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'SOGIE Human Rights': How is the European Court of Human Rights Shaping Queer Emancipation?

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Abstract

From what began as a social movement for emancipation, queers are now fighting for freedom, equality and protection via 'sexual orientation, gender identity and expression (SOGIE) human rights'. This discourse is a relatively recent phenomenon and has evolved based upon existing human rights. Queer legal theory doubts the degree to which marginalised and maligned sexualities, genders and sexes can attain emancipation in a discourse that has previously rendered them absent. It is the aim of the present research to analyse jurisprudence from the strands of criminalisation of homosexuality, the right to private and family life and the right to freedom of assembly and expression in the European Court of Human Rights (ECtHR) with regard to how these form 'SOGIE human rights'. Through a queer discourse analysis, results revealed how law is shaping queer emancipation. Overwhelmingly, heteronormative assumptions and reinforcement of gender binary were found in the narrative. Contemporaneously, there were developments that indicate an increased 'queering' of international law. Bringing awareness to *how* the SOGIE human rights discourse is constructed questioned the frame, and drew attention to the methodologies of rules, norms and identities inherent to law. Herein lies the power that queers need for emancipation.

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I wish to dedicate this research to all the people born *into this world as queer.*
I dream for the day when you will be proud to say 'I'

Introduction

An invitation is proposed- contemplate 'queer emancipation' - what does this mean; how is it described, measured or experienced? Is it the queer that needs emancipating or is it the emancipation that needs to be queer? Taken in the instant context, it means both. To embark on the journey of queer emancipation necessarily involves disrupting discourses that exist in relation to queers. Poignantly, the term queer is a point of departure. Historically, the term has been used as a term to Other, to marginalise and oppress non-normative sexualities. Taking back ownership of the term can empower the attribution of sexualities and genders that do not ascribe to the culturally intelligible heterosexuality or two binary genders to queers, and in doing so, undertake a critical anti-normative project.[1] It is in this sense that 'queer' can be emancipated from its identity-based restraints whilst simultaneously interrogate the normative system that has been adopted, purportedly contributing to emancipation. One of the normative structures that promises a future of queer emancipation is the present-day liberal human rights regime. Yet, is this path to freedom queer?

"Queer challenges us to *resist* and oppose, rather than acquiesce to, existing mechanisms of domination and power."[2] In this regard, the State, law and institutions should be considered as sites that regulate and reproduce heteronormativity (means that construct heterosexuality as the norm) and gender binarism ('two natural genders'). According to Michel Foucault, "Power is essentially what dictates its law to sex…power acts by laying down the rule: power's hold on sex is maintained through language, or rather through the act of discourse that creates, from the very fact that it is articulated, a rule of law."[3] Power masks itself - the essentialist identity markers that came to categorise queers as 'LGBTI'[4], on the one hand aided a politics of difference via social movement and rights' claims while on the other, encouraged notions of immutable, innate identities, significantly oppressive for those inside and outside of the boxes. Additionally, essentialist identities hastily overlook intersecting sites of oppression, *inter alia* race, class, age, ethnicity, religion, disability, or language. Without subjectivation, sexuality, sex and gender could exist free from the reigns of hierarchy and the Self/Other dualism.

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[1] Ratna Kapur, *The (Im)possibility of Queering International Human Rights Law Ch 7* In Dianne Otto *Queering International Law: Possibilities, Alliances, Complicities, Risks,* (London, New York, Routledge, 2017)
[2] Natalie Lovell, 'Theorising LGBT Rights as Human Rights: A Queer(itical) Analysis' (2015) E-International Relations (np) <https://www.e-ir.info/2015/12/30/theorising-lgbt-rights-as-human-rights-a-queeritical-analysis/>
[3] Michel Foucault, *The History of Sexuality Volume I: An Introduction,* translated by Robert Hurley (Random House, 1978) at 83
[4] 'Lesbian', 'gay', 'bisexual', 'transgender' and 'intersex'

There is a powerful system in which queers are now being integrated - international human rights law. Initially 'LGBTI rights', with criticism, the discourse shifted to 'sexual orientation, gender identity and expression (SOGIE) human rights'.[5] The transition was seemingly painless and has been widely adopted by human rights bodies. Regardless of human rights hard law not stipulating protection for queers, queers are claiming their rights before courts of law and are supported by a multitude of soft law, policy documents, guidelines and publications that are endorsing the notion that queer rights are human rights. Despite this recognition, in 2019, 35% of United Nations (UN) Member States criminalise consensual 'same-sex sexual acts', this includes six States that have the death penalty and five with 'probable' death penalty; 26 States with 10 years to life in prison; 31 States with up to eight years imprisonment and two *de facto* criminalisation.[6] Equally, the health and wellbeing of queers is compounded every day, globally. Evidently, there remains discourses of deviance that both emerge from and are disguised by the State, regarding sexuality, sex and gender.

As an authoritative voice on setting standards for human rights, the European Court of Human Rights (ECtHR)[7] possesses great responsibility in ensuring that queer rights ultimately enable emancipation- that is, the liberty of sexual choice *and* manifestation of that choice.[8]

Purpose and research question

The problem for this thesis is that 'SOGIE human rights' as a discourse is hindering queer emancipation. Therefore, the purpose is to critically analyse jurisprudence of the ECtHR through queer discourse analysis, enabling evaluation of how different areas of rights are developing and contributing to the SOGIE human rights discourse. Ultimately, highlighting problematic or queer discourses for queer emancipation. To achieve this, the following research question is posed, *how is the European Court of Human Rights shaping queer emancipation?*

Motivation of the study

Human rights claim universality however through the minoritisation of 'sexual orientation, gender identity and expression' it has been criticised for not resonating universally. To not render the entitlement of rights abstract, it is acknowledged that categorisation aids in attributing personhood, however if the reproduction of heteronormativity is to be disrupted, the

[5] It is also referred to simply as 'SOGI' as well as 'SOGIESC', meaning sexual orientation, gender identity and expression, and sex characteristics
[6] International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA): Lucas Ramon Mendos, *State-Sponsored Homophobia 2019* (13th Edition, Geneva, 2019)
[7] Herein after the 'ECtHR'
[8] Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press, 2015)

source shaping the discourse on 'SOGIE' must be interrogated. This is to encourage the resounding system of human rights to be queered thereby assist those who are marginalised to not only claim human rights but to also live a life of dignity, choice and freedom.

Scope

This research uses the ECtHR due to the leading role they have assumed in progressing 'SOGIE human rights'. Moreover, it is an institution that has substantial power in influencing how this discourse is globalised. It must be noted however, much of the theoretical base is from Western theorists that whilst serving the analysis well, means there is an intrinsic bias and subjectivity. From the range of jurisprudence of the ECtHR in application of the European Convention of Human Rights[9], four main strands are selected - decriminalisation of homosexuality, the right to respect for private and family life (Article 8), the right to freedom of expression (Article 10), and the right to freedom of assembly and association (Article 11). However, during the analysis, other articles of the ECHR are raised. Within these strands, largely, key cases are chosen.[10] The jurisprudence is chosen for its capacity to span different elements of sexuality, sex and gender that are arguably, most contested, and which evoke notions that have, historically wholly excluded queers, or been fundamental in determining the conception of sexuality, sex and gender in society.

Methodology

With respect to the theoretical foundations for the research, queer theory is used for its capacity to initiate a critical perspective towards the normative framework of human rights and the institution of the ECtHR. Moreover, given it theorises specifically on sexuality, sex and gender from a post-structuralist philosophy, it enables discourse analysis on the jurisprudence that is constituting 'SOGIE human rights'. Specifically, queer linguistics is utilised to examine the narratives, performativity, normativity, and institutional practice.[11] Queer legal theory, was established as a disciplinary field by Carl F. Stychin[12] and understands that there is a power

[9] Council of Europe (CoE), *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended), herein after 'the ECHR'

[10] Cases pertaining to SOGIE have largely been brought to the ECtHR by applicants from founding Member States of the CoE, or from States who joined shortly after its creation. Therefore, the cases that have been analysed are from a restricted number of States yet have the effect of influencing all 47 Member States of the CoE. Paul Johnson, ''An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) 10 (1) Human Rights Law Review 67

[11] See William L. Leap, 'Queer Linguistics as Critical Discourse Analysis' in Deborah Tannen, Heidi Hamilton, and Deborah Schiffrin (ed) *The Handbook of Discourse Analysis, 2* (John Wiley & Sons, 2015)

[12] Carl F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (Routledge, 1995)

that law exudes that is both repressive and disciplinary. It also recognises law to be a regulatory system, both over individual identities and the need for categorisation.[13] A socio-legal methodology is thereby adopted to enable the focus to shift from legal argumentation towards a sociological comprehension capable of providing new insights and broader perspectives. Contrary to what appears to be against human rights, queer theory shares fundamental principles with human rights, perhaps most critically, personal autonomy.[14] It is with this view that the research aims to benefit human rights and their universality.

Structure

This thesis has been structured into three chapters – Chapter 1 introduces queer theory, the theoretical foundation on which this thesis rests, along with a brief overview of feminism and corresponding social movements in the West that emerged in the 1960s. It will proceed to link this advocacy with developments that unfolded in the UN and the regional Council of Europe (CoE), with regard to human rights for queers. It is in this space that 'SOGIE human rights' will be introduced. Greater detail will be given on the ECtHR including the interpretative mechanisms it employs that assist in determining whether a Member State was in violation of the ECHR and ways in which specific rights are legitimately restricted by a State. Lastly, Chapter 1 will apply the theoretical tools of queer theory to SOGIE human rights and will lay the foundation for the proceeding analytical research. Chapter 2 is an in-depth analysis on how sexuality is discursively formed through complementing strands of jurisprudence. These strands are separated into three parts. Part 1 is concerned with case law pertaining to the decriminalisation of homosexuality and homosexual relations; Part 2 analyses case law with respect to the right to freedom of assembly and freedom of expression; and Part 3 takes case law from the domain of the right to family life. The final Chapter 3 analyses jurisprudence with regard to sex and gender and does so through examining the right to private life. Within the analysis of Chapter 2 and 3, each strand of jurisprudence will be organised into a multitude of themes that emerge during the research resulting from implementation of queer theory into case law and informing the evaluation of how it shapes queer emancipation. Lastly, the thesis will conclude with observations and recommendations for future research.

[13] Aleardo Zanghellini, 'Queer, Antinormativity, Counter-Normativity and Abjection' (2014) 18 (1) Griffith Law Review 1

[14] See Michael Warner, *Queering International Human Rights Law* in *Law and Sexuality: The Global Arena* edited by Carl Stychin and Didi Herman (University of Minnesota Press, 2001)

Chapter 1 Locating the Queer in Human Rights

The constructs of sexuality, gender and sex have undergone significant transformations over the past century, witnessing a major shift in the 1960s and then again in the 1990s. Tracing these major shifts requires a look at what happened during this time and what has continued to unfold. The feminist and gay movements and accompanying theories, feminism and queer theory, will be discussed in this section. These theories will form the basis for understanding sexuality, sex and gender in which this thesis is based. By doing so, the aim is to locate the queer in human rights. SOGIE human rights in many ways have been a major accomplishment in the defence and advocacy for bringing rights to queers, however, it is crucial that this chosen path for queer emancipation within the context of human rights be interrogated, after all, 'SOGIE human rights' is a discourse.[15] Who is the subject of 'SOGIE human rights' and how is that subject represented? Simply because it is 'human rights' does not necessarily mean that the law has been prepared in a way to represent 'human'. 'Human rights' by the UN is international law and was conceived in 1948[16] as a preventative measure; a standardised system organised through the order and discipline of law. However, it can also be seen as a dialogue initiated by the West that continues to engage political negotiation and geopolitics. Law is not neutral; although it is to protect the non-majoritarian, many marginalised groups have been absent from this system, precisely because of its normative base. One must be sceptical then of a discourse that not only claims universal applicability but that claims this applicability on the grounds of a normative system. After introducing the theoretical basis, this chapter will provide an overview of 'SOGIE human rights' to assist in understanding the legal and political foundation. Apparent by its international authority rooted in the UN and CoE, 'SOGIE human rights' is powerful, however even with power, it does not necessarily enable or ensure emancipation. In the final section of this Chapter 1, queer theory, as an anti-normative critique, will be integrated with 'SOGIE human rights' to question the normative base.

1.1 Feminism and 'Gay Rights'

There are two integral movements, defined in both political and social terms, that have made irrevocable changes to the way in which sexuality, gender and sex are understood. The feminist and gay rights movements have been vitally important in influencing the path that has/is being negotiated for queer emancipation. Feminism in its many forms can be most

[15] When 'SOGIE human rights' is referred to in inverted commas it is under the pretext that it is a discourse.
[16] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR)

simply described as the struggle to end sex oppression of women.[17] The movement and ideology expanded over time to include other dimensions which have contributed to the forethinking of queer theory. Perhaps, one of feminism's most powerful achievements was in exposing the patriarchal system- power relations that privilege the male heterosexual experience, interest and position over all others. In its wake, a social system is created where sexual status, role and temperament for sexuality, gender and sex ensures an internalised normative hierarchical system.[18] First-wave feminists caused significant controversy when they challenged their subordinate position within society and were said to possess symptoms of abnormal sexuality with perverse desires, labelled 'lesbians', 'immoral', 'lacking in maternal instinct', and 'imitating or desiring male roles'.[19]

Propagated early, Aristotle described "the female body as a departure from the norm of the male body and of deducing a characterisation of femaleness by lack of maleness".[20] Underlying gender relations is power, created through characterisation of sex roles and gender stereotypes, and are based on essentialist beliefs about gender and sex differences being rooted in an ideology based on biology and nature.[21] Essentialist claims had devastating consequences for life in the public and private spheres and the 'Personal is Political' slogan the feminist movement was later synonymous with challenged these notions that had delegated women to the private sphere while men carried out their public roles. Kate Millet argued fiercely in her seminal *Sexual Politics* that sexual autonomy and liberation of the female body was the key to ending women's oppression[22], hence, the importance for the politics on reproduction (and production),[23] to be revealed as a technique of maintaining the existing power structure was elevated.

Different strategies were taken for theorising about a woman's position in society and it was the individualist perspective that informed much of the later second-wave feminism. Individualism emphasises personal autonomy and fulfillment and challenged the socially prescribed gender ideologies. It was an approach that was critical for the development of

[17] bell hooks, *Feminism is for Everybody* (Pluto Press, 2000)
[18] Chris Weedon, *Feminist Practice and Poststructuralist Theory* (2nd ed, Blackwell Publishing, 1987)
[19] In 1900, William Lee Howard, an American psychiatrist equated feminism with lesbianism writing "The female possessed of masculine ideas of independence… and that disgusting anti-social being, the female sex pervert, are simply different degrees of the same class - degenerates" cited in Francis Mark Mondimore, *A Natural History of Homosexuality* (The John Hopkins University Press, 1996) at 63
[20] Maryanne C. Horowitz, 'Aristotle and Woman' (1976) 9(2) Journal of the History of Biology 183 at 185
[21] *Weedon* (n 18)
[22] Kate Millet, *Sexual Politics,* (University of Illinois Press, 2000)
[23] See Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender,* (University of California Press, 1978)

citizenship being granted to those that had not previously been afforded such protection. Prior to the second-wave of feminism, critical theory had emerged regarding femininity and women. Existentialism philosophy had been deployed which revealed femininity as the Other and theorised that when men claimed the category of Self/Subject, it pushed women to the status of Other.[24] In the 1960s, significant political gains were made by the feminist movement and over the period of the next thirty years, various theoretical arguments were made regarding sexuality, gender and sex. Language, radical feminists argued, as a framing device, was integral to the deconstruction that needed occur in order to expose the order, power and imagery that defined sexuality.[25]

Black Feminists, or 'womanist' as Alice Walker coined, were feminists that specifically considered challenges faced by Black women and made visible the lack of inclusion and diversity within the existing feminist ideology.[26] It led to what has now been termed intersectionality, a lens which draws attention to the interdependent, indivisible and interrelated nature of *inter alia* race, class, and sexuality, and the effects these have on one's experience as a person. Intersectionality principally challenged the universalist claims that women in the mainstream feminist movement argued. Black feminists argued that it was impossible to separate or prioritise one part of their identity over another, instead seeking a sense of oneness in order to escape the feeling of Otherness.[27] In research conducted with participants who were Black lesbians, they were asked to order the prominence of their different identities in relation to their experiences of discrimination.[28] Results showed that this approach was variable-centred and an approach where focus is not on identity may reveal the complexities of the intersecting identity via reducing limitation from the language frame.[29] Social sciences are typically encouraged to split identities however by de-emphasising this, there could be an exposé of intersectional experience.[30] It is vital for any discussion on human rights to include intersectionality, particular due to their universal claims. The feminist movement was able to

[24] See Simone de Beauvoir, *The Second Sex* translated by Constance Borde and Sheila Malovany- Chevallier (Vintage Books, 2011)
[25] Jeff R Hearn and Pauline W Parkin, '*Sex' at 'Work'. The Power and Paradox of Organisational Sexuality,* (Wheatsheaf Books, 1987)
[26] See Patricia Hill Collins, 'What's in a Name?' (1996) 26(1) The Black Scholar 9
[27] On Audre Lorde cited in Sharon L. Barnes, '"I am. Are you ready?" The Challenge of Audre Lorde's Poetics of Inclusion" (2004) 5(1) Obsidian III 50
[28] Lisa Bowleg, 'When Black + Lesbian + Woman ≠ Black Lesbian Woman: The Methodological Challenges of Qualitative and Quantitative Intersectionality Research' (2008) 59 Sex Roles 312
[29] Ibid.
[30] Patrick R. Grzanka, 'Queer Theory' in Paul Atkinson and others (ed), *The SAGE encyclopedia of research methods* (SAGE Publications, In press)

assist in claiming rights as it provided vital insight on areas for inquiry, *inter alia,* patriarchy, heterosexuality, institutions, the private/public divide, capitalism and religion.

The second movement that warrants discussion is the movement that began as 'gay rights'.[31] In the 1970s, gay liberation intensified, and by using identity politics, they claimed 'gay rights' via focusing on equality claims and liberation demands.[32] Homosexuality and heterosexuality had become diametrically opposed via medical, legal and psychiatric discourses by earlier discourses throughout the twentieth century[33] and the movement attempted to restructure 'gay identity' into 'sexual orientation' instead.[34] Before considering rights regarding sexuality, it must be first understood that 'sexual orientation' and subsequent 'sexual minorities' are social phenomenon.[35] In the gay rights movement, 'sexual orientation' was instigated as a codified identity and presented the view that the rights of the 'minority' should be protected.[36] However, it is interesting to note that being a collectivist movement, there was little attention paid to individualist human rights,[37] and by constructing a group identity, personal autonomy can be affected by applying the group identity to individuals, irrespective of how they identify themselves.[38] From the Stonewall Riots 1969, other political strands emerged on topics of oppression "against normative sexuality, and the hegemony of marriage and the family".[39] In this sense, Samuel Chambers argues that 'gay liberation' was successful as a political movement because the concept of sexual orientation was coherent with the political action taking place through the 1970s and 1980s.[40] Although, the 'gay rights' or 'LGBTI rights/movement', as it was later called, in seeking recognition, respect and dignity for their sexuality, genders and sexes, it has struggled to frame the privilege assigned to heterosexuality as a social problem in a way that highlights how heterosexism is constructed on a daily basis.[41] Deconstructing heterosexual privilege needs to be more than advocating for

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[31] Scholars in discussing the movement, most often refer to it as the *gay* rights movement, as opposed to LGBTI. This is because the movement, in its early days, was predominately focusing on gay (and lesbian) representation. Clearly, this is however the normative story of the queer movement

[32] Kelly Kollman and Matthew Waites, 'The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction' (2009) 15 (1) Contemporary Politics 1

[33] Eve K. Sedgwick, *Epistemology of the Closet* (University of California Press, 1990)

[34] Samuel A Chambers, *The Queer Politics of Television* (I.B. Tauris, 2009)

[35] Eric Heinze, *Sexual Orientation and Sexual Minorities* in *Sexual Orientation: A Human Rights, An Essay on international Human Rights Law,* (Martinus Nijhoff Publishers, 1995)

[36] *Chambers* (n 34)

[37] *Kollman* and *Waites* (n 32)

[38] Jean L Cohen, *Is There a Duty of Privacy? Law, Sexual Orientation, and the Dilemma of Difference* in *Regulating Intimacy: A New Legal Paradigm* (Princeton University Press, 2002)

[39] However, Chambers claims that the most dominant was that of gay rights. *Chambers* (n 34) at 12.

[40] John D'Emilio, *Out of the Closets: Voices of Gay Liberation*, (New York University Press, 1992) cited in *Chambers* (n 34) at 12

[41] Celia Kitzinger, 'Heteronormativity in Action: Reproducing the Heterosexual Nuclear Family in After-hours Medical Calls' (2005) 52(4) Social Problems 477

a change in behaviour by heterosexuals towards queers, it must additionally target heterosexist assumptions in routine interactions between all people.[42]

1.2 Queer Theory

Politically, the time was ripe in the 1980s and there was an emergence of writings on the underpinnings of these movements; these writings were precedential for queer theory. As Eve Sedgwick identified in her *Epistemology of the Closet,* the creation of the 'homosexual' category meant that the 'heterosexual' appeared,[43] which was a turning point in the study and theory for queer identity. Discussion on heterosexuality aimed to expose its social structuring[44] and when Adrienne Rich coined the term 'compulsory heterosexuality' in 1980, she argued that there was a pervasiveness of heterosexual norms which dictated how women and men must perpetuate the heterosexual romance ideology.[45] Moreover, heterosexuality began to be seen as a form of oppression.[46] Interestingly, as the number of Statist societies increased, so too did the "uniformity of norms governing family structure and gender relations" as they "have largely converged on the exclusive, biological mother-father-child paradigm, a *normative-heterosexual* paradigm of social organisation".[47] Another powerful participator in this paradigm of social organisation are the Judeo-Christian cultures of Europe,[48] consisting of religion that enforces patriarchal institution and serves as a legitimising authority.[49]

Heterosexual privilege is bound upon the subordinate homosexual existence[50] and if the pervasive heterosexual norms prevail, they will continue to cause sexuality outside of these norms to be viewed as deviant and transgressive. As Chambers states, "a norm is not a norm without the marginal and the deviant; outliers are exactly what sustain the norm".[51] Heteronormativity is a social macro-issue[52] and explains the power and hierarchy of heterosexuality in the political and social spheres when it operates as a norm, proving to be a prevailing cycle of self-fulfilling normality. Sedgwick, and other queer theorists' approach and critique of the construction of modern sexual categories (LGBTI) is poignant in that it

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[42] Ibid.
[43] Sedgwick (n 33)
[44] Judith K Pringle and Lynne Giddings, 'Heteronormativity. Always at Work' (2011) Paper submitted to Stream 2, 'Gender and Diversity at Work in CMS', Critical Management Studies Conference 1
[45] Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence' (1980) 5(4) Signs 631
[46] See Germaine Greer, *The Female Eunuch* (Harper Perennial, 1970)
[47] *Heinze* (n 35) at 32-33
[48] *Heinze* (n35)
[49] Mary Daly, *Beyond God The Father: Toward a Philosophy of Women's Liberation* (Beacon Press, 1973)
[50] *Sedgwick* (n 33)
[51] *Chambers* (n 34) at 18
[52] *Leap* (n 11)

challenged the foundation of much of the identity politics that had begun a decade earlier under the gay rights movement.

Burgeoning in the 1990s, queer theory emerged as "an impulse to question, problematise, or even disclaim the very idea of a fixed, abiding notion of identity".[53] When Foucault interrogated how sexuality's rules, norms and identities became repeated and naturalised, he found that in Europe, through subjectification of sexuality, sodomy was given personhood, and by pairing homosexuality with a deviancy discourse, the taxonomy of pathology and normality appeared.[54] One of the most central ideas of queer theory is on the essentialist/social constructivist debate, that is, has 'homosexuality' existed *throughout* history or been constructed *within* history?[55] It posits that the world is constructed as binaries - male/female, heterosexual/homosexual, nature/culture, mind/body – assembled and regulated by the normative majority that significantly contribute to queer oppression. Foucault's work on discourse analysis has shown how the knowledge-power relationship which creates, regulates and institutionalises social categories, can be challenged.[56] Traditional gender ideologies are only validated when a social system based on binary oppositions is accepted.[57] Power operates with greater complexity than simply an exchange between Subject and Other, it thrives in the very fabrication of the binary frame of 'male'/'female', and so in order to understand how power maintains consistency of the binary, one must be introduced to the heterosexual matrix of queer theory.[58] The heterosexual matrix stems from this notion that Rich put forth on compulsory heterosexuality, however its implications can be applied on a larger scale greater than just propagating the heterosexual romance. It applies in the case of gender binary whereby 'male'/'female' are sustained as legitimate through the belief of heterosexuality being the norm thereby justifying gender as ontological, when mapped according to this matrix.[59] Challenging heteronormativity will inextricably interrupt the reproduction of the gender binary, thereby having a mutually disrupting effect to other related binaries - sexuality and sex.

Contrary to what many people feel is the most natural scientific distinction, the sex/gender divide is far more complicated than what meets the eye. Labels and categories,

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[53] *Chambers* (n 34) at 13
[54] *Foucault* (n 3)
[55] *Chambers* (n34)
[56] *Foucault* (n 3)
[57] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York and London, 1999)
[58] Ibid.
[59] Ibid.

specifically 'male', 'female', 'gay', 'straight', 'trans' and 'intersex' are exposed through queer theory as constructions developed through a matrix of social decisions.[60] Sex and gender are more than simple biology, empirically verifiable through the sum of their parts. Sexuality, for most people, is closely connected with gender and/or sex and it is the aim of this section to reveal how and why a holistic understanding to these fields is required. Gender can be described as the way in which one lives as a social being, most often measured by degrees of 'masculinity' and 'femininity', and sex can be said to be a type of body;[61] here purposefully vague terms but elsewhere dictated by hegemonic norms that stipulate what is and what is not normal for 'men' and 'women'.[62] It is timely to indicate though that by conflating sex with biology, which an understanding of sex being body would encourage, and gender into a process regimented by culture, would leave the question of where 'woman' and 'man' come from.

From a queer perspective, this is a principle point for inquiry. Butler argues that categories of sex and gender should both be treated as cultural constructions.[63] Butler questions- as is widely agreed across, *inter alia*, feminism and queer theorists (as well as other fields), gender is a cultural construction- what does this mean then for sex, if the binary sex does not naturally lead to strict genders?[64] Does this not question the stability of sex itself and moreover, the well-ordered harmony of the gendered/sexed subject? 'Men' as the category does not accrue solely from the bodies of males and nor will 'women'; the binaries of sex and gender together, lacks intelligibility then if gender is neither restricted by or mimics sex.[65] Radically conceiving sex as distinct from gender would mean then "that man and masculine might just as easily signify a female body as a male one, and woman and feminine a male body as easily as a female one."[66] Eventually, how can one say that one has a 'given' sex or gender when it is not known where they have been 'given' from?[67] Sex and gender are not pre-discursive,[68] they neither existed before meaning had been attributed to them or possessed distinction, that is without and before having been informed by context, history and culture.

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[60] David A Rubin, *Intersex Matters: Biomedical Embodiment, Gender Regulation, and Transnational Activism* (Suny Press, 2017)
[61] Deborah Cameron and Don Kulick, *Language and Sexuality*, (Cambridge University Press, 2003) cited in Heiko Motschenbacher and Martin Stegu, 'Queer Linguistic Approaches to Discourses' (2013) 24 (5) Discourse and Society 519
[62] Heiko Motschenbacher and Martin Stegu, 'Queer Linguistic Approaches to Discourses' (2013) 24(5) Discourse and Society 519
[63] *Butler* (n 57)
[64] Ibid.
[65] Ibid.
[66] Ibid. at 9
[67] See *Butler* (n 57)
[68] Ibid.

Instead, the widespread belief that sex is 'true' pervades, and is produced by performativity of gender norms that surmise to a perceived coherent identity.[69] Integral to this coherent identity is the presumption of heterosexuality- that is, desire, which has been instituted as heterosexual causes diametrically opposed 'feminine' and 'masculine' to be produced, which is the expressive manifestation of the 'male' and 'female'.[70] What happens to the sexual 'identity' that is not supposed to 'exist', that lacks truth, and whose desire does not follow it's 'natural' path or is culturally intelligible?

An integral role has been filled by queer theory due to its ability to study the subjectivity and politics of a particular issue as well as provide a framework for analysis on how sexuality, sex and gender norms are created and persist.[71] The theory has also received criticism from an intersectionality perspective stating that it has failed to explain or explore reasons why the rates of violence against transgender people of colour are much higher than others. [72] More broadly, there is critique of its ability to contend with the dimension where race and gender identity intersect.[73] Nonetheless, the hallmarks of queer theory are considered to be its conceptualisation of sexuality, whereby sexual power across the social system are infused through discourse and prescribed through binaries; the problematisation of identity, including the categories of 'LGBTI', 'sexual orientation and gender identity and gender expression', and the categories of 'sexuality', 'sex' and 'gender' in general; critique of the civil rights techniques by use of deconstruction, anti-assimilation and revisionist readings of what has been considered 'sexless' or 'genderless'; and the interrogation of what were traditionally 'non-sexual' areas.[74]

1.3 'SOGIE human rights'

Beginning as 'gay rights', shifting to 'LGBTI rights' and most recently to 'SOGIE human rights', human rights for queers have been through many transformations, subjected to many discourses. Following the initiation by the 'gay rights' movement, there was a growth of transnational LGBTI networks in the 1970s that mobilised under the banner of equality, this meant that the use of the human rights discourse became a tool used among progressive organisations in the 1980s and arguably increased success for the subsequent rights

[69] The notion of 'true' sex comes from Michel Foucault in part 3 *Scientia Sexualis.* See *Foucault* (n 3) cited in *Butler* (n 57)
[70] *Butler* (n 57)
[71] *Chambers* (n 34)
[72] Reina Gossett, Eric Stanley and Johanna Burton, *Trap Door: Trans Cultural Production and the Politics of Visibility* (Cambridge: the MIT Press, 2017) cited in *Grzanka* (n 30)
[73] Ibid.
[74] Arlene Stein and Ken Plummer, 'I can't even think straight': 'Queer' Theory and the Missing Sexual Revolution (1994) 12 Sociology cited in *Grzanka* (n 30)

movement.[75] In this sense, the human rights discourse gave opportunity for a marginalised people to claim entitlement to these rights, and as Anthony Chase acknowledges, reflects the bottom-up approach which keeps human rights relevant.[76] Within the international context, the appropriation of the human rights doctrine is being used as a vehicle *and* frame by queers[77] which moved to the mainstream with the adoption of 'SOGIE human rights'.[78] Importantly, the inclusion of SOGIE human rights into the framework of international law, albeit not without resistance, has meant that queers have been able to claim these rights and be involved in the international discussion on how human rights are applicable and accessible to them.[79] Human rights bodies have also used their authoritative voice to indicate how States have obligations to protect, fulfil and respect 'SOGIE human rights'. This has ultimately meant a group that have suffered long-term stigmatisation, discrimination, marginalisation, criminalisation and subordination are now seeking claims to equality, freedom and humanity.

1.3.1 The (Normative) International Arena of the UN

It is a relatively recent phenomenon that the local queer struggle transpired into one of an international legal nature. Within the UN, the international human rights legal instruments that 'SOGIE human rights' claims are based on are the International Bill of Human Rights,[80] as other than non-binding resolutions and recommendations, there have been no hard-legal instruments created specifically covering the human rights of queers. To address the growing patterns of abuse targeted towards queers, in 2006 human rights groups[81] gathered in Indonesia to create an instrument that would clarify how international human rights law can and should

[75] *Kollman* and *Waites* (n 32)
[76] Anthony T. Chase, 'Human Rights Contestations: Sexual Orientations and Gender Identity' (2016) 20 (6) International Journal of Human Rights 1
[77] *Kollman* and *Waites* (n 32)
[78] Angelia R. Wilson, 'The 'Neat Concept' of Sexual Citizenship: A Cautionary Tale for Human Rights Discourse' (2009) 15 (1) Contemporary Politics 73
[79] Over a decade prior to the Yogyakarta Conference, in 1993, ILGA became accredited by the UN Economic and Social Council (ECOSOC) as a consultative non-governmental organisation. This was short lived however as after just a few months, the United States of America claimed that the organisation promoted paedophilia and disputed their status. This loss meant there was no permanent organisation in the UN representing queer issues until their status was reinstated 17 years later in 2011. During the absence of ILGAs status, other queer groups were interacting with UN mechanisms which aided queer issues onto the international agenda, albeit in a sporadic fashion. See Doris Buss and Didi Herman, *Globalising Family Values: The Christian Right in International Politics*, (University of Minnesota Press, 2003)
[80] UDHR, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESC)
[81] Including International Commission of Jurists, the International Service for Human Rights and human rights experts. Legal experts and UN representatives as well as NGO's are important actors as *norm entrepreneurs.* Elizabeth Baisley, 'Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) 38 (1) Human Rights Quarterly 134

protect queers. What resulted from the conferences was a document titled the Yogyakarta Principles.[82] The 29 principles make adjacency claims for queer human rights and are a guide on applying existing international human rights law for persons of diverse 'sexual orientations and gender identities'. In 2017 there was the 'YP+10' addition.[83] The principles cover a range of rights *inter alia* the right to life; privacy; to the highest attainable standard of health; freedom of opinion and expression; freedom of peaceful assembly and association; to found a family; and to participate in public life. Whilst the Yogyakarta Principles have heralded in another era for queer human rights, they are non-binding principles that rely on the current state of international human rights law. Impact from the publication can be observed; referenced by the OHCHR, UN Special Procedures, UN human rights treaty bodies and the Commissioner for Human Rights in CoE,[84] shaping geopolitical conversations and most critically here, the discourse on sexuality, gender and sex. It was the Yogyakarta Principles that instigated and consolidated the use of 'SOGIE' to represent queers within human rights.

'Sexual orientation' and 'gender identity' used in the Yogyakarta Principles were in response to the increasing recognition of the need to reduce the essentialist sexual discourse that 'LGBTI' implied. 'Sexual orientation' according to the Yogyakarta Principles is "understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."[85] Whereas 'gender identity' and 'gender expression' describes

> "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."[86]

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[82] International Commission of Jurists (ICJ), *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* March 2007 <http://www.yogyakartaprinciples.org/>

[83] International Commission of Jurists (ICJ), *Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles.* As adopted on 10 November, 2017 Geneva

[84] Dominic McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) 16 Human Rights Law Rev 613

[85] *International Commission of Jurists* (ICJ) (n 83) at 6

[86] Ibid.

In 2011, the UN Human Rights Council adopted the first resolution of its kind - human rights violations based on 'sexual orientation and gender identity'.[87] This was complimented by the first UN Human Rights Office of the High Commission (OHCHR) report on the same subject.[88] By the following year, the OHCHR released 'Born Free and Equal', and proclaimed that

> "the case for extending the same rights to lesbian, gay, bisexual and transgender (LGBT) persons as those enjoyed by everyone else is neither radical nor complicated. It rests on two fundamental principles that underpin international human rights law: equality and non-discrimination."[89]

The document outlined five core legal obligations of states with respect to protecting the human rights of queers and are organised by issue rather than application of specific rights. Issues include protect individuals from homophobic and transphobic violence; prevent torture and cruel, inhuman and degrading treatment of LGBT persons; decriminalise homosexuality; prohibit discrimination based on sexual orientation and gender identity; and respect freedom of expression, association and peaceful assembly.[90] In addition to UN resolutions, numerous major policy speeches and statements have been given by authoritative human rights figures.

Opponents to the adjacency claims of queer human rights reject the notion that these rights can be found in existing human rights instruments and argue that human rights institutions, such as the ECtHR are introducing 'new' rights to which they have not and will not consent to.[91] Here it becomes apparent how critical framing is for acceptance, applicability and universality of a particular chosen discourse, especially one of such scope. The discourse, 'SOGIE human rights', has filtered down to direct and shape how other institutions are approaching human rights for queers, including the ECtHR. Yet despite its supposed inclusive, broad reach, there is substantial global inconsistency among States on what level and type of protection and rights are afforded to queers, even within a seemingly unified regional system such as the CoE.[92]

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[87] UN HRC, Res A/HRC/17/L.9/Rev.1, 15 June 2011
[88] OHCHR 'Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity' 17 November 2011, A/HRC/19/41
[89] OHCHR *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* 2012 at 7
[90] Ibid.
[91] *Baisley* (n 81)
[92] *McGoldrick* (84)

1.3.2 European Court of Human Rights

The focus for this thesis is on how the ECtHR is shaping queer emancipation through the 'SOGIE human rights' discourse. Judiciary of the ECtHR has the responsibility of interpreting human rights law, namely the ECHR, determining whether there has been a violation of the ECHR by a State towards persons within their domestic jurisdiction. The ECtHR and the CoE - taking a subsidiary, quasi-constitutional role in the European region for the field of human rights - have assumed a dominant role in fighting against discrimination and inequality directed at people on the basis of their sexuality, gender and sex.[93] Europe has arguably had the most success in institutionalising prohibition of discrimination on the basis of 'SOGIE' as a regional custom, and for SOGIE human rights more generally. [94]

In order to understand how the ECtHR determines whether a State is in compliance with the ECHR, two interpretative methods are used, the margin of appreciation and the European consensus. Both methods have received heavy criticism, for reasons of relativity, inconsistency of application and absence in the ECHR.[95] As international law, the ECHR is argued to be both a living instrument whilst simultaneously "anchored to the reality of the members States in which it applies".[96] On the one hand, the interpretative methods ensure the law remains legitimate, reflective and relevant to member States. Given the consensual nature of the ECtHR system, an inherent validation is required from member States who created the ECHR or later acceded, regarding the development of the ECtHR case law.[97] Therefore, the European consensus refers to the level of uniformity present among the member States' legal frameworks on a particular topic. Consequently, it can impose higher standards once an emerging trend is observed via analysis among a majority of Member States; an interpretation fulfilling its evolving potential. Alternatively, in the absence of consensus, a wide margin of appreciation can be invoked which, due to the nature of the method, can impose stagnation. According to the CoE, it is unclear what would happen if there begins an emerging trend among Member States of the scope of a right regressing.[98] Therefore, on the other hand, the ECtHR

[93] See Carmelo Danisi, 'How Far Can European Court of Human Rights go in the Fight Against Discrimination? Defining New Standards in its Non-Discrimination Jurisprudence' (2011) 9 (3-4) International Journal of Constitutional Law 793; *McGoldrick* (n 84)
[94] *McGoldrick* (n 84)
[95] Steven C. Greer, 'The exceptions to Articles 8 to 11 of the European Convention on Human Rights'. *Human rights files, No. 15*. (Council of Europe Publishing, 1997) at 6
[96] CoE, 'Interpretative Mechanisms of ECHR case-law: The Concept of European Consensus' < https://www.coe.int/en/web/help/article-echr-case-law> (np)
[97] Ibid.
[98] Ibid.

can use consensus, or lack of, to define or avoid defining concepts raised and moreover, litigate on who is entitled to what rights.

States have a certain degree of flexibility in applying the ECHR, which is pertinent to a States margin of appreciation. In Articles 8 through 11 of the ECHR, provisions are provided for the State to impose restrictions however they must serve a 'legitimate purpose'.[99] Conditions under which a State can claim this purpose are when they are "prescribed by law or necessary in a democratic society… for the protection of health or morals" or *inter alia,* for the protection of the rights of others. [100] This range of rights will be particularly relevant for the subsequent analysis in this thesis, largely because they are rights that are particularly restricted by States when it comes to their applicability for queers. Although States have the margin of appreciation, the legitimacy, lawfulness and proportionality will be assessed by the ECtHR and this is where analysis of European consensus will be initiated. Ultimately, it means that States and the ECtHR regulate controversial topics, especially those that invoke political philosophy, morality or ethical dilemmas, such as transgender legal name changes, queer parent child adoption, and same-sex marriage.[101] This process is highly influenced by larger forces such as the environment in Member States in relation to queer politics. From this perspective, 'SOGIE human rights' is therefore not limited to the point at which the ECtHR finds a violation of the ECHR and when they do not, it is also the narrative/s that are woven in the process. These narratives are discourses and are what culminates to 'SOGIE human rights'. The aim of looking at these narratives is to break down the overarching discourse so that areas consistent with queer emancipation, as in accordance with the perspective of queer theory, can be established whilst that problematic can be highlighted.

1.4 'Queering' International Law[102]

There are two broad interrelated arguments as to why the discourse of 'SOGIE human rights' may be problematic. Firstly, consider the term queer. The meaning of queer is two-fold – it describes a person who does not ascribe to the heterosexual or cisgender identity but it is also used to describe a critical anti-normative project.[103] Turning then to the language put forth by the 'gay rights' movement through to the Yogyakarta Principles; the mainstream agenda

[99] Right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association respectively ECHR
[100] Ibid.
[101] CoE (n 96)
[102] 'Queering' has been a term used by scholars in this field of research meaning 'to queer', and is understood as a verb
[103] *Kapur* (n 1)

has created a discourse on sexuality, sex and gender that is identity based. Although the Yogyakarta Principles adopted a wide-ranging definition of sexual orientation, it still "maintains an understanding of sexual orientation as a distinct component in the identity of the self, determined based on the similarity or difference between one's gender and the gender of one's object of desire".[104] Scholars adopting queer theory criticise this discourse for, *inter alia,* reinforcing binaries by presuming fixed identities and in the process, excluding others that fall outside of this matrix, even identities included in the categorical approach- 'bisexuality' and 'transgenderism'.[105] Bisexuality is inconceivable in the overriding sense of sexual orientation which describes a singular preference towards one gender or the other.[106] There is also a dominant tendency to treat the category of 'gender identity' as applying only to people who identify as 'transgender' (and occasionally people who are 'intersex'). [107] Significant concerns have been raised regarding the Yogyakarta Principles' definition of gender identity as being based on biology, ignoring the social context.[108]

Concepts such as sexual orientation and gender identity place boundaries and limit expression.[109] When the identity became codified, it placed queers as a sexual minority.[110] To adopt the position of a minority however assumes that the characteristics of the minority are unique and in the case of sexuality, the minority position opposes the belief that contact between people of the same sex is just one behaviour amongst a range of choices available to all human beings.[111] This then is weakening the frame of gender, sex and sexuality being a social construction[112] and instead normalising the status quo through the assimilationist framework of human rights.[113] If the prevailing approach is limiting expression or excluding parts of the queer community and reinforcing Otherness, why is this approach adopted and how is it prevailing?

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[104] Aeyal Gross, 'Queer Theory and International Human Rights Law: Does Each Person Have A Sexual Orientation?' (2007) 101 Am Society of Intl Law 129 at 129 - 130
[105] Matthew Waites, 'Critique of "Sexual Orientation" and "Gender Identity" in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles' (2009) 15(1) *Contemporary Politics* 137; Anthony J Langlois, 'Human Rights, LGBT Rights, and International Theory' in Manuela Lavinas Picq and Markus Thiel, *Sexualities in World Politics: How LGBTQ* claims shape International Relations (London and New York Routledge, 2015)
[106] *Waites* (n 105)
[107] Dianne Otto, 'Queering Gender (Identity) in International Law' (2015) 33 (4) J of Human Rights 299
[108] Ibid.
[109] *Kollman* and *Waites* (n 32)
[110] *Chambers* (n 34)
[111] *Sedgwick* (n 43)
[112] Petchesky also discusses the problematic use of the term 'sexual minority'. See Rosalind P. Petchesky, The Language of 'Sexual Minorities' and the Politics of Identity: A Position Paper' (2009) 17 (33) Reproductive Health Matters 105
[113] *Kapur* (n 1)

One explanation is that international human rights law has largely adopted a normative heterosexual paradigm[114] and that even legislation with the most liberalising intentions will still imitate 'orientationalist' discourses of sexuality.[115] By limiting the variation in human expression and desires, the heteronormativity can be reproduced.[116] Eric Heinz states that there are indications that there is increasing recognition towards the changes that are happening to the modern family, nevertheless, the principle model still privileges heterosexual, child-rearing, marriage and social sex roles.[117] When these rights are accorded to queers, such as gay marriage, adoption, parental rights or same-sex partner rights, there is selection as to which queers will be entitled. Homonormativity then explains how certain sexual politics that do not challenge the overriding heteronormative assumptions and institutions are permissible, typically those that have become assimilated.[118] In this sense, it is simply a different type of norm diffusion, with reach beyond sexual politics. Homonormativity also describes practices and outcomes that imitate heteronormativity.[119] Interestingly, early references to homonormativity were used by transgender political activists in the 1990s, denoting practices that marginalised sub-groups within the 'LGBTI' spectrum.[120]

"Human rights relating to sexual orientation continue to be opposed with reference to heteronormative understandings of cultural traditions, national identity and religious beliefs".[121] According to Foucault, when homosexuality was paired with pathology, it rooted societies understanding of sexuality and identity as unhealthy and immoral. Foucault's 'biopower' explains how the rhetoric of health, science, education and management camouflage the discourse on sexuality.[122] Through this rhetoric, institutions such as schools, churches, hospitals, and government can frame sexuality in such a way that perpetuates the norm and deviant.[123] The rhetoric reflects power-knowledge, a form of 'governmentality' which describes how states and institutions compel certain conduct through the disguise of

[114] *Heinze* (n 35)
[115] Tamsin Wilton, *Sexual (Dis)orientation: Gender, Sex, Desire and Self-Fashioning* (Palgrave Macmillan, 2004)
[116] Ibid.
[117] *Heinze* (n 35)
[118] Lisa Duggan, *The Twilight of Equality?: Neoliberalism, Cultural Politics, and the Attack on Democracy* (Beacon Press, 2003)
[119] *Motschenbacher* and *Stegu* (n 62)
[120] Susan O Stryker, 'Transgender history, Homonormativity and Disciplinarity (2008) 100 Radical History Review 145
[121] *Buss* and *Herman* (n 79); C Rothschild, S Long and S T Fried, 'Written Out: How Sexuality is Used to Attack Women's Organisation' (International Gay and Lesbian Human Rights Commission/Centre for Women's Global Leadership, 2005); and S Corre^a and others, *Sexuality, Health and Human Rights* (Routledge, 2008) all cited in *Waites* (n 105) at 141
[122] *Foucault* (n 3)
[123] Ibid.

self-discipline, in other words, subtle yet coercive domination.[124] Power is gained from knowledge, and knowledge will inform one how to use that power whilst at the same time reproduce more knowledge, strengthening that which is already a part of the system. Consider then the ECHR Articles 8 through 11 and the legitimate restrictions as necessary in a democratic society for the protection of health and morals, public safety, protection of public order or prevention of disorder. Could these 'legitimate' restrictions on rights be the rhetoric's of health, education and management that Foucault refers to for concealing discourse on sexuality? It could mean that the ECtHR and international human rights law is regulating sexuality, gender and sex in a way that is causing suppression of queer emancipation.

The second broad argument regards what has been referred to as 'globalising the gay'[125] or the 'Pink Agenda'[126] and the concerns related to the so-called universal nature of human rights. "Doctrinal law considered as either theory or rhetoric presents a coherent, normative system that is not only reflective and passive but active and useful in the implementation of existing power relationships in society."[127] Law, when needing to regulate outside the boundaries of a norm, functions as a social coercion in accordance with the underlying interests of society.[128] Can law then authoritatively review the existing regulations for equality between queer people, heterosexual and cisgender people when the law "itself speaks the ethical language of the majority?" [129]

Universality of 'SOGIE human rights' needs to be reconsidered otherwise risks being perceived as an imperial imposition.[130] SOGIE human rights are progressing at the most advanced rate in Europe which has a potential to reinforce the belief that the region and it's societies are more 'progressive' and 'civilised' than others due to the binaries that are present in race and culture.[131] Conceptions of sexual orientation and gender identity as defined by the Yogyakarta Principles reflects a Western understanding and not characteristic to societies that do not conceive of sexuality as a division of heterosexual and homosexual.[132] The SOGIE

[124] *Grzanka* (n 30)
[125] This term broadly reflects multiple terms such as the 'gay international' and refers to the image and project of the 'gay' conceived in the West
[126] Francesca Romana Ammaturo, 'The 'Pink Agenda': Questioning and Challenging European Homonationalist Sexual Citizenship' (2015) 49(6) Sociology 1151
[127] Martha Albertson Fineman, 'Intimacy Outside of the Natural Family: The Limits of Privacy' (1991) 23(4) Connecticut Law Review 955 at 956
[128] *Fineman* (n 127)
[129] Rainer Forst, *Contexts of Justice: Political Philosophy Beyond Liberalism and Communitarianism.* In *Philosophy, Social Theory and the Rule of Law* (University of California Press, 2002) at 64
[130] *Kollman* and *Waites* (n 32)
[131] *Kapur* (n 1)
[132] *Gross* (n 104)

human rights project "requires a unitary conception of both sexuality and rights"[133] and as Joseph Massad critiques, the 'Gay International' does not exist and the discourse can harmfully repress variable practices that do not assimilate into its sexual epistemology.[134] 'Sexual orientation' and 'gender identity' was adopted as a liberal, undefined approach to the subject however apart from the absent 'global gay', States seem far from ready to relate such an approach to 'SOGIE'.[135] This may be just one explanation as to why some states are defiantly against the terms having legal foundation in international law.[136]

SOGIE human rights have been problematised from many angles with an overriding concern on the use of categories to define the queer. The emancipatory capacities of the human rights frame for queers must be interrogated as queer theorists fear it prescribes to heteronormativity as the prevailing hegemonic norm.[137] Researchers in this field acknowledge that in order for law and policy regarding, *inter alia,* discrimination not to be rendered abstract, categories need to be defined,[138] but surely there is an alternative, one which does not contribute to the perpetuation of oppression, and subordination of queers. The question is then how is the European Court of Human Rights partaking in globalising 'SOGIE human rights' and shaping queer emancipation?

[133] Ibid. at 130
[134] Joseph Massad, 'Reorientating Desire: The Gay International and the Arab World' (2002) 14 (2) Public Culture 361
[135] Manuela Lavinas Picq and Markus Thiel, *Introduction* in *Sexualities in World Politics: How LGBTQ claims shape International Relations* (London and New York Routledge, 2015)
[136] *Waites* (n 105)
[137] *Kapur* (n 1)
[138] *Kollman* and *Waites* (n 32)

Chapter 2 'Sexual Orientation'

Part 1. Criminalisation of Homosexuality

Up until 1987 homosexuality was classified under the authoritative American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (DSM)[139] and it wasn't until 1990 that the World Health Organisation declassified homosexuality from the International Classification of Diseases (ICD-10).[140] What Part I of the present thesis will cover is how the history of homosexuality as researched by Foucault nourished the present day construction of sexuality. It is relevant to apply Foucault's work in this discussion because it will assist in shedding light on how homosexuality came to be considered not only a disease and disorder but also deviant to the degree of criminalisation. Woven discourse on sexuality will be interrogated by looking at case-law regarding criminalisation of homosexuality[141] which will inform the present research on how the ECtHR has and is participating in this. Discoveries that are made on the case-law will be interpreted largely through Foucault's approach due to its applicability and insights. A conclusion will be drawn on what discourse/s was/were used in the context of decriminalisation of homosexuality and how this contributed, firstly to the 'SOGIE human rights' discourse and secondly, to queer emancipation. Decriminalisation of homosexuality is an area of law that is interesting because it has, as stated in Chapter 1, become an international norm, making the case-law rather historical. However, in no way is this redundant, not least because States internationally still criminalise aspects of (queer) sexuality.[142] The discussion maintains pertinence as earlier case-law laid groundwork for what 'SOGIE human rights' would unfold as.

In the *History of Sexuality,* Foucault explains how "up to the end of the eighteenth century, three major explicit codes…governed sexual practices: canonical law, the Christian pastoral and civil law. The codes determined, each in its own way, the division between licit and illicit."[143] Sexual relations in these codes stipulated sodomy as sin; 'contrary to nature',

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[139] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd ed Revised, American Psychiatric Press, 1987)

[140] Susan D Cochran and others, 'Proposed declassification of disease categories related to sexual orientation in the *International Statistical Classification of Diseases and Related Health Problems* (ICD-11)' (2014) 92 Bulletin of the World Health Organisation 672

[141] Sexuality is limited to the category of 'homosexuality' here because this was the identity ascribed to same-sex sexuality acts such as sodomy by medicine, science and law

[142] See world map published by The International Lesbian, Gay, Bisexual, Trans and Intersex Association indicating 'Sexual Orientation Laws in the World 2019' accessed June 5 2019 <https://ilga.org/downloads/ILGA_Sexual_Orientation_Laws_Map_2019.pdf>

[143] *Foucault* (n 3) at 37

making it particularly offensive and rebellious against the law.[144] Foucault argues that the acts contained within these codes were founded to govern the order of things, including the law of nature.[145] As evolved throughout the eighteenth and nineteenth century, there was an eruption of discourses on legitimate unions and relations that centralised heterosexual monogamy and consolidated what was to become known as the norm.[146] Its opponent, the Outsider, encompassed all sexualities that did not conform, simultaneously assembling the unnatural.[147] "There were two great systems conceived by the West for governing sex: the law of marriage and the order of desire" stated Foucault.[148] These explicit codes weakened later in the nineteenth century as law found an increasingly attractive associate and powerful rigor - medicine.[149] Foucault argues that pedagogy and therapeutics operationalised the power of control and surveillance on sexual discourse.[150] The twentieth century saw a medical narrative unfold that plotted homosexuality down a path of sexual deviancy and perversion,[151] a narrative that vastly supported a perceived necessity of criminalisation of homosexuality, in particular of men.

A perception of people as violators of gender roles has more often been ascribed to the homosexual man[152] which may be one reason why male homosexuality has been more criminalised than others. In 1981, the ECtHR ruled on the seminal *Dudgeon v United Kingdom* (1981)[153] the first case in which the ECtHR adjudicated same-sex sexuality. A finding by the ECtHR demonstrated that the criminalisation of homosexuality by the State was in violation of the right to respect for private life. Succeeding *Dudgeon* were two cases *Norris v Ireland*

[144] *Foucault* (n 3)
[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] Ibid. at 39
[149] *Foucault* (n 3)
[150] Ibid.
[151] Homosexuality is classified within the DSM-I under 'paraphilia', in DSM-II under 'sexual orientation disturbance' and in DSM-III as 'ego-dystonic homosexuality'. It has been claimed that the study carried out by Evelyn Hooker was instrumental in initiating the declassification of homosexuality as a mental illness. Evelyn Hooker's findings from psychological tests that proved no difference between homosexuals and heterosexuals consequently challenged heterosexuality as the privileged sexuality. Robert L Kinney, III, 'Homosexuality and Scientific Evidence: On Suspect Anecdotes, Data, and Broad Generalizations' (2015) 82 (4) Linacre Q 364
[152] One explanation for this is the visibility of the homosexual, that is, gender-associated characteristics with perceived sexual orientation are stronger for men. Lisa LaMar and Mary Kite, 'Sex Difference in Attitude Toward Gay Men and Lesbians: A Multidimensional Perspective' (1998) 34 (2) J of Sex Research 189. Another explanation is the patriarchal power of sex as status whereby the male role occupies a superior status, making it more highly valued which increases the cost of disapproval when males display cross-sex-role behaviour. Saul Feinman 'Why Is Cross-Sex-Role Behaviour More Approved for Girls Than Boys? A Status Characteristic Approach' (1981) 7(3) Sex Roles 289
[153] (1981) 4 EHRR 149, herein after '*Dudgeon'*

(1988)[154] and *Modinos v Cyprus* (1993)[155] with violations found of the same right under the same grounds. All three cases are similar except Mr. Dudgeon had been subjected to a police investigation by Northern Ireland in relation to papers describing 'homosexual activities'.

1.1 Development of the Sexual Identity

In *Dudgeon*, the ECtHR, in agreeance with the Commission[156] stated that

> "In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life…either he respects the law and refrains from engaging- even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his tendencies, or he commits such acts and thereby becomes liable to criminal prosecution."[157]

By referring to 'homosexual tendencies' the ECtHR ascribed the applicants' homosexuality to innate characteristics. Through this assertion, the ECtHR gave sexuality a predisposed nature and instituted a conception of homosexuality as a stable identity. Damian Gonzalez-Salzberg argues that the creation of what he labels 'the ECtHR homosexual' enabled the construction of an identity, personifying a subject worthy of protection under international human rights law.[158] For determination of the scope of margin of appreciation afforded to the State, and thus whether a violation had occurred against Mr Dudgeon, the ECtHR took into consideration both the nature of the activity and aim of the restriction. Proclaiming that "The present case concerns a most intimate aspect of private life"[159] that which is "an essentially private manifestation of the human personality",[160] the ECtHR instigated a particular legal discourse on sexuality. Framing certain sexual behaviours as belonging to the identity, entitled to protection, the ECtHR thereby created a discourse of sexuality being an expression of immutable human behaviour,[161] subsequently validated and consolidated in the finding of violation. This statement in 1981 continued to resurface in subsequent case-law and became a central argument in their decision making.

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[154] (1988) 13 EHRR 186, herein after '*Norris'*
[155] (1993) 16 EHRR 485, herein after '*Modinos'*
[156] European Commission of the Court
[157] *Dudgeon* (n 153) para. 41 This same statement was repeated in the *Norris* judgement due to the Court perceiving the applicant as being substantially in the same position. *Norris* (n 154) para. 32
[158] Damian Gonzalez-Salzberg, ''The Making of the Court's Homosexual: A Queer Reading of the European Court of Human Rights' Case Law on Same-Sex Sexuality' (2014) 65(4) Northern Ireland Legal Quarterly 371
[159] *Dudgeon* (n 153) para. 52
[160] *Dudgeon* (n 153) para. 60
[161] Paul Johnson, 'Sociology and the European Court of Human Rights' (2014) 62 The Sociological Review 547

There are a number of considerations here that can be expressed and problematised by this development of the juridical system. The conceptualisation by the ECtHR of homosexuality having innate behaviours meant that it acquired a distinguished categorical identity.[162] Before proceeding, it is worth noting here that the ECtHR adopted the term 'homosexual' and 'homosexuality' to describe applicant's sexuality. Secondly, it is not clear as to whether the labels were by applicants' self-identification or whether the ECtHR gave it to them. The ECtHR does not provide a definition of 'homosexual' in *Dudgeon* nor does it clarify the difference between the noun and adjective, instead clarifying that it was 'homosexual acts' as buggery that was illegal, wherein "Buggery consists of sexual intercourse per anum by a man with a man or a woman…"[163]

As introduced earlier, Foucault revealed how pedagogy and therapeutics became powerful means of control and surveillance.[164] Medicine, Foucault argues, classified sexual practices and pleasures, in other words, acted as a type of management.[165] However, it wasn't that medicine sought to simply prohibit disparate sexualities and persecute them, it instead, among other processes, involved a 'specification of individuals'.[166] The 'specification of individuals' made the homosexual a category through designation of "personage, a past…a type of life, a life form, and a morphology, with an indiscreet anatomy…Nothing that went into his total composition was unaffected by his sexuality."[167] On the one hand, when the ECtHR determined in *Dudgeon* this ontological identity of homosexuality as immutable human nature, it enabled the ECtHR to establish homosexual identity as stable and legitimised a need for difference to be worthy of protection.[168] It enabled the homosexual to be perceived as a 'real' person, engaging in an ontological struggle[169] deeming them a subject with personhood to be included in the 'human' of human rights. Moreover, these essentialist claims gave way to a violation being found in both *Norris* and *Modinos*. Overtime this perception of homosexuality being ontological that began in *Dudgeon*, has informed 'sexual orientation' as a ground that amounts to discrimination prohibited under the ECHR when made as a legal distinction.[170]

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[162] Ibid.
[163] *Dudgeon* (n 153) para. 14
[164] See *Foucault* (n 3)
[165] Ibid.
[166] Ibid. at 43
[167] Ibid. at 43
[168] *Johnson* (n 161); *Gonzalez-Salzberg* (n 158)
[169] *Johnson* (n 161)
[170] Ibid.; In the same year as Dudgeon, the Council of Europe Parliamentary Assembly adopted Recommendation 924/1981 which outlines different provisions to eliminate discrimination against homosexuals, however it wasn't until 1999 that the European Court confirmed sexual orientation as a prohibited category of discrimination, in *Salgueiro da Silva Mouta v Portugal* (1999) 31 EHRR 1055. Decriminalisation of homosexuality is now (cont.)

On the other hand, the sexually stable, essentialist identity claims are problematics, not least in relation to universality of the identity and intersectionality. Queer theorists have exposed how unstable this identity is when "sexual borders and roles can themselves be perceived and experienced in different ways along other identitarian axes such as class, ethnicity, nationality, age and disability".[171] Additionally, in subsequent case law, dating from 1997[172] and 2003[173] the frame shifted due to non-discrimination claims increasing in relation to 'sexual orientation'. As of 1994, the UN's Human Rights Committee determined that 'sexual orientation' was to be included within the reference to 'sex' under the prohibited grounds of non-discrimination.[174] This also meant that the homosexual identity went through a process of 'minoritisation',[175] enabling non-discrimination claims. However when Othering is outlawed by delegitimising distinction of 'sexual orientation' as seen in the right of non-discrimination, it is at the same time creating the Other, deserving of such rights.[176] Moreover, Nancy Levit has argued that the establishment of 'sexual orientation' as a ground prohibited under non-discrimination rights has actually concretised outsider status.[177]

Judgements of *Dudgeon*, *Norris* and *Modinos* as stated previously all ruled violations under the right to respect for private life. When the ECtHR introduced *Dudgeon*, there is attention drawn to the domestic law stipulating criminal "offences are committed whether the act takes place in public or private",[178] the act being 'gross indecency'. [179] It would seem that the ECtHR proved to be highly receptive to *Dudgeon's* claims[180], stating it was "evident in Mr Dudgeon's submission that his complaint was in essence directed against the fact that homosexual acts which he might commit in *private* with other males capable of valid consent are criminal offences under the law of Northern Ireland."[181] Here it would seem that it is the 'act' only of a private nature that the ECtHR shows willingness to protect. Made explicit by

(cont.) recognised by the UN as a core legal obligation of states however the status of prohibition on sexual orientation discrimination remains a contested matter, with States either accepting it as an existing right in international law, or rejecting this and claiming that it is a new right, which has no foundation in or with consensus in international legal instruments.

[171] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) EJIL 1023 at 1025-6

[172] *Sutherland v United Kingdom* Application no 25186/94 Commission report 1 July 1997

[173] *S.L. v. Austria* (2003) 37 EHRR 39*; L and V. v Austria* (2003) 36 EHRR 55

[174] This was established in the landmark UN Human Rights Committee case *Toonen v Australia,* 30 March 1994, No. 488/1992

[175] Grigolo (n 171)

[176] Ibid.

[177] Nancy Levit, 'A Different Kind of Sameness: Beyond Formal Equality and Anti-subordination Strategies in Gay Legal Theory' (2000) 61(2) Ohio State Law Journal 867

[178] *Dudgeon* (n 153) para. 39

[179] *Dudgeon* (n 153) para. 14

[180] *Johnson* (n 161)

[181] *Dudgeon* (n 153) para. 39 emphasis added

the ECtHR, "Decriminalisation does not imply approval"[182] and dissenting Judge Matscher elaborates on this point, reiterating that in no way does the right to private and family life require that homosexuality be declared as an equivalent alternative to heterosexuality.[183] Thereby, the only way in which the applicants, including the subsequent case law, had their sexuality defended was in the private space and even then, it was merely tolerated. As Gonzalez-Salzberg argues, this legality seemed to rest upon its corresponding secrecy; evident in the absence of distinction made between secrecy and privacy.[184] Designation to the private sphere maintains status quo of the dominant and the dominated due to the borders of the private being negotiated by the "public universal heterosexual counterpart".[185] Deviancy then can be easily sustained when queers are kept in the closet.

Dudgeon, *Norris* and *Modinos* confirmed the ECtHR category of homosexual/ity, which as outlined, created a fixed, stable identity, albeit worthy enough for protection and key to later non-discrimination grounds of sexual orientation, but by doing so, made essentialist claims immediately reducing universality of the rights possible of protecting sexuality. The stance taken by the ECtHR meant that it legalised certain (homo)sexuality acts within the confines of privacy, and this legalisation did not imply approval, mere toleration. At this point in the jurisprudence, the discourse being woven is that sexuality that is not heterosexual, assumes a minority position, thereby Othering, and that homosexuality belongs out of sight, in the private space, thereby reinforcing heteronormativity.

1.2 Regulating Sexual Desire

A second point of inquiry in regard to decriminalisation of homosexuality is in relation to how the ECtHR has treated sexual desires outside the context of the cases already examined; in other words, variations of homosexual sexual activities. In *Laskey, Jaggard and Brown v United Kingdom* (1997)[186] and *A.D.T. v United Kingdom* (2000)[187] applicants from both cases had been charged by domestic authorities following the acquirement by Police of video films containing sexual activities involving the applicants and other men (group sex). The videos as evidence in both cases were recorded in private. In *Laskey, Jaggard and Brown,* to demonstrate the harmful impact of the domestic proceedings on the applicants, the ECtHR expressed how

[182] *Dudgeon* (n 153) para. 61
[183] *Dudgeon* (n 153) Matscher J dissenting
[184] *Gonzalez-Salzberg* (n 158)
[185] *Grigolo* (n 171) at 1024
[186] 24 EHHR 39, herein after *Laskey, Jaggard and Brown*
[187] (2001) 31 EHRR 33, herein after *A.D.T.*

"proceedings were given widespread media coverage. All the applicants lost their jobs and Mr Jaggard required extensive psychiatric treatment."[188] An important detail of this case, the reasons which will become apparent, was that the "video films were made during sado-masochistic encounters"[189]. The ECtHR found no violation of the right to private and family life, stating that "the prosecution and conviction of the applicants were necessary in a democratic society for the protection of health."[190]

Contrasting this judgement was *A.D.T.* where the ECtHR found that indeed, the United Kingdom's legislation violated the applicant's right to respect for private life. The ECtHR stated that "the applicant was involved in sexual activities with a restricted number of friends in circumstances in which it was not likely that others would become aware of what was going on."[191] Additionally "there was no element of sado-masochism or physical harm" in the video recordings found by Police.[192] Made in the applicant's home, the ECtHR agreed that the videos consisted of genuinely private activities and expressed it was sufficient reason to adopt a narrow margin of appreciation, as was the situation in other cases of a similar sexualities and involving intimate aspects of one's private life. Disparities between these two cases would suggest that the ECtHR passed judgement on what forms of sex are legitimate and permissible and which are not, for instance, unconventional behaviours as is the instance for sado-masochist sex.[193] Yet "Sex rights are about sexual liberty. They are about releasing us from the structures that place limits on our sexual practices"[194] therefore it is important to interrogate the reasons for the ECtHR to limit consensual sex between adult persons.

Given the nature of the right to private and family life and legitimate reasons for interference including for the protection of public health and morals, it comes as no surprise that morality is a recurring theme. In *Laskey, Jaggard and Brown*, the relevant domestic law for prosecution referred to offences against public decency, whereby keeping a "disorderly house" defined as "one which is not regulated by the restraints of morality" as a common law offence.[195] The applicants contended that their behaviour formed part of private morality and although the ECtHR "did not find it necessary to determine the interference…justified on the

[188] *Laskey, Jaggard and Brown* (186) para. 24
[189] *Laskey, Jaggard and Brown* (n 186) para. 8
[190] *Laskey, Jaggard and Brown* (n 186) para. 50
[191] *A.D.T.* (n 187) para. 37
[192] *A.D.T.* (n 187) para. 10
[193] Grigolo (n 171)
[194] Aeyal Gross, 'Post/Colonial Queer Globalisation and International Human Rights: Images of LGBT Rights' (2013) 4(2) JGLR 98 at 120
[195] *Laskey, Jaggard and Brown* (n 186) para. 31

ground of the protection of morals",[196] it did however express that the State has prerogative "on moral grounds to seek to deter acts of the kind in question".[197] Whereas, in *A.D.T.,* although the government made submissions for interference on the same grounds, the ECtHR did not concur this time. Morality was central in *Dudgeon* whereby the ECtHR accepted the view of the government that the reform on the domestic law which had taken place in England and Wales but denied in Northern Ireland "would be seriously damaging to the moral fabric of Northern Irish society",[198] and made it clear that it had no intention of "making a value judgement as to the morality of homosexual relations between adult males".[199]

Returning to Foucault*,* he found that earlier in the twentieth century, a fixation had developed on regulating sex, especially via government practices.[200] Sexual conduct became a focus of examination as well as a victim to regulation.[201] An increase in legislation regarding sexual and moral matters were observed and the relation between the State and the individual regarding sex became a public concern.[202] Areas where knowledge is taken as truth, such as medicine, injected input into these discourses and taught society how to be moral and moreover, to self-discipline. [203] Through subjectification, there was a seamless transition to self-regulation of their own sexuality and perceived necessity to place boundaries on sexual intimacy, giving way to a whole new regime of discourses.[204] Thus, a link can be drawn between morality and the regulation of the private sphere.

Homosexuality deeply challenges normalisation and naturalness,[205] and as Amnesty International highlights, discrimination and violence towards queers largely stems from ideas related to immorality.[206] Further, religion and sin has also undoubtedly played a crucial role in framing this discourse, with criminalisation of homosexuality trying to enforce a strict moral code.[207] Regulation of intimacy then, or the 'privacy doctrine' as it has been referred,[208] reflects the confines of societal assumptions and culturally defined norms.[209] What is pertinent here is

[196] *Laskey, Jaggard and Brown* (n 186) para. 51
[197] *Laskey, Jaggard and Brown* (n 186) para. 51
[198] *Dudgeon* (n 153) para. 46
[199] *Dudgeon* (n 153) para. 54
[200] *Foucault* (n 3)
[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] Ibid.
[205] *Baisley* (n 81)
[206] Amnesty International, *Love, Hate and the Law: Decriminalising Homosexuality* (Amnesty International Publications, 2008)
[207] Paul Johnson and Robert M. Vanderbeck, *Law, Religion and Homosexuality* (Routledge, 2014)
[208] *Cohen* (n 38); Fineman (n 127)
[209] Fineman (n 127)

how the doctrinal law, that is privacy, not only acts as social coercion in defining sexual activities as legitimate and those that are deviant but also infuses power relationships in society.[210] In *Law's Desire* by Carl Stychin, he posits that the law constitutes and regulates sexual desires, largely those of gay men and less so lesbians and bisexuals, in opposition to a 'coherent heterosexuality' in order to promote heterosexuality.[211] Moreover, when the ECtHR ruled no violation in *Laskey, Jaggard and Brown,* it failed to recognise fluidity in sexual desire, instead choosing to maintain a strict heterosexual/homosexual binary.[212]

Sexuality within the ECtHR was initially pursued as homosexuality and has since opened up into 'sexual orientation'. Consider though that the identification of a lesbian applicant did not arise before the ECtHR until 1999[213] and has since developed only in a tentative manner, with the ECtHR largely still using the term homosexual. Bisexuality has only appeared occasionally in the ECtHR,[214] and pansexuality has only been referenced once in the ECtHR's history by a partially dissenting judge in *Dudgeon.* From a gender perspective it has been argued that the category of lesbian has been invisible in the ECtHR's case law,[215] although this would clearly also apply to other categories. 'Homosexual' within the case law was established in *Dudgeon* in reference to the act of sodomy. It has since developed in support of the masculine subject, and essentially remained indifferent towards rights claims made by lesbian women over the proceeding decades, often reproducing patriarchal norms in relation to the rights being sought.[216] This would be a claim in support of the case law developing in accordance with heteronormative patriarchal structures, despite the transition to the SOGIE human rights framework. However, the use of identity has not been entirely propagated by the ECtHR - applicants who have brought their claims are too perpetuating the Self/Other as they are aware of the protection afforded under the homosexual category.[217]

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[210] Ibid.
[211] *Stychin* (n 12)
[212] Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality Under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (Hart Publishing, 2019)
[213] First mentioned in *Smith and Grady v United Kingdom* (1999) 29 EHHR 493. This case will be discussed in Part 2 Chapter 2. 'Lesbian' was mentioned in case *S. v United Kingdom,* no. 11716/85, Commission Decision of 14 May 1986, 47 *Decisions and Reports* 274 although the Commission failed to identify the applicant as a 'lesbian', they did state that she was in a 'lesbian relationship'
[214] For example, it was mentioned in *Laskey, Jaggard and Brown* in reference to domestic law and since then it has been referred to with regard to international soft law
[215] See Loveday Hodson, 'Sexual Orientation and the European Convention on Human Rights: What of the "L" in LGBT?' (2019) Journal of Lesbian Studies 1
[216] This statement will be explored further in proceeding Parts and Chapters. *Hodson* (n 215)
[217] *Gonzalez-Salzberg* (n 212)

Conclusion on Criminalisation of Homosexuality

There have been cases since *A.D.T.* in relation to criminalisation of homosexuality and age of consent of same-sex sexual relations however the case law examined was foundational to the construction of the subject in 'sexual orientation'. In drawing conclusions from the themes that emerged on sexuality among the case law of decriminalisation of homosexuality and how this has contributed to 'SOGIE human rights' discourse, it would seem that sexuality of queers became rooted in immutable, essentialist claims to identity. It then proceeded to transform into a position seeking equal status, and protection against formal discrimination.[218] However the position of 'minority' is problematic for queer emancipation because it is regulated by heteronormativity and within the confines of private life, furthermore by using a frame based on identity, it reduces its universal recognition. Moreover, the case law examined here on sexual practices between more than two people demonstrated how a tension emerged from the ECtHR, whereby certain sexual desires and personal choices were limited by the ECtHR. One may read this as the ECtHR engaging directly in morality judgements towards homosexual men and sexual practices and although the ECtHR found a subsequent violation in *A.D.T* it was due to the sexual acts meeting morality standards for sexual activity. As part of the decision making in this judgement, it was decided that the activities had a low likelihood of becoming public. Fear of immoral sexual activities, or more so, non-heterosexuality gaining traction in the public space is tangible and may suggest the ECtHR's attempt of ordering sexual desire and reproducing hierarchical sexualities.

[218] *Grigolo* (n 171)

Part 2. Right to Freedom of Assembly and Expression

A constructionist approach to space, including the so-called private and public space entails a refusal of accepting that space merely subsists as a 'given'.[219] It rejects an understanding of space being passive to its occupiers and instead reflects an ideology of space being "constantly produced and remade within complex relations of culture, power and difference."[220] As has been illustrated in Part 1, Chapter 2 of this thesis, the ECtHR's discourse on homosexuality being "essentially a private manifestation of the human personality"[221] consolidated an understanding that sexuality outside of heterosexuality belonged in the secrecy of the private sphere. The importance of space here cannot be understated. Research has shown that from a Western conception, space has been organised to favour heterosexuality as unremarkable and in turn, 'naturalised' a hierarchical sexual order.[222] Thus, to consider how the ECtHR has regulated homosexuality as belonging in the private sphere as seen in the analysis of Part 1, could suggest that law has been used as a disciplinary mechanism for hegemonic heterosexuality. This exclusion and inclusion of sexualities from certain spaces is referred to as 'geographies of sexuality',[223] and of particular relevance in the present Part 2. Here, the aim is to determine what discourse/s the ECtHR used in response to queers who have transcended the private space by examining two strands of jurisprudence; the right to freedom of assembly and association (Article 11) and the right to freedom of expression (Article 10). This will enable a conclusion to be drawn on how these discourses contributed, firstly to the 'SOGIE human rights' discourse and secondly, for queer emancipation.

2.1 Still in the Closet

The point for departure on this discussion is on a case that went before the ECtHR in relation to the widespread military ban for homosexuals.[224] *Smith and Grady v United Kingdom* (1999)[225] originated from two applications who claimed that the United Kingdom's domestic law had violated their human rights. In particular, the ECtHR found a violation of right to respect for their private lives as the applicants' sexuality had been subjected to investigation

[219] Phil Hubbard, 'Sex Zones: Intimacy, Citizenship and Public Space' (2001) 4(1) Sexualities 51
[220] *Hubbard* (n 219) at 51
[221] *Dudgeon* (n 153) para. 60
[222] Hubbard (n 219)
[223] Ibid.
[224] The use of homosexuals here is due to domestic legislation in relation to this ban largely using this terminology
[225] *Smith and Grady* (n 213)

and caused subsequent discharge from the armed forces.[226] Additionally, the applicants alleged violation of the right to freedom of expression, in conjunction with the right to non-discrimination due to the "limitation imposed…on their right to give expression to their sexual identity"[227] arguing that "one's sexuality encapsulated opinions, ideas and information".[228] Fundamental to a person's identity, the blanket ban had "forced them to live secret lives".[229] While the government argued that discharge was not on the basis of their expression (of ideas and information) but rather because of their homosexual identity, as outlawed in domestic law; the applicants refuted this. Solely the presence of their homosexual identity was surely insufficient justification, argued the applicants.[230] Separation between the public and private sphere in which the government tried to do sought to limit sexuality purely to the private sphere. Submissions by the applicants in this regard highlighted how fundamental both the right to privacy and expression are to sexuality.[231] In response, the ECtHR, although acknowledged that the impact of the ban could constitute an interference with freedom of expression, found that it was not necessary to examine the complaint within this provision. This was justified by the ECtHR stating the primary issue at hand was the applicants' sexual orientation. In the ECtHR's view, freedom of expression in the present case, "(was) subsidiary to the applicants' right to respect for private life".[232] It should be noted that the term 'sexual orientation' was used here originally by the European Commission of Human Rights, who had first received the application. It was used subsequently by the applicant, Ms Smith in her submissions and adopted by the ECtHR in their judgement of the case.[233]

Despite the advances made in *Smith and Grady,*[234] the decision and reasoning of the ECtHR would suggest that they are at this point, engaging in typical geographies of sexuality. Also, this case illustrates the limited capacity of the ECtHR to demonstrate how public expression can, most often, be a tool for citizens to safeguard their private freedoms, an idea which will be expanded further shortly.

[226] *Ibid.*
[227] *Ibid.* para. 124
[228] *Ibid.* para. 126
[229] *Ibid.* para. 126
[230] *Ibid.* para. 126
[231] *Johnson* (n 10)
[232] *Smith and Grady* (n 213) para. 127
[233] *Ibid.* para. 111
[234] This ruling paved the way for other cases before the Court against the United Kingdom's ban on homosexuality in the armed forces

2.2 Transcending Space

According to a Western conception of space, for an oppressed group to transgress the private to public space, is to take a stance and challenge their oppressor (in this case, heterosexuality) and in the process make a powerful statement typically associated with politics.[235] Essentially, it has been and is necessary for queers to do this given the substantial gaps worldwide in queers accessing their rights and freedoms. In Europe, these gaps have somewhat been perpetuated by the ECtHR's near-exclusive focus of queer rights on privacy.[236] In saying this however, it is important to note that visibility, being perceived in the West as the ultimate performance which queer identity can achieve, meant that queer emancipation became dependent on 'coming out of the closet'.[237] Additionally, "This strategy assumes something about freedom and what (queer) freedom *should* look like – that is, outness as opposed to the closet."[238] It disregards the highly variable nature of freedom, given the way in which it is experienced and perceived is culturally constructed, and renders the variety of genealogies found in queer subjectivity insignificant.[239] Thus, the coming out story requires a cautionary eye to question the discourse on the binary invisible and visible.

A critical case that went before the ECtHR which did shift the sexuality discourse into the public sphere via freedom of assembly was *Baczkowski and Others v Poland* (2007).[240] *Baczkowski and Others* was a formative case because the ECtHR ruled a violation of right to freedom of assembly; right to effective remedy; and right to non-discrimination, making the most explicit statement in regard to State obligations towards Pride marches[241] and clarifying the SOGIE human right to freedom of assembly.[242] This finding was supported three years later (2010) in *Alekseyev v Russia*[243] when the ECtHR indicated that a State has both negative and positive obligations, whereby they must take appropriate measures to protect marchers against violence. Between the two cases, the Committee of Ministers in the CoE had issued a document for Member States recommending ways to combat discrimination towards sexual orientation

[235] *Hubbard* (n 219)
[236] *Johnson* (n 10)
[237] *Kapur* (n 1)
[238] Ibid. at 8
[239] *Kapur* (n 1)
[240] (2009) 48 EHRR 19, herein after *Baczkowski and Others*
[241] Ronald Holzhacker, 'State-Sponsored Homophobia and the Denial of the Right to Assembly in Central and Eastern Europe: The "Boomerang" and the "Ricochet" between European Organisations and Civil Society to Uphold Human Rights' (2013) 35(1-2) Law & Policy 1
[242] Kristen L Thomas, 'We're Here, We're Queer, Get Used to It: Freedom of Assembly and Gay Pride in *Alekseyev v. Russia*' (2012) 14 Oregon Review of Intl Law 473
[243] *Alekseyev v Russia* (2010) ECHR 1562, herein after *Alekseyev*

and gender identity.[244] It was found, that in *Alekseyev*, the ECtHR referred to this document, giving it judicial effect.[245] Notwithstanding the similarities, there is important evolution that can be extracted between the cases in regard to the 'SOGIE' human rights discourse' and how this contributed to queer emancipation.

2.3 A Democratic Yardstick?

Baczkowski and Others was in relation to Polish authorities preventing a Pride march from being approved under domestic law and the applicants having no available procedure that would have given them a decision in time prior to the march taking place. Here, the ECtHR employed well-established methodology focusing heavily on whether the ban on assembly by the government was prescribed by law.[246] Once its unlawfulness was determined, the ECtHR found no need to apply the legitimacy and necessity test. To a degree, this is in contrast with *Alekseyev,* as the ECtHR instead disposed of the law as not meeting the requirement of 'necessary in a democratic society'.[247] The case of *Alekseyev* was brought before the ECtHR in 2006, 2007 and 2008 due to the Russian governments interference with Pride marchers' right to assembly. What is observed in the ECtHR's discourse of these cases is less of a focus on sexuality but instead on the democratic values that embody human rights.

Outlining that democracy is the only political model compatible with the ECtHR, the judgement of *Baczkowski and Others* refers to how the State is the "ultimate guarantor of the principle of pluralism"[248] and that the ability for people to form associations is key for effective democracy as is pluralism. Elaborating, the ECtHR expresses how pluralism is "built on the genuine recognition of and respect for diversity and the dynamics of…cultural identities…The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion."[249] There are two points to consider here; firstly the ECtHR emphasises that by Polish authorities preventing their citizens from association, they essentially prevented democratic participation in society. Outlining that this process is necessary for "civil society to function in a healthy manner",[250] an absence of this right would presumably mean that a State

[244] Council of Europe: Committee of Ministers, Recommendation CM/Rec (2010)5
[245] Paul Johnson, Russian Ban on Homosexual Propaganda Violates Human Rights, Jurist (Dec. 1, 2011) < https://www.jurist.org/commentary/2011/12/paul-johnson-russia-lgbt/> accessed June 1 2019
[246] Paul Johnson, 'Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v Russia' (2011) 11(3) Human Rights Law Review 578
[247] *Alekseyev* (n 243) para. 69
[248] *Baczkowski and Others* (n 240) para. 64
[249] *Baczkowski and Others* (n 240) para. 62
[250] *Baczkowski and Others* (n 240) para. 62

is *democratically ill.*[251] Secondly, to incorporate queers into the conception of pluralism, the ECtHR placed queers within the category of 'cultural identity'. Whilst this frame has been argued to have made the alleged violation found,[252] it is also highly problematic for both queers and universalism of 'SOGIE human rights'. Not only does it indicate the ECtHR's lack of understanding of sexuality intersecting with other axes, *inter alia*, ethnicity, religion, class and age but it also poses a barrier by narrowly defining homosexuality as 'culture'.[253] As understandings of 'cultural' are dependent on what and whose culture is being referred to, it poses particular challenges when it is used to determine the degree of complicity with the human rights doctrine at an international level.[254] The democratic yardstick of permitting Pride marches was also used in *Alekseyev.*

2.4 Framing Morality

As mentioned, the ECtHR in *Alekseyev* dispensed of legal arguments by finding the domestic law itself in relation to public assembly of homosexuals in Russia as insufficient to justify restrictions to right to freedom of expression and right to freedom of assembly.[255] This case indeed shows a positive evolution in the ECtHR's application of 'SOGIE human rights' regarding those who have transcended the private sphere to the public. The government placed significant weight to their arguments on morality, emphasising that "promotion of homosexuality was incompatible with the religious doctrines for the majority of the population" and that gay parades would be a "terrible debasement of (believers') human dignity".[256] Another argument was that the restrictions were necessary for the sake of protection of children. In response to the arguments on morality, the ECtHR used science to defend their position, stating that

> "There is no scientific evidence or sociological data…suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children…On the contrary, it is only through fair and public debate that society may address such complex issues…Such debate, backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard…"[257]

[251] *Ammaturo* (n 126)
[252] *Johnson* (n 10)
[253] *Ammaturo* (n 126)
[254] Ibid.
[255] *Johnson* (n 246)
[256] *Alekseyev* (n 243) para. 59
[257] *Alekseyev* (n 243) para. 86

Discussed in Chapter 1 of the present thesis, the ECtHR's focus on science can be seen as a form what Foucault termed biopower, in which discourses on sexuality prevail in this regard, as being entrenched with science. The government additionally argued on the basis of there being a lack of European consensus regarding homosexuality among Council of Europe Member States. Strongly refuting, the ECtHR stated that they could not agree with this interpretation and "In any event, the absence of a European consensus on these issues is of no relevance to the present case because conferring substantive rights on homosexual persons is fundamentally different from recognising their right to campaign for such rights".[258] In the ECtHR's argument here, it would seem that the discourse on consensus was more prominently based on the right of assembly as opposed to sexuality which arguably allowed the ECtHR to find a violation.[259]

While queers have been trying to establish a meaningful sense of belonging within the nation-state and thus extend their rights beyond private sexuality rights,[260] this has been curtailed by debates on sexual morality. These debates on sexual morality (which are a prominent position for opponents when sexual dissidents transgress the private/public divide) influence how a society will live[261] as introduced earlier in a process of what Foucault called self-discipline. This self-regulation then will be in accordance with beliefs about what makes up a 'good citizen'.[262] When a State engages in the discourse of moral panic, as witnessed by the Russian and Polish Governments in opposition against public displays of assembly and expression based on sexuality rights, it points to issues in regard to how sexual morality can affect rights accorded to citizenship.

Another side to the morality argument has been the way in which the ECtHR, other Council of Europe and European Union actors have participated in the moralising discourses. For what has been termed the 'Pink Agenda', it describes how rights such as freedom of assembly and freedom of expression have been used for political purposes in the European space against States that have not complied with 'SOGIE human rights'.[263] Russia in particular, with its highly condemned bill banning 'propaganda of homosexuality', was explicitly ousted by the ECtHR in *Alekseyev*, with the domestic law not being compatible with democracy. Through the morality discourse, Europe is positioning itself as politically distant, from Russia

[258] *Alekseyev* (n 243) para. 84
[259] *Holzhacker* (n 241)
[260] Carl F Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart Publishing, 2003)
[261] *Hubbard* (n 219)
[262] Ibid.
[263] *Ammaturo* (n 126)

especially and at the same time framing a European citizenship constructed on the distinction between the outsiders from the insiders and their corresponding morality.[264]

Turning the gaze briefly now to one particular case before the ECtHR which invoked the right to freedom of expression, is *Bayev and Others v Russia* (2017)[265]. Here, the ECtHR found a violation of right to freedom of expression and right to non-discrimination as not serving to advance a legitimate aim of the protection of morals.[266] The violations were similarly to *Alekseyev* stemming from Russia's ban on "propaganda of non-traditional sexual relations aimed at minors" causing the three applicants to be convicted of administrative offences. To determine whether there was justification via protection of morals, the ECtHR indicated that "there is a clear European consensus about the recognition of individuals' right to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their own rights and freedoms".[267] The government submitted that there was "incompatibility between maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality"[268] to which the ECtHR responded by drawing attention to developments within society and changes in perception. This included a recognition of there being more than one way or choice "when it comes to leading one's family or private life".[269] Further, it added "far from being opposed to family values - many persons belonging to sexual minorities manifest allegiance to the institutions of marriage, parenthood and adoption…"[270] This is a highly problematic reference due its homonormative tendency, a notion that will be expanded upon in Part 3 of the present Chapter.[271] Moreover, by framing sexual minorities as taking allegiance with rights that have previously excluded them would suggest that without such allegiance, there would be insufficient normality, perhaps concealed if the ECtHR had accepted a wide margin of appreciation. Hierarchical and preferential treatment of the institutions that have served heterosexuals and excluded non-heterosexuals, signifies participation by the ECtHR in heteronormativity as well. Lastly, it would suggest that the ECtHR perceived this reference to heteronormativity as serving purpose and strength to their position raising concern as to integrity of the 'SOGIE human rights' discourse.

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[264] Ibid.
[265] (2017) ECHR 572, herein after *Bayev and Others*
[266] *Bayev and Others* (n 265) para. 83
[267] *Bayev and Others* (n 265) para. 66
[268] *Bayev and Others* (n 265) para. 67
[269] *Bayev and Others* (n 265) para. 67
[270] *Bayev and Others* (n 265) para. 67
[271] This will be explored further, however for more detail on homonormativity, see Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Russ Castronovo and Dana D Nelson *Materializing Democracy: Toward a Revitalized Cultural Politics* (Duke University Press, 2002)

On another level, there are plentiful references in *Bayev* to sexuality as occupying the minority status as seen in para. 66 – "gay, lesbian and other sexual minorities" and para. 68- "heterosexual majority and homosexual minority". Broadening the context of this last phrase, the ECtHR argued that oppression of the minority is incompatible with the democratic principles of diversity, tolerance and broadmindedness.[272]

2.5 Sexual Citizenship

Citizenship, whilst largely associated with rights, is also about recognition; assigned to people who conform and abide the construction of morality as made by the nation-state.[273] Evidently, this comprehension reveals how citizenship is composed by those constructing political debate, a thought central to Foucault's notion of governmentality.[274] Governmentality "focuses on how the human subject is constituted in relationship to itself and constellations of power"[275] and interrogation of citizenship can provide insight as to how public and private space may better serve queer emancipation.

Citizenship has comprised both civil, political and social rights, encompassing both freedom of assembly and freedom of expression.[276] This conception by T.H. Marshall, a principle theorist on citizenship, has however been critiqued for leaving cultural and economic aspects of citizenship absent. Other theorists have suggested citizenship in relation to sexuality, the so-called 'sexual citizenship' also known as 'intimate citizenship'; describing "a cluster of emerging concerns over the rights to choose what we do with our bodies, our feelings, our identities, our relationships, our genders, our eroticisms, and our representations."[277] It is important to acknowledge the degree of radicality evident in this theorisation about sexuality in relation to citizenship, given it had essentially been excluded for being a 'private matter'[278] and thus not relevant to citizenship. Concerns raised in regard to these early conceptions however were regarding the inherent metaphorical link between intimacy and privacy. The

[272] See *Bayev and Others* (n 265)
[273] Ken Plummer, 'Inventing Intimate Citizenship: An Agenda for Diversity and Difference', paper to the International Association for the Study of Sexuality, Culture and Society Annual Conference, Manchester (1999) cited in *Hubbard* (n 219)
[274] See *Hubbard* (n 219)
[275] Hubbard (n 219) at 53
[276] T.H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge University Press, 1950) cited in Ruthan Robson and Tanya Kessler, 'Unsettling Sexual Citizenship' (2007) 53 McGill Law Journal 535
[277] Ken Plummer *Telling Sexual Stories: Power, Change and Social Worlds* (London Routledge, 1995) cited in Diane Richardson, 'Claiming Citizenship? Sexuality, Citizenship and Lesbian Feminist Theory' in Chrys Ingraham *Thinking Straight: The Power, the Promise, and the Paradox of the Heterosexuality* (Routledge, 2005) at 66
[278] Chrys Ingraham, *Thinking Straight: The Power, the Promise, and the Paradox of Heterosexuality* (Routledge New York London, 2005)

focus on sexual citizenship here is not regarding how it can be a tool for increasing the neoliberal citizenship entitlement of choice nor privacy.[279] Unfavourable for queer emancipation, these discussions have assisted 'privatisation of sexual citizenship' due to enabling obsession with queer sexual desires to be restricted, forcing the right to privacy into becoming the only tool for claiming citizenship rights with regard to sexuality.[280] To determine the universality of the 'privatised sexual citizenship', Diane Richardson found that by focusing exclusively on the private sphere for 'sexual citizenship', it ignores other sites for marginalisation such as economic inequality. [281] If the interpretation was expanded, it could help in reducing poverty through better understanding how sexuality can impact on an individual, or family's economic situation.[282]

As has been explored in the case law on freedom of assembly and freedom of expression, it is evident that queers are increasingly reterritorializing public spaces through the practice of, *inter alia,* marches, and parades - very visible claims to sexual citizenship. It is therefore important to consider how shifting geographies of sexuality will facilitate a new order for sexuality and morality.[283] There is vast literature that heralds the movement of queers into the public space, as if a group cannot be seen in public, it is effectively invisible to the State and its citizens.[284] It is thus tempting to believe the idea that through occupying public space, queers can define themselves, access and possess rights and be respected and recognised.[285] Yet, full access to the public space does not necessarily mean full citizenship because in States and spaces where queers find a need to protest, it is usually those that have failed to meet their needs, and rather it is only particular acts are made acceptable, indicating that queers still withhold, control and monitor parts of their sexual being.[286] To create such a community where queers are full citizens relies on "the effacement of difference and the suspension of selfhood in the interests of an imagined norm".[287] Recommended as a more suitable model for queer emancipation then would be to produce spaces in which the right to privacy and publicity is possible.[288] Fluidity of the spaces would be key and become "ephemeral sites of freedom and

[279] Diane Richardson, 'Rethinking Sexual Citizenship' (2015) 51(2) Sociology 1
[280] *Richardson* (n 279)
[281] Ibid.
[282] Ibid.
[283] *Hubbard* (n 219)
[284] *Ibid.*
[285] Ibid.
[286] Ibid.
[287] Ibid. at 63
[288] *Hubbard* (n 219)

control which could be used to create fleeting but transitory identifications out of which new identities and citizenships could emerge."[289]

Conclusion on the Right to Freedom of Assembly and Expression

In formulating a conclusion on which discourses were used by the ECtHR in regard to the right to freedom of expression, assembly and association, and how these contributed, firstly to the 'SOGIE human rights' discourse and secondly, for queer emancipation, the answer would be three-fold. Universality of queer being taken as a 'cultural identity', is significantly questionable. What is considered culture for one society can be vastly different for another, moreover, it dismisses intersectional elements and suggests they are subordinate. It was seen in the case law as recent as 2017, consolidation of sexuality as a minority status. Debate continued in this jurisprudence on the public and private divide, whereby the ECtHR continued a precarious discourse of suggesting sexuality is merely a private manifestation and thus not relevant to public space, falling short of linear progression. By emphasising the case of science in being able to determine morality simply showed how the State, via its institutions, has been successful in creating a discourse on sexuality that is within the boundaries of moral nature, masked through scientific-based arguments.[290] Thus, whilst it may seem that the violation found would indicate progress, the progress had an undercurrent of self-disciplining sexuality, separating into spheres and privileging of heterosexuality. Moreover, the most recent judgement to address the private/public debate very clearly engaged homonormativity when it gave superior value to the queer life that pleads allegiance with the institutions of marriage, parenthood and adoption.[291] What's more is that these reasons were to counter arguments that homosexuality is not compatible with family values, thereby engaging in the discourse set by the oppressor. Lastly, a suggestion was made to consider sexual citizenship more closely as a tool for enhancing and strengthening queer rights to private life but also for granting rights (and responsibilities) in the public sphere.

[289] Ibid. 51 at 66
[290] See *Alekseyev* (n 243)
[291] See *Bayev* (n 265)

Part 3. Right to Family Life

Family, one of the most powerful social institutions is very slowly being reconstructed by so-called 'families of choice'.[292] With 'new family forms' publicly emerging in Western society in the 1980s and 1990s, there was increasing rejection of heterosexual assumptions, and move towards "a more diverse culture of relationships than law and tradition have sanctioned".[293] These social changes have implications for all, but are particularly salient for queers and in relation to the ECtHR, new family forms are among the most contentious human rights. Established by the ECtHR, there are three types of adoption- single parent adoption, second-parent adoption and joint adoption. Interest here is on four cases that have been before the ECtHR; two single parent adoption cases, *Fretté v France* (2002)[294] and *E.B. v France* (2008)[295] and two second-parent adoption *Gas and Dubois v France* (2012)[296] and *X and Others v Austria* (2013)[297]. These two types will be analysed separately. In analysing these cases the aim is to determine how the right to family life is being constructed through discourse, serving the 'SOGIE human rights discourse' and implicating queer emancipation. Family life is crucial for the private/public binary because it evokes elements from both and reveals attitudes towards a foundational unit of society, the family.

The cases of *Fretté* and *E.B.* displayed many similarities but also multiple disparities. Mr Fretté was a single male whereas Ms E.B. was in a relationship. Ms E.B.'s partner, Ms R., was not a part of the application for authorisation to adopt. After undergoing the authorisation procedure and receiving subsequent refusals, both applicants claimed that they had been discriminated on the basis of their sexual orientation, and alleged violation of their right to non-discrimination in conjunction with their right to private life. There was no contention that the right to private and family life does not give the right to adoption. Nevertheless, previous case law had established 'private life' as a broad concept, encompassing, *inter alia*, "the right to establish and develop relationships with other human beings."[298] Relevant to the argumentation of the two present cases was the domestic law which allowed single people authorisation to

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[292] Jeffrey Weeks, Brian Heaphy and Catherine Donovan, *Same Sex Intimacies: Families of Choice and Other Life Experiments* (Routledge London and New York, 2001); Kath Weston, 'Forever Is a Long Time: Romancing the Real in Gay Kinship Ideologies' in Sylvia J Yanagisako and Carol L Delaney (eds), *Naturalizing Power: Essays in Feminist Cultural Analysis*, (Routledge, 1995)
[293] *Weeks, Heaphy* and *Donovan* (n 292) at viii
[294] 38 EHRR 21, herein after *Fretté*
[295] 47 EHRR 21, herein after *E.B.*
[296] 59 EHRR 22, herein after *Gas and Dubois*
[297] 57 EHRR 14, herein after *X and Others*
[298] *Niemietz v Germany* (1992) 116 EHRR 97 at para. 29 cited in *Fretté* (n 294) para. 29

adopt. In *Fretté*, the ECtHR found no violation of the ECHR yet within the space of six years found a violation in *E.B*.

3.1 The Science of Parenting

In *Fretté,* it was explained how French Social Services reported that although "Mr Fretté has undoubted personal qualities and an aptitude for bringing up children…The question is whether his particular circumstances as a single homosexual man allows him to be entrusted with a child."[299] During the domestic appeal process, the authorities held that although it wasn't based entirely on Mr Fretté's "choice of emotional and sexual lifestyle", this "lifestyle did not appear to be such as to provide sufficient guarantees that he would offer a child a suitable home from a family, child-rearing and psychological perspective".[300] The State ultimately decided that Mr Fretté's "type of home…could pose substantial risks to the child's development…" and thus was refused authorisation to adopt.[301]

The ECtHR decided that Mr Fretté's 'avowed'[302] homosexuality had a decisive influence on the decision of the authorities. Whilst acknowledging studies that demonstrate the irrational assumptions regarding what outcomes may result for a child who is brought up by a homosexual, the ECtHR maintained that the State had pursued a legitimate aim, namely "to protect the health and rights of children…"[303]. It proceeded to express that "There is no consensus about the potential impact of being adopted by an adult who openly affirmed his homosexual on a child's psychological development and more generally, his or her future life, and the question divided both experts on children and democratic societies as a whole."[304] The ECtHR decided however that the scientific community were divided on the topic, and ultimately ruled no violation. Implicit concerns held by the authorities but also legitimised by the ECtHR in their decision making on adoption for queers are indicative of heteronormative privilege.[305] The tension could indeed be read as between the homosexual and heterosexual prospective parents and the rights of the child, always paramount.[306]

It is of particular relevance that there is a near-absence of reference to the lack of scientific evidence in *E.B*. The ECtHR rejected the State's argument of pursuing a legitimate

[299] *Fretté* (n 294) para. 10
[300] *Fretté* (n 294) para. 11
[301] *Fretté* (n 294) para. 16
[302] This was in the words of the Court
[303] *Fretté* (n 294) para. 38
[304] *Fretté* (n 294) para. 36
[305] Paul Johnson, 'Heteronormativity and the European Court of Human Rights' (2012) 23 Law Critique 43
[306] Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: contextualising the Yogyakarta Principles' (2008) 8(2) Human Rights Law Review 207

aim in accordance with the best interests' principles due to an inconclusive scientific-evidence on what impact a queer parent has on the wellbeing of a child. In fact, when the ECtHR does reference *Fretté,* it states that the scientific community *was* divided on the topic, suggesting past-tense, yet failed to give further comment. Instead, the ECtHR proceeded with an assessment in *E.B.* according to other factors, ultimately deciding that the interference did not pursue a legitimate aim. From this comparison, it is evident how 'expert opinions' of the scientific community can be used to justify what type of parent is good or bad, indicating not only a discretionary nature[307] but also recruited for decisions of essentially a moral nature.[308] There are two points of interest here - firstly is how the conversation in the assessment of Mr Fretté by the professional from the French Social Services, is what Derek McGhee calls an exchange of discourse. [309] It is this exchange that will transform individual narrative to psychological fact that can then be used before the ECtHR.[310] Secondly, Foucault's biopower theory needs to be elucidated for its relevance; it is apparent that the ECtHR employed the influential use of science and psychology in *Fretté* that enabled a justified ruling of no violation for, as aforementioned, essentially a decision of a moral nature. Although subtle, these discourses officialise heterosexuality.[311] When the discourse is challenged by the ECtHR, as seen in *E.B.* and operationalised through a lens of awareness regarding discrimination against sexual orientation, new possibilities emerge. The finding by the ECtHR in *E.B.* successfully disrupted heteronormativity by unsettling the truths that the experts posit in their claims.[312]

3.2 Symbolic Order of Kinship

In *Fretté* the assessment by domestic authorities had reported, Mr Fretté had "no stable maternal role model to offer" a child, and psychological disturbance may result if there is no "model of sexual difference".[313] Likewise, in *E.B.* the State authorities raised concern regarding how likely it was that a child would "find a stable and reliable paternal reference" and that "children forge their identity with an image of both parents".[314] Assured State

[307] Francesca Romana Ammaturo, 'The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe' (2014) Social and Legal Studies 1
[308] Linda Hart, 'Individual Adoption by Non-Heterosexuals and the Order of the Family Life in the European Court of Human Rights' (2009) 36(4) Journal of Law and Society 536
[309] See Derek McGhee, *Homosexuality, Law and Resistance* (Routledge, 2001) cited in *Hart* (n 308)
[310] Ibid.
[311] Monqiue Wittig, 'Paradigm' in George Stambolian, and Elaine Marks (ed) *Homosexualities and French Literature,* (Cornell University Press, 1979) cited in Johnson (n 305)
[312] *Johnson* (n 305)
[313] *Fretté* (n 294) para. 10
[314] *E.B.* (n 295) para. 11

authorities affirmed "all studies on parenthood show that a child needs both its parents".[315] During the assessment for Ms E.B.'s suitability, the authorities had taken Ms R. into consideration, additionally, the couple resided together. Preoccupation by the State authorities with what 'role' Ms R. would play in the prospective child's life was particularly important in the ECtHR finding a violation.

Through analysing the ECtHR's scope of family life, Stephanie Lagoutte found that there were three types of relations that were recognised - biological, social and legal - and it was necessary for two out of these three relations to be present in order for family life to be constituted.[316] To illustrate this, it can be observed in *Fretté* when the State authorities claimed that the decision was particularly weighty because "It is one thing to preserve a filial tie between a child and parents who are separating or who wish to confirm their links with him or her but another to allow the establishment of a family tie between a child and an adult out of nothing ...".[317] Particularly salient though is Linda Hart's extension of Lagoutte's analysis, in her claim of a fourth type of relation, the symbolic.[318] The symbolic order of kinship can be found in all other three types and is the cultural ideal for the West when these all unite.[319] To be understood as a collection of cultural laws that regulate kinship, the symbolic actively produces and dictates *sexual difference* of kin relations.[320]

Symbolic ordering of kinship is particularly powerful in fostering heteronormativity because of its dominant guide on genealogy which emphasises the normative need of heterosexuality in reproduction and parenting.[321] Evidently, queers who want to adopt face challenges by not fulfilling the biological nor symbolic criteria for 'family life'. If the ECtHR can critically engage in an understanding on how these cultural laws manifest, there is hope that discrimination on this basis will be acknowledged. This can indeed be seen in the ECtHR's judgement in *E.B.* whereby the depth and forward-thinking understanding of discrimination was key to finding a violation.[322] Not disagreeing with the State authorities position on the lack of paternal referent, it was the merits of this claim that raised alarm given the referent had to

[315] *E.B.* (n 295) para. 11
[316] Stephanie Lagoutte, 'Surrounding and Extending Family Life: The Notion of Family Life in the case law of the European Court of Human Rights' (2003) 3 Nordisk Tidskift for Menneskerettigheter 292 cited in Hart (n 308)
[317] *Fretté* (n 294) para. 15
[318] *Hart* (n 308)
[319] Ibid.
[320] Judith Butler critiques two renowned kinship theorists Levi-Strauss and Lacan to theorise how the symbolic is replicated. Moreover, Butler uses (and critiques) Freud's psychoanalysis to show the cultural laws of the symbolic. *Butler* (n 57)
[321] *Hart* (n 308)
[322] *Johnson* (n 305)

be within an "immediate circle of family and friends".[323] Concerned that this would render the right of adoption for singles near ineffective, the ECtHR reported that this could have acted as a "pretext for rejecting the applicants application on grounds of her homosexuality."[324] Hence, when examining the second reason for refusal of authorisation as being accorded to Ms R's 'attitude' towards her partner's application, the ECtHR argued that "the illegitimacy of one of the grounds has the effect of contaminating the entire decision"[325] and subsequently found a violation through concurrent considerations.

Heteronormative assumptions of institutions such as family and marriage as being necessarily based on and imbedded with 'different-sex-pairs' or believing queer couples are an 'alternative' to the heterosexual couple (or lifestyle),[326] are assumptions that are disrupted by the queer family forming meaningful, intimate relationships.[327] Queer families, treated as the "Other" face incomprehensible difficulties in being able to enjoy the same rights as the heterosexual and this is inextricably linked with concepts of 'family' and 'kin'. The term 'family' is predominately ideologically associated with the 'natural' family, one which is based on the ability to reproduce and consists of 'biological' kin.[328] Prior to the emergence of 'new family forms', studies on genealogies of kinship were constructed largely on the cultural assumptions of kinship ties existing as enduring ties. When David Schneider questioned the limiting of kinship to genealogy, he introduced a critique on biology being constructed as fulfilling the cultural construct of kinship,[329] leading to an expansion on the studies of kinship. As Weston points out though, if we are to deconstruct kinship ideologies and determine *how* procreation ideology became the superior determinant, it must be done so at the intersection of its history, material context and its meaning.[330] It is not fruitful when the so-called 'alternative family form', is discussed as a dichotomised assimilated or rebellious family form.

The construction of kinship as primordial in Western societies raises a distinct ideology of authenticity and sense of permanence,[331] a true force to be reckoned with. Moreover, it has structured kinship as social ties beyond the stretching hands of time, causing power relations

[323] *E.B.* (n 295) para. 73
[324] *E.B.* (n 295) para. 73
[325] *E.B.* (n 295) para. 80
[326] *Kitzinger* (n 41)
[327] *Weeks*, *Heaphy* and *Donovan* (n 292)
[328] *Weston* (n 292)
[329] David M. Schneider, *American Kinship: A Cultural Account* (Prentice-Hall, 1968) cited in *Weston* (n 292) at 88
[330] *Weston* (n 292)
[331] Ibid.

to be distorted and '*beyond social intervention'*.[332] This biological attachment causes it to be perceived as 'natural' and immutable, causing 'blood ties' to be the foundation of society; positioning procreation as the centrepiece of genealogy.[333] Occurrence of birth and death are transfigured as the only capable events that can create kinship.[334] Consider then what it means when applicants before a ECtHR rely upon time as a way to signify kinship. It may not necessarily be harmful to queer rights as by doing so, queer families who are making these claims are actually disrupting the cultural paradigm of kinship "moving from 'what's real must last' to 'what lasts is real'".[335] The way that Weston conceives queer families as constructing kinship is by incorporating ideologies that work in the dominant sphere. Thereby, difficulty arises in distinguishing between that which is dominant and that which is 'alternative'; ultimately Weston suggests that "gay kinship ideologies have used common categories to generate uncommon meanings" and that "The more things stay the same, the more things change."[336]

3.3 The Institutions of Family and Marriage

Despite such expansion of the ECtHR in *E.B.,* it was the reliance on Article 8 right to *private life* that enabled both Mr Fretté and Ms E.B. to argue they had been discriminated against. In this sense, the component 'family life' per se for queer family's access was not explicitly altered. Increasing importance then came from subsequent cases which did fall within the remit of 'family life', in the second-parent adoption cases of *Gas and Dubois* and *X and Others.*[337] In *Gas and Dubois*, the applicants, were a same-sex couple who had recognised civil partnership under French law. When the 'second-parent' Ms Gas tried to adopt the child, biological to Ms Dubois, of which they had decided to conceive together, it was refused on the grounds of domestic law only permitting married couples to share parental rights via second-parent adoption. The ECtHR found no violation, determining that there had been no differential treatment.[338] In the hearing, the applicants argued that heterosexual couples could however bypass such a restriction by entering into marriage, whereas this was not possible for same-sex couples. Minimising their claims, the ECtHR relied on a wide margin of appreciation granted to States in relation to same-sex marriage.

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[332] Ibid. at 104 emphasis added
[333] *Weston* (n 292)
[334] Ibid.
[335] Ibid. at 104
[336] *Weston* (n 292) at 106
[337] Both cases claimed a violation of Article 14 in conjunction with Article 8
[338] See *Gas and Dubois* (n 296) para. 68

When the ECtHR refuses to make a comparison between same-sex couples in civil partnership and unable to marry, to heterosexual couples who are able to marry, it substantially limits the ability of queers to progress prohibition of discrimination complaints.[339] Such pretence of equality is a marked differentiation in treatment.[340] Although the applicants emphasised differential treatment when compared with heterosexual couples, whether married or not, the ECtHR steered the present issue towards the institution of marriage, an institution that 'confers special status'.[341] By initiating this comparison, the ECtHR discarded an opportunity to rule on whether a State should be allowed to maintain such a difference in treatment between couples with different sexualities.[342] It is evident that the ECtHR fell prey to patriarchal assumptions of not only the concept of 'family' but also non-acceptance of alternative conceptions of parenthood not confined to the institution of marriage,[343] clearly an issue that does not just affect queers. 'Family', as institutionalisation, proves to have a very particular role when analysing power relations, and in defining what constitutes 'family', the role of the law is not neutral.[344] Consequently, constructing the single non-heterosexual, as seen in *E.B.,* as equal to the single heterosexual, the ECtHR then constructed them mutually as inferior to the normative married heterosexual couple as seen in *Gas and Dubois.*[345]

The time came shortly after *Gas and Dubois* for the ECtHR to re-examine second-parent adoption in *X and Others.* In this case, domestic law neither permitted parentage divide in excess of two different-sex parents (that is a child cannot have more than one legal mother and one legal father), nor did Austria allow same-sex marriage or single-parent adoption by non-heterosexuals.[346] Relatedly to the precedent case*, X and Others* was an application regarding a same-sex partner of the mother who had a biological child and who wanted to gain parental responsibility through second-parent adoption. In determining that the couple could not be compared to a married couple, the ECtHR found no violation of prohibition of discrimination in conjunction with the right to private and family life. However, when the

[339] Paul Johnson, 'Adoption, Homosexuality and the European Convention on Human Rights: *Gas and Dubois v France'* (2012) 75(6) The Modern Law Review 1136
[340] Damian A Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2014) 29(4) American University International Law Review 797
[341] See *Gas and Dubois* (n 296) para. 67- 68
[342] *Johnson* (n 339)
[343] *Ammaturo* (n 307)
[344] Ibid.
[345] *Gonzalez-Salzberg* (n 340)
[346] Ibid

ECtHR determined that the non-heterosexual couple was in a similarly relevant situation to an unmarried heterosexual couple, a violation was found.

Whilst the finding in *X and Others* indicated an explicit recognition of *de facto* families, it also revealed a tension in the ECtHR between protecting a heteronormative parenthood (as seen in *Gas and Dubois*) and seizing an opportunity of regulating parenthood but in a homonormative way (as seen in *X and Others*).[347] A formal equality model, which can be seen to be adopted by the ECtHR here, although has more judicial success, is also an assimilationist strategy.[348] With an intention for increasing tolerance and understanding, this strategy describes how the sexual dissident can imitate the ideal model, in other words, the heteronorm.[349] Apparent in *X and Others* are descriptions regarding the degree of permanence of the couple's relationship evidenced in references to them being a stable same-sex couple, cohabiting for many years and moreover that they are a *de facto* family.[350] "The Court itself has often stressed the importance of granting legal recognition to *de facto* families" and that these second-parent adoption applications are in "contrast to individual adoption or joint adoption, which are usually aimed at creating a relationship with a child previously unrelated to the adopter…"[351] Formal equality model accepts identity categories at the same time as expressing that these differences should, at least legally, not make a difference.[352] By doing so the model interrogates the ideal of the heterosexual norm, rejecting dependence on accepting the norm as the ideal however it also accepts the norm as a cultural paradigm that requires assimilation for the sake of equality seeking.[353]

3.4 Reconceptualising Intimacy and Sexuality

Through the arrangement of ideas regarding tradition, legality and acts according to custom, family distinctively occupies both the public and private domain[354] sustaining the symbolic order of the heterosexual family through stability provided from the state.[355] Families that fail to conform to heteronormativity are portrayed as 'deviant', and as Martha Finemore argues, this deviancy translates into justification for State regulation and cause for public

[347] *Ammaturo* (n 307)
[348] *Levit* (n 177)
[349] Ibid.
[350] *X and Other* (n 297) para. 95- 96. *Gas and Dubois* were not considered *de facto* and thus a discussion in this judgement on the value given to *de facto* families had not taken place
[351] *X and Other* (n 297), para. 145. It can also be seen here the inherent value placed on biogenetics of kin
[352] *Levit* (n 177)
[353] Ibid.
[354] Michel Foucault, 'The Subject and Power' (1982) 8 (4) Critical Inquiry 777
[355] *Hart* (n 308)

concern.[356] Finemore suggests that in contrast to the deviant family, the 'natural' family *is* granted privacy having earnt this right via conformity with the social norms and dominant ideology.[357] Ideological construction of the 'natural' family function in creating norms of how intimacy is understood in discussions on the family. Individual *intimacy* that needs to be reformulated, as the prevailing natural family positions a male's role in the family in relation to their sexual intimacy with women.[358] Intimacy currently reflects a vertical sexual affiliation between a man and a woman, however if we could reconceptualise intimacy to a horizontal affiliation, it could create a new intimacy scheme, ridding the concept of family being associated with sexuality.[359] Reconceptualisation has the potential to liberate queer families from the perceived deviant space in which they currently occupy. Moreover, a reformulation of intimacy and family would change the way in which they are presently interpreted in law.

Conclusion on Right to Family Life

It was pertinent to see the developments between *Fretté* and *E.B*. to discover how the ECtHR used different strategies in determining a violation or not. Scientific research as offering 'expert opinion' was utilised in *Fretté* to justify a wide margin of appreciation and subsequently dropped six years later in *E.B*. What prevailed in both cases however was the symbolic order of kinship, whereby heteronormativity was used in referencing the need for heterosexual parents, biological kin and primordial genealogy as an indication of authenticity and permanence. It was suggested that the ECtHR successfully identified the inherent heteronormativity in the State authority's assessment of Ms E.B. which manifested into discrimination. Explicit affirmation by the ECtHR in *Gas and Dubois* that marital status entails a privileged status and the lingering concerns of homonormative types of kinship seen in *X and Others* raises significant doubt whether the ECtHR is heading in an emancipatory direction for queers. As indicated earlier in Part 3, family forms are experiencing social change that is largely being re-drawn at a speed faster than that which the law is evolving, and this is not limited to queers. It is crucial that kinship ideologies do not become polarised as this will have negative implications, not least because of the necessity to address intersectionality in the rights to family life. In terms of how these discourses are contributing to the 'SOGIE human rights discourse' and queer emancipation, it would seem that they raise questions in regard to whether

[356] *Finemore* (n 127)
[357] The 'natural' family is granted privacy, Finemore argues because they are economically self-sufficient, independent and do not raise concerns that would justify state regulation.
[358] *Finemore* (n 127)
[359] Ibid.

an equality framework versus difference framework is more productive. If, as offered as suggestions by theorists in the area, kinship ideologies in queer families can continue to use common categories simultaneously facilitating the production of uncommon meanings, the dichotomy of the dominant and the subordinate will be unsettled. Additionally, a radical restructuring, separating sexuality from intimacy may also be way forward in reconceptualising 'family'.

Chapter 3 'Gender Identity and Expression'
Part 1. The Right to Private Life

"There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very "expressions" that are said to be its results"[360]

As extensively discussed in relation to sexuality, law is a powerful regulating system one that extends to sex and gender.[361] Law, in defining legal concepts should be autonomous but this is a fantastical illusion. In defining the legal concept of sex and gender, the law is not restricted to the confines of binary form, yet genitalia, through discourse is branded as sex and gender regulating every individual's identity as a legal subject that stipulates all as a legal woman or a legal man.[362] This legal sex holds the gauntlet of truth inscribed onto the body and perceived as total. Becoming apparent are the inherent difficulties for individuals who do not nicely fit into the binary and what repercussions unfold from law and *genitocentrism*[363].

Rights in relation to the sex and gender of queers has been before the ECtHR amongst other early queer case law with the first case being decided in 1986.[364] Early jurisprudence on the topic was foundational to subsequent cases but at the same time conservative and restrictive. Grasping tightly, it wasn't until 2002 that the stance of the ECtHR changed when a violation against a Contracting State was found.[365] Much like the jurisprudence on sexuality, sex and gender case law has not developed in a linear fashion however drastic change has occurred, nonetheless. As stated in Chapter 1, the 'gender identity and expression' component of SOGIE is most frequently used in relation to people who identify as transgender, limiting its scope. Here the discussion is regarding gender, sexuality and sex however may appear to fall into this trap. In the ECtHR however the cases pertaining to this component have only been in relation to persons they identify as transgender and transsexual, thus an analysis in relation to this case law is necessary to determine how the discourse is developing. Some of the evolution will be captured accompanied by persisting problematic assumptions about and consequences for, queers. Firstly, issues that are emerging in the framework of human rights

[360] *Butler* (n 57) at 34
[361] *Gonzalez-Salzberg* (n 340)
[362] Ibid.
[363] Genitocentrism is a term given by Andrew Sharpe in *Transgender Jurisprudence.* It will be expanded however briefly, it describes the law's obsession on genitalia determining sex and/or gender. See Andrew N Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish Publishing Ltd., 2002)
[364] This case was *Rees v. United Kingdom* (1986) 9 EHRR 56, herein after *Rees*
[365] This case was *Goodwin v. United Kingdom* (2002) 35 EHRR 18, herein after *Goodwin*

concerning intersex will be discussed, regardless of the lack of case law. This is because there are specific areas in the law that will require a re-working if the ECtHR is to be prepared in arming itself towards queer emancipation. Secondly, rights in relation to transgender will be discussed and to lead this section to a conclusion on what discourses can be observed in the transgender jurisprudence, and how this contributed, firstly to the 'SOGIE human rights' discourse and secondly, to queer emancipation.

1.1 Emerging Intersex Human Rights

"Intersex is an umbrella term for the myriad characteristics of people born with sexual anatomies that various societies deem to be non-standard."[366] One reason why intersex disturbs the binary of sex and gender is due to how the biological and cultural level regulate it.[367] From here, intersex is unacceptable as a sex or gender and must be managed and corrected via surgical interventions.[368] What is not widely understood is that these surgical procedures are not without risk, yet since the mid-twentieth century, barely an alternative to medicalisation of intersex has surfaced.[369] Surgery on genitalia is to practice in normalisation, often carried out with the best intentions for the infant to live a 'normal' life. By doing so though, does the surgery not reinforce the exact stigma the 'normalising' surgery is seeking to avoid?[370] Non-acceptance of intersex is a social phenomenon that will not be resolved through medicine if the mere existence of intersexuality in some societies cannot be accommodated, despite its widely accepted biological epistemology discourse.

When advocates raise awareness in regard to intersex human rights issues, it is usually done so with regard towards self-determination and bodily autonomy.[371] Non-conformity of intersex into the gender binary is one of the reasons that intersex is said to experience challenges regarding law. However, as a way to draw distance between the disputed and controversial 'SOGIE human rights', intersex at times, is said to concern *innate* sex characteristics.[372] This strategy would presumably not adhere to a queer perspective as it submits to the prevailing normative discourse of biology which queer theory seeks to challenge.

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[366] *Rubin* (n 60) at 1
[367] *Rubin* (n 60)
[368] *Ibid.*
[369] Rubin refers to medicalisation as a "treatment of human problems of the politics of difference as issues that can only be addressed by medical study, diagnosis and treatment" *Rubin* (n 60)
[370] *Rubin* (n 60)
[371] Morgan Carpenter, 'The Human Rights of Intersex People: Addressing Harmful Practices and Rhetoric of Change' (2016) Reproductive Health Matters 1
[372] See *Carpenter* (n 371)

A body of research nowadays discusses protective ways that legal rights may be able to better serve their human and prevent normalising hegemony amongst people that are intersex.

At the present time, the ECtHR has received only one case regarding intersex matters, and the case, *P. v Ukraine,*[373] is still pending, therefore will not be analysed here. The applicant has claimed violation of right to family and private life and prohibition of discrimination in conjunction.[374] It is uncertain whether the absence in topical matter before the ECtHR will be maintained given the increasing advocacy for self-determination and bodily autonomy and subsequent refusal of the status quo on intersex. Nevertheless, that with more certainty is the amounting body of literature on the harm to, not limited but relevant here, gender identity development caused by irreversible genital surgery,[375] that which is most commonly conducted on infants in the case of intersex. Justly so, the rights of the child[376] are being transformed, albeit delicately balanced against and with others. Specific international human rights that are raised in relation to intersex are those pertaining to prohibition of inhumane and degrading treatment, right to private and family life and the right to non-discrimination. Located under non-discrimination for example, the law could be mobilised to alter birth registration requirements and 'genital-normalising surgery' conducted under the pretence of ascribing to the gender binary.[377] Whilst attention from international human rights law and jurisprudence especially, are in their infancy regarding intersex, case-law that is undoubtedly contributing to these questions does exist. Jurisprudence within the ECtHR that has been addressed in relation to gender identity is raised by transgender and transsexual cases, which is in essence affecting change in all areas of sex, sexuality and gender.

1.2 Regulating Bodies and Binaries

The ECtHR is the monitoring body of human rights that has adjudicated the most cases regarding 'trans' rights. 'Trans' is a term that can be used and will be in this context, to refer to a person who does not feel their gender identity is congruent with the sex they were assigned at birth and socially expected to carry out from birth.[378] As drawn upon in Chapter 1, "The cultural matrix through which gender identity has become intelligible requires that certain kind

[373] *P. v Ukraine* (App 40296/16)
[374] The applicant has also claimed violation of right to an effective remedy, Article 13 ECHR
[375] Edmund M Horowicz, 'Intersex Children: Who Are We Really Treating? (2017) 17(3) Medical Law International 183
[376] Especially UN Convention on the Rights of the Child (adopted 20 November, 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)
[377] *Horowicz* (n 375)
[378] *Gonzalez-Salzberg* (n 340)

of 'identities' cannot 'exist' – that is, those in which gender does not follow from sex and those in which the practices of desire do not 'follow' from either sex or gender".[379] Thus 'gender identity' is to be treated with particular rigour. Distinction between transgender and transsexual is often amalgamated as the terms become interchanged in many contexts. 'Transgender' here will be used to refer to a person who lives, or wishes to live, areas of their life performing a gender that does not reflect the role congruent of the sex assigned at birth whereas 'transsexual' indicates a person that is transgender and post-operative[380] sex-reassignment.[381] Foundational cases in regard to transgender rights are *Rees v United Kingdom,* (1986)[382] *Cossey v United Kingdom* (1990)[383] and *Sheffield and Horsham v United Kingdom* (1998),[384] therefore these will be analysed followed by *B. v France* (1992)[385] which will provide another interesting perceptive. Then *Goodwin v United Kingdom* (2002)[386] and *I v United Kingdom* (2002)[387] will be analysed due to the ECtHR finding violations, integral to the 'SOGIE human rights' discourse. Lastly, *A.P., Garçon and Nicot v France* (2017)[388] for worth of its capacity to show the ECtHR's latest construction of sex and gender.

Beginning with *Rees, Cossey* and *Sheffield and Horsham,* all applicants were transsexual and had been successful in changing various legal documents but not all, forcing them to live both as 'man' and 'woman' for different legal purposes. Of particular concern to the applicants was the inability to change the legal sex on their birth certificates due to domestic law. All cases alleged violations of right to private and family life, and the right to marry, *Sheffield and Horsham* also alleged violation of prohibition of discrimination. No violations were found in any of the three cases, with the ECtHR setting precedent in *Rees* claiming no consensus among Member States regarding legal recognition of people who had transitioned their sex.

[379] *Butler* (n 57) at 24
[380] Adopted here is Andrew Sharpe's usage of the term post-/pre- operative which is reflecting a medically defined character. Post-operative individuals have undergone vaginoplasty or phalloplasty. There are other anatomical alterations that persons undergo which would be considered under pre-operative. See *Sharpe* (n 363) at 35
[381] Gonzalez-Salzberg (n 340). The term transgender will be referred to where it is not otherwise indicated that an individual identifies as transsexual
[382] *Rees* (n 364)
[383] 13 EHRR 622, herein after *Cossey*
[384] 27 EHRR 163, herein after *Sheffield and Horsham*
[385] ECHR 40, herein after *B.*
[386] *Goodwin* (n 365)
[387] 36 EHRR 53, herein after *I*
[388] App 79885/12; 52471/13; 52596/13, herein after *A.P., Garçon and Nicot*

Escaping a definition of 'gender' in all cases, the ECtHR instead validated the definition of 'sex' given by domestic authorities[389] which passed the legal concept of sex as based exclusively on "biological criteria: chromosomal, gonadal and genital sex".[390] Elaborating, "The entry in the birth register is prima facie evidence of the person's sex…"[391] and "Only in cases of clerical error…will a change of the initial entry be contemplated…"[392] In other words, legal 'sex' was immutable, biological by definition, exclusively deducible to birth[393] and sex-reassignment surgery could not falter this. Irreparable implications have arisen for ECtHR cases whereby a preoccupation on determining comprehension of legal sex in this manner has encouraged an overemphasis on the requirement of a binary male or female.[394] Surfacing from this presumption is that sex is foundational to the body, of which gender emerges from and what Andrew Sharpe titles the (bio)logic construction of sex.[395] In consequence, law (and rights) enables a powerful discourse that of a 'coherent' gender identity is in relation to the genitalia observed at the moment of birth.[396]

When applicants began appropriating their own biological arguments to reflect research that had emerged that suggesting the brain played a role in conditioning transsexualism, suggest a physiological ontology, the ECtHR dismissed the claim. Seemingly outside of its legal reach, the ECtHR submits to a legal definition of sex as determined by the medical field stating

> "Accordingly, the non-acceptance by the authorities of the respondent state for the time being of the sex of the brain as a crucial determinant of gender cannot be criticised as being unreasonable…at the time of adoption of the *Cossey* judgement, it still remains established that gender reassignment surgery does not result in the acquisition of all biological characteristics of the other sex despite the increased scientific advances in the handling of gender reassignment procedures."[397]

Dissenting Judge Van Dijk highlighted

> "I cannot see any reason why legal recognition of reassignment of sex requires that biologically there has also been a (complete) reassignment; the law can give

[389] There was a key case in transgender jurisprudence in which the European Court closely referred to throughout these cases, this was *Corbett v. Corbett* (1970) 2 All ER 33
[390] *Rees* (n 364) para. 23
[391] *Rees* (n 364 para. 27
[392] *Rees* (n 364) para. 23
[393] Sharpe (n 363)
[394] Ibid.
[395] Ibid.
[396] Ibid.
[397] *Sheffield and Horsham* (n 384) para. 56

autonomous meaning to the concept of "sex", as it does to concepts like "person", "family", "home" and "property", etc."[398]

As part of the applicant's initiation of a re-orientation, the ECtHR too witnessed the increasing instability of biology's hold and did begin probing the 'transsexual aetiology'.[399] Either way, physiology claims are still problematic. At the current time medicine has not concluded their deduction on transgender aetiology however in a future scenario where it might, "it may serve to fuel a desire to eradicate 'deviant' people altogether".[400]

Dissenting judges increasingly showed support for the de-emphasis on biology in determining sex and began to reform the jurisprudence[401] one of the outcomes being, there was a focus on the 'in between' nature of the subject. According to dissenting opinions, *Cossey,* was neither biologically a woman nor a man but somewhere in between.[402] Yet Ms Cossey identified as a woman, she was not existing in the "interstices of this binary relation"[403], it was the law that made her legal man in some ways and a legal woman in others.[404] Nonetheless the binary's authority appears to have been shaken and the ambiguity law designated to these individuals was later retrieved. In 2002 it amounted to "the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable".[405] These early cases where biology was prime but accompanied by inclinations towards alternatives leaking out by dissenting judges were all in relation to transsexuals. Thus, important implications that were evidently on the horizon weren't addressed until 2017 in *A.P., Garçon and Nicot*. Important changes can be observed in the meantime however.

1.3 Authenticity

The reform jurisprudence argued by Sharpe articulates legal sex in terms of "psychological and physical harmony"[406] with sex reassignment surgery remaining as cardinal importance thus restricted to the post-operative body. Another transformation has been seen in case law which reflects more of a "psychological, social and cultural harmony" conception.[407]

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[398] *Sheffield and Horsham* (n 384) *per* Van Dijk J dissenting para. 8
[399] *Sheffield and Horsham* (n 384) para. 60
[400] *Sharpe* (n 363) at 51
[401] 'Reform jurisprudence' was titled by *Sharpe* (n 363)
[402] *Cossey* (n 383) *per* Palm, Foighel and Pekkanen J dissenting
[403] Judith Butler, *Undoing Gender* (Routledge New York and London, 2004)
[404] Gonzalez-Salzberg (n 340)
[405] *Goodwin* (n 365) para. 90
[406] Sharpe (n 363) at 3
[407] Sharpe (n 363) at 57

In the process of transitioning sex, people who identify as transgender undertake, and are largely required to undertake, a range of procedures, treatments and assessments - psychological harmony, for example, is determined via psychological treatment. What emerges in the case law is a discourse on authenticity. Dissenting judges in *Rees* stated "…anguish and suffering show how real and intense was his desire to adopt a new sexual identity as far as possible".[408] When these judges raised the element of 'truth', they conflated the legal discourse of sex and gender with there being a possibility to determine degree of 'genuine',[409] thereby, establishing a notion of authentic identity tied to bodily change.

Within the medico-legal reasoning that dominates the context in which transgender is litigated, it is evident that both act and identity is employed, and jurisprudence is oscillating.[410] On one hand, selective medical expertise will accordingly find the subjectivity of the 'true' sex causing preoccupation with surgery, (or lack of) to indicate irreversibility.[411] On the other hand, is the individual's act; is their sexuality and gender practice coherent with an 'authentic' transsexual?[412] The ECtHR understands transsexuals to be heterosexual, supported (or informed) by topical research showing greater 'success' for individuals that have this orientation.[413] Such discourse has evoked the role of intercourse embodying gender essentialism,[414] or that 'anatomy determines destiny'[415], elucidating performative assumptions such as matrimony and monogamy.[416] The ECtHR perceives this as fulfilment therefore desirable and achievable through sex-reassignment surgery. It has seemingly translated this as possessing the capacity to determine a 'genuine' from not, and reinforce that persons cannot exist between the boundaries, nor cross from one side to the other.[417] Poignantly, Ralph Sandland suggests that the ECtHR has failed to recognise the difference and, in the process, "looks at the Other, but only sees the Same",[418] reproducing heteronormativity. It could be read from Goodwin, that in finding a violation against her rights, the ECtHR legitimated heterosexuality embodiment as the criteria for crossing the binary.

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[408] *Rees* (n 364) *per* Bindschedler, Robert, Russo and Gersing J dissenting para. 2
[409] *Sharpe* (n 363)
[410] Ibid.
[411] Ibid.
[412] Ibid.
[413] Ralph Sandland, 'Crossing and Not-Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights' (2003) 11 Feminist Legal Studies 191
[414] For example, see *Cossey* (383) *per* Martens J dissenting para. 39
[415] See de Beauvoir (n 24)
[416] For example, see *Goodwin* (n 365) and *I* (n 387)
[417] *Sandland* (n 413)
[418] *Sandland* (n 413) at 201. The 'Same' in this case refers to Self/Same/normal

Consequently, the authenticity as measured through surgery distinguished those who were a) unwilling or b) underserving of such legal sex recognition. In *B. v France,* the applicant, a post-operative transgender female alleged before the ECtHR violation of the right to respect for private and family life due to French authorities refusing her sex to be recognised in the civil status register and official identity documents thus forcing her to disclose personal information.[419] A violation was found, perhaps attributable to the ECtHR not being required to directly recognise legal sex claims.[420] Nevertheless, increasing references to the 'true sex' of the applicant are observed.[421] What is also interesting is the note by the majority about the operation being "irreversible abandonment of the external markers of Miss B.'s original sex".[422] Vehemently challenged due to male sex traits being present,[423] the 'voluntary action' of her surgery and name change being incomplete made Miss B. not sufficiently female according to dissenting judges.[424] Undertaking surgery abroad, Miss B. had not been subjected to the 'medical guarantees' that France, and many European countries require regarding sex-reassignment surgery. Parcel to these guarantees is psychological treatment and dissenting positions would suggest the absence of this caused controversy. Medical evidence that would be presumably extracted by this process presumably distinguishes the rightful transgender and their 'true sex' and ensure they have not mistaken their sexuality.[425] It also provoked what Sharpe refers to as 'the discovery story of transsexuality' whereby the temporal moment of their true sex, and the degree applicants are willing to go to in order to fulfil this true sex are conflated.[426] The biological emphasis and argument of sex is so focused on genitalia that it would suggest an aesthetic and phallocentric fixation.[427]

1.4 Persisting Medicalisation

Turning then to the key case of *Goodwin v United Kingdom*[428] and *I v United Kingdom,* heard on the same day.[429] Both applicants were transgender female, post-operative and alleged violation of right to private and family life, right to marry and prohibition of discrimination

[419] See *B* (n 385) para. 43
[420] Alleged violation of prohibition of torture, inhumane and degrading treatment was made by applicant but not found by ECtHR
[421] This includes by all parties - the Court, the State and the applicant
[422] *B* (n 385) para. 55
[423] *B* (n 385) *per* Pinheiro Farinha J dissenting para. 5
[424] See *B* (n 385) *per* Valticos and Loizou J dissenting, at 37
[425] Sharpe (n 363)
[426] Sharpe (n 363) at 53
[427] Sharpe (n 363)
[428] *Goodwin* (n 365)
[429] *I* (n 387)

due to the United Kingdom not giving full legal recognition of their post-operative sex. Violations of all alleged grounds were found in both cases and substantial shifts can be observed in the case law. In a dismissive fashion, the ECtHR stated "the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance".[430] When assessing the right to marry, the ECtHR indicated that

> "a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender…other important factors- the acceptance of the condition…the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender."[431]

Importantly, the ECtHR questioned chromosomes as being *the* determinant of sex and expanded the criteria, acknowledging sex is not necessarily static, thereby drawing attention to the category being constructed.[432] Nevertheless, the ECtHR did not exercise its power to redefine legal sex but instead stated it was "not persuaded"[433] by the current state of medical and science knowledge, thereby retaining the right for medicine in future to override the newly defined legal notion of sex.[434] In fact, there had been no departure from a biological discourse, it was simply re-orientation. By accepting the 'condition', the medical profession could in turn provide relief through 'treatment'.[435] In using the term 'assimilation' it also indicates that the transgender, post-operative, cannot cross the gender binary, it will be a mere imitation.[436]

In relying on medicine to validate their position, law has, similarly as in the case for homosexuality, engaged in pathologisation. The following excerpt is taken from *Rees* in 1986 however has withstood the test of time as evidenced by the position held in *A.P., Garçon and Nicot* in 2017 regarding applicants who were transgender.

> "Transsexualism is not a new condition, but its particular features have been identified and examined fairly recently…experts in the medical and scientific fields who have drawn attention to the considerable problems experienced by the individuals concerned and found it possible to alleviate them by means of medical and surgical treatment."[437]

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[430] *Goodwin* (n 365) para. 81
[431] *Goodwin* (n 365) para. 100
[432] *Sandland* (n 413)
[433] *Goodwin* (n 365) para. 100
[434] *Gonzalez-Salzberg* (n 340)
[435] *Goodwin* (n 365) para. 81
[436] *Gonzalez-Salzberg* (n 340)
[437] *Rees* (n 364) para. 38

Framing the problem to be the abnormal transsexual detaches responsibility from society as creators of that frame. Pieter Cannoot bids that the ECtHR has in fact facilitated the enduring pathologisation of transsexuality.[438] In part, this is undoubtedly attributable to the current DSM-5 containing 'gender dysphoria', also given exceptional value as the diagnosis forms the criteria for eligibility of sex reassignment surgery.[439]

In the ECtHR's assessment of *Goodwin's* gender identity, the presence of 'gender dysphoria', that which enabled sex re-assignment surgery to be undertaken, to finally 'alleviate' the condition of transsexualism led to the conclusion that it would be "illogical to refuse to recognise the legal implications of the result to which the treatment leads".[440] In finding a violation in Goodwin, the ECtHR defined the legal change of sex, yet there is a cautionary tale. It has entered a dangerous space in which the applicant's sex reassignment surgery proved *enough* to make the binary transition sufficient and warrant the status of 'real'.[441]

'Reform jurisprudence' has allowed sex to be altered in time, in other words, sex is not confined to the sex inscribed on the body at birth[442] however reform, does not necessarily mean progress. Genitalia has been elevated as the sacrifice transgender persons must make and illustrates *genitocentrism* of the law. Biological argumentation disguises such dubious intentions and as Sharpe argues, it is the *genitocentrism* of the law that maintain a status quo and exposes such continuity between the (bio)logic of the past and the reform of *Goodwin.*[443] The question to be answered was how future jurisprudence would treat the pre-operative or non-operative individual who claims their legal sex?

1.5 Transcending Gender/Sex

Finally, the most recent transgender case law in the ECtHR- *A.P., Garçon and Nicot* fulfilled many unanswered questions whilst maintaining the order of others. Three applicants who identified as transgender alleged violations of the right to private and family life (Article 8) for three different reasons. For *Garçon and Nicot* violations were found on grounds of "the

[438] Pieter Cannoot, 'The Pathologisation of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition' (2019) 37(1) Netherlands Quarterly of Human Rights 14
[439] There has somewhat been queer developments in this space however by the shift from the DSM-4 label of 'gender identity disorder', facilitating a disconnection of non-conformity with the gender binary to a mental disorder. Nonetheless, the pathologisation maintains gender identity nonconformity as a condition, unmistaken to be excluded for the normal. Cannoot (n 438)
[440] *Goodwin* (n 365) para. 78
[441] *Sandland* (n 413)
[442] *Sharpe* (n 363)
[443] Ibid.

requirement to demonstrate an irreversible change in appearance".[444] No violation was found in regard to *Garçon* on grounds of "the requirement to demonstrate the existence of a gender identity disorder"[445] and no violation in regard to *A.P* on grounds of "the requirement to undergo a medical examination".[446] Resolving unacknowledged issues that arose in previous case law, the ECtHR firstly determined 'irreversibility' by advocating that "sterilisation, should no longer be a requirement".[447] It went so far as to elevate sterilisation to the applicant's identity and 'existence'.[448] Influence from other human rights bodies played a part in this considering they were/are demanding the abolishment of such requirements.

Conclusion on the Right to Private Life

Through finding a violation on the grounds regarding sterilisation, the ECtHR made an unprecedented move. It abandoned the previous anatomical fixation and found "not all transgender persons wish to or can undergo treatment or surgery".[449] It could be said that *genitocentrism* was disposed of.[450] Value attributed to medicine in law however will no doubt continue to gain and hold supremacy. Perhaps, the direction for the ECtHR will follow on from major changes occurring in some domestic law where the key focus is on the right to self-determination.[451] Maintaining validation of the medical discourse reiterates that a diagnosis is necessary to avoid unwanted transsexuality.[452] Gonzalez-Salzberg suggests that it simply acts as a regulator of the normal and deviant and to prevent a third group of people who have unintentionally become homosexual![453] Pathologisation remains an essential problem. It is telling that the ECtHR overlooked the CoE Parliamentary Assembly resolution on discrimination against transgender persons. [454] This sought for the abolition of "sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person's gender identity in laws regulating the procedure for

[444] *A.P., Garçon and Nicot* (n 388) para. 5
[445] *A.P., Garçon and Nicot* (n 388) para. 5
[446] *A.P., Garçon and Nicot* (n 388) para. 6
[447] *A.P., Garçon and Nicot* (n 388) para. 124
[448] *A.P., Garçon and Nicot* (n 388) para. 123
[449] *A.P., Garçon and Nicot* (n 388) para. 126
[450] Damien A Gonzalez-Salzberg, 'An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *A.P., Garçon and Nicot v France'* (2018) 81(3) MLR 526
[451] States with this domestic law provisions are Argentina and Denmark. *Gonzalez-Salzberg* (n 450)
[452] *Gonzalez-Salzberg* (n 450)
[453] What he means here is how the Court states the diagnosis is necessary to avoid people embarking on a journey of irreversible changes. *Gonzalez-Salzberg* (n 450)
[454] CoE Parliamentary Assembly Resolution 2048(2015) on 'Discrimination Against Transgender People in Europe'

changing a name and registered gender".[455] Finally, no violation found in the claim against the requirement of undertaking a medical examination is strongly suggestive of the inclined condition to seek the 'true sex'. In conclusion, inconsistency is still lurking in whether acceptance of ambiguous sexes and genders is possible.

Rights pertaining to 'gender identity and expression' have been expressed through multiple discourses. It would appear that some of these are stronger than others as based on the discourse still present in the case of 2017. As captured by Sandland, when the ECtHR attempted to look at the Other, all it saw was the Same. This seems to largely reflect the case law in this field of developing 'SOGIE human rights' - medicalisation of sex and gender remains a persisting legitimising discourse that allows the ECtHR to distinguish between the norm and the abnormal. The ECtHR is still enabling the State to regulate bodies by submitting them to 'medical examinations' in which a judgement can be made on whether the transcendence across the binary is enough to validate a 'true sex'. This safeguard for the ECtHR remains firmly in place in the event of the criteria for sex re-assignment surgery as a requirement to acknowledge legal sex change being removed. Nonetheless, transformations in the jurisprudence has occurred in the construction of sex and gender, more specifically, the initial stronghold by the ECtHR on biology and immutability was let go, opening up spaces where having a 'coherent' gender is not dependent on the sexed body at birth.

[455] Ibid. para. 6.2.2

Conclusion

Cases that arrive before the European Court of Human Rights have baggage - they cannot be detached from the cultural context in which they came from. This means, the ECtHR is *inheriting* discourses *and* reshaping before sending them back out into society, in this sense, a dialogue, an exchange, occurs between the national and the international. Whilst many focus on whether there was a violation of rights found or not as the legitimiser, not often enough are the discourses within these judgements considered as legitimate regulators of sexuality, sex and gender. The present thesis, and other researchers in this field are hopefully changing this. To shift the discourse on queers, deconstruction is integral, especially in such an area as influential as law.

International human rights law is complex, it must be universal in order for it not to be rendered meaningless, yet, is culture translatable? Law should be a reflection of society but given the unique character of the ECtHR's 'European consensus' strategy, and the view that the ECHR is a living instrument with evolving potential, it also has the power to carve new norms. There are three stages in developing an international norm- norm emergence, norm cascade and norm internalisation. Norm emergence requires norm entrepreneurs to appeal to a 'critical mass' of States; norm cascade is a 'tipping point' and reached when one-third of the critical mass accepts the norm; lastly, norm internationalisation is when the norm no longer causes debate.[456] It is this last stage that is heavily influenced by authoritative States and institutions mobilising on the topic. 'SOGIE human rights' is cultural- interpretations of sexual orientation, gender identity and expression are highly variable throughout the world, yet it is believed that the discourse has elements of international norms. What does this mean for queers? How is the European Court of Human Rights shaping queer emancipation via SOGIE human rights?

Through analysis of decriminalisation of homosexuality, the right to freedom of assembly and expression, the right to family life and the right to private life, discourses emerged from the ECtHR on sexuality, gender and sex. First and foremost is the formation of the subject's identity. The ECtHR has made progress in its approach to identity- beginning with homosexuality being a private manifestation of the human personality, identity was confined to an immutable, biological characteristic that sexual acts or expression were deduced to. It was a narrow understanding inconsistent with the emancipatory ideals of social

[456] *Baisley* (n 81)

constructivism. Over time, the ECtHR demonstrated an increased awareness towards heteronormativity and in opening the binary that has been exclusively dictated by the majority's norm. It was however noted that the ECtHR has had difficulty in acknowledging the fluidity of identity, preferring instead at times to avoid acknowledgment of sexualities or genders outside of the prescribed homosexual or transgender. There is little reference, for example, to lesbians and bisexuals in the ECtHR's jurisprudence and the ECtHR is yet to manage a case that requests a legal gender neither male nor female. The discourse has barely strayed from one grounded in science and could be seen in cases of decriminalisation of homosexuality (identity constructed on the basis of immutable characteristics, albeit this decreased in time, and sexual desires being restricted for the sake of 'health'); in the right to freedom of assembly (the ECtHR transgressed immutable identity, shifting to 'cultural identity' but later made their justification through science); in the right to family life (the scientific community was divided on the psychological impact a father that identifies as homosexual has on a child thereby justifying the State's legitimate aim in protecting the health of the child); and on legal gender changes (identity had to be confirmed by medical examination and existence of a gender identity disorder). Although there have been changes in some areas of rights, it would appear that science has played and continues to, a central role in the 'SOGIE human rights' discourse regarding identity.

Secondly, the ECtHR levers morality in relation to individual and group expression and this involves both the public and private sphere. What is interesting is how knowledge gained as 'legitimate' truth through scientific discourses has the power to inform society on what constitutes moral/immoral within the ECtHR and moreover can be used to disguise decisions of a moral nature. In relation to decriminalisation of homosexuality, the ECtHR, although 'avoiding morality judgements', was preoccupied with confining sexual expression to the private sphere. This could indicate the ECtHR's participation in shaping discourse on ordering sexual desire, reproducing hierarchical sexualities. Reinforced with the first claims to freedom of expression, queers transgressing this space were initially rejected. However, there has been an interesting twist. The right to freedom of assembly for queers has been enshrined with democracy, nevertheless the 'Pink Agenda'[457] has been criticised as a masquerade that the ECtHR is partaking in and suggests a construction of a 'European citizenship' distinguishing insiders from outsiders according to their sexual morality. This is because the rights afforded to citizenship can be affected by a State's morality towards sexuality. Regardless, it is shaping

[457] See Ammaturo (n 126)

the expression on sexuality, gender and sex through 'SOGIE human rights' as coherent with democracy yet queers are not entitled full citizens; this would require the "effacement of difference and the suspension of selfhood in the interests of an imagined norm."[458] Space must be fluid and transitory for queer emancipation thereby enabling freedom between the public and private, both of which are advancing but restricted by the justification that morality can be countered with normative scientific argumentations.

Thirdly is the status of choice, emerging implicitly in a number of avenues. It could be extracted, especially from the submissions by States to the ECtHR, that there is an overwhelming heteronormative lens with regard to the right to family and adoption and what has been termed the symbolic order of kinship.[459] The ECtHR defied normative regulations when it adopted a queer approach that enabled discrimination to be seen in a case of a single applicant for adoption. In this sense, the ECtHR disrupted heteronormativity. However, in subsequent case law, freedom of choice was compounded with institutional superiority. Marriage was a common comparative for discrimination claims, especially for couples wanting to adopt. When the ECtHR emphasised the 'special status' conferred to marriage, it gave precedence to the institution of religion. Struggling to recognise a queer couple as equal to a married couple places limitations on the variations to family forms. Queer families are not alternatives to the heterosexual unit.

Queer emancipation within the European Court of Human Rights is developing in a convoluted way. The ECtHR is engaging in a dialogue with States meaning they contract narratives, inform 'SOGIE human rights' and impart discourses. It will therefore take a system change - from the individual, to society, to States, to the ECtHR – on discussions of sexuality, sex and gender if we are to disrupt the prevailing status quo. As an anti-normative project, queer theory is sceptical regarding the possibility of 'queering' international law however it must be noted, queer theory "should be regarded as postulating *lex ferenda* – law of the future, as opposed to *lex lata* (law of the present) – based on the 'critique of present institutions'".[460] There are some indications that the ECtHR is beginning to take responsibility as an institution reproducing heteronormativity and gender binary however perhaps greater attention needs to be given to the discourses present in heterosexual jurisprudence as sites of reproduction. Bringing awareness to *how* the SOGIE human rights discourse is constructed questions the

[458] Hubbard (n 219)
[459] See Hart (n 308)
[460] Martti Koskenniemi, 'The Subjective Dangers of Projects of World Community.' In *Realizing Utopia: The Future of International Law*, edited by Antonio Cassese, 3-13. (Oxford University Press, 2012) cited in Po-Han Lee, 'Undoing Sovereignty/Identity, Queering the 'International': The Politics of Law

frame, and draws attention to the methodologies of rules, norms and identities. Herein lies the power that queers need for emancipation.

When the opportunity to contemplate queer emancipation arose, what image came to mind and *who* was the observer? It is neither possible to measure, define nor translate across cultures what is queer emancipation, thus impossible to reduce to 'SOGIE human rights'. Everybody is a part of the discourse that is shaping queer emancipation - from inside the court room, including judges, applicants and legal representatives, to outside the court room. Nevertheless, international human rights law has the power and most of all the responsibility to protect the inherent dignity of all human beings. Whilst the reality for queer emancipation may be on a distant horizon, the time is now for human rights protection of the queer existence.

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