as well as heretics, Hebrews, and Muslims were held up to public shaming and prosecution (Boswell 1980, 279-285). For an in-depth discussion see also Cantarella (1988); Brundage (2009); Bullock and Brundage (2013).

⁶ Michel Foucault describes the emersion of the specific homosexual personage as a sign of discontinuity between the medieval/modern and the contemporary conception of sexuality. This thinking has been widely criticized, as it would mark too sharpened distinctions, not paying proper attention to gender stereotypes already present in past centuries. It appears quite logical that also before the invention of the term 'homosexuality' men who experienced same-sex desires developed a proper sub-culture. Historical sources do in fact suggest that during the Renaissance the ideal of Platonic love was used to refer to same-sex relations, and not simply to sexual activities; moreover, long before the second half of the XIX century in urban cities a hidden geography of tolerant places towards sodomites developed. Still, it's hard to dispute that, up to the second half of the XIX century medicine and new-born sciences supported and justified the prosecution of gays, lesbians, and trans genders, marking a specific and distinct approach to sexuality and to homosexuality. For an in-depth analysis see Foucault (1990), and for a critical review of his thesis refer to Murray (1989).

⁷ Modern US Statutes generally prosecuted all non-procreative sexual activities and offered a detailed, almost morbose, qualification of such acts. See Eskridge (2008; 2010). As concerns European background see Murray (1989).

ing field of social sciences, and almost every aspect of human behavior was filtered through the canons of medicine, psychology, psychiatry, criminology, and of theories of social Darwinism. Criminals and delinquents became privileged subjects of scientific enquiry, which was aimed at discovering the inherent characteristics that brought them to transgress legal, social and moral conventions.

Male homosexuality became one of the most studied examples of deviance, and all emerging sciences - from psychiatry to criminology- engaged in the dilemma of explaining the rational cause of homosexuality, and in searching for the cure to turn every homosexual person 'normal'.

From this perspective, crime and abnormality were tangible manifestations of an innate predisposition; human kind, therefore, could be divided into normal and so-called 'born criminals', who, if not prevented, would fatally break the law.

The main consequence of this new paradigm was the separation between intentions and actions and, as far as sexuality between homosexuality and sodomy is concerned.

The first term⁸ refers to a personal characteristic, while the second simply describes a specific and objectively defined kind of sexual activity.

If, on the one hand, this process led to a huge justification of homophobic social and legal practices on pseudo-scientific grounds, on the other, it also labelled all those who engaged in same-sex acts with common features, giving them the initial cue to create communities and to resist to such pathologizing framing.

I suggest, that being exposed to often obsessive scientific, curiosity and academic arguing could have triggered an unexpected reaction, though limited to metropolitan areas and middle-class intellectuals: new sciences reduced the grey areas of the past, and they brought same-sex orientation to public shaming, inducing some homosexuals, well equipped with cultural and financial resources, to react. Furthermore, the increased number of studies on the topic might have reinforced the informal networks between members of this labelled minority.

Effectively, the early homophile groups combined legal and scientific stances, trying to dismantle medical prejudices in order to promote normative reforms.

In Germany by the middle of the XIX century the first attempts to promote an unprejudiced conception of homosexuality arose, with the primary aim of repealing criminal laws against

⁸ Hungarian literate Karl Maria Benkert invented the term 'homosexuality' in 1869, and proposed it as the appropriate word to describe this peculiar sexual preference, without biased or pejorative meanings. Indeed, he combined Greek term *homoios*, same, and the Latin *sexualitas*, sexuality, to denote in the most aseptic way the desire directed towards people of same sex.

same-sex acts. The term ‘homosexual’ itself first appeared in a legal pamphlet, where Benkert supported the decriminalization of sodomy in all pre-unitary German States. Drawing inspiration from the rising discipline of embryology, Kraft Ebing explained homosexual desire as the outcome of an abnormal foetus development and, therefore, he contended that such behaviour should not be formally punished (Dall’Orto 2015, 540 and fol.). Ulrichs, a jurist with deep scientific knowledge, also conceived homosexuality as a physiological element, but he ascribed homosexuals to a distinct third sexual cluster, named “uranians”⁹. Ulrichs was officially the first man in history to come out, claiming his diversity in a letter to his relatives, and he presented the first amendment against anti-homosexual German laws, without however altering the *status quo*.

Hirschfeld, a pioneer of sexology, was profoundly affected by Ulrich’s theories; in 1897 he founded the Humanitarian Scientific Committee and the motto of the association, *Per scientiam ad justitiam*, demonstrates the importance of the legal sphere. Scientific inquiries had the essential role of spreading an objective understanding of sexuality, but the crucial and ultimate goal remained the decriminalization of sodomy.

For this purpose, in 1898 Hirschfeld presented a legal petition which gathered more than 5000 signatures to overturn paragraph 175, which was then discussed in Parliament; but since only a small group of the Social Democratic Party supported the proposal, the bill was dismissed. Even though Parliament discussed similar proposals again in the 1920s, the German Criminal Code was never amended.

He also set up the famous Institut für Sexualwissenschaft, Sexology Institute opened in Berlin after the First World War, and until his death, in 1935, he internationally promoted legal tolerance of homosexuality and a new scientific approach to sexuality¹⁰.

Looking beyond the historical details of his extremely valuable work, it’s worth noting that by supporting the reform of the German Criminal Code, Hirschfeld publicly conceived a valuable image of homosexuality. Not only did Hirschfeld write several academic articles, but he also diffused several pamphlets celebrating gay and lesbian love and, in 1919, co-wrote and acted in the first movie with an openly homosexual plot, *Anders als die Andern*, different from Others.

⁹ See Kennedy (1981).

¹⁰ in 1921 Hirschfeld organized the first worldwide International Congress for Sexual Reform on the Basis of Sexual Science, which led to the development of the World League for Sexual Reform. Following that experience, Congresses were held in Copenhagen (1928), London (1929), Wien (1930) and Brno (1932) to raise awareness of the public opinion, without achieving significant legal reforms. For an historical account see Dose and Selwyn (2003).

Hirschfeld did not conceive sexual orientation and gender identity as being distinct concepts, he rather considered homosexuals as male people with a female gender identity, who were attracted to other men and, most of whom adopted a feminine way of behaviour. Consequently, the theme of transsexuals and transvestites recurs throughout Hirschfeld's works and he identified these specific conditions as the prototype of the 'homosexual', as a result then clashing with his colleagues. Between 1903 and 1906 some members did in fact leave the Humanitarian Scientific Committee, arguing that homosexuality was a distinctive sign of masculinity, and they founded an organization firstly named *Gemeinschaft der Eigenen*, Community of the Special, and then *Bund für Mannliche Kultur*, Union for the Male Culture. This organization, however, disappeared before the Nazis came to power.

I would hold Hirschfeld's experience as the initial stage of a naming, blaming and claiming process, defined by social scientists Abel, Felstiner and Sarat as the pre-requisite for the beginning of public litigation (Abel, Felstiner, Sarat 1981, 635). Hirschfeld, along with Ulrichs and Kraft Ebing, proposed a neutral nomination of homosexuality, significantly detached from the pejorative terms used in academic and common language, as 'inverted' and 'perverts'.

Though heavily influenced by his medical background, Hirschfeld perceived an *experience*, namely the formal prosecution of homosexuals, as injurious and transformed it into a *grievance*, sociologically described as the attribution of "an injury to the fault of another individual or social entity" (Abel, Felstiner, Sarat, 1981, 635). The causes of marginalization clearly emerge, and so does the guilty part: criminal enforcement, ignorance and biased science infringed the natural rights of homosexuals, therefore responsibility lay with legislators and with the academic world. As Abel, Felstiner and Sarat argue, in the emergence of public disputes other stages are required: "[claiming] occurs when someone with a grievance voices it to the person or to the entity believed to be responsible and asks for some remedy. [...] A claim is transformed into a dispute when it is rejected in whole or in part" (Ib., 635-636).

I would, then, ascribe the first draft to repeal Paragraph 175 and the subsequent work of the Sexology Institute to a *claiming* strategy, which definitely resulted in rejection. The reactive answer of Hirschfeld and his supporters can be thus read within the frame of public litigation - they promoted homosexual rights up until 1933 when the Nazis closed down the Institute, burning all documents, incarcerating hundreds of homosexuals, and forcing Hirschfeld into exile -.

This experience, as far as being geographically and temporally restricted, marks an important change in homosexuals' attitude towards legal and political systems. Differently from the past, in addition to informal tolerance, Hirschfeld claimed that homosexuals should be entitled to rights and, moreover, he called for the withdrawal of public authorities from the individual private

realm. Informal spaces of tolerance, often tiny and changeable, were brought to question, as well as the previous model according to which legal provisions were entitled to strict discipline with personal sexuality, whereas sexual minorities could neither put forward a claim nor influence legal prejudice against them.

The legacy of Hirschfeld's 'movement', adopted by homophile groups in the 1950s, began a relevant change, in that it brought homosexual issues to public debate, pushing for legal tolerance, and above all, considering the law as an essential opportunity to enhance homosexuals' living conditions.

Right from the beginning both Ulrichs and Hirschfeld considered the law as the primary arena in which to question homosexuals' treatment. Although their outcomes have been harshly criticized by contemporary activists, it's necessary to remember that they lived in a period where academics believed in the existence of a rational explanation for every circumstance; as such, it may be hypothesized that the quest for assessing the exact origin of homosexuality was determined more by the will to anchor their legal proposals to an indisputable scientific truth, than by a purely medicalized image of sexuality (Dall'Orto 2015, 530 and fol.).

As extensively analyzed below, in the following decades the inclusion of gay issues in the political agenda, and the mobilization of legal reforms favored reactive dynamics between the homosexual movement and the legal system, thus significantly affecting the evolution of gay liberation movement.

1.2 Homophile Trends and First Attempts of Reform

The associations promoting homosexual emancipations appearing in the aftermath of the Second World War appealed to moderate political positions and endorsed a liberal legal order (D’Emilio 1983; Engel 2000). These groups generally called themselves ‘homophile’, to highlight the emphasis placed on the emotional sphere, removed from any suggestion of (homo)sexual practices; they created effective interpersonal networks in European and American metropolitan cities, proposing an anti-stigmatizing approach to sexual orientation¹¹.

Homophile associations resumed pre-war efforts, though detaching themselves from Hirschfeld’s approach and endorsing a masculine ideal of homosexuality; the international spreading of the Swiss magazine ‘Der Kreis’, the only homosexual publishing to have escaped Nazi fury, supplied homophiles with theoretical and organizational suggestions, and it also functioned as the connection with previous experiences (Dall’Orto 2015, 540-547).

In Paris, for instance, André Baudry founded Arcadie with the purpose of breaking social isolation in which many French gay men and lesbians were pent-up; during the 1950s Arcadie challenged censorship and judicial authorities, broadcasting movies with homosexual plots and supporting the creation of a collective identity.

For the purposes of a socio-legal analysis, I however consider the British and American cases as the most relevant examples. In the UK as well as in the USA criminal sanctions against gay men were actively enforced¹²; consequently, a broad reform of both legal culture and criminal system stood as the pre-requisite for any public gay mobilization. Most notably the Mattachine Society, established in 1951 in San Francisco, was able to ensure a safe space where homosexuals could argue over discriminations they suffered, build good relations and foster a sense of collectivity (Engel 2000; Adam 1995). Within a narrow-minded and hostile society, distrustful of almost all minorities, and under a legal system imposing heterosexuality as the dominant normality, Mat-

¹¹ For an extensive historical account of the European and the American homophile movement see: Marotta (1981); D’Emilio (1983); Adam (1995); Bernstein (1997); Rossi Barilli (1999); Engel (2000); Meeker (2001); Jackson (2006); Jackson (2009); Douglas (2010); Rupp (2011); Stein (2012).

¹² Until 1961 all US judicial systems included sodomy laws, and proscribed a wide range of sanctions, regardless of the consent expressed by the partners involved. In 1961 the State of Illinois repealed all laws that interfered with individual sexuality, remaining an *unicum* for more than a decade (Engel 2000, 36). In 1972 a slow process of reform began, but it soon incurred significant setbacks. In the 1986 famous *Bowers v Hardwick* case, the US Supreme Court upheld the legitimacy of sodomy laws, arguing that claiming “that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious” (*Bowers v Hardwick*, § 191). Only in 2003 did the Supreme Court ratify the unconstitutionality of sodomy laws, leading to the complete repeal of laws criminalizing homosexuality. See Andersen (2004)

tachine principally aimed at a gradual innovation in public consciousness and at spreading liberal ideals, in clear contraposition with sodomy laws. The education of “homosexual masses” (Engel 2000, 31) proved essential, since Mattachine leaders thought that the society would have been more tolerant if gay men had adhered to an exemplar, virtuous and moderate model of citizenship, miles apart from the dangerous and depravate depiction set by Sen. McCarthy. Through legal reform Mattachine pursued the guarantee of private spaces, though not claiming public visibility; the inviolability of individual privacy, in accordance with liberal Millian’s principle of harm¹³, seemed the only strategy to avoid the paranoiac threats spreading in the first half of the 1950s.

Mccarthyism caused a real witch-hunt for anyone suspected of communist or homosexual tendencies, especially if employed in public institutions. Over a period of eight years more than 5000 public employees were fired because of their alleged sexual orientation; furthermore, in 1950 the US Senate set up a specific Committee to evaluate whether the employment of *homosexuals and other moral perverts* threatened national security. The final Report dramatically stated:

Indulgence in acts of sex perversion weakens the moral fiber of the individual. [...] Even one pervert in a Government agency tends to have a corrosive influence upon his fellow employees. [...] One homosexual can pollute a Government office. The Government would be assuming a grave burden if it allowed such morally contaminated persons to remain in its service’ (US Committee quoted in D’Emilio 1983, 44).

Despite the tensions opposing the conservatives to radicalize sections of Mattachine¹⁴, the urgency to amend criminal statutes fostered a lively debate. In 1955 the Mattachine Society

¹³ During half of the XIX century John Stuart Mill elaborated on utilitarian and liberal bases the fundamental concept of harm principle, whereby “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. [...] The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign” (Mill 1859, 21-22). Harm principle is a milestone of Western philosophy and it’s worth noting that, one century later, both the Wolfendern Report and H.L.A. Hart invoked this principle to support the decriminalization of adult, private, and consenting buggery.

¹⁴ In 1953 a group of activists of Mattachine opposed the creation of a legal committee aiming at producing reform proposals and they dreaded “any organized pressure on lawmakers by members of the Mattachine Society as a group would only serve to prejudice the position of the Society [...]. It would provide

praised the Model of the Penal Code drafted by the American Law Institute, wherein homosexuality was no longer considered a crime, and, from the early '1960s, its leaders claimed the right of movement, the right to work and the recognition of all rights denied to homosexual people (D'Emilio 1983, 198).

Though legal advisors of the American Civil Liberties Union, ACLU, refused to uphold the unconstitutionality of sodomy laws in Courts, in 1958 the homophile association ONE challenged legal provisions that allowed the national postal service to not send items with homosexual contents, being granted by the Supreme Court the authorization to freely publish homosexual magazines, as long as they were not explicitly pornographic¹⁵. Nowadays this result may appear minimal, but at that time it marked an essential step, enabling the US homosexual community to open new channels of communication and to strengthen the existing ones.

In the UK between the second half of the 1950s and the next decade, the Homosexual Law Reform Society, HLRS, was in operation that had been specifically founded to lobby the British Parliament for the repeal of the Criminal Offences Act, which provided hard labour, imprisonment or chemical castration for men convicted of 'gross indecency' - a vague concept including any activity held to be inadmissible under Victorian morality¹⁶.

The release of the Wolfenden Report launched the first public discussion raising the issue of same-sexuality, reducing the image of homosexuality to a scary matter which had not to be mentioned.

In 1954 the British Parliament appointed a Committee to study whether the repeal of Criminal Offences Act could fit with British juridical pillars. The Committee included professors, psychiatrists, theologians magistrates, who for the next three years would conduct an extremely detailed study. In the final Report the majority reached an overwhelming conclusion that upheld the necessity to repeal criminal laws against buggery:

an abundant source of hysterical propaganda with which to foment an ignorant, fear inspired and anti-homosexual campaign" (D'Emilio 1983, 83)

¹⁵ *One incorporated v Olsen*, 355 US. 371 (1958). See D'Emilio (1983, 115).

¹⁶ Criminal Offences Act, as amended in 1885, read: "Any male person who, in public or private, commits, or is a party to the commission of, or procures, or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour". Historians estimate however that between 1885 and 1967 nearly 49.000 men were convicted of buggery. For a further discussion see Moran (1996); Engel (2000).

We have [...] worked with our own formulation of the function of the criminal law [...] In this field, its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. [...] It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior” (Wolfenden Report, 1957).

The Report encouraged philosophers as well as politicians to weigh up the connection between law and morals. The debate opposing Professor H.L.A. Hart and Lord Devlin remains the most relevant and, still nowadays, it stands as a milestone in the realm of public ethics¹⁷. Though not presenting simply homophobic argument, Devlin advocated for the criminalization of same-sex acts, on the grounds of philosophical “technical reasons” (Zanetti 2015, 27). The core of his reasoning lies in the famous “disintegration thesis”, by which human societies are tied together by an invisible bondage, a hugely essential one, that permeates legal norms, shared social practices and values, and that must be preserved so as to safeguard social cohesion. Therefore, “a common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price” (Devlin 1965, 10). According to Devlin morality and legality often overlap; it’s interesting to note that he did not propose a substantive cluster of ideals or values, rather assuming a majoritarian definition of morals. Society would be entitled to enforce the dominant conception of morals, for contingent traditional and shared values that create national solidarity, identity and security. Law, therefore, should be subordinated to morals, namely to that common feeling expressed by the reasonable man (Devlin 1965, 78). The contempt of public morals in the name of individual liberty would lead to the society’s complete disgregation (Ib. 76-78).

From this standpoint, since in the 1950s the majority of British people disregarded homosexuality, the Criminal Offences Act was considered both legitimate and desirable, in that it helped maintain public cohesion. H.L.A. Hart, by contrast, argued for a contingent and not normative relation between law and morals; in general terms, if it’s true that what is illegal is often deemed as also immoral, not every immoral act should be considered illegal.

¹⁷See Hart (1961); Hart (1963); Hart (1964); Devlin (1965). On the influence of Hart-Devlin debate in the UK legal culture see Weeks (1980) and Moran, cit. The Hart-Devlin debate is also at the foundation of recent US philosophical debate over moral obligations of law; see Dworkin (1977); Finnis (1980); Macedo (1996); Nussbaum (2010).

Law should be primarily aimed at protecting and promoting individual liberty, without imposing a moralistic conception of reality that, as such, would never be unanimously shared, always resulting disrespectful of minorities. Hart did not discuss the value of homosexuality but claimed that as a private behaviour that did not cause harm to third parties, it fell within one's own private sphere. He strongly contested Devlin's argument, suggesting that neither society can be treated as a "seamless web" (Hart 1963, 68) nor would a detachment from common morals disgregate the overall society itself:

It is no doubt true that if deviations from conventional sexual morality are tolerated by the law and come to be known, the unconventional morality might change in a permissive direction, though this does not seem to be the case with homosexuality in those European countries where it is not punishable by law. But even if the conventional morality did so change, the society in question would not have been destroyed or subverted. We should compare such a development not to the violent overthrow of government but to a peaceful constitutional change in its form, consistent not only with the preservation of a society but with its advance (Hart 1963, 52).

In the late 1950s British public opinion became willing to debate the appropriate legal treatment of homosexuals (Moran and McGhee 2000, 68 and fol.) and, unlike in the USA, the HLRS orchestrated a number of initiatives to push members of the Parliament to implement Wolfenden's Report. In 1957, for instance, the HLRS launched in the national newspapers a plea for the repeal of the Criminal Offences Act, gaining the support of leading intellectual figures, as such H.L.A. Hart, Isaiah Berlin, Julian Huxley and Bertrand Russell, members of the House of Lords, and also religious representatives, and bishops of Birmingham and Exeter (Johnson and Vanderbeck 2014, ch. I). In the same year homosexual activists distributed Chesser's, 'Live and Let Live' pamphlet in parliament, with the intent to persuade conservatives that the repeal of the Criminal Offences Act would have not weakened national security nor threatened collective moral integrity (Engel 2000, 72). All under-taken actions did not overcome conservative refusal nor eradicate the stereotype of gay men as being dangerous and traitorous people. Wolfenden's Report was only implemented in 1967, and it granted homosexuals minimalist protection: it set the age of consent at 21 - for heterosexuals it was 16 - and only decriminalized same-sex acts performed in private. This meant that acts in which a third party either took part or was just present remained a criminal offense; moreover, the notion of private was decisively narrower than one given to heterosexuals. Whilst the law did not restrict freedom to engage in heterosexual group-sex nor it provided legislative *ad hoc* sanctions against public

performance of such acts¹⁸, the Sexual Offences Act read that homosexual acts done “in a lavatory to which the public have or are permitted to access, whether at payment or otherwise” could be sanctioned with detention. Compared to the US example, the distinguishing factor of the British case is twofold: on the one hand the HLRS preferred political mobilization to judicial litigation and, on the other, activists attempted to start a reformist process following a top-down model, by primarily focusing on the persuasion of national cultural elites.

With the exception of Illinois, during the 1950s and the 1960s none of the US States embraced the American Law Institute’s recommendation to introduce a less intrusive criminal legislation¹⁹ and the efforts of Mattachine Society resulted mostly ineffective, affecting neither public debate nor US legal culture.

In conclusion, homophile associations achieved important results, when compared to resources then available, but Western culture still remained permeated with strong negative prejudices.

¹⁸ Heterosexual acts performed in private by more than two persons were not an offense, while if in public they fell within the wide category of acts contrary to public indecency, prosecuted by the 1956 Sexual Offences Act. The maximum penalty amounted to two years’ imprisonment but in the overwhelming majority of cases were dealt with a fine.

¹⁹ In 1955 the American Law Institute drafted a new model of Penal Code calling for the rejection of all sodomy statutes, endorsing liberal principles. (D’Emilio 1983, 108-129; Dall’Orto 2015, 545).

1.3 Libertarian Trends: Law as an Oppressive Institution

In the turmoil of the '68 protests, homophile associations declined and left room for libertarian trends.

In the USA the Stonewall riots²⁰ marked this change, resulting in the birth of the contemporary homosexual movement.

On the night of 28th June 1969 police officers burst into the Stonewall Inn, a notorious gay bar in the Greenwich neighbourhood, New York, to control licenses and record customers. The registration of homosexuals was a widely adopted repression tactic, in order to prevent the emergence of public claims. Furthermore, raids had quite often a violent nature and customers were treated as common offenders (Engel 2000, 20-22; 39-41). That night, the reaction of the patrons took an unpredictable turn: despite the order of respectability promoted by the Mattachine, gays, lesbians and transsexuals began to fight the police in a confrontation that in the following two days involved two thousand gays, lesbians and black people. It was the first time that gay men dared to oppose to the police raids, claiming and celebrating their diversity, freedom, and dignity. The radicalness of the protest marked the breach with Mattachine leaders, who for the most did not share grassroots libertarian stances and refused to endorse the rebels. As Engel recalls, in response to a message scrawled on one bar's boarded-up windows that exalted 'gay power', the Mattachine Society posted outside the same bar the following message: 'We homosexuals plead with our people to please help maintain peaceful and quiet conduct on the streets of the village' (Engels 2001, 41). The fracture could not have been deeper. The Stonewall riots were not only the sign of the explosion of radical stances but, in the following decades, they became a founding myth of collective gay identity, celebrated in poems, writings and movies.

Following the outburst at the Stonewall Inn, young activists from the new-born Gay Liberation Front, GLF, and a myriad of widespread collectives, developed innovative claims, expectations, social and discursive practices, irreversibly differentiating themselves from previous generations, and they disavowed the tactic of respectability, of gradual innovations and deference to heterosexual norm, showing more accord with methods of the New Left and feminist movement²¹.

²⁰ For an in-depth analysis I recall Carter (2010).

²¹ In the 1960s Feminists and New Left hostilely judged the gay liberation theory; for instance, Stokely Carmichael, the US leader of SNCC, Student Nonviolent Coordinating Committee, defined homosexuality as "a sickness, just as are baby-rape or wanting to be head of General Motors" (Carmichael cit. in Engel 200, 42). Both in Italy and France gay militants were forced to the margins of early contestations and they atoned a double prejudice, which depicted them as immoral and reactionary, committed to bour-

Echoes of the Stonewall riots and GLF actions captured the imagination of radical British activists, leading to the creation, of the London GLF in 1971, which, in its short life, theoretically and methodologically resembled the American example.

Also Parisian and Italian gay left-wingers absorbed the example of the US protest, which became a “sign of hope”, a promising “whispering” (Gunther 2009, 45) to all militants trying to mould a distinct homosexual thought within libertarian spirit flown from May ’68.

In the early 1970s the gay movement borrowed from the latter the argumentative, the rhetorical and the strategic repertoire, and it launched a fervid critical discussion about the oppressive character of inherent social and sexual models, in political institutions as well as in capitalist economy.

The Gay liberation theory did in fact represent a cutting edge view of the overall 1960s Youth Movement, and it originally reappraised ground-breaking stances; the medicalized definition of sexuality was presented as being intertwined with the protest against practices reinforcing asymmetrical familiar models, and the disapproval of the capitalist system was coupled with the interpretation of gay oppression in light of Marxist ‘class conflict’. Libertarians suggested a parallelism between proletarians and homosexuals: if the former were oppressed because capitalists held the monopoly of the means of production, the latter had historically been subjected to the monopoly of political, religious and juridical power to define sexually legal models, marginalizing and prosecuting all who did not meet those criteria. Only neutralizing all cultural, social and institutional outcomes embedded with heterosexism²², above all the very notion of heterosexuality and the institution of the nuclear family -the libertarians argued- each person should finally be able to freely undergo his/her own desires and drives.

geois vices. Up to the second half of the 1970s the Italian Communist Party endorsed a rigid morality and supported the image of a working-class extremely disciplined and moderate, in which workers’ virility stood as a basilar and undisputed value. As Casali recalls “i ceti dominanti erano accusati, tra l’altro di bassa virilità, effeminatezza, omosessualità [...]. Per tutto il periodo la rappresentazione classica dell’uomo comunista coincide con quella dell’operaio, preferibilmente di una grande industria, forte e vigoroso nel corpo e dotato di un’alta moralità, assolutamente monogamo e lontano dai vizi” (Casali 2005, 40-41). In such a rigid and austere environment the PCI mixed homosexuality up with paedophilia and expelled any suspect individual, as the affair of Pierpaolo Pasolini shows. See Casali (2005).

²² I adopt the definition put forward forward by the sociologist and sexologist Herek, according to whom heterosexism “is used to characterize heterosexuals’ prejudices against lesbians and gay men, as well as the behaviors based on those prejudices. Heterosexism is manifested both at the cultural and individual levels: cultural heterosexism, like institutional racism and sexism, pervades societal customs and institutions. Psychological heterosexism is the individual manifestation of cultural heterosexism [...] reflected in heterosexuals’ feelings of personal disgust, hostility, or condemnation of homosexuality and of lesbians and gay men” (Herek 1996, 101).

The awareness that homophobic prejudices were also entrenched in radical left-winged culture drove activists to look for origins of hate in the moral and cultural structures behind educative processes of socialization, and to denounce the bias against homosexuals conveyed by left-winged values.

On this regard Mario Mieli, a reference intellectual of the Italian and European gay liberation movement, coined the concept of ‘educastration’²³, *educastrazione*, to define the core of the repressive set of norms inherent to bourgeois society, aimed at stifling children's natural transsexuality²⁴ and at constricting their sexual drives to reproductive models suitable and useful in a capitalist context (Bernini 2007, 43 and fol.). He furthermore denounced that similar mechanisms also occurred in communist culture and clashed with left-wing -leaders as well as with more moderate activists.

The French Front d’action homosexual révolutionnaire, FHAR, during its short history denounced the national working class movement for the celebration of a sexist dimension of maleness, and supported sexual revolution in order to unhinge oppressive moral pillars interiorized in every class:

Vous qui voulez la révolution, vous avez voulu nous imposer votre répression. [...] Vous, adorateurs du prolétariat, avez encouragé de toutes vos forces le maintien de l’image virile de l’ouvrier, vous avez dit que la révolution serait le fait d’un prolétariat mâle et bourru, à grosse voix, baraqué et roulant des épaules. [...] Nous sommes avec les femmes le tapis moral sur lequel vous essayez votre conscience²⁵.

²³ “The repressive society and the dominant morality consider only heterosexuality as normal - and only ‘genital’ heterosexuality at that. Society enforces an *educastration* on children designed to repress those congenital sexual tendencies that are deemed ‘perverse’. [...] the objective of educastration is the transformation of the infant, in tendency polymorphous and ‘perverse’, into a heterosexual adult, erotically mutilated but conforming to the Norm.” (Mieli 1980, 24).

²⁴ “Mieli’s understanding of transsexualism is significantly detached from the mainstream meaning attached to this concept; Mieli himself explains his epistemological choice, rejecting the idea of transsexuals as adults whose gender identity is different from the identity defined on the ground of their biological sexual organs: “I shall use the term trans-sexuality throughout this book to refer to the infantile polymorphous and ‘undifferentiated’ erotic disposition, which society suppresses and which, in adult life, every human being carries within him either in a latent state or else confined in the depths of the unconscious under the yoke of repression. ‘Trans-sexuality’ seems to me the best word for expressing, at one and at the same time, both the plurality of the erotic tendencies and the original and deep hermaphroditism of every individual”. (Mieli 1980, 25-26)

²⁵ Fhar (1972, 1) available at www://inventin.lautre.net/lives/FHAR.pdf

As it emerges from the quoted passage, FHAR stood out for its audacity, often addressing issues considered immoral by the radical Left, among which I recall the question of adolescents' sexuality.

The abolition of any legal age of consent became one of the key-issues and FHAR depicted the distinction between incompetent minors and adults as discriminatory, oppressive and instrumental (FHAR 1972, 1-2). It was discriminatory because it produced an unjust difference, by assuming that boys and girls aged under a strict limit did not feel sexual desire. It was, thus, oppressive since in denying minors' sexuality, the majoritarian culture shamed precocious ones, making them feel guilty and predisposing them to passively obey moral, economic and political authority. Such a distinction also appeared as instrumental, given that it formed two distinct asymmetrical classes: adults, who in fact were entitled to freely seek for sexual pleasure, though not with minors, whereas those under the age of consent were presented both as desirable and desiring subjects ²⁶ (Ibidem) . The overthrow of sexual classism precluded for the fulfilment of a libertarian and egalitarian utopia. FHAR also claimed the positive value of consensual relationships between adults and minors, thus allowing the assimilation between homosexuality, pederasty and paedophilia on the part of public opinion (Gunther 2009, 47-53).

Within this multifaceted frame, libertarian trends conceived the law as inherently oppressive and unfair, adducing reasons that I would ascribe to two main reasoning-lines: the first is pertinent to the nature of the juridical system and to the relation between morals and law-making, whilst the second entails the embracing of the general utopian project.

National movements read homosexual liberation from an anti-establishment standpoint, and they considered the control of sexuality as a dispositive to mould acquiescent citizens to a certain political and economic *status quo*. Law was hence defined and described from a conflictual perspective, and it was considered the vehicle through which dominant classes imposed, perpetuated and depicted as natural a material and moral order, optimal for the maintaining of a

²⁶ This issue raised doubts within the FHAR itself, mostly because it endorsed the traditional image of homosexuals as predators of young boys, and internal divisions arose early on. Whereas moderates asked for more pragmatism and for the adoption of anti-discriminatory tactics, the early militants still gave more relevance to the theorization of a coherent libertarian project, rather than to a rapid normalization of gay and lesbians: "The homosexual movement can content itself with asking for the end of discrimination against homosexuals or it can go further by calling into question laws that restrict any sexual act, gay or straight, for individuals under fifteen years of age. Homosexuals who are looking for a rapid integration into society are especially averse to the question of pederasty, which is too troublesome in their eyes. But if we think about it, the question of pederasty and of childhood sexuality is today the core of sexual liberation, including homosexual liberation" (Bach-Ignasse, quoted in Gunther 2009, 58).

society where the elites detained power and authority, in the broadest sense of term (D'Emilio 1983).

Liberation, therefore, could not pass through legal norms, not even through a pervasive and radical reform, because its grounds were against libertarian and egalitarian stances.

For libertarians, the foundations of any Western juridical system conveyed sexist and homophobic values, functional to reproduce, to pretend the naturalness and the neutrality of social practices deriving from a/the heterosexual norm, and to label any difference as deviant.

Family and labour law effectively favoured asymmetric gender roles, appointing males as head of the household, endorsing male payed-work and justifying the cultural model of a deferent and prolific housewife, whilst criminal law prosecuted prostitution and all so-called sexual perverts. In the 1960s law didn't follow social reality but, instead, men and women had to adapt to its strict models; the desire to start a traditional and nuclear family was central to the public recognition of valuability and heterosexuality lied at the very heart of the enjoyment of citizenship rights.

As previously mentioned, juridical reforms remained in second place in the theoretical and strategic liberationist plans, and they were integrated in a far broader frame of intents.

Between 1969 and the first half of the 1970s, gay activists supported the building of a collective autonomous identity; they encouraged expressive practices of self-determination²⁷, imagination, and experimentation of alternative ways of defining and living sexuality, sociality and public visibility. In such a radical environment, the gay movement celebrated the 'coming out' practice, through which the individual proudly claimed both his diversity to the whole society and established a bound of solidarity with other gay men. At that time most claims that now typify programmatic lgbt agenda were simply unacceptable: marriage and the army opposed utopia and the exclusion of gay and lesbians from these institutions was not perceived as problematic²⁸.

²⁷ The refusal of labels defining heterosexual society is plainly expressed in an American pamphlet from the early 1970s: "liberation for gay people is defining for ourselves how and with whom we live, instead of measuring our relationship in comparison to straight ones, with straight values" Wittman (1970).

²⁸ On this point I recall once again Wittman: "Marriage is a prime example of a straight institution fraught with role playing. Traditional marriage is a rotten, oppressive institution. Those of us who have been in heterosexual marriages too often have blamed our gayness on the breakup of the marriage. No. They broke up because marriage is a contract which smothers both people, denies needs, and places impossible demands on both people. And we had the strength, again, to refuse to capitulate to the roles which were demanded of us. Gay people must stop gauging their self-respect by how well they mimic straight marriages. Gay marriages will have the same problems as straight ones except in burlesque. For the usual legitimacy and pressures which keep straight marriages together are absent, e.g., kids, what parents think, what neighbors say. To accept that happiness comes through finding a groovy spouse and settling down, showing the world that 'we're just the same as you' is avoiding the real issues, and is an expression of self-hatred. [...]" Wittman (1970,1-2).

Libertarian stances refused to significantly engage with the law and, accordingly, structured their claims following the logic of utopian paradigms. The analysis of statutes, programs and newspapers written by the gay community in that period highlights a number of internationally shared issues: the already mentioned refusal of capitalism, the quest for a liberated sexuality and the absolute rejection of whatsoever reformist perspective. I recall, for instance, the Italian **FUORI!**²⁹ and the British manifesto of Gay Liberation Front, where the utopian flavor is extremely accentuated: “Siamo usciti fuori ma ad una condizione fondamentale, autenticamente rivoluzionaria: siamo usciti con la pretesa di essere noi stessi, con la volontà di ritrovare la nostra vitale identità i strutture in cui l’ALTRO ha assorbito, modificato, reificato qualsiasi possibilità espressiva del SE” wrote **FUORI!** in the very first issue of its newspaper, then explicating the joyful and spontaneous nature of gay liberation: “La rivoluzione è GIOIA e le è nel momento stesso in cui, superate tutte le barriere di una condizione non vitale diventa LIBERAZIONE” (**FUORI** 1972, 1). Similar stances can be also traced in **GLF Manifesto**: “ [gay liberation] means a revolutionary change in our whole society [...] a **NEW-LIBERATED LIFE-STYLE** which will anticipate, as far as possible, the free society of the future” (**GLF Manifesto**, 1971). Rights talk, where present, acquired a negative meaning: the malcontent against moderate stances left no room for a theoretical compromise. British **GLF** labelled juridical reforms as the product of patriarchy and sexism, further arguing that “reforms may make things better for a while, changes in the law can make straight people a little less hostile, a little more tolerant but reform cannot change the deep down attitude of straight people that homosexuality is at best inferior to their own way of life, at worst a sickening perversion” (*Ibidem*). Also US **GLF** affirmed similar stances, and even in Italy and France, where criminal prosecution against gay men wasn’t as strongly enforced as in the USA and UK, the logic of rights generally appeared unsuitable. “Omosessualità è immaginazione” read a typical Italian slogan of that time and **FUORI!** Committee vibrantly proclaimed “Ciò che a noi preme è il sovvertimento del sistema capitalistico, per la nostra liberazione, nel contesto della reale emancipazione del genere umano. [...] Noi non lottiamo per essere accettati in questa società ma per la società in cui non si porrà più il problema di accettazione”. Therefore, public claims were not backed up by a legally based logic but they re-

²⁹ **FUORI!** is an acronym for Fronte Unitario Omosessuale Rivoluzionario Italiano; it rose from the experience of previous gay groups organized in Italian cities, such as Milan, Turin, Padua, and Rome. Even though heterogeneity, internal conflicts, and harsh debates badly affected the overall organization of **FUORI!**, at least until 1979 it promoted a libertarian perspective, also by means of a popular journal, named after the **FUORI!** itself, which had significant success. In the early 1980s, the urgency for a national dimension became more visible, and many activists called for the end of internal divisions, forcing the leaders of this association forward to declare, at the 1982 annual Congress, the dissolution of **FUORI!**. For a detailed account see Rossi Barilli, (1999, 32 and fol.).

lied on political grounds. Lgbt activists dreamt of a society refusing the individualistic conception of the correct human rights theory: community, liberty, fluidity, absence of constrictions, and devotion to relational dimensions constituted the cornerstones of radical frame.

Justice and injustice were the poles of the libertarian debate and the socio-anthropological Universalist paradigm affected every claim: everyone was entitled not to what she was morally legitimated to claim as her own right, but to what was just for every human being. The issue at stake did not limit the pursual of benefits for lgbt community and to struggle over their discrimination, but it embraced a complex reflection on the principles that should govern human relations, and on the methods dismantling the existing political and economic institutions

The criticism of subjective rights³⁰ recalled the famous Marxist critique of human rights³¹. The bond among capitalism, ideology of oppression, and heteronormativity seemed unavoidable and, as Mieli explains, rights would represent a functional instrument in reproducing such system and, ultimately, to marginalize homosexuals: “the freedom that is guaranteed homosexuals by the law is reducible to the freedom to be excluded, oppressed and exploited, to be the object of moral and often physical violence, and to be isolated in a ghetto that is generally dangerous and [...] squalid” (Mieli 1980, 100-101). On this issue, the Italian writer Saba Sardi, recalled, by Mieli himself, noted “late capitalist society, while it may extend to homosexuality the legal sanction of tolerance, still imposes on homosexuals a mark of infamy” (quoted in Mieli, *ibidem*) and Mieli further added:

the protection of homosexuals, the permissive morality, tolerance and political emancipation all go together, within certain limits, in the countries of capitalist domination, all these aspects proving in substance functional to the program of commercialization and exploitation of homosexuality on the part of capitalist enterprise. The commercialization of the ghetto pays well, [...]. Capital is working for a repressive desublimation of homosexuality. (Mieli 1980, 105)

Activists of UK GLF drew a line between capitalism and patriarchal family, asserting that

³⁰ I specifically refer to subjective rights because gay radical criticism not only targeted human rights but the concept of rights itself as a legal, legitimate, and enforceable pretense that the individual can advance to the society.

³¹ Karl Marx dismissed rights declared in the American Declaration of Independence of 1776 and in the Universal Declaration of Rights of Man and Citizen of 1789 as “nothing but the rights of a member of civil society, i.e. the rights of egoistic man, of man separated from other men and from the community” (Marx 2012, 162).

Sexism is not just an accident, it is an essential part of our society, and cannot be changed without the whole society changing with it. In the first place our society is dominated at every level by men who have an interest in preserving the status quo; secondly the present system of work and production depends on the existence of the patriarchal family.

Gay libertarians preferred the language of liberty to that of rights, because the former allowed them to imagine a brand new environment while the latter stuck to an image where property and capitalism remained the focal points of economical personal, sexual and political exchanges.

It would however be incorrect to hold that, in the 1970s, libertarian trends entirely monopolized the gay movement; reformist stances continued to exist and to propose a perspective centred on the prominence of a feasible and pragmatic strategy.

A few months after the birth of GLF, the GAA- Gay Activist Alliance- was founded in New York, with the primary task to “secure basic human rights, dignity and freedom for all gay people” (Marotta 1981,71). To that end, GAA supported gay candidates at local elections and presented several amendments to repeal formal discriminations against gays and lesbians.

In 1973 Lambda was established, becoming in just a short time the main US network involved in litigation relating to sexual orientation; in the following years it patronized gay applications free of charge, challenging the effective constitutionality of sodomy laws, denouncing the discharge of gay soldiers³², and asking for public recognition of same-sex unions³³ (Andersen 2004)

The combined effect of legal efforts and cultural provocations, combined with the spreading of a more tolerant sexual morality led to relevant changes, in several realms of public life; during the 1970s several US States repealed sodomy laws, in 1974 the American Psychiatric Association, deleted egosyntonic homosexuality from the list of mental pathologies (Lingiardi, 2011, 59) and in 1975 gays and lesbians were allowed to enter the civil service. Metropolitan cities of Boston, Detroit, Huston, Los Angeles, San Francisco and Washington introduced anti-discriminatory statutes: openly gay politicians, such as Harvey Milk, joined municipal councils, occupying public positions also in France and in the UK (Engel 2000; Gunther 2009). In Italy

³² See *Matlovich v. Secretary of State*, 1974

³³ Jack Baker and Mike McConnell were the first gay couple to claim the right to marry under Minnesota laws. In 1970, indeed, they were prevented from fulfilling the bureaucracy requirements to obtain the wedding license and, consequently, brought their case to the Courts, without success. In a few years the number of couples that asked Lambda to patronize their claim increased, even though until the mid 1990s public recognition of same-sex couples did not emerge as a priority issue (Andersen 2004).

thanks to the pressures of local associations, national and territorial agreements increased the interaction between the gay movement and political institutions, even though with poor results. (Barilli 1999, 85 and fol.).

In the middle of the 1970s, however, the burst of libertarian trends began to diminish.

The strain of libertarian utopia³⁴, the weakening of radical youth movements, and the appearance of a new politically heterogeneous generation of activists compromised libertarian cohesion, to the benefit of reformist impulses.

As Altman recalls, despite the radicalism of GLF and FHAR, the 1970s produced a gay male who was “non-apologetic about his sexuality, self-assertive, highly consumerist and not at all revolutionary, though prepared to demonstrate for gay rights” (Altman 1988, 52).

Militants increasingly called for the improvement of their actual living conditions through the gradual reform of existing institutions, and radical yearnings consistently drained away.

³⁴ Such strain is well captured by a French FHAR militant, describing the valorization of monogamous models by younger activists: “transgressing the social order every day is exhausting. The homosexual couple will continue to recreate a second species of normality [...]. They are responding to the desire to enter into the ranks to participate like the others in the social order” (Gunther 2009, 55).

1.4 Reformist Trends: from Libertarian Discourses to Rights Talk

In the second half of the 1970s reformist stances strengthened in all Western Countries, favouring the establishment of fruitful relationships with political institutions.

In the USA, after the collapse of GLF and GAA, the National Gay and Lesbian Network was created in order to directly lobby with the members of the Congress; in France the Comité d'urgence d'anti-repression homosexuelle, CUARH, silenced its libertarian minority in order to open a constructive dialogue with the Socialist Party towards the complete repeal of 1942 legislation³⁵, which fixed the age of consent for same-sex acts at 21 years old and at 15 for heterosexuals. Finally, on the basis of the FUORI! alliance with the Radical Party at national elections of 1977, in 1983 the Italian new-born Arcigay indicated the strengthening of the bonds with political national, local, and regional institutions as the crucial point of its strategy (Rossi Barilli 1999, 80 and fol.). Not only the tactics but also the organizational structure changed, and a more branched, professionalized reality substituted previous unstable collectives.

The bureaucratization of the overall movement, the professionalization of internal hierarchies, and a distinct process of juridification³⁶ marked the gay movement in this period.

Furthermore, from the end of the 1970s onwards the growth of reformist trends favoured the internationalization of the gay movement, to such an extent that national leaders opened successful discussions with many world-leading political organizations (Trappolin 2004).

The actual asset of the lgbt movement was affected by these dynamics, and still nowadays reformist perspective mainstreams the theoretical and methodological agenda of Western lgbt groups.

³⁵ The equalization of the age of consent was finally achieved in 1982, in accordance with a perspective that did not actually challenge the existence of a legal age of consent, but only its discriminatory enforcement. As Gunther notes, supporters of the reform advocated the universalist values of secularism and liberalism, while relegating the value of difference, so celebrated in radical trends, to the background; specifically deputy Gisèle Halimi defended the reform with a “classic example of republicanism”, arguing “sexual morality must be considered as having the same characteristics as religious morality or a-religious morality: it must be seen as arising from personal choice and individual conscience”. (Halimi quoted in Gunther 2009, 64).

³⁶ I adopt the term juridification here meaning the existence of an increasing ‘legal framing’, namely the tendency to understand self, the others, and the relationship between self and others, in light of legal order; the main consequence of such a standpoint is to foster the consistent reference to law. In so much as individuals mainly perceiving themselves as legal persons and attaching social relevance to law, they will also increasingly define themselves as belonging to a community of legal subjects, with equal legal rights and duties. Therefore, if law consistently shapes the structures of understanding, individuals will be more likely to recur to law in disputes’ resolution. For a review of different positions see Blichner and Molander (2004). For an introduction of different dimensions of juridification see Felstiner, Abel and Sarat (1981); Habermas (1987); Stone Sweet (2002).

The pragmatic approach and, most importantly, the idea that the subversion of the bourgeois State was neither necessary nor desirable affected the attitude towards the law.

Law was valued as a strategic instrument, whereby advancing lgbt interests and obtaining entitlement to equal dignity and rights.

Activists did in fact strongly advocate for judicial activism and strategic litigation, also promoting inclusive values, feasible with existing liberal systems.

Strategic litigation placed emphasis on judicial activism, whether direct or indirect, and it required the careful selection of the cases which were likely to achieve reforms which would otherwise have been very hard to obtain. The most famous example of strategic litigation is the US case *Brown v Board of Education*, which laid the foundations to dismantle the “separate but equal” doctrine; this strategy has been widely adopted by almost all social and political movements appeared in the second half of XX century³⁷.

Even though I extensively explore the concept of judicial creativity in chapter II, I find it useful to flesh out here a general depiction of this phenomenon.

Thirlway³⁸ offers a general, still accurate, definition of judicial activism, distinguishing between ‘formal’ and ‘informal’ activism. The former occurs when “the judge deals with legal issues [...] other than those which could suffice to constitute the logical structure leading up to his ruling.” (Thirlway 2002, 75). The latter, on the contrary “being unsatisfied with existing law, or with what [appears] as lacunae in the existing law” judges “will be ready to indulge in something close to open law-creation in order to base his decision” (Ivi, 76).

Change would, thus, pass through the combination of formal and informal paths, and lgbt activists devoted much effort to stimulating judges on both aspects.

The theoretical and epistemological frame where these strategies developed is that of human rights’ language.

The overall gay movement went through a process of juridification, which nourished the inclination to resort to the Courts and, at the same time, it fostered the tendency to ascribe social inequalities to a discrepancy between legal rights and legitimated claims inscribed in the natural law.

³⁷Literature about strategic litigation is extremely vast; roughly, it can be separated into authors that analyze the impact of judgments and authors that trace the activation of law within specific movements. In the former category see Scheingold (1975); Merry Engle (1990); Rosenberg (2008); Anagnostou (2014); in the latter, for an introduction, see Andersen (2004); McCann (1994).

³⁸ See Thirlway (2002); Zarbiyev (2012).

In a place of liberation, reformist trends preferred the concept of non-discrimination; the ultimate goal of creating a society free from every constraint was replaced by the achievement of full equality and dignity, formal and substantial, to all lgbt citizens.

I would further the analysis by recalling Glendon's sharp analysis (Glendon 1991). She establishes a link between the legalization of popular culture, the reference to values expressed in legal texts, and the quest for legitimacy from those who adopt similar talk (Ivi, 3). Social, cultural, religious and moral heterogeneity, combined with diffuse disagreement over traditional precepts would encourage to "look at law as an expression and carrier of the few values that are widely shared in our society: liberty, equality, and the ideal of justice under law" (Ibidem). Moreover, when addressing a fragmented public opinion, or when trying to build an international cohesive platform, the adoption of a universally legitimate code of meanings or values offers undoubted advantages.

Hence, given the international dimension of actual/present/current lgbt mobilization, the language of human rights provided a shared and powerful resource; human and Constitutional rights affirm absolute, but general, norms that can be variously declined and that hold personal liberty, autonomy, equality, and justice as the essential moral and juridical cornerstone.

Rights talk, thus, represents a unique arsenal, whereby proposing a platform of claims suitable to be upheld in national and international Courts and political arenas, by local lgbt groups.

The increasing legalization of lgbt discourse has to be contextualized within the general process of multiplication and universalization of human rights described by Bobbio³⁹; nevertheless, it raises another important question, concerning the typology of rights called in.

At the origin lies the logic of subjective rights which supported the demand for a public withdrawal from private sphere; over time, however, the lgbt movement began to demand an active institutional role, both in implementing anti-discriminatory policies and in recognizing same-sex couples. The preamble of GAA Constitution of 1969, for instance, resembles the language of human rights, stating that homosexuals "demand the freedom of expression of our dignity and value as human beings", further claiming the specific "right to our own feelings", "the right to love", "the right to our own bodies" and "the right to be persons" (GAA, 1969).

³⁹ Bobbio conceives the affirmation of human rights as marked by a number of progressive steps: the *constitutionalization* of rights, that is their expression in a positive legal form; the *extension* of such rights, both as far as the subjects covered and the human rights afforded are concerned; the explicit *universalization* of these rights, as envisaged in the 1948 Universal Declaration of Human Rights; finally, the process of *specifying* rights declines them in relation to the specific demands for protection, as in the case of women's rights, children's rights, sick and disabled's rights. See Bobbio (1995).

More recently, US NLGTF and British Stonewall have patronized several applications concerning the recognition of same-sex marriage and, thus, the entitlement to social rights arising from civil unions and marriage (Stonewall and NLGTF, 2015).

As it can be deduced, rights talk entails civil, political and social demands; the lgbt movement tackles civil issues, like the recognition of egalitarian marriage, it supports the right not to be deprived of political liberties because of sexual orientation, it demands to recognizing lgbt individuals, couples, and citizens, as being entitled to all social measures publicly provided to other citizens.

The ongoing reference to fundamental rights testifies the prominence of a morally-based legal language, in that human rights as well as natural rights are ultimately grounded on value-oriented arguments. Both clusters do in fact rely on theories of the entrenched and specific moral qualities of human beings, by virtue of rights which are equally held by everyone, regardless from their incorporation in legal systems (Smith 2002, 46).

Ilga-Europe, the International Lesbian, Bisexual, Transgender and Gay Association, for instance, grounds its policies on the idea that dignity, freedom, and the full enjoyment of human rights should be granted to everyone (Ilga-Europe 2015); also the preamble of Yogyakarta Principles, discussed below, recalls the promise of “a different future where all people born free and equal in dignity and rights can fulfil that precious birth right” (Yogyakarta Principles, 2006).

The constitution of Ilga-World provides even starker evidence: along with the aim of “working for the equality of lesbians, gay men, bisexuals, trans people and intersex people and liberation from all forms of discrimination” it mentions the necessity “to promote the universal respect for and observance of human rights and fundamental freedoms, including the elimination of all forms of discrimination” (Ilga-World, 2014). The intertwined bond between non-discrimination, human, and lgbt rights is clearly built on the very Universalist, egalitarian paradigm that, at least formally, should guide human rights law.

It could be questioned why the law should treat heterosexuals and homosexuals as equals; yet, the concept of ‘equality’ recurs throughout all mentioned documents without being further justified.

Indeed, the drafting of the Universal Declaration of Human Rights, the introduction of the ECHR and the adoption of subsequent international Conventions and Declarations removed the urgency to clarify reasons whereby certain human groups should be treated as equals. The constitutionalization of human rights has overcome the problem of finding an ultimate philosophical foundation, providing itself a solution and causing a shift of paradigm. If previous debates aimed at assessing whether human rights did exist, and, if so, to whom should they be recognized, after the UDHR the pressing questions /have become how to interpret and decline

prescribed values and concepts, how to enforce such rights, in order to avoid a Western-centric approach, and how to respect cultural specificities⁴⁰.

The Universalist and inclusive wording of human rights documents already provides a sufficient argument to the LGBT movement, who, in fact frame claims as arising from a misguided application or interpretation of original norms.

The activation of law is the main perspective through which gay associations are able to criticize existing institutions and, at the same time, it also amounts to the theoretical, epistemological and methodological framework in which to funnel collective needs and demands.

Effectively, legal experts involved in LGBT issues appeal to the core values of Western democracies, such as equality, freedom, and non-discrimination, in order to show that gay and lesbian claims are not only compatible, but also essentially necessary to fulfil the core ideals declared in Constitutional Charters, and in international human rights declarations and treaties.

The recognition of full juridical dignity and the achievement of completing equality are the totalizing cornerstone of reformist trends, to the detriment of possible stances that, though targeting the same results, might request the State to positively evaluate those differences that, regardless of their immutability, are fundamental for the construction of self-identity and for the development of individual personality.

Through the constant reference to judicial arena LGBT associations look for public legitimation, while at the same time supporting, the legal system itself.

Political scientists and sociologists highlight that strategic litigation is a form of participation to the governance of institutional architecture and, as Zemans argues, it contributes to legitimize the existing polity:

Law supplies the weak with adventitious strength [...]. In other words law confers power. In Dahl's (1961) words, the *mantle of legality* conferred on private citizens provide them with power previously unavailable to them. Any new authoritative rule, whether statute, judge-made common law, or administrative regulation, merely provides opportunities. (Zemans 1983, 694).

⁴⁰ I recall here Bobbio's well known argument of the possibility of solving the problem of rights foundations "given that the great majority of governments have officially adopted it, the Universal Declaration of Human Rights, it represents a unique demonstration that a value system can be considered to be founded on humanity and thus acknowledged by it: the proof is in the general consensus over its validity. Advocates of natural law would have spoken of consensus *omnium gentium* or *consensus humani generis*" (Bobbio 1995, 13).

Therefore, the eventual willingness of the institutions to enforce lgbt friendly reforms is a source of potential opportunities for the gay movement, which will hence be, more likely to act within existing political and legal boundaries, and abandon utopian and libertarian stances⁴¹.

Formal and indirect lobbying, international policy-oriented networks and think-tanks, proposals of law reform, and complaints filed to territorial, national and international Courts of justice, are some of the principal strategies through which reformist activists pursue the lgbt quest for rights (Andersen 2004; Johnson 2014).

The actual juridification of mainstream movement determines also gatekeeping side-effects: indeed, the top level might grant more relevance, priority and resources to those claims which can be easily expressed in terms of rights and, which as such, have a chance of winning or challenging the existing legal doctrine.

Unlike in previous decades, the strong institutionalization undergone by the lgbt movement is also reflected in the ways in which strategic litigation are displayed

In [planned public interest lawsuit] model, gay rights organizations try to figure out which courts are the most likely to be receptive to their claims, then recruit *plaintiffs* to challenge the laws on the books and file suits. We think, then we act. The whole undertaken is centrally planned in advance of any legal activity. (Kopplemann 2008, 1)

Moreover, I recall Wintemute's analysis on the risks embedded in the activation the law. He did in fact compare strategic litigation with the process of legislative reforms, highlighting benefits and disadvantages of each route:

The 'political route' [...] involves persuading legislators or governments to change the law, by repealing existing discriminatory legislation or by creating new legal protection against discrimination [...]. The 'legal route' involves persuading national and international courts and human rights tribunals that a particular instance of sexual orientation discrimination vio-

⁴¹ Critical Legal thinker Robert Gordon labelled reformism as a normalizing process: "The reformer usually points to a whole body of ideas or practices that is out of line with the basic structure, but that can, with appropriate revisions, be made to fit. This exercise is apologetic because the assumption that existing practices are rational and good, or may readily be made so by procedures and options currently available to policymakers, tends to exclude consideration of other possibilities, such as that the practices are irrational or bad beyond the chance of correction save by fundamental change-in ways of thinking as well as in institutional design. In other words, (to overstate somewhat): if the situation cannot be 'fixed', it is not a 'problem' for the field at all" (Gordon 1981, 1019).

lates *existing* human rights law, whether statutory, constitutional or international. (Win-temute 1995, 1-2)

In the ‘political route’ a compromise with conservative trends is almost inevitable and concessions to the majority will increase along with the weakness of the minority, therefore affecting the original range of claims put forward. Strategic litigation, on the contrary, doesn’t necessarily require mediation, and judgments, when favourable, are generally more adherent to initial goals than the reforms that the same minority could have achieved by taking the political route. However, if pursued in particular homophobic environments, legal route might also lead to side-effects: political elites could not enforce judgments, whether national or international, and public opinion might indicate both judges and lgbt organizations as lobbies that are trying to impose a new moral order, resulting in a possible increasing of social and institutional homophobia.

However, the strategy of gradual reforms allows the lgbt movement to achieve extremely significant legal results, helping to conceive a less heterosexist legal and informal culture, becoming more respectful towards homosexual people.

Among the international achievements obtained through Courts, I recall the repeal of the sodomy laws, the rejection of bans on gay and lesbian soldiers, the recognition of same-sex couples, the acceptance of lgbt adoption and, more generally, the provision of positive policies to enforce substantial equality⁴².

This strategy brought about extremely significant reforms and, despite being based on the analogy between sexual orientation and other classes already secured by law, it still allowed the fulfilment of demands arising from the lgbt community and the development of new legal assets that deeply affect everyday lives of gays and lesbians. In Western Countries homosexual people are not only no longer criminally prosecuted, but also enjoy fundamental, civil and social rights and, thus, legitimately claiming protection, services and recognition in an increasing number of Countries. The heterogeneity of European legal systems predictably creates parallel schemes of protection and, consequently, depending on the Country, homosexuals are recognized to a varying amount of rights; it’s however indisputable that hadn’t lgbt organizations not pushed at na-

⁴² As extensively analyzed in the following chapters, there is a rich international jurisprudence on a plurality of issues concerning sexual orientation. As regards to the ECtHR, I recall *Dudgeon v UK*, 22/10/1981 (criminalization of male same-sex), *Smith and Grady v UK*, 27/12/1999 (ban on homosexual troops), *Karner v Austria*, 24/10/2003 and *Kozak v Poland*, 02/06/2010 (rights granted to same-sex partners living in a de facto marriage), *Schalk and Kopf v Austria*, 22/11/2012 (same-sex marriage), *Vallianatos v Greece*, 07/11/2013 (public recognition of same-sex couples), *Gas and Dubois v France*, 15/06/2012, *Fretté v France*, 26/05/2002, *E.B. v France*, 22/01/2008, *X and others v Austria*, 19/02/2013 (single and second-parent adoption). See Hodson (2013); Johnson (2014).

tional, European and international level, politicians would have been far more reluctant and cautious in amending discriminatory laws or in introducing laws specifically based on lgbt claims.

1.5 The International Lgbt Movement: Introductory Hints

In order to grasp the paradigms that orient the reformist international lgbt movement I suggest focusing on the valuable example of Yogyakarta Principles. In 2006 a conference was held in Yogyakarta, Indonesia, to explore the legal rights of sexual minorities; activists as well as intellectuals, policy-makers, legal experts, and “influential figures” from multilateral bodies and governments took part in the drafting of a list of widely recognized rights that should be awarded to sexual minorities. The 29 Yogyakarta Principles, are not binding however and they cannot even be qualified as sources of international law; nevertheless, UN institutions tend to refer to these principles as a programmatic and quasi-authoritative document concerning the rights of sexual minorities (Thoreson 2009, 327.).

Yogyakarta Principles are worded using the same language as positive international law and they rely on positive sources of law, insisting that the abuse against lgbt people is a violation of binding obligations already signed by the majority of States, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. As an observer of the NGO Human Rights Watch argues “the aim [of Yogyakarta Principles] was normative, not utopian” (Long quoted in Thoreson 2009, 328).

Moreover, the drafters managed to encompass cultural concerns of the different conceptions of family and gender roles, usually put forward by conservative elites. They firstly focused on bodily harm and basic freedoms, stating that a minimum of protection remained “non-negotiable”. As Donnelly notes, drafters “isolate[d] the discrimination that deprives sexual minorities of rights that should theoretically exist for everyone - like freedom of association and freedom of speech- but are frequently and unjustly revoked on the basis of sexual orientation and gender identity” (Donnelly 2003, 226).

For instance, whilst affirming the right to have a family, Principle 24 recognizes that “families exist in diverse forms” and does not indicate marriage or civil partnership as the main order to achieve this right, stressing on the contrary that any kind of family or couple relationship should not be discriminated against in any aspect of social, political or cultural life.

Such an arrangement encourages international institutions as well as national authorities to recognize lgbt claims without implicitly endorsing a state of rights that might appear too westernized. Yogyakarta Principles have been translated and also distributed at the grassroots level to impact both the institutional level and local activism and, consequently, to mainstream these principles in every dimension of human rights initiatives (Thoreson 2009; Sanders 2008).

This description sheds light on the theoretical paradigm that orients lgbt groups and associations: international human rights law provides the “working legal canon” (Heinze 1998, 38) which is analysed through a pragmatic approach, so as to promote substantial equality and to support legal demands of sexual minorities.

The most important organization on a worldwide level is ILGA - International Lesbian, Gay, Bisexual, Transsexual Association; it was founded in 1978 on the impulse of European, American and Australian activists, who structured ILGA as an umbrella-organization of associations, collectives and realities committed to sexual orientation and gender identity issues. Nowadays it contains more than 400 groups from all continents, and it represents an essential socio-political actor pushing for including lgbt demands in the international agenda.

The variety of living conditions, of claims and cultural specificities experienced by lgbt communities has led to the necessity to establish the ILGA regional sections, retaining consistent autonomy. Such multilevel arrangement allows each section to contrast divergent realities; while, for instance, in North America and Europe public attention is focused on the recognition of same-sex marriage and of rights connected to homoparentality, ILGA-Africa is far more concerned with criminal laws that read severe sanctions, including death penalty, for alleged gay and lesbian people. Such course doesn't exclude, of course, a valuable internal coordination, insomuch as ILGA-Europe and ILGA-North America fund campaigns to sustain lgbt organizations in Africa and lobby European and UN institutions to firmly condemn prosecutions perpetrated. At the European level, ILGA-Europe is qualified both at the Council of Europe and at the European Parliament and it benefits from funding from the European Commission, of private enterprises, also counting on the support of many prestigious academic departments and legal scholars.

Core strategies and priorities are defined at Strasbourg, but national groups enjoy considerable autonomy due to domestic peculiarities. The staff of ILGA-Europe is available to give funds, to favor international cooperation and to share expertise with national groups but, at the same time, it demands domestic levels to single out the strategies they judge to be the most effective⁴³.

⁴³ I attended the 2014 Conference of ILGA- Europe, in Riga, and on that occasion I was able to observe that the major efforts of the organization were devoted to developing relations that could then result in joint actions, for instance favoring the exchange of knowledge and best practices, and encouraging a broad confrontation on different national problems. During one informal occasion, representatives of Italian lgbt associations had a meeting with Evelyne Paradise, chief of ILGA- Europe, about the strategy to adopt when, few weeks later, PM Renzi would have spoken to the European Commission. Even though Paradise and her collaborators gave suggestions, it was up to Italian activists to decide whether to picket outside the Commission to denounce the absence of political sensibility towards lgbt issues, or to

The European Court of Human Rights and the European Court of Justice are strategic arenas where to obtain either the enforcement of already recognized rights or to reach judicial interpretations favourable to gay and lesbian claims.

The European Agency for Human Rights in collaboration with ILGA- Europe recently appointed a panel of national legal and social experts to monitor and analyse existing discriminations, national problematics and the best practices, with the final aim formulating policy proposals to European institutions. The last result⁴⁴ of this network was the approval of a Resolution, commonly known by the parliamentary that drafted the text as the Lunacek Resolution, which establishes a “EU Roadmap against homophobia and discrimination on the grounds of sexual orientation and gender identity” and calls for the active participation of the European Commission and multilevel EU institutions to mainstream respect and non-discrimination in all fields. although not binding, this Resolution has a strong symbolic and programmatic value and it incorporates eight key areas of strategic importance: the securing of lgbt migrants, equal access to education, health systems, and social services, protection from hate crimes and speeches, enforcement of fundamental rights - i.e. the freedom of assembly and speech and the implementation of the freedom of movement within the European Union through the guarantee of mutual recognition of partnerships and marriages contracted abroad (Lunacek 2014).

I do not dispute that there’s a long way to go before achieving formal and substantial equality but it’s also undeniable that lgbt claims are now a publicly debated issue: discrimination and violence are broadly condemned, national authorities are called to justify their own conduct and prejudices are increasingly brought to question.

collect demanding, precise, and critical questions that Paradis would have read to Renzi within the institutional environment of the EU Commission.

⁴⁴ Over the last years, the Council of Europe and the European Union have approved a number of relevant resolutions and directives targeted at tackling discrimination against lgbt subjects. Firstly, all States wishing to join the Council of Europe must fully decriminalize same-sex acts; the CM/Rec 2010(5) further recommends implementing national laws and equal opportunities to dismantle prejudice and discrimination. In 1994 the EU Parliament also upheld the Resolution 28/1994, calling to end all legal and administrative discrimination and “to pass legislation providing homosexual access to marriage or an equivalent legal framework” and to allow “the adoption of fostering children” (EC 28/1994, § 14). In 2007 the EU Parliament stated that every 17th May an international day against homophobia and transphobia should be celebrated. The only binding anti-discriminatory instrument within Eu laws remains, however, the directive 78/2000, “establishing a general framework for equal treatment in employment and occupation”.

1.5.1 The Activation of the ECtHR

In this section I will reflect on how to frame the litigation before the ECtHR within the multifaceted frame previously outlined. There are some noteworthy elements, which allow us to appreciate the peculiarity of this case study.

Firstly, right from its establishment onwards, European homosexuals have consistently been filing complaints to the ECtHR, asking for the repeal of national criminal laws⁴⁵. The first applications date back to 1955 and over the following fifteen years the EComHR had to decide on the admissibility of 13 applications grounded on sexual orientation. From 1970 to 1975 there is a gap, which could be explained by both the outburst of libertarian trends and by a temporary disillusionment in the potential benefits descending from favourable ECtHR judgments. After the mid-1970s, however, the number of homosexual applicants started to increase again: over a period of 40 years 112 complaints dealing with sexual orientation were submitted, with various outcomes to be discussed in chapter IV. Even from such a plain description, it emerges that, apart from the already mentioned 1970-1975 period, the recourse to Strasbourg characterizes the trajectory of European homosexual militants from the early beginning.

Between 1955 and 1970 the overwhelming majority of applicants were German or Austrian and lived under a criminal law that sanctioned same-sex acts; in Germany the Constitutional Court had indeed declared paragraph 175 compatible with a democratic regime, thus legitimating the prosecution of gay men, even of those already imprisoned by Nazis (Moeller 1984).

In a context where the gay movement was neither as developed nor as organized as it is today, those who filed applications and engaged in such a complex procedural machinery, must surely have had not only strong personal motivations but also social, economic and personal resources. I would read this data as suggesting that although homophile movements nationally resorted to mild strategies, individuals no longer had to suffer discrimination and oppression in silence. I do not dispute that, all applicants were probably involved in homophile associations to some extent, but I highlight that in none of these applications a direct and consistent involvement of a structured movements emerges.

⁴⁵ As carefully analyzed in chapter III, the ECtHR is not entitled to repeal national legislation, nor to amend it; however, if the Court judges specific provisions in breach of the ECHR, a binding mechanism might impose heavy fines and might also provide the ultimate possibility to throw non-compliant States out of the Council of Europe. This has remained to now a mere abstract possibility, and the enforcement of ECtHR judgments has generally reached high rates (White and Boussiakou 2009; Anagnostou 2014).

Secondly, this evidence testifies that despite the fact that the activation of law is commonly thought to descend from US legal strategies, strategic litigation also has autonomous roots in Western Europe: the recourse to the ECtHR marks an autonomous dynamic, triggered by both the desperation of single men who had to face long sentences of conviction and by the faith placed in the universal, neutral and inclusive wording adopted by the ECHR.

After 1975 a two-step change occurred: firstly, national and, then, international lgbt movements began to directly achieve fundamental results thanks to ECtHR judgments. Mr. Dudgeon, Mr. Morris, and Mr. Modinos, who respectively challenged UK, Irish and Cypriot criminal laws against same-sex acts, were all leaders of national gay liberation groups and they lodged complaints with the precise strategy to push politicians to repeal hostile legal provisions (Johnson 2014).

From the early 1990's onwards, international organizations, such as ILGA-Europe and the British Stonewall, resorted to directly engaging in strategic litigation, through manifold actions thanks to their growing resources.

Lawyers patronizing UK soldiers discharged from the army because of their sexual orientation were affiliated to Stonewall, and the same NGO had ensured its support to the applicants before applications were filed⁴⁶. Nowadays, thanks to vast webs of networking, ILGA-Europe is able to select cases with higher chances of promoting change in ECtHR jurisprudence or, at least, to open a public discussion; strategic litigation is thus considered about “using European courts to advance the rights of lgbti people, [...] as part of a wider advocacy campaign, [in order] to ensure full recognition and implementation of human rights for everyone” (ILGA-Europe 2015). It's not infrequent that even the ECtHR admits lgbt associations as third parties or as *amicus curiae*, therefore positively legitimizing the role of the lgbt movement within communitarian judicial institutions.

As it can easily be imagined, claims brought forward entail the reform of the existing legal system and, as such, they can be labelled as reformist. By this I do not uphold that they are moderate or mild in content; on the contrary, in the 1950s claiming in trial the right to freely engage in homosexual acts was quite radical and still nowadays there are applications, especially regarding gender identity, that promote extremely innovative interpretations of the ECHR.

As extensively analysed in chapter III, applications have to pass a preliminary judgment and if they fall out of the Court's legislation, they are dismissed. It logically follows that the very institu-

⁴⁶ For a description of Stonewall involvement in other ECtHR applications concerning sexual orientation see the official website of the organization: www.stonewall.org

tional asset of the ECtHR casts off any libertarian pretence, for it would not appear compatible with ECHR wording, and encourages a reformist perspective. If this observation is quite predictable, it's worth stressing that the pronounced tendency to resort to judiciary strengthens the expression of lgbt claims according to a legal and theoretical frame compatible with that of the ECHR and with the legal culture of ECtHR judges.

1.6 Queer Trends

Historical and theoretical origins of queer trends go back to the Aids epidemic and they uncover long-term tensions, hidden within the gay movement since its foundations. As Engel recalls, indeed:

AIDS brought into question the underlying point of gay liberation: was gay liberation about the right to have sex? Was gay liberation only about sex? In some sense, AIDS helped to bring back to the surface the same questions that impelled a lesbian-separatist movement to form in the 1970s. (Engel 2000, 52)

The Aids epidemic, the political indifference to health claims, at least until the illness seemed to be confined to gay people, and the general de-sexualization⁴⁷ promoted by reformist organizations, pushed intellectuals and activists ‘at margins’ to reappraise libertarian claims and strategies. These new radical trends named themselves as queer⁴⁸, claiming their difference to the society, embracing it, and positively evaluating all caricature traits generally attached to gays and lesbians, then rejecting the label of public respectable homosexuals.

⁴⁷ In response to the Aids epidemic, the mainstream movement promoted monogamous relationships, discharged the idea of sexual freedom as inherent to gay liberation, and developed new, less sexualized, discursive practices. Such dynamics have been widely criticized and I find specifically challenging the argument put forward by Stychin, according to whom the process of the de-sexualization of the entire movement would have been functional to grant gays and lesbians access to citizenship rights. By analyzing reforms approved in the UK to contrast HIV, and by drawing similar conclusions on the French debate about the introduction of Pacs, he stressed the urgency to pay “attention to what the reform-minded had to say” (Stychin 2003, 26). He also reached a provocative, though quite catchy conclusion: “for the reformers, homosexuality should not be (but then it cannot be) promoted. It is a condition that demands toleration and it can’t be dangerous because it’s not contagious. But it’s also non-threatening because it can be, and *it needs to be*, channeled into relationships that are about romantic love; part of a process of normalization [of] banalized respectability” (Ivi, 36).

⁴⁸ Feminist Teresa de Lauretis firstly adopted the term ‘queer’ in the 1990 Conference “Queer Theory: Gay and Lesbian Sexualities”, to denote an approach to sexuality and sexual orientation in opposition to the reformist pursued by Gay and Lesbian Studies. In the same year grassroots activists also resorted to this concept, and New York radicals founded Queer Nation, a group aimed at directly tackling homophobia and at promoting the visibility of marginalized sexual minorities, by means of provocative actions and strategies defined ‘into your face’. Even though short-lived, Queer Nation renovated and upset mainstream movement, affecting popular culture and effectively conveying more consciousness about the Aids epidemic.

Queerness became a source of pride and the key to affirming specific identities, which by refusing the notion of sameness also exalted the difference arising from the experience of a minority, who had been traditionally oppressed and marginalized⁴⁹.

According to the queer perspective, not only is the ideal of sameness undesirable, since it silences the highest criticism targeted at society and at its political and economic structures, but neither is it feasible, in that sexual orientation affects one's experience of life and shapes different relational paths for heterosexuals and homosexuals.

Post-modernism and post-structuralism lay at the core of queer theories, supporting a multifaceted perspective, through which analysing inequalities and challenging the idea that the needs of gays and lesbians can be univocally defined.

The targets of queer criticism, born in the USA and soon spreading to other Countries, are the deconstruction of the ideal subject entitled to rights; the refusal of the immutable conception of gender identity; the rejection of massive preventive health measures, judged as oppressive and marginalizing instruments; the denial of binary dichotomy heterosexuality/heterosexuality; and the theorization of multiple relational and subjective identities (Bernini 2013).

The refusal of an innatist and inherent understanding of homosexuality is prominent; sexual desire would be fluid, unfixed, not specifically defined by nature, and the labelling of homosexuality would be functional to delimit the borders of the heterosexual majority, and to stigmatize those who do not fit under the normative ideal of family and human being.

Inspiring queer authors are Foucault and Deleuze, as far as the philosophical relation among sexual desire, political power and marginality is concerned; Hocquenghem, who combined a fervid theoretical reflection with participant activism; Lacan and Derrida, due to the political declination of their psychoanalytical and philosophical theories; and Freud, certainly reappraised in an extreme original way by Foucault and Butler.

Queer theories offer a peculiar theoretical, epistemological, methodological, and political richness which is hard to fully capture. Broadly, they could be defined according to three trends: a freudo-marxist trend, grounded on the reinterpretation of Marxist theory and Freudian psychoanalysis, by authors such as Mieli; a constructivist queer trend, mostly shaped by Foucault's and

⁴⁹ I recall Valdes' compelling definition of what queer could mean: "queer serves as a reminder and a challenge to avoid replicating oppressive aspects of the past and present that we seek to discredit and displace with our critics. This term challenges us to honor the inclusiveness and egalitarianism that the term, at its best, signifies. In doing so this term specifically challenges to avoid indulging and perpetuating the androsexism ad racism that afflict sexual minorities as much as they afflict the sexual majority" (Valdes 1995, 349).

Butler's reflections on sexuality and power; lastly, anti-social trends, marked by a sharp radicalness of the arguments and by a distinct epistemological provocation (Bernini 2013, 25-48).

The absence of structured bureaucracy and the refusal of pragmatic strategies are common to these streams; quite often indeed queer theories are accused, also within the lgbt environment, of lacking political pragmatism and feasibility⁵⁰.

Generally speaking, queer academic theorists and activists strongly contest the image of lgbt minority devoted to assimilationist strategies, they challenge the current socio-economic life-style, and judge constraining to overlap the whole lgbt platform with the claim of public/legal recognition.

Besides refusing the dichotomy heterosexual/homosexual, queer theories strongly recall the intersectional dimension of discrimination, aiming at giving a voice to marginalizes subjectivities - such as transgenders, sex workers, migrants, homosexuals, bisexuals - at gathering the several forms of oppression, and at structuring a coalition with gender, racial, class minorities, and with all those who do not correspond to the actual normative socio-economic model⁵¹.

From a queer perspective, battles for legal and social inclusion are paths of assimilation towards a normative, bourgeois model which would impoverish libertarian stances of the early gay liberation movement and, secondly, which would normalize the homosexual community in predefined labels; finally, this strategy would marginalize those who refuse, or can't meet such standards.

⁵⁰ Being questioned about the apparent lack of pragmatic stances in libertarian gay trends, Michel Foucault argued "one of the great experiences we've had since the last war is that all those social and political programs have been a great failure. We have come to realize that things never happen as we expect from a political program, and that a political program has always, or nearly always, led to abuse or political domination from a bloc-be it from technicians or bureaucrats or other people. [...] But in my opinion, being without a program can be very useful and very original and creative, if it does not mean without proper reflection about what is going on, or without very careful attention to what's possible. [...]. One of the things that I think should be preserved, however, is the fact that there has been political innovation, political creation, and political experimentation outside the great political parties, and outside the normal or ordinary program." Foucault (1982, 172-173).

⁵¹ On this point Valdes emphasizes the intersectionality that should characterize a correct queer legal theory: "Queer legal theory can be positioned as a race-inclusive enterprise, a class- inclusive enterprise, a sex-inclusive enterprise, and a gender-inclusive enterprise, as well as a sexual orientation-inclusive enterprise [...]. Thus, Queer legal theory, perhaps even more so than Queer consciousness and Queer activism to date, must convey a sense of political resolution that this Project seeks to invoke: reflecting the gains and challenges of sexual minorities since the Stonewall Riots, Queer legal theory must connote an activist and egalitarian sense of resistance to all forms of subordination, and it also must denote a sense of unfinished purpose and mission." Valdes (1995, 354).

The portrayal of queer activists as being solely utopian, hostile to any legal improvement for the lgbt community, and fully devoted to disruptive social criticism is, however, simplistic and inaccurate.

Indeed, authors such as Butler, Valdes, Stychin, and Moran consider it appropriate and fair to claim a legal frame respectful of gay, lesbians and transgenders but, nevertheless, they deny that homosexual liberation can be entirely channelled in the process of legal emancipation.

Existing legal institutions would stand upon a political-philosophical neoliberalism and a homonormative understanding of society.

Paraphrasing Us sociologist Lisa Duggan⁵², a gay reformist public speech would lack consistent democratic public culture, while favouring exacerbate individualism: rights talk would represent a “kind of political sedative - we get marriage and the military then we go home and cook dinner, forever” (Duggan 2002, 185). Duggan was the first academic⁵³ to adopt the concept of ‘homonormativity’ to underline the most contested social, legal, and economic aspects embedded in the mainstream lgbt movement:

Homonormativity [...] is a politics that does not contest dominant heteronormative assumptions and institutions but upholds and sustain them while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption. (Ivi, 179).

Reformism would blink to both the liberal economic model and to a moderate political paradigm, leaving no room for egalitarian, libertarian, and Universalist aspirations.

What Duggan considers striking, is that gay and lesbians, specifically due to their history of oppression and marginalization, stand in a peculiar position in order to grasp the oppressive nature of sexual and familistic public policies, to denounce the isolation rising from individualistic approaches, to uncover the injustices due to the enforcement of neutral norms, and to address entrenched prejudices. Therefore, the lgbt target should entail the dismantling of actual *status quo*, not the will to be part of it.

⁵² Duggan (2002). For an in-depth discussion on the concept of homonormativity see chapter II.

⁵³ Warner adopts the term “homonormativity” to denounce the possible normalization of gay and lesbian mainstream politics. He highlights, however, the impossibility of a dispositive of homonormativity functioning as that of heteronormativity; since “homosexuality can never have the invisible, tacit society-founding rightness that heterosexuality has, it would not be possible to speak of homonormativity in the same sense” (Berlant and Warner 1998, 3 footnote 2); See also Warner (1999).

Diffidence is the principal queer attitude towards the law, mostly because of the unavoidable crystallizations/simplifications it entails; it's undisputed that law, due to the demands it meets and to the logical structure upon which it stands, marks varied clear-cut demarcations, and qualifies legal relevant paradigms by somehow simplifying reality.

For instance, legislation against homophobic violence - spread in many European countries- reproduces a double binary: the first between gays/lesbians and heterosexuals and the second between homosexuals/heterosexuals and those who do not identify with any of the clusters envisaged by the legislator.

Queers also contest the arguments that underpinned the implementation of certain measures that identify sexual orientation as being a feature worthy of legal protection: in national systems as well as in the ECtHR jurisprudence, it is a juridical reasoning recurs grounded on the analogy of sexual orientation with gender and racial belonging, which thus assumes the innate nature of homosexuality. While the LGBT mainstream movement seems to support such arguments, queer radicals question whether it is possible to define the origin of sexual drives.

Despite the negative answer to this question, I suggest that queers do not rule out the possibility of combining critical reflection of rights with the activation of law in Courts.

If criticism of marriage is almost absolute⁵⁴, queer trends evaluate the introduction of a wide range of rights quite positively, namely those that allow the change of one's gender identity without undergoing gender-reassignment surgery or nullifying eventual ongoing marriages, that recognize social parenthood, and that introduce the chance to juridically settle affective bonds different to the couple paradigm through private contracts.

Through such norms, the legislator would endorse existing sexual fluidity without constricting it and, at the same time, it would enhance individuals' opportunities.

The review of all existing differences within queer literature is very difficult, since they embrace an increasing number of fields and fork in a multitude of complex and often divergent outcomes; I consider it significant, however, to focus on the emergence and general characteristics of *legal queer theory*, a reflection built by legal scholars and jurists who apply queer paradigms to critically approach legal debate⁵⁵.

Broadly speaking, if the queer movements reacted to the early 1990s mainstream movement and its policies of de-sexualisation and respectability, if queer theories challenged gay and lesbian studies "drawn on the tradition of social constructionism, in an attempt to bring to the centre

⁵⁴ For a review on critical queer arguments against same-sex marriage see Eittlebrick (1997); Stein (1999); Conrad (2010); Bernini (2013).

⁵⁵ I go on to conduct a critical review of legal queer theories in chapter II.

those individuals and subcultures which exist at the margins of mainstream society” (Morgan 1995, 2), then legal queer theory critically addresses those legal studies on sexual orientations based on positivist paradigms, aimed at including homosexuals in the existing society without criticizing its foundations or displaying a compelling criticism to disciplinary the power of the law.

The essential premise of legal queer theory is well expressed by Carl Stychin (1996; 2003) and Wayne Morgan (1995), and it hinges on the twofold assumption that legal “disciplinarity is never total” and that law “as a discourse does exercise direct control over people’s lives” (Stychin 1996, 53).

Moreover, as Stychin (1996, 56) points out, legal regulation offers the space for the articulation of alternative identities, through the agency of the excluded ones. A prohibition or a normative binary, indeed, draws categories and, therefore, it acknowledges the existence of ‘others’, hence bringing prohibited practices and identities into the realm of public space/discourse, and providing a possible departing point of solidarity among marginalized groups (Stychin 1996, 49).

It logically follows that legal queer theory critically tackles both the normalizing of hints within the legal framework and aims at enlarging the spaces, the opportunities and the identities still not disciplined by legal power.

Legal queer theory shares many assumptions with race, post-colonial and post-feminist studies, and it comprises a number of academics, generally with a socio-legal background, whose efforts attempt to “break down rigid and reductionist thinking about identity and to scrutinize law’s complex and at times contradictory relationship to sexual practices, identities and representations” (Pickel 1997, 484).

Several themes recur, also depending on whether the author is more inclined to legal practice or cultural studies; here I will highlight a few that cross different approaches.

Firstly, legal queer theory questions about identities and interrogates law on the processes of constitution, consolidation, and regulation of sexual identities (Ivi, 1).

If the very idea of identity as a set of fixed features and subjective characteristics are depicted as socially misguided, legal discourse is thought to be embedded within a web of practices that construct the ‘normal’ sexuality and that, by contrast, define the ‘other’; the legal construction of the homosexual subject, is thus functional to better define and isolate heterosexuality, representing it as normal.

Norms, social practices, and legal discourses would create and reinforce identities; legal queer theory, therefore, has to reveal these dynamics both at international and national level (Moran 1995; Stychin 1996).

Legal queer theory surely has a rich theoretical potential and its critical attitude results in being quite compelling also to those who do not share its aims, but one disputes its practical consequences (Bamforth 1996), or its consistency.

If, as Morgan suggests, also the dichotomy between theory and practice is to reject, since “a theory is [...] always already a part of practice especially when it is hidden under a guise of point-of-view and [...] the two binaries already define each other. [...]” (Morgan 20003, 222), it is possible to share the argument according to which, in the absence of a critical discussion over the foundations of social and legal system, the impact of reforms will always result incomplete and will remain within an oppressive and heteronormative framework.

In the next chapter I will discuss the debate opposing moderate and queer trends on this point, and I will delve deeper into the discussion of the performative role of ECtHR legal discourses.

Another key point of legal queer theory is related to the intertwining relationship between law, politics, and economic power; more precisely to what law can reveal about the bond between legal discourses and the legitimation of existing political and economic systems.

Legal queer activists argue that it’s necessary to understand specific aspects of every realm where power can generate effects, so as to challenge the pervasiveness of values, norms and rules shaped by a heterosexist conception of sexuality:

[mainstream gay and lesbian theories] often fail to delineate some crucial concepts, such as ‘the state’, ‘law’, ‘the dominant (hetero) culture’ and ‘power’. Gay liberation theory often seems to assume that these concepts can be used interchangeably or else assumes the liberal belief in the separability of law and politics. (Morgan 1995, 3)

Queer authors are, thus, committed to a intersectional and interdisciplinary approach, particularly developed by feminists such as Smart, Minow and Young, and the activation of law has not to be privileged “in sense of assuming more importance in defining cultural practices than it really does” (Ivi, 5), to the extent that activists also possessing a legal background embrace multidisciplinary perspectives as an instrument of direct and political action.

Reappraising Smart, it is important to look for extra-legal strategies (1989, 163-5), because otherwise the movement would consider the legal system as the only realm where heterosexist displays its effects, and consequently it would foster the juridification and the normalization of actions undertaken. As Zemans suggests, see *supra*, if law is considered the ultimate solution there will be few incentives to question the foundations of legal systems, whilst the highest premium will lie in taking full advantage of a wise activation of rules, norms, contradictions, and inconsistencies embedded within judicial reasoning and juridical statutes.

The privileged queer methodology implies counter discourses that disrupts traditional narrative about subjective predetermined identities. As already mentioned and in accordance with post-modern feminism, methods and aims overlap: discursive analysis, on the one hand, is extensively adopted to tackle prejudices and undisputed standpoints of traditional legal science, whereas, on the other, the deconstruction of fixed legal subjects serves a broader social and political project.

1.7 Conclusive Remarks

Throughout the intense history of the modern gay liberation movement, the perspective on the role of the law represents a primary element of distinction, and it plays a crucial role in defining internal identities.

The Criticism put forward shed significant light on the contradictions and the biased standpoints inherent to the theoretical foundations of human rights; like feminist, race and post-colonial critical studies, lgbt activists contested the misguided interpretation of the Universal Declaration of Human Rights and of principal Constitutional Charters.

As Morgan suggests, “human rights law for much of this century has done no more than increase the *silence* surrounding non-hetero desire, refusing to acknowledge the abuse suffered by sexual outsiders around the world” (Morgan 2000, 209).

The shared starting point of criticism pertains to the debunking of the universalist, absolute, and rational idealized subject entitled to rights as conceived by liberal legal theory.

Judicial system assumed, *de jure* and *de facto*, citizens’ heterosexuality and imposed it as a requirement for the full enjoyment of civil and political rights: in addition to criminalization, also involuntary admission to psychiatric hospitals, exclusion from public offices, and the loss of parental rights were held against gays and lesbians until very recent times, and fully judged in accordance with the notion of a democratic system.

Throughout different phases of homosexual movement, a strong attitude emerges, namely that of a recurrent criticism of a legal system lacking rationality, coherence, and neutrality.

Both gay and lesbian studies and legal queer theory fall into the cluster of postmodernist legal theories that “sign the movement away from interpretation premised upon the belief of universal truths, core essences, or foundational theories” (Minda 1995, 3); even moderate activists, do in fact critically address the objectivity of national and international laws, and aim at doing away with prejudiced standpoints from judicial and legislative activity.

From such perspectives, judges and legislators are not *super-partes* but, on the contrary, they are fully engaged in the strategic activation of the law, and their perspective can strengthen as well as disrupt existing inequalities.

From a historical perspective, a reasonably distinct progression becomes visible. Initial liberal homophile stances promoted the decriminalization of same-sex acts, thus focusing on the enforcement of formal equality and denying the existence of relevant differences between homosexuals and heterosexuals.

This approach has been surpassed by reformist trends devoted at tackling inequalities⁵⁶, in accordance with the principle of full formal and substantial equality, thus fostering anti-discrimination norms and equal opportunities policies. Reformist trends are fragmented and also the meaning attached to the concept of ‘difference’ varies, swinging from negative evaluations, similar to homophobic ones, to interpretations imbued by the concept of inclusive equality, namely a theoretical and legal understating where differences are neither ignored nor evaluated as a condition to remove, but, rather, considered as positive and relevant characteristics (Facchi 2012).

From a radical standpoint, however, the central scope of the lgbt movement is not about defining the correct legal treatment of differences but, rather, about the dismantling of the existing normative order, and about fostering the anti-majoritarian potential hidden in marginalized groups. Sexual minorities should crumble gender binaries through their otherness: the empowerment of a free and fluid sexuality, and the deconstruction of normalizing legal institutions and practices are essential in order to break down pillars of oppression. The main stance of gay radicalism is political, rather than juridical, and it involves an anti-essentialist, dynamic comprehension of interpersonal relations, combined with the continuous deconstruction of individual identities.

Even though the early gay libertarian motivation has been overtaken, the influence of that period still stands, especially in social practices developed in the *lgbt* community. Practices aimed at building a common sense of identity, the diffusion of relational networks characterized by cohesion, and the celebration of difference effectively come from the after-Stonewall period and strongly mark the reality of gay communities even nowadays.

Queer theories assume a strong political sense and interpret the law as a disciplinary dispositive of power (Stychin 2001, 2003; Morgan 1995; 2001). Generally speaking, queer theories do not aspire to the simple inclusion of marginalized minorities but they support a general rethinking

⁵⁶ I recall Ferrajoli’s distinction between difference and inequality; according to him, differences are the constitutive elements of personal identity, whilst inequalities are the condition that prevents the full development of one’s own identity (Ferrajoli 2001 vol. I, cap. XI). Differences, therefore, inhere to the private sphere and identify peculiarities entrenched in all individuals; inequality, on the other hand, can be considered as the outcome of a normative assumption, that attaches hierarchic values to different features or behaviors and that, consequently, reinforces socio-economic or symbolic inequality. As such, legal and political actors should aim at removing all inequalities based on differences. Even though positively described, differences remain a quasi-private element, in that, as Pitch argues, the public element is limited to the inequality that the difference has produced, and it does not entail the very definition of difference itself. See Ferrajoli (2001); Pitch (2004).

of social, legal and political dynamics, precisely starting from the experience of oppressed groups.

I suggest, however, that while 1970s libertarians did not produce a coherent and large-scale legal thinking, queer provocations are far more compelling. The political aspect of law and the demarcation between insiders, entitled to a cluster of rights, and outsiders, the excluded ones, are queer's principal targets. There are three key questions that legal queers raise, namely which new distinctions does the law create? How does political power deploy rights language to impose the creation of a defined and fixed human ideal-type? (Morgan 1995; Moran 1995; Stychin 2003), which normalizing processes do gay and lesbians have to go through, so as to have full access to citizenship's rights?

[the] aim [...] is to interrogate how recognition, social inclusion and citizenship claims come at a price, in terms of the demands of assimilation, normalization and disciplinarily in several different guises (e.g. marketplace; monogamy; traditional patterns of gendered relationships, home ownership) and to underscore the role which law plays in these construction. (Stychin 2003, 113)

Finally, I wish to stress the overall risk of impoverishment deriving from mutual delegitimization and from the tension between moderate and queer theories. An example of such dynamic can be seen in the negative criticism brought to light by some moderate authors against queers (Bamforth, 1996; Sullivan 1995), the latter publicly depicted with grotesque features or as lacking any practical usefulness.

A common criticism held against queer authors argues that the core of radical theories would comprise much *pars destruens* and few *pars construens*, specifically when legal and practical issues are involved; Nicholas Bamforth, for instance, asserts:

While queer theory may be well interesting as a form of social analysis, it cannot - at least as presently constituted- take us very far in our search for an adequate justification [of law reform]. [...] Liberationism, including queer theory, is far too vague when applied to practical questions of law reform. In particular it is unclear how far liberationists are prepared to work with the established legal system [...]. It is hard to see how liberationist theory could fail in practice to operate in an internal inconsistent fashion. (Bamforth 1996, 229-231)

I however am not, persuaded by this argument since, as I described earlier and as I will show in detail in chapter II, within the extremely heterogeneous realm of queer there are relevant legal

theorists who propose precise paths to reform legal system. Recalling Morgan, for instance, queer efforts should

include paying attention to the ways in which identity is constructed in legal texts and to our own assumptions, continuously made, concerning identity. In terms of lobbying and litigations strategies, it means attempting to refuse the fixity of sexual categories, to argue about identity borders, and to refuse to define what sexuality and any sub-category of it *is*. Instead of focusing on these status questions concerning individuals labelled gay or lesbian, focus could be placed on questions of power, i.e. how law regulates differently individuals who claim ‘outsiders’ identities, how the law assumes and privileges hetero nuclear families and so on. (Morgan 2000, 222)

Several legal queer authors look for practical outcomes, and what at first glance could seem a merely *destruens* approach, it actually stands as the pre-requisite for any pragmatic strategy, according to the paradigm whereby to dismantle and overcome normalizing and oppressive institutions, it's firstly necessary to extensively analyse and describe in their essential mechanisms.

According to radical perspective, thus, law reform is not inherently positive, but its desirability relies upon the resistance opposed to the disciplinary effects of law, which are never total, as Stychin points out (Stychin 2003, 113).

Even though the institutionalization of moderate trends and the development of pressure techniques, typical of lobbies and advocacy groups, permeate the international lgbt mainstream movement, social and cultural realities committed to libertarian argumentations still fulfil a relevant role, both in proposing new causes for reflection and in providing an internal critic voice⁵⁷.

While gay and lesbian studies are strongly anchored to the current and practical improvement of every-day life conditions, legal queers embrace a more complex perspective, well summarized by a writing of the poetess Audre Lorde: "There is no thing as a single-issue struggle because we do not live single-issue lives" (Lorde 1976). Moreover, the theory/practice binary is another ground of discussion and it lays on a different evaluation of how practice should be de-

⁵⁷ On the constructive value of internal criticism, I recall Butler: "For either set of intellectual movements to remain vital, expansive and self-critical, room must be made for the kind of immanent critique which shows how the presupposition of one critical enterprise can operate to forestall the work of another. In many ways the resistance to sympathetic or, indeed, immanent critique only and always weakens a movement rather than understanding that the democratic and non-dogmatic future of nay such movement depends precisely on its ability to incorporate, without domesticating, challenges from its alterities"(Butler 1997, 1-2).

fined. Gay and lesbian studies prefer to focus on strategies and practical campaigns that react to existent injustices, selling queer perspectives as superfluous, if not too provocative and counter-productive as well: “the reactive nature of queer - the continual deconstruction of identity categories - cannot provide justifications for the *practical* questions involved in law reform. We must have arguments based on more than just reaction to existing social norms.” (Bamforth 1996, 228).

The integration of legal queer methodology could however increase mainstream jurists’ vigor and, at the same time, queer theoretical cues could well encourage an ambitious project, aimed at spreading, in the society as well as in the legal system, those social, cultural and relational specificities that represent the peculiarity and the richness of homosexual experience(s), and that convey a notion of inclusive equality, alongside substantial equality, already claimed in all possible venues.

Cooperation between these extremely valuable trends would lead to a strategy able to convey lgbt issues in every public realm, by contrasting formal and informal homophobic practices, by simultaneously supporting the development of a wide social consciousness, and by prodding legislators, judges and the institutions to discuss their unstated assumptions.

CHAPTER II. THE THEORETICAL FRAMEWORK: A SOCIOLOGICAL APPROACH TO THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

“The end of the law is peace. The means to that end is war. So long as the law is compelled to hold itself in readiness to resist the attacks of wrong – and this it will be compelled to do until the end of time – it cannot dispense with war. The life of the law is a struggle, a struggle of nations, of the state power, of classes, of individuals”

Rudolf von Jhering, 1872

2.0 Foreword

In this chapter I aim to develop a sound socio-legal theoretical and methodological framework, suitable to analyse the ECtHR jurisprudence and the EComHR decisions.

The review follows a number of questions, that mark the thread of forthcoming pages and represent the interpretative standpoint of this research.

Specifically, which role do Courts perform in interpreting and enforcing abstract and general provisions, such as human rights? How and with which outcomes can the presence of situated standpoints shape or affect the interpretation of claims put forward by homosexual applicants?

Is it possible, therefore, to argue that judicial reasoning, by Courtesy of which lgbt requests have been ratified or dismissed, has been significantly influenced by moral, social or policy-oriented concerns?

To this purpose, I draw upon a wide range of social and legal approaches, and I deduce theoretical premises and methodological criteria which constitute the lens through which judgments will be further analysed.

Throughout this chapter three are the thematic clusters intensively examined: a) the role of judicial creativity and the impact of judicial discretion in moulding the effective meaning of rights b) the theoretical and methodological contribution of Feminist Jurisprudence, Gay and Lesbian studies and Legal Queer theories and c) the proposal of Critical Discourse Analysis, a specific methodological approach, to delve into judgments, in order to highlight hidden tensions and based assumptions.

2.1 The Creative Role of Judges

The theme of judicial power has been deeply and variously investigated by a broad field of literature⁵⁸. Political scientists, legal and political philosophers, sociologists, and historians have been long studying the relation between the juridical authority and judicial powers, discussing the proper degree of autonomy conferred to the latter, and describing the Courts' functions within the complex national and international normative system.

It appears indisputable that judicial conduct doesn't limit to a mechanical implementation of statutes, as well as it's unavoidable that, when ascertaining relevant facts and legal norms, judges operate with a variable degree of discretion.

As far as detailed and comprehensive, legal systems can't anticipate all eventual concrete circumstances, nor could the legislator rule *a priori* the most adequate combination of norms to apply to each dispute. Furthermore, social, economical, and political environment is likely to affect judicial interpretation and, as time passes and specific moral assumptions become obsolete, it's not unusual for the Courts to depart from the original legislative *ratio*⁵⁹.

The concept of judicial activism precisely refers to the creation of law at the hands of judges in the execution of their duties⁶⁰ (Kmiec 2004, 1471). It is extremely difficult to balance activism and restraint, namely the will not to push legal interpretations beyond the semiotic parameters clearly expressed by the norms; also the separation between judicial law-making and law-declaring often appears blurred, thus recalling a wide range of political and philosophical issues. Academics are extremely divided, and a broad variety of shades emerges on this issue. Benvenisti for instance, argues that a rigid restraint approach may lead to a procedural understanding of justice and to a potential oppressive legal system, "prone to failure when minority rights are involved" (Benvenisti 1999, 854).

Generally, scholars agree that judgments perform more than a purely adjudicative function. Courts' decisions include reasoning-lines, which come up to transform substantial aspects of provisions, to modify the area of application, or to specify the general meaning of a certain legal principle - for instance by extending/restricting cases to which a norm can be applied, by enlarg-

⁵⁸ For an introduction see Mahoney (1990, 57-70); Barak (2009); Holland (2010); Coutinho, La Torre and Smiths (2015).

⁵⁹ Examples of these dynamics can be traced in almost every legal system on a heterogeneous field of issues. As concerns the already mentioned sodomy laws, in the Usa from 1960s onwards the prosecution of 'gross indecency' significantly dropped off, regardless of the wording of criminal laws. See Eskridge (2008).

⁶⁰ For a review of different meanings attached to the concept of "judicial activism", especially in the Us system, see Kmiec (2004).

ing legitimate subjective safeguards, by changing the burden of proof, or by producing new interpretations from those hereto developed⁶¹.

Academic literature recognizes judicial discretion as part of the adjudication process (Fiss 1982; Dworkin 1985); the main difference actually stands between those who dismiss judicial creativity as pathologic, in that it would attest the failure of the ideal of law as an objective and neutral realm, and those who, on the one hand, recognize the unavoidable subjective implications attached, but, on the other, also consider creativity as not contradicting the enforcement of a foreseeable frame or as threatening legitimate institutional boundaries.

Fiss defines adjudication as the “process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text” (Fiss 1982, 739); the adjudicative process, thus, entails both subjective and objective dynamics and establishes a bound between the reader and the text.

Us sociological jurisprudence, spread over the end of XIX century and first decades of XX century, first developed a systematic thought, critical to judicial interpretation⁶².

Pound upheld that judicial discretion would not merely amount to an inadvertent element, due to life unpredictability, rather, it would constitute the logical consequence of tasks assigned to judgments. The author, indeed, emphasized that especially in common law system, besides adjudicating the actual case, Courts also declare “the law for other controversies” (Pound 1923c, 941), hence developing and clarifying methods or doctrines which influence future pronouncements. Depending on the arguments put forward, on the principles invoked, and on the provisions recalled, a single judgment could become a precedent even for dissimilar future cases⁶³.

⁶¹ The comparison between *Plessy vs Ferguson* and *Brown vs Board of Education* is relevant: both judgments challenged racial segregation and the applicants upheld that a similar assessment was in breach of the 14th amendment of the Us Constitution, concerning the equality of citizens. Whereas in *Plessy* the Supreme Court legitimated the “separate but equal” doctrine, in *Brown* judges declared segregation incompatible with the principle of equality. If one considers that the Amendment was drafted long before slavery abolition, that *Plessy* dates back to 1896, in a cultural context where discrimination against Afro-American was extremely widespread, whilst the latter occurred in 1954, when the pressure of the ACLU and other Civil Rights Movement was increasing, it seems likely that in both cases the cultural environment affected judges, thus molding their final interpretation of the notion of equality.

⁶² I refer to works of O.W. Holmes e R. Pound, mainly Holmes (1891a; 1891b; 1894; 1897; 1899); Pound (1907; 1910; 1911a; 1911b; 1921; 1923a; 1923b; 1923c).

⁶³ I recall, for instance, the path which led Us Courts to apply extremely strict scrutiny to evaluate the differentiated treatment involving groups that bore a history of discrimination, belonged to a discrete minority, showed immutable characteristics, and were deprived of political power. Reappraising Zanetti (2015, 60), the notion of ‘suspect’ firstly emerged in *United States v Carolene Products*, concerning milk trading among different States; somehow accidentally judge Stone inserted in his opinion a footnote which in short became a cornerstone of Us jurisprudence: “Prejudice against discrete and insular minori-

It logically follows that Courts' interpretive autonomy is likely to give rise to effects comparable to those resulting from the introduction of new legal provisions.

On this point academic literature generally distinguishes between judicial law-making and judicial law-declaring; the latter applies to cases where the focus of the Court is solely targeted at singular, present case (Pound 1923c; Friedmann 1961; Rasmussen 1986; Von Bogdandy and Venzke 2012).

The former stresses that judges are enabled to clarify blurred, flawed, or obscure aspects by previous jurisprudence, even if not strictly relevant to the case at stake.

I would define this standpoint as 'future oriented', for it concretely attaches more relevance to general elements, which are likely to orient future jurisprudence⁶⁴.

Therefore Courts keep an eye not only about the contingent proper solution but, at the same time, they are concerned about which is the most appropriate doctrine to introduce into the jurisprudential case-method or how to innovate, sometimes even overrule, precedent decisions.

Reappraising Pound's fitting metaphor, judges are comparable to a chemist "who does not make the chemicals which go into his test tube. He selects them and combines them for some purpose and his purpose thus gives form to the result" (Pound 1923c, 941).

The creative process requires to go

outside of the legal materials of the time and place or event outside the law and selecting something which was then combined with or added to the existing materials or the existing methods of developing and applying those materials, and gradual given form as a legal precept to legal institution or legal doctrine." (Ibidem).

Judgments are the outcome of these paths of creativity, and they do allow to delve into judicial standpoints and performances.

ties may be a special condition upon which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and [...] may call for a correspondingly more searching inquiry" (Judge Stone in Ibidem).

⁶⁴ Fluctuation between these two judicial approaches clearly emerges from Pound's words: "When we look narrowly at the cause present dot the court which established the doctrine, we discover that there is an element moving behind the logical scene. In each case we struggled painfully for more than half a century to unshackle the law from these decisions and their consequences, and in more than one jurisdiction the process is far from achieved. On the other hand, quite as many cases may be found strong judges have said, in effect: The result is unfortunate in this particular case, but we must apply the appointed legal precept or the logical consequences of the applicable precedent, be the result what it may" (Pound 1923c, 942).

By tracing and highlighting arguments upheld by the Court, the reader is able to examine judges' creative contribution and to assess the existence of substantial overruling, even if hidden behind a formal attitude to precedent jurisprudence (cfr. *infra*).

Quite predictably the selection of relevant facts and doctrines leaves considerable space for discretion; thus, it's not unusual that different Courts, even though reviewing analogous cases in their essential features, reach disparate interpretations.

In the event of unanimously ascertained facts, judgments are likely to be structured as follows:

- i) selection of legal material on which to ground the decision or as we commonly say, finding the law
- ii) development of the grounds of decision from the material selected or interpretation in the stricter sense of that term
- iii) application of the abstract grounds of decision to the facts of the case (Ivi, 945).

In every modern judicial system, discretion may affect judicial review from the very beginning and the Court could be influenced by subjective elements even when assessing which are essential facts at stake. If there is internal dissent on the correct interpretation of one or more legal materials, events, or precedents to refer to - as it often happens in the ECtHR and in several Western Constitutional Courts- the researcher will directly observe the discretion left to judges, for each of them holds interpretive legitimacy, though contradicting one another.

Quite frequently, then, the process of selection involves a choice among competing texts or opposing analogies⁶⁵. In such events:

interpretation shows that no existing rule is adequate to a just decision and it becomes necessary to formulate the ground of decision for the given facts for the first time. The proposition so formulated may [...] become binding for like cases in the future" (Pound 1923c, 945).

Several field researches have concretely verified that judges draw hints from multifaceted realms outside legal system, spacing from custom, to comparative law, from morals to economics (Friedman 1975,180 and fol.; Fiss 1982, 752 and fol.)

⁶⁵ Pound further notes "in any event this process has gone on and still goes on in all systems of law, no matter what their form, and no matter how completely in their juristic theory they limit the function of adjudication to mechanical application of authoritatively given precepts" (Pound 1923c, 946).

Despite the attempt to detach from morals and politics, judges are often called to give meaning and substance to flawed values, flaunting signifiers (Douzinas 2007, 8), which entail essential concepts, like that of liberty, equality, due process, discrimination, and sexuality, which are also surrounded by moral assumptions. As Fiss notes, especially when human rights are concerned, morals can be considered the “prism through which [a judge] understands the legal text” (Fiss 1982, 753).

Formally, a decision may even appear just as the result of a purely mechanical deduction but, as Pound suggests, it’s necessary to delve beneath the surface of judgments to catch paradigms that inspire the Court:

[an] application may be apparently mechanical but with a greater or less latent margin of something else. [a judgment] depends on the judge’s feelings as to what is right between the parties to the particular case and how this is covered up by a margin of choice between competing rules. Where it seems the better solution to hold that an easement was acquired, a Court will speak only of adverse user. Where it seems a preferable solution to hold that an easement was not acquired the Court speaks of permissive user” (Pound 1923c, 950).

Reasoning on what it is generally considered desirable, traditional legal science calls for Courts able to select the grounds of decisions with reference to fixed precepts, whenever possible, which resort to outside the legal system only when the others fail, or at least when they “clearly fail to give a just result” (ibidem).

If, instead, one adopts a practical perspective she will discover a far more complex and blurred situation, in that “there is no standard method of determining between [different methods of interpretation]. [...]The mental bent of the particular judge or the availability of the result with reference to the particular case seem to be the decisive factors.” (Ibidem).

Since interpretation plays a fundamental role both in the European context and in my research, I consider appropriate to further analyse two fields strictly related to judicial activism, namely the permeability between social and legal sphere and the bound between judgments and social changes.

2.1.1 The Permeability of Legal System

The interplay between social and legal realm is the cornerstone of sociological approach to law and it is widely addressed by several perspectives and theories⁶⁶.

Firstly, law has been famously defined as social fact, as the organization of social life in its “most stable, most precise form” (Durkheim 1997, 86); this perspective has inevitably brought to elaborate theoretical systems which significantly detach from what prescribed by traditional legal science, as concerns the meaning of law itself.

Secondly, sociology of law tries to answer to many issues, including ones about the role of law within social organization (Treves 1987, 289 and fol.; Ferrari 1997), about the impact of legal instruments on individual life and collective relations (Ferrari 2010, 67 and fol.; Bettini 1998; Febbrajo 2009), and about the meaning attached to juridical norms and actors both by civil society and legal experts (Treves 1987, 202 and fol.).

The core element of aforementioned perspectives is, therefore, the twofold influence of legal elements on social system and, vice versa, the influence of social reality on legal realm.

Methodological standpoints and techniques to investigate social reality are extremely variegated as well, including qualitative and quantitative methods (Ferrari 2004, 30). The common vision can be grasped in the empirical approach to reality, and in the study of social realm as both the referent point to verify/falsify theoretical assumptions and the field whereby drawing observations further integrated in a wider frame (Treves 1987, 202-227).

As Friedman famously argued “social theories of law start form one basic assumption: [...] society makes the law. Law is not impartial, timeless, classless; it is not value-free” (Friedman 1975, 178).

From this perspective, judicial reasoning could be also interpreted as a *trait d’union* between social political and economic inputs, on the one hand, and legal outputs, on the other, which consequently result affected by the aforementioned extra-legal elements.

Judicial reasoning is a blurred theoretical and argumentative terrain; to this regard Pound warns

We must seek the basis of doctrines, not in Blackstone’s wisdom of our ancestors, not in the apocryphal reason of the beginnings of legal science, not in their history, useful as that is in enabling us to appraise doctrines at their true value, but in a scientific apprehension of

⁶⁶ For a general introduction see Treves (1987); Ferrari (1997); Ferrari (2004).

the relations of law to society and of the needs and interests and opinions of society of today. (Pound 1907, 12-13).

Even though Holmes, Pound and their epigones explicitly addressed the effect of the social sphere on the legal one, and not the contrary, from their theoretical outset a certain degree of mutual reciprocity is implied.

The permeability of legal sphere became more investigated during 1950s and 1960s (Marradi 1971, 393-445) and, as Tarello recalls (1977, 1 and fol.) it was firstly systematically addressed in Lawrence Friedman's works.

In Friedman's theory the bound between social facts and legal norms neither is a simple descriptive corollary, nor does it only attest the obvious eventuality that judges and policy-makers are subjected to external pressures; rather, it is the cornerstone of Friedman's perspective and it influences the very definition of legal system itself, described as composed of "three kinds of phenomena, all equally and vividly real. Firstly, there are those social and legal forces that, in some way, press in and make 'the law'. Then comes 'the law' itself - structures and rules. Third, there is the impact of law on behaviour in the outside world" (Friedman 1975, 2).

As such, law "responds to outside pressure in such a way as to reflect the wished and the powers of those social forces which are exerting the pressure" (Ivi, 4).

The dynamism of social elements is a distinctive figure embedded in the concept of permeability; actors subjected to the force of law, they interact with it, transferring in legal terms "their feelings, attitudes, motives, and inclinations into group action, bargaining, attempts to influence the law and perhaps into attempts to bend or corrupt the application of law" (Ibidem).

Accordingly, the most relevant index of dynamism lies in the ability of social actors to implement strategies targeted at altering the normative *status quo*, in accordance with their needs and expectations.

To Friedman, the interaction between law and society can be explained resorting to three ideal-typic elements: social *inputs*; structures and rules that filter claims and transfer them into legal terms; and normative *outputs*.

The inputs for legal action and the causes of legal change should be searched throughout social sphere, where also the origins of legal disagreements lie.

Value pluralism, the heterogeneity of interests, as well as the intent not to accept extra-judicial agreements, generally increase the propensity to resort to the judiciary.

Living law (Ivi, 148) shows, thus, the imprint of social forces which "pressed against the legal system and [...] results from and reflects the social forces that exerted themselves to produce, block or change the act" (Ibidem).

If, on the one hand, claims are moulded upon interests, partisan by definition, on the other, in Courts they are expressed through the language of ideals, namely that of universal, objective, and neutral pretences.

“People feel they must follow their ideals; they also believe they should disguise their interests in idealistic clothing” (Ivi, 149) and, as Gordon suggests, the very juridical *fictio* requires to express any critique against the existing system by demonstrating the objective incontestability of proposals put forward:

A complaint about a legal wrong-let's say the claim that one is a victim of discrimination must be framed as a complaint that there has been a momentary disturbance in a basically sound world, for which a quick fix is available within the conventional working of existing institutions. A black applicant to professional school, whose test scores are lower than those of a competing white applicant, asks for admission on grounds of ‘affirmative action’. Everybody in that interaction (including the applicant) momentarily submits to the spell of the worldview promoted in that discourse, that the scores measure an ‘objective’ merit (though nobody really has the foggiest idea what they measure besides standardized test-taking ability) that would have to be set aside to let him in” (Gordon 1981, 15).

Despite the aforementioned frame can be applied to several fields, I suggest that when human rights are concerned, the concept of ‘interests’ should be consistently coupled with ‘values’ and ‘beliefs’. By this I do not deny that the mobilization for human rights is affected by interests, but, rather, I emphasize the strict connection among legal claims, meta-judicial opinions, and assumptions about which values should be socially enforced regardless of their immediate utility⁶⁷.

⁶⁷ The connection between values and interests is multifaceted and, as such, it's not possible to define a clear-cut; values may be understood as interests expressed through a universalist and impersonal structure and, from a critical perspective, it could be also argued that the entire system of values promotes the interests of dominant social actors (Friedman 1975; Gordon 1981). For instance, colonial and marginalized studies consider foundational Western values as instruments whereby the West has imposed its cultural, political, ideological, and philosophical hegemony (Slaughter and Helfer 1997). A classic, though simplified, distinction between values and interests goes back to Aubert's essay *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, later reappraised also by Friedman. Aubert distinguished between interests and claims of right. A conflict of interests entails a clash on the same valuable object, job, or position; the origin of disagreement would lie in the conditions of scarcity and, thus, conflict would come “from a certain base of agreement and there is no conflict over values or principles” (Friedman 1975, 226). On the contrary, a claim of right is couched in terms of rights and wrong, “each party will insist in the pleadings that his claim is right and the other's party is wrong, that the opponent

The clash among opposed interests and values triggers disagreement, and it favours normative changes; consequently, the socio-legal frame not only is permeable and dynamic, but also marked by a relevant degree of contingency, traceable in claims, as well as in the normative *output*.

Expectations are, indeed, anchored to actual *hic et nunc* and, however formally expressed they can be⁶⁸, they mirror needs considered relevant by large portions of public opinion⁶⁹.

Therefore, judicial reasoning deals with social elements and with the quest of normative answers, able to meet social demands.

Once that expectations are expressed as juridical claims “Courts, its staff and the parties begin to process the materials put” (Friedman 1975, 12); in other words, legal actors filter the demands through the lens of the existing rules, norms and values, thus reasoning on specific and circumstantial queries⁷⁰.

misconceives the fact or the rules. The argument will be couched in terms of rights, not interests” (Ibidem).

In practice, it’s possible that sides claiming different values actually find a compromise, for instance by recognizing the necessity to balance the rights at stake. Nevertheless, this distinction grasps how social and political response vary depending on whether claims are couched either in a language based on interests or on values. If in the former there’s at least space for discussion - which doesn’t mean by itself that a mediation will really occur- in the latter such opportunity is extremely reduced, and each side is likely to consider an eventual compromise as a betrayal.

⁶⁸ Ferrari (2004, 71) highlights the necessity to further specify some features of Dahrendorf’s classic political model (1959), to the end of explaining the birth of social thought about law. Most notably, the society perceives needs, which are reappraised and expressed as expectations by interest groups; thanks to the mediation of parties, such interests are conveyed in the political arena. Parties affect policy-makers, for they might have a gatekeeping effect or they might shape specific claims in the light of their own interests. On this issue Ferrari emphasizes that social perception of urgent needs and demands is rarely completely free or spontaneous: “nelle società cd. ‘opulente’ molti bisogni sono indotti dall’azione di coloro che saranno chiamati a soddisfarli. Il sistema mediatico [...] funge da cassa di risonanza di molte esigenze che primariamente partono da gruppi privilegiati che vi hanno accesso e soprattutto da coloro che li controllano. Che costoro possano farsi interpreti di sensazioni già percepite più o meno confusamente da una cittadinanza è senz’altro vero. Ma è altrettanto vero che, in questi casi, è proprio il riconoscimento mediatico ciò che trasforma quelle sensazioni in opinioni” (Ferrari 2004, 172). See also Dahrendorf (1959).

⁶⁹ I uphold such statements, especially as concerns the actors who are politically and socially disadvantaged and who consider themselves as bearers of a new legal standpoint, alternative to that existing. I think of the Us movement for civil rights and of the lgbt movement itself - both extremely likely to recur to Courts- which spoke and still speak on behalf of a marginalized portion of society, and which are often not equipped with political and material resources to promote change exclusively through legislative reform. See Andersen (2004); McCann (1994).

⁷⁰ Lgbt movement displays both lobbying and advocacy strategies to the end of obtaining the public recognition of same-sex couples. Depending on the normative and jurisprudential context, single judgments on the same claim have followed different paths. In the Usa, *Obergefell v Hodges* judgment was achieved on the argument that wedding license could not be constitutionally denied to gay and lesbian people without discriminating against them. The ECtHR, instead, made clear in *Schalk and Kopf v. Austria* that Article 12, securing the right to marry, does not oblige Contracting Members to recognize

Judicial *outputs* are, then, the legal answer to social questions, they reflect how legal actors interpret social reality, which juridical interpretation they find more suitable, and which functions they consider appropriate to their role.

From this perspective, Courts are heavily involved in the process of legitimation and allocation of powerful positions, expressed through the logic of due rights.

To some extent, the whole legal system is imbued by an unequal distribution of resources and Courts detain the power to strengthen, or spoil, dominant balance of power.

According to Weber's famous definition, power states the "probability that one actor within a social relationship will be in a position to carry out his own will despite resistance" (Weber, 1968, 53); a possible legal meaning of the concept of power deals with two intertwined elements: the legitimacy over the claims to intervene/abstain which one or more actors can raise to third parties, and the effective implementation of activated rights.

As Friedman suggests "rules of law and processes of law are products of power. They also define power, and they instruct how power can be used. At the heart of the system, then, are processes and rules that give out units of power, ratify their distribution and describe their use" (Friedman 1975,169).

To this regard, two are the main processes whereby legal reasoning actually reflects and reinforces the existing power relations.

Norms can be formulated so to explicitly legitimate differentiated treatments; in this case the core of the unequal distribution of power does not occur in the application of legal provisions, but rather in their definition.

Under these circumstances, norms come out of the struggle of the power (Ivi, 180) and ratify dominant interests. As concerns sexual orientation, many legal systems directly restricted, or still restrict, sexual freedom, work rights, social, political rights, and family rights to lgbt citizens. By criminalizing same-sex acts, by admitting discriminations against lgbt people, by excluding them from professions involving a contact with minors, by denying them the custody of their own children, and by stating the superiority of heterosexual marriage, law crystallizes paradigms soaked with heterosexist bias.

same-sex marriage. Therefore in the European environment the legal recognition of same-sex marriage can't rest on the claim of direct discrimination; as such movements and lawyers are actually exploring another strategy, namely that of arguing that the absence of whatsoever kind of legal recognition would infringe Article 8, securing the right to respect for private life. If adopted, this strategy would leave to national discretion whether to introduce civil partnerships or same-sex marriage. The final aim, as it will be explored in chapter IV, is to construct a European consensus over egalitarian marriage, though the ECtHR jurisprudence forces to choose a moderate and incremental strategy, different from that adopted in the Usa.

Norms, however, can convey inequality even when neutrally worded. As Friedman suggests “many rules do appear timeless and neutral - expressions of abiding faith and high ideals. How they are enforced in another question. The administration of justice is shot through with subtle and blatant forms of social control that official law does not recognize” (Ivi, 181).

In conclusion, the sketched frame does not suggest that judges act boundless, without abiding to legal rules or principles, but it imposes to carefully scratch beneath the surface of the alleged neutral judicial reasoning, and to treat the Courts as actors embedded in a precise social and political environment. The possibility to perform law-making functions, the awareness of the impact of a single judgment on future jurisprudence and, hence, the inclination to adjudicate cases with a future-oriented mind actually highlights that judges are permeable to social sphere, and it is likely that, whether in ascertaining relevant facts or in deciding and interpreting legal provisions, the final outcome will balance precepts and rules of legal science with a gaze on the wider social system.

However, this gaze does not entirely depart from an external perspective, but, also from judges’ values, attitudes, and from “pressure of interests and events” (Friedman 1975, 170).

I would explain such a dynamic according to a mutual mechanism, for, on the one hand, judge’s values and perspectives are reshaped according to legal procedures, adapted to procedures and bended to the logic of law while, on the other, also legal science can absorb extrajudicial perspective conveyed through judgments, especially if reiterated; as such, meta-judicial foundations of specific jurisprudential practices are likely to stand on situated standpoints. Moreover, even the apparent procedural application of legal provision may not be entirely neutral but, on the contrary, it may endorse and enforce already existing unequal power relations.

Friedman indeed suggested that if Courts, lawyers and attorneys do not critically consider reasons underpinned to their role and function, it is likely that as well as “power is unequally distributed and unequally exercised”, so “the law cannot help but reflect and sustain this distribution” (Friedman 1975, 179).

A useful theoretical concept which actually enables to critically delve into the influence of extrajudicial elements is that of legal culture, widely analysed in paragraph 2.2.

2.1.2 Judicial Interpretation and Social Change

In his famous *The Legal System in A Social Science Perspective* Friedman proposes four ideal-types to analyse the interaction between social and legal change. Relevant variables concern the origin of change and its trajectory; Friedman distinguishes whether they are external, i.e. grounded in the social sphere, or internal, thus circumscribed within legal realm. For purposes of this research I suggest to focus mostly on “the change originated outside the legal system but moving through it (with or without some internal processing) to a point of impact outside the legal system, that is society” (Ivi, 270).

Jurisprudential innovations can be framed, indeed, as the answer of legal institutions to a socially determined demand.

Social and political movements ask for legal changes, which, in turn, affect the society. Recent history displays a number of relevant examples: consider for instance the already mentioned *Brown vs Board of Education* and the Italian Constitutional Court judgment n.27/1975 on abortion. They both arose from an external experience: activists of Civil Rights, Feminist Movement and Radical Party had previously tried to launch a legislative reform, without any success. Legal change was thus conveyed through judicial arena, where the legitimacy of the “separate but equal” doctrine and the criminalization of abortion were brought into question. The final outcome, favorable to the applicants, did not consume its effects within the legal system only, but it significantly spread to cultural and informal customs: the success of *Brown* pushed other activists to challenge existing discriminating laws and to pretend equal opportunity measures (Kluger 2011); likewise the Italian Constitutional Court imposed the discussion of the abortion in the political agenda and ratified the supremacy of women health protection, encouraging a significant cultural shift (Sciré 2008).

Thus, as Friedman argues “reforms have frequently gone to Court to upset many old and established arrangements” (Friedman 1975, 277), supporting judicial activism as vehicle of legal change.

Two are the main processes by which legal reform might affect civil society: disruption and planning. Although they are generally joined it’s appropriate to describe them as distinct phases. Disruption refers to a negative change, implying the dismantlement of the existing legal order, whereas planning recalls a positive action, oriented either at replacing the *vacuum* left by the repeal of previous provisions or at regulating newly emerged realms.

If planning is associated to policies, disruption fits the characteristics of judicial system, for effectively Courts are functionally more equipped to disrupt rather than governing new frames. Even when imposing positive obligation, judges are entitled to state the criteria to be met and

values to be enforced, but they must attain to legislative autonomy and, as such, they enjoy a very narrow margin of planning. For instance, the Italian Constitutional Court held that the criminalization of abortion was illegitimate, if pregnancy was seriously threatening the woman's wellbeing, but it was the Parliament that enacted law 194/78 and assessed detailed procedural guidelines. Likewise, in the Usa the competence to determine policies to empower racial desegregation and to enforce equality was mostly left to political institutions.

On a more in-depth level, it's possible to also identify the category of creative disruption as the process of disruption that, on the one hand, impacts on the existing legislation and, on the other, it lays the foundations of a subsequent path of reforms, whether by highlighting core values to pursue, by creating an absence of norms that has to be fulfilled, or by developing doctrines detached from the past.

Grounding its assumptions on empirical research, Friedman set out four conditions as essential to the emergence of judicial creative disruption (Ivi, 280 and fol.). The first prerequisite attains to the existence of a consistent group of legal experts keen to reformism and equipped with financial funding, public and private.

Judges have also to show a significant will to engage in activism; as Friedman warns, this is totally compatible with the presence of conservative Courts, partly because activism does not correspond to progressivism, but it concerns the willingness to overrule doctrines and previous decisions, and partly because even a minoritarian cluster of judges within the overall bar can reach an innovative outcome, by obtaining the majority in a single case that poses a milestone for subsequent interpretations.

The third condition pertains to the presence of a strong and activist social movement, which prods the Courts to reflect on the legitimacy of certain provisions. The last concerns the willingness of powerful actors to enforce judicial outcomes, regardless from their content.

As already outlined, in the Council of Europe lgbt community counts both an active multilevel movement and various legal think-tanks. In the documental analysis I will ascertain to what extent the ECtHR performs an activist role, and how the necessity to respect the sovereignty of national authorities affects judicial reasoning.

Internal disagreement is essential and, depending on which element it hinges, it shapes the trajectory of change brought forward.

Turning to the ECtHR, human rights easily generate dissent, especially when discussing the meaning to attribute at values. From giving substance to the concept of "inhuman and degrading treatment" (Addo and Grief 1998), to defining the realm of "private and family life" (Benvenuti 1999; Johnson 2014), to explaining whether the "right to life" is against abortion (Puppink

2013), judges of the ECtHR display a variety of opinions, which attest the flaunting and contingent nature of these values.

Also the role played by the ECtHR is not unanimously shared; if departing from judicial adjudicative function, judges will probably embrace a restrained approach, whereas if creative implications prevails, they will be more opened to interpret rules according to social, cultural, and political relevant factors.

On the core reasons behind the drafting of the Convention there is no real debate, because the *ratio* is tersely expressed in the Preamble⁷¹; I would connect internal disagreement to the definition of the proper doctrines or to the duties falling within ECtHR's jurisdiction, generally divided between originalist and purposive ones⁷².

A crucial concept that helps to explain different attitudes towards law is the already mentioned notion of internal legal culture, for it delves into features that shape judges' inclination towards legal system and, therefore, into fundamental assumptions orienting their interpretative mind.

⁷¹ The Preamble of the European Convention of Human Rights tersely expresses reasons moving the European countries to adopt the Convention and it echoes to the aim of “securing the universal and effective recognition and observance of the Rights therein declared [...]”, of achieving a “greater unity between its members and [...] the further realization of Human Rights and Fundamental Freedoms”. See also chapter III.

⁷² These issues are widely addressed in chapter III.

2.2 The Internal Legal Culture

Throughout this paragraph I argue that the concept of internal legal culture allows to study variables, shaping judicial reasoning and connecting Courts' decisions to social norms and cultural values. The notion of legal culture, however, is not a simply one, since it refers to heterogeneous ideas, often presented with blurred borders.

The most known definition of legal culture is that proposed by Friedman, which can be summarized as the combination of “ideas, values, expectations and attitudes towards law and legal institutions, which some public or some parts of the public holds” (Friedman 1994, 34). He also made explicit the distinction between external legal culture, namely “the legal culture of the general population” (Friedman 1975, 193), and internal legal culture, which targets values, ideologies and principles of “those members of the society who perform specialized legal tasks” (Ivi, 223).

For purposes of this research I will use Friedman's definition but, considering the complexity of this concept, in subsequent sections I review its usages and definitions, engaging with other perspectives and proposed definitions, in order to explain why I consider the frame proposed by Friedman as the most adequate to analyse the ECtHR jurisprudence.

2.2.1 Legal Culture: A Multifaceted Concept

The notion of legal culture has been generously discussed over the last forty years. Complexity and multidisciplinary features are unanimously attributed to this concept (Pemisi 1997; Nelken 1997; 2004; Michaels 2011) and even authors who resort to it feel the need to clarify the meaning of the adopted definition (Friedman 1975; 1994; Arold 2007).

For instance, Friedman quite frequently stresses the vagueness of legal culture, in that it would “rest on shaky evidence at best” (Friedman 1975, 204) and it would ultimately constitute “an abstraction and a slippery one” (Ibidem).

An important aspect, that leads to different outcomes and shows the risks entrenched when studying legal culture, concerns the realms where legal culture may prove useful; Nelken identifies three main trajectories: comparative, explanatory, and interpretive (Nelken 1997). Firstly, legal culture may be used to explain the differences across cultures as concerns law, and to justify legal peculiarities; as Nelken notes, however, it's hard to avoid the “ever-present danger of circular argument (they do it that way because that is how they do it in Japan, in Holland or wherever)” (Nelken 2004, 8) and also eminent anthropologists are quite sceptical about the possibility of producing accurate accounts of other cultures (Clifford and Marcus 1986).

The interpretative approach, instead, aim at grasping how specific aspects of multiple legal culture resonate and fit together. The scope lies in translating another system's legal ideas, according to a general web of meanings, a sort of Esperanto. Therefore, different legal cultures are likely to be treated as part of the same flow; quoting Nelken, interpretative authors "try to grasp the secrets of culture by focusing on local terms [...]. They examine the idea of the State in common law and Continental countries so as to understand why litigation is seen as essentially democratic in the Usa and as anti-democratic in France" (Nelken 2004, 10).

Lastly, the descriptive, or explanatory approach, pursues to assess the existence of a correlation between social elements, considered as independent variables, and legal culture, treated as a dependent one. This is probably the most socially employed meaning, even though it may lead to exaggerating the impact of legal culture.

Depending on the departing assumptions, the concept of legal culture may have a legal, social, political, or anthropological prevailing meaning. Haberle, for instance, resorts to this concept synonymously with that of rule of law, and he conceives legal culture as a cluster of political democratic values lying at the very heart of Western constitutions (Haberle 2000).

Geertz proposes, instead, a heavily anthropological perspective, devoted to the idea that legal culture has to be inferred from local legal habits, and centred on the paradigm whereby the analysis of legal culture is not "an experimental science in search of law but an interpretive one in search of meaning" (Geertz 1973, 311).

Reference to a web of legal knowledge is also central to Riles, who identifies legal culture with different models of thinking, approaching and practicing law⁷³. Also Legrand focuses on legal professionals' mind-set, arguing that "culture concerns frameworks of intangibles within which interpretive communities operate and which have normative force for these communities" (Legrand 1996, 56). Specifically, he states that rules and culture are essential parts of national identities and he denies the possibility of a convergence between legal families of civil and common law (Ivi, 57 and fol.).

A national based conception permeates even Tuori's multi-layered approach; he classifies a "surface level", that is the gathering of written statutes and provisions, a "national legal culture",

⁷³ "There is growing agreement among both anthropologists and critical lawyers that in many cases the knowledge practices at stake in human rights regimes borrow implicitly or explicitly from legal institutions, theories, doctrines, and forms of subjectivity. In my own work, I have shown how the knowledge practices of even the least overtly legal of UN activities, the UN World Conferences, are best understood as spheres of legal knowledge—insofar as they explicitly engage diverse constituencies (from so-called experts to so-called grassroots) in a common practice of document production that emulates legal practices." (Riles 2006, 54).

that refers to the legal tradition proper of that Country, and a “deep structures of law”, namely the core foundation of law shared by most of countries (Tuori 1997, 433).

A partial confluence between Legrand’s and Tuori’s approach can be traced in Blankenburg’s definition of legal culture as the gathering of law-oriented practices and attitudes shared within legal institutions (Blankenburg 1997).

He explores, indeed, historical, political, and social conditions under which people are likely to resort to legal institutions, and illustrates how they differ among societies, also addressing the fracture between civil and common law, by upholding the concept of “culture of legal behaviour” (Pennisi 1997, 10) and by studying the impact of cultural peculiarities on the propensity to recur to legal institutions and on the assets of legal system itself.

2.2.2 Internal and External Legal Culture

As already fleshed out, Friedman provides the most extensive account on the concept of legal culture and he is the acknowledged father of the distinction between internal and external legal culture.

His efforts arise from the will to develop a notion that gathers and explains behaviours, patterns of thought, and investigate the comprehension of law, whether involving common people or legal professionals. Therefore, being so embedded within practical realm and entrenched with Friedman's long-term research, the conceptualization of "legal culture" has been subjected to several changes, coming to ultimately comprise a large cluster of social and legal phenomena.

Broadly speaking, legal culture is the mental and cultural filter which enables social inputs to become legal instances and, conversely, which heavily affects judicial reasoning, the choice of legal sources, the interpretation of a concrete case, and the Courts' reaction to social claims.

Attitudes and expectations shape legal culture, in that both public opinion and legal experts have some attitude and expectation towards law.

Consequently, legal culture may indicate the "public knowledge of and attitudes and behaviour patterns towards the legal system" (Friedman 1975, 193), the ensemble of "ideas, values, opinions, people in some society hold with regard to law and the legal system" (Friedman 1994, 118) and also "expectations and attitudes towards the law and legal institutions, which some part of the public holds" (Friedman 1997, 33). Slight dissimilarities above depicted do not amount, however, to significant differences and I would read them as the consequence of a decades-long in-depth analysis. Values, interests, theoretical, and practical perspectives as well as methods of interpretation converge within a single, coherent, theoretical cluster (Ronfani 2004, 9). On the one hand the concept of legal culture surely appears flawed, blurred at least, but, on the other hand, it embraces many relevant socio-legal elements, thus allowing to conduct researches by taking into account the complexity of social reality.

Legal culture determines "when, why, and where people use law, legal institutions or legal process; and when they use other institutions or do nothing" (Friedman 1975, 76).

A relevant perspective to this research entails the impact of extra juridical values on the development of legal doctrines, and it contrasts the image of a totally rational modern legal culture, entrenched with a functional view of law. Indeed, as Friedman points out, "traditional and sacred theories still colour the law, for example in constitutional and human rights" (Ivi, 207).

Videlicet not only does the legal culture investigate juridical and judicial doctrines, methods, traditions, and laws, but it goes far beyond, to question the underpinned standpoints, the un-

stated ideologies and perspectives, which pull the strings of internal and external attitudes towards law and which, ultimately, shape the law itself.

In order to enter the legal arena, social drives have to be transformed, specific demands have to be formulated, legal strategies have to be developed, theoretical frames to be built, and connections with existing normative system to be explored. Legal culture, therefore, is the “translat[or] of interests in demands” (Ivi, 193). As Friedman suggests, the utility of this concept is twofold, since it explains both the proceeding from the society to the law, and the answers given by legal system to those claims.

The notion of internal legal culture recalls Frederick von Savigny and his distinction between technical and political legal culture, where the latter refers to the external legal attitude (Treves 1987, 19; Cotterrell 2006, 84). Not only does Friedman enlarge this concept, detaching from a purely mechanistic touch, but he also offers a suitable tool to critically engage with the claim of judicial neutrality.

I consider extremely useful to integrate Friedman’s theory with Pennisi’s researches on the issue (Pennisi 1997). Pennisi breaks the concept up in three paths and, depending on the type of action involved, distinguishes among a) juridical models of reasoning used to translate abstract normative premises into specific legislative consequences, by means of codified decision-making and legitimizing techniques; b) the specialized lexicon developed and adopted by legal professionals; c) values, assumptions, models, ideologies, techniques, and the politics of law that favor the maintenance of jurists as a peculiar professionalized group (Ivi, 7).

To him, legal culture describes functions such as validity, flexibility, uniformity, and elements as certainty, predictability, efficacy, responsiveness (Ivi, 8); for the purposes of this research the second meaning is the most relevant, since it enables to focus on discursive and theoretical bounds between abstract human rights and ECtHR’s judgments. Judicial reasoning constitutes, indeed, the transmission vehicle through which judges convey ideas, values, and attitudes.

Judgments represent the codified answer of legal system to social inputs, they explain and account for Court’s behaviour (Letsas 2004); it’s interesting to note, however, that unlikely it might seem at first glance, the explanatory function of legal reasoning is not targeted to applicants only but also, if not mainly, to legislative power (Friedman 1975, 388 and fol.; Gordon 1981,15).

As Friedman suggests

legal reasoning and its style are important social facts -whether these give any real clue to what judges think or not. Legal reasoning, in short, must be explained and accounted for. It is an element of internal legal culture and it has obvious significance, since reasoning is a type of legal act which produces rules and interpretations of statutes” (Friedman 1975, 235).

It has to be highlighted that judgments are structured according to “a formal, authoritative, exposition, which purports to show how and why a decision-maker reaches his particular conclusion”, displaying thus a quasi-political nature (Ibidem). Authority and formality are embedded in this definitions, but one may question who is the subject entitled to this authority. Moreover, which are the main actors involved? To answer these questions, it is essential to grasp the ways by which judicial reasoning reflects the dynamics of power. As a matter of fact, these elements are strongly intertwined; parliamentary debates leading to the adoption of a certain provision do not fulfil an explanatory purpose, nor is the government obliged to legally prove a bound between existing legal principles and its policy-proposals. On the contrary, judgments are seen as the principal guarantee of a democratic, objective, and neutral adjudicative and interpretative process, based on the principle of the rule of law.

Recalling the well-known Weberian sociological conception, legitimacy, whether political, legal, or social, is the pillar on which the authority of a given institution stands⁷⁴. In this specific case, two kind of legitimacy can be distinguished (Ivi, 236 and fol.): primary legitimacy, typical of supreme and ultimate authorities, and derivative legitimacy, whose existence depends upon former higher institutions.

Authorities invested with primary legitimacy, such as the monarch or national parliaments, are limited by constitutional norms and procedural rules, but within this frame no further legitimating explanations are required⁷⁵; “whatever the basis of primary legitimacy - charismatic, traditional or rational authority using Weber’s terms- some form of it will be present in every society” (Ibidem). In the context of the Council of Europe, legislative powers lie in the Council of European Ministers and Coe Parliamentary Assembly. Judicial institutions, conversely, have to comply with procedures designated to demonstrate their subordination to legislative power which, thus, mark their derivative legitimacy. To refer again to the Council of Europe, the ECHR was drafted by Member States of the Coe and the very ECtHR authority arose from the

⁷⁴ Max Weber distinguishes among three types of legitimate domination, according to the nature of legitimacy on which they stand: “rational grounds - resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority); traditional grounds - resting on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional authority); or finally charismatic grounds - resting on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him (charismatic authority)” (Weber 1968, 113).

⁷⁵ This does not imply that political actors are not bound to any accountability to electors, supporters and public opinion. It is, however, a completely different matter since it entails the political credibility of the party and not its legal authority or compliance to the rule of law.

political power of legislative organs. Derivative legitimacy requires that institutions perform actions, discourses, rites, and practices that connect their conduct to the superior source of authority, showing deference to rules established by the latter (Ivi, 237).

Legal reasoning is precisely a transmitting vehicle of legitimacy, by which judges frame their decision in the existent legal system, or by which they justify their innovation of legal rules and doctrines; its primary task is, thus, to “link the judge’s conclusions and decisions with some higher body of principles or some agency or institution with primary legitimacy” (Ibidem).

Logic-based arguments are quite recurrent but, as Holmes notes, despite “the language of judicial decision is mainly the language of logic [...]. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds” (Holmes 1897, 18); as a matter of fact any conclusion can indeed be veiled with a logical expressions.

If social poles of this communicative act are fixed - the normative text and the judicial actors - neither the substantial outcome nor power dynamics are. As concerns the first let’s just note that the same legal provision gives rise to different, contrasting but equally legitimated interpretations; furthermore similar outcomes can be justified also following divergent reasoning-lines.

Judicial dissent is present in every Western society, even though it is not always recorded in public documents (Lasser 2004). The very existence of separate opinions demonstrates a) the influence of subjective perceptions and beliefs as well as b) the discretion implied by judicial task.

On the relevance of separate opinions I hint a passage from Robert Gordon, who commenting the methodology of Critical Legal Studies notes “[judicial] discourse has turned contingency into necessity”, trying to conceal “repressed alternative interpretations that are perfectly consistent with the discourse’s stated premises” (Gordon 1981, 17).

Thus, only the majority’s opinion has legal force, binds the applicants and, as concerns the ECtHR, represents the unique legitimated interpretation of the Convention; nevertheless, the dissenting minority displays a reasoning whose legitimacy is neither inferior nor compromised, and whose force depends only on the consensus it gains.

Hence, I would suggest that, in defining its contents, the Courts, on the one hand, enjoy a considerable margin of discretion by virtue of powers separation, while, on the other, they may tend to adopt a ‘political’ attitude. By this term I do not simply refer to the notion of judicial activism, but I also include the case when by choosing a restraint approach judges still perform a quasi-political role, for instance showing deference to specific legislative guidelines, irregardless of possible judicial interpretations that, as far as legitimate, would contrast with political agenda.

The institutional asset, the architectural balance between the institutions, and the frailty that permeates the international and European arena impact on judges’ propensity to engage in crea-

tive interpretation, thus affecting their final standpoints and their balance between contrasting interests (Mahoney 1990; Carozza 1998; Benvenisti 1999).

Moreover, subjective elements may become prominent in complaints regarding sensitive and debated issues; as Holmes highlights “judges commonly are elderly men, and more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties” (Holmes 1899b, 455). Such statement seems confirmed by a plurality of judgments, both of the ECtHR and of other Courts: I recall, for instance, the long road that has led to the already mentioned repeal of ‘separate but equal regime’ in the Usa, the decades-long struggle over Us sodomy laws, not to mention the extreme carefulness of ECtHR to consider same-sex relationship as falling within the ambit secured by Article 8 of the Convention.

Whether conservative or innovative, “the Courts have now definitely invaded the field of public policy.” (Pound 1910,15); therefore, legal culture appears as a relevant and appropriate theoretical frame to delve into structures, theories, methods, institutional constraints, and subjective features that shape and orient the judiciary. As Friedman remarks, “judges have values, attitudes, and intuitions but they have also accepted the ‘role’ of the judge; has this ‘role’ requires them to play the game of law. Judges [...] are much the product of their institutional setting as of their backgrounds” (Friedman 1975, 173).

2.2.3 Culture, Tradition, Ideology

Friedman adopts the term ‘culture’ without adducing any explicit justification to this choice, which appears justified by an historicist legal approach. He, indeed, traced the several meaning generally attributed to the concept of legal culture, without really questioning the noun culture⁷⁶. The concept of culture is probably even less clear than the signifier ‘legal culture’ and, quite unsurprisingly, several authors have proposed to adopt other concepts, such as ‘legal tradition’ or ‘legal ideology’.

A review of sociological studies about the concept of culture would go far beyond the scopes of this research⁷⁷; it’s however appropriate to remember that both in sociology and in sociology of law the concept of culture is the element that assigns a specific social meaning to acts pertaining to any realm of individual and collective life, and that makes it socially relevant.

The term ‘legal tradition’ basically refers to the asset and the historical development of a hierarchy of sources, as defined in systems of civil and common law; therefore, I would not adopt this term, since it theoretically and methodologically answers to comparative issues, not comprised in my research. On the contrary, reference to ideology might be useful, especially when targeting the outcome of a judicial institution as the ECtHR.

Cotterrell analytically criticizes Friedman’s concept of legal culture, proposing the frame of ‘legal ideology’.

Much of his criticism is shared by Friedman himself, and it attains to the fact that notion of legal culture “lacks rigor” (Cotterrell 2006, 82), is “vague” (Ivi, 87) and quite “imprecise” (Ivi, 83). However, Cotterrell goes further, challenging the foundations of Friedman’s work, depicted as incoherent: “[even though] this result should be seen [...] less as a fault of Friedman’s particular

⁷⁶ Introducing the concept of legal culture Friedman does not discuss the appropriateness of the noun ‘culture’, focusing instead on the wide range of theoretical and empirical fields where this concept has been employed (Friedman 1975, 193-194).

⁷⁷ Smelser provides a general but accurate review of multiple sociological approaches on the concept of culture. He identifies five major trends: a) culture is “a coherent set of expression of psychological processes or conditions” (Smelser 1992, 8), b) according to Geertz “a product and a guide to actors searching for organized categories and interpretations that provide meaningful experiential link to their rounds of social life. As such culture is both a simplifying and ordering device” (Ivi, 11), c) according to Parson ideology is a fundamental part of culture and consists of a “system of elaborated and rationalized statements that attempt to make compatible those potential normative conflicts and discrepancies between expectations and reality that actors confront” (Ivi, 12), d) according to A.L. Kroeber culture would consist of a “selection of a few core premises from the myriad of possibilities [and] the systematic differentiation, cultural specialization, cultural play, and elaboration of those premises; and finally the exhaustion and cultural decline of the premises” (Ibidem), e) according to Foucault and Bourdieu culture is simply an expression of domination. See Smelser and Munch (1992); Pennisi (1997); Hall, Neitz and Battani (2003).

elaboration of the concept of legal culture than as a reflection of general problems in using culture as an explanatory concept in theoretical analysis of law” (Ivi, 82).

According to Cotterrell legal culture would be a residual and loose concept, useful just to give an ‘impressionistic’ description of variables and relations between social actors within legal sphere. Moreover, even the flexibility of Friedman’s concept is problematized, in that it would spoil the theoretical accuracy of the entire framework; Friedman’s various works on this issue (Friedman 1975; 1990; 1994) suggest however that the notion of legal culture is suitable to provide explanation for transnational tendencies, and that it has the ambition to account for national and even groups level, on a multi-layered dimension. As Friedman suggests “it should be possible to isolate a pattern for any particular group we might select. This would include nationalities, too, and groups or types of nations” (Friedman 1994, 120).

Instead of recognizing Friedman’s multilevel frame, Cotterrell judges it puzzling and, thus, limits the alleged utility of ‘culture’

as a way of referring to legal clusters of social phenomena coexisting in certain social environments, where the exact relationships existing among elements in the cluster are not clear or are not of concern. Culture is a convenient concept with which to refer provisionally to a general environment of social practices, traditions, understandings and values in which law exists. Legal culture, in this sense, may have the same degree of significance for sociology of law that the idea of legal families has for comparative law (Cotterrell 2006, 88).

Effectively, Cotterrell’s criticism is quite compelling, and I would not cast his frame off, rather intending it as a component of internal legal culture. In Cotterrell words “much of what legal culture can embrace might be considered in terms of ideology. [...] legal ideology can be regarded not as a unity but rather as an overlay of currents of ideas, beliefs, values and attitudes embedded in, expressed through and shaped in practices” (Ibidem).

If this statement heavily recalls Friedman’s thought, in another passage Cotterrell glimpses an implication relevant to study the ideas, the values, and the perspectives internal to judicial reasoning. The concept of legal ideology provides a focus for important inquiries, about the ways in which legal doctrine impacts on ideological arguments, about how legal doctrine helps to constitute or shape social understandings and structures of beliefs, and about how juridical doctrine provides a path whereby extremely general premises can be translated into regulatory practices.

Though considering Cotterrell's theory extremely relevant and useful, it's useful to combine Friedman's approach with Cotterrell's legal ideology, so to provide a theoretical bridge between judicial creativity and interpretation.

As Friedman aptly answers (Friedman 1997, 33-40), echoed by other authors (Pennisi 1997; Nelken 2004) the notion of legal ideology is far from being univocally defined and, on the contrary, it appears no clearer than other socio-legal signifiers; I would also add that not only 'legal ideology' is a flawed concept, but it also recalls a precise political and social framework, such as the Marxist one, potentially leading to misunderstandings and to consider law itself as an ideology (Hunt 1985,11).

Literature in the field of ECtHR remains anchored to the concept of 'legal culture' and the variety of researches in the realm of judicial legal culture suggests that this concept, appropriately defined, still remains adequate.

2.2.4 The ECtHR Legal Culture: A Literature Review

Literature concerning the ECtHR legal culture is a growing field of research, and a number of studies, relevant and interesting ones, address the cluster of values, ideals, and perspectives shared and conveyed by judges of the Court.

Documental analyses of ECtHR judgments are still rare (Dembour 2006; Johnson 2014), although inspiring and important considerations arise from the wider range of studies conducted by interning the judges, and by studying their national background and CVs.

Recent studies stress the social and political meaning of the ECtHR, and offer the opportunity to place my approach within the specific debate related to the role of this Court's reasoning in the institutional environment of the Council of Europe (Anagnostou 2014).

Political scientists are increasingly exploring patterns and questions posed by the asset of the ECtHR, and their findings sound relevant to sociology as well. Heger Boyle and Thompson, for instance, conducted a research about the correlation between States' political system and the number of filed applications⁷⁸ (Heger Boyle and Thompson 2001); Voeten explored the interplay of national policies, international architecture, and judges' professional history to assess the degree of judicial independence, then reaching innovative conclusions. Politics would play a role in the international judicial appointment, and governments would be "heterogeneous in their preferred levels of activism of international Courts and this warrants attention in one's conceptualizations of the interactions between governments and Courts" (Voeten 2007, 695). Consequently, also judges vary the "extent to which they show deference to governments when assessing whether a violation has occurred" (Ibidem), thus demonstrating that judgments are shaped also by other factors outside the mechanical enforcement of the ECHR. Even though national background does not significantly impacts on judges' propensity over dissenting,

⁷⁸ In particular, they suggest that in respect of applications filed to the ECtHR "domestic political organization and the manner in which domestic systems link up to the international system each play a role.[...] Firstly, state structures that provide more political opportunity domestically are positively associated with claims-making in the international arena. Second, a country's overall membership in international governmental organizations (IGOs) had a negative effect on claims-making under the European Convention System. IGOs may concentrate claims and/or channel them away from the European Commission by providing alternative outlets. In contrast, we found that the presence of international non-governmental organizations (INGOs) increases the likelihood that claims will be brought to an international forum" (Heger Boyle and Thompson 2001, 341). A paradoxical effect highlighted by the authors concerns the visibility of violations perpetrated by national authorities: "Levels of human rights abuse affected the level of claimants. In conjunction with the powerful effect of INGO membership, this suggests partial support for the 'boomerang' effect. Higher levels of abuse do lead to action, at least in the short term. [...] An indirect implication is that those nation-states that produce the most claimants to the international system may ultimately have the greatest voice in shaping international law" (Ibidem).

Voeten suggests that “ECHR judges whose previous careers were primarily as diplomats or bureaucrats are significantly less activist than are judges with other previous career tracks” (Ibidem), reinforcing an hypothesis already emerged in White and Boussiakou (2009b, 175). Lastly, Voeten infers from a quantitative analysis that Countries aspiring to join the European Union and countries that are long-time EU members are most likely to appoint activist judges (Voeten 2007, 697). Likewise, politics are also the focus of Flauss, who was concerned with the eventual impact of Eastern judges (Flauss 1998), and Schermers, whose main interest attained to the political elements involved in the judges election process (Schermers 1998).

A classic and inspiring study addressing the substantial element of the ECHR is *Who Believes in Human Rights?* by Marié Dembour. She begins by recognizing the problematic intrinsic nature of human rights, “both attractive and unconvincing” (Dembour 2006, 272), because they would rest upon an act of faith and, then, she critically examines human rights declared in the ECHR in the light of realist, utilitarian, Marxist, particularist and feminist critiques. In her view a multifaceted critique to human rights is urgent and necessary to avoid a sense of nihilism that may arise from the refusal of foundational paradigms:

a critique of human rights is not only legitimate but also called for. [...] human rights remain enmeshed in state interests; allow us to evade important moral dilemmas which must be confronted; fail to include in their ambit everyone irrespective of social position; trumpet universal truths which do not hold in the face of social diversity but nonetheless stand because of the prevalent balance of power; and ignore women’s concerns without even realizing it. [...]” (Dembour 2006, 274).

Admitting the contingent nature of human rights and recognizing that they enforce values proper of a specific time and space, does not infringe their utility and symbolic meaning but, in contrast, allows to critically engage with oppressive dynamics that might otherwise be conveyed as natural.

Dembour introduces one recurrent theme in studies on ECtHR legal culture, that is the relevance of separate opinions:

Separate (generally dissenting, but sometimes concurring) opinions, as they are called, are of special interest to me. In a separate opinion, the judge is free to express himself or herself outside the constraints of a collegiate text. The assumptions underlying his or her logic are more likely to surface, because the coherence of his/her reasoning need not be lost in the

process of accommodating the various perspectives of the individual judges who constitute a bench.” (Ivi, 9).

White and Boussiakou (2009a), Bruinsma (2008), Bruinsma and De Blois (1997), and Rivieré (2004) also stress the importance of pluralism, expressed through separate opinions, and consider it as an extremely important factor to evaluate the ECtHR environment.

White and Boussiakou identify a number of reasons that probably justify the massive adoption of separate opinions: a) they allow to express the ‘nuance’ of law, its complexities, showing for instance in concurring opinions how “you can arrive at the same result with another line of reasoning” (White and Boussiakou 2009b, 177) b) they display empathy to the applicants, demonstrating that although the majority has decided otherwise, some judges did take into account their reasons c) they make the audience understand that judges comprehend the complexity of reality and that they are in touch from the society. Finally, several judges stress an element pertaining to the level of accuracy of the Court; beside legitimating the seriousness of the Court to the audience, they also enhance internal critical discussion, favouring a confront among its members. According to a ECtHR judge “the use of separate opinions favours at least the major debate within the judiciary, because if you have to five reasons why you disagree then that provokes more debate and more deep thinking. [...] yesterday’s separate opinions are sometimes tomorrow’s majority opinions” (Judge B quoted in *Ibidem*).

Furthermore “if the articulation of the dissenting position is more accurate than the majority’s, it will have an impact perhaps in the future” both on the Court and on the society since “pluralism of ideas is always helpful in a democratic society” (Judge D, Ivi, 178). Finally, the analysis of separate opinions sheds light on the internal culture about specific legal concepts “[separate opinions] show that some rules and concepts are accepted in any circumstances and some rules and concepts are still in development. There is no clear majority so the problem is more open” (*Ibidem*).

White and Boussiakou highlight another relevant feature of the ECtHR legal culture, which involves how the Court is perceived: judges were asked to comment the idea that because of its peculiar asset, the ECtHR could be considered as a Constitutional Court. This is an extremely relevant element, since the growing number of complaints effectively brings many scholars to depict the ECtHR as a fourth instance Court⁷⁹; the authors found that “all the judges, however,

⁷⁹ White and Boussiakou recall elsewhere the famous *Loizidou v Turkey* judgment, where judges describe the ECtHR as “a constitutional instrument of European public order” (*Loizidou v Turkey*, § 75).

accepted that the Strasbourg Court has certain features or elements of both a constitutional Court and an international Court. [...] The dual role was frequently emphasized” (Ivi, 172) and, although the ECHR “cannot be viewed as a constitution for Europe”, the Strasbourg Court has no jurisdiction to declare national law invalid” (Ibidem). Reappraising a study by Greer (2000), authors suggest also that a formal constitutionalization of international human rights law may not be rooted, but a dynamic of internationalization of constitutional law seems shared, to the extent that all judges “accepted that the Court could be regarded as having become a type of international constitutional Court” (Ibidem).

The presence of separate opinions and the consequent variable degree of homogeneity are further investigated in Arold (2007). Her premise is twofold: on the one hand, she notes the presence of more than 20 nationalities and suggests that it would be unlikely “that the Court’s legal culture would be one of harmony” (Ivi, 9). On the other, contrasting Legrand who stated precisely that national *mentalities* prevented the creation of a European legal culture, Arold suggests that “a common legal culture, or mentality, brings the judges together, and permeates the entire system of the Court” (Ivi, 15).

After tracing individual professional profile, identifying three legal families -civil law, common law and the former socialist legal family - and interviewing judges on a plurality of themes, Arold delves into the jurisprudence on Articles 8, 9 and 10, testing her hypothesis and considering whether differences in the origin legal family do significantly impact on judicial interpretation. The final results verify the initial hypothesis, bringing Arold to state “in the Court, there is a legal culture that successfully overrides the (legal) differences between its member states. The rich diversities that come to the Court create no obstacles to its work. The high amount of consensus in the decisions shows a convergence of views.” (Ivi, 160)

White and Boussiakou draw similar conclusions

our interviews with judges seemed to support the view we had formed from intense discussions of the material in our database, and from reading cases in which there were dissents. These seemed to be random; it was impossible from reading the cases to discern particular features of individual cases which had motivated the disagreement either with the outcome or the reasoning which appeared on the face of the published judgments and separate opinions (White and Boussiakou 2009b, 180).

Quite interestingly, this expression rarely recurs in the ECtHR jurisprudence (White and Boussiakou 2009a, 38), probably because it implies a discussed and controversial statement about the Court, not unanimously shared.

Leicester researchers, thus, confirm the existence of a “dominance of harmony” (Arold 2007,16); recalling Lasser and combining his analysis of publicly argumentative model⁸⁰ with Arold’s study, they further develop a frame suitable to describe the dynamics of legal culture within a complex institution such as the ECtHR. The publicity of separate opinion would mark a legal culture where the legitimacy of the Court “stands and falls in large measure on the logic and the argumentation of the signed judgment” (Lasser 2004, 338), thus echoing the notion of derivative legitimacy previously analysed. If the complexity and the presence of various reasoning-lines are read as the tangible proof that judges really delve into the specific complaint, it’s no surprising that pluralism and disagreement shape the ECtHR legal culture.

It seems accurate to conclude that, in broad terms, heterogeneity and homogeneity coexist: judges share a common sense of identity and independence both from national States (White and Bossiakou 2009b, 186) and from other colleagues’ opinion, to the extent that “the disagreement which in turn generates separate and dissenting opinions” (Ibidem) is favoured.

Another feature that permeates ECtHR legal culture is the high degree of judicial creativity.

Judges of the ECtHR perform a creative role both when they interpret the Convention following theories different from the literal tenure⁸¹ and when they are called to confront upon frames not envisaged by original drafters (Mowbray 2005, 58). These two elements are intertwined, and it’s far more likely that a purposive interpretation arises when a doubtful case is at stake.

A relevant theoretical frame whereby literature studies judicial creativity is the continuum between self-restraint and activism; as Mowbray notes “judicial activism is a label used to refer to a judicial approach which seems to extend or modify existing law, especially in cases where policy choices are before the Court” (Ivi, 52); restraint, on the contrary, is used to refer to a judicial approach which “focuses upon the judge applying case law and avoiding developing the law beyond its clearly established parameters” (Ibidem). When studying ECtHR behaviour scholars generally apply this continuum to position judges but it’s worth highlighting that, as Wildhaber suggested, these labels

need a little bit of elaboration. [...]. Following judicial precedent is likely to be a sign of self-restraint as breaking new ground is the sign of judicial activism. That works only within lim-

⁸⁰ Lasser defines the publicly argumentative model as a model of deliberation inspired by judicial transparency, by the publicity of individual opinions and by their accountability to the legislative authority.

⁸¹ Methods of interpretation adopted by the European Court of Human Rights are extensively discussed in chapter III.

its. This Court has four different Chambers and the Chambers have different personalities. One of the judges may move ahead and when the composition of the Chamber is favourable, the majority may do something very activist. If you then follow the precedent, you are bound to follow that outcome of judicial activism. As a result, you can be on the side of judicial self-restraint and at the same time you want to change precedent. [...] Court is not a simple *continuum* (Judge Wildhaber in Bruinsma and Parmentier 2003,187).

Furthermore, “judges have their individual personal mentality. I cannot speak about categories. In one case a judge may [...] be conservative and in another case may be more liberal. They [judges of the ECtHR] have their own experiences, their own beliefs, convictions, etc. Therefore [...] a conservative judge may be liberal in some cases and the other way around” (White and Boussiakou 2009b,175). From the words of other judges the professional background, a teaching experience, the involvement in national bureaucracies, or in human rights’ organizations affect judicial definition of the proper degree of activism; all these elements go beyond formal judicial role and bring personal, social, moral, and political hints into the ECtHR (Ivi, 174-177). Most interestingly, White and Boussiakou conclude that although judges could have different views concerning Articles 2 and 3, when the right to life and not to be subject to inhuman and degrading treatment are at stake, judges are likely to find a common interpretation; on the contrary, such dissimilarities became more evident in complaints concerning family rights, on which internal legal culture displays many dissimilarities.

It appears more problematic to assess the adequate criteria to determine which judicial outcomes are activist and which restrained. This operation implies the analysis of how methods and doctrines of interpretation are used and several researches show their political implication (Carozza 1998; Benvenisti 1999; Letsas 2004; Johnson 2014).

As extensively illustrated in chapter III, the ECtHR is not bounded to an exclusive method but it enjoys a considerable margin of discretion to work out its own methodology, on the condition to be coherent and in accordance with fundamental principles of the Council of Europe. Three are the main doctrines of interpretation whose application can concretely convey a judicial reasoning informed by extra-legal elements: the margin of appreciation left to each State, the analysis of whether a consensus on a specific issue exists within the Coe members and the degree to which the Convention should be looked as a “living instrument, [...] interpreted in the light of the present-day conditions” (*Tyler v UK*, §.31).

At this stage it seems worth stressing that internal legal culture of the ECtHR embodies not only theoretical perspectives but also methodological approaches, and a specific interpretation of doctrines, which concretely shapes the combination of interpretive models.

Lastly, the ECtHR internal legal culture strictly recalls the ability of the Court to promote change. As Helfer and Voeten ask, is the ECtHR an “agent of change or do their decisions reflect pre-existing social and political trends?” (Helfer and Voeten 2014,105). Although this research does not focus on the efficacy of ECtHR jurisprudence, I suggest that judges might be influenced when deciding whether adopting a restrained or activist approach, by knowing the ultimate impact on national legal systems. Conducting an extremely detailed quantitative analysis Helfer and Voeten find evidence that “even where international judges take social trends into considerations they nonetheless retain considerable discretion and can encourage policy change by noncompliant countries under the right domestic, political and institutional conditions” (Ibidem). Therefore, despite the permeable, continue, and dynamic exchange between social and legal sphere, the ECtHR internal legal culture is likely to affect political and social culture, whether reinforcing emerging trends or legitimating more conservative positions.

2.3. Gendered and Heterosexist Jurisprudence

In this paragraph I address legal feminism, gay and lesbian studies, and queer theory, analysing how these trends differently challenge the existence of a law shaped upon the interests of white, middle-class, and heterosexual men. The critique to legal neutrality stands at the foundations of feminist and lgbt thought while social, political, and economical inequalities play a fundamental role in triggering feminist and lgbt movement.

All mentioned trends are extremely complex and highly differentiated, and it's almost impossible to produce a comprehensive and exhaustive account, if not at expenses of the clarity and the coherence with other parts of the research.

It's necessary, therefore, to identify a number of criteria to narrow the field. Firstly, I focus on feminist issues that have been reappraised and reinterpreted by Gay and Lesbian Studies and Legal Queer Theory, with the aim of uncovering the ways through which gendered and heterosexist supremacy, judicial interpretation and the production of knowledge have mutually co-constituted⁸².

Consequently I interrogate aforementioned theories on a cluster of questions, namely: what does the expression heterosexist and gender-biased law mean? According to which mechanisms can prejudice be conveyed throughout legal provisions and judicial decisions? How do rights discourses create normalized legal subjects to which men and women have to conform? Which aims are pursued through a critical analysis of jurisprudence? Finally, which risks, entrenched in human rights, do feminist and lgbt activists highlight, and do these rights serve as instruments of liberation and emancipation?

⁸² The original passage refers to the aims pursued by Feminist Standpoint theory, focused on developing a critical account of natural and social sciences, and it recalls the need to “identify ways that male supremacy and the production of knowledge have co-constituted each other”, further exploring how “heretofore unrecognized powers might be found in women’s lives that could lead to knowledge that is more useful for enabling women to improve the conditions of our lives” (Harding 1997, 382-383).

2.3.1 Feminist Jurisprudence

Feminist jurisprudence embraces an extremely wide range of theories, practices, methods, and strategies, whose main common point lies within a critical analysis of the existing legal order, from a perspective moulded upon women's needs and interests.

Neither theories, nor methods, or epistemological assumptions are unanimously shared, and also the trajectory of feminist legal jurisprudence can be described from a variety of perspectives, depending on the chosen yardstick⁸³.

The majority of feminist legal scholars do not dispute the existence of achievements due to the logic of (human) rights, though disagreeing about their width and breadth, about the nature of interactions among gender, law, and oppression (Fineman 1995; Bartlett and Kennedy 1991), or about which should be the proper role of legal activism in the overall feminist platform (Smart 1992).

If the departing premise concerns the existence of a prejudice against women that has been conveyed throughout law, according to which dynamics is this relation structured? And which are the core conditions for a feminist definition of law? To this questions feminist jurisprudence gives different answers.

Olsen's proposal to analyse law through the lens of "dualistic system" (Olsen 1990, 199) seems quite convincing. She upholds that, from Plato onwards, Western thought reinforced around multiple series of opposed dualisms or "opposing pairs": rational/irrational; active/passive; thought/feeling; reason/ emotion; culture/nature; power/sensitivity (Ibidem). Not only in each binomial a part excludes the other, but they are also hierarchically defined, in that they present a positive element coupled with a negative or corrupted one. For centuries, indeed, reason, rationality, power, and restraint have been proposed by philosophy, theology, and natural sciences as correct, superior and valuable. As Olsen notes "dualisms are sexualized" for "men have identified themselves with one side of dualism and have projected the other side upon women" (Ibidem); quite predictably the resulting hierarchical structure confers to maleness all positive element, whereas femaleness is associated with inferior traits.

Thus, law works as a vehicle of enforcement and crystallization of such unequal anthropology, it structures rights upon biased premises; from this angle, differentiation, hierarchy, and sexualization constitute the unstated and hidden premises of modern legal systems. Women's secular

⁸³ For a historical introduction to different feminist legal theories see Cavarero and Restaino (1999); Gambaudo (2007, 93-108); Thomas and Boisseau (2011); Facchi (2012).

exclusion from civil and political rights strengthened their image of unequal subjects and, most importantly, it legitimized the assimilation whereby genital peculiarity would affect also one's personality, her behaviour, and her inclinations, justifying consequently a differentiated legal treatment. Moreover, though female difference has been variously glorified in an 'ideal' world⁸⁴, formal and informal society constricted women in the private realm, because they were assumed to lack of the fundamental virtues to enter the public and political arena, among which the first was to be a man.

Such a distorted conception justifies a binary and stereotyped definition of both men and women and, despite the traditional iconographic depiction of justice as a blind woman, the foundations of legal system rest upon traits attributed to men: "law is supposed to be rational objective, abstract and principled like men; it is not supposed to be irrational, subjective, contextualized or personalized like women" (Olsen 1990, 201).

Women have been long denied civil and political rights, precisely because of their alleged 'natural' inferiority; as in a self-fulfilling prophecy, legal provisions enforced different education paths for boys and girls, who were substantially denied both to access prestigious schools and to join civil society. Women were taught to behave accordingly to the image that men had about them and, for the most, they interiorized male gaze, not showing interest for other activities that those considered appropriate.

Every aspect of public and private life was filtered through the lens of opposing pairs, but the resulting conception of world was treated as objective and neutral, as if it described the inherent human reality from an external standpoint.

Hostility and paternalism historically affected Courts' opinion on female witnesses and a wide stream of literature shows that judges often remaindered to sexual difference in order to justify their positions (Schafran 1986; Rensik 1992; Martin, Reynolds and Keith 2002).

In various occasions women were indeed put under a pressure not existing in confront of men. MacKinnon, for instance, claims that in general laws against rape depart from a sexist perspective, in that they assume both that forced and coercive sex can occur with consent and that rape mostly means genital penetration. Consequently, Western jurisprudence is overrun with debates about how to establish the appropriate criteria to assess the line above which consent can't

⁸⁴ "This hierarchy has been somewhat obscured by a complex and often insincere glorification of women and the feminine. While men have oppressed and exploited women in the real world they have also placed women on a pedestal and treasured them in a fantasy world. And just as men simultaneously exalt and degrade women, so, too, do they simultaneously exalt and degrade the concepts of feminine side of dualisms." (Olsen 1990, 200).

be presumed, how to prove a “sufficient evidence of force” (MacKinnon 1989, 173), or about which sexual acts should amount to rape, even though not involving ‘traditional’ intercourse. Moreover, women who denounce rapes are often questioned about their moral credibility - now less frequently than in the past- since the common prejudice spread in juries and Courts labels women who enjoy of a free sexuality as inclined to promiscuous sex and, thus, presumes that their dignity results little offended (Calhoun 1988; MacKinnon 1989; Rotschild 1993; McPhail 2002; Grubb and Harrower 2008).

As such, feminist critique combines heterogeneous arguments to describe the influence of sexist prejudices on legal systems; more in detail, feminist jurisprudence, that is the specific branch of legal theories adopting a feminist theoretical, philosophical, epistemological, methodological standpoint, offers multiple approaches, aiming at grasping the several hidden levels of discrimination, and at developing a critical thinking about law.

Feminist jurisprudence is an extremely wide field, for the general common goal -the production of a feminist knowledge about law and the achievement of feminist reforms- can be variously pursued. Moreover, even when focusing on a single author, it’s likely that throughout her works she will study several themes, changing perspective and engaging with very different arguments. Only by generalizing the outcomes it’s possible to identify common tracks and, hence, to distinguish the main approaches internal to feminist jurisprudence.

West distinguishes between a “patriarchal jurisprudence” and a “reconstructive jurisprudence” (West 1988, 60-61), disentangling perspectives which are often presented in the same author’s work. ‘Critical’ could be a synonym of patriarchal, in that West’s target is to unmask and deconstruct the structures of power lying beyond alleged natural law.

Reconstructive jurisprudence is oriented at mainstreaming a feminist perspective and it proves essential in publicly unveiling claims articulated under the ‘patriarchal’ perspective, and in conveying a counter-dominant knowledge. Feminists who adhere to this cluster are generally committed at rendering “feminist reform rational” (Ibidem) and at showing that women’s claim are not irrational as they might appear to traditional legal science.

As West suggests, from mainstream/male point of view, feminist efforts result invariably irrational, since “the moral questions feminist pose are always incommensurable with dominant moral and legal categories” (Ivi, 68). To avoid such a misconception, feminist jurisprudence is called to undercover the experience of women, in order to “reconstruct the reforms necessary to the safety and improvement of women's lives in direct language that is true to our own experience and our own subjective lives” (West 1988, 70).

A further distinction identifies a narrative and an interpretive approach. The former implies a

description of justice, the state of nature or of the 'human being' which aims for some degree of generality if not universality, and then tells either a narrative story about how human beings thus described come to agree on the Rule of Law or, alternatively, a phenomenological description of how it feels to be a person within a legal regime (Ivi, 62).

Such phenomenological perspective marks the narrative approach, and many authors develop complex theoretical frames which scratch beyond the formal neutrality of Western laws. I recall, for instance, Fineman's research, which shows how vulnerability affects the social and legal understanding of women's roles as mothers and workers (1990; 1991; 2013), and several MacKinnon's works, although as argued hereafter a number of her works falls within the interpretive perspective. Embracing a radical standpoint, MacKinnon critically reviewed US laws and jurisprudence on rape, arguing their inadequacy to women's needs (1983; 1989; 2006); she understood sexual harassment and abortion within a broad social frame, moulded upon heterosexual men's desire (1987), and she extensively denounced the systematic, subtle, and informal ways whereby sexist violence is extremely spread in contemporary society, affecting women of all social, economic, and ethnic condition (1987; 1989).

The interpretive approach, on the other hand, aims at providing a legal analysis departing from women's perspective: whereas the narrative is generally more abstract and philosophically oriented, the interpretive one tackles existing legal provisions and decisions, in order to "show how patriarchal doctrine constructs, defines and delimits women. [...] The interpretive critique [...] aims to articulate what that something else might be. The interpretive critique is a lot like shining a light on darkness, or providing a negative" (Ivi, 67). Despite their different outcomes, Gilligan Minow, Tronto, Stang Dahl, and post-feminists fall in this cluster.

Also many MacKinnon's works are interpretative; most notably her battle to modify US laws on pornography and to introduce severe sanctions against sexual harassment are an example of how feminist legal theory can inform policy proposals, and promote legal change by departing from women's perspective.

To separate among the many authors of this multifaceted cluster, a number of criteria can be used. The prominent one distinguishes radical and cultural feminism, where culturalism involves "showing how legalism devalues women by not valuing what women value" and radicalism means to account for "how law objectifies sexual peculiarity, translating in legal terms the sexual passive role attributed to women by patriarchal culture" (West 1988, 68).

Cultural feminisms stresses that women do have a "different voice" (Gilligan 1982), namely a perception of social reality and a orientation towards relational and legal dynamics informed by inclusion, care, mutual responsibility, and the maintenance of interpersonal networks.

Such peculiarities should not be discouraged - the culturalist argument goes- but, on the contrary, it would legitimate the quest for a legal system that takes into account women's peculiar sensibility. Even though this standpoint has not led to relevant legal reforms (Facchi 1999, 137), the increasing interest in familiar mediation and solutions alternative to judicial litigation may be considered as partially informed by Gilligan's perspective. On the contrary, radical feminists contest the oppressive tendency of law on the ground that it would be the institutionalization of secular asymmetric assets of power, and that it would instil false consciousness based on gender inequality. The core realm where inequality is produced pertains to sexual roles and, precisely, to the assumption that women have to be compliant and passive, in sexual and other environments. MacKinnon is the most eminent radical feminist and she combines a strong theoretical post-Marxist frame with an outstanding and passionate activism for legal reform. Despite nowadays many national and international legal provisions fail to recognize women's needs and to enforce existing fundamental rights, MacKinnon strongly argues for legal reforms and, thus, devotes her work to an "immanent critique" (Lacey 1998, 170), which "takes jurisprudence and the legal sphere on their own terms, and then holds up their actuality to contrast them with their own professed standards and ideals" (Ibidem).

The debate opposing radical and cultural feminists is probably the best known, but feminist jurisprudence encloses also nuanced perspectives that enrich the overall stream of thought.

Stang Dahl, for instance, shares radical definition of law as an expression of male domination, but she ascribes such feature to social and historical reasons, rejecting the image of law as an intrinsic vehicle of oppression (Verza 2007, 282). Grounding on accurate sociological analyses Stang Dahl and the Oslo School of Women's Law scrutinize every branch of law, to identify the origins of inequality, to analyse how it descends from the enforcement of alleged neutral provisions, and to focus on those legal areas that are most relevant for improving women's life condition (Stang Dahl 1988, 240). As Smart highlights (1989, 24), Stang Dahl also questions the real benefits of gender-specific legislations drafted without embracing a "perspective from below" (Stang Dahl 1988, 240). She, indeed, cautions that even if "law is gender-specific in its formulations need not mean that it is significant for women's position in law or society. The same applies to the directives found in sex discrimination legislation" (Ivi, 24) and she stress that in place of traditional law feminists should claim reforms in the fields of government administration, in the placement of welfare benefits, and in the decision-making processes related to bureaucratic arenas and labour policies (Ibidem).

Minow's works are ground-breaking in debunking prejudices underpinned to legal norms and judgments, as well as at deconstructing traditional legal concepts, and this author embraces a peculiar mix of radical and cultural elements. Not only does she propose a nuanced origin of

women's oppression, not confined to sexual sphere, but she notably endorses an original reading of the bound between law and difference. In her famous essay *Justice Engendered* Minow overcomes the dualistic dimension of difference, suggesting that legally relevant differences are originally biased and partial: "*Difference* is only meaningful as a comparison [...] Such assumptions work in part through the very structure of our language, which embeds the unstated points" and which can also reflect the dominant institutional arrangements" (Minow 1987, 70). Marginality and oppression derive from a plurality of historically and socially biased practices, often conveyed throughout norms and judicial reasoning; Minow's mastery of critical legal method, as hereafter detailed, allows her to uncover prejudices entrenched in the US Supreme Court; in questioning judicial reasoning she adopts a frame that refuses the existence of a single, impartial and unified truth, arguing:

Only by admitting our partiality can we strive for impartiality. Impartiality is the guise partiality takes to seal bias against exposure. It looks neutral to apply a rule denying unemployment benefits to anyone who cannot fulfil the work schedule, but it is not neutral if the work schedule was devised with one religious Sabbath, and not another, in mind. The idea of impartiality implies human access to a view beyond human experience, a "God's eye" point of view. Not only do humans lack this inhuman perspective, but humans who claim it are untruthful, trying to exercise power to cut off conversation and debate (Minow 1987, 75).

The concept of difference under a socio-legal perspective is also central to Tronto who, reappraising Gilligan, develops a legal theory revolved around the "ethics of care", namely an approach that "elevates care to a central value in human life" (Tronto 2001, 64) and that departs from the perspective that all human beings need care and give care to the others. Mutual care would be the ground of every human relation and, as such, Tronto argues that it should be extremely valued both in the political and legal realm. The core of Tronto's political proposal rests on the claim that traditionally disdained roles and works related to care deserve to be economically, formally and informally, much more appraised and that both men and women should be educated to an ethics based on caring. The ethics of care would offer space for endorsing a wide range of policies, summarized as follows "1) everyone is entitled to receive adequate care throughout their lives; 2) everyone is entitled to participate in relationships of care that give meaning to their lives; 3) everyone is entitled to participate in the public process by which judgments about how society should ensure these first two premises are framed" (White and Tronto 2004, 449). Despite on the one hand Tronto recognizes that ethics of justice carry values grounded on liberal principles of autonomy, rationality and individualism, on the other,

she rejects the frame of two alternative and opposed ethics, perceiving them as complementary (Facchi 2012, 124).

Differences are at the core of also post-feminist theory, which deconstructs the very notion of gender and critically engages with feminist theories analysed so far. Beyond the universalist language, both radical and cultural feminist would shape their approaches on a situated subject, namely on the interests and needs of white, middle-class, and heterosexual women. The secular oppression to which women have been exposed all over the world would not create a bond of sisterhood and, as such, Western feminists would not be entitled to claim to fully understand neither women outside Western culture nor those women which stand at the peripheries of Western culture. Feminists must pay attention to oppressive dynamics that would reproduce those unequal structures they scathe, for instance by silencing racial minorities, lesbians, single mothers, marginalized women, and by depicting as universal experiences which are, instead, deeply contingent⁸⁵.

At the crossroads between radicalism and post-feminism, Smart offers a compelling analysis of various standpoints that allow to delve into inequality.

Broadly, Smart shares criticism against the idealized Woman, though not denying the possibility to use law to fight gender-based oppression; she indeed endorses a theoretical perspective strongly informed by Foucaultian models of domination, power and knowledge (Smart 1989, 4-25) and stresses the existence of a “congruence between law and what might be called masculine culture” (Ivi, 4). Therefore, law appears as a “system of knowledge [...] a discourse which is able to refuse and disregard alternative discourses and to claim a special place in the definition of events” (Ivi, 162). Hence, everything in legal systems, from epistemology to the structure of trials, has been shaped to dismiss women’s experience, to convey a knowledge based upon heterosexual patriarchy and, most importantly, to instil mental clusters where entrenched subtle hints of domination are always present. Both domination and liberation affect the law; unlikely MacKinnon, Smart does not identify legal reform as the principal strategy to promote equality or to dismantle patriarchy, warning against the “siren call of law” (Ivi, 160). Quoting Smart “in

⁸⁵ On the risk embedded by the endorsement of an almost indefinite declination of subjectivities, MacKinnon sharply warns: “ironically, and how postmodernism loves an irony, just as women have begun to become human, even as we have begun to transform the human so it is something more worth having and might apply to us, we are told by high theory that the human is inherently authoritarian, not worth having, un-transformable, and may not even exist - and how hopelessly nineteenth-century of us to want it” (MacKinnon 2000, 710-711).

For an introduction to post-modern feminism see Frug (1992, 1045-1075); Levit and Verchick (2006); as regards black feminist movement, see Carby (1982, 212-235); Crenshaw (1989, 139-169); on lesbian feminism see Rich (1980); Butler (1990); Calhoun (2000).

accepting law's terms in order to challenge law, feminism concedes too much" (Ivi, 5), the activation of law is problematic as well, since it "legitimizes law even while individual legal statutes or legal practices are critiqued" (Ivi, 161), thus reinforcing an androcentric standard and favouring a juridogenic effect. In order to have an impact on law actors resorting to law have to "talk law's language, use legal methods and accept legal procedures" (Ivi, 160), and often "rights can be claimed only if the claimant fits the category of persons to whom the rights have been conceded" (Ivi, 161-162). Consequently, legal cure might prove bad as the original abuse, and feminist movement should de-centre legal activism, "think of non-legal strategies and to discourage a resort to law as if it holds the key to unlock women's oppression" and, ultimately, to "resist the temptations that law offers, namely the promise of a solution" (Ivi, 165). In recent years Smart has revised her sharp criticism, clarifying her perspective and giving rise to a quite controversial debate about the legacy of *Feminism and the Power of Law*. In 2010, Smart read family law as a creative kinning practice, thus suitable to meet the demand of recognition arising from lgbt and feminist community (Smart 2009, 20); in response some authors asserted that Smart would consider family law as offering Utopian possibilities (Carr and Hunter 2012, 105) and that she would be more enamoured with law than in the past (Auchmuty 2012, 65 and fol.). Although admitting that "law seem to be playing catch up to keep abreast of social and cultural changes in family relationships" (Smart 2012, 165), Smart's standpoint is far more articulated than this. On the one hand, she suggests not to exclusively focus on the disciplinary power of law or on its side-effects, and she upholds that "law (especially at the levels of both formulating legislation and case law) provides a vital site for the contestation of ideas and values. It provides an opportunity to voice feminist values and concerns, and even possible alternatives" (Ivi,164). However, in her own words, law "does not respond automatically to all demands" [and] in deciding which relationships to recognise and give legal standing to, law is also empowering different parties in relation to each other" (Smart 2009, 20). Law remains a slippery field, which has to be carefully treated so to avoid theoretical and methodological traps coming from a long stand oppressive tradition.

Feminist jurisprudence applies to several legal fields, from anti-discrimination statutes to administrative laws, from welfare provisions to family-law, to human rights. By discussing the theoretical background and the pragmatic enforcement of human rights theories, feminist debate has also shed light on the bias and the contradictions entrenched within alleged universal rights discourse, aiming to question processes by which these rights are defined and to discuss the substance of what is thereby secured (Binion 1995, 513).

Human rights law is indubitably a tricky and ambivalent realm, for on the one hand it provides an extremely powerful language, a political and epistemological code legitimized at most rele-

vant international venues, but, on the other, its historical roots “were not intended to include women” (Brems 1996, 137).

The necessity to adopt a specific Convention addressing crimes perpetrated against women (Cedaw 1979), the incessant drafting of UN resolutions and the promotion of international Conferences tackling the issue of women human rights demonstrates both the frailty of women in contexts of war, famine, or poverty and the basic practical inadequacy of the Universal Declaration of Human Rights (MacKinnon 2006).

Under this perspective, Binion’s and Smart’s doubts on the radical transformative power entrenched to law appear fully justified, and applicable also to other minorities, such as lgbt people; Binion further stresses that “women’s experience would suggest that reliance on Courts, judges, and lawyers to transform the society is folly” (Binion 1995, 514) and Smart doubts on litigation utility to women’s purposes.

The crucial element is neither to deny to human rights any innovative and liberationist feature nor to deny the inconsistencies underpinned to them, but to advocate for a conscious approach to the potentials and to the side-effects entrenched in the ideal of a universal, common rights discourse.

Human rights bear a weighty and malleable symbolical potential, at the same time. Disadvantaged and oppressed minorities are enabled to frame their claims according to the logic of human rights, and to articulate them coherently with the international legal asset; as such, fundamental rights are a strategic arrow in the quiver of marginalized ones, and it empowers them to leave peripheries of law and to break into the centre of the system.

Moreover legal provisions are generally expressed in vague terms, referring to values and principles, leaving considerable space to define them by taking into account local experiences and sensibilities (Dworkin 1963; Dembour 2006; Carozza 1998).

On a closer look, human rights framework may be considered problematic when it “construes the civil and political rights of individuals as belonging to public life while neglecting to protect the infringement of those rights in the private sphere of familiar relationships” (Romany 1993, 87). Reformist feminism discloses and deconstructs the “roads of apologia and utopia”, false and misleading ones, arguing that the actual frame of human rights stands on a normative order, whose main function is to legitimize a specific political asset. Therefore law can perform an apologetic function and amount to a “paradigmatic site of power” (Ivi, 91); echoing Reilly, Romany explains the bound among neutrality, legitimacy, and the construction of power: “in claiming autonomy from the political framework law gives legitimacy to the social constructions of that framework” (Ibidem), and the foundations of such legitimacy are shifted from a political

and questionable realm to the moral venue of universal values, depicted as neutral and, consequently, indisputable..

Hence, legal reasoning would purport to silence any critical dissent.

Traditionally, women constitute a fragile social category and abuses against them are concentrated for the most in the familiar sphere, only recently addressed by international human rights.

Also the partition of civil, political, and social rights, and the hierarchical prominence of the former two is heavily called into question, for it would not serve women's needs adequately. Bunch recalls that although women's rights touch civil and political liberties, gender based violence "is part of a larger socio-economical web that entraps women, making them vulnerable" (Bunch 1990, 488). Furthermore, private violence can't be prosecuted on the ground of international human rights, because their enforcement is generally left to the autonomy of domestic authorities.

Romany sharply addresses the issue and suggests to systematically deconstruct the public/private distinction, so to favour a flourishing reformulation of international spheres of competency. Patriarchy is anything but reinforced from legal doctrines considering the private realm as intangible or sacrosanct (Romany 1993, 103). Although positive law depicts the regulation of private sphere as illegitimate intrusion, a combination of the two realms exists in other branches of international law⁸⁶. It is not utopian hoping for a radical rethinking of human rights foundations, but this embeds a significant change in the dominant attitude towards women's and minorities' interests and perspectives.

Bunch calls for a "feminist transformation of human rights" (Ivi, 496), and suggests five innovations. Firstly, in order to avoid an assimilationist perspective, it's not sufficient aspiring for a real enforcement of already existing human rights, but it's compelling to depart from women's experiences. Secondly, women's rights must be perceived as human rights and women-centred approach has to mainstream every legal field. It's necessary, of course, to keep on tackling the inefficiencies and the lack of enforcement of those rights to which women are already entitled, for instance condemning for instance female sexual slavery, forced marriage, compulsory heterosexuality, female mutilation, and the exclusion from economic and cultural resources (Ivi, 497).

⁸⁶ "The division public/private, particularly in the realm of state responsibility, is variously declined and enforced. There are guarantees which exclude state responsibility for private interferences. Second, there are provisions which clearly contemplate state responsibility for private infringements of protected interests. Third there are provisions creating rights which by their very nature incorporate state responsibility for failure to ensure their respect by private actors" (Romany 1993,119-120).

A similar effort, however, has to be coupled with a trajectory informed by the awareness that many issues are at the moment dismissed as not really related to human rights. Recalling Bunch, the most contested area is the ascertaining of which rights fall within the bracket of human rights⁸⁷, since it requires to broke the “barriers [...] between public and private, state and nongovernmental responsibilities” (Ibidem).

Alternative counter narratives, combined with a critical genealogy of human rights, should be combined to a genealogy of legal discourse itself (Romany 1993, 92). Through “exploring legitimacy stories [...] a feminist critique can begin to unveil the hidden accounts, the silenced voices” (Ibidem).

Liberalism would leave the promise of liberal humanism unfulfilled, and a proper feminist critique should address the imaginary of coherence promised by international law. By challenging the structure of international legal argument and by exposing its “artefactual nature” it is possible to uncover “how such construction serves to perpetuate the alienation of women within international law” (Ivi, 94).

To this aim, the notion of “embodied objectivity” (Ibidem) is crucial. Presented as an instrument suitable to find common denominators in multicultural and globalized societies, it stands upon a twofold assumption. Firstly, it is asserted the “impossibility of reaching abstract objectivity” (Goetz 1991, 151); secondly, partial knowledges are valued insofar they are also conscious, and insofar “the knower conscious takes responsibility for her claims and her enabling practices” (Ibidem). Dynamism and a strong commitment to immanent critical spirit would deconstruct the stability and hierarchy of positive international law, opening up to a constant discussion and revisions of identities and of the artificial criteria underpinned; “embodied objectivity [...] requires that women engage in a dialogue where the intersections between patriarchy and other sites of oppression come to the fore, where each claim to knowledge is open to revision” (Romany 1993,122).

Thus, even in the realm of human rights, legal theory should depart from below and filter majoritarian paradigms and assumptions by assuming the women’s perspective, or that of other oppressed groups.

⁸⁷ Bunch takes the example of women of Plaza de Mayo, in Argentina, who “did not wait for an official declaration but stood up to demand state accountability for these crimes [disappearances]. In doing so they helped to create a contest for expanding the concept of responsibility for deaths at the hands of paramilitary or right-winged death squads which, even if not carried out by the state, were allowed by it to happen”. (Bunch 1990, 497).

Heterogeneity is a distinctive feature of feminist legal methodology as well. Even though much of feminist literature focuses more upon theoretical, epistemological, political, and social issues than on methodological questions (Bartlett 1989, 830), methodologies matter. They do because methods are the lens through which reality is perceived, analysed, and challenged; they do because, depending on the chosen perspective, also the goals change; finally, they do because if feminism really aims at proposing an alternative legal critical theory, it ought to pay attention not to uncritically abide to methods developed within conventional legal doctrine.

Precisely because of the already explored biased historical origins of legal systems, some feminists, a minority indeed, upheld that a inherent tension would oppose traditional legal theory and feminist legal activism (Whitman 1988; Fineman 1995). Fineman for instance argues that dominant discourses would threaten to transform feminism, reconnecting it to the majoritarian perspective (Ivi, 17) while Whitman rhetorically challenges MacKinnon's juridical activism, by asking "must you choose a language of neutrality, which provides credibility but disables you from saying those things you most need to say, and a feminist language, which allows you to say those things at the cost of being believed?" (Ivi, 86). The adoption of alternative methods to the traditional ones may have also significant side-costs, as concerns the perceived legitimacy of feminist lawyers but, as Abrams suggests "to assume a chronic tension between 'feminist method' and 'legal method' that ultimately condemns the former to failure seems both pessimistic and oddly static" (Abrams 1991, 375). Moreover, such a sharp dichotomy risks to misdescribe both conventional and feminist perspectives, creating thus an artificial and misleading segregation. From this standpoint core differences could indeed

relate less to differences in principles of logic than to differences in emphasis and in underlying ideals about rules. Traditional legal methods place a high premium on the predictability, certainty, and fixity of rules. In contrast feminist legal methods, which have emerged from the critique that existing rules over-represent existing power structures, value rule-flexibility and the ability to identify missing points of view (Bartlett 1989, 832).

Generally, legal feminists resort also to conventional methods, though originally declining them, for instance by rejecting the actual hierarchy of legal fonts or processes to ascertain relevant facts and arguments; as Bartlett notes "feminists do what other lawyers do" (Ivi, 836): they examine the facts, they identify the essential features, they determine what legal principles should guide the resolution of the dispute, and they apply those principles to the facts. The difference against other legal orientations lies in reinterpreting all described phases so to unveil the mechanisms that convey women's oppression and to reshape them according to feminist frames.

This procedure involves a number of steps, ascribable to three main methods: “asking the woman question⁸⁸”, adopting a “practical reasoning” and resorting to “consciousness-raising” techniques (Ivi, 836-7).

The woman question exposes “how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups” (Ivi, 836). Many questions are gathered under this conceptual umbrella, including multiple realms and angles whence scrutinizing the same field. On this issue Wishik enlists a number of useful questions, that may orient a critical legal analysis:

what have been and what are now all women’s experiences of the ‘Life situation’ addressed by the doctrine, process, or area under examination? what assumptions, descriptions, assertions and/or definitions of experience [...] does the law make in this area? What is the area of mismatch, distortion, or denial created by differences between women’s life experiences and the law’s assumptions or imposed structures? What patriarchal interests are served by the mismatch? What reforms have been proposed in this area of law or women’s life situation? how will these reform proposals, if adopted, affect women both practically and ideologically? In an ideal world, what would this woman’s life situation look like and what relationship, if any, would the law have to this future life situation? How do we get there from here? (Wishik 1985, 72-75).

Another commenter identifies three key aims implied by the woman question: “i) to identify bias against women implicit in legal rules and practices that appear neutral and objective ii) to expose how the law excludes the experiences and values of women and iii) to insist upon application of legal rules that do not perpetuate women’s subordination” (Clougherty 1996, 7).

Quite predictably, asking in Courts the woman question does not necessarily require a judgment favourable to women, while it urges judges, legislators, and policy-makers to take into account gender perspective.

A criticism raised against this method (Bartlett 1989, 844) suggests that it would be just a mask covering political and ideological intents. From the recalled passage a strong ‘political’ dimension effectively emerges, and it seems combined with a clear scepticism about the feasibility of a neutral legal system. However, if political is used as a belittling synonym of situated and not

⁸⁸ Bartlett acknowledges the first use of this term to Simone De Beauvoir in her masterpiece *The Second Sex*.

neutral, hence also traditional legal doctrine can be considered political and, moreover, as the expression of a majoritarian perspective.

For such reasons I share Bartlett's argument, according to whom

the substance of asking the woman question lies in what it seeks to uncover: disadvantage based upon gender. The political nature of this method arises only because it seeks information that is not supposed to exist. The claim that this information may exist [...] is political but only to the extent that the state for implied claim that it does not exist is also political" (Ivi, 847).

With the increasing attention to the plurality of differences also the woman question has been converted into "asking the suppressed question" (Ibidem), which turns extremely useful to address various inequalities, that may even not imply a gender dimension. The peculiar element of such shift, more than just a terminological one, is that multiple issues create new identities, which have to be investigated through *ad hoc* questions. The woman question, therefore, serves as a model to mould new ones, to address other marginalized matters, with the intent to avoid general and universalist definitions.

The second methodological cluster involves the recourse to 'feminist practical reasoning', whose departing assumption involves the recognition of a discrepancy in the ways by which men and women respectively perceive reality and approach reasoning.

Emphasis is placed on the practical reasoning observed from women experience, in contrast to the abstract conventional legal doctrine.

Authors who adopt this method perceive problems as dilemmas with multiple perspectives, contradictions, and inconsistencies (Ivi, 851). Univocal solutions would be utopian and unrealistic, since they would presume the existence of situations substantially interchangeable; reality, on the contrary, would be "unique, not anticipated in their detail, not generalizable in advance" and, thus, it should be treated as "generative, [arising] practical perceptions and [informing] decision makers about the desired ends of law" (Ibidem).

The casuistic approach and the focus on Courts judgments typify feminist practical reasoning and, although addressing a wide range of issues, it tends to prove useful in deconstructing gender dynamics within existing legal rules.

As a significant range of literature shows (Freedman 1983; Littleton 1987; MacKinnon 1987; Minow 1987; Taub and Schneider 1982), thanks to particle reasoning feminist jurisprudence has unveiled assumed neutral rules and procedures which, instead, tend to drive underground the ideologies of the decision-maker, which do not serve women's interests.

Lastly, Bartlett highlights consciousness-raising method, described as an “interactive, collaborative process of articulating one’s experiences and making meaning of them with others with other who also articulate their experiences” (Ivi, 863-4). One of the most interesting implications by the interplay between experience and theory, “reveals the social dimension of individual experience and the individual dimension of social experience” (Schneider 1986, 603. Consciousness is not confined to tiny informal groups but, on the contrary, it has meaningfulness also in public contexts. Specifically Bartlett describes different paths leading to a more sensitive attitude towards inequalities such as “bearing witnesses to evidences of patriarchy when they occur, through unremitting dialogues with and challenges to the patriarchs, and through the popular media, the arts, politics, lobbying, and even litigation” (Bartlett 1988, 9-10).

Given the complexity of judgments and the variety of possible implications arising from a critical analysis of whatsoever legal institute, legal feminists generally combine all methods described, precisely as traditional jurists resort to multiple techniques on the same issue.

2.3.2. Gay and Lesbian Studies, Queer Legal Theories

Legal theories flourished within homosexual community are more recent than feminist debate, but they display a similar degree of complexity, internal divisions, and critical attitude.

Where feminists challenge gendered law, lgbt activists address heterosexist law, focusing on the legal institutions that, directly or indirectly, require heterosexuality as a compulsory feature in order to enjoy of civil, political, and social rights.

The most compelling contribution concerns the deconstruction of biased mechanisms operating underneath legal surface: Western legal history, indeed, has been characterized both by the criminal prosecution of gay men, and by a multitude of subtle ways proposing heterosexuality as the only legitimate sexual model.

This section provides a detailed review of the debate between Gay and Lesbian studies (hereafter GL studies) and Legal Queer theories (hereafter LQ theories), reappraising some hints presented in chapter I. Both approaches move a harsh critique against conventional doctrines that oppress homosexual people; therefore, the notion of heterosexism recurs throughout all perspectives, transcending internal differences and serving as the premise to denounce the heavy stigma imposed upon gay, lesbian and transgender people, who are often treated as second-class citizen. The normative environment, indeed, often labels homosexuality as deviant and, consequently, legally assimilates lgbt people to criminals, mentally ill, perverted, degenerated, and weak figures. Beside social oppression, cultural stereotypes give rise to legal disadvantages, such as the exclusion of gay men from military because assumed to be abnormal, with disrupting behaviours, or as the practice not to hire homosexual teachers, because presumed to harass pupils (Ewing, Stukas and Sheehan 2003; Rabelo 2013).

Heinze also refers to the “normative-heterosexual” paradigm of social and political organizations, meaning the combination of neutral rules with the unstated assumption that all members are heterosexuals, further noting that it provides theoretical canons informing the drafting of several international Covenants, Conventions and Declarations (Heinze 1995,31-37).

Both GL studies and LQ theories reject this moral, legal and political frame, though displaying relevant elements of dissimilarity.

GL scholars often expose their arguments when engaging in debates on specific complaints; consequently, general standpoints have to be subsumed from commentaries, notes and essays which combine a deep reflection with suggestions related to immediate jurisprudential problems.

As already described in chapter I, equality, non-discrimination, and a general commitment to political liberalism are shared values of GL authors.

Moreover, the comparison between sexual orientation and other personal features legally considered immutable is quite frequent. In his valuable analysis of international rights, Heinze states that “sexual orientation [...] counts among the most determinative forces of human personality and social organization. Those facing the entire range of human rights violations due to their [...] sexual orientation rank on par with those facing racism, sexism and other internationally forms of prosecution” (Heinze 1995, 21). Also Wintemute suggests that the immutable status argument is a “relative objective concept” (Wintemute 1995, 248), though conceding that in the actual international judicial frame sex-discrimination⁸⁹ and fundamental choice⁹⁰ arguments have an enormous potential and, hence, suggesting that lawyers should decide case by case which instrument resort to.

Despite queer authors contend that a similar stance would reiterate a passive, inferior, and subaltern image of homosexuality -namely the idea that since one can't change her sexual orientation she has to be secured by law, as if her condition were a permanent disability-, the real theoretical frame is much more complex. Wintemute, for instance, leans towards essentialist arguments but strongly rejects the idea that even if sexual orientation were changeable, lgbt people would prefer to be heterosexual. Also other GL scholars attach to homosexuality a positive value, but they are far more concerned in defining and empowering strategies which are more likely to achieve positive judicial and legislative results⁹¹, than questioning the side-effects of essentialist readings of sexual orientation (Heinze 1995).

On the other hand, the main critique against LQ theories focuses on their supposed scarce efficacy; commenting queer stances on same-sex marriage Richards rhetorically asks “postmodernism arguments may be even less weighty [in overcoming discrimination regarding same-sex marriage]. Why should any gay or lesbian couple be forbidden marriage on grounds that it would

⁸⁹ The sex-discrimination argument states the illegitimacy of a differentiated treatment grounded on sexual orientation since “the acceptability of a person’s emotional-sexual attraction or conduct depends on their own sex, sexual orientation discrimination may be a kind of sex discrimination like sexual harassment or pregnancy discrimination” (Wintemute 1995, 17). The most well-known European case where lawyers resorted to this reasoning-line is *Grant v South-West Trains*, C-249/96, in which the applicants claimed that had she been a man, she would have not suffered any discrimination for having a female partner. However, the European Court of Justice rejected such argument, determining its rapid decline.

⁹⁰ Fundamental choice argument suggest that “because every person’s sexual orientation is chosen and is extremely important to their happiness, it may be a fundamental choice (or right or freedom), like religion or opinion, and come wholly or partly within a specific fundamental right such as the freedom of expression, association or religion, or a residual and more general right of privacy or right to respect for private life” (Wintemute 1995, 17).

⁹¹ For a review of cases where lawyers resorted to “essentialist” arguments see Wintemute (1995) and Johnson (2014).

reasonably be rejected as compelling reasons for forbidding straight couples form marriage?” (2001, 28-29).

It may be argued, however, that LQ theories do not oppose to legal recognition of same-sex marriage but, rather, they contest its prominence in the lgbt international political and legal agenda. For instance, Stychin clearly acknowledges that, despite the normalizing dynamics entrenched in the universalist rhetoric of human rights, “the discourse of universal human rights can and has been used successfully by local gay rights activists” (Stychin 2003, 951).

Therefore, Richards plea to maintain “the distinction between the different standards applicable to our political and constitutional morality and those relevant to our personal moral lives” (Ibidem) appears misguided, for he attributes to LQ simplified stances.

Reappraising and paraphrasing⁹² Heinze's analysis of human rights tasks, it could be upheld that reformist Gay and Lesbian approach intends, firstly, to name and articulate rights relevant to lgbt people and to decline existing ones, following a lgbt friendly frame; secondly it encourages to denounce violations and it seeks redress both in international and domestic venues, resorting to strategic litigation, political lobbying, and educational campaigns. Then, GL studies strongly support consciousness-raising processes to contrast homophobe informal practices, and they foster equal-opportunity policies as an essential step in achieving a sufficient level of human rights enforcement.

In his masterpiece *Sexual Orientation and Human Rights* Wintemute tersely expresses the legal perspective typically endorsed by GL studies; his focus regards the multiple discriminations suffered by lgbt people⁹³ and, as such, the main problem with human rights would apparently con-

⁹² “Today human rights law has four principle tasks. Its first task is to articulate those rights which are fundamental human rights. [...] Its second task is to identify and condemn violations and if and however possible to seek redress. Its third task is to seek to create conditions in which human rights can be more fully realized and violations not simply condemned but also prevented. Its fourth task is to enlighten people about rights through education and open discussion” (Heinze 1995,11).

⁹³ The proposed definition of discrimination is extremely comprehensive and suggests Wintemute’s effort to provide the widest theoretical frame: “one person may discriminate directly against another person either because of the sexual orientation of the other person or because of the sexual orientation of a specific instance of emotional -sexual conduct in which the other person has engaged. This will involve treating the other person less favorably than persons of other sexual orientation or than persons who have engaged in a specific instance of emotional-sexual conduct of another sexual orientation. One person may also discriminate indirectly against another person by applying a neutral requirement with which a disproportionate number of person of the other person’s sexual orientation are unable to comply and which cannot be justifies” (Wintemute 1995,10). This wording depicts the choice to subscribe a “neutral” notion of discrimination, since he never mentions homosexuality and the clauses above mentioned could be equally applied to heterosexual subjects. Though this choice might be criticized for not tackling the fact that concretely heterosexuals are not discriminated against because of their sexual pref-

cern only their effective enforcement. Throughout the book he argues that fundamental rights provide an adequate theoretical frame to secure lgbt people, and he suggests to target all efforts in claiming their enforcement. Even admitting that “greater attention under constitutional and international human rights law would not be a panacea for the problems of gay, lesbian, and bisexual persons” (Wintemute 1995, 254) Wintemute adduces their “tremendous symbolical value” to justify the support the juridification of lgbt movement.

Despite stating that “at first glance sexual orientation does not fit neatly into a list of other traditional grounds of discrimination” (Ivi, 250), he doesn’t fear eventual normalizing and disciplinary effects of legal system, suggesting, on the contrary, that it is possible to develop new instruments and to adapt the existing ones so to efficaciously enforce substantial equality under the already ratified human rights law.

The explicit working legal canon for GL studies is the international human rights law (Heinze 1998, 38) and they share a positivist perspective, without calling into question the foundations of international and rights system.

By this I do not sustain either that reformist proposals are too mild or that they convey social ideals indifferent from dominant ones; it’s however indisputable that they operate to reform the existing legal system and, depending on the observatory’s perspective, this could be both a vantage or a limit. Reformist strategies have more chances to win in Courts, since they have been fashioned according to a detailed legal knowledge, and structured with intellectual acuteness and strategic awareness; on the other hand, however, GL scholars may risk to consider only juridical and judicial realms, paying scarce attention to political, social, and cultural elements that still affect the daily life of lgbt community.

The analysis of GL studies on same-sex marriage provides a useful example to describe the internal multiplicity of reformist standpoints concerning the role of law and risks entrenched in human rights language.

Bamforth, for instance, identifies the arguments of justice suitable to support same-sex marriage by departing from the assumption that in “liberal societies [...] individual laws must have a sound normative justification in order to be regarded as morally legitimated” (Bamforth 2001, 27). The author recalls that coercion might be used to enforce the right to marry a same-sex person, for instance by obliging clerks to duly compile licenses and certificates, or to stress the necessity to ground lgbt claims to a “defensible normative justification” (Ibidem). To this pur-

erences, the absence of a dual, static, and binary definition of sexual orientation might also avoid to crystallize the differences, leaving room for nuances and refraining from victimizing lgbt people.

pose, the most indisputable argument of justice would recall the concept of “autonomy/empowerment” (Ivi, 41), which would serve practical goals, and which would prove as stronger than the arguments based on equality and respect for privacy. Conventional notions could be, then, shaped to serve reformist ends, and Bamforth confronts with opponents to same-sex marriage on their same theoretical ground, arguing that the very concepts of “autonomy” and “dignity”, as fashioned in Western thought, require legal protection for lgbt individuals and couples.

Bamforth shares with other GL authors the intent to morally legitimize homosexuality and, on this point, contests the idea that legal tolerance does not entail public recognition. Reappraising Nussbaum’s famous argument⁹⁴, if being denied to enter one of the most sacred institutions of our time demands a symbolic and cultural price, the possibility to enter it necessarily conveys the moral acceptance towards homosexual couples. Not only Bamforth, but also authors as Feldblum and Corvino stress quite convincingly that the legislator will vote in favour of recognizing same-sex marriage, only if she is persuaded that gay and lesbian relations are qualitatively equivalent to heterosexual ones⁹⁵; therefore in GL studies the liberal approach calling for a distinct division between morals and law is abundantly surpassed, for both public discourses and judicial arguments are soaked with references to the meta-judicial realm⁹⁶.

⁹⁴ Nussbaum highlights the symbolical meaning of marriage, focusing on social and psychological costs that lgbt couples have to bear when denied to enter the wedlock: “Marriage is both ubiquitous and central. All across our country, in every region, every social class, every race and ethnicity, every religion or non-religion, people get married. For many if not most people, moreover, marriage is not a trivial matter. It is a key to the pursuit of happiness, something people aspire to—and keep aspiring to, again and again, even when their experience has been far from happy. To be told ‘You cannot get married’ is thus to be excluded from one of the defining rituals of the American life cycle” (Nussbaum 2009, 668). As it emerges from the passage, she refers primarily to the Us context but similar conclusions can also draw from all those Countries where public authority holds the keys of wedlock and discriminates on the ground of sexual orientation.

⁹⁵ See Feldblum (2001, 55-75).

⁹⁶ In the case for same-sex marriage, reformists advocate the right to marry not only recalling constitutional principles but also stressing the similarity between heterosexual and homosexual couples as concerns the capacity to care, love, and commit to another person. The core element of marriage would lie, indeed, in the long-term, publicly expressed, exclusive, and dignified commitment and, as such, no relevant difference would oppose heterosexuals and homosexuals. Corvino (2005, 503) for instance strives to “deliberately [...] eschew the kind of reductivist thinking about sex that separates its physical from its emotional (or more broadly, personal) aspects”; Macedo pushes the moral valence of same-sex marriages further: he firstly acknowledges that the institutional wedlock distinguishes between valuable and not-valuable relationships (Macedo 1996, 29) and shows support to public policies that aim at encouraging better lifestyles without resorting to criminal laws (Ibidem). He distances himself, then, from the strict liberal conception of marriage, while endorsing the “attachment of benefits to the status of marriage on the ground that we have good reasons for encouraging people to settle down in long-term relationships” (Ivi, 43). Finally, he conceives marriage as an instrument to promote and persuade people to live according to moral principles, also noting that “extending marriage to gays and lesbian is a way of allowing that

Other authors reach similar result though supporting a different perspective. The concept of autonomy would fail to capture the relevance of social and collective dimension⁹⁷ (Cooper 2001, 77); similarly the moral status eventually conferred to gay and lesbian couples could marginalize those who do not fit into that model; put another way, reformist strategy might favor normative dynamics also in the lgbt community, rewarding those who engage in monogamous relationships. Cooper, most notably, articulates a critical response that, however, does not embrace queer and radical positions.

To the classic paradigm of individual equality, she substitutes the concept of “equality of power”, defined as the assumption whereby “all people should have the same level of capacity to shape their environment, whether discursively, by means of resources, or by recreating or disrupting disciplinary structures” (Ibidem). Interestingly Cooper aims homosexuals to be included in “systemic forms of power based on position and location in relation to [...] the law and family, as well as discourses which legitimate or rationalize current social relations” (Ivi, 78). Such position significantly clashes with LQ positions on the relation among rights, power, and disciplinary.

According to Cooper, the lgbt liberal perspective might imply the risk to extend dominant norms to minorities and, as such, to endorse diffused mechanisms of normalization.

The anti-systemic attitude of radical lgbt movement, as well as sexual and affective experiments alternative to the monogamous couple, are likely to result discouraged and labelled according to the negative prejudice that actually targets same-sex couples. Against this hypothesis, Cooper develops three main strategies. It is often argued that when a right is recognized to a new category of subject, its content will necessary acquire a different meaning, leading to a change both in the legal and in the social realm. For instance, ECtHR judgments against the criminalization of same sex acts favoured the social acceptance of homosexual relations, introducing a less heterosexist perspective within ECtHR jurisprudence. With reference to same-sex marriage, Cooper contends that it is possible to advocate for it while refusing to undermine other kinds of relationships or personal statuses. As she highlights, the rejection of hierarchy between different set

the natural lawyers are not totally wrong: promiscuous sex may well have the essentially masturbatory and distracting and valueless character [...]. We should offer [marriage] to all those whose real good can thereby be advanced: we offer [it] to the elderly and sterile, to gays and lesbians and not only to fertile heterosexuals. We provide everyone with help to stabilize and elevate their sexual relationships, and so to achieve the benefits that natural lawyers rightly claim for marriage” (Ibidem).

⁹⁷ “Liberal equality paradigms with their emphasis on the individual as both the object of equality and author of its achievement tend to divorce equality demo society. Extracting agency from the social liberal individualism does not deal with why someone would want to marry, treating it simply as a personal taste preference” (Cooper 2001, 77).

of interpersonal networks neither embraces the postmodernist ideal of a permanent deconstruction of subjectivities, nor does it expand “the borders of what counts as being in its proper place, for an equality strategy also needs to consider the implications of promoting certain statuses or practices on other aspects of social” (Ivi, 89).

The core of her proposal implies the transformative and innovative potential that would flow from the entrance of gay and lesbians in the wedlock. As Cooper asks “do lesbian and gay men enter these spaces through marriage and commitment ceremonies in too sober and respectful manner? Would greater levity, parody, or the explicit incorporation of non-heterosexual elements help to sustain same-sex marriage as spaces that are not proper places?” (Ivi, 90). Though Cooper does here refer to queer politics, it’s hard to say whether these coloured and alternative representations would overcome the constricting power of a secular institution. It’s possible that many gay and lesbian couples share common conventions about wedding ceremonies and would feel diminished by a ‘queer’ ceremony. Moreover, as Cooper notes, if straight people didn’t fraternize with lgbt couples, such behaviours would origin two separate paths where the homosexual one would presumably still appear as inferior. Precisely for this reason Cooper calls for an alliance with radical heterosexuals, in order to transversally dismantle the asset of marriage. To sum, all considered strategies aspire to reform institutions from their inside, legitimizing the foundational structure of existing social asset.

GL studies highly evaluate intersectionality and difference; the disembodied image of man depicted by the UNHR must become embodied and, to this purpose, GL scholars promote both the extension of subjects secured by international human rights and the specification of the catalogue of human rights.

Legal activists are aware of the power of law to define, legitimize, and shape social reality, and they also recognize that the normative content has to be carefully analysed, since it could vehicle marginalizing and oppressing dynamics. However, they contend that a critical perspective, highly responsive to lgbt community and its internal constellations, should suffice to pursue liberation through human rights.

Such stream of thought attaches to law an emancipatory function and it is confident that strategic litigation contributes to vehicle standpoints and practices that will reshape the meaning of legal provisions and public opinion’s attitude towards lgbt issues.

Effectively recent Us jurisprudence concerning sexual orientation has led to relevant changes: in the last few years gay and lesbian have been admitted to openly serve in the army, and in 2015 the US Supreme Court rejected the ban on homosexual marriages (*Obergefell v Usa*, n. 576 US_2015).

The presence of gay men and lesbian women in the army may facilitate a more respectful culture; same-sex marriage, on the other side, is a site to experiment a different organization of roles, neither gendered nor hierarchical, that could well affect also straight marriages. To such arguments LQ answer that regardless of all innovations, marriage and army would still lead homosexuals to adopt majority's behaviours and patterns of thought, instead of changing them.

From a LQ perspective heterosexism, discipline, and normativeness are tightly related; indeed, drawing on Foucaultian theory, law itself is a disciplining system, a set of rules and practices enforcing, promoting, and crystallizing social conventions, political identities, and power relations. As concerns sexuality, law both represses unconventional drives and regulates the others, "constituting and maintaining coherent sexualities" (Stychin 1995, 1), to the extent that, as it has been suggested, "the representation of same-sex genital relations within the particular social medium of law, [...] of legal practices that generate the specific social meaning that shape, invest and are given such a persistent voice through the medium of law" (Moran 1996, 8).

The working canon preferred by LQ authors are the discourses of parties involved, whether written or spoken (Stychin 1995; Moran 1996; Morgan 2001; Grigolo 2003; Johnson 2014; Gonzales 2014a; Gonzales 2014b).

Stychin, for instance, exposes a perspective endorsed by many other legal queers, according to which "legal discourse is an important site for the constitution, consolidation and regulation of sexuality and, in particular, of the hetero-homo sexual division. Sexuality is socially constructed and law participates in this process. That is, sexual subjectivity comes to be naturalized through a matrix of different discourses." (Stychin 1995, 7).

Similarly, Moran unveils processes which create the category of the "legal homosexual subject", with the aim to produce a detailed knowledge of mechanisms that regulate sexual sphere and to critically address them. If he were convinced of the inherent and immutable rotten nature of law, his long and passionate involvement in legal stances would appear hardly justifiable; in fact, he reconnects the value of descriptive analysis to the task of promoting a renewed engagement with law (Moran 1996, 201), in accordance with the famous principle by which "knowledge is not made for understanding, it is made for cutting" (Foucault 1990, 154).

Stychin and Morgan highlight the duplicity of law and argue that beyond oppression spaces of resistance and self-definition remain opened. Most notably, Stychin suggests that when law discriminates between deviant and normal sexual identities, it also determines the rising of unpredicted, but positive, effects: firstly, it's reasonable to presume that marginalized ones will develop their own linguistic, social, and relations codes, a structure, a common identity; consequently these communities will explore practices and identities that escape strict legal canons and that provide a tangible alternative to dominant models (Moran 1996; Stychin 2003).

Ultimately “legal prohibitions can inadvertently create discursive space for the articulation of the identity of the excluded ‘other’ in a field of legal and political contest” (Stychin 1995, 7).

If disciplinary power is entrenched to rights talk, such disciplinarity is never totalizing: law has some value to liberationist tasks and the main task of LQ theories is precisely to establish a bridge between legal doctrine and queer theoretical perspective, exploiting all positive resources offered by legal system.

Stychin defines law as a “dynamic and unpredictable” locus of struggle (Stychin 1995, 140) and further suggests that “law and legal reasoning can inadvertently contribute to the development of a queer political stance and identity. In this regard, legal discourse often inscribes sexuality in a queer fashion and [...] legal reasoning itself becomes a queer phenomenon.” (Ibidem).

Moreover the inconsistencies in legal reasoning, the contradictions in common law and judges’ opinions offer a unique occasion to study and approach law from a queer perspective.

On this point Johnson, whose standpoint stays in the middle between GL studies and LQ theories, investigates the social construction of the homosexual subject within the ECtHR jurisprudence looking at the “sedimenting effect” that reference to judicial arena has had on discourses of sexuality, heavily influencing public opinion about the alleged innate nature of sexual orientation or reassessing borders between private and public spaces (Johnson 2014, 9-10).

Clashes with Gay and Lesbian studies variously recur, on several issues. For instance the ‘essentialist’ argument endorsed by reformist movement has been widely criticized on the basis that it would remain into a normative binary and that would thereby justify a hierarchy casting off those who do not fit into either heterosexuality or homosexuality (Moran 1996)

Though admitting successes gained by LGBT community, LQ Morgan understands human rights as mostly normalizing devices, in that they would “take the abuses suffered by those who assert difference and colonize their experience to make them conformable to the structures and imperatives of the mythological national state” (Morgan 2001, 212).

Morgan’s polemic target is represented by the so-called ‘humanist’ framework endorsed by Heinze and Wintemute, based on the idea that legal institutions convey a benign point of view. Effectively both authors stress the gaps, problems and bias preventing the human rights law to properly function and they suggest to enlarge the already existing frame, assuming its inherent positivity for minorities’ claims.

According to Morgan, GL studies would not support an extensively bottom-up discussion about pillars of human rights, but they would examine minorities’ claims without completely detaching from a majoritarian perspective, placing a misguided ‘faith’ (Ivi: 213) in human rights, ignoring “the fact that [they] are shaped by governments and sit to their interests rather than the interests of citizens” (Ibidem).

One could however contend, as Bamforth does (1996, 227 and fol.), about practical effectiveness of LQ and, though admitting its philosophical and theoretical perspicacity, doubting whether such approach could lead to real and tangible improvements in human rights law.

Morgan points out three strategies that should translate queer perspectives about law into practice. Firstly, academics should pay attention to “the ways in which identity is constructed in legal texts [...]. It means attempting to refuse the fixity of sexual categories, to argue about identity borders, and to refuse to define what sexuality and any sub-category of it is” (Morgan 2001, 222). Then, “instead of focusing on these status questions concerning individuals labelled gay or lesbian, focus could be placed on questions of power, i.e. how law regulates differently individuals who claim outsider identities, how law assumes and privileges hetero nuclear families” (Ibidem).

Thirdly, it is necessary to open a discursive field in academic, lobbying and litigation enterprises in order to uncover and dismantle hierarchies of oppression, also avoiding ‘minoritizing’ discourses in coalition strategies both around same-sex marriage and families.

An excellent example that sheds an interesting light on the GL/LQ debate is offered by Stychin’s commentary on *Grant v Southeast Railways*, a complaint lodged with the European Court of Justice by a woman alleging she had been discriminated against for being lesbian by her employer, who had denied her benefits provided to married and cohabitant heterosexual couples.

In *Grant* lawyers tested the sex discrimination argument but Stychin’s main concern regards the context wherein certain rights were claimed⁹⁸.

Most notably, he follows two sharp intuitions that tie together the notions of politics of recognition, politics of redistribution, marriage, and capitalist economy.

At first glance the applicants, although lesbian, did respect the image of a typical working couple and, as such, Stychin argues that they “nicely fit into the parameters of EU laws” (Stychin 2003, 82); reasons of *Grant*’s dismissal have to be searched elsewhere. Government submissions catches an insightful glimpse, for they do not really dispute the entitlement of *Grant* to that circumscribed benefit but they express concern for potential consequences in the event state pension and social security schemes were extended also to lgbt couples. Therefore, he suggests the existence of a negative correlation between recognition and redistribution, in that States are like-

⁹⁸ Discussing the variety of approaches towards fundamental rights Stychin describes himself as “critical pragmatist” and evaluates rights according “to their pragmatic uses depending upon the precise context”, also suggesting that “rights struggles should not be divorced form broader social, political and economic movements for progressive change” (Stychin 2003, 78).

ly to easier recognize lgbt rights when they do not involve a significant revision of redistributive policies. Furthermore, since generally social policies favour married couples, Stychin aptly suggests that “maintaining the attractiveness of the institution of marriage and marriage-like relationships requires costly social engineering” (Ivi, 85). The relevance of holding delimited spaces for recognized relations would hinge non only on heterosexist assumptions but also on economical ones, namely on the idea that only a situation with a clear private/public division and asymmetric family roles is functional to successfully maintain capitalist economy. Stychin quite sharply addresses GL studies, by suggesting that “activists and academics should pay greater attention to whether that rendered economy is challenged by lesbian and gay legal struggles or alternatively whether the lesbian or gay subject is normalized within the political economy through the claiming of rights.” (Ivi, 84).

It seems clear that where GL studies pursue substantial equality and orient their strategies in order to mainstream lgbt claims within legal systems, LQ theories aim at a comprehensive, multiple-issues oriented critique, which interlaces libertarian, egalitarian, anti-liberalist criteria and highlights the political fashion of a similar legal theory (Stychin 2003, 76; Grigolo 2003, 1024-1028).

Valdes, for instance, clearly expresses such aspirations, in a sort of Legal Queer manifesto:

Queer legal theory must traverse the dangers of our culture and avoid replicating the androsexism and racism that is endemic to [...] society as a whole. [...] Queer legal theory can set an affirmative example of inclusive and expansive egalitarianism for the sexual majority to learn from and to follow. At the very least, Queer legal theory must be recognized as beneficial and urgent both to sexual minorities and to the sexual majority because it can help to ameliorate the sex/gender structures that delimit everyone’s critical legal thought, can help to uncover the hidden assumptions and arbitrary determinants of legal rules and actions, and thereby help to implement overarching ideals regarding equality and no-discrimination (Valdes 1995, 377).

Obviously also GL studies do have political relevance, since they push for legal reforms impacting on the policy agenda, but the meaning of political is differently declined by LQ authors. To the latter indeed ‘political’ is defined as the simultaneous a) involvement in the public arena, b) adoption of strategies and tactics borrowed from socio-political movements, c) endorsement of the altering of the social and cultural *status quo*, and d) empowering of a broad discussion bottom-up about which should be targets of lgbt movement, aimed at exploring claims regardless of their chance to be transposed in the legal system.

To sum, LQ perspective promotes the experimenting of new relational bonds, the expansion of spaces opened by the jurisprudence, the empowerment of all grey legal areas to dismantle the existing order, the rejection of any moral ‘quality medal’ conferred by public power, and the subversion of the actual hierarchy of values.

According to GL studies, on the other hand, Western imprinting of human rights could be weakened by the combination of several steps, among which I recall: a) the fostering a global reflection on liberties and entitlements worth to be secured (Thoreson 2009), b) the specification of subjects entitled (Wintemute 1995) c) the amending of Conventions and Covenants, so to address the issues that affect specific groups or minorities (Heinze 1995), and d) the endorsement of an intersectional paradigm in all decisional venues (Johnson 2014).

There are however a number of authors who combine suggestions from both approaches; Grigolo discusses how the ECtHR constructed the notion of homosexuality and he upholds that essentialist narratives introduced within ECHR interpretation have been functional to ‘privatize’ lgbt claims and reconnecting them solely to Article 8, ensuring the right to respect for private and family life (Grigolo 2003: 1027-1029). The assumption that sexual orientation is a private, innate human trait would, hence, allow judges to link the recognition of eventual same-sex couples to such realm, leaving untouched the notion of marriage secured by Article 12 (Ivi, 1039 and fol.). Grigolo’s conclusions have been deepened and widened in Johnson (2014), who locates the main limit of the ECtHR jurisprudence in the timid and gradual acknowledgment of the public dimension conveyed by many lgbt claims (Ivi, 210 and fol.). Gonzales further disputes over the ECtHR jurisprudence concerning transsexuals, “challenging the fixity of categories such as sex, gender and sexuality” (Gonzales 2014a, 799) and exposing normalizing effects of categories shaped by the Court by considering exclusively biological assets. According to Gonzales the refusal to approach transsexual issues independently from the medical gender reassignment would reinforce “the binary genders and heterosexuality. [...] Those transsexuals who have not yet undergone surgery are still not recognized, but this is portrayed as merely a temporary situation, since trans people are conceived as necessarily wishing genital surgery.” (Ivi, 828). From a queer perspective it might be far more desirable that the ECtHR recognized transsexuals claims to be treated as males in certain realms and as women in others, regardless of their genitalia (Ivi, 829).

However, it’s not utopian imagining a strategic litigation informed by queer stances, but a similar perspective surely requires an effort targeted both at exploring new theoretical paths and at paying attention to the side-effects of reformist tactics.

In conclusion, the quarrel involving GL studies and LQ theories leaves some space for dialogue. They confront over the same ground, which addresses the right to respect for family life,

to marry or to adopt but they carry specific reflection and, thus, enrich the overall debate on lgbt rights, allowing activists and academics to explore each claim from a multifaceted perspective.

According to both, law directly and indirectly conveys heterosexuality as the only desirable sexual model. Whereas GL studies solve this problem focusing on how to reform human rights law, LQ interrogate the law itself to unveil the fields where biased perspectives are proposed as neutral and natural. Thus, GL studies do positively value the conventional legal categories, but they decline them according to a minoritarian perspective, shaped by lgbt interests. LQ, instead consider themselves as part of a broader critical stream, focused on political activism, legal criticism and social dismantling of sedimented practices and beliefs. According to LQ theories, lgbt community should reject all promises of equality that carry normalizing and disciplining effects, and pretend policies able to really take into account their difference(s) as positive elements. It may be suggested that the fight against inequalities does not imply a levelling of differences; LQ do not dispute that such frame is ideally possible, but concretely the recognition of rights to lgbt people usually requires to fit into conventional lifestyles, while the majority rarely openly transposes linguistic or social practices borrowed from lgbt experience. Indeed, reformist public discourses usually place the accent on how gay and lesbian people are similar to heterosexual ones⁹⁹ (Sullivan 1995), while such comparison is rarely presented with reversed terms.

⁹⁹ One of the most famous reformists who embraces such perspective is Sullivan, who discredits radicals, libertarians, and queers by proposing a defense of same-sex marriage on liberal and conservative arguments. See Sullivan (1995).

2.4 Key Concepts of Documental Analysis

In this paragraph I draw from reviewed literature the qualitative criteria that delimit the frame of documental analysis.

Adopting a pragmatic perspective, I infer questions and categories useful to deconstruct situated standpoints and bias entrenched within ECtHR jurisprudence.

On a closer look, I focus on three concepts: the notion of heteronormativity, the dilemma of difference(s), and the distinction between private and public. They are relevant twice. Firstly they touch exposed nerves and problems internal to Feminist Jurisprudence, Gay and Lesbian studies and Legal Queer theories; secondly these realms attain to processes of neutralization, marginalization, and normalization of minorities and, as such, it's relevant to assess whether and how they affect judicial reasoning, especially when human rights are at stake.

2.4.1 The Concept of Heteronormativity

The term heteronormativity broadly remains to a normative asset revolving around the normative enforcement of heterosexuality, but its borders as well as its content appear blurred.

Effectively, heteronormativity stands at the intersection of multiple reasoning-lines internal to feminism and lgbt critique; as such, in defining its core features one could focus on different peculiarities.

Moreover, when discussing the normative implication of heterosexuality, political, philosophical, social and legal elements come into play; in order to subsume an 'operative' definition suitable to analyse ECtHR jurisprudence, I identify a number of essential elements for purposes of the present research, after an overview of relevant literature.

Heteronormativity relates to the normative imposition of heterosexuality within a specific environment. It affects beliefs systems (Ingraham 2006, 309), social practices, legal and political institutions and, more diffusely, it pervasively conveys the "heterosexual culture's exclusive ability to interpret itself as society" (Warner 1993, xxi), casting off any possible alternative understating of interpersonal relations. Consequently, a similar perspective is able to affect and seep through every space of public and private life.

The basic assumption implied by heteronormativity is twofold. Not only does heterosexuality, defined both as the sexual coupling with a person of different sex and as the subordination of women to men's supremacy, constitute the essential criterion to structure the relation between males and females, but it also justifies hierarchy as a core feature of our society. Reappraising Ingraham, heteronormativity "is the basis for the division of labour and hierarchies of wealth

and power stratified by gender, racial categories, class, and sexualities. It also underlies ideological struggles for meaning and value” (Ingraham 2006, 309). Effectively gender hierarchy, coupled with the alleged normality and naturalness of heterosexuality, transcends other distinctions, to the extent that gender and lgbt bias affects ethnic, religious minorities and disadvantaged groups.

Another tangible effect entails the marginalization, criminalization, and the silencing of alternative sexual orientations and gender identities; any deviation from the conventional model of heterosexuality is deprived of dignity, it is disqualified in its own social meaning, it is filtered according to the majoritarian perspective and labelled as quasi-human (Warner 1993; Stychin 1995).

The emergence of the concept of heteronormativity dates back to the second wave of feminism and particularly to the reflection of radical groups who began to challenge the heterosexual norm, depicted as “primary source of women’s oppression” (Ingraham 2006, 313).

If in the early ‘70s the debate mainly revolved around activism and self-consciousness groups, from the half of that decade onwards the discussion flooded within academia; in 1975 Bunch firstly developed a critical theoretical approach to heterosexuality, distinguishing between the ideology and the institution of heterosexuality, and arguing that they both affected society, mutually strengthening and legitimizing each other. She applied such a frame to delve into women’s economical marginality, stating also that labour market and social institution ideologically assumed that in the name of heterosexual model women had to be subjected to men (Bunch 1975, 34 and fol.).

It’s however Rich’s notion of ‘compulsory heterosexuality’ that is unanimously recognized as the main predecessor of heteronormativity. Whereas Bunch challenged heterosexual norm as the origin of women’s oppression without paying attention to marginalized sexualities, Rich focused on lesbian existence which had been traditionally erased from history (Rich 1980, 135) and she enriched the critical reflection against the heterosexual norm. Rich’s departing point is significantly sharp in respect of traditional feminist reflection: “any theory or cultural/political creation that treats lesbian existence as a marginal or less 'natural' phenomenon, as mere 'sexual preference,' or as the mirror image of either heterosexual or male homosexual relations is profoundly weakened thereby, whatever its other contributions” (Ivi, 131). Drawing on historical sources, Rich addressed the presumed normality of heterosexuality, disclosing the oppression imposed on lesbians and deconstructing the notion of heterosexuality as inevitable and preferable:

if we think of heterosexuality as the natural emotional and sensual inclination for women, lives such as these are seen as deviant, as pathological, or as emotionally and sensually deprived. But when we turn the lens of vision and consider the degree to which and the methods whereby heterosexual 'preference' has actually been imposed on women, [...] we understand differently the meaning of individual lives, [realizing that] heterosexuality has been both forcibly and subliminally imposed on women (Ivi, 138).

When this paradigm is applied also to gay men, heterosexuality becomes a compulsory, contrived, constructed, and taken for granted institution.

By stressing the artificial process of naturalization of sexuality, Berlant and Warner provide what has become the mostly quoted account of heteronormativity, understood as the “institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent but also privileged” (Berlant and Warner 1998, 11). Moreover such normative paradigm permeates popular imaginary, minutely instilling “a way of thinking which conceals the operation of heterosexuality [...] and closes off any critical analysis of heterosexuality as an organizing institution” (Ingraham 1996, 169); in view of this suggestions it could well be suggested that the principle of social union according to Western political thought is the heterosexual couple itself (Warner 1993, xxi).

As mentioned in chapter I, Duggan recently coined the concept of ‘homonormativity’, namely a set of neoliberal politics that “do not contest dominant heteronormative assumptions and institutions but uphold and sustain them while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption” (Duggan 2002, 179).

Homonormativity stands within radical queer legal theories, it is soaked with libertarian stances and it is informed by the intersectional glance typical of these approaches. However, I consider this concept not suitable to address the ECtHR jurisprudence for a number of reasons. Firstly, as far as progressive, lgbt friendly, and favourable to evolutive interpretation judges may be, they are not entitled to rewrite the Convention or to fully detach from the individualist and liberal paradigm that inspired original drafters. Secondly, it’s important to remember the content of claims lodged with the Court: in the vast majority they pretend equal treatment and the removal of discriminations; moreover they do not put forward queer arguments or libertarian stances, probably because they fear that such line would incur into a rejection.

Broadly speaking, the ECtHR is delimited by the wording of the Convention and the Court has jurisdiction only on a limited cluster of rights. Furthermore, if applicants filed an application whose content, normative or substantial, fell beyond ECtHR competencies, it would be deemed

inadmissible. Of course judges enjoy a margin of discretion in deciding admissible issues and arguments, but they move within a process of enlarging or restricting the gaps and flaws of the Convention, rather than operating a radical subversion of the Convention itself.

In contrast, a critique against heteronormativity is useful to deconstruct the moral assumptions of the ECtHR jurisprudence, because it does not pretend to criticize judges' reasoning according to parameters that judges actually can't meet, but it shows the disciplinary feature of existing legal system, unveiling and deconstructing the assumption of neutrality. As Morgan suggests, heteronormativity "entails understanding various ways in which law exercises power over individuals and communities" (Morgan 2001, 211); with reference to the ECtHR the emergence of lgbt litigation, indeed, questioned the prominence of heterosexual norm and, as Johnson argues, "in responding to complaints about heteronormative law, these judgments are examples of how judicial 'ways of thinking' are implicated in both the reproduction and disruption of heteronormative social relations" (Johnson 2011, 351).

Heteronormativity comprises a variety of shades and while some authors, such as Berlant, Warner, Rich stress the role of heterosexual norm in shaping cognitive structures by which we organize and evaluate the reality, others, such as Stychin, Morgan, Moran, Johnson, and Smart study how political, criminological, social, and legal institutions reinforce a heteronormative environment.

The relevance of law is unique and fundamental, for "practices, processes and doctrines of law are one of the most important mechanisms for ensuring the 'privilege' of heterosexuality" (Johnson 2011, 350). Law, indeed, distributes legal benefits through rights and at it clearly bestows valuable or not-valuable meanings to social and individual behaviours (Nussbaum 2009; Zanetti 2015). Smart famously wrote about the effortless privilege of heterosexuality (Smart 1996, 173): whereas culture and social environment lay the argumentative foundations for heteronormative society, it is precisely the legal system that proposes such normative framework as effortless, by marginalizing, prosecuting, ignoring other sexualities, and enforcing a "[a] hegemonic discursive/epistemic model of gender intelligibility that assumes that for bodies to cohere and make sense there must be a stable sex expressed through a stable gender (masculine expresses male, feminine expresses female) that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality" (Butler 1990, 151).

Focusing on international human rights law, it is essential to examine judicial standpoints that structure the reasoning and the wording, thus critically uncovering contending discourses that offer different and contrasting conceptions of the same concept (Morgan 2001, 218).

The notion of heteronormativity also provides a frame to discuss discourses that, though tolerating homosexuals, depict them as 'others', hence crystallizing their difference to better identify

heterosexual ones. On this point I share Morgan's argument, according to whom tolerance "is a common technology of liberalism, effective in maintaining an otherizing and subordinating hierarchy at the same time as it grants rights from its position of passionless neutrality" (Ivi, 220). The problem here implied is that tolerance results too often associated with negative judgments: "you don't tolerate something which is good (you celebrate it), you only tolerate things you would rather didn't exist. Tolerance is a practice of oppression" (Ibidem).

The European Court of Human Rights has a jurisdiction extended over 800 millions of people; even though the Court in each judgment addresses directly only the respondent State, it is extremely likely that at equal conditions the same interpretation of the Convention would be applied to other States. Moreover, ECtHR statements recurrently have a general impact, at least theoretically, and they have the authority to broaden the field of application of a specific norm, irregardless of the specific respondent State. As such, the ECtHR is increasingly treated as a policy institution (Johnson 2014; Hodson 2014; Anagnostou 2014) and because of its essential role in giving substance to ideals expressed in the ECHR, it can be considered as a vehicle in developing a "common soul of Europe" (Coleman 1999, 19)

Reappraising anti-formalist stances and Friedman's theories, judges are embedded within a social and institutional context that orients how they interpret their role and how they perceive the claims which they are called to judge. As Johnson suggests, in a socio-legal perspective

a useful way of thinking about how individual motivations may underpin forms of reasoning and decision-making is through a consideration of how the standpoints that individuals occupy influence both their comprehension of, and orientation to reality. Standpoints are not understood to result from 'will' but, [...] from our experience of the social relations in which we are situated" (Johnson 2011, 353).

Heteronormativity, thus, provides a theoretical and practical instrument to problematically address traditional heterosexual model, by analysing how it is pervasively conveyed throughout formal and informal rules, behaviours, and social expectations. It enables to denounce the normative character entrenched within conventionally undisputed codes of living and to reject the idea that such an understanding of sexuality or family would represent only an objective description of reality.

2.4.2 The Dilemma of Difference(s)

I already variously recalled the problematic issue of how to frame, claim and treat difference, and I explored the multifaceted and passionate debate internal to lgbt and feminist movement. Difference, indeed, emphasizes a dissimilarity, and although it can be positively asserted, it always traces a distinction. In fact, post-modern feminist and queer stream of thought stress the multiple declination of this concept, and argue it should be better to discuss of differences, so to comprise silenced identities built on the intersection of several marginal experiences.

The strain between ‘feminism of sameness’ and ‘feminism of difference’ lies at the foundations of feminist legal theory and it entails how to deal with existing differences. The answer to this question implies an in-depth evaluation of the concept of difference itself, for it brings to consider whether differences related to gender really exist or if they are socially and culturally derived.

Until 1970s, liberal feminism argued for the removal of all formal obstacles that denied gender equality and, most significantly, it placed emphasis on the sameness between men and women, denying that the latter went through social and cultural experiences which had to weight in the public sphere. Liberal feminists denied difference because Western justification for the subordination of women traditionally resorted to their peculiarity, with the aim to allege their unsuitability for public life.

During 1970s and 1980s a new claim of difference emerged, and younger generations of feminists reassessed the meaning of difference, arguing that it’s not fair to pretend that women compete within a society shaped by male values and rules, since such paradigm implicitly takes male model as the reference one and constricts women to adhere to it. Within the boundless feminist literature on this point I consider Young, Tronto and Scott extremely enlightening, both for their critical reflection over difference/sameness debate and for the direct implications of their work on lgbt issues. In *Justice and Politics of Difference* (1990) Young highlights the relation among the ideals of equality, difference and, respectively, the politics of assimilation and the politics of emancipation. The ideal of equality would imply

[a] strategy of assimilation, [that] aims to bring formerly excluded groups into the mainstream. So assimilation always implies coming into the game after it is already begun, after the rules and standards have already been set and having to prove oneself according to those rules and standards. In the assimilationist strategy, the privileged groups implicitly define the standards according to which all will be measured (Young 1990, 164).

As Young argues:

An emancipatory politics that affirms group difference involves a reconception of the meaning of equality. The assimilationist ideal assumes that equal social status for all persons requires treating everyone according to the same principles, rules, and standards. A politics of difference argues, on the other hand, that equality as the participation and inclusion of all groups sometimes requires different treatment for oppressed or disadvantaged groups. To promote social justice, I argue, social policy should sometimes accord special treatment to groups (Ivi, 158).

Scott describes a similar trap, and she warns that “when equality and difference are paired dichotomously, they structure an impossible choice. If one opts for equality, one is forced to accept the notion that difference is antithetical to it. If one opts for difference, one admits that equality is unattainable” (Scott 1988, 43).

With reference to lgbt claims the riddle revolves around the fact that homosexuals can't claim legal protection without comparing their experience to heterosexuals' one, traditionally assumed as normal. Since neither equal nor special treatment could effectively overthrow the normative assumption of heterosexuality as the departing point from which differences should be measured - the argument goes- the equality-difference dilemma does not entail a substantial criticism to heterosexual norm, which remains, on the contrary, the milestone both for the comparison and for the evaluation of minority claims:

the relatively powerless have to persuade the powerful to allow them to enter into the circle of power that already exists. In trying to make such a persuasive case, the powerless have only two options available to them to change the distribution of power [...]: to claim that they should be admitted to the centre of power because they are the same as those already there, or because they are different from those already there, but have something valuable to offer to those already there. Thus [...] the strategic problem of trying to gain power from the margins necessitates the logic of sameness or difference in order to persuade those with power to share it. Once this framework for analysis is accepted, then there is no logical way to escape from many dimensions of difference dilemma. The outsiders, who must on some level accept the terms of the debate as they have been historically and theoretically constructed by those in the centre of power, must choose from that starting point one of two positions on the question of difference (Tronto 1993,15).

From the perspective of traditionally oppressed groups, dealing with difference is also extremely complex, both on a descriptive and on a normative level.

Operatively, how can judicial response be critically analysed? Among the many approaches, I will focus on Minow's reflection of legal traps that, though maintaining an aura of neutrality, relegate minoritarian groups at the margins of the society. First of all it's necessary to stress the complexity posed by the so called 'dilemma of difference' (Minow 1987, 157), namely the risk that either by ignoring or by recognizing the alterity judges pose a burden on different ones and subtly reinforce a majoritarian understanding of reality¹⁰⁰. Secondly, depending on how Courts perceive differences, judges might endow perspectives not entirely soaked with dominant assumptions; this chance requires, however, to admit that differences are relational (Minow 1987, 32).

"Is difference an objective, verifiable matter rather than something constructed by social attitudes?" asks Minow (Ivi, 34) and even if some objective differences existed, do they justify different legal treatment? If so, which differences are worth of legal relevance? To all these questions Minow answers lingering on the social constructed meaning of difference. In the vast majority of cases, indeed, legal practice identifies, names, and shapes differences, giving them normative, moral, political, and social poignancy. Even when addressing an objective difference, for instance the fact that men do not become pregnant, it's easily rebuttable whether such feature should suffice to justify a legal frame enforcing women's domestic seclusion.

As a general and superficial overview of Western jurisprudence shows, judges rarely adopted a similar critical standpoint, assuming on the contrary differences to be intrinsic, stable, objective and indisputable (Minow 1985; 1987).

Treating someone differently implies however a comparison¹⁰¹ and "when differences are discussed without explicit reference to the person or trait on the other side of the comparison an unstated norm remains" (Minow 1987, 39).

¹⁰⁰ Minow argues "the dilemma of difference has three versions. The first version is the dilemma that we may recreate difference either by noticing it or by ignoring it. [...] The second version of the dilemma is the riddle of neutrality. Of the public schools must remain neutral toward religion, do they do so by balancing the teaching of evolution with the teaching of scientific arguments about divine creation - or does this accommodation of a religious view depart from the requisite neutrality? [...] The third version of the dilemma is the choice between broad discretion which permits individualized decisions and formal rules that specify categorical decisions for the dispensing of public - or private- power" (Minow 1987, 12-13).

¹⁰¹ "Legal treatment of difference tends to take for granted an assumed point of comparison: women are compared to the unstated norm of men, minority races to whites, handicapped to able-bodied, and minority religions to majorities. Such assumption work in part through the very structure of our language, which embeds the unstated points of comparison inside categories that but their perspective and wrongly imply a natural fit with the world." (Minow 1987, 13)

A critical analysis of jurisprudence is, thus, called to uncover unstated premises and to investigate their impact. A further question, descending from the alike theoretical frame, considers the mechanisms by which judges mantle their standpoints with natural assumptions.

It's appropriate to explicit that often assumptions covering biased standpoints are used not consciously and judges might be convinced to work without prejudice.

According to a quite common expectation, judges would be able to "see without a perspective" (Ivi, 45). Starting from the premise of static and objective differences, it logically follows that a versed legal judge could recognize untainted facts and to judge accordingly. But such aspirations, as Minow suggests, remains just that, since "it may suppress the inevitability of the existence of a perspective and thus make it harder for the observer or anyone else to challenge the absence of objectivity" (Ivi, 45-46).

In the argumentative model endorsed by the ECtHR, the Court generally pays attention to the applicants' position and deals to ascertain if it falls under the ECHR jurisdiction. They, thus, aim at weighting argumentations and, therefore, they apparently do not take into account any prejudiced suggestion.

However, if considering the judge as a person influenced by cultural, social, political, and legal variables, it is likely that when sensitive issue about conventionally marginalized groups are at stake, the majority of judges will consider other's perspective "irrelevant" (Ivi, 50).

Other's perspective could be ignored, simplified, twisted, misinterpreted or, more probably, understood through the interpretive and cognitive lens of majoritarian assumptions. The most trivial way to neutralize the other's perspective is to openly rejects it, while the most sophisticated includes an apparent evaluation of minoritarian positions, insofar they can be reconnected to the majority and normalized.

As Gilman suggests, stereotyped thinking deals with anxieties and desires for control (Gilman 1985, 23), it nullifies the individuality of the person, enclosing it in a predefined category and making the reality familiar and unsurprising.

The main consequence of a similar reasoning line is assuming that "the status quo in natural, uncoerced and good" (Minow 1987, 54). Prescriptions and practices inscribed in the tradition are generally justified precisely because of their historical roots, held as an inheritance from our ancestors which ensures social cohesion and mutual networks. As Minow considers, these propositions are "rarely stated" and deeply "entrenched", to the extent that *status quo* and stability are generally seen as synonyms of a positive continuity with the past, even when resulting inadequate to the present context (Ibidem).

When studying legal texts, these questions help to study what lies beyond asserted neutrality, to promote a conception of human rights devoted to complexity and sensitive towards a depiction of the judiciary as filled of competing interests.

Rephrasing Minow's conclusions about engendered justice, judges are sensitive about sexual orientation when they "admit the limitation of their own viewpoints, [...] reaching beyond those limits by trying to see from contrasting perspectives and when [they] seek to exercise power to nurture differences to to assign and control them" (Ivi, 95).

Finally, I share Minow's urging for stressing judicial partiality

through deliberate attention to our own partiality we can begin to acknowledge the dangers of pretended impartiality. [...] Admitting the partiality of the perspective that temporarily gains official endorsement may embody resistance to announced rules. But only admitting that rules are resistible and by justifying to the governed their calls for adherence can justice be done in a democracy (Ibidem).

The notion of difference rests on the comparison between at least two terms; likewise, also judicial review strongly refers to comparison, especially in non-discrimination issues. In similar cases judges are called to decide whether two or more groups deserve to be treated as equal and, to this purpose, they have to decide which similarities different groups share, first, and then to weight them with dissimilarities, if any, and finally to judge whether differentiated treatments amount to discrimination.

As such, it proves useful going beyond the final judicial outcome, to discuss canons whereby differences have been defined, typified and incorporated in the interpretation of law.

2.4.3 Between Private and Public

‘The personal is political’ declaimed a common feminist political slogan during the 1970s, meaning that the social asset typical of private realm conveys oppressive dynamics that have to be uncovered and publicly addressed¹⁰². The distinction between private and public, the denounce of risks associated with the former, and the critique of the latter as moulded on majoritarian ideals have characterized all contemporary social and political movements, from Feminism to Race theory, from marginal studies to lgbt theory (Minda 1995, 83-167).

When discussing legal rights, the question becomes even more harder, for Western thought has generally sanctified the private sphere as intangible, by appointing a legal system targeted at enforcing such separation, and at withdrawing from any regarded as galling behind private walls.

The asymmetric division of familiar roles was legitimized by family statutes that denied women the right to vote, to inherit, to have properties, or even to work without their husbands’ consent¹⁰³.

Privacy amounted, therefore, to a chain that constricted women and, at the same time, that rendered their experience, desires, and claims socially invisible and politically irrelevant.

Okin devoted much of her work to challenge the private/public distinction (Okin 1979, 1989, 1999), arguing that this binomial would be the origin of most gendered inequalities and abuses and that its very existence would require “the division of labour among the sexes” (Okin 1999, 118). Upholding an historical perspective she also highlights the entrenched patriarchal nature of liberal rights, in that

from the seventeenth century beginnings of liberalism both political rights and rights pertaining to the modern liberal conception of privacy and the private have been claimed as rights of individuals [...] assumed to be adult, male head of households. Thus the rights of these individuals to be free from intrusion by the state [...] were also these individuals’ rights not to be interfered with as they controlled the other members of their private sphere - those who whether by reason of age, or sex, or condition of servitude were regarded as rightfully controlled by them and existing within their sphere of privacy. (Ibidem).

¹⁰² For an introduction to the feminist critique of ‘privacy’ see Hanish (1969), available at <http://www.carolhanisch.org/CHwritings/PIP.html>; Pateman (1988); Olsen (1993, 319- 327); MacKinnon (1987); Landes (1998)

¹⁰³ For an introduction to Us jurisprudence on this issue see Hoff (1991). An accurate history of european women’s condition is offered by Duby and Perrot (1994); See also Scott and Tilly (1975, 36-74); Simonon (2006).

In respect of sexual orientation, the binary between private and public has developed quite differently from that based on gender issues, and also the current debate over this binomial identifies advantages and disadvantages, both in stressing the privacy and in focusing on the public dimension of sexual orientation.

Historically criminal sanctions against same-sex acts infringed the private realm and denied that individuals should enjoy a space where to decide with whom having sexual relationships.

Unsurprisingly, thus, homophile movement and early advocacy groups challenging criminal laws pledged to the recognition of a private individual sphere. For instance, in the famous Us case *Bowers vs Hardwick*, gay applicants alleged that police should refrain from prosecuting them for engaging in homosexual acts within the walls of their bedroom; the majority of the Court, however, denied that “Constitution confers a right of privacy that extends to homosexual sodomy” (*Bowers v Hardwick* 1986, White opinion) . In 2003 Us Supreme Court overturned this doctrine in *Lawrence v Texas*, recognizing both the lgbt right to sexual privacy and their freedom in choosing to engage in homosexual acts.

Also in the UK, in France and in other Western countries where homosexuality was prosecuted, the privacy argument proved extremely useful and it favoured the decriminalization of such sexual behaviours (Wintemute 2001).

Yet, on a closer look, the appeal to privacy leads to problematic outcomes, potentially collapsing over the famous figure of the ‘closet’, namely the metaphor to indicate the phenomenon of people who publicly pretended to be heterosexual and then, with few intimates and friends, admitted their orientation (Stychin 1995, 140 and fol.).

Whereas heterosexuality has always had a strong public value, until recent times homosexuality has been presented as a private and dishonourable matter. As Grigolo prods

it must be clear [...] that this private choice must find a parallel recognition in the public sphere. Indeed ‘private’ is simply the choice of assuming a sexual identity or engaging in sexual behaviour; [...] the right to choose sexual activity and sexual identity starts, but does not end, within one’s private life” (Grigolo 2003, 1040).

In a similar situation lgbt people would be only tolerated, but certainly not equally valued to heterosexual ones.

Moreover, the intangibility surrounding the institution of family has legitimized informal sanctions against lgbt members, the spreading of homophobic education and, until very recently,

Western legislators did not even discuss the necessity to provide safe familiar cultural and social environment for lgbt young people, exposed to a higher risk of suicide and attacks.

Non-discrimination claims pledge for the public relevance of homosexuality, as a personal feature that deserves to be protected; until domestic or international authorities insist that the only enforceable rights concerns the right to privately engage in same-sex acts, this implies that any public display of one's own sexual orientation might threat her security. Just to quote a famous example, the Us 'don't ask, don't tell' policy did not consider homosexuality in the army as a crime, only requiring that gay and lesbian soldiers kept this feature secret. Any public disclosure of an alleged private feature justified the expulsion from the army¹⁰⁴. As Valdes recalls "the implementation of the Gays-in-the-Military compromise illustrates [that] current conceptions of privacy can be used by dominant forces both as a shield and a sword against sexual minority equality claims" (1995, 370).

Between 1993 and 2010 hundreds of gay and lesbian soldiers were forced to wear a public mask, to dissimulate their identity according to a psychological mechanism named passing, which bears negative consequences for subjects' stability (Belkin 2003).

Furthermore, I consider Valdes critique valuable also to describe risks connected to an excessive 'privatization' of (homo)sexuality:

the misuse of privacy is wholly incompatible with dignity and acceptance because the appearance of equality is granted only at the price of a secrecy not borne by members of the sexual majority. [...] the insistence that only lesbian, gay, and bisexual service members keep their sexuality private (and secret) works like a sword that beats back the expression of sexual minority identity while, at the same time, the privacy of the sexual majority is waved as if shielding legitimate concerns and social justice (Valdes 1995, 370-371).

The entrance in the public arena, on the contrary, allows lgbt to proudly claim their difference, to pretend equal rights, to fight for statutes against discrimination and for the legal recognition of families they choose.

There's little to argue about the relevance of dismantling all legal differences, and also LQ theories support strategic litigation, especially when concerning work field, assistance and health care.

¹⁰⁴ See also Belkin and Bateman (2003); Zanetti (2015).

Furthermore, I would distinguish between entering the public arena and engaging in strategic litigation, or endorsing political compromises. Queer theory, indeed, is all about going public, about dismantling the closet, puzzling heteronormative division of spaces, and invading the presumed desexualized public space with queer practices and discourses.

Queer strategies, thus, are both public and political, in that they pursue the aim to break the fundamental assumptions about sexuality, and to seep through spaces not entirely covered by oppressive and regulatory legal power¹⁰⁵.

Strategic litigation might be a part of the aforementioned frame, insofar it supports a deep criticism of private/public binary; as concerns human rights law, the overwhelming majority of activists criticizes the ‘privatization’ of fundamental rights concerning sexuality, though welcoming the ensuring of private spaces where living same-sex sexuality. One of the main problems that threatens the effective empowerment of human rights related to sexual orientation and gender identity is bound, indeed, to the fact that international Courts often confine the existence of lgbt pretences to a narrow sphere, without fully taking into account consequences that lgbt persons have to face in everyday public life. Furthermore, States not tolerating homosexuality argue that sexual policies fall within domestic sovereignty, and often adduce cultural or religious particularist justifications, adding difficulty to the global affirmation of gay rights.

Further narrowing the perspective on Western context, the binary public/private has been problematized from a plurality of perspectives.

With reference to Us jurisprudence Wintemute delved into the already mentioned *Bowers v Hardwick* case, questioning whether if the applicant’s claim had been recognized the Court decision would have amounted to a “watershed decision, like *Brown vs. Board of Education*” (Wintemute 1995, 47).

The argumentative reasoning followed by *Hardwick*’s counsel and endorsed by a minority of judges was anchored on mild claims; against the threat that *Hardwick* case might open to anti-discrimination statutes or same-sex marriages, his counsel suggested that the applicant “claimed no right whatever to have any homosexual relationship recognized as marriage” (Ivi, 48) further highlighting that even if the Court upheld *Hardwick* complaint, such judgment would “not cast doubt on any administrative programs that states might fashion to encourage traditional hetero-

¹⁰⁵ “Queerness challenges the boundaries through which constraints have been imposed upon sexual expression, for crucial to a sexually radical movement for social change is the transgression of categorical distinctions, between sexuality and politics, with their typically embedded divisions between public, private and personal concerns. [...] The challenge to sexual boundaries offered by many queers in the 1990s also included sexual practices themselves.” (Stychin 1995, 152).

sexual unions” (Ibidem). The fact that the Us Supreme Court did not entail work discrimination or family laws effectively demonstrates how Wintemute concerns about the constraints of shaping lgbt claims upon ‘privacy right’ were well grounded. He raised similar criticism also in respect of the ECtHR, stressing the tendency to frame every lgbt complaint under Article 8, which secures the right to respect private and family life. More recently Johnson (2014) conducted a careful research on ECtHR jurisprudence, further enhancing previous conclusions. On the one hand he admitted the Court’s reluctance to consider claims about freedom of assembly, freedom of speech, or in respect of human dignity, emphasizing that

the Court still relies upon a public/private binary when interpreting the Convention in respect of sexual orientation complaints [...] leav[ing] unaddressed a range of discrimination experienced in public sphere” (Ivi, 212). On the other, however, he optimistically identified many reasons to positively evaluate the potential of Court’s jurisprudence in expanding the protection available to lesbian and gay people under the Convention (Johnson 2014, 210).

The picture Johnson suggests is that of a system wherein lgbt applicants are expanding existing spaces and creating new ones, suitable to respond to their own demands.

The ultimate assumption lies in the belief that judges, however slowly and gradually, embody a crucial bastion for equality all across Europe.

Such optimism is not entirely shared by Grigolo, whose compelling ECtHR criticism is essential for any work that aims at discussing the bound between judicial reasoning and sexual orientation. In particular, the qualification of lgbt rights as ‘exceptional’ and equated to minorities’ rights favours a “minoritization” (Ibidem) of lesbian and gay people, who become a stable group, defined according to majoritarian perspectives and not to their own self standards. Indeed, in human rights law field “in order to achieve recognition, the homosexual legal subject has been presented as the legal counterpart of the heterosexual within a sexual diary logic” (Grigolo 2003: 1027) and, furthermore, “homosexual rights are [...] eventually obtained in the light of social changes but necessarily in terms of their acceptability in relation to the predominant moral and behavioural standards of heteronormativity” (Ibidem).

Against such frame Grigolo suggests to critically investigate how this ideal of a heterosexual legal subject capillary permeates the frame of fundamental rights, in order to dismantle this hierarchy and to support the creation of a universal sexual legal subject.

Among critical legal queer I finally recall Morgan, who though displaying an extreme suspicious attitude in respect of human rights, does not ignore their potential. In even more abrupt terms, he label privacy rights as discourses that maintain the

notion of good citizen, who keeps sexual matters hidden. This silences sexual differences. [...] A sexual rights discourse based on tolerance and privacy amounts to no more than hetero law makers simultaneously assimilating a perceived threat by extending 'rights' (tolerance), whilst maintaining the subordination of those perceived as the threat (by validating heteronormativity). (Morgan 2001, 220-1).

While Johnson, Wintemute and, to some extent, Grigolo imply that framing lgbt claims as public demands would probably lead both to a significant bettering of lesbian and gay life's conditions and to an internal redefinition of conventional institutions, Morgan endorses a radical perspective, informed by Stychin, Moran, and Valdes, suggesting that only within a queer perspective the publicity of human rights could really liberate lgbt people without forcing them to accept disciplining policies.

Both Gay and Lesbian studies and Legal Queer theory, as well as Feminist jurisprudence, however, share an essential assumption, whereby public and private are instruments to mainstream inequality and marginality. Maleness and heterosexuality are generally paired with public realm, while femaleness and homosexuality remain closed in the narrow private space; moreover law is associated with public, while regulation of private is generally left to informal practices and traditions. Moreover, when reference to privacy does not imply the protection of individual preferences, but it imposes the restriction of certain acts or expressions on the grounds they would presumably offend majority, it can be argued that 'privacy' just becomes a synonym for oppression and intolerance.

2.5. Critical Discourse Analysis: Going Beyond Judicial Neutrality

As far as compelling, the criteria described above are in between theory and practice and, as such, it's necessary to ground my research by referring to a rigorous methodology.

Critical discourse analysis (CDA) offers a valuable frame. Quite interestingly it has been generally applied to politics, press, public speaking, and business discourses, but there's a gap on legal texts and judicial reasoning.

Critical discourse analysis arose as a branch of Critical Linguistics (CL), but it soon became a distinct stream of qualitative analysis. Van Dijk and Wodak offer a first, general definition of such method, as a "perspective on doing linguistic, semiotic or discourse analysis" (Van Dijk 1993, 131), where language is considered "as social practice and takes into consideration of the context of language use to be crucial. Moreover, CDA takes particular interest in the relation between language and power" (Wodak 2002,1-2).

Critical attitude, interdisciplinary, and heterogeneity of perspectives mark this field and, among the authors who embrace it, I will refer only to those who appear most suitable for my work¹⁰⁶.

The notion of critique has been variously declined: Krings defines it as "the practical thinking of social and political engagement with a sociological informed construction of society" (Krings 1973, 808) while Fairclough recalls the aim of making visible the "interconnectedness of things" (Fairclough 1985, 747) that would remain otherwise covered and go unnoticed.

The idea of unveiling what usually remains hidden is central also to Wodak, according to whom CDA should analyse "opaque as well as transparent structural relationships of dominance, discrimination, power and control as manifested in language [...] it aims to investigate critically social inequality as it is expressed, signalled, constituted, legitimized and so on by language use" (Wodak 2002, 2). Also Van Dijk endorses a similar perspective, further suggesting that "CDA is a critical perspective on doing scholarship: it is [...] discourse analysis with an attitude. It focuses on social problems and especially on the role of discourse in the production and reproduction of power abuse or domination" (Van Dijk in Wodak and Meyer 2002, 96). Furthermore, he stresses the importance to depart from marginalized perspectives, in order to support their struggle against inequality (Ibidem).

I particularly share Van Dijk's intertwined frame between methods and politics, since it seems a suitable method to delve beyond the alleged neutrality of judicial discourses. Unlikely other

¹⁰⁶ For an introduction to Critical Discourse Analysis see Van Dijk (1984); Fairclough (1989); Wodak and Meyer (2002); Wodak (2008).

scholarship CDA “does not deny but explicitly defines and defends its own socio-political position. That is, CDA is biased and proud of it.” (Ibidem).

If bias means a connection among different realms, then biased methodology such as CDA is not necessarily bad research, but it simply refuses the conventional tradition that would address each realm as separated and isolated from the others.

On the contrary, CDA is a rigorous field of work, where theoretical elements must account for complexities bounding discourse and social structures. As Meyer notes, CDA is not a single method but rather an approach shaped to critically investigate social reality (Meyer 2001, 14). Hence, political arguments and anti-discriminatory yearnings are distinctive and entrenched to such method:

CDA scholars play an advocacy role for groups who suffered from social discrimination. It [...] is evident that the line drawn between social scientific research, which ought to be intelligible, and political argumentation is sometimes crossed. [...] it is a fact that CDA follows explicit power relationships which are frequently hidden and thereby to derive results which are of practical relevance” (Ivi, 15).

Language is considered as a social factor as well, thus, recalling the Foucaultian idea that vocabularies, rules, meanings, and concepts are socially constructed and, at the same time, that they build social roles, behaviours and expectations by themselves.

Discourse, hence, can be defined as a “linguistic action, be it written, visual or oral communication, verbal or nonverbal, undertaken by social actors in a specific setting determined by social rules, norms and conventions” (Wodak 2008, 5).

Judicial reasoning, consequently, is a typical example of written discourse, undertaken by Courts within the specific setting of rules and norms defined both by relevant sources and by rooted practices of its judges.

I also borrow Wodak considerations about the genre of European resolutions, and apply them at ECtHR judgments; she highlights, indeed, the conjunction of declarative models, the vagueness of the text, the presence of many abstract terms combined with prestigious words and grammar metaphors that endorse a strong feeling of impersonality (Ivi, 18).

Whether written or spoken, CDA treats discourse as a communicative event where cognitive elements play an important role. More specifically, Van Dijk defines cognition as “involving both personal and emotions and any other mental or memory structures, representations or processes involved in discourse and interaction” (Van Dijk in Wodak and Meyer 2002, 98)

and, thus, he aims at going beyond asserted neutrality, objectivity and equality of a chosen communicative event, disclosing power and bias which secretly shape it.

Quite obviously a complete discourse analysis, especially when there's a large corpus of texts, is impossible and, consequently, a choice is unavoidable; departing from CDA standpoint it's therefore necessary to identify the structures and the properties that are relevant for inquiring a set of theoretical issues.

I consider prominent Van Dijk's observations concerning the levels and the dimensions of discourse. Firstly, topics can be structures as "semantic macrostructures", that represent "what the discourse is about globally, embody most important information [...] and explain overall coherence of text and talk" (Ivi, 102).

Semantic macrostructures gather global meanings common to users and they identify abstract principles, constituting the ideal and "high-level" concepts-based structure of a whole discourse¹⁰⁷ (Ibidem).

Next, it's necessary to further detail the macrostructures into "local meanings" (Ibidem), which investigate the cluster of lexical elements such as adopted words, the structure of propositions, and the relation among them.

Far from being just a linguistic operation, local meanings reflect, partially and even indirectly, mental models of writers and their socially shared beliefs (Ibidem), tracing a useful path to discuss assimilative and marginalizing discursive dynamics.

For instance, when screening the text, it could be useful to search for those local structures that polarize the imaginary into in-groups and out-groups. Strategies of simplification and strategies of stereotyping positive and negative poles have to be detected, with the intent to unveil the relation among the choice of words and specific ideological standpoints; also the excessive focus on presenting "our good things when their good things are de-emphasized" (Ibidem), and the logical flow by which events are presented at the reader are categories helpful to reconstruct mental models of writers.

¹⁰⁷ Van Dijk offers an accurate example how to identify semantic macrostructures. Drawing an example from a text drafted by the Centre for Moral Defense of Capitalism, he quotes a petition in defense of Microsoft and divides it into 7 semantic macrostructures, very schematic but entrenched with abstract and high-level concepts: "M1: antitrust laws threaten the freedom of enterprise. M2: Successful businessmen are being represented as tyrants. M3: the suit against Microsoft is an example of this trend. M4: The government should not limit the freedom of the market. M5: Microsoft has the right to do with its products what it wants. M6: innovators should not be punished. M7: we call that the case against Microsoft be dismissed" (Van Dijk in Wodak and Meyer 2002, 102). Thus, he suggests to firstly divide the text into macro-structures and, then, to delve into microstructures for each macro-level, so to delve more in depth into documental details.

Thanks to this method it is also possible to study the eventual recurrence of assimilative mechanisms, which might arise when including new subjects in the enjoyment of existing rights, for instance by framing a minority according not to its specificities but solely on the ground of elements that appear acceptable from the majority's point of view.

Another relevant example of local meanings entails the study of "many forms of implicit or indirect meanings" (Van Dijk 2002, 104). Implications, presuppositions, allusions, and vagueness descend from mental models applied to the text, although not directly expressed; as Van Dijk argues "implicit meanings are related to underlying beliefs, but are not openly, directly completely or precisely asserted, for various contextual reasons, including the well-known ideological objective to de-emphasize our bad things and their good things" (Ibidem).

Local meanings could be understood as functional to develop "discourses [...] saturated with categories and images that for the most part rationalize and justify in myriad subtle ways the existing social order as natural, necessary, and just" (Gordon 1981,16).

Besides semantic macrostructures and local meanings, it's also important to analyse so-called event models, namely the boundaries that shape, limit and orient the comprehension of facts called into question, to the extent that "it is not the facts that define coherence but rather the ways the facts are defined or interpreted by language users in their mental models of these facts. These interpretations are personal, subjective, biased, incomplete or completely imaginary (Van Dijk in Wodak and Meyer 2002, 111).

Such hypothesis recalls Pound's and anti-formalists stances against the traditional legal doctrine and it further reinforces the double law/society dynamic above described.

2.6 Conclusive Remarks

In this section I highlight how my theoretical and methodological frame is informed by issues previously analysed.

The aim of this research is to go beyond asserted neutrality of the ECtHR reasoning; hence I propose a sociological approach to the ECtHR jurisprudence endorsing a comprehension of judicial system as a site of power (MacKinnon 1989, 237 and fol.), as an arena where interests clash, where policies are challenged, and where dynamics of power shape the final outcome.

Reappraising Durkheim, law is a mechanism for the embodiment of primary moral relations of organic societies (Durkheim 1997, 43); in the context of the ECtHR judges are called to give meaning to flaunting signifiers, to draw the exact line below which States violate the Convention. If judicial discretion is openly recognized, Feminist jurisprudence, Gay and Lesbian studies and Legal Queer theory argue that also political, moral, religious perspectives, as well as prejudices, heavily affect the substantial asset of human rights law.

As Johnson suggests (2014, 14 and fol.), Courts perform a crucial role in reinforcing or disrupting heterosexist and biased judgments; throughout their reasoning, they can refer to scientific and social evidence, they are enabled to recur to experts' opinions, to question and challenge conventional assumptions or, otherwise, to close off any space for a critical reading of the *status quo*.

I look at law from a perspective that aims to mediate between positivist reformism *à la* Heinze and queer authors, such as Morgan, who ultimately focus only on the global dimension of human rights and who stress the urgency to entirely debunk conventional political and philosophical foundations of law.

Human rights, for instance, are product of a Western, male-oriented and liberal philosophical tradition; nevertheless, they still provide a practical and symbolical instrument to challenge existing inequalities and to promote minorities' claims. Metaphorically speaking, human rights are an arsenal to handle with care, for only through an accurate analysis of the risks and the side-effects entrenched, they prove useful in pursuing equality and freedom of oppressed ones.

From feminist perspective, the foundations of contemporary legal systems share negative attitudes towards women and both juridical provisions and judicial procedures are understood as a site where power relations are moulded and inequality is enforced. Consequently, judicial interpretation relates as to the production of knowledge as to heterosexist or gendered stereotypes; on the one hand, indeed, the Courts often perceive and judge through the lens of a heterosexual male model, usually backed and not even discussed while, on the other, judgments have long produced a biased legal knowledge, legitimizing, conferring veracity, and developing a jurispru-

dence prescribing different criteria to treat men and women, heterosexuals and homosexuals. Thanks to their authority and to the adoption of a highly formal language, knowledge arising from judicial review has been portrayed as neutral and objective, as if it gave a privileged and impartial reading of broad society.

In such a frame, I study judicial discourses following Smart's and MacKinnon's approach, whereby reasoning about the law display concepts moulded by the existing balance of power, enhancing a system of knowledge not only about law, but concerning also the broad society.

Quoting MacKinnon, "law is a particular potent source and badge of legitimacy, and site and cloak of power" (MacKinnon 1989, 237) and it presumes a strict bound between juridical legitimacy and social power, for the former underpins legitimacy while the latter conceals the power (Ibidem).

As MacKinnon passionately argues, without a critical perspective aimed at disentangling potentially oppressive mechanisms, law and jurisprudence tend to crystallize inequality and to promote the introjection of a male/heteronormative perspective "through legal mediation, male dominance is made to seem a feature of life, not a one-sided construct imposed by force for the advantage of a dominant group" (Ivi, 238); Courts' jurisprudence may well represent an essential moment in the construction of mirror-imaged inversions as truth.

When, for instance, judges uphold the criminalization of same-sex acts, they construct a specific jurisprudential approach and label homosexuality as socially undesirable, as unjust, and as inferior to heterosexuality.

However, as explored in previous sections, judicial review can also foster, defend, and endorse changes targeted at building a fairer and a more equal socio-legal environment, providing minorities or disadvantaged groups with legal and symbolic resources to improve their life conditions and to modify the several bias hanging over them.

With reference to sexual orientation, Courts are enabled to justify either a traditional or a progressive conception of sexuality and family: judgments favourable to lgbt claims disrupt conventional jurisprudence and, likewise, they confer legitimacy to the set of values proposed by the applicants, sometimes adjusting them to the existing narratives and sometimes drawing approaches which overcome previous interpretations.

Either way, judges actually choose between contrasting narratives of events and, when sensitive issues are concerned, also between alternative systems of values, that impact on the interpretation of law and on the symbolic attribution of meaning to concrete events.

As such, I propose a reading of the ECtHR jurisprudence informed by the description of diachronic changes within ECtHR jurisprudence and focused on the judicial role in legitimizing values and endorsing certain life models as the most desirable.

Social and political inputs are translated according to human rights language and logic to be, then, channeled in the ECtHR system, where judges decide whether they are admissible and, if so, adjudicate such claims on the ground of the ECHR provisions.

The passage from social meaning to juridical concepts, values, arguments and language, may occur through three steps, at least, that can also overlap: firstly, judges have to identify relevant facts and essential features; then, they are called to ascertain which values and, consequently, which Articles can be applied to the present case; thirdly, in case the ECHR has been breached, it's up to ECtHR judges providing legal outputs, namely jurisprudential answer. As Pound argues, each phase opens for a variable degree of discretion.

Given the peculiar nature of the ECHR, the distinction between law-declaring and law-making is extremely blurred, for it may be suggested that when human rights are concerned, any decision could however hide a relevant amount of judicial law-making.

Paraphrasing Friedman, I uphold that the opinions about gender identity and sexual orientation mold the law. Law is not impartial, nor is it gender-neutral or does it traditionally treat heterosexuals and homosexuals equally; it is not value free but, rather, it reflects the existing distribution of powers and social forces (Friedman 1975, 178).

Since in the last decades lgbt movement has become a relevant social force, committed to promote legal change through strategic litigation, legal system has increasingly integrated a less biased perspective; thanks to the activation of law at the hands of lgbt groups, previously unstated heterosexist prejudices have been called into question, to the extent that nowadays in the Us system lgbt people are regarded as a quasi-suspect category¹⁰⁸ and also in Europe the burden of proof rests on those who support a differentiated treatment, instead than on those claiming equal rights.

As such, Courts still endorse situated interpretations of law and, whether favorable to lgbt claims or not, judges perform law-making functions, in accordance with hypothesis of Pound and Friedman.

¹⁰⁸ In *Windsor v United States*, n. 12-2335, the 2nd Court of Appeal stated that the Defense of Marriage Act required “heightened scrutiny” (§ 24) to assess whether it discriminated against same-sex couples. More in detail, the Court upheld that homosexuals met all four criteria established by US jurisprudence to identify suspect classes “ A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority” (25, 8-14). The Supreme Court, however, has not clarified yet whether sexual orientation fits into an identified suspect class. See Zanetti (2015, 91-95).

Judicial discretion can be thoroughly investigated thanks to the concept of internal legal culture, which precisely stresses subjective elements shaping judicial attitude towards law.

According to both Friedman and Cotterrell, the legal culture of a given institution, such as the ECtHR, can't be considered as monolithic but, rather, it has to be treated as the outcome of internal forces that confront over legal, institutional, and value-oriented perspectives.

More in detail, ECtHR judges adopt, interpret, and apply doctrines though being influenced by extra-legal perspectives, or by assumptions not strictly related to the case; thus the link between judicial interpretation and legal doctrine leaves room for discretion and creativity.

I borrow from Cotterrell the notion that "legal ideology [...] can be regarded as made up of value elements and cognitive ideas presupposed in, expressed through and shaped by the practices of developing, interpreting and applying legal doctrine within a legal system" (Cotterrell 2006, 89). As previously pointed out, however, I prefer the concept of legal culture, for it embraces also elements which can't be fully judged in accordance with the notion of ideology, such as those which concern judicial beliefs about ECtHR tasks without directly entailing sexual orientation.

On a closer look, I refer to the explanatory notion of legal culture, whereby I aim to assess and describe the correlation between social elements and legal doctrines/methods (Nelken 2004, 10).

How can the analysis of ECtHR judgments prove useful to delve beneath the neutral and objective surface of these discourses? And how is it possible to go beyond the primary task of judicial reasoning to account to legislative power (Friedman 1975, 388 and fol.)?

I suggest a twofold approach, taking into account separate opinions and possible bifurcations they create (Rivieré 2004).

Separate opinions provide evidence of internal pluralism and allow the researchers to evaluate the nature of eventual disagreement¹⁰⁹; they testify the actual existence of discretion and, at the same time, they represent the "repressive alternative interpretations" mentioned by Gordon (1988, 17).

Were opinions only concurring, it might be suggested that, although offering various reasoning-lines impacting on the adjudication of the case, ECtHR judges would unanimously share a certain interpretation of ECHR and, as such, it might be contended that the only ground of disagreement would revolve around how to meet criteria imposed by ECtHR derivative legitimacy.

¹⁰⁹ It's possible to draw similar conclusions for the European Commission of Human Rights, which operated as gatekeeper in respect of applications lodged within the ECtHR, until its destitution in 1998. For an extensive analysis of this issue see chapter III.

Dissenting opinions, instead, open a quite different scenario, for judges disagree also on the substantial interpretation of the ECHR and, thus, on the meaning to attach to specific human rights. Given the same wording, the same language, and a quite cohesive legal culture (White and Boussiakou 2009a; Arold 2007), judges still develop opposite legal answers, therefore legitimating the doubt of extra-judicial elements underpinned to their reasoning.

Both concurring and dissenting opinions can be investigated by distinguishing the bifurcations they create; Rivieré proposes an interesting qualitative classification of the ECtHR jurisprudence, based on the reason of disagreement; more in detail, she selects among a) disagreement addressing the foundation of judicial reasoning b) those involving a criticism on the consistency with the ECtHR case-law, c) opinions concerned with admissibility issues and fact-finding, d) those concerned with substantive rights, e) opinions motivated by an alternative methods of interpretation, literal or purposive, of the ECHR. (Rivieré 2004, 464).

Thanks to this proposal, it's possible to further delve into the open argumentative model endorsed by the ECtHR and to effectively shed light on internal ECtHR contending narratives, questioning the hierarchy of values and the legal image of homosexual subject here endorsed. By combining Friedman and Rivieré I aim at applying a socio-legal critical frame to the structure of judicial reasoning.

As to the criteria to delve into the content of ECtHR judgments, I draw on Gay and Lesbian studies, Legal Queer theory, and Feminist jurisprudence; as to the methods I refer to Feminist jurisprudence and Critical Discourse Analysis.

I identify three main guidelines, namely the notion of heteronormativity, the treatment of differences, and the relation between public and private sphere.

Through the concept of heteronormativity I intend to delve into the ECtHR role in upholding and in dismantling the normative understanding of heterosexuality. More in detail, I strive to identify past and present mechanisms whereby judges adhere to or, on the contrary, critically review the idea of heterosexuality as the exclusive legitimated sexual and social model. Most notably, how are judges eventually affected by a heteronormative understating of the ECHR? Do they convey throughout their judgments a legal and symbolical heteronormative conception of sexuality, affectivity and family? Looking at the changes occurred in the ECtHR case-law over time, which trends can be identified? And which frame emerges if one adopts a synchronical approach? Whether and how do ECtHR judges adhere to a heteronormative perspective?

How did/does the ECtHR read and conceptualize claims proposing different and innovative paradigms of family? Is the Court likely to innovate the interpretation of the ECHR or, on the contrary, is it likely to arrange original claims in order to coherently integrate them into existing and normalizing narratives?

Furthermore, given that the notion of heteronormativity implies a strict division of men's and women's duties, and it supports the image of women as mostly devoted to the private realm, to caregiving, nurturing and motherhood, does the ECtHR endorse different approaches in respect of applications raised respectively by gay men or lesbian women, especially on parenting? Focusing of the dilemma of differences, I reappraise Minow's partition to discuss the ECtHR positioning when dealing with minorities who claim legal relevance. As she and other scholars suggest (Bobbio 1995), apart from criminalization there are a myriad of sophisticated ways whereby the majority deals with minorities and, at the same time, it conveys mechanisms of domination, marginalization, and oppression.

Which majoritarian traps mark the ECtHR jurisprudence concerning sexual orientation? Namely, how is difference recognized and treated? Is it merely tolerated or positively evaluated, similarly to features such as personal beliefs, race, ethnicity or gender? To what extent does majoritarian labels about specific issues bind minorities to structure their claims, to shape them in order to result feasible with unstated legal premises? How do premises shape judicial review of relevant facts and admissible arguments?

Moving to mechanisms whereby social inputs are transformed in judicial outputs, how is other's perspective treated? Does it remain irrelevant or is it taken into question, either gradually or entirely? Do judges critically reason about the traditional interpretation of the ECHR or do they simply depart from it, leaving its premises unstated? How do judges filter other's claims, how do they deduct relevant arguments from the many put forward? Are these simplified, twisted, or understood through the interpretive and cognitive lens of majoritarian assumptions? Whether and how does the ECtHR consider *status quo* as uncoerced, natural and good (Minow 1987, 54)? To what extent does the ECtHR critically engage with assumptions developed by jurisprudence, both diachronically and synchronically?

Lastly, turning to the distinction between private and public sphere, and looking at how it affects judicial framing, how does the ECtHR deal with these two dimensions? Does the ECtHR confine lgbt claims in the private realm, for instance by mainly upholding arguments which remain in this realm, by reframing lgbt demands, or by rejecting positive obligations aimed at tackling lgbt public inequality?

How has the ECtHR evolved in respect of claims entailing public sphere? Whether and how does the separation between private and public emerge throughout judicial review? Does the ECtHR jurisprudence verify the criticism, shared by most Feminist jurisprudence and legal lgbt scholars, whereby the powerful majority monopolizes - legally, politically and symbolically- public arena while it binds oppressed groups into private and invisible spheres?

For sake of clarity, I have displayed different questions separately, but in documental analysis it is extremely likely that such concepts will result intertwined, since they are much more similar to three fibers composing the same thread, than to three concepts sealed off from each other.

Among feminist methods I reappraise the ‘woman question’, which in this case can be defined as the ‘lgbt question’, with the intent, paraphrasing Clougherty (1996,7), to i) delve into the biased substantive arguments, procedural rules and jurisprudential doctrines that, at first glance, appear neutral and objective, ii) to expose how the ECtHR jurisprudence excludes the experience and the values of lgbt applicants and, iii) to shed light on doctrines and practices which favor and perpetuate unequal treatment against homosexuals.

Chief queries, deducted from the broad variety of ascribable to ‘lgbt question’, are: what assumptions, descriptions, assertions and/or definitions of experience does the ECtHR make in the area of lgbt claims? What is the area of mismatch, distortion, or denial created by differences between lgbt life experiences and assumptions of the law? (Wishik 1985, 72-75; see p. 47) Although not developed within feminist stream of thought, CDA offers a valuable method to treat texts following a logical path.

As explored in section 2.6 CDA considers discourses according to a frame strongly informed by critical and anti-formalist stances. Hence, language is put in relation with power (Wodak 2002) discourse is considered as a social fact, a venue where interests and power converge and confront, and one of main aims of CDA is precisely to make visible the “interconnectedness of things” (Fairclough 1985: 747), which otherwise would remain hidden and undisputed.

I intend CDA as a guideline to identify most significant passages and to understand which signifiers could be linked to the presence of biased standpoints; the main focus of the research does pertain to values, arguments and reasoning displayed by judges of the ECtHR and within this perspective I evaluate the structure, the grammar or linguistic forms of judgments.

Consequently, I refer to semantic macrostructures, chosen words and clusters of lexical elements (Van Dijk in Wodak and Meyer 2002, 102-104) to unveil the relation among linguistic outputs, interpretive approaches and shared beliefs of the Court.

CHAPTER III. METHODS AND DOCTRINES OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

“Europe is threatened, Europe is divided,
and the greatest danger comes from her divisions.
Human dignity is Europe’s finest achievement,
freedom her true strength.
The union of our continent is now needed
not only for the salvation of the liberties we have won,
but also for the extension of their benefits to all mankind.
Upon this union depend Europe’s destiny and the world’s peace.”
Message to Europeans, 1948

3.0 Foreword

This chapter critically addresses the legal features embodied in the judicial system built by the European Convention on Human Rights, and it discusses the jurisprudential methods developed by the European Court of Human Rights. In paragraphs 3.1-3.2 the most relevant traits concerning the machinery established by the ECHR will be outlined, highlighting the drafters’ aims, describing the values which underpin the Convention, and detailing the institutions aimed at enforcing the ECHR. Then, in paragraphs 3.3-3.4, I move on to critically consider the theoretical standpoints as well as the doctrines developed by the judge, with particular attention to eventual inconsistencies and problematic aspects.

Among the possible perspectives, I consider the ECHR as the outcome of a precise political, diplomatic, and legal compromise. As a consequence, I look at its methods and doctrines of interpretation as a crucial instrument, by which the ECtHR pursues both the enforcement of human rights and answers to extra-judicial demands derived from national authorities and international institutions.

Most notably, the ECtHR appears bound to prove its impartiality, to attest its ability to manage unstable political balances, and to get out of a possible reading of the ECHR as a constitutional charter.

This chapter makes use of the ECtHR’s official documents, of opinions and notes delivered by the ECtHR’s judges, and of essays and articles written by scholars and non-judicial actors, which place the analysis in the context of the Council of Europe.

3.1 The European Convention on Human Rights

The European Convention on Human Rights was opened for signature in Rome on 4 November, 1950, and it entered into force three years later.

According to the provisional text, the validity of the ECHR was subordinated at the ratification of the Convention by at least ten States, with the threshold being reached in 1953.

Though nowadays it is actually recognized and celebrated as a safeguard against abuses and crimes perpetrated by public actors (Wildhaber 2004, 83 and fol.), the drafting process was far from simple and the project seemed about to fail on numerous occasions.

It's worth recalling such debate, for it dismantles the myth of a Convention as the outcome of an uncritical legal and political vision. Indeed, as it may already be known, when interpreting the ECHR, the judges frequently resort to the notion of the original *ratio*, as if the drafters had endorsed a unitary perspective on human rights.

By so doing, the Court abolishes the harsh divisions out of which the ECHR arose, and it supports the image of a 'seamless' theoretical background. Moreover, it's often suggested that the judges should read the ECHR in light of the original goals, while dismissing creative interpretations as potentially inappropriate, politically-twisted, or contrary to the ECHR *ratio*. For instance, former judge Mahoney, quite cryptically argues that "evolutive interpretation does not permit the judicial creation of new rights or freedoms, rights and freedoms not already protected by the text. The only matter which can be evolutionally interpreted - and perhaps expanded into unforeseen fields of applicants- is a matter which is already explicit or implicit in the text" (Mahoney 1990, 66). The argument behind such reasoning is that States should not be bound by obligations exceeding the Convention they signed -as discussed below- however, the clash between activist and traditional legal conceptions marked the ECHR's history from its very origins.

3.1.1 The Historical Background

The drafting of the European Convention on Human Rights took place in a rapidly changing environment, shaken by international political tensions and marked by new legal paradigms (Mowbray 2007; Bates 2011; Madsen 2011). The course of the Second World War, the creation of the United Nations, and the beginning of the Cold War heavily affected Western society, and they marked the theoretical and pragmatic horizon wherein the members of the newborn Council of Europe (1949) began to evaluate the proposal of a regional alliance, aimed at protecting human rights.

The impact of the Second World War on Western thought is widely addressed and I do not intend to analyze it in detail, yet I will simply stress that the “copernican revolution” (Bobbio 1990, 55) from duties to rights was finally carried out in reaction to the atrocities perpetrated in those years¹¹⁰: as a consequence, natural law theories shaped the national Constitutions approved in late 1940s and the contemporary legal paradigm of human rights.

The League of Nations had proved completely useless in preventing Hitler’s power, and it was clear that in the absence of supranational mechanisms of enforcement, any legal system aiming to limit national discretion would result totally ineffective.

To overcome previous outdated international institutions, the newly created United Nations took the first step towards the foundation of contemporary human rights law, drafting the Declaration of Human Rights, proclaimed on 10 December 1948.

¹¹⁰ “Con una metafora usuale, si può dire che diritto e dovere sono come il retto e il verso di una medaglia. Ma qual è il verso e quale il retto? Dipende dalla posizione da cui guardiamo la medaglia. Nella storia del pensiero morale e giuridico questa medaglia è stata guardata più dal lato dei doveri che da quello dei diritti. Non è difficile capire il perché. Il problema di ciò che si deve fare o non fare è un problema prima di tutto della società nel suo complesso piuttosto che dell’individuo singolo. I codici morali e giuridici vengono posti originariamente a salvaguardia del gruppo sociale nel suo insieme piuttosto che dei suoi singoli membri. La funzione originaria del precetto di non uccidere non è tanto quella di proteggere il singolo individuo quanto quella di impedire la disgregazione del gruppo. Prova ne sia che questo precetto, cui si attribuisce un valore universale, vale di solito solo all’interno del gruppo, non vale nei riguardi dei membri di altri gruppi. Affinché potesse avvenire il passaggio dal codice dei doveri al codice dei diritti occorre che fosse rovesciata la medaglia: che si cominciasse a guardare il problema non più soltanto dal punto di vista della società ma anche da quello dell’individuo. Occorre una vera e propria rivoluzione. La grande svolta ebbe inizio in Occidente dalla concezione cristiana della vita [...]. La dottrina moderna del diritto naturale, quale fiorì nei secoli XVII e XVIII, da Hobbes a Kant, ben diversa dalla dottrina del diritto naturale degli antichi, e che culmina nel kantiano «sii persona e rispetta gli altri come persone», può essere considerata per molti aspetti come una secolarizzazione dell’etica cristiana («etsi daremus non esse deum»)” (Bobbio 1999, 433-434).

Here, the individual human being stands at the core of the entire architecture: it is recognized that States play a fundamental role in enforcing the Declaration, but the final aim was to establish a procedure allowing individuals to claim satisfaction against their own governments too. At least officially, the Westphalian model of international relations had been replaced by the UN model (Stirk 2012); the former envisaged States as the exclusive legal actors of international law, it recognized the complete autonomy of national authorities, and ultimately pursued the global balance of national interests. According to the latter, national sovereignty was restricted by human rights law, to the enforcement of which all States were actively involved (Pariotti 2013, 48). In addition, the idea of armed conflicts as “the continuation of politics by other means” (von Clausewitz 1884, 87) was replaced by an outset of peaceful procedures targeted at dispute resolution; the foundations for a new environment based on diplomacy and mutual respect were thus laid down¹¹¹ (Cassese 1990; Falk 2000; 2008; Pariotti 2013).

In May 1948, movements in favor of European unification gathered at The Hague for an intensive congress, presided by Winston Churchill, and they carefully discussed the challenges that the Countries had to face. The congress finally approved a legal and political manifesto, which reflected both fears and hopes which were relatively widespread throughout Western Europe: “Europe is threatened, Europe is divided and the greatest danger comes from her division”, the speech proclaimed, further warning “our disunited Europe marches towards her end. [...] Without a freely agreed union our present anarchy will expose us tomorrow to forcible unification whether by the intervention of a foreign empire or usurpation by a political party” (Message to Europeans, 1948).

This message not only implied the possibility that an authoritarian party could gain power again, but it also gave enormous emphasis to a nameless foreign empire that could destroy European values, among which “human dignity is Europe’s finest achievement [and] freedom her true strength” (Ibidem).

¹¹¹ The extent to which international law manages to affect national authority is widely debated: the line between Westphalian and UN model is blurred and, perhaps, these two models actually coexist. States still perform an essential role in enforcing or infringing human rights, and none of existing international bodies is equipped to effectively ensure human rights without cooperating with local institutions. Moreover, also narratives about Westphalian have been challenged, on the ground that it would convey a myth, giving excessive emphasis to national sovereignty and not taking into proper account the horizontal relations that marked contacts among States before the UN Charter. See Gross (1948); Morgenthau (1985); Krasner (1995); Beaulac (2000); Osiander (2001).

The fear that a free Europe could be overrun by Communists favored a sense of anxiety and uncertainty, which ultimately encouraged Western governments to pursue their dream of European integration. The Greek civil war, the Prague coup, and the installation of communist regimes in Poland, Hungary, Czechoslovakia, Romania, and Bulgaria worsened the urgency felt by Western governments to contrast Soviet dictatorship, in the field of principles and rights too. As Paul-Henry Spaak, one-time President of the Council of Europe's Consultative Assembly, joked "the person who did the most to create the Council of Europe was Joseph Stalin" (Robertson 1963, 4).

Within this dazzling context and despite the different interests pursued by each State, governments opted to support the image of a cohesive Europe, able to stand for democratic values and to go beyond mere economic solidarity.

3.1.2. The Drafting Process of the European Convention on Human Rights

In the above mentioned Message to Europeans, the European movement called for the adoption of a “Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition” and for the establishment of a “Court of Justice with adequate sanctions for the implementation of this Charter” (Message to Europeans, 1948). Though vague, these provisions aimed to foster European unity, based on a common heritage of values and, above all, focused on the defence of liberal democracy. Elsewhere, the message highlighted the economic disadvantages due to European division, and it promoted the freedom of movement; yet the core element remained the suggestion of a Charter and a Court empowered to enforce human rights.

This project gave pre-eminence to civil and political freedoms: human dignity and liberty were considered to mainly develop through political rights and by means of a considerable margin of autonomy from public power.

The following year, the European movement transmitted a draft of the aforementioned Charter, named “the European Convention on Human Rights” to the European Committee of Ministers, supplied with explanatory notes on possible criticisms. At first, the Committee ignored the invitation of the European movement to debate the issue, to the extent that Churchill had to force the hands of the Committee, by sending them a detailed request, signed by fifty eminent international figures, to discuss issues related to human rights (Bates 2011, 22).

Quite predictably, no State desired to be the ‘one’ who prevented free debate over such a delicate topic: therefore unanimous consent was finally achieved, and the draft of the Convention reached the European Assembly.

As Simpson notes, this episode demonstrates that the “majority [of the governments] in the Council of Europe were, whatever their pretensions in public, unenthusiastic at the prospect of international European human rights protection” (Simpson 2001, 667).

The first draft of the Convention was minimalist and fully deferent to national authorities; the so-called freezing clause provided that “each signatory would undertake to maintain intact the rights and liberties selected for protection under Art 1, to the extent that [they] were secured by the constitution, laws and administrative practice existing in each country at the date of the signing of the Convention” (Article 6).

States were only obliged not to breach the pre-existing human rights laws and not to refuse their implementation. In the Commentary, the authors vaguely suggested that, in the long term, the aim was to create a substantial European Convention but, at the same time, they recognized this

project to be extremely ambitious, if not unrealizable, and therefore they declared themselves to be satisfied with preventing backlashes from the *status quo*.

The underpinned concept was to establish an ‘alarm bell’ against authoritarian threats¹¹² and, at the same time, to build a “Conscience of Europe” (Ibidem), aimed at securing, fostering, and empowering European values.

However, the Assembly soon resulted divided between two main trends: the first, expressed by Fyfe, and supporting a strict minimalist Convention; the second, led by Teitgen, and considering the drafting of the Convention as the first step towards a wide process of European integration, a milestone in the creation of a common Bill of Rights. To further complicate this situation, a fierce group envisaged the project, alleging that European countries already secured human rights. Perhaps exaggerating, Teitgen reassured national representatives about the limited power of the Convention, ensuring that “what we are going to ask these States, is to undertake to respect these freedoms and they shall not be dragged—if I may use this vulgar expression—before a Commission or a Court, unless they have, in an obvious way, broken these fundamental, essential and restricted undertakings” (Teitgen 1976, 29).

Consequently, the no-Convention proposal was defeated and the main issue became the asset of the Convention-to-be.

Despite his ambitions, Teitgen understood that a European Convention could be approved only as a result of a compromise with moderate trends; the final proposal, was thus restricted to the fundamental freedoms essential to ensuring personal independence and a dignified way of life. Most notably, the Teitgen Report upheld the fundamental principles of democratic regimes as “the obligation on the part of the Government to consult the nation and to govern with its support, and that all Governments be forbidden to interfere with free criticism and the natural and fundamental rights of opposition” (Ibidem).

During the drafting process, the internal fractures revolved around the possible inclusion of three rights, namely the right to free elections, the right to property, and the right to education.

¹¹² The Teitgen Report clearly defines this perspective as a guarantee, demonstrating “the common desire of the Member States to build a European Union in accordance with the principles of natural law, of humanism and of democracy, it will contribute to the development of their solidarity; it will fulfill the longing for security among their peoples; it will allow Member States to prevent—before it is too late—any new member who might be threatened by the rebirth of totalitarianism from succumbing to the influence of evil, as has already happened in conditions of general apathy. Would fascism have triumphed in Italy if, after the assassination of Matteotti, this crime had been subjected to an international trial?” (Teitgen 1949, 218)

As for the right to free elections, the UK and France were still colonialist nations and discouraged any hint that could encourage already rising nationalist movements; the Dutch and Belgian government, also worried about their trembling possessions, backed the opposition against a too inclusive right to free elections¹¹³.

Worries about property however, did reflect the fears of a Communist threat. On one hand, property was broadly recognized as the precondition for individual independence, and delegates were aware that authoritarian regimes usually began their rise by confiscating private properties; on the other hand, the general protection of the right to property would have delegitimized the policies of nationalization launched by European socialist governments, such as the British one.

Education had been focal for Nazism, which had indubitably built a tremendous machine to indoctrinate pupils, and in its aftermath, Western Countries strictly supervised that public schools did not to spread communist theories. Nevertheless, an eventual provision ensuring families the right to education, against the State's possible interference, opened problematic margins of autonomy to religious and philosophical groups¹¹⁴.

Another feature that nowadays appears striking, is that social rights were not significantly considered, neither in the debate nor in the final ECHR.

Despite the fact that national legislations and Constitutions were increasingly recognizing socio-economic claims as essential to democratic systems, the approach of the European Commission towards this issue is well exemplified by a passage from the above mentioned Teitgen Report:

¹¹³ The original text of the ECHR did not include the right to free elections. In 1952, however, the issue was discussed again and broadly disciplined by Protocol 1. Article 3 of Protocol 1 reads "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

¹¹⁴ Both rights were addressed in the above mentioned Protocol 1. As to education, Article 2 recognizes that "no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions". As to private property, Article 1 solemnly states: "every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

professional freedoms and ‘social’ rights, which have in themselves a fundamental value, must also, in the future, be defined and protected; but everyone will understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union, and then to co-ordinate our economies, before under-taking the generalization of social democracy (Merrills and Robertson 2008, 8).

I would read this tendency in light of two main reasons: firstly, social rights were associated with Communist ideology and deemed as dangerous; in addition to that, the recognition of social or economic human rights would have posed positive obligations upon States, namely to remove inequalities or to provide services, causing an increase in public expenditure. It can be easily imagined that a similar chance would have provoked a massive refusal to sign the Convention, ultimately leading to the complete ineffectiveness of the ECHR itself.

The quest to balance political interests with peculiar understandings of human rights, and the urgency to define a common language affected the specificity of rights ensured; for instance, concepts such as ‘right to life’ and ‘human dignity’ were not further defined, leaving room for a progressive enlargement of their meaning and leaving certain points to national discretion, for instance as far as death penalty was concerned. Exemption clauses were also introduced with regard to many rights, as explored in paragraph 3.1.3.

Teitgen’s dream of a common Bill of Rights seemed defeated; looking at coeval commentaries, however, Tyfe’s image of an alarm bell also appears quite exaggerated, as the ECHR was widely considered as a simply programmatic, useless, declaration of intents.

During the opening for signature at Palazzo Barberini in Rome, the Consultative Assembly’s President commented “it’s not a very good Convention, but it’s a lovely Palace” and the following year Green expressed a shared but trenchant opinion of the ECHR:

In view of the wide exception clauses tending to negate the value of the Declaration of Rights, and the difficulties attached to the inception of the Commission and the Court—difficulties which no State appears willing to overcome—and the unwillingness of the members of the Council of Europe to ratify the Convention, one is tempted to apply the words of Horace to this document: ‘parturiunt montes, nascetur ridiculus mus’ (Green 1951, 444).

Perhaps original drafters did not fully capture the potential entrenched in the ECHR, probably because European leaders were still bound to the Westphalian paradigm, and hence they were sure that the ECHR would have functioned as a State versus State institution. In fact, given that in 1953 the control of the enforcement of the ECHR rested with the Committee of Ministers -

for the ECtHR only became effective in 1959, - the whole human rights system was subject to political, or at least, *quasi-judicial* influence (Bates 2011, 35).

3.1.3 The Essential Features of the European Convention on Human Rights

The literature on the history of the ECHR, on its features, and its functioning is almost boundless, and it embraces several perspectives; from the legal to the political perspective, from the philosophical to the sociological one (MacDonald 1993; Turner 1993; Dembour 2006; Letsas 2006; Mowbray 2007; Madsen 2013; Harris, Boyle, Bates and Buckley 2014; Kauppi 2014). Hence, I will only touch upon the most relevant aspects, further detailing other implications if required.

The Preamble openly recalls the Universal Declaration of Human Rights and identifies it as the theoretical referent of the entire Convention. Section I comprises of eighteen articles and it represents the core of the ECHR, for it determines which rights are fundamental, and thus it gives voice to the “common heritage of political traditions, ideals, freedom and the rule of law” named in the Preamble¹¹⁵.

The subjects mentioned by the Convention are the individuals, who are entitled to the rights declared, High Contracting Parties, who bear the duty to apply the Convention, and the ECHR institutions, entrusted with the task of supervising national compliance with ECtHR’s judgments. The concrete tone of the obligations imposed on public authorities can be grasped by referring to Article 1; it significantly detaches itself from previous international treaties, for it mentions the primary duty to secure rights, which implies that Contracting members are called neither to undertake nor to commit to enforce human rights, but to immediately secure them. Such a wording stresses the significance of legal obligations arising from the ratification of the ECHR, to the extent that “a State which ratified the Convention was required to ensure that its domestic law was consistent with the Convention’s substantive obligations” (Bates 2011, 34).

Though the Convention only expressly binds governments, the ECtHR has also clarified that, in the event of private actors directly infringing upon a fundamental right, provided that public authorities do not adequately satisfy the victims, a Contracting Party could be found in breach of the ECHR (*Young, James and Webster v UK*, nos. 7601/76 and 7806/77; Ziemele 2009, 3).

As for the content of Section I, the Convention includes both absolute and qualified rights. Only four articles do not admit derogation, not even in time of emergency: the right not to be tortured and not to be inhumanly or degradingly treated or punished, Art. 3; the right not to be

¹¹⁵ Section II addresses the establishment of the ECtHR and Section III addresses miscellaneous provisions.

held in slavery or servitude, Art. 4 section 1; the right not to be convicted of conduct which was not an offense at the time it occurred, and the right not to have a heavier penalty imposed than the one applicable at the time the offense was committed, Art 7.

Interferences with the right to private and family life may be admissible if “in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others” (Article 8, section 2). What’s more, freedom of thought, conscience, and religion (Article 9), freedom of assembly (Article 10) and freedom of association (Article 11) admit limitations, which attain to the lawful nature of the interference, to the protection of national security, to ensure public order, or to the prevention of harm to morals, health, and reputation of others. The right to marry, secured by Article 12, is the only right that, instead of “everyone” or “no one”, addresses “men and women of marriageable age.” As explored in the next chapter, such dissimilarity stands at the core of crucial lgbt complaints.

A variable margin of discretion is thus afforded to national authorities, and most importantly, domestic institutions are made aware of the criteria to meet in order to interfere with human rights, without violating the ECHR.

In order to understand the careful interplay between the national and the ECHR system, it’s necessary to refer to the principle of subsidiarity.

This principle implies that “in a community of societal pluralism, the larger social unit should assume responsibility for functions only insofar as the smaller social unit is unavailable to do so” (Petzold 1993, 41); the legal principle of subsidiarity marks Western doctrine from early modern times (Ibidem), and it formalizes a long-standing organizational principle, rooted in several social and political groups.

Narrowing the field to the ECHR system, the principle of subsidiarity indicates what may be termed as a procedural relationship, involving national authorities and ECHR institutions (Ibidem). Subsidiarity is not explicitly stated in the Convention, but this omission is simply due to the fact that all parties took for granted that the ECHR to-be would have functioned according to a multi-level paradigm.

Evidence supporting this argument recurs throughout the Convention: the aforementioned Article 1 binds the States to secure the ECHR, but it does not suggest uniform solutions. Wide margin is left to Contracting States to autonomously determine how to implement human rights and how to comply with obligations undertaken. As Petzold remarks, “what is essential is that the law of Contracting States secures in substance those rights and freedoms to everyone within their jurisdiction regardless of the form in which they choose to do so” (Ivi, 44). Strictly related

to this, Article 13 provides that everyone whose rights are violated “shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”; Article 35, section 1, (ex. art 26) reads “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken”. The combined reading of these provisions attests that the entire ECHR comprises of a legal vision imbued by the notion of subsidiarity.

Therefore, before lodging a complaint, applicants must look for remedy at a domestic level; the ECHR is complementary to national laws and it functions as a last resort guarantee, which can be activated only when the others have failed. It’s noteworthy that the ECHR is not only subsidiary to national legislation, but also that the Court can’t deliver judgments without being seized, not even when provisions appear to be manifestly in breach of human rights.

Under Articles 13 and 36, Contracting Parties are obliged to guarantee the availability of remedies, through an accessible, impartial, and effective judicial system. In other words, the existence of such remedies must be effectively certain: in the event of formal remedies which in practice turn to be inaccessible or ineffective, the ECtHR may well accept the complaint.

The ECtHR stressed this aspect in several judgments, among which I recall *Vallianatos v Greece*, nos. 29381/09 and 32684/09, concerning the alleged violation of Articles 8 and 14 about the legal treatment of same-sex couples:

The Court reiterates that the rule concerning the exhaustion of domestic remedies [...] is based on the assumption, [...] that there is an effective domestic remedy available, in practice and in law, in respect of the alleged violation [...]. It observes that the rule of exhaustion of domestic remedies requires applicants - using the legal remedies available in domestic law in so far as they are effective and adequate - to afford the Contracting States the possibility of putting right the violations alleged against them before bringing the matter before the Court [...]. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these conditions are satisfied [...] (*Vallianatos v Greece*, § 50-52).

Lastly, Article 53 also (ex. art. 60) conveys the influence of the notion of subsidiarity, stating “nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”.

Therefore, it's up to national authorities to increase human rights legislation, but if a Contracting Party fails to enforce them, or applies them according to discretionary and discriminatory criteria, the ECtHR is legitimate to find a violation (Petzold 1993, 45).

The principle of subsidiarity also affects the methods of interpretation adopted by the ECtHR, analyzed in paragraph 3.4, and it raises crucial questions, such as where to draw the line between an appropriate national declination of human rights and a violation of the ECHR.

3.1.4 The Enforcement of Morals

One of the most debated themes concerns the bound established between morals and human rights and the autonomy of Contracting Parties in justifying an interference on this ground.

As already hinted, Articles 8-11 expressly mention the protection of morals¹¹⁶ among the legitimated exemption clauses. More specifically, in Articles 8 section 2, Article 9 section 2, and in Article 11 section 2, the ECHR admits derogation “for the protection of health or morals, for the protection of rights and freedom of others” while in Article 10, the expression reads slightly differently: “for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others”. These dissimilarities, however, do not compromise the overall meaning and, therefore, I will treat them jointly.

First of all, the meaning of morals and its consequent field of application has to be assessed. Though Articles 8-11 do not state this explicitly, the specific realm which the ECHR refers to is that of public morals. How to define, characterize, and delimit this notion is widely debated; furthermore the ECHR’s blunt words remain vague and, most problematically, opened to really different, if not opposite, interpretations.

It could be argued that Article 8 section 2 requires the enforcement of morals, identified as the aggregation of majoritarian moral preferences on specific behavior.

Under such legal understanding, people would only be entitled to the rights which are not envisaged by social majority; in other words, majoritarian moralistic judgments would represent a reasonable justification to restrict individual liberty.

As Letsas remarks, this majoritarian paradigm fails to protect the rights of minorities and, therefore, to serve one of the basic characteristics of human rights law:

¹¹⁶ I am aware of the difference between the term ‘protection’, adopted by the ECHR, and that of ‘enforcement’, adopted in the title of this paragraph. While the former refers to the provision of “legal or other formal measure intended to preserve liberties and rights” (Oxford Dictionary), the latter means “the act of making people obey a particular law or rule” (Ibidem) and, with reference to morals, it is generally associated with Devlin’s argument, extensively recalled in chapter I, paragraph 1.2. I suggest that in the context of the ECHR the line between protection and enforcement is extremely blurred; under certain conditions and in respect of a limited number of provisions, the ECHR admits that national authorities may legitimately restrict citizens’ rights precisely to protect morals. By this, Contracting Parties are entitled not only to protect and positively sanction a situated moral perspective, but also to actively enforce it, by providing legal sanctions for those who do not behave accordingly. Hence, I refer to the concept of enforcement precisely to highlight and problematize the latter aspect.

Given that rights have an anti-majoritarian dimension, it makes no sense to allow the majority itself to decide what rights individuals have in controversial legal cases. [...] If we insist that the majority must respect individual rights we cannot then ask the majority itself to decide whether it has indeed respected them. For it's natural to assume that the majority will often judge itself to have done so, even when this is not the case. (Letsas 2007, 119)

Pluralism and tolerance lie at the core of the ECHR, and the drafting process highlights the will to develop a democratic model based on the supremacy of individual liberty and autonomy. Furthermore, the principle of subsidiarity surely implies heterogeneity, but at the same time, it relates to institutional and procedural aspects concerning national sovereignty, not majoritarian preferences. The ECtHR itself recognizes the intrinsic value of “pluralism, tolerance and broadmindedness without which there is no democratic society” (*Handyside v UK*, n. 5493/72, § 49).

Is this majoritarian moral model compatible with human rights?

From a critical perspective, I recall Letsas' argument, according to whom to shape human rights on the moralistic preferences of the majority “is the greatest insult to values of liberty and equality”, since “rights [should] *block* moralistic preferences; they do not give effect to them” (Letsas 2009, 122).

Such reading of morals attaches total deference to the feelings expressed by the majority, without taking minority rights into account, thus discrediting pluralism, tolerance and broadmindedness.

A completely contrasting interpretation rests on a liberal and egalitarian interpretation of public morals. Nowlin argues that morals do not necessarily clash with liberal theories of human rights, and he draws on Millian's notion of moral rights, in order to reach an understanding of morals “consistent with modern constitutional thinking and human rights jurisprudence that conceptually link the protection of civil or human rights to the promotion of certain democratic values” (Nowlin 2002, 265). In *Utilitarianism*, Mill identifies the core criteria that would allow us to distinguish between moral and immoral behavior, the latter consisting of “depriving a person of a possession, or in breaking faith with him, or in treating him worse than he deserves, or worse than other people who have no greater claims” (Mill, 1969, 247). As Nowlin notes, Mill links the notions of fairness and honesty; hence immorality should only be legally prosecutable in the event that the moral rights of others are violated, for “it is confessedly unjust to break faith with any one: to violate an engagement, either express or implied, or disappoint expectations raised by our own conduct, at least if we have raised those expectations knowingly and voluntarily” (Mill 1969, 242-243).

Letsas reaches similar conclusions, and maintains that the protection of morals should neither directly interfere with civil rights nor deprive people of the opportunity to decide their own plan of life, even when socially considered disgraceful or inferior, nor treat someone as if she was less worth than others (Letsas 2006, 118-119).

Though sympathizing with the thesis on the incompatibility of majoritarian morals with the human rights foundations, I think that the drafters' choice to separately express the notions of "protection of morals" and "rights of others" does not override the suspicion that the drafters endorsed a majoritarian frame.

As Nowlin admits, if morals are interpreted as the moral rights of others, then reference to 'rights of others' appears either contradictory or repetitive, and in any event, it leaves room for contrasting interpretations.

There is another implication I would like to highlight, somehow disclosing themes analyzed hereinafter. The majoritarian perspective does not always imply a conservative mind, and therefore, a similar conception of morals could also bring to the enhancement of human rights; although the outcome might be regarded as desirable, its foundations remain theoretically problematic.

Even if leading to progressive outcomes, the majoritarian approach is embedded with the risk that the field of application of human rights and the degree of protection of minorities might vary in accordance with the preferences of the majority, without guaranteeing stable safeguards to whichever minoritarian party.

Over the years, the ECtHR has avoided clearly choosing between a moralist or a liberal conception, although interpretive doctrines developed by the judges of the ECtHR refer to majoritarian premises, as analyzed in paragraph 3.3.

3.2 The European Court of Human Rights

The European Court of Human Rights and the European Commission of Human Rights are born from the same complex and the prolonged debate that led to the drafting of the ECHR. Both the Court and the Commission are the result of a compromise between original drafters; therefore by tracing how the ECtHR and the EComHR have developed, it's possible to uncover problematic issues, still relevant in current discussions about the role of the ECtHR.

3.2.1 The Debate on the European Court of Human Rights

In the drafting process, two visions of what the ECtHR to-be should represent clashed, in a conflict that recurs throughout the several phases of the evolution of the ECHR. One side supported a *quasi-constitutional* Court, invested with the primary aim of moulding a frame based on the communal respect of human rights, whereas the other mainly hoped for a strictly limited Court, whose jurisdiction could neither overcome national authority nor orient domestic policies (Madsen 2007; Lester 2011).

The proposal of a European Court of Human Rights dates back to the aforementioned Message to Europeans, but the plan was not further detailed until the following year. Accordingly, the ECHR had to be secured through the institutionalization of a Commission and a Court, namely the European Commission and the Court of Human Rights. The Commission was conceived as a gatekeeper, targeted at skimming through inadmissible and admissible complaints, and at transmitting the latter to the Court, which was entitled to deliver the final judgment.

According to this proposal, the ECtHR should have been entitled to choose the members of the European Commission of Human Rights and its jurisdiction would have resulted compulsory; in addition to this, the right to individual petition should have been guaranteed to every citizen of Contracting Parties, and States not enforcing ECtHR's judgments could have been directly reported to the Council of Europe (Kjeldgaard-Petersen 2010, 5).

No doubt both the ECtHR and the EComHR were supposed to have the effective authority to concretely enforce human rights, and to that end, it was essential to introduce access to the Court and to individual and corporate bodies (Ivi, 6).

However, as previously mentioned, a significant minority raised doubts on the very necessity to establish a Court; as Bates recalls "it was said to be too ambitious, and unnecessary for the Eu-

ropean nations where human rights were already well protected. All that was required, was a European Commission on Human Rights, especially if, as was contended, the aim of the Convention was simply to prevent a return of totalitarianism in Europe” (Bates 2011, 26). Though the no-Court proposal was finally defeated, the Consultative Assembly was harshly divided on two aspects, namely “who may appeal to the Court when a guaranteed right of liberty has been violated” (Ivi, 7) and how to define the jurisdiction of the ECtHR.

To be more specific, nine Countries - Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, Sweden and Turkey- were prepared to include the right to individual petition in the Convention whereas Greece, the UK, and the Netherlands strongly opposed it. Seven Countries, among which stood the UK, opposed the creation of the Court while only four did not raise any objections. The only feasible option appeared to be to propose an optional Court, based on the idea that Contracting Parties could subscribe to the ECHR without accepting its jurisdiction and/or the individual right to petition. The UK and the Netherlands argued against it, fearing that in the event of a majority in favor of a powerful ECtHR, there would have been growing pressures towards the uniform recognition of the jurisdiction of the ECtHR. In this respect, the UK representative Ungoed-Thomas polemicized “We are not a federation here. We are not at the moment a small League of Nations. We have not a federal constitution. We have not therefore any need for a federal Court” (Ivi, 9).

The most relevant counterbalance was offered by French support to the Court proposal. France desired to build a Court neither influenced by Western colonial policies nor involved in securing native rights; however, the prevailing opinion agreed upon the ideal of a European Court targeted against political totalitarianism and not involved in foreign policies.

The final jurisdiction of the ECtHR mediated among these divergent interests; the so-called colonial option was introduced, which limited the competence of the ECtHR by giving the optional faculty to declare to Contracting Parties, “at the time of its ratification or any time hereafter” that the Convention extended “to all or any of the territories for whose international relations is responsible” (Art. 63).

With regard to the individual right to petition, disagreement was even deeper and the unfavorable ones singled out that this procedure amounted to a lethal menace to national authority (Kjeldgaard-Petersen 2010; Bates 2011; Madsen 2011).

Various compromises were therefore examined in order to grant a higher degree of consensus towards the European system of human rights protection.

As Teitgen highlighted, the individual access to the ECtHR was essential and represented

the only mean we have of persuading the men and women of Europe that something new has been done and that an advance has been achieved. We must say to them that even if the States take no further interest in them, and even if no one takes action on their behalf, they may, by virtue of their dignity as men, avail themselves on their own behalf of an international organ of protection. (Kjeldgaard-Petersen 2010,10).

To forestall the risk that the optionality of the individual right to petition weakened the effectiveness of ECHR, a further opting-out clause was proposed, whereby States should be allowed to opt out of the right to individual petition rather than opting in (Bates 2011, 31).

In the end however, such amendment remained ignored and Contracting Parties obtained the chance to ratify the ECHR without recognizing the jurisdiction of the ECtHR or/and the individual right to petition.

At the outset, the exchange between national authorities and the ECtHR was unbalanced, since every member State was entitled to elect one judge, sitting for nine years, regardless of the State's position regarding the optionality of the ECtHR.

In accordance to the rules of the ECHR, the ECtHR comprised of one member from each State, it elected its own President every three years, and worked in Chambers of 7 members.

Quite predictably, the asset of the ECtHR has evolved over the years and nowadays neither its jurisdiction nor the right of individuals to size the Court are optional.

From the second half of the 1960s to the late 1980s, the number of Countries recognizing the jurisdiction of the ECtHR and granting the right to individual petition increased; in 1990 and 1998 respectively, Protocol 9 and Protocol 11 definitively modified the rules governing the ECHR system, to the extent that one requisite to enter the Council of Europe is to ratify the ECHR and to recognize the jurisdiction of the ECtHR over the interpretation of the Convention (Caflish 2006; Harmsen 2011).

Another significant change that heavily affected the ECtHR, regards the abolition of the EComHR and the provision of a Grand Chamber targeted at judging hard cases.

Given the gatekeeping role performed by the EComHR, I further examine the core features of this institution in the forthcoming paragraphs.

3.2.2 The European Commission of Human Rights

The ECHR established a permanent European Commission of Human Rights, composed of members elected by the ECtHR, whose task was to screen the complaints in order to identify admissible ones and to transmit them to the Court (Art 48).

A Committee of three people, not necessarily judges, determined the admissibility of filed petitions; in more complex cases, however, a Chamber consisting of seven Commissioners handled the situation.

In the event of admissible complaints, the Commission examined the facts and looked for an amicable agreement. If such an option could not take place, the Commission issued a report and displayed its opinion on whether a violation had occurred or not.

The Commission was given no independent power of publicity, nor did its reports or decisions bind the ECtHR.

As it may be imagined, the EComHR enjoyed a considerable margin of discretion; not only was it entitled to judge on the existence of formal deficiencies or manifest ill-founded claims, but also to substantially review the arguments put forward by each part.

The EComHR was fully entitled to draft reports in order to point out the most important issues to the ECtHR and, quite interestingly, if one reads the EComHR's admissibility decisions, the reasoning-lines adopted by the ECtHR itself will often be found to follow those outlined in EComHR documents.

In other words, the Commission skimmed through the possible approaches to the facts at stake, tracing interpretative paths that the Court would be likely to follow. To mention a relevant example concerning sexual orientation, consider *X v Federal Republic of Germany*, n. 5935/72, where the applicant claimed that the criminalization of same-sex consensual acts, involving a man over 21 years and a boy below the age of 18, infringed upon the right to respect for private life, secured by Article 8 of the ECHR.

The applicant maintained to be a victim of discrimination based on sex, because only male homosexuality constituted a criminal offense (*X v Federal Republic of Germany*, § 52). Though admitting that a person's sexual life is indubitably "part of his private life of which constitutes an important aspect", the EComHR did not leave the task of determining whether German laws legitimately interfered with private realm to the ECtHR, but it engaged in substantial interpretation. Having recalled the Government's perspective, by which criminal laws were necessary to "prevent homosexual acts with adult having an unfortunate influence on the development of heterosexual tendencies in minors", the EComHR acknowledged "the danger to which an ado-

lescent is exposed as a result of homosexual relations with an adult in a subject of controversy in several countries. [...] The fact remains that the action of the German legislature was clearly inspired by the need to protect the rights of children and adolescents [...]. This need is broadly admitted in a large number of member states of the Council of Europe” (Ivi, § 55).

Hence the Commission dismissed the claim of a violation of Article 8 and it also adopted a similar perspective in respect to the alleged discrimination. Most notably, commissioners recalled a previous judgment of the ECtHR and applied it to the present complaint. Therefore, a criterion firstly developed to assess the existence of a violation in respect of the ECHR, here became a parameter for the purposes of admissibility, abundantly exceeding the features imagined by drafters of the EComHR to-be.

In practice the EComHR not only acted like a first instance Court and determined the perspective by which reviewing the complaint, but it also discussed the legitimacy of German laws at length. In particular, commissioners judged the interference with sexual freedom for social protection as a “reasonable criterion” and established that

the existence of a danger making it necessary to protect a social category must be based on various concerning analyses of the position and [...] those of psychologists, sociologists and specialists in social protection. [...] They have led to convincing conclusions as to the existence of a specific social danger in the case of masculine homosexuality. This danger results from the fact that masculine homosexuals often constitute a distinct socio-cultural group with a clear tendency to proselytize adolescents and that the social isolation in which the latter is involved is particularly marked (*X v Federal Republic of Germany*, § 56).

Similar features emphasize the multifaceted gatekeeping role of the EComHR, which affected the ECtHR in at least three ways: firstly, commissioners skimmed through applications determining which could be evaluated by the ECtHR; secondly, the EComHR was entitled to declare a complaint partially admissible, thus restricting the issues the ECtHR had to judge on; thirdly, the reports of the EComHR generally amounted to the highly contested point of departure for the subsequent ECtHR’s review.

Consequently, the EComHR crucially shaped the interpretive process at the hands of the ECtHR, by fixing the timing for judicial review on specific issues and by influencing the ECtHR interpretive approach.

Evidence of this statement can be traced by analyzing the complaints concerning sexual orientation filed to the EComHR between 1955 and 1975. All the complaints were deemed inadmissi-

ble; this outcome prevented the ECtHR from reviewing these issues, and prolonged the criminalization of same-sex acts across Western Europe.

A detailed reading of the decisions of the EComHR highlights a biased perspective on two accounts, namely a negative attitude against homosexuality and the belief that ultimately, the issues related to sexual orientation could not really be ascribed to human rights.

In early complaints, the absence of a critical perspective is striking, and it might be due to the typical heteronormative inclination of closing off any critical analysis of heterosexuality (Ingraham 1996, 69).

In *W.B. v Germany*¹¹⁷, n. 104/55, the EComHR didn't even consider the possible legitimacy of the arguments adduced by the applicant, filing quite a trenchant and flat motivation which established a bound among morals, law, and the prevention of homosexuality, without further arguments: "the Convention permits a High Contracting Party to legislate to make homosexuality a punishable offence; the law relating to private and family life may be the subject of interference by the laws of the said Party dealing with the protection of health and morals" (*W.B. v Federal Republic of Germany*, 1).

In *K.H.W. v Federal Republic of Germany*, n. 167/56, and *G.W. v Federal Republic of Germany*, n. 1307/61, the EComHR established an even stricter relationship between the concepts of health, morals, and homosexuality¹¹⁸, by framing the existence of criminal laws against male homosexuality as being incompatible with public morals and by labeling homosexuals as a public threat for national health; national authorities were thus left with complete discretion in policing sexual behavior.

At least until the end of 1970s, the role of the EComHR remained quite undisputed, mirroring the preference expressed in the drafting process to reduce ECtHR caseload and, at the same

¹¹⁷ This was the first case lodged under the ECHR against criminal laws persecuting homosexuals; the applicant alleged a violation of Articles 2, 8, 14, 17 and 18 of the ECHR and filed an extremely rich complaint, still relevant in many aspects. See Johnson (2014, 22-23).

¹¹⁸ The applicant had been arrested twice by the Gestapo because of homosexual acts, and on those occasions, photographs and records of his fingerprints were taken. Although the final sentence was reduced after the war, the applicant's criminal records had not been deleted. For these reason the applicant was banned from Bremen bar and decided to lodge a complaint with the ECtHR. The EComHR however, legitimized national authorities, on the ground that "keeping the records including documents, photographs, and fingerprints relating to criminal cases of the past is necessary in a modern democratic society for the prevention of crime and is therefore in the interest of public safety" (*G.W. v Federal Republic of Germany*, § 5).

time, to expand the tasks of the EComHR, with the intent of cutting the number of complaints reaching the final review.

As explored in the following paragraph, from the mid-1970s onwards, the role of the ECtHR evolved in the framework of the European institutions and the debate on human rights also detached itself from the rigid logic of the Cold War, leading to a reassessment of the usefulness of the EComHR.

The main criticism of the Commission entailed both the barrier effect performed and the consequent lengthening of the whole judicial process, due to such two-stage machinery.

Moreover, as the ECtHR strengthened its legitimacy, the rates of admissible complaints significantly grew, leading to redundant and expensive trials.

The existence of the EComHR was increasingly put into question and the approval of Protocol 11, which entered into force November 11998, marked the dissolution of this institution, replaced by a reorganized and permanent ECtHR (Madsen 2011; Harmsen 2011; Cameron 2013).

The Preamble of Protocol 11 recalled the aforementioned problems and referred to “the urgent need to restructure the control machinery established by the Convention in order to maintain and improve the efficiency of its protection of human rights and fundamental freedoms, mainly in view of the increase in the number of applications and the growing membership of the Council of Europe” (Protocol 11).

The admissibility test however, remains a prerequisite to reach the ECtHR; once a complaint has been properly filed to the ECtHR¹¹⁹, the Court first examines whether the case complies with procedural and substantial requirements set out in the Convention. If the application is de-

¹¹⁹ Article 35 states preliminary admissibility criteria that applicants are required to meet: “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken. The Court shall not deal with any application submitted under Article 34 that a) is anonymous; or b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.”

clared fully or partially admissible, the ECtHR will transmit the case to one of its sections, which will either deliver a final judgment or relinquish the case to the Grand Chamber. The latter hypothesis only occurs under exceptional circumstances, when serious doubts regarding the interpretation of the Convention are raised or when there is a concrete risk of inconsistency with previous judgments. The parties are also entitled to request a referral to the Grand Chamber, and if such demand is accepted, the Grand Chamber might overturn the initial judgment.

The decision to replace the EComHR was mainly justified by technical matters and by the aim to improve the capacity of the ECtHR to handle cases. ; by 1998, after almost 40 years of activity, the ECtHR had achieved a valuable degree of political legitimacy and, the perspective of a more active Court did therefore not threaten Contracting Parties as it did during the drafting process (Harmsen 2011, 121 and fol.).

3.2.3 International Politics and the European Court of Human Rights

As already discussed, over the decades the relation between the ECtHR and the national States has been multifaceted and deeply affected by international political dynamics.

The drafting of the ECHR, the appointment of the EComHR, and the introduction of the optional clauses can't be understood without referring to the political worries about national sovereignty and autonomy spread in the 1950s in Western Europe.

Likewise, the judicial attitude of the ECtHR was also variously affected by political dynamics, with particular reference to the processes of decolonization, to the easing of politics in the Cold War, and to the consequent attention paid by public opinion to human rights issues (Madsen 2007).

“The ECtHR cannot be understood as a static institution” argue Madsen and Christoffersen (2011, 3), further identifying four stages the Court has undergone since its entry into force, in 1959: the first phase, named legal diplomacy, was marked by the ECtHR's deference to national authorities and by the effort to build a solid judicial legitimacy, proving a sound comprehension of European politics. Later, the ECtHR turned towards a progressive trend, expanding its jurisprudence and developing interpretative techniques, concepts, and methods that still orient its review. Following the end of the Cold War, the ECtHR became the prominent guarantor of human rights in both Western and Eastern Europe, gathering members from new entries in the Council of Europe and widening the issues on which it was called to judge. Lastly, in 2004 the ECtHR entered a fourth phase, characterized by significant structural reforms, by the increased attention to the effectiveness of the ECHR in domestic law, and by the urgency to cope with the overwhelming caseload.

The phase of legal diplomacy marked the first decade of the ECtHR's existence, and it was characterized by two main historical dynamics which constituted the lens through which the ECtHR filtered human rights issues: the Cold War and the nationalist revolts which were happening all over European colonies.

Political instability, economic uncertainty, and the decline of European supremacy favored quite a conservative spirit in leading Parties, who looked to maintain a solid sovereignty, at least within the borders of Europe.

“Human rights were more a question of politics than law”, suggests Madsen (2011, 48), also stressing the jarring clash between the programmatic declarations of the ECtHR and the imperialist policies endorsed by the UK, France, and the Netherlands.

As a result, the ECtHR had to demonstrate its ability to disentangle interwoven political and legal issues without disregarding national interests, to the extent that it may be argued that in this period, the enforcement of human rights remained significantly in the backdrop, while judicial review seemed to be the extension of traditional diplomatic strategies.

Two complaints tested the capability of the Court to counterbalance the interests at stake. In 1956, the Greek government filed an interstate complaint against the British repression of Cypriot nationalist rebels, claiming a violation of the ECHR. The British government quite predictably did not welcome the likelihood that the ECtHR might develop legal grounds against its empire. Moreover, it feared that before deciding about the admissibility of the complaint, the EComHR would conduct examinations on the political situation in Cyprus and on the abuses perpetrated by British authorities; consequently, UK diplomacy strongly pursued an extrajudicial tactic, which finally led to two diplomatic agreements, known as London and Zurich Agreements, with the consequent withdrawal of the complaint. The ECtHR not only welcomed this solution, but it also expressed relief not to be faced with such a conflict, as the words of Rollin, President of the ECtHR, starkly show: “I am the first to admit the paradox - and personally I regret it- that by a chance of fate the first government to be brought to the bar by another government is the United Kingdom, which governs a country which surely, more than any other in Europe, has always shown concern for human rights” (Simpson 2004, 322).

Hence, political concerns exceeded the legal ones, and Rollin took the side of the UK perspective, implying that because of its history and its opposition to Nazism, the UK deserved sympathetic consideration, regardless of the arguments of the counterpart.

Shortly after, another complaint shook the ECtHR system, by calling into question the practice of detention without trial, common in Ireland to contrast IRA, and in the UK and in France to repress nationalist rebellions. In *Greece v UK*, the applicant was surprisingly an Irish citizen, and the resort to diplomacy was not possible so the EComHR, decided to maintain a cautious approach, finally deeming the complaint admissible and transmitting it to the Court. The final judgment was an acute diplomatic balancing act: despite finding Irish practices in violation of Article 5, the Court did not recognize any breach and it accepted derogation through Article 15, stating that “in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”.

The showdown opposing the IRA and the Irish government might be effectively regarded as an emergency situation, yet the definition of concepts like ‘war’ or ‘public emergency’ remained loose¹²⁰, leaving national authorities room to justify contestable practices of detention.

To summarize, in this decade, a slight number of complaints passed the admissibility test of the EComHR, and the ECtHR found a breach in even fewer complaints; I would explain this trend by referring to multiple dynamics. The ECHR was not only interpreted as securing a minimum standard of human rights, but the memories of Nazi atrocities were still vivid, and they represented the implicit basis for the comparison of alleged violations. Moreover, the Communist menace pushed to strengthen internal political order; to prevent the fall of democratic regimes, the ECtHR also allowed quite a questionable constriction of individual civil rights.

Owing to legal diplomacy, the ECtHR achieved great legitimacy among member States, which in turn led to a significant increase in the number of ratifications of the ECHR and to the extension of the individual right to petition. In 1966, the UK accepted the optional clause of jurisdiction and the individual right to petition, followed by Italy and Switzerland in 1973. France remained the only democracy not allowing its citizens to size the ECtHR: it was not until Pompidou’s death that the French government ratified the ECHR and accepted its jurisdiction. It was with Mitterrand’s election that France finally accepted the individual right to petition. Finally, Spain and Portugal signed the ECHR in 1976 and 1977, following the end of both authoritarian regimes¹²¹ (Delmas-Marty 1992, 171 and fol.).

The easing of East-West contraposition, the end of decolonization fights, combined with the civil rights movement concerning the Vietnam War and the establishment of dictatorships in Latin-America, led to a new understanding of violations perpetrated outside Western Europe. In fact, in the early 1970s, most human rights activism was directed at non-democratic regimes outside the jurisdiction of the ECtHR, such as the Greek colonels, Spain under Franco and

¹²⁰ “The natural and customary meaning of the words *other public emergency threatening the life of the nation* is sufficiently clear; whereas they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed; whereas, having thus established the natural and customary meaning of this conception” (*Lawless v Ireland*, n. 332/57, § 28)

¹²¹ Greece was one of the first Countries to join the Council of Europe, in 1949; in 1969 however, the dictatorship of Colonels reacted to international pressure against its anti-democratic methods - climaxed in a complaint lodged with the ECtHR by the Swedish government- by denouncing the Convention and exiting from the Council of Europe. After the Regime of Colonels collapsed, in 1974, the newly elected government re-ratified the ECHR. A complete time-line of Countries ratifying the ECHR is provided by the official website of the European Convention on Human Rights, <http://www.echr.coe.int/>

Portugal under Salazar. However, by the mid-1970s, Greece, Spain, and Portugal had begun a transition towards democracy and the main issue was not how to deal with European authoritarian regimes but, rather how to ensure a common frame of rights. Therefore, the ECtHR arose as a landmark in merging the heterogeneous legal sensibilities and integrating them into a coherent European human rights system.

In the late 1970s, the ECtHR delivered several landmark judgments, widening and deepening its doctrine: in *Tyrer v UK*, n. 5856/72, and *Marckx v Belgium*, n. 6833/74, judges developed a dynamic and integrationist approach; in *Airey v Ireland*, n. 6289/73, and *Golder v UK*, n. 4451/10 they further specified the content of obligations arising from the ECHR.

As it has been suggested, these decisions resulted in tensions between the Court and the member States, but they contributed to enhance the Convention as a genuine source of law, as a force to reckon with and respect.

At the present moment, the legitimacy of the ECtHR is under discussion again, mainly due to the proposal of the UK to introduce a British Human Rights Act, which would override the jurisdiction of the ECtHR and challenge the supreme role of the Court in adjudicating human rights .

In 2015, the British conservative government proposed major changes to amplify national discretion, for instance by removing prisoners from Countries where they are likely to be tortured, proposing a further modification of the machinery of the ECHR: only complaints which were not properly addressed by national Courts could be reviewed by the ECtHR; in any event, the judgments of the ECtHR should only be complementary to national decisions.

The majority of Contracting Parties, however, has not endorsed a similar perspective and it does not seem applicable at length.

In addition, the efficiency of the ECtHR is challenged, mainly by the enormous backlog of complaints, to the extent that the Prime Minister of the UK, David Cameron, recently proposed the so-called ‘sunset clause’ to strike out all the complaints which are not judged by the ECtHR within a period of one to two years.

What’s more, Eastern Countries barely sustain the ECtHR and their compliance with its judgments is frequently limited mostly to the formal level (Pomeranz 2011, 17; Emmert 2012). For instance, a sharp duplicity marks the Russian attitude to the ECHR since its accession to the Council of Europe: on one hand, Russian complaints constitute a great part of the overall case-law, whereas, on the other, the Court has repeatedly chided Moscow for failing to secure human rights. Despite the fact that national Courts refer to the jurisprudence of the ECtHR on various occasions when dealing with civil and social issues, Russian political parties are actually upholding a nationalist language that overshadows the institutions of the ECHR.

In December 2015, the 84th Steering Committee for Human Rights gathered to study “the long-term future of the systems of the European Convention on Human Rights” and it carefully detailed the main problems of the ECHR system, without pointing out a clear pragmatic solution¹²².

According to the 2010 Interlake Declaration, the Committee of Ministers has to decide before the end of 2019 whether structural changes are necessary and whether the adopted procedure of pilot judgments, described in the following paragraph, proves useful.

Moreover, new international events are shaking global politics and redefining legal, diplomatic, and military alliances, also affecting the relation among the Contracting States and among Europe and other emerging Countries.

As a consequence, it is likely that the ECtHR will soon enter a new phase, whose features are extremely hard to forecast, but which will be the outcome of the ongoing conflict between nationalist and integrationist Countries.

¹²² The outcome of the 84th Steering Committee is mostly programmatic. Four problematic areas are addressed: the inadequate national implementation of the Convention, the overwhelming case-load of the ECtHR, the necessity to maintain the authority of ECtHR judgments and the implementation of Convention mechanisms in the European and international legal order. As far as the first issue is concerned, good practices should be internationally identified and implemented, and specialized ‘contact points’ should be created in each State; moreover governments should promote a deeper knowledge of the ECHR, in order to mainstream human rights issues. In the backlog, the Committee encouraged the Court “to examine further possibilities of streamlining its working methods” in order to separate priority cases from non-priority cases. Applicants and lawyers should also be made aware of the scopes and limits of the ECHR, in order to reduce the current number of filed applications. Finally, the Committee of Ministers is urged to find political mechanisms suitable to challenge large-scale violations and to implement the pilot-judgment procedure. The 84th Report on “the longer-term future of the system of the European Convention on Human Rights”, adopted by the Steering Committee for Human Rights, can be accessed at <http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/>

3.2.4 The Enforcement of Judgments of the European Court of Human Rights

According to the guidelines set out in the ECHR, the execution of the ECtHR judgments follows a complex process, with several possible outcomes. As I will exhibit throughout this paragraph, the ECHR institutions are entitled to adopt severe measures in order to force Contracting States to comply with the ECtHR judgments, but the cornerstone of the entire machinery still lies with the voluntary implementation of the Convention.

A non-compliant Country is generally obliged to pay sanctions until the judgments are enforced, but, as one can easily imagine, cases where national authorities prefer this option rather than adopting incisive reforms are not rare.

Diplomatic and economic costs to force a State to abide by the ECtHR judgments are high, and the Committee of Ministers risks starting a judicial contrast which might also lead to economic or political tensions; therefore, the safeguard of human rights is combined with significant efforts targeted at encouraging voluntary compliance.

Each judgment is binding and final, meaning that the judgments not subject to any appeal or other authority (Abdelgawad 2008, 7) and judges are entitled to admit economic and/or extrapatrimonial remedies, in the form of liability, compensation, and annulment (Verhoven 1984, 278).

Not only political executives and governments, but also all public authorities of any level, are legally bound to enforce the ECtHR judgments; as already stated, the Court refuses to clearly indicate the policies or the measures whereby executing a judgment, only stating the right which must be secured. The subsidiary nature of the ECHR system prevents the ECtHR from overcoming national authorities and, as it has been acutely suggested, “the Court is in no position to make such an assessment, which presupposes a relatively detailed knowledge of the domestic system in question” (Abdelgawad 2008, 7). The Court, however, enjoys a discreet margin in restricting the range of possible means, for instance by detailing crucial goals so to implicitly suggest the necessary reforms.

The obligation to achieve a result under the ECHR gives rise to three main duties, in respect of the legal principle of *restitutio ad integrum*: a) the obligation to end the violation; b) the obligation to make reparation; c) the obligation to avoid future breaches.

Regarding point a), in most severe cases, the ECtHR is also entitled to impose economic compensation, but it generally prefers to consider the violation itself as just satisfaction.

Points b) and c) can be fulfilled by three main means. Besides pecuniary sanctions, individual and general measures are frequently invoked. Instruments targeted at single applicants include

the re-opening of judicial proceedings and the re-examination of proceedings when it's not possible to re-open them. Acts of clemency and 'positive actions', though rarer, also recur; for instance, in 2001 after *Stefanov v Bulgaria*, n. 32438/96, the Bulgarian government adopted a general amnesty in regards to Jehovah's witnesses who had refused to do military service. *Vogt v Germany*, n. 17851/91, and *N. v. Finland*, n. 38885.702, fall within the latter group, for the Court stated respectively to reinstate Mr. Vogt who had been illegitimately suspended from civil service, and to grant Mr. N. a continuous residence permit, because the national authorities had threatened him with a possible expulsion to the Republic of Congo.

General measures may also entail changes in national case-law or alterations to judicial rules. As Abdelgawad recalls "significant reforms have also been made to the organisation of the courts, especially in Spain, Portugal and Italy, in order to reduce the length of proceedings, and to the administrative courts in the Nordic countries" (Ivi, 28).

As far as the ECHR is concerned, the Committee of Ministers supervises the execution of judgments; in practice, this reality has become much more complex, also involving the Court and the Parliamentary Assembly of the Council of Europe.

As several authors note (Abdelgawad 2008; Marmo, 2008), the process of supervision does not directly involve the applicant; furthermore, NGOs and third parties are only allowed to submit reports highlighting a lack of national compliance, with informative purposes.

Though not dealing with procedures of supervision, I consider it interesting to enlist the instruments of coercion, in order to show how they require political and diplomatic cohesion.

Interim resolutions are the blandest, and they consist of a public reprimand of non-compliance or of the declaration that the Contracting State has only partially fulfilled its obligations, and they merely threaten the state with further sanctions.

On the contrary, Article 8 of the Statue of the Council of Europe reflects the original will to secure human dignity and to prevent torture at any costs; according to such provision,

any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw [...]. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council from whichever date the Committee determines.

Precisely because of the severity of the dread solutions and wide-ranging consequences, Article 8 has never been used. Turning to recent developments, the ECtHR is increasingly accepting of

the clarification of the scope of its judgments, stressing the shortcomings of national rules, or recommending the adoption of targeted measures.

In 2004, the ECtHR delivered its first pilot judgment, defined as “a technique of identifying the structural problems underlying repetitive cases against many countries and imposing an obligation on States to address those problems” (ECtHR 2015, 1). If the Court receives several applications that share a root cause, it can select one or more for priority treatment; in pilot judgments, the Court’s task is not only to decide whether a violation of the ECHR really occurred, but also to identify the systemic problem and to clearly point out the remedial measures required. Therefore, the same judicial technique will be applied in repetitive cases, and all Contracting Parties are made aware of how to enforce the ECHR with reference to that issue.

Finally, Protocol 14 introduced two new remedies at the hands of the ECtHR. The Court is able to assist the Committee of Ministers, both in interpreting the scope of a judgment and in enhancing its enforcement if the respondent State fails to execute it; at the moment, however, these measures appear programmatic and not pragmatically oriented.

To date, the interplay between politics and the asset of the ECtHR has, on the whole, ensured a positive degree of compliance; thus meaning that flaws in the execution of judgments do not pose a serious threat to the existence of the Court. As Abdelgawad emphasizes, constant vigilance is necessary and no definitive achievement can be taken for granted; the ECHR system is peculiar and differentiated from that of the European Court of Justice - which is mainly reliant on infringement proceedings coupled with daily fines and an elite model of accountability (Abdelgawad 2008, 71). Surprisingly, the Council of Europe opted for a very different approach from the beginning, based on persuasion, on the coordination among various national and international institutions, and on the accountability of the authorities at different levels, in keeping with the participatory model of accountability.

3.3 Doctrines and Methods of Interpretation

Autonomy and empirical research constitute the theoretical pillars of the interpretive methods developed by the ECtHR.

Under Article 32, the Court is the only legitimate interpreter of the Convention, and it draws the meaning of the concepts recalled in the Convention from its own jurisprudence. Both the interpretation of rights and their enforcement depend on the ECtHR itself and, even though other institutions of the Council of Europe can facilitate or informally press for the enforcement of the ECtHR judgments, they are not appointed with the authority to propose alternative interpretations of the Convention, nor are they enabled to advise the Court. Third parties are admissible, nevertheless, they do not bind the Court.

In reference to the empirical approach, the ECtHR incrementally developed its own methods; rules governing the Convention are concise and the Court expanded them in a number of judgments, therefore not tersely separating between the process of adjudication and the definition of internal procedures (see among the others *Loizidou v Turkey*, n. 15318/89; *Bosphorus Airways v Ireland*, n. 45036/98; *Tyler v UK*).

Methods of interpretation are the instrument whereby abstract provisions are turned into contingency; under a socio-legal perspective, the interpretation of the ECHR also fulfills one of the essential requirements pending on the ECtHR, namely to connect judicial review with the wording of the ECHR, and to show deference to the rules established by previous jurisprudence (Friedman 1975, 237).

Hence in the next paragraph, I account for the legal sources that inspired the ECtHR, critically analyzing the most relevant paradigms and the doctrines of interpretation adopted by the Court thus far.

3.3.1 The Vienna Convention on the Interpretation of Laws and Treaties

The ECHR is a treaty of international law, and consequently, its general interpretation is oriented by Articles 31-32 of the Vienna Convention on the interpretation of Laws and Treaties, signed in 1969¹²³.

The Vienna Convention does not single out precise paths, nor does it state a hierarchy among different doctrines; rather, it defines legitimate methods whereby covenants and treaties have to be interpreted, and it ratifies a number of practices already rooted in international judicial practice.

Article 31 reads:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes: a) any agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty; b) any instrument which has been made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Therefore, the following factors shall be taken into account, together with the context: a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, c) any relevant rules of international law applicable in the relations between the parties. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning

¹²³ The Vienna Convention took place nineteen years after the adoption of the ECHR and it was not intended to have retroactive effects. However, scholars agree that reference made by ECtHR judges to the Vienna Convention is fully justified, since that treaty did not establish new obligations, nor did it support innovative doctrines, but it merely systematically formalized and reviewed practices already spread in international law practice. See Mahoney 1990; Matcher 1993; Mowbray 2007.

resulting from the application of Article 31, or to determine the meaning, when the interpretation according to Article 31: a) leaves the meaning ambiguous or obscure or b) leads to a result which is manifestly absurd or unreasonable.

Before analyzing the problematic relation between these provisions and the ECHR, it's worth noting that the language itself of Articles 31-32 leaves room for discussion.

Two main interpretive approaches emerge, namely the originalist and the purposive, or teleological, one (Letsas 2010, 512).

The former assumes that the Convention has to be read as a frozen-in-time document, which binds the present interpreters to the past: more specifically, originalist textualists depart from the meaning attached to the rights at the time of their enactment. Paraphrasing Letsas on LGBT claims, rather than asking whether the right to family-life secured under Article 8 ECHR applies to homosexual relations, we should ask, *would the public at large in 1950 apply the concept of family-life to gay and lesbian relationships*¹²⁴?

Instead, Originalist intentionalists argue that it should be necessary to abide by the aims and the intentions of drafters; in the aforementioned example, the main question would be, *did the original drafters intend to include homosexuality cases within Article 8 ECHR?* This perspective starkly appears imbued by a sharp historicist standpoint, coupled with the defense of Westphalian order and with a restrained conception of the role of the ECtHR.

The purposive approach aims to adapt original provisions to the present socio-economic frame, hence the main fear against such reading concerns the quest for international certainty; as judge Fitzmaurice argued “the parties cannot be expected to implement what would be an important international obligation when it is not defined sufficiently to enable them to know exactly what it involves” (judge Fitzmaurice in *Golder v UK*, § 30).

I wish to stress the connection between the notion of ‘ordinary meaning’, the expression ‘terms of the treaty in their context’, and the phrase ‘light of its object and purpose’: all signifiers are comprised of the same line and they are presented as equally legitimate. The notion of ‘ordinary meaning’, thus seems neither absolute nor grounded on how a single problem was per-

¹²⁴ “Rather than ask ourselves whether the right not to be subjected to inhuman and degrading treatment under Article 3 ECHR applies to circumstances of extreme poverty, we should ask *Would the public at large in 1950 apply the concept of inhuman and degrading treatment to poverty cases?*” (Letsas 2005, 513).

ceived at the time of its enactment but, rather, it may well require a balance with the overall spirit of the treaty.

Therefore, I share Van Dijk and Van Hoof's caution that

The rules of the Vienna Convention do not provide clear-cut solutions to all problems of treaty interpretation. [...] Those rules themselves are not unequivocal. Depending on many factors [...] a Court may be inclined towards an interpretation which is focused on the ordinary meaning of the terms of the treaty or conversely towards an 'object and purpose'-oriented interpretation. (Van Dijk and Van Hoof 1998, 72).

Even though the ECtHR mentioned the Vienna Convention in a limited number of cases, judges preferred to develop their own methods, referring to Articles 31-32 only as a general frame. Not only do the Vienna provisions appear rather unclear but, as a former judge of the Court stressed, the ECHR can't be assimilated to traditional treaties of international law:

human rights treaties have a unique character. They are not concerned with the mutual relations and exchange of benefits between sovereign States. Instead they proclaim solemn principles for the humane treatment of the inhabitants of the participating States. [...] What was in former times considered to be part of unfitted domestic jurisdiction and within the exclusive competence of the sovereign State has become the subject of international protection and supervision (Bernhardt 1988, 65-66).

From such a standpoint, Fitzmaurice's argument can be challenged, since in human rights the essential task is not to bind Parties to a narrow field of obligations, but, on the contrary, it is to lead them to entrust a third institution with the authority to progressively set legitimate rules, procedures, and limits to national policies, in order to effectively enhance the enforcement of human rights.

In *Golder v UK*, the ECtHR extensively debated over the textualist approach, finally dismissing it, and it laid the foundations of teleological doctrine. The applicant, a prisoner serving his sentence, applied to the ECtHR claiming that he was denied the right to consult a solicitor, and thus alleged a violation of Article 6.

Article 6 did not encompass the right to access court and the British government maintained that the right to be given a fair trial did not include the preliminary right to enter the Courts, given that had the drafters intended so, they would have chosen another language.

For the first time, the ECtHR mentioned the Vienna Convention and it stated how it should operatively guide the interpretation of the ECHR: “In the way in which it is presented in the general rule in Article 31 of Vienna Convention, the process of interpretation of a treaty is a unity, single combined operation: this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article” (*Golder v UK*, § 30). Therefore, the Court had to assess an ordinary meaning adequate to the overall aims of the Convention itself. If the right to access to Courts were not guaranteed, the substantial value of the right to a fair trial would be threatened, since Contracting Parties could bypass the ECtHR’s review by simply preventing certain categories from the judiciary. Consequently, the ECtHR found a violation and upheld that the ECHR secures ‘unenumerated rights’.

By fully rejecting the textualist presumption, an essential question remained opened: how does the Court define the concepts enlisted in the ECHR so to detach from domestic laws?

Once again, the answer can be found in a judgment, precisely in *Engel v Netherlands* (nos. 5100/71, 51001/71, 51002/71, 5354/72, 5370/72), concerning the legitimacy of sanctions provided for military infringements.

Dutch laws did not consider military penalties as criminal offenses, and claimed that the ECtHR review should limit itself to secure “civil rights and obligations” affected by criminal provisions.

Once again, the Court stated its preeminence over domestic laws, and it sustained that it was up to the ECtHR to define its guidelines; had the Court accepted the distinctions moulded by respondent States, it would have implicitly restricted its power of review in an unfeasible way. Indeed, in such a scenario, judges would bound themselves to a-critically accept qualifications and distinctions made by respondent States, assessing only whether the enforcement of certain provisions infringed upon the ECHR, without questioning the definitions made by national authorities. For instance, in the *Engel* case, the ECtHR could not have rejected the distinction between military penalties and criminal offences.

In other words, the ECtHR is the ultimate institution entrusted with the authority to define the rights secured by the ECHR; in less than fifty years, the Court has appointed autonomous definitions of concepts such as ‘criminal charge’, ‘civil rights and obligations’, ‘possession’, ‘association’, ‘victim’, ‘lawful detention’, ‘home’, and ‘civil servant’ (Letsas 2004, 283).

Yet, it would be misleading to think that the ECtHR automatically rejects any national meaning assigned to the ECHR; domestic decisions are overturned if they do not meet certain criteria. Most notably, at least two steps are required to trigger autonomous definitions: firstly, the applicants have to contest the national legal meaning assigned to a given concept and, secondly, national authorities have to fail to prove that the alleged right is properly secured. Only under the-

se circumstances is it likely that the ECtHR will uphold applicants' request to conceive an autonomous qualification of the point at issue.

To conclude this overview, the ECtHR has significantly endorsed a purposive approach, developing new interpretations. Bearing in mind the specificities characterizing human rights field, this orientation appears neither surprising nor unjustified: the Court is concerned whether respondent States honor the spirit of obligations under the ECHR and ultimately, whether national authorities really do secure minorities against eventual majoritarian dictatorships.

Throughout the ECtHR jurisprudence, judges sway between diverse interpretations and, sometimes, the ECtHR opts for a more originalist or restrained tendency. In *Witold Litwa v Poland*, n. 26629/95, for instance, the majority implied the possible preeminence of literal meaning, stating “the sequence in which [...] elements are listed in Article 31 of the Vienna Convention regulates, however, the order which the process of interpretation of the treaty should follow. That process start must start form ascertaining the ordinary meaning of the terms of a treaty” (*Witold Litwa v Poland*, § 72). In the majority of cases however, the Court does not preliminary state its position on this issue and the departing approach has to be subsumed in the overall interpretation.

The absence of precise paths, the empirical and the factual nature of the ECtHR, and the necessary balance between the autonomy of the Court and the sovereignty of Contracting Parties, progressively pushed the Court to advance peculiar instruments, whereby interpreting the Convention and reviewing domestic legislation, which are discussed hereinafter.

3.3.2 The European Convention on Human Rights as a Living Instrument

The reading of the ECHR as a living instrument goes back to *Tyler v UK*, and it descends from a purposive approach to the text.

Interpretive autonomy is indeed required, to elaborate a set of pragmatic strategies whereby concretely adjudicating single applications and interpreting the Convention.

Reappraising the famous *Tyler* judgment concerning whether the punishment of pupils by birching infringed Article 3, the ECtHR stated “the Convention is a living instrument which [...] must be interpreted in light of present-day conditions. In the case now before it, the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of member States of the Council of Europe in this field” (*Tyler v UK*, § 31).

The metaphor of a ‘living instrument’ was borrowed from constitutional debates and it recalled the thoroughly investigated alternative between originalist and evolutive interpretations. Though the ECHR does not fit the category of constitutional law, the similarity between the latter and human rights allows us to trace a parallelism. Whereas originalists argue that the ECHR embodies a set of values immune to ephemeral political changes, evolutive interpreters approach the legal text beyond its wording, admitting the regulation of issues which are not originally foreseen and also treating them according to a perspective different from the one that the drafters would have chosen or from the one the drafters implied in preliminary stages (Letsas 2011, 106).

The ECtHR often resorted to the living instrument doctrine, and to this day, judicial review of the ECHR can’t prescind such a method; there is, however, a sequence of judgments which marks the development of the living instrument doctrine, namely *Sigurdur v Iceland*, no. 16130/90, *Young, James and Webster v UK*, *Loizidou v Turkey*, *Matthews v UK*, no. 24833/94, and *Selmouni v France*, no. 25803/94. The interesting element in the former two complaints is that the ECtHR endorsed an interpretation which detached itself from the drafters’ intentions, in that preliminary debates proved that the drafters did not want to grant protection for the situations put forward by the applicants.

Both *James and al.* and *Sigurdur* claimed a negative right to association, related to trade unions and professional associations; even though Article 11 only mentioned the positive right of association and despite the fact that the complaints at stake did not entail criminal law but domestic industrial relations, as Golsong suggests (1990,15) the ECtHR finally found the UK and Iceland to be in breach of ECHR by adopting the “living doctrine” and by mentioning the need “to interpret the ECHR in light of present day conditions” (*Sigurdur v Iceland*, § 35).

In *Loizdous v Turkey* and *Matthews v the UK*, the Court applied this doctrine to procedural and institutional elements which were not originally envisaged, and which were quite in contradiction with the legal diplomacy of the origins. In the former, a Cypriot citizen complained of Turkish interference with her property, located in northern Cyprus; the Turkish Government contended that it had only ratified the ECHR recognizing the competence of the original Court in respect of actions taking place within Turkish boundaries, in accordance with Articles 25 and 46 of the ECHR. Nevertheless, the ECtHR maintained that the evolutive interpretation applied “not only [...] to substantive provisions of the Convention, but also [...] to those provisions, such as Articles 25 and 46, which govern the operation the Convention’s enforcement machinery. It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than four years ago” (*Loizdous v Turkey*, § 71).

The Court reiterated this concept in *Matthews*, stating that the inability of Gibraltar citizens to vote for the EU parliament could not be justified by the fact that the ECHR did not address the issue of overseas territories; on the contrary, to prevent the Convention from becoming a death letter, the Court found a breach of Article 3 of Protocol 1, on the right to free elections in the choice of legislature, concluding

the mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention. To the extent that Contracting States organise common constitutional or parliamentary structures by international treaties, the Court must take these mutually agreed structural changes into account in interpreting the Convention and its Protocols. (*Matthews v UK*, § 39).

In *Selmouni v France*, the ECtHR took into account the possibility to innovate the definition of torture, and further widened the field of application of the living instrument doctrine. The applicant denounced a series of sexual and physical abuses at the hands of police officers during his detention, and in contrast with the French authorities’ submissions, whereby those activities could neither be classified as torture nor would the drafters have held sporadic police violence under such a frame, the ECtHR took the view that under the living instrument

certain acts which [...] classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in the future. [...] The increasingly high standard being required in the area of protection of human rights and fundamental liberties correspondingly, inevitably requires greater firmness in assessing breaches of the fundamental values of democratic society (*Selmouni v France*, § 101).

Throughout the decades, the ECtHR has consistently applied the living instrument doctrine in a multitude of cases, which can't be recalled here, but this doctrine has raised consistent doubts on how far the ECtHR is entitled to go, and to what extent judges can detach themselves from the drafter's intentions.

Three limits mainly restrict the ECtHR review, namely the arguments disciplined by specific Protocols, the rights on which international consensus does not exist and, finally, those rights which can't be directly linked to any Article and whose legitimacy is hotly debated.

In *Soering v UK*, no. 14038/88, and *Ocalan v Turkey*, no. 46221/99, the applicants claimed that the death penalty violated Article 3, since it allegedly amounted to inhuman and degrading treatment. Although by 1989 the overwhelming majority of Contracting Members had *de iure* abolished the death penalty, and although by 2003 the legal position of the Council of Europe was against the death penalty, in both cases the ECtHR decided that essential conditions required to creatively interpret the ECHR were not met. The existence of a dedicated Protocol addressing the death penalty, proved the will of the Contracting Members to discipline such an issue through a "normal method of amendment of the text [...] and to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement" (*Soering v UK*, § 103).

Consequently, a first limit against judicial over-creation concerns the supremacy of eventual Protocols testifying the intention to review the rights secured by the ECHR through a deliberative process.

Secondly, the ECtHR resorted to extreme prudence in deciding on sensitive issues about life and death, especially if there's no clear international consensus. In *Pretty v UK*, no. 2346/02 a British woman, suffering from a motor neurone disease, lodged a complaint with the ECtHR, claiming that the impossibility to mercy-kill herself infringed upon her rights, and further denouncing that in the UK assisted suicide amounted to a criminal offense. Both the legal and social British opinion were highly divided on the issue; the fear that an activist perspective, as compassionate as it might appear, would be critiqued as performing an act of judicial policy-making, pushed the ECtHR to dismiss the application. Moreover, Pretty demanded positive obligations and the ECtHR feared this could lead to a dangerously slippery-slope¹²⁵.

¹²⁵ "While the Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection. [...] The Court cannot but be sympathetic to the applicants apprehension that without the possibility of ending her life she faces the prospect of a distressing death. [...] Nonetheless, the positive obligation on the part of the State which is

A third limit regards the pretenses not yet internationally classified under human rights law; in *Hatton v UK*, n. 36022/97, the Court refused to deduce environmental rights from the ECHR, stating that “environmental protection should be taken into consideration by Governments in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental rights” (*Hatton v UK*, § 122).

It could be observed that besides claims whose bound with the ECHR is clear and without margin of uncertainty, any other alleged violation implies a questionable distinction among: a) issues which have been actually forecasted by the drafters, b) issues which deserve, at present time, protection under the ECHR, though not foreseen or manifestly dismissed at the origins, and c) issues which display a weak and inadmissible bound with the text and the intents of the ECHR.

From the background of the undertaken analysis, the doctrine of living instrument appears more as an orienting guideline to the ECHR rather than an operative method. Further interpretive instruments are required to read the ECHR in light of present conditions and, to this purpose, the ECtHR has justified two fundamental methods, widely addressed in forthcoming paragraphs: the consensus doctrine and the margin of appreciation.

Broadly speaking, the living instrument perspective assesses the direction of judicial review, whereas the joint recourse to the margin of appreciation and consensus builds the concrete path, case by case.

invoked in the present case would not involve the removal or mitigation of harm by, for instance, preventing any ill-treatment by public bodies or private individuals or providing improved conditions or care. It would require that the State sanction actions intended to terminate life, an obligation that cannot be derived from Article 3 of the Convention” (*Pretty v UK*, § 54-5).

3.3.3. Consensus and the European Convention on Human Rights

In the ECtHR's jurisprudence, consensus analysis plays an important role, to the extent that almost every evolutive interpretation recalls such a method.

Consensus could be roughly defined as that interpretive method whereby judges endorse teleological interpretation only if common legal trends emerge on particular matters. The theoretical reference of this doctrine is comparative legal analysis, which, as it can be easily imagined, poses a number of problems.

The origin of the doctrine is embodied in *Tyrer v UK*, and precisely in the same passage as that firstly interpreted the ECHR as a "living instrument". In paragraph 31, the judges stated that the definition of present life conditions "cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe".

Consensus analysis has been adopted in some of the most relevant judgments, and its role in LGBT issues proved essential. After *Tyrer*, the ECtHR famously resorted to comparative legal analysis in *Marckx v Belgium*, to find a breach in national laws discriminating against children born outside marriage and their mothers: "the Court cannot but be struck by the fact that the domestic law of the great majority of member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments towards full juridical recognition of the maxim *mater semper certa est*" (*Marckx v Belgium*, § 40).

Despite the scarcity of theoretical argumentations at the hands of the ECtHR, it's possible to connect the birth of consensus analysis to at least three main legal grounds.

Firstly, the Preamble of the ECHR considers the governments of European countries "like-minded and hav[ing] a common heritage of political traditions, ideals, freedom and the rule of law". As Brems aptly observes (1996, 276-77), the very notion of commonality generally presumes a comparative approach; theoretically speaking, the ECHR is aimed at securing common standards concerning human rights, which have to be pragmatically defined by comparing national legislations and searching for shared elements.

Consensus analysis thus appears as the concrete instrument abiding to the comparative perspective implied in the Preamble.

Secondly, an even more substantial justification is provided by the subsidiary nature of the ECHR.

As previously outlined, the ECHR machinery presupposes a multilevel structure, oriented by the principle that domestic institutions are best placed to answer to social, legal, and political needs; in this way, the quest for a common denominator throughout the Council of Europe is

combined with the promotion of pluralism and with the existence of many national sensibilities. Therefore, when restricting a Parties' autonomy, the ECHR may find useful to justify its interpretation on the grounds that a relevant number of Coe Countries is consistent with its approach.

The spirit of *realpolitik* moulds the third ground of consensus analysis. Several authors highlight the essential role played by voluntary compliance: "judgments can be ignored, the Convention could be even denounced" (Carozza 1998, 1227; Forst 3005; Von Staden 2012). Hence, it's far more convenient to enhance national compliance and eschew the threat of Contracting Members withdrawing from the ECHR, and also to prevent a possible delegitimization of judicial work (Helfer 1993; Stone Sweet and Keller 2008).

If the ECtHR's efforts and resources were mainly targeted at prosecuting non-compliant States, the effective ability of the Court to act as the "conscience of Europe" (Council of Europe 2014) would result negatively affected, since the judiciary could be charged with overreaching judicial activism and of leaning towards politics, at the detriment of its own legitimacy.

With regard to this point, especially when sensitive issues are involved, "the actual practice of the Member States helped it establish its political legitimacy over time and helps it maintain legitimacy in the midst of expanding the scope of the ECHR scope" (Carozza 1998,1228).

Consensus analysis also counterbalances the autonomy of the ECHR; it is the instrument whereby the ECtHR mantles its interpretation with the attributes of necessity and determinacy, and whereby it dissimulates possible political features. Though not suggesting in any way that the ECtHR openly and directly engages in political questions, I share Carozza's view, according to whom the ECtHR's judgments are a choice among competing visions of the requirements of human dignity and of the common good, with unavoidable political consequences (Ivi,1236).

The connection between legitimacy and inter-state comparison not only accounts for the origins of consensus, but also provides an acceptable theoretical justification to a doctrine that, as explored hereinafter, raises complex and unsolved questions.

The ECtHR has been famously described as the "crown jewel of one of the world's most advanced international system" for securing human rights (Helfer 2008, 125), a global beacon of hope (Letsas 2007) and its most significant feature is globally identified in the high compliance with its judgments (Helfer and Voeten 2008). Since comparative standpoint leads to a cohesive effect among Contracting Members, and, at the same time, it mitigates the tension between Universalist aspirations and pragmatic considerations, the frequent resort to consensus is not surprising. Had the ECtHR judges opted for a more universalist method, the Courts itself would have not emerged as the only international judicial institution effectively enforcing hu-

man rights, and the probable outcome would have been the complete disintegration of the ECHR, or the withdrawal in favour of a State-based approach.

However, the pragmatic necessity of consensus does not erase relevant problems regarding the justifications of this doctrine.

Theoretically speaking, the comparative perspective jars with the normative features embedded in the ECHR, for they lay on realms enlivened by different values, aims, and ideals. Reappraising Carozza “what comparative law cannot do is precisely what the European Court’s jurisprudence implicitly claims for it” (Carozza 1998, 1219); consensus is not tailored to clearly establish normative international standards, but rather it constitutes a casuistic, incremental, changing doctrine which “cannot give [...] the normative basis for making judgments about when common standards ought to be enforced and when diversity should be given freer play” (Ibidem). Consensus is established on *here and now* and it necessarily relativizes the very notion of human rights.

Hence, tension between Universalist and pluralist stances leads to two main questions.

From the side of the minorities or the oppressed, why should the recognition of human rights depend on what other States decide? Why should the protection of the weakest social groups descend from the policies implemented in other Countries? Democracy provides safeguards against tyranny, but even when human rights are involved, legislative and policy outcomes are necessarily shaped by majoritarian preferences and values, to the extent that, as Benvenisti polemically argues, consensus “stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities” (Benvenisti 1999, 852).

Similarly, the case of a minority of States providing a high standard of ECHR enforcement against a majority endorsing a downward regulation may well occur; in this event, if applying consensus analysis, the common denominator would probably refer to the latter cluster of States, and the final ECtHR would result prevented to uphold the achievements of the former Countries.

If undertaking the perspective on national sovereignty instead, why should a majority, even a super-majority, bind other States? If the ECHR system endorses the pluralism of values (Mahoney 1990; Letsas 1998; Popovic 2009), why should such pluralism be defined according to majoritarian criteria?

One could answer by recalling the Preamble of the ECHR and the notion of common heritage, but at least two aspects remain problematic: on the side of the minorities, it might be suggested that the ECtHR should deal with such commonality by means of normative arguments with *erga omnes* effect, rather than gathering general principles from particular and contingent frameworks. From the opposite perspective however, Carozza points out that a temporal confusion

might occur, in that it's not clear why "should the obligations a State has assumed under international treaties be based on what some number of other states have chosen to do at any given time?" (Carozza 1998, 1228).

A possible, though not entirely satisfactory, solution is to interpret the notion of heritage as a dynamic concept, informed by a socio-legal approach to reality and opened to new interpretations carved upon changing needs and legal sensibilities in the ECtHR's legal culture; nevertheless, beside theoretical criticisms, methodological questions persist.

How to measure consensus? Either a strict majoritarian criterion or a definition based on emerging legal trends are suitable, and in fact, the ECtHR has consistently adopted both.

Yet, the two are not the same; the former requires a large majority and implicitly favors ECtHR self-restraint, while the latter opens up to judicial creativity.

Moreover, as Wildhaber, Hjartarson and Donnelly note, the definition of majority is flawed, for the number of States required to find consensus is not univocally defined, but will vary according to the context; relevant factors, including "the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned" (Wildhaber, Hjartarson and Donnelly 2013, 257). If, on the one hand, the strict majority of 47 Contracting Members appears somehow lacking in strength and credibility, on the other, it's very complex to translate the principle whereby "comparative research should be as comprehensive as possible" (Ivi, 258) into practice. Quite a heterogenous frame emerges:

in about 56% of post-1998 judgments which discuss consensus in the 47 European member States, the number of legal orders may be qualified as representative; in about 12.3%, roughly half of all States are taken into consideration (and are indicated separately); in about 7%, the comparative research is less than representative, and in about 24.6%, the "new" Court remains content to follow the example of the "old" Court, indicating that it recognizes, or fails to recognize consensus, without any further details or simply speaking of a "majority of States" (Ibidem).

Thus, the ECtHR enjoys a considerable space for discretion in defining and measuring consensus; for instance, one could hypothesize that the more an issue is regarded as sensitive, the more the ECtHR will adopt super-majoritarian criteria in order to justify European heterogeneity, with the intent of guaranteeing national authorities wide discretion at least until they remain almost the only Country to adopt a certain policy.

Consensus analysis can lean towards traditional or restrained interpretation, and comparative enquiry may also curb the enhancement of human rights, especially when complaints address minority issues which are slowly being affirmed in national political agendas.

To better analyze the different outcomes of consensus, so-called transsexual cases provide a useful example: between 1986 and 2002, the ECtHR judged three major complaints, filed by UK citizens against British laws, which denied the right to legally change their gender identity. Despite the fact that in 1986, legal and social European framework already appeared to be quite dynamic and heterogeneous, the ECtHR only found a violation in 2002.

Whereas in *Rees v UK*, n. 9532/81, the Court accepted the justifications of the Government, on the grounds that the majority of Contracting Members had not recognized such a right to transsexuals (*Rees v UK*, §37). Tension between consensus doctrine and Universalist intents starkly emerges in *Cossey v UK*, n. 10843/84. Here, the majority upheld that, though the European context displayed a trend in favor of the applicants and regardless of EU Resolutions and Recommendations to harmonize laws and practices in this field, the UK Government was not in breach of the ECHR¹²⁶.

The strain between these two different approaches to human rights is well captured by four dissenting opinions, gathering eight judges out of a total of eighteen. Interestingly, the core of the disagreement lies precisely in whether Contracting Members shared sufficient consensus to endorse creative interpretation. Most notably, while the ECtHR found only “certain developments” (*Cossey v UK*, § 40), judges MacDonald and Spielmann dissented “we consider that since 1986 there have been, in the law of many of the member States of the Council of Europe, not *certain developments* but *clear developments*” (Joint dissenting opinion, *Cossey v UK*, § 2). What’s more, judges Palm, Foighel and Pekkanen mentioned the legal *status quo* amongst European Countries, contending that the UK authorities failed to adequately justify their own position, and departing from the EU Parliament’s resolutions and recommendations, concluded

¹²⁶ “There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. However, the reports accompanying the resolution adopted by the European Parliament on 12 September 1989 (OJ No C 256, 9.10.1989, p. 33) and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989 - both of which seek to encourage the harmonization of laws and practices in this field - reveal [...] diversity of practice as obtained at the time of the *Rees* judgment. Accordingly this is still [...] an area in which they enjoy a wide margin of appreciation (see the *Rees* judgment, p. 15, para. 37). In particular, it cannot at present be said that a departure from the Court’s earlier decision is warranted in order to ensure that the interpretation of Article 8 (art. 8) on the point at issue remains in line with present-day conditions (see § 35 above)” (*Cossey v UK*, § 40).

“the decisions of these representative organs clearly indicate that, according to prevailing public opinion, transsexuals should have the right to have their new sexual identity fully recognised by the law” (Joint dissenting opinion, *Cossey v UK*, § 3).

In *Cossey* alone, three meanings of consensus arise: the Court’s meaning, not further specified, MacDonald and Spielmann’s variation, based on the concept of trend, and Palm, Foighel and Pekkanen’s version, which takes into account legislative communitarian documents.

In *Goodwin v UK*, n. 28957/95, the ECtHR resorted to a further meaning of consensus, which refers to the trajectory of enacted legislations and not to detailed measures, also implying reference to international trends:

the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving-within their domestic legal systems-the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals, but also of legal recognition of the new sexual identity of post-operative transsexuals. (*Goodwin v UK*, § 45).

In conclusion, though consistently applied, consensus doctrine is far from clearly defined, and it still conveys many grey and uncertain areas.

By adding new meanings and by reviewing the existing ones, the ECtHR creatively disrupts previous understandings of this doctrine, to the detriment of the predictability of the ECtHR; in reference to the issue, Helfer notes that ambiguity marks the ECtHR jurisprudence, and he calls for a rigorous definition in order to reduce contrasts over one of its main interpretative methods (Helfer 1993, 28).

Solving such an intertwined debate would go beyond the scope of my research; I simply remark that this disagreement arises from two conflicting perspectives; an idealist and a pragmatic one, and that this contrast may be harsher in theory than in practice. From a pragmatic perspective, it’s possible to address limits and inconsistencies embedded within consensus doctrine, to ask for a more coherent and systematic doctrine, but at the same time to uphold consensus doctrine as the most feasible in the ECHR system. Conversely, though considering consensus as policy-oriented and value-driven and though sympathizing for an idealist and Universalist doc-

trine, one could admit that the comparative gaze is one of the main strategies whereby the ECtHR achieves significant compliance, and thus complies with the protection of human rights.

3.3.4 The Margin of Appreciation

Broadly speaking, the margin of appreciation grants Contracting Members a space of maneuver when applying or transposing the ECHR in respective national legislations.

The breadth of such a space is quite variable, and it has been variously defined as the “latitude to national deference” (Yourow 1996, 13). Letsas distinguishes between substantial and structural margin of appreciation (see *infra*), and Benvenisti proposes a definition which clearly relates margin of appreciation to public morals and to the balance between majorities and minorities: “This doctrine [margin of appreciation] which permeates the jurisprudence of the ECHR, is based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions” (Benvenisti 1999, 843-844).

Yourow suggests the most comprehensive definition of this doctrine, as

the freedom to act; maneuvering, breathing or elbow room; or the latitude of deference or error which the Strasbourg organs will allow national legislation, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction, or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention’s substantive guarantees (Yourow 1995,13).

Before critically evaluating the theorization and the application of margin of appreciation, let me review the origin and the evolution of such doctrine, and the rationale behind it.

It stands upon two legal pillars: administrative and international law. With regard to the former, Takahashi reconnects theories of administrative discretion to that developed by the ECtHR; yet, administrative and ECHR margin are divided by a significant difference, namely the diverse institutional architecture on which they insist. While administrative discretion indeed entails domestic realm only, by involving “inter-governmental distribution of power in terms of discretion given by the judiciary to administrative agents” (Takahashi 2011, 64), the ECHR produces effects on a vertical level, dealing with downwards deference granted by the Court to national authorities.

As far as the ECHR is concerned, international treaties usually admit a clause of derogation to undertaken obligations mainly in the event that domestic authorities resort to the so-called emergency clause of derogation. Likewise, margin of appreciation firstly emerged as a simple derogation clause; in *Greece v UK*, *Lawless v Ireland*, and *Ireland v UK*, n. 5310/71, the Court and the Commission conceded respondent governments a margin of discretion, due to the ex-

istence of serious threats for national security, on the assumption that “the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favor of the legality of the Government’s appreciation” (Benvenisti 1999, 845).

From the 1960s however, the Court developed a distinct doctrine, enlarging its field of application and altering its paradigm. Until the *Handyside* case, margin of appreciation remained quite experimental (Takahashi 2011, 66), appearing more as a sporadic interpretive device than a constitutive method of interpretation¹²⁷.

Conversely, in *Handyside*, the Court displayed the first systematical dissertation of margin of appreciation, a theoretical frame which, despite its reiterated application, has not undergone relevant alterations. Paragraph 48 reads: “state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them.” (*Handyside v UK*, § 48). In this passage, judges no longer refer to delicate emergency situations but, on the contrary, they justify the principle of national discretion in quite general terms, thus legitimizing appreciation doctrine as an ordinary instrument to interpret the ECHR. Most notably, after *Handyside*, judges increasingly developed margin of appreciation with reference to Articles 8-11, when assessing whether conditions under exemption clauses did take place.

Effectively, ECtHR jurisprudence overwhelmingly resorts to margin of appreciation with reference to Article 8-11, although relevant examples also address Articles 13-14 and Protocol 1; over the decades the margin of appreciation has percolated into a broad cluster of issues, which can’t be grasped in few lines, affecting almost every complaint alleging a violation of the aforementioned Articles.

By going against its original rationale, this method has acquired new features and includes delicate aspects as well.

As Benvenisti notes, the shift of paradigm

reflected an altogether different philosophy, one which is based on notions of subsidiarity and democracy and which significantly defers to the wishes of each society to maintain its

¹²⁷ As Takahashi notes (2011, 66), the Court firstly departed from the traditional understanding of margin of appreciation in *Iversen v Norway*, n.1468/62; in that case it draws a similarity between public emergency mentioned in Article 15, and the shortage of dentists in a sparsely populated region. In addition, to the Belgian linguistic case consisting of six applications submitted between 1962 and 1964, the Court implied the notion of domestic discretion, though not stating or clarifying it. For a reconstruction of early cases involving the margin of appreciation, see also Letsas (2006).

unique values and address its particular needs. In more practical terms, the extension of the doctrine [...] has been explained on the ground of judicial politics (Benvenisti 1999, 846).

Judicial politics constitute one rationale of margin of appreciation; former judge MacDonald indeed justifies the choices of the ECtHR, by describing it as a doctrine giving “the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention” (MacDonald 1993,123).

Subsidiarity underpins appreciation doctrine, hence demonstrating how all methods developed by the ECtHR revolve around this concept, and it’s fair to suggest that since the original drafters aimed to safeguard national sovereignty by stating the supplementary nature of ECHR, the margin of appreciation is also consistent with the overall ECHR structure.

Regarding consensus analysis, this doctrine has not even been systematically addressed, explained or accounted for by the Court. As a result, basilar trends and features have to be grasped throughout ECtHR jurisprudence and casuistic reasoning. Takahashi’s advice not to look for a “fixed benchmark in moral space” (2001, 104) aptly describes a situation where judicial outcomes vary according to the final balance reached between the need to protect rights and the presence of competing values.

Academic literature has however, gleaned noteworthy elements from ECtHR jurisprudence. Takahashi identifies five situations where margin of appreciation is likely to recur: 1- the process of fact-finding and ascertainment of facts; 2- the process of interpreting national laws; 3- the evaluation of human rights norms in the ECHR; 4- the process of balancing individual persons’ rights and public interest grounds; 5- the balance between competing rights and freedoms (Ivi, 69-77).

When dealing with hypotheses at points 1 and 2, the ECtHR generally endorses an extremely cautious review: on one hand, judges are enabled to ascertain both facts and laws put forward, but on the other hand, deference to national authorities is extremely pronounced. The ECtHR has thoroughly clarified, that any departure from respondent State’s ascertainment of facts or any autonomous interpretation of national laws must indeed remain confined to cases where domestic assessment are manifestly unreasonable, arbitrary, or without reasonable foundation.

The evaluation of norms enshrined in the ECHR is obviously the realm where judges enjoy the widest discretion and autonomy.

Nevertheless, the indeterminacy of human rights actually enlarges the spaces for ambiguous interpretation, allowing the ECtHR to mold interpretive doctrines, according to extra-legal values as well (Ivi, 74).

The balance between individual and public interests, or between competing rights, is insightfully addressed by Letsas, who introduces a very useful distinction to disentangle the multiple standpoints comprised under the conceptual umbrella of appreciation doctrine and to better frame problematic issues.

According to Letsas, two margins of appreciation would exist; the substantial margin of appreciation “addresses the relationship between individual freedoms and collective goals” (Letsas 2006, 806), while the structural one “addresses the limits or intensity of the review of the European Court of Human Rights in view of its status as an international treaty” (Ibidem).

Substantial margin of appreciation acts like a cloak, for it formally pays deference to national authorities but, at the same time, it hides the practical tools to extensively review the decisions, the laws, and the values of respondent governments; reappraising Singh’s reflection¹²⁸, Letsas suggests that, here, “the idea of margin of appreciation is not used to express a general point of view about the limitability of rights, but to express a final determination as to whether the state has violated a right in some particular case” (Ivi, 712).

With reference to Articles 8-11, the ECtHR developed a multi-layered process and gradually clarified a number of criteria which national authorities have to meet. Each phase is analyzed independently, but they form a sequence and respondent States are required to fulfill every step; it is not rare for national authorities to only partially satisfy the ECtHR tests, and that the Court decides to restrict domestic discretion accordingly.

The stratification of judicial approach is distinctly clear when Articles 8-11 are considered: as already recalled, exemption clauses consider those interferences with individual rights legitimate if they are in accordance with the principles of legality, legitimacy, and necessity in democratic regimes. Consequently, the ECtHR review involves a four-stage test: at the beginning, judges examine whether the impugned legislation, policies, or actions interfered with the ECHR; then they consider whether this interference was prescribed by national laws and, thirdly, whether it pursued one of the legitimate aims enlisted in the exemption clauses. Lastly, the Court decides whether the interference was necessary in a democratic society, and whether it answered to pressing social needs. As academic literature suggests, the ECtHR has extensively engaged in determining the meaning of aforementioned concepts, with particular reference to necessity

¹²⁸ British judge Singh critically observes that margin of appreciation would “obscure the true basis on which a reviewing court decides whether or not intervention in a particular case is justifiable. As such it [would] preclude courts from articulating the justification for and limits of their role as guardians of human rights in a democracy” (Singh 1999, 4).

(Matscher 1993; Yourow 1996; Greer 2000; Letsas 2005; Takahashi 2011). The ECtHR established a strict relation between necessity and proportionality, so that the latter may well be incorporated in the definition of the former and characterized “as a corrective and restrictive of margin of appreciation” (Matscher 1993, 79). The Court has also clarified that national authorities are not required to show evidence that no other policy or action was possible to tackle that situation: if they pass a proportionality and necessity test, they are considered as best placed to determine how to deal with internal issues.

The margin of appreciation also recurs in complaints alleging a violation of other Articles, such as Article 12, Article 13, Article 14 and Protocol 1. In this event, the line of reasoning of the Court does not formally proceed following the aforementioned criteria, and judges’ interpretive mind aims at fairly balancing the eventual existence of international consensus with national sovereignty. In this way, consensus tempers appreciation doctrine, to the extent that they appear as two sides of the same coin.

On a closer look, appreciation doctrine reveals a problematic relation with ECtHR discretion. It’s up to the judges to decide both how much they wish to interfere with the ECHR, and which interferences are legitimate, as well as to specify the meaning of the concepts listed in different Articles. It’s not surprising then, that throughout its jurisprudence, the ECtHR shows significant heterogeneity on both aspects: from the definition of inhuman and degrading treatments, to the duties connected with *habeas corpus*, to the positive obligations and sexual rights, the ECtHR has changed its interpretation according to present life-conditions hence modifying the degree of discretion left to national authorities.

Substantial margin of appreciation enables the ECtHR to review national laws without appearing intrusive, and at the same time, the progressive strengthening of this doctrine favors the laying of legal, theoretical, and pragmatic foundations of a more creative approach.

On the contrary, structural margin of appreciation limits judicial review and responds to the classic conception of appreciation as expressed by international law.

In this case, the ECtHR simply refers to the subsidiary nature of the Convention, calling itself out from settling the dispute. Therefore, structural appreciation grants the ECtHR a secondary role, both temporally and procedurally, raising troublesome issues: Letsas remarks, that from a chronological perspective, structural appreciation could simply imply what Article 35 already states, by which all complaints, before being lodged with the ECtHR, must first be judged by national Courts. In jurisprudential practice, however, judges have shaped a normative meaning, to the extent “that national authorities are not only the first ones to deal with complaints regarding the Convention rights and provide remedies but also the ones who have either more legitimacy

or are better placed than an international bodies to decide on human rights issues” (Letsas 2006, 722).

If the rationale of the ECHR is to secure individuals against abuses perpetrated by their own governments, how can normative priority be consistent with the effective enforcement of human rights? In the event of a complaint raising manifestly ill-questions, the ECtHR simply declares it inadmissible; therefore, structural margin of appreciation recurs in cases where the Court finds that a complaint has some ground, and that it affects one or more of the rights secured by the ECHR, and yet it decides to entrust national authorities with complete discretion to rule the matter.

If applied liberally, structural margin would undermine the whole ECHR system, for it would presume the legitimacy of any decision endorsed by domestic authorities. The ECtHR has extensively resorted to this interpretive device when faced with public morals and politically sensitive issues (Ivi, 723), such as the functioning of censorship over sexual material, the assessment of the best interests of the child, the definition of the right to property, and the specification of planning policies (Ibidem). To counterbalance possible side-effects, judges generally couple structural margin with consensus doctrine, and tend to favor the former if there is a lack of common policy-lines; given the inconsistencies of the pragmatic measure of consensus, it is a tricky terrain. Moreover, the ECtHR does not apply structural margin in a blind way, but it weights doctrines of interpretation with extremely relevant starting assumptions. As far as public morals are concerned, in the *Sunday Times v UK*, n. 6538/74, the ECtHR stated “the requirement of morals [...] varies from time to time and from place to place, especially in our era and State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements” (*Sunday Times v UK*, § 59). It logically follows that precisely in areas where disagreement is bitter, conflicts are heated, and clashes recurrent, the ECtHR withdraws from its adjudicatory role, hence legitimating national decisions which, in these events, are likely to be based on majoritarian perspectives only.

The imbalance of powers between majorities and minorities, and the recognition and the protection of the former represent the core of the discussion on structural margin of appreciation. Benvenisti’s well known critique explores the multifaceted and intertwined aspects of this issue¹²⁹. In modern, democratic societies, minorities exist and are generally equipped with poor political and economic resources, and with a weaker political voice than majoritarian groups.

¹²⁹ Benvenisti does not distinguish between structural and substantial margin of appreciation. However, as explored throughout this paragraph, his critiques mostly entail the structural meaning of appreciation.

Their different culture, identity, and loyalty are often questioned, they are looked upon as a scapegoat, and historically, minorities have had to face both “absent political influence and [...] prevalent resentment” (Benvenisti 1999, 848). Under these circumstances, the best way may seem to be applying to the judiciary to protect their rights and to claim other demands, but judges might have interiorized the interests of the majority, failing to adequately protect others. In such a frame, the ECtHR becomes the last resort, where national interests should result less compelling. On these premises, structural margin of appreciation leads to the preeminence of national interests, and it fails to address the fundamental task of human rights law, which is the protection of minorities and individuals.

Letsas further reinforces such perspective, recalling that the ECtHR has variously defined national moral conception of the majority as “vital forces of the country” (Letsas 2006, 729), and critically suggests that “no one has the right to impose her own ethical belief on others, or coerce others into abandoning their ethical views on the basis that they are inferior or degrading” (Ivi, 729-730).

To overcome such risk, Benvenisti radically upholds that margin doctrine should only be justified in matters that affect the general people in a given society (Ivi, 847), such as on restrictions to hate speech, or on limitations of actions in tort. Conversely, no deference should be left to national institutions where conflicts between majorities and minorities are at stake, since the risk of restricting the rights of the few would be too high.

It could be argued that also when distinguishing between issues where discretion should be allowed and cases where it shouldn't, the Court enjoys a space for discretion which might still prove deferent to national interests - for instance by developing the tests where collective goals expressed by national majorities are evaluated more than the claims produced by minorities.

As previously analyzed, academic literature attests that the entire ECHR machinery is permeated by autonomy, and thus a conception of appreciation doctrine which does not require judicial interpretation is unrealistic.

From an opposite perspective, former judge Mahoney contends that harsh criticism against appreciation doctrine is misconceived (1990, 81); deference to national authorities would be theoretically entrenched in the ECHR itself and politically required to ensure the distribution of powers between the ECHR institutions and the national authorities. In addition to the already analyzed wording, Mahoney stresses the relevance of philosophical grounds surrounding the ECHR. Most notably, he suggests that the ECHR implies the idea whereby “democracy is the best system of government for ensuring the respect of fundamental freedoms and human rights” (Ibidem). Consequently, democracies would share the belief that the best guarantee “of the sur-

vival of the society is located in decision making by freely elected representatives of the people in majoritarian processes” (Ibidem).

Though not abdicating to their role of international supervisors, judges should pay some deference to the choices and wishes of national majorities; Mahoney also recognizes the need to improve such doctrine, and he encourages the ECtHR to better clarify general criteria behind this method, abiding to the principle of due deference in spheres where there is legitimate scope for difference in opinion (Ivi, 88).

The call for a renewal is widely shared: all considered authors support an in-depth revision of current ECtHR reflection on margin of appreciation, be it aimed at clarifying inconsistencies or at altering the existing procedural dynamics.

From a restrained approach, MacDonald complains about the lack of a theoretical vision within European legal order, and to that end, suggests that the margin of appreciation should be understood as not allowing “the Court’s evasion to responsibility to articulate the reasons why it’s intervention in particular cases may or may not be appropriate” (MacDonald 1993, 124). MacDonald does not hold that the ECtHR should expand its judicial powers, but simply hopes for more transparent and exhaustive judgments.

From a moderate standpoint, Takahashi suggests facing criticism against the margin of appreciation by “clarifying the normative nature of margin of appreciation doctrine, structurally locating the doctrine’s place in the ECHR constitutional normative order [...] and identifying robust substantial rationales that underlie the application of a margin of appreciation” (Takahashi 2011, 82).

Finally, Letsas only justifies substantial margin of appreciation, as the structural one is embedded with an unjustified preeminence of majoritarian preference over minorities, and it would contrast with the main features of the ECtHR, by preventing the Court from behaving as a supranational institution and from acting on behalf of the oppressed.

In conclusion, the common element underlying the different proposals pertains to overcome the casuistic approach hitherto applied, and requires the ECtHR to structure a reasoned and coherent theoretical framework, where multiple problems are faced and substantial elements are clearly defined.

3.4 Conclusive Remarks

The ECHR is an extremely complex system, under both a theoretical and a pragmatic perspective. With regard to the former, it incorporates the tension between universal standards and particularist stances entrenched in human rights law, and it carries a problematic relation between doctrines of interpretation and the protection of minorities. As to the latter, the ECtHR review has to take into account the broad political situation, because of its derivative legitimacy (Friedman 1975, 237) and of its peculiar institutional asset.

There is no doubt that, the ECHR represents a beacon for human rights all over the world, as several researchers show (MacDonald 1993; Lester 2011, 104; Johnson 2014; Helfer and Voeten 2014); furthermore, in more than 60 years, it has redressed a variegated cluster of violations, challenging national policies and building a specific approach to human rights, which still embodies the fundamental common values underpinned to the very European dream. The pillars of this system are the subsidiarity nature of the ECHR, its interpretation as a living instrument, the doctrines of margin of appreciation, and consensus analysis to determine the breadth of national discretion.

Academics and jurists argue about how to better implement the ECHR, and about how the ECtHR should deal with various issues, but no-one suggests it might be better to erase the Convention or the Court. Therefore, the whole debate entails disagreement over the reshaping of the ECHR, but its core value and significance still hold strong.

It could be contended that the ECtHR mostly performs ratification procedures, since it generally innovates the ECHR interpretation when certain developments are already spread among a sufficient number of jurisdictions.

To some extent, this argument appears convincing, but I wish to stress that this institution remains strategic: surely consensus and margin of appreciation reduce the potential for innovation, but judicial reasoning fulfills an essential role in conveying a gradual, yet incremental, enlargement of rights secured.

The ECtHR has expanded the meaning of almost every right, and its judgments bind reluctant States to sharpen their enforcement of human rights. Certainly, the risk that the ECtHR might either loosen its revision or defend majoritarian stances persists, and it is due to the judges' casuistic approach as well as to the absence of fixed interpretive bounds.

The opening wording of the ECHR and ECtHR jurisprudential doctrines leaves significant room for creativity and law-making. Quoting Mahoney, indeed "decision making is no longer perceived as purely rational and deductive exercise" (1990, 57); in addition to the inherent in-

fluence of extra-legal elements, interpretive methods emerge as rather unclear and embedded within an ongoing process.

The current findings of breaches depends on the margin left to national authorities, and they significantly vary according to the parameters by which judges measure international consensus; it may be argued therefore, that these doctrines are sometimes treated like “empty vessels” where the judge can “pour nearly everything he will” (Hand 1930, 12). It is thus unclear whether judges choose interpretive methods only on the ground of the correct meaning that they attach to ECtHR duties, or whether the interpretive approach results informed by the outcome that the Court considers *a priori* as the most desirable.

As thoroughly explored, until 1978, the ECtHR supported legal diplomacy and carefully managed not to alter the delicate international balance; after that phase, though enhancing a more activist role, the Court still tried not to uphold positions that put its legitimacy under threat. Blurred institutional features certainly do not help, and the ECHR is caught between its nature of international treaty and its quasi-constitutional significance.

Consequently, the entire methodology adopted by the ECtHR is molded by the desire to avoid critiques of illegitimate activism, and it responds to the majoritarian perspective justified by Mahoney.

The influence of social conditions and moral beliefs is enshrined in Articles 8-11 of the ECHR, and it is further codified in the living instrument approach.

The intertwining among the doctrinal, social, political, moral and institutional determinants is extremely complex: in broad terms, it is possible that when endorsing a specific interpretive path, the ECtHR formally develops a reasoning consistent with its case-law and mantles any influence of extra-legal factors under the labels of consensus and appreciation, according to the same mechanism described by Letsas with reference to substantial margin of appreciation.

In the frame of the undertaken research, it’s worth recalling that Articles 8-11 admit derogations from the ECHR aimed at securing public morals, a concept that, as argued in previous paragraphs, implies majoritarian tones and can’t be fully understood in liberal terms. As a result, the ECtHR has to condescend to national public morals, which notwithstanding the lack of harm to third parties, might positively sanction certain models of life as desirable or superior to the others.

From the background of the analysis conducted in this chapter, it can be argued that the ECtHR has quite an ambivalent potential. On one hand, the emergence of strong LGBT claims in all Contracting States might push the ECtHR to recognize a relevant ‘trend,’ but on the other, the heterogeneous legal framework might also ensure a wide discretion to Contracting States. At the same time, the inclusion of sexual orientation among personal characteristics secured by the

principle of non-discrimination might encourage the Court to reduce national margin of appreciation, while reference to public morals might lead to the attachment of normative legitimacy to the traditional familiar and sexual model.

Therefore, throughout the following documental analysis, it is relevant to ascertain whether interpretive doctrines prove useful to lgbt claims, and whether lgbt applicants have achieved results thanks to or despite the interpretive methods created by the ECtHR.

CHAPTER IV. DOCUMENTAL ANALYSIS OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

“Humans, including judges, are inclined to label positions with which they disagree as palpably unacceptable [...]. However, it is precisely where we face our ideas that we abhor or despise that we have to be most careful in our judgment as our personal convictions can influence our ideas about what is actually dangerous”

Judge Andreas Sajó, separate opinion, *Féret v Belgium*

4.0 Foreword

This chapter presents the results of the documental analysis conducted on ECtHR’s judgments, according to socio-legal and feminist criteria analysed in chapter II.

The complaints are based on the grounds of the applicants’ claims; in doing so, it is possible to see the intertwining between the social and legal sphere, to highlight the arguments produced by the ECtHR, to emphasize the applicants’ most compelling needs, to trace how the ECtHR has dealt with them, and how the judges have shaped, enlarged, or restricted them.

Judicial reasoning is, then, scrutinized so as to determine the role of the Court in reinforcing/disrupting a heteronormative conception of sexuality, in attaching a positive meaning to difference, and in dismantling the model of the closet.

Methodologically, such a perspective allows the researcher to both maintain argumentative cohesion, and to focus on the combined effect of the multiple dimensions of the same prejudice.

In more detail, the reasoning of the lgbt advocates is analysed by emphasizing the connection of legal claims with the wider agenda of the lgbt movement. Therefore, attention is paid as to whether the applicants are part of organizations, whether they demand policy change or just request personal redress, and whether their legal standpoint is shaped by previous ECtHR’s jurisprudence. It is extremely likely that judicial outcomes mould successive complaints either/both by denying or accepting to frame some behaviour under certain articles of the ECHR, or/and by inducing the applicants to select the claims which are most likely to be successful.

Hence, socio-political demands, first emerging in national contexts, could be narrowed down and restricted when translated into legal terms.

Particular importance is also attached to the legal sources, social elements, political trends, and the cultural phenomena recalled in the ECtHR’s reasoning, insofar as it being relevant to its interpretation.

Judicial reasoning is also scrutinized in order to study the legal culture and internal fractures, to assess its creative or restrained character, to evaluate the role of consensus analysis, and that of the margin of appreciation.

While in this chapter, I tackle the analysis in thematic clusters, in the next, and last, one I present more general considerations, both according to a diachronic and synchronic standpoint.

4.1 An Overall reading of ECtHR Jurisprudence in Respect to Sexual Orientation

Judicial litigation in respect to sexual orientation can be framed according to various approaches, each of which emphasizes a distinct feature embedded in the applicants' perspective and in the judicial review.

When considering the studies of the legal recognition of homosexuality, if restricting the field to those focusing on the judicial realm, a first approach may be that of considering the branch of law being addressed by the complaints; a general distinction could be drawn between the claims against criminal sanctions and those demanding recognition of civil, political, and social rights.

Looking in more detail, the latter cluster can be further articulated according to the subject bearer of the rights. In doing this it's possible to distinguish between the claims enhancing individual rights, those related to couple's rights, and those supporting the recognition of parental rights to LGBT people (Waaldijk 1994, 51-54).

In addition, the ECtHR's law case on sexual orientation may be analysed by following a diachronic sequence, by considering the arguments displayed by the parties (Wintemute 1995), or by considering the Articles on which applicants' rely (Johnson 2014).

I have thoroughly considered how to frame the complaints in order to be consistent with the socio-legal theoretical background previously outlined in chapter II, and I consider it useful to start out from the depiction I made of the ECtHR based on Friedman's theories.

Both derivative legitimacy and internal legal culture are dynamic concepts; in the context of an institution such as the ECtHR, they do not, of course, only change over time, but they assume specific and distinct features also in the same amount of time, depending on other determinants which may well have an extra-judicial origin (Pound 1923c, 950).

The ECtHR is always bound to be coherent with its law case and doctrines, but the tenure of the reasoning, the nature of the arguments, or the kind of interpretive devices will vary in accordance with both the claims and arguments put forward by the various parties. Likewise, disparate claims entail distinct theoretical perspectives, they involve peculiar interests, they require a distinct balance of rights, and, hence, they pose specific substantial, functional, and institutional questions to the ECtHR, which are likely to demonstrate a distinct attitude towards each of them. Therefore, a thematic partition of claims advanced, not only allows us to disentangle and investigate the arguments put forward by the judges, but it also enables the evaluation of how the internal legal culture of the ECtHR may vary in respect to the multiple rights claimed on the grounds of sexual orientation.

I proceed by structuring the analysis as such by mixing the framings sketched at the beginning of the paragraph: the first distinction is made between the rights claimed by individuals (par. 4.2;

4.3; 4.4), couples (par. 4.5), and families (par. 4.6); in each cluster there are subsections on the grounds of the right claimed, and great attention is paid to the legal branch addressed, namely to the distinction between criminal and civil law.

Not only does the core nature of the alleged violations vary, but also the argumentative reasoning of both the applicants and judges significantly differ from one category to another. Freedom of public authority's interference generally relates to negative obligations, for example to repealing laws sanctioning certain offenses and to quashing judgments related to them; on the contrary, when dealing with citizenship's rights, public institutions may tend to lean towards positive obligations, such as the introduction of a new legislation regulating same-sex partnerships.

As for the symbolical meaning of the law, it could be suggested that while liberty from criminal prosecution conveys a liberal conception of the law, without implying any endorsement of homosexual acts, being granted citizenship's rights carries a recognition of value, whether equal or different to that given to heterosexuals.

A significant trajectory also emerges in respect to the subjective referents of rights. Individual rights can be advanced on liberal grounds, by contending that each person should be able to freely express and develop her personality, whether in a private space, at work, or in the public arena.

Yet, legal tolerance of homosexuality does not necessarily imply any kind of endorsement; at the most it carries respect for core freedoms to which every human being is entitled under the ECHR and the UDHR.

Legal recognition and protection of an affective bond, whether through wedlock or other civil arrangements, can be read as a positive sanction in respect to specific relationships: it's not by chance that one of the most resorted arguments in favour of same-sex marriage recalls the value of lgbt relations, and it claims that no relevant difference stands between them and heterosexual ones. Quite predictably, full equality can only be achieved by means of same-sex marriage, for a civil partnership providing the same rights of married couples would still enforce a symbolical and prejudiced 'separate but equal' system, still denying that same-sex and different-sex relations can be fully compared.

However, it has to be pointed out that lgbt legal activists, on one hand, ultimately target recognition of same-sex marriage but, on the other, they also pragmatically prod the ECtHR to incrementally reduce the margin left to Contracting Parties as how to recognise same-sex civil unions. Rights connected to parental status involve even more issues: besides evaluating whether sexual orientation negatively affects one's capacity to foster a child, judges are required to assess whether the child's best interest can be substantiated in living with one or two homosexual parents. Furthermore, even when judges are not biased against homosexual applicants, they might

still lean towards the principle of precaution - a principle frequently adopted when counter-conceptions of life and good are at stake- with the consequent quashing of applicants' claims.

The cluster of individual rights comprises in the highest number of complaints and it addresses the widest set of claims, gathering the largest heterogeneity of judicial interpretation cases analyzed spread over more than three decades; even as far as temporality is concerned.

Under the concept of sexual freedom, I refer to the freedom to engage in private, adult, consensual same-sex acts, without incurring criminal sanctions not valid for heterosexual acts¹³⁰ (par. 4.2).

Secondly, I scrutinize the complaints grounded on the right not to be subjected to inhuman and cruel treatment; in this section both cases of violence perpetrated in restricted regimes of individual liberty and cases concerning the claim to obtain the status of refugee are considered (par. 4.3). Although the two issues are not necessarily related as to the demands advanced, lgbt asylum seekers complain that if deported to their homeland they might face torture or inhuman treatment, and they generally appeal to Article 3.

Then, I go on to analyze the complex realm of civil liberties and non-discrimination claims (par. 4.4), which includes the right to serve in the army (par. 4.4.1), the freedom of expression (par. 4.4.2), and the freedom of assembly and manifestation (par. 4.4.3).

Since the ECtHR has only recently been dealing with cases of couples and family rights, the case-load is quite restricted, but it proves extremely relevant from a qualitative standpoint.

In the cluster of couple's rights (par. 4.5) I include cases where certain social rights are demanded on the grounds of the homosexual tie between the applicants (par. 4.5.1), cases where the applicants ask for the legal recognition of same-sex relationships, either by claiming the right to marry (par. 4.5.2) or the right to be legally recognized (par. 4.5.3).

Finally, under the label of family rights (par. 4.6) the ECtHR's reasoning to determine whether homosexual parents are safe in their care duties by the Convention is investigated, and if Contracting Parties are allowed to restrict the right to adopt on the grounds of sexual orientation.

¹³⁰ In all considered complaints, adults having an affair with adolescents risked criminal conviction and, even though they claimed a discrimination against their sexual orientation, I still consider prominent the criminal nature of corresponding legal sanctions.

4.2 Sexual Freedom

Under the concept of sexual freedom I am referring to a specific cluster of claims, expectations, placed in a clearly defined legal frame; namely, I consider the complaints alleging to the human right to engage in homosexual, consensual, sex and not to be criminally prosecuted because of it.

Hence, the branch of national laws on which these complaints insist, is criminal law, and the right claimed aims at establishing negative obligations upon the State, to oblige public authorities not to interfere with one's own private life.

There are three realms addressed: consensual same-sex acts, age of consent, and sadomasochist/group same-sex acts.

Until 1975, the EComHR maintained an originalist interpretation of Article 8, dismissing all complaints against the criminalization of homosexual acts, thus preventing the ECtHR from judging the issue. The Commission reiteratively showed a stark heteronormative understanding of sexuality and human rights: the blunt text of decisions testifies an unconditioned endorsement of the moral and legal *status quo* as the most natural and positive frame, also denying homosexual men the enjoyment of a private space, which public authority was not entitled to discipline. Commissioners used to depict such criminal laws as necessary in order to protect "morals, health and the rights of other", thus being fully in accordance with the ECHR (*W.B. v Federal Republic of Germany*; *X. v Federal Republic of Germany*; *H.K.W v Federal Republic of Germany*).

For the first time, in 1975, the EComHR deemed a complaint demisable challenging the UK prosecution of same-sex private acts and the unequal age of consent.

In *X v UK* Report, n.7215/75, the majority of commissioners leaned towards finding a violation, offering a majoritarian reading; the preferences freely expressed by elected representatives were entitled to restricting one's own behaviour, even if it did not cause any harm to third parties (*X v UK*, § 144), likewise, given the uncertain social menace posed by homosexuals, it was preferable to adopt the principle of precaution (Ivi, § 143).

X v UK did not reach final judgment, as the applicant passed away a few years later and, consequently, the ECtHR struck the case out.

The following year another complaint was lodged with the ECtHR, by Mr Dudgeon, a UK citizen complaining of Northern Ireland's laws prohibiting male homosexuality: his case finally gave rise to the first judgment on the issue.

4.2.1 Consensual, Private, Adult, Homosexual Activities

In the turn of the decade the ECtHR completely dismissed the EComHR's understanding of Article 8, developing a more tolerant interpretation of private life, evaluating homosexuality as being worthy of some kind of protection, and giving gay citizens the human right to engage in strictly private sexual activities. In *Dudgeon v UK*, n.7525/76, *Norris v Ireland*, n.10581/83, and *Modinos v Cyprus*, n.15070/89, the ECtHR gradually built its approach, following a definite, linear, and incremental interpretive path.

During this phase, however, the Court did not challenge the unequal age of consent, and it displayed a reasoning with lights and shadows.

The applicants shared subjective features, and also the legal condition of their countries was similar. As for the latter, national legislations prosecuted male homosexual acts but these provisions were no longer consistently applied. In Northern Ireland, the Criminal Offences Acts had not been amended by the British Sexual Offences Act 1967; nevertheless, from the late 1960s onwards no one had been prosecuted for an act which could "clearly not have been an offence if committed in England or Wales" (*Dudgeon*, § 30). Also in Ireland the police and the Director of Public Prosecution were tolerant in cases concerning same-sex acts, as long as they did not offend public sensibility in any way. In Cyprus the situation was more turbulent, and there were still a few convictions for homosexual acts between consented adults, up until 1981 (*Modinos*, §12).

As for the subjective history of the applicants, no one had effectively been charged with criminal offences; this feature marks an important distinction between those who had filed analogous complaints between 1955 and 1975, who, for the overwhelming majority, were serving a sentence because of their sexual orientation.

In January 1976 the police searched Mr Dudgeon's address under the Misuse of Drugs Act, and they finally arrested another person with whom the applicant had had contact; in that event personal papers, diaries in which homosexual activities were described, were found and seized. As a result, he was asked to go to a police station where he was questioned about his sexual life for about four and half hours.

The police investigation file was sent to the Director of Prosecutions, who almost a year later decided not to proceed against Mr Dudgeon and to return his papers to him. Consequently, Mr Dudgeon sought redress by lodging the complaint with the ECtHR and denouncing unjustified interference with his right of respect for his private life.

Mr Norris claimed that Irish legislation had breached his rights granted by Article 8 on three grounds: firstly, the criminalization of same-sex acts stood at the core of the deep depression

from which he had been suffering since he became aware of his tendencies; secondly, he feared that his partner, who normally lived outside Ireland, could face criminal sanctions for being with him. Thirdly, he linked the verbal abuse, which he had incurred after participating in a national television program where he admitted to being homosexual, to the very existence of criminal sanctions against same-sex acts (*Norris*, §10).

Similarly, Mr. Modinos stated to have suffered “great strain, apprehension and fear of prosecution by reason of the legal provisions which criminalize certain homosexual acts.” (*Modinos*, § 7).

All three men were heavily involved in respective national gay liberation movements (*Dudgeon*, § 32; *Norris*, § 9; *Modinos*, § 7); thus, their claims can be framed within the broader effort encouraging a more LGBT sensitive international jurisprudence.

Most notably, *Norris* and *Modinos* represent a typical example of strategic litigation and their decision to seize the ECtHR had probably been triggered by *Dudgeon*'s judgment. Not only did *Norris* and *Modinos* file their complaints a few years later the Court having adjudicated *Dudgeon*, but, when considering the ways in which national authorities had restricted their personal life, it seems that *Modinos* and *Norris* aimed at enlarging the hints firstly developed in *Dudgeon*, and at obtaining the most comprehensive judicial protection against criminal provisions.

It's interesting to note that from the very beginning the ECtHR understood the activist meaning implied in *Dudgeon*'s litigation, framing his complaint as “directed primarily against the existence” of certain offences in Northern Ireland laws (*Dudgeon*, §13).

Surprisingly, the ECtHR considered all three applicants as victims, even though *Norris* and *Modinos* had not suffered the same interference as *Dudgeon*, therefore validating the assumption whereby even the existence of criminal laws interfered with one's right of respect for his private life (*Modinos*, § 45).

Had the ECtHR narrowed the threshold required to claim the status of victim, either the interpretation of Article 8 would have been different, or, at least, the importance of *Dudgeon* would have been significantly reduced.

The recognition of ‘victim’ status caused internal fractures, both in *Dudgeon* and *Norris*. In the former, Judge Walsh disparagingly labelled Mr. *Dudgeon*'s case as being “a class action” (Walsh in *Dudgeon*, § 4) while judge Matscher and judge Zekia did not consider his sufferance credible.

Furthermore, the dissenting opinion in *Norris* uncovers the heated debate between an activist approach, favourable to general interpretation, and a restrained one, supporting a casuistic and extremely narrow judicial review. Six out of fifteen judges stated, that it was “not wise to call in

question the authority of the Dudgeon judgment as to the merits”, because it would damage the ECHR system:

To interpret too widely the word "victim" would risk appreciably altering the system laid down by the Convention. The Court might thus be led, even in respect of complaints from individuals, to adjudicate on the compatibility of national laws with the Convention irrespective of whether those laws have in fact been applied to an applicant whose status as a victim would be no more than very potential and contingent. An *actio popularis* would then not be far off. (Norris, dis. op judge Valticos, judge Golcuklu, judge Matscher, judge Berhardt, judge Carrillo Salcedo)

Nevertheless, the ECtHR accepted the status of victim claimed by the applicants and quashed the preliminary objections filed by the respondent Governments.

Within the undertaken theoretical frame, the ECtHR was able to give legal relevance to the applicant's perspective, who had acted on behalf of a sexual minority. Opposing the dissenting judges and also the submissions by national authorities, who pledged the Court not to review the Convention *in abstracto* (Norris, § 28), the Court departed from the minority's perspective and distanced itself from the heteronormative burden that had been imposed on lgbt applicants up to that moment.

When defining the meaning of the interference experienced by Dudgeon, the ECtHR noted that the risk to which he was exposed was not solely linked to the possibility of being prosecuted if engaging in sexual intercourse with other men, but it also embraced the subjective distress caused by “refraining from engaging [...] in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies” (Dudgeon, § 41). Moreover, in Norris the ECtHR reappraised a minority opinion of the Irish Supreme Court, and it specified that the direct risk of being affected by the legislation in question had to be assessed by also taking into account the misapprehension, the general prejudice, the anxiety, the depression, and the guilty feeling that similar provisions reinforced (Norris, § 33). The ECtHR neither disputed the truth of such suffering, nor did it dismiss it as not being serious enough to claim a breach of the ECHR, but it maintained the approach shown in Dudgeon, on which I focus the qualitative analysis.

Mr Dudgeon challenged the entire system maintained by the Northern Irish authorities; which were showed the inability of the local Parliament to amend Northern Irish legislation, Dudgeon alleged that there were substantial reasons for the ECtHR to overthrow political decisions. Firstly, the blanket prohibition of homosexual acts illegitimately interfered with one's own liberty, violating the core principle of modern liberalism. Then, he contended that “the higher age of

consent was illegitimate, the same as that for heterosexual and female homosexual relations that is, 17 years under current Northern Ireland law.” (*Dudgeon*, 62), and that, accordingly, he had been suffering from an illegitimate discrimination under the meaning of Article 14.

He also claimed to be a victim of discrimination, in that he had been subjected to greater interference than heterosexuals and female homosexuals, in Northern Ireland, and male homosexuals in other parts of the UK (*Ivi*, § 65).

The majority of the ECtHR denied both the urgency to equalize the age of consent, and the necessity to compare the condition of Mr. Dudgeon with that of heterosexual and lesbian people. As for the former, judges stated that it fell “in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law” (*Dudgeon*, § 62).

Judges also approached Dudgeon’s requests from a disputable angle, insisting that the primary task of the ECtHR was to assess whether the applicant had suffered a breach of his human rights arising from Article 8, and that there was “no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right” (*Ibidem*). The attempt to establish a relevant analogy under the ECHR between heterosexuals and homosexuals, therefore, failed.

Dissenting judges Evrigenis and De Enterria offered an alternative approach, arguing that “the difference of treatment in Northern Ireland between male homosexuals and female homosexuals and between male homosexuals and heterosexuals ought to have been examined under Article 14 read in conjunction with Article 8, [since] it would be difficult to assert that these conditions were not plainly satisfied in the circumstances” (*Dudgeon*, dis. op., judge Evrigenis and judge Garcia de Entierria). They also critically addressed the impact of this perspective on the entire judgment, warning that by adopting such a restrictive definition of Article 8, “[the] judgment deprives this fundamental provision in great part of its substance and function in the system of substantive rules established under the Convention” (*Ibidem*).

Also the reasoning which ultimately led to the ECtHR innovating the interpretation of Article 8 underpins a heteronormative image of sexuality, and it involves limited tolerance for those who do not conform to the heterosexual model, still considered as being the best choice.

When faced with the necessity of assessing whether the aforementioned laws fall into the exemption causes of Article 8, the ECtHR applies a three-step test; “an interference with the exercise of an Article 8 (art. 8) right will not be compatible with paragraph 2 (art. 8-2) unless it is ‘in accordance with the law’, has an aim or aims that is or are legitimate under that paragraph and is ‘necessary in a democratic society’ for the aforesaid aim or aims” (*Dudgeon*, § 43). Neither

the applicants nor national authorities disputed that the first requirement had been met; as to the aims pursued, Dudgeon did not concede their legitimacy, arguing that

the law reflected a historical attitude of fear and prejudice. Any argument seeking to justify such a total prohibition was a rationalization of this attitude and unjustified on objective grounds. Even if the law were changed, any more restriction of the homosexual freedom of homosexuals as opposed to that of heterosexuals, was a compromise with the underlying irrational hostility. [...] The restriction thus reflected no legitimate end” (*Dudgeon Report*, § 50).

The ECtHR, however, replied that Northern Irish laws pursued the legitimate aim of securing both the morals and rights of others, and it did not even mention the arguments put forward by Mr Dudgeon, moving on to consider whether the impugned legislation complied with the criterion of “necessity in a democratic society”.

According to the doctrine already set out, an action or norm might be regarded as being necessary if the Government proves the existence of “a pressing social need” (*Ivi*, § 51), and if the interference with individual rights is proportionate both to the aims sought and to the quality of activities involved (*Ivi*, § 52).

In the assessment of these two criteria, the ECtHR displays a number of significant considerations which mitigate the heteronormative tenure described up to this point.

Firstly, the Court frames same-sex acts as falling under “the most intimate sphere of private life” (*Ibidem*), and, thus, requires from the UK Government “particularly serious reasons before interferences” (*Ibidem*). The inclusion of homosexuality in the traditional realm of civil liberties, widens the relevance of this judgment: the Court presents homosexuality as being entrenched in individual privacy, implying that any criminal interference with this sphere must be justified on strict terms. As far as the emersion of the private realm raises some issues in respect to possible reiteration of the ‘closet’, it also disrupts the heteronormative understanding developed in past EComHR decisions, whereby gay sexuality was not worthy of any safeguard under the ECHR.

Secondly, the Court establishes an essential bond between the democratic spirit and the tolerance of minoritarian perspectives, somehow contradicting the same judgment, as explored hereinafter. Article 8, indeed, admits interferences with the private and family life, if necessary in a democratic society, and on this point the ECtHR concisely elevates tolerance and broadmindedness as the “hallmarks of democratic regimes” (*Dudgeon*, § 52). As such, democracy encourages national authorities to embed pluralism but, at the same time, it allows political authorities to shape the national legal system according to majoritarian preferences: the two criteria are

clearly inspired by different theoretical perspectives - the former reinforcing the supremacy of the individual and the latter enforcing a communitarian social and moral vision. Hence, it the job of the ECtHR to strike a balance compatible with democracy and respectful to national sovereignty.

Accordingly, the ECtHR denied the UK Government fully meeting any of these criteria. The refraining of public authorities from concretely prosecuting same-sex private and consensual acts, and the fact that this policy has not led to “public demand for stricter enforcement of the law” (Ivi, § 60), demonstrated that an eventual decriminalization would not seriously harm the moral standards of the Northern Irish people. Therefore, no pressing need could be claimed by the Government. Not even the “strong body of opposition stemming from a genuine and sincere conviction [...] that a change in the law would be seriously damaging to the moral fabric of society” (*Dudgeon*, § 57) provided adequate justification; the ECtHR reiterated that the legitimate aims pursued were outweighed by the detrimental effects for individual privacy and that “although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.” (*Dudgeon*, § 60).

To comprehend the innovativeness of such reading, it’s necessary to refer to dissenting opinions. As far as the final outcome may be regarded as being minimalist and, to some extent, biased, four judges still filed extremely powerful dissenting opinions, where the majority is labelled as ‘pro-gay’. The starting assumption is a moral one, which testifies that the main terrain of internal disagreement is extra-judicial, namely the moral contrast on how to qualitatively evaluate homosexuality and on which symbolical significance the ECtHR should convey.

Judge Zekia, judge Matscher, and judge Walsh labelled same-sex practices as “unnatural” (*Dudgeon*, dis. op., judge Zekia, judge Matscher, judge Walsh § 2), recalling the Christian, Jewish and Muslim condemning of such behaviour. Judge Zekia, indeed, noted that “all civilised countries until recent years penalised sodomy and buggery and akin unnatural practices” and Walsh defined homosexual acts as “abnormalities” and “handicaps” (Ivi, § 13).

Under these premises, dissenting judges further held that the criminalization of gay males was essential for the protection of morals and for the rights of others; in addition, they contended

that the ECtHR had to avoid symbolically attaching any value to homosexuality, for it had to be clearly qualified as being deviant and distinct from heterosexuality and lesbianism¹³¹.

Dissenting opinions criticized the ECtHR for not respecting the majoritarian ethos of the Northern Irish community; to my reading, on the contrary, the ECtHR both detaches from and endorses majoritarian statements.

The previously described dismissal of further comparisons between homosexuals and heterosexuals and between gay males and lesbians embed a belittling of the perspective held by the applicant. Before the ECtHR, Mr. Dudgeon recalled the equal value and the identical legal dignity of every sexual orientation but, nonetheless the Court did not even discuss the point, plainly leaving the issue up to national discretion. The ECtHR also justified the higher age of consent on the grounds that it was necessary “to provide safeguards against the exploitation and corruption of those who are especially vulnerable by reason, for example, of their youth” (*Dudgeon*, § 62). From this statement a moral evaluation is implied, which shows homosexuality as representing a potential threat to minors or for those who are not mature enough to understand all the consequences of a similar choice. When referring to heterosexual activities, it would sound strange to consider the sexual desire of young people as the outcome of corruption and exploitation; the only case where this association would be acceptable, would inhere to non-consensual acts or to a specific asymmetric relationship where a young, weak-minded person is circumvented. The applicant, in fact, was not asking for a general lowering of the age of consent - whose existence might have been defended on the grounds of its necessity to prevent corrup-

¹³¹ The definition of gayness fluctuates between the pathological and the criminal label. Walsh endorses the former perspective, stating that “a distinction must be drawn between homosexuals who are such because of some kind of innate instinct or pathological constitution judged to be incurable and those whose tendency comes from a lack of normal sexual development or from habit or from experience or from other similar causes but whose tendency is not incurable. [...] Even assuming one of the two persons involved has the incurable tendency, the other may not. It is known that many male persons who are heterosexual or pansexual indulge in these activities not because of any incurable tendency but for sexual excitement.” (*Dudgeon*, dis. op., judge Walsh, § 13) Also Zekia confusedly suggests that “if a homosexual claims to be a sufferer because of physiological, psychological or other reasons and the law ignores such circumstances, his case might then be one of exculpation or mitigation if his tendencies are curable or incurable” (Ivi, dis. op., judge Zekia, § 4). Matscher, on the contrary, adopts a hostile perspective also denouncing the outrageous hidden agenda of gay movement: “Of course, the applicant and the organizations behind him are seeking more: they are seeking the express and formal repeal of the laws in force, that is to say a “charter” declaring homosexuality to be an alternative equivalent to heterosexuality, with all the consequences that that would entail (for example, as regards sex education”. Furthermore, he finds appropriate the different treatment under criminal law between homosexual and heterosexual conduct “obvious”, since “the moral and social problems to which they give rise are not at all the same” (*Dudgeon*, dis. op., judge Matscher). Similarly, there would exist “a 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” (Ibidem), which would justify the prosecution of the former only.

tion and exploitation - but only for its equalization. Given that UK laws assumed people aged over 16 to be mature enough to decide whether to engage in heterosexual or lesbian relationships, the only reason why the same people were not supposed to freely determine if indulging in gay sex has to be linked to the more harmful nature of male homosexuality.

Therefore, the ECtHR found a breach despite the different value attached to the applicant's sexuality, not evaluating his homosexuality from a positive perspective but definitely seeing difference in a negative light.

By appealing to Article 14, Dudgeon opened the space for the establishment of a legal comparison between heterosexuals and homosexuals: had the ECtHR accepted this analogy and declared Dudgeon's rights that were infringed on the grounds that he had been treated differently from heterosexuals, the Court would have implicitly affirmed a qualitative analogy between heterosexuals and gay men. Such an outcome would have led to relevant consequences, both legal and symbolical. The deeply-rooted prejudice of homosexuality as a deviation from human nature would have been disrupted, to such an extent that lgbt people could have claimed individual, couples, and families rights on the grounds that they were in a condition comparable to a heterosexual one.

As explored hereafter, the ECtHR did not approve of this line of reasoning, supporting instead an ambivalent approach, which however did not prevent it from upholding the claims of Dudgeon.

Moreover, the ECtHR endorsed a majoritarian conception of laws regulating individual freedom, stating that

in assessing the requirements of the protection of morals in Northern Ireland, the contested measures must be seen in the context of Northern Irish society. The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland. [...] As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters, in particular as evidenced by the opposition to the proposed legislative change, is one of the matters which the national authorities may legitimately take into account in exercising their discretion. There is, the Court accepts, a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society. [...] Whether this point of view be right or wrong, and although it may be out of line with current attitudes in other

communities, its existence among an important sector of Northern Irish society is certainly relevant for the purposes of Article 8 par. 2. (*Dudgeon*, § 56-57)

The majority clearly distinguished between the legal and moral realm, rejecting an understanding of human rights exclusively moulded on majoritarian premises, although throughout the entire judgment a begrudged attitude towards homosexuality still emerges.

It could be disputed that whatever the standpoint embraced, the ECtHR reached an outcome disruptive of its previous heteronormative outcomes. To my reading, this is only partially correct: the image of homosexuality as an unfortunate accident pledges some empathy to lgbt people and the ECtHR willingly grants them minimum room of freedom; however, such tolerance accurately restricts the review of the Court, to such an extent that only the first claim of the applicant, i.e. the criminalization of same-sex, consensual, private and adult acts, is upheld.

On one hand, the ECtHR apparently distanced itself from any moral evaluation of the issues at hand, stating that it “is not concerned with making any value-judgment as to the morality of homosexual relations between adult males” (*Dudgeon*, § 54) and assigning to the criminal law in this field “the overall function [...] in the words of the Wolfenden report [...] *to preserve public order and decency [and] to protect the citizen from what is offensive or injurious*” (Ivi, § 49). On the other, when discussing the submissions of the UK Government, the ECtHR acknowledged that “one of the purposes of the legislation is to afford safeguards for vulnerable members of society [...] against the consequences of homosexual practices” (Ivi, § 47), and, a few paragraphs later, it casted off any criticism of this, arguing that “there can be no denial that some degree of regulation of male homosexual conduct, as indeed other forms of sexual conduct” (Ivi, § 49). Despite the reference to a wider set of behaviour, the wording suggests that the element which has to be controlled does not strictly refer to the age of consent or to eventual non-consensual acts, but precisely inheres to the twisted nature of homosexual conduct, and to other, not specified, conducts equally disdained in Western societies.

The ECtHR considers homosexuality as a controversial issue, perhaps even as self-harming behaviour, which can be lawfully prosecuted only when third parties are concretely harmed and on the grounds that “decriminalization does not imply approval” (Ivi, § 61); consequently, the main reason for the final outcome lies in the breadth, in the absolute character, and in the severity of penalties provided, judged as “disproportionate to the aims sought to be achieved.” (Ivi, § 61). In *Dudgeon* the ECtHR built its own notion of homosexuality, further reiterated in *Norris* and *Modinos*. Since the Court denied the comparison between heterosexuality and homosexuality, the latter is defined as a separate condition, whose essential elements and whose normative treatment under the ECHR had to be gradually defined. The implicit reference point

to which the ECtHR compared same-sex activities is that of heterosexuality, but the rights provided to homosexuals were the outcome of an *ad hoc* judicial examination.

The core element is related to the essential right to be respected in those acts which represent “a most intimate aspect of private life” (Ivi, § 52).

Although the applicant framed his own complaint on the grounds of the notion of ‘private life’, an in-depth analysis of his claims reveals the symbolical pretence of opening up a debate on the common evaluation of homosexuality.

Mr. Dudgeon indeed challenged “the myths used to justify special restrictions on homosexuals” (Ivi, § 51) and considered that the decriminalization of buggery stood as the pre-requisite to both effectively respect everyone’s private life and to dismantle the prejudiced public discourse surrounding homosexuality.

Johnson and other commenters (Johnson 2014, 100 and fol.; Moran 1996; Stychin 2003) have suggested that in *Dudgeon* the ECtHR shapes a binary distinction between private and public, which marks its future jurisprudence.

Effectively, it’s worth noting that, the reiterated and combined reference to the concept of “private life”, the inherent sexual disposition of homosexuals, effectively erased the possibility of discussing Dudgeon’s claims in a wider frame than the strictly private one. On this issue, it has been aptly suggested that the ECtHR constructed its approach not only to reach conclusions that in previous jurisprudence were unthinkable, but to make such conclusions “thinkable in such a way as to render any other solutions difficult, if not possible” (Moran 1996, 175).

The overwhelming totality of commenters highlighted this element, attaching a different meaning to it depending on their theoretical perspective; liberal jurists, such as Wintemute, contended that the ECtHR’s approach to homosexuality as an immutable condition offered positive future developments, in that it suggested an analogy with other classes that are usually discriminated against which, in turn, might stretch and strengthen the legal protection and recognition given to homosexuals as well (Wintemute 1995; 2001). By analyzing the discursive power of jurisprudence and the constructivist role performed by judges, Grigolo argued that in *Dudgeon* the ECtHR introduced the homosexual as a legal subject using “traditional essentialist narratives” and, hence, casting off any argument or premise not coherent or in accordance with such a premise (Grigolo 2003, 1027).

In other words, the ECtHR structured its reasoning, its logical premises, and its legal definitions, so as to propose its innovations as if they had exhausted and fully fulfilled all the possible outcomes that were both logical and coherent with the ECHR.

If filtering the definition of privacy set out in *Dudgeon* through Minow's feminist methodological proposal¹³², it appears that even though the Court did not compare Mr. Dudgeon's condition to that of heterosexuals, the unstated norm which set the judges' interpretive binary was the outcome of an unbalanced comparison between the values attached to heterosexuality and those assumed to be conveyed by homosexuality. To support these arguments, I recall that the ECtHR upheld the necessity of "some control over homosexuality by means of criminal law" (*Dudgeon*, § 49) in choosing a strong expression and stating that "there can be no denial" (*Ibidem*) over the issue. Hence, the Court did not even remotely consider that such sexual policies might be controversial, problematic, or unjustified, just noting that homosexuality could be legitimately sanctioned for "particular sections of society as well as the moral ethos of society as a whole" (*Ibidem*).

Hence, the final outcome may have breached the total exclusion of homosexuals' from enjoying ECHR rights, but it surely has not gone beyond a limited and begrudging tolerance of unconventional sexualities.

The perspective endorsed by the ECtHR in *Dudgeon* shaped Norris and Modinos' arguments: both of them did not acknowledge any violation of Article 14, only relying on the notion of private life secured under Article 8.

In addition, they did not dispute the legitimacy of the aims pursued, they rather considered that national authorities had failed to respect their private life.

Despite the submissions being of a lower interest, if compared to *Dudgeon*, it is in *Norris* and *Modinos* that up to now the reasoning analyzed has loosened its casuistic character, acquiring a more general meaning and amounting to the essential foundations of the ECtHR jurisprudence on sexual orientation.

¹³² See chapter II, paragraph 2.4.2

4.2.2. The Age of Consent

As previously highlighted, *Dudgeon* legitimatised the provision of unequal ages of consent, ad-
ducing the necessity to protect the young from the consequences of homosexual acts. Over the
following years an increased number of complaints challenged the ECtHR approach, forcing
the judges to critically review their own interpretations.

The litigation at Strasbourg has to be read within the broader political context of those years: in
the UK and in the other Coe Countries where a different age had been set, the pressure of the
lgbt movement and the parties who supported the equalization managed to reach parliamentary
assemblies. Reform proposals were debated and, between the late 1980s and the early 1990s,
France and Germany equalized the minimum age of consent. In the UK a 1994 reform low-
ered the threshold for male homosexual acts to 18, from the previously stated 21, maintaining
however a slight but relevant difference to heterosexuals. In Austria, any attempt at lowering the
age was voted down by the conservative parties and it was not possible to reach full equality until
2002.

As explored hereafter, both British and Austrian public opinion paid attention to this issue and
also the scientific community devoted great effort to testing the different perspectives.

The ECtHR law case on the age of consent, to my reading, should be divided into two phases:
the first one, including *Wilde, Parry and Greenhalg v UK*, n.22382/93, struck out by the
EComHR, *Morris v UK*, n.31791/96, and *Sutherland v UK*, n.25186/94, judicial reasoning dis-
plays some extremely relevant substantial readings from a socio-legal approach. The second
one, comprising of a number of cases against Austria, reiterates the same interpretation of the
same claims, somehow taking the approach moulded by the first phase as being the ordinary
one when dealing with issues related to the age of consent.

As for the first phase, British citizens were all supported by Stonewall, an lgbt organization
based in London, which provided them with legal advice; therefore their choices can be framed
within the attempt to reform national laws. *Wilde* was lodged before the UK Parliament low-
ered the age for gay acts to 18, while *Sutherland* was registered while the reform was being de-
bated and *Morris* just after it. The whole activation of the law seemed to be targeted at increas-
ing the pressure on policy-makers and, as far as *Sutherland* was concerned, at overturning the
political conservative majority who favoured the unequal treatment of gay acts. The activist
meaning of this complaint can also be understood by the fact that while *Wilde, Parry and
Greenhalg* refused to enter into any agreement with the UK Government, *Sutherland* and *Mor-
ris* did not object to the ECtHR's intention of striking out their cases. While, indeed, the former
case was considered by the ECtHR in 1995, when the Government had not presented any fur-

ther proposal to reduce the age of consent, *Sutherland* and *Morris* were addressed in 2001, when Blair's reform to equalize the age of consent had already been approved.

Before discussing the innovations developed in *Sutherland*, I feel it appropriate to flesh out some of the remarks related to previous EComHR decisions, which had amounted to the implicit reference point of the Court and the Commission in *Sutherland*.

Both in *X v UK* and in *Zukrigl v Austria*, n.17279/90, the EComHR relied on the protection of young men's "psychological development", understood in absolute heteronormative terms. If one considers the personal development of a man aged 16-21 being linked to the expression of one's character, and to the liberty in pursuing one's aspirations, then the freedom to explore his sexuality appears totally legitimate.

In fact, Mr. X had recalled the findings of Speijer's Committee - a Dutch Committee which in 1969 was entrusted with the task of examining the proposal to set an equal age of consent for same-sex acts- which, *inter alia*, contradicted the aforementioned assumption:

it had not been proved that homosexual contact with young persons who have a heterosexual propensity would lead them to acquire permanent homosexual inclinations. Nor it has been proved that such a contact would have a damaging effect on the minor concerned. On the contrary, homosexual contacts could often be of positive help to the young person with homosexual tendencies in so far as they might reduce or even eliminate sensations of stress and frustration (Speijer's Committee quoted in *X v UK*, § 66).

Effectively, the idea that a person's well-being could be preserved by forcing him to deny and conceal his sexuality, only makes sense if the concept of development is defined as the adherence and adaptation to a normative way of life. The heteronormative perspective therefore, prevented the EComHR from even considering the distressing condition of boys caught between their desires and the severity of the law.

The other's perspective remained totally hidden, fully unaddressed, and definitely seen through the lens of a moral majoritarian view. The EComHR commented that although the limit of 21 could be regarded as being high and inconsistent in a legislation where men above the age of 18 were allowed to vote and to fulfil other legal transactions (Ivi, § 152), it was still justified in order to avoid social pressure to which young men engaging in homosexual activities would be exposed (Ibidem).

In *X v UK* another significant element emerges, namely the role of political consensus. Besides substantial evaluations, the Commission recalled that since the UK Parliament had not accepted

a proposal of reform in 1977, it was not in its authority to replace domestic authorities (Ivi, § 153).

Sutherland, on the contrary, showed a different interpretation, which clearly sets him apart from previous ones; it has to be noted that the material on which the analysis has been conducted is the EComHR Report, as the ECtHR struck out the case before the Court could even deliver its judgment. *Sutherland's* Report is nevertheless the documental source which moulds the future interpretive standpoints of the Court and, if Blair had not proposed the aforementioned proposal, it is extremely likely that the ECtHR would have endorsed the Commission's conclusion whereby, "by fourteen votes to four, [...] in the present case there has been a violation of Article 8 of the Convention, taken in conjunction with Article 14 (Art. 8 + 14) of the Convention" (*Sutherland*, § 66).

In this case specialist and scientific knowledge heavily entered into the judicial arena, amounting to the realm on which the EComHR based its interpretation of the Convention.

The wide spread endorsement between physicians, psychiatrists and psychologists towards an equal age of consent was judged to be relevant enough to overcome national policies.

By relying on extra-judicial opinions, the EComHR cast off the principle of precaution, and also embraced a slightly different conception of homosexuality than that emerging in *Dudgeon*. Rather than normative, the EComHR depicted heterosexuality as the normal sexual model; at § 54 same-sex intercourse is, indeed, described as being a "particular type of sexual behaviour", and the main scientific realm to which the EComHR is related is the medical one. Such a standpoint might still convey a biased attitude against lgbt people, but it also reduces the moral condemning looming over homosexual citizens.

According to the UK Government's submissions, the setting of the age-limit at 18 years for gay men and 16 for heterosexuals and lesbians was legitimatised on the grounds of five correlated arguments: a) males aged in the bracket between 16-18 years are immature, and there is the "possibility that they will not be sufficiently mature to cope with the consequences of their actions"; (Ivi, § 42) b) the overwhelming majority of parents expect and hope their children to grow up as heterosexuals and, by imposing stricter conditions, those who are unsure of their sexuality could be encouraged to conform to the heterosexual model; c) if the minimum age were reduced to 16 years, it would "prove wholly unacceptable to public opinion" (Ivi, § 23); d) homosexual acts are undesirable and can be tolerated only above the age "by which a young man's sexual pattern becomes fixed, so that the performance by him of homosexual acts [...] would be unlikely to divert him from a heterosexual to a homosexual pattern of sexual behaviour." (Ibidem); e) gay men are more exposed to the risk of being infected with HIV, gonorrhea and other sexual transmitted infections (Ivi, § 84).

From an institutional perspective, the UK Government invoked the margin of appreciation, contending that since the Parliament was debating the issue still without having reached a definite outcome, it was not up to the EComHR or to the ECtHR to take their place (Ivi, § 42).

The EComHR recognized a certain control of homosexuality as being necessary for the protection of morals, but refused to grant national authorities complete discretion or to review the case by means of the structural margin of appreciation.

The initial assumption opened up to the comparison between heterosexuals and homosexuals, and the EComHR stated that “it is not contested that the applicant as a young man of 17 years who wished to enter into and maintain sexual relations with a male friend of the same age was in a relevantly similar situation to a young man of the same age who wished to enter into and maintain sexual relations with a female friend of the same age” (Ivi, § 52). The problem to be solved was no longer whether gays and heterosexuals were comparable, but if a reasonable proportionality between the aims sought and the means adopted was respected. The EComHR was, therefore, required to state criteria whereby assessing the case, and replying to the UK Government, who relied on *X v UK*, stating that case as twenty-years old and suggested that it was necessary to orient its interpretation according to new and more updated parameters.

In this respect, scientific knowledge became crucial. As to emphasize its reasoning-line and to justify the dismissal of *X v UK* conclusions, the EComHR mentioned the major changes that had occurred in professional opinions, especially in “medical professions” (Ivi, § 59), and it further enlisted the support of the most relevant British associations supporting the reduction of the age of consent, such as the British Medical Association and the British Psychological Association. Only after stressing these findings, the Commission recalled the existence of a European consensus against the UK position; the key to the Report however, to my mind is captured by the following statement “the Commission accordingly considers it opportune to reconsider its earlier case-law in the light of these modern developments, and more especially in the light of the weight of current medical opinion” (Ivi, § 60).

When evaluating the arguments produced by the UK authorities, the EComHR referred to specialized how-know; commenting on the points described in a) and b), the Commission shaped its interpretation by reminding that “current medical opinion is to the effect that sexual orientation is fixed in both sexes by the age of 16” and that “as noted by the BMA [British Medical Association] the risk posed by predatory older men would appear to be as serious as when the victim is a man or a woman and does not justify a differential age of consent” (Ivi, § 64).

It could be critically argued that the focus of the medical evaluation of same-sex acts reinforced both the principle of precaution and the medicalization of sexualities not ascribable to heterosexuality. It is true that the EComHR was faced with an international scientific opinion in favour

of reducing the age of consent and that it could no longer grant national discretion on the grounds that the academic community was internally divided; however, had the EComHR endorsed a biased approach, or had it preferred to recall the principle of precaution, it would probably have attached more relevance to the political debate that was still ongoing in the UK.

The EComHR could also have resorted to the principle of subsidiarity, without considering whether the UK Government's argument was substantially justified.

Instead, specialist opinions outweighed political ones, providing the EComHR with a perspective which could not be accused of being policy-oriented; both the idea that young boys lacked maturity and that they would be harmed by homosexual contact were precisely contested thanks to the position of the medical community.

The EComHR conceded that "some weight should be attached to the fact that the issue has been recently considered by the legislature and that the reduction of the minimum age of consent to 16 was rejected" (Ivi, § 62), but it still considered this argument as being neither decisive nor sufficient.

How to interpret the perspective moulded by the Commission?⁹ I would frame it as raising some considerations on the legal balance between majorities and minorities. Most notably, the applicant's perspective and the heterosexual condition are placed on the same footage, to such an extent that the EComHR sees no difference between the risks to which young boys and girls are exposed. Then, the EComHR marks a fracture with *Dudgeon* and other decisions, by critically approaching the arguments made by the respondent Government. Commissioners, indeed, criticize the line proposed by UK authorities, and extensively challenge their theoretical foundations by showing how they lack scientific evidence. Even though the EComHR does not specifically mention the necessity to protect minorities - this issue will be openly addressed in *L. and V. v Austria*- this concern is implied, to the extent that its choice causes fractures within the same Commission, as separate opinions highlight. Four Commissioners contend that the opinion expressed by the majority of freely elected representatives could not be disregarded, and that, accordingly, it would be far more appropriate for the EComHR to restrict individual autonomy, rather than disowning UK parliamentarians.

It has to be emphasized that the Labour Party was favourable to the proposal and, therefore national political opinion could not be assumed as being completely contrary to claims advanced

by Sutherland; nevertheless, both *Dudgeon* and *X v UK* offered precedents that could have been recalled if the EComHR had chosen a more restrained perspective¹³³.

The intertwining between science and policy-making stands at the heart to when the EComHR shifts from a prescriptive to a descriptive model of heterosexuality. The EComHR still considers homosexuality as a normal human tendency, but, at the same time, it finds that “no objective and reasonable justification exists for the maintenance of a higher minimum age of consent to male homosexuals, than to heterosexual, acts” (Ivi, § 66).

Sutherland led two important interpretive outcomes which, as shown hereafter, mark the ECtHR approach in the forthcoming cases. Firstly, the incomparability between heterosexuality and homosexuality was dismantled; then, the EComHR assumed that moral reasons could not restrict one’s freedom, not even if upheld by the majority of people and conveying the will to protect some vulnerable social sectors. Therefore, even though this decision did not give rise to any judgment, it still opened an initial space to further enhance lgbt claims, as indeed happened in the Austrian cases.

By this term I refer to eight cases adjudicated by the ECtHR, all claiming the same demand and questioning the ECtHR on the amount of protection guaranteed to lgbt people. In order to properly frame them, it’s worth emphasizing that these cases are the outcome of a peculiar legal context and a particularly begrudging political attitude. Precisely because of the reiterated refusal by policy-makers to comply with ECtHR judgments, this sequence of cases suggests the aim of altering the domestic *status quo*. Another hint of strategic litigation regards the involvement of lawyers actively interested in advocating lgbt rights, such as Mr. Graupner; the Austrian cases, therefore, may constitute as being the example of the ‘judicial route’ triggered by political obstacles, described by Wintemute (1995, 2).

All applicants, however, had also been convicted and some of them had also served their sentence in prison; so there is also a component of claiming personal satisfaction, stronger than that outlined in previous examples.

Until 2002, Article 209 of the Austrian Criminal Code read as follows “A male person who after attaining the age of 19 fornicates with a person of the same-sex who has attained the age of 14 but not the age of 18 shall be sentenced to imprisonment for between six months and five years”. Instead, for heterosexual acts the minimum age required was fixed at 14.

¹³³ I recall *X v UK* passage where the EComHR suggested that “such type of different treatment may be regarded by the Commission as having an objective and reasonable justification in the criterion of social protection”, jointly read with *Dudgeon* where the ECtHR reiterated the legitimacy of some degree of control over homosexual behavior.

On 10th July 2002, following the Constitutional Courts' judgment, the Austrian Parliament repealed the aforementioned Article, setting a unique age of consent at 16 years, or 18 in the case of persons below 18 years old being inducted "to sexual activities in return for payment" (*L. and V. v Austria*, § 21). However, according to the transitional provisions, the amendment did not apply to criminal proceedings in which the judgment at first instance had already been given (Ivi, § 22). In the light of the jurisprudence of the ECtHR and the *Sutherland* Report, the provisions however provided the subject with the possibility "of the application of the more favourable law, where judgment is set aside, inter alia, following the reopening of the proceedings or in the context of a renewal of the proceedings following the finding of a violation of the Convention" (Ibidem). These were the only two exceptions where the reform spread retroactive effects; for instance, criminal records could not be deleted, nor could proceedings, in which the definite judgment had already been decided, reopened and quashed.

While *L. and V. v Austria*, n.39392/98 and 39829/98, and *S. L. v Austria*, n.45330/99, were lodged with the ECtHR before 2002, and therefore challenged the existence of Article 209, the other cases were presented after, contending that the applicants had been discriminated against when that provision was in force and that also after the amendment national authorities did not guarantee adequate satisfaction.

From a socio-legal perspective, it's interesting to note that from 2002 to 2014 - from the first to the last judgment- the Austrian government did not further amend its legislation, only approving a reform after the last complaint was filed to the ECtHR. Therefore, even though core issues involved procedural aspects, political authorities preferred to reimburse the applicants, rather than complying with Strasbourg's review. As legitimate and highly-regarded the ECtHR may be, its effective ability to obtain immediate compliance is limited, for in this event it could only reiterate its own reasoning-line until the Austrian government proposed amending the Criminal Code again.

As for the ECtHR perspective, *L. and V. v Austria* displays the most relevant approach. In this case the ECtHR reappraises *Sutherland* (Ivi, § 40, § 42), and clearly labels the maintaining of any criminal provision or procedure discriminating against homosexuals as inherently anti-democratic, also rejecting the assumption that, as far as not being proportionate, the requirement of a higher age of consent theoretically pursued a legitimate aim:

To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority. These negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the

differential treatment any more than similar negative attitudes towards those of a different race, origin, or colour. (Ivi, § 52).

The following cases quote this judgment in different passages, with the effect of reiterating it and, consequently, of including within its consolidated jurisprudential resources the interpretive structure here developed. Furthermore, the absence of dissenting opinions on the conduct of Austrian authorities highlights a strong change in the ECtHR internal legal culture on the matter; in the turn of less than 10 years, the equalization of the age of consent no longer appeared as being a sensitive issue, but rather as an outdated legal problem.

4.2.3. Delimiting Private Spaces

Another point not disputed in *Dudgeon* was the possibility to legally sanction types of homosexual acts not prosecuted when involving persons of different sex. In more detail, the Court did not discuss the notion of privacy outlined by the UK Government, thus endorsing the existing criminalization of homosexual acts involving more than two people, whether group-sex intercourse was taking place or a third party simply being witness to homosexual activity.

UK laws were quite peculiar on the issue, and no other Coe Party had an analogous legislation; quite predictably both civil and common laws involved various offences against public morals or decency, which could be punished either with fines or convictions, but the 1956 Sexual Offences Act created a distinct offense for gay male sex, stating “an act which would otherwise be treated for the purposes of this Act as being done in private [homosexual act] shall not be so treated if done: (a) when more than two persons take part or are present; or (b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise”.

The ECtHR was required to review similar provisions on various occasions, and in two cases it clarified the meaning of ‘private’ for purposes of Article 8, tracing a strict and problematic binary between private and public spaces.

In *Laskey, Jaggard and Brown v UK*, n.21627/93, 21628/93, 21974/93, and *A.D.T. v UK*, n.35765/97, the Court dealt with two sensitive issues, namely that of same-sex sadomasochist and of group intercourses; could gay men claim, under the ECHR, the human right to freely engage in the aforementioned activities? Did sexual acts involving more than two people fall within the notion of private life, secured by the Article 8?

It might be objected that the importance of these two cases is not relevant, since they concern the specific UK peculiarity; the ECtHR, however, approached the issue by carefully considering arguments claimed by both parties, thus delivering considerations of broad relevance.

In both cases the EComHR marks the first fracture with the previous law case, by declaring the complaints admissible and by recognizing that UK laws interfered with private life, and that, as such, they raised issues worthy of being discussed in Court. If compared to EComHR decisions made just a decade before *Dudgeon*, or even in the early 1980s, the Commission managed to critically approach the enforcement of heterosexuality and to admit that similar laws limited individual liberty; this does not imply that the Commission suggested a breach of the Convention, but it certainly showed a less begrudging attitude against homosexual issues. Whether the applicants were right or not, the Commission considered it appropriate to leave the final decision to the ECtHR and, consequently, it enabled the judges to further specify the meaning of the Convention.

In *Laskey* three men were charged with a series of offences, including “assault and wounding, relating to sadomasochistic activities that had taken place over a ten-year period.” (*Laskey*, § 8). During routine investigations on other matters, the police had come into possessions of several videos filmed during these encounters, “involving the applicants and as many as forty-four other homosexual men”(Ibidem). The seriousness of the acts performed was such that the Court contented that, as far as aiming at obtaining sexual pleasure, they could well be compared to genital torture (*Laskey*, § 40). Even though none of the people involved had to go to hospital, had contracted HIV or other infective pathologies, and though none of them was suffering from permanent damage, the Court was faced with the doubt as to whether sadomasochist activities could be protected without opening up to the theoretically complex issue of ‘consenting victim’. Could the Court justify activities where only adults were involved and where all parties gave their consent, regardless of the harm caused? The unanimity of the Court considered this outcome unacceptable and, therefore granted UK authorities the discretion to criminally charge the applicants. The applicants proposed two distinguished arguments: the first discussed the possibility of admitting to ‘consensual violence’ or ‘violent pleasure’, while the second involved the definition of how to assess the privacy of sexual acts.

I suggest that the Court mainly relied on the first issue and that the troublesome knot was given by the kind of activity, not by the homosexuality of the applicants. One could certainly discuss the paternalistic standpoint that the ECtHR endorses or, conversely, it could be emphasized that the potential slippery-slope towards the legitimization of ‘consenting torture’ that the Court would have legitimized, had it opted for a different outcome. The core of the judicial interpretation, however, stressed the degree of injury, wounding, and degrading treatment involved in the activities performed by the three men, denying that these fell into the cluster of merely sexual acts, but rather considering them as bodily offences. As it can be imagined, various commentaries have criticized the approach taken by the ECtHR on the issue, and also seven Commissioners upheld that this peculiar sexual activity would create no more problems than boxing or other activities well permitted under UK laws; a further examination of the issue, however, would go too far from the aims of the present research.

In several passages the Court’s reasoning on the division between legitimated and illegitimate acts is intertwined with reasoning on the meaning of ‘privacy’, leading to specifying a number of criteria, further developed in *A.D.T. v UK*. After recognizing that “there can be no doubt that sexual orientation and activity concerns an intimate aspect of private life” (*Laskey*, § 36), the Court tempered with this finding, by enlisting a number of features which, in their perspective, contrasted with the ideal definition of ‘private’ sexuality.

Most notably, in *Laskey* the Court referred to not strictly private acts on the grounds of four elements: the involvement of “a number of people” (Ibidem), the recruitment of new “members” (Ibidem), the provision of equipped chambers, and the shooting of videotapes which were distributed among members.

In the UK, domestic proceedings and this judgment were surrounded by lively discussion, among those who had optimistically thought that the ECtHR would have upheld the compliant on the grounds of the “privacy argument” and those who right from the start had warned us of the alleged “violence of exclusion” (Moran 1998, 82) entrenched in human rights.

In particular, Moran wrote a trenchant critique of the arguments displayed by the ECtHR, contesting both their theoretical foundations and their interpretive outcome, but, as far as being provocative and compelling, his analysis can be critically challenged on the basis of two ideas, at least, also in light of subsequent ECtHR’s jurisprudence

The ECtHR interpreted the applicants’ activities as “acts so evil that they are not only a threat to the individual but a threat to civilized society” (Moran 1998, 81) - Moran’s argument goes - and the Court would “reduce the viability of any challenge to the State’s determination of the nature of particular acts” (Ibidem). Further, he contended that the concurring opinion filed by judge Pettiti revealed the ECtHR’s reasoning, which provided the “clearest representation of terms of denial” (Ivi, 83), by framing the right of respect for private life as “the protection of a person’s intimacy and dignity, not the protection of his baseness or the promotion of criminal immorality” (*Laskey*, conc. op. § 39). To sum up, for Moran the ECtHR reasoning would protect the private realm only insofar as the acts committed are normalizing the canons of traditional sexuality, while denying “the humanity” (Moran 1998, 83) of those who derive pleasure from the consensual giving and receiving of pain¹³⁴.

I contend, however, that a careful reading of the ECtHR’s arguments suggests that the concept of “criminal immorality” was mostly upheld only by judge Pettiti, while the majority resulted far more concerned by the dilemma and the side-effects of the consenting victim. Judge Pettiti filed a concurring opinion in order to clarify that his reasoning differed from the majorities in several respects, especially on the moral evaluation of the facts at stake.

Moreover, shortly after the ECtHR demonstrated that the realm of privacy secured under the ECHR, as far as being tight, did not necessarily impose a normalization of traditional categories.

¹³⁴ Moran labeled the ECtHR reasoning as “the institutionalization of an ontological order as a moral based upon a violent hierarchy of sex, sexuality, and gender. These ontological hierarchical matters are given another form by way of the medicalization of the actors and the acts they perform” (Moran, 1998, 83).

A.D.T. v UK, instead, was entirely focused on the boundaries of privacy, and it legitimatised the human right to engage in homosexual group sex, an activity not completely positively valued by traditional morals. In 1996 police officers conducted a search under warrant of the applicant's home, seizing various items, including photographs and a list of videotapes. Mr. A.D.T. was interviewed by the police, and he admitted that some of the videotapes contained footage of the applicant and up to four other adult men, engaging in sexual activities in his house. Consequently, he was charged with gross indecency, precisely in relation to the commission of group sex. As the ECtHR recalls, “the acts which formed the basis of the charge involved consenting adult men, took place in the applicant's home and were not visible to anyone other than the participants. There was no element of sadomasochism or physical harm involved in the activities depicted on the videotape.” (*A.D.T. v UK*, § 10). All material seized was destroyed and Mr. A.D.T. was sentenced to two years imprisonment, although finally discharged.

Under the ECHR, he complained that his conviction constituted a violation of his right of respect for his private life, protected by Article 8 of the Convention (Ivi, § 20).

The respondent Government, instead, objected by drawing a distinction between intimate, and therefore acceptable homosexual activity involving two men only, and acts involving more than two men, which appeared potentially public and, therefore, unacceptable. The acceptable/unacceptable distinction not only conveyed a moral judgment, but it also set the legal ground to define criminal provisions.

Given that UK laws, as previously mentioned, did not include similar offences for heterosexual activities, the division between private/public supported a conception of law moulded on the enforcement of morals and on the idea of homosexuality as inherently disordered.

The Court reviewed the parameters adopted to define what is private, and the final judgment combined innovative and restrained outcomes. On one hand, the Court found a breach of Article 8, concretely recognizing the right to engage in private group-sex and further enlarging the space of tolerance identified in *Dudgeon*; on the other, however, the enjoyment of this right was subordinated to a number of criteria which significantly border the private realm. As explored hereinafter, these were quite tightening conditions, whereby privacy almost collapsed over the (in)famous model of the closet.

As for the innovative implications, the ECtHR rejected both the Government's opinion that the case would not give rise to interference with private life and it evaluated the final conviction as lacking proportionality with the offense committed by the applicant. Moreover, the Court recalled *Dudgeon*, establishing a substantial link between the two cases and implying that the situation of Mr. A.D.T. was comparable to Mr. Dudgeon's.

Hence, the wording does not convey an openly biased conception of homosexuality, to the extent that the Court does not reiterate the necessity to control homosexual acts, nor does it depict sexual acts performed by Mr. A.D.T. with negative tones.

Then, the Court concludes that the reasons submitted by the respondent Government are not sufficient in order to justify the legislation and prosecution.

However, the Court also problematically delimited the space wherein an act can be legitimately labelled as private. The reason why the ECtHR recognizes an interference with the applicant's private life, indeed, is mainly due to the fact that

no evidence has been put before the Court to indicate that there was any actual likelihood of the contents of the tapes being rendered public, deliberately or inadvertently. In particular, the applicant's conviction related not to any offence involving the making or distribution of the tapes, but solely to the acts themselves. The Court finds it most unlikely that the applicant, who had gone to some lengths not to reveal his sexual orientation, and who has repeated his desire for anonymity before the Court, would knowingly be involved in any such publication. (Ivi, § 25)

Had the applicant inadvertently rendered the videos public, or had he openly lived his homosexuality, it's possible to suppose that the ECtHR would have granted national authorities a greater margin of appreciation. The ECtHR's evaluation of the applicant's desire for privacy might be read from two different perspectives; if stressing the ECtHR's concern for the act to remain private and the emphasis placed by the judges on the desire of anonymity, the ECtHR reasoning might be considered as "reproduc[ing] the social relations of the closet" (Johnson 2014, 105). From this perspective, the applicant's refusal to reveal his sexual orientation would be positively considered by the ECtHR, as if the sincerity of the applicant was proven, and attested that there would be something wrong in living one's own sexuality out.

From a different perspective, it might be contended that the ECtHR had to weigh up the individual's desire for privacy as inherent to his right to respect for his private life. The quoted passage, hence, would not express any bias against the applicant, but it would reiterate that the individual private realm has to be greatly evaluated as a garrison against public interference and that, within its borders, everyone should be entitled to the human right to engage in whatever consensual, adult, and non-violent sexual activity.

Effectively, had the ECtHR endorsed a prejudiced conception, it would have applied the same reasoning as *Laskey, Jaggard, and Brown*, or it would have not established a comparison between the case of Mr. A.D.T. and the case of Mr. Dudgeon.

In contrast with such a view, the ECtHR's wording only takes into account the objective probability if the videotapes were rendered public, ignoring the subjective disposition of the applicant and suggesting a begrudging approach to his personal case.

Yet, the ECtHR was reviewing the applicant's intentions not to define the desirability of the acts he had performed, but to assess whether he had effectively committed homosexual acts which could be considered public under the relevant UK legislation; as a consequence, any speculation over the ECtHR's contempt against Mr. A.D.T. results would be difficult to prove.

What instead is quite clear, is the restricted definition of private realm endorsed by the ECtHR, who challenged the assumption that Mr A.D.T. had breached the requisites under the Sexual Offences Act, but who did not discuss the appropriateness of similar criminal laws, enforcing a meaning of privacy which resembled that of invisibility.

Effectively, as to the likelihood that the videotapes were rendered public, the Court only considered the objective probability of such an event, while completely ignoring subjective intentions. The definition of private collapses over that of invisibility: according to the quoted reasoning of the ECtHR, homosexuals are entitled to claim protection under the Convention, only insofar as they do not give any hint of the acts they perform to the public.

When referred to heterosexual behaviour, the notion of privacy can be stretched, to some extent, into the public sphere; when addressing homosexuality, the borders are fixed: private life comprises all consensual, adult, same-sex acts performed in a way to be unintelligible to anyone not directly involved in those activities.

In conclusion, it's interesting to note that the ECtHR never referred to the fact that UK laws did not provide criminal sanctions for comparable heterosexual acts, just imposing a fine for manifestly public sexual acts. It's true that the applicant had not claimed a breach of the principle of discrimination, Article 14, but when reasoning with the meaning of private life, the Court could have however attached some legal relevance to this differentiated treatment.

The lack of a similar comparison recalls the perspective adopted by *Dudgeon*, *Norris* and *Modinos*: the Court gradually shaped the legal category of homosexuality and gradually defines the rights which can be legitimately claimed, reinforcing a strict binary between private and public.

4.2.4 Conclusive Remarks

Several socio-legal features emerge throughout the three issues addressed.

Reappraising the image of the judicial arena as a site where litigants pursue their interests (Friedman 1975, 170), and where social inputs are formalized into legal outputs, I compare the set of demands put forward with the consequent answer given by ECHR institutions.

Dudgeon claimed against the criminalization of homosexuality, by framing criminal laws against male same-sex acts as in violation of his right to private life, as discriminatory in respect to heterosexuals and lesbians, and as imposing an unjustified higher age of consent. He contended that homosexuality was a feature worthy of protection under Article 14 of the ECHR, since it fell within the notion of ‘sex’, and he extensively argued against the very legitimacy of any prosecution against same-sex acts. Mr. Dudgeon read UK laws as the product of secular prejudice against homosexuals, and his complaint pursued judicial law-making, beside law-declaring. *Norris* and *Modinos* shared this intention, but, at the same time, they did not frame their complaints under the principle of non-discrimination anymore, since the ECtHR had previously ruled that gay men and heterosexuals/lesbians were not in a relevant comparable situation. Therefore, their demands aimed at reinforcing, enlarging, and grounding the principle whereby private life also protected the homosexual private realm.

As for the age of consent, I have already outlined that *Sutherland* fully stands within a plan of strategic litigation pursued by the British lgbt movement in order to persuade political actors to lower the threshold to 16 years. The ‘Austrian cases’ present a stronger desire for redress, though they also can be read as promoting retroactive measures, namely the annulment of criminal records of gay men who had had relations with boys aged between 16-18.

Both *Laskey* and *A.D.T.* tried to stretch the breadth of private life, including the notion of a consenting victim, and requiring that the law did not interfere with the number of partners involved.

Turning to the judicial outputs, the interpretation of the ECtHR has focused on Article 8 and Article 14, clarifying which are the boundaries of homosexual freedom secure by the ECHR.

Article 8, under the notion of private life, secures the human right to engage in homosexual activities, as long as they are consensual, adult, and private. Public authorities are entitled to interfere with lgbt sexual freedom, but throughout the mentioned cases the Court has clarified a number of strict criteria, which ultimately limit national discretion. Firstly, homosexuality can be restricted on the grounds of protecting morals, public health, and the rights of others, but domestic authorities must demonstrate that it was not possible to achieve the same result with alternative measures, that a pressing social need existed, and that the means adopted did not im-

pose disproportionate interference. Moreover, the ECtHR can't accept as legitimate laws which merely reflect moral disapproval, or which restrict one's freedom on the grounds of the hypothetical and uncertain harms he may cause to public health. Neither national laws are allowed to impose a different age of consent, nor are they enabled to restrict the number of partners.

Hence, the margin left to Coe members in prosecuting homosexuality is extremely reduced, and the possibility to charge someone because of his sadomasochist encounters is related to the risk of harm caused to the other person or persons involved, not to the moral judgment of the act itself.

The ECtHR has not really addressed Article 14, and the most relevant element concerned precisely what the Court did not assess. In judgments dealing with the first and the third cluster, the Court argued that it was not relevant to determine whether homosexuality fell into the notion of 'sex' or 'other status', secured by Article 14; even when reviewing provisions on the age of consent, on one hand, the Court upheld that heterosexual and homosexual young people are in a relevant comparable situation, but, on the other, such a statement was the result of a careful review of international medical and scientific sources, which proved, beyond any reasonable doubt, that gays and heterosexuals aged between 16 and 18 were in an analogous mental condition. It, thus, seems that the comparison between different sexual orientations stood more as the result of a substantial reasoning, rather than the initial point of judicial reasoning. In *L. and V.* this perspective is mitigated by the recognition that the eventual higher age of consent required for homosexual activities embodies a bias on the part of a heterosexual majority against a homosexual minority, thus amounting to a breach of the Convention.

The demand of judicial law-making emerges from all cases considered, whether more or less prominent, and it's interesting to evaluate how the ECtHR balanced its role of law-declaring with such pressures.

Formally, the Court has adhered to the casuistic approach along all judgments analyzed; in *Dudgeon* judges remember that the ECtHR was not concerned with any general value-judgment, (*Dudgeon*, § 54), and in *A.D.T.* they openly reject any abstract evaluation (*Ivi*, § 36). Expressions like "the present case" or "under these circumstances" emphasize the empirical approach of the Court, implying, thus, a present-oriented gaze and a law-declaring approach.

The ECtHR has not ignored the applicants' demand of law making, on the contrary scattering statements of primary and general relevance which have oriented, and still orient, the ECtHR perspective on alike issues.

A number of arguments verify this assumption: in *Dudgeon* the ECtHR offers a comment impacting on the wide relationship between morals and the law, denying the fact that legislation can be used to indicate the approval or disapproval of harmless behaviour (*Dudgeon*, § 62).

The Court also rejects the so-called argument of disgust, on the grounds of its inherent unacceptability, setting an essential interpretive yardstick also for future law cases. According to the majority, indeed, the disturbance caused by the commission from others of private homosexual acts cannot, on its own, warrant the application of penal sanctions (Ivi, § 60). Furthermore, by comparing *Dudgeon* with *L. and V.* it's possible to note how the attitude towards homosexuality changed between 1980 and 2003; in the former, the ECtHR plainly admits the necessity to control consensual homosexual conduct, implying a biased attitude, while in *L. and V.*, the Court upholds a parallelism between sexual orientation and other features secured and positively evaluated by Article 14.

The Court performs a law-making role, and it clarifies the interpretation of the ECHR, by specifying the standards to adopt when dealing with homosexuality, public morals, and age of consent.

Both in its adjudicatory and creative role, the Court's reasoning line displays several features which enable the researcher to study ECtHR internal legal culture. Most notably, it is possible to uncover the ECtHR initial values and premises, as well as understanding structural and institutional determinants.

I have already extensively stressed the peculiar outputs of each judgment, according to the concepts of heteronormativity, dilemma of differences, and the binary public/private, emphasizing hence that extra-legal assumptions of the Court as far as sexual orientation is concerned play an essential role.

The ECtHR shapes the homosexual subject as a personage with innate homosexual tendency, who discretely lives his sexuality, and whose moral status, is at first, quite uncertain (*Dudgeon*, § 61). Furthermore, it can be argued that this discourse has been, and often continues to be, the basis on which public authorities in contracting states justify the mechanisms of social control designed to suppress the leakage of homosexuality into the public sphere. In any event, from *Dudgeon* onwards, the Court does not label him as criminally deviant anymore, rather assuming heterosexuality to be the normal sexual drive. The EComHR, indeed, in *Surtherland* appears concerned about whether sexual orientation is already fixed in adolescents, as to suggest that same-sex acts imply tolerance only if they do not threaten to 'corrupt' young boys into homosexuality. Both the UK Policy Advisor Committee and the BPA opinions are quoted precisely to attest that "most researchers now believe that sexual orientation [is] usually established before the age of puberty in both boys and girls (Ivi, § 58). The Commission suggests that since at a certain age sexual orientation is already decided, a higher age of consent would not bring any public benefit. Hence, the reasoning is not moulded by an equal evaluation of heterosexuality and homosexuality, for had the Commission shared this view, it would have considered the

very existence of legal separate regimes as being problematic, regardless of any consideration of the innateness of gay tendencies.

In *L and V*, the ECtHR recalls the imperative to protect minorities from majoritarian prejudice, and it modifies its previous standpoint by referring to the principle of equality. Nonetheless, the emergence of rights to sexual freedom requires demonstrating that the lowering of the age of consent would not have detrimental effects, such a requirement has never occurred in relation to heterosexual consent.

How can the reasoning of the Court be filtered through the dilemma of differences? The Court overturns the EComHR heteronormative approach, however endorsing the frame of tolerance, but not that of respect. The Court, indeed, avoids recognizing the equivalent value of heterosexuals and homosexuals, rather progressively recognizing those rights whose foundations proved convincing to lgbt people.

In conclusion, if the previous EComHR approach to homosexuality had considered the society as a garrison, to defend from moral deviations that would otherwise dismantle or criticize the *status quo*, the ECtHR now distances itself from such a normative reading of morals, implementing the ideal of a pluralist, tolerant, and broadminded Europe.

Focusing on internal disagreement, I addressed, in respect to each section, the perspective and the arguments claimed by dissenting and concurring judges; in more general terms, I propose two considerations: firstly, internal divisions are neither wide nor reiterated in time. Secondly, dissenting opinions display a multifaceted range of arguments, fluctuating between disagreement concerning extra-legal elements, namely moral, political or social values attached to the facts at stake, and over the method of how to interpret the Convention, to measure the consensus, or to evaluate the margin of appreciation.

Most heated divisions occur in *Dudgeon*, *Norris*, and *Sutherland*, while in *Modinos* and in the ‘Austrian cases’ either final decisions are unanimity, or separate opinions are on strictly procedural terms and they are not qualitatively representative. Also in *Laskey* and *A.D.T.* the Court’s judgment does not record separate opinions.

A twofold argument can explain this evidence: on one hand, *Dudgeon* and *Sutherland* strongly innovate the interpretation of the ECHR and, as such, they offer more room for disagreement; on the other, it’s appropriate to highlight that *Laskey* and *A.D.T.* occurred in 1998 and 2000, while the Austrian cases took place between 2003 and 2014, almost twenty years later than *Dudgeon*. The social and moral attitude of homosexuality had evolved, to the extent that private sexual freedom was no longer debated, at least in Coe Countries; as a consequence, the ECtHR have probably mirrored such a change, also on the grounds of an internal changed perspective on the meaning of private life. In *Norris*, temporally contiguous to *Dudgeon*, the dis-

senting opinion gathered two judges that had already dissented in *Dudgeon*; hence this case can be treated as the extension of the previous judgment.

In *Laskey, A.D.T.*, and *L. and V.* the Court adopted decisive wording, without recalling the general necessity to control same-sex behaviour, and plainly quoting *Dudgeon* as the established cornerstone of the ECtHR jurisprudence on the matter.

It has to be acknowledged that the EComHR and the ECtHR interpreted Article 8, so as to include the human right to engage in same-sex acts, when the overwhelming majority of Coe members did not prosecute gay acts anymore; analogously, the Court endorsed an equal age of consent when the majority of Coe States had already quashed discriminatory laws, and it declared the interference set out in *A.D.T.* as illegitimate in a context where such provisions did not openly occur. In conclusion, as far as *Dudgeon* innovated the interpretation of the ECtHR, I have read all judgments previously analyzed not as the result of a peculiarly activist and innovative interpretation, but as the ratification of an established trend.

4.3. The Right not to be Subject to Inhuman or Degrading Treatment

This cluster addresses complaints where applicants have claimed either that they had been violated of their right to physical and psychological safety because of their homosexuality, or that they were facing the risk of suffering from treatment contrary to Article 3, if deported to their homeland.

The first part of the paragraph focuses on cases in which the applicants were lawfully deprived of their personal freedom, and were either confined in prison or detained in centres of identification. The actions contested inhered to rape, bodily assaults, and threats to the applicants' safety, and the connection with the concept of personal security is quite plain.

In the second part, I focus on cases challenging national refusal to grant refugee status to lgbt applicants, on the grounds of reasons already explained in paragraph 4.1.

Unlike the applications against immigration policies for purposes of family reunification, which alleged a differentiated treatment between heterosexual and homosexual immigrants, here the core issue does not directly call for any comparison, rather claiming that the Court should expand its jurisprudence on refugees to consider homosexuality a weighty ground to be protected under the ECHR.

In the first cluster, there are three principal cases investigated: *Stasi v France*, n.25001/07, *Zontul v Greece*, n.12294/07, and *X v Turkey*, n.24626/09; even though homosexuals have been claiming the violation of Article 3 since 1955, by arguing against their imprisonment, physical abuse whilst in confinement, and forms of verbal abuse in various social contexts, the Commission never deemed such complaints admissible.

The ECtHR delivered these judgments between 2011 and 2012; hence, it's possible to treat them as contemporary and to consider eventual differences as the outcome of a changed judicial evaluation of the duties imposed on the respondent government, rather than as the consequence of a temporal change in judicial attitude.

At the time of the alleged breaches, Mr. Stasi and Mr. X were serving a prison sentence, while Mr. Zontul was detained in a Greek centre for illegal immigrants.

Abuse, violence, and the infringement of human rights often mark the routine of prisons, centers of detention, and other structures where personal freedom is restricted, and where a large number of people are forced to stay in limited areas, as many sociological researches demonstrate (Lockwood 1980; Man and Cronan 2002; Lahm 2008).

The victims are not necessarily only lgbt people; on the contrary, the categories most at risk are those who infringe the conventional criminal code of honour, such as sexual offenders, paedophiles, and even murderers of women or children (Knowles 2002; Phillips 2001). It's indisput-

able, however, that gay men are exposed to the risk of bodily assaults when in prison, especially when forced to deal with inmates or policemen with homophobic feelings. According to the trivial prejudice spread in many prisons, the suspect of being homosexual is the worst insult to a man's virility, and the punitive rape by other men not only aims at physically harming the other, but also at annulling his reputation, his dignity and his 'maleness'. Hence, gay prisoners are often equated to subjects who do not deserve respect, who can be harassed for other's pleasure, and who constantly try to seduce their heterosexual fellows (Hensley 2000; Kunzel 2002).

Violence and rape may be perpetrated by other detainees, by policemen, or other representatives of public institutions, and they can be targeted either at abusing someone because of his sexual orientation or at 'punishing' someone, regardless of his eventual homosexuality.

I will focus on the former, only when the applicants openly claim protection under the ECHR because of their homosexuality, and they encourage judges to determine how to protect minorities in regimes of restricted personal liberty.

In *Stasi v France* and *X v Turkey* the applicants denounced that they had been threatened and abused by other inmates, and they claimed a violation of the ECHR on the grounds that prison administration had failed to properly manage the situation, for instance by further restricting the liberty of lgbt detainees and not that of those who had harassed them.

Mr. Stasi had informed the director of Villefranche-sur-Saone prison that he had been the victim of acts of rape during his previous period of detention. He was thus placed alone in a cell on a corridor of the prison reserved for vulnerable prisoners.

Nevertheless, between February and March 2007, the applicant was forced to share the cell with P., who "l'aurait frappé, brûlé entre le pouce et l'index, forcé à porter une étoile rose et aurait mangé ses repas. Il l'aurait également forcé à rester dans la cellule pour cacher les traces des coups" (Ivi, § 13). After Mr. Stasi reported these events and after he showed the intention of committing suicide, he was medically treated, his case was transmitted to social services, and he also stayed in a psychiatric hospital for seven days. When returned to prison, Mr Stasi was the victim of other acts, and medical certificates were issued attesting bruising. He was pushed down the stairs by an unidentified inmate and he injured his right leg; in 2008 a prisoner stubbed a cigarette under his left eye, and another inmate assaulted him in the shower.

In response, the director "décida de le changer de cellule et de mettre en place un suivi particulier, en le faisant accompagner par un surveillant dans ses déplacements et en lui permettant d'accéder seul aux douches." (Ivi, § 21). On the day of his release he was admitted to the psychiatric hospital of Saint-Cyr au Mont d'Or, when he remained until 14 January 2009. Relying on Article 3, Mr Stasi alleged that he had been the victim of ill-treatment by other inmates, dur-

ing his two periods of imprisonment, and he alleged that the authorities had not taken the necessary measures to ensure his protection and to safeguard his human rights.

Also Mr. X was put into isolation because of the intimidation he had been suffering from other heterosexual inmates. He was subjected, however, to an even stricter regime than that provided for criminals convicted of sexual assaults, murderer or paedophilia:

The applicant stated that the cell in which he had been placed measured 7 m², with living space of no more than half that. It had a bed and toilets, but no washbasin, was very poorly lit and very dirty and rat-infested. The [...] ten other cells of the same type [...] were intended for solitary confinement as a disciplinary measure or for inmates accused of paedophilia or rape. After he had been put in an individual cell on 5 February 2009, the applicant was deprived of any contact with other inmates and any social activity. He had not been permitted any outdoor exercise and had been allowed out of his cell only to see his lawyer or attend hearings held approximately once per month. (*X v Turkey*, § 10)

After three months of such a regime, Mr. X started to suffer from psychiatric problems and he requested equal treatment like the other inmates. Both internal administration and domestic Courts dismissed his request; another homosexual detainee was put into the applicant's cell for four months, up to December 2009, but then, Mr. X was forced again into confinement until February 2010, when he finally obtained a transfer to another prison and to be placed in a standard cell, with three other inmates where he was given the same rights as the other prisoners. According to his lawyer, Mr. X still suffered from depression and insomnia, on the account of his previous solitary confinement. Also Mr. X claimed a breach of Article 3, denouncing that "he had been placed in an individual cell for more than thirteen months. He also alleged that there had been no legal basis for placing him in a small individual cell, that he had been detained twenty-four hours per day, deprived of any contact with other inmates and not allowed any outdoor exercise" (Ivi, § 29).

Stasi and *X* raised the issue of which measures should Coe parties adopt in order to prevent the harassment of vulnerable prisoners, and what degree of discretion they would enjoy in deciding the most appropriate measures. Consequently, the main responsibility of the public authorities, if any, lied in the absence of an adequate response.

In *Zontul*, however, the applicant reported to have been raped by a coastguard responsible for his supervision, and also pointed out the inadequacy of redressing afforded by the State. Mr. Zontul was a Turkish national who, in 2001, was intercepted by the Greek coastguard, while sailing to Italy with other illegal immigrants, and he was escorted to a port on the island of

Crete. Besides forcing the applicant and the other immigrants to live in inhuman living conditions, two coastguards repeatedly threatened him, and one also raped him with a truncheon. Although he reported such violence, and although the command officer opened an inquiry, the final sentence was only delivered in 2006, and the rapist was condemned to pay a fine of 792 euros.

The ECtHR did not consider the French authorities in breach of the ECHR and it dismissed Mr. Stasi's request; on the contrary, it found a violation of Article 3 in both *Zontul* and *X*.

The element which could explain the different approach taken by the ECtHR refers to the role of national authorities and to the obligations which bind them to prevent ill-treatment. In *Stasi* the Court emphasized that, given the absolute character of Article 3, national authorities were required to adopt direct and indirect measures targeted at ensuring the dignity of anyone under their jurisdiction: "la nature du droit protégé par l'article 3, il suffit à un requérant de montrer que les autorités n'ont pas fait tout ce que l'on pouvait raisonnablement attendre d'elles pour empêcher la matérialisation d'un risque certain et immédiat pour son intégrité physique, dont elles avaient ou auraient dû avoir connaissance. Il s'agit là d'une question dont la réponse dépend de l'ensemble des circonstances de l'affaire en question." (Ivi, § 79).

The ECtHR still held the view that "les autorités pénitentiaires ont pris toutes les mesures nécessaires pour le protéger" (Ivi, § 102), and that they had promptly considered Stasi's complaints. Moreover, taking into account the proceeding against Stasi's former inmate P., the Court - five votes to two- concluded that "le droit interne assurait au requérant une protection effective et suffisante contre les atteintes à son intégrité physique" (Ibidem).

A possible critical reading of this judgment initiates from the dissenting opinion jointly delivered by two judges. They contend that French authorities had not considered the peculiar fragile nature of Mr. Stasi, as a detainee and as a gay man, and that they had not taken all possible measures to prevent him from undergoing violent acts, at least until the director decided to survey him even when going to the showers. Prison authorities should be required not only to deal with or to react to harm inflicted on the applicant, but also to dismantle the climate of hostility and silence which surrounded Mr. Stasi. Dissenting judges acknowledged that "les autorités ont pris certaines mesures pour protéger le requérant ; leur réaction a inclus certaines mesures préventives limitées dans le temps [...], des mesures d'investigations [...] et, du moins pendant un certain temps, le suivi médical régulier du requérant et un compte-rendu quotidien à cet égard [...]. La tendance suicidaire de l'intéressé n'a pas été ignorée [...]" (Stasi, di. op. judge Spielmann, judge Nussberger).

The same authorities, however, had mostly passively reacted to Mr. Stasi affirmations, without showing any active initiative to prevent such abuse, and, therefore, they lacked the “[volonté] du savoir” (Ibidem) and they did not challenge the “loi du silence” among the detainees.

Therefore, such criticism contended that the French institutions had not really considered the other’s perspective, nor had they given credit to the fact that gay men were notably exposed to greater risks. On the contrary, they applied “une approche trop standardisée en attendant de la part du requérant qu’il se plaigne à chaque fois qu’il subissait des mauvais traitements” (Ibidem).

In this judgment the ECtHR did not convey a heteronormative approach; as previously fleshed out, during the 1960s the EComHR had dismissed some applications lodged by German and Austrian citizens against the regime of their detention, by arguing that no right could be granted on the grounds of sexual orientation, that the violence they alleged to have experienced did not reach the minimum threshold of seriousness, and that national authorities were entitled to decide how to comply with prison arrangements. In Stasi’s case, however, the Court admits the severity of the harm suffered by the applicant, and also frames it as dire enough to fall into the ambit of Article 3. Had Court adopted an openly restrained and biased approach, it would have contended that the applicant could have prevented such negative reactions, by simply concealing his sexual orientation.

In light of these considerations, the ECtHR mainly suggests a perspective shaped by a loose depiction of obligations imposed on the respondent government; while dissenting judges imply that, precisely because of the core value of Article 3, domestic actors are required to do anything possible and necessary, the majority draws a distinction between essential actions, which if not implemented give rise to a breach of the ECHR and those which, instead, are left to national discretion.

Under this framing, in *X*, the Turkish government was found in breach of the ECHR because it failed to establish minimum safeguards against the infringement of both Article 3 and Article 3 taken in conjunction with Article 14. Most notably, the ECtHR stressed that when the applicant had turned to national judges, expressively requesting equal treatment like other inmates by means of measures capable of protecting him from bodily harm, the post-sentencing judge had simply observed that the prison authorities had a discretionary power to decide such matters. Given that sexual orientation impacted on “intimate and vulnerable sphere of an individual’s private life”, the Court held the opinion that the ECHR imposed on the domestic authorities the duty to “take all possible measures to determine whether or not a discriminatory attitude played a role in adopting the measure totally excluding the applicant from prison life” (Ivi, § 55).

Homosexuality was, hence, positively evaluated, and competent authorities were considered to be under the obligation to ensure the protection of the LGBT prisoners' human rights without causing them perhaps more serious harm, and they had not to impose the burden of prejudice on the victims

In *Zontul* the ECtHR reiterated this approach, endorsing arguments of general relevance, by framing even a single act of rape as torture, and not just as mere ill-treatment.

The Court implied that both the redress and the effort to prevent such acts must be effective. Quite predictably, the Greek government did not defend the actions of the coastguard, while it contested that the applicant could not claim to be a victim of torture, also suggesting that the domestic judicial system had provided adequate satisfaction to Mr. Zontul, and stating that they had not impeded the applicant from being actively involved in the proceedings. The ECtHR, however, reviewed both the leniency of the penalty imposed on the rapist and the procedural aspects of trials in stark violation of Article 3.

Moreover, the ECtHR argued that, even if not reiterated, the rape denounced by Mr. Zontul amounted to an act of torture, worsened by the fact that an official of the State had perpetrated it. The wording of the judgment is clear and extremely harsh on Greek authorities.

In respect to LGBT human rights in the contexts of deprivation of personal freedom, the ECtHR endorses a unbiased perspective, framing homosexuality as an essential individual feature, which can't be suppressed, and managing to critically review majoritarian assumptions.

Also the definition of torture is rather enlarged, and to this scope the ECtHR recalls the UN Convention against torture and other inhuman and degrading treatments¹³⁵, and the decisions of Rwanda and Yugoslavia Criminal International Courts¹³⁶. Both the nature of the acts which can

¹³⁵ Under Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment “the term *torture* means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”.

¹³⁶ Most notably, in *Zontul* the ECtHR quotes paragraph 150 of *Kumarac*, IT-96-23, which states “The Appeals Chamber holds that the assumption of the Appellants that suffering must be visible, even long after the commission of the crimes in question, is erroneous. Generally speaking, some acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture”, and paragraph 597 of *Akayesu*, ICTR-96-4-T, which reads

give rise to a breach of Article 3, and the concrete duties of public authorities are drawn from other legal texts, thus stating a clear path of duties and obligations.

If considering the context when these three judgments were delivered, the qualification of rape as torture is not really surprising, since by 2011 the most important sources of international law and human rights law justified a theoretical and legal frame targeted at condemning and actively preventing torture and degrading treatment or punishments. The infamous mass rapes and killings during the civil wars of Rwanda and Yugoslavia had made the international community aware of the importance of enlarging the conventional definition of torture, so to accord more relevance to the power imbalance which may subsist between the victim and her executioner.

Also the statement according to which the Court is entitled to find a State in violation of Article 3, even though such a violation has been perpetrated by a public official by his own initiative, fits to the established international judicial pattern. If, indeed, national authorities do not adequately redress the victim, they behave as if they endorsed the ill-treatment, or underestimated it.

On the contrary, if compared to the EComHR decisions of the 1950s, 1960s, and 1970s, the approach of the Court in *X v Turkey* is quite innovative for the first time in history, for it upholds a complaint related to sexual orientation under Article 3 of the ECHR.

The ECtHR jurisprudence appears more problematic and begrudging in respect to lgbt immigrants claiming refugee status. It has to be acknowledged that it's difficult to ascertain whether infringements of human rights occurred or whether there is a concrete risk for their breach in politically troubled countries, ravaged by war, or in socio-legal systems where hostility against lgbt subjects is mostly conveyed by informal practices. Moreover, the ECtHR does not guarantee the specific right to obtain the status of refugee, and domestic immigration policies are traditionally regarded as one of the main bastions of national sovereignty. As the ECtHR recalls,

“the Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control, destruction of a person. Like torture, rape is a violation of personal dignity and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity”. *Kunarac* and *Akayesu* judgments can be accessed at this [address](http://www.un.org/en/preventgenocide)<http://www.un.org/en/preventgenocide>

The expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 of the Convention implies an obligation not to deport the person in question to that country (*M.E. v Sweden*, § 71).

Given the core significance of individual integrity, and considering that the Court has included sexual orientation as a characteristic worthy of protecting under the ECHR, one may think that, when the applicants' submissions are likely to be plausible, the Court will adopt the principle of precaution in favour of potential victims. As extensively shown hereinafter, the ECtHR has, instead, consistently applied the principle of precaution to protect the autonomy of Contracting Parties in controlling their borders.

Nine complaints were filed between 2003 and 2015; four have been struck out whereas the other five have been deemed either inadmissible or the Court has not found any violation. As for the formers, in three cases the Court acknowledged that the applicants had been guaranteed a residence permit while the trial was still pending (*Sobhani v Sweden*; *A.E. v Finland*; *A.S.B v Netherlands*), while in the last one, the applicant interrupted communications with her lawyers and with the Court (*D.B.N. v UK*). However, if in *A.S.B v Netherlands*, n. 4854/12, and *Sobhani v Sweden*, (dec) 32999/96, the respondent authorities recognized a permanent residence permit, the ECtHR approach in *A.E. v Finland*, n. 30953/11, is more problematic, for the Finnish government granted a permit for a period of one year, with the possibility of renewal; despite the risk of future deportation, the ECtHR held that the absence of an imminent risk caused the decadence of the case. In light of the similarity between the arguments put forward by Mr. A.E. and those put forward in cases where the ECtHR delivered the final judgment, I thus consider *A.E.* joint with *F. v UK*, *I.I.N v Netherlands*, *M.K.N. v Sweden*, *M.E. v Sweden*. All lgbt migrants had illegally entered European borders, they had submitted their homosexuality as a relevant reason for fleeing their homeland, but they had been refused either the status of refugee or a permanent residence permit.

Under the theoretical frame I outlined in chapter II, the judicial approach appears flawed, in respect to the international human rights law, controversial, most notably on the private/public distinction, and problematic, as concerns the normative image of homosexuality.

Firstly, the Court confronts with the complicate, sometimes contradictory, facts alleged by the applicants according to a homonormative and simplified perception of reality. By this, I refer to both the tendency of the judges to implicitly refer to a sexual and personal model to which the

applicant has to conform, and to their indifference, if not misjudgement, to complexities and nuanced conditions which mark concrete life. Indeed, the Court seems not to interpret the Convention so as to shape the meaning of theoretical rules on practical reality, but rather to require the applicants to demonstrate a linear path of life, fitting with clear-cut legal distinctions.

Consider for instance, the story of Mr. M.K.N.: he was an Iraqi, married to a woman and with two children. He arrived in Sweden in 2008, and applied for asylum two days later, submitting that he had been persecuted due to his Christian beliefs and due to the fact that he was well-off as he was the part-owner of a workshop. After the Swedish Migration Board rejected his request, Mr. M.K.N. appealed, adding that, “after his departure from Iraq, the Mujahedin had found out that he had had a homosexual relationship and that, as a consequence, his partner had been stoned to death” (*M.K.N.*, § 7). The Mujahedin had also been looking for the applicant in 2009 due to this relationship; nevertheless, “he had not revealed this information earlier as he had not been aware that homosexual relationships were accepted in Sweden. Despite this relationship, his intention was to continue living with his wife” (*Ivi*, § 7). The Court, on one hand, admitted to being aware of the very difficult situation for real or perceived homosexuals in Iraq, but, on the other, it counterbalanced this evidence by commenting that he “has expressed the intention of living with his wife and children” (*Ibidem*). Also the silence of Mr. M.K.N. regarding his homosexual relationship until his second hearing with Swedish authorities, was negatively considered by the Court, which agreed “with the Migration Court that the applicant did not give a reasonable explanation for the delay in making this claim in the domestic proceedings” (*Ibidem*).

In conclusion, the Court considered that the applicant’s claim concerning his homosexual relationship was not credible. I do not dispute flawed aspects in M.K.N. submissions, but I suggest that the Court filtered the applicant’s case through a normative image of how a homosexual person should behave in order to obtain ECtHR credibility. The Court recalls the intention of Mr. M.K.N. to live with his wife and his delay in reporting his condition in a diminishing way; hence even if the applicant grew in a legal and social hostile environment against homosexuals, the ECtHR didn’t even reckon that he might effectively be ashamed of declaring his relationship. Moreover, the intention of M.K.N. not to divorce his wife was evaluated as a weighty grounds to uphold the decision of the Swedish authorities, as if he could erase his past experience without facing possible prosecutions; the applicant, however, did not allege risking ill-treatment and death because he wanted to live openly as a homosexual, but he denounced he had been already prosecuted because of his homosexual relationship and contended that, if deported, the Mujahedin would still search for him. Hence, to be credible Mr. M.K.N. should

have conformed to the Western model of homosexuality, displaying a linear homosexual tendency and waiving it as essential to his personal identity.

The idea of coherent and seamless homosexuality also emerges in *M.E. v Sweden*, both in Chamber and Great Chamber judgments. The applicant was a Libyan citizen and he had entered Sweden in 2010, applying for asylum after three days. At first, he submitted that he had worked as a soldier and had smuggled illegal weapons for local clans; after national authorities arrested and tortured him, he revealed the names of clans involved and, finally, managed to escape from prison. If deported to Libya, he alleged risking at least ten years' imprisonment for his involvement in weapons trafficking. He would further risk being killed by the clans since he had revealed their names under torture. As the ECtHR recalls, "the Migration Board's officer asked whether the applicant had other grounds for requesting asylum, to which the applicant replied no", after a few months, however, he wished to add to his grounds for asylum that he was homosexual and had a relationship with N., a Libyan transsexual who lived in Sweden and had a permanent residence permit. Mr. M.E. justified his initial position affirming that "he had been 'normal' before and that it was N. he had become interested in" (Ivi, § 16). They had also married in late 2010 but, nevertheless, the Swedish authorities refused to give him the status of refugee and stated that he could apply for family reunion only once having returned to Libya. Consequently, he feared that if returned to Libya, it would become known that he was married to a man and he would risk persecution and ill-treatment.

Effectively, Mr. M.E. shifted from alleging to Swedish authorities that he had never had homosexual contacts in Libya, to reporting to the ECtHR that he had been living as a homosexual in Libya and that he had suffered two arrests by the moral police; although this change could well undermine his credibility, the ECtHR upheld the initial statement of Mr. M.E., whereby he was normal and had heterosexual desires, to suggest that he completely lacked credibility.

To my analysis, the outcome itself is not necessary to be striking, but the reasoning behind it: the ECtHR did not even consider the influence of cultural environment. In non-Western cultures homosexual behaviour may be spread, but those who engage in it do not necessarily define themselves as being homosexual. Therefore, even if aware of his tendencies, Mr. M.E. could have decided not to reveal them immediately to the Swedish authorities either because he did not consider them as being relevant or because he still did not think of himself as a gay man. In the ECtHR reasoning there are not hints suggesting that a similar perspective has been considered; this reluctance could be framed as recalling the notion of homonormativity. The ECtHR does not endorse separation between heterosexuality and homosexuality, but it requires a linear path, thus imposing and disciplining the normative shaping of the homosexual image.

Moreover, whilst the ECtHR problematically adheres to an innatist conception of homosexuality, reinforcing the clear distinction between heterosexuals and gay people and implying that the two categories do not present blurred borders, it also legitimizes a controversial and quite contradictory position on the private/public sphere.

The previously mentioned M.E. case offers a reasoning shaped precisely by the model of the closet, denying that the applicant could face prosecution once deported to Libya, while waiting for family reunification; even though Mr. M.E. should hide his sexuality while waiting for the approval of his request, during an estimated period of four months, “this must be considered a reasonably short period of time and, even if the applicant would have to be discreet about his private life during this time, it would not require him to conceal or suppress an important part of his identity permanently or for any longer period of time” (Ivi, § 88).

Furthermore, the Court did not judge it credible that the family of Mr. M.E. could know of his homosexuality, since the applicant had introduced N. to his family when they had spoken over the internet using a camera and N. presented himself as a woman. “The applicant’s family [...] believes N. to be a woman since the applicant has chosen to present the relationship in this manner. In the Court’s opinion, this indicates that the applicant has made an active choice to live discreetly and not reveal his sexual orientation to his family in Libya - not because of fear of persecution but rather due to private considerations” (Ivi, § 86). Hence, even though Mr. M.E. had denounced that another Libyan citizen had become aware of his marriage to a man and had informed his family, the ECtHR denied that such an event threatened the applicant’s safety, also assuming that the choice to present N. as a woman was not dictated by the Libyan social attitude towards homosexuality.

A comparable situation was also raised in *I.N.N. v the Netherlands*, concerning an Iranian citizen.

Most notably, Libya and Iran share a similar degree of legal confusion, of discrepancy between the law in books and the law in action, and the political turmoil surely did not facilitate the provision of certain and sure information.

Formally, in Iran homosexuality was punished harshly, even with death, while in Libya Article 407 and 408 of the Penal Code provided imprisonment for male same-sex acts; the evidence gathered by international NGOs and diplomatic institutions highlighted, however, a confused enforcement of these provisions. As far as Iran is concerned, the UK, Canadian, Swedish and Danish reports on the condition of homosexuals highlighted a climate of informal and judicial tolerance. Not only would the police not be allowed to “go in search of possible sinners [...] behind the veil of decency of their closed doors” (*I.I.N.*), but “is expert opinion that in practice homosexuality is presently, and has been in the past, most part tolerantly treated and frequently

occurring. In practice it is the only public transgression of Islamic morals that is condemned” (*F v UK*) and “that there are some parks in Teheran where many homosexuals meet up in the evening. Generally speaking it can be said that people seeking homosexual relations in Iran are known to find their way. It must be noted that openness about it is avoided.” (*I.I.N. v Netherlands*).

As long as homosexuals publicly conform to the dominant model, by marrying a woman and having children, they may avoid prosecution.

Also the burden of proof seems heavy, for “it must be proven by either four righteous men who witnessed the act, or through the knowledge of a Shari’a judge derived through customary methods, If the accused repents before the witnesses testify, the penalty will be quashed” (*Ibidem*).

Despite apparent tolerance, homosexuals are however forced to live discreetly, to conceal their identity and they may result more exposed to the risk of blackmailing. Furthermore, as UNCHR Branch Office in Germany points out “although the most repeated execution by stoning for repeated homosexual acts and adultery took place in 1995, local newspapers continue to report about executions of homosexuals”. In the absence of systematic observations of the enforcement of human rights in Iran, the Court decided that it could not be confirmed whether the people concerned had been convicted and executed solely for homosexual acts or also for additional charges; against this background they stated “it cannot be asserted with certainty that the criminal law provisions on homosexuality only have a theoretical significance” (*Ibidem*).

Even in Libya “it appears unclear to what extent homosexual acts are prosecuted and punished, as they are difficult to prove” (*M.E.*, § 43), but relevant sources report a hostile situation.

In 2012, a Libyan activist stated that he had never heard of publicly documented cases of men being charged under the Penal Code (*Ibidem*). On the other hand, however, the UNHCR emphasized that “homosexuality is a taboo subject not only in public spaces but also within the private sphere, seen as an immoral activity against Islam”, and the UK Border and Immigration Agency noted that “during 2012 the Nawasi brigade, Tripoli’s largest and most powerful militia brigade, allegedly arrested, assaulted and beat homosexuals simply for being homosexuals.” (*Ivi*, § 44).

As the actual enforcement of criminal provisions may be not strict, homosexuality surely emerges as an aggravating factor, and the ECtHR admits that the political climate does not foster the protection of human rights and that homosexuals may be vulnerable to abuse (*I.I.N*).

In fact, the ECtHR quotes the UNCHR, which clearly sets out a general strategy to protect lgbt refugees:

The UNCHR states that it is well established that laws which criminalize consensual same-sex relations are discriminatory, and violate international human rights norms. Even if irregularly, rarely, or never enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGBTI person, rising to the level of persecution. [...] These laws can also hinder LGBTI persons from seeking and obtaining State protection; [...] where the Country of origin information does not establish whether or not, or to what extent, the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence that LGBTI persons are nevertheless being prosecuted (*M.E.* § 47).

Even if “an applicant may be able to avoid persecution by concealing or by being discreet about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status” (Ivi, § 44).

Hence, the ECtHR approach in *M.E.*, and the consequent finding that the necessity to suppress his homosexuality for a certain amount of time did not raise any serious doubts, is quite flawed and contradicts UN guidelines.

Moreover, as to the procedure required to file the request for family reunification, the Court dismissed the fact that all Swedish embassies in Libya had closed down as an irrelevant issue, acknowledging that he would have to travel to a Swedish embassy in a neighbouring country for the actual interview, but it also found “no reason to believe that the applicant’s sexual orientation would be exposed so as to put him at risk of treatment contrary to Article 3 of the Convention in Algeria, Tunisia or Egypt” (Ivi, § 89).

On this issue Amnesty International stressed the demand as being unreasonable that a homosexual applicant would have travel to, and remain for months, in a country where same-sex sexual conduct was illegal, since this “would mean that the applicant would have to hide a core aspect of his or her identity, and run a significant risk if the same-sex marriage became generally known.” (Ivi, § 68).

The Court, however, rejected all claims, and I would provocatively suggest that if it’s extremely difficult to prove same-sex activities under Shari’a, it’s far more difficult to gain the credibility of the ECtHR.

Mr. F. had reported that he and his partner had been prosecuted, detained, and beaten by Iranian authorities; Mr. I.I.N. claimed he had been arrested while kissing a male friend in an alley, subsequently being beaten and raped. He was also forced to sign a statement in which he declared that he was homosexual and that he had been caught *in flagrante delicto*. After being released, he attended a protest meeting and after a few days his friend’s body was found in a

ditch. I have already discussed the claims made by Mr. M.K.N. and Mr. M.E., which claimed equally serious violation of human rights. In *F. v UK* the ECtHR stated that since homosexuality was informally tolerated in Iran, it was not likely that the applicant could have been arrested; in respect to Mr. I.I.N the ECtHR bluntly noted that “while he claimed that he had been arrested after having caught kissing a male friend [...], there is no indication that his has in fact resulted in any criminal procession’s being brought against him” (*I.I.N*). As to M.E., even if he showed bruises and scars, the ECtHR considered that there could not be sure whether these signs were the result of alleged tortures.

In conclusion, when there’s room for even minimum doubt, the ECtHR prefers to leave national authorities a wide margin of appreciation, somehow diminishing the sufferance alleged by the applicants; in *F* and *I.I.N* the Court euphemistically describes the legal sanctions against homosexuality as “draconian” and assumes that homosexuality is as a light, which can either be switched on or off according to the broad social environment.

Even in its last judgment, the ECtHR has not altered its standpoint: the Grand Chamber struck out M.E.’s case, avoiding upholding the applicant’s claim that his case “raised serious issues of fundamental importance relating to homosexuals’ rights and how to assess those rights in asylum cases all over Europe” (*Ivi*, §, 30).

The applicant aimed for a general interpretation of the ECHR that could lead to a sort of pilot judgment, but the ECtHR preferred not to jeopardize national sovereignty in immigration issues, and considered the permanent residence permit that the Swedish authorities granted him after the Chamber judgment as sufficient to declare the striking out of the complaint.

The only dissenting opinion *M.E. v Sweden* is that expressed by judge Power-Forde both in the Chamber and the Grand Chamber judgment, and it sheds light on unstated premises of the Court, displaying an interpretation of the Convention less heteronormative and homonormative, more devoted to securing individual human rights, and definitely critical in respect to the binary public/private.

The ECtHR emphasized certain international sources only, while not considering the recent developments of European jurisprudence; as Power-Forde recalls, “in 2010 [the UK Supreme] Court held, unanimously, that the reasonably tolerable test of being discreet was objectionable because no heterosexual person would find such constraints on being open about their sexual orientation to be reasonably tolerable”. Moreover, it is mentioned that the Court of Justice of the European Union judgment *Minister voor Immigratie en Asiel v. X, Y and Z*, which endorsed a similar principle: “it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot

be required to renounce it” (C- 0199/12 and C0201/12, §70). Therefore, despite the absence of a clear and ascertained legal situation in Libya and Iran, the frequent reminder of the Court of the importance of being discreet contradicts these recent findings, and it justifies a loose protection of lgbt immigrants under the ECHR; given the peculiar aim of the Convention to foster human rights, such an outcome is extremely problematic, since it upholds a strong majoritarian conception of reality, where the minoritarian part is expected to behave as the majority dictates. As Power Forde notes,

had it been applied to Anne Frank, it would have meant, hypothetically, that she could have been returned to Nazi-occupied Holland, as long as denying her religion and hiding in an attic were reasonably tolerable means of avoiding detection. The absurdity of that argument is not diminished by the fact that the requirement to hide in an attic to avoid detection might involve only few months rather than years. (*M.E.*, dis. op., judge Powder-Forde)

The ECtHR ignored that the disclosure of one’s own sexual orientation might not be entirely determined by his own conduct; with respect to M.E., Powder-Forde stresses that the applicant would be obliged to travel to a Swedish Embassy in Egypt to Algeria, where homosexual acts are criminalized, and she contended that it was inconceivable to conduct the interview process for family without disclosure of his sexual orientation. Therefore, there would be the real “risk that his sexual orientation [...] would be disclosed to the authorities at that point and his carefully woven cover blown” (*Ibidem*).

From an ideal and theoretical perspective, the ECtHR approach results as being even more startling. The ECtHR upheld the nonlinear account of M.E.’s sexuality as a sign that he lacked credibility, therefore understanding sexual orientation in terms of identity, but, after a few lines, the Court acknowledged that “sexual identity is, primarily a matter of sexual orientation” (*Ibidem*), and perhaps also not even essential. As Power Forde notes, this perspective contradicts previous ECtHR jurisprudence, whereby sexual orientation involves a most intimate aspect of private life, and it twists reality, up to presume that the hidden part of one’s own identity would not bear serious consequences.

Since the ECtHR had previously held the opinion that depriving a person of his reading glasses for a few months reaches the minimum threshold required by Article 3, something in the ECtHR approach doesn’t fit, to quote judge Power Forde words. Either the ECtHR judges homosexuality through heteronormative lens or there are other reasons which push the majority to such a restrained reading of the ECHR.

In support of the first hypothesis, it may be suggested that the ECtHR found that discretion requirement is insufficient to reaching the threshold of Article 3. To my analysis, the final outcome can be regarded as heteronormative, but the core reasons behind the ECtHR reasoning are probably shaped by policy concerns. Surely, the Court justifies some requirements it's not necessarily that would not be considered the same if applied to heterosexual persons, and while heterosexuality is fully dignified as a feature worthy of staying in the public arena, homosexuality is enclosed under the veil of decency. Nevertheless, if jointly considering cases on refugee status and those addressed in the first part of the paragraph, a more complex puzzle emerges; namely one where the actual cornerstone is the national autonomy in immigration policies. In all complaints, the ECtHR begins its review by remembering that "the Contracting States have the right as a matter of international law and subject to their treaty obligations including the Convention, to control the entry, residence, and expulsion of aliens" (*M.K.N.* § 25; *M.E.* § 71; *F* § 1; *ILN* § 12). Then, it can't be said the Court refrained from interpreting Article 3 in order to provide protection against ill-treatment and torture perpetrated on the grounds of the victim's sexual orientation. Rather, positive obligations are more demanding when citizens of Contracting Parties or regular immigrants are concerned, while in respect to illegal immigrants the interpretation of the ECHR takes another path. To obtain redress, the applicants should be able to detail any alleged violence: even if informally perpetrated or even if they come from a Country where homophobia is wide spread, they should demonstrate that, despite their discreet lifestyle, they were prosecuted only due to their homosexuality.

Quite absurdly given that they are presumed to conceal homosexuality, they should also produce evidence supporting that they effectively lived as homosexuals in their homeland.

The ECtHR, up to now, has chosen a deferent approach to national authorities, possibly because immigration and safety lie at the core of domestic sovereignty, and an activist judgment might trigger criticism from the States, hence threatening the legitimacy of the ECtHR interpretation. As judge Gaetano implied in *M.E.* chamber judgment, a quite consistent portion of public opinion suspects that if the ECtHR required member States to grant asylum to lgbt migrants from countries in which homosexuality is formally or informally prosecuted, then a great portion of heterosexual people would enter into marriages of convenience and declare themselves as being homosexual, even if not true.

Despite the involvement of third parties, such as Ilga-Europe and the International Federation of Human Rights, arguing that "homosexual applicants for asylum had the right to be open in their country of origin about their sexual orientation and marital status and could not be expected to remain silent or discreet about these important aspect of their lives" (*M.E.*, § 70), the

ECtHR avoided providing general statements, not only considering domestic decisions as legitimate, but also evaluating the alleged violence as not being particularly severe.

In cases concerning both the treatment of lgbt detainees and those of illegal immigrants claiming refugee status, the ECtHR performed a law-making function, most notably since it clarified the meaning of Article 3.

In respect to lgbt prisoners the Court made several statements of general value, favourable to the applicants: the ECtHR qualified rape, confinement, and the exclusion from prison life in a wide frame, establishing an interpretive milestone which binds future judgments and forecasts strict obligations for respondent governments (*X v Turkey*, § 38, 40; *Zontul v Greece*, § 84, 88, 89, 91).

On the contrary, in respect to lgbt asylum seekers, the Court gave a far-reaching interpretation which restricted applicant's claims, by reinforcing the model of the closet.

A.E. v Finland, *F v UK*, *I.L.N. v UK*, *M.K.N. v Netherlands*, *M.E. v Sweden* judgments share a common semantic macrostructure, which provides information on how the discourse weighs different ideals and concept-based structures (Van Dijk in Wodak and Meyer 2002, 102).

The first macrostructure is comprised of the already quoted reiteration of national sovereignty in immigration policies (*I.L.N.*, § 12; *M.K.N.*, § 25; *M.E.*, § 71); the second, counterbalances the former by remembering that the Court can, in exceptional cases, review domestic decisions as infringing Convention (*Ibidem*). The relationship between the first and second concept seems enclosed in the word 'however', which remains of a balance between these two contrasting statements, a balance which implies a compromise between ideal human rights enforcement and complete national discretion.

The balance between contrasting ideals also marks the remainder of the judgment. In the turn of two paragraphs, the ECtHR admits that the applicants are entitled to allege violations of human rights in their homeland and it also suggests that when assessing the credibility of their statement, "the benefit of doubt" should be considered; such cue is however restricted, for "the individual must provide a satisfactory explanation for the alleged discrepancies" (*M.E.*, § 73). In principle, "the applicant has to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention." (*M.E.*, § 71). Under these circumstances, it is for the Government to dispel any doubts; hence, if the benefit of doubt is seen as the most suitable solution in an ideal world, the practical approach to follow is stated in the last part. In particular, the wording establishes a high threshold for applicants: they *must* produce *evidence*, to *prove* the existence of *substantial and real risks* against his direct person.

From this analysis, the balance reached by the ECtHR clearly favours national autonomy, establishing a general frame whereby the eventual and possible findings of a breach of the ECHR will remain reasonably confined to a restricted number of cases and it won't create space to interpret the Convention as imposing positive obligations in respect to this dramatic issue.

4.4 Non Discrimination, Sexual Orientation, and the ECHR

This paragraph gathers a wide and heterogeneous cluster of cases, which address different issues and raise interpretative questions on multiple aspects of private and public life; they, however, present a twofold common feature, in that all claims are based on anti-discriminatory arguments and the demand surrounding individual rights.

The applicants contended a violation of the ECHR alleging illegitimate pejorative treatments. The Court was, then, forced to deepen its reasoning of the comparability between homosexual and heterosexual subjects, and to review its early, restrained, approach towards the application of Article 14.

The main theoretical claim underpinned to these cases is the equal value of lgbt persons to other citizens; as extensively explored these cases attain to the recognition of basic rights which enable the individual to openly identify himself/herself as being homosexual, without fearing illegitimate treatment or being forced to conceal it.

If in the previous phase homosexuality was framed as a private element, affecting intimate and individual life, but not necessarily the relational, working, and social experience, the anti-discriminatory perspective insists that lgbt must be protected not only as individuals, but precisely as homosexuals. Moreover, the recognition of the right to engage in same-sex acts does not require a positive evaluation of the acts involved, as long as they do not harm third parties; on the contrary, as Zanetti points out, protection against discrimination is granted only when judges and policy-makers evaluate a certain feature as valuable and worthy of protection (Zanetti 2015, 48 and fol.). Claiming rights on anti-discriminatory grounds requires going beyond majoritarian indifference, to simultaneously apply the principle of equality to homosexuals, and to legally and symbolically recognize them as equals.

Given the heterogeneous variety of claims advanced, I will discuss the conclusive remarks in respect to each section, without providing a final section as for other paragraphs.

4.4.1 The Right to Serve in the Army

The right to serve in the army of one's Country has been traditionally linked to the notion of citizenship, to such an extent that, as Zanetti argues, the possibility to enter into the army is intertwined with being recognized as being "valuable" (Zanetti 2015, 49). A person is valuable if he is judged able to defend his homeland, and, conversely, only those who are considered physically, mentally, and morally valuable are deemed able to serve the army.

Hence, the traditional exclusion of gays and lesbians from this conglomerations of virtues is not surprising, but it reveals the multiple prejudices against them. Firstly, they were regarded as inadequate, since presumed to be mentally fragile, hysterical, and not capable to be effective in distressing conditions; secondly, they were judged as immoral, and it was commonly thought that they dishonoured the value of the army itself. Thirdly, more recently some argued that even though gay men and lesbian women were capable of being good soldiers and excellent patriots, they would disrupt troops' moral, since heterosexual colleagues might feel uncomfortable sharing showers, restrooms, and bedrooms with them (Ivi, 50-51).

While the first two categories openly express negative moral and a normative evaluation of homosexuality, the third pretends to be objectively based, just looking at reality and coping with it. However, it assumes *the status quo* as being fixed, as if either this environment couldn't change or as if it was not necessary to alter it; consequently, eventual entrenched prejudices and bias are not challenged, discussed, criticized, or tackled but solely read as the starting point, as the evidence that shapes norms and policies.

To sum up - this argument goes- minorities would only be allowed to claim the rights which do not threaten or even disturb common assumptions; insofar that lgbt remain closeted, they can claim rights as people, as citizens perhaps, but not as gays, lesbians, or as a sexual minority.

Hence, the right to enter into the army mainly challenges the heteronormative depiction of society and the rigid division between private and public; lgbt individuals demand more than the tolerance of private same-sex activities and they also interpret their homosexuality as an essential part of their identity. As US history testifies, formal tolerance coped with the indifference of the law in so that private spaces can coexist with a ban on homosexual soldiers, while the enforcement of positive measures aimed at tackling homophobia spread in the army and at securing the right of lgbt people to openly serve their Country requires dismantling the prejudice of homosexuality as a vice, and rejecting the image of gays and lesbians as not being suited to military life.

The ECtHR delivered its most important judgments on this theme in the late 1990s and in the early 2000s, showing interesting timing compared to the USA. While in the USA the final

compromise was the introduction of *Dadt*, which forced gay and lesbian soldiers into the closet and imposed on them the obligation to dissimulate their identity, the ECtHR denied that soldiers could be legitimately discharged solely on the grounds of their sexual orientation.

Surely the reasoning of the Court displays also dark areas, but it highlights the ability of the judges to review, contrast, and even reject biased arguments which supported the exclusion of homosexuals from the army.

Judgments hereinafter analyzed are theoretically relevant, and they mark a turning point in the approach of the ECtHR to sexual orientation. The Court, indeed, does not refer to the procedural margin of appreciation, rather examining the possible *ratio* of differentiated treatment, engaging in a rich debate over the foundations of the right to serve in the army, and finally interpreting the discharge based on sexual orientation as lacking objective justifications and of being in breach of the ECHR. It may be true that at that time the majority of the Coe members did not openly prevent homosexuals from joining the army, and that a clear consensus emerged in favour of the applicants. Nevertheless, the Court could have approached the complaints by relying on the crucial role of the army in ensuring national safety and, accordingly, by judging domestic authorities as best placed to define which standards should respective armies conform to.

Between 1996 and 2002, British gay and lesbian soldiers alleged that the UK army had breached their human rights by discharging them on the exclusive grounds of their homosexuality. In one case there was the involvement of Liberty, a civil rights group based in London (*Smith and Grady*, § 1), while in the others no official connection with lgbt movement emerges. The applicants, employed in various departments, had gained positive judgments from their superiors, being recommended for promotion (*Smith and Grady*, § 11), obtaining “8 of a maximum of 9 marks for trade proficiency, supervisor ability and personal qualities” (*Ivi*, § 17), and proving to be able to adequately perform their functions (*Beck, Copp and Bazeley*, § 12).

Hence, it was not disputed that their discharge was entirely due to their homosexuality. Moreover, when their sexual orientation had become noted, all the applicants had been subjected to detailed and intrusive interviews by the service police, while their personal lockers had been searched for items connected to their sexual activities.

The procedure was moulded on those used in criminal investigations, and that they had been treated as criminals. For instance, Ms. Smith was asked “whether she and her partner had a sexual relationship with their foster daughter 16 years old” (*Smith and Grady*, § 14), and Mr. Beckett was interrogated about his previous relationship with a woman and whether “she was not enough” and whether “he had been touched up or abused as a child and whether he had bought pornographic magazines” (*Lustig-Prean and Beckett*, § 19). The wording as well as the

nature of questions effectively showed a biased, and morose attitude towards gays and lesbians, who were depicted as deviants; the service police questioned them in detail about their sexual practices, whether they had had sex in public, if they considered themselves ‘queens’ or ‘benders’, if their parents knew about their homosexuality, whether they were monogamous and if they were sure that they could not be “normal” (Ibidem).

Moreover, the applicants highlighted that such that a ‘blanket policy’ was only adopted in reference to sexual orientation, while there were not similar measures against those whose actions could or did affect service efficiency, such as those involved in theft or adultery, or those who carried out dangerous acts under the influence of drugs or alcohol (*Smith and Grady*, § 81). Under these circumstances, the individuals could be dismissed only after a careful consideration of all the circumstances of the case (Ibidem), whilst, on the contrary, homosexuality was considered in itself as a weighty ground to justify discharge without further evidences.

All the applicants wished to discretely live their sexuality, yet they alleged a violation not only of their right of respect for their private life, but also of their right to “give expression to their sexual orientation” (*Smith and Grady*, § 124); with the exception of *Lustig-Prean and Beckett*, no 31417/96, and no. 32377/96, in other cases the complaints were framed as to disrupt the traditional private nature of homosexuality, and to challenge the silence imposed on lgbt soldiers. At the time of the introduction of the Dadt in the Usa, *Smith and Grady*, n.33985/96, 33986/96, argued that freedom of expression secured the freedom to express one’s sexuality, which in turn “encapsulated opinions, ideas and information essential to an individual and his or her identity” (Ivi, §126). Given that the UK policy forced them to “live secret lives, denying them the simple opportunity to communicate openly and freely their own sexual identity” (Ibidem) they had suffered from a severe inhibiting factor of their right to express themselves.

Before analyzing the interpretation endorsed by the ECtHR, it’s appropriate to recall the arguments displayed by the UK government, for it effectively produced a wide and varied set of papers, reports, and opinions in support of its policy.

Firstly, it claimed that the ECtHR should allow wide discretion on the matter and that, since the issue was politically debated and a number of reform proposals had been issued to Parliament, it was not up to the judges to substitute British politicians. The core of Government submissions, however, addressed substantial reasons, and attempted to provide objective and reasonable grounds for the exclusion of homosexuals from the army.

From a theoretical perspective, the Government did not dispute the ability or personal qualities of gays and lesbians, nor did it openly depict them as not being valuable, rather recognizing that homosexual men and women are in themselves “no less physically capable, brave, dependable and skilled than heterosexuals” (*Lustig Prean and Beckett*, § 44). However, it also argued that

since the majority of staff was heterosexual, it could not disregard the common attitude towards gays and lesbians, hence upholding a majoritarian understanding of morals and human rights. After Smith and Grady and Lustig Prean and Beckett lodged complaints with the ECtHR, the British government conducted an intensive report to “undertake the internal assessment of the armed forces” (Ivi, § 44). The report of the Homosexuality Policy Assessment Team (hereinafter HPAT) was based on approximately 639 letters from UK soldiers all over the world, and the conclusion was that there was an “overwhelming view that homosexuality was not normal” and that the “vast majority of participants believed that the present ban on homosexuals should remain” (Ivi, § 45). The Government disputed that the applicants’ claim that British policy was not established by a pressing necessity was ill-founded, and concluded that even though a change in mentality was desirable, policy-makers had to deal with the present attitudes and they could not undermine troops’ cohesion by allowing gays and lesbians to serve (*Smith and Grady*, § 74, 78).

Even if acknowledging that other countries experienced a wide variety of official positions and legal arrangements (*Lustig Prean*, § 51), the report highlighted that the crucial point was to protect the effectiveness of the army, even if this implied a restriction of individual liberty and privacy (Ivi, § 69).

In conclusion, UK authorities apparently suggested that the ban on homosexuals should be maintained in force *despite* the opinion of the Minister of Defence or that of the Government:

if service people believed that they could work and live alongside homosexuals without loss of cohesion, far fewer of the anticipated problems would emerge. But the Ministry has to deal with the world as it is. [...] in the UK homosexuality remains in practice incompatible with service life if the armed forces are to be maintained at their full potential fighting power (Ivi, § 55).

Despite the pretence of neutrality, if not empathy, there are two issues reiterated by the UK Government which conveyed a situated standpoint on sexual orientation: firstly, authorities considered “well established that the presence of homosexuals into the armed forces would produce certain behavioural and emotional responses and problems, which [...] negatively affect the fighting power of the armed forces” (Ivi, § 47) and, thus, they did not conduct a survey departing from a neutral perspective, but tried to practically ground a policy that they already considered ideally justified and desirable.

Likewise, the official Policy and Guidelines on Homosexuality, distributed from 1994 onwards, did not problematize homophobia, nor did it encourage a tolerant climate among soldiers; on

the contrary, it considered “homosexuality, whether male or female, [...] incompatible with service in the armed forces”, not only because of the close physical conditions in which personnel had to live and work, but also because homosexual behaviour allegedly caused offense, polarized relationships, included ill-discipline, and damaged morale and unit effectiveness.

The ECtHR refused to apply the procedural margin of appreciation, and it critically reviewed the submissions of the respondent Government, engaging in a vivid debate as to whether the objectivity and the appropriateness of HTAP and Policy Guidelines.

The Judicial approach, hence, was definitely activist, and the overwhelming majority found that the Court was entitled to review domestic policies on a strategic sector as the army.

Amongst these cases, the ECtHR significantly disrupted the normative understanding of homosexuality, upholding the applicant’s perspective as far as private life was concerned. Indeed, it affirmed that national authorities could not frustrate the exercise by individual members of the armed forces of their right to respect for private lives (Ivi, § 82), and it qualified the policy at stake as “striking” (Ivi, § 86), since it established the immediate discharge irrespectively from the individual’s conduct or service record (Ibidem). Moreover, the Court challenged the value of the HPAT report, it criticized the methods adopted to collect data, and it denied the legal relevance of prejudice; since the report did not automatically grant anonymity, and since the Ministry of Defence had made its standpoint clear, “many of the questions in the attitude survey suggested that answers in support of the policy” (Ivi, § 87). The most interesting issue, however, entails the criticism of the merits of the report: the Court argued that even accepting that the results of the survey were representative, a violation of the Convention still existed. Judges endorsed an anti-discriminatory perspective, dismissing the threats highlighted by the HPAT as “founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation” (Ivi, § 89); secondly, instead of labelling homosexuals through majoritarian lens, the Court embraced minorities’ perspective. Both the arguments and the language chosen by the ECtHR pay no deference to national discretion, clarifying that neither common sense nor the quest for effectiveness amount to legitimate grounds to discretionally restrict human rights. The de-legitimization of heteronormativity is, hence, coupled with a positive evaluation of differences, and with the refusal to justify the *status quo* as un-coerced and natural.

The ECtHR stated that to the extent that negative attitudes against gay and lesbian soldiers “represent a predisposed bias on the part of a heterosexual majority” (Ivi, § 90), they could not, of themselves, be considered to suffice to the interferences with the applicants’ rights, “any more than similar negative attitudes towards those of a different race, origin, or colour” (Ibidem).

The comparison with ethnicity is extremely powerful, for ECtHR jurisprudence and the international law case against racial discrimination was more developed than that in respect to sexual

orientation, and it symbolically meant that the discrimination of gays and lesbians had to be evaluated as odious as racism.

Had the Court considered homosexuality abnormal, it would not have established such a theoretical link, nor would it have explicitly argued that “even if [...] the integration of homosexuals would give rise to problems not encountered with the integration of women or racial minorities, the Court is not satisfied that the codes and rules which have been found to be effective in the latter case would not equally prove effective in the former” (Ivi, § 95).

Hence, the ECtHR somehow overturned the approach developed in *Dudgeon*, whereby some control over homosexuals was necessary, and it posed a milestone in interpreting the ECHR so as to include homosexuality among the issues to be protected.

These being the premises, the Court finally held that UK policy violated the right to respect for private life, and that it could not be defined either necessary or proportionate.

The interpretation upheld by the Court had a primary symbolical meaning, for it reduced the discretion granted to Contracting Parties in disciplining their armed forces, it reversed the balance between individual rights and public interest in favour of the former, and it denied any legitimacy to the ban on homosexual conscripts.

In *Lustig-Prean and Beckett* the Court dismissed all three reasons traditionally claimed to excluding homosexuals from the army: the fact that they were both capable and morally adequate to serve in the army was not even discussed, while their alleged disruptive effect was considered as not being prominent. It was up to national authorities to adopt all necessary measures so as to positively integrate homosexual soldiers within the army environment, and “in so far as negative attitudes to homosexuality are insufficient, of themselves, to justify the policy [...], they are equally insufficient to justify the rejection of a proposed alternative.” (Ibidem).

The reasoning of the Court displayed, however, some dark areas on the separation between public and private, and on the interpretation of Article 10, almost loosening the approach here-to analyzed. If previously the ECtHR apparently implied that not only the discharge, but also the ban on the recruitment of homosexuals was illegitimate, the interpretation under Article 10 traces quite a dissimilar path.

The silence imposed on the applicants as regards to their sexual orientation, together with the constant need for vigilance, discretion, and secrecy in that respect with colleagues, friends and acquaintances “could” constitute as an interference with their freedom of expression (*Smith and Grady*, § 127), but the Court noted that “the subject matter of the policy and, consequently, the sole ground for the investigation and discharge of the applicants, was their sexual orientation which is an essentially private manifestation of human personality” (Ibidem). Consequently, the Court considered the freedom of expression claimed by the applicants as subsidiary to the right

of respect for private life, and it concluded that it was not necessary to further examine the complaints under Article 10.

Hence, while the right of expression applies to the public sphere, sexual orientation appears circumscribed to the private realm. If heterosexuality and homosexuality were considered as being perfectly equal, and just as two sides of the same coin, then this judicial approach would be flawed. Hypothesizing a reversed frame where homosexuality is the norm, heterosexuality would be read as essentially a private manifestation of personality, and policies targeted at disciplining heterosexual orientation would not apparently amount to an interference with one's right to expression, rather pursuing the safety of the army. Quite obviously a similar condition has never occurred in judicial history, and the hypothetical environment where vigilance, secrecy, and discretion are required of heterosexuals would result against their freedom of expression.

Reappraising Kavey's fresh and insightful critique of *Smith* and *Lustig-Prean*, such a narrow definition of the private realm would mostly convey an unrealistic definition of what homosexual orientation actually consists of.

The ECtHR's perspective, as previously mentioned, is encapsulated in the expression whereby sexual orientation is "a most intimate aspect of an individual's private life" (*Smith and Grady*, § 89); though there can be no doubt that private life entails both intimacy, confidentiality, and secrecy, this definition fails to grasp the complex and multifaceted relational dimension of private life. Such a narrow definition creates both a "crude, one-dimensional and hyper-sexualized" homosexual subject (Kavey 2013, 768) and it restricts all claims advanced on the sole legal ground of Article 8, dismissing for instance the claims related to the freedom to express one's identity and sexuality under Article 10. If linking the wording of the ECtHR to the frequent remainders to *Dudgeon*, it's indeed clear that private life refers to the private sexual life, while it's not clear the extent to which it also includes a relational dimension. In everyday life there are countless occasions in which we witness a public manifestation of someone's heterosexual orientation¹³⁷, but almost no one would react by thinking that the people involved have publicly exposed a feature that they have revealed an "essentially private manifestation of human personality". To sum up, from the ECtHR's reasoning homosexual people appear as being mainly de-

¹³⁷ Daily discourses and behaviors are soaked with references to heterosexuality, and generally no one thinks they shouldn't; from the pronoun used to talk about one's partner to discourses about plans of life, from holding hands to kissing, these are all actions part of heterosexuals' daily routine; on the contrary, lgbt people are forced to be cautious or to tone down their behavior and discourses depending on their audience, and, above all, they are expected not to suffer from such a limitation. See Kavey (2013).

fined by their confidential and private sexual urges, but, if adopting the lens used to understand heterosexual behaviour, homosexuality should be recognized as a “pervasively public manifestation of human personality” related to parts of life that are “publicly visible and often celebrated by other people” (Ivi, 768).

In the overall context of the wording adopted by the Court, this choice is not easily interpretable, for the ECtHR adopted a universalist layering, to suggest an equal approach to every sexual orientation. However, more than a neutral choice, such wording recalls Gordon’s image of expressive categories with the purpose of justifying and subtly rationalizing existing bias (Gordon 1988).

The applicants themselves had alleged a violation of their freedom of expression, but the ECtHR did not understand same-sex sexual orientation to affect the public realm.

One could resist that, practically, since the Court denied a ban on homosexual policies, it also implicitly legitimized those discourses and behaviour that, in the daily working routine, might disclose one’s sexual orientation.

Effectively this unbalance remains on a mostly symbolic level: as already shown, according to the ECtHR’s frame it’s extremely difficult to prove the legitimacy of eventual restrictions based on sexual orientation; hence the implicit assumption is that homosexuality should not lead to detrimental effects on one’s working track.

However, this result remains only timidly implied; given the highly symbolic poignancy entrenched in human rights, a careful evaluation of these aspects would have suited the ECHR’s aims at best.

In conclusion, the Court did not endorse a strict model of the closet, but its reasoning fails to fully recognize homosexuality as being entitled to enter the public arena just as heterosexuality does.

Hence, the Court did shape and process the applicants’ inputs, picking up certain claims and dismissing others. Besides the already mentioned complaints, *Smith and Grady* and *Lustig-Prean and Beckett* alleged a violation of Article 3, denouncing that the way service police had conducted interviews amounted to ill-treatment. The Court, however, ruled that the minimum level of severity required had not been reached, even though “investigation and discharge [...] were undoubtedly distressing and humiliating for the applicants” (Ivi, § 127).

The reasoning had also prominent significance of law-making, and, to a socio-legal reading, it sheds light on the extra-legal evaluation of homosexuality; in fact, judicial perspective on homosexuality is crucial to understanding the ECtHR and this element effectively works as a chemical component (Pound 1923c, 941) which allows to pass from an aggregate of substances to their synthesis. Judicial interpretation is grounded on the assessment made by the judges on the risks

entrenched in the presence of gay and lesbian soldiers, not on the meaning of some legal provisions or on the coherency of a given case-law. There are three perspectives clarified in this track of cases: firstly, homosexuality is a human, innate, feature such as race and gender; then, sexual orientation does not amount to such problematic issues in order to justify the ‘blanket ban’ on lgbt soldiers and, hence, gays and lesbians themselves do not threaten national security. Thirdly, although the distinction between private and public is problematically addressed, the ECtHR widens the space of the private realm, stretching it to also cover the work place. The restrained frame, where the private collapsed over the four bedroom walls, is now outweighed, and the Court rejected the image of homosexuality as morally ambiguous, or pathologically unbalanced. The interpretation of Article 8 is extremely creative, for it gives substance and clarifies the meaning of private life, also assessing that this realm can’t be restricted without objective, urgent, and reasonable justifications. Moreover, the link established between sexual orientation, ethnicity, and gender foreshadows a connection between the realm of privacy and that of non-discrimination, hence requiring stronger safeguards for lgbt subjects and symbolically upholding their claims as being highly valuable.

As for the internal judicial culture displayed, no harsh divisions recur and the Court shows a homogenous approach, reiterating the established interpretative structure without altering it. In *Lustig-Prean and Beckett* and *Smith and Grady*, the first two cases where the ECtHR has dealt with this issue, one judge only filed a dissenting opinion, suggesting a restrained interpretation of the ECHR. Most notably, he endorsed the disruptive argument, denouncing the fact that “the applicants would have to share single-sex accommodation and associated facilities (showers, toilets, etc.) with their heterosexual colleagues” as problematic and concluding “conduct codes and disciplinary rules cannot change the sexual orientation of people and the relevant problems which – for the purposes of the issue under consideration – in the analogous case of women makes it incumbent to accommodate them separately from male soldiers” (*Smith and Grady*, dis. op., judge Loucaides). He also relied on the margin of appreciation, stating that “the Court should not interfere simply because there is a disagreement with the necessity of the measures taken by a State” (*Ibidem*) and that judges should not substitute their view to that of the national authorities, further adding that “the wider the margin of appreciation allowed to the State, the narrower should be the scope for interference by the Court” (*Ibidem*).

Therefore, the reason for such a limited internal dissent rests on a different interpretation of the principle of precaution, and on a divergent image of how to balance majority and minority. As far as relevant, these contrasting perspective neither gathered significant consensus within the ECtHR nor proposed peculiar and innovative standpoints to interpret the ECHR.

4.4.2 The Freedom of Expression

Although freedom of expression has been subsidiarily claimed throughout cases challenging the criminalization of same-sex acts and the exclusion of lgbt people from the army, there are a number of complaints which primarily deal with Article 9 and Article 10.

The right to freely express one's own sexuality and ideas gathers heterogeneous cases, which differ in both the facts at stake and in the judicial timing: they, indeed, cover a temporal arch from 1979 to 2013, and, therefore, are intertwined with ongoing ECtHR jurisprudence on sexual orientation.

After a closer look, I distinguish among a) complaints framing blasphemy and public disclosure of obscene materials as part of freedom of expression; b) complaints demanding the right to manifest homophobic expressions and to practice conscious objection against same-sex couples; c) complaints concerning the alleged freedom of press in outing public or semi-public persons.

The first cluster is not particularly relevant, since neither the applicants' claims nor the ECtHR reasoning disclose innovative findings, according to my theoretical frame; the only relevant feature comes from the diversity between the majority's and separate opinions' perspective about how to effectively secure public decency. In *X Ltd. v UK*, no. 8710/79, the publishing company X had approved a poem describing homosexual acts between the author and Christ's dead body, and, hence, it had been condemned to pay a fine of 1000 pounds; in the second case, *Wingrove v UK*, no. 17419/90, Mr. Wingrove had shot a movie on the ecstasy of Saint Therese, depicting it as a sexual experience and filming some scenes where the Saint and an unknown woman performed sexual acts with the crucified Christ. The national British Board of Film Classification, hence, classified the movie as unsuitable to be sold, and prohibited the applicant from distributing or to broadcasting it. Both the applicants were prosecuted on the grounds of national criminal law against blasphemy, and in both cases national decisions were considered legitimate, and the judges recalled that under the Convention itself the freedom of expression could be regulated by

conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (Art. 10).

Only two of the seven judges voted against *Wingrove*'s final decision, and even though their reasoning is not shaped by a biased evaluation of homosexuality, it still gives some valuable hints on the internal disagreement over the enforcement of morals, and on the possibility to apply the margin of appreciation when not agreeing with national decisions.

Judge Bernhardt began by stating that "personally" he would not have banned the vision of the movie, and he ascribed this conviction to "his impressions while watching the film"; however, he concurred with the majority, asserting that the classification of video films might result sensitive "in view of the dangers involved, especially for young persons and the rights of others". Hence, in order to control possible damages, proper procedures are required, and to judge Bernhardt, "national authorities have a considerable margin of appreciation". On the contrary, judge De Meyer reviewed the case as "a pure case of prior restraint, a form of interference which is [...] unacceptable in the field of freedom of expression" (*Wingrove*, § 1), displaying a perspective endorsed also by judge Lohmus. Even admitting that "it is difficult to ascertain what principles determine the scope of [...] margin of appreciation", he offered a structured opinion, where the degree of protection given by the Court to Christian beliefs is read as problematic. British laws, indeed, only protected "the Christian religion and, more specifically, the established Church of England", and consequently "this in itself raises the question whether the interference was necessary in a democratic society" (Ivi, § 4). Furthermore, even admitting the legitimacy of similar provisions, Lohmus suggested that "the Court makes distinctions within Article 10 when applying its doctrine on the States' margin of appreciation. Whereas, in some cases, the margin of appreciation applied is wide, in other cases it is more limited" (Ivi, § 6), thus depicting the ECtHR jurisprudence on the matter as flawed and obscure.

The protection of traditional feelings, especially when religious beliefs are concerned, has been regarded as sensitive; consequently, it opened a wider margin of appreciation, and it was likely to justify domestic decisions. It has to be highlighted, however, that while this trend emerged clear when religious traditions resulted offended by blasphemous behaviour, in cases when religion was waived to justify conscientious objection or homophobic acts against the LGBT community, the Court adopts a far more demanding scheme to review national outcomes.

As for homophobic behaviour and speeches, when direct and manifest incitements to hate are not present, the distinction between legitimate and illegitimate acts is blurred and hard to ascertain. Even within the LGBT community there's an ongoing debate, opposing those who support the restriction of homophobic speeches, even if not directly inciting violence, and those who contend that similar restrictions might prove ineffective and damage the LGBT community, by portraying it as intolerant, and not able to accept any critical or negative opinion on its account.

Given the slippery theoretical ground, it's complicated to legally distinguish between the two categories, but, at the same time, it's also a benchmark to evaluating the breadth of the protection ensured by the ECtHR against homophobic expressions or actions.

In two cases the Court has been called to strike a balance between the freedom of expression and the prevention of discrimination or hatred incitements and, by looking at the reasoning adopted in this trial, it's possible to comprehend the parameters adopted.

These judgments allow the researcher to evaluate the rigidity of the Court and to assess the threshold beyond which facts or speeches are not qualifiable as freedom of expression, but they do on the rights of others. As shown hereinafter, the ECtHR has interpreted the Convention in favour of restricting the freedom of expression to protect homosexuals, and, quite surprisingly, it has reached this outcome by a large majority.

Vedjedland v Sweden, handed down in 2012, precisely remains of this hard balance, and it questions the practical boundaries the freedom of expression; another element of interest, in this case, concerns the involvement of third parties, for it testifies the effort to encourage judicial law-making, and to establish a specific and comprehensive frame against hate speech. Although the ECtHR framed the complaint according to the already set jurisprudence, not deriving from the ECHR a new legal institution, the perspective adduced by third parties seems to have influenced the overall judicial approach.

The complaint was lodged by four Swedish men, who had distributed a hundred leaflets in an upper secondary school, leaving the sheets in or on the pupils' lockers. The author was National Youth and, *inter alia*, leaflets denounced that "in the course of a few decades society has swung from rejection of homosexuality and other sexual deviances to embracing this deviant sexual proclivity. Your anti-Swedish teachers know very well that homosexuality has a morally destructive effect on the substance of society and will willingly try to put it forward as something normal and good." (Ivi, § 8).

The pupils were also directly addressed with further advice, such as to remember their teachers that "HIV and AIDS appeared early with the homosexuals and that their promiscuous lifestyle was one of the main reasons for this modern-day plague gaining a foothold", and that "homosexual lobby organizations are also trying to play down paedophilia" (Ibidem). The director of the school stopped the applicants, who were charged with agitation against a national or ethnic group. Despite further appeals, they were given suspended sentences combined with fines ranging from 200 to 2,000 euros and the fourth applicant was sentenced to probation (*Vedjedland*, § 17).

Under the ECHR the applicants alleged a breach of their right to expression, stating that "the wording in the leaflets was not hateful and did not encourage anyone to commit hateful acts, [...]"

rather encouraging the pupils to discuss certain matters with their teachers and providing them with arguments to use in these discussions” (Ivi, § 26). Moreover, they denied that the Swedish secondary school could be regarded as being sheltered from the political actions of outsiders, since the Swedish education system would allegedly have a tradition of letting political youth parties spread their messages to pupils in secondary schools.

Third parties, namely INTERIGHTS and ICJ, filed a powerful and dense intervener, even though the focus was not entirely on the facts committed by the applicants. The core of their argument, indeed, stood in the demand to “adopt particularized standards to address the problem [of homophobic hate speech], at both the European and the international political level” (Ivi, § 42). The present case provided third parties with the opportunity to prod the ECtHR to interpret the Convention as prohibiting hate speeches against a person or a class of people because of their sexual orientation, hence enlarging the protection already granted to LGBT citizens.

Judicial law-making was strongly backed and encouraged on the grounds of three legal principles: firstly, the ECtHR should consolidate a clear approach to hate speech, in analogy with its case-law on xenophobia and racism. Secondly, by establishing such a comparison, it would be desirable for the ECtHR to finally recognize sexual orientation both as equal to race, ethnicity, and religion, and as a marker of group identity (Ivi, § 45). Lastly, third parties justified a broad restriction of freedom of expression, arguing that “restrictions on freedom of expression must therefore be permissible in instances where the aim of the speech is to degrade, insult, or incite hatred against persons or a class of person on account of their sexual orientation, so long as such restrictions are in accordance with the Court’s well-established principles” (Ivi, § 46).

The optimum was intended as a legal frame which limited not only speeches directly causing or inciting hatred actions, but also those degrading or insulting others; predictably, the borders of what could amount to degrading or insulting speech is quite blurred, and it opens up to judicial law-making and judicial discretion.

In response, the Court handed down a fascinating judgment without, however, recognizing homophobic hate speech as distinct from other verbal expressions amounting to a violation of the ECHR.

Judicial wording mirrors the difficult balancing of competing interests, and it also shows the will to appear equidistant from both parties, thus not adopting the wording of third parties. Nevertheless, the majority progressively identifies multiple criteria which allows us to interpret the ECHR as tackling homophobic hate speech.

After reiterating that the freedom of expression is applicable to information or ideas that shock, offend, or disturb (Ivi, § 54), the Court also noted that restrictions to Article 10 must be strictly and convincingly established. As for the language and the concepts expressed in the leaflets,

even though not directly calling for hatred actions, the ECtHR qualified them as serious and prejudicial (*Ibidem*).

The controversial issue was to determine whether such arguments and expressions fell within the cluster of disturbing ideas secured by Article 10, and to draw the line beyond which hate speech could be sanctioned.

Though never mentioning homophobic hate speech, the Court affirmed that

inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on specific persons committed by insulting, holding up to ridicule, or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression (*Ivi*, § 55).

The applicants had been limited with their right to expression, and the ECtHR paid attention to assess the proportionality of the interference they had suffered, by evaluating the nature and the severity of the penalty imposed in respect to the aim sought by national authorities.

Lastly, given that the distribution of leaflets had taken place at a school which none of the applicants attended and had involved young people without the possibility of declining to accept them, the Court regarded the fines as not being excessive, it also considered the suspended conviction of the applicants as “not disproportionate to the legitimate aim pursued” (*Ivi*, § 59).

Therefore, the ECtHR unanimously held the view that there had been no violation of Article 10. In *Vejdeland* there are three concurring opinions, each displaying a peculiar interpretation, and showing how the same result can be shaped by different aims and theoretical perspectives.

The presence of such a varied cluster of separate opinions testifies the complexity of the debate on the freedom of expression, and it questions the separation between offensive, but legitimate, forms of expression and prosecutable ones.

In particular, the majority and the minority opinions conveys diverse attitudes towards judicial activism.

Judge Bostjan and judge Zupanic admit they voted for no violation of Article 10, though upholding the conviction of the applicants, with “great hesitation” (*Vejdeland*, con. op., judges Bostjan and Zupanic, § 1). On one hand, they considered the message of the leaflets “relatively inoffensive” (*Ivi*, § 5), further criticizing the majority’s approach as going “too far [...] on the grounds of proportionality and considerations of hate speech - in limiting freedom of speech by overestimating the importance of what is being said.” (*Ivi*, § 12).

On the other, however, these two judges recalled that, given the peculiar nature of secondary schools, Swedish authorities had not exceeded their margin of appreciation. This conclusion

comes at the end of an extensive analysis of US jurisprudence on the freedom of speech, and their opinion expresses a position begrudgingly favourable to the majority's decision. Judges Bostjan and Zupanic, indeed, do not rely on ECtHR law case, while they do compare European framework with the USA; as it may be known, in the US Supreme Court they apply two strict parameters, both to be met in order to justify an interference with the right to free expression: "it must avoid content discrimination (the State cannot forbid or prosecute inflammatory speech only on some disfavoured subjects) and, second, it must avoid viewpoint discrimination *forbidding or prosecuting inflammatory speech that expresses one particular view on the subject*" (Ivi, § 4). As it is noted in this opinion, had the ECtHR applied this test to the case at stake, the applicants would have probably breached in their rights secured under Article 10, especially as the latter criterion is concerned.

I evaluate this concurring opinion as relevant also for the implicit statement it holds, which, to my reading, has a gaze on the future jurisprudence, and aims at tracing an interpretive track for other similar cases. Most notably, the merits of the applicants and the content of the leaflets are evaluated thorough the theoretical lens developed by US jurisprudence.

Both Swedish and ECtHR's decisions are considered as "culturally predetermined" (Ivi, § 7), and concurring judges also suggest that national authorities voted for the punishment of the applicants only because it was targeted against homosexuals, for "had the applicants defended homosexuality and railed against wicked homophobes in their leaflets, they would probably not have been convicted" (Ivi, § 4).

Apart from schools and other venues where the audience can't but listen to certain messages, or where the audience is particularly impressionable, judge Zupanic and judge Bostjan evaluate the message of the leaflets secured by Article 10.

Also Judge Spielmann and Judge Nussberger adduced the peculiar scholastic environment as decisive in deciding against the applicants, though following a different reasoning and endorsing a more activist approach and a perspective sensitive to tackling homophobia.

They recalled that "hate speech, in the proper meaning of the term, is not protected by Article 10" (Ivi, § 4), but they disputed whether national Courts exhaustively examined if "behind the apparent aim there was any hidden agenda to degrade, insult or incite hatred against persons or a class of persons on account of their sexual orientation" (Ibidem).

The last part of the separate opinion, however, provided a powerful theoretical ground which anchored the final decision to the Coe and UE policies against homophobia and transphobia. In particular, besides recalling that "the factual circumstances of the distribution have an impact regarding the scope of the margin of appreciation" (con. op. judge Spielmann and judge Nussberger, § 6), they noted that

members of the LGBT community face deeply rooted prejudice, hostility and widespread discrimination all over Europe” (Ibidem), concluding that “it should also not be forgotten that a real problem of homophobic and transphobic bullying and discrimination in educational settings may justify a restriction of freedom of expression [...]. It is against this background that I am satisfied, on balance, that the conviction [...] did not violate Article 10 of the Convention (Ivi, § 8).

As for the commune policy environment, judge Spielmann and judge Nussberger further mentioned the Resolution that had been adopted by the European Committee of Ministers, in 2009, which recognizes that “statements of a homophobic nature contribute to an atmosphere of hostility and violence against sexual minorities” (Ibidem).

This judicial outcome was influenced by considerations which do not strictly attain with the facts at hand, and the judges were highly aware of the symbolic and the social meaning of their interpretation. Therefore, even though admitting they voted with the majority with “the greatest hesitation” (Ivi, § 1), they preferred to endorse an interpretive approach which is more concerned with preventing hate crimes, rather than supporting an almost unlimited freedom of expression, like in the USA.

The last separate opinion, filed by judge Yudkivska and judge Villiger, fully embraced an activist perspective, considering the case at hand as the starting point to create a specific discipline on homophobic hate speech under the ECHR.

Unlike the previous opinions and in contrast with the majority itself, that aforementioned judges said that they had “no difficulty in finding that Article 10 was violated” (con. op., judge Yudkivska and judge Villiger, § 1), thus denying *Vejedland* any highly problematic and sensitive profile.

Whereas other concurring judges aimed at emphasizing the caution that the ECtHR should adopt in similar cases, the last concurring judges criticized the ECtHR reasoning as being too mild, and as missing the opportunity to “consolidate an approach to hate speech against homosexuals” (Ivi, § 2).

In this opinion the submissions of third parties are openly recalled, and not simply implied as in ECtHR judgment; the opinion starts out precisely from quoting third parties interveners and from complaining of the lack of a specific category to sanction homophobic hate speech.

Moreover, judge Yudkivska and judge Villiger suggested that the Court should take into account the most recent developments in the international human rights law, amongst which they recalled the Recommendation R (97)20 of the Committee of Ministers of the Council of Europe,

reading: “the term hate speech is to be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance” (Ivi, § 3). This statement amounts to the interpretive lens through which facts at stake are evaluated; the accusations of “spread HIV” and of “morally destruct society” are hence evaluated as fitting the above definition.

In respect to the first separate opinion, it’s interesting to note the internal disagreement over which theoretical and the legal path to follow when dealing with speeches expressing prejudice and bias. The American solution, proposed by judge Zupanic and Bostjan, imposes “a high threshold”, protecting hate speech until it “threatens to give rise to imminent violence” (Ivi, § 6); yet, according to this standpoint, “for many well-known political and historical reasons today’s Europe cannot afford the luxury of such a vision of the paramount value of free speech.” (Ibidem).

From judge Yudkivska and judge Villager’s perspective, this judgment has to be considered too restrained, for it refrained from considering hate speech as a distinct offense, which would be destructive “for democratic society as a whole” (Ivi, § 9). Quoting the Canadian Supreme Court, concurring judged emphasized that hate speech

should not be viewed merely as a balancing exercise between the applicant’s freedom of speech and the targeted group’s right to protect their reputation, [...] since prejudicial messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups, and therefore it should not be protected. (Ibidem)

Activism and judicial law-making are strongly encouraged, to the extent that this opinion waives the threat of hate speech as a prelude to a climate in which “conduct and actions that were not possible before, become possible” (Ivi, § 12).

Against the background of a relatively plain judgment, separate opinions capture the complexity of theoretical issues implied, and also testify the sociological role of the judges.

Not only do all judges perform a creative role, but they do not even pretend to attain either to the wording or to the original intensions of drafters. They are aware that they are called to answer to pressing social needs that the ECHR functions as the essential frame to which they are bound, and that they have to draw concrete criteria from the present legal situation. The source of disagreement regards how to philosophically and politically frame the competing interests, and how to balance them.

Also the collection of legal sources varies; while judge Bostjan and judge Zupanic look at the US context, other concurring judge's focus on the European framework, suggesting that the Court should mould its own peculiar solution.

In *Vejedland* the Court strengthened and widened the anti-discriminatory safeguards provided for homosexual subjects, connecting homophobic speeches to the already existent case-law against racist and xenophobic speeches; in conclusion, Article 10 does not protect those speeches that, despite not openly calling for violence against minoritarian groups, convey particular heinous biased and hatred images of a person or of a group of people, especially when these expressions are targeted at easily influenced and vulnerable audiences.

Even though the Court did not adopt particularized standards to address the problem, carefully avoiding even to name "hate speech", the effective interpretation of the ECHR set a first safeguard against these kind of expressions; had the ECtHR found a breach of Article 10, the impact on European legislation would have been severe: a consistent number of COE Countries already punished hate speech on the grounds of legislations similar to the Swedish one, and, hence, under this hypothesis, several groups hostile to LGTB community would have seized the ECtHR and demanded the repeal of similar provisions¹³⁸.

The Court further specified its approach as to which behaviour and actions conveying hostility against homosexuals are secured by the ECHR in *Eweida and others v UK*, n.48420/10, 59842/10, 51671/10, 36516/10.

¹³⁸A original critical reading of *Vedjeland* is offered by Heinze; as a legal scholar active in human rights, he is extremely concerned about the words and the expressions loaded with hatred meanings, and he acknowledges that "queer bashing without words is like a dirge without music" (Heinze 2009, 193). Yet, he strongly argues that in "stable, long-standing democracies" (Ivi, 204) sexual minorities should avoid activating or reinterpreting the restriction of the freedom of speech, while instead fostering tolerant language and broadmindedness through informal socio-cultural strategies. On a closer look, judgments like *Vedjeland* would breach twice the profound theoretical premises of non-discrimination. Firstly, they would call for a limitation of free speech regardless of the evidence of a demonstrated correlation between the amount of potentially offensive insults and the degree of violence perpetrated. Secondly, and most importantly, they would endorse a legal asset that, if applied to every human category which is verbally mocked and offended - Heinze mentions the disabled and mentally impaired people, the obese, and the aged ones, would result in an unfeasible restriction to almost every form of expression and in an inherently wrong interpretation of human rights. Heinze resorts indeed not only to pragmatic arguments, but also to arguments of justice: given the practical impossibility to extend the ban on hate speech to any actual or potential group victim of discrimination, "even if a hate speech ban could be both drafted and applied so to protect some groups [...] we would still be contradicting the founding assumptions of leading human rights norms - certainly, of all those that have been central to rights of sexual minorities- if we were to maintain that a norm is legitimate even if it cannot be enjoyed equally by all similarly situated persons" (Heinze 2009, 202-203). As a consequence, sexual minorities should pretend to fully enjoy of their human rights but, at the same time, they should avoid the illusion that the judiciary is entitled to adjust and uphold any possible claim. In other words, democracies are legally equipped with all the instruments to enforce existing human rights without restricting or infringing those of others.

This case was filed by four applicants alleging to be discriminated against because of their religious beliefs. Most notably Ms Ladele, the third applicant, held that marriage was exclusively the union of a man and one woman for life, and believed that same-sex civil partnerships were contrary to God's law (*Eweida*, § 23). Being employed as a registrar of births, deaths, and marriages, when the UK Civil Partnership Act entered into force, in 2004, she was required to legally register also civil partnerships; initially the applicant was permitted to make informal arrangements with colleagues to exchange work, but then she was reported for not respecting the equality policies supported by the local authorities. The refusal to carry out civil partnerships cost Ms Ladele her dismissal. The Civil Partnership Act, effectively, provided the eventuality to opt out of designation as civil partnership registrars in the event of sincere religious beliefs, but it left the discretion to local authorities, not to individuals. Therefore, since Islington authorities did not approve of such an option, Ms Ladele was not entitled to refrain from celebrating same-sex civil unions. She claimed the right to object to a law in contrast with her religion and conscience, on the grounds that a) UK law did not impose this duty without exceptions, as it is in France for instance, and b) she had been hired before the Civil Partnership Act was approved and, hence, she could not have reasonably foreseen that her mansions might contrast with her faith.

The ECtHR delivered a quite concise judgment, dismissing Ms Ladele's claims; scratching beneath the surface, however, a number of important elements arose. Most notably, it's necessary to pay attention to both what the ECtHR actually said and to what judges avoided stating.

The structure of ECtHR reasoning does not attach particular relevance to Ms Ladele's choice, almost displaying a begrudging attitude to her case; on one hand, the Court acknowledged that the consequences for the applicant were serious, and it also admitted that, given the strength of her faith, she had no choice but to face disciplinary action.

The Court recalled that she was not able to waive her right to manifest her religious belief by objecting to participate in the creation of civil marriages when hired, since this requirement was introduced later. However, the Court bluntly held the view that wide discretion should be granted when it comes to "striking a balance between competing Convention rights" (*Ibidem*), and concluded that "national authorities [had not] exceeded the margin of appreciation available to them" (*Ibidem*).

Apparently, the Court applied a structural margin of appreciation, but a closer look reveals a substantial evaluation. Firstly, the ECtHR did not review objections on genuine religious grounds as valuable, or as sensitive, showing a decisive secularized interpretation of the Convention, nor did it display any affection for Christian morals. This evidence could be considered as obvious, but if compared with the EComHR and also with dissenting opinions in *Dudgeon*,

where commissioners and judges justified the criminalization by recalling religious feelings, *Eweida* marks a completely different approach. Secondly, the Court did not even consider the possibility that the conscientious objection, optional according to the Civil Partnership Act, had to be granted to all those individuals who genuinely opposed same-sex unions. Thirdly, I consider the absence of even a slight empathy towards the applicant extremely relevant, or at least of a symbolic positive evaluation of the contrast between individual conscience and legal obligations.

Lastly, even though the applicant was discreet about her beliefs in public, she did not try to persuade anyone, and she did not compromise the effective possibility for same-sex couples of that district to register their civil partnership, the majority found sanctions imposed proportioned and necessary. However, the Court resulted divided on the issue, and the final decision of non-violation gathered five votes out of a total of seven; the two dissenting judges filed a sharp opinion, going far beyond the mere legal evaluation of the facts at hand, rather crying out for a more deferent interpretation to individual and, I would add, to traditional beliefs.

Judge Vucinic and judge Gaetano backed the supremacy of individual conscience, arguing that “once a genuine and serious case of conscientious objection is established, the State is obliged to respect the individual’s freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the objector) and negatively (by refraining from actions which punish the objector or discriminate against him or her)” (Ivi, § 3).

The applicant’s choice was also dignified in relation to the symbolic meaning it conveyed, since judges established an implicit link between the upholding of Ms Ladele’s claims and the “acts of heroism, whether at the hands of the Spanish Inquisition or of a Nazi firing squad” (Ivi, § 4).

While the majority reviewed Ms Ladele’s behaviour as infringing on the promotion of equal opportunities ensured by local authorities, the dissenting opinion evaluated the facts from an different perspective, arguing that the reasoning and arguments of the majority are “at best irrelevant and at worst a case of inverted logic: the issue in Ms Ladele’s case is not one of discrimination by an employer, a public authority or a public official *vis-à-vis a service user* of the Borough of Islington because of the said service user’s sexual orientation” (Ivi, § 6).

Lastly, I wish to emphasize that the judges shared the specific set of values recalled by the applicant, since their opinion went beyond a merely objective evaluation of the facts, conveying a resentful opinion against the policies activated by local authorities. Ms Ladele’s dismissal was thus defined as “the combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured gay rights over fundamental human rights) eventually led to her dismissal” (Ivi, § 5). Apart from the wording, the message implied is extremely hostile in respect to lgbt rights, since it implies that there would be a conflict between

human rights and gay rights, as if the latter were not a part of the former; at the same time, this argument opposed the two categories, as to label the conduct of domestic authorities as unreasonable. Such an evaluation is stated even clearer a few passages below, where dissenting judges polemically contended that Islington authorities “instead of practicing the tolerance and the *dignity for all* it preached, pursued the doctrinaire line, the road of obsessive political correctness.” (Ivi, § 7).

Both *Vejdjeland* and *Eweida* tested the possibility to waive the ECHR to legitimize positions and ideas restricting lgbt rights, and they have to be interpreted within the wider legal and political European context. Back then, legal safeguards against discriminations grounded on sexual orientation were expanding, and new regulatory schemes against homophobic speeches and behaviour were arising in national and international laws. Moreover, up to that point, the ECHR had proven useful to enlarge lgbt rights, to legitimize their pretences as human rights; in *Vejdjeland* and *Eweida* the situation is reversed, and traditional social sectors resorted to the ECHR precisely to stem the tide of lgbt achievements.

The Court, however, denied this possibility and it strongly endorsed a secularized interpretation of the ECHR, detaching from the confused notion of morals outlined in previous judgments; therefore bias arising from genuine personal or religious beliefs deserves no more consideration than that accorded to bias stemming from racist and xenophobic perspectives.

Turning to the last section, related to the freedom of the press, the ECtHR caselaw addressed the issue by focusing on the practice of outing. The term ‘outing’ defines the practice of publicly disclosing that someone who is assumed to be heterosexual is instead gay, lesbian, or bisexual; newspapers and journalists have generally been quite interested in the sexual behaviour of politicians or other well-known people, to the extent that, in the late 1890s, newspapers all across Europe ensured coverage of the trial of Oscar Wilde, and British newspapers, up to the mid-1960s, devoted several pages to trials conducted on the grounds of gross indecency.

The clash with human rights possibly arises when the outed person alleges a violation of her privacy or frames her outing as contrary to her good reputation; applications raised to the ECtHR on this practice precisely address this hypothesis.

These cases do not convey any creative claim, rather expecting individual satisfaction, nor do they challenge the ECtHR to innovate the interpretation of the Convention. Their demands could be understood as asking for a clarification of the boundaries of the freedom of expression, and as encouraging a reflection over the balance between the freedom of the press and the right to private life.

In *Porubova v Russia*, n.8237/03, the applicant was a journalist, condemned by respective national judicial authorities for the publication of several items concerning the large-scale misap-

appropriation of budgetary funds allegedly committed by Mr V., the head of the Sverdlovsk Regional Government, for the benefit of Mr K., an employee of the Moscow representative office of the Sverdlovsk Region. Ms Porubova indulged in great detail depicting a homosexual relationship between Mr. V. and Mr. K.; the main article was entitled “Gay Scandal at the White House”, and the piece, inter alia, read

Once upon a time there lived the head of the Sverdlovsk Regional Government Mr V. He had everything: his position, high esteem and respect. And also the governor's love. [...] But V. fell in love [...] not with the governor or with his work, but with a twenty-five-year-old employee of the region's representative office in Moscow, Mr K. [...] how does one become a homosexual? Where does this “love” come from? We are simple unsophisticated people [...] And we cannot imagine the scene that took place between them in the sumptuous building of the region's representative office in Moscow. [...] Rumour has it that the governor, on having learnt certain details, was furious and even fired K. from his position. But love, as we know, can overcome any obstacle. It finds not only a time, but also a place. (*Porubova*, § 8)

The article further asserted that Mr V. had used public funds to purchase a three-room flat in Moscow (*Ivi*, § 10).

Her conduct was judged as being outrageous, and the Moscow Court of Appeal held that she had disseminated information based on insinuations which she knew to be untrue and defamatory. Consequently, she was found guilty under Article 129 § 2 of the Criminal Code, i.e. dissemination via the mass media of information known to be untrue and damaging to other persons' honour, dignity and reputation” (*Ivi*, § 22).

In *Kuchl v Austria*, n.51151/06, and *Rothe v Austria*, n.6490/07, the case was brought forward by two priests who had been outed during a journalistic enquiry on presumed homosexual activities spreading in St. Poulten Seminary. The article they complained of suggested that Mr. Rothe and the principal of the seminary had had sexual relations with seminarians, also reporting that some seminarians had downloaded pornography and child pornography onto their computers. Two photographs of the applicant were shown, one in which he was about to embrace a seminarian, Mr Kuchl, and another one where he and Mr Kuchl were about to kiss each other. Mr. Kuchl and Mr. Rothe reported the newspaper, but both the Regional Court and the Vienna Court of Appeal held, firstly, that “a large percentage of readers [...] would read the news magazine in only a cursory manner and would also consult other media before forming their opinion” (*Ivi*, §12); secondly, Vienna Court of Appeal found established that “the applicant had had a homosexual relationship with a seminarian, in which he had openly engaged

at the priests' seminary. One witness had stated that the two men were wearing rings with each other's names engraved on them together with the date of the beginning of their relationship" (Ivi, § 15). Moreover, owing to the importance of the Roman Catholic Church as a role model, the public had a great interest in knowing what was going on in that seminary, also in light of the heated debate on civil partnerships. Therefore, both the claims were dismissed. Under the ECHR they alleged a violation of their right of respect for private life, contending that national journalists could not hide behind the freedom of expression secured by Article 10.

The ECtHR balanced these two competing interests by giving prominence to the freedom of expression at the hands of the press. In particular, when professional politicians or public figures are involved, a closer scrutiny of their every word is inevitably both by journalists and the public at large; hence "the right of the public to be informed, which is an essential right in a democratic society, can even extend to aspects of the private life of public figures, particularly where politicians are concerned" (*Porubova*, § 45).

Furthermore, by reporting the facts, even if controversial, the press enhanced the public debate related to politicians in the exercise of their functions, and it exercised the vital role of *watchdog* (*Ibidem*).

Such freedom could not be restricted even in a context particularly hostile to homosexuality: in *Porubova*, indeed, the Court found that even though, as reported by cultural and linguistic experts, "tolerance was uncharacteristic of the Russian mentality" (Ivi, § 48), a journalist could not be reported if not explicitly adopting an offensive language, and if reporting information of public interest or useful to corroborate other statements. In this case, the ECtHR read the passage on the alleged homosexuality of Mr. V. and Mr. K. as "to explain why the scheme had been mounted in such a way that Mr K. would be its ultimate beneficiary" (Ivi, § 44).

Also the negative judgment conveyed by ecclesiastic authorities on homosexuality was not evaluated as being sufficient to uphold Mr. Kuchl and Mr. Rothe's right not to be outed; on the contrary, precisely because of the Catholic Church's model role and its active participation in the debate on the recognition of same-sex couples, the Court recognized that the public had an interest in what had happened in the seminary (Ivi, § 54).

Quite obviously, the press does not enjoy unlimited freedom of expression, but the ECtHR applied a set of criteria already established in cases not specifically involving sexual orientation¹³⁹,

¹³⁹ In detail, when ascertaining whether articles or photographs infringing on one's right to private life, the ECtHR had to answer, or to take into account, the following questions "(i) which is the contribution to a debate of general interest? (ii) how well known is the person concerned and what is the subject of the report? (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its ve-

hence not considering this feature as more problematic or requiring specific standards of evaluation.

I do not consider the ECtHR caselaw on freedom of press and outing as particularly theoretically crucial, since it does not innovate the Court's perspective on difference nor does it disrupt or reinforce a heteronormative understanding of sexuality.

It could be argued that the ECtHR reasoning on the matter proves relevant as to the distinction between private/public, since it apparently fosters public debate on sexual orientation and does not close it behind the veil of privacy and silence.

Insofar as journalists respect the parameters set out by the Court, they are, indeed, allowed to disclose one's sexual orientation to public audience, but I wish to stress that this perspective does not necessarily imply a positive evaluation of homosexuality itself, since the press is allowed, if not encouraged, to unveil crimes and the dark sides of politicians and public figures.

As far as judicial wording does not disclose any hostile evaluation of homosexuality, the context in which the outing took place is intertwined with other elements, such as corruption or monastic life. Therefore, the same approach would have occurred if, for instance, Ms. Porubova had denounced a heterosexual affair as the reason of Mr. V actions, or if Mr. Kuchl and Rothe had engaged in heterosexual intercourse, equally problematic under Catholic morals.

In conclusion, the ECtHR has delivered relevant theoretical and general interpretive assumptions only in relation to homophobic expressions and conscientious objection, which I have already analyzed above.

racity/ circumstances in which the photographs were taken; (v) content, form and consequences of the publication" (*Von Hannover v Germany*, § 109-113)

4.4.3 The Freedom of Assembly and Association

The ECtHR has recently dealt with complaints alleging a violation of Article 11, securing the freedom of association, on the grounds of sexual orientation, and it had the opportunity to expand and review the safeguards given to the lgbt community when entering the public arena.

If compared to the complaints related to the ban on joining the army, this collection marks a relevant shift and it fully addresses the public dimension of sexual orientation.

If backwards lgbt people had been secured thanks to the qualification of sexual orientation as a strictly private issue, nowadays a growing number of complaints demands the full enjoyment of the freedom to gather in associations and to publicly manifest in order to claim rights and to defend interests precisely shaped from any perspective.

Hence, the right to public visibility as gay and lesbian citizens is claimed, the right to enter public spaces as homosexual people, the possibility to influence public opinion and to actively participate in political and social debates.

As for the complaints, the first element which stands out is the exclusive involvement of Eastern European Countries, and this situation can be ascribed to multiple political, social, and legal determinants.

As for the social environment, Eastern Countries are permeated with entrenched homophobic attitudes and behaviour: lgbt manifestations are likely to be interrupted by hostile counter-manifestations, gays and lesbians are exposed to a higher degree of violence and hate crimes, and what may be considered as hate speech in Western Countries, here it is regarded as being perfectly legitimate and normal.

Informal sanctions are also mirrored in the political realm, to the extent that a recent ILGA Survey pointed out that Eastern authorities do not talk openly about the devastating effects of homophobic bullying among young people, nor do they encourage the reporting of attacks and hate crimes (Ilga-Europe 2006). The lack of legal instruments, policies, and political intention to tackle these phenomena, quite obviously constricts many homosexual people from living discreetly; moreover, in recent years a legal backlash leading to formal discrimination has spread throughout Eastern Europe.

Since 2006, an increasing number of Russian regions has enacted multiple laws restricting the public distribution of lgbt materials, formally to protect minors; in 2013 a federal law has criminalized the distribution of “propaganda” in support of what it has been defined as ‘non-traditional’ sexual relationships, in contexts where minors could be exposed to such information. As various NGOs and lgbt activists report this laws *de facto* criminalize homosexuality

if publicly disclosed, and they provide a justification to hate crimes (Kon 2009; Wilkinson 2013).

Secondly, in all cases analyzed national associations were supported by international groups and lawyers, so as to elaborate sound theoretical justifications to their claims.

The involvement of lgbt international dimension, particularly clear in *Aleksejev v Russia*, n.4916/07, 25924/08 and 14599/09, attests that these cases go beyond the demand of satisfaction or restitution, trying to hold the ECHR as a safeguard against the hatred winds coming from the East. Most notably, I emphasize that the ECtHR reasoning did not revolve round the tolerability of private homosexual acts, but it focused on the legitimacy of public claims put forward in support of the lgbt agenda.

In *Baczkowski and Others v Poland*, n.1543/06, the ECtHR firstly set out an interpretative guideline, establishing quite a friendly path to the lgbt movement, further widened, deepened, and detailed in over the following years.

The applicants wished to hold a march in Warsaw, with a view to alerting public opinion to the issue of discrimination against minorities – sexual, national, ethnic, and religious – and also against women and disabled people. Despite the initial agreement on the itinerary of the planned march, Municipal authorities subsequently denied them the possibility of holding the march, since they had not submitted a “traffic organisation plan” (*Baczkowski*, § 11). The Mayor held the opinion that such a march had to be organised away from roads used for traffic. If they were to use roads, more stringent requirements were to be applied. The organizers wished to use cars carrying loudspeakers, but they had not indicated where and how these cars would park during the assembly as not to disturb the traffic, and how the movement of people and cars between the assembly sites would have been organized. As both the applicants and the ECtHR recalled, a number of requests had been submitted to organise other assemblies on the same day the tenor of which ran counter to the ideas and intentions of the applicants, permission was also refused in order to avoid any possible violent clashes between participants in the various demonstrations. The Major, however, adopted different standards and he permitted six demonstrations with slogans as “For more stringent measures against persons convicted of paedophilia”, “Against any legislative work on the law on partnerships”, “Against propaganda for partnerships”, “Education in Christian values, a guarantee of a moral society”, “Christians respecting God's and nature's laws are citizens of the first rank”, “Against adoption of children by homosexual couples” (Ivi, § 16).

Hence, the applicants decided to hold the manifestation, even if not authorized, and luckily no disorder occurred, but they denounced their treatment as discriminatory. In 2006 the Polish Constitutional Court upheld the applicant’s claim, and condemned municipal authorities; the

applicants, however, denounced a violation of their right to manifestation under the ECHR, since despite their efforts, local authorities had not revised their decision in good time to hold the march, nor had the latter recognized any satisfaction or compensation to the applicants after the judgment of Polish Constitutional Court.

The ECtHR started out by recalling that the Convention was designed to promote and maintain the ideals and values of a democratic society; therefore, the limitations admitted to Articles 9, 10, and 11 had not to compromise the democratic structure of society. Then, it extensively considered the value of pluralism and respect for diversity, hence endorsing the applicants' perspective, and it finally found that Polish authorities had breached Article 11.

Besides the outcome, the structure of judicial reasoning criticizes the heteronormative conception of sexuality and it disrupts the image of homosexuality as a purely private personal feature. Not only is the essence of democracy linked to pluralism and tolerance, but the Court reviews public manifestations in support of sexual orientation as performing a crucial role in fulfilling democratic ideals, as a "harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion." (Ivi, § 62). A few lines after, the Court also indirectly cautioned Municipal authorities, by reiterating that "although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position." (Ivi, § 63).

Public actors are first mentioned as being the bearer of duties, and unlike in other judgments, the ECtHR does not proceed by recognizing a margin of discretion to Contracting Parties which is progressively reduced, taking instead the opposite standpoint and assessing that

genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms. (Ivi, § 64)

This passage already discloses that the final judgment would probably find a violation and, more interestingly, it grounds this interpretation not merely on the Constitutional Court judgment, but on substantial reasons concerning the legitimacy of the facts at stake.

The Court, indeed, affirmed that the obligation upon public authorities was of "particular importance for persons [...] belonging to minorities, because they are more vulnerable to victimization" (Ivi, § 65).

Furthermore, the Court rejected the argument of the respondent Government, which contended that since the applicants had however taken their march, without incidents, no violation of the ECHR could be reasonably claimed. The ECtHR indeed found that “the applicants took a risk in holding them given the official ban in force at that time” (Ivi, § 67), and the absence of a presumption of legality, which constituted as “a vital aspect of effective and unhindered exercise of freedom of assembly and freedom of expression” (Ibidem), could have had a “chilling effect on the applicants and others participants, [...] discourag[ing] other persons from participating in the assemblies on the ground that [...] non official protection against possible hostile counter-demonstrators would be ensured by the authorities.” (Ibidem).

The lgbt community was fully entitled to publicly displaying their demands, and the ECtHR positively encouraged such manifestations as being able to gather the widest number of people interested in such issues. Had the Court opted for a more heteronormative perspective, also restricting the enforcement of the ‘closet’, this reasoning would not have occurred, and the effective carrying out of the specific march would have been deemed as being sufficient in order to quash any pretence of violation under the ECHR.

Besides alleging a violation of Article 11, the applicants claimed to be a victim of discrimination on the grounds of their sexual orientation, relying on Article 14. In previous sections I have already highlighted the fluctuating approach of the Court to this issue, and the general caution to directly bind lgbt claims to the principle of non-discrimination, rather connecting them to other provisions of the Convention.

In *Baczkowski* administrative decisions had refused the request, relying on the absence of a proper ‘traffic plan’, without judging the message of the march; the applicants, however, asserted that these decisions were shaped by the will to prevent lgbt from publicly holding a parade and, to corroborate this statement, they recalled an interview released by the Mayor of Warsaw, only a month before the date of the planned march. On that occasion, he had admitted that he would have banned the manifestation “regardless of what they had written”; in fact, he stated to be “not for discrimination on the grounds of sexual orientation” but he aimed at preventing any form of public propaganda of homosexuality, commenting “I do not forbid them to demonstrate, if they want to demonstrate as citizens, but not as homosexuals” (Ivi, § 27).

Although apparently not contesting the good faith of administrative actors, and conceding that no speculation could be carried on the existence of motives, other than those expressly articulated, to refuse the authorization, the Court stated it “could not overlook” (Ivi, § 97) the interview with the Mayor. He was both an elected politician and holder of public office, with particular responsibilities. The fact that administrative authorities acted “on the Mayor’s behalf” could not be regarded as a merely formal element, but, on the contrary, it affected the ECtHR reason-

ing, which indeed held: “his opinions could have affected the decision-making process [...], and, as a result, impinged on the applicants’ right to freedom of assembly in a discriminatory manner” (Ivi, § 100).

Therefore, the Court found a violation of Article 14 in conjunction with Article 11, and it refused the distinction between “homosexual propaganda” and freedom of manifestation, displaying an interpretive standpoint definitely in contrast with a biased evaluation of homosexuality.

This frame was subsequently implemented and specified in *Aleksejev v Russia*; Johnson, for instance, interprets this case as the trailblazer for a more general approach, which conveyed a creative interpretation of the ECHR less tied to the concrete circumstances of facts (Johnson 2011).

Briefly outlining the background of the case, Mr. Aleksejev made three applications to the Court, between 2007 and 2009, related to the attempts to organize a ‘Pride March’ in Moscow. In 2006 after he had announced his intention, the Mayor of Moscow delivered a statement showing hostility towards any gay march held in Moscow. Consequently, the Mayor also instructed his officials and all prefects of the city “to take effective measures for the prevention and deterrence of any gay-oriented public or mass actions in the capital city” (*Aleksejev*, § 20). Hence, the Department of Liaison with Security Authorities of Moscow Government and the Mayor refused the applicant’s request on the grounds to secure public order, to prevent riots, to protect health, morals, the rights and the freedom of others. Regardless of the applicant’s appeals, Moscow Central Administrative Court confirmed this decision, and it also reiterated it for the following two years.

Government’s submissions display a range set of justifications to their conduct whose significance goes beyond the facts at hand, pointing out the relation between national sovereignty and the ECtHR, also showing a certain hostility towards moral standards imposed by the outside to Russian political environment.

From an institutional perspective, the Government openly claimed that “if the Court were to give an assessment different from that of the domestic authorities, it would put itself in the position of a Court of fourth instance” (*Alekseyev*, § 58), and, hence, it disputed the legitimacy of the Court to review the assessment made by the Russian Courts, implying that, in the event a breach was found, the Russian authorities would have not complied with the judgment of the ECtHR.

From a substantial point of view, the decision of the Mayor was considered as the only measure that could adequately address the security risk; according to the Russian Government, after Mr. Alekseyev announced the ‘Pride March’, numerous public petitions had been sent to the

Mayor's office, from political, religious, governmental and non-governmental organizations calling for the ban of this manifestation, some of which also included threats of violence (Ivi, § 57). Differently from *Baczkowski*, however, the Russian Government did not mantle his intentions under technical issues, nor did it pretend that the ban was entirely due to protecting the applicant and those who might attend this march. On the contrary, the Government alleged the necessity to protect morals, and it upheld a strong majoritarian understanding of which behaviour and values were worthy of legal protection. It emphasized that "any promotion of homosexuality was incompatible with the religious doctrines for the majority of the population [...] and that allowing the gay parades would be perceived by believers as an intentional insult to their religious feelings and a terrible subbasement of their human dignity" (Ivi, §59).

If in *Grady and Smith*, *Sutherland*, and other cases, the respondent Government had recalled the predominant traditional moral feelings, but it had also highlighted its efforts in promoting a change in dominant mentality, Russian authorities presented their decisions as fully in accordance with international human rights law and with the ECtHR jurisprudence. Relying on the International Covenant on Economic, Social and Cultural Rights, on the International Covenant on Civil and Political Rights, and on the ECtHR *Otto-Preminger Institut v Austria* judgment, they noted that individuals should be respected in their religious and moral beliefs, in their right to bring their children up in accordance with them, and they concluded that "the State must take into account the requirements of the major religious associations and [...] the democratic State must protect society from destructive influence on its moral fundamentals, and protect the human dignity of all citizens, including believers" (Ivi, § 60).

Believers' perspective was, hence, fully legitimized, and it was not critically scrutinized to determine whether it illegitimately restricted the rights of others. Moreover, the quoted statement attests that Russian authorities were not neutral, but they considered homosexuals as morally destructive, and as not being entitled to human rights.

Gay parades may be viewed by involuntary spectators, the Russian argument goes, especially children and, because of this, any form of celebration of homosexual behaviour should only take place "in private or in designed meeting places with restricted access" (Ivi, § 61).

Lastly, the Russian Government tried to demonstrate the lack of consensus among COE Countries on the issue, so as to claim a wide margin of consensus. As the Court noted, however, they took into account a loose and flawed parameter, namely the extent to which homosexuality was accepted in each country, also referring to obsolescent cases, like *Dudgeon* or *Muller*.

The ECtHR disowned Government's submissions by each and every point, taking the opportunity to reaffirm the competences of the Court in reviewing domestic decisions.

The Court distanced itself from the heteronormative and majoritarian reading of homosexuality, neither interpreting it as a potential disruptive feature, nor defining rights granted to minorities on the grounds of majoritarian attitudes. The ECtHR unanimously held the view that there had been a violation of Article 11 and of Article 14 in conjunction with Article 11, according to a straightforward reasoning, which directly challenged the Government's position.

While the Russian Government implied that the ban was required precisely to maintain the democratic asset, the Court noted "irrespective of the aim and the domestic lawfulness of the ban, it fell short of being necessary in a democratic society" (Ivi, § 69).

The anti-majoritarian judicial attitude can be understood also in relation to two other issues: the evaluation of the actual risk posed by threats received by local authorities - and the consequent obligation imposed on public actors- and the ascertainment of whether public morals justified the ban.

As for the former, the Court admitted that "where a serious threat of a violent counter-demonstration exists, domestic authorities [enjoy] a wide discretion in the choice of means to enable assemblies to take place without disturbance" (Ivi, § 75); however, the mere existence of a risk was insufficient to justifying the ban, and further investigation was required.

The Court noted that some groups, such as the Orthodox Church, had simply written to local authorities to express their opposition to the pride March, and others, such as the Supreme Mufti, had declared they would hold a counter manifestation, but they did not threaten the applicant in anyway whatsoever. Only the Muslim authority in Nizhniy Novgorod threatened violence; consequently, Russian authorities should have assessed the degree of risk posed solely by this association and the possible means to contrast it.

Then, even admitting the serious threat posed by petitions and opponents, the Government had failed to carry out an adequate assessment of the risks for the participants and to take all the necessary measures to offer minorities the effective opportunity to enter into the public arena.

The absence of deference to national sovereignty emerges even in another passage, where the Court found that "if security risks played any role in the authorities' decision to impose the ban, they were in any event secondary to considerations of public morals" (Ibidem). The Court scaled down security issues in the overall assessment, almost implying that the attention to this theme was functional to cover the core reasons behind the Russian decisions.

As for the protection of morals, the Court denied that the march posed relevant trouble or that it could result as being offensive for large portions of society, since the purpose of the march was to promote respect for human rights and freedom, and to call for tolerance towards sexual minorities; at no stage was it suggested that the event would involve any graphic demonstration of obscenity (Ivi, § 82). Also the assumption that democracy imposed the obligation to strictly

respect majoritarian beliefs, by restricting individual rights, was rejected, and the Court clarified that such a perspective was in direct opposition with the ideals of the ECHR itself, for “it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority” (Ivi, § 81). Were this so, a minority group's rights would become merely theoretical rather than practical and effective as required by the Convention.

Interestingly, the Court restated the secularized approach developed in *Baczowski*, and it did not even consider whether the majority of the Russian population actually despised homosexuals, further detaching itself from the interpretive path of *Dudgeon*, where the majority had held that if “there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities” (Dudgeon, § 56).

The strict separation between the private and public realm was deemed unacceptable as well; the Russian Government had quoted ECtHR *Dudgeon*, *Norris*, and *Muller* to allege that the only right that homosexuals could claim was not to be criminally prosecuted, if living their orientation discreetly. The Mayor had, indeed, clearly considered it necessary “to confine every mention of homosexuality to the private sphere and to force gay men and lesbians out of the public eye, implying that homosexuality was a result of a conscious, and antisocial, choice” (Ivi, § 86).

Judicial standpoints show an emphatic evaluation of the applicant, and, to my reading, the judges sent Russian authorities the message that the increasing institutional homophobia would no longer be tolerated under the ECHR. The tenor of the arguments, the choice of language, and the sharpness of wording are quite surprising, especially when considering that in 1993 the EComHR had dismissed the case of two Austrian citizens, wishing to hold at official national celebrations banners remembering gays and lesbians who had been deported to Nazi camps, by justifying the argument provided by domestic authorities that the tenor of their claim clashed with the solemnity of the ceremony.

Eventually, the Court also denied the necessity to rely on European consensus, since, on these questions, it was “of no relevance [...] because conferring substantive rights on homosexual persons is fundamentally different from recognizing their right to campaign for such rights” (Ivi, § 84). In any case, the ECtHR highlighted that no ambiguity could be admitted by national legislation on the recognition of the individual right to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly.

The contrast between the ECtHR definition and that endorsed by the Russian Government led to the substantial dismissal of the ECtHR judgment, since the Russian Parliament enacted the same year anti-gay propaganda laws, and politicians openly defended the legitimacy to ban gay parades.

Formally, Russian authorities argue that they are complying with European standards on human rights, since, according to their submission in response to harsh critics from the European Parliament, these laws would only prevent the proposal of homosexuality as being normal and as desirable as heterosexuality, but they would neither criminalize homosexuals, nor would they preventively deny freedom to expression and manifestation to sexual minorities.

As several NGOs highlight, however, the actual enforcement of similar provisions consistently restricts lgbt rights, and it contributes to creating a social and informal environment which was extremely hostile to gays, lesbians and transsexuals, who often fell victims to hate crimes (Wilkinson 2013; Fish 2014).

The interpretation of Article 11 was applied again in *Genderdoc v Moldova*, n.9106/06, which is extremely similar to *Alekseyev*, while the ECtHR significantly innovated its interpretation in *Identoba and others v Georgia*, n.73235/12, a case which has been defined as a “jurisprudential milestone for lgbt citizens” (Johnson 2015).

The main fact of that case may be summarized as follows: Identoba, a Georgian non-governmental organization promoting lgbt rights, planned to organize aq march on 17th May 2012, in the centre of Tbilisi to mark the International Day Against Homophobia. Identoba gave notice to the Tbilisi City Hall and to the Ministry of the Interior prior to the event, informing them of the planned route of the march and of the estimated number of participants, and also requesting specific protection from possible violence, stemming from the general background of hostility towards sexual minorities. Neither the City Hall nor the Ministry of the Interior objected, and the march took place. However, while proceeding through the city centre and holding banners, staff members of Identoba and other activists were stopped by members of the Orthodox Parents ‘Union and the Saint King Vakhtang Gorgasali’s Brotherhood, who claimed that “nobody was entitled to hold a Gay Pride Parade or to promote ‘perversion’, as it was against moral values and Georgian traditions” (Ivi, § 12). In reply, the marchers continued to walk. They were even subjected to threats of physical assault and to insults, accused of being “sick” and “immoral” people and “perverts”. Further pejorative name-calling such as “fagots” and “sinners” was also repeated. The police patrol cars, which were escorting the marchers, distanced themselves from the scene, intervening only after counter-demonstrators grabbed the banners from the hands of several activists, kicked, insulted and knocked them down. Moreover, the police did not arrest counter-demonstrators, but forced three lgbt activists to stay in the

Police department for some twenty minutes, while waiting for counter-demonstrators to go away; as a consequence of this attack, three applicants had to receive medical treatment for injuries on the knees, grazes on palm and fingers, haemorrhagic forearm, hematoma on eyebrows, contusions on the chest and wrists. Therefore, *Identoba* filed a formal proceeding, complaining both of the attacks and of the behaviour of the police, who had not promptly protected them; as stated to the ECtHR, several TV channels had broadcasted the scenes of the fight and the police was well able to identify the aggressors, since their faces were clearly recognizable.

Subsequent investigations, however, concluded that, as there were no signs of illegality in the actions of the police during the demonstration, there was no need to launch an investigation for abuse of power. As for the counter-demonstrators' actions, two of them were arrested for transgression of minor breaches of public order and fined 100 Georgian laris - 45 euros- each. The applicants specifically requested that criminal investigations be launched on account of the verbal and physical attacks perpetrated against them, and on account of the acts and/or omissions of the police officers, who had failed to protect them from the assaults. The applicants emphasized that criminal inquiries should be conducted with due regard to Article 53 of the Criminal Code, which provided that the existence of homophobic intent was an aggravating circumstance in the commission of a criminal offence. Nevertheless, domestic authorities did not review their decisions, and at the time of the ECtHR judgment, as the Court notes, "the criminal investigations opened [...] by the sixth and fourteenth applicants are still pending, and the two applicants have never been granted victim status" (*Identoba*, § 28).

Hence, *Identoba* and the activists affected by aforementioned events alleged a violation of Article 3 in conjunction with Article 14, and of Article 11 in conjunction with Article 14; they also alleged a violation of Article 10, but the Court stated that there was no need to examine the case under that provision.

In light of *Backowski* and *Alekseyev*, the finding of a violation of Article 11 in conjunction with Article 14, namely an illegitimate interference with the applicants' right to manifestation on the grounds of their sexual orientation, appears relevant but not innovative.

Rather, this outcome reiterates and strengthens the interpretive path already set out in the previous two cases. The most important outcome, which justifies the relevance attached to this judgment, lies in the fact that the Court held that the Georgian authorities had breached Article 3 in conjunction with Article 14, thus framing the conduct of the police as amounting to ill-treatment: they had failed to provide due protection during the parade, and they had also carried out ineffective investigations, twisted by the entrenched bias against homosexuals.

A violation of Article 3 in respect to sexual orientation has rarely occurred in ECtHR jurisprudence, and, moreover, here it is linked with Article 14; this implies that discrimination and ill-

treatment against homosexuals are brought into the scope of Article 3, which is one of the most important and absolute rights within the entire ECHR. Furthermore, the Court did not interpret ill-treatment as requiring extreme physical harm, rape or other forms of bodily torture, rather referring either to treatments which are discriminatory or addressing the lack of adequate measures against hate crimes, and framing them as exceeding the minimum threshold required by Article 3.

Public authorities are not only bound not to allow public officials to directly inflict ill-treatment on lgbt people, but also to effectively protect individuals from attacks related to their sexual orientation, perpetrated by private actors.

Whilst in *Vejdeland* the concept of hate speech/crimes was not set out by the Court, in *Identoba* the Court takes a further step in interpreting the Convention as imposing broad obligations in respect to homophobia. The majority of the judges considers that “all of the thirteen individual applicants became the target of hate speech and aggressive behaviour” (Ivi, § 70), and assessed the existence of inhuman treatment by starting from subjective feelings and sufferance experienced by the applicants themselves: “the treatment of the applicants must necessarily have aroused in them feelings of fear, anguish and insecurity, which were not compatible with respect for their human dignity and reached the threshold of severity within the meaning of Article 3 taken in conjunction with Article 14 of the Convention” (Ibidem). Thus, despite violence being described as mainly verbal and only sporadically physical, it nevertheless infringed the applicants’ human rights.

This judgment conveyed a notable positive evaluation of difference, and it further legitimizes lgbt movements as essential actors in democratic public debate.

The Court began its review by recalling that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Ivi, § 65), and by interpreting discriminatory remarks and insults as “an aggravating factor when considering a given instance of ill-treatment” (Ibidem).

Discrimination carries the prejudice against a minority, and it is utterly incompatible with the essential aims of the Convention; since a biased interpretation of differences leads to behaviour infringing on human dignity, the prevention of such crimes plays a fundamental role in complying with obligations arising from the ECHR.

Quoting ECtHR wording, “the authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by [...] violence motivated by gender-based discrimination

[...]. Treating violence and brutality with a discriminatory intent [...] would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.” (Ivi, §, 67)

Not even wide spread hostility against the lgbt community can justify the restriction of the freedom of manifestation, while, instead, it obliges competent authorities to elaborate actions which effectively contrast the risks faced by lgbt activists and which ensure them the right to freely manifest for their goals and claims (Ivi, § 68).

The Georgian police failed to comply with such positive obligations, also falling “short of their procedural obligation to investigate [...], with particular emphasis on unmasking the bias motive and identifying those responsible for committing the homophobic violence.” (Ivi, § 80).

The only dissenting opinion did not dispute the violation of Article 11 in conjunction with Article 14, but it claimed that those acts of ill-treatments could not be brought into the scope of Article 3. According to judge Wojtyczek the Court should have been more cautious in evaluating the applicants’ submissions, while remaining as suspicious as in its previous jurisprudence and interpreting Article 3 as requiring either physical harm or prolonged psychological damage. From this opinion, however, the main element of dissent does not rely on a specific understanding of homosexuality, but on how to assess the existence of torture or of inhuman treatment, and, to my reading, it can’t be interpreted as endorsing discrimination against sexual minorities.

If considering the interpretive approach of the ECtHR in respect to Article 11, it seems that the Court is taking quite a straightforward direction, aimed at securing the right to freely manifest for lgbt rights and at interpreting the contribution of the lgbt movement to the public debate as an enriching and essential precondition for the protection of democratic regimes, and as a positive obligation imposed by the ECHR.

Even if anchoring the present judgment to past caselaw and presenting it as coherent and linear prosecution, the Court innovates its interpretation and performs law-making. Firstly, it enlarged the set of events that has given rise to treatments forbidden by Article 3; secondly, it framed discrimination as an aggravating factor when assessing the breach of other provisions. Then, the Court specified that public authorities are obliged both to positive and negative obligations, requiring not to illegitimately restrict the citizens’ right of manifestation, and also requiring to effectively secure that everyone is enable to exercise their rights.

The remainder to hate speech and hate crimes stems from a marked awareness of the European social and political debate, since these terms refer precisely to issues highly debated in national political arenas; hence, the Court is not concerned with interpreting the ECHR so as to maintain an originalist reading of the Convention, but if fully undertakes a creative and innovative path, aimed at answering the social needs expressed by an oppressed minority.

The reference of the Court is the ECtHR jurisprudence itself, even as to the definition of ill-treatment and degrading treatment, and it definitely disrupts the model of the closet.

4.5 The Legal Recognition of Same-Sex Couples

Following the scheme set out in paragraph 4.1, I now address the cases claiming for the legal recognition of same-sex couples, whether through wedlock or civil partnerships. I focus on those claims of rights, whose *raison d'être* lying in the existence of a relationship between the applicant and another person of the same sex; these rights attain to social benefits granted to married or cohabiting heterosexual couples, to the application of specific schemes of taxation and, above all, to the legal recognition of same-sex couples.

The strategic aim pursued by these complaints is to obtain the recognition of a progressively wider frame of rights, moulded on those granted to married couples. Before the ECtHR, the applicants contended that the recognition and protection of homosexual relationships fell into the ambit of human rights, and claimed that Countries not recognizing same-sex marriage, or not providing adequate civil partnerships, would be in breach of the Convention.

The ECtHR case-law on same-sex couples is marked by three phases: firstly, the applicants long challenge of the ECtHR and the EComHR interpretation, thus framing same-sex relationships as falling within the ambit of family life, secured by Article 8 (par. 4.5.1); secondly, in the landmark *Schalk and Kopf v Austria* case, n.30141/04, it was extensively discussed whether the ECHR obliged contracting States to recognize same-sex marriage (par. 4.5.2); thirdly, in recent years, the Court has dealt with relevant cases concerning the legal recognition of same sex couples by means of frameworks alternative to that of marriage (par. 4.5.3).

The relational and affective dimension plays a fundamental role, and it leads to a significant shift of the paradigm: in previous case-law, the entrenched question raised by the applicants addressed those rights which enabled the person to live his homosexuality openly, to gather with other homosexuals, to create networks, to serve in the army, or to manifest on the grounds of his/her sexual orientation.

The claim of legal recognition of same-sex couples, instead, assumes the existence of a committed, relational bond as the foundational element of the rights claimed: the legislator is required to discipline, to recognize as publicly valuable, and to make the relationship between two same-sex partners official. Public authorities are not just the guarantors of the effective possibility for homosexual individuals to fully enjoy of all their citizen's and human rights, but they are the authority who is deemed to legally recognize same-sex couples.

Hence, the demand of specific rights and duties bears the symbolic image whereby the recognition from the State brings a qualitative melioration in the relationship between two people, in that it becomes official and with public relevance.

lgbt strategic litigation on this issue falls within the wider ongoing litigation on same-sex marriage, spread throughout European Countries, the USA, and also non Western Countries. Though this claim has only been directly raised twice, in *Schalk and Kopf v Austria* and partially in *Oliari and others v Italy*, n. 18766/11 and 36030/11, also complaints demanding alternative forms of recognition try to reduce the distance with the legal status of married couples. It might be suggested that the other applicants chose to frame their claim without recalling the right to marry, precisely because of the ECtHR approach to *Schalk and Kopf*, with the intent to pursue a pragmatic strategy and incremental achievements.

The first phase attains to the right of lgbt couples to be recognized even through different legal schemes; from this point, activists can push forward the ECtHR reasoning by challenging the legitimacy of differentiated treatment between heterosexual and homosexual cohabiting partners and, then, between unmarried homosexual and married heterosexual ones, on the grounds that the former were not allowed to enter wedlock.

At this point the margin of discretion granted to national countries would result as being reduced, and despite marriage still being restricted to heterosexuals only, homosexual couples should be granted legal schemes ensuring the same and equal rights. From a pragmatic point of view, the unicity and supremacy of marriage would be disrupted, but from a symbolical perspective, this solution would lead to a problematic ‘separate but equal’ regime.

Marriage indeed confers rights, and social dignity to those relationships which are considered valuable, which allegedly convey positive values and ideals, and fulfil social utility. Nowadays all Western legislations do not consider the presence of children as essential to enter into wedlock, to the extent that couples which are not able to generate biologically or which do not plan on having children are allowed to marry. Reappraising a famous article by Nussbaum, the meaning of marriage is neither univocal nor fixed; leaving aside the religious meaning, two main aspects are related to marriage: a civil right, and an expressive aspect (Nussbaum 2009, 669). As for the first aspect, “married people get a lot of government benefits [...]: favourable treatment in tax, inheritance, and insurance status; immigration rights; rights in adoption and custody; decisional and visitation rights in health care and burial; the spousal privilege exemption when giving testimony in Court; and yet others” (Ibidem).

Moreover, though marriage people express a public commitment to mutual care, that is often expressed in the front of the community where the partners live; as such “being able to make it, and to make it freely [...] is considered a definitive aspect of adult human freedom” (Ibidem), and as Nussbaum argues, marriage presumes a symbolical answer on the part of the society, for the spouses declare their love and commitment, and the society, in response, recognizes and dignifies that commitment.

Civil partnerships risk becoming citizens of second class, even on a purely symbolical level; the dimension of symbols and social meanings, however, is essential to individual and collective life, as Zanetti points out in a powerful and catchy passage “un sogno d’amore non viene coronato offrendo un anello in un ristorante fancy, col ginocchio piegato, chiedendo al partner se accetta la proposta di formare una domestic partnership; e indubbiamente c’è una certa differenza se si presenta la persona amata come il proprio consorte o come il proprio domestic partner” (Zanetti, 2015, 88).

At the moment, however, the ECtHR does not seem to be the appropriate arena where to advance claims based on symbolical arguments; even though the Court has recently recognized the equal value of same-sex relations, it appears quite difficult that this institution will interpret Article 12 as requiring Contracting Parties to recognize same-sex marriage, at least in the nearest future.

4.5.1 Same-sex Couples and Family Life

One of the most controversial and sensitive issues that the ECtHR had to confront with regards to the question whether same-sex relationships fall into the ambit of ‘family life’, secured by Article 8 of the ECHR. The relevance of this issue is twofold: the claim to frame same-sex relationships as a form of family life challenges the heteronormative assumption according to which gays and lesbians are not capable of establishing an affective bond comparable to heterosexual ones; furthermore, the recognition of homosexual family life stands as the legal and theoretical starting point that justifies the reading of Article 14 in conjunction with Article 8 in respect to same-sex couples and, consequently, the comparison between the legal treatment granted to heterosexual couples and homosexual ones.

Approaching the jurisprudence of the ECtHR and of EComHR, the first complaint based on the existence of homosexual relationship between the applicants is *X. and Y. v UK*, (dec) n. 9369/81, whereas the first deemed admissible, and partially upheld, has been *P.B. and J.S. v Austria*, n. 18984/02¹⁴⁰.

As previously recalled, *Dudgeon* enlarged the notion of private life, up to include homosexual private life, but the ECtHR didn’t consider homosexual acts as falling within the ambit of family life. Establishing a strict separation between the private and public sphere, the ECtHR also drew a line between private, consensual homosexual activities and homosexual relationships.

In a sense, it could be argued that what appeared as most troublesome was not the idea of two men having sex but, instead, the possibility that their relationship was based upon the same commitments and desires as heterosexual couples. The imaginary of gay men indulging in frequent and promiscuous activities challenged the heteronormative perception of affectivity less than the idea of a homosexual mutual commitment.

X and Y v UK, *S. v UK*, (dec) n.11716/85, *W.J and D.P. v UK*, (dec) n.12513/86, *Z.B. v UK*, (dec) 16106/90, *C. and L.M. v UK*, *Rössli v Germany*, (dec) n.28318/95, *Mata Estevez v Spain*, (dec) n. 56501/00, *Manec v France*, (dec) n. 56501/00, *Courten v UK*, (dec) n. 4479/06, *Karner v Austria*, n.40016/98, *Kozak v Poland*, n.13102/02, and *P.B. and J.S. v Austria*, n.18984/02, questioned precisely this idea and argued for the recognizing a legal value to the affective, as well as to the sexual, bond between two same-sex persons.

¹⁴⁰ The Court deemed the case admissible on the 20th March 2008, two years before *Schalk and Kopf v Austria*. Nevertheless, the Grand Chamber upheld *Schalk and Kopf* a month before the First Section judged the case *P.B. and J.S. v Austria*.

Until *Mata Estevez*, the decision of what fell within ‘family life’ was entirely at the hands of the EComHR, which deemed all complaints inadmissible. By performing this role of gatekeeper, the EComHR both prevented the ECtHR to judge on the issue and, at the same time, it engaged in the interpretation of Article 8, and performed a consequent creative interpretation.

On a closer look, the EComHR laid the foundations of its restrained notion of family life in *X and Y v UK*, *W.J. and D.P. v UK*, *B v. UK*, *C. and L.M. v UK*, (dec) n. 4753/89, which challenged, unsuccessfully, British provisions in immigration law. Even though insisting on the same national context, these cases still prove relevant, since the EComHR enriched the final decisions considering general importance.

To briefly sketch the main common features, the British Statement of Changes in Immigration Rules HC 169, allowed certain foreign heterosexual spouses and fiancés to join the partner in the United Kingdom but, as the EComHR noted, the law did not make any provision for the reunification of homosexual couples (*W.J. and D.P. v UK*, § 22).

This provision also applied to heterosexuals with an unsettled immigrant situation, under the condition that the British partner was able to economically maintain the second without public expenditure, and that, at the time as the request, the partner seeking admission held a current entry clearance granted to him for that purpose.

Leaving aside the specificities of different cases, the reiterated and basilar departing assumption of the Commission was that, despite the evolution of attitudes towards homosexuality, the Commission could not ascribe same-sex relations to family life for purposes of Article 8.

Moreover, when evaluating the alleged discriminatory treatment imposed by British Rules on Immigration, the EComHR acknowledged that the applicants had been treated less favourably because of their sexual orientation, but, nonetheless, the Commission fully justified the choice of British authorities, accepting that

the treatment accorded to the applicant was different from the treatment [he] would have received if the partners had been of different sexes. [...] the Commission therefore accepts that the difference in treatment between the applicant and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified. (Ibidem)

This decision reveals the practical consequences of the privilege attached to a heteronormative conception of sexuality. Had the applicants been a heterosexual couple, the EComHR would have considered their relationship as falling within the meaning of ‘family life’, thus restricting the discretion granted to the respondent Government. Instead, the EComHR found that the

deportation order was proportionate to the “aim [of] economic well-being of the country” (Article 8) and dismissed all claims.

Moreover, the reasoning adopted by judges implies that a homosexual person, with an unsettled immigration status, has to abstain from establishing affective and loving relations, unlike heterosexual people; this assumption could be related to different but connected arguments: it firstly recalls the stereotypical idea that, since gay couples can't give birth to children and are presumed not to have deep social roots, they could easily settle in any country; secondly, it assumes either that the enforcement of a deportation order doesn't affect the same intensity same-sex and heterosexual relations or that a same-sex relationship does not realise a valuable commitment.

The EComHR did not review, or change, its perspective, not even when the risk of criminal prosecution was implied, or when minors were involved. In *Z.B. v UK* the applicant was a Cypriot national who lived in a stable relationship with a British citizen; subsequently to the expiration of his residence permit and to the denial of stable residence permission, the applicant claimed for asylum, “on the basis of a well-founded fear of prosecution [...] in view of the fact that male homosexual behaviour is a criminal offence in Cyprus” (*Z.B v UK*, § 1).

The EComHR, however, legitimized the UK decision and its indifference to the fact that Mr. R couldn't follow the applicant in Cyprus suggests a prejudiced approach; evaluating the concrete risk of prosecution, the EComHR didn't attach relevance to the probable prosecution against Mr. R, almost suggesting that if he followed his partner to Cyprus it would be his responsibility not to behave too openly.

The case of *C and L.M. v UK* raised the issue from a different standpoint, namely that of child's best interest. C. was an Australian citizen who had been living with a female partner in the UK since 1984 and who in 1989 had given birth to a child, namely the second applicant. After her request of a permanent residence permit was denied, she lodged a complaint with the ECtHR, contending that since the birth of the child she was economically dependent on her partner and that “in the event of her deportation to Australia with the child, she would be homeless, destitute, and have to rely on social security payments for the maintenance of herself and her child”. Given the stable relationship between the two women and the necessity to guarantee a fair balance between the best interest of the child and the public laws on immigration, one could expect a careful approach, engaging in a critical reading of UK immigration rules, even leaving the final outcome unchanged. Instead, no weighty reasoning occurred and the Commission simply relied on its previous case-law, without even mentioning the well-being of the child, but solely upholding the legitimacy in treating differently same-sex and heterosexual relationships.

Both the traced interpretive standpoints and the plain words of the Commission display a heteronormative definition of family life: the EComHR acknowledged that the final outcome was due to the homosexuality of the applicants, but it also emphasized the different entrenched value of heterosexual ones, attaching greater value to the latter:

The Commission considers that the family merits special protection in society and it is no reason why a High Contracting Party should not afford particular assistance to families. The Commission therefore accepts that the difference in treatment between the applicant and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified. (*W.J. and D.P. v UK, C and L.M. v UK*)

Not only did the EComHR refuse any possible relationship between the notion of ‘family life’ and a same-sex relationship but it expressed a conception of family completely grounded on marriage. Even though in the quoted passage judges do not plainly express this concept, they convey it as underpinning the ideal of family, as if the only thing that has to be secured under the Convention, is the one sanctioned by wedlock. Following the reasoning of the EComHR any other relationship should be allowed to claim rights under the Convention only insofar as it can be assimilated to the ideal model of family.

The character of the heteronormative perspective endorsed by the EComHR is so pervasive that judges do not justify further their position and completely reject the claims of the applicant. Majoritarian morals are both undisputed and upheld by the EComHR; its reasoning, however, conveys an inherent biased interpretation of family life, since the Commission mentioned the recent developing trends towards a growing tolerance, but it accorded them less relevance than that granted to the protection and the enforcement of traditional values, as if the latter aims were more desirable and dignified.

The differences were negatively evaluated and commissioners did not deny the difference between cases put forward, but they fully justified the UK decisions, framing homosexual and heterosexual relations as two separate and unequal conditions.

Looking at the structure of the EComHR decisions, national laws constitute to the parameters and the reference point of any evaluation. The extent to which the *status quo* is considered as good and uncoerced is given by the absence of a reasoning taking into account, even partially, the perspective put forward by the applicants.

At the core of the EComHR decision to quash the applicants’ complaints a rigid distinction between private and public sphere can be understood, between sexual and family life. From the reasoning of the Commission, the private sphere looks like a closet, wherein lgbt people have to

stay, and which is completely closed off from any other realm. In other words, the EComHR does not attach legal relevance to social relations built on the grounds of a specific sexual orientation, as if it were possible to separate sexual intercourses from affective bonds established on the grounds of a given sexual orientation.

Over the same time period, a number of applicants asked for the recognition of specific rights descending from long-term cohabitation, generally guaranteed to heterosexual couples under the notion of ‘family life’ secured by Article 8 of the Convention.

Until the already mentioned *Mata Estevez*, judges reiterated a completely heteronormative conception of ‘family life,’ without further explaining or justifying their perspective. In *S v UK* and *Roosli v Germany*, the applicants claimed the right to succeed in the tenancy of the house where they had been living with their deceased same-sex partner, who was the tenant. Both British and German laws provided this opportunity for unmarried, cohabiting heterosexual couples, but a similar opportunity was precluded to lgbt couples. The EComHR simply considered that “the family (to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated) merits special protection in society and it see no reason why a High Contracting Party should not grant particular assistance to families” (*S. v UK*, §7), also accepting “that the difference in treatment between the applicant and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified.” (Ivi, § 7).

The realm of private life, for the purposes of present cases, was furthermore narrowly defined as the relationship between the applicant and his/her deceased partner; given that the applicants had not been interfered with in the course of their same-sex relationship, no breach of their respect for private life could be claimed. Hence, according to this perspective, private life necessarily included an ongoing relation with a same-sex person, and it did not cover the situation of the surviving partner. Furthermore, in *S v UK* the Commission entirely dismissed the perspective of the minority, adopting a loose reasoning. The Court stated that “The fact remains, however, that on the death of the partner, under the ordinary law, the applicant was no longer entitled to remain in the house, and the local authority was entitled to possess the house so therefore it could no longer be regarded as "home" for the applicant within the meaning of Article 8” (Ivi, § 4).

It could be critically noted that the Commission took as its starting point the same arguments and evidence that the applicant had brought before them, in order to critically review them; the exact reason which had led the applicant to file a complaint, became the starting and undisputed premise of the EComHR. Therefore, the structure of this passage recalls the structural mar-

gin of appreciation, and it encourages a formalist review of national provisions, further strengthened by the heteronormative and majoritarian standpoints already addressed.

Mata Estevez can be considered, however, as the initial turning point that pushed judges to critically consider their positions. It was indeed the first complaint in which the ECtHR provided justification for its decision not to comprehend the homosexual relationship of the applicant in the notion of ‘family life’, by recalling the doctrine of consensus.

After the death of his long-term partner, Mr. Mata Estevez appealed to national authorities claiming the social-security allowances for the surviving spouse; however, the National Institute of Social Security refused to grant him a survivor’s pension on the grounds that since he had not been married to Mr G.C., he could not legally be considered as his surviving spouse.

The Court accepted that marriage constituted as an essential precondition for eligibility for survivor’s pension, but it clarified that a difference in treatment is discriminatory under Article 14 if it has no objective and reasonable justification, in other words if it does not pursue a “legitimate aim” or if there is no “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (Article 14).

The judicial reasoning is still extremely problematic, for it combines a substantial question, namely whether a homosexual relationship falls within the scope of family life, with a procedural method, the consensus analysis.

Judges do not express any substantial argumentation against the claim of the applicant, also recognizing that, in principle, he might have a fair demand. Apparently, the main grounds which leads to the exclusion of long-term same-sex relationships from the notion of ‘family life’ lies entirely on the absence of a European consensus on that specific issue.

It could however be contended that the practical definition of consensus departs from a biased interpretation of legal and social changes that were taking place within the Council of Europe. While same-sex marriage were already legal in the Netherlands, by then seven Contracting States had recognized same-sex civil partnerships¹⁴¹ and in other three, at least, the legal recognition of same-sex couples was an issue of public relevance¹⁴². Even though there wasn’t a homogeneous common policy, the ECtHR could have attached some relevance to the developing trends, hence more accurately reflecting the evolution of European legal systems and conduct-

¹⁴¹ At that time Denmark, Norway, Sweden, Iceland, Netherlands, France and Belgium already recognized same-sex civil partnerships.

¹⁴² In Germany, Finland and United Kingdom the legal recognition of homosexual couples was debated in Parliament. In Germany a Civil Partnership Act was approved the 1st August 2001, in Finland in 2002 whereas the British Parliament adopted the Civil Partnership Act in 2004.

ing an in-depth analysis of public debate around gay and lesbian issues, even if not leading to a different decision.

The absence of hostile considerations in respect to the applicant suggest that, unlike in the previous cases, this decision is imbued more by the image of marriage as a fixed institution, shaped by national culture, rather than by a prejudiced evaluation of same-sex relations; the wording of the ECtHR suggests indeed that if Spanish legislation had provided the same rights to unmarried heterosexual partners, its reasoning might have been different: hence, the Court implies a comparison between heterosexual and homosexual couples, even though restricting it to unmarried ones.

In fact, this approach was at the core of *Karner v Austria*, where the Court upheld the complaints of the applicant, but left the question open as to whether a same-sex relationship still fell outside the notion of family life.

This case revolved around the alleged right of the survival partner to continue the tenancy of the house where he had been living with his partner; the applicant died in 2001 while the complaint was still pending, but his mother asked for the case not to be struck out.

Karner marks the initial point of a process of change within the ECtHR's approach to family life, and here the Court opened the interpretation of the ECHR as to include same-sex affectivity within the notion of family life, displaying however very cautious reasoning.

The first innovative element is the reason not to strike out the case: the Court interprets the case as the opportunity to extensively clarify the rules instituted by the ECHR, and it further notes that "although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States." (*Karner*, § 26).

Hence, Mr. Karner's claim is framed not as primarily entailing individual satisfaction or compensation, but as involving "an important question of general interest not only for Austria but also for other States Parties to the Convention" (*Ibidem*), namely that of the difference in treatment of homosexuals as regards to succession tenancies.

Karner is also the first case in which the Court has positively evaluated and mentioned third parties' opinion; Ilga-Europe, Liberty, and Stonewall granted legal and argumentative support to the applicant, and through his case tried to promote civil partnerships as a matter of human rights. They submitted the idea that strong justification was required when the grounds for a distinction was sex or sexual orientation, also alluding to the growing number of national Courts in European and other democratic societies requiring equal treatment of unmarried different-sex partners and unmarried same-sex partners (*Ivi*, § 36).

Quite interestingly, the ECtHR started out from third parties' statements and it did not stray from them, rather considering that their intervention had highlighted the general importance of the issue, and therefore the majority decided not to reject the case .

The Court undertakes an activist and creative perspective, which gathered the overwhelming majority of the judges; judge Grabenwarter, however, filed a significant dissenting opinion, where the main terrain of disagreement concerned the role of the Court and its proper degree of activism.

Most notably, this opinion raises doubts as to whether the Court is entitled to deliver judgments of general importance, and as to whether it is appropriate to establish a frame which could easily lead to a massive caseload of parallel applications. Judge Grabenwarter, indeed, suggests that "it is not in line with the character of the Convention system [...] to continue proceedings without an applicant on the ground that this contributes to elucidating, safeguarding and developing the standards of protection under the Convention. [...] General importance needs to be read in a narrower sense" (Ivi, dis.op., judge Grabenwarter).

Not only did the Court take the opposite view, but it also opened up to consider same-sex relationship as falling within 'family life'; even if suggesting that the present case did not raise the necessity to examine the meaning of family life, the Court reduced the margin of appreciation conceded to domestic authorities, affirming that the aim of protecting the family "in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it" (Ivi, 41). Under the ECHR differences in treatment based on sexual orientation could be accepted only if national authorities convincingly show that in order to achieve a legitimate aim, as it may be the protection of traditional marriage, "it was necessary to exclude certain categories of people - in this instance persons living in a homosexual relationship. [...]" (Ibidem). In *Karner* the Court concluded that the Austrian Government had failed to uphold this requirement and, therefore, held that there had been a breach of Mr. Karner's rights under the ECHR.

This passage is extremely relevant, both for what the Court says and for what it does not do. To clarify my position, I focus on the argumentative structure of the Court's evaluation: if in previous cases the departing macrostructure had been the recognition that the protection of traditional family was weighty and required great discretion, here the Court begins by questioning the set of policies usually labelled as necessary in order to protect a situated model of family.

While in *S. v UK* the Commission had considered such aim as "itself clearly legitimate", in *Karner* it does not recall the great importance of traditional values, but emphasized its abstract nature: the breadth of national discretion was reduced and even though implicitly, the Court clarified that homosexual couples could be compared to heterosexual unmarried ones.

This reading enlarged the role of the Court in substantially reviewing national legislations, and it explicated the pre-eminence of non-discrimination over the enforcement of traditional values; the Court further discussed the notion of family life, roughing out the approach that will mark its interpretive perspective in the majority of cases concerning the claim of rights grounded on same-sex long-term relationships.

In *Kozak* the Court compares the applicant's situation to family in a traditional sense, detaching from the notion of family based on heterosexual marriage.

Mr. Kozak alleged a discrimination against him, on the grounds of his homosexuality, since Polish authorities had denied him the possibility of taking over the rent of his deceased partner, hence infringing his private and family life, while this opportunity was granted to unmarried cohabiting heterosexual couples.

Before the Court, the respondent government contended that the relationship between Mr. Kozak and Mr. T.B. could not be considered as genuine, since "at some unspecified time the applicant and T.B. had come into conflict. T.B. asked the authorities to strike the applicant's name out of the residents' register and intended to start eviction proceedings against him" (*Kozak*, §11) while the applicant had not assumed responsibility for T.B.'s funeral.

Moreover, the applicant's credibility was further questioned since Polish authorities referred that in the years 1994-1995, the applicant had unsuccessfully attempted to succeed to have tenancy of a council flat, after the death of a certain E.B., hence implying that Mr. Kozak's claim should be dismissed as ill-founded.

The applicant contended that despite the fact that he and Mr. T.B. had been arguing for a period, nine months before T.B.'s death they had reconciled and they had resumed their relationship. He also submitted that he had looked after T.B. during his illness up until his death, and explained that he had helped T.B.' former wife to organize his funeral but that officially she figured as the sole organizer, in order to receive a partial refund of expenses from the Social Security.

Quite interestingly, the Court preferred not to judge the quality of the relationship between the two men. Judges noted that for heterosexual cohabiting partners the Polish 1994 Act did not require them to be fully and sincerely committed one another, but it solely required the objective cohabitation in the tenant's household, in a "*de facto* marital cohabitation" (Ivi, § 40).

Had the Court filtered the facts through a heteronormative perspective, or even through the principle of precaution, it would have extensively disputed the nature of their commitment, for instance by considering the decision of Polish authorities as not deriving from a discriminatory intent.

The ECtHR standpoint is innovative on two occasions: firstly, the Court does not directly link the aforementioned provisions with the legitimate aim of protecting traditional family and, secondly, it dismantles the biased idea, conveyed throughout previous judgments, whereby in order to claim rights, lgbt people were required to demonstrate a linear and coherent path of behaviour. By undertaking such a view, the Court interprets the EHCHR as detaching from both heteronormativity and majoritarian premises.

As in cases before *Karner*, the ECtHR initially conceded that the protection of the family in the traditional sense was “in principle a weighty and legitimate reason which might justify a difference in treatment”, but in the proceeding judges shelled out a rich reasoning, which restricted the set of legitimate means to adopt in the protection of traditional family.

Most notably, respect for family life had to necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, “including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life” (Ivi, § 97). The intangibility of traditional family was, then, dismantled, and the Court suggests that even same-sex couples may fall within this notion. A few lines later, the majority also focuses on striking a balance between traditional family and the rights of sexual minorities, stating that it “is, by the nature of things, a difficult and delicate exercise [...]. Nevertheless, [...] a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in its traditional sense” (Ivi, § 97).

The innovations encapsulated in these passages are various, relevant from a sociological and legal perspective, for they convey an interpretation of the ECHR anchored to the present social environment.

Firstly, the Court acknowledges that the term family comprises of a heterogeneous multiplicity of relationships, among which the traditional model is just a specific one, and it upholds that the discrimination of other forms of family life could amount to discrimination under the ECHR. The Convention does not mention sexual orientation among forbidden causes of discrimination, nor could it be deduced by drafters' original intentions, but it derives from the reading of present-day conditions. Moreover, the Court considers the balance between traditional family and same-sex relationships, without mentioning the existence of overwhelming majorities supporting alternative models of family; this suggests that the assessment of rights which could be afforded to lgbt couples neither requires support from the widest national public opinion nor presumes scientific evidence on the comparability between these two models.

Domestic authorities are enabled to decide how to legally structure rights arising from wedlock and the Court does not deny that traditional family would stand in a preeminent position in confront of all others models.

This standpoint appears as being mostly shaped by a substantial evaluation of the deep rooted social meaning of marriage and by the principle of precaution, but not by majoritarian concerns; otherwise, the Court would have probably relied on public opinion, as it did in *Dudgeon*, or on medical evidence, as it did in *Sutherland*.

Though not explicitly stated, *Kozak* is framed as falling within family life, and even the doctrine of the Convention as a living instrument is influenced by such a frame. The Court, indeed, states that “the State, in its choice of means designed to protect the family and secure, as required by Article 8, respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.” (Ivi, § 99).

Even though not recognizing same-sex couple relationship as family life, the ECtHR seems aware that the traditional family is not the only existing model, and that also the others deserve legal protection under the ECHR.

The ECtHR made its most direct statement about the relation between family-life and same-sex relationships in two almost simultaneous judgments, *Schalk and Kopf v Austria* and *P.B. and J.S. v Austria*. While the first one has been extensively criticized and will be thoroughly analyzed in the next paragraph, less has been written about the latter, which still represents an interesting case.

The complaint was about the alleged right to obtain an extension of the health insurance to the partner of a stable same-sex relationship. Mr J.S, an Austrian citizen, was, indeed, ensured with the Civil Servant Insurance Corporation, which refused to recognize Mr. P.B. as being entitled to benefits, in 1997.

Austrian legislation was then amended, but it reiterated discrimination based on sexual orientation. Before J.S. and P.B. filed their complaint to national Courts, the law specifically provided a difference based on the sex of the partner of the insured. After the definitive amendment, however, health insurance was granted to a person who even though not a relative of the insured, had been living with him/her in the same household for at least ten months and since then, *inter alia*, he or she is bringing up one or more children living in the same household.

The majority, five to two, departed from what previously implied in *Kozak*, finally stating that

The Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would. (Ivi, § 30)

The right to respect of family life, to which applicants were now entitled, allowed the Court to reduce the margin of discretion for national authorities; in respect of the original legislative provision the Court found a violation, whilst it considered the amended versions legitimate, since it set out criteria according to a neutral wording, and since “the applicants did not argue that under Austrian law homosexuals are excluded from caring for children” (Ivi, § 47).

I consider this argument, however, as extremely problematic, since it doesn’t address the problem of indirect discrimination; even though the applicants did not dispute the exclusion of homosexuals from raising children, at that time, Austrian legislation excluded same-sex couples from second parent-adoption and joint adoption. It was not rare that homosexual couples raised a child, whether she was the biological or the adopted child of one partner, but the frequency of these families could not be compared to the extension of unmarried couples with children.

The alleged neutrality of the wording adopted by Austrian legislator, therefore, could be interpreted not as a way of eliminating discrimination against same-sex couples but just to shape the discriminatory provisions in a more suitable and apparently equal way.

The deliberate choice of the majority not to consider this issue, consequently, could be considered as a restraint approach that endorsed the discretion of national authorities to pursue discriminatory policies, as long as covered by a neutral language.

The final outcome appears jeopardized, torn between the enlargement of the notion of the meaning of Article 8 and the consequences that would logically follow from an activist interpretation of the ECHR. If the interpretive instruments developed by the ECtHR are adequate and sharp in contrasting the multiple forms of direct discrimination, their potential in addressing indirect and pervasive forms of discrimination remains undeveloped.

If the prejudice according to which same-sex couples weren’t considered as families has been formally overturned, still, the perspective that orients the ECtHR to same-sex issues does not take a full departure from the heteronormative understanding of marriage, as explored in the next paragraph.

4.5.2 Is There a Right to Same-Sex Marriage Under the ECHR?

Given the theoretical, legal, and symbolical relevance of marriage, it's surprising that the Court has only directly dealt with this issue once, in *Schalk and Kopf v Austria*. As already suggested, the claim of same-sex marriage is implied in a variety of other complaints, yet the demand that Article 12 requires same-sex marriage has been presented as the main grounds of a complaint. This fact could be explained by the interpretation laid down by the ECtHR, which, on one hand, clarified that there was no room to support an interpretation of the ECHR requiring same-sex marriage, at least in the short run, and, on the other, which also pointed out that the only way through which lgbt could claim couple rights, was that of widening the sphere of comparison between unmarried heterosexual and homosexual couples.

Effectively, *Schalk and Kopf v Austria* offered the testing ground for hopes flourished after *Karner* and *Kozak*, and judges were faced with the choice as to whether or not to lay the foundations for a completely renewed definition of marriage.

This case was originated by two male Austrian cohabiting citizens who, between 2002 and 2004, were denied the possibility to marry or to have their relationship otherwise recognized by law (*Schalk and Kopf*, § 3). Until 2010 the decision of domestic authorities not to amend the Civil Code, which directly mentioned the heterosexual nature of marriage, led to the total absence of legal recognition for gay and lesbian couples.

In 2010, the Austrian government introduced the Civil Partnership Act for homosexual couples, which granted limited rights and denied gays and lesbians the right to adopt; nevertheless, the applicants contended that even after the introduction of civil partnership, gays and lesbians were granted fewer rights and, hence, they argued that a discriminatory distinction between lgbt and heterosexual married couples was still held.

The applicants pursued an activist and strategic perspective: their main aim was to push the ECtHR to consider same-sex couples as being legally equal to married couples and, to this end, they relied on two distinct but intertwined standpoints. Firstly, they alleged that even though Article 12 did not mention same-sex marriage, the Court should interpret that provision as prohibiting discrimination on the grounds of sexual orientation in civil status legislation. Then, they claimed that, since lgbt affectivity fell within family life, any differential treatment between heterosexual and homosexual couples would amount to discrimination; as a consequence, under the conjoint reading of Article 14 and Article 8, COE Parties were allowed to recognize same-sex couples by alternative means to marriage, only insofar such institutions conferred the same rights and duties arising from wedlock.

Before considering the ECtHR response, it's worth emphasizing the role played by the third parties, which made a valuable effort to produce legal, social, and theoretical compelling arguments. Among third parties, the UK Government intervened against the applicants, highlighting that relevant political pressure was upon the Court. NGOs, represented by Robert Wintemute, clearly encouraged the Court to create law, "to use the opportunity to extend access to civil marriage to same-sex couples", since "the fact that different-sex couples were able to marry, while same-sex couples were not, constituted a difference in treatment based on sexual orientation" (Ivi, 37).

In his submission Wintemute contrasted various arguments usually against same-sex marriage, offering multifaceted cues to judges.

From a legal standpoint, Wintemute argued that differential treatment could only be justified for "particularly serious reasons" and that, in their contention, "no such reasons existed: the exclusion of same-sex couples from entering into marriage did not serve to protect marriage or the family in the traditional sense" (Ibidem). He also recalled judgments from the Constitutional Court of South Africa, from Canadian and the US Courts, so as to demonstrate that, despite the lack of a European consensus on same-sex marriage, legal recognition of same-sex couples was marking a worldwide trend.

From a symbolical perspective, NGOs emphasized that same-sex marriage would not devalue marriage in the traditional sense, since those who believe in the latter institution would be free to behave as they pleased.

Finally, Wintemute relied on social evidence, recalling that the institution of marriage had undergone considerable changes and that, as the Court had already held, the inability to procreate could not be regarded as *per se* removing the right to marry. It was conceded that in *Goodwin*, relating to the right of trans genders to marry a person of the opposite sex, there was European consensus, but Wintemute argued that in the absence of any objective and rational justification, considerably less weight should be attached to consensus doctrine.

The Court took the opportunity to reason on the meaning of 'family' and 'marriage', but the majority did not acknowledge either the applicants or the NGOs' arguments, and its judicial reasoning has given rise to multiple controversial issues.

As for the claim that Article 12 required same-sex marriage, the ECtHR strongly anchored its understanding of marriage to the alleged intentional *ratio* of the drafters and to a restrained literal interpretation of Article 12, which read: "men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

The ECtHR, at unanimity, held that there had been no violation of Article 12 (Ivi, § 64). I would read this decision as the outcome of political and institutional concerns; by 2010 the national and international lgbt movement was strongly claiming the right to marry throughout Western countries, often clashing with counter-demonstrators, with religious opposition, and with political conservative parties. The fact itself that the UK Government filed an opinion against the applicants marks that this case went beyond the situation of the applicants, and it signifies a contrasted vision of ECtHR aims. The lgbt movement, on one hand, resorted to the Court with the intent of pursuing socio-legal change aiming at overstepping national coalitions that impeded such a reform, hoping that the Court would lay down a uniform legal frame for all COE Countries; on the other hand, the UK Government reiterated the primary role of national sovereignty and European consensus, and recalled that the issue of same-sex marriage concerned a sensitive area of social, political and religious controversy, where national States should enjoy a particularly wide margin of appreciation.

The effective lack of consensus of same-sex marriage might suggest that the ECtHR actually shaped its decision purely on formal and doctrinal reasons, without discussing the merits of the parties. Even if it were so, the ECtHR reasoning could be critically evaluated as being strongly majoritarian, since it would however subordinate the legitimacy of claims advanced by the effective existence of a broad and uniform interpretive environment, favourable to the recognition of the aforementioned rights.

Throughout the judgment there are several passages suggesting a reasoning moulded on structural margin of appreciation; the comparison between Article 12 and Article 9 of the European Charter of Human Rights, which does not mention specifically ‘men and women’, the statement that the Court “would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex”, as well as the final affirmation that “the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State” (Ivi, § 60).

As far as being majoritarian and targeted at strengthening its own legitimacy, the ECtHR reasoning might be still regarded as not openly heteronormative; other passages depict quite a different frame.

Assessing the principles that guide its review, the ECtHR hints at considerations of general importance, laying the reference points also for following case-law; firstly, the Court recalls that even though the right of marriage is subjected to national laws, “the limitations thereby introduced must not restrict or reduce the right in such a way or to such extent that the very essence of the right is impaired” (Ivi, § 49). Then, the Court observes that at the outset, it had not yet had “the opportunity to examine whether two persons who are of the same-sex can claim to

have a right to marry” (Ivi, § 50). Hence, even though the focus is the case at stake, the horizon of the Court is definitely wider, since judges do not deal with the question of whether, given the factual circumstances, the applicants can claim the right to marry, but rather they reason on whether same-sex marriage falls within human rights secured by the ECHR.

Recalling its jurisprudence on the marriage of transsexuals, the Court also noted that since the enactment of the Convention there had been “major social changes in the institution of marriage” (Ivi, § 52), and that Article 12 could be interpreted in order to meet such changes.

Nevertheless, the Court relied on a strong heteronormative perspective: transsexuals had been allowed to marry both because in Europe the legal frame was quite homogenous, and because judges had considered that in those cases the post-operative transsexuals could be assimilated to a born female/male (Hodson 2011, 170). Hence, the final outcome relied not on the reform of the institution of marriage, but on the normalization of transsexuals, whose features were considered fitting the binary heteronormative conception of sexuality¹⁴³. Had the Court upheld the claim of transsexuals on the grounds that the legal notion of marriage was presumed to mirror wide spread social changes, the claim of same-sex couples to enter into wedlock would have appeared less problematic.

Instead, the ECtHR departed from the original wording of the Article, stating that even though “looking at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women, [...] the choice of wording in Article 12 must be regarded as deliberate” (Ivi, 55).

It is true that Article 12 is the only provision where the ECHR grants rights not to “everyone” but to “men and women”, and it is also quite obvious that in the 1950s marriage was understood in the traditional sense of being a union between partners of different sex.

Yet, it seems disputable to draw a line between some aspects of marriage, considered as fundamental to secure its traditional asset, and others which, instead, are depicted as accessories: in the 1950s not only same-sex marriage, but also legal equality between the spouses, the right to divorce, and the dismantling of the presumption of paternity were unconceivable, but the Court has interpreted the ECHR as securing such features.

¹⁴³ On this point I recall Gonzales, who conducted an in-depth analysis of the ECtHR’s caselaw on gender identity; in respect of transsexual marriage he offers a critical reading of the arguments displayed by the ECtHR’s judges, arguing that “the victory of Goodwin [...] showed that the Court decided to re-define its understanding of legal sex in a manner that incorporates the transsexual who has moved across the binary, as a member of the sex group on the other side of the boundary.” (Gonzales 2014a, 812)

Even the statement that the choice was deliberate is loose, since drafters mentioned both men and women not to crystallize the heterosexuality of marriage, but to emphasize that both men and women enjoyed the same freedom to choose when and who marry. (Johnson 2015, 207).

Besides being historically inaccurate, such a statement offers a theoretical ground to deny that same-sex marriage could even fall under Article 12, since even imagining a clear consensus on the issue, the deliberate intention would remain unchanged.

In this frame, the ECtHR recurs to the principle of precaution, endorsing the *status quo* as neutral and natural, but not completely casting off the possibility to develop a different approach in the future. Firstly, the Court observes that “marriage had deep-rooted social and cultural connotations, which may differ from one society to another” and that “the Court must not rush to substitute its own judgment in place of that of national authorities” (Ivi, 62). Precaution and subsidiarity are strongly intertwined, and the Court enigmatically finds that “it cannot be said that Article 12 is inapplicable to the applicants’ complaint” (Ivi, § 61).

This ‘double negative’ form does not lead to an affirmative outcome, rather suggesting that the applicability of Article 12 to same-sex couples is inconclusive, and, as the Register of the ECtHR held, it could neither be ascertained that Article 12 applies to same-sex couples, nor that it does not, leaving the issue opened.

As Hodson remarks, “if marriage is not inevitably an institution for opposite-sex couples, as the Court has acknowledged, then the exclusion of a peculiar group from it requires explanation.” (Hodson 2011,173). Article 12 does not provide exemption clauses¹⁴⁴ and, accordingly, a differentiated treatment in the enjoyment of the aforementioned right may be justified only on the assumption that homosexual and heterosexual couples wishing to marry are not in a relevant comparable situation. Before *Schalk and Kopf*, the ECtHR had endorsed such reading; after *Schalk and Kopf*, however, the position of the Court is less than clear: same-sex couples are comparable to different-sex couples, but nevertheless Article 12 only applies to them if with the say-so of national States (Hodson 2011, 173).

Undoubtedly, a different reading of Article 12 would have fuelled the objection that by engaging in activist judicial review, the ECtHR would usurp the democratic functioning of Contracting

¹⁴⁴ Most notably, unlikely Article 8, Article 12 does not allow the Contracting Parties to restrict the enjoyment of the right to marry insofar they pursue a legitimate aim, they respond to a pressing social need, and there is proportionality between the means and the aims sought. On the interpretation of Article 12 with reference to same-sex marriage see Schuster (2012); Hodson (2011); Johnson (2011); Scherpe (2013).

Parties, especially if considering that in 2010 only seven of 47 Countries allowed same-sex couples to marry (Lau 2013, 643).

In fact, it's relevant to note that several leading scholars and jurists, though starting out from a secularized perspective, considered the ECtHR reading of Article 12 as appropriate or, more precisely, as the only feasible under the COE's political and legal framework.

Commenting that judgment, Wintemute, for instance, reflected whether the tie of consensus had a utility, and he considered it a strength in the overall scenario of LGBT litigation. Single judgments surely disappoint the applicants and the activists, but a judicial review completely detached from consensus analysis would prove much more perilous;¹⁴⁵ “the Court looks for consensus because its judgments are binding” Wintemute argued, further adding “if the Court appeared to force the views of a small minority of Countries [...], it would risk a political backlash, which could cause some governments to threaten to leave the Convention system” (Wintemute 2010, 1).

This incremental approach is also endorsed by Eskridge, who considers the small but incremental achievements as the safest solution to foster an inclusive culture, to root respect and dismantle prejudices, and to prevent the risk of backlashes (Eskridge 2002, 58).

Against this background, the restraint of the ECtHR on the alleged violation of Article 14 conjointly read with Article 8 is definitely more questionable.

Dissenting judges Spielmann, judge Rozakis, and judge Jebens, in particular, highlight the non-exhaustive and contradictory Court reasoning. The majority recognized the comparability between heterosexual and homosexual couples, stating that it would be “artificial to maintain the view that, in contrast to a different same-sex couple, a same-sex couple cannot enjoy family life for purposes of Article 8” (*Schalk*, § 94), also clarifying that “the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship” (Ivi, § 99). Yet, the majority denied that the absence of recognition for same-sex couples amounted to an unjustified discrimination (Ivi, § 103).

¹⁴⁵ In that occasion Wintemute also compared the ECtHR and the UN system, pragmatically weighting the gradual but concrete achievements of the former with the plangent proclaims of the latter: “United Nations human rights law often loses all contact with Earth, and floats off into the stratosphere. Laudable pronouncements about human rights are made, but they are not binding on governments, and there are no sanctions for non-compliance, especially not expulsion from the UN. The closest we have to a world court of human rights is the UN human rights committee in New York and Geneva. But it is a committee, not a court, and issues non-binding “views”, rather than binding judgments” (Wintemute 2010, 1).

To make the situation even more complex, in 2010 the Austrian government approved the Civil Partnership Act, specifically to provide a legal frame for homosexual couples. Not only did this Act mark the difference with marriage, but it also denied lgbt couples the right to access the technique of artificial insemination, unlike that provided for heterosexual unmarried couples. The majority of the ECtHR, however, argued that the Court was not called to review the national legal framework, stating that judgment of PA “would go beyond the scope of the present application” (Ivi, §109).

Neither dissenting judges expressed an evaluation on Partnership Act, but they still considered Austrian family laws in breach of Article 14 in conjunction with Article 8, up to the introduction of the aforementioned Act, nor did they also contend that this outcome was coherent with the majority’s reasoning.

According to dissenting judges “having decided that the relationship of the applicants [...] falls within the notion of *family life*, the Court should have drawn inferences from this finding” (Ivi, dis.op., judge Spielmann, judge Rozakis, judge Jebens, § 3). By deciding that there has been no violation, the Court at the same time “endorses the legal vacuum at stake, without imposing on the respondent State any positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy.” (Ivi, § 4).

Had the majority followed this reasoning, the Court would have eluded obstacles posed by Article 12, by recognizing the illegitimate nature of the absence of legal recognition for homosexual couples. Such an interpretation would have significantly challenged the heteronormative interpretation of the Convention, innovating the notion of marriage and, at the same time, interpreting the ECHR as a living instrument.

The Court argued that in order to assess eventual discrimination, the legal treatment of gay and lesbian couples had to be compared to that of unmarried heterosexual couples, but it also considered that States enjoy a certain margin of appreciation as regards to the exact status conferred by alternative means of recognition (Ivi, § 108), hence rejecting the idea that “if a State chooses to provide same-sex couples with an alternative means to recognition it is obliged to confer a status on them which [...] corresponds to marriage in each and every aspect” (Ibidem).

Schalk and Kopf marked an impasse in the ECtHR jurisprudence, but, at the same time, it reiterated that same-sex relationships fell within family life, that a blanket distinction between the former and heterosexuals was artificial, and that, gay and lesbian couples had a similar need for legal protection.

The majority of comments has focused on the shortcomings of the ECtHR’s review. However, some authors have also addressed the innovative features of *Schalk and Kopf*, effectively anticipating the ECtHR’s approach of *Vallianatos* and *Oliari*. Most notably, Scherpe considered this

judgment as “an ‘historic’ one, as truly marking the beginning of the end of discrimination against same-sex couples and as the first step on the final meters on the road towards equality” (Scherpe, 2013, 92); also Hodson (2011) emphasized the opening up of the Court towards same-sex couples, and she stressed the importance of a judgment where, despite the outcome, judges had not endorsed an inherent heteronormative definition of marriage.

Despite the final outcome, the approach to Article 14 conjoint with Article 8 left some room for lgbt activists, who indeed challenged the ECtHR reasoning within short space of time.

4.5.3 The Legal Recognition of Same-Sex Couples

The inclusion of same-sex relationships in the notion of family life made a breakthrough in the exclusive heteronormative conception endorsed by the Court up until then; hence, despite the dissatisfaction due to the ECtHR interpretation of Article 12, Ilga-Europe, national movements, and same-sex couples put all their efforts in loosening the reading of Article 14 conjointly with Article 8.

In *Schalk and Kopf*, the Court considered same-sex affectivity theoretically worthy of some legal protection, while in *Vallianatos and Others v Greece*, n. 29381/09 and 32684/09, and *Oliari and Others v Italy* it specified the nature of such protection, further weakening the ECtHR heteronormative understanding of sexuality, without however completely disrupting it.

It has to be underscored that both these cases concerned two specific national realities, which do not recur in other parts of Europe: in Greece the law operated a double discrimination against gays and lesbians, since they were not allowed to marry and they could not enter civil unions; in Italy, however, even though the Italian Constitutional Court had stated the necessity to provide a legal frame for same-sex couples, national Parliament refused to introduce civil unions.

In *Vallianatos* judges were called to review the legitimacy of the Greek Act 3719/2008, which had introduced only civil unions for heterosexuals; the applicants lodged with the ECtHR alleging that the aforementioned Act amounted to a discriminatory provision, since it infringed on their right of respect for private and family life.

The applicants offered a ‘sociological’ perspective, since they highlighted both material and symbolical consequences of being excluded from legal recognition. To them, “the present case affects their civil status and their position in Greek society” (*Vallianatos* § 43), and they also contended that Greek law “cast a negative moral judgment on homosexuality as it reflected an unjustifiable reserve, not to say hostility, towards same-sex couples.” (Ivi, § 60).

On the contrary, the Greek government displayed a wide range of arguments to justify its decisions, ranging from legal to social, from political to institutional, hints. Firstly, the authorities alleged that the main aim of the enacted legislation was to arrange a “set of provisions allowing parents to raise their biological children [...] without the couple being obliged to marry” (Ivi, § 62). Far from dismantling the traditional institution of marriage, civil unions “sought to strengthen [...] family in the traditional sense, since the decision to marry would hence for be taken irrespective of the prospect of having a child and purely on the basis of a mutual commitment” (Ibidem).

The aim of the Act was to amend obsolete laws on traditional marriage and family, so as to discipline parental relations that, otherwise, encouraged fathers to avoid their responsibilities: most notably, “Law 3719/2008 enabled the father of a child born outside marriage to establish paternity and be involved in the child’s upbringing without having to be married to the child’s mother” (Ivi, § 67).

However, the presence of children was not an essential requirement to enter into civil union, which could be concluded by “two different-sex adults governing their life as a couple” (Ivi, § 16).

Despite this incongruence, the Greek government heavily relied upon the relationship between civil unions and parenthood; I would frame this as the attempt to justify its policies by advancing an argument on which the Court, at least until then, had been quite restrained and had avoided general considerations, namely that of homo-parentality.

Domestic authorities did not call for a wide margin of appreciation on sensitive issues, rather reiterating that “the biological difference between different-sex and same-sex couples in so far as the latter could not have biological children together, justified limiting civil unions to different-sex couples” (Ivi, § 67).

Then, according to Greek submissions, civil unions simply ratified existing phenomenon, they just provided a legal frame to unmarried different-sex couples with children, already rooted in Greek culture.

The Greek legislature had expressly stated in a report that it was not seeking to regulate all forms of de facto partnership and, as a consequence, “the introduction of civil unions for same-sex couples would require a separate set of rules governing a situation which was [...] not the same as the situation of different-sex couples.” (Ibidem).

It was also denied that same-sex couples were not granted the possibility to regulate their patrimonial assets, since for social security matters they were in an identical position as different same-sex couples who had decided to enter into a union, while as far as maintenance and inheritance issues were concerned, “these could be regulated within a same-sex couple without a civil union, by means of a contractual agreement” (Ibidem).

In addition, Greek authorities also proposed strict separation between the private and public realm, pointing out that among the applicants some did not live together on a regular basis as they worked in different cities, and that they could not claim any right under the notion of family life.

The ECtHR began its reasoning by narrowing the scope of the present case, framing the applicants’ complaint as not relating “to a general obligation on the Greek State to provide for a form of legal recognition in domestic law for same-sex relationships” (Ivi, § 75). I consider this pas-

sage as a device of derivative legitimacy, which serves a twofold aim: firstly, the Court removes the expectations of general judicial law-making and it clearly avoids delivering a judgment which would bind all COE Parties to the introduction of civil unions for homosexual couples; secondly, by referring to the casuistic nature of judicial review, the Court also pays deference to the wording and to essential doctrines of the ECHR system.

Greek submissions are then carefully analysed, and by starting from the notion of family life, the majority depicted them as being flawed, incoherent, and biased.

Not only did the applicants form stable same-sex couples, but their relationship fell within family life, “just as would the relationships of different-sex couples in the same situation” (Ivi, § 73). The Court, moreover, “can see no basis” for drawing a distinction between those who live together and those who for professional or social reasons, do not, since “the fact of not cohabiting does not deprive the couples concerned of the stability which brings them within the scope of family life within the meaning of Article 8” (Ibidem).

The majority, hence, chooses a blunt but decisive expression, and it does not concede the minimum credibility to Greek perspective, simply evaluating it as lacking any rational or objective grounds.

Since Act 3719/2008 did not require the existence of children born outside wedlock, nor did it consider them essential to enjoy of special rights of inheritance, social and health assistance, the ECtHR dismissed the Government’s standpoint, and stated that the legislation in question was designed “first and foremost to afford legal recognition to a form of partnership other than marriage [...]” (Ivi, § 86).

Departing from such a premise, the ECtHR further developed a reasoning disruptive of heteronormative assumptions and prejudices.

The majority, indeed, widened what had already been found in *Schalk and Kopf v Austria*, reiterating that same-sex couples are just as capable as different same-sex couples of establishing stable committed relationships. Therefore, the alleged impossibility of same-sex couples to biologically have children was dismissed, while the applicants were considered in “a comparable situation to different-sex couples as regards their need for legal recognition and protection of their relationship” (Ibidem).

I wish to stress the relevance that the ECtHR attached to the symbolic meaning of civil unions, and to the role of the enforcement of traditional familiar and models.

Most notably, judges appear fully aware of the immaterial meaning attached to the instrument of law, and they highlight that, besides concrete benefits and rights, the legal recognition of affective relations conveys value, dignity, and social acceptance; public and legal positive sanctions are particularly relevant when marginalized minorities are involved; hence, the central issue of

the case is not whether same-sex couples are allowed to regulate their affairs through private agreements, but the fact that civil unions have an intrinsic value and they would grant gays and lesbians the “only opportunity [...] of formalizing their relationship by conferring on it a legal status recognized by the State” (Ivi, § 81).

The relevance of legal recognition is thus separated from the rights and benefits it implies, and the Court evaluates that in the absence of same-sex marriage, same-sex couples have a crucial interest in entering into civil union, which would legally and publicly recognize their union.

In conclusion, the Grand Chamber, sixteen to one, evaluated that the Greek government couldn't show convincing, objective, and grounded reasons to justify the exclusion of same-sex couples from civil unions introduced with the enactment of the law 3719/2008, finally finding a violation of Article 14 conjoint with Article 8.

Also consensus doctrine is approached from an innovative perspective: though not reviewing the case in abstract, the Court recalls the resolution 278(2010) of the COE European Assembly, the EU Charter of Human Rights, the recommendation CM/Rec(2010)5, the directives 2003/86 EC and 2004/38 EC, in order to stress that EU and COE institutions were significantly reducing the margin of discretion granted to national States on such issues, with the aim of tackling differentiated treatment on the grounds of sexual orientation.

As hinted at the beginning of this section, alongside innovative and creative elements, the Court also displayed problematic statements, which can be considered as showing the pervasive nature of heteronormativity.

Throughout its reasoning, the Court reiterates that the criterion of comparison applies only between unmarried heterosexual and same-sex couples, reinforcing marriage as a legal and social *unicum*, endorsing the same perspective laid down in *Schalk and Kopf*.

In addition to this, judges considered the protection of traditional family a legitimate and weighty aim, which could also justify a difference in treatment (Ivi, § 83).

Hence, the Court actually promoted the legal recognition of same-sex couples, but following the “separate but equal” model, thus weakening the effects of heteronormative culture without, however, managing to completely overturn it.

The concurring opinion filed by judge Casadevall, judge Ziemele, judge Jociene, and judge Sicilianos suggests that the Court upheld the applicants' claims because Greek civil unions did not provide adoption for unmarried couples, and because it did not raise any question on second parent or joint adoption by same-sex couples.

The fact that neither the applicants nor the Greek law involved to any extent homo-parentality significantly could have favoured the final outcome of the Court, which was not called to evaluate whether being raised by same-sex parents could fit the child's best interest.

Despite the casuistic premise, many statements bear a general significance and they appear as marking the frame also for future cases.

It is precisely against the alleged too activist trend of the Court that judge Pinto De Albuquerque filed a dissenting opinion. In particular, De Albuquerque accused the Grand Chamber of “performing an abstract review of the conventionality of Greek law, while acting as a Court of first instance” (Ivi), also harshly depicting the ECtHR as a “positive legislator”, and emphasizing that “not even Hans Kelsen, the architect of concentrated constitutional review system, would have dreamed that one day such step would be taken in Europe” (Ibidem).

In conclusion, in *Vallianatos* judges take a further step in enhancing the rights of same-sex couples and in dismantling the privilege of heterosexuality, also reducing the margin of discretion given to national authorities. The perspective flashed out in the concurring opinion raised, however, the doubt that on same-sex parenthood the Court might prefer a more restrained approach; had Greek law provided civil partners with the right to adopt, perhaps the Court could have considered the exclusion from this right on the ground of sexual orientation as being legitimate.

Such a concern is further reappraised in *Oliari and others v Italy*, where the ECtHR highlights the existing tension between the legal recognition of same-sex couples and the right to adopt which could descend from entering civil unions; as extensively argued hereinafter, the Court restricted its own review in order not to draw a general obligation from the ECHR to grant different-sex couples all rights provided to different-sex couples.

Oliari and others v Italy is the last case where the ECtHR has dealt with the legal recognition of same-sex couples, and in this judgment all parties involved displayed relevant arguments concerning both same-sex marriage and civil unions.

The applicants held multifaceted arguments, complaining that Italian legislation did not allow gays and lesbians to get married or even to enter into any type of civil union, and that a stark conflict marked the relationship between judicial and legislative powers; already in 2010 the Constitutional Court had considered that “the State had an obligation to introduce in its legal system some form of civil union for same-sex couples” (*Oliari*, § 105).

Moreover, civil jurisprudence and local municipalities had supported a legislative reform, without obtaining response from the government; in particular, in 2012, the Tribunal of Reggio Emilia, in light of the EU directives and of EU Charter of Fundamental Rights, considered a same-sex marriage contracted abroad as valid for the purposes of obtaining a residence permit in Italy. In 2014, the Tribunal of first instance of Grosseto had held the opinion that the refusal to register a foreign same-sex marriage was unlawful, and had ordered the competent public authority to register the marriage. The State appealed and a few months later the Court of Appeal

of Florence quashed the first-instance judgment, remitting the case to the tribunal of Grosseto. The Court of Cassation, to which the case was finally delivered, remarked in its judgment 4284/12 that “to the effect that a same-sex marriage contracted abroad was no longer contrary to the Italian public order”, there could be room to recognize same-sex marriages contracted abroad, but only by means of a legislation approved by the Italian Parliament.

Consequently, the applicants described the government policy on the matter as flawed, and highlighted that the so called cohabitation agreements provided a limited set of rights, that they could be signed also by cohabiting people not in a relationship, and that these agreements had not an *erga omnes* effect, nor could they be considered as equally binding as rights secured by legislative means.

Both the applicants and NGOs, intervened as third parties, emphasizing the symbolic and social meaning entrenched in civil unions, contending that the recognition in the law of one’s family life and status was “crucial for the existence and well-being of an individual and for his or her dignity”, and that no private cohabitation agreement could adequately substitute a “recognized union [...] by means of a solemn juridical institution, based on a public commitment and capable of offering legal certainty” (Ibidem).

Besides alleging same-sex unions as a necessary step in enhancing minorities’ rights and in fostering democratic spirit (Ivi, § 113), the applicants and Wintemute, on behalf of the international lgbt NGOs, engaged in a critical reasoning on the Court’s decision in *Schalk and Kopf*.

Firstly, it was emphasized that, in the turn of four years, a clear consensus had been achieved, for until June 2014 22 of 47 COE founding States recognized same-sex unions, and Greece was under obligation to introduce such reforms after the *Vallianatos* judgment.

Wintemute, in particular, extensively relied on international jurisprudence, hence asserting that even if the primary source of the ECtHR was the ECHR, it could really protect and enhance human rights only by giving relevance to judicial, legislative, and political trends spreading all over the world. He also framed the Italian situation through the lens of indirect discrimination - introduced in the EU anti-discriminatory law by the directive 78/2000- and recalled that in light of the recent *Vallianatos* case, the burden of proof was entirely on the government. The Italian Associazione Radicale Certi Diritti even shown the result of a survey carried out by the Italian institute for statistics, which gave evidence that a considerable majority of the Italian population did not consider civil unions as threatening traditional family or traditional values (Ivi, § 144). The clear intent was to contrast the objection that in Italy a pressing social need justified the absence of a legal frame for gay and lesbian couples, but from a socio-legal perspective this argument enriches the debate and brings into the judicial arena social data, hence attesting the ECtHR attention for social system.

To these statements the Italian government replied by alleging Italian peculiar culture on sexual matters and argued that even if “at the end of a gradual evolution a State was in an isolated position with regard to an aspect of its legislation, this did not necessarily mean that that aspect was in conflict with the Convention” (Ivi, § 124).

Drawing a similar approach to *Sutherland*, respondent authorities also relied on the argument of political pre-eminence; the ongoing debate on civil unions would not testify the inability of political authorities to comply with judicial outcomes and social needs, rather showing the real intention of Italian authorities to find a solution which would meet public approval, as well as with the needs of protection by a part of the community. From this premise, it would follow that neither could the Italian State be held responsible for the tortuous course towards legal recognition of same-sex couples nor should the ECtHR substitute its own review to the legitimated decisions approved by national Parliament.

Among third parties, the European Centre for Law and Justice, ECJL, strongly argued against the applicants, relying on the alleged slippery slope that an eventual judgment favourable to civil union would trigger. In particular, the ECJL feared that if the Court established that same-sex couples had a right to recognition in the form of a civil union, the next issue would be what rights to attach to such a union, “in particular in connection with procreation.” (Ivi, § 149). Not only should same-sex couples not be legally recognized, but the ECJL contended that the entire ECtHR jurisprudence which had ascribed same-sex relations to family life was ideologically oriented and legally flawed.

To them, only the presence of a biological child justified the notion of family life, and they considered that any recognition given to a couple by society had to depend on the couple’s contribution to the ‘common good’ through founding a family, and definitely “not on the basis that the couple had feelings for each other, that being a matter concerning private life only.” (Ivi, § 150).

Moreover, the intervener resorted to the (in)famous PIB argument (Corvino 2005, 501), namely that an interpretation of the ECHR favourable to lgbt couples would open up to the recognition of “certain families, such as polygamous or incestuous ones.” (*Oliari*, § 153).

To sum up, the ECJL invited the Court to qualify only those couples with biological children as family life and denied that the stability of a relationship could amount to a relevant criterion to frame a same-sex couple as a family. The recent jurisprudence of the Court in favour of lgbt claims was regarded as ideologically twisted and as threatening the very existence of democracy. On one hand, “if children stopped being at the heart of the family, then it would only be the concept of interpersonal relations which would subsist – an entirely individualistic notion” (Ivi, § 156); on the other hand, a State wanting to define “family” in contrast with ‘natural law’, and

aiming at accepting medically assisted procreation for female couples and surrogacy for male couples, would be a “totalitarian state” (Ivi, § 158).

In contrast with ECJL, judges reaffirmed the equal capacity of same-sex couples to enter into stable and committed relationships, and they referred to positive obligations connected to this issue, reiterating that “while the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8” (Ivi, § 159). This standpoint implies that the ECtHR reasoning might have a general effect and might set out positive binding obligations for all COE Parties.

The intertwining of statements on positive obligations and the general wording adopted to refer to the applicants’ claims, suggests that the ECtHR also focused on future cases, and that it did not disregard the possibility of offering a general interpretation of the Convention requiring the legal recognition of same-sex couples, under Article 8 ECHR.

Such an innovative cue was not unanimously shared, and concurring judge Mahoney, judge Tsotsoria, and judge Vehabovic opted for a “narrower reasoning” (Ivi, § 1), also stating there was “no need to assert that today Article 8 imposes on Italy [...] a positive obligation to provide same sex couples [...] within a specific legal framework providing for the recognition and protection of their unions” (ibidem). Most notably, concurring judges grounded their decision to the specific and peculiar Italian framework, namely to the fact that the “Italian State has chosen, through its highest Courts, notably the Constitutional Court, to declare that two people of the same sex living in stable cohabitation are invested [...] with a fundamental right to obtain juridical recognition [...]” (Ibidem). It was this “voluntary, active intervention” (Ibidem) by the Italian State into the sphere of Article 8 that attracted the application of the Convention’s guarantee of the right to respect for private and family life, “without there being any call to invoke the pre-existence of a positive Convention obligation” (Ibidem).

The majority of the Court, did not consider the judgment of the Italian Constitutional Court as prominent, while it extensively debated the damage caused to lgbt couples by actual legislative *vacuum*. Also the aforementioned contract of cohabitation was deemed insufficient to “provide for some basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship” (Ivi, § 169).

The Court also stressed the particular social, meaning of civil unions, accepting that an eventual recognition would “further bring a sense of legitimacy to same-sex couples.” (Ivi, § 174).

So, not only did the section on general principles, but also that concerning the application of theoretical principles to the fact at stake clearly set out substantial and comprehensive argu-

ments that deeply question the negative effects on lgbt private and family life due to the lack of adequate national legislation or to the State's failure to comply with its positive obligations.

The reference to the Constitutional Court, hence, seems quite accessory, suitable to further accentuate the inability of the Italian government to comply with an already existing positive obligation.

The different role assigned to the Italian judicial outcomes can be understood by focusing on the argumentative structure displayed by concurring judges and by the majority. In the former, the first paragraph defines Italian legislative and judicial peculiar frame as the "decisive" element of the forthcoming evaluation (*Oliari*, con.op. § 1); this premise is further reiterated in each and every paragraph, and it functions as the logical macrostructure which justifies and introduces the conclusions of concurring judges. On the contrary, though attaching relevance to the Constitutional Court judgment as well as to the decisions of lower domestic Courts, the majority directly recalls that judgment in the end of its review, and not in a preeminent position. In fact, the macrostructure which orients the ECtHR review does not refer to the duties imposed by the Italian judicial system on the Italian government, rather entailing the general evaluation of differential treatment between unmarried different-sex and same-sex couples. Hence, reference to the Italian Courts is functional to justifying the restriction of national margin of appreciation and to further legitimize the ECtHR perspective, but they do not shape the tenure of the final decision, taken at unanimity, that found a violation of Article 14 in conjunction with Article 8.

The ECtHR clearly disrupts the heteronormative notion of family life in its heaviest form, it departs from the arguments developed in *Vallianatos* but embraces more creative and activist ones. Yet, *Oliari* can't be considered as dismantling the privileges attached to heterosexuality. Amongst other claims, the applicants had also alleged a violation of Article 12, hence proposing again the same claim of *Schalk and Kopf*. While in respect to civil unions the ECtHR *de facto* overturned its previous decisions, in respect to marriage it stuck to the principle of caution, finding that "despite the gradual evolution of States on the matter the findings reached [...] remain pertinent. In consequence [...] Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple access to marriage" and it also considered the complaint under Article 14 as ill-founded in conjunction with Article 12 as well. The Court hence reinforced the qualitative uniqueness: of marriage: given the traditional values, beliefs, and meanings attached to this institution, the Court preferred not to modify it, as if its solemnity would be diminished if adapted to present conditions.

On this aspect the ECtHR adhered to a majoritarian perspective, while in respect to civil unions majoritarian tones are quite superficial. The Court recognized that a "thin majority" had

emerged on civil unions (Ivi, § 195); it further linked the final decision to the fact that “the Italian Government ha[d] failed to explicitly highlight what, in their view, corresponded to the interests of the community as a whole” (Ivi, § 196). This statement might be interpreted as being soaked with majoritarian tones: if, instead, the Government had proved that the Italian community as a whole was against the recognition of same-sex civil unions, the Court could have assessed the interest of the community in a different light. Hence, the direction of the outcome appears to be shaped by the already spread tolerant attitude towards gays and lesbians, and the ECtHR seems to ratify an already existing social environment. Whilst this reading may be grounded to some extent, it has to be pointed out that even if the Government had satisfied the burden of proof, still the Court would have probably found a violation, in light of the substantial and general principles outlined at the beginning of its own review. Therefore, I suggest that the structure of the arguments echoes majoritarian tones in order to justify the ECtHR reasoning, to emphasize its adherence to traditional doctrines of interpretation, and to prevent harsh criticism of policy-making.

Lastly, the private/public distinction is not really discussed neither in *Vallianatos* nor in *Oliari*, but, if ‘private’ is understood as synonym of ‘closet’, then the ECtHR does not endorse or support such framework arguing, on the contrary, in favour of the public visibility of lgbt couples, to the extent that positive obligations are imposed on national authorities. Same-sex couples are fully entitled to enter into the public arena, to claim rights on the ground of their relationship, and to demand their legal and public recognition. Still, they are not entitled to claim the right to marry under the ECHR. Hence, they deserve public relevance, but, at the same time, the regime of ‘separate but equal’ holds.

4.5.4 Conclusive Remarks

The various demands advanced through the cases addressed in this paragraph can be gathered under the claim of the legal recognition of same-sex relationships.

The demand of legal recognition also conveyed a symbolical claim, according to the already analyzed mutual influence between the social and legal realm: law bears legitimacy, meaning both that it grants certain people to legitimately claim a right, and that it defines certain pretences as legitimate to public opinion, thus favouring a change in attitude on the issue which has been amended.

The road that led to the most straightforward argumentative line, in *Schalk and Kopf*, in 2010, has been long and multifaceted, and from *M.W* onwards it displays certain features typical of strategic litigation. If the first complaints against UK immigration laws were mainly aimed at obtaining individual satisfaction and a permanent residence permit, then, the effort to consciously promote legal and policy change through judicial claims becomes increasingly relevant.

The involvement of third parties - most notably of Ilga-Europe- has gradually increased, and if in *M.W* the arguments displayed were relevant but quite casuistic, in *Oliari* Wintemute delivered a wide-ranging submission, which engaged in the ECtHR on the legal meaning of the Convention, on the relevant international legal and political trend, on the balance between majority and minority's claims, and on the theoretical value of same-sex couples.

In general terms, two main phases emerge: the first involves all complaints which argued that same-sex relations fell within family-life; the second departs from the essential finding that "a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of family life" (*Schalk and Kopf*, § 94), and questions the concrete effects and implications arising from such a statement. Both these lines consists of further phases: the first mainly comprises a bottom up approach, where the applicants, alone or assisted by national lgbt movements, tried to establish a comparison between heterosexual and homosexual couples on a limited collection of rights, whether concerning the succeeding in a tenancy or immigration laws. Hence, the claim does not directly call for legal recognition of gay and lesbian couples, but it demands the enjoyment of rights guaranteed to married or cohabiting heterosexual couples.

Therefore, judicial findings in *Karner, Kozak, P.B. and J.S* could be read as a creative disruption (Friedman 1975, 277), which prelude *Schalk and Kopf*, *Vallianatos*, *Oliari*, and to the cases concerning homo-parentality (par. 4.6).

The judicial opening the homosexual understanding of family life effectively brought major changes, since, on one hand, lgbt movements across Europe relevantly resorted to the ECtHR in order to stretch this notion to hold the right to same-sex marriage, and, on the other, the

Court found a theoretical base in human rights to dismantle all provisions which deliberately admitted a differentiated treatment on the ground of sexual orientation.

The ECtHR is aware of its creative potential, and it clearly masters the direction of the desegregation, most notably by restricting it to unmarried couples and by apparently upholding the 'separate but equal' solution.

As a consequence, in the second phase - which is still ongoing and whose outcomes are not easily foreseeable- the applicants and the third parties variously adjusted their strategy; even though the aim remained unchanged, the rhetoric and legal arguments were carefully planned within the frame established by the ECtHR case law, seeking to focus on the most progressive outcomes of the ECtHR, and to expand them. After *Schalk and Kopf* and *Vallianatos* the Court had reaffirmed national discretion in recognizing rights enshrined to the institution of marriage; therefore judges were keen on comparing same-sex and different-sex couples only where national laws already recognized civil unions, but provided different rights for homosexuals and heterosexuals, or where domestic provisions conferred this right to heterosexual unmarried couples only.

This approach could be criticized as flawed, since it precluded to a two-track Europe, in which judgments of the Court would have a real impact for homosexual citizens only in those Countries which already have overturned the dogma of intangibility of marriage, whereas the same judgments would just represent a pragmatic statement for Countries where parental and family rights are entirely anchored to wedlock.

However, *Oliari* marks a turning point, which gives effect to hints already implied in *Schalk and Kopf* and it adjust previous interpretive approaches on a more coherent track.

The ECtHR reasoning in *Oliari* to some extent reaffirms this suggestion, while, at the same time, it endorses a lgbt friendly interpretation of the ECHR. The perspective of marriage remains unchanged, and, hence, in a context where familiar and parental rights are entirely bound to wedlock, it's possible that the ECtHR would not interpret the ECHR as imposing positive obligation to provide civil unions. However, *Oliari* casts a different light on the Article 14 in conjunction with Article 8: certainly, the reiterated judgments of the Constitutional Court and of other domestic tribunals had legal relevance, but it's worth stressing that the Court upheld the applicant's claim even though Italy did not provide civil unions for heterosexual couples, as did Greece.

The majority also made a number of general statements, whereby it's possible to conclude that same-sex couples are entrusted with the right to be legally recognized by means of domestic partnership, which represent "the most appropriate way in which they could have their relationship legally recognized and which would guarantee them the relevant protection - in the form

of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance” (*Oliari*, § 147).

Hence, the only criticism that still stands concerns the enforcement of heterosexual marriage: it’s possible that the ECtHR will change its approach in the future, but, at the moment, judges prefer to gradually require the same rights granted to married couples from civil unions.

Moreover, if the Court follows the track of *Oliari*, its interpretation will probably evolve only to ratify an existing trend. Indeed, *Oliari* innovates the ECtHR jurisprudence in a context where the overwhelming majority of COE States already recognize civil unions or same-sex marriage, and its judgments appear innovative in respect to its own previous judgments, but not in respect to the European social and political context.

Considering the legal culture emerging from the cases addressed in this paragraph, quite a dynamic, still linear, trend emerges. By this, I refer to the fact that especially from 2002 onwards, the Court has been able to continuously innovate the interpretation of the same provisions, without displaying significant internal dissent.

Until *Karner* both the EComHR and the ECtHR had decided at unanimity; then, just as the ECtHR engaged in law-creation and activist role, a minoritarian dissent emerged. In *Karner*, *P.B. and J.S.*, *Vallianatos* and *Oliari* only one judge dissented, while *Kozak* the decision was at unanimity; *Schalk and Kopf* was the only case where the Court effectively displayed a high degree of internal conflict in respect of Article 14 in conjunction with Article 8, since the final decision was reached with a majority of four votes to three.

On a closer look, it can be noted that dissenting opinion recur when the Court embraces a certain interpretation for the first time: while in *Karner*, the dissenting judge labelled the case as not relevant, in *Kozak*, even though the personal situation of the applicant was far less linear, no doubts were cast on the fact that same-sex couples cohabiting in a *de facto* marital relationship had legal relevance under the ECHR. Therefore, the disagreement was not anchored on a clash of values, but rather on the priorities of the Court, on its timing, and on the most appropriate interpretive perspective. In fact, judge Grabenwarter did not negatively depict Mr. Karner, nor did he suggest that his claim undermined any fundamental tradition; on the contrary, he suggested that the case should be struck out, because the applicant was deceased, and he stressed that the ECtHR was not “a constitutional Court which decides on a case-by-case basis which cases it deems expedient to examine on the basis of a general criterion such as the one provided by the majority.” (*Karner*, dis op, § 3). Hence, the bifurcation of the Court was mainly on the admissibility of the case.

In *Schalk and Kopf* the disagreement revolved around a value-oriented bifurcation. Most notably, the opinion filed by judge Rozakis, judge Spielmann, and judge Jebens dissented both

against the consistency of the ECtHR reasoning and against the evaluation of substantial rights at hand. Minoritarian judges claimed that the final decision of the ECtHR did not logically derive from stated premises, since, on one hand, the Court had recognized same-sex cohabitation as a form of family life and, on the other, it denied that such findings had legal relevance. Moreover, whilst the majority precisely referred to the social and political frame to assess that the timing to claim same-sex marriage was wrong, dissenting judges held the view that “any absence of a legal framework offering them, at least to a certain extent, the same rights and the same benefits attached to marriage would need robust justification”, since at that time it was widely recognized and also accepted that same-sex couples enter into stable relationships. Another partially dissenting opinion was signed by judge Malinverni and judge Kovler, and it held that Article 12 necessarily excluded the marriage between two men or two women. In particular, the minoritarian perspective addressed an alleged inconsistency of the ECtHR, with the scope of the ECHR system, and with the appropriate doctrine to interpret it. In particular, the Vienna Convention was mentioned as the main reference point, and literal interpretation was deemed as the general and preeminent rule which would preclude to Article 12 from being construed as conferring the right to marry on people of the same sex. From such a standpoint, even the cautions opening to a positive future different reading of Article 12 would be inadmissible, since it would derive a right not included therein at the outset.

Disagreement over procedural aspects lie at the core of the powerful dissenting opinion filed in *Vallianatos*, where judge Pinto De Albuquerque contested the admissibility itself of the complaint. While the majority considered that Greek government neither intended nor was able to provide effective redress to the applicants, and hence admitted their case even though they had not exhausted domestic remedies, judge De Albuquerque took the opposing view. For the purposes of the present research, I consider it appropriate to focus on two points, namely the disagreement over the new procedures adopted by the ECtHR and over the possibility of identifying homosexual unmarried couples as a suspect category. As for the former issue, the clash between the majority and the dissenting judge mirrors the theoretical tension between the restrained and the activist vision of the ECHR, already described in chapter III. Judge De Albuquerque stressed the international role of the Court that is of a supra-national tribunal bound to respect national sovereignty and to apply the principle of subsidiarity whenever possible; by departing from the case at stake, he then sharply argued against the ECtHR recent trends, stating that

After pilot judgment procedures, and [...] so called quasi pilot judgments, the Grand Chamber has inaugurated a novel remedy [...] which posits a specific legislative solution to a social

problem that has allegedly not been solved by the national legislator [...]. The Court is no longer a mere negative legislator: it assumes the role of a supranational positive legislator which intervenes directly in the face of a supposed legislative omission by a State Party. (*Vallianatos*, dis. op., judge Pinto de Albuquerque)

The term 'legislative' recurs throughout the text, and it clearly aims at denouncing that the ECtHR is developing a jurisprudence contrary to the natural constraints of judiciary; whereas the majority opts for an activist solution in order to grant an effective response to the applicants, this opinion looks back at the ECHR as securing minimum standards.

As for the latter issue, the dissenting opinion gives rise to a bifurcation which points against the consistency of the present judgment with the ECtHR case-law. According to Article 34 applicants must fall into one of the categories of petitioners mentioned in the provision and must be able to make out a case that he/she is the victim of a violation of the Convention. According to the Court's established jurisprudence, the concept of "victim" has to be autonomously interpreted, and it protects not only the direct victim of the alleged violation, but also "any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end" (*Vallianatos*, § 47).

Against this background, judge De Albuquerque contended that only those under pain of criminal prosecution and those who are members of a class of suspect people, who risk being directly affected by the legislation, such as illegitimate children, Roma and Jewish people, would be able to file a complaint without being directly harmed. Even though the applicants argued to be belonging to a group based on an identifiable characteristic, historically discriminated against, and directly affected by the enacted Greek legislation, the dissenting judge considered their claim as lacking any justification.

Such a standpoint might be justified by two arguments: the first relies on a restrained interpretation of the ECHR, whereby the Court should refrain from creating law or expanding its power of judicial review; the second might speculate over a personal evaluation of the claims advanced. Since in the wording the judge does not express any sort of empathy or understanding towards the applicants, I would suggest that both perspectives concur to shape his final opinion.

As confirmed in *Oliari*, however, this minoritarian view did not gather much consensus and the ECtHR does not consider the legal recognition of same-sex civil unions as a problematic issue anymore.

In conclusion, the ECtHR restricted the realm addressed by the applicants and reiterated the power of the law to legitimise and discipline kinships, crystallizing some differences and assuming them as relevant to justify differential treatment.

If the institution of marriage and the reformist agenda of strategic litigation is questioned from a radical perspective, the ECtHR reasoning raises even more doubt, in that it emphasizes the power of the law in deciding what should be recognized as valuable, and in continuous quandaries about kinship which condition and limit judicial approach (Butler 2002, 16).

4.6. Homosexuality and Parenthood

Is homosexuality compatible with parenthood? Is it legitimate to restrict the rights of one parent because he or she is homosexual? Are homosexuals and heterosexuals in a similar condition for the purposes of adoption procedures? Does the concept of ‘family life’ recognized to same-sex couples also include the right to be parents? Which rights should be granted to the so-called care-giver or social parents within the frame of a same-sex relationship?

These questions have been raised before the ECtHR several times and they fully address one of the most debated themes related to family.

Surely, if these claims had been raised in the 1950s, the answer would have been completely negative, from both judicial Courts and legislative assemblies.

Not only were homosexuals assumed to be harmful for minors, but also the dominant model of family was still anchored to traditional grounds and values. I do not dwell further on the transformations of the idea of family in Western society, since it would require in itself an entire thesis, but I wish to emphasize that heteronormativity cast off the acceptability of gay and lesbian parents, just in the same manner whereby it disqualified unmarried and single mothers/fathers or step-families.

In the second half of the XX century European society gradually evolved, and so did the law, laying the foundations for the actual fragmented, multifaceted, and definitely not univocal socio-legal notion of family. In particular, divorce spreading in all European Countries broke the bound of monogamous, life-lasting, heterosexual relationship as the only socially legitimate and legally recognized tie between men and women. Divorced parents began to form new families, where children established a social and affective relationship with their new parent’s partner, and with their eventual half-siblings. Therefore, the severing of the indissolubility of marriage led to the severing of the indissolubility of the filiation (Pocar and Ronfani, 2008: 224); a gradual change occurred in social and legal culture, and the minor’s best interest became decisive to determine with whom a child should grow up, thus giving less importance to the ‘stability’ of the traditional model of family.

Most notably, as Ronfani notes, the notion of child’s best interest and the growth of new familiar structures, oblige to “dissociare in tre questioni ciò che prima ne costituiva una sola [...]: la questione della coppia, quella della famiglia e quella della filiazione” (Ibidem).

Moreover, thanks to the decriminalization of homosexuality, to the strengthening of the lgbt movement, to the increased social tolerance, and to policies aimed at tackling homophobia, the number of parents who decided to live their sexuality openly increased; if during the 1970s and 1980s parenthood was mainly issued in the lesbian movement only, later it gained primary rele-

vance also within the gay reformist movement. Unlike the claim of same-sex marriage, parenthood is somehow declined even according to queer perspective, in that radical trends suggest that the rethinking of parental roles in light of a fluid sexuality might dismantle the existing social structures. I refer here to the constructivist queer approach, which endorses an immanent critical effort devoted to realizing sexual liberation from normative structures that shape legal, political, cultural, and cognitive relations in our societies. While anti-social queers generally focus on nihilist stances, on internal dynamics within the lgbt community, casting off demands to public authorities, constructivist queers produce a compelling theoretical reflection which can effectively ground legal and judicial strategies as well. Butler, for instance, reappraises the distinction between concepts of family and kinship and she emphasizes the latter's subversive potential, for both theoretical and legal purposes (Butler 2002, 14). I suggest that by departing from her reflection it is possible to identify both a specific meaning of heteronormativity, which is specifically applied when minors are involved, and a critical perspective whereby evaluating the applicants and the ECtHR's reasoning.

While the existence of marriage unavoidably depends on the recognition and regulation of the State, that kinships stems from social and interpersonal practices, and it accounts for the complexity, the fluidity, and the heterogeneity of sexual and affective forms established by non-heterosexual people. As Butler notes, "a number of kinship relations exist and [...] do not conform to the nuclear family model and [...] draw on non-biological relations, exceeding the reach of current juridical conceptions, functioning according to non formalizable rules" (Ivi, 15); these kinship frames pervade every aspect of human life, negotiating "the reproduction of life, the demands of death", addressing the fundamental forms of "human dependency, which may include birth, child-rearing, emotional dependency and support, generational ties, illness, dying and death" (Ibidem).

Even though the intervention of the law always conveys the risk of disciplinary and normalizing practices, when kinships are concerned a critical political movement can promote the legal protection of new emerging social assets.

The theoretical premise of such perspective addresses the significance attributed to the State; from a queer perspective, the State "can be worked, exploited" (Ivi, 27), while policy agenda and judicial arena can challenge law, and push Courts to adjudicate and recognize new kinships as legitimate.

To the extent that the law is considered the function to providing individuals with the opportunity and rights to settle their kinships as they please, judicial litigation may also pursue radical goals. To the extent that legal and judicial institutions cope with social complexity, foster the

flourishing of new kinships, do not subordinate the enjoyment of rights to normative and normalizing constraints, law can grasp and secure life's complexities.

In more detail, most controversial questions linked to non-heterosexual, or rather not heteronormative, kinships entail, for instance, the politics of international adoption and donor insemination, families in which relations of filiation are not based on biology. Among the "salutary consequences" which judicial decisions might reach, Butler recalls the breakdown of traditional symbolic order, since "kinship ties that bind persons to one another may well or may not be based on enduring or exclusive sexual relations, and may well consist of ex-lovers, non-lovers, friends, community members" (Ibidem).

Hence, the law should recognize the multiple and unconventionally affective trajectories which mark the affective map of a growing number of minors.

The ECHR system, as far as being malleable and open to judicial creativity, it is however bound to doctrines of interpretation which do not encourage a radical role; however, I suggest that, on one hand, the applicants could frame their case by positively evaluating their difference and, hence, by claiming that judges should secure existing kinships and not only those kinships that do conform to heterosexual models already legally recognized. On the other hand, judicial reasoning can be scrutinized to determine whether the ECtHR's interpretive standpoint seems open to the acceptance of the aforementioned not predetermined notion of family.

This perspective is relevant because it allows for the study of the intertwining between heteronormativity and the dilemma of difference, showing that the disruption of the former does not necessarily lead to a positive evaluation of the latter.

Traditional heteronormative model's of family presumes the cohabitation of two parents with their biological or adopted children. As previously recalled, this paradigm has been disrupted by many changes in family patterns; the notion of social parenthood, the techniques of assisted heterologous reproduction, and the practice of surrogacy - just to mention the most relevant - have impacted on the image of parenthood, and have led to the possibility of having a child without necessarily abiding to the nuclear and monogamous image of couple.

According to the radical perspective, the legal reforms introduced to keep up with these changes may have altered all the premises of the traditional family, but one: even in the actual same-sex families by choice¹⁴⁶ it is generally assumed that there can be only two parents which, regard-

¹⁴⁶ I recall here the famous slogan firstly adopted by US gay and lesbian couples who from the mid-1980s were "recasting close friends as kin" (Weston 1997, xiv). The first pioneering essay which extensively accounted for this phenomenon is Weston's *Families We Choose*, published in 1990 and soon become a reference point in the academic literature on LGBT families. Most notably, the ways gays and lesbians

less of their biological bond with the child, are supposed to live in a nuclear, monogamous, and committed relationship. As such, outside the couple, those who are involved in the surrogacy and may play a relevant role in the child's upbringing, or those who are daily involved in parental tasks, remain without voice and without rights. Under these premises, the heterosexual meaning of traditional family is disrupted, but the differences introduced by these new relational patterns are not legally evaluated; according to this critique, same-sex partners would be entitled to parental rights only insofar their conduct can be assimilated to that of traditional heterosexual parents.

It follows that the law evaluates any distance from the unstated normality as negative, even if it were proved that such an environment was very positive and healthy for the child. If the core aim of family law is to assess the child's best interest, it may be argued that, insofar as they play a relevant and continuous role in the child's life, the recognition of kinships different from nuclear families might really answer the idea of a child-oriented law.

It might be critically observed that the ECtHR is seized by same-sex couples and homosexual individuals and since judicial review is limited by the text of the ECHR, the ECtHR is not the appropriate arena where to discuss the normative features still embedded in the model of family.

While it is undoubtedly true that the Court mainly addresses pretences of assimilation, there is one case, thoroughly investigated in the next paragraphs, where judges were provided with the opportunity to detach from the aforementioned image of family (see paragraph 4.6.3).

While national debates are mostly focused on joint adoption and on the acceptance of medically assisted procreation for same-sex couples, the Court has not yet had the opportunity to review similar issues, delivering however landmark judgment which granted lgbt parents a variable degree of protection under the human rights law.

On this respect, three groups have emerged: the first takes into account the claims raised by homosexual biological parents; the second is concerned with the alleged discrimination against homosexual individuals who wished to adopt, in a context where singles were allowed to adopt;

structured their families, the new kinships and relations they were establishing, the social and economic constraints that were burdening them, and she tried to explain the shift of paradigm which led gay and lesbian movement to publicly uphold the necessity to include family issues in their agenda. Over the years, this expression has become common in public discourses on lgbt families and it generally aims at emphasizing that, independently from State's recognition, gay and lesbians *have* families, that they experiment and explore new kinship and that, both by resisting and by enduring homophobe dynamics socially spread, they are already active subjects of their lives and not passive objects of others' prejudice..

the third addresses the multifaceted issues related to social parenthood and second-parent adoption.

The caseload is quite limited, but relevant from a qualitative point of view. The covered temporal arch goes from 1989 to 2013, even though in certain periods there is a significant gap: after *Kerkhoven and Heinke v the Netherlands*, (dec) 15666/89, the ECtHR had to decide on parental rights only after eleven years, in *Salguiero de Silva Mouta v Portugal*, n. 33290/96, and *Craig v the UK*, n. 45396/99. Subsequently, *Fretté v France*, n. 36515/97, and *E.B. v France*, n. 43546/02, were decided in 2002 and 2008, respectively, while the *Gas and Dubois v France*, n. 25951/07, and *X and others v Austria*, n.19010/07, date to 2012 and 2013.

It is however extremely probable that in the near future the Court will be called to debate the issue again, with much more frequency; whereas in the past years the main goals of the lgbt movements were focused on individual rights, first, and on couple rights, then, one crucial border which marks the privilege attached to heterosexuality concerns the restrictions of the right to adopt or to access assisted medical procreation, and parental rights are considered essential by the international and domestic lgbt movement.

The undisputed theoretical and legal reference point is the child's best interest, and this notion recurs throughout all decisions and judgments; in this respect, a similarity can be drawn with the jurisprudence on the age of consent. In both cases, it is claimed that homosexuality does not harm minors, whether they wish to engage in homosexual activities or they live with same-sex parents. When dealing with minors, international and domestic jurisprudence generally resort to the well-known principle of precaution, and it is, thus, presumable that the judges will be more restrained in opening up to new and unseen scenarios. On the age of consent the Court, effectively, admitted that a differentiated threshold for gays and heterosexuals was discriminatory only when the majority of COE Countries already provided an equal age and when the overwhelming majority of scientific evidence demonstrated that minors would not have been harmed.

It is generally deemed that the child's best interest is to live in a safe environment, where her concrete needs are satisfied and where she is able to learn a valuable way of life.

Hence, personal qualities and economic possibilities are certainly extremely important but, let alone, they could not suffice to deem a person adequate to adopt; in fact, one argument against same-sex parenthood suggests that even though gays and lesbians are able to provide a safe, comfortable, loving environment to the child, still their homosexuality would have detrimental effects on her psychological development, for instance by impairing her sexuality.

Therefore, the issues related to homosexual parenthood not only contend that it is possible to be good parents regardless of sexual orientation, but also that both homosexual single parents

and same-sex couples are able to foster a valuable way of life, to convey the essential values of our society.

Same-sex adoption and the protection of homosexual parents' rights not only dismantled the heteronormative and binary model of different-sex parents but also support the equal value of lgbt people and couples, enhancing the full enforcement of the principle of equality.

As extensively explored in forthcoming sections, this argument has been variously raised before the ECtHR, with fluctuating outcomes.

4.6.1 Homosexual Parents and the ECtHR

In this section I analyze the ECtHR reasoning on the human rights secured by the ECHR to lgbt parents; with reference to the above mentioned repartition, here the separation between the couple realm and the family realm is addressed, but not the distinction between the family and the filiation realm, since all the applicants are biologically tied to the child.

Both in *Salgueiro De Silva Mouta v Portugal* and *J.M. v UK*, the applicants had been previously married and in that context they had had a child; after divorcing and openly living their sexual orientation, however, they alleged that their parental rights had been impaired and denounced a discriminatory treatment.

Salgueiro is the first case on the matter that passed the gatekeeping decision of the EComHR, and that was also upheld by the ECtHR.

This judgment dates to 1999, the same period when the ECtHR tuned its anti-discriminatory approach on issues related to homosexual soldiers, also affecting the Court's perspective on this case. In order to contextualize and critically analyze the ECtHR review it's necessary to briefly detail the facts and to recall the arguments displayed by both parties.

After divorcing his daughter's mother to move in with a same-sex partner, Salgueiro signed an agreement with C.D.S., his ex-wife, where the parental responsibility was awarded to the latter while he maintained the right to have contact. However, Salgueiro was not able to exercise this right, because C.D.S. did not comply with the agreement. Consequently, the applicant sought an order giving him parent's responsibility, while C.D.S. accused Salgueiro's partner of sexually abusing the child.

The Lisbon Family Affairs Court upheld the applicant's compliant and, relying on the opinion of psychologists and psychiatrists, dismissed the mother's accusation as ill-founded and prompted by others to the child, which at that time was aged 6.

After a few months, however, the mother abducted M. and appealed against the Family Affairs Court's judgment to the Lisbon Court of Appeal, which finally reversed the lower Court's judgment. In particular, judges maintained that a child needs the care which "only the mother's love can provide" (Ivi, 14), and that even though "there is ample evidence [...] that the appellant habitually breathes the agreements entered into by her regard to the father's right to contact [...] her conduct is due not only to the applicant's lifestyle, but also to the fact that she believed the indecent episode related by the child, implicating the father's partner" (Ibidem). Furthermore, the Lisbon Court resorted to the principle of precaution and produced a wording which did not hide or conceal the Court's negative opinion of the applicant's homosexuality. In fact, despite the experts' unanimous opinion, the Lisbon Court evaluated "cannot rule out the possibility

that it [the sexual abuse] did occur. It would be going to far [...] to assert that the boyfriend of M's father would never be capable of the slightest indecency towards M." (Ibidem). Finally, judges also stated that Salgueiro and his partner did not provide the healthiest environment for a child's psychological, social and mental development further commenting that "the child should live in a family environment, a traditional Portuguese family [...]. It is not our task here to determine whether homosexuality is or is not an illness or whether it is sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations; such are the dictates of human nature." (Ibidem).

Before the ECtHR the applicant alleged a violation of Article 14 in conjunction with Article 8, and accused the Portuguese authorities of denying him his parental rights, on the grounds of his sexual orientation.

Neither international national lgbt organizations filed third opinions, nor did they appear involved in shaping the applicant's reasoning.

He argued that the paramount interest of her daughter was to live with him, while the Lisbon Court of Appeal's had only reinforced "atavistic misconceptions" (Ivi, § 24). The respondent Government, instead, proposed a restrained and quite striking reading of Article 8, alleging that the applicant's right to respect for his private life prevented public authorities only from interfering with his right to freely express and develop his personality. The decision of the Lisbon Court, moreover, had to be read in light of the child's best interest and of all the circumstance of the case.

The Court reached an innovative outcome, reviewing substantially the decisions of both domestic Courts; the wording and the scheme of the reasoning line suggest a begrudged attitude against the applicant, but I argue that certain rhetoric devices are mainly useful to justify the Court's reasoning and to balance its review with the respect for national sovereignty.

As for the arguments displayed, the Court observed that whilst Lisbon Family Affairs Court had not mentioned the applicant's homosexuality in deciding M's custody, the Court of Appeal had introduced a new factor, namely that he was homosexual and lived with another man. Therefore, the ECtHR described itself as "forced to conclude" (Ivi, § 28) that a different treatment based on sexual orientation had occurred, and it considered that the final judgment depended on the legitimacy of the aim pursued and on the proportionality of the means applied by the Court of Appeal's judgment.

The ECtHR did not dispute the intentions of the Court of Appeal, but it found the decision exceeding the necessary proportionality and endorsing discrimination in contrast with the ECHR. Most notably, the wording of the Court of the Appeal clearly expressed prejudice against the applicant, and homosexuality played a central role in the final decision: not only was the father

depicted as abnormal and his partner as a potential paedophile, but the Court of Appeal also made it clear that, when in contact with the child, “it should be impressed upon the father that he would be ill-advised to act in any way that would make his daughter realize that her father is living with another man in conditions resembling those of man and wife” (Ivi, § 14).

Consequently, the ECtHR reiterated that it was “forced to find” (Ivi, § 36) that the Court of Appeal had made a distinction which was not acceptable under the ECHR.

I deliberately quoted the expressions “forced to conclude” and “forced to find” because in no other analyzed judgment did the Court adopt such expressions, almost as if it were reproaching Portuguese authorities not really for the substantial decision, but for the openly discriminatory and biased language adopted, somehow suggesting that had national Courts adopted a neutral wording, the final review could have been different.

However, at least two elements shed different light on the ECtHR reasoning: firstly, the Court disagreed with the Court of Appeal, dismissing the image of homosexuality as a potential illness as biased. Therefore, the ECtHR challenged the idea of LGBT people as abnormal also in connection with parental rights: if in previous cases the Court had recognized rights connected with their personal life to LGBT subjects, here the core issue involved a third, vulnerable, party. Hence, if the Court had really endorsed a begrudging perspective, it would have recalled the principle of precaution, which instead is not even mentioned. Another realm which provided some space of manoeuvre related to the alleged sexual violence by Salgueiro’s partner.

Despite the opinion of psychologists, the ECtHR could have made a similar reasoning to that endorsed in *X v UK* on the age of consent, where regardless of recent scientific findings, the EComHR granted national authorities with wide discretion. Given the controversial nature of the alleged violence, the Court could have reviewed the final decision of the Court of Appeal as legitimate. The fact that the ECtHR, at unanimity, did not attach any relevance to the alleged violence, fully endorsing the lower Court and of experts, is extremely valuable, for it reinforces the image of a Court not biased against gay men, which reveals an innovative perspective behind the veil of cautious expressions.

In 2010, the ECtHR decided another case dealing with a claim raised by a biological homosexual parent who alleged to be suffering from discriminatory treatment. Ms. J.M. was a lesbian mother of two children, who lived with her female partner. Parental custody had been awarded to the father and she was declared ‘non resident parent’. Under UK Child Support Act 1991 the parent who does not have the primary care of the children is required to pay for child maintenance, but, the amount of this support is reduced when the absent parent enters into a new relationship, whether she also decides to marry or not.

At first reading this rule seems counterintuitive, but, on a closer look, it bears a stereotyped image of family; as it has been pointed out (Timmer, 2010), the implicit rationale is twofold. Firstly, after divorce, children are generally presumed to stay with their mother, while their father pays for support, and effectively in most cases the agreement went this way. Secondly, it is assumed that when the father enters a new relationship, he has to financially support his new partner, and their eventual new children. Despite the neutral wording, this Act effectively recalls the classic male-breadwinner family, with a clear division of roles, and echoes the primary role of the mother in the upbringing of the children.

In this case the roles were reversed, and national Courts dismissed the applicant's request to reduce her financial support, since she was living in a stable relationship with a same-sex partner, stating the aforementioned Act did not apply to same-sex relationship.

The ECtHR quite predictably found a violation, but it did not frame the complaint under Article 8, rather raising Article 1 of Protocol 1, concerning private property.

This case dates to 2010, when the Court was gradually affirming that same-sex relationships fell within family life; hence, this standpoint could be justified by the aim not to lay the foundations for attracting parental rights within the ambit of a same-sex relationship.

The Equality and Human Rights Commission, intervened as a third party, extensively exploring the different perspectives whereby UK authorities would have violated Article 8; most notably, the Commission framed the claim as a strategic step in the strengthening and widening of the ECtHR jurisprudence on same-sex 'family life'. In fact, it "urged" the Court [...] to accept in principle that a same-sex relationship is no less capable of constituting family life than a heterosexual relationship" (Ivi, § 44).

Despite these demanding urges, the Court refused to assess whether the claim fell within the ambit of Article 8, and in that case, if it entailed private or family life, laconically stating that the "natural" frame of J.M.'s complaint was Article 1 of Protocol 1, since the object at stake inhaled to the State's interference with a possession of hers.

The startling effect of this standpoint is confirmed by eminent sources: three judges filed a concurring opinion where, though agreeing with the majority on the final outcome, they highlighted that J.M. offered a "good opportunity to contribute to the emerging change in our case law [after Schalk and Kopf]. Regrettably, the majority chose to avoid taking a clear position" (Ivi, con. op.), further cautioning the risks implied by a too restrained approach: "judicial self-restraint is often a virtue, but not in cases in which Courts should admit their own mistakes. [...] In any case, we should not have refrained from unequivocal confirmation that today, in 2010, the notion of family life can no longer be restricted to heterosexual couples alone" (Ibidem).

While in *Salgueiro* the Court significantly detached from a heteronormative notion of family and parenthood, endorsing the claim of a gay man who was cohabiting with a same-sex partner, in *J.M.* the reasoning appears far more entangled, as if the majority wished to restrict and delimit the innovative effects of *Schalk and Kopf* and *P.B. and J.S.* judgments.

Although parental rights are part of family life, which inheres to the private realm, in *Salgueiro* the Court takes a further step in detaching from the stereotype of the closet: the Court of Lisbon had indeed cautioned the applicant to conceal his same-sex relationship while being with his daughter, hence suggesting him to hide his sexual orientation. The ECtHR made no reference to the desirability of such conduct, neither directly nor indirectly suggesting a discreet lifestyle.

Therefore, the ECtHR clarified that it does not take being heterosexual or in the closet, to be a good parent.

4.6.2 Homosexuality and the Right to Adopt

The ECtHR case-law on the right of LGBT people to adopt is restricted to two complaints, which insist on the same legislation and which provide the opportunity to compare the reasoning displayed. In *Fretté v France*, n. 36515/97, and *E.B. v France*, n. 43546/02, the applicants had been refused the authorization to adopt, and they alleged a discriminatory treatment on the grounds of their homosexuality.

The pronouncements date back respectively to 2002 and 2008, and since at that time the Court had not yet framed homosexual relationships as family life, the applicants relied on the concept of private life, hence contending that a negative evaluation of one's ability to adopt infringed on her essential ambit of private life. Before delving further into the applicants' claims and in the ECtHR's reasoning, I briefly recall French legislation; under Article 343 of the Civil Code, section 1 read "adoption may be also applied for by any person over twenty-eight years of age" (*Fretté*, § 17); single persons were thus allowed to adopt and, as such, the binary model of parenthood had been formally overturned. In practical terms, however, social services were entitled to take into account multiple factors, among which the general lifestyle of the applicant and her ability to provide other reference figures; under such labels it was possible to concretely dismiss those who were deemed as not fitting to an alleged normal and desirable model as being inaccurate.

Both Mr. Fretté and Ms. E.B. had been positively evaluated, and social services had emphasized their subjective qualities; in the former case social services concluded "Mr Fretté has undoubted personal qualities and an aptitude for bringing up children. A child would probably be happy with him" (*Ibidem*). Many qualities were also recognized to Ms. E.B. and she was depicted as "enthusiastic and warm-hearted and come across as very protective of others." (*E.B.*, § 12).

The first difference between the applicants concerned their kinships: while Mr. Fretté was single, living alone, even though surrounded by friends and he also had a female friend who expressed the wish to play a role in the eventual child's rearing, Ms. E.B.'s condition was more blurred, in that she cohabited with a female partner but they did not consider themselves as a couple nor did her partner express the will to have a continuous and primary role in the child's life.

Ms. E.B. also referred to her social broad environment, contending the positive value of social parenthood and upholding an enlarged notion of family; she indeed proposed to "provide a future adopted child with a father figure in the person of her own father and her brother-in-law"

also emphasizing that “the child will be able to choose a surrogate father in his or her environment (a friend’s relatives, a teacher, or a male friend...)” (*E.B.*, § 10).

However, the final decision was against both their applications, and they were judged as not being adequate to adopt. Mr. Fretté was dismissed on the grounds that he offered no stable maternal models and that he might experience difficulties in envisaging the practical consequences caused by the arrival of a child; Ms. E.B. was instead considered as inadequate because she did not offer a stable paternal model and because the relationship with her partner was unclear, a situation that could harm a future child.

The ECtHR was then called to ascertain whether the applicants had been discriminated against on the grounds of their sexual orientation, and it delivered two different judgments.

In *Fretté* the Court held that even though national authorities had decided exclusively on the grounds of the applicant’s homosexuality (*Fretté*, § 39), the decision had to be considered proportionate and objectively aimed at securing the legitimate interest of a possible child.

It was not disputed, then, the existence of a difference in treatment, nor the applicant’s situation was framed as not comparable to that of a single heterosexual; on the contrary, the majority reviewed the facts in light of Article 14 in conjunction with Article 8, but it concluded that national authorities had not exceeded their margin of appreciation.

To my frame, this judgment presumed both a heteronormative understanding of family and a negative evaluation of differences.

The Court recalled the international scientific opinion in order to assess the suitability of homosexuals to adopt; as extensively explored, the appeal to scientific argument is quite recurrent when minors are at stake and it helps to clarify the Court’s perspective laid down in *Salguiero*. In that judgment the Court had not restricted the applicant’s rights by mentioning the potential detrimental effect of his homosexuality; hence, one could presume that the Court would not recall the principle of precaution neither in *Fretté*. However, in the former case the ECtHR had decided so because the child had already established a relationship with the applicant, and a different outcome would have harmed her; in *Fretté* instead no child was effectively implied and the Court assessed that only those who could offer the child the most suitable home in every respect should be chosen to adopt.

At this regard, the ECtHR’s legal culture on homosexual parenthood is shaped by two, distinct, unstated evaluations, which do intersect. The first is related to sexual orientation, and it questions whether homosexual individuals or couples are capable of nurturing a child, to ensure her an environment as adequate and loving as possible, and to properly address her cognitive, psychological, and relational needs; the second, instead, depends on the model of parenthood to which judges, even implicitly, refer, and it is shaped by how they understand the notion of nor-

mal development. In fact, as Hodson highlights (2011, 5), it is possible to define the normal and healthy development of a child not only in regards to her subjective and specific needs, but also in consideration of what it is commonly assumed to be the proper and average model of life. To sum up, paraphrasing the words of French authorities in *Fretté*, it is perfectly possible to recognize a homosexual person the personal qualities and the aptitude for bringing up children, it is even feasible to admit that a child would be probably happy and fulfilled with this person while, at the same time, arguing that it's better to deny him the possibility of adopting on the grounds that his lifestyle would result as being too unconventional for a child.

Therefore, the knot to solve revolves around whether a single homosexual person could be a good parent and whether it is appropriate to permit him to establish a relationship with a child; “the scientific community is divided over the possible consequence of a child being adopted by one or more homosexual parents”, the Court observed, also adding that no conclusion could be assessed given “the limited number of scientific studies conducted on the subject” (Ivi, § 42).

The Court resorted to the principle of precaution and, implicitly, it assumed that until proven otherwise homosexuals should be regarded as not being adequate to adopt.

Once more homosexuality was considered under a majoritarian and prejudiced frame, as an abnormal and problematic feature, which deviated from the normal *status quo* and, hence, could harm children.

The pejorative depiction of homosexuality emerges from another passage, where the Court bluntly considered that “there are not enough children to adopt to satisfy the demand” (Ibidem), in order to justify French concrete preference for heterosexual couples. Unless a family based on the traditional monogamous relationship is considered as the best option for a child, such a statement would make no sense, for it would be unclear why homosexual singles should be accounted as being the second choice.

A different perspective was developed by judge Bratza, judge Furthmann, and judge Tulkens; they indeed dissented with the majority and emphasized how the Court's departing assumption endorsed discriminatory treatment and how the reference to the child's best interest was actually used to cover a biased attitude against same-sex persons.

Given that French law authorized single persons to apply for adoption, if all those who could not provide a parental model of different-sex were excluded, the effective enjoyment of that right would have been completely disregarded.

Dissenting judges remarked that the majority had shared such a premise but that after a few paragraphs it had nevertheless voted against finding a violation; besides criticizing the majority's judgment as loose and flawed, dissenting judges also expressed concern related to the wider European socio-legal context, by noting that “in a time when all countries of the Council of Europe

are engaged in a determined attempt to counter all forms of prejudice and discrimination, we regret that we cannot agree with the majority” (Ibidem).

In the minoritarian opinion no principle of precaution applied, and, as such, dissenting judges did not consider homosexuals as posing more problems than heterosexuals.

The ECtHR overturned *Fretté* in *E.B.* and, although it contended that the latter case was significantly different from the former, the final reasoning contradicted several hints underpinned in *Fretté*. Firstly, scientific consensus was not even mentioned, and the entire reasoning revolved around the principle of discrimination; secondly, even though national authorities had described the applicant as problematic even in relation to issues not necessarily linked to her homosexuality, the Court considered that French social services had been biased against Ms. E.B.; thirdly, it’s also interesting to note that the minoritarian opinion filed in *Fretté* strongly shaped *E.B.* judgment, hence demonstrating the dynamic internal relation among different conceptions of the ECHR.

The psychologist who had examined the applicant had indeed recommended the refusal of the authorization, alleging that Ms. E.B. was “seeking to avoid the violence of giving birth and genetic anxiety regarding biological child”, that she idealized and underestimated the difficulties connected to providing one with a home, and that she “fantasised about being able to fully amend a child’s past” (*E.B.*, § 11).

Besides the lack of a paternal model, the psychologist negatively considered the relationship between E.B. and her partner, since the latter did not appear to be a party to the plan.

However, the Court read such a statement in the context of a broad hostile evaluation of Ms E.B.’s homosexuality, arguing that the manner in which certain opinions were expressed was “revealing in that the applicant’s homosexuality was a determining factor” (Ivi, § 85).

The ECtHR acknowledged that it was perfectly normal that French authorities scrutinized the relationship between Ms. E.B. and R., but it also did not consider their relationship as a relevant negative element, to the extent that the Court did not address this point at any length in the review. On the contrary, the interpretation of the ECHR was entirely devoted to ensuring an effective enforcement of the principle of non-discrimination, which reappraised *Fretté* minoritarian perspective; national authorities were free to choose whether singles could apply for the authorization to adopt but, in that event, they were bound by the ECHR to enforce such policies by abiding to the principle of equality and non-discrimination.

The ECtHR’s approach was hence quite straightforward and it was extremely different from the confused and contradicting judgment laid down in *Fretté*; to my reading, this case conveyed an interpretation of parental relations moulded on the idea of kinship described by Butler, and on the assumption that even non heterosexual persons, who do not fit into the traditional catego-

ries, are able to be good parents. Had the Court wished to apply the principle of precaution, it would have probably evaluated the role of R. from another perspective; even though French law enabled singles to adopt, the Court could have considered Ms E.B. relational environment as significant and it could have concluded that national authorities had not decided on the solely grounds of her homosexuality. Seven judges effectively upheld such a perspective and they contended that French social services had just acted to secure the child's best interest.

Therefore, not only did the ECtHR reaffirm that if the law admitted singles to adopt, these could not be excluded on the grounds that either they did not provide another parental figure, of different sex, or that they were homosexual, but it also implied that even though a kinship did not fall within traditional and conventional categories, it could nevertheless provide a safe environment for a child.

Before evaluating the ECtHR's reasoning as for the binary public/private, I wish to compare the ECtHR's approach to these two cases in light of the applicants' biological gender.

A closer analysis of these judgments raises the doubt that the ECtHR did not uphold Mr. Fretté's claim because, as a homosexual male, he was filtered through the stereotype whereby men would be unable to be single fathers. To support this statement, it's necessary to recall how the ECtHR dealt with the submissions of French authorities; social services had negatively noted that Mr. Fretté had realized how unsuitable his flat was for a child only when they had visited his house, but they admitted that he had stated to be considering the possibility of moving (*Fretté*, § 10). As the ECtHR acknowledged, the main reason for denying him the authorization was his homosexuality coupled with the fact that he was single. In light of these submissions, one could reasonably presume that the ECtHR might want to substantially discuss such statements while, instead, the majority approached the issue by both endorsing his alleged practical incapacity - as if he had not expressed the intention to move in to another flat- and by questioning whether homosexual single men should be entrusted to adopt.

As far as criticisable, this reasoning-line set a clear path: the ECtHR, in light of the current scientific studies available and considering the lack of political consensus on the matter, considered it legitimate to deny a person the authorization to adopt precisely on the grounds of his sexual orientation.

Against this background, it would have been reasonable to find the same approach in *E.B.*, given that, as the Court noted, the case concerned "the question of how an application for authorisation to adopt submitted by a homosexual single person is dealt with" (*E.B.*, § 71), and given that also some elements of Ms. E.B.'s personal life were judged as inappropriate. Instead, the ECtHR did not even refer to the divided scientific community, nor did it take into account the lack of a consensus among COE Countries.

As such, despite appearing comparable on several aspects, there has to be some peculiarities which divide these two cases, so as to justify such a significantly diverse review.

To my reading, the answer might lie in the unstated and undiscussed prejudice whereby a single man, especially if homosexual, is deemed as not being able to properly comply with the task of caregiving, whereas a woman, even though living in a unclear lesbian relationship, would however be equipped with the necessary resources to be a mother. As such, the comparison between *Fretté* and *E.B.* would provide a relevant example of the dynamics described with reference to Minow's theory: the perspective adduced by Mr. Fretté remained ignored and, despite his efforts to comply with social services' requests, the ECtHR understood his case by filtering him through the interpretive and cognitive stereotype of the gay man, whose request to adopt deserved to be regarded with suspect and caution, at the very least.

Both *Fretté* and *E.B.*, however, are problematical as far as the division between private and public is concerned, since the Court framed the complaint through the lens of private life, denying that their case fell under that of family life: whereas in *Fretté* judges did not even discuss the reason for such an approach, in *E.B.* they denied that the claim to apply for the authorization to adopt amounted to the attempt to create a familiar relationship with a child. According to the majority the notion of family life presupposes the existence of family, it does not secure the right to create a family or to adopt; at least it requires the "potential relationship between [...] a child born out of wedlock and his or her natural father, or the relationship that arises from a genuine marriage, if family life has not yet been fully established, or the relationship that arises from a lawful and genuine adoption" (*E.B.*, § 41). As such, the situation of Ms. E.B. had to be considered under private life, insofar as it encompassed "the right to establish and develop relationships with other human beings, the right to personal development, or the right to self-determination as such, [...] gender identification, sexual orientation and sexual life" (Ivi, § 43).

Although such framing did not prevent the Court from finding a violation, it still could be criticized as displacing, since the case at stake did not entail a general claim to establish interpersonal relations, but to create a bond based on a parental one, which is commonly presumed to be the very core of family life itself.

It might be argued that if the Court had aimed at enforcing the model of the closet, it would have probably delivered a diverse outcome, or at least a more hostile wording; likewise, it could have also judged that the relationship claimed by Ms. E.B. did not fall within those secured by Article 8. I quite agree on this point and I suggest that the approach of the Court has to be contextualized within the general strategic litigation for the recognition of same-sex family life; *E.B.* was delivered four years before the Court finally innovated its jurisprudence on the matter and,

as such, I would ascribe this restrained and clear-cut division between private and public to the will not to open interpretive spaces for framing same-sex couples under this realm.

In fact, as explored in the forthcoming section, once that the ECtHR framed same-sex relationships under the notion of family life, it extended such frame also to claims addressing parental rights.

4.6.3 Second-Parent Adoption

From 1989 onwards several same-sex couples, lesbians, filed complaints to the ECtHR, claiming either the right to enjoy the so-called second parent adoption that is the adoption by the mother's partner, or the application of rules on legal paternal presumption in the context of a same-sex kinship.

If in previous clusters the parties discussed the effective parental ability and value of lgbt persons, with reference to second-parent adoption the theoretical core changes; the debate does not revolve around whether homosexual individuals are able to take care and to properly raise children - the Court had already held that they were, both if biological or adoptive parents- but it focuses on the meaning of family and on its structural asset. By this, I frame the applicants' claim as proposing a different structure of family, more suitable to ratifying the existing kinships, and a rights configuration moulded on the changing social reality.

The main problem, the reason why national authorities had dismissed the applicants' claims, was that those lesbian couples aimed at being recognized both as parents; therefore, French, Austrian, German and Netherlands governments denied that families not adhering to the heterosexual model could claim any right.

Under this light, the State performed a legitimizing function, for it did not merely ratify situations which de facto existed and which did not harm any of parties involved, but it understood the law as a main vehicle of legitimation, and endorsed a quite traditional reading of what family is. As a consequence, reality had to conform to legal categories, whilst the latter were not read as particularly flexible or suited to answer social trends and demands.

The factual condition before the ECtHR was, indeed, clear, and it addressed the legal status of same-sex social parents, who had already established a strong tie with their partner's child.

Besides specificities of different cases, which will be analyzed hereinafter, the perspective laid down by same-sex couples is complex and remainders, at the same time, of a traditional and a queer approach to law and family.

As for the first, the dimension of a couple was read jointly with that of family, implying that the essential core of a family was fixed and necessarily implied the committed relationship between two persons; therefore, these cases did problematize the foundational role of monogamous kinship, to the imitation of the biological tie between generations, but the fact that same-sex couples resulted excluded from it.

Moreover, the request advanced in *Boeckel and Gessner* to extend the presumption of paternity to the same-sex partner who lived with the biological parent at the time of the child's birth conveys a symbolical and ambivalent meaning.

With reference to the aforementioned case, German laws provided second parent adoption in the context of a same-sex registered partnership, and local authorities had not denied this option to the applicant. However, they submitted that “there was no reasonable justification for entering the biological mother’s husband into the birth certificate as the child’s father, while refusing to enter the biological mother’s same-sex partner” (*Boeckel and Gessner*, § 21), hence framing legal presumption of paternity as applicable irrespectively of the mother’s partner sex.

This case did not challenge existing laws in that they did not provide a direct and immediate recognition of the second parent, or in that they mirrored an outdated concept of family, rather alleging the indifference between the situation disciplined by German legislator in 1952 and that of the applicants.

As a consequence, *Boeckel and Gessner* somehow claimed a normalization of their condition within the traditional narrative of family; they did not refer to a presumption of more general parental care nor did they discuss the required statement of paternity on the birth-certificate, but they precisely defined the second parent as the father.

On the other hand, all claims described also convey innovative and potentially radical consequences. In general terms, the *factio* of biological parents is disrupted, since in the case of same-sex couples the biological bond obviously can’t be presumed by the law; as such, the reason to legally recognize same-sex second parents can’t be concealed under the legal indifference for the effective genetic tie, nor can it be viewed as a way of enforcing the institution of marriage in contexts where gays and lesbians are only allowed to enter civil unions. If anything, the grounds of similar innovations recalls the positive evaluation of social caregivers, the valorisation of those people who effectively play a relevant role in the child’s life, regardless of genetic ascendance. Such flexibility would therefore ratify existing situations and would pose the first step to shaping family law according to multifaceted, complex and not linear family bonds which mark Western society.

The progressive widening of homosexual parental rights potentially blurs the normative effects of traditional laws on parenthood, thus enhancing the ratification of not heterosexual and not conventional kinships.

As discussed below, both parties and the ECtHR have mostly relied on the principle of equality and on the comparability of LGBT families to the traditional one, but in the future such a perspective could change and emphasize most disruptive consequences.

Turning to the specific cases, *Kerkhoven and Hinke v Netherlands* is interesting from a historical perspective, since it was raised in 1989 and it gave the opportunity to the EComHR to interpret this issue before it became a widely politically debated public issue. As such, the diachronic approach allows the understanding of the change occurred both on the interpretation of the

same provisions, and on the wider theoretical approach, in the turn of two decades. Ms. Hinke was the biological mother of a child she had by means of medical assisted reproduction, and she cohabited with Ms. Kerkhoven, who actively took part in taking care of the child, to the extent that the Commission noted that they “shared parental tasks”. The couple had asked without success the national Courts to vest the second parent with parental authority, without success: under Dutch laws, the adoption presumed the absence of the parent of the same-sex of the adopter and also legal recognition was admitted only for men, since it relied on the legal presumption of paternity.

Before the ECtHR they contended a discriminatory treatment in the enjoyment of their right to respect for private and family life. The EComHR dismissed the possibility of framing that situation as family life, but it also displayed contradicting reasoning, whereby the reason why it reached such a decision was not that the applicants and their child could not be considered as a family, but that they did not fit the model of family allegedly required by the ECHR. Indeed, firstly commissioners held that a relationship between two women does not fall in family life, but after a few lines, it “further note[d]” that even if the frame of family life had applied, no violation could have been claimed, in that “the relevant legislation in itself does not prevent the three applicants from living together as a family. The only problem [...] is the impossibility to the first applicant to establish legal ties with the third applicant, which may become of practical importance should the natural mother die or the relationship between the two adults end otherwise”.

If the EComHR had really considered the applicants as not being able to claim family life, the second part of the quote would sound odd, because it would offer non required justification; not only the Court admits that the applicants live *as a family*, but it also concedes that the legal recognition of the second parent may have substantial grounds, under particular and exceptional circumstances.

The issue at hand, hence, inhered to the possibility deriving from the ECHR the obligation to recognize second parents, also in the context of same-sex cohabitations, consequently questioning the tolerable distance from the traditional cluster of values and models of life attached to the Convention, so to raise a legitimated pretence.

On the issue, the Commission judged the situation of the applicants as not comprising neither in private life nor in family life secured by Article 8. Commissioners did not indulge in extensive explanations of their normative perspective, just legitimizing the *status quo* secured by Dutch legislation as neutral.

I would ascribe the lack of sensitivity towards differences to a stark heteronormative endorsement: the Commission implicitly compared *Kerkhoven and Hinke* to a family, but it assessed

that such comparisons should not give rise to legal consequences, in that the difference to the normal and desirable model of family was too great.

When the same claim was reiterated to the Court, in *Gas and Dubois v France*, the ECtHR conducted a deeper analysis, even though it finally found no violation; since the Court was called to review a similar complaint two years later, in *X and others v Austria*, and it reached the opposite outcome, I consider the interpretation laid down jointly, so as to evaluate the reasons for such dissimilar interpretive result.

In *Gas and Dubois* the applicants creatively interpreted the existing legislation, proposing to apply the legal institute of ‘simple adoption’ also to circumstances other than those for which it had been created. According to the original provision simple adoption does not sever the ties between the child and her original family, but creates an additional legal parent-child relationship, in order to compensate for the failings of biological parents. Only in the event of a married couple, was the spouse allowed to resort to simple adoption to create a tie with her partner’s child.

The lesbian couple, however, supported a creative disruption of that legal institute, by stretching its effects also to unmarried same-sex couples, where the biological parent gave her/his consent even though he/she was able to raise the child; by loosening the prerequisite of biological parent’s incompetence, simple adoption would affirm social parenthood, providing thus a legal instrument to introduce second-parent adoption even in legal contexts where this issue was not regulated by specific provisions.

However, the overwhelming majority of the Court did not uphold their reasoning, for both substantial and institutional reasons.

As for the former, *Schalk and Kopf* was reiterated and, consequently, the situation of the applicants was compared to a heterosexual unmarried couple; according to the ECtHR marriage “confers a special status on those who enter it” (*Gas and Dubois*, § 68), also implying its specificity and unicity in the overall legal frame.

The Court conceded that the indirect discrimination alleged by the applicants effectively applied, since it was possible for them to marry, whereas heterosexual couples could circumvent French legislation on simple adoption by that means. Nevertheless, it held that on this issue no activist outcome could be reached, and that the Court had to abide to its restrained previous case-law.

As for the latter, namely for structural reasons, the ECtHR started out from the premise that French law refused simple-adoption within the frame of civil partnerships, and in the event of one partner adopting his/her partner’s child, parental responsibility would have been transferred to the adoptive parent, to the detriment of the latter. The Court did not dispute such

framing, and took it as the orienting framework for its review, which read “in essence, [...] any couple in a comparable situation by virtue of having entered into a civil partnership would likewise have their application for a simple-adoption order refused [...]” (Ivi, § 69) and which observed that no difference in treatment based on sexual orientation could be claimed.

At first sight, the ECtHR seems to only review the internal coherence of national laws, hence addressing only if unmarried heterosexual couples were treated the same as same-sex couples, without taking into account the reason why the latter could not be compared to married ones. Hence, it might be argued that judges applied the structural margin of appreciation, in deference to national authorities, but, on a closer look, they reached this conclusion after a careful substantial reasoning. Indeed, they firstly discussed, and rejected, the applicants’ claims, debated the emerging COE trends, recalling that Article 12 did not secure same-sex marriage, depicting French legislation on simple adoption as not problematic, and only in the end did they concede national authorities a wide margin of appreciation.

ECtHR wording somehow expects that this was the only objective and logic interpretation of the ECHR; concurring and dissenting opinions, however, proposing a different perspective which, even though leading to the same final outcome, sheds light on a less majoritarian interpretation. Whilst the majority held that “it can only refer to its previous findings” (Ivi, § 71) as concerned the claim of indirect discrimination, concurring judge Spielmann and judge Berro-Lefevre contended that the applicants’ legal situation was comparable to that of a married couple, precisely because they were prevented from entering wedlock. Moreover, on one hand, the Court did not critically address the role of child’s best interest within French laws, hence assuming it had been properly taken into account; on the other hand, both concurring and dissenting judges emphasized the relevance of this issue pointing out that even though they had voted against finding a violation French legislation still remained extremely problematic. Judge Costa labelled the structure of Article 365 of the Civil Code as “less than convincing”, hoping that “French legislature will [...] review the issue”, and judge Spielmann, and judge Berro-Levefre, considered that simple adoption remained “a source of problems [...]. The child’s legal status remains precarious, a situation which cannot be in his or her best interests” (Ivi).

Despite these remarks, all mentioned judges found no violation, by relying on structural margin of appreciation, by considering domestic authorities as best placed to address the issue, and by noting that although a European trend in favour of lgbt second parent adoption was emerging, still no definite majorities existed.

Judge Villiger, the only dissenting, offered an interesting reasoning, since he approached the facts and the claims from a different angle, namely that of child’s best interest. Against the majority he argued that “the judgment focuses on the adults but not on the children who are never-

theless an integral part of the applicants' complaints". Effectively, this issue was barely untouched in the majority's review, and judge Villiger assumed that the essential question the Court should have answered was "whether the difference of treatment complained of is justified from the vantage point of the child's best interests". From this angle the final decision could not be justified, as the Court legitimatised a jeopardized position of the children of the various relationships. Children of heterosexual couples benefit from joint parental responsibility if the couple is married, those of a same-sex couple don't as their parents are prevented from marrying, but not because their best interest is not to be legally tied to those who are raising them. If all children should be given the same treatment on the grounds that they share the same needs, judge Villiger argued that there was no reason "why some children, but not others, should be deprived of their best interests, namely of joint parental custody".

Thanks to concurring and separate opinions, it's possible to scratch beneath the surface of *Gas and Dubois* judgment, and to comprehend the implied and situated premises endorsed by the majority.

Firstly, creative desegregation is rejected, and the Court dismisses any attempt to apply simple adoption for unintended purposes; secondly, the necessity to establish a comparison is grounded on majoritarian and heteronormative premises. Judge Villiger demonstrated how the comparison between married and unmarried couples was not the only possibility, and proposed departing from the child's perspective; the majority, however, reiterated the intangible nature of marriage, and did not give particular relevance to the minoritarian perspective brought forward by the applicants. The child's voice is practically erased, and the Court evaluates only the interest of the biological parent not to be deprived or diminished in her rights and duties, not the interest of the minor involved in being secured in his/her affective kinships.

By focusing on what the Court implicitly states, a premise which precluded to a possible lgbt friendly interpretation of the ECHR emerges. Such peculiarity can be grasped if confronting the majority with concurring judge Spielmann and judge Ferro-Lefevre; whilst the latter contended that even if the law discriminated against same-sex couples as far as simple adoption or second adoption were concerned, this differential treatment would not be unjustified or problematic, the majority anchored the final decision to the fact that French law made no difference between heterosexual and homosexual unmarried couples.

Hence, one could presume that in the event of a differentiated legal frame, the Court would have reached a different outcome, still reinforcing the intangibility of wedlock, but requiring equal treatment of other forms of family life.

As such, the Court would not convey a biased attitude against homosexuals as parents, but it would not manage to dismantle the privilege of heterosexuality, in that only national authorities

are legitimatised to allow same-sex marriage while, in the absence of a clear trend, the ECHR would secure only different-sex marriage.

Effectively, this premise was reappraised in *X and others v Austria*, where the ECtHR reached a landmark decision.

In *X and Others v Austria*, n. 1910/07, two cohabiting lesbian women alleged Article 182 of Austrian Civil Code as discriminatory, since it implicitly denied the second-parent adoption in case of same-sex couples, while allowing heterosexual unmarried couples¹⁴⁷. The applicants were bringing up a child, which one applicant had had from a previous heterosexual marriage, and the social mother claimed the right to access adoption without severing parental rights and duties of his biological mother. Whereas the minor consented to the adoption, his biological father remained hostile to the lesbian couple and did not consent to the adoption, since he risked being severed in his paternal role.

Insofar as fluctuating in undertaking his duties and begrudging in respect of the lesbian couple, the father was attached to the child, and before national Courts he stated that if his paternal role were severed, he would have not the opportunity to establish a positive relationship with his son.

Unlike in *Gas and Dubois*, the ECtHR departed from assessing the child's best interest and even though it acknowledged that, in theory, difference in treatment based on sexual orientation violated the ECHR, the Court also held the opinion that the final outcome had to protect the rights and needs of the child involved.

It's true that the Court recalled that, in cases of simple adoption, the French law allowed only married couples to share parental rights, stating that "having regard to the special status conferred by marriage" (*X and others*, § 104) the applicants' legal situation was not comparable to that of a married couple. The final decisions might be ascribed, hence, to the different legal frame, namely to the fact that Austrian legislation discriminated between heterosexual and homosexual unmarried couples, while the French did not.

¹⁴⁷ Article 182 (2) of Austrian Legal Code provides "If the child is adopted by a married couple, the legal relationship under family law- above and beyond the legal kinship itself- between the biological parents and their relatives on one hand, and the adopted child and his or her offspring who are minors at the time of the adoption takes effect on the other hand, shall cease at that time, apart from the exceptions referred to in Article 182. If the child is adopted just by an adoptive father (an adoptive mother), the relationship shall cease only in respect of the biological father (the biological mother) and his (her) relatives; in so far as the legal relationship with the other parent remains intact after the adoption, the court shall declare it to have been severed, subject to the consent of the parent concerned. The relationship ceases to exist as of the date on which the statement of consent is given, but no earlier than the date on which the adoption takes effect" (*X and others*, § 27).

To some extent I agree, and I suggest that if under Austrian provisions second-parent adoption had been provided to married couples only, the Court's reasoning would have followed another path.

However, I wish to emphasize the reiterated statements directly tackling the prejudice against homosexual parents, and confronting with opponents on second-parent adoption on the terrain of whether a child should grow up with two same-sex parents.

Two conservative thinking, the Alliance Defending Freedom and the already mentioned European Centre for Law and Justice, urged the Court not to uphold the applicants' claims, contending that there had been "no interference with the applicant's *de facto* family life" (Ivi, § 81), and that domestic Courts had only tried to preserve the "natural family and providing legal certainty for the child" (Ivi, §); moreover it was argued that recent studies conducted in the USA, among which the infamous Regnerus study¹⁴⁸ had falsified the so-called "indifference thesis, [...] the claim made by various studies that children raised by same-sex couples were not disadvantaged in any significant respect compared to children raised by heterosexual parents" (Ivi, § 91).

The ongoing medical and scientific debate was also paired with the alleged lack of COE consensus, so to claim wide national discretion.

¹⁴⁸ In 2012 Mark Regnerus, professor of sociology at Austin University, published a study which allegedly demonstrated that children raised by same-sex parents experienced serious side-effects during their adulthood. Such a study was published by the prestigious academic journal "Social Science Research", and it was waived by Republican, conservative Parties, and religious groups all over the world, both in legislative assemblies and before judicial Courts. According to Regnerus children with same-sex parents were more likely to remain unemployed, to have an unsatisfactory affective life, to commit suicide, to feel unsatisfied with themselves, and not to become completely autonomous adults. This research offered a crucial weapon to opponents of same-sex marriage and homosexual parenthood, in that it claimed to objectively prove beyond any doubts that it was in the child's best interest to grow up with heterosexual parents. Quite predictably, the impact of Regnerus' study -backed by religious and political parties- was, and still is, immense, and it directly affected the enhancement of lgbt rights: in the USA arguments against same-sex marriage and lgbt adoptions still recall this study, and all over Europe traditionalist parties resort to this research in order to influence public opinion, framing the ban on lgbt parenthood as necessary for minors' correct development. However, the scientific nature of this research was heavily disputed, and, finally, three serious flaws were found in Regnerus' study. Firstly, Regnerus had adopted biased criteria and parameters to gather data, including in the sample only persons raised by homosexual parents in context of social disadvantage, and framing as homosexuals biological parents which had had even just only one sporadic homosexual encounter. The departing point of the research was, then, definitely unreliable. Secondly, as a consequence, the statistical relevance of his findings have also been challenged; thirdly, the peer review process had been shortened thanks to the lobbying of foundations which, on one hand, has sponsored Regnerus and, on the other, had managed to convince the editors of "Social Science Research" to accept his manuscript without revising it. In conclusion, Regnerus' study was judges as completely unfounded and lacking of any scientific evidence. However, its influence still spreads effect: not only it is raised as a scientific argument against lgbt rights in the political arena, but, as X and others demonstrate, it is also echoed by judges who interpret human rights law.

For a detailed account of Regnerus affair, see Zanetti 2015.

The Court agreed that the only relevant criterion was the protection of the child's best interest, but at the same time, it pointed against the lack of evidence "adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes" (Ivi, § 146), and to the absence of "any specific argument, any scientific studies or any other item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs" (Ivi, § 142).

As such, the Court did not adopt the principle of precaution, and it firmly held that same-sex couples had to be considered as equal to different-sex couples even in the realm of adoption. The reasoning which led to the final decision, namely the finding of a violation of Article 14 jointly considered with Article 8, relied on the child's interest and merely on the enforcement of the principle of equality and non-discrimination.

Before further analyzing the ECtHR, it's worth emphasizing that the ECtHR highlighted that the present case did not concern the question "whether the applicants' adoption request should have been granted in the circumstances of the case" but "whether the applicants were discriminated against on account of the fact that the Courts had no opportunity to examine in any meaningful manner whether the requested adoption was in the second applicant's interests, given that it was in any case legally impossible" (Ivi, § 152).

In fact, the Court adopted a standpoint critical to several heteronormative assumptions.

Firstly, the judgment endorsed a parental frame not inherently heterosexual; secondly, the Court recalled previous jurisprudence referred to sexual orientation, narrowing the national margin of appreciation, implying that national authorities were entitled to exclude unmarried couples from adoption procedures but, they could not draw a distinction between unmarried different-sex and same-sex couples without violating the Convention. Thirdly, the missed recourse to the principle of caution can be read as a further step in legitimatising a reading of human rights detached from biased and majoritarian gaze against homosexuals.

Quite predictably, the ECtHR reasoning was harshly challenged by dissenting and concurring opinions. Judge Spielmann reiterated the argument laid in *Gas and Dubois*, whereby same-sex couples should be compared to married heterosexual ones, being the former not allowed to marry even though living in a *de-facto* marriage; the strongest criticism was however raised by seven dissenting judges. They indeed labelled the ECtHR reasoning as saying "too much and yet not enough on the subject of second-parent adoption in same sex couples" (Ivi, dissenting opinion, § 11). On one hand, the Court ascribed the restriction of second parent adoption to heterosexual couples as merely "reflecting the position of those sectors of the society which are opposed to the idea of opening up second parent adoption to same-sex couples" (Ivi, § 143),

but dissenting judges contended that such opinion was legitimate and could mirror a reality “valid for Austria but also for other State Parties to the Convention” (Ivi, dissenting opinion, § 9). On the other, the Court imposed responding to the Government the burden to scientifically prove that homosexual couples were not able to provide a child’s needs but, according to dissenting opinion, it failed to clarify why “the Government [should] have adduced such evidence” (Ivi, dis. op., judge Spielmann § 10), since in the frame of the actual case it allegedly proved “irrelevant”. Given the lack of European consensus on the matter, the ECtHR should have been careful not to impose change, and not to engage in an activist interpretation of the ECHR.

Surely *X and others v Austria* marked a consistent precedent but I would argue that its efficacy is quite limited, especially if considering those States in which only married couples can adopt; from this standpoint, the Court reaffirmed national discretion in defining rights enshrined to the institution of marriage. Therefore, I would evaluate judicial interpretation as challenging and overcoming specific and limited heteronormative assumptions, without breaking their most pervasive effects.

Another criticism concerns the evaluation made by the ECtHR in respect to the father’s role and in respect to the family reinforced by Austrian legislation. The aim of Austrian provisions was “to create a relationship akin to that which exists between biological parents and their children” (Ivi, §18) and it assumed the model of nuclear heterosexual family as the normative, fixed, horizon, to where any other kinships should conform in order to be legally protected. In this case, for instance, the child consented to be adopted by his mother’s partner but, at the same time, he didn’t deny the existence of a relatively positive tie with his father, demonstrating that both his stepmother and his father played a diverse but relevant role in his life. The Court, however, didn’t give any room to the eventual father’s right not to be deprived of his parental role, endorsing a model of homosexual adoption shaped upon the nuclear model, according to which even if homosexual, there can be only two parents, in imitation of biological ones.

Most notably, dissenting opinion recalls the conflict between the claims of applicants and the possible interest of the biological father, highlighting open questions embedded in the legal system affecting not only homosexual couples, but all families in which, on one side, the parent who will lose parental rights has not committed sever breaches and, on the other, the child’s best interest would require both to maintain the tie with her biological parent and to recognize the existing relationship with her social parent. It is a complex framework and I am aware that the Court has to narrow its reasoning only to claims made by the applicants, but, perhaps, the ECtHR could have detailed a few notable and detailed remarks on the problems posed by the traditional family.

In conclusion, however, spaces hinted in *Gas and Dubois* were considerably expanded, and the Court secured the human right of homosexual couples to enjoy of the same rights provided by national legislations to heterosexual unmarried, or civil united, couples in quite general terms.

4.6.4 Conclusive Remarks

From a general perspective the ECtHR jurisprudence on sexual orientation and parenthood displays relevant features especially as far as internal divisions are concerned. The Court's legal culture on this specific issue, indeed, unveils theoretical tensions related to the evaluation of the applicants, but also profound disagreement as to the roles and of the Court and to the functions of the Convention.

These contrasts entail a wide range of issues; on closer analysis in some cases behind doctrinal or institutional arguments a substantial evaluation of the claim advanced is implied, while in others the dissenting judges contrast the majority outcome even though probably agreeing with the content of the final judgment.

Consider, for instance, *E.B. v France* and *Gas and Dubois v France*. Both cases reached a final result with a majority of ten against seven votes, and while in the first the Court upheld the applicant's claim, in the latter it dismissed the request of second parent adoption.

Focusing on dissenting opinions in *E.B.*, judge Costa, judge Turmen, judge Ugrekhelidze, and judge Jocene disagreed on the tasks that the ECtHR should perform; most notably, they shared the message sent by the ECtHR to State Parties that "a person seeking to adopt cannot be prevented from doing so merely on the ground of his homosexuality. [...] Our Court [...] considers that a person can no more be refused authorization to adopt on the grounds of their homosexuality than have their parental responsibility withdrawn on those ground" (*E.B.*, diss. op., judge Costa, judge Turmen, judge Ugrekhelidze, judge Jocene, § 3).

However, to them the applicant's homosexuality had not been the decisive element in denying her the possibility to adopt, and they argued against the so-called contamination argument, namely the idea that homophobic feelings could percolate into decisions and policies even though not explicitly stated.

Surely, their perspective could be criticized as formalistic, as devoted mainly to tackling formal discrimination but not informal, effective, or indirect discrimination. Effectively, as they emphasized, French law did not prohibit homosexuals from adopting, but the procedure carried out by social services posed on them such a heavy burden that practically impaired their rights.

On the other hand, their arguments can't be considered as strictly erasing the minoritarian perspective, as instead does the dissenting opinion of judge Zupanic. He framed adoption as a "privilege", also discussing the difference between rights, which involve "discrimination in terms of unequal treatment", and privileges, namely "situations in which the granting *vel non* of the privilege make it legitimate for the decision-making body [...] to exercise discretion without fear the right of the aggrieved person will be violated" (*E.B.*, dis. op., judge Zupanic).

Just as it would be “bizarre” for anybody to claim a particular award, decoration, or privilege, likewise judge Zupanic considered the applicant’s claim odd; further contending that the Court was called to secure the child’s best interests, which to him had not been considered enough.

Hence, the other remarks on the margin of appreciation and on the alleged objectivity of the French authorities, could be read as being soaked in the aforementioned value-oriented perspective.

Turning to *Gas and Dubois*, instead, as already explored, the concurring opinions call French authorities to review rights provided to civil unions, showing sympathy for the applicants, but, at the same time, they denied that national decisions had breached the ECHR, by relying on doctrinal elements and, most notably, on the necessity not to draw from the ECHR either the right to adopt, nor the right to second adoption.

In fact, most critic passages do not entail the possible situated perspective conveyed by the Court, rather contesting its role of law creation and suggesting that the restrained path followed on same-sex marriage should be reiterated also as far as parenthood and adoption are concerned.

Another relevant element attains to the different sensitivity to direct and indirect discrimination. Neither French, nor Austrian legislations openly prevented gays and lesbians from adoption but, in fact, either administrative procedures or the general meaning of single provisions, restricted their rights. Hence, the applicants mostly relied on a substantial meaning of discrimination, contending that the essential grounds for their reaction had been their homosexuality, or pointing out that given the wording of certain provisions, same-sex couples resulted excluded from second parent adoption.

If on direct discrimination, like that denounced by Mr. Salgueiro, the Court undertook a clear and unanimous decision, upholding his claims, in respect of indirect discrimination the situation is far more blurred. In *Gas and Dubois* concurring judges alleged that had the applicants been a man and a woman who were not married, they would not have been eligible for this type of adoption either, hence stating that “it is difficult to argue that this was a case of discrimination on sex, still less it was homophobic”. In this reasoning it completely misses any reference to the fact that a heterosexual couple was allowed to marry and, hence, to meet the requirements provided for second parent adoption; only the formal wording of the law is examined, while the broad legal context or its practical effects are not equally evaluated.

The ECtHR internal legal culture on the issue is hence passed through by multiple and varied bifurcations; as concerns the interpretation of the ECHR and the substantial rights secured, the Court appear to be extremely divided.

As for the former, the terms of comparison and the applicability are strongly debated. Throughout all case-law on second parent adoption, the Court does not agree whether same-sex cohabiting partners could be compared to unmarried heterosexual ones, whether they could be compared to married couples, or whether same-sex couples could not be compared to heterosexual ones at all.

In *Gas and Dubois v France e X and others v Austria* the majority endorsed the second perspective, establishing an analogy between same-sex and unmarried couples; however, judge Spielmann, in the former, and him jointly with judge Berro-Lefevre, in the latter, strongly argued that the applicants should have been compared to married couples, since same-sex couples were not provided with the right to enter into wedlock. In both cases, however, this perspective did not gain much success and, at the moment, it remains restricted to a tiny minority.

As for rights secured, disagreement entails a triple dimension: firstly, majorities and minorities do not agree if and whether a right to adopt exists; secondly, the balance between the child's best interest and the parents' rights is difficulty assessed. Lastly, the very definition of which is the child's best interest is extremely debatable.

In *Fretté* concurring judges emphasized that since no right to adopt was included in the ECHR, the Court should refrain from introducing rights not originally enclosed and also previously denied by the Court itself. In a precedent case the ECtHR had clearly denied that a right of adoption existed, and, in fact, both in *Fretté* and *E.B.* the majority referred to the right of being considered for adoption purposes. However, also in *E.B.* seven judges claimed that neither the ECHR secured the right to adoption, nor did it include the right to be considered eligible to apply for adoption.

The second and third element are deeply explored in *Gas and Dubois* and *X and others*, where the applicants already had a relationship with the child and, hence, where both parties could claim interests on these grounds.

While *Gas and Dubois* depart from the positions of the applicants, *X and others* relies mainly on the child's best interest, as if to suggest a change of perspective. In the former, indeed, dissenting judge Villiger precisely contested the majority on the grounds that it had focused on adults, without fully evaluating the child's point of view, which, in his opinion, required the simple adoption by his mother's partner. In the latter, however, dissenting judges disputed both the assessment of the child's best interest and the evaluation of adults' interests involved. As already recalled, dissenting judges argued that biological father's rights had not been considered and, they suggested that it was up to the Court to balance the applicants' interest with the father's rights, even if the latter had not lodged with the ECtHR. Moreover, while the majority endorsed the assumption whereby the child's best interest was to be legally secured in the affective and

social environment in which he was growing up, dissenting ones strongly supporting the model of traditional family as best suited.

The latter argument could also be framed as imbued by a disagreement of values to secure, and, therefore, it can be read in conjunction with *E.B.* dissenting opinion delivered by judge Mularoni, and with *X and others* joint dissenting opinion.

Internal disagreement strongly holds in all judgment, and it shows that adoption by same-sex couples or homosexual persons is still a deeply debated theme, on which the Court had not reached a uniform perspective; in fact, even though the majority has progressively interpreted the ECHR favourable to the applicants, the width of dissent has not significantly decreased, still holding 40% of total judges.

Even the departing assumption shared by all judgments, namely that the applicants had a case under the ECHR is not shared, and a minoritarian but fierce portion of judges opposing law-creation at the hands of the ECtHR.

In conclusion, focusing on how the Court shaped the applicants' claims, I would highlight three remarks. Firstly, the ECtHR narrowed the terms of comparison between heterosexual and homosexual couples, since in *Gas and Dubois* it denied that unmarried same-sex couples were comparable to married ones. As such, the intangibility of wedlock was safeguarded and the Court perpetuated the assumption that heterosexual couples would be in such a valuable position that national authorities are allowed to provide them with specific rights. In the reasoning of the Court, marriage is worthy of legal protection since it's entrenched in European culture and it's greatly evaluated in every society; as long as true, such a perspective reiterates a perspective which does not merely ratifies an effective long-standing tradition, but it mantles tradition with normativeness. Although not stating that same-sex couples are less capable or valuable than heterosexuals, the Court reinforces a legal and symbolic order whereby rights and duties connected to marriage can't be extended beyond the borders of wedlock.

Secondly, on the other hand, the Court has variously confirmed that besides marriage, same-sex couples deserve the same legal treatment granted to different-sex couples, even in respect to adoption and parenthood. The minoritarian assumption whereby homosexual couples would not be a healthy environment, or whereby "homosexuals, like [...] any other persons with some peculiarity, accept that they may not qualify for certain activities which, by their nature and under certain circumstances, are incompatible with their lifestyle" (*E.B.* dis. op. judge Loucaides). On the contrary, neither in *E.B.* nor in *X and others* the Court referred to the principle of precaution, but it expanded the original findings of *Salgueiro*.

Reappraising the questions mentioned at the beginning of this paragraph, according to the ECtHR homosexuality is definitely compatible with parenthood, but the exact willingness of the

Court to recognize the rights claimed by lgbt people will depend on the legislation concerning unmarried heterosexual couples.

Such perspective could be criticized as endorsing a majoritarian meaning of human rights connected to parenthood. In fact, if comparing the subjective condition of Ms Gas, Ms Dubois and the applicants in *X and others*, the element that pushed the Court to find a breach only in the latter was due to the different legal frame provided for unmarried couples, not to an alleged inability of the former women to take care of a child. Hence, it could be suggested that if Austrian legislation had not allowed second parent adoption for cohabiting heterosexual couples, the ECtHR judgment would have been analogous to *Gas and Dubois*.

If one considers that in COE Countries the trend is to recognize and secure increasing rights also to cohabiting partners and to single individuals, it's likely that the ECtHR outcome could apply to several Countries; nevertheless, from a theoretical perspective the final interpretation of the ECHR remains problematic, for it does not focus on how lgbt deserve to be treated as parenthood is concerned, but it assumes the condition of a group of heterosexuals as the yardstick to determine rights of homosexuals.

CHAPTER V. CONCLUSIVE OBSERVATIONS

“Most people think of the legal recognition of homosexuality as one single development. That is a mistake. Homosexuality is a complicated phenomenon, with different aspects of feeling and of behaviour. In the words of the song-writer: a many splendored thing.”
K. Waaldijk, 1994

5.0 Foreword

In the context of the European lgbt mobilization for rights, the innovative potential of the ECtHR is often recalled by the applicants and by lgbt reformists as one of the most relevant vehicles in which to pursue their agenda. Effectively, the ECtHR is equipped with enough autonomy and legal resources to deliver extremely activist and innovative judgments; however, this possibility does not imply that the majority of the Court is willing to do so, nor that other constraints wouldn't bind the judges.

Before discussing the findings of this research, I will briefly outline the evolution of the ECtHR's jurisprudence in respect to sexual orientation. Reappraising Friedman's seminal socio-legal theories, the ECtHR's review amounts to the answer of the legal system to the claim of change put forward by various social forces (Friedman 1975, 2), and, as such, it has to be comprehended that in the wider frame of the permeable dynamic that relates to the social aspect of the legal realm.

The timing of the ECtHR's jurisprudence has been shaped, partially by social inputs and partially by the ECHR system itself, most notably through the gatekeeping role of the EComHR.

Generally speaking, the ECtHR's jurisprudence can be defined in three phases, which I shall go on to treat separately but which are strongly related. The first, the Court has dealt with complaints invoking individual rights; secondly, the Court has been sized by couples seeking legal recognition or the enjoyment of social rights guaranteed to heterosexual partners; and thirdly the Court has interpreted the ECHR when same-sex parenthood is concerned.

As to individual rights, the ECtHR's jurisprudence entails both criminal and civil law, and it imposes both positive and negative obligations on Contracting Parties. Initially, homosexuals challenged the legitimacy of criminal legislations sanctioning male same-sex acts, invoking the right of respect for their private lives, secured by Article 8; in *Dudgeon v the UK* the Court set the first landmark judgment: homosexuality was judged as falling into the ambit of private life and the Court held that although some members of the public might be shocked or disturbed by the

commission by others of private homosexual acts, “this cannot on its own warrant the application of penal sanctions” (*Dudgeon*, § 60). Subsequently, this approach was strengthened and reiterated in *Norris v Ireland* and in *Modinos v Cyprus*, where the ECtHR clarified that also apparent death-letter laws criminalizing same-sex consensual acts could amount to a breach of the ECHR (*Modinos*, § 23). Despite its initial restraint and the famous endorsement of “some control” of homosexuality, by the first years of the XXI century the ECtHR had declared that engaging in private, consensual, homosexual sex, independently of the number of partners involved be recognised as a human right (*A.D.T. v the UK*); in those years it also highlighted the discriminatory and illegitimate nature of national legislations in imposing a higher age of consent for same-sex activities. Moreover, the ECtHR challenged the prejudice whereby homosexuals could not enter the army, and in the essential *Lustig-Prean and Beckett v the UK*, the Court widened its interpretation of the right to respect private life, when applied to lgbt issues: even though homosexuality remained a private feature, a soldiers career could not be damaged if they were discovered to be gay or lesbian; not even the delicate nature of the army or the alleged necessity to maintain the troops’ cohesion could justify a breach of the principle of equality. As such, in light of these judgments, Article 8 was interpreted as also securing the human right not to be discharged from the army purely based on the grounds of an issue pertaining to the private sphere. Hence, respondent governments were burdened with negative obligations and with the duty to refrain from interfering with the applicants’ privacy and intimacy. More recently, however, the Court has also drawn from the ECHR positive obligations, most noteworthy Article 3, Article 10, and Article 11. Domestic authorities are indeed required to adequately redress homosexual persons in case of torture and ill-treatment perpetrated by public actors, and also to take all the positive measures necessary to prevent public officials from infringing homosexuals’ dignity and physical integrity (*X v Turkey* § 44; *Zontul v Greece* §§ 110-111). Also, under Article 10 and Article 11, the freedom of expression, the freedom of assembly and the freedom of association must be effectively ensured; national and local authorities are not only required to formally allow lgbt associations to organize marches and assemblies (*Bączkowski v Poland* § 62, § 67; *Alekseyev v Russia*, §§ 77-82), but, if the safety of lgbt protesters is under threat in advance of public events, competent authorities are called to evaluate the risk and to prosecute those responsible before the march takes place, so as to comply with Article 11 (*Genderdoc-M v Moldova*, §§ 51-53; *Identoba v Georgia*, §§ 99-100). In particular, the ECtHR reiterated that the States are the “ultimate guarantor of the principles of pluralism, tolerance and broadmindedness” (*Identoba v Georgia*, § 47), implying that national authorities are required to adopt all necessary measures in order to truly ensure a genuine debate.

The ECtHR has also considered whether it be possible to claim the status of refugee or to obtain a permanent residence permit on the grounds of sexual orientation, and it has rejected such an option. The Court has not excluded that, in the event of specific, verified, demonstrated and reiterated threats to someone because of her homosexuality, the ECHR would not secure the right to a permit nor would the individual be deported (*M.K.N. v Sweden*, § 25; *M.E. v Sweden*, § 71); however, the threshold to gain the ECtHR's trust has been placed so high that actually no applicant has showed sufficient evidence to convince the Court.

In respect to the freedom of expression, secured by Article 10, I would like to emphasize that the ECtHR's case law even addressed the demand to publicly convey homophobic opinions and to refuse to perform working duties because of them being incompatible with religious beliefs. In both cases the ECtHR denied that personal freedom may legitimately support hatred attitudes, or that it may justify homophobic conscientious objection; however, such decisions caused harsh internal divisions: several judges voted in favour of this outcome with "greatest hesitation" (*Vejdeland v Sweden*, con.op., § 1) and critical voices have denounced how the so-called "gay rights" would outweigh the essential freedom to obey one's conscience (*Eweida v the UK*, dis. op., § 5).

As to the claim of legal recognition of same-sex couples, the law case is quite complex and it has interested the ECtHR's jurisprudence for almost thirty-five years. After denying for years that both same-sex cohabitations fell within the ambit of family life, secured by Article 8, (*X and Y v the UK*; *W.J. and D.P. v the UK*; *Z.B. v the YK*; *Cardoso and Johansen v the UK*) and that same-sex partners should be entitled to the same social rights and benefits granted to heterosexual partners (*S v the UK*; *Mata Esteves v Spain*; *Courten v the UK*), in 2010 the ECtHR reviewed its approach and framed same-sex cohabiting partners as a *de facto* cohabitation, under the notion of family life under Article 8 (*Schalk and Kopf*, § 94). At the moment the Court has not yet imposed the obligation to recognize a legal frame to cohabiting same-sex partners on Contracting Parties, but the interpretation it has laid down in *Oliari* suggests that it could do so in the near future. In *Schalk and Kopf* the Court has admitted that Article 12 might be interpreted as not securing the union between a man and woman, but it has also clarified that until the majority of Coe Countries will not allow same-sex marriage, a similar interpretation will not be endorsed.

In contrast, however, the ECtHR has conjointly interpreted Article 8 and Article 14 so as to reduce the national margin of appreciation on *de facto* cohabitations, civil unions and domestic partnerships. Contracting Parties may decide not to recognize any familiar asset alternative to traditional marriage; however, in the event they grant rights or social benefits to unmarried heterosexual couples, if similar measures are not also extended to same-sex couples it is very likely

that the ECtHR will find a breach of the Convention (*Karner v Austria*, §§ 40-43; *Kozak v Poland*, §§ 97-99). Likewise, national legislations only recognizing heterosexual partnerships, thus discriminating against homosexual ones; in that judgment, since “a difference of treatment is discriminatory if it has no objective and reasonable justification” (*Vallianatos v Greece*, § 76) and since “same-sex couples are just as capable as different-sex couples of entering into stable committed relationships” (*Vallianatos*, § 81), the ECtHR judged Greek authorities in breach of the Convention (Ivi, § 92). In *Oliari v Italy* the Court has widened this approach, holding the view that the “Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions” (*Oliari*, §185).

Although this outcome may prelude to the positive obligation of recognizing same-sex couples by means of civil partnerships, it is worth remembering that the Court’s interpretation hinged on a previous judgment of the Italian Constitutional Court; as such, it’s unsure whether the same result would have occurred if not even national Courts had interpreted national legislations as requiring a form of juridical recognition for homosexual couples. Since a consistent number of Contracting Parties allow same-sex marriage or provide civil partnerships (Ivi, § 178), and in light of the ECtHR’s established law case on *de facto* homosexual family-life, it’s highly probable that also under that hypothesis the Court would have restricted the national margin of appreciation, but only future complaints might verify or falsify this hypothesis.

As to family rights, the ECtHR’s law case is still limited and it has not had the opportunity to debate the delicate theme of surrogacy that is being widely discussed by political institutions and Courts in all Europe. The ECtHR has dealt with three issues related to homosexual parenthood: firstly, it has assessed whether sexual orientation might legitimize the restriction of biological parents’ rights and duties. Secondly, it has evaluated whether homosexual persons might be refused authorization to adopt purely on the grounds of their sexual orientation. Thirdly, it has interpreted the ECHR as clarifying whether the protection of private and family life may require the obligation to permit a homosexual cohabiting person the possibility of adopting her partner’s child.

Even though the ECHR does not secure the right to adopt, the ECtHR has framed aforementioned complaints under the concepts of private, family life, and non-discrimination.

According to the established case-law of the Court, gay and lesbian parents must be entitled to the same rights and responsibilities looming over heterosexual parents (*Salgueiro de Silva Mouta v Portugal*, §§ 34-36), and when assessing the child’s best interests national authorities can’t rely on sexual orientation without infringing the principle of non-discrimination secured by Article 14.

If in the case of homosexual persons with an already established parental tie, it appears quite obvious what is in the child's best interest in complaints lodged by homosexual applicants who had been refused the authorization to adopt, the ECtHR found it more complex to ascertain the appropriate interpretation of the ECHR.

In *Fretté v France* the Court granted national authorities wide discretion and it upheld that, "the decisions to reject the applicant's application for authorisation pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure" and that they resulted not discriminatory. The ECtHR considered that the case of Mr. Fretté was one of those social issues "on which opinions within a democratic society may reasonably differ widely" (*Fretté*, § 41) and it also recalled the division within the scientific community over the possible consequences on a child who had been adopted by one or more homosexual parents in order to justify its final decision (*Ivi*, § 42).

However, just six years later, the ECtHR went against its own interpretation, and in *E.B.* it concluded that if national legislations envisaged adoption by singles, then no differential treatment should be deemed legitimate purely based on sexual orientation under the ECHR (*E.B.*, § 96). A similar trend also marked the ECtHR's approach on the theme of second parent adoption. Indeed, in *Gas and Dubois* the Court interpreted the ECHR as leaving the final decision up to national authorities as to whether to provide or not this kind of adoption; most notably the ECtHR endorsed a quite striking reasoning, based more on the enforcement of traditional marriage than on the child's best interests. Unlike *Fretté* and *E.B.*, in this case there was already a child who was living with the applicants, namely Ms Dubois's daughter, conceived through donor insemination; therefore, one could reasonably expect that the ECtHR greatly evaluated such an element when striking a balance between the arguments at stake. On the contrary, the premises which shaped the ECtHR's reasoning were quite different. Under French law, Ms Dubois was the sole parent of the child and the applicants wished to obtain a simple adoption order, to create a parent-child relationship between the child and her mother's partner with the possibility of sharing parental responsibility. The Court, however, noted that, in cases of simple adoption, the French law only allowed married couples to share parental rights. As a consequence the ECtHR rejected their claim and held that the applicants could not state to be suffering from discriminatory treatment on the grounds of their sexual orientation. Same-sex couples could not be compared to married couples and, accordingly, the ECtHR found no term of comparison for the case. In this respect the ECtHR highlighted that if Ms Gas and Ms Dubois's complaint had been upheld, the implications of law-creation would have gone too far, for instance in outweighing the fact that the legislation in question did not allow the creation of the legal adoptive relationship sought by the applicants (*Gas and Dubois*, § 63).

Six years later, the Court reached an opposite outcome and, even though the relevant legislation was different, it conveyed a different theoretical approach to the issue. In *X and others v Austria* the ECtHR did not consider that excluding second-parent adoption for a same-sex couple was necessary for the protection of the interests of the child (*X and others*, § 151).

The Court attached great importance to the fact that, under Austrian legislation, heterosexual unmarried couples were allowed to stipulate a second parent adoption, which therefore severed the parental tie between the child and her biological parent of her parent's partner same-sex. Against this legal background, Austrian legislation was found in breach of the Convention, in that it provided a differential treatment on the grounds of sexual orientation in the enjoyment of rights covered by the ECHR. Even though this outcome apparently appears justified by concerns entailing domestic regulation, a closer analysis suggests that judges also evaluated whether same-sex couples could be harmful to a minor, reaching a negative conclusion. Indeed, as extensively argued in chapter IV, if the ECtHR had had doubts on the parental qualities of the applicants, it could have recalled the child's best interest and dismiss their claim.

Precisely for the decisive and unambiguous wording chosen by the ECtHR, *X and others* has been widely addressed both in academic literature and in newspapers as a turning point in the ECtHR's jurisprudence on sexual orientation.

At the outset, same-sex couples and families are protected under Article 8 and Article 14, and, differently from past decades, the ECtHR has progressively identified a growing amount of demanding evidence that the respondent Governments have to show in order to comply with its duties and obligations (*X and others*, § 135, §142, § 151).

This excursus might be puzzling, at first, for the heterogeneity of the issues recalled, for the variety of the arguments displayed, and for the multiple legal and social standpoint implied. No doubt, this complexity makes any analysis hard, but it also describes a rich and fruitful institution where social interests, creative claims, and national legal sensibilities constantly encourage the ECtHR to further elaborate its interpretation of the ECHR and of the rights therein declared.

Moreover, the fact that issues heatedly debated in national Courts and Parliaments are almost simultaneously raised in the ECHR system confirms that from the applicants' perspective the quest to Strasbourg is crucial, in that it offers the chance to foster a legal lgbt friendly frame despite an eventual political and legislative reluctances¹⁴⁹.

¹⁴⁹ Such a statement also predictably well describes how the ECtHR is perceived by other categories of disadvantages citizens; as Anagnostou recalls the ECtHR is a venue where "individual and collective ac-

Hence, the Court is invested with great expectations, and it is thought to hold the power to set the policy path for Coe Countries. Reappraising Wintemute's terminology (Wintemute 1995, 2), strategic litigation is triggered by the same determinants that stand beneath political fight: as such, the ultimate aim is not only the applicants' satisfaction, but, rather, the overruling of norms and policies considered as oppressive and discriminatory.

My analysis, however, partly falsifies the assumption of a completely innovative Court, and paints quite a different picture; by resorting to crucial socio-legal concepts I propose the explanation of some of the ECtHR's features and dynamics that at first glance might convey the image of an inconsistent and loose judicial review.

I recall, for instance, *Dudgeon*, *Norris*, *Modinos*, and *Smith and Grady*; they are generally deemed being landmark cases, and they have effectively marked a turning point in ECtHR's jurisprudence; however, when considering the impact of that litigation on the Coe policy agenda, the innovative meaning of such judgments has to be reduced.

By 1980, out of the Coe Countries only the UK, Ireland, and Cyprus still criminalized adult and consensual homosexual acts, and by 1997 only Austria and the UK still set an unequal age of consent and only the UK openly discharged gay and lesbian soldiers. Consequently, the ECtHR did not act as a beacon of novelty, rather ratifying what in the overwhelming majority of Coe Countries was already the norm.

As for 'family life', still in the early 2000s the Court preferred not to review the issue, stating that it was not essential to determine whether the applicant's request fell under the notion of private or family life (*Karner*, § 33). Only in 2010 did the Court overturn its approach and even though such an outcome innovated the reading of the ECHR, it did not introduce outstanding legal doctrines. In fact, by that year, in the Council of Europe a growing number of Countries already recognized or were about to recognize same-sex unions, and in seven States same-sex marriage was already legal. Five years later, in *Oliari* the Court vaguely referred to the necessity to recognize same-sex couples; nevertheless, the judges did not openly introduce positive obligations on Coe Parties, and even though 27 out of 47 members granted some form of legal protection to gay and lesbian couples, the Court did not completely cast off the legitimacy of not recognizing affective frames others than marriage.

tors seek redress, contest policies, and pursue social reform, [...] where some of the most sharply contested societal issues today, concerning sexuality, migration, ethnic diversity and social integration, are debated and fought" (Anagnostou 2014, 8).

A similar dynamic can be traced also with reference to claims entailing immigration policies, which are widely debated throughout Europe and on which the Court prefers not to directly impact, even though it has been provided with the opportunity to play a guide role.

Before altering its jurisprudence, the Court requires an absolute majority shared between member States, sometimes even more qualified; otherwise it is likely to adopt a restrained perspective, and to endorse both the traditional *status quo* and national discretion.

5.1 ECtHR Internal Perspectives: Interpretation and Disagreement

When dealing with such a multifaceted law case, the ECtHR's jurisprudence displays an obvious degree of heterogeneity, which might be interpreted as both a richness and a threat to the effective enforcement of the ECHR.

For instance, a criticism raised against the ECtHR is that relating to LGBT rights it would adopt a "piecemeal" jurisprudence (Johnson 2010, 579), namely an approach marked by a high degree of variability and by an "inconsistent" (Ibidem) use of consensus analysis and margin of appreciation doctrine.

According to this critique, the recent judgments of the ECtHR potentially damage the "integrity of [its] judicial methodology and, ultimately, its interpretation of the Convention" (Ibidem); the ECtHR is indeed criticized for not applying universal and fixed standards to all the complaints but rather to develop specific, sometimes contradictory, approaches in respect to each claim advanced.

Socio-legal theories provide the tools to possibly account for such confusion; judicial reasoning and its style are social facts which might reveal some clues to interpret what judges think (Friedman 1975, 235).

Hence, the conceptual frame of internal legal culture (Ivi, see par. 2.2) proves particularly useful in filtering the ECtHR's arguments, and it enables us to look at the significant patterns of judicial review that, at first, remain hidden.

Against this background, the study of internal disagreement allows us to focus on the ECtHR's legal culture from a critical angle, namely from a perspective devoted to emphasizing the repressed alternative interpretations of the law (Gordon 1981, 17).

Internal divisions are crucial, in that they offer a valuable instrument to study the ECtHR as a social, complex, and dynamic actor; they show that the ECtHR can't be treated as a monolithic institution and that the final outcome is the result of an internal, sometimes conflictual, interpretive process.

Moreover, such an internal perspective enables the researcher to understand which are the most controversial issues for the Court, also stressing how the dynamics between minority and majority shape the judicial attitude towards the Convention.

I will identify three main typologies of disagreement; structural disagreement is related to the role of the ECHR within the institutional architecture of the Council of Europe; functional disagreement refers to the role of judicial interpretation and to the appropriate degree of judicial

creativity; substantial disagreement concerns the interpretation of programmatic and vague rights declared by the Convention.

As for the first, in *Vallianatos* and *Oliari* disagreement opposed two contrasting interpretations of the ECHR: on one hand, the majority turned an eye to a maximalist perspective, whereby the Convention should foster human rights by expanding its breadth; on the other, the minority supported a minimalist approach, moulded on the idea of the alarm bell¹⁵⁰ and on the complete subsidiarity of the ECHR to national authorities. It's worth emphasizing that in both cases the bone of contention entailed the role of the ECHR, and not the substantial claim advanced, to such an extent that in *Oliari* the minority filed a concurring opinion, not a dissenting one. Most notably, in *Vallianatos* the debated issue regarded the criteria of admissibility: even though the applicants had previously not exhausted all national remedies, the majority deemed their complaint admissible, while the minority called for a literal reading of the ECHR provisions. Likewise, in *Oliari* even the minority found the Italian government in breach of the ECHR, but it found no need to legitimize the new positive obligations to provide same-sex couples with a specific legal framework, rather anchoring its outcome on the already quoted Italian Constitutional Court's judgment.

As for functional disagreement, in several complaints the reason for internal fractures lies in a different evaluation of the boundaries to which judicial interpretation has to conform. Most notably, if in the previous cluster the attention is focused on the goals of the Convention, here it concerns the proper role of the Court, and it depends on the image that judges have of their own role.

Despite activism and restraint being generally unclear and appearing to be melted into each other, documental analysis allows us to distinguish between those who support creative and purposive interpretations and those who rely on mainly literal and originalist reading. This conflict strongly influences the final outcome and, more importantly, it affects the definition of human rights.

In *Dudgeon*, for instance, dissenting judges Matscher and Walsh, stated *inter alia* that since the Council of Europe undoubtedly encompassed considerable diversities of culture, the Court was not entitled to impose the changes occurring in a restricted number of societies to other Parties, by means of a so-called "Euro-norm" (Ivi, sep.op., judge Walsh, § 16). Likewise, in *Fretté* and *E.B.* internal conflicts insisted on whether the ECtHR would be entitled to expand the ECHR so as to cover differential treatment in the explication of adoption procedures.

¹⁵⁰ see chapter III, par. 3.1.

In *Fretté* partly concurring judges acknowledged that under French legislation “in practice a homosexual such as the applicant is denied any possibility of adopting a child” (partly conc. op., judge Costa, judge Jungwiert, judge Traja), but they also held that Article 14 did not apply, since the facts at issue did not fall within the ambit of any provision; as a consequence, differential treatment in the ambit of adoption procedures did not amount for discrimination because it fell outside the ECHR’s *ratione materiae*, not because national authorities enjoyed wide discretion. Had these opinions gain the majority in the ECtHR, they would have led to a different definition of human rights; in that event, the Convention would not have granted any right in procedures related to adoption, and this realm would have been completely cast off from ECtHR’s review. Quite interestingly, this outcome would have been justified not from a substantial perspective as to the inherent meaning of the right to adopt, but from a functional aspect.

Therefore, if the realm of human rights seems to be only theoretically defined by substantial considerations, from a pragmatic and realist point of view, even the definition of core values and rights of our society depends on the evaluations which, at first glance, might appear marginal or on a subordinated realm.

The category of substantial disagreement gathers the widest number of cases and, for the sake of clarity, I go on to differentiate it into three further clusters.

Generally speaking, it grasps the socially soaked nature of judicial reasoning, and it addresses the differences of the definition of legal concepts, the divergences on the evaluation of individuals’ rights, and the contrasts on the balance between competing values and claims.

The first sub category is that of disagreement of the interpretation of single concepts and provisions. Most notably, I refer to the ECtHR jurisprudence on private and family life. As previously mentioned, in respect to both claims an internal clash opposed judges upholding that private and family life comprise also same-sex relationships, and those interpreting sexual and affective sphere exclusively through the lens of tradition.

The second sub category addresses the disagreement over the correct balance between competing interests and rights. How does one determine which right should prevail? The ECHR does not offer pre-determined solutions; they have to be decided by the Court case by case, and the different answers to this question might lead to extremely heterogeneous readings.

In *Eweida*, for instance, the Court had to weigh up individual freedom of conscience with the enforcement of the principle of non-discrimination. While the majority gave pre-eminence to the latter and reviewed Ms Ladele’s firing as proportionate, judges Vucinic and De Gaetano argued the other way around, holding that individual freedom of conscience should prevail over any other consideration.

Another example of a clash of rights is provided in *M.E.* and it revolves around the balance between national economic well-being and personal dignity (*M.E.*, § 96). The majority filtered the applicant's requests through the lens of domestic sovereignty, and it finally stated that the decision to expel the applicant pursued the legitimate aims of protecting the economic well-being and of implementing immigration control. As previously mentioned, against this background judge Powder Forde put forward a different evaluation of the interests, weighing up individual dignity as valuing for more than national discretion in immigration policies.

Finally, the third sub category of substantial disagreement concerns the importance of extra-legal experts' opinion, and of common moral sense.

Given the 'living instrument' doctrine and the fixed wording of the Convention, the ECtHR is able to innovate its jurisprudence only by adopting an open canon of legal propositions, namely a system where judges can "invoke broad social standards [...] and decide on the basis of ethical imperatives, utilitarian and other experiential rules and political maxims" (Friedman 1975, 243). Hence, even though the ECtHR formally refers to social context as being only subsidiary, and despite the apparent deference to precedents, extra juridical elements strongly shape the final meaning of the Convention itself.

Theoretically, the Court has always been quite unanimous on this point, but heated discussions recur when such a principle is put into practice; in other words, judges do not discuss whether the social, moral, and cultural realm bear legal relevance, but it's highly disputed which propositions and perspectives should be chosen.

Consider, for instance, *X and others v Austria*, which attests the impact of scientific studies on judicial perspective; the majority quoted, the absence of scientific studies showing that same-sex families could not provide for a child's needs, to corroborate their evaluation in favor of the applicants. Even in this case an internal minority maintained a restrained approach, which filtered scientific studies through the lens of subsidiarity and which considered national authorities as best placed to strike a balance between divergent interests.

Another highly debated realm is that of morals; as thoroughly illustrated in chapter IV, the consensus doctrine often blinks an eye to tradition, in that it reinforces extremely cautious and gradual change.

Nevertheless, even when slight innovations are introduced, the liberal approach to human rights coexists with one oriented more towards the enforcement of the *status quo*. Separate opinions in *Dudgeon* offer the clearest example in support of a binding function of morals, but most of the filed separate opinions prove useful to this point; hence, depending on the perspective, either liberal or majoritarian, that gathers the majority of the Court, human rights enshrined in the ECHR acquire a different meaning.

5.2 The ECtHR Jurisprudence through a Feminist and LGBT Lens

Throughout the documental analysis I have consistently applied the ‘lgbt question’¹⁵¹, which has been shaped on the famous “woman’s question” proposed by Bartlett (1989, 837). Indeed, I have investigated the ECtHR arguments, by extensively i) analyzing bias against lgbt applicants implicit in judicial standpoints and practices that appear neutral and objective ii) exposing how the law might exclude the experiences and values advanced by homosexual people and iii) arguing for an interpretation of the ECHR that does not perpetuate the subordination of sexual minorities¹⁵².

In the first part of this paragraph I will proceed to highlight the achievements of ECtHR’s jurisprudence, while in the second I will emphasize a number of inconsistencies which have emerged in respect to the feminist and lgbt criteria identified in chapter II, namely the concept of heteronormativity, the dilemma of difference, and the distinction between public/private.

On the whole, it’s indisputable that the ECtHR has progressively innovated its jurisprudence towards a more lgbt-friendly interpretation of the Convention, and that it has increasingly recognized homosexual individuals, couples, and families as holders of human rights. Academic literature and lgbt movements do acknowledge this fact, and even most critical *queer* actors concede that the ECtHR performs a valuable role in protecting the rights of homosexual citizens throughout Europe (Gonzales 2014; Grigolo 2003; Johnson 2014; Hodson 2014; Winemute 1995).

As for the individual realm, Article 8 secures the human right to engage in same-sex acts, even if involving more than two partners, and it forbids any differential treatment regarding the age of consent. Article 3 and Article 8 also impose the positive obligation to prevent, prosecute and to adequately redress violent acts perpetrated against homosexual subjects, whether deprived of their freedom or under the State’s temporary custody. Even a single rape might amount to torture, and Prison Administrations are obliged to not disadvantage homosexual prisoners or to expose them to other inmates’ hatred behaviour.

Sexual orientation constitutes as a private feature, which also effects the public sphere, with the consequent widening of duties looming over Coe Parties: as the caseload of the army testifies, the disclosure of one’s homosexuality is not sufficient to discharge him/her, nor can gay and

¹⁵¹ See ch. II, par. 2.3 and par. 2.4

¹⁵² This phrase paraphrases the famous passage by Clougherty (1996, 7), where she described the essential steps to critically approaching legal science from a feminist perspective. I have addressed her proposal in chapter II, par. 2.3.1

lesbian soldiers be obliged to conceal their sexuality. Moreover, the freedom of expression, of assembly, of association, and the freedom of the press can't depend on majoritarian feelings or beliefs, and any restriction grounded on the alleged hostility of public opinion would breach Article 11.

In addition, the Court has greatly evaluated the importance of the principle of non-discrimination, Article 14, to the extent that in *Eweida* and *Vejdejdland* the ECtHR considered the practical and symbolic enforcement of the principle of equality as being paramount to the individual freedom of conscience and expression.

Although the ECtHR's jurisprudence does not apply the concept of suspect category, yet judges have stated on various occasions that when they are dealing with lgbt applicants, the review must carefully assess whether the difference of treatment is caused due to homophobic beliefs or not. Also the public visibility of the lgbt movement has been recently positively evaluated: in *Aleksejev* and *Identoba* the Court stated that lgbt movements deserve to be tolerated, and it has judged the possibility to manifest, to picket, and to demonstrate for lgbt rights as essential for democratic regimes.

The ECtHR has, hence, integrated the homosexual subject within its reading of the Convention, and it has opened spaces to challenge the traditional reading in every aspect of individual life.

If looking at the ECtHR's wording and at the expressions depicting same-sex couples, the ECtHR's jurisprudence apparently recognizes gays and lesbians as being fully valuable, and the Court seems to completely detach itself from a heteronormative perspective, from a negative evaluation of differences, and from the enforcement of the closet. In fact, sexual orientation is framed as a "most intimate aspect of private life", a particular "weighty" feature in the development of one's self.

Also, same-sex couples are openly recognized as being as "capable as different-sex couples of entering into stable, committed relationships" (*Oliari*, § 165), and they are deemed as being as "suitable or unsuitable as different-sex couples when it comes to adopting children" (*X and others*, § 142).

On first reading, the only criticism against judicial interpretation would entail past and overturned lawcases, with the relevant exception of same-sex marriage.

For my analysis, however, such conclusions do not grasp the complexity, the dynamism, and even the contradictions entrenched in ECtHR's jurisprudence.

On a closer look, multiple inconsistencies stand still, and the ECtHR's interpretive path fluctuates from creative and innovative judgments to restrained and traditional ones.

If it's true that sexual orientation can't justify either differentiated or pejorative treatments, a more detailed analysis unveils a jeopardized frame, where the ECtHR's approach can be critically reviewed from different angles.

The main subject entitled to full and boundless enjoyment of human rights is a heterosexual and, regardless of the variety of rights recognized, homosexuals remain a singular category, and in early ECtHR's jurisprudence they were also framed as being 'distinct'.

With the term 'distinct' I refer to the approach sketched in *Dudgeon* and implemented until *A.D.T*: the Court did not shape its reasoning on the comparison between heterosexuals and homosexuals, but it discussed which rights were reasonably claimable by gays and lesbians. In those complaints the Court departed from analyzing whether justifications adduced by respondent Governments bore reasonable grounds. Hence, judicial interpretation framed the homosexual subject as a category whose human rights were not defined in similarity to those granted to heterosexuals, and whose claims were acceptable insofar as he/she was able to demonstrate the irrational and prejudiced nature of national laws.

The possibility of framing lgbt rights without constantly comparing the conditions of lgbt people to heterosexuals rested on the idea that the two categories were so qualitatively distinct that they couldn't be correlated; it might be contended that this perspective implied a possible anti-majoritarian potential, in that the Court opened a hint to frame minorities' claims by completely detaching them from the legal treatment of sexual majority, and by focusing on only what substantially appeared just.

From a *queer* perspective it might be argued that, if implemented, these discourses could have led to practices of resistance against normalizing stances, and that sexual minorities could have framed a legal counter-narrative by endorsing a fluid and not-binary legal understanding of sexuality (Stychin 2003, 113). However, a similar suggestion risks remaining purely speculative, in that the majority of the complaints deal with the prohibition of discrimination, which is essentially grounded on comparison¹⁵³. Hence, in the frame of the ECHR, the rights granted to heterosexuals amount to the yardstick whereby measuring lgbt claims; in fact the Court rapidly abandoned the distinct approach, and from *Sutherland* onwards it extensively discussed the comparison between heterosexuality and homosexuality. The only notable exception regards

¹⁵³ I do not argue that a similar perspective is not feasible in every judicial or legal system; on the contrary, I consider it extremely fascinating and potentially empowering, but in contexts where the Court deals with a much more vast body of legislation. In similar systems, it might prove extremely useful to interrogate the law in the intersection of multiple dimension of exclusion and to reappraise the imaginary stances of libertarian trends.

the complaints concerning physical integrity, the freedom of association and expression. In the latter the Court couldn't draw a comparison because effectively no 'heterosexual march' had ever occurred, nor had heterosexuals ever been restricted in publicly expressing their sexual orientation.

As to the caseload concerning same-sex couples and families, judges tend to uphold lgbt claims insofar as the applicants realize an effective commitment commonly valued by Western culture. At first glance, this affirmation apparently disrupts the heteronormative understating of sexuality, and it allegedly fully realizes the principle of equality. However, as explored in chapter II, differences can be filtered through different, if not opposite, perspectives; one which positively evaluates them and which aims at fostering alternative lifestyles, and the other which, instead, pursues a normalization upon majoritarian standards.

I would ascribe most of the ECtHR's reasoning to the latter standpoint, because beneath the idea that heterosexuals and homosexuals deserve equal rights, the assumption that homosexuals have to be respected in as much as their conduct can be assimilated to heterosexuals' is often present.

Let's consider, for instance, the ECtHR's jurisprudence on the concept of family life. Despite a twisted and rough approach, the Court has recognized that same-sex cohabitations are a form of family life, but it has also stated that national authorities are obliged to legally recognize them even if domestic legislation already grants specific rights to heterosexual cohabiting partners.

From *Karner* to *Kozak* and *Vallianatos*, from *Fretté* to *E.B.*, to *X and others*, the very condition which has pushed the Court to uphold the applicants' claim was the existence of differential treatment between unmarried heterosexual and homosexual couples.

Marriage remains an intangible institution, the garrison of heterosexual privilege, and it draws a fundamental distinction, which apparently can't be bridged by the Court: outside wedlock gays and lesbians are equal to heterosexuals but, through marriage, the latter acquires a qualitative peculiarity which allows no comparison.

Hence, the boundaries are fixed, and, in this frame, the best possible result looks like a problematic 'separate but equal' regime. The reason for this choice is not clearly defined; judges do not necessarily display hostile or prejudiced arguments, describing, on the contrary, gays and lesbians as being capable of having a committed, stable, and caring relationship (*Schalk and Kopf*, § 94), of raising children (*X and others*, § 151), and also acknowledging that they have both the necessity to benefit from some kind of public recognition and the symbolic interest of being publicly entrusted with positive sanctions (*Vallianatos*, § 81).

Rather, I proceed to evaluate the intangibility of marriage as mostly deriving from strong deference by national authorities and from a restrained image of judicial roles; throughout judgments

several passages suggest that the Court wishes for an increasing of Coe Parties recognizing same-sex marriage, but the Court also considers itself as not legitimate to derive such obligation from the ECHR, at least at the present stage.

However, apart from the soft and non-binding encouragements towards egalitarian marriage, the outcome and the effect of the aforementioned judgments are to confer the residual supremacy of heterosexuality. Indeed, the Court has not been able to critically discuss the discriminatory and oppressive features entrenched in traditional marriage, hence describing such an institution as foundational and inherently valuable.

If heteronormativity embraces the ability and the power of heterosexual culture to mould the legal system and to veil the partiality and contingency of institutions such as that of marriage, then the ECtHR does not manage to disrupt this perspective; on the contrary, in *Schalk and Kopf* the Court pretended to offer a completely neutral interpretation, without even considering if the traditional rhetoric on wedlock affected its standpoint.

Therefore, tradition constitutes to being as neutral and it is generally endorsed, at least until the majority of Coe Parties does not choose another path.

The theoretical reasons why marriage deserves special concern are not discussed by the Court, in that they are so deeply entrenched that, reappraising Minow (1987, 95), the continuity with traditional prescriptions is in itself considered as a positive and legitimated aim; moreover, I consider the rigid separation between marriage and civil partnerships as mantled with a pretence of inevitability, which suppresses any other alternative point of view and tries to “make it harder for the observer [...] to challenge the absence of objectivity” (Ivi, 46).

As for the balance struck between heterosexual majority’s interests and lgbt minority’s claims, if comparing first EComHR decisions to most recent ECtHR judgments, a progression becomes visible and it’s clear that the Court has detached itself from a stark majoritarian reading.

In particular, when discussing homosexuals right to serve in the army, the Court stated that those policies or laws amounting to “a predisposed bias on the part of a heterosexual majority against a homosexual minority”, can’t bear “sufficient justification for the interferences with the applicants’ rights” (*Smith and Grady*, § 97).

The Court further specified this concept in *Alekseyev*, extensively discussing the relation between the Convention and minorities’ rights; in particular, judges rejected the possibility that the exercise of rights by a minority group was “conditional on its being accepted by the majority”, otherwise the ECHR itself would become “merely theoretical” (*Alekseyev*, § 81).

With reference to the aforementioned cases, the other’s perspective is taken into consideration, it is legally secured and positively evaluated; however, if comparing this caseload with ECtHR

judgments on lgbt migrants, I suggest that the perspective of the Court can be still considered as oriented towards a majoritarian definition of homosexuality.

To evaluate the attitude of the Court in respect to lgbt migrants correctly, it's indeed essential to focus on how the Court characterizes the homosexual personage.

From my reading the Court appears to be indirectly soaked with a normative understanding of homosexuality, which is read through Western lens; while analyzing *M.E.*, *M.K.N.*, *Sobahi*, *I.I.N.* the recurrent question I posed myself was 'which and whose homosexuality is the Court securing?'. Apart from the peculiarities of each case, two common traits are shared: firstly, the political and legal turmoil situation did not allow the applicants to prove beyond any doubt that if deported to their homeland, would they have faced harm and criminal sanctions. Secondly, all the applicants displayed a subjective experience of homosexuality which did not fit with the Western model: they had not come out, they did not live openly, but they often conformed to the heterosexual norm. In fact, some of the applicants did not even identify themselves as being gay, only submitting that they had had homosexual encounters and that this had exposed them to death threats. Their stories were not linear, but rather flawed and controversial, and the applicants had often failed to properly comply with immigration procedures.

Unlike in *Dudgeon*, *Norris*, *Sutherland* and other complaints, the applicants indirectly framed homosexuality as a fluid element and they did not waive it as an essential element of their personality.

Since the Court generally endorsed an innatist definition of sexual orientation, it's not surprising that the judges considered their account in respect to sexual orientation as lacking credibility.

To sum up, the Court was quite rigid in respect to the non-Western experience of homosexuality, and it implicitly restricted the cluster of lgbt people entitled to claim human rights to those who fitted to a stereotypical label of homosexual.

The very recent judgment of *Taddeucci* and *McCall v Italy*, app. no. 51362/09, reinforces such critical reading: the applicants, an Italian and a New Zealander citizen, who have been living in a homosexual relationship since 1999 and their personal history fits with the conventional image of sexual minorities endorsed by the Court: they are openly living their homosexuality and they have repeatedly challenged the Italian laws so as to obtain a residence permit for Mr. McCall; moreover, they live in contexts where information is easily collectable and they are easily labelled according to conventional Western narrative of homosexuality. On the contrary, despite in the former *I.N.N v the Netherlands* the applicant had stated to have lived with another man, to have kissed him in an alley, and to have been subjected to violence because of this, the Court concluded that since it was unlikely that in Iran people engaged in public kissing, the applicant

lacked credibility, somehow implying that even if his submissions were true, he was the only one to blame, in that he had not paid enough attention to widespread prejudices.

The Judges implicitly compared the condition of lgbt asylum seekers to an “unstated norm” (Minow 1987, 49), namely with the model of homosexuals that has emerged in European and north American culture: a man who has been aware of his sexual tendencies since infancy and who perceives his sexual orientation as an essential trait of his identity, so that the Court and society can label him and enclose him in a static and reassuring category. Hence, the other’s history and claims result either simplified or understood through the cognitive lens of majoritarian assumptions, and the Court might lean towards a quite stereotyped thinking.

I use the term stereotype in Gilman’s meaning¹⁵⁴, in order to stress how the desire for control might nullify the peculiarity of each person and might enclose him/her in a fixed category; with reference to asylum or residence permit seekers, the Court might be worried both that migrants are likely to lie about their sexual orientation and that a progressive slippery slope might occur. Most notably, permissive judgments towards lgbt migrants might incentivate all those whose request has been denied to lodge a complaint with the ECtHR on this ground, regardless of their actual sexual orientation. Had judicial outcome been favourable to the applicants, the Court would have endorsed as significant degree of activism, and its reasoning would have been harshly criticized by national authorities - a threat that the ECtHR tries to avoid as much as possible.

As for the distinction between private and public, the disruption of the closet emerges as the ambit where the ECtHR has developed the most innovative interpretation of the Convention. In contrast to coeval US policy, the ECtHR both condemned the UK ban on gay and lesbian soldiers and it laid down an interpretation to safeguard the freedom of speech, of expression, and of association. In early ECtHR’s judgments, from *Dudgeon* to *A.D.T.*, the separation between private and public was extremely sharp, to such an extent that the Court endorsed tolerance for private homosexual acts and the enforcement of some control over public disclosure of homosexuality. Privacy was, then, narrow and it resembled the model of the closet. Such reading, however, has been overturned in each and every realm: at present, the core for disagreement and the realm where the ECtHR could expand its interpretation are no longer centered on the separation between private and public, but, rather, on the range of duties, obligations, and rights implied by the right of public visibility recognized to lgbt people.

I would like to highlight another issue, relevant to the frame analyzed and to all the three criteria described in this paragraph. As Minow suggests, differences are frequently erased and

¹⁵⁴ See chapter II, par. 2.4.2

judged as irrelevant, both by the Courts and by the policy-makers (Minow 1987, 10-95); one of the concrete methods to make the other invisible is to enclose her demands, expectations, and experience in stereotyped labels.

As such, the problematic outcomes of the ECtHR might be read as “reject[ing] the experience of different people” (Ivi, 51). Yet there is another side to this coin that I would like to emphasize.

In the first decades, the EComHR effectively refused any possible debate on homosexuality, but from *Dudgeon* onwards the ECtHR has extensively dealt with the issue of difference and, though altering the other’s perspective, it has also recognized and greatly evaluated it.

Even in problematic judgments such as *Smith and Grady*, *Schalk and Kopf*, *Fretté*, *Vallianatos*, *M.E.* - to quote just a few- the Court strives to identify the correct approach to differences, as far as judicial perspective might be imbued by situated standpoints (Harding, 1997). Therefore, the Court might reject some claims related to counter-conceptions of sexuality and family, but it acknowledges the relevance of the difference, to the extent that it debates which human rights should be recognized to lgbt people precisely on the grounds of their difference.

Hence, a critical reading of the ECtHR’s reasonings might be articulated on two levels, in accordance with Minow’s proposal. Firstly, the Court selects those differences which should be legally evaluated and, secondly, the ECtHR reshapes them according to its theoretical premises and methodological choices, and, by doing this, it recreates differences which are conveyed through judicial review back in the social and political field.

In this respect, judicial reasoning amounts to a system of knowledge (Smart 1989, 162), which plays a role in constructing a hierarchy among the claims advanced in the name of a different sexual orientation. Through the careful picking, skimming, and redefining of the applicants’ perspective, the Court also manages to impact the social realm, on how lgbt activists might perceive and shape their claims related to the human rights law.

This is not a striking element, since, as Friedman extensively illustrated, in the course of the interaction between social interests and legal outputs, recent legal history presents various examples of legal changes which have led to “major social changes” (Friedman 1975, 276).

It would be pointless to assume that the ECtHR’s reasoning on homosexuality does not also affect the homosexual themselves; the interesting element is to raise awareness of this mutual influence among lgbt activists and those involved in ECtHR’s litigation. The comprehension of these mechanisms allows them to challenge and resist them: no doubt that in each judgment the Court leaves room for further elaboration and change, and that in the frame of pragmatic strategy, the best option is to take maximum advantage of these hints. However, from a more theoretical standpoint, it could also be useful to question the assumptions on which the ECtHR’s in-

terpretation stands and the eventual prejudiced dynamics it conveys, in order to produce further legal arguments to resist them.

5.3 Final Remarks

In conclusion, documental analysis does not allow any clear-cut or straightforward answer.

The ECtHR's interpretive standpoint may fluctuate from a decisive endorsement of minorities' rights to a questionable majoritarian perspective, from a decisive evaluation of homosexuals' public visibility to a more 'closeted' standpoint.

The ECtHR's internal legal culture is extremely heterogeneous, and depending on the issue addressed also the position of the Court, on which human rights can be legitimately claimed, varies.

As far as marriage and family life are concerned, I resort to the metaphor of a glass ceiling: the jurisprudence of the ECtHR departed from a 'floor' where homosexuals were openly excluded from any human rights, to progressively reaching a ceiling glass, a phase where equality and non-discrimination are achieved, but only under specific circumstances and under a sort of 'separate but equal regime'.

Therefore, the ultimate consequence is that despite the extremely valuable interpretation of the ECHR, at the moment, the Court seems neither to be about to dismantle such a ceiling, nor to give full enforcement to the principle of equality, or to carry out a positive evaluation of differences.

On the other hand, the Court has certainly interpreted the ECHR so as to open it to a lgbt-friendly meaning; as far as the Court might sometimes appear restrained, on numerous occasions it has dignified lgbt claims under the legal and theoretical frame of human rights.

Besides individual cases, the Court has rejected the stereotype of homosexuals as morally deviant, and even when endorsing a traditional asset, it no longer upholds openly begrudged prejudices against the applicants, while it seems more concerned about possible tensions with Coe political parties at the frontline to defend the traditional model of family.

Had the Court pursued a biased interpretation of the ECHR, it would have probably rejected the claims related to civil rights such as the respect for human dignity and the freedom of assembly, and it would have presumably restated the supremacy of national margin of appreciation.

For my analysis, the interpretation laid down by the ECtHR is not a trailblazer in enlarging the definition of lgbt human rights law, rather, it collects, systematizes, expands, and legitimizes already existing and ongoing trends. By this, I do not mean diminishing the valuable role of the Court in enhancing the flourishing of human rights; the ECtHR, indeed, performs a crucial task

of creative ratification, in that it often combines the ratification of existing legal trends with symbolic or theoretical innovations which affect the interpretation of the Convention.

Creative ratification can be defined by combining together Friedman's theories on the concept of creative disruption and of ratification.

Whereas the former "refers to the change through destroying or dismantling an established legal order" (Friedman 1975, 277), ratification identifies those legal acts that "put a formal stamp of approval on behaviour previously performed" or that "codify a new social state or rules of behaviour or attitude that already exist" (Ivi, 272).

In the context of the ECHR system, the Court can't be considered as purely adhering to the cluster of creative disruption, for its disposal at judicial activism is quite fluctuating and, at the same time, it does not have the authority of the national Courts to alter domestic legislations. Nevertheless, the interpretation of the ECHR involves a relevant degree of law creation and, then, it can't be classified as an act of pure ratification.

This feature starkly emerges when considering the law case on the UK ban of homosexual soldiers. As I already recalled, the UK was a negative exception in the European frame, in that other legislations; hence the Court ratified the existing trends in the Council of Europe, applied it to the case of the UK, and it did not set an innovative or unpredicted interpretation of the ECHR to this regard.

However, from a slightly different angle, the Court innovated the ECHR by clarifying its meaning. In reality, the formal admissibility of homosexuals in the army did not mean that they were effectively allowed to openly serve in Western armies, nor that they weren't discriminated against on this ground. Therefore, the Court not only ratified the 'formal trend' existing in Europe, but it also upheld the applicants' perspective under the theoretical umbrella of human rights, implying that national authorities had to formally and substantially enforce the right of lgbt soldiers to serve in the army and not to be discharged because of their sexuality. It has to be emphasized that the arguments adduced by the UK government were internationally shared, as the US case shows¹⁵⁵, and that the prejudice whereby gay and lesbians would have a negative ef-

¹⁵⁵ The comparison between the US case and the ECtHR's one allows also to better appreciate the innovative mind of the judges. In *Steffan v Cheney* the Court of Appeal offered an articulated opinion to dismiss the applicant's claim that he had been discharged from the army on the only ground of his affirmative answer when he had been asked whether he was homosexual. In particular, the Court of Appeals held that "constitutional theory" allowed the Board to terminate Steffan from the Academy, and also denied that the argument of Steffan, who had argued that he couldn't refuse to answer to the board's question and not to disclose his sexual orientation, for had he done so, they would either have investigated his private life or discharged him anyway (Zanetti 2015, 47 and fol.). Also British authorities tried to uphold a similar strategy, in *Smith and Grad* and *Lustig-Prean and Beckett*, by objecting to the

fect on the morale of armed forces, and would be unable to perform duties in stressful military contexts, was still spread both in political and in legal minds over Europe. It's precisely against this background that the ECtHR's interpretation acquires a creative meaning: it denied to such a differentiated treatment whatsoever legal value and it also framed similar arguments not as the outcome of an illegitimate perspective, which might have been understood though not legally upheld, but it trenchantly dismissed it as a merely negative and unjustified attitude (*Smith and Grady*, § 97).

As to the bound between the ECtHR and LGBT movements, they affect each other through a two-fold process; LGBT demands emerged in the social realm are transposed in legal terms, they are translated into the theoretical, logical, and discursive canons provided by the ECHR. Through its interpretative function, the Court answers those claims and, at the same time, it opens new spaces for future action and reflection.

On one hand, LGBT activists and those who wish to file a complaint extensively debate the implied, perhaps unpredicted, consequences of ECtHR's judgments, in order to define the future steps of their strategic litigation; on the other, LGBT movements stress the powerful legitimation given by the ECtHR, and they resemble the discursive practices of human rights moulded in the arena of the ECHR.

To sum up, an accurate analysis of arguments displayed by the ECtHR on sexual orientation testifies the contingent nature of human rights, and it helps to unveil the underpinned clash of interests: the final outcome, indeed, often appears defined as much by functional or structural considerations as by the will to ascertain what is theoretically and inherently just, normal, and/or appropriate.

The caseload on same-sex marriage and civil partnerships further attests that the Court does not move within a closed system¹⁵⁶, nor does it aim to do so; on the contrary, it variously refers to

applicants that they had been able to “freely chose, in any event, to answer the questions put to them and they were both told that they did not have to answer the questions and that they could have legal advice” (*Smith and Grady*, § 80), hence suggesting that their investigations had not relevantly and illegitimately breached the applicants' private life. Nevertheless, the ECtHR looked beneath the surface, and concluded that “had the applicants not participated in the interview process and had [the applicant] not consented to the search, the Court is satisfied that the authorities would have proceeded to verify the suspected homosexuality of the applicants by other means which were likely to be less discreet” (*Lustig-Prean and Beckett*, § 102). As such, the Court endorsed an interpretation of the Court more shaped on the knowledge of the practice of law, rather than on its mere formal appearance.

¹⁵⁶ Friedman describes closed those formal systems of legal reasoning when “decision-makers on the whole believe that they must base their decision only on ‘legal’ premises” (Friedman 1975, 237). Depending on whether these systems accept or not innovations, Friedman distinguishes between Sacred systems and systems based on Legal Science. In the former, decision-makers have a closed set of premises and deny any hint of innovation; in the latter, “the canon of premises is fixed but the known canon

consensus and to respect for common trends, hence suggesting that also the ‘judicial route’ requires compromises, and that in order to succeed, it’s not sufficient to persuade judges that a particular instance of sexual orientation may be interpreted as violating existing human rights law.

Hence, the ECtHR’s arguments depict a frame loaded with potentialities, but also a Court extremely careful not to overrun national sovereignty; against this background, strategic litigation bears significant outcomes when claims insist on the jeopardized enforcement of the human rights declared in the ECHR, or when national legislations fail to abide to the principle of equality or to the essential boundaries set by the Court. On the contrary, the ECtHR is not the appropriate arena where creatively stretching the meaning of human rights to vanguard demands, especially if these have not yet been addressed by lower political and legal systems.

Nor is it an institution keen on tracing a defined path of reforms and on imposing a top-down redefinition of the human rights declared in the ECHR. The ECtHR may be the only legitimate actor to interpret the ECHR, and it also may perform a crucial role of law-making, but always within a theoretical and discursive frame which is accepted, at least, by the *quasi* majority of Contracting Parties.

Rather, the Court is more receptive of demands from the grassroots which have already been the object of legal debate, and it may give them a systematic meaning under the frame of the ECHR. By this, I do not intend that in the event of a Country where lgbt claims are systematically rejected by the Courts and ignored by internal political debate, the ECtHR is necessarily likely to recognize a wide margin of appreciation. On the contrary, if in the Council of Europe a relevant majority or a growing number of States have juridically considered those demands and have developed relevant legal arguments, the ECtHR will probably inquire the ‘outlier’ Country and depart from the common perspective emerged to develop its own.

For my reading, the symbolic realm is the one where the Court delivers its most innovative judicial hints and, effectively, from *Dudgeon* onwards it has provided lgbt citizens with rights and it has empowered them with symbolical resources. Despite the casuistic approach and the very narrow margin of comparison between the facts submitted in one complaint and the circum-

of premises is not the same as the potential canon. Jurists can ‘discover’ new propositions, improve old ones, and show fresh relationships” (Ivi, 241). In common law the dynamics are revered, in that judges do not pretend to draw on a closed system of legal propositions only, while also referring to extra-judicial prepositions. For contrast, they formally deny innovation, and the doctrine of *stare decisis* would ensure a “notable pole of stability” (Ivi, 239). The ECtHR is, of course, an hybrid between these categories, but the doctrines of consensus and of the ECHR as a living instrument show that the canon of legal premises endorsed by the judges is quite opened.

stances in other Countries, the Court has repeatedly included in its judgments far-reaching statements.

Hence, the Court has transposed the particular to the general, by anchoring claims stemming from circumscribed facts to the theoretical frame of human rights.

Judges not only interpret the Convention and adjudicate cases, but they transform the nature of justifications and arguments; quite interestingly, in recent times even when dismissing the applicant's claims the Court has frequently opened limited spaces precluding to interpretive innovations. For instance, in *Schalk and Kopf* the Court opened the notion of family life to same-sex couples (*Schalk and Kopf*, § 94); likewise, in *Gas and Dubois* the Court structured its reasoning so as to clarify that its final decision was the outcome not of prejudice, but that of a comparison with rights guaranteed by the French legislation to unmarried couples. As far as flawed and problematic the final decision may be considered, such a statement still implied that in the event that national authorities discriminated between heterosexual and lgbt couples, the ECHR would be breached.

Despite its inconsistencies, the ECtHR stands for a symbolic beacon for lgbt human rights. Over the years the ECtHR has indeed specified the meaning of the ECHR so as to include gay and lesbian citizens as holders of the rights therein declared, and it has enlarged both negative and positive obligations burdening Contracting Parties, hence expanding the variety of rights and liberties enjoyed by homosexual men and women.

Above all, it has consistently clarified that gay rights are human rights, and that the respect for sexual minorities legitimately belongs to those values and ideals which constitute the best legacy of Europe.

APPENDIX I:

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Rome,

04.11.1950

The Governments Signatory hereto, being members of the Council of Europe,
Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;
Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;
Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;
Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;
Being resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,
Have agreed as follows:

ARTICLE 1

Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I RIGHTS AND FREEDOMS

ARTICLE 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

- (c) any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community;
- (d) any work or service which forms part of normal civic obligations.

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent Court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a Court or in order to secure the fulfillment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a Court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in Court.

ARTICLE 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

ARTICLE 14

Prohibition of discrimination

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

ARTICLE 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16

Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II: EUROPEAN COURT OF HUMAN RIGHTS

ARTICLE 19

Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis.

ARTICLE 20

Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

ARTICLE 21

Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a fulltime office; all questions arising from the application of this paragraph shall be decided by the Court.

ARTICLE 22

Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

ARTICLE 23

Terms of office and dismissal

1. The judges shall be elected for a period of nine years. They may not be re-elected.
2. The terms of office of judges shall expire when they reach the age of 70.
3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
4. No judge may be dismissed from office unless the other judges decide by a majority of two thirds that that judge has ceased to fulfil the required conditions.

ARTICLE 24

Registry and rapporteurs

1. The Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court.
2. When sitting in a single judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry.

ARTICLE 25

Plenary Court

1. The plenary Court shall
 - (a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
 - (b) set up Chambers, constituted for a fixed period of time;
 - (c) elect the Presidents of the Chambers of the Court; they may be re-elected;
 - (d) adopt the rules of the Court;
 - (e) elect the Registrar and one or more Deputy Registrars;
 - (f) make any request under Article 26, paragraph 2.

ARTICLE 26

Single-judge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.
3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
4. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.
5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

ARTICLE 27

Competence of single judges

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.
2. The decision shall be final.
3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee, or to a Chamber for further examination.

ARTICLE 28

Competence of Committees

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,
 - (a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or
 - (b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established caselaw of the Court.
2. Decisions and judgments under paragraph 1 shall be final.
3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.(b).

ARTICLE 29

Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.
2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

ARTICLE 30

Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

ARTICLE 31

Powers of the Grand Chamber

The Grand Chamber shall

- (a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;
- (b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and
- (c) consider requests for advisory opinions submitted under Article 47.

ARTICLE 32

Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

ARTICLE 33

Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

ARTICLE 34

Individual applications

The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

ARTICLE 35

Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
 - (a) is anonymous; or
 - (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
 - (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
 - (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

ARTICLE 36

Third party intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings
2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.
3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

ARTICLE 37

Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

- (a) the applicant does not intend to pursue his application; or
- (b) the matter has been resolved; or
- (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

ARTICLE 38

Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

ARTICLE 39

Friendly settlements

1. At any stage of the proceedings the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2. Proceedings conducted under paragraph 1 shall be confidential.

3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

ARTICLE 40

Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

ARTICLE 41

Just satisfaction

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

ARTICLE 42

Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

ARTICLE 43

Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

ARTICLE 44

Final judgments

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
 - (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or
 - (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
 - (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.

ARTICLE 45

Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

ARTICLE 46

Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph

1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

ARTICLE 47

Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the committee.

ARTICLE 48

Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

ARTICLE 49

Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

ARTICLE 50

Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

ARTICLE 51

Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

SECTION III MISCELLANEOUS PROVISIONS

ARTICLE 52

Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

ARTICLE 53

Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

ARTICLE 54

Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

ARTICLE 55

Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

ARTICLE 56

Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, nongovernmental organisations or groups of individuals as provided by Article 34 of the Convention.

ARTICLE 57

Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned.

ARTICLE 58

Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

ARTICLE 59

Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
2. The European Union may accede to this Convention.
3. The present Convention shall come into force after the deposit of ten instruments of ratification.
4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome This 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Paris,

20.03.1952

The Governments Signatory hereto, being members of the Council of Europe,
Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”),
Have agreed as follows:

ARTICLE 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

ARTICLE 2

Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

ARTICLE 3

Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

ARTICLE 4

Territorial application

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

ARTICLE 5

Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

ARTICLE 6

Signature and ratification

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

APPENDIX II

SUMMARIES OF LEGAL CASES

W.B. v the Federal Republic of Germany

App. no. 104/55

17.12.1955 [Commission]

I. Facts

The applicant was, at the relevant time, serving a sentence of 15 months for homosexual acts prohibited by the German Criminal Code, which criminalized male homosexual acts. Before the ECtHR he complained that the criminalization of such acts amounted to an unjustified interference with his right to private life, and that the existence of a differentiated treatment between homosexuals and heterosexuals/lesbians was discriminatory. Hence, he invoked Article 2, Article 8, Article 14, Article 17, and Article 18.

II. Law

Holding:

Inadmissible.

Commission's decision:

The Commission reiterated that the ECHR allowed the Contracting Parties to legitimately interfere with citizens' private life, insofar the interference pursued a legitimated aim, it was in accordance with the law, and it was necessary in a democratic society. The Commission considered that homosexuality did not fall within the meaning of private life, and it held that also the differentiated treatment between homosexuals and heterosexuals/lesbians under the German Criminal Code was legitimated and did not require further examination. The Commission declared the compliant inadmissible.

X v the Federal Republic of Germany

App. no. 5935/72

30.09.1975 [Commission]

I. Facts

The applicant was convicted of indecent assault against minors of the same sex, punished by the German Criminal Code. The minors were aged under 16 and he was sentenced to two years and a half of prison. He maintained that the evidence given by the witnesses was not trustworthy or was improperly taken during abnormally long hearings, and that certain experts whom he wished to have heard on his defense had not been called by national Courts. Before the ECtHR the applicant alleged that the criminal provisions by virtue of which he was convicted were contrary to the ECHR, constituted an interference with the right to private life, and amounted to discrimination based on sex, in that German law punished the solely homosexuality of a man over 18 years with a partner under 21. He invoked Article 8, alone and in conjunction with Article 14, and Article 6.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 6: the Commission did not find any appearance of violation of the rights and freedoms guaranteed by this Article and considered this part as manifestly ill-founded.

Article 8: The Commission observed that the provisions of the German Criminal Code relating to sexual offences had been considerably amended, and since 1969 masculine homosexuality was no longer punished as such. The purpose of the German legislature was to prevent homosexual acts with adults having an unfortunate influence on the development of heterosexual tendencies in minors; in particular it was feared that on account of the social reprobation with which homosexuality was still regarded, a minor involved in homosexual relationships with an adult might in fact be cut off from society and seriously affected in his psychological development. In so far as the protective measure enacted by the legislature could be considered to affect the applicant's private life, German legislature was aimed at protecting the rights of others within the meaning of paragraph 2 of Article 8 of the ECHR .

Article 8 in conjunction with Article 14: the Commission considered that German authorities distinguished between homosexuals and heterosexuals/lesbians on the ground of the reasonable fear that the former entailed more risks, as it was associated to a distinct social-cultural groups with a clear tendency to proselytize adolescents. No breach of Article 14 arose.

X v the UK

App. no. 7215/75

12.07.1978 [Commission]

I. Facts

The applicant was charged and found guilty of the offence of buggery in respect of the acts committed with a male aged between 18 and 21. In 1974 he was sentenced to two and a half of imprisonment, in accordance with Sexual Orientation Act which criminalized homosexual acts with men aged below 21 years. The applicant was released in 1976. Before the ECtHR he complained that the law which set the age of consent was unjust and violated his right to respect for private life. He also alleged a discriminatory treatment, since the age of consent for private acts between males was 21 while for heterosexuals and lesbians it was 16. He invoked Article 8, alone and in conjunction with Article 14, and Article 10, in that during his sentence he had been denied to freely express his love for men.

II. Law

Holding:

Striking out.

Commission decision:

The Commission deemed the case admissible, but the applicant died shortly after and the Court struck the case out. The report of the Commission, however, offers insightful considerations, reappraised in subsequent decisions and judgments.

Article 8: the Commission considered whether the prosecution of the applicant and the provision that fixed the age of consent at 21 unjustifiably interfered with his right to private life. The prosecution of the applicant was deemed as necessary to the protection of the others, and the provision of a minimum age of consent pursued the legitimate aim of protecting young men aged between 18 and 21.

Article 8 in conjunction with Article 14: the Commission considered whether the difference in the age of consent set for homosexuals and heterosexuals/lesbians amounted to a discrimination in the right to respect for private life. The Commission considered that both heterosexuals and lesbians had a different social nature, less harmful, and voted against finding a violation.

Article 10: the Commission did not further assess the issue, declaring it inadmissible.

Dudgeon v the UK

App. no. 7525/76

22.10.1981 [Plenary Court]

I. Facts

The applicant complained against the existence of criminal laws in Northern Ireland against male same-sex acts. The applicant complained of having been questioned by the police about his homosexual status, attitudes and behavior in January 1976, and he complained that the homosexual reform organization of which he was a member had been subject to harassment by the police since then, and that he personally had experienced fear and psychological upset because of such harassment. Before the ECtHR the applicant also emphasized that, being homosexual, he suffered unjustifiable discrimination on grounds of sex and residence, in contravention of Article 14 of the Convention; offences in the criminal law of Northern Ireland were not part of the law in other regions of the UK and, therefore, if being homosexual he resided in such other regions, he would not suffer fear and distress of prosecution. The applicant invoked Article 8, alone and conjunction with Article 14.

II. Law

Holding:

Existence of criminal laws prohibiting homosexual practices between consenting adult men: violation.

Court's decision:

Article 8: the Court considered that the prosecution of consensual, private, homosexual acts could not be justified by the existence of pressing social needs, nor by the necessity to protect the rights of others or to enforce morals. The restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, was disproportionate to the aims sought to be achieved, apart from the severity of the possible penalties provided for. As to the age of consent, the Court considered legitimate in a democratic society to provide a degree of control over homosexuality, in order to protect the youth and, therefore, it judged Northern Irish legislation legitimated. Therefore, the ECtHR found a breach of Article 8 as the criminalization of male homosexuality was concerned, but not on the age of consent.

Article 8 in conjunction with Article 14: the Court deemed as not necessary to consider the complaint under Article 14.

X ldt. and Y v the UK

App. no. 8710/79

07.03.1982 [Commission]

I. Facts

The applicant X ldt. was the publisher and applicant Y the editor of a magazine which consisted mainly of homosexual content. One of the issues carried a poem describing explicit acts with the body of Christ immediately after his death and ascribing to him promiscuous homosexual practices with the Apostles and other men. Private prosecution was brought against X ldt. and Y by Mrs W, while the Director of Public Prosecutions decided not to prosecute them. As a result, the applicants were sentenced to pay a fine, and the second also to few months of imprisonment. The applicants appealed, submitting that they had not blasphemous intents and arguing that the offense of blasphemy, as far as rooted in judicial practice, was not codified by British law. Before the ECtHR they contended that they had been discriminated in the exercise of their freedom of conscience, further adding that their conviction was based on legal principles which had not existed or had not been defined with clarity at the time of the commission of the offence. They invoked Article 7, Article 9, Article 10, and Article 14 in conjunction with Article 10 and with Article 9.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 7: the Commission conceded that the applicants had been interfered with their freedom of expression, and that this interference needed to be justified. The Commission observed that also rules of common or other customary law may provide a sufficient legal basis for the restriction of fundamental rights subject to exception clauses, if two requirements are met: the law had to be adequately accessible and, secondly, a norm could not be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. The Commission applied the same principles to common law, holding that the complaint under Article 7 was ill-founded.

Article 10: the Commission noted that the Government had invoked three grounds of restriction to freedom of expression, namely prevention of disorder, protection of morals, and protection of the rights of others. The Commission concluded that the restriction was covered by a legitimate purpose, namely the protection of the rights of others, and that the restriction imposed on the applicants could be considered as necessary within a democratic society. In fact, the Commission accepted that the religious feelings of the citizens deserved protection against indecent attacks on the matters held sacred. The applicants' complaint was found ill founded, and consequently dismissed.

X and Y v the UK

App. no. 9369/81

03.05.1983 [Commission]

I. Facts

X, who was Malaysian citizen, and Y, who was a UK citizen, had established a stable homosexual relationship, at first living together in the UK. Then, X and Y had left for Malaysia but Y was only granted limited residence permit by Malaysian authorities and was refused a work permit. In 1979, X and Y returned to the United Kingdom, where X was granted a temporary residence permit but no work permit. In 1982, X was found guilty of overstaying and a deportation order was made against him. Before the ECtHR the applicants complained that the refusal by UK authorities to allow the first applicant to remain in the UK infringed their right to respect for private life. They invoked Article 8.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 8: the Commission found that the applicants' relationship did not fall within the scope of the right to respect for family life ensured by Article 8, but that it fell within the respect for their private life. The Commission found that it had not been shown that the applicants could not live together elsewhere than the United Kingdom or Malaysia. The Commission concluded, therefore, that the refusal to allow the first applicant to remain in the United Kingdom did not constitute an interference with the applicants' right to respect for private life. Accordingly, this aspect of the application was declared inadmissible as ill-founded.

B v the UK

App. no. 9237/81

12.10.1983 [Commission]

I. Facts

In 1972 the applicant joined the army for a term of nine years. On 26 August 1980 he appeared before a Court-martial in Germany: he had been charged with homosexual conduct which the applicant had engaged in with a gunner in his regiment in Germany, and with a civilian at home. The gunner concerned was aged below 21; the applicant admitted the charges and was sentenced to a reduction in rank and to nine months' imprisonment with corrective military training, followed by dishonourable discharge. He had previously had an exemplary military record. Before the ECtHR the applicant complained of his conviction on the above-mentioned charges, and he alleged the breach of Articles 8, alone and in conjunction with Article 14.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 8: the Commission considered the proceedings against the applicant as interfering with his private life, yet necessary and legitimated. The Commission accepted that homosexual conduct by members of the armed forces might pose a particular risk to order which would not arise in civilian life. In these circumstances, the Commission considered that his Court-martial and dismissal from the service could be considered "necessary in a democratic society" for the "protection of morals" and also "for the prevention of disorder" in the context of military service. Article 14 in conjunction with Article 8: in the Commission's opinion the measures in question were taken in pursuit of a legitimate aim and were not in the circumstances disproportionate. The Commission declared the complaint inadmissible.

S. v the Federal Republic of Germany

App. no. 10686/83

05.10.1984 [Commission]

I. Facts

The applicant was a German citizen, who lived and worked in Morocco, between 1963 and 1975. In 1973 he and a colleague were arrested by the Moroccan police on the suspicion of having committed homosexual offences and passport forgery. They were convicted by the District Court in Casablanca and sentenced to three years' imprisonment, but shortly before the hearing of the second appeal both defendants were expelled from Morocco. After his return to the Federal Republic of Germany, the applicant lodged a civil action against Germany, claiming damages on the ground that during his arrest and trial in Morocco he had not been adequately assisted by the German diplomatic services. The action was dismissed by domestic Courts, in that the applicant's Moroccan lawyer had kept German diplomats informed and, according to Moroccan laws, foreign diplomats were not allowed to intervene in proceedings. Before the ECtHR the applicant submitted that German diplomatic services had not intervened to protect him while he was in prison and had thereby exposed him to the risk of torture. But also the inhuman conditions in prison could have been avoided had the diplomatic service intervened on his behalf. He invoked Article 3, and Article 6.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 3: The applicant did not produce adequate evidence of any ill-treatment contrary to Article 3.

Article 6: the Commission first noted that the subject of the applicant's complaint was not his treatment in a Moroccan prison or the alleged unfairness of his trial but the alleged failure of the German diplomatic authorities to take adequate action. The Commission therefore considered whether the Convention imposed any obligation on the diplomatic authorities of the Federal Republic of Germany to take action such as those contended by the applicant. The Commission had previously held that a High Contracting Party may, in certain circumstances, be liable for the acts or omissions of its authorities occurring outside its territory, or having consequences outside its territory. However, the Commission had even clarified that no right to diplomatic intervention *vis-à-vis* a third State could be inferred from the Convention. The Commission finally noted that the circumstances of the present case were entirely different from those of expulsion cases in which the Commission had held that, in exceptional circumstances, expulsion or extradition may violate the Convention. The application was accordingly considered incompatible with Convention *ratione materiae* and was rejected.

S. v the UK

App. no. 11716/85

14.05.1986 [Commission]

I. Facts

The applicant had lived in a house belonging to the Borough of Harrogate with Ms. R. s a "secure tenant" within the meaning of the Housing Act 1980 from the Harrogate Borough Council. It was generally known and accepted in the neighbourhood that they lived together in a lesbian relationship. In 1984 Ms. R. died and the Harrogate Borough Council commenced possession proceedings against the applicant. The applicant appealed to the Court of Appeal requesting that the possession order be set aside, that a declaration be made that the tenancy should rest in the applicant by virtue of Section 30 of the Housing Act 1980 and asking for costs. However, the Court of Appeal rejected her request and also the House of Lords dismissed her case. Before the ECtHR the applicant complained that respect for her private and family life had been denied, and that she had been evicted from her home for no other reason than that she was of the wrong sex to be able to claim under domestic law to succeed to the tenancy of her home. She invoked Article 8, Article 13, and Article 1 of Protocol 1.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 8: the Commission recalled that, despite the modern evolution of attitudes towards homosexuality, a stable homosexual relationship between two men/women did not fall within the scope of the right to respect for family life ensured by Article 8. Since the applicant had lived alone since the death of her partner, the applicant's own private life in respect of that partner had not been interfered with. Any interference which there may have been with the applicant's private life, it had to be considered in the context of her home. On this point, however, the Commission noted that the applicant was occupying the house without any legal title whatsoever and that she was no longer entitled to remain in the house.

Article 1, Protocol 1: the Commission considered the Borough of Harrogate's policy as clearly in accordance with the law and also as necessary for the protection of the contractual rights of the Article 1, Protocol 1. The Commission considered the complaint as ill-founded and declared in inadmissible.

Johnson v the UK

App. no. 10389/83

17.07.1986 [Commission]

I. Facts

The applicant held a party, to which he had invited some 40 people, all of whom were homosexual as was the applicant himself. Between 02.00 a.m. and 02.30 a.m. the police entered the flat where the party was still in progress, suspecting that sexual activities with men aged below 21 were going on. Various items were removed from the applicant's bedroom and the applicant was taken to the police station. The applicant had not invited any person aged under 21, nor minors were present at the party. However, the applicant was accused of permitting homosexual acts contrary to the Sexual Offences Act 1967, which provided that a homosexual act in private shall be an offense when more than two persons take part or are present. No prosecutions were subsequently brought; however the applicant remained upset and frightened by the events; moreover the publicity in the press probably played a decisive part in the withdrawal of an offer of permanent employment at the firm of travel agents with which he was on probationary service. Before the ECtHR the applicant submitted that the raid on his home was an interference with his right to private life and his home. He also complained a discrimination, since the legislation applied to male homosexuals only. He invoked Article 8, alone and in conjunction with Article 14.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 8 alone and in conjunction with Article 14: the Commission considered whether the existence of legislation prohibiting homosexual acts with consenting males under 21, in the personal circumstances of the applicant, directly affected his private life. It was not however contended that the applicant had had or wished to have homosexual relations with a male under 21; hence, the legislation did not continuously and directly affect his private life. Accordingly, the Commission found that the existence of this legislation did not present any appearance of an interference with the applicant's rights. The Commission further noted that the entry into the applicant's apartment was made on the suspicion that an offence against this provision was being committed, namely that of a man committing buggery with another man aged below 21. As already held in other cases, the Commission concluded that the difference in treatment between male homosexuals and heterosexuals/lesbians was justified by the criterion of social protection of vulnerable men and by the peculiar social nature of male homosexuality. Accordingly, the Commission declared the complaint inadmissible.

W.J. and D.P. v the UK

App. no. 12513/86

13.07.1987 [Commission]

I. Facts

The first applicant was a citizen of New Zealand, living with the second applicant, who was a citizen of the UK. The first applicant had enjoyed of a entry permit, in 1979, and this permit had been renewed until 1985. Then, the first applicant requested indefinite leave to remain, on the ground that since April 1982 he had been living with the second applicant in a stable homosexual relationship. He was also employed as a teacher. The Home Secretary considered the question of the stable homosexual relationship, but highlighted that the Immigration Rules made no provision for a person to remain in the UK on that basis. The first applicant appealed against the Secretary of State's decision, but he incurred in a rejection. The second applicant stated that he would not be admitted to New Zealand to work as enquiries had revealed that he could not be considered eligible for the "occupational priority list". Before the ECtHR they complained in respect of the refusal by immigration authorities to grant the first applicant to remain in the UK, invoking Article 1, and Article 14 in conjunction with Article 8.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 1: the Commission concluded that this aspect was ill-founded and dismissed it.

Article 14 in conjunction with Article 8: The Commission held that homosexual relationships did not fall within the ambit of family life, but rather within the notion of private life. Hence, even though the refusal to allow a person to remain in a country where he has been living and working for several years may result in a disruption of his private life, this event can't be regarded as an interference with the right to respect for private life, unless the person concerned can demonstrate that there are exceptional circumstances in his case justifying a departure from that principle. Accordingly, the Commission found that the absence in UK Immigration Rules of settlement rights for non-nationals in respect of their stable, private relationships, other than family relationships, did not, of itself, disclose any appearance of a violation. The Commission found no substantiation in this case for the applicants' claim that no individual consideration has been given to their particular circumstances by the Secretary of State; nor had the applicants provided any substantiation of their claim that it would be impossible to live together in New Zealand or elsewhere. In the light of the above considerations, the Commission concluded that the complaint was ill-founded and declared it inadmissible.

Norris v Ireland

App. no. 190581/83

26.10.1988 [Plenary Court]

I. Facts

David Norris was homosexual and had been a campaigner for homosexual rights in Ireland since 1971. In 1977 the applicant instituted proceedings in the High Court claiming against the existence in Ireland of laws which made certain homosexual practices between consenting adult men criminal offences. The applicant had never been convicted on the ground of the aforementioned legislation, but nevertheless he contended to suffer from illegitimate interference with his private life. Most notably, the applicant suffered deep depression on realizing that he was irreversibly homosexual and that any overt expression of his sexuality would expose him to criminal prosecution. He also feared that when his partner came to visit him in Ireland, he could be criminally charged. After participating in a television programme on State broadcasting company, in the course of which he admitted to being a homosexual but denied that this was an illness, a complaint was lodged against that programme but authorities finally decided not to prosecute him. However, the applicant gave evidence of suffering verbal abuse and threats of violence subsequently to the interview, and he also alleged that in the past his mail was opened by the postal authorities. Before the ECtHR the applicant claimed that the existence of laws which criminally sanctioned male homosexual practices infringed his right to respect for private life. He invoked Article 8.

II. Law

Holding :

Existence of criminal laws prohibiting homosexual practices between consenting adult men: violation.

Court's decision:

Article 8: the Court adopted a reasoning similar to *Dudgeon's*. It held that the existence of aforementioned laws did interfere with the applicant's private life, and it ascertained whether such an interference was in accordance with exemption criteria set out in Article 8, namely whether it was in accordance with the law, it had a legitimated aim, and it was necessary in a democratic society. The Court considered that it could not be maintained that in Ireland there was a "pressing social need" to make such acts criminal offences. On the issue of proportionality, the Court restated that although public opinion who judged homosexuality as immoral may be shocked, offended, or disturbed by the commission by others of private homosexual acts, this could not on its own warrant the application of penal sanctions when consenting adults alone are involved. Therefore, the Court found a breach of Article 8.

C. and L.M. v the UK

App. no. 14753/89

09.10.1989 [Commission]

I. Facts

In 1984 the first applicant had entered the UK with a prior entry clearance as a working holiday-maker. Her stay was extended until 22 February 1986, when the first applicant applied for a permanent residence on the basis of her permanent job and her lesbian relationship with a British woman (Ms. E.). Her application was rejected, this not being a status recognized by the statement of changes in Immigration Rules. In 1988 further representations were made to the Minister, including the fact that the first applicant was now pregnant by artificial insemination by a donor, and that the splitting up of such a family unit would be contrary to the ECHR. The Home Office replied that it did not consider the pregnancy to be a sufficient reason to depart from the immigration rules, even though Ms. E., had no eligibility to emigrate to Australia, nor did she wish to. The first applicant gave birth to a daughter, the second applicant, on 6 January 1989. Since confinement and the birth of the child, the first applicant was financially dependent on Ms. E. and parenting tasks were shared between them. In the event of her deportation to Australia with the child, the first applicant risked to be homeless, destitute, and to be forced to rely only on social security payments for the maintenance of herself and her child. The applicants submitted to be victims of a breach of Articles 8, 12 and, implicitly, 14 of the Convention.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 8: the Commission found that the applicants' lesbian partnership involved private life, within the meaning of Article 8. Although lawful deportation might have repercussions on such relationships, this measure cannot be regarded as an interference with the ECHR. The Commission, therefore, concluded that there had been no interference with the applicants' right to respect for private life ensured by Article 8.

Article 12: the Commission excluded that such provision might refer to same-sex couples and rejected this complaint as ill-founded.

Article 14: in accordance with its case-law, the Commission considered legitimate that the immigration rules give priority and better guarantees to traditional established families, rather than other established relationships like a lesbian partnership. The Commission found no element of discrimination contrary to Article 14 of the Convention.

Under these considerations, the Commission declared the complaint inadmissible.

Z.B. v the UK

App. no. 16106/90

10.02.1990 [Commission]

I. Facts

The applicant was a Cypriot national, who had arrived in the United Kingdom in 1977 with a limited leave to remain as a student. In 1983 the Secretary of State made a deportation order against the applicant, who requested a residence permit on the ground that he was in a permanent and stable homosexual relationship with Mr. R., a UK national, with whom the applicant had been living since late 1985. After the refusal of his request, the applicant's solicitors made a claim for asylum in view of the fact that male homosexual behavior was a criminal offence in Cyprus. The applicant was further informed that even taking into account the possible effect of the applicant's deportation on Mr. R. and the total period spent by the applicant in the UK, the Secretary of State had decided not to revoke the deportation order. The applicant also resorted to the High Court, without success. Before the ECtHR he invoked Article 8, alone and in conjunction with Article 14.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 8: The Commission noted that the applicant formed his relationship with Mr. R. at a time when he was aware that he had no right to remain in the United Kingdom. The Commission held that although lawful deportations inevitably have repercussions on such relationships, such a policy cannot in principle be regarded as an interference with the right to respect for private life. On the overall, the State's right to impose immigration controls and limits remained preeminent. In the present case, however, the applicant further contended that he would have been exposed to prosecution for homosexual activity if he had returned to the northern part of Cyprus. Nevertheless, the Commission maintained that UK authorities had acted in accordance with the law, seeking legitimate aims, and respecting the requisite of proportionality.

Article 8 in conjunction with Article 14: the Commission reiterated that no discrimination existed contrary to this provision where the Immigration Rules gave priority and better guarantees to established couples living in a family relationship as opposed to other relationships. Accordingly, the Commission concluded that this complaint was manifestly ill-founded, and declared it inadmissible.

Kerkhoven, Hinke, and Hinke v the Netherlands

App. no. 15666/89

19.05.1992 [Commission]

I. Facts

The first and second applicant had a stable lesbian relationship since December 1983 and considered themselves to be the social parents of the third applicant, born on 20 November 1986, who biologically was the second applicant's son. The first and second applicant requested to be vested with the parental authority over the third applicant. This request was rejected on 4 September 1987. Also the Arnhem Regional Court and the Supreme Court dismissed the applicants' plea of nullity. The Supreme Court held that unmarried parents could be vested with the parental authority over a minor only if both have legal family ties with the child. The first applicant had no legal ties with the child, nor was she able to establish those ties through recognition, as this option was impossible for a woman under Dutch law. Before the ECtHR the applicants complained that the refusal to vest the first applicant with the parental authority over the third applicant amounted to an unjustified interference with their right to respect for their family life and private life. They further alleged a discrimination in respect of heterosexual couples. They invoked Article 14, alone and in conjunction with Article 8.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 8 in conjunction with Article 14: the Commission recalled that a stable homosexual relationship between the two women did not fall within the scope of the right to respect for family life ensured by Article 8. The Commission further noted that the relevant legislation in itself did not prevent the three applicants from living together as a family; the only problem was the impossibility for the first applicant to establish legal ties with the third applicant. The Commission was of the opinion that Contracting Parties were not required to allow that a woman such as the first applicant, living together with the mother of a child and the child itself, should be entitled to get parental rights over the child. The Commission therefore considered that there had been no interference with the applicants' right to respect for their family life. As regards private life, the Commission considered that the statutory impossibility for the first applicant to be vested with the parental authority over the third applicant did not entail any restriction in the applicants' enjoyment of their private life. The Commission noted that, as regards parental authority over a child, homosexual couples could not be equated to a man and a woman living together. For these reasons the Commission declared the application inadmissible.

Modinos v Cyprus

App. no. 15070/89

22.04.1993 [Chamber]

I. Facts

The applicant was involved in a sexual relationship with another male adult. He was the President of the "Liberation Movement of Homosexuals in Cyprus" and he stated to suffer from great strain, apprehension, and fear of prosecution by reason of the criminal provisions which criminalized homosexual acts involving consensual adult males. Before the ECtHR the applicant complained that the maintenance in force of provisions of the Cypriot Criminal Code criminalizing private homosexual relations amounted to an unjustified interference with his right to respect for private life under Article 8.

II. Law

Holding:

Existence of criminal laws prohibiting homosexual practices between consenting adult men: violation.

Court's decision:

Article 8: even if since *Dudgeon* judgment the Attorney-General, who was vested with the power to institute or discontinue prosecutions in the public interest, had followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct, on the basis that the relevant law is a dead letter, this policy provided no guarantee that eventual prosecutions will not be taken by a future Attorney-General, particularly when considering the statements by Government ministers which suggested that the relevant provisions of the Criminal Code were still in force. Moreover, it could not be excluded that the applicant's private behavior might be the subject of investigations by the police or that a private prosecution might be brought against him. Against this background, the Court considered that the existence of the prohibition continuously and directly affected the applicant's private life. The Court held the same approach of *Dudgeon* and *Norris* judgments, finding a breach of Article 8.

Hauer and Guggenheim v Austria

App. no. 18116/91

13.10.1993 [Commission]

I. Facts

During a memorial against war and fascism the applicants and other members of their association unrolled a banner with the inscription "Thousands of homosexual victims of concentration camps wait for their rehabilitation". Subsequently, two police officers requested the applicants to remove the banner. Two other members of the association accompanied them in order to ask a superior police officer about the reasons for this request. A group of twenty to thirty police officers rushed towards the banner and took it. The applicants lodged a complaint with the Constitutional Court claiming that they had been violated in their right to freedom of expression. The Constitutional Court rejected the applicants' argument and held that they had attempted to demonstrate their interests and claims at a particularly solemn ceremony to unveil a memorial against war and fascism. Before the ECtHR the applicants complained that the removal of their banner amounted to a violation of their right to freedom of expression. They invoked Article 10.

II. Law

Holding:

Inadmissible.

Commission's decision:

Article 10: the Commission had to ascertain whether the police interference in the applicants' freedom of expression had been justified, legitimate, and proportionated. Firstly, the Commission noted that the removal of the banner was aimed at protecting a particular ceremony and, thus, that it pursued legitimate aims within the meaning of Article 10. Secondly, the Commission recalled that the adjective "necessary" implied the existence of a "pressing social need". The Commission further considered that the applicants had showed their banner on the occasion of a ceremony with a solemn character. The Commission, balancing the applicants' interest in exercising their right to freedom of expression and the public interest in protecting the undisturbed performance of the ceremony in question, found that the removal of the applicants' banner had not overstepped the margin of appreciation left to the national authorities. The interference could, therefore, be regarded as "necessary in a democratic society" for the prevention of disorder and the protection of the rights of others. In particular, there was a reasonable relationship of proportionality between the means employed and the legitimate aims pursued. The complaint was considered ill-founded and declared inadmissible.

Scherer v Switzerland

App. no. 19/1992/41493

23.03.1994 [Commission]

I. Facts

The applicant, who died on 13 March 1992, ran a sex shop for homosexuals in Zürich. The shop sold, among other things, magazines, books and films, but the nature of the establishment was not apparent to passers-by. At the back of the shop there was a room, used for showing video films that were changed every week or every fortnight. On 23 November 1983 the sex shop was searched; the Zürich district Attorney's office confiscated the film "New York City", and brought proceedings against the applicant, who was also questioned by the police. After hearing the parties, the Canton of Zürich Court of Appeal sentenced Mr Scherer to a fine of CHF 4,000 for publishing obscene items and for driving while under the influence of alcohol. On the first count the Court held that the aim of Article 204 of the Criminal Code was to protect the public in a wider sense; Mr Scherer lodged an application for a declaration of nullity with the Zürich Court of Cassation and then he resorted to the Court of Appeal, but his appeal was rejected. Before the ECtHR he complained under Article 6 of the Convention of the length and unfairness of the criminal proceedings against him. He also relied on Articles 8 and 10 for his conviction for showing the film *New York City* and for his conviction for selling obscene materials.

II. Law

Holding:

Striking out.

Commission's decision:

the Government asked the Commission to consider whether the instant case should be struck out of its list in view of Mr Scherer's death; on the contrary, Mr Scherer's lawyer challenged the Government's argument. He first referred to the wishes of his client, who had expressed the desire that the case be pursued to its conclusion. Secondly he argued that a judgment by the Commission would clarify a number of difficult issues related to the freedom of expression. Thirdly, he reported that the applicant's executor wanted the proceedings to continue. On a number of occasions the Court had accepted that the parents, spouse, or children of a deceased applicant were entitled to take his place in the proceedings, but the Commission did not find anything similar to these position in the present cases. Under these circumstances Mr Scherer's death was held as a "fact of a kind to provide a solution of the matter" and it was stroke out.

Wilde, Greenhalgh, and Parry v the UK

App. no. 22382/93

19.01.1995 [Commission]

I. Facts

The applicants were three homosexual men who, in separate occasions, suffered from homophobic attacks which caused them injuries and distress. The first applicant had been physically attacked but they did not report the fact to the police, because he feared not to be considered. In 1993 the second applicant, aged 24, took part in a radio discussion in which he referred to his sexual relationship with the third applicant aged 19. A member of the public wrote to the Director of Public Prosecutions to ask for criminal proceedings to be brought. Mr. Greenhalgh and Mr. Parry were then interviewed by the police on 21 July 1993, but the proceedings were not ultimately brought against them. Before the ECtHR the applicants claimed a reduction of the age of consent and they recalled the Policy Advisor Committee on Sexual Offense, which suggested to reduce the age for homosexual relations at 18. They invoked Article 14 in conjunction with Article 8.

II. Law

Holding:

Striking out

Commission's decision:

In 1994 the age of consent for homosexual activities was reduced to 18 years and despite a difference between heterosexuals/lesbians and homosexuals still existed, the Government asked the Commission to strike the case out of its list.

The Commission found that the aim of the applicants was not to equalize the age of consent, rather to have a reduction of the minimum age for homosexual acts from 21 to 18, since they were all aged 18 and over. Therefore, even though after the reform UK laws still provided different ages of consent for homosexuals and heterosexuals, the Commission found that the entry into force of the entry in force of the Criminal Justice and Public Order Act 1994 had resolved the matter brought forward by the applicants. Against this background the Commission struck the case out of its list.

Reiss v Austria

App. no. 23953/94

06.09.1995 [Commission]

I. Facts

The applicant owned a bar in Wien and its customers were mainly male homosexuals. Customers seeking entrance to the bar had to ring at the door, minors under 18 years were not admitted. Following an anonymous letter, three police officers entered the applicant's bar and seized a homosexual pornographic video which was shown on a video monitor as well as several similar video cassettes. The applicant was heard by the Investigating Judge and charged under the Pornography Act. The applicant stated that while he was not at his bar, an acquaintance of his had deposited several video cassettes there for him, not to be shown in public; one of his employees, however, had shown them on the videos. The Regional Court convicted the applicant of the offence under Pornography Act and sentenced him to a fine of 40 daily rates of 300 AS each and 20 days of imprisonment. Subsequent appeal were rejected. Before the ECtHR the applicant complained that the criminal proceedings against him had been unfair and that his conviction violated his right to respect for private life. He invoked Article 6 and Article 8.

II. Law

Admissibility:

Inadmissible.

Commission's decision:

Article 6: the Commission found that the Regional Court based its judgment on the assessment of the evidence it had and drew its conclusions therefrom. Whether these conclusions involved an error of fact or law was an issue which the Commission was not entitled to determine. Under such circumstances there was no appearance of a violation of the applicant's right to a fair trial under Article 6.

Article 8: the Commission recalled that while business activities enjoyed to a certain extent the protection of Article 8 of the Convention, regard must nevertheless be had in this respect to the nature of such premises, the business activities exercised therein and the nature of the alleged interference. In the present case the applicant was the owner of a bar, accessible to the public, although subject to certain control. At least on 21 November 1991 a homosexual pornographic video cassette was shown in the bar and similar video cassettes were found there. In short, having regard to the specific circumstances of the present case, the Commission couldn't find that the applicant's conviction under the Pornography Act constituted an interference with his rights. The application was considered ill-founded and declared inadmissible.

Roosli v Germany

App. no. 28318/95

15.05.1996 [Commission]

I. Facts

The applicant had commenced co-habitation with Mr. B. in 1988, at an apartment owned by Mrs. W. and rented by Mr. B. The applicant and Mr. B. had a homosexual relationship. Mr. B. died in 1993. In March 1994 the applicant informed Mrs. W. that he intended to succeed to the late Mr. B.'s tenancy contract, and she commenced eviction proceedings against the applicant. The Munich District Court granted Mrs. W.'s eviction claim and ordered the applicant to leave the apartment by the end of August 1994. Also the Munich I Regional Court dismissed the applicant's appeal. In 1995 the Federal Constitutional Court refused to admit the applicant's constitutional complaint. Before the ECtHR the applicant complained under Article 14, taken in conjunction with Article 8 that, unlike the surviving partner of married or other heterosexual couples, he was refused succession to the tenancy of his late partner's apartment.

II. Law

Admissibility:

Inadmissible.

Commission's decision:

Article 14 in conjunction with Article 8: the Commission recalled that, despite the modern evolution of attitudes towards homosexuality, a stable homosexual relationship between two men did not fall within the scope of the right to respect for family life. Moreover, the Commission held that the applicant's relationship with his deceased partner accordingly fell outside also the scope of the right to respect for private life, since as long as the latter was alive they had not been interfered in their relationship. The Commission found that any interference which there might have been with the applicant's private life had to be considered in the context of his right to respect for home. It was not disputed that the treatment accorded to the applicant had been different from the treatment he would have received if his partner had been of different sex. The Commission recalled that the family, to which the relationship of heterosexual unmarried couples living together as husband and wife could be assimilated, did merit special protection in society and that it saw no reason why a Contracting Party should not afford particular assistance to traditional families. The Commission therefore accepted that the difference in treatment between the surviving partner of a homosexual or lesbian couple and somebody in the same position whose partner had been of the opposite sex could be objectively and reasonably justified. The Commission concluded that the application was manifestly ill-founded and declared it inadmissible.

Wingrove v the UK

App. no. 17419/90

25.11.1996 [Chamber]

I. Facts

The applicant had written the shooting script and directed the making of, a video work entitled "Visions of Ecstasy", allegedly derived from the writings of St. Teresa of Avila about her powerful ecstatic visions of Jesus Christ. The video had only erotic scenes, and the applicant filmed two women, supposed to be St. Teresa and her psyche, having sexual intercourses between them and with Christ. The British Board of Film Classification denied the applicant the possibility to lawfully sell or distribute the video, since it conveyed blasphemous messages; the applicant appealed against, but he was finally advised that his case was not suitable for judicial review. In the event that the applicant distributed the video, he risked to be criminally prosecuted for blasphemy. Before the ECtHR the applicant complained that the refusal of a classification certificate for his video - without certificate no video could be sold in the UK - was in breach of his freedom of expression. He invoked Article 10 of the Convention.

II. Law

Holding:

Refusal to grant distribution certificate for a video depicting a blasphemous lesbian sexual intercourse: no violation.

Court's decision:

Article 10: the Court accepted that the applicant had been interfered with his freedom of expression and it investigated whether the criteria required by Article 10 exemption clauses had been met. Firstly, it accepted that blasphemy by its very nature has no precise legal definition and afforded national authorities wide flexibility in assessing whether particular facts fall within definition. The aims pursued by the government corresponded to the protection of others and the Court evaluated the interference as fully consonant and balanced. Lastly, the interference intended to protect the audience against seriously offensive attacks on matters regarded as sacred by Christians, and the Court noted that there was not sufficient common consensus to conclude that blasphemy legislation was, in itself, unnecessary in a democratic society.

Although interference amounted to a complete ban, this was the understandable consequence of authorities' opinion that the distribution of that video would infringe the criminal law and of applicant's refusal to amend it or cut out blasphemous scenes. Hence, the Court found no violation.

Laskey, Jaggard and Brown v the UK

App. no. 21627/93, 21628/93, 21974/93

19.02.1997 [Chamber]

I. Facts

In the course of routine investigations into other matters, the police came into possession of a number of video, filmed during sadomasochistic encounters involving the applicants and as many as forty-four other homosexual men. As a result the applicants, with several other men, were charged with a series of offences, including assault and wounding, relating to sadomasochistic activities that had taken place over a ten-year period. The infliction of pain was subject to certain rules including the provision of a code word to be used by any "victim" to stop an "assault", and did not lead to any instance of infection, permanent injury or to the need for medical attention. The activities took place at a number of locations, including rooms equipped as torture chambers. There was no suggestion that the tapes had been sold or used other than by members of the group. The proceedings were given widespread press coverage. All the applicants lost their jobs and Mr Jaggard required extensive psychiatric treatment. All the applicants were sentenced for imprisonment in accordance with the Person Act 1861, which provided imprisonment for whosoever unlawfully and maliciously wounded or inflicted bodily harm upon other person. Before the ECtHR the applicants relied on Articles 7 and 8 of the Convention, complaining that their convictions were the result of an unforeseeable application of a provision of the criminal law which, in any event, amounted to an unlawful and interference with their right to respect for their private life.

II. Law

Holding:

Prosecution and conviction for sadomasochistic homosexual practices: no violation.

Court's decision:

Article 8: the Court held that not every sexual activity carried out behind closed doors necessarily fell within the scope of Article 8. In the present case, national authorities had acted consistently with the Person Act and they had pursued a legitimate aim, namely the protection of the rights of others. The Court held that the applicants' sadomasochistic activities involved a significant degree of injury which could not be characterized as trifling or transient. Nor did the Court accept the applicants' submission that no prosecution should have been brought against them since their injuries were not severe and since no medical treatment had been required. In sum, the Court found that the national authorities were entitled to consider as necessary the prosecution and conviction of the applicants in a democratic society for the protection of health within the meaning of Article 8.

Article 7: The Court did not consider necessary to examine the complaint under this issue.

Sobhani v Sweden

App. no. 32999/96

10.07.1998 [Commission]

I. Facts

The applicant was an Iranian citizen, arrived in Sweden where he later applied for asylum. In 1995 the National Immigration Board rejected the application and ordered the applicant's expulsion to Iran. The applicant's appeal was rejected by the Aliens Appeals Board. Before the ECtHR the applicant claimed that he would be arrested and executed upon return to Iran on the account of his homosexuality. He invoked Article 2, Article 3, and Article 8.

II. Law

Holding:

Striking out.

Commission's decision:

In 1996 the Commission decided to indicate to the respondent Government that it was desirable in the interest of the parties and for the proper conduct of the proceedings not to expel the applicant to Iran until the Commission had had an opportunity to examine the application. On 17 June 1998 the Government informed the Commission of its decision to grant the applicant a permanent residence permit. The Government requested the Commission to strike the application out of its list of cases. By letter of 1 July 1998, the applicant expressed the wish to withdraw the present application. As regards the issues raised in the present case, the Commission found no reasons of a general character affecting respect for human rights, requiring the further examination of the application. The case was struck out.

Smith and Grady v the UK

App. no. 33985/96, 33986/96

23.02.1999 [Section III]

I. Facts

Both applicants, who were at the relevant time members of the UK armed forces, were homosexual. The Ministry of Defense applied a policy which excluded homosexuals from the armed forces. The applicants were each the subject of an investigation by the service police concerning their homosexuality and were discharged on the sole ground of their sexual orientation. They appealed against this decision, but their appeal was rejected. Before the ECtHR they complained that the investigations into their sexual orientation and their subsequent discharges violated their right to respect for private life; they further claimed that the policy against homosexuals and consequent investigations had been degrading and that they had been illegitimately interfered in their right to express their sexual identity. They also denounced national remedies as inadequate. The applicants invoked Article 8, alone and in conjunction with Article 14, Article 3, alone and in conjunction with Article 14, Article 14 in conjunction with Article 10, and Article 13.

II. Law

Holding:

Discharge from army due to implementation of policy against participation of homosexual in armed forces: violation.

Lack of adequate domestic remedies: violation.

Court's decision:

Article 8: the Court considered that the investigation and discharge together with the blanket nature of the policy of the Ministry of Defense, did not meet the criteria required by exemption clauses of the ECHR, also lacking of proportionality with the aims sought and resulting not necessary in a democratic society. Therefore, it found a violation of Article 8, taken alone.

Article 3: the Court accepted that investigations and discharges were undoubtedly distressing and humiliating; however, the Court did not consider that the treatment reached the minimum level of severity which would bring it within the scope of Article 3.

Article 10: the Court also considered that the freedom of expression was not crucial to the present case and it found that it was not necessary to examine the applicants' complaints under Article 10.

Article 13: the applicants argued that domestic judicial review did not constitute an effective domestic remedy: the Court found that the threshold at which the domestic Courts might find the policy of the Ministry of Defense irrational had been placed so high that it effectively excluded any consideration on the question of whether the interference with the applicants' private lives had answered a pressing social need, on whether it was proportionate to the national

security and to public order. The Court concluded, accordingly, that the applicants had not been granted any effective domestic remedy in relation to the violation of their rights.

Lustig-Prean and Beckett v the UK

App. no. 31417/96

27.09.1999 [Section III]

I. Facts

Both applicants, who were at the relevant time members of the UK armed forces, were homosexual and after investigations by the service police concerning their homosexuality, they were discharged on the sole ground of their sexual orientation. They appealed against this decision, but their appeal was rejected. Before the ECtHR the applicants complained that the investigations into their sexual orientation and their subsequent discharges violated their right to respect for their private lives and amounted to an unjustified discrimination. The applicants invoked Article 8, alone and in conjunction with Article 14.

II. Law

Holding :

Discharge from army due to implementation of policy against participation of homosexual in armed forces: violation.

Lack of adequate domestic remedies: violation.

Court's decision:

Article 8 in conjunction with Article 14: the Court considered that the investigation and the discharge together with the blanket nature of the policy of the Ministry of Defense were of a particularly grave nature, and did not meet the criteria required by exemption clauses of the Convention. Therefore, it found a violation of Article 8, taken alone.

Article 3: the Court accepted that investigations and discharges were undoubtedly distressing and humiliating for each of the applicants; however, the Court did not consider that the treatment reached the minimum level of severity which would bring it within the scope of Article 3.

Article 10: the Court also considered that the freedom of expression was subsidiary to the applicants' right to respect for their private lives, and it found that it was not necessary to examine the applicants' complaints under Article 10.

Article 13: the Court found that the threshold at which the domestic Courts could find the policy of the Ministry of Defense irrational had been placed so high that it effectively excluded any consideration by the domestic Courts of the question of whether the interference with the applicants' private lives had answered a pressing social need or was proportionate to the national security and public order. The Court concluded, accordingly, that the applicants had not had an effective domestic remedy, and it found a violation of Article 13.

Salgueiro de Silva Mouta v Portugal

App. no. 33290/96

21.12.1999 [Chamber]

I. Facts

The applicant had been prevented by his ex-wife from visiting his daughter M., in breach of an agreement reached at the time of their divorce. He, then, sought an order awarding him parental responsibility for the child, which was granted by the Lisbon Family Affairs Court in 1994. M. lived with the applicant until 1995 when she was allegedly abducted by her mother. On appeal, the mother was given parental responsibility whereas the applicant was granted a contact order which, he maintained, he was unable to exercise. The Lisbon Court of Appeal gave two reasons in its judgment for granting parental responsibility for M. to her mother, namely the interest of the child and the fact that the applicant was homosexual and he lived with another man. Before the ECtHR the applicant complained of an unjustified discrimination against his right to respect for his private and family life, in breach of Article 14 in conjunction with Article 8. He also invoked Article 8 alone, because he had been forced by the Court of Appeal to hide his homosexuality when seeing his daughter.

II. Law

Holding:

Refusal to grant custody to a parent living in a homosexual relationship and obligation to hide his homosexuality during meetings with his daughter: violation.

Court's decision:

Article 8 in conjunction with Article 14: the Court noted that the judgment of the Lisbon Court of Appeal constituted an interference with the applicant's right to respect for his family life, and it acknowledged that the decision to grant parental responsibility to the mother rather than the father, had had regard to the fact that the applicant was a homosexual and living with another man. There had been, therefore, a difference in treatment between the applicant and M.'s mother based on the applicant's sexual orientation. The Court of appeal had pursued a legitimate aim in reaching its decision, namely the protection of the child's health and rights. However, several passages from the judgment of the Lisbon Court of Appeal suggested that the applicant's homosexuality had been decisive in the final decision, which thus amounted to a distinction dictated by the applicant's sexual orientation that was not permissible to draw under the Convention. That conclusion was supported by the fact that the Court of appeal had discouraged the applicant from behaving during visits in a way that would make the child aware that he was living with another man "as if they were spouses". The Court therefore found a violation.

Article 8: the Court held that it was unnecessary to rule on the alleged violation of Article 8 taken alone as the same point was the same as that considered under Article 8 taken together with Article 14.

A.D.T. v the UK

App. no. 35765/97

31.07.2000[Section III]

I. Facts

The applicant was homosexual. Following a police search of his home, he was arrested and taken to the local police station where he admitted that certain videos seized during the search contained footage of himself and up to four adult men engaging in sexual acts in his home. He was convicted of gross indecency between men contrary to Sexual Offences Act 1956 and he was sentenced and conditionally discharged for two years. Before the ECtHR the applicant complained of an illegitimate interference with his private life, further alleging to have been discriminated against because of his homosexuality. A group of heterosexual individuals or homosexual females involved in similar sexual activities would not have been prosecuted, there being no legislation prohibiting such acts. The applicant invoked Article 8, alone and in conjunction with Article 14.

II. Law

Holding:

Criminal conviction for engaging in homosexual group sex: violation.

Court's decision:

Article 8: the Court agreed that, with reference to certain sexual activities, the State's interference may be justified, either as not amounting to an interference with the right to respect for private life, or as being justified for the protection, for example, of health or morals. The facts of the present case, however, did not indicate any such circumstances. The applicant had been involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. The activities were therefore genuinely "private" and the Court adopted the same narrow margin of appreciation it had applied in other cases involving intimate aspects of private life. Given the absence of any public-health consideration and the purely private nature of the behaviors in the present case, the Court found that the reasons submitted for the maintenance in force of legislation criminalizing homosexual acts between men in private were not sufficient to justify the legislation and the prosecution.

Article 14: the Court deemed not necessary to examine the case under this provision.

Craig v the UK

App. no. 45396/99

05.09.2000 [Section IV]

I. Facts

The applicant was a social worker working with children under five years who had been involved in a homosexual relationship with Ms. L since 1990. L obtained a divorce in February 1993 but the custody and care of L's four children were the subject of High Court proceedings and L agreed that she would not permit the children to come into contact with or remain in the company of the applicant or of any other person known to L to be lesbian. Ms. L asked the applicant not to call at her home at any time when she had access to the children, and she undertook not to answer or open the door if the applicant called at her house during a scheduled access visit. Before the ECtHR the applicant complained she was deprived of the right to intervene in the custody proceedings, in support of her relationship with L. She further complained that she was obliged to disclose to any future employer the fact that her name was mentioned in Court orders in proceedings involving children and she alleged that this could negatively affect her future work with children. She also complained about a discriminatory difference in treatment, since the orders in question did not apparently restrict the children's contact with all male homosexuals. She invoked Article 6, Article 8, Article 13, Article 14.

II. Law

Holding:

Inadmissible.

Court's decision:

Article 6 and Article 8: the Court found that the applicant's inability to intervene in or to take proceedings with the purpose of supporting her relationship with L did not disclose a violation because, it was Ms. L herself who had chosen to limit their relationship in the terms outlined in the relevant High Court orders.

Article 13: the Court held that no separate issue arose under Article 13 in respect of this aspect of the applicant's complaint.

Article 14: the Court observed that the applicant had compared her position to that of all male homosexuals. Since L was a woman and had a relationship with a female applicant, the Court did not find that the applicant and other female homosexuals could be compared and considered analogous to male homosexuals in the particular context.

Finally, the applicant complained that she was obliged to disclose to any future employer the fact that her name was mentioned in Court orders in proceedings involving children and she maintained that this could effect her future employment in posts involving children. Both her employer and the school where she voluntarily worked were aware of her homosexuality and she did not provide any evidence of any positions in respect of which she had been obliged, to

her detriment, to disclose the relevant Court orders. Hence, the Court declared the complaint inadmissible.

Cardoso and Johansen v the UK

App. no. 47061/99

05.09.2000 [Section III]

I. Facts

The first applicant had been resident in the United Kingdom since 1981 and he had been in a long term stable relationship akin to marriage for 18 years with the second applicant. The first applicant worked and paid tax and National Insurance contributions and submitted tax returns, and tried to obtain a permanent permit by a marriage of convenience, in 1984. In 1995, the first applicant was diagnosed as suffering from HIV and in November 1996 with an AIDS defining illness. In 1997, the first applicant obtained a false Italian passport to visit his elderly mother in Brazil. On his return from that trip, he was stopped and his false identity discovered. On 5 October 1998, the Secretary of State refused the first applicant a leave to enter the United Kingdom and ordered to remove him to France on the basis that the first applicant could make an application to enter from there and that this was the Country from which he had entered the UK. The first applicant could not benefit from available concessions concerning homosexual relationships as, although he had lived in the United Kingdom since 1981, he was technically seeking leave to enter and not leave to remain. The first applicant obtained medical reports in support of his attempt to stay in the United Kingdom.

II. Law

Holding:

Striking out.

Court's decision:

By letter dated 26 July 1999, the Government informed the Court that the Immigration Service had reconsidered the first applicant's case and found it appropriate to waive the entry clearance requirement. On 27 July 1999, the first applicant was granted leave to enter the UK. On 7 August 2000, the applicants' representatives accepted the offer of the Government to pay their fees and costs in the amount of GBP 11,025 in full and final settlement of their claims. The Court noted that the applicants had agreed to settle their claims on the basis of the first applicant receiving leave to enter the UK and on payment of a sum in respect of their legal costs and expenses. In these circumstances, it found that the applicants no longer intended to pursue their application. The Court was satisfied that respect for human rights did not require the continued examination of the application. For these reasons the Court struck the case out.

Sutherland v the UK

App. no. 25186/94

01.07.1997 [Commission decision]

27.03.2001 [Grand Chamber]

I. Facts

The applicant, British national, was homosexual. He had met his partner when they both were aged 16. They had a sexual relation but were worried about the fact that under the law this was a criminal offence. Under Sexual Offences Act 1967 homosexual buggery did not amount to offence, provided that the parties had consented thereto and had attained the age of 21. In contrast, the age of consent with respect to women was 16. On 21 February 1994 the House of Commons had rejected an amendment to reduce the minimum age of consent for male homosexual acts to 16 but, by 427 votes to 162, had accepted an amendment to reduce the minimum age to 18. Before the ECtHR the applicant complained that the fixing of the minimum age for lawful homosexual activities between men at 18, rather than 16 as for women, violated his right to respect for private life under Article 8, and was discriminatory in breach of that Article taken in conjunction with Article 14.

II. Law

Holding:

Striking out.

Commission's opinion:

Article 14 in conjunction with Article 8: the Commission recalled that there was a legitimate necessity in a democratic society for some restrictions over homosexual conduct, most notably in order to provide the safeguards against the exploitation and the corruption of those who are vulnerable by reason of their youth. The Commission also considered that the applicant was in a relevantly similar situation to a young man of the same age who wished to enter into and maintain sexual relations with a female friend of the same age. UK provisions did pursue a legitimated aim, namely the protection of morals and the right of others, but the Government failed to demonstrate a reasonable relationship of proportionality between the means employed and the aims sought. In the light of the changes occurred in medical profession on the subject of the need for the protection of young male homosexuals and on the desirability of introducing an equal age of consent, the Commission reconsidered its earlier approach and considered that there didn't exist any objective justification for maintaining a different age of consent for homosexual and heterosexual acts.

Court's decision:

After the approval of Sexual Offences Act, in 2000, the Court received a statement from the Government and from the applicant, both asking to strike the case out from its list. By equaliz-

ing the age of consent for homosexual acts between consenting males to 16, new provisions removed the risk or threat of prosecution that previously existed under national laws of the respondent State. Against this background, the Court was satisfied that the matter had been resolved and struck the case out of its list.

Mata Estevez v Spain

App. no. 56501/00

10.05.2001 [Chamber]

I. Facts

The applicant had lived with another man, Mr G.C., for more than ten years. They could not sanction their union by marrying because under Spanish law only heterosexual couples could marry. In 1997 Mr G.C. had died in a road accident. The applicant claimed the social-security allowances for the surviving spouses, arguing that he had cohabited with the deceased for many years. The National Institute of Social Security granted the applicant's claim in respect of an allowance for death expenses, but it refused to grant him a survivor's pension on the ground that since he had not been married to Mr G.C., he could not legally be considered as his surviving spouse for the purposes of General Social Security Act. The applicant appealed against that decision, but his appeal was dismissed by the Madrid Social and Employment Court. The applicant lodged an application for the protection of fundamental rights with the Constitutional Court, which dismissed the appeal on the ground that it was ill-founded. Before the ECtHR the applicant complained that the refusal to award him a survivor's pension amounted to a discriminatory treatment infringing his right to respect for private and family life. He invoked Article 14 in conjunction with Article 8.

II. Law

Holding:

Inadmissible.

Court's decision:

Article 14 in conjunction with Article 8: the Court reiterated that long-term homosexual relationships between two men did not fall within the scope of the right to respect for family life protected by Article 8 of the Convention. The Court considered that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this was an area in which they still enjoyed a wide margin of appreciation. Accordingly, the applicant's relationship with his late partner did not fall within Article 8 in so far as that provision protected the right to respect for family life. With regard to private life, the Court accepted that the applicant might have been treated differently if his partner had been of different sex. Indeed Spanish legislation had taken some account of unmarried couples with regard to their eligibility for a survivor's pension since, under Spanish law, persons living together as man and wife before 1981 who could not marry each other, since they had been already married with others and before 1981 Spanish law did not permit divorce, had been eligible for a survivor's pension. However, marriage constituted an essential precondition for eligibility for a survivor's pension; in no circumstances relevant Spanish legislation permitted marriage between persons of the same sex. The Court considered such differentiated

treatment as pursuing the legitimated aim of protecting the family based on marriage bonds. In conclusion, the application was rejected as manifestly ill-founded.

Goddard v the UK

App. no. 57821/00

15.01.2002 [Section IV]

I. Facts

The applicant was engaged as a private in the Royal Logistics Corps of the UK army. In 1999 she admitted to her commanding officer that she was homosexual, and she received a certificate of discharge from the armed forces. On 20 December 2000 the applicant commenced proceedings in the Employment Tribunal alleging a breach of her contract, further denouncing to suffer from discrimination on grounds of sexual orientation. On 2 March 2000 that tribunal dismissed her claims; in addition, on 18 April 2000, her proceedings were struck out. Before the ECtHR the applicant complained about the investigations conducted into her sexual orientation and her discharge; she invoked Article 8, alone and in conjunction with Article 13 of the Convention, and Article 3, alone and in conjunction with Article 14.

II. Law

Holding:

Striking out.

Court's decision:

By a letter dated 30 October 2001 the applicant's representatives confirmed her acceptance of the Government's settlement offer. The Court noted that the matter had been resolved. It was further satisfied that the parties' agreement was based on respect for human rights as defined in the Convention or its Protocols. Accordingly, the case was struck out of the list of the ECtHR's cases.

Fretté v France

App. no. 36515/97

26.02.2002 [Section III]

I. Facts

The applicant had applied for the authorization to adopt but, in 1993, the Paris Social Services, Youth and Health Department refused the applicant's request. An appeal lodged by the applicant was dismissed on the ground that the applicant's "choice of lifestyle" did not appear to be such as to provide sufficient guarantees that he could give a child a suitable home from an educational, psychological and family perspective. The Paris Administrative Court set aside the decisions refusing the applicant authorization, noting there was no evidence to establish or even suggest that Mr Fretté's lifestyle denoted a lack of moral rigor or emotional stability. Paris Social Services, however, appealed to the *Conseil d'Etat*, which set aside the Administrative Court's judgment and dismissed the applicant's request for prior authorization. Before the ECtHR the applicant complained that the dismissal of his request amounted to arbitrary interference with his private and family life, because it was based exclusively on the unfavorable prejudice about his sexual orientation. He invoked Article 6 and Article 14, taken together with Article 8.

II. Law

Holding:

Refusal to authorize the adoption on the ground of sexual orientation: non violation.

Failed summoning to judicial hearing: violation.

Court's decision:

Article 14 in conjunction with Article 8: French domestic law authorised any unmarried person to apply to adopt, and the Court concluded that there had been a difference in treatment based on the applicant's sexual orientation. The Court noted that the decisions refusing authorisation pursued the protection of the health and rights of children who might be concerned by an adoption procedure. Noting that the scientific community was divided over the issue, the Court afforded national authorities with wide margin to legitimately circumscribe the right to be able to adopt. Therefore no violation was found.

Article 6: The Court noted that the applicant had not been summoned to the hearing in the *Conseil d'Etat*. As a result, he had not had the opportunity to have knowledge of the submissions of the Government commissioner. Not being represented, he could not obtain a general idea of their content before the hearing either. That had deprived him of the possibility of filing a rejoinder in the form of a note to the Court at the deliberations stage. Hence, the Court found a violation of Article 6.

Perkins and R. v the UK

App. no. 43208/98, 44875/98

22.10.2002 [Section IV]

I. Facts

Both applicants had been at the relevant time members of the UK armed forces and were discharged because of their homosexuality. The applicants were also subjected to an investigation by the service police concerning their homosexuality. They appealed against this decision, but their appeal was rejected. Before the ECtHR the applicants complained that the investigations into their sexual orientation and their subsequent discharges had violated their right to respect for private life; they further claimed that the policy against homosexuals were degrading and that they had been illegitimately interfered in their right to express their sexual identity. They also denounced national remedies as inadequate. The applicants invoked Article 8, alone and in conjunction with Article 14.

II. Law

Holding:

Discharge from army due to implementation of policy against participation of homosexual in armed forces: violation.

Court's decision:

Article 8: the Court considered that the investigation and the discharge together with the blanket nature of the policy of the Ministry of Defense were of a particularly grave nature and constituted direct interferences with the applicants' right to respect for private life which could not be justified as being "necessary in a democratic society". A violation of Article 8 was therefore found.

Article 14: the Court did not consider that the applicants' complaints under Article 14 of the Convention in conjunction with Article 8 gave rise to any separate issue.

Beck, Copp, Bazeley v the UK

App. no. 48535/99, 48536/99, 48537/99

22.10.2002 [Section IV]

I. Facts

The three applicants had been each the subject of an investigation by the service police concerning their homosexuality and were discharged on the sole ground of their sexual orientation. They appealed against this decision, but their appeal was rejected. Before the ECtHR the applicants complained about both the intrusive investigations into their private lives and about their subsequent discharges. They invoked Article 8, both alone and in conjunction with Article 14 of the Convention; they also considered that they had been treated in a manner inconsistent with Article 3, either taken alone or in conjunction with Article 14 of the Convention. The applicants further invoked Article 10, both alone and in conjunction with Article 14 of the Convention. Finally, the applicants invoked Article 13 of the Convention, arguing that they had had no effective domestic remedy in relation to the above violations of the Convention.

II. Law

Holding:

Discharge from army due to implementation of policy against participation of homosexual in armed forces: violation.

Court's decision:

Article 8: the Court considered that the investigation and the discharge together with the blanket nature of the policy of the Ministry of Defense were of a particularly grave nature, and did not meet the criteria required by exemption clauses of the Convention. Therefore, it found a violation of Article 8, taken alone.

Article 3: the Court accepted that investigations and discharges were undoubtedly distressing and humiliating for each of the applicants; however, the Court did not consider that the treatment reached the minimum level of severity which would bring it within the scope of Article 3.

Article 10: the Court also considered that the freedom of expression was subsidiary to the applicants' right to respect for their private lives, and it found that it was not necessary to examine the applicants' complaints under Article 10.

Article 13: the Court found that the threshold at which domestic Courts could find the policy of the Ministry of Defense irrational had been placed so high that it effectively excluded any consideration by the domestic Courts of the question of whether the interference with the applicants' private lives had answered a pressing social need or was proportionate to the national security and public order. The Court observed that the applicants had not had an effective domestic remedy, and it found a violation of Article 13.

L. and V. v Austria*

App. no. 39392/98, 39829/98;

09.01.2003 [Section I]

I. Facts

The applicants were convicted of homosexual acts under Article 209 of the Criminal Code, which penalized homosexual acts of adult men with consenting adolescents aged between 14 and 18, while for heterosexuals and lesbians the age of consent was 14. The first applicant had appealed and he had also asked a review of the constitutionality of Article 209, but his request had been rejected. Before the ECtHR the applicants alleged that the maintenance in force of Article 209 as their convictions under that provision violated their right to respect for their private lives and were discriminatory. They relied on Articles 8 and 14 of the Convention.

II. Law

Holding:

Differentiated age of consent for male homosexual activities: violation.

Court's decision:

Article 14 in conjunction with Article 8: the Court noted that, following the Constitutional Court's judgment of 21 June 2002, Article 209 of the Austrian Criminal Code had been repealed on 10 July 2002. Nonetheless, criminal convictions under that provision were unaffected by the change in the law. Accordingly, the Court found that the applicants were directly affected by the maintenance in force of Article 209 before the age of 18; as a consequence, the Court considered that the Constitutional Court's judgment had not afforded redress for the alleged breaches of the Convention. Nor had it resolved the issue in question. The Court denied that there was an objective and reasonable justification why young men in the 14 to 18-year age bracket needed protection against any sexual relationship with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. The Court held that there had been, in both cases, a violation of Article 14 taken in conjunction with Article 8.

* Comparable facts, law, and Court's decision in *Ladner v Austria* (App. no. 18297/03); *S. L. v Austria* (App. no. 45330/99); *Woditschka and Wilfing v Austria* (App. no. 69756/01, 6306/02); *H.G. and G.B. v Austria* (App. no. 11084/02); *R.H. against Austria* (App. no. 7336/03); *E.B. and Others v Austria* (App. no. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07)

Karner v Austria

App. no. 40016/98

24.07.2003 [Section I]

I. Facts

The applicant had been cohabiting with his same-sex partner as tenants in Wien. His partner had died in 1994 after designating the applicant as his heir. After unsuccessfully attempting to terminate the tenancy, the landlord had appealed to the Austrian Supreme Court, but the Court had interpreted the Rent Act as applying to heterosexual couples only, and it had upheld the landlord's appeal. Before the ECtHR the applicant complained that the Supreme Court had illegitimately discriminated against him on the ground of his sexual orientation. He invoked Article 14 in conjunction with Article 8. The applicant died in 2000.

II. Law

Holding:

Impossibility to succeed to same-sex partner's tenancy: violation of Article 14 in conjunction with Article 8.

Court's decision:

The Court reiterated that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Just like differences based on sex, differences based on sexual orientation required particularly serious reasons by way of justification. The Court accepted that the Government sought to protect the traditional family unit, and it also acknowledged that the protection of the family in the traditional sense was, in principle, a weighty and legitimate reason which might justify a difference in treatment. However, such aim was rather abstract and a broad variety of concrete measures might be used to implement it, without discriminating against same-sex cohabiting partners. Accordingly, the Court found that Austrian Government had not offered convincing and weighty reasons justifying the narrow interpretation of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.

Thus, there had been a violation of Article 14 of the Convention taken in conjunction with Article 8.

F. v the UK

App. no. 17341/03

22.06.2004 [Section IV]

I. Facts

The applicant had entered the United Kingdom illegally and claimed asylum on the basis that he feared persecution as a homosexual. He and his partner lived in Iran and had been arrested, beaten and his partner confessed to being homosexual. After being held in prison for three months and four days, he was allegedly released on the payment of bribes by his family who feared that he would face the death sentence as a homosexual. The Secretary of State rejected the asylum application: he found it lacking in credibility that the authorities had kept him so long in custody if they intended to execute him, and he also had doubt on the nationality of the applicant. The applicant appealed to the Adjudicator, without success; as the applicant had not expressed any prospect of continuing a relationship with his partner and was not at risk of punishment for acts conducted in private, his request was rejected also by the Immigration Appeal Tribunal. Before the ECtHR the applicant invoked Article 2, Article 3, Article 5, Article 6, Article 8.

II. Law

Holding:

Inadmissible.

Court's decision:

Article 3: the Court reiterated that the right to asylum was not protected in either the Convention or its Protocols. However, the expulsion by a Contracting State of an alien might give rise to an issue where substantial reasons showed that the person in question would have faced a real risk of being subjected to torture or to inhuman treatment. The Court observed that the materials before it did not disclose a similar situation, and it considered this part of the application as manifestly ill-founded.

Article 5 and Article 6: only in exceptional circumstances, which did not arise in this case, could these provisions be engaged by an expulsion decision. The applicant had failed to identify how any prosecution, conviction or sentence would infringe either Article 5 or 6. It follows that these complaints were deemed as manifestly ill-founded.

Article 8: the Court observed that its case-law had found responsibility attaching to Contracting States in respect of expelling persons who were at risk of treatment contrary to Articles 2 and 3 of the Convention. Such compelling considerations did not automatically apply under the other provisions of the Convention, since the Court assessed that an expelling Contracting State could not be required to only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention. The Court found that in the circumstances of this case it had not been established that the applicant's moral integrity would have been

substantially affected to a degree falling within the scope of Article 8 of the Convention. The Court declared the complaint inadmissible.

I.I.N v the Netherlands

App. no. 2035/04

09.12.2004 [Section III]

I. Facts

The applicant was Iranian and applied for asylum in the Netherlands. He claimed that he had been arrested, ill-treated, and raped by the police of his hometown because he had been caught while kissing a male friend in an alley. The applicant also claimed that, on 18 March 2001, he had attended a protest meeting in the course of which films had been shot and photographs taken, including photographs of the applicant in the company of a good friend, who had been found dead few days after. Fearing the same fate, the applicant decided to flee Iran. The Deputy Minister of Justice rejected the applicant's asylum request, holding that the applicant's account lacked credibility and that the applicant had been unable to provide evidence about his involvement in the aforementioned March, or to show any record related to his detention. The applicant's subsequent appeal was rejected on 16 July 2003 by the Administrative Jurisdiction Division of the Council of State. Before the ECtHR the applicant complained that, if expelled to Iran, he would face a real risk of treatment contrary to Article 3 of the Convention on account of his sexual orientation.

II. Law

Holding:

Inadmissible.

Court's decision:

Article 3: the Court reiterated that the right to asylum was not protected in either the Convention or its Protocols. However, expulsion by a Contracting State of an alien might give rise to an issue under Article 3 of the Convention in the event that there existed a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. The Court observed that the materials before it did not disclose a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships. The Court was not persuaded by the applicant: he reported that he had been arrested after having been caught kissing a male friend in an alley, but there was no indication that this had in fact resulted in any criminal proceedings. Although the Court acknowledged that the general situation in Iran did not foster the protection of human rights and that homosexuals were vulnerable to abuse, the applicant had not established that in his case there were substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention on grounds of his homosexuality. For these reasons the Court declared the application inadmissible.

Wolfmeyer v Austria

App. no. 5263/03

12.10.2005 [Section I]

I. Facts

The applicant had been convicted of homosexual acts under Article 209 of the Criminal Code, which penalized homosexual acts of adult men with consenting adolescents aged between 14 and 18, while for heterosexuals and lesbians the age of consent was 14. Upon the applicant's appeal, the Innsbruck Court of Appeal requested the Constitutional Court to review the constitutionality of Article 209, and the Constitutional Court gave a judgment holding that Article 209 of the Criminal Code was unconstitutional. The amendment repealing Article 209 entered into force on 14 August 2002; according to the transitional provisions, Article 209 remained applicable in all cases in which the judgment at first instance had already been given before the entry into force of the amendment, but it could no longer be applied in the applicant's case since it had been the case in point before the Constitutional Court. However the applicant argued that his acquittal could not be considered as having removed the discrimination he had suffered: he had been exposed to public humiliation and, as a result, he had lost his employment. He invoked Article 8, alone and in conjunction with Article 14.

II. Law

Holding:

Differentiated age of consent for male homosexual activities: violation.

Court's decision:

Article 14 in conjunction with Article 8: this case differed from *L. and V. v. Austria* in that the applicant was acquitted following the repeal of Article 209, while the convictions of applicants L. and V. continued to stand despite the said repeal. In this context, the Court had referred to its above finding that the applicant's position as a victim had not been removed by his acquittal. The Court did not consider the repeal of that provision as affecting the applicant's victim status. Accordingly, the Court considered that the maintenance in force of Article 209 of the Criminal Code and the conduct of the criminal proceedings against the applicant amounted to a violation of Article 14 taken in conjunction with Article 8. Having regard to the foregoing considerations, the Court did not consider it necessary to rule on the question whether there had been a violation of Article 8 alone.

Love and Others v the UK

App. no. 4103/04, 5498/04, 10617/04, 14557/04, 27313/04

13.12.2005 [Section IV]

I. Facts

The applicants were serving members of the British armed forces. They claim that, following an investigation into their sexual orientation, they were each discharged from the armed forces pursuant to the policy against homosexuals in the armed forces, between 1997 and 1998. The applicants submitted a claim to the employment tribunal arguing that their dismissal, and the circumstances leading to it, breached the 1975 Sex Discrimination Act. Two applicants complained also under Article 3 of the Convention, one applicant complained under Article 10 of the Convention and all applicants complained under Articles 14 in conjunction with Article 8.

II. Law

Holding:

Inadmissible.

Court's decision:

The Court did not discuss the merits of the case, which had been already adjudicated in previous cases. Rather, the Court emphasized that the applicants had not respected the time-limit of six imposed by Article 35, which imposed a period of six months from the date on which the final decision was taken, and declared their complaint inadmissible.

Kobenter and Standard Verlags GmbH v Austria

App. no. 18766/11, 36030/11

02.11.2006 [Section I]

I. Facts

The applicants were the editor in chief and the publishing company of an Austrian magazine, which had been convicted for insult against a regional Court. Commenting a trial, the first applicant had criticized a passage of the judgment, which compared homosexuality to same-sex practices among animals. The applicant journalist stated in essence that the judgment had not significantly differed from “the traditions of medieval witch trials” and that it had lent “support to a homophobe's venomous hate campaign”. Subsequently, the judge removed the impugned passage from the judgment and he underwent disciplinary proceedings. Upon a prosecution filed by the judge, the regional Court had convicted the applicant of defamation and had imposed a fine on him. It had also ordered the publisher of the daily to pay compensation to the judge, and to publish the judgment on the newspaper. The Court found that the journalist's statement had not only been a value judgment, but had also insinuated that the judge had grossly violated fundamental procedural rights, such as the principles of impartiality and adversarial proceedings, like in medieval witch trials. The applicants appealed unsuccessfully. Before the ECtHR the applicants complained that the Austrian Courts' judgments violated their right to freedom of expression under Article 10.

II. Law

Holding:

Conviction for criticizing a Court's judgment: violation.

Court's decision:

Article 10: the Court considered the impugned statements as based on facts, as concerning the judgment and not the alleged deficiencies by the judge in conducting the proceedings. Moreover, the outcome of the disciplinary proceedings against the judge in question proved that he had not discharged his duties in a manner fitting for a judge. The applicants had complied with their duties and responsibilities as a public “watch-dog” and the criticism made did not amount to an unjustified or destructive attack against the judge concerned or the judiciary as such. Thus, the applicants had been violated in their freedom of expression, secured by the ECHR.

Ayegh v Sweden

App. no. 4701/05

07.11.2006 [Section II]

I. Facts

On 8 February 2003 the applicant and her son A, aged 17, arrived in Sweden and applied to the Migration Board for asylum and residence permits. They had fled from Iran because A. would be called to do his military service when he reached 18 years of age and there was a risk that he could be stationed at the border with Iraq. She had given her passport to the smugglers and could not prove her identity; she further submitted that A. had been raped, harassed, and beaten by his school headmaster. Since homosexual acts were strictly forbidden in Iran, he feared that he would be severely punished if he were forced to return to his home country. The applicant later admitted that her husband had denounced her for adultery, and she risked death penalty. The Migration Board rejected the application for asylum and residence permits. It first found that the applicant and A. had not been persecuted by the Iranian authorities and thus they could not be considered as refugees or granted asylum. Moreover, the claim that he had had a conflict with his headmaster did not alter this conclusion. Thus, the Migration Board found no reason for A. and the applicant to be allowed to stay in Sweden on humanitarian grounds. Despite several appeals, the Migration Board did not alter its decision. Before the ECtHR they complained that the deportation to Iran would subject her to a real risk of being killed or subjected to torture or inhuman and degrading punishment, in violation of her rights under Articles 2 and 3 of the Convention.

II. Law

Holding:

Inadmissible.

Court's decision:

Article 2 and Article 3: the Court observed that Contracting States have the right to control the entry, residence and expulsion of aliens. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. The applicant's main allegation was that she would face the prospect of being sentenced to death or to corporal punishment for having committed adultery, but the Court doubted of the submissions, since Iranian Government had claimed that they are with great certainty false. Also the allegations of violent act suffered from A. were not considered reliable.

Bączkowski and Others v. Poland

App. no. 543/06

03.05.2007 [Section IV]

I. Facts

The applicants had sought permission from the Warsaw municipal authorities to stage a march through the city to alert public opinion to the issue of discrimination against minority groups, homosexuals, and women. Citing road traffic regulations and the risk of clashes with other demonstrators, the authorities had refused permission for the march. Shortly before the date scheduled for the demonstrations the Mayor of Warsaw said in an interview that he would refuse the applicants' request in all circumstances and that “propaganda about homosexuality is not tantamount to exercising one's freedom of assembly”. Although municipal authorities' decisions were subsequently quashed on appeal, the applicants argued that the remedy had come too late as the dates planned for the demonstrations had already passed. Before the ECtHR the applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied the relevant domestic law to their case. They invoked Article 11 of the Convention, alone and in conjunction with Article 13, and Article 14, in conjunction with Article 11.

II. Law

Holding:

Unlawful refusal to grant permission for a march and meetings to protest against homophobia: violation.

Belated quashing of an unlawful refusal to grant permission for a march and meetings to protest against homophobia: violation.

Possibility that a municipal authority's refusal to grant permission to protest against homophobia was influenced by the mayor's publicly expressed views: violation.

Court's decision:

Article 11: the Court recalled Polish Constitutional Court's judgment and held that the decisions to refuse the applicants permission to take part in the demonstrations had violated the applicants' freedom of expression.

Article 13: the Court also held that the timing of the appeal who quashed the initial refusal was ineffective and threatened to render freedom of assembly meaningless, for it was delivered after the date scheduled for manifestation. The applicants had been denied an effective domestic remedy.

Article 14: the Court could not overlook the newspaper interview in which the Mayor had expressed strong personal opinions about freedom of assembly and “propaganda about homosexuality”. Since the decisions concerning the applicants' request had been given by the municipal authorities on the Mayor's behalf, the Court was surmised that his opinions had affected the

decision-making process and had consequently infringed in a discriminatory manner the applicants' right to freedom of assembly. The Court found a breach of Article 14 in conjunction with Article 11.

E.B. v France

App. no. 43546/02

22.01.2008 [Grand Chamber]

I. Facts

In 1998 the applicant had applied for the authorization to adopt a child. During the adoption procedure she mentioned her homosexuality and her stable relationship with Ms. R., who did not feel committed to her partner's decision. On the basis of the reports drawn up by a psychologist, the president of the Council for the *département* refused the authorization. The reasons given for both decisions were the lack of "identificational points of reference" due to the absence of a paternal image or reference and the ambiguous nature of the applicant's partner's commitment to the adoption plan. Domestic Courts upheld the council decision and the Conseil d'Etat dismissed E.B.'s appeal on the ground, among other things, that the Administrative Court of Appeal had not based its decision on a position of principle regarding the applicant's sexual orientation, but it had had regard to the needs and the interests of an adopted child. The applicant alleged that she had suffered discriminatory treatment, based on her sexual orientation, and she had been interfered with her right to respect for her private life. She invoked on Article 14, taken in conjunction with Article 8.

II. Law

Holding:

Refusal to grant the authorization to adopt on account of sexual orientation: violation.

Court's decision:

Article 14 in conjunction with Article 8: the Court found that the attitude of the applicant's partner was not without interest or relevance in assessing the application. With regard to the lack of paternal referent in the household, the Court considered that, in the present case, it was permissible to question the merits of such a decision as the application had been made by a single person and not by a couple. In the Court's view, however, that ground might have served as a pretext for rejecting the applicant's application on the grounds of her homosexuality. Regarding the systematic reference to the lack of a "paternal referent", the Court disputed not the desirability of addressing the issue, but the importance attached to it by the domestic authorities in the context of adoption by a single person. The Court further assessed that the domestic authorities had not based their decision on one ground alone but on "all" the factors, namely the lack of a paternal figure and the attitude of the applicant's partner. Consequently, the illegitimacy of one of the grounds (lack of a paternal referent) had contaminated the entire decision. Accordingly, that there had been a violation of Article 14 of the Convention, taken in conjunction with Article 8.

Fairfield and Others v the UK

App. no. 24790/04

08.03.2008 [Section IV]

I. Facts

The applicants were the daughter and the executors of the estate of the late Harry Hammond and she complained about his arrest for breach of the peace and his conviction for having been preaching in a public place with a sign including the words “Stop Homosexuality”. Mr Hammond had refused to take down the sign and leave the area after an angry crowd had gathered and a disturbance had occurred. On his death in 2002, during the Administrative Court proceedings, his daughter and executors had obtained permission to pursue his case. Before the Court the applicants complained under Articles 9 and 10 that the arrest and conviction of Mr Hammond had infringed his freedom of religion and freedom of expression. He had been prevented from teaching his religion by preaching and had been penalized for the content of his message and for expressing his opinion, although he had not used offensive or degrading language, or incited the use of violence.

II. Law

Holding:

Inadmissible.

Court’s decision:

The Court noted that an individual applicant should claim to have been actually affected by the violation he alleges; under the ECHR *actio popularis* were not permitted and individuals were not entitled to complain about a law simply because they felt that it contravened the Convention.

The existence of a victim, that is to say, an individual who is personally affected by the impugned legislation, was indispensable for putting the protection mechanism of the Convention into motion, although this criterion was not to be applied in a rigid, mechanical and inflexible way throughout the proceedings. A case might be continued after the death of an applicant, and even in the absence of heirs wishing to continue, where the issues transcended the interests of the applicant and raised an important question of public interest relevant to human rights standards in Contracting States, that applicant had also died after the introduction of the application before the Convention organs. In the present case none of these circumstances occurred and the Court declared the complaint as incompatible *ratione personae*.

Courten v the UK

App. no. 4479/06

05.11.2008 [Section IV]

I. Facts

The applicant and his long-term partner, Mr Stanley, had been living together for 25 years when, in 2003, Mr. Stanley suddenly died. On 21 April 2005 the applicant wrote a letter to the Inland Revenue asking for an extra-statutory tax concession equivalent to the exemption from inheritance tax which a spouse would have received. The Inland Revenue informed the applicant that the exemption was not available on the ground that also heterosexual unmarried couples were not entitled to such exemption. The applicant however appealed because unlike heterosexual cohabitants, he had been unable to marry and had been denied access to any right to exemption. The applicant was informed that his appeal to the House of Lords bore no reasonable prospect of success under the Human Rights Act 1998. Before the ECtHR the applicant complained that as a survivor of a same-sex couple who had been unable to marry, he had been illegitimately denied the tax exemption from inheritance tax available to married couples. The applicant invoked Article 14 in conjunction with Article 1 of Protocol 1.

II. Law

Holding:

Inadmissible.

Court's decision:

Article 14 in conjunction with Article 1, Protocol 1: the Court recalled that under Article 14 not every difference in treatment amounts to discrimination contrary to this provision. In order to find a breach, it had to be established that other persons in an analogous or relevantly similar situation enjoyed of preferential treatment, and that there was no reasonable or objective justification for this distinction. The Court remarked that, notwithstanding social changes, marriage remained an institution that was widely accepted as conferring a particular status on those who enter it. The applicant had pointed out that he was unable at the relevant time, through no choice of his own, to enter into a legally-binding arrangement akin to marriage, since the facts of his case predated the entry into force of the Civil Partnership Act 2004. However, in the area of evolving social rights, UK Government could not be criticized for not having introduced the 2004 legislation at an earlier date and for not having enabled the applicant to obtain the benefit of inheritance tax exemptions. For these reasons, the Court declared the application inadmissible.

Small v the UK

App. no.7330/06

02.06.2009 [Section IV]

I. Facts

The applicant, a UK homosexual citizen, lodged his application when he was aged 16. He had his first homosexual encounter when he was sixteen with another person of his own age: they were both worried about the relevant law of Jersey at the material time, which decriminalized homosexual acts in private only if the consenting parties were at least eighteen years of age. He further alleged that the Jersey police investigated his private life and attempted to prosecute his partner under this law. He invoked Article 8, alone and in conjunction with Article 14, against the differentiated age of consent.

II. Law

Holding:

Striking out.

Court's decision:

On 20 March 2009 the Government informed the Court that it was prepared to pay the sum of 5830 Euros in full and final settlement of the applicant's claim. In 2007 the Sexual Offences Jersey Law also reduced the age of consent for sexual activities from 18 to 16 years, thereby equalizing the age of consent between homosexual men with the age of consent between men and women. The applicant accepted the proposal and waived any further claims against the UK. The Court took note of the friendly settlement reached between the parties, and it considered appropriate to strike the case out.

M.W. v the UK

App. no. 11313/02

23.06.2009 [Section IV]

I. Facts

The applicant had been living with his same-sex partner, Mr. M., for twenty-three years until the latter's death on 10 April 2001. The applicant stated that he and his partner were financially interdependent, pooled their income and that each had designated the other as his heir. Around two weeks after M's death, the applicant asked a social worker whether he could claim Bereavement Payment. He was advised that the benefit was only payable to the survivor of a married couple, and so he did not formally claim it. The applicant complained of his ineligibility for bereavement benefits to his Member of Parliament. The applicant also wrote to the Prime Minister, who forwarded his letter to the Department of Work and Pensions, which replied that marriage was a cornerstone of the contributory benefits system and that all rights to contributory benefits were based on the concept of legal marriage. The applicant complained under Article 14 of the Convention, taken in conjunction with Article 8, and Article 1 of Protocol No. 1 that, as a survivor of a same-sex couple who had had no means to achieve formal recognition of their relationship, he had been denied a benefit available to those who had been able to marry.

II. Law

Holding:

Inadmissible.

Court's decision:

Article 14 in conjunction with Article 8 and Article 1, Protocol 1: the Court recalled that in order for an issue to arise under Article 14 there had to be a difference in the treatment of persons in relevantly similar situations. The applicant's complaint that it was impossible during his partner's lifetime to gain formal recognition of their commitment to one another was, in effect, a criticism of the length of time it took the United Kingdom to enact the necessary legislation. However the Government could not be criticized for not having introduced the Civil Partnership Act at an earlier date that would have entitled the applicant to claim Bereavement Payment. Nor could the enactment of the Civil Partnership Act be taken as an admission by the domestic authorities that the non-recognition of same-sex couples, and their consequent exclusion from many rights and benefits available to married couples, was incompatible with the Convention. Instead, the United Kingdom authorities remained within their margin of appreciation. In light of the above, the Court concluded that the applicant was not entitled to claim that, at the material time, he had been in an analogous situation to a bereaved spouse. His complaint therefore was rejected as manifestly ill-founded.

Porubova v Russia

App. no. 8237/03

02.03.2010[Chamber]

I. Facts

The applicant was the editor-in-chief of the newspaper D.S.P. and she published an article in 2001 which accused V. and K., two local officials in the Sverdlovsk Region, of misappropriation of public funds. It also alleged that the two officials were having a homosexual affair. The officials concerned subsequently brought criminal proceedings against the applicant for criminal libel and insult. Ultimately, domestic Courts, leaving the alleged embezzlement outside the scope of the charges, found that the articles in question had damaged V.'s and K.'s reputation as politicians and public servants. Following a trial conducted in private to protect V. and K. from further publicity about their private lives, the applicant was found guilty, charged and sentenced to one-and-a-half year's correctional work, from which she was subsequently dispensed on the account of an amnesty in favor of women and minors. Before the ECtHR the applicant complained that the proceedings against her had infringed her right to freedom of expression, and also that her right to a fair trial had not been respected. She invoked Article 6 and Article 10 of the Convention.

II. Law

Holding:

Penalties imposed on journalists for suggesting the homosexuality of public officials, in connection with public resources unjustified: violation.

Court's decision:

Article 10: the Court found that the articles in question, concerning the allocation and the management of public resources, had dealt with issues which merited legitimate public concern and on which the applicants, as journalists, had the right to report. Despite the charges retained against the applicant had been in relation to V. and K.'s alleged homosexual relationship, the Court considered that the main thrust of the applicant's articles had been the dubious transactions with taxpayers' money and not V. and K.'s private life. Their alleged homosexual relationship had served to explain why the scheme had been mounted in such a way that K. would be its ultimate beneficiary. Moreover, the subjects of the applicants' scrutiny had been, in the first case, professional politicians, and in the second case, a State body and civil servants acting in their official capacity, who had to accept that the limits of acceptable criticism were wider for them than for private individuals. Given the severity of the sanctions against the applicant, the Court found that the Russian Courts had not adduced relevant and sufficient reasons to justify the interference with the applicants' freedom of expression. The interference had not therefore been "necessary in a democratic society" and it amounted to violation.

Article 6: the Court considered the decision to hold the trial in private as not arbitrary or unreasonable and, therefore, it held that there had been no violation.

Kozak v Poland

App. no. 13102/02

02.03.2010 [Chamber]

I. Facts

The applicant had lived together with his partner in a homosexual relationship, for several years. They shared a municipality flat rented by the applicant's partner. After his partner's death, in April 1998, the applicant applied to the municipality to succeed to the tenancy of the flat. The municipal buildings department denied the request and ordered the applicant to move out. The applicant brought proceedings against the municipality, seeking to have his succession to the tenancy acknowledged. Relying on the Housing Act in force at the time, he brought forward that he had a right to succession, as he had run a common household with his partner for many years and had thus lived with him in *de facto* marital cohabitation. The claim was dismissed by the district Court, holding in particular that Polish law recognized *de facto* marital relationships only between partners of different sex. Also the Constitutional Court dismissed the applicant's claims. Before the ECtHR he complained that Polish Courts had discriminated against him on the ground of his homosexual orientation, and he claimed the right to succeed to his partner's tenancy. He invoked Article 14 in conjunction with Article 8 of the Convention.

II. Law

Holding:

succession to tenancy of a flat denied to homosexual after his partner's death: violation.

Court's decision:

Article 14 in conjunction with Article 8: the Court agreed with Polish Government that some of the applicant's statements concerning the nature and duration of his relationship with his partner and his residence in the latter's flat might have been considered as inconsistent. However, the Court observed that in establishing whether the applicant fulfilled the conditions set in the Housing Act, the domestic Courts had focused on the homosexual nature of the relationship with his partner; moreover, Polish Courts had rejected his claim on the grounds that only a relationship between a woman and a man could qualify for *de facto* marital cohabitation. The Court accepted that the protection of the family founded on the union of a man and a woman was in principle a legitimate reason which might justify a difference in treatment. However, when striking the balance between the protection of the family and the rights of sexual minorities, States had to take into consideration the developments in social attitudes. The Court could not accept that a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy was necessary for the protection of the family. It therefore concluded that there had been a violation of Article 14 taken in conjunction with Article 8.

Schalk and Kopf v Austria

App. no. 30141/04

24.06.2010 [Section I]

I. Facts

In 2002 the applicants, a same-sex couple, was denied the permission to get married: under Austrian law a marriage could only be concluded between persons of opposite sex. Following their subsequent constitutional complaint, the Constitutional Court held that Austrian Constitution did not require that the concept of marriage, which was geared to the possibility of parenthood, should be extended to same-sex relationships. In 2010 the Registered Partnership Act entered into force in Austria, aiming to provide same-sex couples with a formal mechanism for recognizing and giving legal effect to their relationships. While the Act provided registered partners with many of the same rights and obligations as spouses, some differences remained; in particular registered partners were unable to adopt or undergo artificial insemination. Before the ECtHR the applicants claimed the right to marry; they further held that before the entry in force of the Registered Partnership Act they had been illegitimately denied any possibility to have their relationship recognized, on the ground of their sexual orientation. They invoked Article 12, and Article 14 in conjunction with Article 8 of the Convention.

II. Law

Holding:

Inability of same-sex couples to marry: no violation.

Lack of legal recognition of same-sex partnership: no violation.

Differentiated treatment between marriage and civil partnerships: no violation.

Court's decision:

Article 12: the Court accepted that the relationship of the applicants fell within the notion of "family life", just as the relationship of a different-sex couple in the same situation did. However the Court held that the applicants were not entitled to claim the right to marry under Article 12. In the light of recent developments in domestic and European law, the Court argued that it could not be concluded that Article 12 did not apply to the applicants' complaint. At the same time, given the lack of consensus and the relevance attached to the traditional model of family, the Court left the decision whether or not to allow same-sex marriages to national law's discretion.

Article 14 in conjunction with Article 8: the Court was also unable to share the applicants' view that the obligation to grant same-sex marriage could be alternatively derived from Article 14 taken in conjunction with Article 8. Austrian legislature could not be even reproached for not having introduced the Registered Partnership Act any earlier stage; the fact that there existed some substantial differences compared to marriage in respect of parental rights mirrored the

trend in other member States adopting similar legislation, and did not violate the applicants' rights.

J.M. v the UK

App. no. 37060/06

28.09.2010 [Section IV]

I. Facts

The applicant was the divorced mother of two children living mainly with their father. Since 1998 she had been living with another woman in a long-term relationship. As the non-resident parent, she was required by child-support regulations to contribute financially to the cost of her children's upbringing. Her child-maintenance obligation was assessed without referring to the regulations which provided for a reduced amount where the absent parent had entered into a new relationship but took no account of same-sex relationships. The applicant complained that the difference was appreciable – she was required to pay approximately 47 sterling pounds per week, whereas if she had formed a new relationship with a man the amount due would have been around 14 sterling pounds. Her complaint was upheld by three levels of jurisdiction, but the case was overturned by a majority ruling in the House of Lords in 2006. Before the ECtHR the applicant complained a discrimination because of her sexual orientation on the right to enjoy of her resources. She also complained a discrimination in her right to respect for private life. She invoked Article 14 in conjunction with Article 1, Protocol 1, and in conjunction with Article 8.

II. Law

Holding:

Difference in treatment on grounds of sexual orientation in relation to child-support regulations: violation.

Court's decision:

Article 14 in conjunction with Article 1, Protocol 1: the Court held that the case came within the ambit of Article 1 of Protocol 1, and that it attracted the protection of Article 14 even in the absence of any deprivation of, or other interference with, the existing possessions of the applicant. The statutory obligation on an absent parent to pay money to the parent with custody could be regarded as an interference with the right to the peaceful enjoyment of his possessions. The Court did not find it necessary to go on to decide whether the facts of the case also fell within the ambit of Article 8. The only relevant point of difference between the applicant's situation and the comparable situation of an absent parent who formed a new relationship with a person of the opposite sex was the applicant's sexual orientation. Bearing in mind the purpose of the regulations, which was to avoid placing an excessive financial burden on the absent parent in their new circumstances, the Court could see no reason for treating the applicant differently. Therefore, the Court found a violation.

D.B.N. v the UK

App. no. 26550/10

31.05.2011 [Section IV]

I. Facts

The applicant was Zimbabwean, she had arrived in the United Kingdom in 2009 and had made an asylum application on the basis of her homosexuality. She claimed that in 1996 her and her partner had been gang raped by a group; both her and her partner had become pregnant, as a result of which her partner had committed suicide. The applicant had tried to take her own life shortly afterwards, and she had been harassed by her family and community over a number of years. The applicant's asylum claim was refused by the Secretary of State; it was accepted, *inter alia*, that the applicant was a lesbian and that the incidents in 1996, 2005 and 2008 had effectively occurred. Nevertheless, it was not accepted that the applicant was entitled to international protection because her problems had been caused by her family and other private actors, not by public authorities. The Immigration Judge considered that any discrimination experienced by the applicant in Zimbabwe had been limited because she had been able to work without difficulty and the amount of incidents which had occurred were linked to her family's disapproval of her sexuality. Before the ECtHR the applicant complained under Articles 2 and 3 that she faced the risk of being killed or ill-treated if returned to Zimbabwe. Further, she complained under Article 8 of the that her removal to Zimbabwe would destroy her right to private life. She also complained under Article 13 and Article 14 in respect of how UK authorities had dealt with her procedure.

II. Law

Holding:

Inadmissible.

Court's decision:

On 8 April 2011 the Government informed the Court that they were having difficulty in establishing the applicant's whereabouts and that there was no evidence that she was still in the United Kingdom. They explained that she had left the UK voluntarily in June 2010 travelling as a South African national and had later been identified in Lille, Dublin and Madrid. Given that the questions posed by the Court in the application related to risks associated with the applicant's removal to Zimbabwe from the United Kingdom and that the Government understood that she had left the United Kingdom voluntarily, the Government considered that the Court's questions were no longer relevant. The Government therefore requested that the Court verify with the applicant where she was, whether she accepted that she had South African nationality and whether she continued to pursue her claim before the Court. In the absence of any response, the Government invited the Court to strike the application out its list of cases. The applicant's representative informed the Court that they were not in continuous contact with the

applicant and had been unable to take instructions on the issues raised by the Government. In the light of the above the Court struck the case out.

Stasi v the UK

App. no. 25001/07

20.10.2011 [Section V]

I. Facts

The applicant was charged with fraud in two occasions and he was sentenced to two and three years' imprisonment, including a suspended term of eighteen months. He served the second sentence immediately following the first, remaining in Villefranche-sur-Saône Prison. On his arrival in Villefranche-sur-Saône Prison for the second time, on 27 July 2006, Mr. Stasi reported that he had been the victim of acts of rape during his previous period of detention. He was thus placed alone in a cell on a corridor of the prison reserved for vulnerable prisoners. He remained alone in the cell except for the period 26 February 2007 to 18 March 2007, when he had to share with another prisoner, who ill-treated the applicant, as confirmed by a medical certificate. During his imprisonment the applicant was victim of other violent acts, such as bruising, he was beaten, and also stubbed with cigarettes. On the day of his release he was admitted to the psychiatric hospital of Saint-Cyr au Mont d'Or, when he remained until 14 January 2009. Before the ECtHR the applicant complained he had been subjected to inhuman and degrading treatments contrary to Article 3 during his detention.

II. Law

Holding:

Positive obligations in respect of homosexual detainees: no violation.

Court's decision:

Article 3: the Court noted that the applicant had produced a number of medical certificates concerning the various incidents complained of. It thus found it established that while in prison he had been subjected to acts of violence and that were serious enough for the facts in question to be classified as inhuman and degrading treatment. The Court observed that on his arrival at Villefranche-sur-Saône Prison the applicant had mentioned his homosexuality and reported the acts of violence against him during his first period of imprisonment. To the Court, French Prison's Administration had positively complied with their positive obligations, by placing the applicant in a corridor reserved for vulnerable inmates by allowing him to take a shower alone at a different time to other inmates and by accompanying systematically when he moved around. The Court found that, in the circumstances of the case, and taking into account the facts that had been brought to their attention, the authorities had taken all the measures that could reasonably be expected of them to protect the applicant from physical harm. The Court held that, having regard to the facts of the case, there had been no violation of Article 3 of the Convention, and found no need to examine separately the applicant's other complaint.

Alekseyev v Russia

App. no 4916/07

21.10.2010 [Section I]

I. Facts

The applicant was one of the organizers of a series of marches planned to be held in Moscow in 2006, 2007 and 2008 to draw public attention to discrimination against the gay and lesbians. The organizers informed the mayor's office and undertook to cooperate with the law-enforcement authorities in ensuring safety and respect for public order and to comply with noise restrictions. Their requests were, however, turned down on public-order grounds after petitions from people opposed to the marches were received. In the authorities' view, there was a risk of a violent reaction degenerating into disorder and mass riots. The mayor and his staff were also quoted in the media as saying that no gay parade would be allowed in Moscow under any circumstances. The applicant mounted an unsuccessful challenge in the domestic Courts. Before the ECtHR the applicant complained a violation of his freedom of manifestation, and he further held that he had not had at his disposal any procedure which would allowed him to obtain a final decision prior to the date of the planned demonstrations. The applicant invoked Article 11, alone and in conjunction with Article 13, and Article 14 in conjunction with Article 11.

II. Law

Holding:

Repeated refusals to authorize gay-pride parades: violation.

Court's decision:

Article 11: the Court refused all the arguments put forward by Russian Government. Firstly, the risk of a demonstration creating a disturbance was not sufficient, for the society would be deprived from hearing differing views on questions which were relevant even though offended the sensitivity of traditional public opinion. Secondly, in the event of a counter-demonstration, the authorities could have made arrangements to ensure that both events proceeded peacefully and lawfully. Thirdly, the Court considered the Mayor's expression and the Government submission against "gay propaganda" as incompatible with the ECHR. Consequently, the decisions to ban the events in question had not been based on an acceptable assessment of the relevant facts, nor did they meet a pressing social need or were necessary in a democratic society. In the absence of a legally binding rule requiring the authorities to issue a final decision before the dates on which the marches were planned, the judicial remedy afforded to the applicant had been of a *post hoc* nature and had not guaranteed adequate redress. Lastly, the main reason for the bans was the authorities' disapproval of demonstrations which they considered to promote homosexuality. The applicant had thus suffered a discrimination on the ground of his and other

participants' sexual orientation. The Court held that there had been a violation of Article 11, alone and in conjunction with Article 13, and of Article 14, in conjunction with Article 11.

Zontul v Greece

App. no. 12294/07

17.01.2012 [Section I]

I. Facts

The applicant was a Turkish national. In 2001 while trying to illegally reach Italy, he and other migrants were intercepted by the Greek coastguard and escorted to a port on the isle of Crete. The applicant reported that two coastguard officers had forced him to undress while he was in the bathroom and that one of them, D., had raped him. The commanding officer, who had not been present during the incident, ordered an inquiry, but in June 2006 the Naval Appeals Tribunal sentenced D. to a suspended term of six months' imprisonment, which was commuted to a fine of EUR 792. Before the ECtHR the applicant denounced Greek authorities both for torture and inhuman treatment, and for the inadequacy of the redress afforded. He invoked Article 3 and Article 6 of the Convention.

II. Law

Holding:

Rape of illegal immigrant by coastguard responsible for supervising him: violation.

Inadequacy of redress afforded by State to detainee victim of torture: violation.

Court's decision:

Article 3: the rape of a detainee by an official of the State has to be considered as an especially grave form of ill-treatment; owing to its cruelty and its intentional nature, the treatment to which the applicant had been subjected amounted also to an act of torture.

Article 6: the Court had doubts as to whether a thorough and effective investigation had been carried out in the context of the disciplinary proceedings brought against the coastguard officers. The penalty imposed on D. resulted manifestly disproportionate in the view of the seriousness of the treatment inflicted on the applicant. In view of that finding and of the fact that the applicant had been subjected to an act of torture, Greek criminal-law system, as applied in the present case, did not reach the desired deterrent effect such as to prevent the commission of the offence complained of by the applicant, nor did it provide adequate redress. Consequently, the Court found a violation.

Vejedland and Others v Sweden

App. no. 1813/07

09.02.2012 [Section V]

I. Facts

In 2004 the applicants went to an upper secondary school and distributed a hundred leaflets, by leaving them in or on the pupils' lockers. The statements in the leaflets were, in particular, allegations that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect on the substance of society" and was responsible for the development of HIV and AIDS. The District Court convicted the applicants of agitation against a national or ethnic group. The charges against the applicants were rejected on appeal, on the ground that a conviction would amount to a violation of their right to freedom of expression. The Supreme Court, however, convicted the applicants of agitation against a national or ethnic group. The majority of judges found in particular that the pupils had not had the possibility to refuse the leaflets and that the purpose of supplying the pupils with arguments for a debate could have been achieved without offensive statements to homosexuals as a group.

Before the ECtHR the applicants alleged that the Supreme Court had violated their freedom of expression and they further submitted that they had been punished without law. They invoked Article 7 and Article 10 of the Convention.

II. Law

Holding:

Criminal conviction for distributing leaflets offensive to homosexuals: no violation.

Court's decision:

Article 10: the applicants were convicted of agitation against a national or ethnic group in accordance with the Swedish Penal Code. The Court, therefore, considered that the interference with their freedom of expression had been sufficiently foreseeable and thus "prescribed by law" within the meaning of the Convention. The interference had served a legitimate aim, namely "the protection of the reputation and rights of others". The Court agreed with the Supreme Court that, even if the applicants' aim to start a debate about the lack of objectivity of education in Swedish schools might be regarded as legitimate, regard had to be paid to the wording of the leaflets. The Court further emphasized that the applicants had imposed the leaflets on the pupils by leaving them on or in their lockers; in addition, the distribution of the leaflets had taken place at a school which none of the applicants attended and to which they did not have free access. The Court therefore considered that the interference with the applicants' exercise of their right to freedom of expression had not exceeded the discretion left to national authorities.

A.S.B. v the Netherlands

App. no. 4854/12

10.07.2012 [Section III]

I. Facts

The applicant was Jamaican and lived in the Netherlands, where he applied for asylum. He feared persecution and treatment contrary to Article 3 of the Convention in his country of origin on account of his homosexual orientation. The final negative decision on his asylum request was given on 11 January 2012 by the Administrative Jurisdiction Division of the Council of State. The applicant complained that if expelled to Jamaica he would face a real and personal risk of treatment in violation of Article 3 due to his homosexuality.

II. Law

Holding:

Striking out.

Court's decision:

On 25 January 2012, the President of the Chamber indicated to the Government that it was in the interests of the parties and the proper conduct of the proceedings that the applicant should not be expelled to Jamaica while pending the proceedings before the Court. On 20 April 2012, the Government informed the Court that on 19 April 2012 the applicant had been granted an asylum-based residence permit. This information was transmitted on 24 April 2012 to the applicant who did not call the Court to continue the examination. Accordingly, the Court struck the case out of its list.

Eweida and Others v the UK

App. no. 48420/10, 598442/10, 36516/10

15.01.2013 [Section IV]

I. Facts

All four applicants were practicing Christians who complained that domestic law had failed adequately to protect their right to manifest their religious beliefs. The first and the second applicant complained on issues not related to sexual orientation. The third applicant, Ms. Ladele, a Registrar of Births, Deaths and Marriages and the fourth applicant, Mr. McFarlane, a counselor in a relationship counselling service, complained that they had been dismissed for refusing to carry out certain of their duties which they considered would condone homosexuality, a practice they felt was incompatible with their religious beliefs. The invoked Article 9, alone and in conjunction with Article 14.

II. Law

Holding:

Disciplinary measures against employees for refusing to perform duties they considered incompatible with their religious beliefs: no violation.

Court's decision:

Article 9 and Article 14: the Court acknowledged the importance in a democratic society of freedom of religion, and it considered that the better approach to the present case would be to consider whether the restriction was proportionate. In considering the proportionality of the measures, it was notable that the consequences for the third applicant were serious: she preferred to face disciplinary action rather than be designated a civil-partnership registrar and, ultimately, she lost her job. When she had entered into her contract of employment she couldn't specifically waive her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement had been introduced by her employer at a later date. However, the local authority's policy aimed to secure the rights of others and the Court allowed the national authorities a wide margin of appreciation on the issue. In all the circumstances, the Court did not consider that either the local-authority employer, which had brought the disciplinary proceedings, or the domestic Courts, which had rejected the third applicant's discrimination claim, had exceeded the margin of appreciation available to them. While employed by a private company with a policy of requiring employees to provide services equally to heterosexual and homosexual couples, the fourth applicant had refused to commit himself to providing psycho-sexual counseling to same-sex couples, facing consequent disciplinary sanctions. He had voluntarily enrolled on his employer's post-graduate training program in psycho-sexual counselling; the Court did not consider that that margin had been exceeded. There had therefore been no violation of Article 9 alone or in conjunction with Article 14.

X. v Turkey

App. no 24626/09

09.10.2012. [Section II]

I. Facts

In 2008 the applicant was sentenced to prison for almost ten years for various offences. He was initially placed in a shared cell with heterosexual prisoners, but he asked the prison administration to transfer him, for his own safety, to a shared cell with homosexual inmates. He was immediately placed in an individual cell, small and rat-infested, being also deprived of any contact and of any social activity. After a number of unsuccessful requests to the public prosecutor's office and to the post-sentencing judge, the applicant was ultimately transferred to a psychiatric hospital where he was diagnosed with depression and remained for about a month. Another homosexual inmate was placed in the same cell as the applicant for about three months; during that period they filed a complaint against a warder for homophobic conduct, insults, and blows. The applicant was subsequently deprived again of any contact with other inmates and he withdrew his complaint. This situation ended in February 2010 when the applicant was transferred to another prison and placed with three other inmates in a standard cell, where he enjoyed the rights usually granted to convicted prisoners. He invoked Article 14 in conjunction with Article 3 of the Convention.

II. Law

Holding:

Holding of homosexual prisoner in total isolation for more than eight months to protect him from fellow prisoners: violation.

Court's decision:

Article 14 in conjunction with Article 3: the Court emphasized that Prison Administrations imposed on the applicant harsher conditions of life than other detainees, on the solely basis of his sexual orientation, allegedly to protect him from bodily harm. He had requested to be treated on an equal footing with the other inmates, so to benefit from the possibility of outdoor exercise and social activities with others whilst being protected from physical harm, but as a result he had been treated harsher than prisoners condemned to a life-sentence. In the Court's view, the prison authorities had not performed a sufficient assessment of the risk for the applicant's safety. The applicant's total exclusion from prison life could not be regarded as justified. Thus the Court was not convinced that Prison Administrations acted for the applicant's physical well-being, ascribing their behavior to a prejudiced attitude against the applicant's homosexuality. As a result it was established that he had sustained discrimination on grounds of sexual orientation.

X and Others v Austria

App. no. 19010/07

19.02.2013 [Grand Chamber]

I. Facts

The first and third applicant are two women living in a stable homosexual relationship. The second applicant is the third applicant's minor son; he was born out of wedlock, his father had acknowledged paternity but the third applicant had sole custody. The first applicant wished to adopt the second applicant, in order to create a legal relationship between them without severing the boy's relationship with his mother and an adoption agreement was concluded between the two women to that end, while the father strongly disagreed. However, domestic Courts refused to approve the agreement since under domestic law adoption by one person had the effect of severing the family-law relationship with the biological parent of the same sex: the boy's adoption by the first applicant could not but severe his relationship with his mother, the third applicant, while it could not affect his father's parental role. Before the ECtHR the applicants invoked Article 14 in conjunction with Article 8 of the Convention.

II. Law

Holding:

Impossibility of second-parent adoption in same-sex couple: violation.

Court's decision:

Article 14 in conjunction with Article 8: the Court accepted that the applicants were in a relevantly similar situation to an unmarried different-sex couple in which one partner wished to adopt the other partner's child. The Court was not convinced by the Government's argument that the applicants' adoption request had been refused on grounds unrelated to their sexual orientation. The domestic Courts had not dealt with the question whether there were any reasons for overriding the refusal of the child's father to consent to the adoption; in contrast, in the case of an unmarried different-sex couple they would have been required to examine that issue. The Government had failed to give convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in unmarried different-sex couples, was necessary for the protection of the family in the traditional sense or for the protection of the child's interest. The distinction resulted therefore discriminatory.

Boeckel and Gessner v Germany

App. no.8017/11

07.05.2013 [Section V]

I. Facts

The applicants were two women who had been living together in a registered civil partnership since 2001. In 2008 the second applicant gave birth to a son, and she was recognized in the birth certificate as the mother, while the space provided in the form for the father's name was left blank. In 2009 the applicants concluded an agreement whereby the child would be adopted by the first applicant. The district Court granted the adoption order and declared that the child obtained the legal position of the child of both applicants. In the meantime the applicants requested the district Court to rectify the child's birth certificate by inserting the first applicant as the second parent, submitting that the Civil Code, which stipulated that the father was the man who was married to the mother of the child at the time of birth, should be applied *mutatis mutandis* in cases where the mother lived in a registered civil partnership with another woman. They also claimed that there was no reason to treat children born into a civil partnership any differently from children born in wedlock. The domestic Courts rejected their request and subsequent appeals. Before the ECtHR they invoked Article 14 in conjunction with Article 8.

II. Law

Holding:

Inadmissible.

Court's decision:

The Court based its examination on the assumption that the applicants were able to claim to be victims of a violation of their Convention rights in the view of the fact that the first applicant had to undergo the adoption process in order to be recognized as the second parent. The applicants lived together in a registered civil partnership and were raising the child together. It followed that the relationship between the two applicants and the child amounted to "family life" within the meaning of Article 8 of the Convention. Accordingly, Article 14 of the Convention in conjunction with Article 8 was applicable. The Court took note of the domestic Courts' reasoning according to which section 1592 § 1 of the Civil Code contained the presumption that the man who was married to the child's mother at the time of birth was the child's biological father. The Court also noted that it was not confronted with a case concerning transgender or surrogate parenthood: in cases where one partner of a same-sex partnership gave birth to a child, it could be ruled out on biological grounds that the child descended from the other partner. The Court accepted that, under these circumstances, there was no factual foundation for a legal presumption that the child descended from the second partner. Consequently, there was no appearance of a violation of Article 14 of the Convention read in conjunction with Article 8 and the complaint was dismissed as ill-founded.

Vallianatos and Others v Greece

App. no. 29381/09, 32684/09

07.11.2013 [Great Chamber]

I. Facts

The first application was lodged by two Greek nationals, and the second by six Greek nationals and an association whose aims included providing psychological and moral support to gays and lesbians. On 26 November 2008 Law no. 3719/2008, entitled “Reforms concerning the family, children and society”, had entered into force. It had introduced an official form of partnership for unmarried couples called “civil union” which was restricted to different-sex couples, thereby excluding same-sex couples from its scope. Before the ECtHR the applicants alleged that the fact that the civil unions were designed only for couples composed of different-sex adults infringed their right to respect for their private and family life and amounted to unjustified discrimination between different-sex and same-sex couples, to the detriment of the latter. They invoked Article 14 taken in conjunction with Article 8 of the Convention.

II. Law

Holding:

Exclusion of same-sex couples from civil unions: violation.

Court’s decision:

Article 14 in conjunction with Article 8: the Greek Government contended that same-sex couples were already enabled to provide a legal framework under ordinary law to their patrimonial interests. Also, the enacted legislation sought to achieve several objectives, including the strengthening of the legal status of children born outside marriage. The Court considered it legitimate for the legislature to enact legislation to regulate the situation of children born outside marriage, and also evaluated the protection of the family in the traditional sense as a weighty and legitimate reason which might justify a difference in treatment. It remained to be ascertained whether the principle of proportionality had been respected in the present case. Greek legislation had introduced a form of civil partnership which excluded same-sex couples while allowing different-sex couples, whether or not they had children, to regulate numerous aspects of their relationship. Lastly, under Greek law, different-sex couples could have their relationship legally recognized even before the enactment of Law no 3719/2008, whether fully on the basis of the institution of marriage or in a more limited form under the provisions of the Civil Code dealing with *de facto* partnerships. Consequently, same-sex couples were recognized as bearing a particular interest in entering into a civil union, since it amounted to the sole basis in Greek law on which to have their relationship legally recognized. The Court dismissed Greek Government’s arguments as not weighty to justify the differentiated treatment and found a breach of the ECHR.

M.E. v Sweden

App. no. 71398/12

26.06.2014 [Section V]

08.04.2015 [Grand Chamber]

I. Facts

The applicant, a Libyan national who had been living in Sweden since 2010, applied for asylum initially on the grounds that he feared persecution because of his involvement in the illegal transportation of weapons. Some months later he raised an additional ground for asylum stating that he was homosexual and had married a man in Sweden. The Migration Board rejected his request because he had given contradictory statements and his story lacked credibility. The Board considered that the applicant would find no obstacle to his returning to Libya and to apply from there for a residence permit in Sweden on account of his family ties and marriage. Before the ECtHR the applicant complained that, if he were forced to return to Libya to apply for family reunion from there, he would face a real risk of being persecuted and ill-treated primarily because of his homosexuality, but also due to previous problems with the authorities. He relied on Article 3 of the Convention.

II. Law

Holding:

Homosexual required to return to Libya in order to apply for family reunion: no violation.

Court's decision:

Article 3: in the Court's view, the applicant had failed to give a coherent and credible account on which to base the examination of his claims. Even though there was little information about the situation of homosexuals in Libya, there appeared to be no public record of anyone actually having been prosecuted or convicted for homosexual acts since the end of the Gadhafi regime in 2011.

Even though he would need to be discreet about his private life during the waiting period in Lybia, that would not require him to conceal or suppress an important part of his identity permanently or for a longer period of time. While it was true that he would have to travel to Egypt, Tunisia or Algeria for interview, since there was no Swedish Embassy in Libya, the Court denied that the applicant was at risk of ill-treatment in those countries. In sum, the Court found no substantial grounds for believing that the applicant would be subjected to ill-treatment on the account of his sexual orientation if he returned to Libya in order to apply for family reunion from there.

M.K.N. v Sweden

App. no. 72413/10

26.06.2014 [Section V]

I. Facts

The applicant was Iraqi and applied in Sweden for asylum. He was Christian and his wife and children lived in Syria. He claimed that he had been persecuted and kidnapped due to his Christian beliefs and the fact that he was well-off. The rest of the family had left for Syria, where they remained in difficult circumstances. The Migration Board rejected the application, and it pointed out that the applicant had stayed in Mosul for almost a year after the kidnapping without facing further threats. In sum, there was no individual threat against the applicant. The applicant appealed and claimed that, after his departure from Iraq, the Mujahedin had found out that he had had a homosexual relationship and that his partner had been stoned to death. He had not revealed this information earlier as he had not been aware that homosexual relationships were accepted in Sweden. In reply, the Migration Board submitted that as a Christian, the applicant had a need of protection in regard to Mosul, but he was not facing any risks in the Kurdistan Region, which constituted a reasonable relocation alternative. As to the new personal information given by the applicant, the Board noted that it had not been submitted in the beginning of the proceedings. Noting that there was no substantiation for the claim, the Board found that the story lacked credibility and refused the applicant's appeal. Before the ECtHR the applicant complained that his return to Iraq would involve a violation of Article 3 of the Convention.

II. Law

Holding:

Implementation of the deportation order: no violation.

Court's decision:

Article 3: the Court concluded that, as a Christian, the applicant faced the risk of ill-treatments in the southern and central parts of Iraq, but he may reasonably relocate to the Kurdistan Region. On the applicant's alleged homosexuality, the Court acknowledged the difficult situation for real or perceived homosexuals in Iraq, but it noted that the applicant has expressed the intention of living with his wife and children. In particular, the Court justified the Migration Board's negative decision on the ground of the inconsistencies in the applicant's submissions. Having regard to all the circumstances, the Court considered that the applicant's claim concerning the homosexual relationship was not credible and it did not find a violation of Article 3.

Identoba and Others v Georgia

App. no. 73235/12

12.05.2015 [Section IV]

I. Facts

The applicants were a non-governmental organization set up to promote and protect the rights of lesbian, gay, bisexual and transgender people in Georgia, and 14 individuals. On 17 May 2012 a peaceful demonstration took place in Tbilisi and was attended by approximately 30 people, including 13 of the individual applicants. During the event, the participants in the march were insulted, threatened and assaulted by a larger group of counter-demonstrators who were members of two religious groups. The police eventually arrested four of the applicants and briefly detained and/or drove them around in a police car, with the alleged aim of protecting them from the counter-demonstrators. The applicants filed several criminal complaints, requesting that criminal investigations be launched into the attacks against them and into the acts and omissions of the police officers, who had failed to protect them from the assaults. Two investigations into the injuries sustained by two of the applicants were opened in 2012 and remained pending. Before the ECtHR the applicants complained that the relevant domestic authorities had failed to protect them from the violent attacks perpetrated during their peaceful march and to investigate effectively the incident. They invoked Article 11 and Article 14 in conjunction with Article 3.

II. Law

Holding:

State's failure to protect demonstrators from homophobic violence and to launch effective investigation: violation.

Court's decision:

Article 11: the Court firstly held that since the organizer of the march had specifically warned the police about the likelihood of abuse, the authorities had been under a compelling positive obligation to protect the demonstrators from violence. However, police officers distanced themselves from the scene, thus allowing the tension to degenerate into physical violence, and they had even arrested some of the applicants. Domestic authorities had failed to provide adequate protection to the applicants from the attacks of private individuals during the march, and the Court found a violation.

Article 14 in conjunction with Article 3: the authorities had also fallen short of their procedural obligation to investigate what went wrong during the incident. Despite the reiterated complaints filed by the applicants, domestic authorities had not launched a meaningful inquiry and the Court considered police's resultant indifference as tantamount to acquiescence or even connivance in hate crimes. Therefore, the ECtHR found a violation.

Oliari and Others v. Italy

App. no. 18766/11 and 36030/11

21.07.2015 [Section IV]

I. Facts

The applicants were three couples living in stable same-sex relationships who had been denied to publish marriage banns because the Italian Civil Code provided that the spouses had to be of the opposite sex. Following an appeal by the first couple, the Italian Court of Appeal had made a referral to the Constitutional Court regarding the constitutionality of the legislation. In April 2010 the Constitutional Court declared the applicants' constitutional challenge inadmissible, finding that the right to marriage, as guaranteed by the Italian Constitution, did not extend to homosexual unions and was intended to refer to marriage in its traditional sense. At the same time, that Constitutional Court pointed out that it was for the Parliament to regulate, in time and by the means and limits set by law, the juridical recognition of the rights and duties pertaining to same-sex couples. The appeal was consequently dismissed. Before the ECtHR the applicants complained that they had no means of legally safeguarding their relationship; they invoked Article 8 alone and in conjunction with Article 14. The applicants in app. no. 18766/11 also invoked Article 12, alone and in conjunction with Article 14 of the Convention.

II. Law

Holding:

Lack of legal recognition of same-sex partnership: violation.

Court's decision:

Article 8: the Court considered that the legal protection currently available in Italy to same-sex couples failed to take into account the core needs relevant to a couple in a stable committed relationship, which fell within the scope of family life under Article 8. The Court further noted a trend among Council of Europe States towards the legal recognition of same-sex couples, with 24 of the 47 member States having legislated in favor of such recognition. Moreover, the Italian Constitutional Court had pointed out the need for legislation to recognize and protect same-sex relationships, but the Italian legislature had for a long time failed to take this into account, thus leaving the individuals concerned in a situation of legal uncertainty. In view of the foregoing, the Court found that Italy had failed to fulfill its obligation to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their union.

Article 8 in conjunction with Article 14: the Court considered not necessary to consider the complaint under this perspective.

Article 12 in conjunction with Article 14: in the light of its case-law, the Court considered this part of the complaint as ill-founded and declared it inadmissible.

A.E. v Finland

App. no. 30953/11

22.09.2015 [Section IV]

I. Facts

The applicant was a Kurd living. He and four of his friend had been allegedly questioned by the police at a private homosexual party. The applicant was frightened and decided to flee the country; he managed to reach Finland, where he applied for the status of refugee. The Finnish Immigration Service rejected his application; Iran was a relatively tolerant country as concerned homosexuality, as long as it was not exercised in public. Even though the death penalty could be imposed, Finnish Immigration Service did not consider the applicant's account that the police knew about his homosexuality credible and, in any event, he could move to another city in Iran. As the applicant had been able to live in Iran as an active homosexual for five years without problems, it could not be said that he had been obliged to suppress his identity in an unbearable manner. The case was still pending before the Supreme Administrative Court. Before the ECtHR the applicant invoked Article 2, Article 3, Article 5, Article 6.

II. Law

Holding:

Inadmissible.

Court's decision:

The Court noted that after filing the recourse to the ECtHR, the applicant had been granted a continuous residence permit valid for a period of one year with a possibility of renewal. He was thus no longer subject to an expulsion order; moreover, the Court observed that the applicant had not put forward any arguments which could be construed as indicating his dissatisfaction that all issues giving rise to his application had not been adequately addressed by the domestic authorities, even though he did not call to strike the case out. In the light of the foregoing, the Court found no special circumstances regarding respect for human rights and decided to strike the application out of its list of cases.

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