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EUROPEAN SEXUAL CITIZENSHIP

Human Rights, Bodies and Identities

Francesca Romana Ammaturo

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To my family

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Contents

List of Abbreviations

CFREU	Charter of Fundamental Rights of the European Union
CM	Committee of Ministers of the Council of Europe
COC	Cultuur –en Ontspanningscentrum [Centre for Culture and Leisure]
CoE	Council of Europe
CRC	United Nations Convention on the Rights of the Child
DSM	Diagnostic and Statistical Manual of Mental Disorders
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice of the European Union
EU	European Union
FGM	Female Genital Mutilation
FRA	Fundamental Rights Agency of the European Union
GID	Gender Identity Disorder
ICSE	International Committee for Sexual Equality
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
ISNA	Intersex Society of North America
LGB	Lesbian, Gay, Bisexual
LGBTQI	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex
OII	Organisation Intersex International
PACE	Parliamentary Assembly of the Council of Europe
TEU	Treaty establishing the European Union
TGEU	Transgender Europe
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

CHAPTER 1

Introduction

Abstract This book aims to contribute to bridging the gap between contiguous strands of literature by providing an articulate reflection on the productive relationships underpinning the creation and circulation of the lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) citizen and rights-holder in the European continent, defined not by the narrow borders of the European Union, but as an *aspirational* entity and *symbolic* space of belonging. By combining a Foucauldian perspective on the productive operation of human rights law on LGBTQI persons with a critical deconstruction of some strands of case law of the European Court of Human Rights (ECtHR) on sexual orientation and gender identity, this books seeks to explore the ways in which LGBTQI persons, and the recognition of their rights claims, are at the core of the process by which a "European identity" and a "European Citizenship" is relentlessly sought and defined.

Keywords Council of Europe • Human rights • European identity • European citizenship

This book is a contribution to the field of both socio-legal studies on the rights of lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) persons, and to sexual citizenship studies. In fact, its aim is to help to bridging the gap between these contiguous strands of

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literature, by providing an articulate reflection on the productive relationships underpinning the creation and circulation of the LGBTQI citizen and rights-holder in the European continent defined not by the narrow borders of the European Union, but as an *aspirational* entity and *symbolic* space of belonging. By combining a Foucauldian perspective on the productive operation of human rights law on LGBTQI persons, with a critical deconstruction of some strands of case law of the European Court of Human Rights (ECtHR) on sexual orientation and gender identity, this books seeks to explore the ways in which LGBTQI persons, and the recognition of their rights claims, are at the core of the process by which a "European identity" and a "European Citizenship" are relentlessly sought and defined. Increasingly, discourses concerning the rights associated with individuals' sexual orientation and/or gender identity are proliferating and intensifying in various geo-political and legal contexts. Social, legal and political recognition of the legitimacy of these rights claims is happening both at the level of nation-states and in international fora. Europe, in this regard, seems to occupy the symbolic position of catalyst for social change concerning the rights of this heterogeneous group of individuals.

Structural invisibility, and political, social and economic marginalisation of this heterogeneous group of individuals, often artificially regrouped under the "LGBTQI" acronym regardless of their differences, has for a long time been the norm. It could be argued that, in the 1948 Universal Declaration of Human Rights, the typical rights-holder in the collective imaginary was not just *male*, *white* and *middle class*, he was also *heterosexual* and *cisgender*. Similarly, the citizen of the polity was understood to incarnate these same characteristics by default, with issues of sex and gender entirely disappearing from a discussion concerning one's belonging to the national political community. Hence, same-sex sexual and sentimental attractions, as well as the defiance of gender norms, have been enshrouded in silence, shame and reprobation in different social, cultural and political contexts. While the legacy of this transversal stigma has far from vanished, many of the claims advanced by LGBTQI persons in the past few decades, starting from the late 1970s, have been legitimately included into the "repertoire" of human rights both at the national and international level, as well as finding legitimate recognition in the sphere of citizenship. Although with different aims and intensity, international organisations such as the United Nations (UN), the European Union (EU) and the Council of Europe (CoE) have officially started to include sexual orientation and gender identity among the "human rights issues" in

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

This process of increased recognition of rights of a formerly stigmatised and marginalised group of individuals, however, is not without its grey areas that directly call into question the interrelationship between law and politics. The citizenship status of LGBTQI persons is far from neutral and unproblematic. On the contrary, inclusion in the polity of former gender or sexual "outlaws" presents important productive aspects which ultimately require an interrogation of the principles by which this process of socio-political inclusion is enacted. More specifically, LGBTQI-friendly human rights policies promoted both at the level of nation-states and at the level of supranational international organisations, engender, to some extent, the suspicion that such an enthusiasm may well hide subtler political purposes pursued by these actors, for instance in connection with the promotion of a specific concept of nationhood or citizenship. In a context in which human rights may lose their aura of almost sacred universality and become the object of various political negotiations (Douzinas 2000; Dembour 2006), the emergence of rights claims concerning individuals' sexual orientation and gender identity represents a unique opportunity to explore the ways in which the boundaries of human rights can be stretched and new rights-holders and citizens can be created.

This book acknowledges the peculiar role played by Europe in this process of inclusion and recognition of LGBTQI subjectivities, rights and citizenship claims. Notwithstanding the crucial role of activists in the USA in the pioneering work on the claims to equality for LGBTQI persons, this book claims that this fight for inclusion and recognition in Europe

intersects with a peculiar and extremely fascinating phenomenon which points to the possibility of a radical transcendence of national boundaries, identities and allegiances. This process of creation or definition of an elusive concept of "European Citizenship", with the corollary concept of "European Identity", represents a direct and problematic challenge to the power and prerogatives of nation-states. Simultaneously, it also opens up important spaces for questioning the nature and content that these notions of "European identity" and "European Citizenship" should take.

Because of its focus on the interplay between human rights and citizenship, rather than on economic integration, the CoE, rather than the EU, has been identified in this context as the crucial actor in the process of the creation of a European notion of "human rights" and of "European citizenship". With its 47 member states, many of which aspire to join the EU, the CoE represents a perfect arena when conflicting notions of human rights and Europeanness are articulated. As such, therefore, the CoE can prove to be an inspiring locus from which to observe emerging dynamics of creation of "European sexual and gendered citizenship" as being a fundamentally rights-based transnational civilizational discourse. At the same time, however, the focus on the CoE, is not deprived of problematic aspects. In fact, notwithstanding the institution's predominant focus on the respect, promotion and dissemination of human rights principles in the European continent, the institution has relatively limited power in enforcing human rights standards in the various member states. Similarly, its work does not directly translate into the creation of a clearly bounded supranational concept of "European sexual and gendered citizenship". While the "moral" influence of the ECtHR's judgments may be recognised by the various member states, the political impact of these judgments often remains limited. As a "creature" of nation states, therefore, the CoE suffers a fundamental weakness: it can be destroyed by those same actors from which it originated. At the same time, however, it is argued in this book that the ECtHR's judgments, as well as the initiatives of the CoE's political bodies, play an important role in contributing to define the transnational standards of human rights in respect of the rights of LGBTQI persons, as well as providing the blueprint for the emergence of a European identity as being intrinsically "queer-friendly". It is argued in the book, that these institutions also participate, in a specular manner, in the creation of a regime of recognition of LGBTQI asylum seekers and refugees in Europe. This process, however, appears to be problematic, as preconceived notions about LGBTQI identities are played out in these contexts

and narrow criteria are often employed to determine the truthfulness of the asylum claims. This phenomenon, furthermore, acquires a much more significant value if seen against the background of the current "migration crisis" on the shores of the Mediterranean, whereby people from (but not limited to) war zones such as Syria are seeking refuge in Europe. In this context, European institutions (such as the EU or the CoE) have proved to be unable to provide adequate responses against populist temptations and fears that target migrants directly, and thus appear impotent in ensuring the implementation and respect of European human rights standards for non-European nationals. It is within this framework that the situation of the LGBTQI asylum seeker and refugee should be assessed and appraised, and her/his increasing vulnerability should be acknowledged and seen as a problem to address both in the courtroom and outside of it.

The CoE fulfils an important function insofar as it carries out the utopian objective of creating and strengthening a "European" model of human rights. Because of this peculiar function, it is the privileged terrain in which to investigate the emergence of new subjects of human rights, such as LGBTQI rights-holders. In the context of the CoE, in fact, the contradictions between the theory and the politics of human rights converge, and the creation of new subjects of human rights—such as LGBTQI rights-holders and citizens—represents a fascinating opportunity to both observe these contradictions and unveil the productive processes by which some individuals are endowed with entitlements, while others are sealed off from the political community. The research focus on the CoE, therefore, reflects the researcher's awareness of the highly political nature of this institution and it is in line with the necessity of highlighting the crucial ideological function that the work of the CoE fulfils in contributing to the creation of seemingly homogeneous conceptions of "human rights" which can be framed as crucial elements of an emerging "European identity".

In this regard, therefore, by acknowledging the limitations that the setting of the CoE offers, this book investigates the extent to which LGBTQI identities in Europe can be understood as being legal, political and social fictions, and what implications this process presents in relation to the existence of specific forms of gendered and sexual citizenship, both at the level of the various member states of the CoE and at the continental level. Far from being conceived as a mere critical reappraisal of the work of the CoE, this book seeks to problematise the notion of "LGBTQI rights" in the European context, in order to provide alternative models of non-national citizenship, such as "multisexual citizenship", based on active

political participation and challenges presented to normative categories of sexual orientation and gender identity. The ideal terrain for discussion is one in which it is possible to unpack these claims in order to transcend the rhetoric of "equality" and "freedom", which may often hide discourses of normalisation of difference and neutralisation of political challenges coming from the periphery of the multifarious plethora of human rights actors and subjects.

CHAPTER 2

Gender, Sexuality and Human Rights: A European Perspective

Abstract This chapter focuses on the way in which human rights discourses on LGBTQI persons' rights have been developed in the European continent and how this may or may not differ from the American model of human rights advocacy. The chapter highlights the peculiarity of the "European Model" of protection of LGBTQI persons as being influenced by the presence of both the EU and the CoE. Further, the chapter illustrates how developments in the field of human rights protection for these "sexual minorities" cannot be disjointed from supranational dynamics originating in these two organisations. Lastly, the chapter paves the way to introduce the concept of "European Sexual Nationalism" as a rhetorical and ideological device used in both national and foreign policy.

Keywords Gender • Sexuality • LGBTQI rights • LGBTQI activism • Council of Europe • European Union

A discussion of the concept of "European sexual and gendered citizenship", and its deep connection with the protection of the rights of LGBTQI persons, needs to be coupled with an exploration of the presumed exceptionalism of Europe on matters relating to gender and sexual expression. Given the shifting and problematic definition of "Europe" adopted in this book, it appears crucial to discuss and understand the ways in which Europe—mostly conceived in the narrow terms of *Western Europe*—has been associ-

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ated, in the past few years, with the protection, respect and promotion of LGBTQI rights (Ayoub and Paternotte 2014, 3). Ultimately, the analysis of this close association between *Europeanness* and *LGBTQI-friendliness* can help to shed light on European sexual and gendered citizenship as operating simultaneously as a normative and productive device on the one hand, and as a potential critical tool for empowerment and radical democratic engagement on the part of LGBTQI persons beyond its immediate neo-liberal framing and significance.

This chapter is organised around two analytical axes which will contribute to understand better Europe's presumably undisputed leadership position on LGBTQI rights worldwide and possibly put it in critical perspective. The first axis of analysis considers the way in which the rights of LGBTQI persons have developed in Europe and in the context of the USA, often heralded as the birthplace of LGBTQI activism, thanks to events such as the Stonewall Riots of 1969 in New York. The analysis contains a contextual appraisal of the various institutional, social, religious and political features of the two contexts which may have led to a differentiation in the model of advocacy and protection of LGBTQI rights in Europe and the USA. The second axis of analysis concentrates on the specific role of institutions such as the EU and the CoE as catalysts for the recognition, respect and protection of the rights of LGBTQI persons on European soil. In particular, the final section of the chapter will consider the emerging concept of "European Sexual Nationalism" as a newly deployed rhetorical and ideological device which promotes the production of specific gendered and sexualised identities throughout the continent and well beyond its borders, with the intention of strengthening the symbolic and material connotation of Europe as a moral hegemon.

The respect, protection and promotion of human rights have been characterised as a fundamental feature of European identity (Habermas 1992; Beger 2004; Todorov 2010). Whilst fascinating, this characterisation is nonetheless problematic as it implicitly assigns to Europe—understood as the "Europe of European institutions"—the role of moral champion vis-à-vis the rest of the world. Furthermore, this problematic depiction of the European continent as the cradle and birthplace of human rights overshadows the important political and social connotations (as well as potential responsibilities) that this identity carries with it. Nonetheless, for the purpose of this book, the conflation of Europe with the respect for human rights offers important occasions for reflection, as it helps to trace the peculiar trajectory of the development of LGBTQI recognition in Europe.

The development of an analysis of the framework of human rights protection for LGBTQI persons would be unthinkable without the joint analysis of activism and activists' initiatives and the consequent institutional responses to human rights claims of this heterogeneous "minority", at both the level of the various nation-states and the supranational level represented by European institutions such as the EU and the CoE. As Ayoub and Paternotte (2014, 7) have argued, in fact, there is a mutually constitutive relationship between the idea of a "rainbow Europe" and the work of LGBTQI activists; whilst LGBTQI activists shape their own vision of "Europe", they are in turn shaped by a specific idea of "Europe", both within and outside the formal boundaries of the EU. The dynamic and tight articulation of the nexus between LGBTQI activism and Europe, however, requires a brief historical digression tracing the emergence on the European public arena of lesbian and gay activism first and of bisex, trans and intersex experiences and activism later.

The Birth of the European and American Lesbian and Gay Movements: Cultural, Political, Religious and Legal differences

The experience of World War II has been considered as a shifting point in the development of lesbian and gay communities in both the USA and Europe (Altman 2002; D'Emilio 1983; Fejes 2008; Bérubé 2010), since it has enabled individuals to explore desire beyond the realm of underground gay venues typical of the pre-war period. These explorations were followed, in the immediate post-war period, by the creation of both "homophile" and lesbian organisations, both in Europe and in the USA. The Dutch organisation Cultuur- en Ontspanningscentrum [Centre for Culture and Leisure] (COC), founded in 1946 is often considered the first of its kind in the world, followed by two other important organisations across the Atlantic: the Mattachine Society, founded in 1950, and the Daughters of Bilitis, founded in 1955. In this regard, however, Rupp's (2014) work suggests that a parallel genealogy of lesbian and gay activism in the early 1950s in Europe and the USA may be oversimplified, as there is evidence that activism on issues relating to same-sex affect and desire in these times was predominantly driven by European activists. In particular, Rupp (2014, 29) has argued, that the creation of the International Committee for Sexual Equality (ICSE) in 1951 can be seen as the propulsive element in the development of a structured, articu-

lated, incisive and diverse LGBTQI movement in Europe, leading to the foundation of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) in 1978, the most important worldwide LGBTQI organisation. In general terms, Rupp (2014, 30) has identified three reasons for the fundamentally European character of lesbian and gay activism in the 1950s. Firstly, European organisations played a pivotal role in the organisation of transnational lesbian and gay activism, especially as the hub of activism moved from Germany to the Netherlands. Secondly, particularly in Europe, the emergence of a feeling of "homosexual cosmopolitanism" and the development of relatively unbridled forms of "sexual expressiveness" (Rupp 2014, 35), shaped the European homophile movement. Thirdly, Rupp (2014, 40) refers to European activists' conviction, particularly within ICSE, of having better organisational capacities with respect to their counterparts in the USA. This last aspect, in particular, has also been highlighted by Altman (2002, 421) who has argued that whilst the popular image of lesbian and gay activism is undoubtedly associated with the USA, the development of international networks has not been undertaken by American activists.

Rupp's analysis appears interesting insofar as it highlights the importance of social and cultural factors that have contributed to the early shaping of European and American lesbian and gay activist movements and laid the foundations for future differentiation between the two. There are, however, other aspects that can be added to the discussion in order to highlight the distinct developments of the lesbian and gay movements across the Atlantic and to partly explain the power of the contemporary European discourse on LGBTQI rights. These aspects mostly pertain to three areas: the sphere of politics, the sphere of religion and morality, and the sphere of the law and the protection of human rights beyond the horizon of the nation-state.

The first important contextual difference between Europe and the USA is represented by the phenomenon of McCarthyism in the USA (Beger 2004; Friedman 2005; Fejes 2008; Rizzo 2010; Rupp 2014) which profoundly contributed to depicting in a negative light homosexuality in the 1950s. The so-called "lavender scare" (Johnson cited in Fejes 2008, 17), by which homosexuality was closely associated with the threat of Communism (gay individuals working for the government were seen as being weak due to the risk of being blackmailed), contributed to the stigmatisation of gay and lesbian persons in American society. This association of homosexuality to the "Red Scare" in the USA highly differs from

the way in which homosexuality was regarded in Europe. Whilst the general affinities of lesbian and gay movements with left-wing politics have been pointed out by various authors (Engel 2002; Altman 2002), others (Hekma et al. 1995; Beger 2004) have specifically pointed out the existence of a steady strategic alignment between European left-wing parties and the various national lesbian and gay activists organisations. These alignments, Beger (2004, 47) argued, enabled European lesbian and gay movements to become, in different ways, part of the left-wing political landscape in the various nation-states. Looking at the desired outcomes of the European and American lesbian and gay movements, Rizzo (2010, 214) has claimed that whilst lesbian and gay movements in Europe—especially in France and Germany—have been characterised by a strong revolutionary tradition, lesbian and gay activism in the USA has predominantly sought to shift cultural perceptions of homosexuality. The orientation of the US lesbian and gay movement towards cultural reform, rather than towards a more revolutionary politics, can be traced back to the advent of the counterculture movement and the "sexual revolution", as well as the strengthening of the Black Power movement in the 1960s (Fejes 2008, 32). In fact, whilst these events brought about the emergence of more radical segments of the American lesbian and gay movements (e.g. the Gay Liberation Front) which distanced themselves from the assimilationist politics of groups such as the Mattachine Society, the radical potential was lost relatively soon. Within a decade, and with the decline of radical politics in the early 1970s, Fejes (2008, 33) argued that the US lesbian and gay movement fundamentally reverted back to a more assimilationist agenda. In this regard, however, Beger (2004, 47) offers a partly different reading of the development of lesbian and gay activism in the USA. Whilst claiming that lesbian and gay organisations in Europe did not undergo that process of polarisation between assimilationist and radical segments of the movements, as in the USA (Beger 2004, 47), by drawing on Epstein's (1999) and D'Emilio's (1983) work he equally highlights the lasting importance of the queer movement in the USA as one of the two crucial components, together with the assimilationist gay movement, of the American lesbian and gay movement fighting against the backlash from the Christian Right. At the same time, however, it would be reductive to see European lesbian and gay movements as being monolithic, as different broad trajectories existed in the various countries, with countries in Northern Europe being characterised by more liberal sexual politics (Altman 2002, 418; Beger 2004, 48; Rupp 2014, 34).

The argument of political alignments of the lesbian and gay movement, both in the USA and in Europe, leads to another strand of analysis relating to the role played by religion and morality in shaping activists' strategies and responses, as well as the emergence of a distinct European identity of the lesbian and gay movement. Coming back to Beger's (2004) argument about the need to oppose the Christian Right's backlash against homosexuality in the context of the USA, there are two interesting contributions to this debate. The first is represented by the work of Fejes (2008, 71) who has claimed that in the USA churches only started to play a role in the "condemnation" of homosexuality from the 1970s onwards. Before that time, Fejes (2008, 71) argued, religion's involvement in public debates on homosexuality was negligible. The task of condemning homosexuality was largely left in the hands of law and medicine (Fejes 2008, 71–72). In fact, many religious denominations in the USA had taken quite accepting and "tolerant" stances towards homosexuality. However, religious involvement in debates on homosexuality dramatically changed in 1977 and 1978 when American voters were called to vote for various referenda on laws protecting gay rights (Fejes 2008, 218–219). The campaigns against lesbian and gay rights, led by activist Anita Bryant, strongly mobilised religious narratives against homosexuality, thus leading to a direct involvement of religious leaders and figures in the thorny debate and, possibly, in the consequent and long-lasting deep entrenchment of conservative and religiously motivated views on homosexuality in American public opinion. In turn, lesbian and gay activism in the USA has been profoundly shaped by the strong mobilisation of the Religious Right, as Fetner (2008) has argued. In light of the comparison between the European and the US lesbian and gay movement, the lack of such a "structured" opponent in the case of Europe may be said to have played a role in the articulation of rights claims brought forward by activists and the obtainment of specific rights directly ensuing from those very claims.

Nonetheless, beyond the immediate involvement of religious leaders in the debates of 1977 and 1978, religious influence on the debate relating to homosexuality (and to the rights of lesbian and gay individuals) has also been expressed in a less direct way in the USA. In analysing the reasons why Europe can be defined as "lesbian- and gay-friendly" as opposed to the USA, Wilson (2013) has grounded her arguments on the existence of different cultures of "care" across the two sides of the Atlantic. More particularly, Wilson (2013, 16) has argued that the development of a les-

bian- and gay-friendly Europe has to do with the different states' fundamental commitment to provide care for their citizens as opposed to the dominance of private provision of care in the US context. What is interesting about Wilson's argument, however, is that the author traces the difference back to the influence of Christian conservative values in the USA to account for the different development in the "political economies of care" in the two settings and the development of attitudes towards issues such as same-sex relationships and marriage, in light of the existence of a "care crunch" from the 1980s onwards, which has led many governments to shift responsibility for care onto citizens (Wilson 2013, 63). Although not immediately related to the development of the lesbian and gay movement itself, it is possible to argue that if Wilson's explanation holds, the development of a secular paradigm of provision of care in Europe, as opposed to a system organised around faith-based care provision in the USA, has contributed to create the environment in which substantial arguments in favour of the recognition of same-sex partnership and/or marriage could be developed in Europe—hence its labelling as "friendly". Wilson's argument is interesting insofar as it presents an intersection between politics, political economy and religion and can, therefore, help to reflect on the ways in which narratives about inclusive citizenship and protection of human rights can actually disguise less politically progressive agendas such as the demise of the state's obligations towards its citizens.

Without delving too deeply into a discussion of the ramification of religious convictions on specific policies, campaigns or claims of the lesbian and gay movement both in Europe and in the USA, it is important to bring back the conversation to a more abstract level in which general patterns of religious behaviour and convictions relating to the sphere of sexuality in the two settings can be taken into account. In this regard, as Rupp has claimed, one line of fracture between the European and the North American continents in relation to the perception and reactions to the issue of homosexuality was the one relating to the fundamental puritanical character of American society (Dabhoiwala 2012, 78; Rupp 2014, 35). The influence of Puritanism on American society has led to the development of a quite distinct orientation towards issues relating to sex and sexuality, often exemplified in the enmeshment of politics and religion in American political life. More specifically, as both Beger (2004, 47–48) and Clark (2008, 14) have argued, sex and sexuality in Europe do not hold that strong public and political significance that they have in the

USA. Clark (2008, 14) has suggested that in Europe sex and sexuality are not viewed as strongly as in the USA, particularly in relation to questions such as teenager contraception, sex education, teen pregnancies and welfare for single mothers, as well as on issues relating to homosexuality and same-sex marriage. On a similar note, Clark (2008, 14) has argued that attitudes towards sexual political scandals and attitudes towards pornography in Europe are much more lenient than the USA, where there is often public condemnation of these issues. At a glance, this important difference in attitudes towards sexuality on the two sides of the Atlantic helps us to understand how, in Europe, lesbian and gay movement can have more leverage in making their claims and putting forward political requests. In this regard, furthermore, it is important to trace the connection between moral and religious stances towards sex and sexuality and the role of the law in upholding or dismissing these very positions.

In this regard, the connection with Puritanism is particularly important, specifically for the American context. As Dabhoiwala has argued (2012, 78) whilst in the nineteenth century in England the legal sanction of "immorality" became less stringent (although prostitution and sodomy remained criminal activities), in the USA the influence of Puritanism ensured a protracted effort to punish extramarital sex alongside other sexual behaviours outside the boundaries of morality. Drawing from Foucault (1998) this argument could be expanded by encompassing a broader overview on how during the nineteenth century the emphasis started to gradually shift from the intention of punishing to the decision of regimenting and controlling sexual conduct and behaviours. More significantly, however, this observation is helpful in considering the extent to which the position of the law in the USA and in Europe with respect to homosexuality may have determined different patterns in the development of the distinct lesbian and gay activist movement in the two contexts. It can be argued that, in this regard, the most significant difference is the existence of legal provisions criminalising homosexual conduct. Whilst provisions of this kind were in place in the USA until the landmark case of *Lawrence v. Texas* in 2003 before the US Supreme Court, these were almost entirely absent from the European continent. A notable exception in this regard is represented by the UK, in which same-sex activity was decriminalised across the country only in 1982 (although England and Wales had decriminalised it in 1967). As Rizzo has argued (2010, 200) the presence of laws criminalising homosexuality should not be underestimated in the appraisal of the different ways

in which gay politics has developed. Whilst conceding that the lack of decriminalisation in various European countries does not imply uniformity of legal cultures on the topic, Rizzo nonetheless claimed that in the 1990s it would have been unthinkable in Italy or France to go to trial for sodomy, as it was instead the case for the USA (2010, 200). Rizzo's argument can be complemented by Altman's (2002, 417) observation on the fact that during the 1970s and 1980s shifts on perceptions and attitudes towards homosexuality developed swiftly in Western countries, except for the USA in which criminalisation remained a crucial issue to be tackled. This broad, and certainly not exhaustive overview, can help to understand how, whilst European activists could go past the request to render homosexual activity licit in their own country, in the USA, activists were forced to articulate many of their advocacy efforts around the issue of decriminalisation of homosexuality. Moreover, as will be argued in the next section of this chapter, the USA lacked the presence of a mechanism of protection of human rights that acted as an external court of last resort such as the ECtHR. In this regard, the above-mentioned case relating to the decriminalisation of same-sex sexual activity in the UK, is particularly important to mention, given that, in this instance, the decriminalisation of homosexuality across the country was a direct result of the judgment of the ECtHR in *Dudgeon v. UK* in 1981, in which the ECtHR asked the UK to decriminalise homosexuality in Northern Ireland (Ayoub and Paternotte 2014, 12). Before exploring at length the ramifications of the interaction between European lesbian and gay activists with institutions in Europe, more specifically with the EU and the CoE, however, it is important to integrate into this digression a discussion on the development of the transgender and intersex movements both in Europe and in the USA.

When discussed under the banner of the "LGBTQI" acronym, bisex, trans and intersex issues often risk being marginalised and overshadowed by the prominence of the discussion of lesbian and gay issues. In this chapter, it appears evident that more space has been devoted to the discussion of the genesis and development of lesbian and gay social movements and rights, mostly because its earlier institutionalisation, with comparison to trans and intersex social movements, offers more material for reflecting on the development of a distinct "European" movement for sexual and gender freedom and expression. Nonetheless, this dominant focus on lesbian and gay activism present in this book should not be read as a lack of interest in bisex, trans and inter-

sex social movements and politics but, rather, as an acknowledgment of the limited breadth of analysis that can be reached on this topic within the scope of this book. Simultaneously, however, it is possible to briefly situate the development of the bisexual, trans and intersex movements in the European context.

As Richardson and Monro (2012, 13) have pointed out, the issue of bisexual and trans persons has occupied a marginal position within mainstream lesbian and gay activism and important tensions between these groups exist (Monro 2005, 91). Whilst bisexuality has been seen as having the potential to destabilise the coherence of homosexual identity (Richardson and Monro 2012, 18), trans issues have often been made the object of contestation from the part of radical lesbians who argued for "separatism" (Monro 2005, 93–94). Generally, over the years, there has been the impression that, when included in the actions of mainstream lesbian and gay activism, bisexual or trans issues where only superficially addressed. As for issues relating to intersexuality, notwithstanding the birth of the Intersex Society of North America (ISNA) in 1993 (Chase 1998), inclusion into mainstream European lesbian and gay activism has only happened during the last decade, thanks to the interest taken by both the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and the Transgender Europe (TGEU) in the issue.

Bisexual activism gained in importance in the 1970s, especially in the context of the USA (Monro 2005), with a stronger institutionalisation of the movement during the 1980s (McLean 2015, 151). Needs of the bisexual community partly differed from those of men and women represented by mainstream gay and lesbian activism, as bisexual persons fundamentally challenge the "monosexual assumption of society" (Maliepaard 2015, 2). Furthermore, bisex activism often brings to the forefront, differently from mainstream lesbian and gay activism, issues relating to non-monogamous and polyamorous relationships. Hence, the movement may be said to introduce challenges, to a certain extent, to the agenda of respectability often promoted within the ambit of more conventional lesbian and gay activism. As for its epicentre, the bisexual movement has strong roots in the context of the USA, with important ramifications in the UK (McLean 2015, 157). At the European level, whilst formally included in the mandate of ILGA-Europe, bisexual issues are fundamentally overlooked and subsumed under lesbian and gay identity politics, thus leaving room for future productive and substantial articulations.

Whilst similarly pushed to the fringe of lesbian and gay activism, the trans movement has had a stronger organisational capacity with respect to the bisexual community and can now count on a structured European framework of activism, thanks to the work of TGEU. Early transgender activism substantially developed in the US context with the work of pioneers such as Louise Lawrence, Virginia Prince and Sylvia Rivera (Stryker 2004; Monro 2005), responding to both issues of police harassment towards trans persons and cross-dressers and necessity for support for those wishing to undergo gender-confirming surgery. The movement became institutionalised in the 1970s and 1980s with the inclusion of groups working on specific issues faced by female-to-male (FtM) individuals. The founding of Transgender Nation in 1992 represented an important moment in the establishment of an activist movement (Wilchins cited in Monro 2005, 134). As for the context of Europe, whilst most countries have their own trans organisations, working on several issues, an important moment has been the establishment of the network of TGEU in 2005. This organisation has a strong "European" identity (Balzer and Hutta 2014, 175) and closely collaborates with European institutions, both the CoE and the EU, in order to enable broader and more significant recognition of trans human rights issues at the forefront of the European human rights agenda. At the same time, trans issues at the European level are also covered by the mandate of ILGA-Europe, albeit in a limited way, given the existence and work of TGEU.

Lastly, it is also important to mention briefly the emergence of intersex activism, both generally and in the European context. ISNA, founded by Cheryl Chase (now Bo Laurent) was the first pioneering organisation advocating for a proscription of "normalising surgeries" performed on intersex children. Whilst ISNA stopped its activities in 2008, intersex activism has far from vanished. In particular, the birth of Organisation Intersex International (OII) has marked the beginning of a new era for intersex activism, providing an international network for intersex activists across the globe. As for the state of activism in Europe, together with the work of OII, as well as some advocacy initiatives undertaken by TGEU on intersex human rights issues, the establishment of the Intersex Forum in Brussels in 2011 and the decision of ILGA-Europe to extend its mandate to cover intersex issues in 2008 have contributed to the creation of a European space in which human rights issues of intersex persons can be debated (Ammaturo 2015, 43). These developments point to the establishment of an integrated arena of discussion and, possibly, to a stronger

professionalization and institutionalisation of the intersex movement in Europe and beyond.

The Development of LGBTQI Rights in Europe

So far, this chapter has sought to appraise the factors that may have had an impact on the development of a "distinct" European lesbian and gay activism as opposed to the one existing in the USA. The inspiration from such endeavour, as has been alluded to, has come from Ayoub and Paternotte's (2014) claim about the crucial role of activists in shaping a certain vision of a "Rainbow Europe", that is to say a concept of Europe characterised by an almost constitutive desire to protect and promote the rights of LGBTQI persons. Up to this point, more in particular, the chapter has looked at the cultural and organisational, political, religious and legal features that may have had an impact on the characterisation of European LGBTQI movements as the leading actors, at the global level, in the advocacy of rights relating to sexual orientation and gender identity. Whilst obviously important, these factors only acquire a systematic importance if seen in conjunction with the most relevant process at work in the construction of a LGBTQI-friendly Europe. This process is constituted by the special relationship developing between activism and the two supranational institutions of the CoE and the EU. Both institutions, albeit differently, have represented, over the years, the perfect sounding boards for LGBTQI activists throughout the continent, especially in situations in which the domain of domestic policy and law-making were foreclosed and "agenda-setting litigation" remained the only viable option to make important human rights claims (van der Vleuten 2014, 120).

As important interlocutors of European LGBTQI activists, therefore, both the CoE and the EU have been invested with a symbolic role of gatekeepers and protectors of "European values" based on the rule of law, the promotion of democracy and—obviously—the protection and guarantee of human rights. This operation, however, is far from innocent, as there is a risk of lapsing into a European moral exceptionalism that overshadows ideological configurations, inter-state power relations, dynamics of inequality and robust national and supranational interests at play in the European arena. Precisely to better appraise the risks and opportunities in developing an increasingly tighter association between LGBTQI rights (and ensuing claims to citizenship) and the concept of "Europe", it appears crucial to delve deeper in understanding the peculiar role that

both the CoE and the EU have played in relation to LGBTQI rights in the last few decades. The first two sections that follow will delineate the role of the CoE and the EU in relation to the protection of LGBTQI rights.

The Council of Europe and LGBTQI Rights

Established in 1949 in the aftermath of World War II, the CoE was created to promote democracy and the rule of law and create unity among its member states. However, it was the product of different political interests. On the one hand it was conceived as an instrument to contain the aspirations of post-war Germany (Steiner et al. 2008, 933). On the other hand it continued, to some extent, on European soil, the idealist tradition of Woodrow Wilson and presented an "ideological stance against communism" (Steiner et al. 2008, 936). To date the CoE has 47 member states in Europe, with nearly 800 million people from Reykjavik to Vladivostok under the ECtHR's jurisdiction. The ECtHR was drafted and adopted in 1950 (but officially entered into force on 3 September 1953) and it protects a series of fundamental rights and freedoms (later extended by the introduction of additional Protocols) such as:

1. the right to life (Article 2);
2. the right not to be subjected to torture, inhuman or degrading treatment or punishment (Article 3);
3. freedom from slavery (Article 4);
4. the right to liberty, security of person (Article 5), and due process of law (Article 6);
5. the right not to be held guilty for acts that were not criminal offences at the time of their perpetration (Article 7);
6. the right to a private and family life (Article 8);
7. freedom of thought, conscience and religion (Article 9);
8. freedom of expression (Article 10) and of peaceful assembly and association (Article 11);
9. the right to marry and to found a family (Article 12);
10. a non-autonomous clause on non-discrimination (Article 14);

The Convention is binding in its entirety for the contracting parties and, under Article 19, two institutions (the *Commission of Human Rights* and the *European Court of Human Rights*) were created to observe compliance with the above-mentioned standards. These adjudicatory bod-

ies, however, were ineffective due to the steadily increasing number of applications they received over the years; in 1998, Protocol 11 substituted them with a new full-time ECtHR. In fact, the "new" ECtHR became the only adjudicatory body in charge of all of the competences of both the Commission and the "old" ECtHR (De Salvia 2006, 62). The fulcrum of the Council of Europe is, indeed, the ECtHR. Its prestigious and influential role is not only *quantitatively*, but also *qualitatively* determined. The ECtHR saw the amount of applications increase enormously and exponentially to nearly 90,000 pending cases in 2006 (Steiner et al. 2008, 964), and the range of human rights issues that it has dealt with thus far constitutes the really interesting aspect of its activity. The other main bodies of the CoE are the Committee of Ministers (CM) (the decisional and executive organ), the Parliamentary Assembly (PACE) (a forum of discussion for member states without binding powers) and the Commissioner for Human Rights (a non-judicial institution established in 1999 and elected by the Parliamentary Assembly every six years).[1]

The role of the CoE in setting the trend for LGBTQI rights in Europe has been undeniable. One may even argue that its influence has been by far the most important in leading to legislative and political changes on stances towards homosexuality, bisexuality and trans issues throughout the continent. To date, most of the case law of the ECtHR on issues relating to sexual orientation and gender identity concerns men in same-sex relationships and, to a lesser extent, women in same-sex relationships and trans(sexual) persons. No cases have seen bisexual or intersexual plaintiffs coming forward so far, and it would be interesting to know whether this relates to a lack of relevant applications to be presented in Strasbourg, or to a structural invisibility of these two "groups" of individuals.

The earliest, albeit unsuccessful, engagement of the ECtHR with issues of homosexuality came long before the above-mentioned judgment of *Dudgeon v. UK* in 1981 on the decriminalisation of homosexuality in Northern Ireland. In the 1950s, the newly formed Commission on Human Rights (forerunner of the current ECtHR) heard several complaints by German plaintiffs complaining about the enforcement of Section 175 of the German Penal Code forbidding homosexual acts (Hendriks et al. 1993, 236; Johnson 2012, 19). At the time, however, the Commission held that proscription of homosexuality was in line with the protection of health and morals of others and the various complaints were dismissed. The centrality of the evolutive principle in the reading of the ECHR, however, enabled a swift change of positions on homosexuality on the part

of the judges. Later these changing attitudes in relation to the interpretation of the rights protected by the ECHR also became visible when trans plaintiffs went to Strasbourg. The 1980s were important for the development of the case law of the ECtHR on sexual orientation and the role of activists in this regard was crucial. In particular, *Dudgeon v. UK* (1981) had many points of contact with the subsequent case law, especially with *Norris v. Ireland* (1988) and *Modinos v. Cyprus* (1993). Firstly this was owing to the fact that in Northern Ireland, Ireland and Cyprus there was non-enforced legislation aimed at condemning male homosexuality.[2] Secondly, in these cases the three applicants were activists from gay organisations seeking to obtain decriminalisation in national criminal law. The plaintiffs, therefore, resorted to their activism as a tool to demolish the (already weakened) national legislation on homosexual contact between adults in these countries.

From the late 1980s onwards, more broadly, the ECtHR delivered a series of judgments which profoundly shaped and changed the protection of LGBTQI rights in Europe in areas ranging from the protection of "private life",[3] discrimination on grounds of sexual orientation in the context of parental responsibility,[4] single-person adoption,[5] second-parent adoption,[6] housing provision,[7] social security allowances,[8] freedom of expression and freedom of association,[9] asylum claims on ground of homosexuality,[10] as well as various judgments relating to the possibility that same-sex couples could have a "family life".[11] Within four decades (1980s–2010s) the interpretation of the rights protected in the ECtHR by the judges in Strasbourg has changed dramatically and many of the cases have reached the ECtHR thanks to the strenuous efforts of dedicated activists and plaintiffs who have agreed to have their complaint framed as a "test case". Some issues, such as the recognition of the family life and adoption rights of same-sex couples remain still debated and the ECtHR has not been fully convinced that a true "European Consensus" has been reached on these issues.

Most importantly, however, these changes have not only been confined to the sphere of issues relating to sexual orientation, as fundamental changes on the protection of human rights in Europe have also happened in the field of trans issues and rights claims brought forward by activists. The case law of the ECtHR, in this regard, can still be considered as moving within the boundaries of normalisation of trans identities and experiences within the gender binary of male/female. At the same time, however, issues as crucial as the recognition of one's gender of election

following gender-confirming surgery should not be taken for granted as they represented an important battleground for trans activists. More specifically, the ECtHR's case law on this issues in the 1980s saw a substantial failure to recognise individuals' right to have one's gender altered in official documents.[12] It was only with the landmark case of *Goodwin v. UK* (2002) that things changed and the ECtHR could—partially—overcome the concept of "biological sex" in the determination of one's gender. At the same time, however, grey areas persist in other areas, such as family life,[13] of trans persons and, in some regard, in relation to the requirement of forced sterilisation of trans persons for the recognition of one's legal gender.[14]

At a glance, it is possible to follow Kollman (2014, 19) in saying that, compared to the European Court of Justice of the EU (ECJ), the ECtHR is the most "activist" court on issues relating to sexual orientation and gender identity. At the same time, however, it would be reductive to think that within the CoE the discussion of issues relating to sexual orientation and gender identity have been relegated to the judicial sphere. In fact, the political bodies of the institution—the CM and the PACE—have played an important role, especially in recent times. Furthermore, the independent body of the CoE, the Commissioner for Human Rights, has significantly established (himself) as an important figure in the pan-European dialogue on LGBTQI rights, particularly during the mandate of Thomas Hammarberg from 2006 to 2011. As for the CM and the PACE, recent interventions have included two important documents (a CM Recommendation and a—non binding—PACE Resolution) issued in 2010,[15] and the more recent PACE Resolution on tackling discrimination on grounds of sexual orientation and gender identity adopted in 2013.[16] At the same time, another important document—the only explicit action in this regard undertaken by the two political bodies of the CoE—has been the PACE Resolution (2013) on "Children's Right to Physical Integrity",[17] in which the PACE has dealt, among other issues, with the phenomenon of normalising surgeries on intersex babies and children.

Two other important and recent developments at the CoE also have to be pointed out. The first is represented by the strong engagement with LGBTQI issues, during his 2006–2011 mandate, by the Commissioner for Human Rights of the CoE, Mr. Thomas Hammarberg (followed in this effort by his successor, Mr. Nils Muižnieks). With the publication of an important pan-European report on Discrimination on Grounds of Sexual Orientation and Gender identity (Commissioner 2011), Hammarberg

established himself as an important—and strategic—interlocutor for LGBTQI activists, although his mandate does not attribute to him any executive power. The other interesting development in the institution has been the creation, in 2013, of the Sexual Orientation and Gender Identity Unit of the CoE which works across the institution engaging systematically on issues relating to sexual orientation and gender identity, albeit without specific powers to act. In sum, both the work of the ECtHR and the various endeavours on the part of the other non-judicial actors at the CoE to put the rights and claims of LGBTQI persons on the human rights agenda highlight a strong investment in the discourse of human rights protection on issues relating to sexual orientation and gender identity. Given that the focal point of this book is precisely represented by the case law of the ECtHR on sexual orientation and gender identity, there will be sufficient scope to analyse the ways in which the CoE and the ECtHR's role in the shaping of specific modalities of being "LGBTQI" in Europe directly linked to a specific model of European sexual and gendered citizenship. Before doing that, however, it is important to briefly position the EU with respect to the protection of human rights in Europe and with respect to the role of the CoE on LGBTQI issues.

The European Union and LGBTQI Rights

As has already been pointed out in the previous sections, there is the strong perception of the EU as having at the core of its mandate the protection of human rights. This assertion, however, reflects only partially the reality. In fact, the EU has started to systematically acknowledge the importance of human rights protection only from the 2000s onwards. In this respect, the adoption of the Charter of the Fundamental Rights of the EU (CFREU) in 2000, the creation of the FRA in 2007 and the adoption of the Lisbon Treaty in 2009 represent important milestones. The adoption of the CFREU in 2000 marked the beginning of the EU's systematic interest in the issue of human rights protection in the European continent and the subsequent inclusion of human rights issues in the organisation's political agenda. Heavily drawing from the European Convention on Human Rights (ECHR) (Douglas-Scott 2011, 655), the CFREU represents to date the most relevant human rights instrument devised and adopted at the EU level. Furthermore, with the adoption of the Lisbon Treaty in 2009, human rights policies within the EU acquired an even more prominent position. In modifying Article 6(2) of the Treaty on European Union

(TEU), the Lisbon Treaty prescribed that the CFREU becomes legally binding for the EU's member states and indicated the necessity for the EU to accede to the ECHR. Following Opinion 2/13 of the ECJ in December 2014, however, the latter process temporarily halted. Lastly, the creation in 2007 of the Fundamental Rights Agency (FRA) of the EU, has further contributed to bring human rights to the core of EU's political priorities. At a glimpse, these developments in the field of human rights protection at the EU level can be seen as potentially constituting an interference with the long-standing work of the CoE which has been considered, since its establishment in 1950, the undisputed and privileged actor in this field. Smismans (2010) has referred to the different distribution of power between the EU and the CoE, highlighting the way in which the EU creates its own identity as a human rights actor by means of a "mythological free-riding" at the expense of the CoE's reputation in this field. In this regard, the EU would seem to benefit from the human rights standards established, reinforced and promoted by the CoE since its creation by adopting these values, frameworks and standards without giving enough credit and recognition to the work of the CoE in the first place.

In relation to the recognition, protection and guarantee of human rights for LGBTQI persons, the impact of the EU and the ECJ has been more limited with respect to the CoE's and the ECtHR's breadth and reach of action. Notwithstanding the different magnitude, it is important to highlight the main ways in which LGBTQI rights have entered the EU political and juridical arena. The first important institutional recognition of issues relating to sexual orientation has been the Resolution A3-0028/94 adopted by the European Parliament in 1994, and issued from the famous "Roth Report". The Resolution, for the first time, acknowledged a broad range of issues relating to sexual orientation and was considered quite advanced in comparison to the prevailing level of the debate on these issues at the time (Sanders 1996, 83). In some respects, furthermore, this Resolution can be considered to be the forerunner of the provision later contained in Article 19 TEU which proscribes discrimination on grounds of sexual orientation (but not of gender identity directly). This inclusion appears even more important in light of the adoption of the 2000 Employment Equality Directive (2000/78/EC) which covers all the grounds of discrimination included in Article 19. As van der Vleuten (2014, 132) has observed, however, the field of applicability of Article 19 TEU remains very limited to date, given the fact that the only instrument available at the moment, and with important limitations with respect to

discrimination on ground of gender identity, is the 2000 Directive in the field of employment. This limited impact can also be said to be related to the fact that, to present, there has been a significant halt to a more comprehensive Directive aimed at combatting discrimination in other important areas such as education, health, goods and services and social security (van der Vleuten 2014, 132). This overview suggests that the role of the political bodies of the EU may be limited and that more may be expected to happen in the context of the ECJ. When confronted with the work of the ECtHR on similar matters, however, it appears obvious that the competences of the ECJ are far more limited. The most significant part of the cases heard by the ECJ, in fact, concerns the sphere of discrimination in the context of employment.

At the same time, however, Whittle (2002, 201) has argued, in this regard, that the specific focus of the ECJ on issues relating to discrimination represents a relevant contribution in substantial terms, given the possibility, for this court, of tackling more directly issues of discrimination as compared to the ECtHR (as has been shown before, in the ECHR the only provision on non-discrimination—apart from the optional Protocol 12—is the non-autonomous clause on non-discrimination contained in Article 14). Furthermore, Whittle has maintained (2002, 201) that the ECJ is relieved from the moral responsibility that the ECtHR holds with respect to the protection of human rights, having more discretion in its judgment, as long as they are aligned with the general—economic—principles of the EU. An interesting addition to Whittle's comment, in this regard, has been offered by van der Vleuten (2014, 132) who has argued that this specific focus on the protection of economic interests by the ECJ means that only the interests of a relatively well-off portion of the LGBTQI population can be effectively protected by the ECJ.

Going into the merit of the case law of the ECJ,[18] it is possible to identify significant cases relating both to sexual orientation and to gender identity. As far as the issue of discrimination on grounds of sexual orientation is concerned, the ECJ has issued important judgments (albeit not always in favour of the plaintiffs), such as the *Lisa Jacqueline Grant v. South West Trains Ltd* (C-249/96), *Tadao Maruko v. Versogunganstalt der deutschen Bühnen* (C-267/06), *Römer v. City of Hamburg* (C-147/08), *W. v. European Commission* (F-86/09), *Asociația ACCEPT contro Consiliul Național pentru Combaterea Discriminării* (C-81/12). Recently, the ECJ has also heard the case *X. Y. and Z. v Minister voor Immigratie en Asiel* (C-199/12, C-200/12 and C-201/12), relating to asylum claims

based on fear of persecution on ground of sexual orientation (see van der Vleuten 2014 for a brief analysis).

As for cases relating to gender identity and discrimination, the ECJ has issued important decisions in *P.v. S. and Cornwall County Council* (C-13/94), *K.B. v. the National Health Service Pensions and the Secretary of State for Health* (C-117/01) and S.M. *Richards v. Secretary of State for Work and Pensions* (C-423/04). It is beyond the scope of this book to analyse in depth the above-mentioned case law of the ECJ in relation to sexual orientation and gender identity. Whilst it can be certainly argued that when positive for the cause of LGBTQI rights the judgments of the ECJ have had an important impact on the development of national legislation in the different member states of the EU, at the same time the symbolic reach of these decisions remains apparent, given the limited sphere of action of this judicial institution. It will be interesting to see if, in the future, the direct applicability of the CFREU and the possible accession of the EU to the CoE will change the role or reach of the ECJ. Furthermore, in this regard, the EU's emerging interest in the field of human rights, may have important consequences for the relations between the two organisations. For Von Bogdandy (2000), the EU's interest in human rights represents a currently more intriguing objective than the creation of a common market. Von Bogdandy, however, doubts that in the future the EU could become the leading human rights actor in the field. Similarly Douglas-Scott (2011) has argued that human rights seem to be a peripheral area of activity of the EU, without a real challenge to the CoE's role. For the time being, the CoE seems to firmly hold its primacy as the "conscience of Europe" but the prestige associated with inhabiting the position of an international moral actor may lure the EU into seeking a more proactive role in this ambit.

As it was the case for the CoE, the work of the EU on issues relating to sexual orientation and gender identity, however, is not entirely ascribable to the ECJ, since other actors intervene in the debates on these issues, particularly acting as important interfaces with activists. This is particularly true for the LGBT Intergroup at the European Parliament (created in 1997) and, most importantly, for the FRA founded in 2007. The FRA has played an important role in assisting the bodies of the EU in providing information. Significant in this regard, has been the comparative legal report on discrimination on grounds of sexual orientation and gender identity issued in 2008 and updated in two instances in 2010 and 2015.[19] Another important contribution to the European debate on LGBTQI

rights has been the recent paper issued in 2015 on the rights of intersex people.[20] In the field of the rights of LGBTQI persons in Europe, therefore, the FRA has established itself, in less than ten years, as an important locus for interaction and collaboration both with LGBTQI activists and the other bodies of the EU. Similarly to the Commissioner for Human Rights of the CoE, as well as the Sexual Orientation and Gender Identity Unity of the CoE, the FRA has contributed to deepening and widening the ties between the supranational European institutions (the EU and the CoE) and LGBTQI activists. This relationship between activists and EU institutions, however, is not unproblematic, as Ayoub and Paternotte (2014) have claimed. On the contrary, it is important to consider how the work of the EU, and more particularly that of the CoE, exists in a triangular relation with advocacy efforts of LGBTQI activists and the existence of a specific model of European sexual and gendered citizenship.

LGBTQI Rights in Europe: Towards a Form of Supra-national Nationalism?

The great power held by the EU—and especially the CoE—in setting the pace for the European human rights agenda relating to issues of sexual orientation and gender identity, however, also comes with a great responsibility and, therefore, it is important to situate these institutions within the wider context of a burgeoning concept of "European citizenship" and, more specifically of "European sexual and gendered citizenship". The full ramifications of the process by which rights claims brought forward by LGBTQI activists are shaped at the ECtHR as expressions of a specific type of European sexual and gendered citizenship will be the object of Chaps. 4 and 5 of this book. Before getting to the substantial analysis, however, two observations need to be made. Firstly, whilst the protection and enactment of human rights provisions still largely depends on the nation-state, it would be reductive to see developments such as the achievement of marriage equality in Ireland in 2015 and the new Maltese law on the recognition of trans and intersex persons as the mere crowning achievements of the efforts of local activists and/or willing politicians.[21] Although, of course, the efforts of local actors should not be underestimated on matters relating to LGBTQI issues and rights claims, it is not possible to talk about purely "endogenous" initiatives. In fact, as van der Vleuten (2014, 120) claims LGBTQI activism has been shaped almost

from its very onset as strongly "European". Achievements in the field of LGBTQI rights, therefore, have to be inserted within the broader context of triangular interaction between nation-states, activists and supranational institutions such as the CoE and the EU. Whilst in this triangular relationship the various interests may not always overlap between the three different actors, it is nonetheless possible to affirm that in the last four decades there has been the emergence of a fundamentally (neo)liberal consensus on the necessity of ensuring equal rights and protection (with some limitations in some instances) to LGBTQI persons. The emergence of this consensus, more specifically, has been particularly evident at the level of LGBTQI activism and in the context of the work of the EU and CoE on issues relating to sexual orientation and gender identity. The result is a dynamics of normalisation of LGBTQI identities in full swing which, especially in the context of the case law of the ECtHR, has been shaped and modulated through the language of the law.

Secondly, the emergence of a consensus on the necessity of guaranteeing and protecting the rights of LGBTQI persons in Europe, furthermore, has proved to be congenial to various quasi-ideological operations, such as the definition of a form of European moral exceptionalism based on the respect of human rights that can be strategically deployed vis-à-vis other states. In this regard, it can be argued, echoing Colpani and Habed (2014), that there is indeed a process by which a new form of nationalism—detached from the narrow limits of the concept of the "nation-state"—is emerging. This newly formed "European sexual nationalism", as Colpani and Habed (2014) define it, can be particularly powerful in creating fractures within the context of Europe itself by assigning roles of *catalysers* or *paralysers* of progress to different nation-states in which different sets of rights are recognised for LGBTQI persons. What is interesting about this concept, in the context of a book concerning the production of a specific European sexual and gendered citizen through the work of the ECtHR, is that this form of supranational nationalism, similar to what Anderson (1994) had discussed about "traditional" forms of nationalism, contains an element of *imagination*, that is to say the illusion that the lives of LGBTQI across Europe (here understood again as an aspirational, rather than a geographical concept) may be specular and, at the same time, can be mobilised indiscriminately to advance claims about the unique character of the European "folk". In this regard, therefore, the newly conceived concept of European sexual nationalism deserves some

attention, as it indicates the necessity of looking deeper into the relationship between identity, human rights and citizenship.

Notes

1. Committee of Ministers of the Council of Europe, *Resolution (99) 50 on the Council of Europe Commissioner for Human Rights*, adopted on 7 May 1999.
2. In *Modinos v. Cyprus*, the ECtHR notes that following *Dudgeon v. the United Kingdom*, the Cypriot Attorney General had not instituted any prosecution for homosexual conduct that could be in breach of Article 8 ECHR. The legislation, as in the case of Northern Ireland, however, remained on the statute books.
3. *Lustig-Prean and Beckett v. UK* (1999), *Smith and Grady v. UK* (1999).
4. *Salgueiro Da Silva Mouta v. Portugal* (1999).
5. *Fretté v. France* (2002), *E.B. v. France* (2008).
6. *Gas and Dubois v. France* (2012), *X and Others. v. Austria* (2013).
7. *Karner v. Austria* (2003).
8. *Mata Estevez v. Spain* (2001).
9. *Bączkowski v. Poland* (2007), *Alekseyev v. Russia* (2010), *Genderdoc v. Moldova* (2012).
10. *F. v United Kingdom* (2004), *I.N.N. v. the Netherlands* (2004).
11. *Schalk and Kopf v. Austria* (2010), *P.B. and S.J. v. Austria* (2010), *Oliari and Others v. Italy* (2015).
12. *Rees v. UK* (1986), *Cossey v. UK* (1990).
13. *Parry v. UK* (2006), *H v. Finland* (2012).
14. *Y.Y. v. Turkey* (2015).
15. CM Recommendation CM/Res/(2010)5 on *Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*. Adopted on 31 March 2010; PACE Resolution 1728 (2010) on *Discrimination on Grounds of Sexual Orientation and Gender Identity*. Adopted 29 April 2010.
16. PACE Resolution 1948 (2013) on *Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity*. Adopted on 27 June 2013.
17. PACE Resolution 1952 (2013) on *Children's Right to Physical Integrity*. Adopted 1 October 2013.

18. It is important to specify that the ECJ can only intervene on request of domestic courts and, through preliminary rulings, can offer a correct interpretation of European law and the compatibility of domestic law with EU law. Hence, single plaintiffs cannot resort directly to the ECJ.
19. The different reports are available at: http://fra.europa.eu/en/theme/lgbti.
20. The paper is available at: http://fra.europa.eu/en/publication/2015/fundamental-rights-situation-intersex%20-people.
21. See the text of the *Gender Identity, Gender Expression and Sex Characteristics Act* at: http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/GIGESC.aspx, Accessed 21 February 2016.

CHAPTER 3

Sexual Citizenship: From Social Inclusion to Political Contestation

Abstract This chapter introduces the concept of "sexual citizenship", starting with a focus on citizenship as the crucial site where human rights and LGBTQI identities intersect. While the chapter highlights the intrinsic tension existing between citizenship and human rights, it also considers emerging models of non-national citizenship in the context of Europe as a unique opportunity to rethink exclusionary practices in the allocation of political membership and human rights entitlements in the European continent. The chapter also considers the issue of belonging to a national community from the perspective of "homonationalism" (Puar 2007), by which some queer identities become mobilised for the purpose of portraying and promoting national liberal values, to the detriment of other sexual and racial identities.

Keywords Gender • Sexuality • Citizenship • Sexual citizenship • European citizenship • CoE

Choosing Between Citizenship and Human Rights?

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

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compelling argument still has profound reverberations in the current analysis of the critical interplay between citizenship, politics and human rights. Up to this point, the connection between human rights and citizenship has been taken for granted. Before delving into a discussion of the concept of citizenship, however, it is necessary to explore the connection between human rights and citizenship more carefully.

Presented here are Tambakaki's (2010) reflections on the possible mutually exclusive relationship existing between *human rights* and *citizenship* and, on the other hand, Dembour and Kelly's (2011) investigation on the extent to which human rights can be said to fully apply to migrants. These two perspectives shed light on the existing tension between these two spheres and help to open up a discussion on how to overcome this problem. In *Human Rights or Citizenship?* Tambakaki (2010, 6) has argued that the tension existing between human rights and citizenship is owing to the different positions that these inhabit with regard to politics. While citizenship is embedded in the context of the creation of political community, human rights are conceived precisely as a way to overcome the limitations of politics in guaranteeing entitlements and protection to all human beings (Tambakaki 2010, 7). It would be possible, therefore, to give in to the temptation of privileging human rights over citizenship, because their codification into international law would assign them a supranational status. Tambakaki (2010, 4) has argued, however, that thinking in terms of mutual exclusion would have significant—negative—implications for democratic political practice.

There is, however, a further problematic dimension identified by Tambakaki. Notwithstanding the fact that human rights and citizenship operate on two distinct levels (the former on the level of *symbolism* and the latter on the level of *exercise*), the promise of maximum individual freedom implicit in human rights hampers the unity of common intents required by citizenship. In turn, however, citizenship could also be seen as constraining individual freedom (Tambakaki 2010, 11). The solution the author hopes for is, therefore, a reappropriation of the *agonistic* role of citizenship within politics. This implies that the political arena, rather than the courtroom, should be the privileged site to enhance and promote participation in democratic processes.

Tambakaki's contribution can be seen in a dialectical relationship with the work of Dembour and Kelly (2011), who have explored the intricate relationship between human rights and citizenship from a different perspective. By asking "are human rights for migrants?", the authors have

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

Dembour and Kelly's analysis bears a direct relevance to the purpose of this research and is helpful in the debate on the citizenship status of LGBTQI persons. By building on the acknowledgment of the internal dynamics of the hierarchisation of rights-holders within the borders of the nation-states (but also at the level of the CoE), it is possible to trace back the process by which LGBTQI individuals are constructed as human rights subjects in ways that ensure their normalisation and assimilation. The existence of blurred lines between the inside and outside of human rights within nation-states, as Dembour and Kelly suggest (2011, 9), could help to explain how LGBTQI persons may be constituted, at the same time, as being both members and outcasts of political communities. This becomes even more relevant when we recognise that the LGBTQI person can be a migrant or a refugee and can, therefore, experience multiple forms of exclusion from the polity and the enjoyment of human rights. It will be argued, however, that it is not only in the context of nation-states that this process of bounded exclusion takes place, as the work of the CoE on human rights can be said to be characterised by important dynamics of exclusion. At the same time, this supranational dimension inevitably implies the existence of new models of citizenship which transgress the boundaries of national sovereignty but which, nonetheless, are informed by exclusionary practices, rather than by the presumed accomplishment of a "universal" application of human rights across the European continent.

Before delving into the possible alternative forms of non-national citizenship within which human rights can or cannot be realised, it is necessary to ask what role identity plays in this existing interplay between citizenship and human rights. To do so, the idea of "group rights" will be

briefly discussed in order to assess the extent to which LGBTQI persons can, for the purpose of having their rights recognised, be considered as a "group" and what consequences this would entail.

Citizens with an Identity: LGBTQI Persons and Political Membership

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

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

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

pant, relating to ethnicity, age, religion, disability or other personal circumstances. Isin and Wood suggest that citizenship is strongly influenced by the ways identities—both individual and collective—are shaped in relation to the rights claims they advance. Building on this assumption, it is necessary to address the specific patterns of sexual and gendered forms of citizenship of LGBTQI persons in the context of Europe, and how these dynamics are also the product of specific narratives on human rights originating from the CoE.

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

Sexual Citizenship: A Resistant Integration

The role of gender and sexuality in the definition of citizenship has not always been recognised. Marshall's (1950) seminal work on citizenship, for instance, substantially disregarded the way in which one's gender (or sexuality) impacts inclusion in the political community. Increasingly, however, scholars in different fields have started to explore and study the gendered and sexual dimensions of citizenship. In this regard, Mosse (1988) has provided an interesting account of the entanglement between sexual-

ity and nationalism in Europe. Stychin (1998, 8) has argued that gender represents one of the "historically central relations of domination in the construction of national identity". Pateman (1988) has read the "social contract" from a feminist perspective, highlighting the ways in which women were radically excluded from this original pact. The gendered and sexual dimensions of citizenship, therefore, are of enormous importance in understanding political participation; they are also significant in having fundamental rights guaranteed, for both citizens and non-citizens alike. It is in this context that the concept of "sexual citizenship" acquires importance, as it can be used to illustrate how LGBTQI persons have increasingly sought to be included in the social and political fabric of the nation as being equal to the heterosexual and cisgender majority.

Whilst the concept of "sexual citizenship" inevitably opens up new forms and possibility of being LGBTQI and part of the national community, it should not be forgotten that the polity contains hierarchies of citizenship which crucially include various forms of sexual and gender categorisation. In this regard, Phelan (2001) has illustrated this aspect by arguing that contrarily to heterosexual individuals, LGB persons inhabit a suboptimal form of citizenship as "second-class citizens". While being asked to contribute to the national community—by means of economic obligation or political participation—these individuals are excluded from the enjoyment of a full array of entitlements. Their political membership, therefore, seems to imply an unequal balance between the duties they are required to fulfil and the rights they are granted. Calls for the inclusion of LGBTQI persons in the domain of citizenship, however, are far from being unambiguous. As Brandzel (2005, 176) has argued, on the one hand, citizenship helps one to organise politically and to claim equality. On the other hand, however, citizenship also overshadows its exclusionary dynamics. Brandzel's interesting argument on the twofold dynamic of inclusion/normalisation of LGBTQI persons into citizenship, paves the way to critically introduce the concept of "sexual citizenship". As early as 1993, this concept was formulated by Evans (1993) in order to describe the connection between citizenship and the structure of capitalism, entailing a commodification of sexual and gender identities while maintaining the exclusion of some individuals from the full enjoyment of the rights connected to their membership into the polity. Far from seeing citizenship as a positive instrument for the construction of an inclusive community, Evans (1993, 9) has described it as being inherently heterosexist and patriarchal in nature. He conceded that the principles underpinning citizenship

have been increasingly "liberalised", but he has argued that this process was leading to the creation of new unequal and differentiated categories. The citizenship of sexual and gender minorities for Evans (1993, 8) was only expressed in relation to the *commodification* of their sexual/gender identities, aimed at creating specific market *niches* for the immoral individuals within "segregated, privatised social and economic territories".

In appraising Evan's work, Bell and Binnie (2000, 11) have argued that his argument requires a split between morality and legality. While individuals are granted rights, they are simultaneously subjected to a *moralising gaze*. In this regard, the existence of legitimate spaces of expression, as well as sites where capitalist desire can be fulfilled, contributes to this dynamic, thus fostering the illusion that one is really taking part in the liberal system. The process of the commodification of sexual and gendered identities may take different forms,[1] some of which will be explored in this context.

In the last two decades, Evans' concept of "sexual citizenship" has become increasingly popular and has become the object of various scholars' interest (Richardson 1998; Bell and Binnie 2000; Plummer 2003). In this context, Evans' work has also been reassessed and criticised by various authors. Richardson (2000a, b, 262), for instance, has claimed that Evans has obliterated the "lesbian citizen". In her work, in particular, Richardson has employed lesbian and feminist theory to indicate sexual citizenship as both a site of normalisation and site of of stigmatisation for some individuals. Similarly, questions have been raised in connection to the specific issues faced by bisexual (Monro 2015; Richardson and Monro 2012), transgender (Hines 2013) and intersex (Grabham 2007) persons when claiming their status as citizens. In regard to bisexual citizenship, for example, Monro (2015) has argued that bisexual individuals have been discouraged to publicly articulate their identities owing to the crucial challenge they pose to the tenets of monogamy or heterosexuality of committed relationships. The consequence of this push towards the private realm for bisexual persons is that these identities cannot be successfully politicised in the public sphere. This specific example shows that significant problems arise in connection to the inclusion of this heterogeneous group of individuals and that a radical reconfiguration of the attributes of the citizen in the first place is required, in order to go beyond the conventional heterosexual and cisgender matrix around which political belonging at the level of the nation-state is articulated.

The other important reflection on "normalisation" of LGBTQI persons also pertains to the issue raised by Richardson on what constitutes an example of bad/good citizenship. In this regard, Bell and Binnie (2000, 26) have pointed out the danger of fostering a notion of "respectability" within the domain of citizenship. The heterosexual matrix of citizenship, in fact, seems to be strengthened by the inclusion of sexual "dissidents" within the national community, by their very determination to adhere to certain institutions, such as the family and the army, for instance. Weeks (in Bell and Binnie 2000, 27), echoed also by Grabham (2007) among others, has described the tension existing around the strategies of *acceptance* or of *subversion* that sexual minorities adopt. In particular, he has maintained that strategies of acceptance are characterised by a *moment of citizenship*, while strategies of subversion are enacted through a *moment of transgression* (Weeks in Bell and Binnie 2000, 27). As it is, therefore, the concept of sexual citizenship may prove problematic when issues of inclusion of polyamory, bisexuality, gender fluidity, intersexuality, sadomasochism and fetishism are concerned, as these require a radical "queering" of the fundamentally heterosexist, heteronormative and cisgendered matrix of political belonging to a community, and inevitably bring to the forefront questions of transgression or rearticulation of the very notions of "bad" and "good" citizenship.

Increasingly, discussion on the inclusion of LGBTQI persons in the domain of citizenship is articulated along the lines of debates concerning the danger of assimilation to mainstream culture, as opposed to the possibility of cultivating, transmitting and nurturing sexual and gender difference. In this regard, Richardson and Monro (2012) have highlighted the role of international actors and transnational institutions in fostering a climate in which LGBTQI becomes "normalised". This process echoes somewhat Bell and Binnie's (2000) preoccupation concerning the fact that the emerging notion of a "transnational sexual citizenship" could lead to a radical exclusion of those who cannot not be included in the midst of the nation-state, or fail to be successfully assimilated. In this regard, it is important to join Stychin in asking whether "national identity [can] […] be reconceived in a contingent and flexible fashion that does not depend on the construction of the other". His answer to this interrogative is ambivalent because if rights represent a way to absorb and validate minorities "in terms of prevailing national norms", at the same time, they allow minorities to participate in imagining another nation (Stychin 1998,

13). Stychin's question, of course, can also be rephrased as not merely referring to national identity, but also to emerging forms of supranational identity and citizenship, such as in the European context. In Chapter 6 of this book, Stychin's question will be directly addressed, particularly in relation to the possibility of exploring alternative ways in which rights and political membership can be configured as to allow an open-ended and dynamic appropriation of contingent subjective positions.

The Council of Europe: LGBTQI Identities and Models of "European Citizenship"

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

Because of the significant number of member states (47), the CoE is also a crucial site to investigate the ways in which domestic perspectives on human rights in the European continent participate in the production of international standards, the dissemination of human rights principles back in its member states and the impact that the recognition of human rights has on the creation of the LGBTQI citizen throughout the continent.

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

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

Compared to the 28 member states of the EU, the 47 member states of the CoE share a much broader notion of "Europe" in terms of geographical, socio-political and cultural configuration. Benoît-Rohmer and Klebes (2005, 37) have argued that the expansion of the CoE has been grounded in a criterion of membership based on the "sense of belonging to Europe". The implications are significant: 800 million people from the coasts of Iceland to the seashore in Vladivostok, Russia are nominally protected under the ECHR. Potentially these numbers are even higher, since non-nationals are also afforded a certain degree of protection under the ECHR.

The ECtHR prides itself on being the "conscience of Europe" (CoE 2010), and Jacobson (1996, 81) sees in the ECtHR the "realisation of human rights in Europe". It can also be suggested, moreover, that the ECtHR's work has an impact well beyond its European borders, acting as a reference for many other regional human rights systems. For LGBTQI persons, and their right claims, this has a tremendous impact; it provides them with a tool to oppose their nation states which may be engaging in human rights violations against them and it also works in the direction of establishing a common culture of human rights on LGBTQI rights in Europe. Some commentators, however, express scepticism of the fact that the CoE represents such a thrilling example of the practical achievement of human rights in the continent. Douzinas (2007, 25), for instance, is convinced that the case law of the ECtHR, rather than being the product of the independent process of adjudication, is better understood if one refers to the political positioning of the judges. Whilst Douzinas may be exaggerating the extent to which politics influences the orientation of the ECtHR, his analysis induces thought about the interplay between the administration of justice and the potential political interferences in this process. Why should an *inter-governmental* human rights organisation be exempt from *realpolitik*? Dembour (2006) has adopted a similarly sceptical approach, expressing affinities with Douzinas on the effectiveness of the institution. One example she mentions is the high rate of applications rejected in a preliminary phase, as much as 90 % of the total (Dembour 2006, 13), together with the significant loopholes existing in the implementation of such rights, such as the substantial bypassing of women or the derogation from the rights protected in the Convention that states have in

case of emergencies (Dembour 2006, 13). In exposing her self-proclaimed *nihilism* on the effectiveness of human rights, Dembour endorses a sort of Nietzschean position, for which a connection can be said to exist between human rights and the will to power (Dembour 2006, 275).

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

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

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

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

The creation of otherness and its compatibility with modern notions of citizenship, which surpass or challenge nation-states on the one hand, and the influence of an international rhetoric of human rights on the other, are equally parts of this analysis. Jacobson (1996, 76) has asked whether it is possible for individuals to make demands on states by grounding their requests on international rights codes. If this happens and is successful, Jacobson maintains, it is possible to witness a change in the structure of international society, with states' legitimacy less rooted in popular sovereignty and more in "transnational human rights" (Jacobson 1996, 76). Furthermore, he has argued that, after the waves of immigration during the 1970s and the 1980s, the radical distinction between *national* and *alien* has been weakened (Jacobson 1996, 73).

At the same time, Dembour and Kelly (2011, 9), in trying to understand why migrants do not have access to rights in Europe, have maintained, instead, that human rights seem to be more at the service of the powerful, rather than an instrument in the hands of the powerless. The situation of migrants in accessing rights is embedded in a system of hierarchies of access to entitlements (Dembour and Kelly 2011, 9). While for Jacobson the *other* is becoming progressively an insider thanks to human rights, for Dembour and Kelly this figure, particularly embodied by the migrant, is still framed as a radical outsider. For the latter, therefore, citizenship still seems to possess a discriminatory character which narrowly limits access to the enjoyment of rights.

Scholars interested in alternative configurations of citizenship have tried to solve the enigma of how to conceptualise and reduce the exclusionary dynamics of citizenship in order to ensure a more universal guarantee of human rights. Butler and Spivak's essay "Who sings the nation state?" (2007) and the works of Soysal (1994) and Balibar (2004) are particularly interesting in this regard. Butler and Spivak (2007, 40) begin with the Arendtian notion of *statelessness* in order to analyse the ways in which the nation-state instrumentalises citizenship against individuals. One of the core assumptions is that nation-states create the premises for their legitimation by creating the nation in the first place (Butler and Spivak 2007, 31). States, therefore, create both the conditions for belonging and the conditions for dispossession. This twofold dynamic is contextualised by the authors within the broad framework of European governance, which they see as creating further borders and boundaries (Butler and Spivak 2007, 86). The creation of these fractures, furthermore, increasingly responds to logics of neoliberal economic globalisation rather than global

democratisation of the states (Butler and Spivak 2007, 84–85). Butler and Spivak, therefore, explore the exclusionary character of citizenship without, however, suggesting that decoupling citizenship from the nation-state would entail a radical configuration of the dynamics of belonging to the political community.

While Butler and Spivak only briefly touch on the existence of new configurations of citizenship beyond the framework of the nation-state, the works of Soysal (1994) and Balibar (2004) constitute a direct interrogation of the limits of national citizenship and engage with the possibility of alternative configurations not limited to the sphere of the nation. The conclusions reached by the two authors, however, significantly differ. In particular, Soysal (1994, 3) articulates a notion of "postnational citizenship" centred on the idea that there are effective ways to bypass the state sovereignty in allocating human rights to individuals. The author gives the example of guestworkers in Europe in order to demonstrate how the guarantee of rights does not always necessarily require an inclusion of the individuals into the national community (Soysal 1994, 3). This is rendered possible, according to Soysal (1994, 3) by virtue of a change in the process of the legitimisation of rights: from a legitimisation founded in the nation to a legitimisation rooted in the concept of *personhood*. Soysal's argument, however, can be said to rest on a false tautology, as personhood can still be subjected to those exclusionary criteria that continue to mark the allocation of rights to different "minorities". Soysal seems to be confident in the fact that universalistic discourses will be used in positive terms in order to foster inclusiveness. What is left out of this picture is the ways in which individuals are allowed to inhabit national spaces; but they are, nonetheless, in a liminal position.

Balibar (2004), in particular, has analysed the current dynamics of democratisation in Europe and has proposed a model of "transnational citizenship". This model of citizenship differs from both postnational and supranational models because of the lack of concrete structures and anticipations on the outcomes (Balibar 2004, viii). One fundamental point of departure for Balibar is the idea that borders are dispersed everywhere, rather than being solely located at the "limit" (Balibar 2004, 1). The "displacement" of the border, Balibar maintains, plays a fundamental role in the construction of European citizenship configured as a "citizenship of borders" (Balibar 2004, 6). More precisely for the author, this implies that the deployment of "European citizenship" in order to foster a united continent, inevitably creates another inclusion/exclusion divide

(Balibar 2004, 44 and 47). This divide concerns those that are not considered European and it amounts to a form of "European racism". In this regard, therefore, European citizenship would be "a development of quasi-apartheid social structures and institutions" (Balibar 2004, 116). In comparison to Soysal, Balibar appears clearly less convinced about the possibility of bypassing citizenship in order to guarantee human rights for those currently excluded from their enjoyment within the polity.

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

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

In June 2010 Judith Butler refused the "Civil Courage Prize" at the Christopher Street Day in Berlin because of the racist tones used by spokespersons of the German LGBT movement. Butler highlighted the fact that many of the people suffering homophobia were also being targeted by racial violence, thus experiencing a situation of "double jeopardy". In rejecting the prize, Butler wanted to position herself against the

promotion of a form of "new libertarianism" which is often aligned with various institutions of power and promotes a narrow—individualistic—view of freedom based on resurgent dynamics of militarism, nationalism and "European purity".[2]

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

The rise of this sort of "homonormative Islamophobia" that Puar describes as a phenomenon of the global North is accompanied by similar processes described by authors such as Massad (2008) and Altman (1996). In coining the term of the "Gay International" Massad (2008, 160) describes a process of the global transposition of Western gay identities outside of the West. For the author this enterprise has an important missionary dimension (Massad 2007, 190). Seen at a glance, therefore, Puar's and Massad's work highlights the existence of multiple trajectories in the deployment of sexuality as an instrument to create sharp divisions and borders, and to exert cultural and political influence on non-Western countries. Whilst Puar and Massad depict the rise of these phenomena as having a global reach, it is important to recognise that it is at the micro-level, at the level of national(ist) rhetoric, that the deployment of these arguments is possible in the first place. Zanghellini (2012) offers a specification of Puar's arguments. Far from dismissing the analytical framework of *homonationalism*, he is not convinced that all the representations of

Muslim queerness are subject to the same degree of hegemonic discourse (Zanghellini 2012, 366). For the author it is not possible to regroup under the banner of *homonationalism* all the critical engagements which involve Islam and the "radical" others, since they cannot all uncritically be the outcome of an outright hostility. Zanghellini's contribution challenges Puar's work insofar as it seems to ask for a nuanced approach to the analysis of the process by which different categories of sexual subjects are created as being antithetical to one another. Puar's argument, nonetheless, remains powerful and challenging insofar as it deprives human rights discourses in the West, about the rights of LGBTQI persons, of an aura of idealism that often masks unavowed political objectives. *Homonationalism*, therefore, could be said to function both as an omni-comprehensive corollary to human rights rhetoric and, at the same time, as an undeniable *ideological glue*, which allows nation-states to proactively promote their *values* abroad.

There are some illustrations of the way in which homonationalism may be practically articulated at the level of the nation-state. The first is the case of the Netherlands, often cited in relation to the prominent place of discourses on gay rights and sexual freedom in the country (Mepschen et al. 2010, 963). Jivraj and de Jong (2011, 143) define this proactive promotion of the rights of LGBTQI persons both in domestic and in international politics as the "Dutch homo-emancipation policy" (Jivraj and de Jong 2011, 143). With this term, the authors want to emphasise the way in which tolerance of homosexuality has gained legitimacy into Dutch nationalist discourse and identity (Jivraj and de Jong 2011, 145). What they describe is the way in which strategies for promoting this tolerance strongly target the Muslim population, who are considered to be homophobic by default.

Mepschen and colleagues (2010, 966) read this process of active promotion of the rights of LGBTQI persons in the Netherlands in the context of the "rampant secularisation" that the country is undergoing. Moreover, they also contextualise the image of the gay man in the Dutch narrative of human rights as the "ideal citizen of neoliberal modernity" (Mepschen et al. 2010, 970) because of his autonomy. Dutch nationalism, therefore, has managed to appropriate the rhetoric of human rights for LGBTQI persons in order to create the *homophobic other*. Jivraj and de Jong (2011, 148) define it as "capitalisation of sexuality in relation to the perceived multicultural crisis". It is possible to read the Dutch example, therefore, as generating two outcomes: on the one hand, the domestication of formerly

dissident sexualities and gender(s); on the other hand, the racial stigmatisation of presumably illiberal segments of the political community.

Collateral to *homonationalism*, although placed in a somewhat different geo-politically specific context, is the phenomenon of *pinkwashing* applied to the creation of a gay-friendly image of Israel which stands in opposition to a presumed "Palestinian Homophobia" (Puar 2011, p. 137). Both the case of the Netherlands and the case of Israel, illustrate the thin line existing between a selfless defence of universal human rights principles and the danger of instrumentalising the rights of some individuals in order to potentially exclude and marginalise others. In the context of this research, the framework of *homonationalism* will be applied, in an experimental way, to a non-national context, that of the CoE. The objective is that of investigating the extent to which there may be a form of undetected "European racism", as Balibar has suggested, that fosters the creation of the "other" in terms of sexual and gender identities, and functions not at the level of each and every member state of the organisation, but is structured as a powerful supranational meta-narrative on human rights.

Notes

1. One interesting example in this regard is Grabham's (2007, 44) description of intersex corporeality and how it relates to the medicalisation of intersex persons as a commodified relationship with medical practitioners.
2. From "AVIVA-Interview with Judith Butler", available at: http://www.aviva-berlin.de/aviva/content_Interviews.php?id=1427323, Accessed on 26 November 2012.

CHAPTER 4

"The Pink Agenda": The Challenges of Promoting Queer-Friendly Policies Abroad

Abstract By analysing issues relating to the freedom of expression, freedom of assembly and freedom of association for LGBTQI persons, specifically in the context of Eastern Europe, as well as claims of LGBTQI asylum-seekers in Europe, this chapter analyses the way in which a geography of queer-friendly versus homo- and transphobic member states of the CoE is created in the case law of the ECtHR. The chapter employs the term "Pink Agenda" to indicate the set of measures enacted at the domestic and international level in order to promote a specific type of European homonationalist identity within and outside the borders of Europe.

Keywords European Court of Human Rights • Gay pride parades • LGBTQI asylum-seekers • Human rights • Homonationalism

Human rights represent for states a strong *political currency*. Discourses on the protection of human rights undeniably represent a way for national actors to position themselves, in relation to other states, in the international arena. In this regard, they constitute an object of investigation for international relations scholars (Donnelly 1986, 2003; Moravcsik 2000). In this

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global context, in which seemingly universal principles of human rights are constantly affirmed and restated, new human rights actors emerge. Since the mid 1990s there has been the emergence of the 'queer liberal subject' (Warner 1999; Puar 2005; David et al. 2005). Often portrayed as married, child-rearing, tax-paying and allowed to serve in the army, this sketched socio-legal subject is also being materialised as a citizen and, hence, as an integral part of the nation. This process of inclusion, however, presents numerous political and social ramifications.

This chapter investigates the process by which the constitution of the "queer liberal subject", through political practices enacted in the European socio-legal arena of the CoE, serves specific political purposes resonating with dynamics of European exceptionalism in the field of human rights. In particular, by means of a critical reading of specific strands of the case law of the ECtHR on the rights of lesbian, gay, bisexual and transgender (LGBT)[1] persons, this article seeks to demonstrate that the promotion of the rights of LGBT persons may be part of a broader political agenda, defined for the purpose of this study as the "Pink Agenda". It is argued that the "Pink Agenda" works by creating and promoting lines of fracture between presumably *queer-friendly* and *homo- and transphobic* countries both within and outside European borders.

The chosen strands of case law of the ECtHR for the analysis relate mainly to two areas: the right to freedom of expression and the right to freedom of assembly and association on the one hand,[2] and the issue of LGBT asylum seekers in Europe on the other. The article discusses the way in which the CoE has become a powerful and effective sounding board for the implementation of the "Pink Agenda", aimed at creating an appealing prototype of the European LGBT citizen, perfectly integrated into the social and political fabric of each member state and standing in opposition to the "subjugated" queer inhabitants of other European and non-European countries.

The insistence on a European standard of respect for the rights of LGBT persons is, in fact, perfectly functional to the strengthening of a model of European citizenship grounded in the liberal concept of "tolerance" as a cultural and political marker of civilisation as opposed to a specific conception of *backwardness* in the context of human rights protection. The emergence of models of citizenship transgressing national boundaries—such as in the case of European citizenship—is one of the most fascinating transnational social processes under way, which highlights both the existence of multiple individual allegiances to different political and cultural

entities, but also emphasises the difficulty of fostering the creation of new communities transcending national borders. In this regard, the rights of LGBT persons may represent a unique tool to catalyse the creation of a model of European citizenship based on the continent's unique role as guarantor of human rights.

As the main continental forum in which European discourses on human rights are produced, performed and circulated, the CoE offers an interesting illustration of the process of contingent emergence of the "queer liberal subject". Since its establishment in the aftermath of World War II, its judicial body, the ECtHR, has dealt with different facets of the discrimination and violation of human rights experienced by LGBT persons. Nonetheless, this work needs to be contextualised in the broader framework of a European agenda on human rights. The specific sub-agenda concerning the rights of LGBT persons, defined here as the "Pink Agenda",[3] consists of a set of legal, social and political instruments employed both by nation-states and by international human rights institutions, such as the CoE, to subtly promote, in a proactive way, specific LGBT identities beyond the borders of Europe; and, at the same time, to single out anti-LGBT positions within these same borders. This strategy helps directly to foster a model of "European citizenship" based on the creation of sexual and racial others and the simultaneous inclusion of a limited portion of non-heterosexual/non-cisgendered people as part of the citizenry.[4]

This chapter will firstly expand on the previously mentioned concept of the "Pink Agenda" in the context of the emerging notion of "European citizenship". Secondly, it will delve into the analytical discussion of the above-mentioned strands of the case law of the ECtHR, to highlight the underlying discourses on European exceptionalism on human rights and the creation of the "queer other" as an integral part of the "Pink Agenda". The selected case law reflects the timeliness of the debates; an increasing number of asylum seekers are framing their requests in terms of persecution suffered in their home countries because of their sexual orientation or gender identity. The "credibility" of these individuals' claims, however, is often put into question (Morgan 2006; Jenkins 2009). At the same time, in Eastern Europe and in the Balkan countries, an increasing number of demonstrations and gatherings organised by LGBT associations are taking place (Davydova 2012; Gruszczynska 2012). Some of these have been banned by governments or disrupted by violent—often racist and homophobic—counter-demonstrators. This chapter acknowledges

the emergence of these phenomena and connects them to politico-judicial responses given by the CoE.

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

The creation of a "Pink Agenda" on the rights of LGBT persons on the part of nation-states has the purpose of subtly exploiting the citizenship of these newly included subjects in order to articulate national political discourses vis-à-vis other national actors. This process, however, is also enacted in international fora, such as the CoE, with the scope of "spotting" non-compliant, hence by definition *homophobic* and *transphobic*, states. This process of inscribing LGBT persons into the fabric of the nation has as its most visible implication the normalisation of national(ised) LGBT identities that fosters new lines of exclusion and the emergence of the *good* (homosexual) citizen (Smith 1994), as opposed to the "citizen pervert" (Bell 1995).

The "Pink Agenda" is a conglomerate of juridical and political actions, based on the idea that the LGBT population can be rendered equal thanks to a concession of certain rights already enjoyed by the heterosexual majority, according to the model of "formal legal equality" (Spade 2009, 297). With the purpose of letting individuals fit into the system, this inevitably creates lines of fracture between those who can afford to integrate and those who remain at the borders of the normative sphere. As a *relational* concept, the "Pink Agenda" can be used as a yardstick in order to measure the progress of other states (both members and non-members of the CoE) in the context of the protection of the rights of LGBT persons. Furthermore, it crystallises LGBT identities as given and unchangeable, removing both racial and class connotations and reinforces the importance—and exclusionary power—of institutions such as "the family" and "marriage".

As a mechanism of control of individuals, the "Pink Agenda" is embedded in a structural strategy aimed at continuously creating the subject position of "the other". The inclusion of both queer and LGBTQI persons in the neoliberal repertoire of legitimate socio-legal positions works to foster their normalisation (Duggan 2003; Spade 2011). At the same time, the *relational* character of this phenomenon occupies a central position in the work of Puar (2007) who has employed the concept of

"homonationalism" in order to describe the way in which sexual identities can be mobilised in favour of the interests of nation-states and their (neo) liberal agendas. Homonationalism functions as a mechanism for the co-optation of acceptable racialised segments of the queer population within the nation. This, in turn, entails a definition of all those who fall outside of this paradigm as *sexual-racial others* (Puar 2007, 2), in opposition to the virtuous, integrated (homosexual) citizen.

In the context of this process of veiled political instrumentalisation of LGBTQI identities, the articulation of a viable concept of "sexual citizenship" acts as the access gate to juridical, political and social intelligibility. Since the formulation (Evans 1993) of the concept "sexual citizenship", several authors (Bell 1995; Bell and Binnie 2000; Richardson 2000a, b; Phelan 2001; Brandzel 2005; Monro 2005) have discussed the implications, as well as the limitations, of a citizenship-based approach to the issue of the protection of the rights of LGBT persons. In the context of Europe, Richardson (2000a, b: 266), in particular, has argued that paradigms of sexual citizenship may seem to uphold, rather than criticise, extant institutions and hierarchies of power and gender. Bell and Binnie (2000, 3) have suggested that "sexual citizenship" is highly prescriptive, as it fosters the idea of an "acceptable" mode of citizenship. Hence, the act of allowing LGBT persons to "become" first-class citizens is connected with an attempt to tame their "diversity", but also to actively articulate their identities to serve concrete political and ideological purposes.

The attempt of the EU or the CoE, to foster the political unity of member states through the creation of a common European citizenship inevitably poses challenges to the narrow definition of citizenship as an element of the sovereignty of states. As Bell and Binnie (2000: 4) have commented, there is a clear connection between the "politics of transnational sexual citizenship" and phenomena such as the "Europeanisation of human rights law" or the regulation of both migration policies and the "globalisation of sexual identities". Ayoub and Paternotte (2012) have suggested that in Europe LGBT activism has also actively participated in the expansion and reinforcement of Europe through actions undertaken both at the level of the CoE and the EU. In imagining alternative models of "Europe", they argued, this form of activism has actively contributed to forming a link between European values and the respect and recognition of the rights of LGBT persons. This mutually constitutive relationship between the institutional actors and activists shows the existence of a thin

demarcation line between a genuine commitment to human rights and a subtle instrumentalisation of these same issues for political purposes.

The emerging concept of a "European citizenship" in this context is particularly important. Whilst Soysal (1994) and Balibar (2004), whose work has been discussed in Chap. 3, describe models of European citizenship increasingly detached from national sovereignty, the reality is far more complicated. Nash (2009, 1072) has highlighted the limits of a cosmopolitan conception of citizenship based on a sharp division between citizens and non-citizens and on the proliferation of status groups with different sets of entitlements. In identifying at least five subgroups,[5] Nash intends to highlight how the promotion of human rights as applying to all individuals regardless of their citizenship status is more an aspiration than a reality. Nash's hierarchies of citizenship seem to be crucial in social organisation and difficult to eradicate by virtue of a systematic promotion of human rights. LGBT persons are not excluded from such hierarchies and become subjected to both dynamics of inclusion and concomitant processes of reinforcement of pre-existing hierarchical organisations and the creation of new marginal (queer) subjects. To this extent, the "Pink Agenda" favours the emergence of a specific type of "queer European citizen" and participates in the reproduction of hierarchies of value, which are organised along exclusionary lines of racial and sexual difference.

Confessing One's Queerness: LGBTQI Asylum Seekers and the Space of Legal Intelligibility

If one was to adopt Nash's (2009) categories of citizenship, asylum seekers would be described, beyond doubt, as "sub-citizens", a marginal, invisible group of people with almost no entitlement in the country in which they reside, or in which they are detained while they wait for their case to be heard. Their precariousness and vulnerability are the result of political and legal regimes that regulate their entitlements and obligations on foreign soil. Yet the heavy scrutiny to which they are subjected can be dehumanising. Asylum seekers need to be good storytellers—the better the story, the more likely it will be considered credible. It was not until 2008 that the United Nations High Commissioner for Refugees (UNHCR) issued a Guidance Note on asylum claims related to sexual orientation and gender identity that allowed LGBT persons to be recognised as asylum seekers as members of a "particular social group" under

the 1951 UNHCR Convention Relating to the Status of Refugees ("the 1951 Geneva Convention").

In some countries, LGBTQI individuals may be subject to—often state sponsored—harassment, persecution and violence, resulting in a decision to leave their country of origin and seek protection elsewhere. The inclusion of sexual orientation and gender identity among the legitimate grounds on which an asylum claim may be based, however, can be instrumentalised politically. It is precisely with this ambiguity in mind that Bracke (2012, 245) has talked about the "saving gays rescuing narrative", by which European states articulate a civilisational politics that posits tolerance of sexual and gender diversity as a marker of the "civilised West", enabling these countries to save persecuted queers around the world. Torn between the need to create a global geography of "homo- and transphobic countries" and protect those fleeing from fear and persecution, Europe (framed as both the EU and the CoE) tries to capitalise on its image as a tolerant, liberal and *queer-friendly* continent, not without ambiguities.

As a result of this attempt to rescue persecuted queers, individuals may find themselves, paradoxically, in a vulnerable position: they become *trophies* of the West, yet treated with suspicion when they have to substantiate their "gayness" or "queerness" in the asylum process (Berg and Millbank 2009, 200; Bennett and Thomas 2013, 25–29). Extensive and intrusive questioning are not uncommon in this process and stereotypes about sexual orientation and gender identity often place the applicants in vulnerable positions (Morgan 2006). Oftentimes, moreover, LGB applicants are deported to their home countries with the suggestion that they should be "discreet" and avoid flaunting their homosexuality (Millbank 2009).

When a claim is successful, however, it can be said that the condition of the "refugee" is far from being ideal. Judith Butler and Gayatri Spivak (2007, 6) have suggested that the condition of the refugee is one of otherness with regard to the host state, and Schuster (2003) has pointed out that their freedom is mostly illusory. Against this background, the "saving gays rescuing narratives" appear as a powerful political instrument that can enhance European human rights exceptionalism by essentialising homophobic others in non-Western contexts. The creation of "queer refugees" allows the specular creation of the "queer citizen". The dialectical relationship between these two "strangers" is important insofar as it reinforces the heteronormative character of the nation, while simultaneously providing a space of mild tolerance for the others.

The role of the CoE in the enhancement of this process, aimed at rescuing persecuted queers worldwide, is ambiguous. If the political bodies of the organisation, such as the CM and PACE, have urged member states to take seriously in the courtroom asylum applications filed on the grounds of sexual orientation and gender identity, the logic of suspicion prevails and great leverage is given to the respondent states in assessing which asylum seekers' stories are credible. The ECtHR has heard a limited number of cases in which the applicants alleged a violation of Article 3 of the ECHR on the prohibition of torture, inhuman and degrading treatment or punishment.[6] The ECtHR has been called to evaluate whether national courts had been wrong in their assessment of the criteria to determine the danger of persecution to which individuals were subjected in their home countries.

The cases of *F. v. the United Kingdom* (2004) and *I.N.N. v. the Netherlands* (2004) both concern two male applicants from Iran who reported having fled the country because of the danger to them due to their homosexuality. Subjected to harassment and violence on the part of the Iranian police on several occasions, they had escaped to avoid harsher punishment such as a death sentence.[7] These two cases see the exposure of the "hypervisible Iranian queer" (Shakhsari 2012), an increasingly popular stylised figure in the repertoire of human rights violations. Both applicants, F. and I.I.N., staged a *Foucaultian confession* in the process of avowing their homosexuality. They ascribed to themselves an identity that might render their asylum claim successful. In recalling their experiences of abuse and violence, they confessed and exposed their humanity in all its vulnerability before the ECtHR. However, for the ECtHR the question remained: could they be believed?

While it was primarily the responsibility of the national authorities (the British and the Dutch) to decide whether the applicants' stories fitted the "typical" confession of the Iranian homosexual, the ECtHR in Strasbourg had to verify whether these authorities were right in their assessment. In both judgments the ECtHR reached the conclusion that the national authorities were right: neither F. nor I.N.N. were at risk of capital punishment were they to be returned to Iran. There is, however, a striking difference between the experiences *confessed* by the applicants, and the existence, in the background, of a narrative of Iran as the "grand prison and death chamber for queers" (Shakhsari 2012: 15).

While national authorities tried to demonstrate how in reality homosexual behaviour is tolerated, rather than harshly punished, in Iran, the

ECtHR in fact reinforced the discourse of "homophobic versus homophile" countries. Paradoxically, while the ECtHR stated that the conditions for queers in Iran were not as bad as the applicants sought to demonstrate, at the same time it reinforced the dichotomy between the Western *observer* and the Oriental *observed*. In this regard, scrutinising the applicants' intimate confessions produces a logic of suspicion and stylisation of sexual personages, recognised as being alien to the citizenry of Europe but who, at the same time, aspire to become sheltered in its midst.

Moreover, in implicitly reinforcing the moralising judgment between liberal countries that grant asylum and illiberal countries forcing people to seek asylum elsewhere, the ECtHR indirectly contributes to the construction of a common European identity based on respect for human rights, which needs homo- and transphobic countries as its functional "others". Hence, the ECtHR participates in maintaining the abstract symbol of the persecution of queers—the Islamic Republic of Iran—intact. At the same time, the *persecuted* has not suffered "enough" in order to be admitted to a privileged geo-political space such as that of tolerant and liberal Europe.

A comparison of the actions undertaken by the judicial and the political bodies of the CoE highlights, in this regard, the way in which the "Pink Agenda" enhances a certain model of citizenship vis-à-vis the issue of LGBTQI asylum seekers. Non-judicial bodies such as the CM (2010) or PACE (2010) have issued recent recommendations and resolutions, calling on member states to recognise sexual orientation and gender identity as legitimate grounds for an asylum claim. Both bodies emphasised the "well-founded fear of persecution", one of the tenets of the 1951 Geneva Convention and, hence, the necessity for the applicants to be credible in framing their asylum claim. The irony is that the members of the CM and PACE are also members of national governments that systematically scrutinise, with intrusive questions, those same applicants whose rights they are trying to protect in Strasbourg.

These two sides of the same coin reinforce the perception that in the European arena of human rights the "Pink Agenda" is more an ideological toolkit than a concrete working plan. If there were a genuine interest in defending individuals—either citizens or non-citizens—from human rights abuses, stories of structural violence or harassment would be enough to grant protection, without the applicants having to demonstrate a threat of death or an extreme punishment. Paradoxically, while the discourse of LGBTQI refugees enhances "civilisational politics" (Bracke 2012), it also hides a fundamental aversion to migration flows in Europe, considered to

endanger the socio-cultural and economic stability of Europe. The result is a juxtaposition of a formal proclamation of the need to "rescue" persecuted queers and the enhanced protection of the integrity of national borders.

Contrary to the well-established idea of an American exceptionalism on human rights (Fitzpatrick 2003; Ignatieff 2009), the idea of a "European exceptionalism" on human rights is less widespread. Nonetheless, it is a strong rhetorical element in the construction of the concept of European citizenship. Statements—such as the one issued by the president of the European Council of the EU, Van Rompuy (2010), on the occasion of the International Day Against Homophobia—indicate how LGBT issues might come to the forefront as a new, and problematic, benchmark of European civilisation and help to sketch the contours of a tolerant model of European citizenship:

> discrimination on the basis of gender and sexual orientation has ceased to constitute a political cleavage, and is enshrined in the EU's founding act and statement of values. It is something that *distinguishes* [my emphasis] Europe from many other parts of the world.[8]

The statement appears presumptuous in its declaration of respect toward LGBT persons as a founding value of the EU. The emergence of this continental Euro-nationalist agenda on the rights of LGBT persons appears as a concerted political effort to establish dichotomies in the international arena rather than from a genuine commitment to achieve substantial equality of all citizens.

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

The mobilisation of LGBTQI identities for political purposes in the European arena, as well as the articulation of specific human rights policies going under the name of the "Pink Agenda", also target member states in order to expose their structural lack of compliance with fundamental human rights principles. Some of these rights could be, for instance, the right to freedom of expression (Article 10 ECHR) and to freedom of assembly and association (Article 11 ECHR) in relation to the rights of LGBTQI persons.

The last few years have seen a proliferation of events, and the establishment of associations, connected with the defence of the rights of LGBTQI persons, particularly in Eastern Europe. These events or venues, however, have often become the object of attacks or limitations of their activities on the part of both governmental and non-governmental actors since the 2000s (Commissioner for Human Rights of the Council of Europe 2011). By means of outright bans, bureaucratic impediments and/or failure on the part of national authorities to ensure the safety of the participants or members of associations, the enjoyment of the right to freedom of expression and freedom of assembly and association of LGBTQI persons have been seriously curtailed in these countries. This emerging phenomenon, while genuinely requiring attention from political and judicial actors both in domestic contexts and in the context of the CoE, can also be prone, to a certain extent, to different forms of instrumentalisation.

It would be reductive to consider the "Pink Agenda" as only encompassing access to societal institutions such as marriage or the army, or rescuing "persecuted queers" as discussed. This diverse range of queer-friendly policies and actions can also be said to help the cross-cultural transposition of "Anglo-American identity politics" in the European arena (Stychin 1998, 134). In this regard, therefore, it appears important to ask to what extent the political emphasis on the importance of gay pride parades, and similar events across member states, can be said to correspond to this process of transposition identified by both Stychin (1998) and Altman (1996).

Two recent judgments of the ECtHR, *Bączkowski v. Poland* (2007) and *Alekseyev v. Russia* (2010), help to shed some light on the possible existence of these dynamics. Since 2007 the ECtHR in Strasbourg has issued three judgments on the banning of gay pride parades and other similar events.[9] The increasing number of applications is due mainly to the existence of a problem in the enjoyment of freedom of expression and freedom of assembly and association in some countries, but also to the increasing effectiveness of non-governmental actors in networking and litigating strategically in order to achieve a political goal before the Strasbourg Court.

The possibility of so-called "sexual minorities" carrying out peaceful demonstrations is often considered a litmus test for countries needing to prove their democratic character or for those aspiring to gain access to the EU (for instance in the case of Serbia).[10] Gay pride parades in Eastern Europe become, therefore, the symbolic markers of democracy

in these countries. However, this strategic importance attributed to gay pride parades is likely to oversimplify national debates on these issues and favour the radicalisation of these debates and the occurrence of political backlashes in order to counter the various attempts of externally driven "Europeanisation" (O'Dwyer and Schwartz 2010, 222).[11]

In the two above-mentioned cases, successful before the ECtHR, the Polish and the Russian authorities had either banned or put into place administrative impediments aimed at preventing the organisation of gay pride parades or similar events. In *Bączkowski v. Poland*, the ECtHR implicitly judged the democratic character of the Polish state and society by measuring the events in Poland against the background of a trio of well-rehearsed terms from its previous case law that describe every democratic state: *pluralism*, *tolerance* and *broadmindedness* (*Bączkowski v. Poland*, para. 63). The use of the term *broadmindedness* appears vague and ambiguous; what does it mean to be broadminded? The word also points to a space, either physical or symbolic, where *tolerance* can happen. There is a connection between *broadmindedness* and *tolerance*; both of these characteristics point to a space in which someone's presence can be endured, while not necessarily accepted.

The concept of *broadmindedness*, however, is also connected to an evaluation of Polish society contrasted with a "society that functions in a *healthy* [my emphasis] manner" (*Bączkowski v. Poland* 2007*:* para. 62). In implicitly defining Poland as narrow-minded, the ECtHR places its emphasis on the malfunctioning of its society. Its narrow-mindedness is seen as being caused by a *democratically ill* society that prevents people from freely associating and marching in the street. The picture is that of a dangerous country; a society that does not function in a healthy manner is automatically associated with the existence of a danger, a danger which does not exist in other "democratic" states where gay pride parades take place.

The ECtHR's analysis, however, is also coupled with a problematic definition of "pluralism" as a benchmark of what constitutes a well-functioning society. In order to include LGBT persons in this notion of "pluralism" the ECtHR goes as far as defining these individuals as falling under the category of "cultural identity" (Johnson 2012, 187). Although this could be useful in order to define LGBT persons, as a sort of "social actor", it also signals the incapability of the ECtHR to understand sexual orientation and gender identity as transversal aspects of individuals' lives that cross-cut ethnicity, religion, class, age and other characteristics.

Homosexuality and queerness "as culture" are problematic concepts, especially if employed in order to measure compliance with human rights norms in international settings.

The use of gay pride parades as a yardstick to measure the democratic character of European societies was evident not only in *Bączkowski v. Poland*, but also by the more recent case of *Alekseyev v. Russia,* in which authorities had banned the marches organised by the plaintiff, a famous Russian gay activist, for several years. It is telling that in the judgment the ECtHR reiterates the trio of terms *pluralism*, *broadmindedness* and *tolerance* used in the previous judgment (*Alekseyev v. Russia*, 2010: para. 70). The judgment is also permeated by a strong narrative of "respectability" in both the plaintiff's and the ECtHR's arguments. The plaintiff, in particular, had affirmed that "the participants had not intended to exhibit nudity, engage in sexually provocative behaviour or criticise public moral or religious views" (*Alekseyev v. Russia* 2010: para. 82). Alekseyev's argument echoes Davydova's (2012: 33) attempt to distinguish between Eastern European gay pride parades and the "disturbingly carnivalesque and glamorous gay pride parades of Western European and North American cities". This attempt suggests that in Eastern Europe, activists simultaneously try to *embrace* and *resist* the "cultural heritage" of Western LGBT movements. Davydova (2012, 33) somehow attempts to *sanitise* the image of these events while recognising that Western partners (both institutional and non-institutional) are crucial in the organisation and the logistics of gay pride parades and rallies in Eastern Europe. In recalling the organisation of the 2012 Lithuanian Gay Pride Parade, in fact, she explains how some of the Lithuanian participants were prevented from physically taking part in the march because half of the marchers allocated by the Vilnius municipality (400 persons in total) were taken up by guests from other Baltic and international LGBT associations, foreign ambassadors and members of the European Parliament. This small-scale episode shows how, to a certain extent, the oversight of some of these events may rest in the hand of the more "experienced" or more "liberal" Western organisers and "defenders of democracy".

The case of *Alekseyev v. Russia* represents the tip of the iceberg of an international confrontation between the country and Western states in relation to the harsh stance against homosexuality adopted by the Russian Parliament and President Putin, culminating with the introduction of the bill banning "homosexual propaganda" in June 2013. While Russia had already been condemned in *Alekseyev v. Russia*, it continued to ban

gay pride parades after 2010. In 2013 the Parliament managed to introduce the above-mentioned controversial bill in the national legislation. Russia was soon put under surveillance by the CoE (Johnson 2012, 191). Concerted efforts by Russian authorities to ostracise and silence LGBT organisations and individuals were met with critical comments from several actors at the EU and the CoE. Some comments highlight the extent to which reactions to the Russian crackdown on LGBT persons was framed by Western European commentators as an item falling under the "Pink Agenda". The Dutch member of the European Parliament, Sophie in 't Veld,[12] (2012) stated:

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

In 't Veld's comment is clearly intended as a provocation since membership in an organisation, rather than the exclusion of a non-compliant state, is deemed more efficacious in persuading a country like Russia to conform to norms (Jordan 2003, 660). At the same time, in 't Veld also portrays a partial picture of the CoE and the EU as institutions founded upon the respect of the right of LGBT persons. At the time of the accession of Russia to the CoE, in 1996, this was far from being the case. It has only been since the 2000s that systematic attention has been given to these issues by means of resolutions issued by the two main political bodies, the CM and PACE. The same could be said for the EU.

Furthermore, labelling Russia as homophobic and transphobic directly strengthens the dichotomy between liberal (queer-friendly) and illiberal (homo/transphobic) members of the CoE. At the same time, it is also likely to re-entrench political resistance to values and norms seen as being imposed on Russia (or on other countries) directly by the "West". In particular, since the adoption of these European strategies aimed at opposing the Russian stance on homosexuality, the result has been that of a stiffening of anti-gay measures and rhetoric. Disguised as a law aimed at protecting the integrity of minors, this legislative measure has successfully served Putin's nationalist goal of pointing the finger at Western interference in Russian politics. In a specular way, the various European states and supranational institutions have themselves resorted to moralising discourses

in order to demarcate the political distance between the condemnable Russian attitude towards homosexuality and European efforts to build a queer-friendly continent.

The outright confrontation between "Europe" and Russia on the above-mentioned legislation represents a good illustration of the problematic character of the "Pink Agenda" pursued in Europe. As Kulpa and Mizielinska (2011, 46) have commented, in Western attitudes towards the treatment of LGBT persons in various Eastern European countries there is a sense that Eastern European countries have to "catch up" with the standards of civilisation, with benevolent help from Western states. While this expectation is destined to fail, political negotiations around the lives of individuals have negative consequences for the persons involved, who may become more vulnerable to violence and attacks while being considered both co-opted subjects in homonormative terms and outcasts in heteronormative terms.

This chapter has sought to show how the protection of the rights of LGBTQI persons in the context of the CoE can contribute to framing and articulating a notion of European citizenship based on the creation of moral hierarchies between *insiders* and *outsiders*. Building on notions of normalisation of queer subjectivities within the nation-state, as illustrated by some American authors (Duggan 2003; Puar 2007), this chapter considers the extent to which similar dynamics are emerging in the supranational context of the European continent in conjunction with pushes for "Europeanisation", as has been suggested by several authors (Bell and Binnie 2000; O'Dwyer and Schwartz 2010; Ayoub and Paternotte 2012). It has been argued here, that the CoE, specifically through the judicial work of the ECtHR, plays a crucial role in portraying Europe as a tolerant, open and respectful continent for LGBTQI persons while, simultaneously, identifying intolerant and homo- and transphobic "others" both within and outside its borders.

In this regard, this chapter has introduced the concept of the "Pink Agenda" as a set of complex political and legislative measures aimed at promoting a queer-friendly image of Europe. By insisting on Europe's uniqueness in the field of the protection of the rights of LGBT persons, the "Pink Agenda" works in order to identify European exceptionalism on human rights as a distinguishing cultural, political and legal feature of the whole continent. Far from merely focusing on the specific verdicts reached by the ECtHR in the various cases analysed, this chapter has sought to unveil the process by which the ECtHR implicitly participates in the cre-

ation of moral dichotomies between compliant and non-compliant member states of the CoE as well as reinstating European moral superiority on human rights issues vis-à-vis non-European countries.

As the self-proclaimed "conscience of Europe", the ECtHR fulfils a unique role in setting the legal standards for the respect of human rights in the continent. However, the ECtHR also contributes to the emerging concept of "European citizenship" by implicitly suggesting that Europe's uniqueness lies in its open-mindedness and tolerance with respect to LGBT persons as opposed to homo- and transphobic "others" both within and outside its own borders. This necessity to create the racial/sexual "other", also increasingly at the core of European politico-diplomatic strategies, however, oversimplifies the existence of complex and articulate debates in national fora to the detriment of the individuals whose rights are instrumentally appropriated in order to fit broader political strategies. This has been the case, for instance, for the bill banning "Gay Propaganda" in Russia and the consequent political backlashes against LGBT persons in the country. Hence, turning the respect of the rights of LGBT persons into a civilisational argument, as Europe may sometimes be tempted to do, may be a risky operation. On the one hand, in fact, it may render LGBT persons more vulnerable and prone to political instrumentalisation both in Europe and well beyond its borders. On the other hand, however, it may also contribute to construct the concept of "European citizenship" on unstable and shaky grounds, because emphasising moral superiority can easily become a double-edged sword when European states—or Europe as a whole—fail to comply to other human rights standards in different circumstances.

Europe is currently a continent on a continuous and relentless search for a common identity (Todorov 2010) and indicating the "respect of human rights" as one of the distinguishing features and peculiarities of this continent certainly represents a powerful argument. In this regard, the concept of the "Pink Agenda" has been at the core of Europe's quest for a common identity and the idea of "European citizenship". The concept, in fact, highlights the ways in which judicial discourse on LGBT persons at the ECtHR may echo political strategies aimed at fostering emerging models of Euro-nationalist queer citizenship based on exclusionary membership of a transnational community.

The implications for future research in this field are numerous. Firstly, this discussion calls for a reconsideration of current strategies of inclusion of LGBTQI persons into the fabric of nation-states in Europe in a

way which is non-exclusionary and subtracted to racial and sexual profiling of non-European "others". Because of the increasing interest on the rights of LGBT persons in various international legal and political fora, it is important to subtract these conversations to the petty negotiations of politics. Secondly, acknowledging the influence of the "Pink Agenda" on current discourse of protection of the rights of LGBT persons in Europe, furthermore, will help to shape the emerging concept of "European citizenship" as fundamentally different from the classic models of membership of a national political community which often fail to recognise the multiple—and sometimes conflicting—allegiances held by individuals. Thirdly, introducing the concept of the "Pink Agenda" can also help to further investigate the extent to which LGBTQI persons themselves feel part of a transnational European political community.

In the last instance, this chapter has opened up the possibility of discussing the extent to which the inclusion of sexual orientation and gender identity among the fundamental features of the "European citizen" can help to weaken the process by which citizens are arranged into informal hierarchies, as is currently the case for nation-based models of citizenship. In turn, this would also help to create and discuss new models of citizenship promoting flexibility and protection without "normalising" those who wish to be included in the political community. Questions pertaining to the sphere of gender, gender identity and gender fluidity represent the perfect examples in this regard, as they pose a fundamental challenge to the binary structure of societal institutions and to citizenship itself, sharply articulated around notions of masculinity and femininity. As Chap. 5 shows, the case law of the ECtHR regarding issues of gender identity confines LGBTQI persons within the logic of the gender binary, without granting the possibility of rethinking human rights and the consequent claims to citizenship beyond the discrete category of male/female. The upholding of the gender binary by the ECtHR implies, of course, that newly emerging forms of queer, transgender or intersex citizenship cannot escape this fictitious space and can be expressed, on the contrary, only within the boundaries of the categories of "male" and "female".

Notes

1. The chapter leaves out queer and intersex persons as there is no relevant case law of the ECtHR that has involved people who identify as "queer" or "intersex" to date.

2. The right to freedom of expression is protected under Article 10 of the ECHR. The right to freedom of assembly and association is protected under Article 11 of the ECHR.
3. The use of the adjective "pink", in this regard, signals a problematic semiotic reference to femininity, sexuality and queerness (Koller 2008).
4. The word "cisgender(ed)" is used in opposition to "transgender" to define individuals whose sexual and gender identity is in accordance with the gender assigned at birth (Schilt and Westbrook 2009).
5. The subgroups of citizens identified by Nash (2009) are *Super-citizens* (economically privileged), *Marginal Citizens* (formally citizens but economically or socially marginalised), *Quasi-citizens* (long-term residents in a country who have a limited set of entitlements), *Sub-citizens* (such as asylum seekers) and *Un-citizens* (such as undocumented migrants).
6. This allegation is based on the landmark 1989 case of *Soering v. the United Kingdom*, in which the ECtHR declared that returning an individual to a country in which she/he would suffer a treatment amounting to torture and inhuman and degrading treatment or punishment amounted to a violation of Article 3 of the Convention.
7. Sharia law in Iran officially punishes "sodomy" with capital punishment upon production of the testimony of four (male) witnesses (*F. v. the United Kingdom*, p. 3).
8. Van Rompuy, H. (2010), Statement by President Van Rompuy on the International Day against Homophobia. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/114351.pdf. Last Accessed: 14th October 2016.
9. The third case is *Genderdoc v. Moldova* (2012).
10. The banning of the gay pride parade in 2013 for the third year in a row sparked protest from the part of the EU, as the country was getting ready to open EU membership talks with the organisation.
11. O'Dwyer and Schwartz (2010: 222) define "Europeanisation" as a process by which European norms are internalised.
12. Ayoub and Paternotte (2012) have also analysed critically In' t Veld's statement.

CHAPTER 5

The Gendered and Sexed Citizen: Different Bodies, Different Rights?

Abstract This chapter focuses on gender identity and the rights claims arising on the part of transgender and intersex persons. While rights claims concerning intersexuality are only recently developing, the ECtHR has issued several judgments on the recognition of one's preferred gender, the right to marry for transgender persons and discrimination in the welfare and healthcare sectors, as well as on the issue of compulsory divorce for married individuals who wish to have their preferred gender recognised in countries in which same-sex unions are not recognised. The chapter discusses the current limited possibilities existing for opening up a radical deconstruction of gender in these fora.

Keywords European Court of Human Rights • Human rights • Gender identity • Intersexuality • Transgender

Gender and sex play a fundamental role in the description of what counts as "human" and can be understood as both a *descriptive* and *prescriptive* category. In the normative domain, these descriptive and prescriptive dimensions are deeply intertwined: a legal subject is inevitably gendered and with specific sexual "characteristics". This chapter offers a chance to explore the ways in which transgender and intersex persons and their rights claims, as well as the possibility of claiming forms of transgender and intersex citizenship, radically challenge the law by defying and destabilising the binary categories of *male* and *female*. Whilst a thorough discussion of the

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rights of intersex persons has not yet occurred in Strasbourg, some reflections will be proposed on the subject in this context.

As a preliminary observation, it must be noted that in its case law, the ECtHR exclusively employs the term "transsexual" (post-operative, willing to identify with one gender),[1] thus de facto denying legal subjectivity to the broader category of transgender persons. The exclusion of those who have not irreversibly "crossed" the line of gender and/or sex highlights the disruptive potential that these forms of identification represent for the clear definitions of genders within the domain of the law. Furthermore, this implicit erasure of transgender persons in the case law of the ECtHR undeniably marginalises those individuals who refuse to fall entirely into one gender category.

The analysis of the case law that will comprise the object of this chapter is organised around three main axes. Firstly, the issue of the recognition of one's preferred gender is approached, with a thorough critical analysis of some landmark cases such as *B.v. France* (1992) and *Goodwin v. the United Kingdom* (2002), as well as references to earlier case law. Secondly, the analysis will consider another strand of the case law of the ECtHR, touching on the relationship existing between the recognition of one's gender and the economic and financial implications descending from such recognition (*Van Kück v. Germany, Grant v. the United Kingdom* 2006, *Schlumpf v. Switzerland* 2009). It will be suggested that the recognition of specific sets of rights for transgender persons has an undeniable, and often problematic, financial dimension that directly calls into question the interests of the responding states and—ultimately—the possibility for trans people to claim their citizenship. Thirdly, space is devoted to the discussion of those cases, decided by the ECtHR, that deal with the family life of transgender (transsexual) persons (*Parry v. the United Kingdom* 2006, *H. v. Finland* 2012). While talking about a trans-normativity (as compared to "homonormativity") would be theoretically adventurous, at the same time various configurations of normativity for transgender persons can be explored in relation to the recognition of different models of family. The subsection 'Intersexuality' and Gender Categories: Ticking the Right Box will explore the socio-legal aspect of the regulation of intersex identities and trace possible profiles in this field in regard to the role of the CoE.

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

Trans and intersex experiences and identities are connected by a sort of specular relation, according to Ben-Asher (2006, 55), in relation to the different roles played by medical intervention and expertise. While trans-

gender activists seek to promote the right to have surgery performed (and recognised as necessary), intersex activists are lobbying for a moratorium on paediatric genital surgeries on intersex children and newborns which are seen as harmful and unnecessary (Chase 1998). While these claims seem to be antithetical, they actually have in common the same goal: a radical disruption of gender norms. In this regard, Butler (2004, 6) has suggested that both intersex and transgender persons "challenge the principle that a natural dimorphism should be established at all costs". For the purpose of this analysis, it is important to understand why transgender and intersex bodies are seen to transgress so radically the boundaries of the normative, and why the regulation of bodies along the lines of the sexual binarism is a paramount preoccupation of both nation-states (Boyd 2006, 421) and, by reflex, human rights actors such as the CoE.

The Normative Creation of Transgender Identities

The creation of legal transgender/intersex identities serves the purpose of preserving normative structures of gender and ensuring uniformity and compliance (Garfinkel 2006, 158; Spade 2006, 136). The existence of a transgressor to the norms of gender symbolically reinstates the importance of the binary categories of *male* and *female*. Furthermore, complying with the tacit norms of gender guarantees the acquisition of legal and social intelligibility (Boyd 2006, 421). Gender fulfils, therefore, various crucial social and legal purposes which, ultimately, facilitate the distribution of rights and responsibilities, as well as ensure the preservation of a stable social (and moral) order. Faithful (2010, 102), however, has observed that the pervasive and imperative character of gender norms, as well as the severity with which they are enforced, derives from a fundamentally shaky basis on which they rest. Hence, the enforcement of gender norms is said to require "severe regulation in order to ensure uniformity" and a constant policing on the part of the various institutional and non-institutional actors entrusted with this responsibility.

The pathologisation of transgender identities is an important historical and medical phenomenon. It was only during the 1950s that medical professionals started to take an interest in the definition of "transsexualism" as a pathological category.[2] To these early categorisations followed an inclusion of "transsexualism" in the Diagnostic and Statistical Manual III (DSM), under the rubric of "Gender Identity Disorders (GID)" which was only removed in the fifth edition issued in 2012.[3] According to this

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

An under-researched aspect of the process that leads to having one's gender change recognised is the widespread requirement that the person become sterile. Surgery leading to irreversible sterility, as Whittle (2002, 162) has suggested, can be harmful and dangerous for some people, because of existing health conditions or because of the invasive character of some surgical interventions, such as hysterectomy, which satisfy the requirements of national legislation without real benefit for the person concerned. While a great number of transgender persons decide to undergo such procedures, others feel compelled to do so by virtue of the requirements imposed by law in order to have one's official records and documents amended. Enormous disparities exist in national legislation across Europe on change of gender and the controversial topic of compulsory sterilisation for transgender persons, which has been framed as a human rights issue in front of the ECtHR (Sivonen 2011; Cojocariu 2013) and is starting to be debated in various fora.

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

The ECtHR has been a real battleground for the rights claims advanced by transgender and transsexual persons during the last three decades. Sandland (2003, 201) has argued, however, that rights to transgender persons still seem to be conceded by the heterosexual majority according to a process of normalisation. This entails a subsequent effort to "reinstate

and affirm the proper" on the part of the ECtHR (Sandland 2003, 201). The analysis of different strands of case law on the rights of transgender persons can be said to confirm Sandland's intuition insofar as it highlights the contorted approach to these issues that the ECtHR has adopted, also demonstrating a limited knowledge of the sociological data available on the different experiences, identities, and kinship and life arrangements of transgender persons across Europe.

Recognising Gender, Normalising Individuals

It could be argued, provocatively, that the case law of the ECtHR concerning transgender persons is a case law on the "right to pass" as a member of the sex opposite to the one assigned at birth, falling entirely within the boundaries of "liberal transsexual politics" (2002, 502). Beyond the provocations, as well as the political implications of the "passing strategy", it is important to recognise how this discourse about being fully accepted as a member of the preferred gender has strongly permeated the narratives of the ECtHR. In this regard, narratives in the courtroom on one's preferred gender are made the object of close judicial scrutiny according to what Sharpe (2002, 31) has described as the "hermeneutics of suspicion",[4] aimed at verifying the authenticity of the applicants' gender identity.

This analysis tries to break from the traditional approach to the case law of the ECtHR based on an assessment of the "evolution" of the judgments of this judicial institution. For this reason, the early cases decided during the 1980s have been omitted.[5] The three chosen cases, instead, concern the legal recognition of the gender of post-operative transsexual persons, and exemplify very well that process of *hyper-regulation* and *erasure* of transgender persons described by Spade (2009, 289), by which conflicting legal norms and administrative policies and measures create an "incoherent regulatory matrix" that renders individuals vulnerable in terms of discrimination, violence and economic instability. What is striking, however, is that while the ECtHR strongly calls on member states to solve the various implications of this incongruence, it nonetheless reproduces this situation of vulnerability through its judgments.

The first of these cases, *B. v. France* (1992), is considered the first partially successful judgment in terms of the recognition of the right of trans(sexual) persons to have their preferred gender recognised. After the failures of applicants in *Rees v. the United Kingdom* (1986) and *Cossey v. the United Kingdom* (1990), the ECtHR substantially overturned its previous

case law on this subject. While this change is surely surprising, the most interesting aspect is the presence of a thorough speculation on the authenticity of the applicant's transsexuality and a strong rhetoric of opposition between "true" and "false" transsexual persons. It can be argued, in fact, that the above-mentioned "hermeneutics of suspicion" (Sharpe 2002, 31) permeating the case law of the ECtHR on transgender rights is particularly strong in the instant case.

The case concerned a male-to-female (MtF) post-operative transsexual person who had undergone gender-confirming[6] surgery in Morocco (vaginoplasty) and had, consequently, sought amendment to her civil status in France, her country of origin. The refusal to the amendment had been motivated by the French Court of Cassation, with the claim that the appellant could not be considered as a "real" transsexual (*B. v. France*, 1992: para. 16) because she had not been under medical control in France that could have confirmed the genuineness of her "transsexualism". To this refusal, followed B.'s application at the ECtHR, in which she claimed the violation of Articles 3, 8 and 12 ECHR. From the start, in the "background to the case" (*B. v. France*, 1992: para. 10), is present a strong narrative of authenticity that permeates the applicant's self-presentation. The applicant, in fact, explains how, since her early stages of life, she was perceived by her brothers as a "girl" and how throughout the years she had been experiencing this discrepancy between the assigned and the desired gender with extreme distress which led to depression. The purpose of this narrative was to convince the ECtHR that her claim was genuine and to counter "suspicions" as to what her *true* gender was.

The strategy of the applicant, however, also pursued another objective. Prior to *B. v. France*, the ECtHR's case law did not oblige member states to recognise one's preferred gender. In order to avoid having her case dismissed, the applicant had to convince the ECtHR that her case was innovative with respect to the past case law. Apart from highlighting the differences between the French and the British legal system,[7] the applicant emphasised developments in the scientific field regarding transsexualism.[8] Hence, B. combined her narrative of authenticity with a narrative of rigorous scientific legitimacy. She constructed her legal intelligibility by referring to two different sets of "truth telling" (one experiential, one scientific) that could respond to the ECtHR's request to prove the genuine nature of her identity.

The applicant's narrative proved to be successful, as the ECtHR recognised the truthfulness of her claim and a violation of Article 8. While

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

The narrative of the "true transsexual" is an important and problematic one both for human rights and citizenship. In the case just discussed, this model is articulated beyond the verdict of the ECtHR, as the six dissenting judges (Matscher, Pinheiro Farinha, Petitti, Valticos, Loizou and Morenilla) motivated their opposition to the decision of the ECtHR in terms of having not been convinced about the genuineness of the applicant's transsexualism. In particular, Judge Pinheiro Farina's intervention clearly adopts transphobic language[9]:

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

This statement is problematic under two profiles. On the one hand, it is contradictory. How can Judge Pinheiro Farinha recognise a "true transsexual" if he does not recognise the right to change one's gender in the first place? On the other hand, the Judge demonstrates a narrow-mindedness in wanting to delegate the discussion of what counts as gender to the purely legal sphere—"I do not know the concept of social sex". This statement suggests that the sociological factors in the determination of gender

identity are completely overlooked by ECtHR. In this regard, the ECtHR shows a fragmented and stereotypical knowledge about "proper" gender and places the applicants in the position of having to "prove" their level of compliance to dictates of the sought-after gender. Erasure is a total obliteration of trans experiences as something deprived of meaning that is only useful insofar as it determines the passage from one gender to the other. As the following cases will show, the approach of the ECtHR is strongly permeated by this "hermeneutics of suspicion" coupled with a strong effort at the normalisation of transgender identities.

In 2002, ten years after *B. v. France*, the ECtHR recognised formally the obligation on member states to recognise one's preferred gender regardless of biological criteria. In *Goodwin v. the United Kingdom* (2002), to some extent rightly considered as a landmark judgment, the obligation for member states to rectify documents of individuals that wanted to change their gender was affirmed. This obligation, however, was formulated in a way that allowed member states to apply a wide margin of appreciation in setting up the criteria for the recognition of one's preferred gender. Hence, burdensome requirements such as surgery, psychiatric assessment and compulsory sterilisation were not proscribed, thus preventing those trans persons who refused to embrace a medicalised definition of their gender identity, to have their preferred gender recognised by the law.

Goodwin v. the United Kingdom (2002) concerned a British applicant who had not obtained the amendment of her gender on her birth certificate. In the opinion of the applicant, the refusal to amend her birth certificate had entailed a level of disruption in her life, particularly in relation to her right to marry, her employment, her social security and her state pension, as well as in relation to an episode of sexual harassment she had experienced in her workplace. She alleged a violation of Articles 8, 12, 13 and 14 of the ECHR.[10] The applicant's narrative touched on elements concerning her diagnosis of transsexualism and the ability or failure to "pass" as a female individual. It was, furthermore, supported by an intervention by the British non-governmental organisaton Liberty, highlighting the existence of sociological data that showed an increasing acceptance of transsexual individuals (only post-operative).[11] It is interesting to notice how pre-operative transgender persons are erased not just by the ECtHR, but also by the intervening third party, who could be seen as strategically focusing only on post-operative transsexual persons for the sake of persuading the ECtHR.

In reading Goodwin's arguments, the impression is one of the relative powerlessness of the individual with respect to the omnipervasive character of the law and of administrative procedures, rather than empowerment. Goodwin, as with many other transgender applicants, seems to stand, in relation to the law, in the same position as the man in Kafka's (2005) *Before the Law*, who asks the gatekeeper whether he would be granted "entry to the law" and receives the answer "it is possible […] but not now". In fact, although the ECtHR in the instant case recognised member states' obligation to rectify trans(sexual) persons' gender on official records, it overlooked the existence of important collateral issues, such as the requirement of compulsory divorce for married individuals wanting to have their gender amended, or the compulsory sterilisation of transgender persons, as Cojocariu (2013, 118) has highlighted. The ECtHR seems, in fact, to have shied away, in *Goodwin v. the UK*, from justifying why the obligation for states to recognise one's preferred gender only applied to "transsexual" persons as opposed to "transgender" (Cojocariu 2013, 118). To this extent, the ECtHR was adamant in denying that a "third zone" between *male* and *female* (*Goodwin v. the UK*, 2002: para. 90) could be allowed. This voluntary omission, this silence, equals an ontological erasure that has not been lifted with subsequent judgments.

Several commentators (Whittle 2002; Sandland 2003; Dembour 2005; Cojocariu 2013) have expressed ambivalence towards the judgment and sought to address its limitations. They have addressed, in particular, the reinstatement of the binarism of gender that helps the ECtHR to shun all possible expansive interpretations of the process of gender recognition as also encompassing "pre-operative" transgender persons. This approach has been read by both Sandland (2003, 192) and Dembour (2005, 40) as a demonstration of the "conservative" role of the ECtHR.[12]

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

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

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

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

The preliminary reference made in this chapter to the issue of the pathologisation of transgender identities becomes useful in introducing another strand of the case law of the ECtHR. One of the issues arising in the ECtHR during these years is the one concerning the extent to which defining "transgenderism" as a medical condition can help those who want to undergo surgical procedures to have them paid for by the public healthcare system or by their private insurance. Against the claim that these medical treatments may fall under the category of "cosmetic surgery", Spade (2008, 38) has claimed that there is a *myth* asserting that gender-confirming healthcare is not "legitimate medicine". For Spade the lack of provision for treatments (both hormonal and surgical) often push the most deprived segments of the transgender population towards the black market of transgender healthcare or to participate in criminalised activities, such as prostitution (Spade 2008, 38).[13]

Cultural and economic capital play an important role in navigating the complex socio-legal reality of gender recognition, as Davy (2011, 57) and Cojocariu (2013, 122) have suggested.[14] Beyond the question of ontological visibility, in fact, the recognition of one's gender has a clear impact on daily life, on life decisions and on one's status as a citizen. Surgical procedures to confirm one's gender, as well as other treatments, may be very expensive. Should the state pay for these treatments? Across Europe there is no established consensus (Cojocariu 2013, 121) and the issue is particularly sensitive, as it touches both on the individuals' interests and on states' (and private companies') interests. Both cases examined in this part of the analysis, *Van Kück v. Germany* (2003) and *Schlumpf v. Switzerland* (2009), concern the request to have gender-confirming surgery and other

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

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

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

In both the above-mentioned cases the ECtHR recognised the violation of the right to a fair trial (Article 6 ECHR) of the applicants who had been prevented from effectively being heard before national courts in relation to their requests for reimbursement. Moreover, the ECtHR made a strong reference to the necessity for "self-determination" (*Van Kück v. Germany*, 2003: para. 78 and *Schlumpf v. Switzerland*, 2009: para. 77). This statement, however, is far from meaning that transgender persons could be granted recognition of their gender without having to undergo surgery. In fact, the ECtHR explained the principle of self-

determination[15] as entailing the possibility for the individual to freely opt for surgery in order to have their preferred gender recognised, rather than self-determining one's gender without surgical intervention. As it was for Goodwin, the self-determination, for the ECtHR, only applied to decisions falling within the boundaries of the normative, excluding de facto "pre-operative" transgender persons.

Moreover, the subtle socio-economic criteria employed to ascertain the genuineness of transgender individuals contributes to enhancing the pathologisation and stigmatisation of these persons. Equally, this also pushes transgender persons who would like to undergo these medical procedures to frame their requests in pathological terms, as if the rhetoric of compassion was the only instrument they have to convince the judicial authorities that they are not "taking advantage of the system". Trans persons have to rely almost exclusively on the pathologising model of gender identity in order to gain their legal and social intelligibility as human rights subjects. How is it possible to balance the need to de-stigmatise transgender identity with the need to have access to healthcare treatments that are not extremely burdensome for individuals? The ECtHR does not address the question, limiting itself to monitoring the access gate to transgender healthcare treatments.

In another strand of the case law concerning the issue of paying pensions according to the applicant's acquired gender, however, the ECtHR has recognised the violation of socio-economic rights. In both *Goodwin v. the United Kingdom* (2002) and *Grant v. the United Kingdom* (2006), the ECtHR ascertained a violation of Article 8 ECHR. Both applicants had alleged that while they had paid female contributions, they had been refused retirement at the age of 60 (until 2010 the retirement age for women in the United Kingdom) and had been treated as males for the purposes of pensions payments. The interesting aspect of these two judgments is that the ECtHR evaluated the negative repercussions that would affect the general public if the pensions were to be paid to the applicants at the female age for retirement. However, the language of the ECtHR appears vague and abstract, without specifying the detrimental effects that the recognition of the applicants' rights would entail. The expressions employed are "concrete or substantial hardship or detriment to the public interest" (*Goodwin v. the UK*, 2002: para. 91) and "unfairness to the general public" (*Grant v. the UK*, 2006: para. 24). The reach of these expressions is clearly ambiguous and could be used and interpreted differently by the ECtHR depending on the circumstances. In the two instant

cases the ECtHR assessed that the level for damaging the "public" had not been reached, consequently recognising the violation of the applicants' rights. The problem, however, remains in theory, whenever the ECtHR is called to strike a balance between the individual and the "public interests", whose definition is highly debatable and may also be interpreted differently across the member states of the CoE.

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

The Invisible Spouse: "Family Life" and Transgender Persons

Many of the limitations of the ECtHR's approach to the question of the guarantee of the rights of transgender persons are particularly visible in relation to the right to marry and found a family guaranteed by Article 12 ECHR.[16] In a time frame of more than two decades, the ECtHR has always shown a certain reluctance in recognising the violation of Article 12 ECHR in relation to claims made by transgender applicants. This may be owing to the fact that the enforcement of gender dimorphism of the spouses is a way to patrol the borders of the heterosexual institution of marriage from an "unnatural homosexual incursion" (Sharpe 2002, 87).

The family arrangements of transgender persons can be subjected to intrusive and invasive scrutiny on the part of judicial authorities, and the authorities' results are often based on stereotypical ideas of the "characteristics" of the family itself. As Hines (2006, 354) has observed, little attention has been paid to the question of intimacy and family relations in the context of gender transition from a sociological perspective. The predominance of a formalist approach (Robson 1998) in relation to gender identity and the right to marry is exemplified by some judgments of the ECtHR. Although there are several cases concerning transgender applicants alleging the right to marry and found a family,[17] this part of the analysis will focus on the controversial question of compulsory divorce for individuals who are already married at the time they decide to undergo

gender-confirming surgery and who live in member states in which same-sex marriage is not available.

This chapter acknowledges the social and economic limitations of marriage as an institution, and moves to discuss how—within the boundaries of this exclusionary institution—further lines of distinction between viable and non-viable spouses arise. Hence, this chapter does not contain a praise of marriage for transgender persons per se, as much as it is an occasion to point out the inconsistency in the strategies of promotion of "normalcy" for those who do not fit the male/female gender dichotomy. In the literature (Sharpe 2002; Whittle 2002; Robson 2009; Cruz 2010) there has been more attention paid to cases concerning the annulment (*ab initio*),[18] rather than the invalidation of marriages in which one of the spouses is transgender. Rarer is a discussion of the cases and socio-legal implications of those marriages which are not dissolved because of a unilateral decision of one of the spouses. The issue of "compulsory divorce", however, is extremely interesting, as it intersects with the recognition of same-sex relationships.

In *Parry v. the United Kingdom* (2006) and *H. v. Finland* (2012) the ECtHR had to assess whether the requirement of divorcing in order to have one's preferred gender recognised, constituted an infringement of the rights of the applicants. Could the ECtHR corroborate the position of national governments (in this case the British and the Finnish governments), forcing the individual to choose between two equally important rights, namely the right to have one's private life respected (by means of the recognition of one's preferred gender) and the right to marry (by means of respect for one's already existing marriage regardless of the gender of the spouses)? In both judgments, it appears obvious how the legitimate "borders" of marriage are policed both in national courts and at the ECtHR. In *Parry v. the United Kingdom* (2006) the ECtHR was confronted with the case of a married couple with three children, in which one of the spouses had undergone gender-confirming surgery in order to be recognised as female. While the couple intended to remain together, the only way to have formal recognition of the acquired gender of the transgender spouse would have been to dissolve their marriage, as British law did not allow same-sex marriages. The application resulted in a claim for an alleged violation of several articles of the ECHR, among which were Article 8 and 12. In order to convince the ECtHR, the applicants highlighted their condition as a "loving and married couple" (*Parry v. the UK*, 2006: 2) as well as highlighting the religious importance of their marriage

and the consequent breach of Article 9 ECHR (*Parry v. the UK*, 2006: 6). The way in which the applicants presented themselves before the ECtHR raises an important question: "are families with trans persons socially assimilationist and normative, or counter normative?" (Pfeffer 2012, 77).

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

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

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

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

The above-illustrated case seems to suggest that protecting marriage as an institution by forcing some (transgender) individuals to divorce is clearly disproportionate. In the instant case, however, the ECtHR maintained that a state could not be required to "make allowances for the small number of marriages where both partners wish to continue notwithstanding the change in gender of one of them" (*Parry v. the UK*, 2006: 12–13). The expression "make allowances" can be understood here as implying that the state cannot be expected to derogate from the prohibition on same-sex marriage, only because a small number of families have different *needs*. As for the previous judgments, the ECtHR reinstated in this case a hierarchy, in qualitative terms, between heterosexual (legitimate) and non-heterosexual families (either same-sex or with a transgender spouse).

Parry v. the United Kingdom (2006) shows that families with transgender members face a problem of invisibility in the context of an attempt to label the individuals as either being in a "heterosexual" or "homosexual" relationship for legal purposes. Hence, the denial of the specificity of the experience of couples with a transgender spouse can be said to go so far as representing a forced assimilation into the heteronormative structure of society (Robson 2007, 59), where one has to prove the adherence to the institution of marriage. At the same time, while the quest for recognition and preservation of one's relationship is legitimate and undeniable, it is nonetheless important to question the role of the institution of marriage itself, which is the main locus in which lesbian, gay, bisexual and transgender rights advocates may sign up to that "conservative egalitarianism" criticised by Spade (2011, 60).

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

In the case of *H. v. Finland*, (2012), the applicant, registered as male at birth, had been married to a woman for 17 years. After having undergone gender-confirming surgery, she made a request to obtain an amendment of her identification number that ratified her female gender. As it was for

Parry, the obtaining of such a change could only happen provided the applicant had obtained a divorce from her spouse. Unwilling to bring her legal relationship to an end, the applicant claimed before the ECtHR a violation of both Articles 8 and 14.[19] The ECtHR ascertained that there had not been a violation of the Convention. This negative outcome led the applicant to ask that the case should be heard by the Great Chamber. However, in its final judgment, the Great Chamber upheld the ECtHR's decision.

As has already been hinted at, the relationship between the issue of "compulsory divorce" for transgender persons and the recognition of same-sex marriage is particularly problematic. Sharpe (2002, 2) has suggested that the behaviour of the Courts deciding on the validity of marriages in which one of the spouses is transgender (or transsexual) is characterised by a "judicial anxiety", namely a fear that the judicial recognition of these marriages would constitute an expedient to allow same-sex marriages. In this case the ECtHR has considered the recognition of one's preferred gender and the possibility of remaining married after gender-confirming surgery to be two mutually exclusive rights. In fact, their contemporary fruition seems to be considered, by both the Finnish government and the ECtHR, as entailing the existence of a same-sex marriage. In the referral to the Great Chamber, the legal representatives of H. contested the fact that the ECtHR had not considered the status of the legislation in the rest of the member states, thus refusing to consider alternative solutions not entailing compulsory divorce for the spouses, available in at least 24 member states of the CoE (Cojocariu and Vandova 2013, 4).

The striking aspect of this judgment is the fact that, in order to avoid a "domino effect" that would affect the protection of the "traditional institution of marriage" (*H. v. Finland*, 2012: para. 48), the ECtHR went as far as saying that the dissolution of the applicant's marriage served the purpose of defending the general interests. Is it possible to protect marriage in general terms by imposing the cessation of a right that has already been enjoyed? In this regard, the decision of the ECtHR seems to descend directly from that "judicial anxiety" described by Sharpe.

Another interesting aspect is the fact that in evaluating the case of H., the ECtHR made an assumption about the sexual orientation of the applicant and her partner. This, however, raises a question: is a spouse's change of gender enough to radically transform the nature and form of a marriage from *heterosexual* to *homosexual*? In its reasoning, the ECtHR implicitly evaluated the affective and sexual behaviour of the spouses as being

inevitably conditioned, by the "lack" of the fundamental prerequisite for marriage: sexual dimorphism. However, dimorphism in itself cannot guarantee the heterosexual character of marriage or sexual intercourse between spouses. In its judgment, therefore, the ECtHR has proved to be incapable of thinking beyond the categories of heterosexual/homosexual marriage, thus substantially downsizing the rights available to couples with a transgender spouse.

H. v. Finland (2012) is also useful in providing hints of reflection on the process of hyper-regulation and erasure indicated by Spade (2009, 289). As a disciplinary and regulatory technique, this twofold process creates a situation of vulnerability for the social and legal subject. From a Foucauldian perspective, as Spade has suggested, it is not the mere introduction of certain juridical norms that act as a regulating mechanism of the social order. Rather, it is the juxtaposition of these norms with other administrative practices, inconsistent with the former, that are more efficacious in pushing individuals to internalise important rules such as the binarism of gender or the heteronormative character of the institution of marriage. In *H. v. Finland* (2012) the applicant had to choose between two equally important rights in order to obtain the social and juridical recognition of her gender identity. Presenting the applicant with an *aut aut* places her in a situation of vulnerability with respect to the enjoyment of her rights, and drastically reduces her choices to two equally problematic alternatives. On the one hand, invisibility as an intelligible subject before law and society; on the other hand, ceasing to be in a valid marriage with her spouse. These two forms of invisibility are equally destabilising as they deny a part of her social and juridical subjectivity. *H. v. Finland* (2012), therefore, seems to confirm the conservative character that Sandland (2003, 192) and Dembour (Shaw and Ardener 2005, 40) ascribed to the ECtHR. It is possible to say that in the future the ECtHR will be unwilling to modify its attitude and may, therefore, keep on operating through "strategic positionings" (Sandland 2003, 192), with respect to issues relating to sexual orientation and gender identity.

Intersexuality and Gender Categories: Ticking the Right Box

One does not do gender for oneself "but always with/for another" (Butler 2004, 1). The price to pay when one does not do gender "correctly" is often social marginalisation and lack of recognition in various spheres of

life. Struggles in order to do gender "correctly" may concern different groups of individuals. Intersex persons, in particular, face important problems in the social, political and legal domains. Intersexuality is a complex phenomenon concerning individuals born with chromosomal, gonadal and anatomical characteristics that appear in contrast to given notions of male and female gender. The estimates about the percentage of the population with an intersex condition vary significantly (Fausto-Sterling 2000, 51; Davidian 2011, 4)[20]. Similar to the process of medicalisation of transgender identities, medical evaluation and intervention is a fundamental element in the definition of the concept of "intersexuality", which can be historically located in the nineteenth century in Europe. The medicalisation of intersex identities has entailed the proliferation of surgical procedures aimed at "normalising" newborns in order to redress what is usually defined as a "psycho-social emergency" (Chase 1998, 302). Ambiguous gender characteristics are, in fact, deemed to entrain important psychosocial consequences in the lives of both the parents and the children. For this reason, surgical procedures are seen as the remedy for bringing coherence between aesthetics and gender. Some authors, however, have pointed out that in the cases of both transgender and intersex persons medical interventions are motivated and deeply shaped by dynamics of "phallocentrism" (Sharpe 2001, 621; Ehrenreich and Barr 2005, 121), positing masculinity—hence the *phallus*—as being superior to femininity. This approach is practically translated into surgical intervention on intersex children primarily aimed at enabling the subjects to live a heterosexual life and engage in heterosexual relationships (either being able to "penetrate" or "be penetrated" sexually).

The issue of intersexuality, however, is far from being confined to the medical sphere, as there are undeniable legal profiles concerning the rights of the newborn and children that undergo these procedures. As Kessler (1998, 32) has argued, in fact, the reason why surgical interventions are performed is not because genital ambiguity is detrimental to the child's life, but because it is deemed to be "threatening to the infant's culture". Moreover, the paradox of the medical treatment, and the cultural and social outcomes of genital surgery on intersexual children, is that it restores a fictitious natural status quo (Ehrenreich and Barr, 118). The problem with corrective surgical procedures may be, furthermore, that they present significant health risks for the child (Davidian 2011, 8) in addition to the fact that the bodily integrity of the child (and future adult) is compromised in order to restore a "true sex". Oftentimes individuals, in growing

up, experience a psychological discomfort with the gender assigned with the surgery, as well as an irreversible loss of the possibility to experience sexual pleasure.

From the legal perspective, the issue of the parents' consent (Parlett and Weston-Scheuber 2004, 376) to surgery seems to be coming to the forefront when talking about the rights of children. While Bird (in Hermer 2007, 261) goes as far as saying that these surgical interventions represent a violation of Article 19 of the Convention of the Rights of the Child (CRC),[21] the reality, in fact, is that there are neither international nor national legal instruments that address this issue, and doctors performing these medical interventions act out of their beliefs in relation to the "true sex" of the newborn (Fausto-Sterling 2000, 48). There is, therefore, a legal silence—an "unsaid"—surrounding the lives of intersex persons whose rights claims are difficult to articulate in the existing human rights arena. It could be argued that the stronger the pressure to conform to gender norms, the stronger the erasure of intersexuality that is carried out. Davidian (2011, 21) has highlighted the necessity of considering the usefulness of corrective surgery in conjunction with reflections on the extent to which intersex children are considered to be "human" within a human rights framework. It is, hence, precisely this lack of imagination about "what counts as human" that currently informs legal theory and practice concerning gender and gender regulation. Is one human only insofar as the "right" sexual organs have the right shape, size and function? Framed in these terms, the question is pressing and requires legal and political answers. Beyond the absence from human rights discourse, in fact, there is also an undeniable political and social obliteration of intersex and transgender persons altogether. As for intersex persons this marginality is of a greater symbolic magnitude, given the fact that, to date, an extremely limited number of national courts have dealt with issues related to parents' consent to surgery (Davidian 2011; Larson 2011, 225),[22] thus reducing the public fora in which these important human rights issues can be raised and debated.

In relation to these issues, there are some developments in Europe and, particularly, at the CoE.[23] As of October 2013, PACE has adopted a Resolution (Res. 1952 (2013)) on the "Children's Right to Physical Integrity" which also addresses other issues such as female genital mutilation (FGM),[24] circumcision of boys for religious reasons and other medical treatments performed on children. Although the Resolution is not

binding on member states, it signals the emergence of an unprecedented interest in the issue of intersexuality. The overarching principle put forward by the PACE, is that of the "best interests of the child". These interests, as have been briefly illustrated, are difficult to define as far as the issue of intersexuality is concerned, and tend, sometimes, to be confused with broader societal interests in relation to the perpetuation of the gender binary. One passage of the Resolution, in particular, is particularly interesting, in relation to PACE's call for member states to:

> ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to persons concerned, and provide families with intersex children with adequate counselling and support.[25]

Surprisingly, in the document the language employed is very close to the language used by intersex activists themselves. In the first place the distinction between *cosmetic* and *vital* surgery allows one to reflect on the climate of "emergency" surrounding the decisions on corrective surgery and the social pressure experienced by parents of intersex children. The second important aspect is the recognition of a right to autonomy and self-determination that takes precedence over the necessity of establishing the proper gender as soon as possible. In this regard, the parental authority with relation to the decision to perform these surgical interventions seems to be put into question. Thirdly, the Resolution also highlights the need for informing and helping parents more efficaciously. Lack of information or support, in fact, may significantly hamper the ability of the parents to make sensible decisions in their long-term interests. It is important to observe, however, that the decision of PACE of putting together different issues, such as surgery on intersex newborns, FGM and circumcision, can be quite problematic as these issues are often invested with different political connotations on the part of different actors (Chase 1998). Although the 2013 PACE Resolution represents an important improvement in the direction of recognising the rights of intersex persons, changes will not be effective if they are not coupled with an effort to rethink the role of gender in European societies, as a factor that limits personal expression in various fields of life and often represents an obstacle to the fulfilment of one's personality and personal integrity.

Notes

1. The expression "post-operative" refers to individuals that have undergone different sets of irreversible surgical procedures, aimed at modifying their secondary sexual characteristics, in order to bring coherence with their preferred gender. They may involve various genital surgeries, as well as sterilisation procedures.
2. David Cauldwell is the first to have used the term "transsexual" in 1949, while Harry Benjamin wrote the first academic paper on "transsexualism" in 1953 (Whittle 2002, 21).
3. Transgender activists had campaigned for the removal of transsexualism as GID in the DSM V which could signify a departure from the pathologisation to which transgender persons were subjected. The DSM V, in practice, has replaced the "GID" diagnosis, with a diagnosis of "Gender Dysphoria" (incongruence between one's experience of gender and gender assigned at birth). This change, however, is far from being unproblematic, as it raises other concerns in relation to litigation strategies in the courtrooms and in relation to healthcare provisions.
4. The "hermeneutics of suspicion" is an expression coined by Ricoeur (Pepa 2004) and indicates a way of interpreting things aimed at unveiling the hidden political interests concealed by the superficial level of a text. In Sharpe's use of this expression, the text is represented by the personal narratives of transgender applicants.
5. *Rees v. the United Kingdom* (1986), *Cossey v. the United Kingdom* (1990).
6. This terminology has recently been adopted by trans activists as a more accurate way of describing the process by which individuals alter their gender.
7. All the cases previously decided by the ECtHR saw the United Kingdom as respondent state.
8. In particular the applicant refers to the fact that different strands of scientific research had put into question the reliability of a person's chromosomal endowment in order to determine one's gender (*B. v. France*, 1992: para. 46).
9. *B. v. France* (1992), Dissenting Opinion of Judge Pinheiro Farinha, para. 5.
10. Article 13 ECHR protects the right to an effective remedy before national courts; Article 14 ECHR is the non-free-standing article

concerning the prohibition of discrimination. It is not free-standing because its violation can only be claimed in conjunction with another right set forth by the Convention. Article 8 ECHR is the right protecting private and family life, while Article 12 ECHR protects the right to marry and found a family.

11. *Goodwin v. the United Kingdom*, para. 55.
12. Dembour (2005, 41), however, is equally uncertain about whether a "proactive" Court could have been equally, or more, dangerous than a "conservative" one.
13. Spade carries out his evaluations in the context of the USA where a universal system of healthcare, similar to that existing in many European countries, is not in place. Beyond the obvious differences between these two contexts, it is nonetheless possible to find points of commonality, as there are transgender persons who may not officially qualify for treatment in accordance with the healthcare standards and may try to find alternative channels.
14. Davy (2011, 57) suggests that the aesthetics of gender of transgender persons can be considered as a "form of generative cultural capital".
15. The ECtHR specifies in *Van Kück v. Germany* (2003: para. 69) that the case law of the ECtHR does not present cases that deal with the issue of the right to self-determination per se.
16. Robson (1998) describes two different views on gender identity adopted on the part of the Courts when analysing cases concerning marriage rights of transgender persons. The former, the formalist view, "relies upon formal relationships dictated by law"; the latter, the functionalist view, "emphasises the functions as attributes or 'realities' that are deemed to be operative".
17. *Rees v. the United Kingdom* (1986), *Cossey v. the United Kingdom* (1990), *Sheffield and Horsham v. the United Kingdom* (1998), *Goodwin v. the United Kingdom* (2002), *L .v. Lithuania* (2007), *Cassar v. Malta* (2013), *H. v. Finland* (2012).
18. As in the infamous British case of *Corbett v. Corbett* ([1971] 2 All ER 33) in which the plaintiff sought to have his marriage declared void because his partner was transsexual.
19. The ECtHR decided, in the course of the hearing, to evaluate a complaint also under Article 12 ECHR.
20. Fausto-Sterling (2002, 52) lists the different types of intersexual conditions, the most statistically common being the Turner

Syndrome, the Klinefelter Syndrome, the Congenital Adrenal Hyperplasia, the Androgen Insensitivity Syndrome and the 5 Alpha Reductase Hermaphroditism. Fausto-Sterling (2000, 51) gives a figure of 1.7 % of the population, while Davidian (2011, 4) talks about different authors providing estimates between 4 % and 0.0018 % of the population.

21. Article 19 recites "States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation."
22. The most famous case, described by Davidian (2011), is that concerning an opinion of the Colombian Constitutional Court in the judgment SU-337/99 which disputed the parents' absolute authority in consenting to a corrective surgery on an 8-year-old child. In Europe, the European Commission and ILGA Europe report two cases in Germany. (http://www.ilga-europe.org/media_library/ilga_europe/publications/reports_and_other_publications/ec_trans_intersex_report_cover).
23. In 2013, the German Parliament also passed a law that allowed the registration of a child as having "indeterminate" gender at birth, particularly for intersex children. This law, however, was criticised by LGBTI activists, who affirmed that the provision was not coupled with an opening up of the rights that individuals registered as "non-gendered" could enjoy, such as the right to marry or the possibility of having insurance. See Viloria, H. (2013) Op-ed: Germany's Third Gender Law Fails on Equality, *The Advocate*, available at: http://www.advocate.com/commentary/2013/11/06/op-ed-germany%E2%80%99s-third-gender-law-fails-equality . Accessed 28 February 2014.
24. The issue of FGM in particular had been compared to the treatment of intersex children as an example of a different approach to the notion of "bodily integrity" of children. Chase (1998), Kessler (1998) and Ehrenreich and Barr (2005), in particular, had maintained that there was hypocrisy in the West considering these two issues that rendered FGM unacceptable but allowed surgeries on intersex babies as legitimate.
25. Parliamentary Assembly of the Council of Europe, Resolution 1952 (2013) on *Children's Right to Physical Integrity*, 3 October 2013, § 7.5.3.

CHAPTER 6

Multisexual and Multigender Citizenship: Towards a New Framework of Human Rights Protection in Europe

Abstract In transferring the terms of the debate into the field of citizenship, this chapter seeks to demonstrate that opening up the current predominant model of national citizenship to dynamics of a layering of allegiances, modes of belonging and forms of identification permits a radical challenge in the current framework of European protection of human rights for LGBTQI persons, but also to the concept of human rights more broadly. In proposing a model of "multisexual and multigendered citizenship", this chapter depicts a citizen able to simultaneously mobilise multiple sexual, gendered, ethnic, religious, political and cultural allegiances in order to make human rights claims as an active agent, rather than a passive recipient of protection on the part of a national or supranational politico-legal authority.

Keywords Multisexual and multigendered citizenship • Sexual citizenship • European citizenship • Human rights

The analysis carried out for this book on the case law of the ECtHR has shown the two sides of the protection of human rights on the European continent. The analysis has shown that a twofold dynamic is at play. Firstly, LGBTQI identities are normalised and the individuals are assimilated into the social fabric of the different European nation-states; and secondly, the recognition of these presumably new actors of human rights leads to the emergence of new lines of exclusion for those who cannot be subsumed

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under the current paradigms of human rights, because of their challenge to normative models of kinship, gender norms or societal institutions more broadly.

A further layer of complexity in this process of recognition of human rights is represented by the ambiguous relationship of LGBTQI persons with the international legal, political and social arena. While nation-states remain the main enforcers and guarantors of human rights (Bhabha 1999, 12), at the same time the *idea* itself of human rights, in its universal aspiration, transcends these national borders. In the previous chapters there has been an acknowledgment of the inconsistency between a global—or preferably *Western*—abstract discourse on LGBTQI rights, and the practical articulation of these claims at the ECtHR. The work carried out has highlighted the existence of a tension between the specific location of the human rights subject in a spatial, legal, cultural, social and political context, and the broader—and often unacknowledged—problematic narratives of universalisation of the "human being" as the dematerialised, transhistorical object of legal and sociological speculation.

It would be reductive, however, to narrow down the scope of this research to a descriptive analysis of the role of these different actors of the CoE in the construction and promotion of specific liberal, rights-centred, LGBTQI identities and their circulation across the European continent. Rather, it is essential to point out the necessity to connect their work to the emergence of models of European sexual and gendered citizenship, whereby the concept of "Europe" is not limited to the context of the EU, but has a broader reach, that is to say the one represented by the 47 member states of the CoE. Looking beyond the borders of the EU is useful insofar as it allows one to understand the extent to which human rights claims relating to sexual orientation and gender identity fall within the process of the "globalisation of human rights" described by Stychin (2004, 951), through which human rights standards become a kind of civilisational benchmark that is used to assess nation-states' progress. Therefore, by focusing on the emergence of a "European sexual and gendered citizenship" it is possible to describe the process by which, at the continental level, narratives about what counts and who does not count as an "LGBTQI citizen" can be interpreted both as giving rise to a neoliberal, standardised model of citizenship and as allowing the emergence of more critical forms of citizenship in which multiple allegiances, spatial locations and forms of identifications are at play.

While discussions of *good* and *bad* queer citizenship have ignited the debate both in the USA (Smith 1994; Warner 1999; Phelan 2001;

Duggan 2003; Franke 2006) and in Europe (Richardson 2000a, b; Bell and Binnie 2000; Stychin 2004), the focus on citizenship could appear to some to be anachronistic, as individuals' allegiances are increasingly shifting and are less and less attached to the nation-state (Soysal 1994; Turner and Isin 2002; Balibar 2004; Stychin 2004). Although patterns of globalisation and the emergence of the international human rights regime seem to have facilitated—and somehow catalysed—the erosion of states' sovereignty (Bhabha 1999, 11; Sassen 2002, 288), human rights nonetheless remain enforced at the national level and work as the "key opening up [of] the political realm of full citizenship" (Stychin 2000, 968). This element is crucial in the articulation of social, political and legal subjectivity, as it allows inclusion or exclusion from the polity or from other national communities. As Bhabha (1999, 13) has observed, phenomena such as migration and the existence of transnational ties or multiple allegiances for individuals call into question both the lines of division between those who are considered as citizens and those who are not and the very criteria that describe the concept of citizenship itself. The existence of multiple trajectories in individuals' lives, which cross-cut the mere possession of a passport, hence represents both a factor related to the deconstruction of citizenship and also an instrument that strengthens the importance of it as an access gate to socio-political and economic privilege.

Moreover, as has already been briefly hinted at, the emergence of alternative modalities of citizenship is partially informed by the existence of an informal geography of states that are compliant with human rights principles and states that are not. The fact that supranational institutions such as the EU and the CoE foster an appealing idea of "Europeanness" is far from being a harmless operation. On the contrary, it presents huge political and social implications. One practical illustration of this tendency could be, for instance, the multiplication of the so-called "Rainbow Maps" drawn by LGBTQI associations such as ILGA or by governmental organisations such as the EU and the CoE, which show the progress achieved in different fields of human rights protection (e.g. maps showing countries that allow same-sex couples to marry, adopt and so forth). Although these maps obviously respond to the necessity of monitoring and providing a continental overview on the degree of protection of LGBTQI persons in different countries, they are also problematic. Apart from offering a simplified and dichotomous division between virtuous and non-virtuous states, they also narrow down the concept of "human rights" to a set of measurable criteria or policies whose implementation is taken as

automatically entailing an immediate improvement in the life of the individuals concerned. In this regard, a mechanistic understanding of human rights decoupled from a critical appraisal of the political and social conditions favouring the emergence, implementation and circulation of specific sets of rights and identities fails to acknowledge the socially constructed character of human rights as a presumably coherent and well-bounded universal body of principles.

As a result of this simplified process of monitoring human rights compliance, the predominant focus of commentators on piecemeal legislation, policy-oriented strategies for the protection of human rights, or single judgments by either national or international courts (such as the ECtHR) overshadows the complex normalising and disciplinary role of the law—and of international human rights institutions such as the CoE—in defining LGBTQI persons as a homogeneous group of individuals in need of protection. This does not mean that policies or legal provisions aimed at improving people's lives are redundant or trivial. Rather, it suggests that the focus on realising a framework of formal equality for LGBTQI persons unaccompanied by a critical discussion of the very criteria employed to define human rights holders—and citizens as a consequence—represents only a partial outlook on patterns of injustice, inequality and marginalisation.

In this regard, this final chapter is conceived as a space in which to take further the findings of the substantive analysis and establish a connection between the protection of the rights of LGBTQI persons in Europe and the possibility of thinking about citizenship in a way that radically transcends the national dimension of this institution. Moreover, this discussion also aims to challenge the current paradigms of sexual and gendered citizenship as rigidly framed socio-political instruments whose usefulness is mostly limited to the acquisition of certain gains, privileges and entitlements, rather than being a way to access the political arena as fully participating members of a polity in the Arendtian sense. This necessity for "action" is understood as being in continuity with the claim advanced by Stychin (2000) and Duggan (2003), who have highlighted how, paradoxically, the concession of some human rights to LGB persons—in particular the possibility of getting married—has led directly to a depoliticisation of the gay movement.[1]

In order to discuss a "multisexual" paradigm of citizenship that transcends national borders and is informed by a dynamic appropriation of labels, identities and identifications, citizenship will be posited as a

performative and transformative practice, rather than as a static endowment of some individuals within nation-states. Europe is an extremely interesting setting in which to conduct such research, precisely because of the relatively high level of political integration—unparalleled elsewhere—and the simultaneous existence of a myriad of multiple lines of allegiances and identities that destabilise both the concept of the nation-state and the concept of Europe itself.[2] This multidimensional, layered and ever-changing model of European citizenship—with obvious problematic political contours—is understood here as a challenge to the current framework of sexual and gendered citizenship, which is narrowly tailored around specific rights claims that frame the individual as a "passive" rather than an "active" agent.

Citizenship as a Performative and Transformative Act: Beyond Static Conceptions of Socio-Legal Subjectivities

Understood as a practice (Oldfield 1998, 79) or as an *enactment* (Isin 2013, 21), citizenship becomes a precarious endeavour. The line between being a *good* or *bad* citizen, in fact, may prove to be very thin when actions, behaviours or even identities are under scrutiny, and individuals may be required to demonstrate their adherence to the functioning principles of the political community to which they belong or which they aspire to join. As Patton (1993, 148) has suggested: "competing rhetoric of identity interpellate individuals to moral positions that carry with them the requirements for action. Identity is an issue of deontology, not ontology; it is a matter of duties and ethics, not of being." This close relationship between citizenship and the possibility of action, implies that, as far as LGBTQI persons are concerned, it is possible to draw a line between a *good queer citizen* (tax payer, married, child-rearing, patriot, productive) and a *bad queer citizen* (polyamorous, kinky, HIV-positive, with an ambiguous gender presentation, or at the margins of societal institutions). The dyad citizenship-action also appears relevant to the situation of those individuals who cannot participate in citizenship (economic migrants, asylum seekers, "persecuted queers") and whose presence is perceived as both a symbolic threat to the demo-economic stability of the nation, as well as a powerful interrogation of the limits and function of citizenship itself in a globalised world. Whilst the idea of "active citizenship" has been criticised

(Newman 2013, 93) for being a by-product of the radical shift of responsibilities from the nation-state to the individual, the framework of "citizenship" does not appear as being entirely exhausted within the discourse of neoliberalist citizenship and there are, instead, gaps that can be filled in alternative—perhaps radically alternative—ways . In directly interrogating the extent to which citizenship can be a *practice*, rather than a nominal entitlement, the *bad queer citizens* and the *queer non-citizens* directly challenge conceptions of citizenship that rest on static membership of a polity, and suggest a configuration of citizenship as simultaneously transformative and performative.

The idea of a "performative model of citizenship" can clearly be traced back to Butler's (1990, XV) concept of the "performativity" of gender, insofar as it implies "not a singular act, but a repetition and a ritual, which achieves its effects through naturalisation in the context of a body, understood, in part, as a culturally sustained temporal duration." The existence of a specific temporality of "being a citizen" contributes to rendering citizenship performative. In fact, it is always possible, by means of one's actions, behaviours or self-ascribed identities, to cross the line between good/bad citizenship or to fall short of qualifying as a citizen in the first place. Furthermore, while the attributes of citizenship are enunciated in the abstract, it is the enactment of actions that concretely shapes citizenship. This continuous enactment and creation of citizenship happens thanks to the performance of those small daily acts that confirm one's right to belong to the national community.

The idea of creating citizenship by endlessly performing it may be considered to sit well with the existence of an ideal of progress in the recognition of the rights claims of LGBTQI persons in juridical and political fora. In fact, the trajectory of achievements in relation to the human rights of LGBTQI persons in the Western context, from Stonewall onwards, can be seen as slow progress by which former outlaws enact a sort of ascension to the acceptable ranks of citizenship, thanks to the acquisition of specific sets of rights (marriage, the right to non-discrimination, adoption, gender confirmation surgery and so forth) and an attached status of respectability within the political community.

An illustration of the trajectory of progress regarding the human rights of LGBTQI persons is the already mentioned "law of small change" (Waaldijk 2003), which posited a smooth transition from the decriminalisation of sexual activity to the recognition of same-sex marriages and adoption rights, by the LGB citizen who could climb up the ladder of

citizenship and try to reach the optimum of social recognition as a married, child-rearing individual. As for transgender and intersex persons, instead, the idea of a (irreversible) trajectory of transition from one gender to the other, could also be seen as entailing a sort of "improvement", as if the fact of inhabiting an ambiguous gendered space could be associated with a bad practice of citizenship.

The idea of "progress" can also be applied to those LGBTQI "non-citizens" who seek some form of limited recognition of their human rights entitlements on foreign soil. The case of LGBTQI asylum seekers, in this regard, is particularly telling, as the kind of extensive questioning they have to undergo in order to be considered credible can be seen as an attempt to assimilate them, albeit in a very limited way, to the good citizenry with which they will be allowed to live in the host state. The experiences of these "outsiders" who have to demonstrate in different ways that they are worthy to receive citizenship point to the fact that citizenship should be articulated as something more than simply the prize for "good citizens". Because individuals perform acts of citizenship on a daily basis, by engaging in the community in which they live, contributing to the economic prosperity of a specific country through their work, or sharing cultural affiliations with a country of their choice, citizenship should be understood more as a bottom-up process than as a top-down concession.

Moreover, thinking about citizenship as a performative practice breaks with the idea of citizenship as a static mark in a person's life. It entails both an idea of precariousness and the possibility of continuous transformation and multiple crossing, from one gender to another at different points of one's life, or from one gendered erotico-sentimental relationship to another, closely tied to strategic repositionings in terms of race, ethnicity, class or ability/disability status and age. Citizenship can be *done* differently at different stages of one's life, due to the various stages of life and possible changes in circumstances (economic, personal, political or social) in one's life. In order to preserve her/his membership of the community, therefore, the citizen adjusts her/his practices to the changing circumstances, in order to make sure that she/he does not cross the line of "bad citizenship".

Rather than merely being symbolised by obtaining a passport, the fact of "having" citizenship means having an agentic role, one by which duties and rights—human rights—can be not only exercised but also questioned and rephrased, as in the model of "radical democratic citizenship" proposed by Mouffe (1992).[3] Mouffe, in particular, suggested that identities,

which are themselves the product of multiple allegiances, are active sites of political struggle, and citizenship is far from being conceived of as a passive status characterised by the acquisition of some entitlements. Clearly, this way of understanding citizenship is in opposition to neo(liberal) and widespread conceptions of citizenship, which posit the individual as entirely self-sufficient and, to some extent, also atomised and highly problematic for sociological analysis, as Dahlgren (2006, 268–269) has suggested that the experience of citizenship is seen as not requiring formal prerequisites and that the citizen can "naturally" play her/his role. Dahlgren's description of neoliberal citizenship is fascinating and compelling insofar as it calls into question the issue of the "naturalness" of citizenship, as if one, by default, possesses an identity and gives shape to specific forms of civic behaviour that result in a good performance as a citizen. This discourse, of an "inborn" way of inhabiting citizenship, can be said to be attuned to the idea of the universality of human rights principles. Both assumptions start, in fact, from the idea that there is an identifiable "core" that describes both the citizen *and* the human rights holder. Discarding this deterministic view about a prototype of the citizen/rights holder allows for a de-essentialised and temporally multidirectional, as opposed to temporally linear, approach to LGBTQI identities and the process of the negotiation of legitimate socio-legal positions. The rights-holder, as well as the citizen, does not exist in perfect autonomy and isolation, but constructs their multiple identities in connection with others. From this relational aspect of identity-building descends the necessity of adapting human rights to the intricate trajectories of individuals' personal lives and stories, even if this signifies adding a further layer of complexity to the existing architecture of human rights and to the rules for obtaining citizenship.

Moreover, performing one's citizenship may also entail a continuous crossing between lines of good and bad citizenship not only to call into question the parameters by which *good* and *bad* citizens are assessed, but also to challenge the instrumentalisation of sexual orientation and gender identity as new civilisational yardsticks employed to evaluate, across borders, different nation-states and their human rights agendas. This reconfiguration of citizenship in radical terms, however, cannot be confined solely to models of citizenship based on nationality, as the increasing and relentless globalisation of LGBTQI identities requires the adoption of a broader socio-political and geographical perspective that sheds light on the creation of transnational solidarities and forms of identification under the structure of an emerging "European sexual and gendered citizenship".

European Sexual and Gendered Citizenship: A Concept in Continuous Transformation

In their discussions about an emerging "European Citizenship" most scholars have used the EU as a reference (Helfer 1991; Tassin 1992; Bhabha 1999; Painter 2002; Stychin 2000, 2001, 2004; Todorov 2010). The EU is seen as the privileged locus for the analysis of new forms of citizenship. It is detached from the nation-state by virtue of its unique attempt to constitute a transnational political community based on shared (European) values. As Stychin (2004, 963) has highlighted "the EU becomes the civilised version of nationhood, while simultaneously transcending the idea of nationhood". If on the one hand the EU acquires its legitimacy from its member states, on the other hand it sets the ambitious goal of producing a synthesis of the European *Geist*. For this research, however, the framework of the EU has been deemed to be, relatively, too narrow.

From a political perspective, it could be argued that the CoE as an analytical framework is less significant than the EU, because of its lack of instruments in fostering a political community (Benoît-Rohmer and Klebes 2005) and that the EU should be preferred when discussing the concept of "European citizenship". Nonetheless, it could also be argued that the idea of "Europe" and "Europeanness" can be better grasped by understanding them as an aspiration, rather than an acquired fact or a mere by-product of the freedom of movement enjoyed by citizens of the EU. Moreover, the fact that the EU, in contrast to the CoE, was not founded for the protection of human rights makes it more of an economic organisation that struggles to develop a unified political identity than a transnational community that finds profound agreement on specific socio-cultural and political values. While the creation of a "political Europe" remains the EU's ultimate goal, strong resistance still exists on the part of the various member states. On the contrary, because of its specific focus on human rights, the CoE shows interesting dynamics in terms of the attempt to create a "European moral community". Overwhelmed by the necessity of integrating the various member states' economies, especially in times of economic crisis, the EU sometimes seems not to mobilise enough resources to discuss how to build a common political identity. Furthermore, broadening the spectrum of analysis beyond the borders of the EU allows one not only to perceive more neatly the divide between *moral* and *immoral* European states in relation to issues pertaining to

gender and sexuality, but also to critically discuss the concept of "Europe" as polysemic and subject to continuous change.

Currently, the image of Europe as the continent with the most efficient system of human rights protection in the world, thanks to the role of the ECtHR, is also, indirectly, boosted by the recognition of LGBTQI persons as legitimate human rights actors. Human rights can be considered to be, on the one hand, a fundamental element in the construction of a peculiar European identity and, on the other hand, a crucial factor in the emergence of a model of sexual citizenship (Grundy and Smith 2005, 393). This twofold process shows how human rights directly inform European exceptionalism with regard to both human rights in general and matters concerning sex, sexuality and gender more specifically. The result of this intersection between these two strands of exceptionalism is the emergence of a "European sexual and gendered citizenship", characterised by the centrality of the recognition of human rights for LGBTQI persons as an access gate to full membership of these individuals in the political community of "Europe".

In the various judgments of the ECtHR, there is a precise idea of "Europe" in the background that directly or indirectly informs the evaluations expressed by these actors in relation to human rights violations in different member states. As has been shown in relation to the case law of the ECtHR on freedom of expression and freedom of assembly and association of LGBTQI persons, European democracies are encouraged to function in a "healthy manner" and to display signs of tolerance and broadmindedness. These requirements of open-mindedness and tolerance are also found in the case law concerning the rights of transgender persons in relation to the recognition of their preferred gender, where the general public is encouraged to adopt a more tolerant attitude towards those who "transgress" the boundaries of sex and gender.

In this regard, therefore, "Europe" ceases to describe a geo-political area and becomes a prescriptive and normative idea, almost an aspiration. Hence, in order to truly become "European", some countries have to embark on a process that radically transforms their legal, social and political structures.[4] This process, however, not only invests the national institutions, it also informs LGBTQI persons' attitudes as well, insofar as it implicitly requires them to become more "European" by adopting specific sexual and gendered identities such as lesbian, gay, bisexual, transgender and intersex. The aspiration to become "European", therefore, is part of a broader and overarching process of construction of European citizenship,

by which both states and individuals in these states are promised entrance into the European arena, provided that they fulfil certain criteria in terms of respect for human rights. Human rights, therefore, become the core of a European identity insofar as they play the role of a "fault line on which Europe's internal and external borders are being inscribed" (Bhabha 1999, 21). If one considers the rights of LGBTQI persons as the latecomers into this European panorama of human rights, it is easy to see how they can be effectively mobilised, together with other strands of human rights discourses, in order to foster an even more rigorous concept of "Europeanness".

The concept of "European sexual and gendered citizenship" obviously retains an Anglo-American matrix insofar as it is the direct product of post-Stonewall discourses on the need to acknowledge and protect the human rights of LGBTQI persons. This universalising discourse, however, has been met with a variety of reactions, ranging from cautious endorsements to outright backlashes against these presumably externally imposed human rights agendas. In this regard, Stychin (2004, 951) has maintained that the most effective results in terms of the recognition of human rights have been achieved in cases in which activists have been able to debate these issues in local politics, rather than by adopting a top-down approach that has taken for granted the universality of human rights. He illustrates this point by referring to examples from countries such as Romania and Zimbabwe, in which activists have tried to connect issues relating to sexual orientation and gender identity to a national common past. These strategies, for Stychin (2004, 954), respond to a need to counter the movement of the globalisation of sexual identities that is built upon a hegemonic Western matrix. The analysis carried out for this book has tried to highlight the extent to which the protection of the human rights of LGBTQI persons in Europe presents several limitations insofar as it is heavily indebted to civilisational discourses that favour the establishment of a neoliberal model of European citizenship across the continent by positing respect for the rights of the individual as a self-sufficient unit, cut off from the broader social context in which the persons are embedded.

Thus, promoting the recognition of the rights of LGBTQI persons across Europe without engaging in political dialogues that go beyond the "us versus them" rhetoric is, at best, a civilisational endeavour, devoid of traits that favour the opening-up of a debate on what "European citizenship" should be in practice for individuals across the continent. In this regard, therefore, it is necessary to unpack the concept of "European

sexual and gendered citizenship" and rediscuss some of the entitlements that this concept entails, such as access to marriage and adoption, and irreversible transition from one gender to the other, which serve a very narrow (neo)liberal agenda and do little to address structural problems, such as intersecting forms of inequality and discrimination connected to the attribution to individuals of various categories of gender, race, class and economic status, and ability or disability which, consequently, give rise to endemic forms of socio-economic and socio-political vulnerability. It is precisely the idea of a "one-size-fits-all" model of the recognition of human rights which is applied blindly across the European continent that runs counter to the idea of Europe itself as an ideal *forge* in which concrete and dynamic forms of transnational solidarity are put into place against the atomising tendencies of economic and financial globalisation.

Current rights-based discourses on the equality of all individuals often have the limitation of approaching different strands of inequalities as if they were watertight compartments in individuals' lives and as if one could embark on a description of a neat geography of differences. Such a limitation can also be found in relation to emerging discourses on the rights of LGBTQI persons. For instance, even if marriage were open to all same-sex couples in the 47 member states of the CoE, it would prove beneficial to those couples who already have some economic and cultural capital to benefit from through access to such an institution, while their inclusion implicitly traces new lines of exclusion for different portions of the population. Similarly, the harmonisation of legislation on gender recognition across the different states would not reduce the existence of transphobia, sexism or violence. Rather, it would scratch the surface of the problem without addressing the root causes of discrimination and hostility towards those who seem not to comply with gender norms.

It is precisely for this reason, therefore, that the fact of adopting a conception of "Europe" as an entity that continuously questions its own borders is an excellent occasion to also question the very *content* that Europe as a socio-political entity should have, in an attempt to break away from the creation of a self-sufficient, perfectly liberal and productive European citizen. Hence, it is the combination of the right to freely express one's sexual orientation and gender identity, together with the possibility of freely expressing other aspects of one's life (not necessarily crystallised in terms of "identities") and other sets of socio-economic rights, which has the potential to engender a dialogue on the role and reach of a European

citizenship that is really considered valuable and meaningful by individuals (Stychin 2004, 292).

Multisexual Citizenship as a Challenge for the Protection of Human Rights in Europe

The analysis of the case law of the ECtHR regarding issues relating to sexual orientation and gender identity has suggested that it is not enough for LGBTQI persons in Europe to become the passive recipients or beneficiaries of human rights entitlements embedded in a neoliberal socio-economic framework. This principle of the passive reception of rights lessens the possibilities of debating the content and reach of human rights provisions as being connected to other spheres of individuals' lives. Hence, the need to consider a multisexual model of citizenship stems from the necessity to recognise the embodied and multidirectional trajectories of the life of individuals. This implies that crafting or "performing" one's citizenship as an LGBTQI person means, in the first place, contributing to reshaping and building Europe as a community with variable boundaries and numerous—and potentially shifting—combinations of sexual and gendered identities. The role of LGBTQI persons is particularly important in this regard, because it touches on sex and gender, upon which social control, power and sovereignty are based, and can also be crucial in the process of admitting that the mere recognition of rights does not entail automatic entrance into the domain of citizenship (Phelan 2001, 147). *Upgrading* one's citizenship status from "second-class" to "first-class" can be seen as merely entailing access to a set of privileges, rather than the possibility of shaping one's citizenship by truly recognising the equality of LGBTQI persons.

In recent years, an increasing number of scholars from various fields, (Yuval-Davis 1999; Painter 2002; Ehrkamp and Leitner 2003; Grundy and Smith 2005) have engaged in the definition of models that break with the traditional monodimensional conception of citizenship, in order to recognise the various, sometimes conflicting, factors that account for the creation of the "citizen". In most cases, the new models that have been proposed start from the recognition of different geographical, political and sociological layers that participate in the emergence of the modern citizen, and, in some cases, they also touch on issues of sex, sexuality and gender (Grundy and Smith 2005). The concept of "Europe" plays a

fundamental role here, as it is referred to by various scholars in order to demonstrate how current accounts of citizenship are increasingly detached from the nation-state and develop according to transnational trajectories.

Through an acknowledgment of the process of the "globalisation of same-sexualities as identities" described by Stychin (2004, 951), it is possible to explore the intersection between new conceptions of European citizenship and new conceptions of sexual citizenship that are multilayered. In their study on multiscalar citizenship and LGBT politics in Canada, Grundy and Smith (2005, 390), for instance, have pointed out how LGBT activists tend to perform citizenship differently at different local and national scales and at the same time they question the horizon of the nation-state as the sole arena in which to talk about citizenship in the first place.[5] In their account, citizenship is understood to be adaptive to circumstances and constantly in flux, since it can be attuned to different contingent exigencies, particularly in relation to the notion of space and the crossing of borders.

The idea of "scale" is particularly relevant in the context of this research and in the formulation of a "multisexual" conception of citizenship, because it points to the fact that individuals may perform their gendered or sexual citizenship differently, sometimes even inconsistently, in different spaces or at different times. For instance, concepts such as that of "coming out" or "passing" or the concept of what constitutes "private life", which have been addressed in the previous substantive chapters of the book, necessitate an interrogation of the interrelationship between space, time and citizenship, insofar as they involve decisions that individuals make in their daily lives in relation to actions that are socially and politically relevant to themselves and others, such as endorsing an identity that may be associated with a specific set of rights claims or that can be used to fulfil a certain social role (parent/spouse). Furthermore, phenomena such as "coming out" or "passing" strategies, or shifting notions of "privacy", may also be adopted selectively, depending on the usefulness of concealing or revealing one's sexual orientation or gender identity in the given circumstance.

One interesting illustration of the possibility of enacting sexual and gendered citizenship performatively and at various "scales" is represented by the issue of disclosing one's gender identity. For individuals who identify as transgender or whose gender differs from the one assigned at birth, the disclosure of gender identity may not be relevant at all "scales". In the context of healthcare provision, disclosing one's status as transgender

could be helpful in obtaining reimbursement for specific medical expenses. In relation to one's marital or parental status, instead, one's gender identity should not become determinant in the allocation of specific rights to each and every person. Therefore, an individual may strategically make use of the identitarian label of "transgender" to obtain a legitimate benefit, while adopting more open-ended self-descriptions in other spheres of life (e.g. when defining personal relationships, when undertaking parenting duties and so forth). Similarly, when considering the claims of LGBTQI asylum seekers, attention should be paid to the fact that individuals are not always open about their sexuality across time and space, so it is not possible to ask someone to "prove" her/his gayness in order to rule out possible frauds. Individuals' experiences of sexuality may not entail full disclosure, or the existence of "proof" of one's sexual or romantic engagement. In situations of danger, individuals may dissimulate or hide their sexual orientation and/or gender identity, negotiating at different "scales" or levels their public identity and their membership of specific political and social communities. Recognising the complexity and, sometimes, the incongruity of individuals' experiences in the exercise of their citizenship is, therefore, crucial, in order to ground human rights in something other than the mere attribution of one-size-fits-all labels that open up the possibility of receiving specific entitlements.

If one wants to elaborate in more detail on the concept of "scale", citizenship could be conceived of as being "multisexual" whenever the individual has the possibility of enacting different combinations of gender and sexuality depending on the circumstance and the relevance that these aspects have for the actions performed. Far from being merely a form of promotion of one's self-interests, the fact of being able to adjust one's identity to the specific circumstance can be linked to the possibility of participating in the fate of a community, rather than finding oneself in a community as an outsider.

Moreover, since citizenship has already been posited in this chapter as a practice, it is easy to see how this variable geometry of gender and sexuality fits with a model of citizenship that departs from the consideration of subjective and identitarian positions—such as "lesbian", "gay", "bisexual", "transgender" or "intersex"—as pregiven labels to which only one type of behaviour or one prototype of law-abiding citizen may correspond. Painter (2002, 93) considers Europe as the perfect place to imagine new forms of citizenship that dissolve that intimate relationship with the nation-state and recognise the convergence of different spatial dimensions, as well as

simultaneous membership of what he calls "various non-territorial social groups" (Painter 2002, 93), such as religions, sexual minorities and ethnic diasporas. Painter's intuition is that of dismantling the myth of a "unified European identity" (Painter 2002, 94), a problem that has also been the basis of Balibar's (2004) and Todorov's (2010) speculation regarding the specific characteristics that should form a "European identity". The alternative to the endless enumeration of criteria to define "Europeanness" is the recognition of Europe as continuously in flux and difficult to capture in a single snapshot. In this regard, issues of sexuality and gender become crucial to understand emerging models of citizenship involving a resizing of the importance of the nation-state as the sole actor of human rights and citizenship. This is not only because of the performative character of sexuality and gender (Butler 1990), but also by virtue of their potential as vehicles of power and regulation (Foucault 1998). A citizen (or a *wannabe* citizen) who embraces various sexual orientations and/or gender identities simultaneously—or in fact none of them—directly challenges the state insofar as they displace the attribution of a specific identity as a marker of one's societal role. When this same individual also claims for her/himself the fact of belonging to various political, cultural or religious communities she/he takes the challenge further, contributing to the deconstruction of the ideal type of what a citizen should look like in a given nation-state.

Furthermore, this intention to decouple citizenship from crystallised sexual and gendered conceptions of citizenship presents the advantage of revealing how the system of protection for human rights in relation to the recognition of LGBTQI persons as legitimate human rights subjects rests on a fixed set of assumptions about individuals' lives, which are seen as being characterised by events such as getting married, becoming parents, receiving benefits or fitting (irreversibly) into the appropriate gender category. In this regard, both national citizenship and human rights practice tend to rigidly articulate individuals' identities. This common attempt to rigidly articulate subjective positions can be traced back to the common regulatory and disciplinary functions that both citizenship and human rights fulfil. For this reason, proposing a multidimensional conception of citizenship can also help to discard a system of protection of human rights that establishes a perfect correspondence between the provision of the law and the recipients of such provision, without addressing the broader socio-economic and political context in which human rights violations occur. Whether their claims can be verified or not should not be of paramount importance. Rather, what is at stake is that often those who are to

be deported may also be in the most vulnerable economic and political position, by being deported to a home country that may not offer them the same quality of life (in terms of protection from homo/transphobia) or work opportunities. Hence, in cases like this, it should not become burdensome for the individual to demonstrate that she/he has the right to enjoy her/his "family life". The system of human rights protection in place should encompass those who present fewer credentials or have weak claims, since the fact that they find themselves in such a vulnerable legal position may well be the reason why they need to be protected the most, as with the figure of the "Arendtian refugee".

The proposals advanced in this chapter in relation to a "multisexual citizenship" are closely linked to the work of Stychin (2004), among others. One passage, in particular, highlights the fact that a combination of European citizenship and sexual citizenship can represent a new possibility of envisioning individuals as active participants in the construction of a more dynamic and politically engaged Europe, in which rights are discussed, rather than only being claimed. It is possible to suggest that in order to realise the "democratic contestation" that he advocates, it is more appropriate to take the CoE, rather than the EU, as the legitimate domain of action for individuals across the continent. More specifically, some new forms of European sexual and gendered citizenship that build on the importance of the recognition of human rights can be tried out by contributing to a call to strengthen the sociological competences of the institution, whose work is currently dominated by a strictly legal framework. While the judicial role of the ECtHR is fundamental and immensely valuable, it is somehow reductive to consider this as the main and sole instrument to promote the respect of human rights in Europe. It is true that the ECtHR is starting to take into account the work of the Commissioner for Human Rights of the Council of Europe in order to ground its decisions on more solid sociological facts, such as in the 2013 case concerning adoption by a same-sex couple in Austria (*X. and Others v. Austria*). At the same time, however, it would be an exaggeration to posit that the ECtHR has thoroughly acknowledged the need for a shift in its rigid legalistic approach, which still constitutes the bulk of its action.

Furthermore, in order to counter the phenomenon of European (Western) exceptionalism with regard to human rights, which may lead to new forms of cultural imperialism (Linklater 2002, 317), it is necessary to allow individuals, in the different geo-political and social contexts, to have a say on the human rights campaigns and initiatives that are

promoted. Processes of consultation with both local activists and human rights observers could be beneficial in order to rephrase the "vocabulary" of human rights, following a bottom-up perspective. The instrumental use of the concept of the universality of human rights, in this regard, should be minimised by the CoE. The existence of these subtle hidden political objectives undermines the presumed genuineness and universal applicability of those principles that are set forth and continuously restated by the different bodies of the organisation, among which the ECtHR surely plays a unique role.

The Rights of LGBTQI Persons in Europe: The Need for a New Agenda or of a New Approach to Inequalities?

In his book *The End of Human Rights*, Douzinas (2000) called for a transformation of the role of human rights beyond the current instrumental use that is made of them by different political actors. Far from having the intention of describing human rights as superfluous or obsolete, Douzinas' critique of the current system of protection of human rights rested on the idea of an ongoing process of debasement, for merely political purposes, of human rights' ideal moral reach and required a thorough reconsideration of both their role and the means by which human rights are promoted, protected and guaranteed. A call similar to Douzinas' is echoed in this book: human rights should be advocated and strengthened, but beyond political appropriation. If subtracted from the colonising logic of petty political calculations, human rights are valuable because of their potential to be used as living instruments to monitor patterns of injustice and inequality and to articulate proposals for social change. They should, however, rest on a less defined vision of the human being and be more flexible in order to accommodate the lives of individuals.

Since the 1990s, the slow but steady appearance on the international "stage" of human rights, of new human rights actors that (directly or indirectly) challenge the norms of heterosexuality and the duality of gender, has resulted in a new vital push for the theory and practice of universal human rights. In fact, it has introduced the necessity for a profound reconsideration of two of the major tenets of modern societies: sexuality and gender. The enormously disruptive character of the rights claims of these new human rights actors has almost taken the shape of a

theoretical earthquake insofar as it has forced legal scholars to question the rooted heterosexual character of the nation, as well as the role and function of various societal institutions (kinship, marriage, the army, the nation) in the light of the existence of former gender or sexual *outlaws*. The radical potential associated with the emergence of these new human rights actors, however, can be said to have been underestimated by the new actors themselves who, to some extent, have acquiescently subscribed to a model of recognition of their rights—also conceived as a way to gain access to full citizenship—that has posited them as passive recipients of benefits or entitlements, rather than as active protagonists in the critical process of questioning the heterosexual and cisgendered foundations of the nation and societal structures.

Precisely because of this predominant passive framework of the articulation of legal and social subjectivities by these actors, which is clearly visible in the construction of LGBTQI identities by the ECtHR, this book has engaged in a quest for alternative models of citizenship. These models of citizenship acknowledge the reality of multiple allegiances and forms of identification that individuals experience during their lifetime.

Furthermore, these new modalities of citizenship permit a radical reconception of the role of human rights in ensuring the acquisition of the "privilege" of citizenship both within and outside the boundaries of the nation-state. On the one hand, the classic paradigm sees human rights and citizenship as being in a univocal relationship with the nation-state as the sole source of legitimacy, protection and recognition. On the other hand, to radically abandon the horizon of the nation-state in favour of a universalist model of human rights or a cosmopolitan model of citizenship can harbour the danger of promoting new forms of cultural or political imperialism. This clear tension, between the national and the transnational dimensions of human rights and citizenship, cannot be resolved merely by an abstract exercise of political will by the actors concerned. On the contrary, the tension can only be solved if actors continuously re-enact and perform those acts of citizenship, which can, precisely by virtue of their incessant repetition, favour the crystallisation of new cross-dimensional models of belonging to different spatial, social and political realities. By continuously acting as citizens who cross the lines of sex, gender and heterosexuality, together with a whole constellation of other ethnic, religious and multinational affiliations, LGBTQI persons can truly change the content of "European citizenship and identity" from within.

Moreover, it is also possible to broaden the perspective so as to encompass Tassin's (1992, 189) suggestion to consider entrance into the public sphere of citizenship as "elective" rather than "native". This proposal to abandon a conception of citizenship that builds on a natural derivation of one's membership of the (national) political community allows the inclusion of those individuals that do not possess the characteristics to become citizens in the first place, such as LGBTQI asylum seekers and economic migrants. Using the example of Europe as an illustration of the possibility of discarding the national model of citizenship, Tassin (1992, 189) is adamant in proposing a model of European citizenship that breaks away from the univocal correspondence between the individual and the nation-state, and places significant emphasis on the notion of "choice". Choice is understood in terms of the possibility for each person to "select" their citizenship and, hence, participate in the decisions concerning the destiny of that community.

It may appear odd to link Tassin's notion of "choice" to the situation of LGBTQI asylum seekers or economic migrants who cannot qualify as citizens in the first place. However, it is precisely because of the fact that their rights claims are not evenly recognised across the international arena that their case is the most significant in illustrating the usefulness of broadening the concept of citizenship so as to encompass an element of "choice". In fact, it appears more significant to start from the periphery in order to illustrate what needs to be changed at the core of the current system by which rights are granted and citizenship is recognised. As this book has shown, LGBTQI asylum seekers or economic migrants are often treated with suspicion by their prospective host states because of the possibility of "fraud" that they can enact by claiming to have undergone persecution in their home country on the grounds of their sexual orientation or gender identity. Their ambiguous position as both "unwanted" guests and a symbol of the intrinsic benevolence of Europe creates a situation in which they often embody the situation of figurative "statelessness" insofar as they are unwilling to endorse their home countries' citizenship but, at the same time, they do not meet the criteria to become members of the host states' political communities. The strengthening of "Fortress Europe" only exacerbates the creation of outsiders who are denied the possibility of participating in the fate and decisions of a political community that perceives them as "threats" or "impostors", while simultaneously instrumentalising politically their presence and experiences on the national soil.

Connecting the situation lived by LGBTQI asylum seekers and economic migrants to the lack of an element of "choice" in the definition of one's citizenship is necessary in order to understand the limitations of the concept of citizenship in the first place. When some passports are deemed to be more valuable than others and some sexual orientations, gender presentations, religious, ethnic or racial profiles, and class statuses are more valued than others for the acquisition of citizenship, it becomes imperative to ask whether it is possible to introduce an element of "choice" into the concept of citizenship. If applied to the context of Europe, in which human rights are at the core of the continental identity, it becomes even more pressing to ask, to what extent European (sexual) citizenship can be constructed on specific notions of racial, economic, sexual and gender privileges. The recognition of the rights of LGBTQI persons in Europe, and their access to full national and European citizenship, requires a radical interrogation of the dynamics that make membership of the political community possible. Why is that possibility of political action that Hannah Arendt advocated only reserved for an extremely tiny minority that possesses all of the moral, economic, cultural and social characteristics to be a "good" citizen? Is it possible for Europe to praise itself and its achievements by tacitly luring others to have the same aspirations, while simultaneously denying them access? Is it not precisely Europe's ability to absorb difference that constitutes both its uniqueness and its potential? Why not, then, dare to allow these "differences" to speak for themselves in deciding what type of citizens different people wish to become?

Equally, in terms of the performativity of citizenship, it is possible to suggest that the repeated acts of those LGBTQI non-citizens that reside in a host state, be they asylum seekers or economic migrants, constitute a new challenge to the static notion of national citizenship still largely in place. By selectively choosing, within the host state, which elements of LGBTQI identities they want to appropriate for themselves, together with other identitarian traits connected to ethnicity, language, religion, culture or other forms of belonging, these individuals demonstrate that citizenship can be continuously *done* from below, because it can be mobilised in order to obtain formal recognition beyond the description of what a citizen ought to be. What if the ideal space of citizenship was conceived of as a domain in which self-determination could be realised beyond both communitarian and liberal models? This possibility, of course, would be to consider "choice" as something more than neoliberalism considers it to be—a mere possibility of choosing for oneself in order to pursue one's

interests. Under these terms, the process of choosing one's citizenship, therefore, cannot be equated to the "flexible citizenship" of the diasporic Chinese economic elite described by Ong (1996), in which individuals adopt a strategic and opportunistic attitude towards citizenship because of the changing political and economic conditions. Rather, the notion of "choice" employed here takes political action as a fundamental aspect, as it connects it to the possibility of also advancing one's human rights claims as an agent rather than as a recipient. Giving more voice to those who are part of or wish to be included in the citizenry also represents a countermeasure to the phenomenon by which individuals become entrenched in sectarian positions, while they lose the existence of a "common fate" or refuse to define what a common fate should be in the first place.

Hence, debating the rights claims of LGBTQI non-citizens and LGBTQI citizens in the context of the CoE brings an immense contribution to the definition of European (sexual) citizenship as a phenomenon that not only concerns the so-called "sexual minorities", but also appeals more broadly to the whole of the European population. The intricate relationship between citizenship and human rights claims relating to sexuality and gender is not merely the interest of a minority. Sexuality and gender inform everyone's citizenship and contribute to shaping one's participation in different spheres of public life. In fact, far from being confined to the private sphere, sexuality and gender have a public dimension that also informs one's way of doing citizenship. If the material and symbolic membership of Europe is also measured by the degree to which human rights are respected and promoted, then sexuality and gender need to be included in this discussion, but clearly not as instruments in order to foster exclusionary models of Europe based on moral exceptionalism.

The discussion of alternative models of citizenship that admit a plurality of sexual and gender positions, together with other layers informing one's identity as a citizen, can be transformative for the definition of "Europe" in the first place. A more dynamic conception of citizenship would help to conceive of Europe as something more than an economic space with bland dynamics of social and political cohesion. In this regard, the work of the CoE can be strategic insofar as the institution can dissociate itself from its current image as a distant and bureaucratic giant, and can start to employ instruments to attune its work more finely to the complexity of the lives of the individuals across the continent. The ability to respond to this transformative challenge could also, potentially, lead to the accrued

prestige of this institution as a true interlocutor for individuals across the continent on matters of human rights protection.

Moreover, the rights claims of those who appropriate the label of "LGBTQI" for themselves, need to be decoupled from mechanistic notions of both "equality" and "freedom", which narrow down the possibility of having one's rights recognised by becoming equal to heterosexual and cisgendered counterparts or as free as them. It is this sort of comparative endeavour on which human rights theory and practice has embarked, up to this moment, which has simplistically blurred the lines between becoming a subject of human rights and becoming an actor of human rights.

Notes

1. Stychin (2000, 965) describes the problem of the depoliticisation of the gay movement in a poignant way: "It becomes far too tempting for the 'citizen gay' to consume human rights and then withdraw from any kind of progressive politics, especially when those who have bestowed the rights are also pursuing policies that are eviscerating the human rights of others on issues from migration to counterterrorism."
2. Sassen (2002, 279) claims that it is precisely the existence of multiple allegiances of individuals that "parallel the devaluation of nation-state-based sovereignty".
3. Chantal Mouffe (1992, 235) provides a definition of citizenship as: "an articulating principle that affects the different subject positions of the social agent […] while allowing for a plurality of specific allegiances and for the respect of individual liberty".
4. It should not be forgotten that membership in the CoE is a formal prerequisite for accession into the EU and that respect of human rights is one of the pillars of the Copenhagen Criteria used to assess eligibility of candidate member states in order to join the EU (Börzel and Risse 2004).
5. The authors define the concept of "scale" as socially constructed through state processes, rather than being a geographical given (Grundy and Smith 2005, 391).

Conclusion

As has been illustrated in the analysis carried out in this book, the recognition of LGBTQI persons' formal equality or formal freedom does very little to favour a rediscussion of the reasons behind the existence of structural inequalities. To be treated equally as gay in the workplace while gaining a wage below the subsistence level should not be perceived solely as an instance in which the person's sexual orientation is at stake. Indeed, to ask for the recognition of one's equality while disregarding the other intersecting factors that contribute to the definition of a situation of inequality is, at best, a Pyrrhic victory. A piecemeal approach to the protection of human rights does little to improve, in real, material terms, the life of the individual concerned.

The human rights not only of LGBTQI individuals, but more broadly of all individuals, need to be understood beyond the current predominant framework of formal equality and freedom, which, very often, serves narrow interests in both domestic and international politics and only scratches the surface of the structural inequalities affecting LGBTQI persons. When analised in conjunction with the attempt to build forms of transnational citizenship in Europe, the fact of recognising the limits of the current system of protection of human rights can be used as an opportunity to bring to the table alternative models that enable "European citizens" to debate the real human rights struggles that matter to them. This, in turn, allows one to distance oneself from an abstract formulation of human beings as all being born equal and free, and requires a political and social engagement with

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the roots of inequality in a continent that increasingly and relentlessly builds its reputation on its record of protection and respect for human rights standards.

While the case law of the ECtHR represents an incredible instrument to foster common European standards of human rights and its analysis allows one to unveil many of the social and cultural policies at play in the construction of human rights subjects in the first place, it should not be taken as the sole crowning achievement of all human rights struggles of LGBTQI persons in Europe. The delivery of the ECtHR's judgments is currently taken as the most authoritative source on the continent, regarding what the human rights standards should be in the 47 member states of the CoE. However, it is far from being an all-encompassing perspective that takes into account the multifaceted aspects of complex issues such as marriage, parenting, gender expression and gender presentation, as well as sexual behaviour and sentimental relationships. The significant bulk of the work produced by the ECtHR on issues relating to sexual orientation and gender identity should be complemented by paying more systematic attention to the social fabric in the different member states from which these human rights claims originate. While the law requires simplification and categorisation in order to function and ensure equal treatment, it is nonetheless true that the current predominant legalistic approach that it adopts in relation to rights claims, paradoxically, often strips the individuals of the dignity and integrity that the law seeks to protect, by reducing them to a shapeless and voiceless crowd.

Bringing to the surface the ways in which human rights institutions, such as the CoE, rely on the simplification of the experiences of sex, sexuality and gender in daily life, and their multiple intersections with many other characteristics and conditions, serves to establish a fruitful critical dialogue with these institutions, and can also help activists in framing their requests to these institutions so as to ground their action on a more accurate sociological basis rather than merely on neoliberal stereotypes about same-sex families, same-sex parents, sexual behaviour, gender conformity and so forth. A process of rebalancing the way in which human rights are constructed and advocated would be precisely aimed at establishing a synergy between the black letter of the law and the extremely variable and fluid object of inquiry of sociological scholarship on gender, sex and sexuality.

The field of the rights of LGBTQI persons represents a perfect location in which this experience of "pioneering" new forms of human rights

advocacy and protection can be tried out. Because of their peripheral position in the panorama of international human rights, the rights claims of LGBTQI persons also represent the most vivid example of how often the acquisition of legal, social and political intelligibility is enacted through the existence of a compromise that curtails the possibility of self-determination. Moreover, the process by which "new" human rights actors are allowed into the international and domestic arenas also sheds light on the crucial process of the reconfiguration of forms of citizenship and socio-political belonging in a European continent that currently hesitates between two ambiguous positions in world politics: on the one hand, the possibility of becoming a tranquil international moral hegemon; and on the other, that of acting as a reluctant but assertive international political actor.

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