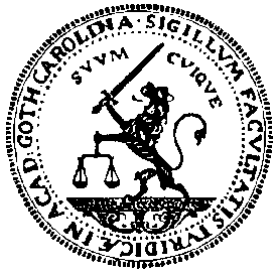

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Sexualized and gendered bias in the ECtHR jurisprudence

How the bias distorts the access of people of diverse sexualities, genders, and sex characteristics to their rights

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Contents

Summary

This thesis encompasses the analysis of the ECtHR jurisprudence on the rights of persons outside the sexual and gender binary which impairs the full emancipation of the said individuals. This piece of academic scholarship has instrumentalised queer theory to challenge the sexualised and gendered political hegemonies present in the Court's jurisprudence. Ultimately, the thesis argues that there is gendered and sexualised bias present in the ECtHR jurisprudence which alters the Court's line of reasoning to support the outcome compatible with heteronormativity and its broader implications. This conclusion was reached by analysing and critiquing the Strasbourg adjudication on the two most controversial and problematic areas, namely family- and asylum-related rights.

Within the first area, it was observed that the ECtHR upheld the heteronormativity of the crucial social institutions of marriage and adoption. It perpetuated the narrative of queer people as 'the other', which is opposed to heterosexual subject of human rights entitled to the comprehensive protection of the Convention. The Court instrumentalised a wide margin of appreciation as a shield from the necessity to reject heteronormative assumptions and engage in the substantive analysis of the corresponding rights and other relevant aspects necessary for impartial adjudication.

Concerning asylum-related rights, such areas as credibility assessment, discretion requirement, and the mere criminalization of consensual same-sex relations were addressed to elucidate the suspected presence of the gendered and sexualized bias. The thesis shows that the heteronormative stance of the ECtHR upholds the binary heterosexist narratives which in the queer asylum context are transformed into acceptance of controversial credibility assessment methods, application of the concealment reasoning to enable refugees' removal, and normalization of the criminalization laws. The bias, moreover, is shown to intersect with racism, cultural othering, and homonationalism that affect asylum seekers outside the sexual and gender binary to a greater extent. Lastly, the thesis addresses broader legal, political, and social implications following the said restrictive ECtHR jurisprudence to reveal its strong *erga omnes* effects on queer-related legislation, policies, and social attitudes in the CoE states.

Preface

This thesis was written as a part of my education at Lund University which was enabled by the Swedish Institute. I would like to express my sincere gratitude to both the Swedish Institute and Lund University for providing me with this incredible opportunity to pursue my goals. I am grateful to my professors, my supervisor Christoffer, my parents, and my dearest friends Pedro, Maria, and Anna who have wholeheartedly supported me during these challenging yet particularly memorable years.

This thesis is inspired by the former and present queer activists and revolutionaries that have put and continue putting significant efforts to change the detrimental discriminatory and stigmatising reality surrounding many queer people. It is an honour to provide a theoretical contribution to the struggle for the full emancipation of (queer) people.

I would like to dedicate this work to the brave asylum seekers who despite the plight in their countries of origin continue their fight and expose Western hypocrisy. My thoughts are especially with those experiencing the undignified detriment of being forced to hide their true selves.

I am also dedicating this thesis to the brave (queer) defenders of Ukraine who took arms against the antihuman Russian state to protect the values of freedom, equality, and social justice.

In honour of everyone who lost their youth, family, friends, home, or life because of whom they love(d).

Abbreviations

CoE	Council of Europe
ECHR, the Convention	European Convention of Human Rights
ECtHR, the Court	European Court of Human Rights
EU	European Union
FIDH	International Federation for Human Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Commission of Jurists
ILGA	International Lesbian, Gay, Bisexual, Trans, and Intersex Association
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
US	United States
UK	United Kingdom
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Issue in focus

As Jack Balkin rightly noted, 'what becomes law is the text as read, rather than the text as written'.[1] While this is the reality which might be applicable to any law existent, it is particularly so concerning the European Convention of Human Rights (hereafter – the ECHR or the Convention) that the European Court of Human Rights (hereafter – the ECtHR or the Court) considers to be 'a living instrument'. That is, as being interpreted dynamically, 'in the light of present-day conditions',[2] which may deviate from the principles laid down in the Vienna Convention on the Law of Treaties (hereafter – VCLT). This emphasizes the value of the judicial interpretation, somewhat fuelling the struggle between judicial activism and judicial restraint, especially in the most controversial aspects of human rights, for instance, related to bioethics, new technologies, the environment, and others. One such aspect has always been the rights of people of diverse sexualities, genders, and sex characteristics[3] which the Court has somewhat actively addressed over the last decades. As of the end of 2017, there have been more than 100 cases concerning the said rights decided.[4] Within this context, there have been many milestone positive changes following the Court's progressive interpretation of the Convention, including outlawing the criminalization of homosexual relations

[1] Jack Balkin, 'Deconstructive Practice and Legal Theory', 96 *Yale Law Journal* (1987) 782.

[2] *Tyrer v. the United Kingdom*, ECtHR, App. No. 5856/72, judgment of 25 April 1978, para. 31.

[3] For the purposes of this thesis such terminology is set to be the most appropriate due to its inclusivity, diversity, comprehension, and departing from the 'westernised' self-identity-based labels such as LGBTQI+. The adopted terminology is rather technical yet at the same time inclusive not only of sexuality, sexual behaviour, sexual practices, and sex characteristics but also of potential identities, though not necessarily, that often may be attached to those categories. Regardless, other terms of addressing people outside of heteronormativity and gender binary will be used in certain contexts. In this thesis the term 'diverse sexualities' refers to the ones lived and/or (self) perceived, and the term 'diverse genders' includes both gender (self) identities and gender expressions.

[4] Damian A Gonzalez-Salzberg, 'An Introduction to Queer(ing) Human Rights Law', in *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law*, Oxford: Hart Publishing, 2018, 1–27, 8.

between consenting adults,[5] different ages for sexual consent between homo- and heterosexual people,[6] prohibition of homosexual people to serve in the military,[7] and (homo)sexuality-based limitation of the right to individual adoption,[8] among others.

It is difficult to underestimate the positive implications of the ECtHR's jurisprudence for progressive human rights interpretation, implementation, protection, and broader application to comply with demands of inherent inalienable human dignity. Such changes are present and visible through legal, political, and social dimensions, as it is evident that overall political, legal, and policymaking narratives, as well as social attitudes, on the reality outside the sexual and gender binary have significantly improved over the last decades in most of the CoE states.[9]

At the same time, the jurisprudence of the Court concerning the abovementioned rights reflects – as argued in this thesis – systemic persistent conservatism when it comes to other relevant aspects such as interpretation of the family, marriage equality, asylum-related rights of queer asylum seekers, prohibition of homo-transphobic hate speech and others. In particular, in *Schalk and Kopf v. Austria*,[10] a milestone decision addressing the right to marry for persons of the same (documented) gender, the ECtHR held that the absence of marriage equality violates neither Article 12 nor Article 14 in conjunction with Article 8 of the Convention as these provisions cannot be regarded as imposing an obligation to grant same-sex couples access to the institution of marriage. The Court has persistently avoided assessing the substantive nature of this right and builds its standpoint solely on the wide, in the view of the Court, margin of appreciation and the lack of consensus on the perception of marriage across the Contracting States.[11]

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[5] *Dudgeon v. United Kingdom*, ECtHR, App. No. 7525/76, judgment of 22 October 1981.

[6] *L. and V. v. Austria*, ECtHR, App. Nos 39392/98 and 39829/98, judgement of 9 January 2003.

[7] *Smith and Grady v. United Kingdom*, ECtHR, App. Nos 33985/96 and 33986/96, judgment of 25 July 2000.

[8] *E.B. v. France*, ECtHR, App. No. 43546/02, judgment [GC] of 22 January 2008.

[9] ILGA Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People Covering Events that Occurred in Europe and Central Asia between January-December 2022*, February 2023, available via the website of ILGA Europe.

[10] *Schalk and Kopf v. Austria*, ECtHR, App. No. 30141/04, judgment of 24 June 2010.

[11] ibid., paras 100–109.

Another problematic overarching judgment is *M.E. v. Sweden*[12] which touches upon some asylum-related rights of persons of diverse sexualities, genders, and sex characteristics. The ECtHR has engaged in highly controversial reasoning, particularly regarding the acceptable level of proof in sexuality-related asylum claims (obligation to provide proof of sexuality) and the concealing of sexual identity (discretion requirement).[13] Moreover, the Court's questionable standpoint significantly differs from the one of another major judicial institution in the region – the Court of Justice of the European Union (hereafter – the CJEU).[14]

Very often the described ECtHR jurisprudence, which elucidates the Court's broader perception of human rights of persons outside the sexual and gender binary, faces substantive criticism from different actors, including NGOs in the human rights sector, academic scholars, policymakers, and politicians. The criticism is thus jointly projected through legal, political, and social dimensions, as these are the areas most affected by the negative implications of the Court's jurisprudence. Furthermore, having the presumption of just, equal, and non-discriminatory protection of human rights as a fundamental core of democratic order being the ultimate goal of the Court, the certain stances of the judicial body are difficult to reasonably perceive or explain. It would be challenging to do so particularly when interpreting the Convention as 'a living instrument' (which should be regarded following the modern-day reality) and in accordance with the fundamental principles of law such as equality, non-discrimination, justice, and respect for dignity.

It is true that when the Convention was drafted and came into force, the legal, social, and political reality surrounding the treatment of persons of diverse sexualities, genders, and sex characteristics was drastically different. It is obvious that the document was forged to protect what was acceptable and seen as a value by European societies at the time, where there was no moral space for the said individuals and homosexuality was criminalized in many countries. Since then, the situation has changed dramatically and now homosexuality and bisexuality are

[12] *M.E. v. Sweden*, ECtHR, App. No. 71398/12, judgment of 26 June 2014.

[13] ibid., paras 86–88.

[14] *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, CJEU, joined cases C-148/13 to C-150/13, judgment [GC] of 2 December 2014.

scientifically perceived as two of the three most common 'normal aspects of human sexuality'.[15] However, despite this scientific 'equation' of sexualities, the political, legal, and thus social equality has not been nearly achieved, in which the ECtHR has been playing crucially important role.

When it is especially difficult to agree with the Court regarding major stances on the rights of persons outside of the sexual and gender binary and find the persuasive substantive legal arguments to explain them, political motivation could be suspected behind such reasoning. The said motivation can potentially derive from any ideology or beliefs hidden behind politically appointed judges of the ECtHR, which are 'susceptible to unilateral political influence'.[16] However, it would become particularly problematic if such motivation is *biased*. Potential presence of any bias jeopardizes impartiality as the core principle of justice, which is perceived, following Dworkin's definition, as treating all parties as equals, implying evaluation 'on the extent to which they observe their obligations rather than on factors unrelated to their rights and obligations'.[17] Such unrelated factors can be of the most diverse nature, especially those constituting conventionally protected characteristics such as age, gender, religion, and including sexuality, gender identity and expression, and sex characteristics.

While the ECtHR has a very strong positive reputation not only within the European region, but also abroad, as it is a rather uniquely powerful regional institution, it is far from being flawless, especially considering the strong political state-supported mechanism of functioning. Indeed, the judges are appointed within the governmental preferences for the more deferential judicial body, which leads to selection of more restrained judges.[18] Moreover, recent research has revealed that at least 22 out of 100 judges serving at the Court between 2009 and 2019, having strong links with some frequently involved NGOs, failed to recuse themselves in

[15] American Psychological Association, *Sexual Orientation and Homosexuality*, 29 October 2008, available at the APA's website.

[16] Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights', 64 *International Studies Quarterly* 4 (2020) 770–784, 773.

[17] Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights, 102 *The American Political Science Review* 4 (2008) 417–433, 417.

[18] Stiansen and Voeten (n 16) 773.

roughly 90 cases even where parties were represented by their former employers.[19] Whilst the said reality might have compromised compliance with the principles of impartiality and independence, one may suspect that other such factors may also be involved. In particular, the international judges have shared concerns for the Court's institutional capacities, and thus they are vulnerable to the risks of legislative override, non-compliance, and post-service annulling of the governmental support, which hence fuel their potential career insecurities.[20] Furthermore, while the national, cultural, and geopolitical aspects cannot be left without consideration, there can also be a reasonable assumption made that the majority of the judges are 'policy seekers' that adjudicate to pursue their values and policy agenda.[21]

Notwithstanding, it is almost impossible to identify and reveal the potential sexualized and gendered bias in the Court's practice as it is deeply hidden behind the judges' profoundly personal set of thoughts and values. At the same time, a potential way to address this issue is to review the corresponding jurisprudence and its legal quality to identify certain patterns that could indicate or imply existence of the bias, which shall be the primer focus of this thesis.

The central idea of this paper is based on the premise that the inner resistance the Court encounters when addressing the rights of persons of diverse sexualities, genders, and sex characteristics and preventing them from full emancipation, is not of legal nature, but political. The abovementioned creates an issue which has both theoretical and practical dimensions. The former relates to the substantive suspicion arising around the sexuality- and gender-related jurisprudence of the Court, particularly its impartiality and legal quality. The latter aspect entails the legal, political, and social implications of depriving the affected persons of one of the few protecting mechanisms available to serve in their interest and defence.

[19] European Centre for Law and Justice (ECLJ), *NGOs and the Judges of the ECHR 2009-2019*, by Grégor Puppinck and Delphine Loiseau, February 2020, available at the ECLJ's website.

[20] Voeten (n 17) 417.

[21] ibid.

1.2 Research objectives

Therefore, the research objective, reflecting the multi-faceted nature of the issue, is to bring forward and challenge the relevant sexualised and gendered political hegemonies present in the ECtHR jurisprudence. While there has been a lot of criticism directed against specific aspects of the jurisprudence such as the absence of marriage equality and restricted parental and asylum-related rights, there is no comprehensive assessment targeting the possibility of the broader gendered and sexualised bias existence in the Court. The goal, however, is not limited to academia only, but rather strives to affect and influence the practical application of the Convention to comply with its true purpose of 'the maintenance and further realisation of Human Rights and Fundamental Freedoms'.[22] In the broader sense, the research shall contribute to challenging the long-lasting domination of institutional heteronormativity and heterosexism in the legal, political, and social reality, where the European Human Rights Law is not an exception.

1.3 Research question

The main research question is, thus, weather there is and to what extent a gendered and sexualized bias present in the ECtHR's jurisprudence concerning the rights of people of diverse sexualities, genders, and sex characteristics.

To answer the main research question, it is necessary to answer the following *sub-questions*:

- When identified, to what extent the bias affects/compromises the adequacy of access to the rights guaranteed by the ECHR?
- What are the broader legal, political, and social implications of such a bias to the existent human rights application?

1.4 Methodology

The methodological point of departure will be a doctrinal analysis to thoroughly investigate the sexualized and gendered jurisprudence of the ECtHR, namely by

[22] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

addressing substantive argumentation and legal quality of the Court's positions on selected aspects of the rights outside of the sexual and gender binary. The application of the method supposes the potential conclusions to both reflect the state of the Convention application and to fill the potential gaps arising from the inner-Court resistance to fully emancipate the affected individuals.

Most importantly, the research will be framed through the queer theory perspective. It is therefore reasonable to make some general comments on the matter, considering that there is no unanimous agreement among scholars as to how queer theory can be defined. One of the potential definitions could be taken from Sedgwick's interpretation, namely 'the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning when the constituent elements of anyone's gender, of anyone's sexuality aren't made (or can't be made) to signify monolithically'.[23] Another more practical description of the theory could be 'a deconstructive strategy that aims at denaturalising heteronormative understandings of genders and sexualities'.[24]

It is doubtful, however, that any specific definition could elucidate the perspective at its core and its potential influence on other areas such as law. Hence, the key characteristics of the queer, as summarised by Gonzalez-Salzberg, are as follows and will be correspondingly applied through this thesis *to* and *against* the line of the Court's reasoning to assess its jurisprudence. First, the perspective is significantly influenced by Foucault's philosophy, namely through the tools of discourse production, which highlights that the ideas and the language instrumentalised to refer to a certain reality are not just descriptive but also truth-constructional, and discourse deconstruction, as a denaturalising tool of the theory.[25]

Then, both the notions of sex and gender are perceived to be the historical and cultural constructs that mean the same, rather than gender being a social construct based on the biological category of sex.[26] They are categorised by performativity, which is not a matter of person's agency, but an implication of

[23] Eve Kosofsky Sedgwick, 'Queer and Now', *Tendencies*, Taylor & Francis, 1994, 7.

[24] Gonzalez-Salzberg (n 4) 22.

[25] ibid., 13.

[26] ibid., 15-16.

'constraining regulatory regime based on hierarchical differences, taboos and prohibitions'[27] and 'the threat of ostracism and even death controlling and compelling the shape of the production'.[28] Simultaneously, a relatively new 'invention' of human sexuality is culturally constructed within the two opposite binaries of homosexuality and heterosexuality which, in turn, draw their meaning from the contrast perception of each other and rejection of other forms of identity.[29]

The theory emphasises that identities are forged not only based on their own perceived characteristics but necessarily in opposition to the opposite of such identity, the so-called 'the other', the minority, which in the sexual binary context encompasses homosexuality.[30] Furthermore, every individual is set to be categorised within the sexual binary due to the ideological and cultural nature of (sexual) identity creation which 'established particular consequences for those positioned in the 'wrong' category'.[31] Due to the long history of pathologizing the homosexual (identity) such consequences are still widespread, and while in the CoE context these implications may seem less visible, in comparison, for instance, with states criminalising non-heterosexual relations, they are nonetheless structural and systematic.

Queer theory aims at challenging and critiquing identities by denouncing them as natural, absolute, objective, and necessary and, on the contrary, deeming them as artificial, arbitrary, and unstable. It strives to denaturalise and deconstruct such perception of identities particularly by targeting the binary categorisation of two sexes/ genders with their attributed normativity and heterosexuality/homosexuality as normal/abnormal and by recognising other forms of identity or even the absence of it.[32] The queer, furthermore, aspires to question the aspects that are not perceived as sexuality-related and to queer re-read

[27] ibid.

[28] Judith Butler, 'Phantasmatic Identification and the Assumption of Sex', *Bodies That Matter*, Routledge, 2011, 60.

[29] Gonzalez-Salzberg (n 4) 16-17.

[30] Arlene Stein and Ken Plummer, 'I Can't Even Think Straight' 'Queer' Theory and the Missing Sexual Revolution in Sociology', 12 *Sociological Theory* (1994) 178, 182.

[31] Gonzalez-Salzberg (n 4) 17.

[32] ibid., 19.

'ostensibly heterosexual or non-sexualised texts' as even those supposedly neutral areas and regulations are soaked with heteronormativity.[33]

Heteronormativity, as proposed by Berlant and Warner, can be understood as 'the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent … but also privileged'. The said heterosexual privilege is rather *prima facie,* acquired/used unconsciously, and takes noted or unnoted forms or projected as 'an ideal or moral accomplishment' and is 'sustained by the legal discrimination' of non-heterosexuals.[34]

The following features of heteronormativity as the central concept of the theory should be highlighted. Firstly, there is a presumption of heterosexuality of people and their binary gender, which is deeply reinforced by social and legal norms, policies, practices, and institutions.[35] Secondly, the concept of heteronormativity initially includes (traditional) heterosexism, often limitedly referred to as a much simpler concept of homophobia, as discriminatory 'processes, acts, and attitudes' excluding, oppressing, and marginalizing persons of diverse sexualities, genders, and sex characteristics. It can be expressed on both individual, taking the form of everyday discrimination, and socio-political levels, represented in antiqueer legislation.[36] Thirdly, heteronormativity is overarched by invisibility as its biggest driving force, preventing societies from seeing such a social force 'that privileges some while oppressing others', thus safeguarding itself from being abolished.[37] Then, in contemporary societies, law is 'central to the creation, maintenance and reproduction of heteronormativity' with its role being the most important tool to guarantee the privilege and 'effortless superiority' of heterosexuality even when it results in 'hardship to those living outside those boundaries'.[38]

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[33] Stein and Plummer (n 30) 182.

[34] Lauren Berlant and Michael Warner, 'Sex in Public' 24 *Critical Inquiry* (1998) 547; Rachael D Goodman and Paul C Gorski, *Decolonizing 'Multicultural' Counselling through Social Justice,* Springer, 2014, 31; Paul Johnson, 'Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority', 20 *Social & Legal Studies* (2011) 349, 351.

[35] Berlant and Warner (n 34) 558–560; Goodman and Gorski (n 34) 27.

[36] Goodman and Gorski (n 34) 28.

[37] ibid.

[38] Johnson (n 34) 350.

Lastly, and most importantly, heteronormativity encompasses other forms of forced normativities that in the context addressed by queer theory act and influence the conceptualisation of identities simultaneously. Those may include sexual imperative, highlighting the assumption that sexuality is equally vital for all individuals, repronormativity, deeming reproduction as a life-driving force, mononormativity, embracing monogamy as the preferred kind of relationship.[39] It is the broader goal of queer theory to address these normativities as well as all the institutions and regimes reinforcing the prevalence of heteronormativity and the binary division of two sexes/genders and one accepted sexuality, the most essential of which could arguably be law, both on the written and interpretative levels.

The abovementioned queer theory standpoints shall be applied directly *to* and *against* the main argumentation of the ECtHR relevant jurisprudence on the reality outside the gender and sexual binary. It will be used to substantively challenge such line of reasoning but also to understand and explain why the Court adopted those stances in the first place. It shall not, however, be the aim of this piece of academic scholarship to engage in the debate if queer theory and the human rights regime can be compatible and thus if law, namely human rights, can be queered. Instead, at the centre of the thesis methodology lies the assumption that law can and should be queered to constructively combine achievements of both queer theory as postmodern creation and human rights as a liberal concept to achieve the closest to *just* the affected persons could get.

1.5 Scope and limitations

For the purposes of this thesis gender will not have the primary focus of the analysis, namely regarding the rights of transgender individuals as such. However, it will be actively used to address the way the Court has constructed the narrative of sexuality in its jurisprudence as these two notions are closely linked and inseparable in their mutual influences, or rather perception/normativity of such binary influences (e.g., heteronormativity would imply that a person of a certain perceived gender *is supposed to* be attracted to a person of the opposite binary gender).

[39] Gonzalez-Salzberg (n 4) 20–21.

The thesis does not strive either to address all the ECtHR jurisprudence on sexuality, but rather selects the most problematic milestone judgements that are preventing persons of diverse sexualities, genders, and sex characteristics to be fully emancipated, namely in the aspects of family- and asylum-related rights.

1.6 Outline

The next chapter will address the analysis of the ECtHR jurisprudence on family-related rights of persons outside the sexual and gender binary. Queer theory will be instrumentalised to elucidate the main arguments built through the chapter, namely that the Court failed to address and reject heteronormativity of marriage, adoption, and queer parenting and instrumentalised a wide margin of appreciation to reaffirm heteronormativity of the said institutions. Chapter 3 is dedicated to the Court's stances on queer asylum seekers' rights. The analysis encompasses the aspects of credibility assessment, discretion reasoning, criminalisation of same-sex sexual conduct, and the intersection of heteronormativity with racism, cultural othering, and homonationalism. Chapter 4 concerns the broader legal, political, and social implications of the restrictive ECtHR jurisprudence through *erga omnes* effects, followed by the conclusion.

2 Addressing family-related rights through the prism of Article 12 and Article 14 in conjunction with Article 8 ECHR

When it comes to addressing the jurisprudence of the ECtHR on the rights of persons of diverse sexualities, genders, and sex characteristics, one of the most significant, problematic, and still currently debated aspects concerns family-related rights, particularly those arising from the marriage institution. The significance of family-related rights to people outside the gender and sexual binary is difficult to underestimate as historically non-heterosexual relationships have been met with rejection, discrimination, stigmatisation, and persecution. A person's sexuality and gender are at the heart of the said rights and the corresponding narrative as it concerns, first and foremost, the subject of romantic and/or sexual attraction that arguably reaches its peak in a consensual committed relationship which may lead to the desire of the state officialization. The truth-constructing narrative around diverse sexualities, genders, and sex characteristics is determinative for the aim of the full emancipation of the concerned persons. Having in mind the absence of a particular definition of family in the Convention, the said rights concerning marriage and related family aspects remain 'specifically gendered and (hetero) sexualised and, in turn, so is the human entitled to them'.[40] Law, and its judicial interpretation correspondingly, has a vital influence on constructing the narrative around the family as a societal structural element and its essential characteristics, as well as power relations within, with society, and with the state.[41] A closer examination of the Court's relevant jurisprudence will elucidate major inconsistencies, gaps, and lack of persuasive line of argumentation, which in turn may be an indication of biased adjudication.

[40] Damian A Gonzalez-Salzberg, 'LGBT Families and Non-discrimination', in *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law*, Oxford: Hart Publishing, 2018, 94–119, 94.

[41] Naomi Cahn, 'The New Kinship', 100 *Georgetown Law Journal* (2012) 367, 381.

2.1 Failure of the Court to address and reject the heteronormative perception of marriage

While the ECtHR has developed a somewhat broad jurisprudence concerning family-related rights, particularly marriage equality, this thesis will concentrate specifically on *Schalk and Kopf v. Austria* as the most important milestone case where the Court for the first time accessed the possibility of same-sex couples' accessibility to marriage under Article 12 ECHR and which is reiterated in the latest jurisprudence of the Court.[42] The case concerned two Austrian nationals of the same gender in a committed romantic relationship as a same-sex couple who declared their intention to marry before the national authorities, which, however, was rejected under the Austrian national legislation that contained the different-sex requirement to enable conducting marriage.[43] The key issue when the case appeared before the Court was whether the absence of marriage equality was contrary to the Convention, namely whether the right to marry and the prohibition of discrimination in conjunction with the right to private and family life covers same-sex relations and poses an obligation to establish access for same-same couples to the institution of marriage.

At first glance, the case can be seen as somewhat progressive because the ECtHR recognised several important aspects in favour of persons of diverse sexualities, genders, and sex characteristics. In particular, it referred to its previous jurisprudence regarding the marriage of transgender persons and stated that following the major social transformation in the institution of marriage since the adoption of the Convention the perception of gender was no longer limited to merely biological criteria.[44] Recognizing that family exists regardless of marriage, following the rapid evolution of same-sex relations perception in the Contracting States, the ECtHR equated relations of same-sex couples with the ones of opposite-sex couples, thus concluding that committed stable cohabiting same-sex relations constitute both 'private life' and 'family life' within the meaning of Article 8

[42] *Schalk and Kopf v. Austria* (n 10).

[43] ibid., paras 7–9.

[44] ibid., para. 52.

ECHR.[45] Comparing the Charter of Fundamental Rights of the European Union and the Convention, the Court no longer considers that the right to marry applies exclusively to different-sex couples, which has notably been a very important change from the very conservative stance prevalent in the ECtHR jurisprudence for many years.[46]

While having some positive outcomes towards interpreting Article 12 and Article 14 in conjunction with Article 8 of the Convention, such as the conclusion that individuals of the same gender are not necessarily excluded from marriage under Article 12, the Court, however, failed significantly to recognize, address, and redress the heteronormativity of marriage. As Paul Johnson argues, the 'strong' and 'pervasive' heteronormative perception of the institution of marriage is enshrined in the ECtHR's jurisprudence.[47] Indeed, the Court further elaborated that even though marriage equality had already been established in some of the CoE Member States, this was their unique understanding of the institution in their societies rather than the interpretation derived from Article 12 of the Convention.[48]

It can be inferred from the judgement that the above-mentioned positive developments, gradual rethinking, and deconstruction of the narrative surrounding people of diverse sexualities, genders, and sex characteristics do not lead to the emergence of the obligation to establish marriage equality, in a similar way as the rejection of procreational purpose of marriage does not merely address same-sex marriage.[49] This is due to the different social and cultural perceptions in different societies creating the lack of consensus among the Contracting States, which the Court used as a justification to apply a wide margin of appreciation.[50]

The obligation to establish marriage equality, in the Court's opinion, cannot be derived from Article 14 in conjunction with Article 8 of the Convention either, as these provisions are even broader and must be interpreted in harmony with other

[45] ibid., paras 91–95.

[46] ibid., paras 54–55, 61.

[47] Paul Johnson, *Homosexuality and the European Court of Human Rights,* Routledge, 2014, 151.

[48] *Schalk and Kopf v. Austria* (n 10) para. 53.

[49] ibid., paras 56, 60–61.

[50] ibid., paras 58, 62.

articles.[51] Moreover, following a similar line of reasoning that same-sex couples' rights recognition being evolving matter with lacking consensus, the ECtHR alleged that there had not been an obligation to establish any form of legal recognition earlier than the state did.[52] Finally, the Court argued that the said margin of appreciation allows the states to establish their own regime and scope of rights that follow certain ways of relationship recognition other than marriage.[53]

The ECtHR assessed the wordings contained in Article 12 of the Convention, namely 'men and women', reaching the understanding that it does not necessarily exclude the possibility of marriage between persons of the same sex, however, still confirmed the heteronormative perception of marriage enshrined in the Convention.[54] The Court has touched upon the possibility to adopt the more progressive interpretation of Article 12 ECHR, yet still rejected it, despite scholars and the human rights sector supporting such an interpretation. Indeed, the wording in Article 12 ECHR leaves space for non-heteronormative interpretation of limiting the right enshrined in the article exclusively to heterosexual persons.[55] Rather, there is no direct requirement for men to marry women and the other way around, as the article follows as 'men and women of marriageable age have the right to marry'.[56] By rejecting this reading of the text, the Court has found '…in Article 12 the source of the heterosexuality of the subject of human rights'.[57]

The Court thus engaged in truth-constructing or reaffirming the narrative of the exclusively heterosexual institution of marriage as a human right. The construction of heterosexual individual as the subject of human rights, namely 'the

[51] ibid., paras 100–101.

[52] ibid., paras 102–106.

[53] ibid., paras 107–109.

[54] ibid., para. 55.

[55] Robert Wintemute, 'Strasbourg to the Rescue? Same-Sex Partners and Parents', in Robert Wintemute and Mads Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, Hart, 2001, 713–729, 728; Damian A Gonzalez-Salzberg, '(Homo)Sexuality before the Court', in *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law*, Oxford: Hart Publishing, 2018, 59–93, 61.

[56] ibid.; ECHR (n 22).

[57] Gonzalez-Salzberg (n 55) 61.

one entitled to every right established in the Convention', automatically invalidates and shapes non-normalised sexuality as 'the other' simultaneously removing it from the overall narrative.[58] The Article 12 ECHR would thus be read as:

> 'The heterosexual subject conceived by the Convention has the human right to marry a person of the 'opposite' sex and to engage in reproductive sexuality in order to found a family'.[59]

The heteronormative line of reasoning prevailing in the ECtHR's relevant jurisprudence on family-related rights indicates that the Court has been instrumentalising its power to protect the Western model of sexuality, namely the one formed around the sexual binary of normalised heterosexuality and abnormal homosexuality, or 'the other'.[60] The main instrument in achieving such a goal has been ensuring that the homosexual subject of human rights is kept away from full emancipation. According to this line of thought, potentially threatening the heteronormative narrative would cause serious concerns and

> 'If that were to happen, the stability of the heterosexual identity, as the true subject of human rights, would be jeopardised by the blurring of the dividing line between the self and the other'.[61]

Admittedly, the Court has asserted that a violation of Article 14 ECHR arises with the existence of differential treatment of individuals in 'relevantly similar situations' without objective and reasonable justification of pursuing legitimate aim and being proportionate.[62] Moreover, sexuality-related differences require particularly weighty reasons for the states to justify the difference in treatment.[63] The Court, nonetheless, normalised the establishment of separate institutions for the same purpose of relationship recognition with the mere characteristic of sexuality being the criteria to determine who can afford the broader or narrower

[58] ibid.

[59] ibid.

[60] ibid., 79.

[61] ibid.

[62] *Schalk and Kopf v. Austria* (n 10) para. 96.

[63] ibid., paras 96–98.

recognition. Despite alleging that it sees both different-sex and same-sex relationships as having an equal value, the ECtHR did not find it discriminatory to continue categorising people into normal and abnormal, privileged and those without it. It did not provide specific reasoning as to what constitutes those 'particularly weighty reasons' that may justify continuing the narrative of lesser value and deserving of being able to enter the institution of marriage.

It is evident that the stance of the ECtHR to require states to provide alternative ways of same-sex couples recognition in the absence of marriage equality[64] has a positive dimension. Indeed, this requirement implies that such couples can be afforded at least some level of recognition and protection from the state, compared to the absolute absence of it. However, the creation of a separate legal regime, even if such a regime would be as similar as possible to the institution of marriage in terms of rights and privileges attached to it, is inherently discriminatory and unjust in relation to people of diverse sexualities, genders, and sex characteristics. Particularly because the right to marry has been constructed in the way that it belongs to everyone, regardless of the presence or absence of certain characteristics. Affording same-sex couples the possibility of entering a lower-class institution only is correspondingly an attempt to construct or reaffirm the truth of non-normalised otherness of persons outside the sexual and gender binary.

This matter was considered by the courts outside of the CoE and EU, which show clear contradictions to the stance of the ECtHR. The Connecticut Supreme Court in *Kerrigan v. Commissioner of Public Health* (2008)[65] has held that dividing people based on sexuality into separate marriage and civil partnership regimes is an unlawful practice of segregation and constitutes 'cognizable harm' to the dignity of the affected persons.[66] Similarly, the inconsistency between the regimes of marriage and civil partnerships is not 'innocuous' because it is 'a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual,

[64] *Oliari and others v. Italy*, ECtHR, App. Nos 18766/11 and 36030/11, judgement of 21 July 2015, paras 185–187.

[65] *Kerrigan v. Commissioner of Public Health*, Supreme Court of Connecticut, judgement of 28 October 2008.

[66] ibid., 142.

couples to second-class status'.[67] Likewise, the Inter-American Court of Human Rights perceives creating two distinct institutions that guarantee the same rights yet are called differently 'to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them' senseless and discriminatory based on person's sexuality.[68] It, furthermore, touched upon the notion of heteronormativity, arguing that:

> 'there would be marriage for those who, according to the stereotype of heteronormativity, were considered 'normal', while another institution with identical effects but with another name would exist for those considered 'abnormal' according to this stereotype'.[69]

Such logic of the described segregation impermissibility is, moreover, spread among states, for instance, the Canadian Civil Marriage Act (2005) indicates that any other institution that is not marriage violates the dignity of same-sex couples and is unable to ensure 'the right of couples of the same sex to equality without discrimination'.[70]

Then, the Court's perception of the institution of marriage is seemingly based on the heteronormative assumption that marriage has always existed to officialise the romantic relationships between heterosexual men and women. The judgement in *Schalk and Kopf* marked the shift from the explicit perception of marriage as an exclusively heterosexual institution, which was prevalent in the earlier jurisprudence, particularly that concerning marriage of transgender individuals.[71] While the ECtHR has still been both explicitly and implicitly engaging in truth-construction of such a narrative, it is questioned, in particular, by

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[67] ibid., 152.

[68] *Advisory Opinion OC-24/17 Requested by the Republic of Costa Rica on Gender identity, And Equality and Non-Discrimination and Same-Sex Couples*, Inter-American Court of Human Rights, 24 November 2017, para. 224.

[69] ibid.

[70] Civil Marriage Act (S.C. 2005, c. 33).

[71] Damian A Gonzalez-Salzberg, 'Of Marriage, Partnerships and Parenthood (and Marriage Once Again)', in *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law*, Oxford: Hart Publishing, 2018, 120–157, 128–129.

queer theorists. Even though the Court further departed from the basic narratives of adequacy of criminalisation of same-sex conduct (within the context of the CoE which is important for the analysis in the next chapter) and rejected the view that the only acceptable sexual conduct is between a man and a woman, the current line marked between the rights of normalised heterosexual people and 'the others' concerns 'relationships, conjugality, and the idealisation of the heterosexual couple'.[72]

As the US Supreme Court pointed out, the institution of marriage has been largely influenced by social and legal developments and thus has been evolving. The Supreme Court refuted the common belief that marriage has always been a free union of a man and a woman. For example, the Court described the origin of marriage as an agreement between the parents of a couple or elders of the families, which was formed on the basis of political, religious or financial needs.[73] This version of marriage completely mismatched its contemporary established mandatory elements such as free consent of the participants, the minimum age, and, finally, the desire, based on a romantic relationship, to create a family as the main goal of these agreements. Subsequently, the institution evolved to be understood as a single legal patriarchal entity, which, however, did not take into account the will and rights of women in any way. Only after the recognition of most women's rights, marriage was given the meaning of a free union between a man and a woman, the particular form of which thus has a very short history.[74]

Moreover, queer theorists argue that the ECtHR itself has shown in its jurisprudence, contrary to its long-lasting heterosexist position, that marriage has not always been exclusively heterosexual.[75] This can be inferred from the earlier jurisprudence regarding the right of persons of diverse genders to marry. In *Cossey v. the United Kingdom* (1990),[76] the Court denied the right of a transgender applicant to marry a person of the opposite gender, yet indicated that the applicant's

[72] Gonzalez-Salzberg (n 55) 59.

[73] *Obergefell v. Hodges*, 576 U.S. 644 (2015) 6–7.

[74] ibid.

[75] Gonzalez-Salzberg (n 71) 129–130.

[76] *Cossey v. the United Kingdom*, ECtHR, App. No. 10843/84, judgement of 27 September 1990.

right to marry was not violated.[77] This meant in practice that as soon as transgender individuals marry someone of the same gender, or, in the Court's view, of the opposite biological sex to that transgender individuals were assigned at birth, it was allowed and violated neither their rights nor the national legislation.[78] Thus, while applying transphobic reasoning, the Court openly queered the institution of marriage. Such a queer precedent was, however, later overruled by the judgement in *Christine Goodwin v. the United Kingdom* (2002).[79] The ECtHR took a more progressive stance on the rights of transgender individuals by rejecting for the first time that '…these terms [the right of a man and woman to marry] must refer to a determination of gender by purely biological criteria'.[80]

This turn in the Court's position normalised gender change and the (hetero)sexuality of transgender individuals simultaneously reaffirming the heteronormativity of marriage and denying the right to marry of transgender individuals of diverse sexualities.[81] The reasoning for such change can additionally reveal the structural heterosexism behind the Court's jurisprudence. It can be inferred from the queer theory aspects mentioned in the introduction that deeply heterosexist institutions strive to preserve the existent gender and sexual binary, and the marriage institution appears crucial in this struggle. When challenged with cases concerning persons of diverse genders, the Court was forced to choose the lesser threat to heteronormativity: normalising gender transitioning or normalising homosexual marriage of transgender individuals. The Court sided with the former seeing no substantial danger to heteronormativity of marriage[82] since '…it is possible to cross genders, while at the same time reinforcing the stability of gender by insisting on a choice between two distinct gender categories'.[83] The ECtHR's choice may well rest on the widespread assumption that transgender people strongly

[77] ibid., para. 45.

[78] ibid.; Gonzalez-Salzberg (n 71) 129–130.

[79] *Christine Goodwin v. the United Kingdo,* ECtHR, App. No. 28957/95, judgement of 11 July 2002.

[80] ibid., para. 100.

[81] Gonzalez-Salzberg (n 71) 131.

[82] ibid.

[83] Aeyal Gross, 'Gender Outlaws Before the Law: The Courts of the Borderland', 32 *Harvard Journal of Law and Gender* (2009) 165, 228.

align to the stereotypical binary norms of their transitioned gender which results even in 'greater consistency than a straight cissexual person, since there has been an important element of will and sacrifice in order to achieve heterosexuality for straight transsexuals.'[84]

Moreover, the struggle of the ECtHR to preserve the heteronormativity of marriage led it to operate outside of gendered and sexual reality so that at least the institution remains exclusively heterosexual on paper. This can be seen, for instance, in *Hämäläinen v. Finland* (2014)[85], which concerned a transgender female applicant married to a cisgender woman and who could not obtain full recognition of her gender change while she was still married, as it would transform her marriage to a same-sex one, which was not provided for according to the law at the time.[86] Despite the fact that the applicant was forced to choose between (legally) living her true identity as a female and losing her marriage, the Court did not find any interference with her rights guaranteed by the Convention.[87] The Court's above-mentioned ignoring of sex characteristics on which the notions of sexuality and gender are constructed was exaggerated to the extent that the sexuality of the applicant would instantly change upon receiving state documents.[88] It elucidates that in reality, the ECtHR was

> '…protecting only the (legal) fiction of heterosexuality within marriage, an idea completely divorced from the materiality of sexual conduct, and only based on the literality of a label given to it by a legal document',[89]

regardless of actual sex characteristics, gender, and sexual identities attached to them.

The Court, overall, had not been able to reject exclusively sexual perception of same-sex relations leaving the romantic aspect of relationships behind, as well

[84] Gonzalez-Salzberg (n 71) 131.

[85] *Hämäläinen v. Finland*, ECtHR, App. No. 37359/09, judgement [GC] of 16 July 2014.

[86] ibid., paras 9–14.

[87] ibid., paras 88–89, 110–113.

[88] Gonzalez-Salzberg (n 71) 133.

[89] ibid.

as to accept equal dignity of persons of diverse sexualities, genders, and sex characteristics and the corresponding relationships they form.[90] This can be seen as a bright indicator of the ECtHR's heteronormative/heterosexist set of values, which prevented it from seeing the equal value of non-normalised relations compared to those of heterosexual persons. Even though *Schalk and Kopf* for the first time recognized that same-sex couples are equal to the ones of different-sex under the umbrella of private and family life, this has not progressed any further in relation to marriage even in the most recent jurisprudence of the Court.[91]

The Court's failure to engage with the issue impartially and outside of heteronormativity-related political values can be seen as a defensive behaviour of the ECtHR that privileges heterosexual marriage and can be compared with a 'lurching ship entering choppy unchartered waters' sought the safe harbour of heteronormativity'.[92] That is strongly related to the judges' interpretative set of ideas which correspondingly was a crucial point when deciding the case in respect of rejecting or, as in *Schalk and Kopf,* confirming heteronormativity.[93] Johnson also separately highlighted the very conservative and restrictive concurring opinion of Judge Malinverni joined by Judge Kovler calling it 'extremely nervous at the slightest hint' that Article 12 ECHR can be interpreted as imposing an obligation to establish marriage equality and 'an example of the panicked response that is frequently produced when heteronormative social relations are challenged'.[94] Such a standpoint of the Court can thus be perceived as tolerating and even reinforcing heterosexism with all the corresponding consequences of the reproduction of heteronormative privilege that persons of diverse sexualities, genders, and sex characteristics are coping with and will need to do so for uncertain period of time.

[90] Johnson (n 47) 152.

[91] *Schalk and Kopf v. Austria* (n 10), paras 91–95; *Chapin and Charpentier v. France,* ECtHR, App. No. 40183/07, judgment of 9 June 2016.

[92] Johnson (n 47) 157.

[93] Johnson (n 34) 350.

[94] Johnson (n 47) 157–158.

2.2 The margin of appreciation as a shield for heteronormativity

As it was previously noted, the Court merely relied on the margin of appreciation to support the outcome of *Schalk and Kopf*, however, its justification of the margin's applicability in the case and the related jurisprudence is rather poorly established. The 'slippery and elusive' concept itself is highly critiqued and is often viewed as 'a substitute for coherent legal analysis at the issues at stake', which in this case serves simply to avoid the critical challenging of heteronormativity and legitimize the politically acceptable outcome.[95] Indeed, in anti-discrimination cases, the Court applies its own multi-dimensional test, namely if the assessed aspects fit under the ambit of the Convention, whether there is a comparatively similar situation, if there is a differential treatment, and whether such treatment peruses a legitimate aim and is proportionate. Yet when it comes to the family-related rights of persons outside the sexual and gender binary, the judicial body often avoids such analyses, substituting them with a wide margin of appreciation. Even though the ECtHR itself highlighted the limited nature of the margin and thus affirmed that it 'goes hand in hand with European supervision',[96] the latter is not present in *Schalk and Kopf*.

The context in which the margin of appreciation has been applied in *Schalk and Kopf* shows the perceived hierarchy of rights the Court has been establishing. Notably enough, by not critically and substantially addressing the right to marry for same-sex couples, the Court once more backs heteronormative legal and social existence putting the rights of persons of diverse sexuality, gender, and sex characteristics under the lower place in the hierarchy, as the appliance of margin is in itself 'an expression of the moral reasoning of the Court'.[97]

The fact that the Court eventually closed the margin of appreciation regarding (criminalization of) same-sex sexual activities but not yet towards the right to marry is an example of the ECtHR, even slowly progressing, still being corrupted by its

[95] Johnson (n 47) 70, 75.

[96] *Handyside v. United Kingdom*, ECtHR, App. No. 5493/72, judgment of 7 December 1976, para. 49.

[97] Johnson (n 47) 71.

inability to push rejection of heteronormativity further to the extent that it can truly and impartially assess the marriage equality issue.[98] The latter example can also be seen as the implicit attribution of 'moral value' to the said sexual activities; the opposite can, however, be presumed in the situation of marriage equality – the Court, upholding heterosexual privilege and heterosexism, does not (implicitly) deem same-sex marriage as of equal moral value to the heteronormative one.[99]

The usage of margin and its justification in *Schalk and Kopf* and the Court's relevant jurisprudence is rather inconsistent; nor can it be clearly understood from a critical legal standpoint why it is applied *at all* towards marriage and family-related rights. Furthermore, by applying the margin of appreciation, the Court embraces heteronormativity and the very restrictive understanding of the right to marry. The decision, moreover, embraces not only heteronormativity but heterosexism as such using the matter of political pleasing rather than undertaking an in-depth human rights analysis and the nature of the rights at stake. This also implies that such a hidden heteronormative standpoint amounts to the justification of the corresponding rights' limitations with necessity, legitimacy, and proportionality becoming irrelevant, which cannot be accepted. The joint dissenting opinion of Judges Rozakis, Spielmann and Jebens to the majority's decision in *Schalk and Kopf* also highlighted that failure to justify differential treatment of non-heterosexual persons should exclude the applicability of margin of appreciation. Against this background, the margin should have not been awarded and the presence or absence of the European consensus, being a merely subordinate basis of the margin of appreciation concept, is irrelevant.[100]

Moreover, what the Court is ignorant about, or at least fully avoids recognizing, is the nature of such differences in the treatment of persons outside the sexual and gender binary and the corresponding lack of consensus. Unlike the social and economic policies, for instance, which are usually afforded a wide margin of appreciation because they depend on the economic capabilities of states, the treatment of the said individuals differs due to other reasons. Namely, it is

[98] *Dudgeon v United Kingdom* (n 5).

[99] Johnson (n 47) 73.

[100] Joint dissenting opinion of Judges Rozakis, Spielmann, and Jebens in *Schalk and Kopf v. Austria* (n 10), para. 8.

conditioned by the long-lasting history of discrimination and exclusion and how deeply it penetrated societal structural elements. Historical economic and social openness can be of influence as well. Nonetheless, it is important to emphasize that the different treatment and the lack of consensus based on the level of discrimination and overall acceptance of certain people cannot be a valid justification not to afford the affected persons the rights as important as family-related ones. The Inter-American Court of Human Rights addressing the same situation with the lack of consensus regarding the rights of people of diverse sexualities, genders, and sex characteristics in American states concluded:

> 'it is important to recall that the lack of consensus in some countries as regards to the full respect for the rights of certain groups or persons identified by their real or perceived sexual orientation, gender identity or gender expression cannot be considered a valid argument to deny or restrict their human rights or to reproduce and perpetuate the historical and structural discrimination that these groups or persons have suffered. The fact that this issue could be controversial in some sectors and countries, and thus that is not necessarily a matter of consensus, cannot lead the Court to abstain from taking a decision, because when so issuing its opinion, the Court must refer only and exclusively to the stipulations of the international obligations that States have assumed by a sovereign decision under and through the American Convention'.[101]

The instrumentalization of the wide margin of appreciation in the cases concerning marriage equality also means that substantive analysis is absent from the ECtHR's jurisprudence. Unlike other regional and domestic courts, the ECtHR kept applying the strong heteronormative perception of marriage and did not engage in certain important considerations which would allow it to adequately assess the issue and redress historical traditional heteronormativity. For instance, the Inter-American Court of Human Rights,[102] the Supreme Court of the United States,[103] as

[101] *Advisory Opinion OC-24/17* (n 68), para. 83.

[102] ibid.

[103] *Obergefell v. Hodges* (n 73).

well as the Constitutional Court of South Africa[104] addressed the legal, political, and social implications of the absence of marriage equality as well as the nature of the right to marry. On the contrary, the ECtHR has not conducted a conceptual analysis of the right to marry, its applicability, fundamentality, and overall importance. Nor has the Court provided any assessment regarding the justification of the exclusion of same-sex couples from marriage in terms of the necessity, presence of legitimate aim, and proportionality of such exclusion, simply 'bypassing' it.[105] Moreover, the substantive equality elements and the consequences of long-standing discrimination in marriage based on sexuality have never been reviewed.

The analysis of the said aspects of equality is of particular importance as they '…reveal the poverty of our vision of social equality'.[106] The current system of anti-discrimination is flawed to the extent that it enables the formal reclaiming of some rights yet simultaneously tolerates long-lasting structural inequalities.[107] Within the aspect of diverse sexualities, genders, and sex characteristics, the latter entails the prohibition of discrimination based on these features yet simultaneously the existent system continues to segregate queer people and privilege heteronormative social institutions. To overcome this reality, the ECtHR should have comprehensively challenged, in particular, '…whether it is justifiable to hold couplehood, monogamy, stability and domesticity, among others, as the values to be cherished to gain access…' to different rights and privileges.[108]

Lastly, to adequately assess legally as wide a concept as human sexuality aiming to redress heteronormativity, the current relevant scientific conclusions under the umbrella of biological determinism might also be necessary to address, as they have played a crucial secondary role in establishing marriage equality

[104] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, Constitutional Court of South Africa, Case CCT 11/98, judgement of 9 October 1998.

[105] Johnson (n 47) 153.

[106] Gonzalez-Salzberg (n 40) 115.

[107] ibid.

[108] ibid., 117.

around the world.[109] Against this background, socio-cultural aspects based on long-standing heteronormativity become irrelevant as human rights, arguably being universal, simply cannot depend on such precepts, especially within the CoE context. Equalizing marriage equality merely with political/domestic/consensus issues fully leaves behind the legal nature of the right and its understanding.

2.3 Addressing the heteronormativity of adoption and parenting

It is important to briefly comment on another aspect of family-related rights of persons of diverse sexualities, genders, and sex characteristics, namely those concerning adoption and parenting. When it comes to the protection of children, international law has established a principle of the best interest of the child. Despite being a nearly universal standard of treatment, the principle is not framed in the clearest way, which always leaves room for broad (juridical) interpretation.[110] The heteronormative construction of persons outside the gender and sexual binary as 'the other' has been instrumentalised to portray such people as a danger to children, their health, and their wellbeing. Such narrative is, either explicitly or implicitly, and despite being rebutted scientifically a long time ago, still present to some extent among different heterosexist structures, where the ECtHR is not an exception.[111]

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[109] Shamus Khan, 'Why Should Gay Rights Depend on Being 'Born This Way?', *Aeon*, 23 July 2015, available at aeon.co.

[110] Gonzalez-Salzberg (n 71) 140–141.

[111] It has been established, in particular, that the factors which affect the adjustment of children are not dependent on parental gender or sexual orientation; there is no scientific basis for concluding that same-sex couples are any less fit or capable parents than heterosexual couples; or that their children are any less psychologically healthy and well adjusted, in Brief of the American Psychological Association, Kentucky Psychological Association, Ohio Psychological Association, American Psychiatric Association, American Academy of Pediatrics, American Association for Marriage and Family Therapy, Michigan Association for Marriage and Family Therapy, National Association of Social Workers, National Association of Social Workers Tennessee Chapter, National Association of Social Workers Michigan Chapter, National Association of Social Workers Kentucky Chapter, National Association of Social Workers Ohio Chapter, American Psychoanalytic Association, American Academy of Family Physicians, and American Medical Association as

The ECtHR's relevant jurisprudence on family-related rights other than marriage is rather limited. In *X and others v. Austria* (2013),[112] the Court stated that when it comes to adoption by persons of diverse sexualities (homosexuals, in its own words), there can be distinguished three main situations. The first concerns single-parent adoption by a single person who publicly identifies as non-heterosexual, while the other refers to second-parent adoption of their spouse's/partner's child.[113] While the said types of adoption were most recently addressed by the Court in *E.B. v. France* (2008)[114] and the said *X and others* correspondingly, the third one, namely joint adoption, was only mentioned in *Alekseyev v. Russia* (2010).[115] In the latter judgement, the Court stated that '…there remain issues where no European consensus has been reached, such as granting permission to same-sex couples to adopt a child…'.[116]

Despite having no separate decision dedicated to joint adoption by parents of diverse sexualities, it can be inferred from *Alekseyev* that the current stance on the issue is predetermined by the Court's heterosexist set of values. The analyses highlighted above on heteronormativity of marriage are fully applicable here, particularly because the ECtHR has abstained (or anticipated the abstention) from the corresponding substantive analyses by again referring to the lack of consensus and a wide margin of appreciation. As highlighted above, the lack of consensus on the rights of people of diverse sexualities, genders, and sex characteristics flows directly from a long-lasting history of discrimination and traditional structural heterosexism. Within the latter, parenting and adoption have had even more perverted othering than that of non-normalised intimate relationships because of the Western construction of persons outside the sexual and gender binary as dangerous

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Amici Curiae in Support of Petitioners in *Obergefell Et Al. v. Hodges, Director, Ohio Department of Health*, 17-30, available at the link.

[112] *X and others v. Austria*, ECtHR, App. No 19010/07, judgment [GC] of 19 February 2013.

[113] ibid., para. 100.

[114] *E.B. v France*, ECtHR, App. No. 43546/02, judgement of 22 January 2008.

[115] *Alekseyev v. Russia*, ECtHR, App. Nos 4916/07, 25924/08 and 14599/09, judgement of 21 October 2010.

[116] ibid., para. 83.

to children. It is, thus, another example of the Court's role in the truth-constructing of the narrative that reinforces heteronormativity.

Regarding single-parent adoption, it is important to highlight that with *E.B. v. France,* the ECtHR rejected its previous standpoint according to which diverse sexualities were not compatible with the possibility to adopt and raise a child in their best interest. Such an obviously heterosexist perception was present in *Fretté v. France* (2002),[117] where the Court stated that:

> 'Even if the decision to refuse authorisation had been based exclusively or chiefly on the applicant's sexual orientation, there would be no discrimination against him in so far as the only factor taken into account was the interests of the child to be adopted'.[118]

It continued:

> 'In the Court's opinion there is no doubt that the decisions to reject the applicant's application for authorisation pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure…'.[119]

Even though the ECtHR overruled its position six years later in *E.B.* arguing that contrary to the Convention, the rejection of the applicant's adoption request was conditioned merely by her sexuality,[120] there is still a place for heteronormative argumentation within the Court. For the first time, the principle of the best interest of the child was not instrumentalised to construct the narrative of the incompatibility of the principle with adoption by people of diverse sexualities, genders, and sex characteristics.[121] Judge Loucaides, however, disagreed with the majority and delivered a very controversial dissenting opinion where he used apparently heteronormative reasoning based on the perception of people outside the

[117] *Fretté v. France*, ECtHR, App. No. 36515/97, judgment of 26 February 2002.

[118] ibid., para. 36.

[119] ibid., para. 38.

[120] *E.B. v France* (n 114), para. 96.

[121] Gonzalez-Salzberg (n 71) 149–150.

sexual and gender binary as the non-normalised 'other' as well as the corresponding harmful stereotypes:

> 'I find that in deciding what was in the best interests of the child to be adopted, the domestic authorities could legitimately take into account the sexual orientation and lifestyle of the applicant… I believe that the erotic relationship with its inevitable manifestations and the couple's conduct towards each other in the home could legitimately be taken into account as a negative factor in the environment in which the adopted child was expected to live. Indeed there was, in these circumstances, a real risk that the model and image of a family in the context of which the child would have to live and develop his/her personality would be distorted.'[122]

The dissenting judge then specifically highlighted that were it not for the applicant being in a same-sex relationship, he would most likely have taken a different stance on the matter.[123] Thus, it appears that as soon as persons outside the sexual and gender binary do not follow the lifestyle of meeting their sexual and romantic needs, they do not constitute a threat to children. It is impossible to believe Judge Loucaides would have taken the same stance of requiring heterosexual people to live a celibate life to be able to abstain from any alleged elusive threat to their children. The line of reasoning applied by the judge reveals that aggressive heteronormative perception of family-related rights of persons of diverse sexualities, genders and sex characterises, particularly concerning adoption, has still a presence within the Court. It thus still possesses the potential of reaffirming heterosexual exclusivity of adoption that could be exaggerated to the extent of having a 'choice' of either being heterosexual or having diverse sexuality under the condition of not living according to the corresponding sexual and romantic needs or, in any other case, being (legally) unable to adopt. While there was no other explicit instrumentalization of the best interest of a child principle as incompatible with queer parenthood, the ECtHR neither accepted that it is in the best interest of

[122] Dissenting opinion of Judge Loucaides in *E.B. v France* (n 114), paras 11–12.

[123] ibid.

the child to have two queer parents instead of one,[124] which will be elaborated below.

When it comes to the second parent adoption, the cases of *Gas and Dubois v France* (2012)[125] and *X and others* are of particular importance. *Gas and Dubois* concerned a complaint of a same-sex couple in a registered partnership who alleged discrimination based on their sexuality since one in the couple was not recognised as a parent of the child the other partner had through artificial insemination from a male donor.[126] The French legislation at the time recognised two types of adoption, namely full adoption by a married couple or by one of them and simple adoption by a want-to-be parent not related to a child.[127] Since France did not have marriage equality, the applicant was thus deprived of the possibility to adopt her partner's child.

The ECtHR rejected the applicant's claim on the basis of comparison and equation between same-sex couples and unmarried heterosexual couples, whether cohabiting or being in registered partnerships. Since neither of the categories of people could adopt children because they were not married, the Court did not see any violation of the Convention.[128] Such a stance appears rather hypocritical as heterosexual couples' status as non-married was conditioned by exercising their agency, while same-sex couples were deprived of such a choice by the law, which was nonetheless ignored by the Court. The decision can be seen as another example of heteronormativity and exclusivity of marriage reaffirmation, which supported 'the validated privileged status to have consequences for individuals other than the unmarried couple',[129] namely the children of same-sex families. This stance of the Court was further upheld in *X and others*,[130] even though the Court simultaneously deemed allowing second-parent adoption for both married and unmarried different-

[124] Gonzalez-Salzberg (n 71) 155.

[125] *Gas and Dubois v. France*, ECtHR, App. No 25951/07, judgement of 15 March 2012.

[126] ibid., paras 9–15.

[127] ibid., paras 17–19.

[128] ibid., para. 69.

[129] Gonzalez-Salzberg (n 71) 151.

[130] *X and others v. Austria* (n 112), paras 109–110.

sex couples but not for same-sex couples discriminatory and thus contrary to the Convention.[131]

Simultaneously, the ECtHR keeps insisting that the 'traditional family' needs protection, often balancing such an elusive aim against the rights of people of diverse sexualities, genders, and sex characterises. In its own words:

> 'The Court is aware that striking a balance between the protection of the family in the traditional sense and the Convention rights of sexual minorities is in the nature of things a difficult and delicate exercise, which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition'.[132]

Despite seemingly indicating that 'traditional family' needs protection specifically from persons outside the sexual and gender binary, the Court fails to explain the reasons behind the overall necessity of such protection and in what way 'traditional family' can be harmed by such people. Such a questionable position not only reinforces the harmful consequences of the socially constructed identity of queer as 'the other' but also is actively instrumentalised by the Court to declare the discriminatory treatment of the states as having a 'weighty and legitimate' aim.[133] Applying queer theory interpretation to the said ECtHR's logic reveals that the argument of the necessity to protect 'traditional family' from becoming queer-friendly is based on the presumption that the latter would somehow demean it. In other words:

> 'To see gay marriage as 'demeaning' is … a way of seeing 'traditional marriage' as more significant … [M]arriage advocates have only to expose such thinking to the ridicule it deserves in order to point up its injustice'.[134]

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[131] ibid., paras 152–153.

[132] ibid., para. 151.

[133] ibid., para. 138.

[134] Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life*, Harvard University Press, 2000, 82.

Contrary to the heterosexist stance of the ECtHR, which reinforces and instrumentalises heteronormativity of marriage as a reason to reject queer parenthood, the protection of children and their respective families could be seen as one of the strongest arguments in support of the marriage equality establishment and overall protection of family-related rights of the affected persons. By recognizing the legal essence of the relationship in which the parents are, marriage enables children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives'.[135]

In fact, many same-sex couples create comfortable and loving families for their children, whether they are their biological issues or adopted, providing them with protection, stability, and permanency that are essential for safeguarding the principle of the best interest of the child.[136] That is why the exclusion of same-sex families from access to the institution of marriage 'conflicts with a central premise of the right to marry'.[137] Without the recognition, predictability, and stability that the institution of marriage provides, children of people outside the sexual and gender binary will feel lesser in relation to themselves and their families. Such children are also hostage to the financial problems associated with being in families where parents cannot officially marry, and the moral pressure surrounding a more complex and uncertain experience of family life.[138] In view of this, the laws that prohibit, do not allow marriage equality, or do not recognize same-sex marriages, 'harm and humiliate the children of same-sex couples'.[139]

This argument and position are very important not only to support the establishment of marriage equality, but also to invalidate one of the most common myths about persons of diverse sexualities, genders, and sex characteristics according to which they have a detrimental effect on children, their mental health, sexuality and so on. On a broader scope, it is instrumentalised to deconstruct the current Western-built sexual and gender perception with its binary division on the normal and 'the other'. Simultaneously, such a line of reasoning is an example of

[135] *Obergefell v. Hodges* (n 73) 15.

[136] ibid.

[137] ibid.

[138] ibid.

[139] ibid., 15–16.

homonormativity, namely the phenomena and strategy that describes the conforming of people outside the gender and sexual binary to the heteronormative incarnations of experiencing sexuality and gender in their everyday life to claim rights and recognition.[140] Despite being a very useful strategy, the effects of which can be witnessed in the significant progress made within the last decades, it simultaneously poses a somewhat invisible threat. In particular, homonormativity is a consequence of a long-lasting institutional heterosexism and as such contributes to the reaffirmation of the created sexual and gender binary and the corresponding identities without challenging their necessity, stability, and fairness. This means that heteronormativity will not be challenged substantially and efficiently preserving the current sexual inequality, and persons of diverse sexualities, genders, and sex characteristics, especially those not willing or being unable to conform to the system, will further be stigmatised and excluded.

2.4 Conclusion

This chapter addressed family-related rights, namely connected to social institutions of marriage and adoption, to understand, elucidate, and challenge the suspected gendered and sexualized bias within the relevant ECtHR jurisprudence. It reveals that the Court fails to acknowledge, address, and rectify heteronormativity underlying family-related rights. It did so, in particular, by not recognizing the equal worth and dignity of queer individuals and their relationships and safeguarding the Western-established model of sexual and gender identities, considering them as necessary, stable, and just. The ECtHR rejects the progressive interpretation of the Convention and thus hinders further progress in reclaiming queer rights and impedes the full emancipation of persons outside the sexual and gender binary. It reinforces heterosexuality as the norm to privilege the institutions of marriage and adoption and constructs heterosexual individual as the rightful subject of human rights, while simultaneously marginalizing individuals of diverse sexualities, genders, and sex characteristics. Following such narratives, the Court normalized

[140] Lisa Duggan, 'The new homonormativity: The sexual politics of neoliberalism', in Russ Costronovo and Dana D. Nelson (eds), *Materializing democracy: Toward a revitalized cultural politics*, Duke University Press, 2002, 179.

sexuality-based segregation of marriage and other forms of relationship recognition, defied sexual and gender reality to technically preserve heteronormativity of marriage and adoption, and additionally impaired the rights, privileges, and best interests of queer parents' children. The dangerous queer narrative still has a place in the ECtHR's (implicit) reasoning as it does not consider having two non-heterosexual parents to ally with the best interest of the child principle. A wide margin of appreciation was abused to sustain the above-mentioned narratives and avoid engaging in the necessary substantive legal analysis.

3 Addressing asylum-related rights through the prism of Article 3 of the Convention

3.1 The stance of the Court on the acceptable level of proof and credibility assessment in sexuality-related asylum claims

In addition to family-related rights, another significantly problematic area concerning persons outside the sexual and gender binary is asylum-related rights. While in the context of the CoE there is no unity in the asylum legislation and overall practice, the majority of the Member States share the Common European Asylum System mechanisms. However, even within the EU, the practice of asylum claims assessment still varies among its Member States particularly due to the lack of precision in the directives regulating this matter. Article 4 of the Qualification Directive,[141] for instance, only highlights that it is the duty of asylum seekers to 'submit as soon as possible all the elements needed to substantiate the application for international protection', while it is the duty of the state to conduct a comprehensive assessment of the application.[142]

The applicants are expected to provide as much documentary evidence as possible to facilitate the corresponding assessment but very often it is impossible due to the lack of such proofs or simply inability to collect them before unexpected fleeing. Moreover, it is even more problematic for queer asylum seekers, as very few of them have any evidence proving their sexuality, which could be, for instance, arrest warrants, court judgements, police reports or information available from media, if the affected persons are activists or high-profile figures. It can be

[141] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20 December 2011, 9–26.

[142] ibid.

presumed, however, that in the absolute majority of the claims this is not the case, having in mind particularly degrading persecutory treatment in many countries which, thus, presupposes discreetness of the asylum seekers. It hence becomes a significant issue for queer asylum applications to be assessed for credibility as most of them are solely based on individual testimonies. The issue is further intensified by, firstly, the absence of legislation on possible ways, methods, and techniques of the credibility assessment that states should and are permitted to employ, and, secondly, the deep personal nature of sexuality and sexual identity experiencing, perceiving, and awareness.

The use of different ways and methods of credibility assessment in queer asylum seekers' applications can in itself be contrary to Article 3 and Article 8 of the Convention as degrading and privacy-interfering treatment. One of the most invasive and degrading methods is so-called 'phallometric testing' which is the exposure of applicants to pornographic content in the presence of a practicing sexologist to 'verify' their sexuality.[143] It is contrary to contemporary human rights standards,[144] condemned by numerous human rights bodies,[145] and is not permitted by the Asylum Procedures Directive which indicates that the state 'shall … arrange for a medical examination of the applicant concerning signs that might indicate past persecution or serious harm'.[146] Despite the above-mentioned unacceptability of the practice, alongside all other types of medical and psychological evaluations, such

[143] Andrea Mrazova, 'Legal Requirements to Prove Asylum Claims Based on Sexual Orientation: A Comparison Between the CJEU and ECtHR Case Law', in Arzu Güler, Maryna Shevtsova and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective*, Springer, 2019, 185–208, 188–189.

[144] As it is pointed out in Yogyakarta Principle 18, 'no person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed', available at yogyakartaprinciples.org.

[145] UNHCR, *UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation*, April 2011, available at the UNHCR's website.

[146] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29 June 2013, 60–95.

methods may still be present in some European states, particularly in the Czech Republic and Hungary.[147]

Phallometric testing is not the only disturbingly problematic aspect of the credibility assessment of queer asylum applications present in the CoE context. It can be observed that there are many other disturbing issues surrounding the process, which points out the deep mistrust in the queer sexual identity as presented in the corresponding applications. While the said controversial treatment of asylum seekers of diverse sexualities, genders, and sex characteristics is deeply rooted in state practice, it is also more so enhanced by the ECtHR's stance on the issue which shall be the focus of this section of the chapter.

The other aspect used to invalidate the applications of queer asylum seekers is the instrumentalization of late disclosure of sexuality and previous heteronormative relationships as an indicator of incredibility.[148] It can be argued that this is a very common practice of national migration authorities, however only a limited number of cases have been dealt with by the ECtHR where it explicitly addressed these aspects. The first case where the Court took a stance on the matter was *M.K.N. v. Sweden* (2013)[149] which concerned an Iraqi asylum seeker who upon reaching Sweden applied for international protection based on persecution due to his (Christian) religion and social (well-off) status. After the initial rejection by the Migration Board, the applicant appealed, revealing that he had also been persecuted due to a homosexual relationship but did not disclose it earlier since he was not aware that homosexual relations were accepted in Sweden.[150] Both the Migration Board and the Migration Court found the applicant's new statements not credible as the applicant 'must have understood the importance of stating all the important facts at once' and that there was no 'reasonable explanation' for the late disclosure of homosexual relationship and the corresponding persecution.[151] On this matter,

[147] Mrazova (n 143) 189, 192.

[148] ibid., 193–194.

[149] *M.K.N. v. Sweden*, ECtHR, App. No. 72413/10, judgment of 27 June 2013.

[150] ibid., paras 7–9.

[151] ibid., paras 10–12.

the ECtHR fully accepted the arguments of the state and found no reason to regard the applicant's statement on his sexuality as credible.[152]

The Court's stance contradicts the expert conclusions from the relevant actors best placed to exercise the expertise on international protection. The UNHCR provides clear instructions and guidelines on sexuality and gender in the corresponding asylum cases, particularly those on self-identification, self-realization, non-conformity, and (previous) romantic and sexual relations. It is explained that differences in self-realization, cultural stigma, lack of access to sexual education, drastic discrimination and so on may result in the inability of the applicants to identify their sexuality within the narrative acceptable by the West or unwilling to disclose it before the national authorities due to fear, stigma, isolation, and other related factors.[153] Furthermore, the corresponding assessment while interviewing must be conducted in a sensitive, non-judgmental, individualized, and non-confrontational way, and while it may often not be the case, asylum seekers may address the sexuality or past harm related to that during the later asylum stages. Nonetheless, the mere fact of later disclosure of sexuality cannot be perceived as a lack of credibility from the side of the applicant.[154]

Moreover, the UNHCR clearly points out that:

> '…an applicant may be married, or divorced and/or have children. These factors by themselves do not mean that the applicant is not LGBTI. Should concerns of the credibility of an applicant who is married arise, it may be appropriate to ask the applicant a few questions surrounding the reasons for marriage. If the applicant is able to provide a consistent and reasonable explanation of why he or she is married and/or has children, the portion of the testimony should be found credible'.[155]

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[152] ibid., para. 43.

[153] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 4, April 2019, 181–182.

[154] ibid., 181–182.

[155] ibid., 182.

Viewing the case within the queer theory's main standpoints, the Court did not express any necessary sensitivity towards addressing the above-mentioned credibility assessment. First, the ECtHR did not attempt to assess any potential reasons for late disclosure of the applicant's sexuality, namely those affecting the narrative of perceiving homosexuality as 'the other', the pathological contrary of heterosexuality. It seemingly treated the late disclosure of homosexuality as unnecessary or unworthy of assessment due to the contrasting normativity of heterosexuality, as the latter is never surrounded by such factors as stigma, isolation, discrimination, fear and so on. Thus, the Court did not even touch substantively upon the complex issue of late disclosure showing rather little understanding of the consequences of the culturally constructed notion of sexuality. Instead, the discourse used in the judgment is, using the Foucauldian instrument of discourse production, truth-constructional, which in this particular context means that the only accepted reason for being unable to reveal someone's (homo)sexuality at once is to abuse the system of international protection.

The ECtHR, furthermore, despite claiming it is 'aware of the very difficult situation for real or perceived homosexuals in Iraq', started developing its argument on the non-credibility of the applicant's sexuality with the fact 'that the applicant has expressed the intention of living with his wife and children'.[156] This logic is significantly problematic on two levels. First, it may indicate that the Court finds it appropriate to believe that queer asylum seekers' alignment with the heteronormative institution of marriage and the corresponding lifestyle could protect them from persecution. Second, it is used as a way to compromise the applicant's credibility of his sexuality as the Court appears to reinforce the assumption of sexuality or sexual identity as a necessarily stable category.

This logic, moreover, could be perceived as a bright example of the queer theory's critique of the prevailing culturally constructed sexual binary that rejects other forms of identity other than normative heterosexuality and abnormal homosexuality. Indeed, there was no place in the judgment to address the possibility of the applicant being sexually fluid or, at the very least, bisexual. Regardless of the actual or self-perceived sexual identity of the applicant, any form of practice outside

[156] *M.K.N. v. Sweden* (n 149), para. 43.

of heteronormativity could have put him at the risk of being subjected to treatment contrary to Article 3 of the Convention. This corresponds to the fact that not only actual sexuality, as identified, experienced, or lived by the applicant, constitutes a discriminating ground for protection, but also perceived sexuality or romantic/sexual practices, from the point of view of persecution agents, whether these are states or private actors.[157]

The Court, moreover, seemingly deeming homosexuality as 'the other', is ignorant of or, rather, purposely indifferent towards the reality forcing many individuals outside of sexual and gender binary to conform to a heteronormative way of living and (publicly) expressing their 'desired' sexuality. They are made to do so by entering into forced marriages or entering willingly into different-sex marriages to 'avoid severe ostracism and exclusion from their family and communities'.[158] Only with time the oppressed individuals can come to terms with their sexuality and be brave enough not only to accept it themselves but also to disclose it to others, particularly to state officials who might not always be competent and sensitive enough to create the necessary safe space with trust.[159]

Despite acknowledging that 'owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt', the Court did not even attempt to address more closely any aspect of the said personal circumstances.[160] Such ECtHR's stance 'has actively undermined the claims of LGBT+ asylum seekers by intentionally disregarding their particular vulnerability as well as the specific challenges they face'.[161] This approach is seemingly queer-hostile and shows the Court as not a queer-accepting and queer-friendly institution, but one which stays behind within the European and broader human rights context.[162] Therefore, individuals should not be automatically presumed heterosexual in general, but more so because of the mere fact of

[157] UNHCR (n 153) 166.

[158] Mrazova (n 143) 193.

[159] ibid.

[160] *M.E. v. Sweden* (n 12), para. 73.

[161] Laura Ablondi, 'B and C v Switzerland: Has rainbow Europe finally opened its doors to LGBT+ asylum seekers?', *SSRN*, Asyl 3/2022 (2022) 7.

[162] ibid.

previously being in a heteronormative marriage, having children, and being unable to disclose their sexuality and/or intimate practices at the beginning of the asylum procedure.

Simultaneously, the very controversial stance of the Court on credibility assessment appears even more problematic in comparison with the position addressing the same issue of another major judicial body of the region, the CJEU. In *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, the CJEU clearly highlighted that considering 'the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality' it could not be inferred that applicant's statements regarding his sexuality are not credible 'simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset'.[163] The Court argues that there are, in particular, two obligations of Member State authorities arising from Article 13(3)(a) of Directive 2005/85 and Article 4(3) of Directive 2004/83 that temper the requirement to provide all necessary information to substantiate the asylum claim as soon as possible. These are the obligation to interview applicants for international protection in a manner that considers both personal and general circumstances related to the application, especially the applicant's vulnerability, and the obligation to carry out an individual evaluation of the application, considering the unique position and personal circumstances of every applicant.[164] The CJEU, therefore, concludes that rejecting an asylum seeker's claims as not credible simply because of the late disclosure of their sexuality would fail to comply with the above-mentioned requirements.[165]

Another judgement touching upon the controversial credibility assessment of queer asylum seekers is *M.E. v. Sweden*. This case concerns a Libyan asylum seeker who initially applied for international protection due to persecution following his involvement in illegal weapons sales. During the later stage, the applicant added more information, in particular, that he was in a homosexual

[163] *A, B, C v. Staatssecretaris van Veiligheid en Justitie* (n 14) para. 69.

[164] ibid., para. 70.

[165] ibid., para. 71.

relationship and marriage with a man[166] whom he had met after fleeing to Sweden and were he to return to Libya to apply for family reunification he would risk being persecuted as it would be revealed that he was married to a man. The Migration Board rejected the application because of the lack of credibility, *inter alia* with regard to the applicant's relationship with the man, and other contradictory statements. Furthermore, the Migration Board found no necessity to apply the exception of releasing the applicant from the obligation to leave Sweden and apply for family reunification from Libya despite the fact the Swedish legislation allowed such exceptions when it is considered unreasonable to impose such a requirement.[167] The Migration Court did not question the applicant's sexuality but still rejected the corresponding appeal because it concluded that the applicant had failed to substantiate the existence of a threat of sexuality-motivated persecution. Moreover, the Migration Court supported its argument by emphasizing that it was not known in Libya that the applicant was homosexual, and that the family reunification interview is set to be conducted completely confidentially.[168]

The biggest issue with the judgement in *M.E.* is that, unlike in the previous case, the ECtHR decided to completely abstain from any evaluation of the methods, quality, and the ways the national authorities conducted the credibility assessment that led to deeming the applicant's sexuality not credible. Instead, the Court justified its 'markedly hands-off approach'[169] by stating that '…as a general principle, the national authorities are best placed to assess the credibility of the applicant if they have had an opportunity to see, hear and assess the demeanour of the individual concerned'.[170]

While it is true that national authorities are well placed to assess individual applications, the Court can still have full access to the individual materials of

[166] The case concerns a transgender woman that just begun the process of gender transitioning at the beginning of the Court's assessment. However, since the applicant referred to his partner as a man pointing out that he was in homosexual relationship, for the purposes of this thesis the masculine pronouns will be used when addressing the applicant's partner.

[167] *M.E. v. Sweden* (n 12), paras 9–19.

[168] ibid., para., 23.

[169] Ablondi (n 161) 7.

[170] *M.E. v. Sweden* (n 12), para. 78.

asylum seekers' cases, including transcripts of interviews and personal statements. Having in mind the very significant value of such materials, which often, as noted above, are the only evidence an entire application is based on, they should be analysed and scrutinized both substantively and structurally. The former refers to the content and the nature of the applicants' statements, the analysis of which should aid in determining the credibility of such statements, while the latter concerns the way, and the form in which the interviewing was organized, to address the quality of the interrogation. Therefore, the presence of judicial scrutiny of asylum applications and their credibility is crucial and apparent. Simultaneously, there can be no valid reason identified for the Court not to engage in such assessment other than seemingly perceiving the cases and applicants themselves as being outside of the Court's implicit political agenda.

Moreover, by seeing nation-states as best placed for such assessment with simultaneous abstention from any substantial involvement in the analysis, the Court automatically upholds the methods of credibility assessment and arbitrary arguments states use. This in turn creates a dangerous precedent and the illusion of the absence of the supranational judicial body authorized to scrutinize the corresponding state conduct. It thus can be seen by states as an invitation to continue ignoring the UNHCR's guidelines and using the arbitrarily developed heteronormative line of arguments and overall methodology of credibility assessment. The ECtHR, correspondingly, failed to make use of the possibility to 'provide any clues or guidance on how the credibility should be assessed'.[171] It also persists to ignore the probability that national authorities may be hostile towards asylum seekers of diverse sexualities, genders, and sex characteristics, not only because they are outside the sexual and/or gender binary but also because they are migrants.[172] This stance elucidates the intersectionality of institutional heterosexism with racial/cultural othering that creates an even more complex multifaceted 'other' which will be briefly addressed in the next sections.

Finally, the Court continues 'to perpetuate a culture of suspicion and disbelief' which forces asylum seekers 'to conform to European stereotypes of an

[171] Mrazova (n 143) 195.

[172] Ablondi (n 161) 10–11.

'out' LGBT+ person to lend credibility to their claim'.[173] Therefore, the line of reasoning that the Court has applied to substantiate its abstentionist approach appears weak and rather unpersuasive, simultaneously raising suspicion of other, non-legal reasons behind such practice.

The ECtHR's abstentionist position was further reaffirmed in the latest judgment on the issue in *B and C v. Switzerland* (2020)[174] which concerned addressing the possibility of removal of a homosexual applicant to Gambia. The Court, in contrast to the abovementioned decisions, sided with the applicant by declaring that the state's failure to sufficiently assess the risk of ill-treatment that the applicant may encounter is contrary to Article 3 of the Convention. The body nonetheless stated that it '…does not see a reason to depart from…' its abstentionist position since '…it is they [the domestic authorities] who have had an opportunity to see, hear and assess his or her demeanour…'.[175]

The sexual binary and its reassurance are also closely linked to the over stereotyping of such binary categories during the credibility assessment. While not explicitly recognizing it, both national authorities and the Court seemingly perceive sexuality as necessarily encompassing certain features that do not relate to sexual or romantic practices. This first and foremost relates to gender expression, manners, appearance, speech, and specific level of knowledge on the Western-constructed social queer normality.[176] For instance, the most credible application would appear from visibly feminine men with particular knowledge of queer social life, political issues, and NGOs protecting the corresponding rights. Simultaneously, feminine women or stereotypically masculine men, especially without the said relevant familiarity, will more likely be seen as lacking credibility and correspondingly rejected.[177] Considering this against the background of protecting persons of diverse sexualities, genders, and sex characteristics, it 'proves especially inadequate and

[173] ibid., 10–11.

[174] *B and C v. Switzerland,* ECtHR, Apps. Nos 889/19 and 43987/16, judgement of 17 November 2020.

[175] ibid., para. 58.

[176] Mrazova (n 143) 195.

[177] ibid., 195–196.

can, among other things, lead to an unlawful requirement of discretion'[178] which will be the focus of the next section.

3.2 The stance of the Court on concealing sexual identity (discretion requirement)

Another very problematic issue in the Court's jurisprudence is concealing one's sexuality and its implications if removed to states where asylum seekers may face treatment contrary to Article 3 ECHR. The problem of requiring queer asylum seekers to conceal their sexuality (discretion requirement) is still present in the CoE context. The discretion requirement is based on the assumption that if queer asylum seekers conceal their sexuality, sexual identity, and have their romantic and sexual life hidden from the public, this will guarantee that they will not be persecuted in states and societies hostile towards persons of diverse sexualities, genders, and sex characteristics.[179] On the contrary, living one's (sexual) life freely and openly without concealing it, or refusing to 'play the game', can trigger persecutory treatment contrary to Article 3 ECHR.[180] Despite heavy criticism from the human rights sector, national authorities still tend to apply the discretion requirement to exclude asylum seekers from receiving international protection. For instance, in 2017 the UK Home Office in its guidelines on queer asylum seekers from Afghanistan stated that 'a practicing gay man who, on return to Kabul, would not attract or seek to cause public outrage, would not face a real risk of persecution'.[181] In the most recent guidelines on Afghanistan the UK Home Office insisted that

[178] Petra Sussner, 'Addressing Heteronormativity: The Not-So-Lost Requirement of Discretion in (Austrian) Asylum Law', 34 *International Journal of Refugee Law* 1 (2022) 31–53, 35-36.

[179] Deniz Akin, 'Discursive construction of genuine LGBT refugees', 23 *Lambda Nordica: Tidskrift om homosexualitet* 3-4 (2018) 21–46, 34; Janna Wessels, *The Concealment Controversy Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection*, Cambridge University Press, 2021, 18–19.

[180] Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights', 29 *Law Critique* (2018) 221–239, 224.

[181] European Council on Refugees and Exiles (ECRE), 'UK Home Office Guideline: Afghan gay asylum-seekers expected to conceal their sexual orientation to avoid persecution when sent back', March 2017, available at ECRE's website.

there can be multiple reasons why queer persons may choose to conceal their sexuality in the country:

> 'If a person does not live openly as LGBTI, consideration must be given to the reasons why they do not. Each case must be considered on its facts with the onus on the person to demonstrate that they would be at real risk on return'.[182]

The ECtHR has dealt with the concealing of sexual identity in the abovementioned cases of *M.E. v. Sweden* and *B and C v. Switzerland*. The reasoning in *M.E.* appears particularly problematic as the Court perpetuates the same logic and narrative as national authorities, namely that asylum seekers of diverse sexualities, genders, and sex characteristics may choose to conceal their sexuality for reasons other than stigma, discrimination, indecent, degrading, and persecutory treatment. In the judgement, the ECtHR concentrated on the fact that the applicant presented his partner online to his family as a woman, implying that the family is aware of his marriage but is mistaken about its same-sex nature since 'the applicant has chosen to present the relationship in this manner'.[183] It continued:

> 'In the Court's opinion, this indicates that the applicant has made an active choice to live discreetly and not reveal his sexual orientation to his family in Libya – not because of fear of persecution but rather due to private considerations'.[184]

The Court then assessed the approximate amount of time the applicant would need to conceal his sexuality to avoid persecution, namely four months, which, in the Court's view, is 'a reasonably short period of time'.[185] It concluded that being forced to conceal the applicant's sexuality for this period of time would not be sufficient to breach Article 3 ECHR as 'it would not require him to conceal or suppress an important part of his identity permanently or for any longer period of

[182] The UK Home Office, *Country Policy and Information Note Afghanistan: Fear of the Taliban (Version 3.0)*, April 2022, available at the Office's website.

[183] *M.E. v. Sweden* (n 12), para. 86.

[184] ibid.

[185] ibid., para. 88.

time'.[186] The Court thus adopted a clearly heterosexist standpoint by devaluing homosexuality as 'the other' and its importance for the dignity and personal integrity of persons of diverse sexualities, genders, and sex characteristics.

Apart from having apparent heterosexist nature, the ECtHR's reasoning is contrary to the essence of international protection; i.e. to provide asylum seekers with a dignified existence, physical integrity, and a possibility to freely exercise any part of their identity, whether political, religious, sexual, or other, for which they would be otherwise persecuted.[187] This is reaffirmed by multiple competent international actors and relevant documents. According to the abovementioned Yogyakarta Principles, every person is entitled to freedom of opinion and expression, notwithstanding sexuality or gender, including 'the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means ...'.[188] Such expression of identity/personhood can be crucial as these are, contrary to heteronormative equating of it exclusively with same-sex sexual relations, often inseparable and impossible to conceal.

The UNHCR in its guidelines also clearly indicated that persons of diverse sexualities, genders, and sex characteristics, are 'as much entitled to freedom of expression and association as others' and that being able to hide one's sexuality and avoid persecution in the past or the future cannot be 'a valid reason' to refuse international protection.[189] The Agency, moreover, reaffirmed, that an asylum seeker 'cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution',[190] which straightforwardly contradicts the reasoning in *M.E. v. Sweden*. Likewise, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (hereafter – ILGA-Europe), the International Federation for Human Rights (hereafter – FIDH)

[186] ibid.

[187] Mrazova (n 143) 200.

[188] 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, 10 November 2017, Geneva, available at yogyakartaprinciples.org.

[189] UNHCR (n 153) 174.

[190] ibid.

and the International Commission of Jurists (hereafter – ICJ) jointly argued before the Court that being 'required to present publicly elements of a heterosexual narrative to evade harm was in itself an Article 3 violation as it debased the human being and constituted degrading treatment.[191]

Comparing the issue of claiming international protection due to sexuality-based persecution with the religious one, 'it is not possible to argue that asylum applicants should keep for example their religious beliefs secret and live without problem in their countries of origin'.[192] The CJEU had the same standpoint on the matter, deeming the possibility to conceal certain religious practices to avoid persecution as 'irrelevant'.[193] Religious and sexual identities are different in its nature, both on biological (unlike sexuality, religion does not have a biological dimension) and socially-constructing levels, though both could be regarded as crucially important aspects of personal identity. While religion under certain circumstances and life choices can be renounced or changed, this cannot be expected with one's sexuality (as opposed to sexual identity which can evolve over time). Simultaneously, sexuality as a more constant and inseparable dimension is seemingly afforded a lower level of protection, which in practice would imply 'acting in contradiction to the non-discrimination principle'.[194] Such reality may be linked to the broadly disseminated perception that 'not all violations of human rights, but only some of them should lead to asylum'.[195] The said distinction can be seen as the essence of the existent system regulating international protection which correspondingly challenges the universality and fundamentality of some human rights because it is accepted that removing asylum seekers and thus enabling or facilitating violations of their fundamental rights is not breaching these rights *per se*.[196]

[191] *M.E. v. Sweden* (n 12), para. 70.

[192] Mrazova (n 143) 200.

[193] *Bundesrepublik Deutschland v. Y and Z.*, CJEU, joined cases C-71/11 and C-99/11, 5 September 2012, para. 79.

[194] Mrazova (n 143) 200.

[195] Spijkerboer (n 180) 225.

[196] ibid., 228.

The abovementioned heterosexist reasoning of the ECtHR appears even weaker when confronted with judicial opposition both in and outside the Court. Judge Power-Forde delivered a dissenting opinion to the majority's judgment in *M.E.* where she argued that concealing the applicant's sexuality to avoid persecution by 'exercising greater restraint and reserve than a heterosexual in expressing his sexual orientation' is not something which should be considered.[197] Comparing the experiences of concealing both non-heterosexual and heterosexual sexualities, despite the Court actively avoiding it, is useful for drawing understanding from queer theory's standpoints. Perceiving sexuality other than heterosexual as lesser, less valuable, and less deserving to be experienced and protected can be presumed to be at the centre of the *M.E.* reasoning. The ECtHR appears to evidently perpetuate the socially constructed narrative of homosexuality as 'the other', without even comparing it to heterosexuality, its non-pathologized opposite.

Such comparison was, however, present in the United Kingdom Supreme Court's decision in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* (2010).[198] The ruling encompassed, despite being dated four years prior to *M.E.*, completely opposite logic that also may seem somewhat non-heteronormative. In particular, the Supreme Court affirmed that like no heterosexual men can accept any limitations on their sexuality and openness about sexual identity as 'reasonably tolerable', homosexual men cannot be expected to do so either.[199] The judicial body thoroughly elucidated its reasoning with everyday aspects and manifestations of sexuality, which are so deeply rooted in a heteronormative culture that they are not even seen as related to sexuality. They include, for instance, public expression of affection, holding hands, sharing feelings with friends, choosing and being safe in social settings, and even (spontaneous) flirting.[200] Such manifestations are fully enjoyed by heterosexual people yet simultaneously they are not available to others and even pose a danger to them.

[197] Dissenting opinion of Judge Power-Forde in *M.E. v. Sweden* (n 12), para. 4.

[198] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, the United Kingdom's Supreme Court, UKSC 31, judgement of 7 July 2010.

[199] ibid., para. 77.

[200] ibid., paras 77–78.

Indeed, queer theory emphasises that the sexual and gender binary as a social construct '…restricts and regulates sexuality, ignoring dimensions along which sexuality actually extends'.[201]

This reality contradicts the (implicit) assumption of the ECtHR's majority, namely that sexuality 'is, primarily, a matter of sexual conduct which – if not publicly displayed or discussed by the applicant – would eliminate any risk of harm being visited upon him'.[202] The UK's Supreme Court concluded that 'it is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable'[203] and that 'gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men without the fear of persecution'.[204]

Moreover, it is not possible to establish any kind of test which could measure what can be considered as 'reasonably tolerable' when it comes to concealing any aspect of human sexuality. As any concealment of heterosexuality would never be accepted as reasonably tolerable, there cannot be such thing as reasonably tolerable concealment of homosexuality *per se*. The fact that some applicants were able to live discreetly and successfully avoid persecution is a mere indication that they 'put up with living discreetly for fear of the potentially dire consequences of living openly' and cannot be used as a justification and acceptability of requiring them to live discreetly in the future.[205] Reasoning otherwise is 'tempting' though to do so would simply mean 'falling into error'.[206]

Using Foucault's tool of discourse production to address the ECtHR's discretion line of reasoning, by claiming that concealment of any aspect of sexuality even for a limited period of time can be reasonably tolerable, the Court seemingly attempts to construct heteronormative truth. In reality, however, such truth construction has no valid ground, is wrong, and is set to serve the aim of devaluing sexuality and people's experience, and further excluding persons of diverse

[201] Gonzalez-Salzberg (n 55) 92.

[202] Dissenting opinion of Judge Power-Forde in *M.E. v. Sweden* (n 12), para. 13.

[203] *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* (n 198), para. 77.

[204] ibid., para. 78.

[205] ibid., para. 80.

[206] ibid.

sexualities, genders, and sex characteristics. Moreover, it additionally has negative implications on the debate whether all human rights of all people are universal in their character. The ECtHR, by applying the above-mentioned arguments, denies such universality and attacks the idea of equal and shared human dignity of Europeans and asylum seekers from elsewhere, as well as that their fundamental rights should be protected equally and without discrimination.[207]

The Court's attempt to validate the acceptability of concealment of (homo)sexuality is not the only significantly problematic narrative present in its jurisprudence. The ECtHR was also involved in constructing and disseminating the notion that queer asylum seekers, as described above, may choose to live a discreet life and conceal their sexuality for 'private' reasons, that is other than fear of being persecuted, discriminated against, stigmatized, or otherwise harmed. The described notion is fuelled by the heteronormative division on public and private which puts sexuality and gender in 'a (legally protected) private sphere',[208] simultaneously causing 'the assimilation of privacy with secrecy'.[209] It is particularly dangerous as not only is it ignorant of the reality that puts people outside of gender and sexual binary into 'closet', but also because it is constructed on the highest institutional level. This correspondingly results in the circulation of the narrative that was constructed out of heterosexist perception of non-normalised sexualities and came from the lowest level of ignorance and heterosexism and was reaffirmed at the highest (judicial) level. Moreover, the lower levels of heterosexist structural elements very well rely on and are fuelled by such argumentation, whether it is national authorities, (conservative) political parties, or NGOs that strive to prevent the full emancipation of people outside the sexual and gender binary.

While the Court does not provide any explanations as to from where it draws the present reasoning, seemingly it is derived from the heteronormative assumptions and expectations surrounding non-heterosexuality which may 'not only feel normal, but somehow also feel right'.[210] The concealment of sexuality is

[207] Spijkerboer (n 180) 229.

[208] Sussner (n 178) 36.

[209] Gonzalez-Salzberg (n 55) 63; Johnson (n 47) 104-105.

[210] ibid., 35.

then constructed through the lens of 'reasonableness, naturalness and the social'.[211] The very idea of sexuality concealment mirrors broader social reality which perceives 'the proper place' of non-heterosexuality as 'something to be hidden and reluctantly tolerated, a purely private sexual behaviour rather than an important and integral aspect of identity, or as an apparent relationship status'.[212] Under the dominance of such heteronormative assumptions, the most sensible conduct for asylum seekers is to abide by their local traditions and morals, even if they are incompatible with non-normalized sexuality, sexual identity, and sexual behaviour.[213] It is also supported by the established practice, notably still prevailing in the ECtHR's jurisprudence, to afford protection to people of diverse sexualities, genders, and sex characteristics only within the area of consensual sexual intercourse that always appears in private. This, correspondingly, excludes any other, as described above, manifestation of sexuality which, in turn, have often been perceived through heteronormative bias as ''flaunting', 'displaying' and 'advertising' homosexuality as well as 'inviting' persecution'', and overall not necessary for the sexual identity to exist and to be lived with.[214] Lastly, the heterosexist narrative and assumption of discretion as a 'natural choice' ignores the facts that concealing non-heterosexuality is both unreliable in general but also conditioned by factors and actions which are often out of control of asylum seekers.[215]

Overall, 'it is really difficult to imagine' why asylum seekers, having fled from structurally heterosexist states, would choose to live discreetly and conceal their sexuality, 'if not for fear of consequences'.[216] Judge Power-Forde aptly criticized the Court's stance by comparing the logic of adequacy of concealment to the persecution of Jewish people during WWII. She noted that:

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[211] Wessels (n 179) 16.

[212] Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom', 13 *The International Journal of Human Rights* (2009), 393.

[213] Wessels (n 179) 16.

[214] Millbank (n 212) 393.

[215] Wessels (n 179) 16.

[216] Mrazova (n 143) 200.

> ‘had it been applied to Anne Frank, it would have meant, hypothetically, that she could have been returned to Nazi-occupied Holland as long as denying her religion and hiding in an attic were a ‘reasonably tolerable’ means of avoiding detection’.[217]

The concealment of heterosexuality does not exist as such, at least in the same sense that the one of homosexuality does, as there cannot be any negative consequences anywhere on the globe for its free and open manifestation. To adhere to the fundamental principles of equality, non-discrimination, and respect for inherent and inalienable human dignity, the same must be applied to people of diverse sexualities, genders, and sex characteristics.

Another important judgment which fully contradicts the ECtHR’s line of reasoning regarding the concealment of non-normalized sexuality is the CJEU’s *Minister voor Immigratie en Asiel v. X, Y and Z* (2013),[218] which was also issued prior to *M.E*. The CJEU explicitly argued that:

> ‘requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it’.[219]

Even though both *X, Y and Z* and *M.E.* concern the same issue of discretion requirement, the key differences between the two judgments should be highlighted. First, the ECtHR dealt with the case addressing *non-refoulment* under Article 3 ECHR, while the CJEU did so using the 1951 Convention refugee definition. That is, the courts were reasoning within the notions of ‘real risk of torture or inhuman or degrading treatment in the country of origin’ and ‘a well-founded fear of being persecuted’ respectively.[220] However, in the context of addressing the concealment

[217] Dissenting opinion of Judge Power-Forde in *M.E. v. Sweden* (n 12), para. 12.

[218] *Minister voor Immigratie en Asiel v. X, Y and Z,* CJEU, joined cases C-199/12 to C-201/12, judgement of 7 November 2013.

[219] ibid., para. 70.

[220] Spijkerboer (n 180) 229.

of sexuality and whether it can be permissible, the said distinction is irrelevant.[221] Second, *non-refoulment* under Article 3 ECHR does not require the existence of any particular reasons why the prohibited treatment may arise, while the refugee definition is based on five specific protected characteristics, namely race, nationality, religion, political opinion, and a membership of a particular social group.[222] Likewise, for the comparative analysis of the two cases and their compatibility, the latter difference does not matter either, as sexuality-based persecution addressed in the two cases satisfies both Article 3 ECHR *non-refoulment* regime and the refugee definition under the 1951 Convention.

Despite earlier availability of the CJEU judgement on the very same issue, the majority of ECtHR's judges, except Judge Power-Forde, chose to ignore it and avoid any interacting analysis. The dissenting judge aptly called the majority's decision out by comparing it to another ECtHR judgement, namely *Slyusarev v. Russia* (2010),[223] which deemed depriving a person of reading glasses for four and a half months as degrading treatment and thus a violation of Article 3 ECHR.[224] Simultaneously, 'depriving this applicant of his dignity for a similar or longer period by expecting him to hide an intrinsic part of his identity for fear of persecution' was not seen in the same way.[225] The dissenting judge then concluded:

> 'Having to hide a core aspect of personal identity cannot be reduced to a tolerable bother; it is an affront to human dignity—an assault upon personal authenticity. Sexual orientation is fundamental to an individual's identity and conscience and no one should be forced to renounce it—even for a while. Such a requirement of forced reserve and restraint in order to conceal who one is, is corrosive of personal integrity and human dignity.'[226]

[221] ibid.

[222] ibid., 229-230.

[223] *Slyusarev v. Russia*, ECtHR, App. No. 60333/00, judgement of 20 July 2010.

[224] ibid., paras 43–44.

[225] Dissenting opinion of Judge Power-Forde in *M.E. v. Sweden* (n 12), para. 17.

[226] ibid.

The most recent case of the ECtHR on concealment of sexuality, namely *B and C v. Switzerland*, was welcomed by the human rights sector as the Court appeared to have departed from the above-mentioned discretion requirement. Indeed, for the first time,[227] the Court explicitly recognized, at least through the wording that it is agreed upon between the parties, that human sexuality is a fundamental aspect of a person's identity which nobody can be required to conceal for the purposes of avoiding persecution.[228] The ECtHR also perceived the fact that the applicant was living discreetly in his country of origin as irrelevant, as it does not guarantee that his sexuality could not be discovered by the domestic authorities or local population in the future in case of his removal.[229]

The judgment can indeed be seen as progress towards the full emancipation of people of diverse sexualities, genders, and sex characteristics, and was praised as 'a significant step forward, both in terms of outcome and reasoning'.[230] The ECtHR additionally recognized that persecutory treatment may not always be limited exclusively to state conduct but could also be personalized through 'individual acts of 'rogue' officers'.[231] The Court was also able to acknowledge that despite there being no reports present on such acts, it could have been due to underreporting and the reality could be different than that known.[232]

While the judgment should indeed be seen as a positive development and an indication of further potential the ECtHR has, there is a significant difference in

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[227] The fundamentality of human sexuality and rejection of its concealment to avoid persecution in case of (permanent) removal was first recognised in *I.K. v. Switzerland*, ECtHR, App. No. 21417/17, decision (admissibility) of 19 December 2017. Para. 24 of the decision indicates that:

> 'Par ailleurs, la Cour estime que l'orientation sexuelle constitue un aspect fondamental de l'identité et de la conscience d'un individu et qu'il ne saurait dès lors être exigé de personnes déposant une demande de protection internationale fondée sur leur orientation sexuelle qu'elles dissimulent cette dernière'.

However, since the only official version of the judgement is issued in French, for the purposes of this thesis, focus will be given to *B and C v. Switzerland*, where the judgment is available in English.

[228] *B and C v. Switzerland* (n 174), para. 57.

[229] ibid.

[230] Ablondi (n 161) 10.

[231] *B and C v. Switzerland* (n 174), para. 59.

[232] ibid.

discretion requirement analysis in *B and C* and *M.E.* that should be highlighted separately. It concerns the fact that *B and C* addressed the possibility of concealment in case of *permanent* removal of the queer applicant, that is when he would need to live his life discreetly for an indefinite period of time. With this judgment, the ECtHR got closer to aligning its jurisprudence with the one of the CJEU as well as broader demands of the human rights community. Such aligning has also a negative dimension as both courts seem to finally outlaw the discretion reasoning, yet they 'fell short by not giving enough indication as to what to do', creating a 'legal vacuum', which correspondingly means that national authorities can and still do find a way to apply such reasoning in practice, both explicitly and implicitly.[233]

Simultaneously, the decision in *B and C* does not address the possibility of removal for a limited period of time, and, correspondingly, temporary concealment of sexuality, as it was very specifically established in *M.E.* The latter judgement had a unique problematic nature, as the ECtHR addressed temporary concealment exclusively, and introduced the so-called 'duration test' that was not present in the CoE/EU context before.[234] Regardless of for how long a person is to be removed, the inseparable importance of human sexuality for identity, personhood, and dignity determines the necessity to reject any requirement to suppress the said aspects and live discreetly. The obligation for an asylum seeker to conceal their sexuality for months instead of years does not diminish 'the absurdity of that [discretion] argument'.[235]

Therefore, the latest judgement in *B and C* does not necessarily indicate the progressive turn of the ECtHR to full abandonment of discretion reasoning, at least particularly the one of temporary nature. The consistent monitoring of further developments and potential human rights sector interventions should be in place as the latest judgment led to 'a crack in the door' which '…can be used and widened by further strategic litigation'.[236]

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[233] Sussner (n 178) 35.

[234] Dissenting opinion of Judge Power-Forde in *M.E. v. Sweden* (n 12), para. 11.

[235] ibid., para 12.

[236] Ablondi (n 161) 11.

3.3 The stance of the Court on the mere criminalisation of same-sex consensual sexual activities

Another issue that deserves at least a brief attention is the ECtHR's stance on whether the mere criminalization of same-sex consensual romantic and sexual activities amounts to persecution or treatment contrary to Article 3 ECHR, which can reveal additional suspicion of sexualized and gendered bias in the Court's jurisprudence. In the latest judgement addressing the rights of asylum seekers of diverse sexualities, genders, and sex characteristics, *B and C v. Switzerland*, the ECtHR stated that:

> 'the mere existence of laws criminalising homosexual acts in the country of destination does not render an individual's removal to that country contrary to Article 3 of the Convention'.[237]

Despite this decision mirroring the *Minister voor Immigratie en Asiel v. X, Y and Z* of CJEU, which took the same stance on the issue, it is significantly problematic for the abovementioned reasons derived from queer theory. Moreover, it appears hypocritical as the ECtHR applies double standards if measured against its own jurisprudence dating back as early as the 1980's. In *Dudgeon v. United Kingdom* (1981), the Court argued that having the criminalisation legislation in force, even if it is not applied in practice, interferes with, and directly affects the concerned persons' private life.[238] Moreover, the ECtHR explains that the life of the applicant is conditioned by his choice either to abstain from any behaviour leading to same-sex relations, despite his homosexuality and consensual intimate relationship, or consciously accept that he would commit a crime every time he engages in same-sex activity, even when it is hidden in private.[239] Such lifestyle can be significantly impairing to the mental health of persons of diverse sexualities,

[237] *B and C v. Switzerland* (n 174), para. 59.

[238] *Norris v. Ireland*, ECtHR, App. No. 10581/83, judgement of 26 October 1988, para. 32, 38 citing *Dudgeon v. United Kingdom* (n 5), para. 41.

[239] ibid.

genders, and sex characterises, and the Court recognised it itself by referring to the conclusion that:

> 'One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease'.[240]

Therefore, the ECtHR itself was able to see such negative, widely elucidated, consequences of criminalisation of homosexuality, even if inactive, which include, except for depression and anxiety, damage to self-esteem as well as social marginalisation.[241] Moreover, legislation in force shapes the legal, as well as social and political reality, surrounding the treatment and rights of people of diverse sexualities, genders, and sex characteristics. The enactment of such laws is also conditioned by a current political regime and leadership as it can always change or deteriorate, especially in the states with weaker democracy strength. Not only is it a real possibility *per se* in theory, but it is also backed by multiple recent examples of reversing policies, in particular, in Malawi, Zambia, and Zimbabwe.[242] Again, the Court acknowledged this reality noting that the criminal legislation can be again applied in the future if there is a change of policy and thus the asylum seekers 'run the risk of being directly affected' by such laws as long as they are not repealed.[243]

The ECtHR acknowledged it is possible for a treatment to reach the necessary threshold of Article 3 ECHR violation even if it does not necessarily concern physical harm. In particular, treatment can be degrading if it causes victims to experience 'feelings of fear, anguish and inferiority capable of humiliating and

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[240] ibid., para. 33.

[241] Amnesty International and the International Commission of Jurists, *Observations by Amnesty International and the International Commission of Jurists on the case X, Y and Z v Minister voor Immigratie, Integratie en Asiel (C-199/12, C-200/12 and C-201/12) following the Opinion of Advocate General Sharpston of 11 July 2013*, 2 October 2013, 4, available at amnesty.org.

[242] ibid., 7.

[243] *Norris v. Ireland* (n 238), para. 33.

debasing them'.[244] While the Court did not argue this in relation to the treatment of persons of diverse sexualities, genders, and sex characteristics specifically, criminalisation of homosexuality can arguably amount to the same level of mental pain and suffering. Such perception of the mere presence of criminalisation legislation is shared among many human rights actors and judicial bodies. The UNHCR stated that the existence of such legislation is capable of causing 'an intolerable predicament for an LGBTI individual rising to the level of persecution'.[245] The mere fact that it can be applied rarely or not applied at all is not determinative as such laws can construct or facilitate 'an oppressive atmosphere of intolerance' and produce fear of persecution.[246] It can be used to extort or blackmail affected people, physically abuse them with impunity, invite and justify physical and mental harassment, as well as induce broader heterosexist political rhetoric simultaneously affecting future policy levels.[247]

Criminalisation laws are also an evident indication that persons of diverse sexualities, genders, and sex characterises are automatically deprived of state protection in case the prohibited treatment, which extends 'far beyond' criminal prosecution, comes from non-state actors of persecution.[248] This means that affected persons can neither afford protection of the police from violence nor judicial redress, as the state simply 'cannot provide effective protection against its own state-approved persecution'.[249] If the country of origin information is ambiguous or does not indicate that there is enforcement of such laws, 'a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted or are at risk thereof'.[250] Because of the abovementioned reasons, international organisations

[244] *Soering v. United Kingdom*, ECtHR, App. No. 14038/88, judgement of 7 July 1989, para. 100.

[245] UNHCR, *UNHCR Observations in the cases of Minister voor Immigratie en Asiel v. X, Y and Z (C-199/12, C-200/12, C-201/12) regarding claims for refugee status based on sexual orientation and the interpretation of Articles 9 and 10 of the EU Qualification Directive*, 28 September 2012, para. 4.3.2, available at refworld.org.

[246] ibid.

[247] ibid.; Amnesty International and the International Commission of Jurists (n 241) 6.

[248] Amnesty International and the International Commission of Jurists (n 241) 6.

[249] ibid.

[250] UNHCR (n 245), para. 4.3.2.

consider that the mere existence of laws criminalising same-sex conduct in any form *per se*, regardless if applied in practice, poses a real risk of persecution and thus amounts to well-foundedness of persecution.[251] Likewise, the Italian Supreme Court held that criminalisation law (in Senegal) is 'in itself a general condition of deprivation of the fundamental right to live an emotional and sexual life without restrictions' and thus '…considered to be itself a form of persecution'.[252]

Interestingly, Judge De Getano in his separate opinion to the majority's judgement in *M.E.,* issued six years prior to *B and C,* criticised the CJEU's 'controversial statement' on the criminalisation of same-sex conduct.[253] He argued that such a position can be perceived 'as somehow undermining the standards set by the Court as far back as the 1980s in connection with the criminalisation of homosexual acts and the resulting violation of Article 8'.[254] This may imply that the ECtHR's earlier jurisprudence could also be interpreted as deeming criminalisation laws *per se* as treatment contrary to Article 3 ECHR, were it assessed within the Article 3 ECHR *non-refoulment* regime. Nevertheless, just a couple of years after the decision in *M.E.*, the Court fully sided with the CJEU, taking identical heterosexist position in *B and C.*[255] Furthermore, restricting its assessment in queer asylum cases to Article 2 ECHR and Article 3 ECHR led to the establishment of two different, and rather opposing, stances on criminalisation laws, 'with the much broader scope of protection under Art. 8 ECHR remaining inaccessible to asylum seekers'.[256] Besides, the Court paradoxically abused the reality and experiences of asylum seekers in their countries of origin with inefficient and distorted law-enforcement mechanisms 'to the detriment of asylum seekers'.[257]

The reluctance of the ECtHR, as well as of the CJEU, to see and accept the drastic consequences of the criminalisation laws present in the lives of people

[251] Amnesty International and the International Commission of Jurists (n 241) 8.

[252] *Ordinanza n. 15981 del 2012*, Supreme Court of Italy (Corte Suprema di Cassazione), 20 September 2012, available at refworld.org.

[253] Separate opinion of Judge De Gaetano in *M.E. v. Sweden* (n 12), para. 4.

[254] ibid.

[255] *B and C v. Switzerland* (n 174), para. 59.

[256] Ablondi (n 161) 9.

[257] ibid.

outside of the sexual and gender binary can be seen as purely heterosexist. The double standards or abstentionist approach of the Court would be difficult to explain otherwise, particularly purely within the applicable law and general principles:

> 'why a permanent infringement on the right to respect for private life which results in 'anxiety and guilt feelings of homosexuals leading, occasionally, to depression' would not qualify as degrading treatment remains unclear'.[258]

Such a position of the Court, which also has a truth-constructional dimension, flaws from all the above-mentioned assumptions on the intrinsic value, privacy, and necessity to experience sexuality-related behavioural aspects in everyday life, which the Court sees differently than that of normalised heterosexuality. Moreover, the diversification of the ECtHR's approach to same-sex activities criminalisation in the context of inside and outside the CoE might imply the existence of broader intersectional bias of heteronormativity and racism.

3.4 Intersectionality of heteronormativity and racial bias, cultural othering, and homonationalism

It is worth noting that in the case of asylum cases concerning individuals of diverse sexualities, genders, and sex characteristics, the sexualized and gendered bias in the ECtHR's jurisprudence may intersect with racial bias and cultural othering. While this intersectionality is not the focus of this thesis, it is nonetheless necessary to briefly address it to better elucidate the biased treatment that people outside of gender and sexual binary encounter, even when approaching the highest human rights body in the region. There might be a presumption that a major part of such biased treatment arises from the racist perception of the East as rightless land and cultural othering.[259] Yet it is crucially important to additionally highlight that queer asylum seekers would be significantly disadvantaged even in comparison to those persecuted on other grounds due to the additional intersection with the gendered and sexualized bias.

[258] Spijkerboer (n 180) 233–234.

[259] Ablondi (n 161) 7–8.

The ECtHR, among others, has been continuously portraying Europe as progressive and the most developed region which has shaped the narrative that human rights as an idea is enshrined in European identity and mentality. The rights of persons of diverse sexualities, genders, and sex characteristics have become a very important part of this narrative, especially contrasted against the lack of developments in other regions.[260] Simultaneously, the inclusion of queer people in political, social, and sexual citizenship has been instrumentalized as a tool of exclusion. Constructing a unique place of European states as where, exclusively, human rights thrive can be characterized as 'European LGBT+ rights exceptionalism'.[261] At the centre of such discourse lays populist homonationalism.

As introduced by Puar, homonationalism implies that states are not always heteronormative, and that queer is not necessarily perceived as 'the other'. Instead, 'acceptance and tolerance for gays and lesbians have become a barometer by which the right to and capacity for national sovereignty is evaluated'.[262] Because the migrants are a part of the broader racialized and culturalized narrative constructed to exclude 'the other', they are considered to be a threat to the progressive and modern West, its white people, and both white queer people and queer people of colour.[263] Simultaneously, asylum seekers of diverse sexualities, genders, and sex characteristics are somewhat of a mutant nature.[264] First, they are vulnerable with deprived agency fully relying on the progressive queer-inclusive West to protect them from the premodern East. Then, they are a part of the East themselves, representing the corresponding threat to the order and values of the West if they are to be allowed to stay.[265] This correspondingly provokes 'political anxiety' around asylum seekers of diverse sexualities, genders, and sex characteristics that contributes to the widespread culture of disbelief.[266] The abovementioned sections

[260] ibid.

[261] ibid., 8.

[262] Jarbin Puar, 'Rethinking Homonationalism', 45(2) *International Journal of Middle East Studies* 336–339, 336.

[263] ibid.; Akin (n 179) 35.

[264] Akin (n 179) 35.

[265] ibid.

[266] ibid.

on different aspects of queer asylum applications unpack the reality that the ECtHR sees asylum seekers of diverse sexualities, genders, and sex characteristics as non-Europeans first, and only after that as vulnerable persons in need of international protection.[267] In practice, this means that such people are primarily assessed against the background of them posing a threat, and then, already biased with the first part, against their vulnerability and the need of protection.

The queer *or* refugee dichotomy is even more exaggerated if asylum seekers are not just rightless subjects of the conservative East but also Muslims. The post-9/11 splash of racism and islamophobia has constructed the narrative around *Muslims* as *terrorists* and 'unenlightened barbarians'[268] who are the threat to peace, democracy, and particularly European queer people's safety.[269] A queer Muslim asylum seeker is therefore opposed to European 'disciplined homosexual subject' as 'sexually pathological terrorist figure'.[270] Fuelled by islamophobia, racism, and cultural othering, the heteronormative culture of disbelief in this case is aggravated to the level of 'dilemma of subjectivity', namely 'are you Muslim, or are you gay?'.[271]

It is difficult to underestimate the active role of the ECtHR in establishing and strengthening the described narrative. It is done so, in particular, through the truth-constructing reality that lower human rights standards are prevalent outside of the CoE context and that thus the CoE Member States do not bear responsibility for applying lower standards to asylum seekers.[272] Regardless of the theory or explanation used, it can be argued that the queer *or* refugee dichotomy as an embodiment of intersectional bias is another example of heteronormativity reaffirmation. Here non-normalized sexuality, as 'the other', is used to exclude even more unacceptable, unnormalized queer that is also migrant. Despite homonationalism being alleged to protect European persons of diverse sexualities,

[267] Ablondi (n 161) 9.

[268] Spijkerboer (n 180) 224.

[269] Jarbin Puar, *Terrorist Assemblages: Homonationalism in Queer Times*, tenth anniversary expanded edition, Duke University Press Books, 2017, 20.

[270] ibid., 21.

[271] ibid.

[272] Ablondi (n 161) 9.

genders, and sex characteristics, not only is it a significantly problematic phenomenon in itself, but also more so because such reality only accepts the very particular Western heteronormativity-constructed homonormative queer to the exclusion of the other forms. Such a version is sustained by the very same normativities underpinning heteronormativity, namely mononormativity, repronormativity, cisnormativity and sexual imperative.

3.5 Conclusion

This chapter was dedicated to the analysis of asylum-related rights of persons outside the sexual and gender binary to challenge the controversial stances of the ECtHR on credibility assessment, discretion requirement, and criminalisation of queer sexual conduct. It was revealed that the Court has adopted an abstentionist approach to national authorities' credibility assessment, which correspondingly upholds heterosexist narratives on late disclosure of sexuality and former heteronormative relations. Such a position correspondingly overlooks the asylum seekers' vulnerability, fuels the 'culture of disbelief', and reaffirms the binary division that rejects sexual and gender diversity. Then, the ECtHR has developed a very controversial stance concerning discretion requirement, particularly of temporary nature which has not yet been overruled. The line of the Court's reasoning is based on the heteronormative premise of non-heterosexuality as exclusively sexual phenomena belonging to the realm of privacy and secrecy. The Court also established different standards of protection when it comes to the existence of homosexual conduct criminalisation, as it does not perceive it contrary to Article 3 ECHR despite the detrimental impact on refugees' mental health and social perception of diverse sexualities, genders, and sex characteristics. Finally, asylum seekers outside the sexual and gender binary appear even more vulnerable due to the construction of the narrative around them fuelled by the intersectionality of heteronormativity and racial bias, cultural othering, and homonationalism. The Court thus perpetuated the mutant perception of them through the dichotomy of abnormal queer and dangerous migrant.

4 Broader legal, political, and social implications of the existent bias

As it was elucidated in previous chapters, the ECtHR's jurisprudence on the rights of persons of diverse sexualities, genders, and sex characteristics is very controversial, particularly when it comes to family- and asylum-related rights. Such a controversy appears even more problematic when addressed through the lens of queer theory as it reveals the failure of the Court to address and redress heteronormativity, incarnations of which are deeply rooted in the current jurisprudence. Despite formally having a binding effect only on the parties to a case, adjudication of the ECtHR as an international judicial body has *erga omnes* effects, meaning it possesses an arguably significant influence on the CoE states' policies.[273] As the Court highlighted itself:

> 'judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties… Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.'[274]

The Court's adjudication thus correspondingly has broader legal, political, and social implications which are the centre of this chapter.

[273] Laurence R. Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68 *International Organization* 1 (2014) 77–110, 77–78.

[274] *Karner v. Austria*, ECtHR, App. No. 40016/98, judgement of 24 July 2003, para. 26.

4.1 Broader legal implications

When it comes to addressing the legal implications of the heteronormative bias in the ECtHR jurisprudence, the biggest aspect of it is the corresponding impairment of the rights belonging to people of diverse sexualities, genders, and sex characteristics. First, it includes the right to marry or to have a marriage recognised, which is of essential importance to queer people in their struggle for (legal) normalisation, despite being a largely heteronormative institution itself. Then, access to marriage always entails other rights and privileges attached to it, particularly of economic significance. Third, queer people are deprived of the protection of their rights as parents, particularly that of second-parent and joint adoption. The latter impairs not only the inherent human dignity and the rights of queer parents but more so of their children as well.

When it comes to asylum-related rights, the consequences of the ECtHR's restrictive position may appear as a greater detriment to queer asylum seekers' rights, in comparison to those of the CoE states' residents. The Court has reinforced the exclusionary and inhuman asylum practices that coexist within the CoE and the EU systems. That, correspondingly, normalises the legal policies on invasive and indecent credibility assessment methods, the existence of (temporary) *refoulment* under the discretion requirement, as well as supporting the narrative of the adequacy of criminalisation of consensual same-sex sexual activities which is not applied in practice. In the broader scope, this contributes to the creation of the different human rights standards, which, correspondingly invalidates the argument of human rights universality.

It can be witnessed how the early jurisprudence of the ECtHR on the rights of people outside the sexual and gender binary has forced positive changes onto national legislations, for instance, by outlawing criminalisation of same-sex sexual conduct that sped up abandoning such laws within the context of CoE.[275] The same, however, cannot be said about marriage equality and other family-related rights. The sexually- and gender-biased stance of the Court did not provide the possibility for pushing further progressive and inclusive legislation. The ECtHR abstained from the possibility to push forward the changes that would significantly weaken

[275] Helfer and Voeten (n 273) 88.

the long-lasting heterosexism, discrimination, and exclusion of queer people from sexual citizenship.

There is a voluntary practice of the CoE states of changing their laws and regulations following the judgements against other countries.[276] Some states would do so, anticipating the negative outcome were there the same complaint against them, to avoid future (costly) litigation before the Court.[277] Moreover, the abovementioned *erga omnes* effects have even stronger influence, particularly on the constitutional law dimension, and 'the Convention, as interpreted by [the] Court, has thus become a reference point for constitutional review'.[278] On the contrary, the CoE states can view the described ECtHR jurisprudence as an invitation to continue othering persons outside the sexual and gender binary on the legislative level. For the currently deeply heterosexist CoE states, such as, for instance, Hungary or Poland, it is a sign that there are no legal, political, or ideological obstacles to pursuing their present exclusionary social policies to back the same type of legislation. In relation to the states that have, on the contrary, queer-friendly legislation, the Court's restrictive stance may indicate that there are no safeguards preventing them from reversing its policies into exclusionary and discriminatory ones in case of change of a government. In the era of populist surge across the CoE states, such a possibility appears significantly plausible, as can be witnessed, for instance, in the case of Italy, where the new conservative government pledged to restrict the rights of queer people to protect 'traditional family'.[279]

4.2 Broader political implications

There can be many substantive political implications of the ECtHR's restrictive adjudication on the rights of persons outside the sexual and gender binary identified. The long-lasting structural heterosexism has constructed the queer rights and diverse sexualities, genders, and sex characteristics themselves as a highly

[276] Council of Europe, *Annual Report 2010 of the European Court of Human Rights*, 48–49, available at the link.

[277] Helfer and Voeten (n 273) 81.

[278] Council of Europe (n 276) 49.

[279] Le Monde with AFP, 'Protests in Italy as government limits rights of same-sex parents', 18 March 2023, available at Le Monde's website.

politicised narrative. In many CoE states the issue is consistently present on different levels of political debates, from the lowest, such as, for instance, proclaiming 'LGBT-free zones' in many municipalities in Poland,[280] to the highest, where it becomes central in national elections, as it was in Italy in 2022 parliamentary elections.[281] It is often constructed to support the homophobic narrative of protection of 'traditional family', marriage, moral values, and children from pervasive non-normalised queer people, which, furthermore, may often take the form of hate speech.

In the surge of populism across many CoE states, such tactics can be particularly efficient and bring the desired political outcome. Despite having the possibility within its power to deconstruct or, at the very least, initiate such a deconstruction of the said heterosexist political narrative, the ECtHR refused to do so. Thus, on the political level states are free to further pursue policies aimed at exclusion, stigmatisation, and discrimination of queer people in crucial aspects of their rights.

Based on the broader consequences of the early jurisprudence from Strasbourg, there is a finding that 'an ECtHR judgment against one nation increases the likelihood that all CoE countries will adopt the same pro-LGBT policy'.[282] The presence of a judgement additionally increases the probability of positive queer-friendly policies adoption by roughly fourteen per cent.[283] Moreover, it has the greatest marginal effect in states with negative attitudes towards diverse sexualities where such judgments play legitimising and justifying roles.[284] It can be concluded that the presence of both a positive ruling and adequate legal and political institutional capacities reduces public and political negativity surrounding the non-binary reality and enhances the probability of policy change.[285] Furthermore, the

[280] Claudia Zygmunt, 'Polish Activists Win Cases Against 'LGBT-Free Zones', Human Rights Watch, 8 May 2023, available at hrw.org.

[281] Giulia Tranchina, 'The New Italian Government Poses A Human Rights Challenge', Human Rights Watch, 28 September 2022, available at hrw.org.

[282] Helfer and Voeten (n 273) 80.

[283] ibid.

[284] ibid., 80, 106.

[285] ibid.

Court's progressive judgements have a consolidatory effect on queer and other political movements dedicated to human rights protection as well as an agenda-shaping effect on national authorities.[286] In the broader international dimension, particular judgements against one state 'may embolden international organizations […] to demand policy change in all of its member states'.[287]

Nonetheless, in the present case of the ECtHR reaffirming heteronormativity, the corresponding political movements are deprived of a very powerful instrument for achieving the establishment of progressive, friendly to diverse sexualities, genders, and sex characteristics policies. The opposite, however, can be concluded about conservative or populist political actors which may find additional support from the Court's current line of reasoning. Simultaneously, the biased jurisprudence of the ECtHR on the reality outside gender and sexual binary reduces the possibility that populist governments susceptible to fear of reputational damages on the international arena would pursue more queer-friendly policies, were they initiated or fuelled by more progressive Strasbourg judgements.[288] Indeed,

> 'It is one thing not to *initiate* policy change on the national level and quite another not to *respond* once a particular right is made salient through international negotiations. Silence is ambiguous in the absence of a particular proposal, but it can easily be interpreted as opposition in the presence of a specific accord'.[289]

4.3 Broader social implications

Social implications of the heteronormativity incorporation in the ECtHR's main argument on the rights of persons of diverse sexualities, genders, and sex characteristics are closely connected to the legal and political ones. As highlighted

[286] ibid., 82.

[287] ibid., 79.

[288] ibid., 80.

[289] Beth A. Simmons, 'Theories of Compliance', in *Mobilizing for Human Rights: International Law in Domestic Politics,* Cambridge: Cambridge University Press, 2009, 112–156, 128.

in the previous chapters, law is a crucial instrument in the reinforcement of heteronormativity as it influences

> 'the demarcation of the boundaries of accepted/unaccepted sexualities, which takes place both by granting privileged status to those sexualities that accommodate to the norm(al), as well as by exercising juridical power to punish those sexual practices that deviate from it'.[290]

Thus, law constructs the narrative around persons outside the sexual and gender binary which has a broader social dimension. As previously elaborated, the prevention of full emancipation of queer people by legal and judicial means exacerbates the negative effects on them which are translated into social attitudes. Then, when both elites and the public are aware that certain policies from other states were perceived as contrary to the ECHR, they are more prone to expressing opposition towards those policies.[291] In the absence of such a perception and where there are no proper legal instruments of protection, the social attitudes may depend on other types of social regulators such as moral values, ethics, or even religion to a larger extent.

The flawed legislation and biased adjudication furthermore tend to validate more negative social attitudes towards persons outside of the sexual and gender binary. Correspondingly, the Court's heteronormative stance(s) contribute to establishing a circular argument of heterosexism – the ECtHR does not take a more progressive interpretation of the Convention because of the lack of consensus among the CoE Members, which is largely conditioned by the social attitudes present there. At the same time, the negative social attitudes and the corresponding lack of proper queer human rights compliance are not challenged and more so are fuelled by the politicised lack of the will from the Court to protect such rights.

It is difficult to underestimate how important is legal and judicial interpretation of the rights of persons of diverse sexualities, genders, and sex characteristics for constructing social reality around it. The ECtHR's involvement in the issue highlights the multidimensional evolution that queer rights have been

[290] Gonzalez-Salzberg (n 55) 59.

[291] Helfer and Voeten (n 273) 82.

undergoing over the last decades. It reflects all milestone changes in the social, legal, and political narratives, starting from the outlawing criminalisation of homosexual sex, which symbolised the beginning of deconstructing diverse sexualities as fully abnormal 'other'. It was followed by reclaiming other rights further officialised by many positive decisions of the ECtHR that were gradually erasing the consequences of the long-lasting structural heterosexism.

The gradual inclusion of queer people into sexual citizenship has been deconstructing the social narrative on queer rights themselves, which can be characterised as a transition from 'basic rights' to 'sex rights', and finally 'love rights'.[292] The broader social perception of rights regulating diverse sexualities, genders, or sex characteristics, could be somewhat categorised as 'the right to relate'[293] in whatever form it may appear. Such 'love rights' or 'the right to relate' categories as a homonormative strategy appear particularly efficient in deconstructing sexuality and gender as identities necessarily opposed to diversification from the heterosexual and cisgender norm. Yet at the same time, the current jurisprudence of the ECtHR can be alleged to impair or, at the very least significantly slow down the said evolution and overall social acceptance of full emancipation of people of diverse sexualities, genders, and sex characteristics. It contributes to the preservation of the current binary sexual and gender identities as necessary, stable, and just.

Another social implication of the Court's biased adjudication is the strong reaffirmation of the heterosexist structure of societal institutions, particularly that of marriage and adoption, followed by additional negative consequences. In particular, the ECtHR validated redistribution of social and economic benefits depending on willingness, and, in many queer people's cases, ability to enter the institution of marriage. Inferred from the queer theory standpoints, 'granting economic benefits based on marriage means considering other relationships to be

[292] Masuma Shahid, 'Equal marriage rights and the European Courts', 23 *ERA Forum* (2023) 397–411, 409.

[293] Kees Waaldijk, 'The Right to Relate: A Lecture on the Importance of 'Orientation' in Comparative Sexual Orientation Law', 24 *Duke Journal of Comparative & International Law* (2013) 161–199, 168.

less worthy'.[294] Overall, the social consequences of preserving heteronormativity of the marriage institution could be best summarised as:

> 'To a couple that gets married, marriage just looks ennobling… Stand outside it for a second and you see the implication: if you don't have it, you and your relations are less worthy Without this corollary effect, marriage would not be able to endow anybody's life with significance. The ennobling and the demeaning go together. Marriage does one only by virtue of the other. Marriage, in short, discriminates'.[295]

Concerning asylum-related rights, the social implications of the corresponding ECtHR jurisprudence encompass the intersectionality of heteronormativity and racial bias of cultural othering. The Court's stance perpetuates the existent narrative simultaneously fuelling the negative attitudes towards queer asylum seekers that already suffer from multifaceted discrimination from both the receptive and their own communities in a country of asylum. Additionally, they appear more vulnerable due to the inability to conform to the ECtHR-backed Western homonormative construction of who persons outside the sexual and gender binary are.

Overall, the heteronormative construction of the legal, political, and social realities has been under active revision, regardless of the ECtHR's role in it. It has become a permanent 'subject to legal negotiations' with active acknowledgement of discriminatory power relations.[296] Even though it still appears under the binary categorisation due to the active reclaiming of homosexual identity before the Court,[297] as the absolute majority of cases are dedicated to that, it cannot be excluded that in the nearest future, the ECtHR will address other identities as well. This correspondingly holds the potential of challenging the sexual and gender binary on a new systematic and structural level that may bring positive changes for persons of diverse sexualities, gender, and sex characteristics on their way to full emancipation.

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[294] Gonzalez-Salzberg (n 40) 103.

[295] Warner (n 134) 82.

[296] Sussner (n 178) 39.

[297] Gonzalez-Salzberg (n 55) 92.

4.4 Conclusion

This chapter provided a brief overview of the broader legal, political, and social consequences resulting from the conservative ECtHR jurisprudence on family- and asylum-related rights. It was observed that through the strong *erga omnes* effects the Court's impact extends significantly to other CoE states. The restrictive adjudication on the matter may perpetuate the existent discriminatory policies within family- and asylum-related rights, or even reverse existing queer-friendly legislation and policies, in case of a regime change. The Court's refusal to uphold the establishment of marriage equality and full adoption rights, and to invalidate the unjust asylum practices not only undermines the political consolidation around human rights but also supports the struggle of conservative groups that harbour hostility towards individuals outside the sexual and gender binary. Similarly, the analysed ECtHR jurisprudence impedes the social progress around queer rights, hinders the normalization of diverse sexualities, genders, and sex characteristics, and prevents the necessary shift in social attitudes.

5 Conclusion

Being dedicated to the analysis of the ECtHR jurisprudence on the rights of persons outside the sexual and gender binary, this thesis departed from the research question of whether there is and to what extent a gendered and sexualized bias present in such adjudication. The application of queer theory as the main methodological tool to the analysis of the most controversial areas of the corresponding jurisprudence, namely family- and asylum-related rights, has determined answering the research question as follows. In short, the refusal of the Court to abandon heteronormative narratives when addressing the reality outside the sexual and gender binary implies the existence of the bias, which reveals and explains structural inconsistencies, gaps, and the lack of persuasive line of argumentation on the matter. This argument was inferred from the analysis, the corresponding observations, and conclusions built through the thesis chapters.

Chapter 2 was dedicated to family-related rights, namely those connected to the institutions of marriage, adoption, and parenting. It revealed that, despite the significant progress made over the last decades, the ECtHR prevents further reclaiming of queer rights and thus full emancipation of the affected individuals. The Court does so by protecting the Western-built model of sexual and gender identities as necessary, stable, and just, and thus by failing to acknowledge, address, and redress heteronormativity underpinning family-related rights. It refused to accept the equal value and dignity of persons outside the sexual and gender binary and the relationships they form. The ECtHR's rejection of the Convention's progressive interpretation has reaffirmed heterosexuality as the only acceptable norm that privileges social institutions. It, correspondingly, constructed heterosexual individual, contrary to the queer, as subject of human rights entitled to every right guaranteed by the Convention. By doing so, the Court validated the segregating and discriminating existence of two separate regimes with the same purpose of relationship recognition, the access to which is conditioned exclusively on participants' sexuality.

The struggle of the ECtHR to preserve heteronormativity, at least on paper, was exaggerated to the extent of ignoring the sexual and gender reality and impairing the rights of others, particularly children of queer people. Concerning the

latter, the Court has abandoned the active instrumentalization of the best interest of the child principle as incompatible with queer parenting yet failed to recognise that having two (queer) parents falls within the principle. Finally, the Court instrumentalised a wide margin of appreciation to shield itself from the necessity of addressing the right to marry, the consequences of the absence of marriage equality and adoption for queer persons and their children, substantive equality demands, the necessity of joint adoption, and other crucial analysis.

Chapter 3 concerned the ECtHR assessment of the asylum-related rights of persons outside the gender and sexual binary which revealed that the line of the Court's reasoning is constructed on heteronormative assumptions as well. The judicial body primarily deferred to national authorities in credibility assessment methods which are based on the premise of the lesser value of queer people. It can be witnessed through, in particular, portraying late disclosure of sexuality and former heteronormative relationships as a sign of incredibility, which simultaneously reaffirms the sexual and gender binary exclusive of other forms of identity. The Court's abstentionist approach correspondingly perpetuates 'the culture of disbelief' that portrays queer asylum seekers, disregarding their particular vulnerability, as deceitful abusers of the international protection system.

Then, the judicial body adopted a deeply problematic stance on discretion requirement. Despite recently declaring that obliging asylum seekers to conceal their sexuality indefinitely to avoid persecution cannot be accepted, it is not clear whether the Court abandoned the same reasoning for temporary discretion. The concealment argument present in the Court's jurisprudence flows from heterosexist limitation of non-heterosexuality to exclusively sexual phenomena that should be kept in privacy and secrecy. This correspondingly normalises and constructs discretion as natural, and non-heterosexuality as 'the other'. Contrary to the ECtHR's position, discretion requirement as impairment of one of the most important and inalienable aspects of personhood is in itself degrading and thus contradicts the Convention.

It is also observed that the ECtHR attempts to normalise the mere criminalisation of same-sex sexual activities as compatible with the Convention. The judicial body's heteronormative standpoint prevents it from accepting that even if these laws are not applied in practice, they inflict mental suffering upon the

affected individuals which may be contrary to Article 3 ECHR. Such laws simultaneously construct the hostile legal and political narratives surrounding the issue, which are correspondingly transformed into deeply negative social attitudes. The Court also ignores that queer people are automatically deprived of state protection if the prohibited treatment comes from non-state actors and that there is no guarantee the policy of non-appliance of the criminalisation laws will not be reversed.

Finally, it is observed that the ECtHR practice also perpetuates the intersectionality of heteronormativity and racial bias, cultural othering, and homonationalism. Asylum seekers outside the sexual and gender binary are thus even more disadvantaged and vulnerable, as the Court constructs them as of somewhat mutant nature, being both unnormalized queers that do not fit in the Western sexual narrative and uncivilised migrants that threaten the European order. Such a reality has resulted in the creation of two distinct standards of protection, the lower of which is allocated to queer asylum seekers.

Chapter 4 briefly addressed further implications of the restrictive interpretation of family- and asylum-related rights within the legal, political, and social dimensions. It was observed that despite formally being binding only on parties in a case, the ECtHR jurisprudence has strong *erga omnes* effects on other CoE states. Namely, states tend to adopt queer-friendly legislation and policies following a Court's judgment, yet the present state of the jurisprudence may be interpreted as inviting governments to continue pursuing discriminatory policies within family- and asylum-related rights or reverse queer-friendly legislation and policies. Reaffirmation of the absence of marriage equality, restriction of adoption, and the existence of indecent asylum practises weakens the human rights sector and the political consolidation around it. Simultaneously, it fuels the effort of conservative groups hostile to persons outside the gender and sexual binary. Similarly, the restrictive ECtHR judgements impair the evolution of queer rights reclaimant, the normalisation of diverse sexualities, genders, and sex characteristics and the corresponding social attitudes.

Overall, the described weaknesses, gaps, inconsistencies, and the lack of a persuasive (legal) line of argumentation in the ECtHR adjudication on family- and asylum-related rights elucidated the non-legal reasons and factors behind the

restrictive judgements. Such reality, considering the above-mentioned observations based on queer theory, takes the form of gendered and sexualised bias. Correspondingly, the existence of the bias impairs the rights of persons of diverse sexualities, genders, and sex characteristics to the extent that they are still excluded from major institutions such as marriage and adoption, denied adequate access to international protection, and forced to experience the heteronormativity-constructed segregation and discrimination.

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