



Università
Ca'Foscari
Venezia

Master's Degree
in Comparative
International Relations

Final Thesis

**LGBT RIGHTS: How Politicization of LGBT Issues Leads
to Violence Against Sexual Minorities**

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Academic Year

2019/2020

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ABBREVIATIONS

HRC- Human Rights Committee

USSR- Union of Soviet Socialist Republics

PiS- Law and Justice party

CEE- Central and Eastern Europe

WHO- World Health Organization

ILGCN- International Lesbian and Gay Cultural Network

ECtHR- European Court of Human Rights

CSO- Civil society organizations

ETA- Equality Treatment Act

ILGA Europe- ILGA-Europe. European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association

ICCPR- International Covenant on Civil and Political Rights

EUCFR- EU Charter of Fundamental Rights

ECRI- European Commission against Racism and Intolerance

CoE- Council of Europe

CCRF- Constitutional Court of the Russian Federation

INOP- Institute for Societal Projecting

WCF- World Congress of Families

CM- Committee of Ministers

ACLU- American Civil Liberties Union

INS- Immigration and Naturalization Service

DOB- Daughters of Bilitis

APA- American Psychiatric Association

GLF- Gay Liberation Front

CHF- The Committee of Sexual Freedom

PACS- Pacte Civil de Solidarité

ECJ- European Court of Justice

TFEU- Treaty on the Functioning of the European Union

VddB- German Theatre Pension Institution

ACPFB- the Committee for Protection of Foreign Born

EP- European Parliament

EC- European Community

HUAC- The House Un-American Activities Committee

BPP-Black Panther Party

ABSTRACT

Questa tesi tenterà di tracciare e descrivere il difficile processo politico di accettazione della comunità LGBT e la loro mobilitazione attraverso il XX secolo, incitando il cambiamento nell'opinione pubblica. Inoltre, il percorso legislativo e sociale che ha fornito alla comunità LGBT i propri diritti non è emerso dall'oggi al domani, come può essere percepito da un lettore del 21 ° secolo, ma è stata piuttosto una lotta, una battaglia guidata da una sottocultura di persone che sono stati perseguitati dallo stato solo per essere nati diversi. Infine, la tesi esamina la questione dello status LGBT contemporaneo all'interno del sistema europeo, lo scontro tra valori democratici e resistenze tradizionali in alcuni paesi e quali sono i modelli legali e sociali riconosciuti e le pratiche per superare la discriminazione della comunità LGBT.

Ciò che risulta affascinante, analizzando l'evoluzione del movimento LGBT e dei loro primi contatti attivisti avvenuti dopo la Seconda guerra mondiale, è il lato della persecuzione da parte di membri del Congresso come Joseph McCarthy e la House of Un-American Activities. Questa schizofrenia sistematica esibita dalla società americana nel diffamare le voci diverse che a loro volta hanno portato all'espulsione di molti membri LGBT dal loro luogo di lavoro. Come viene sottolineato nella tesi, il caso di Harry Hay è un fattore interessante nel descrivere la situazione della società americana negli anni '50 e, soprattutto, il modo in cui le istituzioni legali americane affrontano due nemici percepiti: il comunismo e l'omosessualità. La questione della persecuzione sociale non era riferibile agli americani in quei tempi negli anni '50 e '60. A quel tempo, gli autori contemporanei trattavano la questione dell'omosessualità non come un problema di un gruppo minoritario, ma come un problema individuale.

Successivamente, il secondo capitolo prosegue la ricerca sulla situazione delle minoranze sessuali rispetto all'evoluzione del legislatore europeo nel trattare gli strumenti per contrastare l'orientamento sessuale come reato discriminatorio. Per quanto riguarda la politica antidiscriminazione, il contesto europeo non offre lo stesso panorama politico come quello degli Stati Uniti, per quanto riguarda l'organizzazione dei movimenti e la rivendicazione dell'uguaglianza matrimoniale.

Questo è il motivo per cui l'importanza dei primi movimenti e lo Stonewall costituiscono un importante elemento storico per i successivi sviluppi globali in questo campo. L'Europa si è rapidamente presa e, nelle società moderne, i movimenti non conoscono confini o limiti continentali. Tuttavia, i processi legislativi e l'attuazione delle politiche esistenti in

materia di antidiscriminazione e inclusione della comunità LGBT a livello europeo mancano ancora di coesione e attuazione all'interno dell'Europa come continente, l'Unione come modello di ruolo e il resto del mondo come influenzato da esso. Come fa notare Mark Bell, negli Stati Uniti e in Europa c'è stata una minore disponibilità a introdurre leggi antidiscriminazione nei settori della vita familiare, un matrimonio piuttosto che una categoria lavorativa. Fondamentalmente, le direttive europee sull'uguaglianza devono fornire ed essere uno strumento contro la lotta agli stereotipi e ai diritti fondamentali contro la discriminazione

Il ruolo delle istituzioni europee nell'interpretazione di queste Direttive è oggetto di un attento esame in questa tesi, compresa l'analisi del processo di politicizzazione in corso all'interno dell'Unione Europea. Le metodologie utilizzate dalla Corte di giustizia europea in casi come Grant al fine di determinare la discriminazione basata sull'orientamento sessuale mostrano un disprezzo per la questione del sesso del ricorrente da parte della Corte nei primi casi di interpretazione delle Direttive da parte dei tribunali europei. La politica della Corte di giustizia europea non è stata definita nella sostanza nelle sue sentenze negli anni '90, è diventata un confronto politico tra il Parlamento europeo e il Consiglio dei ministri, dall'altro lato che ha fatto marcia indietro sulle proposte legislative per l'espansione dei diritti LGBT e il loro tutela nei tribunali europei. Tuttavia, la natura vaga delle Direttive non ha risolto i problemi tra distinguere la discriminazione diretta e quella indiretta, soprattutto in materia di orientamento sessuale. Le Direttive sull'uguaglianza sono diventate uno strumento meno potente di comparabilità con le altre Direttive basate sulla discriminazione di: razza, etnia o sesso . Molti esperti e studiosi dopo l'approvazione della direttiva sull'uguaglianza stanno criticando la loro struttura a causa della creazione di un ordine gerarchico non compatibile con i casi di discriminazione multipla.

Tutti i punti sopra elencati saranno ulteriormente discussi e analizzati in questo documento con l'obiettivo di far emergere risultati rilevanti su ciò che causa oggi la discriminazione LGBT e quali sono i modi per contrastarla. La tesi tenterà di rispondere alla domanda se la politicizzazione della questione LGBT porti a più violenza e, in caso affermativo, quali sono i ruoli delle convenzioni internazionali per la protezione dei diritti umani e più specificamente dei sistemi regionali, come il Consiglio d'Europa o l'UE, in contrastare queste pratiche pericolose in Europa e altrove.

Introduction

It is vital to understand that political homophobia has been a social phenomenon, but also and even more importantly, a political tool for elites to discriminate the LGBT communities as soon as society developed progressively through the end of the 19th century. The reason modern society is shaped nowadays as it is in the context of gender and sexual identity, dates back to the cross dressings and expressing femininity in a society that has problems in accepting anything less than expression of manliness. This thesis will attempt to trace and describe the difficult political process of acceptance of the LGBT community and their mobilization through the 20th century, inciting the shift in public opinion. Furthermore, the legislative and social behavior that provide the LGBT community with their rights did not emerge overnight, as it may be perceived by a 21st century reader, but it was rather a struggle and a victory, a battle led by a subculture of people who were persecuted by the state just for being born different. Finally, the thesis examines the question of contemporary LGBT status within European system, the clash between democratic values and traditional resistances in certain countries, and what are the legal and societal patterns recognized and practices in overcoming the discrimination of LGBT community.

In the first chapter I will discuss the common perception of LGBT rights is rarely considered within its history, namely the Stonewall or the homophile movement. One never imagines how the drag queen culture and revolt of people like Sarria came to be. Definitely its inception from violence and police persecution just for the benefit of establishing their social contact came about into existence in places like New York and San Francisco that were experiencing cultural renaissance. What is fascinating analyzing the evolution of the LGBT movement and their first activist contacts that came about after the Second World War, it is the persecution side from Congressmen such as Joseph McCarthy and the House of Un-American activities. This systematic schizophrenia exhibited by the American society in vilifying the voices that are different that themselves resulted in expulsion of many LGBT members from their place of employment. As it is pointed out in the thesis, the case of Harry Hay is an interesting factor in describing the situation of the American society in the 1950s. Most importantly, the manner of the American legal institutions in dealing against two perceived enemies: communism and homosexuality.

The issue of social persecution was not relatable to Americans during those times in the 1950s and 1960s. At that time, contemporary authors treated the issue of homosexuality not as a problem of a minority group, but as an individual problem. The vantage point presented by D'Emillio in his book *Sexual politics, Sexual communities* presented a worldview based on an issue of breaking the norms regarding the vantage of homosexuality in regards to the law, science or religion. It only appeared abnormal to the norms and decency when addressing the homosexuality as a treat to the welfare of society.

The weakest phase of the organization for homosexual rights came about from the formation of the Mattachine society and the Daughters of Bilitis, organizations that were involved in institutional pressure and mobilizing to change the public perception on homosexuality. The militancy that was introduced in these activist circles along with the Supreme Court's multiple decision on series of cases involving: decency, profanity and obscenity paved a way for a new mode of activism. Their effort of fighting against censoring efforts from the postal service, along with the cases involving freedom of speech never resulted in an open expression of sexual identity by the homosexuals in the 1950s or 1960s. The political campaign of anti-gay emerged along with the protest surrounding the places where homosexuals socialized and were subjected to police harassment on a daily basis. The issue of the bar culture ingrained in the gay culture as a genesis of the revolt from the state and its agents came about from the famous Black Cat bar. The protest of Sarria helped along with the reorganizing of the homophile movements to usher a new era of organizing that will supplant the less militant factions of the gay movement that preceded Stonewall.

The DOB's involvement (Daughters of Bilitis) in the homosexual movement was instrumental part of the establishment culture, a non-reactionary alternative to the aforementioned bar culture. It aimed to shift the homosexual's status in the society, which as a result to their establishment efforts, the group disbanded. At this point, the start of the radicalization process came about to the homophile organizations. The expansion of organizations that came with the conflicts and distortions of the homophile movements provided the rise of a new Left activism structure in the American society. These radical left groups organized mainly from college campuses along with their tactics in creating a direct mobilization of their members allowed the spreading of a gay liberation movement that will define the next 30 year of homosexual activism in the United States. The gay movement transformed the noting of expressing sexual identity and 'coming out' during their rise in the

1970s, but the fractious multifaceted coalition out of Stonewall born a new lesbian movement and feminist uprising ever since the state repressing during the 1970s. More or less the activism movements after Stonewall dwarfed the homophile activism, they have contributed mightily in the altering of positions such as the APA (American Psychiatric Association) in changing its position on homosexuality as a mental disorder. More or less the sodomy laws and the employment issue that troubled homosexuals in the 1950s disappeared along with many states passing anti-discrimination laws that protected homosexuals. This subculture that sprung negated all the negative consequences from the anti-American commission in the 1950s, along with the usual police harassment that came about in the bar culture. The gay movement flourished along with gay life after Stonewall due to the ability of homosexuals to express their identity openly in public life. The raising of the consciousness of the American public thanks to these radical sparks of outrage after Stonewall created the sense of community and institutions that were created to address the problems of homosexuals, but also transmit the knowledge of their struggle to the other parts of the world.

This is why the importance of the early movements and the Stonewall make an important historical element for subsequent, global developments in this domain. Europe swiftly caught up, and in modern societies, movements know no boundaries or continental limits. However, the legislation processes and the implementation of existing policies on anti-discrimination and inclusion of LGBT community on European level, still lacks cohesiveness and implementation within the Europe as a continent, Union as a role model, and the rest of the world as influenced by it. As Mark Bell notes that in the United States and in Europe there has been less willingness to introduce anti-discrimination law in the areas of family life a marriage rather the employment category. Basically, Europe's Equality Directives need to provide and be tool against fighting stereotyping and basic rights against discrimination. Instead, they became when instituted a formal comparator-based approach that does not solve the societal issues of sexual orientation and transgender rights alike.

The problem of anti-discrimination struggle by the aforementioned non-governmental movements enabled the subject of LGBT recognition to become prominent even in Europe. In which, unlike the United States has not experienced the political and social backlash in society that resulted in sexual revolution that promulgated the rights of the LGBT members in public society. Due to the complexity of the European system of government between Member states did not allow the evolution of anti-discrimination policies to take root until the end of the 20th

century. The second chapter reflects on creation of policy that will allow the expansion of LGBT rights came in effect in 1999 with the passage of the Equality Directives, it can be seen that sharp conflicts with the national legislation were pressing the enactment of European law. With the introduction of the Amsterdam Treaty, the politicizing process of anti-discrimination came about with the introduction of now known Article 19 of the TFEU, important tool that will provide the fight against discriminations on any level. Because of Europe not having any sovereign power on the matters of sexual orientation that does not mean according to Kerry Kolman that dematerialization of normative powers of the European legislation is not happening. More importantly, the legal recognition of the LGBT members through the European legislature allows only a soft law approach that recognizes the rights of LGBT, therefore the only piece of legislature in the last 30 years it is the Directive, however its more of an instrument that sets standards that provides an indirect influence over the national legislation of Member States.

The role of the European institutions in interpreting these Directives is under a close inspection in this thesis, including the analysis of politicization process that is going on within the European Union. The methodologies used by the ECJ in cases such as Grant in order to determine discrimination based on sexual orientation shows disregard on the issue of sex of the claimant by the Court in the first instances of interpretation of the Directives by the European courts. The policy of the ECJ was not defined by the substance in its rulings during the 1990s, it became a confrontation of policy between the European Parliament and the Council of Ministers on the other hand that backtracked the legislative proposals for the expansion of LGBT rights and their protections in the European Courts. However, the vague nature of the Directives did not fix the problems between distinguishing the direct and indirect discrimination, especially on the matter of sexual orientation the Equality Directives became less powerful instrument comparability to the other Directives based on discrimination of: race, ethnicity or sex. Many academics after the passage of the Equality Directive are criticizing their structure due to the creation of hierarchical order that is not compatible with cases of multiple discrimination.

The Maruko case before the ECJ shows a clear progress in relation of sexual discrimination based on the benefits of a couple that is in a life time partnership, because of the nature of progression of the European law in the method of interpreting the benefits of same sex couples along with those in the opposite sex marriage. Along with the case of Romer, there

was a change in interpreting the methodology of discrimination based on sexual orientation basically the Court decided to follow the Directives and institute a precedent where it allows the same rights of LGBT couples. Furthermore, the pressure for formal and informal groups that criticized the neutral stance of the Court in regards to LGBT issues and sexual orientation resulted in progress with the case of *Asociația Accept* mainly due to the clarifying and allowance by the Court to hear cases not from the plaintiff directly but from those NGOs that file the complaint. The broad application of the ruling by the Court in the *Asociația Accept* case allowed the broad judgement of substantive issues rather than formal equality when it comes to sexual orientation. Based on the cases of *Asociația Accept* and *Hay*, the Court proved to be less hesitant in sanctioning discriminatory behavior from the Member States of the European Union. Furthermore, the Court's unbalanced judgment to the *Paris* case clearly supplants the positive developments of the cases beforehand. The issue of multiple discrimination still preceded the topic of involving age and sexual discrimination, as it seems the Court assumed it would be up to the national legislature to resolve the issue of multiple discrimination using the instruments of the Directives.

Nowadays, the expanding scope of the Court in interpreting discrimination based on sexual orientation against proves challenging when it involves Member States that are demanding the curtail of European institutions when it comes to legislature involving sexual orientation. The competence of the European Court comes to question when the measures that are there to protect LGBT members are being politicized due to fears of norm imposition regarding issue surrounding culture or tradition. This is why the role of the European institutions is more important than ever when it comes to Eastern and Central European countries and their role in supplanting the LGBT movements and promoting anti-gay bans on their citizens who are looking up to the European institutions for guidance.

The last chapter will discuss the nature of political homophobia of Eastern European countries that are contesting European institutions, whether they are the member states the European Union, candidates or non-members. The usage of political homophobia as a mechanism to backtrack on the progress of LGBT rights has been the most evident in Eastern Europe, where the complete disregard of international law and norms has made the life of LGBT members more dangerous. Russia as the 39th member of Council of Europe is the foremost offender of the international human rights conventions. More specifically being part of the regional system, i.e., European Convention for Human Rights, has inspired a plethora of

countries in the European Union or outside of it, countries such as Russia, in utilizing its political methods in suppressing the rights of LGBT individuals. Understating the methodology of the authoritative reign in using the anti-gay legislature to prove itself as a beacon of Christianity and traditional marriage has been achieved with the institutionalization of the anti-gay propaganda law in 2013 by the Putin regime. The current spread of right-wing homophobia can be traced back to the effects of communism where the treatment of homosexuality as illness itself allowed the current framework of policy as itself because the transition from communism to capitalism in the Eastern European Countries has not changed the nature of the issue of treating homosexuality instead of repressing it.

The question of the anti-gay propaganda law in Russia has provided the Russian Supreme Court of an opening in confronting courts such as the ECtHR as outside influence interfering in the traditional way of life. Even the passage of the European Convention of Human Rights made the Russian institutions not binding when it comes to problems such as freedom of assembly or the right to form an organization. The intervention from the ECtHR upon the Russian negligence of right to organize gay parades, this instance has created a spectacle and a debacle when the European institutions were trying to strengthen the rights of LGBT members in Russia. In accordance with the ECtHR ruling of *Alekseyev* or *Markin* by the Court, Russia's politicization of LGBT issue has strengthened the reign of Vladimir Putin and his vision of authoritarian and traditional Russia. The rift created by the rulings against Russia concerning LGBT rights has proved a perfect opportunity for the authoritarian government to supplant the norm imposition by the European institutions and has created a perfect excuse where populism threatens the norm imposition of rules that protect the lives of LGBT people to be turned into a weapon for repressive governments to impose traditional viewpoints on its homosexual minorities.

Unlike Russia, Poland has been subjected to more scrupulous objection from the European institutions due to its wish for European integration. Given the links of the Article 6 that predisposed Poland to maintain standards drafted by the ECHR, they would require proper treatment in case of any breach of European law. However, the Europeanisation process in Poland was indiffereniable in their treatment of LGBT issue when it comes to the norm imposition and politicization this process by the European institutions. Not only that, the politicization of the Europeasation process not only made Poland less accountable for its policies in regards to LGBT rights, but more importantly after Poland's accession into the

Union, it allowed the mobilization of the far-right propaganda and political backlash against the European institutions.

The political nomenclature in Poland displayed its original behavior when they called out the European Union as morally corrupt and perverse. In the *Bączkowski* case in particular, the European Court of Human Rights convicted Poland for: having violated the right to assembly, the judgment of the Court deemed Poland as narrow-minded and backwards country. Their conclusion was that Poland has not amended its laws, especially the Criminal code for offenses that go against LGBT persons. As it seems Poland's not adherence to the European Council in applying the Equality Act in its domestic legislature became an issue over time. The abstention of the LGBT issue in regards to healthcare or employment has allowed Poland to disregard the rights of homosexuals, but the negligence of their national courts in treating the hate crimes has opened up the causality for more perpetuation of violence against gay men and women from far-right propaganda. The European Parliament and European Commission have repeatedly taken a stance against Poland's local municipalities resolutions banning any gay presence within their territories. As soon the norm imposition failed, the legislative bodies of Poland not only acknowledged their intention of repressing LGBT members but also encouraged abuse and violence.

The aforementioned pattern of political *modus operandi* has been repeated in Russia, Serbia and the United States even, when the use of populism and religious nationalism transform the state into a symbol against the promotion of LGBT rights and the norm imposition of European and international law for national legislatures. Those lessons of defiance have been perfectly put to test by the repressive governments in Serbia in regards to the right of an assembly. The politicization process in Serbia under Alexander Vucic clearly shows the hypocrisy and the playacting by bad faith actors in supplanting the Europeanisation process when it comes to the rights of the LGBT minority.

As it evidently shows the European Court of Human Rights cannot protect the rights of LGBT members, the stagnant nature of playacting the reform to improve or allow the LGBT minority to organize and mobilize its efforts has proved in vain. The more the European Union demands of Serbia to respect the decision of ECHR, the more their government will suppress and attack the rights of its citizens that filed those motions. On the other hand, the norm imposition where it has succeeded in a degree its Croatia, due to their ethnic and religious differences between Serbia, the imposition of LGBT matter has been used as an acceptance of

western values to differ itself from their Balkan identity. But he subtler methods of repressing and using the imposition of values of European nature has made Croatia a unique subject of interest for scholars. The rhetoric of protecting the moral compass of the nation or the institution of marriage has made Croatia a place where nationalism and homophobia are interlinked where their political institutions have falsely been trying to create a LGBT inclusive state where underneath the all political and social system are rooted in homophobia.

All points listed above will be further discussed and analyzed in this paper with an aim of bringing out relevant findings on what causes LGBT discrimination nowadays and what are the ways to counter it. The thesis will attempt to answer the question of whether politicization of LGBT issue leads to more violence, and if yes, what are the roles of international conventions for protection of human rights and more specifically regional systems, such as Council of Europe or EU, in countering these dangerous practices in Europe and elsewhere.

Chapter I: LGBT activism, the advancement of LGBT rights

1. History of pride, the societal and legal persecution of LGBT members in United States before the Stonewall uprising.

Taking into consideration the gender conformity displayed among homosexuals after the Second World War, many homosexuals responded to their “fear” of their lives getting ruined by exposing their lifestyle.¹ The nature of these apparent gender conformity actions where countless homosexuals is evident by the action being hard-pressed by their “gentler” members of gay community in adopting masculinity. This issue of preventing effeminate mannerisms developed into a case of a conflict between gays in the United States. These types of behaviors, were challenging the hetero-normative practices of society, provided with the discouraging participation of homosexuals in public life, prevented them from participation in the political sphere effectively.²

D’Emilio in his 1983 essay “Capitalism and Gay Identity” argues about the economic shifts that capitalist economies contributed in the appearance of - hetero/homosexual identities in the American society.³ Because of soothing of the heteronormative standards inside the nuclear family, novel identities were possible, and as a result of the material devastation of capitalism, this economic system allowed the exaltation of the nuclear family. D’Emilio proposes his narrative during this time, when there is a reemergence of new heteronormative standards within society, the new identities were taking shape in response to the restricting of the entire mode of living in the new system of values.⁴ The emancipatory nature of capitalism after the Second World War, along with the growth of the living standard certainly created “freedoms and precarities” states D’Emilio.⁵ Therefore, he clearly conditions his essay in

¹ Loftin, Craig M. “Unacceptable Mannerisms: Gender Anxieties, Homosexual Activism, and Swish in the United States, 1945-1965.” *Journal of Social History* 40, no. 3 (2007): 590.
<https://www.jstor.org/stable/4491939>.

² Ibid, 578.

³ Holland, Janet, Caroline Ramazanoglu, Sue Sharpe, and Rachel Thomson. “Feminist Methodology and Young People’s Sexuality,” December 7, 2020,241.

⁴ Ibid, 244.

⁵ “Capitalism Made Gay Identity Possible. Now We Must Destroy Capitalism.” Accessed December 7, 2020.
<https://jacobinmag.com/2020/08/gay-identity-capitalism-lgbt>.

conclusion concerning the interlinking between gay identity and economic transformation, by allowing the construction of sexualities in accordance to his proposal, D’Emilio clearly manages to create a historical-materialistic narrative about the elements of capitalism and sexuality, subjects that are according to him closely linked.⁶

While discussing the proposition of D’Emilio about the involvement of capitalism and sexuality, Yishai Blank examines the outcome of capitalism on the gay identity. He demonstrates how capitalism within the gay and lesbian community created the conditions for the formation of communities that are homogenous in the political activity. Therefore, we can conclude that the male oriented middle-class household provided the instruments for emancipation of the homosexual class in “coming out” during the 1950s and mostly 1960s. The inclusivity of the gay community is destroyed according to Blank, because of the commodification of the lifestyle of the gay enclave.⁷ In conclusion, the sterilization of the gay identity started as soon as minority entities were excluded from the community only because of their affluency in participation in organizing for political change.⁸

Insofar as the question of marriage legality concerning same-sex couples dominated conversation within the USA and Europe throughout the second half of the 20th century. During the 1950s and 60s, political engagement pervaded among marginalized groups; state-sanctioned violence allowed movements in the United States to foster dissent among activists that fought for LGBT liberation. The movements that came about in the 1960s against imperialism, sexism, and racial order spurred discussion among the LGBT communities which enabled debates on topics concerning sexuality, but also the validity of the state that is incrementally targeting those sexual communities.⁹ Considering the countercultural movement in the 1960s, more aggressive forms of activism came to account during these times, according

⁶ John D’Emilio, “Capitalism and Gay Identity,” in Ann Snitow, Christine Stansell, and Sharon Thompson, eds., *Powers of Desire: The Politics of Sexuality* (New York, 1983), 100–113, quoted in Regina Kunzel, “The Power of Queer History,” *The American Historical Review* 123, no. 5 (December 1, 2018): 1561.

⁷ Yishai Blank, Kristen L. Walker, and Aeyal M. Gross, “Liberalizing Markets and Sexuality,” *Proceedings of the Annual Meeting (American Society of International Law)* 93 (1999): 222–24.

⁸ Itaylor. “D’Emilio – ‘Capitalism and Gay Identity.’” *Gender, Race and Biotech* (blog), February 10, 2011. <https://biopoliticssacrossborders.wordpress.com/2011/02/10/demilio-capitalism-and-gay-identity/>.

⁹ Ashley, Colin P. “*Gay Liberation: How a Once Radical Movement Got Married and Settled Down.*” *New Labor Forum* 24, no. 3 (September 2015): 28–32. <https://doi.org/10.1177/1095796015597453>.

to Colin Ashley, “Much of the gay activism during this period sought to challenge the state as opposed to assimilating within Society; Rising next to a second-wave feminism, the Gay Liberation movement critiqued stereotypical gender roles and identities, patriarchal family arrangements and traditional understandings of sexual desire.”¹⁰

There is a clear distinction as far as the LGBT historical analysis of the movements in comprehension to their modus operandi, the first wave of LGBT activism is timid, probing for institutional tolerance. To premise Nikita Shepard’s statement over the homosexual identity as analogous to other racial minorities, they do not adopt their status or seek to further their struggle of expanding their civil rights during the homophile era; specifically, the homophile movement’s ask for recognition is a primary issue, adopting a concept of a minority that is only reliant on the sexual identity, but not their race.¹¹ She notes furthermore on these matters concerning around political discourses displayed, in her article, Shepard explains, “frameworks rejected minoritarian concepts of sexual identity and couched political appeals within discourses of individual freedom, sexual liberation, anti-fascism, psychological change, and human potential, and personal privacy, to name just a few.”¹²

Antecedent to those discussions, we might pinpoint and attribute anti-gay behavior being magnified due to the scandals created by the media, erupting around the homosexual behavior. Condemnation signifying a sensationalist portrayal enabled the public to react hastily towards lifestyles that didn’t stand to any deviation from the social norms constructed by the American society. Description of uncoordinated rebellion are prevalent amongst feminist or the transgender movements. According to Jack Drescher, the Mattachine society’s intention in upholding the moral societal values, these actions resulted with a condemnation of anyone that is disrupting the status quo in cultural and political sense, especially amongst minorities that were feeling repressed by the State’s persecution.¹³ The perpetuation of morality, the state and

¹⁰ Ibid.

¹¹ Nikita Shepard, “‘The Second Largest Minority’: Analogies Between Race and Sexuality in the American Homophile Movement, 1944-1968” (M.A., United States -- Tennessee, Middle Tennessee State University, 2018), 5. <https://search.proquest.com/docview/2046417890/abstract/8FCEEAB0E13E4E8EPQ/1>.

¹² Ibid.

¹³ Drescher, Jack. “Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual.” *Archives of Sexual Behavior* 39 (April 1, 2010): 441. <https://doi.org/10.1007/s10508-009-9531-5>.

the religious institutions by this organization shows, its conservative nature. The subversive element in addressing the State and its institution is not going to be challenged in the upcoming years by these homophile groups.¹⁴ The Mattachine society is clear in its aggression towards communist or any social values change that will come from protest or dissention. Ronald Bauer in his *Homosexuality and American Psychiatry; The Politics of Diagnosis* is describing the climate of prosecution that is coming from the politicians of the 50s and 60s, Bauer's account of these conservative organizations is poignant, he writes: "While rejecting any affiliation with political movements and parties, the Mattachine Society explicitly declared its commitment to Americanism, avowing a strong anticommunist posture. In the context of the McCarthyite purges of suspected homosexuals, such a stance was hardly surprising from a group that sought to project an image of social conservatism."¹⁵

On the other hand, the gay movement wasn't immune to McCarthy's attack in the halls of Congress. McCarthy's insinuation about communist influences inside the Mattachine movement appeared in the 1953 in the magazine Los Angeles Mirror.¹⁶ The division in the movement's rank created problems inside the organization, while these prosecutions are instigated in the House Un-American Activities Committee (HUAC), people with an anti-communist outlook of things took over and jolted the more pro socialist elements from its ranks, therefore allowing the turning around in an ideological sense.¹⁷ Most notable member being kicked out from the Mattachine Society because of their communist proclivities was Harry Hay- one founder of the Mattachine Society, a staunch Stalinist, having structured this organization in a democratic centralism, Hay at the end is forced to leave the society in 1953.¹⁸

¹⁴ Ibid, 446.

¹⁵ Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis*, Princeton Paperbacks (Princeton, N.J: Princeton University Press, 1987) 71, quoted in Jack Drescher, "The Circle of Liberation," *Journal of Gay & Lesbian Psychotherapy* 4, no. 3-4 (July 6, 2001): 119-31, https://doi.org/10.1300/J236v04n03_09.

¹⁶ Brownworth, Victoria A. "Gay Men, McCarthy and the Mattachine Society." Philadelphia Gay News, June 6, 2019. <https://epgn.com/2019/06/06/gay-men-mccarthy-and-the-mattachine-society/>.

¹⁷ Activities, United States Congress House Committee on Un-American. *Investigation of Communist Activities in the Los Angeles, Calif., Area: Hearings Before the Committee on Un-American Activities, House of Representatives, Eighty-Fourth Congress, First Session ...* U.S. Government Printing Office, 1955.

¹⁸ "(PDF) Communist and Homosexual: The FBI, Harry Hay, and the Secret Side of the Lavender Scare, 1943-1961." Accessed December 7, 2020.

Owing to the change in rank and file inside the Mattachine society, Harry Hay's influence was declining, a sign for the times to come to the infiltration of more 'conservative voices'¹⁹, which weren't challenging the government anymore about the abusive actions inside their working space, the suppressive mechanisms of Congress that prosecuted homosexual just because of political reasons dictated during the Red Scare.²⁰

Deliberating this theme, Simon Hall in his article, *Americanism-Americanism and the Gay Rights Movement* raises a point on how historians have argued on the issue of homosexuality during the Cold War, especially the "integral part "of homophobia that played during the Red Scare²¹ following the expulsion of many homosexuals from the institutions like the Army, related to the national security threat matters being levied at them, politicians and officials were treating homosexuality as a risk palpable to blackmail. Especially these attacks on the employment of homosexuals came from the Undersecretary of State John Purifoy, his revelation about the firings of many of these "sexual perverts" that posed security risks caused a panic that spread in Congress due to the sensitivity of this issue.²² Corresponding on this subject is D'Emilio's writings on the state of gay rights, he writes how the portrayal of homosexuals as: "emotionally unstable, of weak moral fiber, and vulnerable to blackmail, this issues enabled the treatment of homosexuals as a serious threats to the moral and security state of the United States by both politicians and journalists." Particularly McCarthy, he argued about the degeneration of the U.S national leadership, their complacency in addressing homosexuality, in his comments the term "moral degeneracy" was highlighted. McCarthy's

https://www.researchgate.net/publication/263133639_Communist_and_Homosexual_The_FBI_Harry_Hay_and_the_Secret_Side_of_the_Lavender_Scare_1943-1961.

¹⁹ Meeker, Martin. "Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s." *Journal of the History of Sexuality* 10, no. 1 (2001): 79. <https://www.jstor.org/stable/3704790>.

²⁰ Sherry Wolf, *Sexuality and Socialism: History, Politics, and Theory of LGTB Liberation* (Chicago, Ill: Haymarket Books, 2009),65.

²¹ A "Red Scare" is the promotion of a widespread fear of a potential rise of communism or anarchism by a society or state. The name refers to the red flags that the communists use. The term is most often used to refer to two periods in the history of the United States which are referred to by this name.

²² National Archives. "These People Are Frightened to Death," August 15, 2016. <https://www.archives.gov/publications/prologue/2016/summer/lavender.html>.

statements were riddled with paranoia, illustrating a clear picture about the damning situation homosexuals were in America during 1950s.²³

In the United States, LGBTB contemporaries have mythologized the Stonewall movement, thus going contrary to the cases that show previous issues of conflicts on dealing with sexual freedoms.²⁴ Analyzing the struggle for sexual expression has experienced institutional repression by Congress during the McCarthy's years which I have previously mentioned, most notable to reference as the predecessor of the Stonewall movement, it's the aforementioned homophile organization. This is an organization that started after its founding a subject of historical revisionism by contemporary social historians. Due to the homophiles ability to attract publicity in the cultural sphere, their activities were drawing the interest of several local police departments.²⁵ Correspondingly, at the beginning of 1953, the FBI conducted extensive surveillance on gay organizations and their leaders.²⁶ Despite the difference in application of the methods of resisting oppression from authorities, the homophile movement against the internal tension between gay men and lesbians, drew an ample support from politicians and other cultural actors. Many contemporaries took their actions as 'cowardly'; we can determine this in the writings of contemporary authors such as Eric Marcus. He states that their purpose throughout those "troubled times" was to keep a "low profile" in their activism.²⁷ The homophile members were under powerful pressure, nonetheless they

²³ David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: The University of Chicago Press, 2006), 16-17, 18-20, 28-30, 38-39; John D'Emilio, "The Homosexual Menace: The Politics of Sexuality in Cold War America," in Kathy Peiss and Christina Simmons, eds., *Passion and Power: Sexuality in History* (Philadelphia: Temple University Press, 1989), 226-40, 227-28, quoted in SIMON HALL, "Americanism, Un-Americanism, and the Gay Rights Movement," *Journal of American Studies* 47, no. 4 (2013): 1109-30.

²⁴ Armstrong, Elizabeth A., and Suzanna M. Crage. "Movements and Memory: The Making of the Stonewall Myth." *American Sociological Review* 71, no. 5 (2006): 743. <https://www.jstor.org/stable/25472425>.

²⁵ Stewart-Winter, Timothy. "Queer Law and Order: Sex, Criminality, and Policing in the Late Twentieth-Century United States." *Journal of American History* 102 (June 1, 2015): 62. <https://doi.org/10.1093/jahist/jav283>.

²⁶ K. A. Cuordileone, "'Politics in an Age of Anxiety': Cold War Political Culture and the Crisis in American Masculinity, 1949-1960," *The Journal of American History* 87, no. 2 (2000): 536, <https://doi.org/10.2307/2568762>.

²⁷ See more about the homophiles struggles against law and order during the 1950s and 1960s : Weston, Kath. "Get Thee to a Big City: Sexual Imaginary and the Great Gay Migration." *GLQ: A Journal of Lesbian and Gay Studies* 2, no. 3 (June 1, 1995): 253-77. <https://doi.org/10.1215/10642684-2-3-253>.

found an institutional function to combat police oppression.²⁸ Besides the writings of contemporary writers scorning the homophiles, diminishing their imprint in the gay liberation struggle, I will provide many examples on the importance of the homophile organization, however I am also describing their culpability in the polarization of the homosexual rhetoric in the United States in the Civil Rights Era.

Reflecting on the homophile movement that predated the Stonewall riots, we are taking into account the eroding of conventional centers²⁹ of influence during the 1970s in which according to D'Emilio is the result of: "... The shifts that occurred in the decade were because of the weakening of traditional centers of power, which were eroded by the protest movements in the 1960s, but also the relative ease in which gay liberationists accumulated victories can only be explained by the persistent, plodding work of the activists who preceded them."³⁰ The misinterpretation concerning the case of the Stonewall riots birth and prominence, in relations to the of LGBT movement, was promulgated by a committed group with its generational outrage where they proclaimed a falsehood of a "historical scheme". These conflicts in the storytelling about the activists that preceded Stonewall is being addressed by Tomas Piontek in his book *Queering: Gay and Lesbian studies*.³¹ Piontek concluded there are qualitative contrasts between the two groups, for example the actions on the homophiles were categorized as a straightforward act, indeed in their activism they have found a substitution for the perceived police brutality that negates their work, although they were asymmetric to an extended community organizing itself.

Clarifying the Stonewall assumptions on several processes which linked a divergent organization engaged in previous human rights alliances between liberal organizations; the emphasis of conceptions about developed social attempts to evaporate the pecking order of the

²⁸ Eric Marcus and Eric Marcus, *Making Gay History: The Half-Century Fight for Lesbian and Gay Equal Rights*, 1st ed (New York: Perennial, 2002),87.

²⁹ Stewart-Winter, "Queer Law and Order," 64.

³⁰ John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (Chicago: University of Chicago Press, 1983),240.

³¹ Thomas Piontek, *Queering Gay and Lesbian Studies* (Urbana: University of Illinois Press, 2006),132.

60s and 70s, it negates events in the early decade like those in New York or San Francisco.³² That New Year's ball raid in 1965 confirmed the homophile groups' demands towards continuing their battle for proper assembly, provided by the pervasive raids from authorities.³³ Conflicts that set this homophile movement as a predecessor, as reference to Stonewall, their activism has set up the following sexual revolution, with focus especially on issues which resulted from subjugation perpetuated by the law enforcement agencies, particularly cultural/social spots like bars where social life conducted by the LGTB members; more or less the homophiles felt aggravated in their rights by the perpetual incursions from the law prosecution.³⁴ Confronting the State was the ultimate matter in the development of a rhetoric that depicted a noble struggle by the homophiles to purge themselves of the failed approach of being detained and harassed while planning any communal endeavor.³⁵

A central characteristic of the 1960s organization are the direct-action forms of protest which were utilized successfully by the Civil Rights Era activists, an example of this activity is the 1965 meeting of the New York Mattachine.³⁶ Their president urged his members to "approach militantly", deliberating a report published by the Mattachine Newsletter which proclaimed on how the direct-action protest 'a potent means both of reaching the public and effecting a social change'.³⁷ As of 1970 the Civil Rights continued to influence the thinking and development of a strategy in order to affect change in regards to treatment by police authorities. Many of the activists active in the 1960s, were influential in the creation of patterns of protest that came about a decade later in form of the New Left. Just to name of few activists like John O'Brien, Jim Fouratt and Martha Shelley- they proved instrumental in the creation of

³² Christina B. Hanhardt, *Safe Space: Gay Neighborhood History and the Politics of Violence*, Perverse Modernities (Durham: Duke University Press, 2013):39.

³³ Armstrong and Crage, "Movements and Memory," 724–51.

³⁴ Ibid.

³⁵ Hanhardt, *Safe Space*, 86.

³⁶ Ramom de Souza Torrecilha, "The Mobilization of the Gay Liberation Movement," *Dissertations and Theses*, January 1, 1986, 135 <https://doi.org/10.15760/etd.5545>.

³⁷ Ibid, 128.

the Gay Liberation Front, an organization that will be heavily discussed in the following paragraphs.³⁸

The 1960s are notable for the adoption of tactics by the homophile organizations to soften the blow of the institutional oppression by embracing the gay rights movement.³⁹ The Mattachine Midwest organization wing during their meeting on July 1965, for example, attempted to link the fight of the gay liberal movement to Revolutionary struggle.⁴⁰ This attempt of application of patriotism in order for the American institutions to notice their struggle, their difficulties are considered sensible by the Mattachine Midwest group's president Robert Sloane, who connected - the struggle for gay rights with the Revolutionary struggle for liberty and Abraham Lincoln's appeal at Gettysburg.⁴¹ During the demonstration in Philadelphia- the East Coast Homophile Organization stressed about their visibility in society, in order to pressure the Federal government to implement the Bill of Rights.⁴² The homosexuals demanded comparable treatment to other citizens privileged with rights, this was an essential factor in making an immense reversal in public opinion. The protest against the closing out bars went directly according to the gay organizations, against their fundamental rights like "pursuit of happiness" along with the right of a free assembly.⁴³

³⁸ Dudley Clendinen and Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* (New York 1999), 36-7, 41; D'Emilio, 'After Stonewall', op. cit., 242; Stein, *City of Sisterly & Brotherly Loves*, op. cit., 316, quoted in Simon Hall, "Protest Movements in the 1970s: The Long 1960s," *Journal of Contemporary History* 43, no. 4 (2008): 661.

³⁹ See more on the radicalization process of the Mattachine movement: James Darsey, "Escalation of Agitative Rhetoric: A Case Study of Mattachine Midwest, 1967-1970.," n.d., 25.

⁴⁰ St Sukie de la Croix, *Chicago Whispers: A History of LGBT Chicago before Stonewall* (University of Wisconsin Pres, 2012): 257.

⁴¹ SIMON HALL, "The American Gay Rights Movement and Patriotic Protest," *Journal of the History of Sexuality* 19, no. 3 (2010): 541, <https://www.jstor.org/stable/40986338>.

⁴² Armstrong and Crago, "Movements and Memory.": 736, <https://www.jstor.org/stable/25472425>.

⁴³ 'Introductory Address, as given by Mattachine Midwest, President Robert Sloane, at the First open meeting of Mattachine Midwest, July, 1965', pp. 1-2, in MSNY, Series 3, Gay Organizations, Box 7, folder 21 'Midwest Mattachine, 1965-1972' reel 17, MSNY Records; ECHO, 'Announcement', in MSNY, Series 2, Topical File, Box 3, folder 21 'Demonstrations 1965-1966', reel 9, MSNY Records, quoted in Hall, "Protest Movements in the 1970s.," 665.

1.1 The influential role of the homophile movement in United States during the Gay liberation struggle

In line with the previous discussion of 1960s movement, there are certain conclusions to be made in regard to homophile movement in the Gay liberation struggle. Appraising the homophiles presence during the 1960s, we may deliberate that on how their uniformity was inconsequential and unorganized, because it varied within every organization, mostly due to a particular intellectual agenda.⁴⁴ The tentative character of these homophile groups, such as the Mattachine society, formed as a gay support group, them being traditional and non-antagonistic, their status quo approach in policy strategy affected by the deterioration of its organizational stance; by the more radical-wing of homophile activist. Because of their generational distinction in the activist movement, they viewed their passivity as poignant, those emotions birthed radicalization midst the additional progressive LGBT members. As pointed out by the historian Michael Sibalis, "The homophile movement—which disliked the word "homosexual" for stressing sex rather than love—was mostly middle class, conformist, politically and socially conservative."⁴⁵

However, the division between homophile organizations over actions and preferences was the most visible between the female and male homosexual circles. The DOB's formation in 1955, as serious civil and political activist group, it provided support to women that were feeling scared to come out, primarily through the work of their publication magazine Ladder. This magazine was the primary vehicle for addressing the issues compared to the hetero-normative oriented members of the homophile movement.⁴⁶ Ladder was a magazine famous for encouraging women to "get out", causing an integrationist stance towards other LGBT

⁴⁴ Wolf, *Sexuality and Socialism*, 118.

⁴⁵ Sibalis, Michael, 2005. *Gay Liberation Comes to France: The Front Homosexuel d'Action Révolutionnaire (FHAR)*, French History and Civilization. Papers from the George Rudé Seminar. Volume 1, 267.

⁴⁶ Del Martin and Phyllis Lyon, "Daughters of Bilitis and the Ladder That Teetered," *Journal of Lesbian Studies* 5, no. 3 (November 8, 2001): 113–18, https://doi.org/10.1300/J155v05n03_13.

groups.⁴⁷ The organization of the Daughter of Bilitis⁴⁸ focus was on the desires of the middle-class homosexuals, generating a class split between the working-class women by the qualitative differences these two groups possess; even still there were attempts of uniting the fragmented factions, to erect broader support.⁴⁹ The point of mentioning their emergence, it is to stress the DOB's accentuation to lesbians' point of view in opposition to the conventional family values-oriented culture pervasive during the 1950s and 1960s in the United States. The tackling of the State's repression produced a negative image around the lesbian movement by confronting their commitment presented with the questioning of them of image and portrayal, mainly of their lifestyle choices. The patriarchal institutions insisted with stigmatization of the lesbian voices along with the chastisement concerning their responsibilities. They were describing the lesbian movement as being the 'oppressor' themselves, by signifying a fault within their own rhetoric, the lesbians became a target, they were confronted by allowing to be solicited in regards to their own actions.⁵⁰ Del Martin criticized these attacks in his editorial titled "It's time for a Change", who pointed out the disparities in their criticism, relaying in his editorial the "isolation" of these pointed attacks, enabling the blame to shift towards the oppressed.⁵¹

The ostentatiousness of the male members of the homophiles, their discriminatory tendencies through expression of masculinity in slurring the more effeminate members caused infighting within the organizational structure. The curious case of the homophile movement concerning its usage of the slur "swish" as a pejorative term which permeated the case in relations to the gay members not being accepted in the American society.⁵² Homophile leaders

⁴⁷ Elyse Vigiletti, "Normalizing the 'Variant' in The Ladder, America's Second Lesbian Magazine, 1956–1963," *Frontiers: A Journal of Women Studies* 36, no. 2 (2015): 47–71, <https://doi.org/10.5250/fronjwomestud.36.2.0047>.

⁴⁸ The organization, formed in San Francisco in 1955, was conceived as a social alternative to lesbian bars, which were subject to raids and police harassment.

⁴⁹ Kristin G. Esterberg, "From Accommodation to Liberation: A Social Movement Analysis of Lesbians in the Homophile Movement," *Gender & Society* 8, no. 3 (September 1, 1994): 424–43, <https://doi.org/10.1177/089124394008003008>.: 424-43.

⁵⁰ Elizabeth A. Smith, "Butches, Femmes, and Feminists: The Politics of Lesbian Sexuality," *NWSA Journal* 1, no. 3 (1989): 421, <https://www.jstor.org/stable/4315922>.

⁵¹ Martin, Del, (1963). *It's time for a Change*, Ladder 74:4-5,22-24.

⁵² Alisha West, "Exploring the Missing Pieces: Readers, Religion and Societal Relations in ONE Magazine, 1954-1963." (University of Louisville, 2013),54, <https://doi.org/10.18297/etd/1551>.

kept looking at solutions in which they can ease the tensions between groups One, Inc and the Daughters of Bilitis on the manner of creation a homosexual “Bill of Rights”⁵³, the underlying tension was regarding the passing of an adequate document to confer their demands.⁵⁴ The DOB reluctance in accepting these documents created a rift between the movements, the homophile leaders’ intention in trying to organize a coalition between the homophile groups, put the DOB participation in question, those efforts proved futile in creation of a platform, consigning the movement in destitute.⁵⁵

The DOB’s criticism concerning the lesbian culture created a separation from the established core of the progressive lesbian movement. Along with their apparent belittlement of the bar culture as the location where lesbian identity was being established, especially during social networking between lesbian members.⁵⁶ This criticism of the “bar culture”⁵⁷ echoed by the DOB’s president Jaye Bell in 1961, writing these words considering her point of view towards the lesbian culture, her statements come in negligent fashion, in regards to the bar culture: “Have their place, yes, but only the people with real strength can fight their way out of the example they see there that reeks of defiance, disillusionment, and despair. The defiance, disillusionment along with despair, we all know, lie there under the mask of ‘gaiety’ which [patrons] of the bars put on!”⁵⁸

⁵³ R. E. L. Masters, *The Homosexual Revolution - a Challenging Exposé of the Social and Political Directions of a Minority Group* (The Julian Press Inc., 1962):116-117

⁵⁴ Blog editor October 8, 2015October 8, and 2015, “Off the Shelf #7: In the Olden Days: Gay Marriage and the Homophile Movement,” *Rainbow Round Table Book and Media Reviews* (blog), accessed December 7, 2020, <https://www.glbtrt.ala.org/reviews/off-the-shelf-7-in-the-olden-days-gay-marriage-and-the-homophile-movement/>.

⁵⁵ C. Todd White, “Homophile Movement,” in *The International Encyclopedia of Human Sexuality*, ed. Anne Bolin and Patricia Whelehan (Oxford, UK: John Wiley & Sons, Ltd, 2015), 501–81, <https://doi.org/10.1002/9781118896877.wbiehs213>.

⁵⁶ Elizabeth Diane Greer, “‘There Was Something Grotesque’: The Application and Limits of Respectability in the Daughters of Bilitis,” n.d., 3-4.

⁵⁷ *Ibid*, 32.

⁵⁸ Jaye Bell, “DOB Anniversary Message from the President,” *Ladder*, October 1961, pp. 4-9; “The Dare of the Future: An Appraisal of the Homophile Movement,” *Ladder*, May 1962, pp. 4-10; “The Philosophy of DOB: The Evolution of an Idea,” *Ladder*, June 1962, pp. 4-8, quoted in John D’Emilio, *Sexual Politics, Sexual Communities: Second Edition* (University of Chicago Press, 1998),186.

One notable difference, that is noteworthy to examine from another perspective of the LGBT struggle in the face of resistance from the institutional discrimination is the case of Jose Sarria, in relation to the situation revolving around the “Black Cat” bar.⁵⁹ Sarria’s drag portrayal is a prime example of a designed theatrical protest that intended to affect the broader population in regards to issues of employment concerning the participation drag queens within the larger bar social sphere.⁶⁰ The San Francisco native, coming from a town considered progressive during that time, prompted a larger outlook of the damning positions of the employability besides servitude from queer people, relating to the issues of serving drinks. Alcohol license as a topic regarding patrons was a showcase of a stringent discussion on many topics concerning: political, sexual or economic subjects as predicated to gay people.⁶¹

The controversy surrounding the young activist’s opposition to the ban of “serving alcohol”, their persistence through protest, demanded an address by the State’s persecution throughout discriminatory laws during the middle of the 1960s. Even though the State didn’t prevent the serving of alcohol for LGBT members, there was a clear contempt from the establishment. Inspired by the civil rights movement, young radical activists took part in “sip-in” at a bar named “Julius” on the 21th April.⁶² Their intention was to provoke action, that latter one considered successful. In New Jersey, the Mattachine society decided to sue bars that refused service to gay people. In 1967, the state’s Supreme Court ruled that “well-behaved homosexuals” could not be denied service. “In our culture, homosexuals are indeed unfortunates,” the ruling added. But “their status does not make them criminals or outlaws.”⁶³

⁵⁹ “Guest Opinion: Jose Sarria’s History Is Important,” *The Bay Area Reporter / B.A.R. Inc.*, accessed December 7, 2020, <https://www.ebar.com/news/news//278715>.

⁶⁰ Claire Potter, “A Queer Public Sphere: Urban History’s Sexual Landscape,” *Journal of Urban History* 40, no. 4 (July 1, 2014): 817-818, <https://doi.org/10.1177/0096144214527051>.

⁶¹ “How Liquor Licenses Sparked the Stonewall Riots,” *Reason.Com* (blog), June 28, 2015, <https://reason.com/2015/06/28/how-liquor-licenses-sparked-stonewall/>.

⁶² Kyle Morgan and Meg Rodriguez, *The American LGBTQ Rights Movement: An Introduction*, 2020, 30. <https://digitalcommons.humboldt.edu/cgi/viewcontent.cgi?article=1006&context=textbooks>.

⁶³ Jim Farber, “Before the Stonewall Uprising, There Was the ‘Sip-In’ (Published 2016),” *The New York Times*, April 20, 2016, sec. New York, <https://www.nytimes.com/2016/04/21/nyregion/before-the-stonewall-riots-there-was-the-sip-in.html>.

Illustrating the case of application of punitive laws that endangered the livelihood of gay people during the Civil Rights era, the case of Jose Sarria's is notable, her prestige in the homophile movement is more of a somber reminder as the preliminary, "drag queen" who ran for political office in the 1960s; but more importantly her fight against the anti-sodomy laws that forbid her to go about her work. Furthermore, Sarria has precipitated all across the social venues, spots where she met with other activists, places celebrated as symbols to queer culture. Albeit her activism didn't provoke as powerful outrage as the protests throughout the Stonewall riots.⁶⁴

Meanwhile, under intensifying pressure from gay movement groups, a few local partners were running ahead for a governmental post. Prodded by the Washington Mattachine Society, the ACLU office in the nation's capital aggressively defended the rights of homosexuals.⁶⁵ In dialogue with homophile activists, ACLU affiliates in southern California, Philadelphia, and New York also drove forward on gay issues.⁶⁶ Other than the police harassment exhibited by authorities in relations concerning the socializing nature between the homosexuals, the conservative actions of the homophile members, like the Mattachine society, garnered attention throughout the 1960s, by applying institutional methods in addressing the plight of the LGBT movement.⁶⁷

The radical members nullified the more established methods that were pervasive, the disposition of radicalism was spreading, the uncompromising activists fighting the moral, societal and psychological indignation of the responsible authorities.⁶⁸ With the establishment of the loose federation of homophile organizations in Kansas in the early 1966, deemed the

⁶⁴ Elyssa Goodman, "This Drag Queen Was The First Openly Gay American To Run For Office," them., accessed August 20, 2020, <https://www.them.us/story/jose-sarria-drag-queen-history>

⁶⁵ "For Love and For Life, LGBTQ People Are Not Going Back," American Civil Liberties Union, accessed December 8, 2020, <https://www.aclu.org/issues/lgbt-rights/love-and-life-lgbtq-people-are-not-going-back>.

⁶⁶ D'Emilio, *Sexual Politics, Sexual Communities*, 212.

⁶⁷ Meeker, Martin. "Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s." *Journal of the History of Sexuality* 10, no. 1 (2001): 78-116. [doi:10.1353/sex.2001.0015](https://doi.org/10.1353/sex.2001.0015).

⁶⁸ Marc Stein, *Rethinking the Gay and Lesbian Movement*, 1st edition (New York, NY: Routledge, 2012), 67.

North American Conference of Homophile organizations.⁶⁹ This political formation allowed the radicalization in its methods by protesting, but also stirring the usual harassment that was coming from the police in the public places. Moreover, it allowed the homosexual persons to unleash public protest unseen most times in all places around the country.⁷⁰

1.2 Supreme Court's adoption of heteronormativity⁷¹

More prominently, it is worth mentioning that until 1965, United States, state, local and federal authorities policed sex and gender in many ways in relation to applying a heteronormative standard. The State policed through laws on: indecency, obscenity, sexual psychopathy and sexual transmitted diseases. Regarding the ruling in *Griswold*, *Fanny Hill*, *Loving*, *Eisenstadt*, *Roe*, the special rights and privileges of the hetero-normative social life created an unequal ground for gay people, who didn't enjoy their constitutional rights.⁷² The inconsistencies of the Supreme court's ruling regarding sexual freedom are the opposite to the Court's already made rulings on the matter of married sex or privacy in the bedroom. The inconsistent rulings created a hierarchy of social formations in: gender, class and race structures.⁷³

The case of the gay magazine "Drum" a radical publication edited by Clark Polak, the president of the Janus society, it's another radicalizing subject which affected profoundly for the exposure of the homosexual viewpoint, which was contrastingly different from the other organizations such as the Mattachine Society. The project of this publication was radical, the Drum in addition to spreading the ideological point of sexual liberation, functioned as a contrast

⁶⁹ Ibid.

⁷⁰ Nicholas C. Edsall, *Toward Stonewall: Homosexuality and Society in the Modern Western World* (Charlottesville: University of Virginia Press, 2003),345.

⁷¹ Unlike homophobia, "heteronormativity" does not necessarily imply hatred or even antipathy towards gays and lesbians. Yet it is based on the universal ideology privileging biologically determined gender roles and heterosexuality. Heteronormative discursive practices organize such identity categories into hierarchical binaries. Through these practices, LGBT lives often remain marginalized in political and employment settings and can be invisible within social spaces such as schools.

⁷² Marc Stein, *Sexual Injustice: Supreme Court Decisions from Griswold to Roe* (Chapel Hill: University of North Carolina Press, 2010):45.

⁷³ Stein, *Sexual Injustice*,28.

to the other homophile organizations.⁷⁴ Because other Homophile organizations concentrated in subjecting themselves to the normative narratives of the conventional society. As mentioned initially, the conservative nature of the old homophile organizations, their purpose was in conveying a message about tolerance just to maintain the status quo, the Mattachine society wasn't arousing the interest of many radicals in the LGBT movement, that is the reason why homophile organizations such as the Mattachines lost their popularity. On the other hand, he Drum publication, which started publishing in 1964 on a monthly basis, their provocative content centered the attention of the public but also surpassed the popularity of other homophile magazines like the ONE or the Ladder.⁷⁵

On the issue of the Supreme Court's ruling with the permittance of the publishing of more sexually explicit material, tolerating the sensibilities of the greater public in the compliance with the contemporary stature, the case *Roth v. United States* (1957), the Court replaced the Hicklin rule emphasis on the vulnerable viewer with a new test: whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."⁷⁶ This new standard used by the Court to justify greater tolerance of LGBT publications in two important cases: *One, Inc. v. Oleson* (1958), which overturned the Los Angeles postmaster's decision to exclude a homophile magazine from the mails, in addition *Manual Enterprises, Inc. v. Day* (1962).⁷⁷ The legal press of LGBT issues following the annulation of the Court's decision to publish materials, allowed the production of materials to continue, besides the legal threats later in the Stonewall years.

One, Inc v. Oleson is a primary case of an explicit judgement by the Supreme Court on the grounds of upstaging the first amendment and freedom of expression. This decision by the

⁷⁴ Marc Stein, *City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972* (Philadelphia: Temple University Press, 2004).

⁷⁵ "Queer Sex in the Archives: "Canonizing Homophile Sexual Respectability"," NOTCHES (blog), October 23, 2014, <http://notchesblog.com/2014/10/23/queer-sex-in-the-archives-canonizing-homophile-sexual-respectability/>.

⁷⁶ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446, 1973 U.S. LEXIS 19.

⁷⁷ Marc Stein, ed., *Encyclopedia of Lesbian, Gay, Bisexual, and Transgender History in America* (New York, NY: Charles Scribner's Sons/Thomson/Gale, 2004),249.

Court, provided the authorizing of publication of homosexual materials in the public.⁷⁸ ONE bringing the case against the Postal Service in their disallowing of delivering of sexual materials, is one of the most notable instances of their legal suit being struck in lower court's, in eventuality after an appeal the decision being unturned by the Supreme Court.⁷⁹ This decision by the Supreme Court indeed propelled the freedom of expression by homosexual in the public press.⁸⁰ However, the ONE direction in publication of their material contributed to the commercial benefits in constructing a consumer identity on the backs of the gay movement.⁸¹ The critical decision on the part of the Courts in upholding gay rights against the obscenity charges, provided an impetus in the Homophile efforts in promoting the rights of the homosexual as a positive shaped identity. Alongside the judgement on other cases similar like *MANuel Enterprises v. Day*⁸², the decisions upheld by the highest court in the United States, indeed proved outlandish and inconsistent, primarily on one hand they allowed the promotion on gay rights, on the opposite side they were suppressing the free expression of sexuality articulated by the gay movements.⁸³

The case of the Clive Michael Boutillier⁸⁴, it is an interesting situation of a decision by the Supreme Court's decision on multiple issues revolving around homosexuality. Boutillier, who was born in Canada, then emigrated in United States in 1955; by means of a young person, was involved sexually with both women and men. The issue in regards to the Boutillier's Supreme Court's decision is a fascinating event in queer history, since it comprises rulings on issues such as: sodomy laws, immigration and naturalization. In 1963, when Boutillier applied

⁷⁸ *One, Incorporated, a Corporation v. Otto K. Olesen*, Individually and as Postmaster of the City of Los Angeles, 241 F.2d 772 (9th Cir. 1957).

⁷⁹ "Free Speech and Minority Rights: The One, Inc. v. Olesen Case," Cato Institute, November 24, 2014, <https://www.cato.org/events/free-speech-minority-rights-one-inc-v-olesen-case>.

⁸⁰ Gregory Briker, "THE RIGHT TO BE HEARD: ONE Magazine, Obscenity Law, and the Battle Over Homosexual Speech" 31 (n.d.): 82.

⁸¹ William B Turner, "The National Masturbators' Task Force; or, the Importance of LGBT Political Organizing for Evaluating LGBT Equal Protection Claims in Competition with Free Exercise of Religion Claims" 25 (n.d.): 74.

⁸² *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639, 1962 U.S. LEXIS 2163.

⁸³ Stephen M. Engel, *Fragmented Citizens: The Changing Landscape of Gay and Lesbian Lives* (NYU Press, 2019), 119.

⁸⁴ *Boutillier v. INS*, 387 U.S. 118, 87 S. Ct. 1563, 18 L. Ed. 2d 661, 1967 U.S. LEXIS 1400.

for U.S. citizenship, he revealed to the Immigration and Naturalization Service (INS) that he had been arrested on a sodomy charge in New York City in 1959. Questioned by the INS⁸⁵ in 1964, Boutilier revealed particulars concerning his sexual history, comprised same-sex and cross-sex activities, about three or four times a year, before and after he entered the United States.⁸⁶ Boutilier shared a room with a homosexual partner, he had psychiatric examination that resulted in his classification as 4-F by the Selective Service. In spite of everything, he was being charged for having an oral and anal unlawful sex. However, it was “dismissed after the complaining party failed to appear in the courts.”⁸⁷

According to the INS, Boutilier is designated as a “psychopathic personality”, his application is rejected because of this examination, due to Congress statute from 1952 allowing the INS in deportation of an illegal alien associated with acts of perversion. The 1952 Immigration and Nationality Act⁸⁸ propelled in addressing the homosexual aliens to deportation under the guise of Congress’s order- through executive power.⁸⁹ Concerning Boutilier, the problematic case is affected to being designated as a criminal due to his offenses prior in receiving unlawful sex due to his prior charges not being pressed.⁹⁰ Although he wasn’t convicted, due to failure of prosecution as I have mentioned previously, Boutilier’s legal situation was complicated due to other anterior complications. More importantly, Boutilier’s status as an immigrant, a significant issue that raised in his case about the possibility of deportation, if convicted it might end up separating him from his family that moved prior in

⁸⁵ The United States Immigration and Naturalization Service was an agency of the U.S. Department of Labor from 1933 to 1940 and the U.S. Department of Justice from 1940 to 2003.

⁸⁶ “Introduction · Marc Stein: Boutilier v. Immigration and Naturalization Service (1967) · OutHistory: It’s About Time,” accessed October 3, 2020, <http://outhistory.org/exhibits/show/boutilier/intro>.

⁸⁷ Arthur S. Leonard, *Sexuality and the Law: American Law and Society* (Routledge, 2013),643.

⁸⁸ " The 1952 Immigration and Nationality Act, often referred to as the McCarran-Walter Act, revised the third category to exclude aliens "afflicted with psychopathic personality." This change reflected the rise of psychological models that de-emphasized or rejected "constitutional" (biological, hereditarian, and/or congenital) explanations of sexual deviance.

⁸⁹ See more on the 1952 Immigration and Nationality Act: Marc Stein, “Boutilier and the U.S. Supreme Court’s Sexual Revolution,” *Law and History Review* 23, no. 3 (2005): 491–536.

⁹⁰ “Queering Immigration in the Age of Trump: A Roundtable on Boutilier v. INS,” *NOTCHES* (blog), May 22, 2017, <https://notchesblog.com/2017/05/22/queering-immigration-in-the-age-of-trump-a-roundtable-on-boutilier-v-ins/>.

the United States.⁹¹ However, even though his father was an American citizen, that remaining fact didn't matter to the courts, along with the eventual separation from his partner Eugene O'Rourke. The Boutillier defense strategy was conducted by defense attorneys Robert Brown and Blanch Freedman- defense lawyers distinguished advocated for the rights of immigrants in their profession due to their work for the Committee for Protection of Foreign Born (ACFPB). Brown and Freedman decided as a part of their defense strategy to send Boutillier to a psychiatric checkup, the diagnosis of doctor Edward Falsey declared him not a psychotic. Moreover, the examination of Dr. Montague Ultman also declared him not a "psychopath", those two professional opinions weren't enough to deem him transferable to Canada by the Circuit Court of appeals, who voted 2-1 in, the majority of opinion was written by Judge Irving Kaufman.⁹²

Nevertheless, it is noteworthy that in this case about the involvement of Judge Kaufman and his connection in the Red and Lavender scares during the 1950s. Kaufman was famed for his anticommunist disposition, more importantly it was Kaufman that convicted the alleged communist spies Julius and Ethel Rosenberg for the act of espionage.⁹³ Consequently, from Kaufman's rulings on multiple cases, we can state that his ideology was: anti-gay, anticommunist and anti-immigrant, therefore factual to his beliefs, it did allow him to be the main judge presiding in the case of Boutillier.⁹⁴ The lawyers in defense of Boutillier, in opposition to Kaufman's record on homophobia was Blach Freedman, a legal guardian of the rights of aliens, leftists. Hence, it's important not just to mention about the mutual relations between Kaufman and Freedman, but also about Freedman's partner Gloria Angrin, the same lawyer who assisted in the defense of the Rosenberg's in the 1950s.⁹⁵ Expanding on the Boutillier defense, they argued because of the scientific and legal constructs being broken on

⁹¹ Jason Pierceson, *LGBTQ Americans in the U.S. Political System: An Encyclopedia of Activists, Voters, Candidates, and Officeholders [2 Volumes]* (ABC-CLIO, 2019),89.

⁹² "Introduction · Marc Stein: Boutillier v. Immigration and Naturalization Service (1967) · OutHistory: It's About Time."

⁹³Kenneth C Petress, "A Judicial Decision Under Pressure: A Dramaturgical Analysis of the Rosenberg Case.," n.d., 129.

⁹⁴ Ibid,152.

⁹⁵ Marc Stein, "Boutillier and the U.S. Supreme Court's Sexual Revolution," *Law and History Review* 23, no. 3 (2005): 510, <https://www.jstor.org/stable/30042897>.

the issue of homosexuality in the 1950s and the late 1960s, therefore there were referring to the scientific judgement to determine the prerequisite order of events, in correlation to the deportation order by the immigration authorities.⁹⁶ Boutillier's lawyers were implying on unconstitutional nature of the law, the vagueness of its language exhibited by Congress.⁹⁷ The interpretation of the laws by the lower Courts did not allow any proper protection of Boutillier's rights, functionally in exposing Congress's mandate in exclusion of homosexuals without any allowance for modification of Boutillier's behavior.⁹⁸ Essentially, in allowing the appellate Court's during the course Kaufman opinion, the judge did put in question the sexual identity of defendant, by admonishing his behavior. The Appellate Court's⁹⁹ decision exhibited an uncordial language in the usage of homophobic jargons. This legal opinion, in turn provided by Kaufman is retained by the other panel of judges, his opinion is used in turn to undermine their propositions in the executing judgments on issues concerning sexuality.¹⁰⁰

The Second Circuit court judges expressing their opinions on the Boutillier case decided to use the evidence provided by the government concerning his former homosexual acts. The portrayal of those homosexual interaction by Boutillier with multiple men. His mentioning to the judge panel that he had anal sex multiple times while living in New York, allowing the display of an argument on how his actions are part of the lifestyle choices. The biased perspective of the panel of judges were their inability to allow any deviation or perversion from homosexuals, especially illegal immigrants arriving to the United States. Margot Canaday states in his book *The Straight State: Sexuality and Citizenship in Twentieth-Century America* on how institutions can decide on psychotic personality this provision, federal immigration officials or courts can utilize the clause to address any conviction or public misdemeanor in order to deport an alien deemed homosexual. The vagueness of this attribute, according to Canaday, clearly demonstrates how the federal government can misuse this power over the

⁹⁶ Suman Chakraborty, "Sexual politics and the alien invert: Boutillier vs INS," *Georgetown Law*, (2000):5.

⁹⁷ *Ibid*,6.

⁹⁸ *Ibid*,7.

⁹⁹ *Clive Michael Boutillier v. The Immigration and Naturalization Service*, 363 F.2d 488 (2d Cir. 1966).

¹⁰⁰ Marc Stein, "Boutillier and the U.S. Supreme Court's Sexual Revolution," *Law and History Review* 23, no. 3 (2005): 491–536.

treatment of homosexuals that are considered for deportation by its institutions. Besides the arguments used against Boutilier were the diagnosis of him being a “psychotic personality” deeming his mental status an unreliable, with no avail effort to his legal defenses presenting him as a model citizen, its main point of contraction is the dehumanization through enforcing homophobic legislation.¹⁰¹

Canaday analysis on the Boutilier case clearly allows an open placement of the contradiction between sexual identity as a status in society, the sheer federal suppression of human rights of the citizenship, but more importantly the categorization of homosexual men in their private lives.¹⁰² Somewhat the inscription into law for the heteronormative dualism distinction in society between a man and a woman provided a vague terminology for the justices of the Supreme Courts not to allow progress on the issue of homosexuality.¹⁰³ Subsequently, the Supreme Court’s prescribing an equivalence between psychopathy and homosexuality to Boutilier’s status, his position not as an alien or an immigrant, but an unrecognizable entity therefore a homosexual was the reason he was not permitted entry to United States.¹⁰⁴ The Supreme Court’s decision following these states of affairs decided against annulation of any psychiatric or medical explication that proved false in denouncing homosexuality as an illness.¹⁰⁵ As Canaday points out this in his by book: by its assignment of a legal rather than a medical valence to psychopathic personality cases, the Supreme Court thus made “the word of the bureaucrat supreme,” regardless of what any given doctor might say about who a homosexual was. Consequently, the role of the psychiatric body is interjected along with the immigrant officials, however the federal authorities’ refusal to disintegrate the

¹⁰¹ Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America*, Politics and Society in Twentieth-Century America (Princeton, N.J: Princeton University Press, 2009),232.

¹⁰² José A. de la Garza Valenzuela, “Queer in a Legal Sense: Negation and Negotiation of Citizenship in Boutilier v. Immigration and Naturalization Service and Arturo Islas’s The Rain God,” *Latino Studies* 17, no. 2 (June 2019): 189, <https://doi.org/10.1057/s41276-019-00173-3>.

¹⁰³ Marc Stein, “All the Immigrants Are Straight, All the Homosexuals Are Citizens, But Some of Us Are Queer Aliens: Genealogies of Legal Strategy in Boutilier v. INS,” *Journal of American Ethnic History* 29, no. 4 (2010): 62, <https://doi.org/10.5406/jamerethnhist.29.4.0045>.

¹⁰⁴ Margot Canaday, “‘Who Is a Homosexual?’: The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law,” *Law & Social Inquiry* 28, no. 2 (2003): 362, <https://www.jstor.org/stable/1215774>.

¹⁰⁵ Ibid,372.

difference between identity and sexual acts proves the simplification of the federal institutions approach along with behavior schematics in shaping legislature.¹⁰⁶

The decriminalization of sodomy laws and the enactment of anti-discrimination laws in the 1970s led to creation of a movement that paved a way for a marriage equality struggle along with the conception of more toleration of the gender fluid identities and sexual orientation of the LGBT members; the push for gender equality during the Stonewall era provided the push for expression of sexual identity in various ways to appear.¹⁰⁷ According to Edsall, “The passage of the Sexual Offenses Act in England in the summer of 1967 and the Stonewall riots in New York in the summer of 1969 were the two most important events, symbolically and in fact, leading up to the late-twentieth-century gay rights movement”.¹⁰⁸

This group of marginalized and oppressed individuals amounted to most diverse groups of people, the Stonewall riots didn’t change things particularly in a sizable sense of the way, but systematically over time the importance of this rebellion, on the basis over the treatment of LGBT members by political institutions, somewhat this practice peaked in the following decade. This historical event, speaking about substantive progress, demanded time and effort for the acknowledgement of queer, in order for these to penetrate beyond the urbanized space into the more affluent suburban spaces.¹⁰⁹ There are still contentious deficiencies that predicated the Stonewall and the pre-Stonewall movement as far as inclusion come to the lesbian and women's movement, within those spheres there is a separation on: class, sex and gender when focusing on these issues. The separation of women, but also the separation of black women from the feminist movement was a defining problem that keeps the LGBT organizations at arms’ length until the 1980s. The dismissal of “white people’s issues”, black

¹⁰⁶ Canaday, *The Straight State*, 259-260.

¹⁰⁷ Ibid,177.

¹⁰⁸Nicholas C. Edsall, *Toward Stonewall: Homosexuality and Society in the Modern Western World* (Charlottesville: University of Virginia Press, 2003),334.

¹⁰⁹ Marie Cartier, *Baby, You Are My Religion: Women, Gay Bars, and Theology before Stonewall*, Gender, Theology & Spirituality (Durham: Acumen, 2013),9.

female leaders focused more on the black issues, even though members didn't find any acceptance there, as far as being an active factor in creation of organizational tactics.¹¹⁰

These conceptions are close to a view of the state widespread in the early gay liberation movement, which likewise broke with a liberal politics of law reform in favor of mass mobilization and confrontation.¹¹¹ Gay men in particular faced the state as direct oppressor, because their own sexuality was criminalized. Police homophobia has been an important issue; it is significant that the gay liberation movement was triggered by a confrontation between gay men dressed as women and the police of New York, so-called "Stonewall riot" of 1969 were aptly named after the bar the police raided.¹¹² Lesbians have experienced the state as oppressor in the courts (for example, in custody battles), in the exclusion of lesbian experience from education, and through experiences shared with heterosexual women. Gay and lesbian writers have not, however, produced much formal theorization of the state.¹¹³ What there is, notably the work of Fernbach, emphasizes the historical embedding of violent masculinity in the state with the creation of armies and empires.¹¹⁴

¹¹⁰ James Polchin and ProQuest (Firme), *Indecent Advances: A Hidden History of True Crime and Prejudice before Stonewall*, 2019, 355.

¹¹¹ Brett Beemyn, "The Silence Is Broken: A History of the First Lesbian, Gay, and Bisexual College Student Groups," *Journal of the History of Sexuality* 12, no. 2 (2003): 220.

¹¹² Read more about the New Police's raid: Betsy Kuhn, *Gay Power!: The Stonewall Riots and the Gay Rights Movement, 1969* (Twenty-First Century Books, 2011).

¹¹³ R. W. Connell, "The State, Gender, and Sexual Politics: Theory and Appraisal," *Theory and Society* 19, no. 5 (1990): 507–44.

¹¹⁴ *Ibid.*

1.3 Stonewall's impact on the relations between Civil Rights movement's organizations

Considering the case law and the events discussed above, Stonewall had a great impact on consequent developments, and this chapter will further explain how. Noticeable, by stating it for the historical purposes, Stonewall's riots indeed happened on the night of June 29, 1969, the same day that gay icon Judy Garland died. This event occurred in New York City, at the Stonewall Inn, a popular gay dance bar. The following year, in 1970, Stonewall became popularized most notably for the annual marches in New York City and in Los Angeles, but also in LA the first gay pride festival.¹¹⁵ Given the historical context, they subjected the homosexual population to institutional pressure internalized by the medical and psychiatrist professions, the criminalization of homosexuality and its classifications as an "illness". The establishment strictly monitored the classifications of the gender various in the 1970s. The disqualification of homosexual from any search for employment because of the gender orientation contributed to the impression of "coming out" to far from ideal unless a radical shift in the government's response, this presented a problem on the grounds of dismissal until the mid-1970s¹¹⁶ More importantly taking into consideration the status of women, as the subordinate participants in the male homosexual subculture that predicated the Stonewall liberation movement, the number of exclusions is astounding given the male-dominated field.¹¹⁷ In view of lesbianism mainly put to the side, lesbian subcultures, as the as the primary agitators for women's rights in the 20th century are an unreported issue. As far as the Stonewall goes, the "Lavender Menace"¹¹⁸ pushed the heterosexism of the male dominated cultural discrepancy.¹¹⁹

¹¹⁵ Leah K Rosenbaum, "The Influence of the Stonewall Riots," n.d., 16.

¹¹⁶ Carlos A. Ball, ed., *After Marriage Equality: The Future of LGBT Rights* (New York ; London: New York University Press, 2016),120.

¹¹⁷ Casandra Sobczak, "Impact of Stonewall Riots (1969)," Medium, May 3, 2018, <https://medium.com/@casandrasobczak/impact-of-stonewall-riots-1969-1882a1264afe>.

¹¹⁸ The Lavender Menace or revolution was an informal group of lesbian radical feminists formed to protest the exclusion of lesbians and lesbian issues from the feminist movement at the Second Congress to Unite Women in New York City on May 1, 1970. Members included Karla Jay, Martha Shelley, Rita Mae Brown, Lois Hart, Barbara Love, Ellen Shumsky, Artemis March, Cynthia Funk, Linda Rhodes, Arlene Kushner, Ellen Broidy, and Michela Griffio,[1] and were mostly members of the Gay Liberation Front (GLF) and the National Organization for Women (NOW).

¹¹⁹ Ibid.

Women, as feminists were radicalized within the movement in the 1960s, they did try to apply the methods and the tactics of the Civil Rights movement, but from the liberation of the social and cultural conventions stipulated by the patriarchal society, they came about into more institutional pressures with the affirmation of the female's self-determination of their gender or sex in society.¹²⁰ The success of the female movement in the broader context encouraged the expression of ideas from the existing gay men leadership of the organization. Analyzing the work of D'Emilio, we can determine how the overblown cultural shift is stifled at the end of the 1960s, the considering progression of every distinct entity in American society about their "individual role" came about from the new shaping of society that is becoming unbalanced under the conditions set previously.¹²¹ The female reshaping of the broader culture shows a deeper structural conflict within the personal sphere, where women are perceived just as an element of the household, treating their existence without acknowledgement, their present political activism, broadly radicalized by the removal of gender and sexual roles in the nuclear family in the United States specifically.¹²²

Although gay liberation did happen in 1969 by form of rioting against the police, these actions promulgated many nights of unrest among the community that feared the routines of harassment did not stop. Granting, the commemoration of the riots spearheaded the subsequent first anniversary of Stonewall. Along with the growing of political messages and events afterwards, the subsequent years allowed the founding of the National Gay task forces.¹²³ This task force in 1973 fought for the claiming of the first same-sex marriage proposal in Minnesota, being struck by the Supreme Court allowed the forming of multiple LGBT organizations that fought for "gay rights".¹²⁴ Institutionalizing the struggle of gay liberation concluded by the

¹²⁰ Stephanie Gilmore and Elizabeth Kaminski, "A Part and Apart: Lesbian and Straight Feminist Activists Negotiate Identity in a Second-Wave Organization," *Journal of the History of Sexuality* 16, no. 1 (2007): 98, <https://www.jstor.org/stable/30114203>.

¹²¹ Martin, John Levi. "Structuring the Sexual Revolution." *Theory and Society* 25, no. 1 (1996): 134. <https://www.jstor.org/stable/658058>.

¹²² D'Emilio, *Sexual Politics, Sexual Communities*, 226.

¹²³ See more on the Gay National Task Force: Doreen J. Mattingly and Ashley Boyd, "Bringing Gay and Lesbian Activism to the White House: Midge Costanza and the National Gay Task Force Meeting," *Journal of Lesbian Studies* 17, no. 3–4 (July 2013): 365–79, <https://doi.org/10.1080/10894160.2013.767738>.

¹²⁴ Erik Eckholm, "The Same-Sex Couple Who Got a Marriage License in 1971 (Published 2015)," *The New York Times*, May 17, 2015, sec. U.S., <https://www.nytimes.com/2015/05/17/us/the-same-sex-couple-who-got-a-marriage-license-in-1971.html>.

establishing of the National Gay Task force, an organization instrumental in organizing and achieving political rights for LGBT members, spearheaded that institutional effort.¹²⁵ Their campaign of removing the categorization of mental disorder tied to homosexuality as a category in the 1970s.¹²⁶ Besides those facts, media presence is essential for the portrayal of the legacy of Stonewall, the media's choice in allowing the appearance of homosexual characters in its programs. The highly popular show during the 1970s *All in the Family*, had a homosexual character, unquestionably an expression of effeminacy was beneficial for a corporate structure.¹²⁷

The practicality of the gender agenda that pushed for more recognition after Stonewall, came about in the form of the new movements efforts to signal to the political parties about their direct actions in creating a narrative, which will allow bigger political cover for their members. In Michael Bronski article, he mentions: The Boston Gay's Liberation Front, a LGBT group formed after the Stonewall riots, their political action at the Democratic Convention allowed an articulation of a new "utopian political vision", their demands concerning legal rights "Extending far beyond then we can conceptualize as LGBT politics."¹²⁸ The Gay's Liberation demands came about in a multilayered fashion, nonetheless it is also noteworthy that during the 1970s, the biological and psychological opinions were discriminatory, institutionalized to the point of punishing a homosexual by documenting his sexuality.¹²⁹ Their legal rights violated considering an obtainment of: employment, social security or a medical service from a predestined institution.¹³⁰ The exact notion of being a part

¹²⁵ "National Gay and Lesbian Task Force," accessed December 12, 2020, <https://law.jrank.org/pages/8726/National-Gay-Lesbian-Task-Force.html>.

¹²⁶ "Guide to the National LGBTQ Task Force Records, 1973-2017.," accessed December 12, 2020, <https://rnc.library.cornell.edu/EAD/htmldocs/RMM07301.html>.

¹²⁷ Waddock, Sandra, Steve Waddell, and Paul S. Gray. "The Transformational Change Challenge of Memes: The Case of Marriage Equality in the United States." *Business & Society*, (December 2018). <https://doi.org/10.1177/0007650318816440>.

¹²⁸ "Boston's GFL's 10-Point Demands to the Democratic Convention, 1972," *The Cambridge Room* (blog), January 16, 2018, <https://thecambridgeroom.wordpress.com/2018/01/16/bostons-gfls-10-point-demands-to-the-democratic-convention-1972/>.

¹²⁹ Professor Manon Tremblay and Dr David Paternotte, *The Ashgate Research Companion to Lesbian and Gay Activism* (Ashgate Publishing, Ltd., 2015),138.

¹³⁰ Michael Bronski, "When Gays Wanted to Liberate Children," Text, *Boston Review*, June 4, 2018, <http://bostonreview.net/gender-sexuality/michael-bronski-when-gays-wanted-liberate-children>.

of a broader coalition, their status already defined by the same institutions which produced outcomes in a disparaging manner, the level of oppression cannot be correctly determined by making a hierarchal structure of factored elements in disposing of all our doubts, in which we can absolute conclude what minority can be perceived as the most “oppressed”.¹³¹ Mainly reacting to the whole dissonance of the legal system, my point is showing the exact instance of subjugation within the realm of societal or cultural systems, in which multiple actors are shaking up the already established conventions and laws of governance.¹³²

The Gay Liberation Front as a leftist organization, during Stonewall, remained small in organizational standing members, when it came to addressing power dynamic in the institutional structure of the American society, their members focused on primordial injustices like those plaguing their predecessors in the 1960s (racism, sexism, imperialism). The GLF in its founding during the Stonewall movement, according to Duberman, “called for a fierce, full-scale assault on sexual and gender norms, on imperialistic wars and capitalistic greed, and on the shameful mistreatment of racial and ethnic minorities”. The moment gay movements notable as the GLF achieved prominence, their significance vanes in the retrospect, a disconcerting effect from the saturation of the previous activism.¹³³ In reconsideration, the change of institutionalized fight came about in the form of lobbying organizations, not militant groups, their primary goals in today’s time being “marriage legality” and serving in the military. Masha Gessen observes in her New Yorker article: the reflection of the narrowing of the LGBT agenda, absent from any solidarity towards other minority groups. Unlike the current LGBT groups, which fight for being present in the institutions, the New Left’s affiliated groups main obstacles to their program’s directive were the abolition of the “Nuclear Family” or “War”, as the representation of toxic masculinity, as symbols present in society throughout the

¹³¹ Tremblay and Paternotte, *The Ashgate Research Companion to Lesbian and Gay Activism*,125.

¹³² Shannon Gilreath, *The End of Straight Supremacy: Realizing Gay Liberation* (Cambridge University Press, 2011),8.

¹³³ Martin Duberman, *Has the Gay Movement Failed?* (University of California Press, 2018),17-18.
<https://doi.org/10.1525/9780520970847>.

1970s. The transformation of institutions through access, not permissible act for the radical movement of the GLF's character.¹³⁴

In the Mattachine society and DOB, the members of GLF couldn't allow themselves to express their deep-seated ideas, their opposition to the war in Vietnam or any particular controversial action, consider for the periods of Stonewall as a radical shift in ideological thinking.¹³⁵ For the reason that, qualms about the other homophile groups, their involvement in other "people's struggles" is an issue, in either monetary consideration or joining movements that are negating homosexuality as an illness. nonetheless the GLF members realized that uniting: the war movement, the women's struggle, the black civil rights movement and also the socialist politics expressed during the 60s and 70s; the issue on united front is paramount, most of all, not a subject for debate according to members. The discourse surrounding the actions of GLF is explicitly depicted by Martha Shelley¹³⁶-a feminist, member of the DOB that joined these conversations, she states "We had the feeling that the revolution was right around the corner and that we were part of the vanguard. The problem was, we had all these platforms, but we never could figure out how to get from here to there," more prominently the members of GLF desired to assimilate the activists of DOB and the Mattachine society, basically ending the homophile movement as much they can.¹³⁷ One of the most important struggles that needed addressing by the GLF movement as part of the larger emphasis on gay rights, it is the fight against the APA that took part for an extended time during the 1970s (American Psychiatric Association)¹³⁸ for designating the sexuality of homosexuals as "sickness," they are pathologized, mistreated, also let down by the whole professional community for their

¹³⁴ Masha Gessen, "Martin Duberman Points to the Failures of the Gay-Rights Movement," *The New Yorker*, accessed September 7, 2020, <https://www.newyorker.com/news/our-columnists/martin-duberman-on-what-the-gay-rights-movement-has-lost>.

¹³⁵ Geoffrey W Bateman, "Gay Liberation Front," n.d., 2.

¹³⁶ Van Gosse, "Martha Shelley," in *The Movements of the New Left, 1950–1975: A Brief History with Documents*, ed. Van Gosse, The Bedford Series in History and Culture (New York: Palgrave Macmillan US, 2005), 137–41, https://doi.org/10.1007/978-1-137-04781-6_40.

¹³⁷ Marcus and Marcus, *Making Gay History*, 146.

¹³⁸ Albert R. Marston, "Reflections After a Confrontation with the Gay Liberation Front.," *Professional Psychology* 5, no. 4 (November 1974): 380–84, <https://doi.org/10.1037/h0021325>.

treatment of sexual determination.¹³⁹ These allegations are affecting the legal and social statutes of gay people, therefore militant gathering from the GLF disrupted the meeting of the APA in the 1970s.

Later on, in 1973, under the leadership of noteworthy activists, in the image of Barbara Gittings and Frank Kameny-did allow the gay movement to remove the ugly description in relation to sickness from the psychiatrist lobby.¹⁴⁰ This unscientific examination from psychiatrists is thoroughly exposed by Frank Kameny, they presented arguments in which, they exposed the APA's therapies procedure as highly harmful to gay people.¹⁴¹ Other noteworthy sample of early protesting organized by the members of GLF is the advertisement in the newspaper *Village Voice*, famous for their misrepresentation of the Stonewall riots.¹⁴² Their activists tried to flood the newspaper with messages because their publication refused to publish the word "gay", considering the term 'filthy'. Many representations of GLF appeared across the country, as far as Britain, protesting the outline of newspapers portrayal of LGBT people, demanding the fair depiction of their issues. The board of trustees of the APA removed the word 'homosexuality' from its list illnesses.¹⁴³ The gay and lesbian psychologist decided to form a caucus within the APA in 1978, they never allowed any professional in the psychologist field to use their power to minimize their 'sickness' in the social or legal context.¹⁴⁴

¹³⁹ The American Psychological Association (APA) is the largest scientific and professional organization of psychologists in the United States, with over 121,000 members, including scientists, educators, clinicians, consultants, and students.

¹⁴⁰ David K. Johnson, "Gay Is Good: The Life and Letters of Gay Rights Pioneer Franklin Kameny Ed. by Michael G. Long (Review)," *Journal of the History of Sexuality* 26, no. 2 (2017): 331–33, <https://muse.jhu.edu/article/657285>.

¹⁴¹ Darren Arquero "Out of the Closet: Frank Kameny's Militant LGBT Activism of the 1960s," in the "The Mellon Mays Undergraduate Fellowship Journal 2010," :11, accessed February 26, 2021, <https://uraf.harvard.edu/mmuf-journal>.

¹⁴² See more: Jeff Goodwin and James M. Jasper, *The Social Movements Reader: Cases and Concepts* (John Wiley & Sons, 2014).

¹⁴³ Jack Drescher and Joseph P. Merlino, *American Psychiatry and Homosexuality: An Oral History* (Routledge, 2007), 46.

¹⁴⁴ Wolf, *Sexuality and Socialism*,130.

The conflict that exacerbated after the Stonewall between members of GLF were pressured from internal struggles within their organization, and, many of them felt disenfranchised by the stigma coming from the other civil right movements, especially the usage of homophobic rhetoric coming from the Black Panther Party. The frustration coming from the members of the GLF, concerning the negligence of the situation of the gay right in particular to the usage of the word ‘faggot’ in casual conversation.¹⁴⁵ Taking into account, many black revolutionaries approached the manner of sexual liberation with contempt, the instance worth mentioning is the letter from the chairman of the Black Panther Party.¹⁴⁶

In late August, 1970, Huey P. Newton, upon release from prison wrote an open letter in *The Black Panther*, about an alliance between the Homosexual movements, Women’s Liberation, and the Black Panther Party. The letter was republished in the *Berkeley Barb*, in which Newton speaks honestly about his own awakening to the oppression of gay people and women.¹⁴⁷ In his statement on the coalition building, he readdresses the urgency of the black liberation movement to stand along with the Women’s movement, not only focus on the stands on racial justice and the black liberation against the capitalist state. His intention was creation of a coalition that can stand in the way against the patriarchal state.¹⁴⁸

Huey P. Newton focus on a process of the construction of a community building, he deliberated in his writings openly about the repression of the gay community before and after Stonewall. Therefore, Huey. P Newton is conscious when recognizing the struggle comparable to biases of other members in the Black Panthers Party.¹⁴⁹ Most notably, the member’s

¹⁴⁵ Jared Leighton, “‘All of Us Are Unapprehended Felons’: Gay Liberation, the Black Panther Party, and Intercommunal Efforts Against Police Brutality in the Bay Area,” *Journal of Social History* 52, no. 3 (January 1, 2019): 871, <https://doi.org/10.1093/jsh/shx119>.

¹⁴⁶ Karla Jay and Allen Young, *Out of the Closets: Voices of Gay Liberation* (NYU Press, 1992),23

¹⁴⁷ Ibid,863.

¹⁴⁸ “Solidarity with the Black Panther Party,” *The Berkeley Revolution*, August 12, 1970, <http://revolution.berkeley.edu/solidarity-black-panther-party/>.

¹⁴⁹ See more on relations between the Black Panthers and Queer organizations in the 1970s: Lisa M. Corrigan, “Queering the Panthers: Rhetorical Adjacency and Black/Queer Liberation Politics,” *QED: A Journal in GLBTQ Worldmaking* 6, no. 2 (2019): 1–25, <https://www.jstor.org/stable/10.14321/qed.6.2.0001>; Also see : Jeb Ebben, “Movement(s) in Dialogue: Kaleidoscope and the Discourse of Underground News,” *URCA: The NCHC Journal of Undergraduate Research & Creative Activity*, January 1, 2016, <https://digitalcommons.unl.edu/ureca/33>.

homophobic tendencies¹⁵⁰, concealed in the class struggle, negation of the other movement's struggles.¹⁵¹ Newton's clear realization of the patriarchal modus operandi of the current society, the regression of misrepresentation of homosexuality in his words it is expressed by Newton, he writes: "When I say "insecurities", I mean the fear that they're some kind of threat to our manhood, I can understand this fear. Because of the long conditioning process which builds insecurity in the American male, homosexuality might produce certain hang-ups in us. I have hang-ups myself about male homosexuality."¹⁵²

More potently, the activist turned professor Angela Davis - a member of the Black Panther Party remembers how the awareness of their organization to homosexual issues was exacerbated by the poet Jean Genet. Angela Davis mentions in her speech given at the Odeon seminar in Paris in May 1991, she recalls: "David Hilliard told me that when they were traveling together from state to state, from one university to another, some members of the party were using very rude and homophobic words to insult Nixon or (U.S. Attorney General John) Mitchell."¹⁵³ She clearly reveals in her speech, the low level of awareness by its members but also the description of the workings of many gay activists who brought the attention of sexual rights at the forefront of the U.S radical movement.¹⁵⁴ Clearly demonstrating the level of cooperation of gays and lesbians in the broader struggle, despite the reluctance of many people's recognition for their struggle.¹⁵⁵

¹⁵⁰ Phillip Brian Harper, "Eloquence and Epitaph: Black Nationalism and the Homophobic Impulse in Responses to the Death of Max Robinson," *Social Text*, no. 28 (1991): 74, <https://doi.org/10.2307/466377>.

¹⁵¹ Marjorie J. Hill PhD, "Is the Black Community More Homophobic?: Reflections on the Intersectionality of Race, Class, Gender, Culture and Religiosity of the Perception of Homophobia in the Black Community," *Journal of Gay & Lesbian Mental Health* 17, no. 2 (April 1, 2013): 208–14, <https://doi.org/10.1080/19359705.2013.768089>.

¹⁵² "The Women's Liberation and Gay Liberation Movements," accessed December 20, 2020, <http://www.historyisaweapon.com/defcon1/newtonq.html>; "Huey P. Newton on Gay, Women's Liberation," accessed April 2, 2021, https://www.workers.org/2012/us/huey_p_newton_0524/.

¹⁵³ "The Black Panthers and Gay Rights," September 12, 2016, <http://www.advocate.com/politics/2016/9/12/black-panthers-and-gay-rights>.

¹⁵⁴ Samuel Galen Ng, "Trans Power! Sylvia Lee Rivera's STAR and the Black Panther Party," *Left History: An Interdisciplinary Journal of Historical Inquiry and Debate* 17, no. 1 (December 31, 1969), 18, <https://doi.org/10.25071/1913-9632.39213>.

¹⁵⁵ "The Black Panthers and Gay Rights," September 12, 2016, <http://www.advocate.com/politics/2016/9/12/black-panthers-and-gay-rights>.

The relationship between the Panthers and the Gay Liberation movement is an important factor in the ascendancy or the shaping up of the struggle for sexual liberation, more importantly the factor of the Huey Newton's speech is considerable, converging on the stigmatization of the struggle and the intra-descriptions of the working of the gay movements.¹⁵⁶ Nonetheless, the foremost cause of the addressing the subjects, it's the fight they have fought for without recognizing the fact- police intervention and role of the state is incandescent and clairvoyant presence as the main factor in subjugation of interpreting of theirs struggle.¹⁵⁷

Gay liberation activists in the Bay Area - San Francisco in particular, saw the State's policy towards minorities as the main obstacle; the raids of the police in particular, but mainly the political system's resolve through the courts and the levers of oppression coming from the politicians. The illustrious newfound alliance that established a parallel fight; regardless of the journalistic or scientific damage during or after the Stonewall riots.¹⁵⁸ The black panthers and the gay liberation activist realized the levels of discrimination and the threat of systemic oppression is based not just on race but also on: class, gender, sexuality, therefore the common denominator of the whole ordeal is finding a common understanding against the rightly 'perceived enemy' in the police, which is an epitome of instrumentalization of a systemic correspondence on many levels, when it comes to oppressing the minorities. As the cofounder of the Bay Area's Committee for Homosexual Freedom correctly professed "Alliances with the Black Panthers, the Resistance, and other anti-war groups will help when common causes arise", rightly guessing the criminalization in California and the United States of the whole 1960s movements era members is instituted them to be poignant 'unapprehended felons' according to the writing/testimony of the scholar Elizabeth Hinton.¹⁵⁹

This concept of fighting on multiple fronts administered by the case of the Gay Liberation front, mainly through the events in Stonewall and the emergence of the New Left;

¹⁵⁶ See more: Ng, "Trans Power! Sylvia Lee Rivera's STAR and the Black Panther Party."

¹⁵⁷ Ng, "Trans Power! Sylvia Lee Rivera's STAR and the Black Panther Party,"21.

¹⁵⁸ Ronald K. Porter, "CHAPTER THIRTY-FOUR: A Rainbow in Black: The Gay Politics of the Black Panther Party," *Counterpoints* 367 (2012): 364–75, <https://www.jstor.org/stable/42981419>.

¹⁵⁹ Leighton, "'All of Us Are Unapprehended Felons.'"

by allowing the masculinist tones of the Black Panthers and the New Left posterior on homosexual nature to create a culture of male privilege and power dynamics.¹⁶⁰ Disputes between organizations created a rift on various layers that made a difference in settling disputes by managing to disperse the multifaceted coatings of oppression that are showed in the 1960s, especially concerning the gay rights after Stonewall. The shift in gay liberation struggle is agonizingly making a complicated case for scholars to determine the multiple reasons why the split came, as Betty Luther Hillman notes: “As individuals and groups struggled class and racial activism, women's liberation, and New capitalism alongside gay rights activism ...”¹⁶¹

The multiple organizations that came about from these endeavors is enormous in the process of studying the phenomenon of the sexual liberation during the period of the 1960s and 1970s its relatively dissimilar to the future position of LGBT groups, especially the current patterns of lobby and think-tank policy creations. Contradictory to the current times, the groups that are created from an event of the extent of Stonewall exhibited a proof of “unprivileged children” and “gender undefiant youths”; from where these activists formed an organization CHF (The Committee of Sexual Freedom) in 1969 that resisted countering to the homophobic impulses, by large, the prejudices of the New Left. In order to combat these “insecurities,” the CHF adopted a masculinist undertone in their rhetoric in relation to the New Left rhetoric.¹⁶² The disallowing of any display of any effeminate characterizations of any “drag queen homosexuality” that left out the “manhood” element from the social strata, therefore CHF purposefully distanced the drag queen characterization of the movements that are tackling the issues of social expression in the bar culture especially. The CHF position demanding a particular timeline in expressing the drag queen culture discussed by Hillman hitherto, the alienation of the gay liberation fight from the center of the bar culture, as the author states, the

¹⁶⁰ Rossinow, *Politics of Authenticity*, 298; Steve Estes, *I Am a Man: Race, Manhood, and the Civil Rights Movement* (Chapel Hill: University of North Carolina Press, 2005), chap. 7, quoted in Betty Luther HILLMAN, “‘The Most Profoundly Revolutionary Act a Homosexual Can Engage in’: Drag and the Politics of Gender Presentation in the San Francisco Gay Liberation Movement, 1964–1972,” *Journal of the History of Sexuality* 20, no. 1 (2011): 153–81.

¹⁶¹ HILLMAN, “‘The Most Profoundly Revolutionary Act a Homosexual Can Engage In.’”, 169.

¹⁶² Katherine Turk, “‘Our Militancy Is in Our Openness’: Gay Employment Rights Activism in California and the Question of Sexual Orientation in Sex Equality Law,” *Law and History Review* 31, no. 2 (2013): 444, <https://www.jstor.org/stable/23489486>.

precarious situation within the gay liberation movement through the inclosing of propaganda material initiated by the gay liberation activist, :

“A flyer for the picket produced by San Francisco and Berkeley Gay Liberation, two groups that formed after the Stonewall Rebellion in New York City, suggests that members of these organizations felt differently about the role of drag in gay liberation politics. The flyer called on drag queens to recognize that drag balls perpetuated their oppression in the everyday world by allowing drag only "on these one or two special occasions per year" but discouraging drag as an everyday practice. ”¹⁶³

In many cases, the omission of the many instances of intersectionality due to : class, race or gender distinctions being disputed among the members in society during the 1970s, the biological makeup of the drag queen performance-as male individual presenting themselves as women, contrary to the belief of the psychological field, their medical treatment along with interpretations what is valuable, the actions of “drag” proved as more contentious in the organizational plan to the proponents of the sexual liberation. In this chapter, I try to conceptualize the conflict between intrasexual presences that are revolving around the issue of acceptance beyond the legal terminology. But, the point of this argument was intersectional even back then, as we can determine the women’s movement point of view concerning drag queen performance, this is not as contentious in today’s time, as much as it was in the 1970s.¹⁶⁴

Therefore, when studying the ideological influences, Davis testimony allows the overseeing along with the conceptual examination of the Black Panthers, through recognition of cultural intrigues of their leader. Basically, in order to understand the gender sensitive issue particularly coming from the Black Panther Party, we need to recollect another behavior in previous times.¹⁶⁵ Consequently, their militant nature, this is a rebuke towards the wariness emanating throughout activism by other black oriented organizations during the Civil Rights era. The Black Panther Party’s priorities are economic and social empowerment for the African

¹⁶³ Ibid,170.

¹⁶⁴ T. Kissack, “Freaking Fag Revolutionaries: New York’s Gay Liberation Front, 1969-1971,” *Radical History Review* 1995, no. 62 (April 1, 1995): 123, <https://doi.org/10.1215/01636545-1995-62-105>.

¹⁶⁵ Winifred Breines, *The Trouble Between Us: An Uneasy History of White and Black Women in the Feminist Movement* (Oxford University Press, 2006),56.

American population that was suffering segregation and violence amongst other things. The response of the Black Panther Party is a critique of the established values in American society; therefore, we can detect the ideological and masculine undertones coming out from the mouths of their leaders.¹⁶⁶ Angela Davis elaborates this notion; she is stating on how the presence of black women inside the organization drew controversy owing to the masculine rhetoric. Obviously, as the black women existence in the Party heightened, from of the most prominent fighters for liberation, establishing an immense disapproval coming from the black women is evident.¹⁶⁷ She reminiscences the black male's perceived threat emanating from their presumed masculine rhetoric, Davis maintains: "We were trying to control everything, including the men- which meant by extension we wanted to rob them of their manhood."¹⁶⁸

In reality, all of these human rights movements excluding the Black Panthers are consistent swathed in the "white presence" amongst activists circles, the ambivalent nature of the Black Panthers did not constitute any successful structure or attempt in constructing something permanent coming from the alliance of gay liberation and black power activist in the 1970s.¹⁶⁹ The increasing tensions between female and male participants became apparent in the forefront, gender realities disposed the female members not to take part of the homosexual alliance, the publication of materials and book that exhibited an institutional approached based on male supremacy.¹⁷⁰ With the opening of "New communal and commercial spaces at a dazzling speed." Described by Dennis Altman in his book *The End of*

¹⁶⁶ Matthew W. Hughey, "Black Aesthetics and Panther Rhetoric: A Critical Decoding of Black Masculinity in The Black Panther, 1967—80," *Critical Sociology* 35, no. 1 (January 1, 2009): 31, <https://doi.org/10.1177/0896920508098656>.

¹⁶⁷ Wini Breines, "What's Love Got to Do with It? White Women, Black Women, and Feminism in the Movement Years," *Signs: Journal of Women in Culture and Society* 27, no. 4 (June 2002): 1095–1133, <https://doi.org/10.1086/339634>.

¹⁶⁸ Davis, A. (2004). Angela Davis, an autobiography. New York: International Publishers, quoted in Porter, Ronald K. "CHAPTER THIRTY-FOUR: A Rainbow in Black: The Gay Politics of the Black Panther Party." *Counterpoints* 367 (2012): 364-75. Accessed September 26, 2020. <http://www.jstor.org/stable/42981419>.

¹⁶⁹ Martha Robinson Rhodes, "Bisexuality, Multiple-Gender-Attraction, and Gay Liberation Politics in the 1970s," *Twentieth Century British History*, no. hwaa018 (June 10, 2020), <https://doi.org/10.1093/tcbh/hwaa018>.

¹⁷⁰ Mary Bernstein, "Identities and Politics: Toward a Historical Understanding of the Lesbian and Gay Movement," *Social Science History* 26, no. 3 (2002): 546, <https://www.jstor.org/stable/40267789>.

the Homosexual, “only a minority of homosexuals maintained strong social links across gender lines.”¹⁷¹

By examining Altman’s book, his preposition of women’s outlook within a divergent framework, he figures in how the subsidiary position of women, the organization possible fragmentation supports the comprehension of the full scope of feminist and lesbian separation.¹⁷² Furthermore, Altman expresses: “For women, there was a constant tension between identifying with other women on the basis of shared gender oppression and making sexuality the primary basis for politics and community.” As deliberated, the lesbian initiatives are the driving forces behind the emancipatory movements of the 1970s, nonetheless the inability to achieve recognition inside the structure propelled them to become isolated¹⁷³, the vindictiveness of these division created cracks in the interior the feminist movement, especially in regards to the associations analogous to transgender women.¹⁷⁴ In all likelihood, ideological separation is shown as an example of the furthering of the agenda of different gender-oriented groups, the primary example of Elaine Noble-as a first homosexual elected in any state or federal office in the Massachusetts legislature, she recalls: politically oriented gay men and women began to seek out each other and formed local gay caucuses that focused on legislation within their cities and states.¹⁷⁵

Marie Cartier details the processes behind the fragmentation of the women’s movement that provided the elements in progression of their cause, in establishing their own institution to combat misogyny of the “butch men” in the 1970s. Cartier states in her writing concerning the lesbian protest: “The lesbian separatist world sought to be separate from the patriarchal or male-centered world. Within a surprising amount of time, approximately a decade, this lesbian world would flower in every urban area from Los Angeles to Des Moines

¹⁷¹ Dennis Altman, *The End of the Homosexual?* (St Lucia, Qld: University of Queensland Press, 2013),97; Albert Field, quoted in George Megalogenis, *The Australian Moment*, Viking, Melbourne, 2012,77.

¹⁷² Karla Jay and Allen Young, *Out of the Closets: Voices of Gay Liberation* (NYU Press, 1992),180.

¹⁷³ Peter M. Nardi and Beth E. Schneider, *Social Perspectives in Lesbian and Gay Studies: A Reader* (Psychology Press, 1998),253.

¹⁷⁴ Bernstein, “Identities and Politics,”565.

¹⁷⁵ *Ibid*,99-100; Peter Thompson, *Bob Brown of the Franklin River*, Allen & Unwin, Crow’s Nest,1984, 43–7, 151–53.

to New York. Lesbians were no longer mentally ill (since 1973) and this gave them the ability to open services such as health centers as openly lesbian health centers.”¹⁷⁶ Prior to 1973 a self-identified lesbian considered mentally unstable by the establishment running a mental health clinic would be a misnomer.¹⁷⁷ During the 1970s, however, feminist therapy would develop as a *bona fide* field. Women-only spaces opened and lesbians exploded from the feminist movement to populate them.¹⁷⁸ Women couldn’t accept the dominance of “butch men” demanding their place of influence within the social contacts recognized for lesbians, this social contact consists in the notorious infatuation with bar culture during the 1960s.¹⁷⁹ The bar culture proved as part of a network of public spaces that will allow lesbians into expressing their demands about the gay liberation movement.

The opening of many women’s shelters, rape hotlines, abortion clinics notes on how the lesbian movement was a major driving forces behind the women choice to culturally emancipate their activism. As Yolanda Retter defers to the Stonewall age concerning lesbian issues, she raises a good point on the expansion of lesbian rights from the 1960s until the Reagan era.¹⁸⁰ Retter depicts in her book *Queers in Space: Communities, Public Places, Sites of Resistance* the expansion of the sexualized community spaces in order to combat the growing push back from the right-wing members of the American society. She states in her writing about the evolution throughout the decades since the creation of lesbian public spaces: In the 1970s lesbians began to picket and boycott bars with racist admission policies. And in the 1980s bars became the site of pro-sex lesbian movement, a reaction to the emergence of the conservative right wing, antigay, and anti-sex Reagan government and to some parts of lesbian-

¹⁷⁶ Heather Murray, “Free for All Lesbians: Lesbian Cultural Production and Consumption in the United States during the 1970s,” *Journal of the History of Sexuality* 16, no. 2 (2007): 255, <https://www.jstor.org/stable/30114234>.

¹⁷⁷ Catherine P. Batza, “Before AIDS: Gay and Lesbian Community Health Activism in the 1970s” (thesis, University of Illinois at Chicago, 2012), 11-12, [articles/thesis/Before AIDS Gay and Lesbian Community Health Activism in the 1970s/10910060/1](https://www.proquest.com/health-care/theses/Before-AIDS-Gay-and-Lesbian-Community-Health-Activism-in-the-1970s/10910060/1).

¹⁷⁸ Marie Cartier, *Baby, You Are My Religion: Women, Gay Bars, and Theology before Stonewall*, Gender, Theology & Spirituality (Durham: Acumen, 2013)103.

¹⁷⁹ Jean Bessette, “An Archive of Anecdotes: Raising Lesbian Consciousness after the Daughters of Bilitis,” *Rhetoric Society Quarterly* 43, no. 1 (January 1, 2013): 22–45, <https://doi.org/10.1080/02773945.2012.740131>.

¹⁸⁰ Dana A. Heller, *Cross-Purposes: Lesbians, Feminists, and the Limits of Alliance* (Indiana University Press, 1997),27.

feminism, which some believe desexualized lesbianism to make it more acceptable to heterosexual feminists.”¹⁸¹

Chapter II: The European Union Equality Directives and approach to gender equality within European human rights regional system

2.The evolution of European anti-discrimination law and the impact of European institution such as the ECJ in tackling sexual discrimination

Despite the efforts of the informal and non-governmental organizations’ movements and endeavors in mitigating discrimination against sexual minorities, very little was done on legal and political level in recognizing the issue. Only after the 1970s and the aforementioned occurrences, most prominent being the Stonewall and so-called homophile movements, did the LGBT gained recognition. This recognition of LGBT rights found its way only after the 1970s, due to the activities of LGBT organizations that were raising awareness because of events such as Stonewall and through the organizations such as the homophile raising responsiveness for the LGBT issues.¹⁸²

Europe unlike the United States has not experienced any powerful and social backlash that anticipates an ambitious program of anti-discrimination law, especially in difficult economic times. Apart from anti-discrimination law in the 1970s revolving around the employment, most of the EU anti-discrimination has been adopted since 2000s.¹⁸³ Furthermore, the resistance from Member states in enacting this legislature has a contrasting view with the United States due to Europe’ bureaucratic mechanism in governing and implementing its legislation.¹⁸⁴ Therefore, the with the rising Euroscepticism and xenophobia, Europe may be

¹⁸¹ Gordon Brent Ingram, Anne-Marie Bouthillette, and Yolanda Retter, eds., *Queers in Space: Communities, Public Places, Sites of Resistance* (Seattle, Wash: Bay Press, 1997),326.

¹⁸² For the history of the early lgbt movements see Lillian Faderman, *The Gay Revolution: The Story of the Struggle*, Illustrated edition (New York London Toronto Sydney New Delhi: Simon & Schuster, 2016).

¹⁸³ GRÁINNE DE BÚRCA, “The Trajectories of European and American Antidiscrimination Law,” *The American Journal of Comparative Law* 60, no. 1 (2012):8, <https://www.jstor.org/stable/23251946>.

¹⁸⁴ Ibid,7; on the consensual, interest-based and non-conflictual mode of EU "policy without politics," see Vivien Schmidt, *Democracy in Europe: The EU and National Politics* (2006). See also Simon Hix, *Why the EU needs (Left-Right) Politics: Policy Reform and Accountability are Impossible without It* and Stefano Bartolini, *Should the Union be 'Politicised'? Prospects and Risks*, Notre Europe Policy Paper No. 19 (2006).

several decades behind the United States because it needs to experience an ideological and strong political and social opposition, similarly as the United States has experienced in the past, in order to readdress the social and economic equality through their anti-discrimination law.¹⁸⁵ This chapter will highlight the evolving nature of the EU anti-discrimination law and its legal effects on cases that revolve around the prohibition of discrimination based on sexual orientation.

However, in the next chapter I will also discuss more about the judicial activism that European institutions such as the European Commission, exhibit when it comes to relations with countries that are not part of the European Union.¹⁸⁶ Countries such as Russia and Serbia that are dismissing the rights of individuals to organize and openly proclaim their homosexuality.¹⁸⁷ These countries, which in fact are not part of the EU as political union, are still considered to be under the auspices of norm infusion by the European institutions, and, as signatories to the European Convention of Human Rights, are expected to adhere to European values. This thesis will examine the conflict of countries that are in the European Union and outside of it, but yet parties to the ECHR, and discuss the role of the judgments of cases by the ECJ and the ECtHR and the profound impact they have on the public and private lives of gay people in Europe. Especially the negligence of the Russian and Serbian institutions when it comes to respecting the decision of European courts, their rhetoric and political tools in which they use to create a less diverse and more discriminatory society.¹⁸⁸ It is important to develop a comparative analysis on the issue of combatting sexual orientation, when it comes to the standards that the European institutions are demanding, especially through the work of the

¹⁸⁵ Ibid,10.

¹⁸⁶ Dmitri Bartenev, “LGBT Rights in Russia and European Human Rights Standards,” in *Russia and the European Court of Human Rights*, ed. Lauri Mälksoo and Wolfgang Benedek, 1st ed. (Cambridge University Press, 2017), 326–52, <https://doi.org/10.1017/9781108235075.013>.

¹⁸⁷ Ibid.

¹⁸⁸ See more: Marek Mikuš, “‘State Pride’: Politics of LGBT Rights and Democratisation in ‘European Serbia,’” *East European Politics and Societies* 25, no. 4 (November 1, 2011): 834–51, <https://doi.org/10.1177/0888325411426886>; “Belgrade Pride Promotes Equality and Diversity,” Council of Europe Office in Belgrade, accessed March 19, 2021, https://www.coe.int/en/web/belgrade/news/-/asset_publisher/tM7Uo4CVRhTF/content/belgrade-pride-promotes-equality-and-diversity.

European Commission on the European integration process. It is evident that the system of promotion of LGBT rights is having problems on multiple levels due to the rise of populism and nationalism, two ideologies that are employed as tools for the protection of morals of society and the protection of the institution of marriage.

With regards to the anti-discrimination policy ever since the 1970s, it took three decades in Europe to form a political movement in order to create a legally binding document that was meant to protect the rights of the sexual minorities.¹⁸⁹ This along with other elements in European law within the ECJ's rulings gave impression of a neutral stance by the EU judiciary in relations to protecting the person of non-heterosexual orientation. The approach of this issue in the EU has been mixed due to the pressures exerted by its Member States. This is because of the competing notions of promoting human rights and the Europeanness¹⁹⁰ and the homonationalist narratives that emphasize morality, tradition and national identity as precursor in protection against 'foreign forces' living as minorities in the European Union.

The first effort aimed at protecting the rights of LGBT members was made in the 1970s in Europe. This effort led to politicizing process in order to mobilize and promote a debate on the issue on sexual orientation. However, until 1999 the European law did not comprise any protections for the sexual minorities, before 1999 there was no binding EU legal instrument to protect them implicitly or explicitly as Tryfonidou mentions.¹⁹¹

As a new element of human rights - the LGBT issues are perceived as a result to the case law interpretations and the purposefulness of the European institutions and international organizations, namely the EU and Council of Europe, in limiting discrimination. Through the analysis of several cases in front of the ECtHR it can be determined that Article 14 does not

¹⁸⁹ Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 180/22.

¹⁹⁰ "The so-called Old Continent forms an essential and inherent part of the universal history of culture and to some extent has dictated its rhythm and tempo. It has been one of its great inspirations and driving forces. Without Europe, this cultural progression would be difficult to understand. This development, to a greater or lesser degree, is manifestly impregnated with Europeanness".

J. Vergara, "The History of Europe and Its Constituent Countries. Considerations in Favour of the New Europe," 2007, <https://doi.org/10.2390/JSSE-V6-I1-1036>.

¹⁹¹ A Tryfonidou, 'The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU law' in U Belavusau and K Henrard, *EU AntiDiscrimination Law Beyond Gender* (Hart 2018) 231-232

include sexual orientation as a protected ground.¹⁹² By the end of the 1990s the only achievement in the struggle for the rights of sexual minorities were the rulings of the ECtHR under the mandate of the Council of Europe, not the work of the political or elected bodies within European Union.¹⁹³ Tellingly, prohibition on discrimination was not available in most countries of Europe, Council of Europe member states, or the European Union, there was not any legal document which enshrines and protects the rights of LGBT members, and hence they were still experiencing political homophobia and societal alienation. However, the politicizing process of the EU anti-discrimination law from a common market to a human rights instrument were placed as the foundation of the Treaty of Amsterdam.¹⁹⁴ With the introduction of this treaty which brought about a new legal basis now known as Article 19 of TFEU, this provided EU with the legitimacy to tackle discrimination on multiple levels.¹⁹⁵

The Courts judgment in the case of *Salgueiro da Silva Mouta v Portugal* was in particular significant, because: “The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and M.’s mother which was based on the applicant’s sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention.”¹⁹⁶ But throughout the Court’s jurisprudence it can be determined that with the mixture of other ECHR provisions, they can be united with the aforementioned Article 14 to combat discrimination against LGBT persons. The larger implication of the *Salgueiro* case was

¹⁹² *Salgueiro da Silva Mouta v. Portugal* App No. 33290/96 (ECtHR 21 December 1999); *P.V. c. Espagne* App No. 35159/09 (ECtHR 30 November 2010).

¹⁹³ App 7525/76, *Dudgeon v UK*, Judgment of the European Court of Human Rights, 22 October 1981, [1982] 4 EHRR 149; App 10581/83, *Norris v Ireland*, Judgment of the European Court of Human Rights, 26 October 1988 [1989] 13 EHRR 186; App 15070/89 *Modinos v Cyprus*, Judgment of the European Court of Human Rights, 22 April 1993 [1993] 16 EHRR 485.

¹⁹⁴ A Tryfonidou, ‘Discrimination on the Grounds of Sexual Orientation and Gender Identity’ in S Vogenauer and S Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017). For an article which explains the reasons why putting LGBT issues on the agenda at the EU has been much more successful than at the UN see J Swiebel, ‘Lesbian, gay, bisexual and transgender human rights: the search for an international strategy’ (2009) 15 *Contemporary Politics* 19

¹⁹⁵ see M Bell and L Waddington, ‘The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article’ (1996) 25 *Industrial Law Journal* 320; M Mos, ‘Of Gay Rights and Christmas Ornaments: The Political History of Sexual Orientation Non-discrimination in the Treaty of Amsterdam’ (2014) 52 *Journal of Common Market Studies* 632

¹⁹⁶ Judgment on just satisfaction delivered by a Chamber, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 1 and 3, ECHR 1999-IX.

that the Strasbourg Court determined that sexual orientation discrimination, in a case where violation on that manner of Article 14 coupled with another violation of another article, breaches the guaranteed by the ECHR.¹⁹⁷ Since the 1980s there are multiple steps taken by the European institutions in addressing the protection of the rights of the sexual minorities, but until the 1999, there are only soft law measures implied by the Courts.¹⁹⁸ Due to Europe having no sovereign power over its territory on sexual matters as Kelly Kolman recognizes, this instance does not indicate dematerialization of normative powers on the whole European Continent, therefore Kolman concludes that : “ advocacy groups working at both the national and transnational levels have been able to knit ... disparate supranational norms, decisions and policies together to create a soft law norm – a shared, nonbinding principle – for the legal recognition of same-sex relationship.”¹⁹⁹ These soft law instruments are not in the traditional legislation, they have set the standards and the expectations while having an indirect influence on the interpretation of the hard law instruments that are enacted by the national legislation, the European Commission and the Council have adopted these instruments on many issues and conclusively they cannot be empty of legal consequence.²⁰⁰

The European Parliament has addressed the situation concerning LGBT issues ever since the adoption of the Resolution on the rights of homosexuals in the workplace in 1984.²⁰¹ The European Parliament Committee on Civil Liberties and Internal Affairs in 1994 decided to draw up a report on the problems identified that cause legal and societal obstacles to homosexuals and requested from the member states to address the issues that are noted in the

¹⁹⁷ Sandra Fredman, “Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights,” *Human Rights Law Review* 16, no. 2 (June 1, 2016): 273–301, <https://doi.org/10.1093/hrlr/ngw001>.

¹⁹⁸ Kelly Kollman, “European Institutions, Transnational Networks and National Same-Sex Unions Policy: When Soft Law Hits Harder,” *Contemporary Politics* 15, no. 1 (March 1, 2009): 37–53, <https://doi.org/10.1080/13569770802674204>.

¹⁹⁹ Phillip Ayoub and David Paternotte, *LGBT Activism and the Making of Europe: A Rainbow Europe?*, Gender and Politics (Palgrave Macmillan UK, 2014), 78, <https://doi.org/10.1057/9781137391766>.

²⁰⁰ Christopher McCrudden and Sacha Prechal, “The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 16, 2011), 8, <https://papers.ssrn.com/abstract=1762815>.

²⁰¹ SHREEVES Rosamund, “The Rights of LGBTI People in the European Union,” n.d., 10.

report, such as criminalization of all legal provisions which discriminate homosexuals but also age consent to apply for homosexuals.²⁰²

More importantly the report confirmed to the European Community that it has an obligation to apply the notions regarding equal treatment of every individual regardless of their sexual orientation, therefore all legal provisions need to be applied that are passed until that time and in regards to the future provisions.²⁰³ Especially countries that possess criminal laws that still ‘contain provisions contain discriminatory provisions on sexual behavior and the age of consent ’ such as Great Britain, the federal republic of Germany and Luxembourg ²⁰⁴ Furthermore the Commission didn’t treat the rights of homosexuals seriously in the pre-accession phase of the Union’s integration, more significantly this is based on the ECJ (European Court of Justice) treatment of the Treaty due to its ambiguity in regards to sexual orientation.²⁰⁵

The EU commissioner Flynn equated the issues of sexual orientation as a matter of eradication of discrimination as defined as a broader concern, these issues having to do with the rights and freedoms of all the European citizens.²⁰⁶ Due to the status of the Treaty of the European Union prior to the enactment of the Equality Directive 2000/78/EC²⁰⁷ was not ideal for the rights of the LGBT, but the purpose of this Directive under Article 1 is that : “...This Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation,

²⁰² Claudia Roth “Report on the Committee on Civil Liberties and Internal Affairs on Equal Rights for Homosexuals and Lesbians in the EC. Session Documents 1994, Document A3-0028/94, 26 January 1994 - Archive of European Integration,” accessed January 4, 2021, <http://aei.pitt.edu/49350/>.

²⁰³ Roth Report, Motion for a Resolution on equal rights for homosexuals and lesbians in the EC, at para. 2.

²⁰⁴ Roth Report, The legal and social situation of gays and lesbians in the European Community and the individual Member States.

²⁰⁵ Jürgen Gerhards, “Non-Discrimination towards Homosexuality: The European Union’s Policy and Citizens’ Attitudes towards Homosexuality in 27 European Countries,” *International Sociology* 25, no. 1 (January 1, 2010): 5–28, <https://doi.org/10.1177/0268580909346704>.

²⁰⁶ Lisa Waddington, “Throwing Some Light on Article 13 EC Treaty,” *Maastricht Journal of European and Comparative Law* 6, no. 1 (March 1, 1999): 1–4, <https://doi.org/10.1177/1023263X9900600101>.

²⁰⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16 [2000].

with a view to putting into effect in the Member States the principle of equal treatment.”²⁰⁸ The Treaty does not offer the European institutions any specific powers to combat the problem of sexual discrimination. Especially the pre-accession monitoring did not allow the Commission to promote its platform for equal rights and LGBT tolerance, therefore the Commission did not have the necessary backing from the European acquis to combat the intolerance in its member states.²⁰⁹

The first instance to reach the ECJ was the case of *P v. S and Cornwall*²¹⁰ that involved a gender transfer from male to female person, the wronged claimant was challenging his employer for letting her go due to having decided to do a gender reassignment surgery, and therefore under EU law it wasn't appropriate for her to lose her job due to sexual orientation issues. Because of its dismissal, it fell under EU law concerning working conditions it was argued by the defendant that went opposite the Equal Treatment Directive from 1976.²¹¹ Factually it was the decision on the *P v S and Cornwall* that the Court's pronouncement in this case, which prohibited discrimination based on the sex due to gender reassignment that formed the basis for the Grant case that sexual discrimination under the guise of sex is a ground for discrimination.²¹²

²⁰⁸ Ibid, Article 1; see more on the purpose of the Equality Directives when it comes to prohibition of discrimination based on the sexual orientation: Annick Masselot, “The State of Gender Equality Law in the European Union,” *European Law Journal* 13, no. 2 (2007): 152–68; P Skidmore, “European Development. EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?,” *Industrial Law Journal* 30, no. 1 (March 1, 2001): 126–32.

²⁰⁹ Dimitry Kochenov, “Gay Rights in the EU: A Long Way Forward for the Union of 27,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 16, 2007), 475, <https://papers.ssrn.com/abstract=1006752>.

²¹⁰ Case C-13/94 *P v S and Cornwall City Council* EU:C: 1996:170; Rosemary Auchmuty, *Great Debates in Gender and Law* (Macmillan International Higher Education, 2018), 79; see Leo Flynn ‘Annotation of Case C-13/94, *P v S and Cornwall County Council*, Judgment of the Full Court of 30 April 1996, [1996] ECR I-2143’ (1997) 34 *Common Market Law Review* 367,382.

²¹¹ Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

²¹² The term ‘transsexual’ is taken to mean ‘someone who is intending to undergo, is undergoing or has undergone gender reassignment treatment’. In this context, gender reassignment treatment or the desire for it is

Individuals (regardless of sex and gender) should be protected against less favorable treatment being accorded them because they do not share society's current perception of the different social roles and conduct appropriate to men and women.²¹³ The *Grant* case²¹⁴ was approached with the 'equal treatment' aspect, from the refusal of the train company to grant to the female companion of the female employee the same travel concession they granted to the female companions of the male employees. The *Grant* case was approached with the 'equal treatment' aspect, from the refusal of the train company to treat the same sex relationship, that is, provide to the female companion of the female employee the same travel concession, as they did with the female companions of the male employees. Basically, it was opposite the notions of Article 119 (now, article 157 TFEU²¹⁵) and the European and UK sexual equality legislation.²¹⁶

The *Grant* argument against the Court was not accepted, mainly the Court employed the 'equal misery' argument basically trying to compare Ms. Grant with a hypothetical male employee claiming the same concession for his male colleagueship.²¹⁷ This methodology has been widely criticized by the academic society for using the wrong comparison, the only comparison that changed was the sex of the claimant, which means the Court mistakenly

not used as the determining factor as to whether a person is trans or not; the desire for gender reassignment surgery delineates the transsexual person who belongs to a sub-group of trans community. Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* (Routledge-Cavendish, 2012), pp. xxii f, <https://doi.org/10.4324/9781843144861>.

²¹³ Heather Lardy and Angus "Discrimination against transsexuals in Employment." *Eur. L. Rev.* 21 (1996):412,416.

²¹⁴ Case C-249/96 *Grant v South-West Trains* EU:C: 1998:63.

²¹⁵ The Treaty on the Functioning of the European Union (TFEU), as a result of the Lisbon Treaty, was developed from the Treaty establishing the European Community (TEC or EC Treaty), as put in place by the Treaty of Maastricht. The EC Treaty itself was based on the Treaty establishing the European Economic Community (TEEC), signed in Rome on 25 March 1957. The creation of the European Union by means of the Treaty of Maastricht (7 February 1992) marked a further step along the path to the political unification of Europe.

²¹⁶ Nicholas Bamforth, "Sexual Orientation Discrimination after *Grant v South-West Trains*," *Modern Law Review* 63, no. 5 (September 2000): 694, <https://doi.org/10.1111/1468-2230.00287>.

²¹⁷ Case C-249/96 *Grant* (n 197) at para 27.

decided to disregard the sex of the claimant and her partner, that was changed in this particular case.²¹⁸ The Court in the Grant case pointed out that:

“in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.²¹⁹ Finally, the Court concluded on this matter that discrimination on the grounds of sexual orientation is not covered by the EU’s law prohibiting discrimination on the grounds of sex.”²²⁰

Articles 2 and Article 3 from the Council Directive 2000/78/EC impose the task of promotion of equality between men and women in the European Union.²²¹ Article 141 on the other hand promotes the right for equality of pay principle on equal treatment. There are set of measures and incentives that are advantageous for groups that are marginalized in the workforce in order for them to pursue a career choice and allowing their workplace to be less underrepresented on the grounds of sex.²²²

The ECJ has not considered by that time to whether sexual determination is also direct discrimination contrary to the EC treaty Article 119.²²³ In *Smith and others vs Ministry of*

²¹⁸ Flynn (n 588) 382; Robert Wintemute, “Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes,” *The Modern Law Review* 60, no. 3 (1997): 334–59, <https://www.jstor.org/stable/1097240>; John McInnes, “Case C-249/96, *Lisa Jacqueline Grant v. South West Trains Ltd*, Judgment of the Full Court of 17 February 1998, [1998] ECR I-636,” *Common Market Law Review* 36, no. 5 (October 1, 1999), <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/36.5/239879>.

²¹⁹ Case C-249/96 *Grant* (n 197) at para 35.

²²⁰ The CJEU followed the same approach in Joined Cases C-122 and 125/99 P D and *Sweden v Council* EU:C:2001:304.

²²¹ Council Directive 2000/78/EC (n 207) at paras 2 and 3.

²²² “EC Treaty: Article 141,” Minority Rights Group, accessed January 7, 2021, <https://minorityrights.org/law-and-legal-cases/ec-treaty-article-141/>.

²²³ Council Directive 75/117/EEC [1975] OJ L 045, 19/02/1975, P. 0019 – 0020.

*Defense*²²⁴ the divisional court, Simon Brown LJ used a different comparator for sexual discrimination eventually comparing the treatment of gay men with that of lesbian women, rather than the discrimination heterosexual women : women: 'If ... an employer were willing to employ lesbians but not male homosexuals, that would be discrimination on grounds of sex. Where ... an employer refuses to accept homosexuals of either sex, that is discrimination on grounds of orientation'.²²⁵

ECJ jurisprudence on sexual discrimination wasn't defined by its substance but by its absence during the 1990s. The European Parliament has been on the forefront on legislative effort to push for sexual orientation policy, therefore the Council of Ministers had a vested interest to reject their proposals. Thus, the Parliament was not successful in convincing the European Commission on those legislative proposals.²²⁶ There was a disunity between member states on the issue of defining sexual discrimination, they thought of the inappropriateness of the Commission's meddling in the national legislature.²²⁷

Most importantly there was a difference in opinion between the national courts of those member countries in defining sexual discrimination. Even if Member States before the Equality Directives agreed to act on the issue of sexual discrimination, they had to discuss and negotiate the content of the legislation that was put forward.²²⁸ The legal barriers had been demolished about the competence of the ECJ in legislating issues concerning sexual discrimination, this was the result of the treaty of Amsterdam.²²⁹ This treaty amends the

²²⁴ "Smith & Others v Ministry of Defence," JUSTICE, June 19, 2013, <https://justice.org.uk/smith-others-v-ministry-defence/>.

²²⁵ Terrell Carver and Veronique Mottier, *Politics of Sexuality: Identity, Gender, Citizenship* (Routledge, 2013),52.

²²⁶ Ibid,64.

²²⁷ Ibid,65.

²²⁸ Johanna Maria van der Vleuten, *The Price of Gender Equality: Member States and Governance in the European Union* (Ashgate Publishing, Ltd., 2007),161.

²²⁹ Carver and Mottier, *Politics of Sexuality*,65.

previous treaties and expands the capability of the ECJ to tackle cases in the sphere of anti-discrimination law.²³⁰

Due to lobbying from governments like Ireland and Austria and the mobilizing from ILGA-Europe thus in the Amsterdam treaty it was inserted Article 6 (a) in the EU treaty stating : “ without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”²³¹

The importance of this amendment in the EC law was that it was an acknowledgment by the 15 members states of the need to combat sexual discrimination. Furthermore, the Commission argument was gone that they did not possess any legal powers to enforce the anti-discrimination legislation. Equality as an element has an uncertain role in the EC law, therefore in the *Defrenne*²³² case the ECJ recognized the elimination of sexual discrimination due to being a fundamental part of human rights within EU Law. Even though the Court decided not to widen the scope of the Article 119 which requires equal pay for sexes, the request was to enable a respectable condition at work in relation to equality of gender.²³³

By the middle of the 1990s, discrimination within the EU amounted to prohibition of dismissal due to nationality or sex, as an example of the case where the claimant fell within her right that she was discriminated because she switched sexes. The equal misery approach conflates and seems to be based on the notion that the stereotypical reading and understanding of gender which in turn conflates the sex and the sexual orientation, henceforth declaring that

²³⁰ Elizabeth F. Defeis, “The Treaty of Amsterdam: The Next Step towards Gender Equality,” *Boston College International and Comparative Law Review* 23 (2000 1999): 1, <https://heinonline.org/HOL/Page?handle=hein.journals/bcic23&id=7&div=&collection=>.

²³¹ Ibid.

²³² Case C-149/77 *Defrenne v Sabena* [1978] ECR I-1365.

²³³ Geoffrey Garrett, R. Daniel Kelemen, and Heiner Schulz, “The European Court of Justice, National Governments, and Legal Integration in the European Union,” *International Organization* 52, no. 1 (1998): 155, <https://www.jstor.org/stable/2601330>.

the person of one sex can only be attracted to the opposite sex.²³⁴ Proponents of the discrimination on ground of sexual orientation deem that their argument is not based on the grounds of sex, therefore they proclaim their equal misery approach that allows equal discrimination of gay male and female members, therefore regardless of sex, according to the proponents of this theory, whether lesbian or gay irrespective on their composition the discrimination is not based on sex.²³⁵ Andrew Coppeland has argued that hierarchy between males and females reinforces the discrimination and amounts to discrimination based on sex : the effort to end discrimination against gays should be understood as a necessary part of the larger effort to end the inequality of the sexes.”²³⁶ The same author recognizes these deficiencies in the law and explains :

“if the same conduct is prohibited or stigmatized when engaged in by person of one sex, while is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition or stigma is discriminating on the basis of sex... If a business fires Ricky, or if the state prosecutes him, because of his sexual activities with Fred, while these actions would not be taken against Lucy is, she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex. If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is being discriminated against because of his sex.”²³⁷

Until the promulgation of Directive 2000/78²³⁸, discrimination was allowed based on sexual orientation to be permissible and vague under EU law. Unlike gender reassignment²³⁹

²³⁴ Auchmuty, *Great Debates in Gender and Law*,78.

²³⁵ Auchmuty, *Great Debates in Gender and Law*,78.

²³⁶ Andrew Koppelman, “Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, May 1, 1994), 202,<https://papers.ssrn.com/abstract=2248257>.

²³⁷ Ibid, 208.

²³⁸ Council Directive 2000/78/EC, (n 207).

²³⁹ Waddington, L.B. et al., “The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article.”320–36; Leo Flynn, “Implications of Article 13 EC - After Amsterdam, Will Some Forms of Discrimination Be More Equal than Others, The,” *Common Market Law Review* 36 (1999): 1127, <https://heinonline.org/HOL/Page?handle=hein.kluwer/cmlr0036&id=1143&div=&collection=>.

the discrimination over the sexual discrimination basis wasn't fixed until the Treaty of Amsterdam with the introduction of Article 13 with its stipulation:

“Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”²⁴⁰

The provision of Article 13 does not prevent discrimination *inter alia*, but it is just a competence giving provision that lacks effect. The latter prohibits discrimination on the grounds of sexual belief disability age or sexual discrimination in the areas of employment and membership of professional organization; it based this harassment as legitimate to be discriminated.²⁴¹ The Directive serving as an instrument makes specific provision on the grounds of age and disability. The indirect discrimination can be justified on any grounds objectively. However, the Directive 2000/78 introduced a form of derogation²⁴² from the form of discrimination for the reason of preventing and protecting public safety. Most importantly the given protection measures of EU law from different forms of discrimination, there is no derogation coming from the Race Directive 2000/43²⁴³ or the Equality Directive, they do not contain any derogation.

Article 2 (5) of the Directive 2000/78 provides that the Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offence,

²⁴⁰ Consolidated version of the Treaty on the Functioning of the European Union - PART TWO: NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION - Article 19 (ex Article 13 TEC) *Official Journal* 115, 09/05/2008 P. 0056 – 0056.

²⁴¹ Dagmar Schiek, “The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation,” *Industrial Law Journal* 35, no. 3 (September 1, 2006): 329–41, <https://doi.org/10.1093/indlaw/dwl026>.

²⁴² Maria do Rosário Palma Ramalho, “Age Discrimination, Retirement Conditions and Specific Labour Arrangements: The Main Trends in the Application of Directive 2000/78/EC in the Field of Age Discrimination,” *European Labour Law Journal* 4, no. 2 (June 1, 2013): 109–18, <https://doi.org/10.1177/201395251300400204>

²⁴³ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Equality Directive).

for protecting health and for protecting the rights and freedoms of others.²⁴⁴ The new version of Article 141 states that the EU pursues the aim of equal opportunities and equal treatment for men and women in the matters of employment and occupation and that: ‘the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1’.²⁴⁵ The legislation is a bare minimum in achieving harmony, enabling Member states to maintain provision that are more appropriate for the national legislation than those laid down in the Directive. More importantly, the provision is made for enabling dialogue and discussion with the appropriate NGOs that contribute in the fight against discrimination and the promotion of principle in equality.

2.1 The Framework Equality function in addressing discrimination based on the grounds of sexual orientation

The Framework Equality Directive²⁴⁶ is an important provision in the establishment of the prohibition on the discrimination on the grounds of sexual orientation. However, it has been criticized for being not enough comparably to other instruments prohibiting discrimination on the grounds of sex, racial and ethnic origin. In comparison, protections against racial or ethnic origin discrimination are stronger because the Race Directive allows the justification for direct discrimination only in limited and prescribed circumstances: “ for genuine and determining occupational requirements (Article 4) and for positive action measures (Article 5).”²⁴⁷ The material scope of the Directives in which the field apply can be found in the Article 3 of both Race and Framework Directives.²⁴⁸ While the Directives cover employment and access to

²⁴⁴ See Lisa Waddington and Mark Bell, “More Equal than Others: Distinguishing European Union Equality Directives,” *Common Market Law Review* 38, no. 3 (June 1, 2001), <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/38.3/350516>.

²⁴⁵ Council Directive 2000/78/EC, (n 207) Article 7.

²⁴⁶ Council Directive 2000/78/EC, (n 207).

²⁴⁷ Erica Howard, “The EU Race Directive: Time for Change?,” *International Journal of Discrimination and the Law* 8, no. 4 (March 1, 2007): 237–61, <https://doi.org/10.1177/135822910700800403>.

²⁴⁸ See Dimitry Kochenov about the legal basis of EU that goes beyond Article 19 and 157 TFEU , EU’s ability to act on the matter of protection of minorities, consequently the matter of minority protection never overlap with EU policy objectives, “When Equality Directives Are Not Enough: Taking an Issue with the Missing Minority Rights Policy in the EU,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 17, 2018), <https://papers.ssrn.com/abstract=3125579>.

vocational training, working conditions and participation in working organizations. The Race Directive covers all these categories but also social protection including social security and health care and access to supply of goods and services which are available to the public.²⁴⁹

Therefore, while the Framework directives cover areas concerning employment and professional occupation, the Race Directive goes beyond this. It is evident that there is exception when it comes to the Directive 2000/78 meaning that less categories of issues and groups fall under its protection comparably to the Race Directive 2000/43.²⁵⁰

More importantly the Race Directives implores the member states to create a designated body in order to promote equal treatment on the grounds of ethnic and racial origin while there is no implication for the Directive 2000/78.²⁵¹ That is why many academics have criticized European anti-discrimination policy for creating a hierarchy between various grounds for discrimination, with discriminations concerning racial and ethnic origin on the top of the hierarchy, while discrimination regarding age on the bottom of the hierarchy.²⁵² Anyhow the hierarchical relationship in relation to various areas of discrimination are not compatible with dealing with multiple discriminations, because for example in the housing discrimination based on race is constituted as a discrimination, while discrimination on the issue of sexual orientation is not considered by the Directives.²⁵³

²⁴⁹ Dagmar Schiek, “A New Framework on Equal Treatment of Persons in EC Law?,” *European Law Journal* 8, no. 2 (2002): 290–314, <https://doi.org/10.1111/1468-0386.00154>.

²⁵⁰ This is due to the fact that the whole EU legal system is based on (mostly undisclosed) market-focused assumptions, such as the (economic) objectives of the integration process which are both presumed to be good for all Europeans as outlined and are not contestable by democratic means. This is not good news for the vulnerable groups in need of protection, particularly given how blurred the border line between ‘market-related’ and ‘non-market-related’ issues is. Furthermore, both FED and RED target primarily employment discrimination, i.e., revealing an old economic rationale behind their adoption, while only RED spreads its material scope a bit further, covering also social protection, education, access to goods and services.

²⁵¹ Directive 2000/43, (n 617) Article 13.

²⁵² Dimitri Droshout, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law: Ius Commune Casebooks for the Common Law of Europe*, ed. Dagmar Schiek, Lisa Waddington, and Mark Bell, Illustrated edition (Oxford ; Portland, Or: Hart Publishing, 2007); Dagmar Schiek, “A New Framework on Equal Treatment of Persons in EC Law?,” *European Law Journal* 8, no. 2 (2002): 290–314, <https://doi.org/10.1111/1468-0386.00154>.

²⁵³ Mark Bell, “Advancing EU Anti-Discrimination Law: The European Commission’s 2008 Proposal for a New Directive,” 2009, 9.

The lacunae in the existing legal framework are frustrating due to its inability to face discriminations on more than one ground, for example a gay Asian tenant facing discrimination on the grounds of ethnic origin and sexual orientation, when he is protected facing harassment on the basis of ethnic origin only not sexual orientation as well.²⁵⁴

Therefore, inevitably gender discrimination is the most common instance of multiple discrimination²⁵⁵, however the Directive will provide the gender discrimination at least protected grounds of the EU anti-discrimination legislation. Problems can still arise with the Directive concerning multiple grounds of discrimination, as Mark Bell argues that even if there is comprehensive legislation that prohibits discrimination across many grounds, problems will arise from: issues that range from locating an appropriate comparator for a complainant alleging discrimination on multiple grounds, to determining whether the remedy awarded should be adjusted if the discrimination has been on more than one ground.²⁵⁶

In similar fashion the Directives do not address issues whether discrimination by assumption or discrimination by association are forbidden, nonetheless this has been established by the ECJ. In *Coleman*, the Court held that the Directive prohibits discrimination on particular grounds rather than to protect certain groups of people, establishing this precedence with its jurisprudence.²⁵⁷

The prohibition of discrimination was interpreted by the ECJ on the grounds of sexual discrimination through of number of rulings, the first ruling was delivered eight years after the promulgation of the Directives. The Maruko case²⁵⁸ was relating to the case of Mr. Maruko and the German Theatre Pension Institution ('Vddb') with the refusal of the Vddb to enable

²⁵⁴ Ibid.

²⁵⁵ See more, Kanchana N. Ruwanpura, "Multiple Identities, Multiple-Discrimination: A Critical Review," *Feminist Economics* 14, no. 3 (July 1, 2008): 77–105, <https://doi.org/10.1080/13545700802035659>.

²⁵⁶ Ibid.

²⁵⁷ Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* EU:C: 2013:275 (discrimination by assumption); Case C-303/06 *Coleman v Attridge Law and Steve Law* [2008] EU:C:2008:415 (discrimination by association).

²⁵⁸ Case C-267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-01757, see C Tobler and K Waaldijk, 'Annotation of Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported' (2009) 46 *Common Market Law Review* 723.

the widower her entitlement, this pension was part of the survivor's benefit, as part of the compulsory occupation pension scheme, in which the deceased partner had the benefits as member of that pension system.²⁵⁹ VdB refusal to grant the partner benefits was part of the provision that enables those entitlements for spouses and not registered partners, therefore excluding them. Therefore, due to this contested refusal, whether it amounted to sexual discrimination, the Court pointed out that: from 2001 [. . .] the Federal Republic of Germany altered its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life.²⁶⁰ Therefore, having the German courts determine not to permit people of same sex to marriage, it did allow for the creation of a separate arrangement, the life partnership to conditions that were admissible and considered close to the those of a marriage.

Namely this act would amount to discrimination based on sexual orientation, and hence be in contrary to the Directives, if the Courts of a Member State considers the same-sex partnerships as equivalent to marriage, therefore it must treat them as the same. The ECJ rightly determined that Maruko case is viable due to having grounds for discrimination based on sexual discrimination. Since marriage was not allowed for the same sex couples in this case, any entitlement that is prohibited by legislation that amounts to prevention of couple that are engaged in registered partnerships. Therefore, if this legislation refuses to allow the entitlements to these persons, this case amounts to direct discrimination by the legislature on the grounds of sexual orientation.²⁶¹ In the other case, due to the need of equal treatment between registered partnerships and married couples, in the Maruko case, the Court leaves the

²⁵⁹ Katharina Boele-Woelki, Angelika Fuchs, and Academy of European Law (Trier, Germany), eds., *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-Border and European Perspectives*, Fully rev. 2nd ed, European Family Law Series 32 (Legal recognition of same-sex relationships in Europe (Conference), Cambridge ; Portland: Intersentia, 2012),274.

²⁶⁰ Case C-267/06 Maruko (n 249) at para 67.

²⁶¹ According to Tobler and Waaldijk Maruko can be viewed as a 'move away from an approach under which only measures that are explicitly based on the prohibited criterion or on a criterion that is by nature indissociably linked to it (such as pregnancy in the case of sex) amount to direct discrimination.' – see Tobler and Waaldijk (n 638) 739-740.

equal treatment requirement only if the Member state deem the situation comparable for a specific purpose.²⁶²

The Court was deferring to the Member States legislature to deem what is compatible to the opposite same-sex marriages. The Maruko judgement contains criteria that is relevant for this compatibility by the national legislatures. The ECJ established an individual specific comparison with: “situation comparable to that of a spouse who is entitled to the survivor’s benefit provided for under the occupational pension scheme managed by the Vddb.” The national courts used two criteria for comparing opposite sex marriage and registered partnerships: both partnerships are (a) formally entered into for life and (b) constitute a union of mutual support and assistance. The ECJ in its judgment repeatedly and explicitly quoted these criteria.²⁶³ The operative part of the judgement for the Maruko case states that : “ The combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings ... [following the description of the legislation at issue] .²⁶⁴ This is comparable to the judgment of *Palacios*²⁶⁵ where the operative part states : “The prohibition of any discrimination on grounds of age ... must be interpreted as not precluding national legislation such as that at issue in the main proceedings, ...[following the description of the legislation at issue], where ...[follow criteria which the national court has to apply in determining compatibility with community law]” (emphasis added).²⁶⁶

More importantly the Court held that the Directives preclude the discrimination based on sexual orientation in the case of *Romer* where the Court followed the same approach in calculating the supplementary pension to which they were obligated in delivering to the partner in the same sex marriage.²⁶⁷ In similar fashion to the Maruko case the refusal of the German authorities allowed the ECJ to preclude that Directives allowed the need of a different method

²⁶² A.Eriksson, ‘European Court of Justice: Broadening the scope of European nondiscrimination law’ (2009) 7 International Journal of Constitutional Law 731, 745.

²⁶³ Case C-267/06 Maruko (n 633) at paras 62, 69.

²⁶⁴ Ibid, see paras 69,73, operative part 2.

²⁶⁵ Case C-411/05, *Palacios de la Villa v. Cortefiel Servicios SA* EU:C:2007:604.

²⁶⁶ Ibid, see operative part 2.

²⁶⁷ Case C-147/08, *Römer v Freie und Hansestadt Hamburg* EU:C:2011:286.

if the Member State which is concerned is reserving the person of same gender a life partnership in order to be eligible for the entitlement.²⁶⁸ Furthermore, the issues over marriage propelled the Court to conclude that due to the marriage situation in the Romer case, the direct discrimination was palpable because of the grounds of sexual orientation. The marriage of a person to their life partner deemed in Germany as compatible to a marriage from a person of opposite-sex marriage, therefore the issue with pension is compatible with German law.²⁶⁹ The ECJ followed the reasoning of the Maruko case, stating that, in order to be entitled to the same pension, the situation must be comparable to the situation to a married person as previously stated, proving with their decision that along with the following of the Directives, the ECJ deemed that the rights of couples in life partnerships and marriages are treated equally, regardless the institution of marriage.²⁷⁰

The following case of that merits discussion the issue of discrimination based on sexual orientation under Directive 2000/78 was *Asociația Accept*²⁷¹, which was between a Romanian NGO called Accept that promotes the rights the LGBT rights and Romanian Council for Combatting Discrimination. The case is prominent due to the dismissal of operative owner of a Romanian soccer team and his influence. Specifically, Mr. Becali statements in regards to a player signed by the Romanian team FC Steaua. Accept claimed that Mr. Becali inflammatory comments in regards to not signing a player that is allegedly gay, constituted as a discriminatory rhetoric, and that the principle of equal treatment has been breached in the phase of the recruitment by FC Steaua. The Court in their judgements deemed that establishing a direct discrimination as part of the operative owner of the club statements on the grounds of

²⁶⁸ Koen Lenaerts and Kathleen Gutman, “The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic,” *The American Journal of Comparative Law* 64, no. 4 (2016): 848, <https://www.jstor.org/stable/26425478>.

²⁶⁹ Ibid, 849.

²⁷⁰ Ibid.

²⁷¹ Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* EU:C: 2013:275.

sexual discrimination, its permissible for a complaint to be lodged by a third-party privy to the discussions.²⁷²

The NGO Accept filed this complaint even though they had not considered the point of view of the player to determine whether his side was harmed by this discriminatory rhetoric. Nonetheless this complaint was accepted by the Court due to the public opinion in regards to the owner's stance towards the player.²⁷³ Regardless, Mr. Becali alleged involvement or noninvolvement in an official capacity in Steaua does not prevent third parties from establishing links that may prove grounds for discrimination based on sexual orientation.

The Court clarified due to the importance of the discriminatory words expressed by Mr. Becali, and the recanting of those sentiments by the club, the Court will take into consideration their timid position when establishing links to sexual discrimination from the club. The Court elaborated in its judgment that they found the club's statement established association through guilt between Mr. Becali and the football club. Therefore, the Court concluded that their association with Becali's is prohibited by the Framework of the Equality Directive.²⁷⁴ In other context, for discrimination of sexual orientation to be established, its only necessary for someone to be discriminated regardless of his or other people's opinion if he is gay or not. The sexual orientation is irrespective in this regard when it comes to the case of Mr. Becali.²⁷⁵

The broad application by the Court in establishing a precedent in regards to sexual orientation in their adoption of their judgement. The court through its rulings demonstrated that their efforts to achieve substantive rather than formal equality is the purpose.²⁷⁶ In their judgement they have allowed the desecration of any obstacles in the employment market to be

²⁷² Case C-81/12 Asociația Accept (n 648) at para 36. The Court had already held this in relation to the prohibition of discrimination on the grounds of race in Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn* EU:C:2008/397.

²⁷³ See more on homophobia in football Simon Gardiner and Louisa Riches, "Racism and Homophobia in English Football: The Equality Act, Positive Action and the Limits of Law," *International Journal of Discrimination and the Law* 16, no. 2–3 (June 1, 2016): 102–21, <https://doi.org/10.1177/1358229116655648>.

²⁷⁴ Case C-81/12 Asociația Accept (n 247) at paras 46-53.

²⁷⁵ Marco Cellini, "The Right to Non-Discrimination on the Ground of Sexual Orientation: An Analysis of the EU Legislation and the ECJ's Jurisprudence," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 20, 2015), 10-13 <https://doi.org/10.2139/ssrn.2652739>.

²⁷⁶ *Ibid*, 14.

forbidden, whether the person is gay, their access due to their sexual orientation should not be limited and constrained by the option of their employer.²⁷⁷ Unlike the previous cases where the criteria it considered on an individual and particular case of employment or marriage comparable to other groups of non-marginalized people, the practices of discrimination are prohibited when it established that the alleged party perpetuates a climate of sexual discrimination in the employment practices.²⁷⁸ What is encouraging in the *Asociația Accept* case in regards to the Court's opinion in these matters it is their treatment towards minorities in relation to the coming out of their sexual orientation.²⁷⁹

The LGBT complaints can be lodged by any party that can establish bad behavior, which is a positive sign that allows NGO to file a complaint from an unidentifiable party that is privy to the sexual discrimination suit.²⁸⁰ The Court's decision pertains certain guarantees of protection that are based on the fact that considers the negative consequences of the discriminate parties in regards to discrimination on the grounds of sexual orientation, their avoidance of any problems with their future or current employers or the attention it will spring out from announcing in a prevalent and openly institutional discriminatory practice coming out from a Member State, where political homophobia is a major factor of punishable through institutional circuits.²⁸¹

The same positive approach the Court took as the *Romer* and *Maruko* case towards the protection of same sex partnerships with the case of *Hay*²⁸², where the Court reacted in a

²⁷⁷ Case C-81/12 *Asociația Accept* (n 247). For excellent commentary on the case, see U Belavusau 'A Penalty Card for Homophobia from EU Non-Discrimination Law: Comment on *Asociația Accept* (C-81/12)' (2015) 21 *Columbia Journal of European Law* 329.

²⁷⁸ *Ibid.*

²⁷⁹ Tryfonidou, "The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law," 238.

²⁸⁰ Case C-54/07 *Feryn* EU:C:2008:397 Article 9(2) of the Directive gives locus standi for organisations to represent disadvantaged groups either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

²⁸¹ *Ibid.*, 239; U Belavusau and D Kochenov, 'Federalizing Legal Opportunities for LGBT Movement in the Growing EU' in K Sloatmaeckers, Touquet, and P. Vermeersch (eds), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave Macmillan 2016) 77.

²⁸² Case C-267/12 *Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* EU:C:2013:823.

positive manner towards the similar case involving employment benefits.²⁸³ Like the previous case, the Court the compatibility approach due to criticism levied against them, the Court did not allow the decision to be left to the Member States. The Hay case, because of the similarity was applicable on the issue of the Directives. The French bank employee who had solidarity pact with his male partner along with that a special leave and bonus granted to him as part of the staff if he married. Then the court made their compatibility analysis in comparing couples of opposing sexes, whether under the Pacte Civil de Solidarité (PACS) were in position comparable to receive special leave and bonus, in that advance the Court concluded that opposite sex partners are indeed receiving that.²⁸⁴ Unlike in the Maruko or Romer case, the Court did not explain how the compatibility analysis should be conducted, instead the issued proper guidelines on the method of the conduction of this compatibility. In line with the Maruko case And Romer case, the court upheld the discrimination that couples who had entered into a form of registered partnerships that amounted to direct discrimination because of the unavailability to marriage to the them.²⁸⁵ The Court noted that:

The fact that the PACS, unlike the registered life partnership at issue in the cases which gave rise to the judgments in Maruko and Römer, is not restricted only to homosexual couples is irrelevant and, in particular, does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage’.²⁸⁶

According to the Court, direct discrimination impacts same sex couples because of their inability to enter into a marriage arrangement. However, direct discrimination also presupposes that if additional rights are available to the couples thar are married, these rights should be granted comparingly to the people in a life partnership.²⁸⁷

²⁸³ Ibid, at para 36.

²⁸⁴ Tryfonidou, “The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law,” 240.

²⁸⁵ Case C-267/12 Hay v Crédit, at para.41.

²⁸⁶ Ibid, at para 43.

²⁸⁷ Tryfonidou, “The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law,” 240.

Taking into consideration the issues in the cases of *Hay* along with the reasoning behind the judgment for *Asociația Accept* can be shown as a clear example of the cases that have improved the statuses of same sex couples and LGBT people in general under the auspices of EU secondary law.²⁸⁸ This interpretation of the issues of sexual discrimination broadly has allowed the ECJ to prove less hesitant in their judgements but also to sanction discriminatory behavior from Member States of the EU. The big issue here is the possibility of the Court to conduct itself the compatibility analysis in determining case by case if there is under national law, same sex partnerships that are not properly situated within their rights opposite those that are in a opposite sex couples. In any case, with this broad treatment of sexual discrimination, the Court propels the Member States to address individual cases and extend entitlements that are purposefully neglected and only made available to those couples in opposite-sex marriages. In case of positive determination, the Court subjects and takes a critical role in propelling hesitant member states to regard more closely their national law prerogatives.²⁸⁹

The latest case concerning sexual discrimination under the Directive 2000/78 is *Parris*.²⁹⁰ Concerning the Parris case, Tryfonidou in her article explains that : “ The request for a preliminary ruling in the Parris case was referred by the Labor Court (Ireland) hearing an appeal from a decision of the Equality Tribunal (Ireland) in proceedings brought by Dr David L. Parris – a retired academic – against Trinity College Dublin (his former employer), the Higher Education Authority (Ireland), the Department of Public Expenditure and Reform (Ireland) and the Department of Education and Skills (Ireland), arguing that he had been discriminated against by the defendants by reason of his age and sexual orientation.”²⁹¹ The employer of Dr. Parris, the Trinity College Dublin refused to accept his request after his death, that his survivor’s pension be granted to his partner as part of the occupation benefit scheme. The refusal was part of the fact that Dr. Parris had entered into civil partnership before the age

²⁸⁸ Alina Tryfonidou, “Law and Sexual Minority Rights in the EU: Navigating a Political Minefield,” in *Research Handbook on the Politics of EU Law*, ed. Paul James Cardwell and Marie-Pierre Grainger (Edward Elgar, 2020), 214, <http://centaur.reading.ac.uk/92174/>.

²⁸⁹ Ibid, 213.

²⁹⁰ Case C-443/15 *Parris v Trinity College Dublin and Others* EU:C: 2016:897.

²⁹¹ Alina Tryfonidou, “Another Failed Opportunity for the Effective Protection of the Rights of Same-Sex Couples under EU Law: *Parris v Trinity College Dublin and Others*,” *Anti-Discrimination Law Review* 2, no. 2 (October 2017): 83–95, <http://centaur.reading.ac.uk/74269/>.

of 60, under the occupation benefits scheme was payable only if the entity was in a marriage or a civil partnership before the age of 60.²⁹² However, due to the matter in hand that civil partnerships entered in Ireland in 2011, people born before January 1951, meaning people turning 60 before this measure took effect were excluded from the instance of claiming a survivor's benefit, from their same sex partner.

The main question that the Court was posing is whether the contested rule of the occupational scheme amounted to discrimination on the grounds of sexual orientation. The Court decided that the contested rule did not apply and it was not direct discrimination because it did not refer to the worker's sexual orientation. Furthermore, the Court decided that also, indirect discrimination did not apply either, because Dr. Parris due to state law was not able to get recognition of his civil partnership, in Ireland there was not same sex partnership recognition.²⁹³ Secondly, because of the absence of rules governing the survivor's benefit at issue in the main proceedings, of transactional benefits for homosexual members born before 1951. The Court referring to the Recital 22 of Directive 2000/78, proceeded to highlight the understanding it shows to state laws regarding the regulation of same sex relationships, because it is up to the States to maintain competence and accordance with the EU law, provided they are compliant with the obligations.²⁹⁴ The courts explanation was that Member States have the right to allow the permittance of marriage for same sex partners, and according to this if they do provide, they have the possibility to proclaim the date when this marriage or relationships takes effect. Concerning this issue, the Court stated that:

EU law, in particular Directive 2000/78, did not require Ireland to provide before 1 January 2011 for marriage or a form of civil partnership for same-sex couples, nor to give retrospective effect to the Civil Partnership Act and the provisions adopted pursuant to that act, nor, as regards the survivor's benefit at issue in the main

²⁹² See more intersectional discrimination and a critique on the ECJ to conduct an analysis for multiple discrimination cases such as Parris: Shreya Atrey, "Illuminating the CJEU's Blind Spot of Intersectional Discrimination in Parris v Trinity College Dublin," *Industrial Law Journal* 47, no. 2 (July 2, 2018): 278–96, <https://doi.org/10.1093/indlaw/dwy007>; Mathias Moschel, "If and When Age and Sexual Orientation Discrimination Intersect: Parris," *Common Market Law Review* 54 (2017): 1835, <https://heinonline.org/HOL/Page?handle=hein.kluwer/cmlr0054&id=1853&div=&collection=>.

²⁹³ Case C-443/15 *Parris v Trinity College Dublin* (n 665) at para 63.

²⁹⁴ *Ibid*, at paras 57-58.

proceedings, to lay down transitional measures for same-sex couples in which the member of the scheme had already reached the age of 60 on the date of entry into force of the act.²⁹⁵

According to this notion, the CJEU considered that the contested rule didn't violate the prohibition on discrimination on the grounds of sexual orientation, because the contested measure was meant to establish a difference in treatment based on the age criteria, but this fell within one of the exceptions of the Directives and therefore was not prohibited.²⁹⁶

2.2 The European Court of Justice position on multiple discrimination and its conservative interpretation of EU law

The *Léger* case is where the ECJ missed the opportunity to offer an effective protection for the LGBT community in same sex marriages. Despite the positive recognition coming from the cases of *Hay* and *Asociația Accept*, which allowed the Court to portray itself as a protector of LGBT rights under EU law, the decisions in the cases of *Parris* and *Léger*²⁹⁷ beforehand have shown the cautious nature of the Court in treating matters involving national law regarding its Member States.²⁹⁸ The Court careful ruling was because of the fear of being accused of imposing norms and views that are still in contention between member states in regards to the situation of marriage equality. The judgement of the Court against showed its inability to tackle cases that are accountable as multiple discriminations, according to *Tryfonidou*, the judgment demonstrates : the ECJ's failure to accept the reality of multiple discrimination, as it was ruled that if a measure does not give rise to discrimination on any of the grounds prohibited by Directive 2000/78²⁹⁹ – when these grounds are taken in isolation –

²⁹⁵ Ibid, at para 60.

²⁹⁶ Tryfonidou, “The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law,” 241.

²⁹⁷ Case C-528/13 *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang* [2015] EU:C:2015:288.

²⁹⁸ Tryfonidou, “Law and Sexual Minority Rights in the EU,” 221.

²⁹⁹ Mathias Moschel, “If and When Age and Sexual Orientation Discrimination Intersect: *Parris*,” *Common Market Law Review* 54 (2017): 1835–51. Case law beyond employment has been more ambiguous in relation to asylum and national policy around blood donations by men who had sexual intercourse with men (*X and Others* C-199-201/12 EU:C: 2013:720, and *Léger* C-528/13 EU:C:2015:288). However, the recent *Coman* ruling on derivative free movement rights of non-EU same sex spouses of EU citizens is more positive (*Relu Adrian Coman et al Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, C-673/16 EU:C:2018:385).

then it cannot be considered as inciting discrimination on the basis of the combination of those two factors. With the Court hiding behind the Recital 22, it tried avoiding this case.³⁰⁰

Therefore, the ECJ permitted discrimination based on marriage in certain states that have not gotten up to date with certification of that rights, therefore, the Parris judgement comes as a surprise, because it negates previous rulings in favor of LGBT rights.³⁰¹ However, the ECJ, dropping its prerogative in regards to Member States regulation in the governance of state pensions in situations involving same sex marriages, on the other hand the ECJ should have pursued and ensured that states are complaint with the Directive 2000/78.³⁰² The compliance of Ireland's legislature is expected in the future, the complaint element should have been achieved by the emendation of the rule and the allowance for persons born before 1951 to claim the survivor's benefits pension, even if they entered into a same-sex partnership or marriage after 61.³⁰³ The jurisprudence and the EU legislature seem to ignore the reality of multiple discrimination like the cases of Parris involving age and sexual orientation. The ECJ should take the level of multiple discrimination seriously and provide guidelines on how to tackle those cases, besides the point that the authors of the Directive had that case in mind, the ECJ assumed it would be resolved by the same instruments of the Directive.³⁰⁴

³⁰⁰ Case C-443/15 *Parris v Trinity College Dublin* (n 665) at para 80.

³⁰¹ Lina Triantafyllia Papadopoulou, "Sexual Orientation and Gender Identity Law in the European Union and Its Court of Justice," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, December 21, 2018),21, <https://papers.ssrn.com/abstract=3305093>.

³⁰² Dagmar Schiek, "On Uses, Mis-Uses and Non-Uses of Intersectionality Before the European Court of Justice (ECJ): The ECJ Rulings Parris (C-433/15), Achbita (C-157/15) and Bougnaoui (C-188/15) as a Bermuda Triangle?," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 1, 2018),11, <https://doi.org/10.2139/ssrn.3196036>.

³⁰³ Steve Peers, "EU Law Analysis: Another Failed Opportunity for the Effective Protection of LGB Rights under EU Law: Dr David. L. Parris v. Trinity College Dublin and Others," *EU Law Analysis* (blog), December 1, 2016, <http://eulawanalysis.blogspot.com/2016/12/another-failed-opportunity-for.html>.

³⁰⁴ Sarah Hannett, "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination," *Oxford Journal of Legal Studies* 23, no. 1 (March 1, 2003): 65–86, <https://doi.org/10.1093/ojls/23.1.65>.

2.3 Political opposition from Member States over the expanding scope of European institutions over the interpretation of EU law

The objectives of the Treaty of Lisbon were to amend the Maastricht Treaty³⁰⁵ that laid the foundation for the establishment of the European Union. This Treaty is renamed the ‘Treaty on the Functioning of the European Union’ (TFEU) and the term ‘Community’ is hence replaced by ‘Union’ throughout the text.³⁰⁶ The passing of the Treaty of Lisbon made the Charter of Fundamental Rights of the European Union³⁰⁷ (EUCFR) binding and at the same legal value as the treaties.³⁰⁸ Firstly, the treaties added a provision in the Article 10 of TFEU³⁰⁹ in which contains policies from the Union that contribute in the fights ground for discrimination on sexual orientation basis.³¹⁰ This provision provided that EU policies should be free from discrimination and ensures protection on the grounds of sexual discrimination. The provision of Article 10 offers a complementary piece of protection along with the secondary legislation enabled by the passage of the Directives 2000/78.³¹¹

More importantly the Treaty of Lisbon allowed the EUCFR to be binding, therefore allowing the European institutions. Thus European member states can be charged for breaching the rights by individuals and NGO’s that fall under the scope of European law.³¹² In regards to

³⁰⁵ Treaty on European Union (Consolidated Version), Treaty of Maastricht [1992] OJ C 191.

³⁰⁶ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/01.

³⁰⁷ Charter of Fundamental Rights of the European Union, [2012] OJ C 326.

³⁰⁸ Peers, “EU Law Analysis.”

³⁰⁹ European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

³¹⁰ Geert De Baere, “Shall I Be a Mother - The Prohibition on Sex Discrimination, the UN Disability Convention, and the Right to Surrogacy Leave under EU Law,” *Cambridge Law Journal* 74 (2015): 44, <https://heinonline.org/HOL/Page?handle=hein.journals/camlj74&id=44&div=&collection=>.

³¹¹ Jasper P. Sluijs, “From Competition to Freedom of Expression: Introducing Article 10 ECHR in the European Network Neutrality Debate,” *Human Rights Law Review* 12, no. 3 (September 1, 2012): 550, <https://doi.org/10.1093/hrlr/ngs015>.

³¹² Helen Meenan, “Reflecting on Age Discrimination and Rights of the Elderly in the European Union and the Council of Europe,” *Maastricht Journal of European and Comparative Law* 14, no. 1 (March 1, 2007): 39–82, <https://doi.org/10.1177/1023263X0701400103>.

LGBT persons, the Article 20 of the Charter states that: everyone is equal under the law.³¹³ Along with Article 21, it provides prohibition of any discrimination such as sexual orientation.³¹⁴ Ultimately, European citizens can rely on this provision to protect them from discrimination based on sexual discrimination, even if the case is not related to employment benefits, or professional organizations.³¹⁵ Finally, the Court has expanded its material scope in accordance with its prohibition of discrimination based on the grounds of sexual orientation.³¹⁶

Member States are only bound when they are implementing European law, since it is not clear enough when the provision is satisfied. More importantly, the extension when LGBT can rely on the provision to protect their rights from infringing Member States of the Union solely depends on the willingness of the Court to interpret the provision broadly.³¹⁷ Nonetheless beside the Article 21 TFEU, the Charter includes many protections that serve the LGBT people such as the right to human dignity and family life.³¹⁸

³¹³ Gráinne de Búrca, “After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?,” *Maastricht Journal of European and Comparative Law* 20, no. 2 (June 1, 2013): 180, <https://doi.org/10.1177/1023263X1302000202>.

³¹⁴ Charter of Fundamental Rights of the European Union, (n 298) in Article 21 states:

1. Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

³¹⁵ Angela Ward, “The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?,” *Cambridge Yearbook of European Legal Studies* 20 (December 2018): 32–60, <https://doi.org/10.1017/cel.2018.11>.

³¹⁶ “ILGA-Europe Welcomes Judgement from the Court of Justice of the European Union (CJEU) Saying That a Homophobic Statement on an Italian Radio Show Constituted Discrimination in Employment | ILGA-Europe,” accessed February 24, 2021, <https://www.ilga-europe.org/resources/news/latest-news/ilga-europe-welcomes-judgement-court-justice-european-union-cjeu-saying>; Virginia Passalacqua, “Homophobic Statements and Hypothetical Discrimination: Expanding the Scope of Directive 2000/78/EC: ECJ 23 April 2020, Case C-507/18, Associazione Avvocatura per i Diritti LGBTI,” *European Constitutional Law Review* 16, no. 3 (September 2020): 515, <https://doi.org/10.1017/S1574019620000267>.

³¹⁷ Laurence R. Helfer and Erik Voeten, “International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe,” *International Organization* 68, no. 1 (2014): 77–110, <https://www.jstor.org/stable/43282096>.

³¹⁸ Alina Tryfonidou, “The Legal Position of LGBT Persons and Same-Sex Couples in Cyprus,” *The Cyprus Review* 29, no. 1 (March 13, 2018): 183–213, <http://cyprusreview.org/index.php/cr>.

To this date, the Court has only once applied the Charter in case involving LGBT case involving individuals of same sex orientation, such as the *Leger* case concerning on the grounds of sexual orientation, beside the employment culpability's case concerning the culpability of a ban by the French government on men who had sex with other men.³¹⁹ This measure by the French government clearly was meant for homosexual and bisexual men: thus it had grounds for discrimination based on sexual orientation.³²⁰ The contested French legislation was implementing European secondary law, therefore had been applicable under the Charter. Because the Court stated that the French legislation: must respect inter alia Article 21(1) [of the Charter] ... according to which any discrimination based on sexual orientation must be prohibited. Article 21(1) is a particular expression of the principle of equal treatment, which is a general principle of EU law enshrined in Article 20 of the Charter'.³²¹

More importantly, the Court concluded that the contested ban : may discriminate against homosexuals on grounds of sexual orientation', since the challenged legislation 'determines the deferral from blood donation on the basis to the homosexuality of the male donors who, on account of the fact that they have had homosexual sexual relations, are treated less favorably than male heterosexual persons.'³²² Nevertheless, this measure may be considered justified by the conditions laid down by Article 52³²³ of the Charter, therefore, the CJEU left it in the home court's table, determining that there are needs of some proper

³¹⁹ Juliane Kokott and Christoph Sobotta, "The Charter of Fundamental Rights of the European Union after Lisbon," *Revista Romana de Drept European* 2012 (2012): 93, <https://heinonline.org/HOL/Page?handle=hein:journals/rianrwioe10&id=835&div=&collection=>.

³²⁰ Colm O'Conneide, "The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground," *Maastricht Journal of European and Comparative Law* 22, no. 3 (June 1, 2015): 370–95, <https://doi.org/10.1177/1023263X1502200304>.

³²¹ Giovanni Zaccaroni, *Equality and Non-Discrimination in the EU: The Foundations of the EU Legal Order* (Edward Elgar Publishing, 2021), 177.

³²² Steve Peers, "EU Law Analysis: Block Exclusion on Blood Donation by Gay and Bisexual Men: A Disappointing CJEU Ruling," *EU Law Analysis* (blog), April 30, 2015, <http://eulawanalysis.blogspot.com/2015/04/block-exclusion-on-blood-donation-by.html>.

³²³ Paragraph 1 of Article 52 of EU Charter of Fundamental Rights states: Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others; Paragraph 4 also specifies that : In so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

guidelines, pointing out that the national courts should provide a solution that will not prove a total imposition or restrictions based on blood donations by the LGBT community.³²⁴

The judgment on the Leger case involving the ECJ role is disappointing because even though there are measures under Article 21 prohibiting discrimination based on sexual orientation, the Court still considered the notion of the French legislature in evoking the Article 52, completely justifying this discriminatory action.³²⁵ Basically, banning all gay men even those that had once sex with a partner from giving blood donation is completely unjustifiable according to the Court.³²⁶

Furthermore, the approach of the Court in leaving this measure in the hands of the national courts, reinforced a stereotypical and narrow point of view regarding the lives of LGBT individuals. This wholesome ban on every level even goes against the established medical and scientific facts in regards to reporting and detecting of HIV.³²⁷ The Court's hesitant approach goes to show their sensitivity in regards to public safety and sexuality. A threshold the ECJ didn't want to cross over and apply a broad interpretation of the Charter for fear of interfering in the national legislature of a member state.³²⁸ Yet, in a case where there is a clear and primary example of breach of fundamental rights of the LGBT rights in relation to this undignified measure, but not interfering in this case, the ECJ left a vulnerable population be stigmatized and opinionated by the French institutions and legislature.³²⁹ With regards to the Charter, it has an option to complement the Directives in regards to protecting the rights of

³²⁴ Uladzislau Belavusau, "Towards EU Sexual Risk Regulation: Restrictions on Blood Donation as Infringement of Active Citizenship," *European Journal of Risk Regulation (EJRR)* 7 (2016): 806, <https://heinonline.org/HOL/Page?handle=hein.journals/ejrr2016&id=842&div=&collection=>.

³²⁵ Ibid, 809.

³²⁶ "Gay Blood: Bad Blood? A Brief Analysis of the Léger Case [2015] C-528/13," *European Law Blog* (blog), August 26, 2015, <https://europeanlawblog.eu/2015/08/26/gay-blood-bad-blood-a-brief-analysis-of-the-leger-case-2015-c-52813/>.

³²⁷ Tryfonidou, "The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law," 245.

³²⁸ Belavusau, "Towards EU Sexual Risk Regulation," 807.

³²⁹ Elise Muir, "The Essence of the Fundamental Right to Equal Treatment: Back to the Origins," *German Law Journal* 20, no. 6 (September 2019): 817–39, <https://doi.org/10.1017/glj.2019.64>.

LGBT individuals, the Court's social and political nature is preventing a considerable protection measure in regards to the rights of LGBT people.³³⁰

Along with political opposition, administrative problems or the issues of linkage to protracted national reform processes have created a contested situation in which the Member States are non-compliant with EU law or its interpretation on what Member States are required to do.³³¹ Their arguments on the expanding scope of the European institution's inclining need to be curtailed and not meddled in national matters that do not concern the Union. Objectively the argument concerning the lack of competence of certain European member states are used to argue and object to any proposal that enhances the rights of the LGBT minorities.³³² The fact that one of these arguments are used against the EU and the CJEU is the reason why there is fear over extending the EU and the competences of the European institutions over the rights of sexual minorities: especially, the EU and their judiciary's extreme caution when it comes to the rights of LGBT minorities. As an example, there is a reason why for instance the EU doesn't have any competence to decide over the issue of family law: it is because it does not have the proper power to adopt cross-border implications of its harmonizing measures on family law.³³³

Therefore, it was decided to leave it in the hands of member states to decide if there is a possibility of legal recognition of same sex marriages in their territories.³³⁴ But also, it is up to the member states to allow same sex couples to become de facto parents and try to establish

³³⁰ Eleni Frantziou, "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality," *European Law Journal* 21, no. 5 (2015): 657–79, <https://doi.org/10.1111/eulj.12137>.

³³¹ Tanja A. Börzel and Ulrich Sedelmeier, "Larger and More Law Abiding? The Impact of Enlargement on Compliance in the European Union," *Journal of European Public Policy* 24, no. 2 (February 4, 2017): 197–215, <https://doi.org/10.1080/13501763.2016.1265575>; Gerda Falkner et al., "Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?," *West European Politics* 27, no. 3 (May 1, 2004): 452–73, <https://doi.org/10.1080/0140238042000228095>.

³³² Erica Howard, "EU Anti-Discrimination Law: Has the CJEU Stopped Moving Forward?," *International Journal of Discrimination and the Law* 18, no. 2–3 (June 1, 2018): 60–81, <https://doi.org/10.1177/1358229118788454>.

³³³ *Ibid.*, 62.

³³⁴ Louise K. Davidson-Schmich, "LGBT Politics in Germany: Unification as a Catalyst for Change," *German Politics* 26, no. 4 (October 2, 2017): 534–55, <https://doi.org/10.1080/09644008.2017.1370705>.

a family and be legally recognized under EU as joint parents of those adopted children.³³⁵ It represents distant clarity that EU is not competent to legislate on those issues except the extension on the rights of same sex couples.

On the issue of extreme competence, the Member states have to be obliged by the EU law and respect the obligations. The EU does not have competence on many issues that impact the lives of the LGBT community, either hand when EU law is invoked, especially when it comes to the free movement of its citizens and the legal cross border recognitions.³³⁶ In situations, where the legal rights of the LGBT are affected, almost incidentally, EU law is automatically triggered due to the fear of breaching EU provisions such as free movement provisions that are meant to protect the rights of sexual minorities.³³⁷ The case of *Coman*³³⁸ explains why the Court was reticent, in their explanation in which they emphasize on how the rights of the LGBT are not expanded in any case such as the *Obergefell*³³⁹ in the United States, just reminding the Member states not to obstruct the current EU concerning the free movement provision of its citizenship under EU law.³⁴⁰

Even in the case of Leger, it was considered that the measures of the French legislative system were indeed discriminatory towards a specific sexual minority. Nonetheless, it was a

³³⁵ Jennifer B. Mertus, “Barriers, Hurdles, and Discrimination: The Current Status of LGBT Inter-country Adoption and Why Changes Must Be Made to Effectuate the Best Interests of the Child,” *Capital University Law Review* 39 (2011): 271, <https://heinonline.org/HOL/Page?handle=hein.journals/capulr39&id=275&div=&collection=>.

³³⁶ Federico Fabbrini, “After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States,” *German Law Journal* 16, no. 4 (September 2015): 1003–23, <https://doi.org/10.1017/S2071832200019970>.

³³⁷ Phillip Ayoub and David Paternotte, “Europe and LGBT Rights: A Conflicted Relationship,” in *The Oxford Handbook of Global LGBT and Sexual Diversity Politics*, by Phillip Ayoub and David Paternotte, ed. Michael J. Bosia, Sandra M. McEvoy, and Momin Rahman (Oxford University Press, 2020), 152–67, <https://doi.org/10.1093/oxfordhb/9780190673741.013.11>.

³³⁸ *Coman, Hamilton and Asociația Accept v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (C-673/16) EU:C:2018:385.

³³⁹ Emily Kazyak and Mathew Stange, “Backlash or a Positive Response?: Public Opinion of LGB Issues After *Obergefell v. Hodges*,” *Journal of Homosexuality* 65, no. 14 (December 6, 2018): 2028–52, <https://doi.org/10.1080/00918369.2017.1423216>.

³⁴⁰ Alina Tryfonidou, “The EU Top Court Rules That Married Same-Sex Couples Can Move Freely Between EU Member States as ‘Spouses’: Case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General Pentru Imigrări, Ministerul Afacerilor Interne*,” *Feminist Legal Studies* 27 (July 1, 2019), <https://doi.org/10.1007/s10691-019-09397-z>.

decision by the Court to leave it to the State to determine if the respected discriminatory measure was justified.³⁴¹ This happened because the French judiciary system enjoyed a broad margin of appreciation from the Court in their ruling, due to the Court's expectations that the Member State will correct their legislation and therefore eliminate the discriminatory measure that was challenged. Although it is clear that challenging the national legislation was not disregarded by the Court in the complex policy discussions, but it is finally up to national courts to have the last word whether certain measures are justified or not.³⁴²

Yet, it is up to democratically elected representation to create public policy, that is not up to unelected Courts, however, the issues of sexual minorities involve creating policy for minority that also have to suit their needs. Accordingly, the national legislatures are better suited to determine local needs and protect the rights of their citizens, even though when the human rights of sexual minorities are under threat, supranational institutions such as ECJ should step up and relay that message to the national courts.³⁴³ This is the case in which the EU is presenting itself as organization that respects human rights and life dignity of its sexual minority.³⁴⁴ Finally, it's the EU priority to protect human rights in the external and internal circumstances, even if those violations on LGBT prove difficult with the relation of its Member States.³⁴⁵

Although European Union policy in protecting is evident in the cases of employment when it comes to sexual minorities, it has not any range when it comes to marriage equality or

³⁴¹ Belavusau, "Towards EU Sexual Risk Regulation," 808.

³⁴² Stefan Enchelmaier, "Supremacy and Direct Effect of European Community Law Reconsidered, or the Use and Abuse of Political Science for Jurisprudence," ed. Karen J. Alter, *Oxford Journal of Legal Studies* 23, no. 2 (2003): 281–99, <https://www.jstor.org/stable/3600626>.

³⁴³ Tracy H. Slagter, "National Parliaments and the ECJ: A View from the Bundestag," *JCMS: Journal of Common Market Studies* 47, no. 1 (2009): 175–97, <https://doi.org/10.1111/j.1468-5965.2008.01837.x>.

³⁴⁴ Uladzislau Belavusau, "Legislative and Judicial Politics of LGBT Rights in the European Union," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, October 4, 2020), <https://doi.org/10.2139/ssrn.3704924>.

³⁴⁵ Phillip M. Ayoub, "Contested Norms in New-Adopter States: International Determinants of LGBT Rights Legislation," *European Journal of International Relations* 21, no. 2 (June 1, 2015): 293–322, <https://doi.org/10.1177/1354066114543335>; Koen Sloopmaeckers, "Constructing European Union Identity through LGBT Equality Promotion: Crises and Shifting Othering Processes in the European Union Enlargement," *Political Studies Review* 18, no. 3 (August 1, 2020): 346–61, <https://doi.org/10.1177/1478929919877624>.

parenting in regards to the legal imposition to these notions to its Member States. Homophobic states in the Union regulate the protection of sexual orientation on the matters of culture and tradition.³⁴⁶ Moreover, European institutions competence to make direct enforced makes it difficult to protect the rights of the sexual minorities. This is the reason why, the ECJ and European institutions take a middle ground when it comes to member states which discriminate sexual minorities, such as Croatia or Poland. Sexual minorities are human beings which enjoy fundamental human rights, but any progress in regards to LGBT issues needs to be invoked in the national legislature.³⁴⁷

Yet, this doesn't mean that LGBT individual enjoy complete parity with the heterosexual citizens and are free discriminations in their lives. That is why the Framework Equality Directive 2000 is still confined to the areas of employment and vocational training.³⁴⁸ Nonetheless, European States are obliged to have provisions in their legislation to prohibit discrimination on the grounds of sexual orientation, Article 21 of the Charter only requires link with EU law when a Member State is discriminating LGBT individuals on grounds of sexual orientation or when their free movement rights are prohibited in territory of the European Union.³⁴⁹ Unlike the Charter, the Directive is prohibiting inter alia sexual orientation that is only reserved for private bodies and parties.³⁵⁰ This is why the proposed Equality directive is needed, to impose obligations on all Member States outside of employment and vocational training, this uniform protection of LGBT citizens will ensure that all member states are

³⁴⁶ George Vasilev, "LGBT Recognition in EU Accession States: How Identification with Europe Enhances the Transformative Power of Discourse," *Review of International Studies* 42, no. 4 (October 2016): 748–72, <https://doi.org/10.1017/S0260210515000522>.

³⁴⁷ Conor O'Dwyer, "From Conditionality to Persuasion? Europeanization and the Rights of Sexual Minorities in Post-Accession Poland," *Journal of European Integration* 32, no. 3 (May 1, 2010): 229–47, <https://doi.org/10.1080/07036331003646819>.

³⁴⁸ Julia S. O'Connor, "Employment-Anchored Social Policy, Gender Equality and the Open Method of Policy Coordination in the European Union," *European Societies* 7, no. 1 (March 1, 2005): 27–52, <https://doi.org/10.1080/1461669042000327018>.

³⁴⁹ Paul Lemmens, "The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects," *Maastricht Journal of European and Comparative Law* 8, no. 1 (March 1, 2001): 49–67, <https://doi.org/10.1177/1023263X0100800104>.

³⁵⁰ Victoria Chege, "The European Union Anti-Discrimination Directives and European Union Equality Law: The Case of Multi-Dimensional Discrimination," *ERA Forum* 13, no. 2 (August 1, 2012): 275–93, <https://doi.org/10.1007/s12027-012-0260-1>.

viable.³⁵¹ This is problematic in ensuring that the proposed the Equality Directive is accepted from national courts, because it will take care of issues that are not even related to or do not fall under the scope of EU law.³⁵² The proposed Equality Directive if adopted will allow the LGBT community to rely on the national legislation even if it is going against private individuals.³⁵³

However due to the European three eastward enlargement processes in (2004, 2007 and 2013)³⁵⁴, Europe consequently has more diverse membership that is opposite to the LGBT friendly countries such as Holland and Belgium.³⁵⁵ Although some of the member states in the European Union have decriminalized same sex relations, also enabled the age of consent and implemented the Equality Directives with the prohibition on discrimination on the grounds of sexual orientation in the area of employment, there are still six Member States that prohibit any recognition of same sex relationships, approximately seven of them have a ban on the same sex marriage.³⁵⁶ In these countries where there is no social progress on these issues and the leaders are politicizing and mobilizing a more traditional population to openly display their homophobia, by using nationalism and religion to portray and ostracize the LGBT population. Religious institutions³⁵⁷ in these countries, such as Poland, are a powerful counter force against

³⁵¹ “Tapping the Full Potential of Equality Bodies for a Fairer Europe,” Commissioner for Human Rights, accessed February 25, 2021, https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/tapping-the-full-potential-of-equality-bodies-for-a-fairer-europe.

³⁵² “Time to Adopt the Equal Treatment Directive – Equinet,” accessed February 25, 2021, <https://equineteurope.org/2018/time-to-adopt-the-equal-treatment-directive/>.

³⁵³ “Bell, M., “Advancing EU Anti-Discrimination Law: The European Commission’s 2008 Proposal for a New Directive,” Equal Rights Trust, July 10, 2009,10, <https://www.equalrightstrust.org/content/bell-m-advancing-eu-anti-discrimination-law-european-commissions-2008-proposal-new-directive>.

³⁵⁴ see K Sloopmaeckers and H.Touquet, ‘The Co-evolution of EU’s Eastern Enlargement and LGBT Politics: An Ever Gayer Union?’ in K Sloopmaeckers, H Touquet, and P Vermeersch (eds), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave Macmillan 2016)

³⁵⁵ See, the essays in R Kulpa and J Mizielska (eds), *De-centring Western Sexualities: Central and Eastern European Perspectives* (Ashgate 2011)

³⁵⁶ See, A Tryfonidou, ‘EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition’ (2015) 21 *Columbia Journal of European Law* 195; D Kochenov, ‘On Options of Citizens and Moral Choices of States: Gays and European Federalism’ (2009) 33 *Fordham International Law Journal* 156

³⁵⁷ For an article exploring the role of religion (and cultural context) in shaping attitudes towards non-heterosexual sexual orientations see A Adamczyk and C Pitt, ‘Shaping attitudes about homosexuality: The role of religion and cultural context’ (2009) 38 *Social Science Research* 338

LGBTB activism, portraying its citizens as if they are foreign agents or enemies of the state.³⁵⁸ As Ayoub notes in his book - 'LGBT activism and the making of Europe' Eastern Members view the imposition of norms and values as inherently western to them, which clash with their views on the issues of family life as foundation of the society.³⁵⁹ 'The next chapter will closely discuss political background in terms of the status of the LGBT population in countries of the Eastern Europe and therefore analyze the potential of European practices and influence in the neighborhood and candidate countries. More importantly, my analysis will expose the level of norm infusion of European institutions in relations to countries such as Russia which are overtly homophobic in nature. Finally, my hypothesis on the politization process that goes along with European integration will showcase the reluctant acceptance of the proposed policies in tackling political homophobia in countries that are already members of the EU. Countries that are experiencing rampant homophobia such as Poland and Croatia, along with EU aspiring Serbia that is exemplifying the same characteristics of political homophobia and nationalism that I will expose in my Russian subchapter.

Chapter III: Political homophobia: analysis of the Russian, Polish, Serbian and Croatian cases

This chapter will demonstrate this paper's hypothesis through an analysis of LGBT status and political homophobia in different countries of Central and Eastern Europe. Seemingly with different democratic levels and state structures, four countries which will be discussed, Russia, Poland, Serbia and Croatia, share certain historical and political landscapes, which can be beneficial to identify for the purposes of recognizing shortcomings of already existing norms and anti-discrimination policies at European level. On the other hand, Serbia presents an interesting and significant case for its unique position between East and West, both in geopolitical and cultural context, its alliances with Eastern countries, as well as its EU candidacy. Moreover, Russia serves as an example of the Eastern influence, as well as the one of the world leader's states with a worrying level of LGBT discrimination, and this chapter will

³⁵⁸ See more on the eastern enlargement process, K Sloomaeckers, H Touquet, and P Vermeersch, 'The Co-evolution of EU's Eastern Enlargement and LGBT Politics: An Ever Gayer Union?' (n 635)

³⁵⁹ See more on homonationalism and the role of religious institutions in shaping public opinion against sexual minorities, P Ayoub and D Paternotte, 'Europe and LGBT Rights: A Conflicted Relationship' in M Bosia, SM McEvoy and M Rahman (eds), *The Oxford Handbook of Global LGBT and Sexual Diversity Politics* (Oxford University Press 2019)

further examine this, and its status as a member state of the Council of Europe. What is familiar in all those countries is the invocation of traditional values, as Craig Calhoun points out:

“tradition is a political project, something that is continually reproduced, rather than a fixed, pre-determined cultural reality. Tradition is not only about the past but is both backward- and forward-looking and should not be understood as existing in opposition to modernity, but rather as a way to negotiate modernity. Russia’s narrative of an alternative modernity and the turn toward “traditional values” is thus a political struggle over identity and modernity, which makes sense only in the context of globalization and contentious global geopolitics.”³⁶⁰

While we examine the similarity in the notions that effect Eastern European countries, there are also the realization of human rights standards with the EU accession from countries such as Poland or Croatia. Unlike the Russia culture that abhors its citizens that are declaring themselves openly gay.³⁶¹ Finally, European countries such as Poland and Croatia which can be labelled homophobic, also have complied with the Europeanisation process in regards to compatibility of the national legislation with EU laws. This lack of substantial transformation in tackling political homophobia will be demonstrated in this chapter, but also the regression of LGBT rights in these two European countries will be examined, along with the identifiable notions of nationalism, the influence of the Church in stifling the LGBT voices.

³⁶⁰ Emil Edenborg, “Homophobia as Geopolitics: ‘Traditional Values’ and the Negotiation of Russia’s Place in the World,” in *Gendering Nationalism*, ed. Jon Mulholland, Nicola Montagna, and Erin Sanders-McDonagh (Cham: Springer International Publishing, 2018), 67–87, https://doi.org/10.1007/978-3-319-76699-7_4.

³⁶¹ “Respecting European standards concerning human rights of LGBT people in the Russian Federation and Ukraine, a comparative analysis” *Reality of Politics. Estimates - Comments - Forecasts*, no. 7 (2016): 56–67, <https://www.cceol.com/search/article-detail?id=563007>.

3. Criminalization and stigmatization of homosexuality in the Russian society

Examining political homophobia³⁶² as a phenomenon for political oppression, this thesis will address the current pattern of institutional strategies that the state provides in order to legitimize its domestic policies. Purveying Nikita Sleptcov article on political homophobia, in it, he describes the state of affairs in the modern Russian state under the guise of Vladimir Putin, his policies on unifying the Nation against his alleged ‘threats of national disunity’.³⁶³ Addressing the phenomenon that shaped Putin’s aggressive anti-LGBT stance will allow us to see the phenomenon behind his authoritarian rule.³⁶⁴ Along with Russia’s application of “homophobic national discrimination”³⁶⁵ policy against LGBT persons along with the state’s homophobic discourse, I will make a comparative analysis of its legislation and heteronormative history, but also decide to show a notion of state behavior similarity in societal aspect among other Eastern European nations. Countries such as Poland exhibit the same right-wing shift in reassuring their religious induced population of this deemed ‘outside threat’ after the fall of the Berlin Wall, and the end of Communist rule.³⁶⁶ Regarding the European conventions that will allow LGBT rights, citizens at the brink of society possess certain unalienable rights in regards to representation, expression or presence in the workforce. Poland and Russia non-adherence to ECHR conventions has seen no progress in regards to the advancement of LGBT rights: according to the Council of Europe, Moscow failed to execute the ECHR decisions made three years ago. In 2017, the court ruled that the Russian government

³⁶² Homophobia is also a tool mobilized by state governments. What Michael J. Bosia and Meredith L. Weiss call political homophobia is when states engage in anti-LGBT discourses as a form of state-making in resistance to what are argued to be Western narratives of LGBTQ rights as human rights. The authors contest, ‘political homophobia incites a Western sexual binary, which in turn structures reactive organizing among sexual minorities through identities that draw from the Western binary’. See: Meredith L. Weiss and Michael J. Bosia, *Global Homophobia: States, Movements, and the Politics of Oppression* (University of Illinois Press, 2013).

³⁶³ Nikita Sleptcov, “Political Homophobia as a State Strategy in Russia,” n.d., 23.

³⁶⁴ President Putin in 2013 signed into law a measure prohibiting the dissemination of LGBT “propaganda” to minors allegedly to “protect children from information advocating for a denial of traditional family values.” In response to an international uproar in response to the law, President Putin stated that the law was not about LGBT individuals at all; rather, it was about protecting children from “destructive” influences. While the law nowhere mentions the words “homosexuality” or “homosexual,” preferring “non-traditional sexual relationships” as a euphemism, it has been broadly interpreted to target pro-LGBT speech.

³⁶⁵ Zillah Eisenstein, “Putin’s Homophobic Nationalism,” accessed October 15, 2020, <https://www.aljazeera.com/opinions/2013/10/31/putins-homophobic-nationalism/>.

³⁶⁶ “In Poland’s ‘LGBT-Free Zones,’ Existing Is an Act of Defiance,” accessed October 15, 2020, <https://www.cnn.com/interactive/2020/10/world/lgbt-free-poland-intl-scli-cnnphotos/>.

violated the rights of 23 complainants who were denied their applications to hold public events dated back to 2009-2011. The applicants complained that they were detained during various rallies or punished for conducting solo protest actions. They asked the court in Strasburg to intervene to restore justice.³⁶⁷

Using political homophobia as a political strategy is a very familiar characteristic attributed to the Russian regime ever since the Soviet times. Stalin used this strategy of attack against his opponents in order to consolidate power.³⁶⁸ With the collapse of the Iron Curtain, and the introduction of the market economy, the emasculation of the male populations of the Russian Federation contributed in the creation of market driven standards in order to make up for the losses prior. The masculine image of the “Slavic macho” as Valerie Sterling states, was directed at men who derived success through financial measures.³⁶⁹ This notion of masculinity continued in the Putin era, the sexualization of capitalist images engulfed the Putin era, amongst the advertisements of masculine characters enabled the economic interests of the State to collide with the political sphere. The gender norms allowed the usage of political actors to intimidate and subordinate their political opponent through language that demasculates and demeans. As an example, Sterling provides the case of the liberal politician Grigorii Yavlinsky and the leader of the Communist party Gennadii Ziuganov. Both of these men, were being ridiculed by the regime in the appearance and their choice of lifestyle amongst many other attributes the use of disinformation - Ziuganov case was that he dyed his hair (implying a female characteristic in his political action, adding a feminizing trend in his portrayal).³⁷⁰ Beside many instances of using PR marketing for portrayal of politician life in a positive light, the comparison of the previous government officials during the Soviet times – characterized as gerontocratic and boring, the shift of masculine portrayal of Putin’s image was the clear opposite. The focus on Putin’s physique demonstrated by the campaign and media images of

³⁶⁷ “Russia Slammed For Human Rights Violations By Council Of Europe,” *Qrius* (blog), September 25, 2020, <https://qrius.com/russia-slammed-for-human-rights-violations-by-council-of-europe/>.

³⁶⁸ Dan Healey, “Homosexual existence and existing socialism: New Light on the Repression of Male Homosexuality in Stalin’s Russia,” *GLQ: A Journal of Lesbian and Gay Studies* 8, no. 3 (June 1, 2002): 349–78, <https://doi.org/10.1215/10642684-8-3-349>.

³⁶⁹ Valerie Sperling, *Sex, Politics, and Putin: Political Legitimacy in Russia*, Oxford Studies in Culture and Politics (Oxford: Oxford University Press, 2015), 60.

³⁷⁰ *Ibid.*

his presidential tenure from (2000-2008), then as prime minister (2008-2011) displayed an image of an “eternally young, sporty man.”³⁷¹ This demonstration in the media was heavily orchestrated as a distinction from the other leaders prior to his rule, such as Yeltsin or Gorbachev.³⁷² In order to comprehend the methodology and the linguistics of the Russian regime towards homosexuality, the figurehead of the heteronormative structure - Vladimir Putin is being depicted by Lara Ryazova-Clarke analysis on the spectacle of his power dynamics. Clarke’s writing about a primary event from the medium perspective on October 18, 2008, a spectacle that is typical of Vladimir Putin’s machoistic rhetoric in regards to the general population. She talks about the ‘discursive marathon’ of Putin’s presidency through the format of *Direct Line with Vladimir Putin*-3 hours simultaneous radio and television broadcast of Putin addressing the nation in depth, infantilizing nature of approaching a subject as Clarke notes: “In any case, it was an intensive exercise in identity narrative to which both information seekers and information givers made their contributions.”³⁷³

The Soviet times tend to be negatively framed by the recent past, intentionally. The description of Putin’s relating to the 1990s, in which Clarke points out his utilization of “strategy of demontage” as an example, given by Clark is the story of Boris Yeltsin.³⁷⁴ The “negative knowledge schema” is being implemented by Putin’s regime in relation to the Yeltsin years, where the establishment of democratic norms and throwing away the Communist rules indeed happened rather magnanimously. Noteworthy considering Clarke opinions about those historical aspects, in the present times they: “are suppressed or relegated to the background. In their place, a different knowledge frame is constructed, in which the period is described as a time of instability, moral corruption, populism and governmental

³⁷¹ Sperling, *Sex, Politics, and Putin*,61.

³⁷² See more from Clarke on the image narrative being constructed in the Post-Soviet Russian society, she provides a great emphasis on the impact of Vladimir Putin’s rhetoric: “(PDF) ‘The Discourse of a Spectacle at the End of the Presidential Term’, in E. Goscilo (Ed.), *Putin as Celebrity and Cultural Icon*. London: Routledge, 2013, Pp.104-132.” accessed October 15, 2020, https://www.researchgate.net/publication/259740513_The_Discourse_of_a_Spectacle_at_the_End_of_the_Presidential_Term_in_E_Goscilo_ed_Putin_as_Celebrity_and_Cultural_Icon_London_Routledge_2013_pp104-132.

³⁷³ Ibid,104.

³⁷⁴ “Putin: Soviet Collapse a ‘Genuine Tragedy,’” NBC News, accessed October 24, 2020, <https://www.nbcnews.com/id/wbna7632057>.

inefficiency.”³⁷⁵ Therefore, explaining the narrative of the Russian society, in the aspect of identity needs to be understood as a spectacle- performance of the “spectacular power”³⁷⁶ as an abstract depiction of its leader, where he is able to demonstrate his unfailingly divine nature, and reach a discourse that hasn’t got no semblance of reality.³⁷⁷

The media discourse of the post-Soviet collapse is being described by many scholars as the period of “sexual revolution” in which summates the transformations of sexual norms and practices being devolved within Russian Society.³⁷⁸ The point being of any progressive change, expected by the academia after a climactic event such as the end of the Soviet Union, compares in reality to the recent developments that Gradskova concludes, which shifted the gender dynamics in a rightwing direction. The passing of the anti-gay law³⁷⁹, a measure enacted by the Russian Parliament (Duma) stigmatizes any information about homosexuality being given to children, directly correlating the psychotic and pedophilic trope against homosexuals in Russia. The right-wing swing in its political legislation, as this repressive anti-gay law³⁸⁰ presents an attempt by the state to curtail the broader non-traditional sexual relations.³⁸¹

³⁷⁵ Ibid,115.

³⁷⁶ The concept of “the spectacle” according to Guy Debord interrelates and explains wide range of seemingly unconnected phenomena. The apparent diversities and contrasts of these phenomena stem from the social organization of appearances, whose essential nature must itself be recognized. Considered critique that grasps the spectacle's essential character reveals it to be a visible negation of life - a negation that has taken on a visible form; for more on the concept of spectacle see: Guy Debord and Ken Knabb, *The society of the spectacle* (London: Rebel Press, 2005),9-10.

³⁷⁷ “(PDF) ‘The Discourse of a Spectacle at the End of the Presidential Term’, in E. Goscilo (Ed.), *Putin as Celebrity and Cultural Icon*. London: Routledge, 2013, Pp.125.”

³⁷⁸ Yulia Gradskova, “Personal Is Not Political? The Sexual Self in Russian Talk Shows of the 1990s,” *Sexuality & Culture* 24, no. 2 (April 1, 2020): 389–407, <https://doi.org/10.1007/s12119-019-09695-3>.

³⁷⁹ Associated Press, “Russia Passes Anti-Gay-Law,” *The Guardian*, June 30, 2013, sec. World news, <https://www.theguardian.com/world/2013/jun/30/russia-passes-anti-gay-law>.

³⁸⁰ Russian gay activists and their supporters are tarred as part of a “fifth column” along with the rest of his political opposition. Russian homophobic attitudes made LGBT individuals an easy target for Putin; the Russian LGBT propaganda law had the support of 88% of the Russian population at the time of its inception. See, David Herszenhorn. 2013. “Gays in Russia Find No Haven, Despite Support from the West.” *The New York Times*. Accessed September 10, 2014. http://www.nytimes.com/2013/08/12/world/europe/gays-in-russia-find-no-haven-despite-support-from-the-west.html?pagewanted=all&_r=0.

³⁸¹ *Russian Federation: Federal Law No. 135-FZ of 2013, on Amendments to Article 5 of the Federal Law "On the Protection of Children from Information Harmful to their Health and Development", and Miscellaneous Legislative Acts of the Russian Federation for the Purpose of Protecting Children from Information that Promotes the Rejection of Traditional Family Values.*

Besides, the disallowance of promotion of any homosexual rhetoric or material, the propagandization of “family value”³⁸² along with - the ban of abortion determines with the coincidental assertion of Gradskova point about the reversibility of human rights, the transferability of the opposite.³⁸³

Understanding how LGBT activism contributed to the prosecution against homophobia means analyzing Putin’s tenure in the 2000s, the civil rights activism and human rights violation fit into a pattern of popularity and policy management by the governments of Medvedev and Putin. The civil society was coopted by the in order to consolidate the dominant elite groups ideological positions according to Chebankova.³⁸⁴ The creation of the Public chamber was created to promote socio-political integration. Law No 32-FZ - ‘On the Public Chamber of the Russian Federation’³⁸⁵, which was enacted on 1 July 2005 after being passed by the State Duma in March 2005, orders the Chamber to serve as a mediating agent between the state and society by conducting an expert assessment of federal and regional legislation, exercising public control over the Federation and regional governments, and ensuring freedom of speech within the Russian Federation.³⁸⁶

The public chamber supported the State in providing research grants and promoting values that are approved by the President, in a way to prevent ‘uncooperative’ NGOs to receive outside money. In 2007, the Public Chambers gave public grants aimed at negating the effects of the Western influence. The head of INOP (Institute for Societal Projecting) claimed that: ‘we must make an effort to fund our own civil society to counter the lavish Western financing

³⁸² “D&D 14 - Human Rights Diplomacy Amidst ‘World War LGBT’: Re-Examining Western Promotion of LGBT Rights in Light of the ‘Traditional Values’ Discourse,” *Humanity in Action* (blog), accessed October 24, 2020, https://www.humanityinaction.org/knowledge_detail/human-rights-diplomacy-amidst-world-war-lgbt-re-examining-western-promotion-of-lgbt-rights-in-light-of-the-traditional-values-discourse/.

³⁸³ Gradskova, “Personal Is Not Political?”, 390-391

³⁸⁴ Elena Chebankova, “State-Sponsored Civic Associations in Russia: Systemic Integration or the ‘War of Position’?,” *East European Politics* 28, no. 4 (December 2012): 398-399. <https://doi.org/10.1080/21599165.2012.674939>.

³⁸⁵ “Federal Law No. 32-FZ of April 4, 2005 on the Public Chamber of the Russian Federation (with Amendments and Additions) | ГПААHT,” accessed October 31, 2020, <https://base.garant.ru/557742875/>.

³⁸⁶ Chebankova, “State-Sponsored Civic Associations in Russia.”: 399.

that is primarily aimed at promoting political activity'.³⁸⁷ Finally, the foreign endorsed NGO's claimed that the state ombudsmen, Vladimir Lukin filed reports that were politically compliant according to the government's wishes, but also negligent of the state attacks of freedom of speech and the control of the media.³⁸⁸

The Kremlin worked to create a system over which organizations can operate in Russia, groups that are accepting the role within the system created by the licensing from the State, were receiving funding and institutional support. Unlike the opposing deemed groups, they are eliminated or at the mercy of Putin's government.³⁸⁹ Central to that new system was the Federal Law No.18-FZ, "On Introducing Changes to Several Legislative Acts of the Russian Federation," its ambiguity typical of Putin's Russia. Government officials can be allowed to demand internal documents, day to day decisions, but also the government can send representatives to all the organizations meetings.³⁹⁰ The formulation of the law, along with the rejection of their application of the documentation, it was deemed as an arbitrary interference with the right of association protected by human rights law.³⁹¹ The European Court of Human Rights has consistently clarified that the "right to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning."³⁹² While a state has a right to regulate an association's aim and activities, it must do so in a manner compatible

³⁸⁷ Ibid,400

³⁸⁸ Ibid

³⁸⁹ Graeme B. Robertson, "Managing Society: Protest, Civil Society, and Regime in Putin's Russia," *Slavic Review* 68, no. 3 (2009): 540, <http://www.jstor.org/stable/25621654>.

³⁹⁰ Ibid

³⁹¹ The European Court of Human Rights has on several occasions found that rejection of registration of organizations on the grounds that they have incomplete or inappropriate documentation will be a violation of freedom of association, if the state has not made clear what exactly the organization must do to comply. See, for example, *Tsonev v. Bulgaria*, April 13, 2006; and *The Moscow Branch of The Salvation Army v. Russia*, October 5, 2006.

³⁹² Council of Europe: Commissioner for Human Rights, Opinion of the Commissioner for Human Rights: Legislation and practice in the Russian Federation on non-commercial organisations in light of Council of Europe standards: an update, 9 July 2015, CommDH (2015).

with its obligations under the Convention.³⁹³ The protection of opinions and the freedom of expression under Article 10 of the ECHR is also one aim of the freedom of association.³⁹⁴

In 2006, The Rainbow House organization that protects rights of gay, lesbian and transgendered people was denied registration on the grounds of arbitrary restrictions based on the compatibility of “security of the state.”³⁹⁵ The Russian government considered their actions, which are aimed at protecting personal rights and liberties, but also non-traditional sexual orientations, as undermining the integrity and the sovereignty of the Russian federation.³⁹⁶ The Rainbow House applied in 2006, which was rejected due to its lease and payment of registration fees. It resubmitted its application in 2007, when Strasbourg Court decided upon a judicial review that there were no indications of extremism from the LGBT organizations that asked from the Russian State to be registered. With *Zhdanov and others v. Russia*³⁹⁷ the Court’s judgement found a violation in the Article 6 (access to the Court) and of Article 11 (freedom of assembly) alone in the conjunction with Article 14 (prohibition of discrimination).³⁹⁸ Facts about this case are that three LGBT organizations and four founders that leaders of these organizations. The Zhdanov case is interesting due to refusal of the authorities to issue formal documents but also for not allowing these LGBT organizations to promote gay rights.³⁹⁹ The Russian Authorities held a view that these organizations could destroy the moral fabric of society, but last impact the rate of natality in the Russia Federation, and affect the relations of institutions like family and marriage.⁴⁰⁰

³⁹³ Ibid

³⁹⁴ “Choking on Bureaucracy: State Curbs on Independent Civil Society Activism: IV. The 2006 NGO Law,” accessed October 31, 2020, https://www.hrw.org/reports/2008/russia0208/4.htm#_ftn56.

³⁹⁵ See more on the decision of the Tyuamen Courts decision regarding the registration ban of Rainbow House: Inara Gulpe-Laganovska, *Choking on Bureaucracy: State Curbs on Independent Civil Society Activism* (Human Rights Watch, 2008),34.

³⁹⁶ Ibid.

³⁹⁷ *Zhdanov and Others v. Russia* App No.12200/08 35949/11 58282/12, (ECtHR 16 July 2019).

³⁹⁸ *Zhdanov and Others v. Russia* (n 388), at para 3.

³⁹⁹ Laurens Lavrysen, “Zhdanov and Others v. Russia: On Missed Opportunities and an Offensive Applicant,” *Strasbourg Observers* (blog), August 29, 2019, <https://strasbourgobservers.com/2019/08/29/zhdanov-and-others-v-russia-on-missed-opportunities-and-an-offensive-applicant/>.

⁴⁰⁰ Ibid.

Popov in her study argues that the idea of LGBT community has very little impact on the demographics of Russia. Social issues such as “pandemic alcohol addiction” where the “level of alcohol consumption has reached 18 L per capita” which is 10 L over the established “epidemic threshold” and drug addiction with associated mortalities “increasing 15 times over the last ten years with an increase of 45 times among the youth” are both major factors behind the health problem.⁴⁰¹ However, the issue of non-traditional marriages was not even discussed during the federal meeting on the demographics, nevertheless Putin during this meeting tried to justify his anti-gay laws because of the lower of natality in Russia.⁴⁰² The Court addressed the following legitimate aims invoked by the government: the protection of morals, the protection of national security and public safety, the protection of the rights and freedoms of others, and the prevention of social and religious hatred and enmity.⁴⁰³ The Court’s explanation about the 2017 *Bayev and Others v. Russia judgment*⁴⁰⁴ was resolved with its questioning of the legality of the so-called gay propaganda law. The Court decided that three previously mentioned aims by the Russia government did not qualify as “legitimate claim” in the sense of Article 1 §2.⁴⁰⁵ Interestingly, concerning the matter of the fourth government aim, on prevention of social and religious enmity the Court stated:

“Lastly, as regards the aim of preventing social or religious hatred and enmity incited by the activities of LGBT associations and which might, in the domestic authorities’ opinion, lead to violence, this may correspond to the legitimate aim of the prevention of disorder. The Court accepts that social or religious hatred and enmity represents a danger for the social peace and political stability of democratic States [...] and is likely to lead to violence [...]. It therefore accepts that the declared aim of preventing such

⁴⁰¹ N. P. Popov, ‘Is Russia Dying Out?’, *Harald of the Russian Academy of Sciences*, Vol. 82, No. 1 (2012), 6.

⁴⁰² Team of the Official Website of the President of Russia, “Meeting of the Council for the Implementation of Priority National Projects and Demographic Policy,” President of Russia, accessed November 2, 2020, <http://en.kremlin.ru/events/president/news/17586>.

⁴⁰³ *Zhdanov and Others v. Russia*, at paras 157 and 161.

⁴⁰⁴ *Bayev and Others v. Russia* App.No.667667/09,44092/12 and 56717/12 (ECtHR, 20 June 2017).

⁴⁰⁵ Lavrysen, “*Zhdanov and Others v. Russia*.”

hatred and enmity corresponds to the legitimate aim of prevention of disorder [...] and will proceed on the assumption that the contested measures pursued that aim.”⁴⁰⁶

The Court finds no “reasonable objective justification” for the ⁴⁰⁷ different treatment on the grounds of sexual orientation. The Court didn’t engage with the argument with the third opinion of the Human Rights Centre (Ghent University) where they have mentioned that Article 14 encompasses on the State as a positive obligation to use of all its power to combat homophobia and to take measures to counteract the discrimination on the grounds of sexual orientation in society, in line with State obligations’ under the international human rights law.⁴⁰⁸ Most scholars agree that the state of human rights in Russia is in a terrible state, even though Russia legal structure is working according to European standards, Starzhenetskii is highlighting this, mentioning that Russia is upholding the rulings of the European Court regularly.⁴⁰⁹ However, there are critical remarks coming from politicians, public figures, scholars, representatives from the Russian Orthodox Church—that proclaim how human rights are becoming individualistic, selfish and egoistic. Their complaints concerning human rights are that there is no room for compromise and contextual judgements for situations revolving around cultural diversity. The concern for traditional values and family, according to Russian public officials, needs to be addressed in the evolution of human rights doctrine. ⁴¹⁰

The office of Human rights ombudsman in Russia has grown in importance during the two decades since the end of the Soviet Union, but because of being under-funded, the ombudsman is incapable of handling the large number of complaints that is receiving.⁴¹¹ Besides, the ombudsman’s established influence, its ability to elaborate on social problems has been interesting in broadening the understanding of the pattern and the trends of human rights

⁴⁰⁶ *Zhdanov and Others v. Russia*, cited above n.110, ¶ 160.

⁴⁰⁷ *Ibid.*, at para 182.

⁴⁰⁸ Lavrysen, “*Zhdanov and Others v. Russia*.”

⁴⁰⁹ Vladislav Starzhenetskii, “Assessing Human Rights in Russia: Not to Miss the Forest for the Trees A Response to Preclik, Schönfeld and Hallinan,” *Review of Central and East European Law* 37, no. 2–3 (2012): 349–56, <https://doi.org/10.1163/092598812X13274154886908>.

⁴¹⁰ *Ibid.*

⁴¹¹ Emma Gilligan, “The Human Rights Ombudsman in Russia: The Evolution of Horizontal Accountability,” *Human Rights Quarterly* 32, no. 3 (2010): 575–600, <https://www.jstor.org/stable/40784056>.

violation by the State. Unlike the Russian court system, one of the major strengths of the ombudsman in dealing with human rights cases is the ability to respond to them through suggesting amendments to the law or new legislation. The emergence of this office is fundamental to tackle the state, which is not used to changing its behavior patterns with the demands of accountability through public pressure and persuasion.⁴¹²

The view concerning the repudiation of human rights rhetoric is the noticeable in Skak's view on Russia's identity and policy orientation. She noted how both Yeltsin and Gorbachev had failed in playing the domestic levels, how they were trying to and hoped to counterbalance the domestic turbulences by gaining support from the West on human rights, but their expected support that did not come to the desired extent.⁴¹³ Unlike them, Putin played this domestic forces carefully. As Jeffrey Mankoff argued, Putin was "agile enough to come across as a liberal [...], a statist, or a Russian nationalist as the situation demand[ed]."⁴¹⁴ Putin's creation of the homogenous view of the Russian identity which identifies values as: centralization, a strong state, and an emphasis on Russian uniqueness, provided him with the arguments to depicts the human rights debate as an outside value import, an issue that is not aligned with the Russian culture.⁴¹⁵ The view is supported by other social groupings, with the Russian Orthodox Church amongst the strongest supporters of this type of rhetoric.

As an example, in April 2006, during the Tenth World Council of the Russian People, the Russian Orthodox Church adopted its own declaration of human rights and dignity in which they declared that values as – faith, morality, sanctuary, fatherland are holding the same level as the human rights, and therefore there is no precedence should take over these values. This declaration was a repudiation of the western values, it was simply an instrument for the abuse of rights for political and ideological purposes.⁴¹⁶ From the point of view of the late Patriarch

⁴¹² Ibid.

⁴¹³ Jakob Hedenskog et al., eds., *Russia as a Great Power: Dimensions of Security Under Putin*, 1st edition (Routledge, 2013),82.

⁴¹⁴ ⁴¹⁴ Jeffrey Mankoff, "Russia and the West: Taking the Longer View," *The Washington Quarterly* 30, no. 2 (April 1, 2007): 123–35, <https://doi.org/10.1162/wash.2007.30.2.123>

⁴¹⁵ Ibid,129.

⁴¹⁶ *Russia and European Human-Rights Law: The Rise of the Civilizational Argument* (Martinus Nijhoff Publishers, 2014), 79;

Aleksei II, a break had occurred “[...] between human rights and morality, and this break [threatened] European civilization. We can see it in a new generation of rights that contradict morality and in how human rights are used to justify immoral behavior.”⁴¹⁷ More importantly, the criticism of the Western human rights views was exacerbated in front of high ranking legislators and executives as Masha Lipman reports : “ The council was broadly publicized by the government-controlled media, and a television talk show a couple of days later had an audience that showed its strong support for the view that the Western concept of human rights was inherently alien to the Russian people.”⁴¹⁸

However, as early as the perestroika with the declaration of Gorbachev about preeminence of human rights in the Soviet Union, this notion of civil liberties and liberal democracy was alien to the Soviet state.⁴¹⁹ Therefore, I would like to discuss the treatment of gender and sexual issue after the Bolshevik revolution, about the abolishment of capital punishment in 1917 that existed in the Russian Empire. But also, I will examine the duopoly lifestyle of Russian women, their non-existent representation in the Soviet system. Contrary to many scholarly assumptions, as far as 1993, the decriminalization⁴²⁰ of gay homosexuality reconnect with the private sphere ⁴²¹ addressed by the Soviet legislature ⁴²², all forms were treated as a ‘natural intercourse’, however the ignoring of lesbianism with the USSR(Union of Soviet Socialist Republics) is seen as non-lethal to criminal prosecution, understandably only

⁴¹⁷ “LGBT Activists Concern over Homophobic Patriarch,” accessed December 19, 2020, <https://www.pinknews.co.uk/2007/10/08/lgbt-activists-concern-over-homophobic-patriarch/>.

⁴¹⁸ “Pēcis Pelēcis Vilks. Vienkārši pilsonis Vilks.: augusts 2008,” accessed December 19, 2020, <http://pelecisvilks.blogspot.com/2008/08/>.

⁴¹⁹ Ibid.

⁴²⁰ Russia, for instance, decriminalized homosexuality shortly after independence, and LGBT individuals began to organize themselves politically and socially. However, as the power of the Russian Orthodox Church and conservative movement in Russia increased, the situation for LGBT individuals gradually deteriorated. In 2002, 60% of Russians believed homosexuality should not be accepted by society; by 2013, that number grew to 74% of the population. Recent years have been marred with the closing of gay bars, increased rates of violence against LGBT individuals, and active persecution of LGBT individuals by the national government. See, 1615 L. St NW, Suite 800 Washington, and DC 20036 USA 202-419-4300 | Main 202-857-8562 | Fax 202-419-4372 | Media Inquiries, “The Global Divide on Homosexuality,” *Pew Research Center’s Global Attitudes Project* (blog), June 4, 2013, <https://www.pewresearch.org/global/2013/06/04/the-global-divide-on-homosexuality/>.

⁴²¹ Healey, *Homosexual Desire in Revolutionary Russia*, 50.

⁴²² Rustam Alexander, “Homosexuality in the USSR” (2018).

envisaged with a central system of government, for case involved in: violence, abuse or a violation of the interest of others.⁴²³

The shift of trend after the October revolution in 1917, allowed the communist rulers to defect from the conservative matrix of the Tsarist regime, the position of the women along with homosexual was an attempt from the communist to decry the previous times with liberal ideas.⁴²⁴ Such measures in the 1920s proved futile as soon as Josef Stalin came to power, soon afterwards the position of women portrayed only as the “breeder”, a derogatory terminology used to show exactly the place where Stalinism ranked the women in society predisposed to his industrial revolution, nonetheless excluding the chauvinism aside, it is important to mention his stance towards homosexuality became antagonistic, comparably to the Revolutionary times.⁴²⁵ Therefore, the trending nature of rights reversal of human rights came to pass as soon as famous people in the government such as the Marxist writer Maxim Gorki⁴²⁶ branded the homosexuals as the products of fascism.⁴²⁷ Writers such a Ben De Jong write on this reversal of human rights attributed to the Communist party:

“In the first few years after the 1917 Revolution, the newly established Soviet regime stood for a fairly broad-minded moral code in the private sphere. Its professed opinions about matters such as divorce, abortion, and homosexuality which would be considered progressive and tolerant even by present Western standards. However, with the establishment of Stalin's personal dictatorship at the end of the 1920s this comparatively liberal period came to an end.”⁴²⁸

⁴²³ Oleg Yegorov, “What Was It like to Be Gay in the Soviet Union?,” December 26, 2018, <https://www.rbth.com/history/329768-ussr-lgbt-soviet-gays>.

⁴²⁴ Sarah A. Rosenthal, “Speaking Out: Terms of [Deviant] Sexuality in Russian History,” accessed November 3, 2020, 17. https://www.academia.edu/43107135/Speaking_Out_Terms_of_Deviant_Sexuality_in_Russian_History.

⁴²⁵ Healey, *Homosexual Desire in Revolutionary Russia*, 204.

⁴²⁶ Yaroslav Mogutin, “Gay in the Gulag,” *Index on Censorship* 24, no. 1 (January 1, 1995): 66–69, <https://doi.org/10.1080/03064229508535832>.

⁴²⁷ Ibid.

⁴²⁸ See more on Soviet treatment of homosexuality: Ben de Jong “‘An Intolerable Kind of Moral Degeneration’: Homosexuality in the Soviet Union,” *Review of Socialist Law* 4 (1982): 342.

The attitude change from the Soviet authorities with regard to homosexuality is explained in detail by the three editions that appeared in the *Bolshaia Sovetskaia Entsiklopediia*. In the first edition, published in 1930⁴²⁹, it is specified that homosexuality is “relatively benevolent... It is stated that sexual perversions are not found any more frequently among homosexuals than among heterosexuals.”⁴³⁰ The second edition contained an article critiquing capitalism as result of homosexuality stating: “In capitalist society homosexuality is a widely spread phenomenon... Drunkenness and also sexual impressions from early childhood are of great significance in the development of homosexuality.”⁴³¹ The latest version was more businesslike, but less extensive according to De Jong⁴³², as it seems the entry of pederasty (*muzhelozhstvo*).⁴³³ Prior to describing the decriminalizing omission of bolshevism, as an oversight until 1934, I would like to provide a texture with the article of Fred Weston *Bolshevik decriminalization of homosexuality – intentional or oversight?* In this part I will also discuss his notions about the “enormous advances of women and homosexuals” in the Bolshevik era.”

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⁴²⁹ BSE, Vol17, Moskva 1930, 593-597.

⁴³⁰ Brian Kassof, “A Book of Socialism: Stalinist Culture and the First Edition of the Bolshaia Sovetskaia Entsiklopediia,” *Kritika: Explorations in Russian and Eurasian History* 6, no. 1 (2005): 55–95, <https://doi.org/10.1353/kri.2005.0009>.

⁴³¹ BSE, 2rd ed., VoU2, Moskva 1952, 35.

⁴³² Jong, “HOMOSEXUALITY IN THE SOVIET UNION.”, 343.

⁴³³ Alexander Prokhorov, ed., *Great Soviet Encyclopedia Bol'shaya Sovetskaya Entsiklopediya Complete SET*, 3rd edition (“Sovetskaya Encyclopedia” Publishing House, 1968).

⁴³⁴ Fred Weston, “Bolshevik Decriminalisation of Homosexuality – Intentional or Oversight?,” In *Defence of Marxism*, accessed October 16, 2020.

3.1 Homosexuality in the Soviet Union

Although official policy toward homosexuality was different and inconsistent throughout history, ranging from tolerant and affirmative to openly homophobic and repressive, same-sex relations were documented for centuries and were part of sexual experience in Russia. First attempts to regulate and control sexuality were undertaken under Peter the Great, resulting in a legal ban on male homosexuality in the armed forces.⁴³⁵ As the growth of civilizations had started, the element of the genteel society is worth mentioning in their attributing homosexual tendencies towards public officials that were on high positions within Tsarist regime. The tropes of nepotism caused a scandalous rupture among the population for awarding functions to a proper number of their young protegees.⁴³⁶

In 1835, this ban on homosexuality was extended to the Russian civilian population and the new Criminal Code that was introduced, it defined homosexual intercourse as illegal under Tsarist law.⁴³⁷ Legal measures on sodomy and a number of medical documents as well as personal diaries demonstrate the visibility of same-sex relations in the public sphere in nineteenth-century Russia. These accounts show that same-sex relations were viewed as part of patriarchal society and masculine culture before transforming to a homosexual subculture in its modern sense.⁴³⁸

According to Kon, the state of homosexuality hardly changed since the 1990s from the Soviet times, he states: “It seemed that the Soviet situation definitely disappeared and turned to the irrelevant past. However, every day our current society reminds me more of that country where I lived sixty years of my life.”⁴³⁹ Kon wrote this long before Russia became a symbol of worldwide political repression of homosexuality. The repression of sexualities that became the state policy, its narrow set of heteronormative practices encouraging animosity

⁴³⁵ Healey, *Homosexual Desire in Revolutionary Russia*, 22

⁴³⁶ Donald J. West and Richard Green, *Sociolegal Control of Homosexuality: A Multi-Nation Comparison* (Springer Science & Business Media, 2006), 222.

⁴³⁷ Healey, *Homosexual Desire in Revolutionary Russia*, 22.

⁴³⁸ Ibid.

⁴³⁹ Alexander Kondakov, “Teaching Queer Theory in Russia,” *QED: A Journal in GLBTQ Worldmaking* 3, no. 2 (2016): 107–18, <https://doi.org/10.14321/qed.3.2.0107>.

towards lesbians and gay men, the legitimization of open gay bashing along with the clamping down of every homosexual representation makes the state clearly responsible in the impossibilities of studying sexualities in Russia according to Kon.⁴⁴⁰

After a short period of liberal legislation on homosexuality in revolutionary Russia, sodomy law was reintroduced to the Soviet Criminal Code in 1934 and homosexual issues became social taboo.⁴⁴¹ The communists in power under Vladimir Lenin used gender politics to attack the lasting influence of the Orthodox Church, in order to disrupt their authority over in the country. The Orthodox Church was the biggest obstacle in craving a cultural and institutional influence in Russia, therefore the communist deemed how the Orthodox Church should be regulated. The Church's influence before 1917 over family life and sexuality made the communist think on ways to desacralize it, through the reforms enacted to profoundly create one of the three sexual revolutions in the 20th century. Influenced heavily by the works of Western European socialist ideas about the end of a patriarchal male domination in social life. The influences of French and German thinkers allowed the adoption of notions nurtured around sciences and application of sexuality, these ideas were heavily discussed between Russian radicals, later on seized by Marxist. The Marxist revolutionaries such as Alexandra Kollontai⁴⁴² imposed those ideas of "free love"⁴⁴³ and dismemberment of male hegemony on the rural population that were skeptical about an adoption of ideas that were centered around urban centers. Almost immediately, the revolutionaries started adopting secularized measure in their societal reforms, marriage was secularized, along with the divorce being more liberal towards

⁴⁴⁰ Kondakov, "Teaching Queer Theory in Russia," 107-118.

⁴⁴¹ Alexander Kondakov, "Resisting the Silence: The Use of Tolerance and Equality Arguments by Gay and Lesbian Activist Groups in Russia 1," *Canadian Journal of Law and Society / Revue Canadienne Droit et Société* 28, no. 03 (December 2013): 403–24, <https://doi.org/10.1017/cls.2013.3>.

⁴⁴² As a Marxist, Kollontai insisted that this sexual revolution was not a mere change in attitude, but would only be possible on condition of fundamental social and economic reforms, where childcare and housework were socialized, and women found themselves on the same footing as men at work and in politics.

⁴⁴³ Alexandra Kollontai was at the centre of Bolshevik debate about the position of women, and her life provides an absorbing chronicle of, as she put it, "a sexually emancipated communist woman." These successes were short-lived, however, as Kollontai's views and activities increasingly set her apart from other Bolsheviks, ultimately at the cost of her career. Kollontai's ideas on free love and her liaison with the sailor Dybenko, a man both younger than her and lower in social status, were the source of considerable suspicion in the Party, where conservative views about sexuality and the family continued to prevail, for more on Kollontai participation in 1917 October Revolution See : Christine Sypnowich, "Alexandra Kollontai and the Fate of Bolshevik Feminism," ed. Alexandra Kollontai and Cathy Porter, *Labour / Le Travail* 32 (1993): 287–95, <https://doi.org/10.2307/25143737>.

women. Moreover, the unresistant attack on patriarchal power over multiple stages is incognizant with the inclusion of women into life of politics, including the encouragement of more female presence in the educational sphere.⁴⁴⁴ The fluctuating status of women within private and public life, equalized them along the lines with men, paving the way for the Bolsheviks to make way for their scientific and secular approach to bear fruit with the adoption of abortion in 1920, including the decriminalization of sodomy in the Soviet Republic's legal code in 1922.⁴⁴⁵

According to Stam and Radtke, we need to do an appraisal of the state's location within gender relations:

“The state is a structure of power, persisting over time; an institutionalization of power relations. It is not the only institutionalization of power, nor even the monopolist of legitimate force, as some classic theory has it.⁴⁴⁶ Feminism points to the family as a domain of power, and to husbands' violence against wives - which survey research shows very widespread - as a socially legitimated use of force. Violence against gay men is also widely regarded as legitimate, and in bashings of gays, as in husbands' bashing of wives, the laws against assault are generally inactive.”⁴⁴⁷

The communist believed that class and economic issues overturned the mentioning of any “sexual revolution,” their instance of class property as bulwark of patriarchy was just the starting point of the revolutionary nature of their reforms. Through class reforms and science, the communist believed the sexual revolution will be achieved, therefore it's difficult to perceive the detail plans of this political system while analyzing the records of legal and

⁴⁴⁴ “Works of Alexandra Kollontai 1921,” accessed November 3, 2020, <https://www.marxists.org/archive/kollonta/1921/sex-class-struggle.htm>.

⁴⁴⁵ Dan Healey, *Russian Homophobia from Stalin to Sochi* (New York: Bloomsbury Academic, 2017),16.

⁴⁴⁶ H. Lorraine Radtke, Henderikus J. Stam, and Professor Henderikus J. Stam, *Power/Gender: Social Relations in Theory and Practice* (SAGE, 1994),148

⁴⁴⁷ Ibid.

medical experts arguing about the social impact of same-sex relations through the early stages of the Bolshevik rule.⁴⁴⁸

The gender revolution of 1917, including the Bolsheviks' decriminalization of homosexuality in Russia in the same year, also helped to foster the phenomenon of everyday cross-dressing during the liberal 1920s. One employee of the Soviet intelligence services (or GPU), listed in documents as "Evgeniya Fedorovna", could pass as a man for a long time. In 1918, she began work at the Cheka, or secret police, working in the investigative unit, speaking about herself only in the male gender and wearing a man's uniform. In 1922, she successfully registered her marriage to a woman who suspected nothing and only much later uncovered "her spouse's true sex."⁴⁴⁹ Fedorovna's colleagues attempted to take her to court for "crimes against nature", but the case collapsed and the marriage was not overturned. She was later wounded by a bullet during an encounter with some Moscow bandits and forced into retirement: against her dearest wishes she was forced to part with the uniform that she loved. She began to drink and was arrested several times for "debauchery involving women."⁴⁵⁰

But on no occasion in Russia – or, anywhere in the world had an attempt been made to introduce the "female element" into the closed, conservative and fiercely masculine world of the navy.⁴⁵¹ But 1917 destroyed many long-lasting martial traditions, the women's naval unit, formed with Kerensky's approval and under his patronage, was the first step "towards women receiving full, professional maritime training."⁴⁵² Another notable example of everyday gender fluidity took place in January 1921, when a police raid saw the arrest of 95 people during a

⁴⁴⁸ See more: Claire Shaw, "Dan Healey, Russian Homophobia from Stalin to Sochi," *Journal of Contemporary History* 55, no. 4 (October 1, 2020): 924–26, <https://doi.org/10.1177/0022009420939472k>.

⁴⁴⁹ Olga Khoroshilova, "Sea Change: How a Company of Female Sailors Sparked a Gender Revolution in 1917," *The Calvert Journal*, accessed October 20, 2020, <https://www.calvertjournal.com/features/show/8302/revisiting-revolution-sea-change-female-sailors-gender-1917>.

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

⁴⁵² Katy Turton, *Family Networks and the Russian Revolutionary Movement, 1870–1940* (Palgrave Macmillan UK, 2018), 133, <https://doi.org/10.1057/978-0-230-39308-0>.

wedding between men taking place in a private apartment in the center of Petrograd.⁴⁵³ Almost all those arrested were men who had arrived at the occasion in dresses, with one in a wedding gown and bridal veil. It's worth noticing that women dressed as men and the "bride" were hardly shocking at the time, especially not to the police.⁴⁵⁴ It appears that the raid was only carried out because a whistle-blower had alleged that the apartment was occasionally used by participants in a counter-revolutionary plot "aimed at weakening the morale of the Red Army."⁴⁵⁵ The political and gender revolutions of 1917 were, it seemed, working in unison. Soviet citizens were able to work through their own liberation as they wished, as long as the Party line was not crossed.⁴⁵⁶ People continued to build relationships in the Bulvarny Circle in Moscow, in "Katka's Garden" in Leningrad, on the banks of the sea in Sevastopol, in Chelyuskintsev Park in Minsk, outside the Opera Theater in Yerevan, in banyas, on beaches, and, most commonly of all, in public bathrooms. Gay meeting places were called *pleshki*.⁴⁵⁷ There were even "*pleshki* on wheels" — gay people would find new partners in the backs of trolleys or buses.⁴⁵⁸

Karl-Maria Kertbeny condemned the people who criminalized homosexuality, therefore she was the first person that addressed same-sex couples as homosexual in her writings.⁴⁵⁹ However, turning our gaze on the 1800s in Europe, several people spoke out

⁴⁵³ "1917 Russian Revolution: The Gay Community's Brief Window of Freedom," *BBC News*, November 10, 2017, sec. Europe, <https://www.bbc.com/news/world-europe-41737330>.

⁴⁵⁴ Dan Healey, *Homosexual Desire in Revolutionary Russia: The Regulation of Sexual and Gender Dissent* (University of Chicago Press, 2001), 283.

⁴⁵⁵ Khoroshilova, "Sea Change."

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Ksenia Nouril, "Absent Statues," a Review of Two Recent New York Exhibitions Featuring Yevgeniy Fiks," *The Calvert Journal*, accessed October 27, 2020, https://www.academia.edu/11180601/Absent_Statues_a_review_of_two_recent_New_York_exhibitions_featuring_Yevgeniy_Fiks.

⁴⁵⁸ "Less Equal than Others A History of Anti-Queer Persecution in the USSR," *Meduza*, accessed October 22, 2020, <https://meduza.io/en/feature/2019/03/04/less-equal-than-others>.

⁴⁵⁹ M. Herzer, "Kertbeny and the Nameless Love," *Journal of Homosexuality* 12, no. 1 (1985): 1–26, https://doi.org/10.1300/j082v12n01_01.

against the criminalization of homosexuality.⁴⁶⁰ Karl Heinrich Ulrichs gave a “coming out” speech in August 1867 in front of the Congress of German Jurists in Munich where he was shouted down for his protest of sodomy laws.⁴⁶¹ He protested Article 143 of the Prussian Penal Code and, in his speech, openly professed his homosexuality.⁴⁶² The term would later be used in 1886 in the first psychiatric book about “sexual perversions”, *Psychopathia Sexualis*. In the late 1800s in Berlin, Magnus Hirschfeld was one of the most vocal proponents of the decriminalization of homosexuality; he spoke at the German Parliament on behalf of the social democratic party.⁴⁶³ In the USSR, a new penal code was passed in 1903 under the order of the Czar. Liberals argued against the criminalization of homosexuality because of the right to privacy and personal autonomy, yet it remained a crime. But it would not be until the Bolshevik Revolution that the old Penal Code was eradicated — and “sodomy” between consenting adults was no longer penalized. The measure was confirmed in May 1922 with the creation of a new Soviet Penal Code.⁴⁶⁴ The fact that the Soviet Union could decriminalize homosexuality decades before other countries is historically specific. It was about the specificities of that moment and the role of Bolshevik party vis-a-vis the Soviets that made decriminalization possible in the first post-war period.⁴⁶⁵ This decision was met with conservative elements in Russia at a time when there was a massive economic crisis and a civil war supported by imperialist powers who sought to crush the USSR. Alexandra Kollontai is notable example of a Bolshevik leader that foresaw the sexual crisis, she was concerned not only about the affluent in society but more importantly the working class, who were suffering psychologically due to

⁴⁶⁰ “The Decriminalization of ‘Homosexuality’ in the USSR: A Milestone in the History of Sexual Liberation,” *Left Voice* (blog), accessed April 7, 2021, <http://www.leftvoice.org/The-Decriminalization-of-Homosexuality-in-the-USSR-a-Milestone-in-the-History-of-Sexual-Liberation>.

⁴⁶¹ Vernon A. Rosario M.D, *Science and Homosexualities* (Routledge, 2013), 38.

⁴⁶² Karl Maria Kertbeny was probably the inventor of the word Homosexualität (homosexuality), if he had not published in 1869 two anonymous tracks (1869a,1869b) in which he used his newly coined word for the first time, he would rightly be forgotten today.

⁴⁶³ Rosario, *Science and Homosexualities*,15.

⁴⁶⁴ “First Soviet Criminal Code,” *Seventeen Moments in Soviet History* (blog), August 27, 2015, <http://soviethistory.msu.edu/1924-2/socialist-legality/socialist-legality-texts/first-soviet-criminal-code/>.

⁴⁶⁵ Fred Weston, “From Emancipation to Criminalisation: Stalinist Persecution of Homosexuals from 1934,” In *Defence of Marxism*, accessed November 3, 2020, <https://www.marxist.com/from-emancipation-to-criminalisation-stalinist-persecution-of-homosexuals-from-1934.htm>.

the State's repression.⁴⁶⁶ She became an important voice for: "homosexual emancipation throughout Western Europe."⁴⁶⁷

Other proponents of decriminalization were from the health sector, such as Grigorri Batki, who chaired the Moscow Institute of Social Hygiene. He argued that, "Soviet legislation declares absolute non-interference of the State and society in sexual matters." Yet, as Sherry Wolf, author of *Sexuality and Socialism* points out, the Bolsheviks were not: "deeply enlightened about gender or sexuality issues... They were interrogating and investigating the idea of human liberation and they stood in opposition to oppression."⁴⁶⁸ In addition, along with the decriminalization of sodomy, women and trans people served openly in the Red Army, at least one same-sex marriage license is documented, and according to Wolf, trans people had access to gender-reassigning medical surgery.⁴⁶⁹ The question of sexuality came after the movement for women's rights, which had been discussed and theorized by the Bolsheviks and the broader society.⁴⁷⁰ The women's movement had already made profound advancements in the late 19th and early 20th centuries.⁴⁷¹ Inside the Bolshevik party, there were intense debates and a clear policy for women's liberation. The gains of sexual and gender liberation were historically significant; they preceded the decriminalization of sodomy in several Western countries, including the United States. These gains for sexual liberation were the first steps on the path for the demands of LGBT activists in the US in the 70s, with the Compton Cafeteria Riots and the Stonewall Riots.⁴⁷²

In the period of sodomy decriminalization from 1922 to 1933, the name of homosexuals did not appear in official documents, instead they were categorized as "psychiatric cases " or

⁴⁶⁶ Don Milligan, "THE POLITICS OF HOMOSEXUALITY," n.d., 20.

⁴⁶⁷"The Decriminalization of 'Homosexuality' in the USSR."

⁴⁶⁸ Wolf, *Sexuality and Socialism*, 97.

⁴⁶⁹ Ibid.

⁴⁷⁰ Marie Frederiksen, "Women before, during and after the Russian Revolution," In Defence of Marxism, accessed November 3, 2020, <https://www.bolshevik.info/women-before-during-and-after-the-russian-revolution.htm>.

⁴⁷¹ "'Thirty Years of Counter-Revolution': An Interview with Clyde Young," Platypus, January 29, 2012, <https://platypus1917.org/2012/01/29/interview-with-clyde-young/>.

⁴⁷² "The Decriminalization of 'Homosexuality' in the USSR."

characters from small print poetry of Milkhaïl Kuzmin, Nikolai Kliuev and Sophia Parnok.⁴⁷³ But once the Soviet regime was established, queer men and women hid their sexual identities from the authorities- clearly as defined as identities they were perceived in the Russian culture, instead mistreated as a medical deviation.⁴⁷⁴ Unlike the narrow space for sexual exploration in the Soviet society, within the social democratic contest during those times it was clear the Weimar Republic's sexual freedoms are more expansive and of liberating nature, compared to the Soviet One.⁴⁷⁵ Through the Weimar Republic liberal constitution, the controversial view of Hirschfeld's medicinal- biologic acceptance of homosexual it seemed controversial but emancipatory for the Soviet queer research in the 1920s. Of course, homophile Germans tried to develop alternative to a medical explanation that is differs from Hirschfeld's in explaining homosexual love.⁴⁷⁶

While the law was repealed after the 1917 Bolshevik Revolution, during the Stalin era, "sexuality itself became politicized as the state increasingly intervened in the control of desire, sexual expression, and family life," and a ban on consensual homosexual intercourse between adult men was reintroduced in 1934 under Article 121 of the Soviet criminal code, with homosexual acts between men classified as "crimes against the state".⁴⁷⁷ Those convicted of consensual contact under Article 121 were sentenced to "up to 5 years of hard 7 labor" in a prison system in which "they constituted the lowest caste in prison society" (a group known as the *opuschennye*, or "fallen"), "and were subjected to the most degrading tasks, physical violence, sexual assault, and starvation."⁴⁷⁸ While women were not included in the criminal definition of homosexuality, those found to be "female sexual dissidents" were schizophrenic

⁴⁷³ Healey, *Russian Homophobia from Stalin to Sochi*

⁴⁷⁴ "The Inner Lives of Queer Comrades in Early Soviet Russia," openDemocracy, accessed November 3, 2020, <https://www.opendemocracy.net/en/odr/interview-with-ira-roldugina/>.

⁴⁷⁵ See more: Laurie Marhoefer, *Sex and the Weimar Republic: German Homosexual Emancipation and the Rise of the Nazis*, German and European Studies 23 (Toronto; Buffalo: University of Toronto Press, 2015).

⁴⁷⁶ *Ibid*, 179.

⁴⁷⁷ Essig, "'Bury Their Hearts': Some Thoughts on the Specter of Homosexuality Haunting Russia," *QED: A Journal in GLBTQ Worldmaking* 1, no. 3 (2014): 43, <https://doi.org/10.14321/qed.1.3.0039>.

⁴⁷⁸ Sharon G. Horne et al., "Leaving the Herd: The Lingering Threat of Difference for Same-Sex Desires in Postcommunist Russia," *Sexuality Research & Social Policy* 6, no. 2 (June 1, 2009): 89, <https://doi.org/10.1525/srsp.2009.6.2.88>.

and subjected to treatment that included “electroshock therapy, drugs, inducing diabetic comas, and, if all this proved insufficient, a sex change”.⁴⁷⁹

It is a question of comparative gender attitudes. Most countries never introduced laws against lesbianism because women were traditionally restricted to the private sphere and were under the control of their husbands.⁴⁸⁰ Stalin and his circle did not approve of women’s emancipation: there was not a single woman in the Politburo, for example. I think that for Stalin, homosexuality was a “male” issue, connected to national security. Stalin and his circle did not approve of women’s emancipation: there was not a single woman in the Politburo. Women, on the other hand, did not serve in the armed forces and were not particularly active in the security organs, so they were less of a risk. I also think that Stalin and his associates also believed that a good “seeing-to” by a man would cure them of any lesbian tendencies.⁴⁸¹

Unlike the restrictions Stalin placed on women’s rights, the ban on homosexuality was not repealed under Khrushchev and had to wait until 1993 to be overturned. Although homosexuality is not being banned again, in practical terms current government policy puts gay men and women back in the ghetto, encouraging homophobia and hate crime, all in order to prop up Putin’s waning popularity by chasing after some illusory sense of “unity” and to distract and splinter the opposition that challenged his authority in the protests of winter 2011. The hollowness and hypocrisy of the government’s moralistic family values agenda is exposed when one remembers that nothing is being done about the enormous sex industry that has grown up in post-Soviet Eastern Europe.⁴⁸²

⁴⁷⁹ Ibid.

⁴⁸⁰ Caimiao Liu, “Stalin’s ‘New Soviet Woman,’” *Sociology Mind* 09, no. 04 (2019): 254, <https://doi.org/10.4236/sm.2019.94016>.

⁴⁸¹ “Gay Life in Stalin’s Gulag,” openDemocracy, accessed October 21, 2020, <https://www.opendemocracy.net/en/odr/gay-life-in-stalins-gulag/>.

⁴⁸² Ross Wolfe, “Cruising Past: Moscow’s Forgotten Gay History,” *The Charnel-House* (blog), July 1, 2014, <https://thecharnelhouse.org/2014/07/01/cruising-past-moscows-forgotten-gay-history/>.

The medical interpretation of homosexuality as Foucault ⁴⁸³ states that contributed in the development of modern sexual identity in the West, these ideas did not influence at all the Russian legal thinkers. For Foucault: “modern identities are produced by disciplinary regimes that permeate our being, defining and constraining who we are, in terms of fixed limits and boundaries of normalcy and deviance.” ⁴⁸⁴ Even among medical professionals in Russian, homosexuality did not arouse interest as medical intervention is concerned, or ideological harassment, as some Western scholars were discussing about the insignificance of a homosexual activity as a social deviance. On the public stage, according to Laura Engelstein, homosexuality never served as a vehicle for symbolic politics as it did in England or Germany during that period. Sodomy was conceptualized in secular terms as a psychological or psychical violence rather than prescribed as an act of sin in the religious context. As a crime sodomy didn't involve any violence or coercion but it concerned the state as the personal autonomy within the law. The statutes didn't specify the gender of the offenders in the anal intercourse, but the contextuality of the law meant that suppressing the intimate relations between men as the primary concern for the States.

Therefore, sodomy entered law practice as a definition of maleness as an attribute of subject-status before the law. ⁴⁸⁵ Discussing on the repercussions of Stalinism and his application of the sodomy legislation, it can be concluded that men were arrested under the “sodomy” statute in every Soviet republic. Those who were not imprisoned were held under observation, frequently blackmailed. ⁴⁸⁶ Many faced physical violence from local homophobes, and those attacks were euphemistically termed “repairs.” ⁴⁸⁷

Precise statistics about the prosecution of homosexuality in the Soviet Union remain unavailable to this day. However, one thing is clear: after the death of Joseph Stalin, repressions

483 Weir, Allison. “Who Are We? Modern Identities between Taylor and Foucault.” *Philosophy & Social Criticism* 35, no. 5 (June 2009): 533–53. <https://doi.org/10.1177/0191453709103426>.

⁴⁸⁴ Ibid.

⁴⁸⁵ Laura Engelstein, *The Keys to Happiness: Sex and the Search for Modernity in Fin-de-Siècle Russia* (Cornell University Press, 1994), 58.

⁴⁸⁶ George Haggerty, ed., *Encyclopedia of Gay Histories and Cultures: Volume 2* (New York: Routledge, 1999), 803.

⁴⁸⁷ Ibid.

related to homosexuality did not decline; instead, they became more intensive.⁴⁸⁸ “As strange as it may seem at first, the 1980s saw the peak number of convictions under this statute. For example, Roldugina stated that: “in 1960 in the USSR, in all of the republics put together, 439 people were convicted under the sodomy law, and eight people were acquitted. In 1987, 1155 people [were convicted]. The plurality, of course, were in the Russian SFSR. In 1985, 1620 people were convicted.”⁴⁸⁹

Larger focus for current homosexual historians is Stalin’s repression of sexual freedoms. Comparingly, there is a discussion between commentators on the current disputes that according their studies are not strictly between homosexuals and heterosexuals⁴⁹⁰, they are rather products of a conflict between two different versions of homosexuality, “Soviet and Western version.”⁴⁹¹ After Stalin banned homosexuality in the 1930s, a letter of protest⁴⁹² written to Stalin by openly gay British communist Harry Whyte,⁴⁹³ is included in Fiks’ book, discussion surrounding homosexuality were thought as a sexual intercourse between males being imprisoned in one of Stalin’s gulags.⁴⁹⁴ Those victims were not allowed to express their homosexuality and their ‘sexual acts’ were linked with the criminal hierarchy in the Gulag.⁴⁹⁵

⁴⁸⁸ AFP/Getty Images, “The History of Homosexuality in Russia: From Soviet Sex Changes to Gay Gulags,” Current, ABC Radio National (Australian Broadcasting Corporation, December 4, 2013), <https://www.abc.net.au/radionational/programs/rearvision/the-history-of-homosexuality-in-russia/5134412>.

⁴⁸⁹ “Less Equal than Others A History of Anti-Queer Persecution in the USSR.”

⁴⁹⁰ Eric Naiman, *Sex in Public: The Incarnation of Early Soviet Ideology*, (Princeton: Princeton University Press, 1997), 54; Dan Healey, “Homosexual Existence and Existing Socialism: New Light on the Repression of Male Homosexuality in Stalin’s Russia,” *GLQ: A Journal of Lesbian and Gay Studies* 8, no. 3 (2002): 350.

⁴⁹¹ Gennady Shkliarevsky, “Homosexual Desire in Revolutionary Russia: The Regulation of Sexual and Gender Dissent,” *Medical History*, accessed October 27, 2020, https://www.academia.edu/26109031/Homosexual_desire_in_revolutionary_Russia_the_regulation_of_sexual_and_gender_dissent.

⁴⁹² Ross Wolfe, “Can a Homosexual Be a Communist? Harry Whyte’s Letter to Stalin, 1934,” *The Charnel-House* (blog), June 27, 2015, <https://thecharnelhouse.org/2015/06/27/can-a-homosexual-be-a-communist-harry-whytes-letter-to-stalin-1934/>.

⁴⁹³ Joe Morgan, “The Secret Gay History of Russia,” *Gay Star News*, June 17, 2018, <https://www.gaystarnews.com/article/the-secret-gay-history-of-russia/>.

⁴⁹⁴ “Yevgeniy Fiks’ Unearthing of Historic Gay Languages | Frieze,” *Frieze* (blog), accessed November 3, 2020, <https://www.frieze.com/article/yevgeniy-fiks-unearthing-historic-gay-languages>.

⁴⁹⁵ Adi Kuntsman, “Shadows of the Past: Memoirs of the Gulags and Contemporary Homophobia” accessed October 27, 2020,

The consequent taboo attached to homosexual identities prevents them from being seen as something “natural” in Russia.⁴⁹⁶ The current spread of far-right, homophobic attacks from the Church and State cannot be just attributed to the communist past; but also, it can be traced to the unsuccessful transition to capitalism. Therefore, due to the primary effect of the Bolshevik rule, it can be said that they have liberalized the sexual tension coming from the repressive Tsarist Russia, that is why the communist past cannot be entirely blamed by liberals in Russia.⁴⁹⁷ In the Bolsheviks’ conception of communism, sexuality was not meant to be politicized and controlled by the State, it had the function to liberate the people for the greater good.⁴⁹⁸

3.2 Russia’s application of hetero-nationalism- the ideology of conservative nationalism and the ECHR criticism

After the fall of the Soviet Union, Western values surged therefore the respective governments expected Russia to liberalize, they instigated pressure concerning the human rights issues in which it provided a justification for the Russian Criminal Code to be reformed in 1993, but in hindsight the moral and criminal connotation of homosexuality were never publicly challenged in Russia.⁴⁹⁹ The Russia Federation had an underlying reason for quietly removing homosexuality from the criminal code, it is because of their pending application for membership in the Council of Europe. Even though Russia’s application was accepted in 1996 to join the Council of Europe, they were eager to comply with the judgments of the ECtHR

https://www.academia.edu/171862/Shadows_of_the_Past_Memoirs_of_the_Gulags_and_Contemporary_Homophobia.

⁴⁹⁶ Agata Pyzik, “Cruising Past: Photographer Yevgeniy Fiks Resurrects Moscow’s Forgotten Gay History,” The Calvert Journal, accessed October 22, 2020, <https://www.calvertjournal.com/articles/show/1235/moscow-cruising-sites-fiks>.

⁴⁹⁷ See more on the Soviet approach to homosexuality: Radzhana Buyantueva, “LGBT Rights Activism and Homophobia in Russia,” *Journal of Homosexuality* 65, no. 4 (March 21, 2018): 456–83, <https://doi.org/10.1080/00918369.2017.1320167>.

⁴⁹⁸ Ibid

⁴⁹⁹ AFP/Getty Images, “The History of Homosexuality in Russia: From Soviet Sex Changes to Gay Gulags,” Current, ABC Radio National (Australian Broadcasting Corporation, December 4, 2013), <https://www.abc.net.au/radionational/programs/rearvision/the-history-of-homosexuality-in-russia/5134412>.

until the cases of propaganda laws started to gather negative attention for Russia.⁵⁰⁰ Along with ratification of the European Convention of Human Rights in 1998, this agreement saw a whole new discourse on international law in Russian judiciary system. Russia's Constitutional court (CCRF) inability to comply with the decision of the ECtHR about two recent cases⁵⁰¹ provides the situation of the possibility in Russia crashing out of the COE. According to Bill Bowring: "Russia's most controversial and high-profile engagement with the CoE is, as indicated above its ratification of the ECHR and frequent appearance as a defendant in the ECtHR."⁵⁰² However, Russia is deeply embedded in a wide range of CoE activities in 2013, the Russian Federation amended the law Federal Law.436-FZ- "On protection of Children from Information Harmful to their Health and Development", introducing language making it illegal to producing or "propagandizing" about "non-traditional sexual relationships".⁵⁰³ This law was undertaken to be bold rejection to "European" values to gay rights movement, which is characterized as detrimental to traditional values of Russia, but most importantly to repress freedom of expression of sexual diversity and the rights to an assembly.⁵⁰⁴ The 2013 law defies the European Convention of Human Rights (the ECHR) as interpreted by the European Court of Human Rights of Strasbourg (the ECtHR or the Court).⁵⁰⁵ The decisions of the authorities

⁵⁰⁰ Justine De Kerf, "Anti-Gay Propaganda Laws: Time for the European Court of Human Rights to Overcome Her Fear of Commitment," *DiGeSt. Journal of Diversity and Gender Studies* 4, no. 1 (2017): 35–48, <https://doi.org/10.11116/digest.4.1.2>.

⁵⁰¹ "The Russian Federation Constitutional Court Confirms That The Russian Constitution Does Not Allow the Provisional Application of International Treaty Provisions on Investor-State Dispute Settlement," *Russia vs Yukos: Facts*, December 28, 2020, <https://www.yukoscase.com/news/in-the-news/russian-federation-constitutional-court-confirms-russian-constitution-not-allow-provisional-application-international-treaty-provisions-investor-state-dispute-settlement/>.

⁵⁰² Bill Bowring, "Russia and the Council of Europe: An Incompatible Ideology, and a Transplanted Legal Regime?," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 1, 2018), <https://papers.ssrn.com/abstract=3291512>.

⁵⁰³ Russian Federation: Federal Law No. 135-FZ of 2013 (n.380).

⁵⁰⁴ Article 11 of the Convention: "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

⁵⁰⁵ Jesse Stricklan, "Testing Constitutional Pluralism in Strasbourg: Responding to Russia's 'Gay Propaganda' Law," *Michigan Journal of International Law* 37, no. 1 (September 1, 2015): 192, <https://repository.law.umich.edu/mjil/vol37/iss1/4>.

of the Constitutional Court of the Russian Federation in St. Petersburg and the European Court for Human Rights are in conflict.. Therefore, multiple rulings of the ECtHR against Russia put the Court in dispute over their accepting cases about the prohibition on public discussion of homosexual discussions. Even so, Russia didn't violate the ECHR by recriminalizing homosexuality due to prohibition on criminalization by the ECtHR since the judgment in *Dudgeon v The United Kingdom* in 1981.⁵⁰⁶ Instead, the anti-gay legislation subtly promoted traditional values, it was Russia's attempt not to alienate itself from the Court and the human rights debate, ensuring that : "LGBT citizens enjoy all the same rights and protections as heterosexual citizens, provided they do not transgress societal norms in public."⁵⁰⁷

Legislative developments in Russia reflect the tendencies in altering the regional legislatures in amending laws that address: gay pride demonstrations, protect public morals or prevent the 'corruption' of children. Since 2006, nine regional jurisdictions have amended the administrative law to prohibit the propaganda of homosexuality among minors. The Kaliningrad region has enacted legislation that is broader in scope and it's not addressing only the propaganda against minors., but also public actions that are aimed at the promotion of pedophilia, sexual relations with minors, along with lesbianism and bisexuality which are prohibited.⁵⁰⁸ The Ryazan oblast was the first that imposed administrative liability on ' public actions aimed at propaganda of homosexuality (sodomy and lesbianism)' among minors.⁵⁰⁹

⁵⁰⁶ *Dudgeon v. United Kingdom App. No.7525/76* (ECtHR, 23 September 1981).

⁵⁰⁷ Cai Wilkinson, "Putting 'Traditional Values' Into Practice: The Rise and Contestation of Anti-Homopropaganda Laws in Russia," *Journal of Human Rights* 13 (July 1, 2014), 3-5, <https://doi.org/10.1080/14754835.2014.919218>.

⁵⁰⁸ Закон Калининградской области от 30 января 2013 г. № 199 «О внесении изменений и дополнений в Закон Калининградской области «О защите населения Калининградской области от информационной продукции, наносящей вред духовно-нравственному развитию»» [Zakon Kaliningradskoi oblasti ot 30 yanvarya 2013 g. No. 199 'Ovnesenii izmenenii i dopolnenii v Zakon Kaliningradskoi oblasti "O zashchite naseleniya Kaliningradskoi oblasti ot informatsionnoi produktsii, nanosyashchei vred dukhovno-nravstvennomu razvitiyu"'] [Kaliningrad Regional Law No. 199 of January 30, 2013, 'On Amending and Adding to the Kaliningrad Regional Law "On the Protection of the Population of the Kaliningrad Region from Information Harmful to Moral and Spiritual Development"']].

⁵⁰⁹ Article 4. Ryazan Regional Law No. 41-OZ, supra n. 18. Article 3.10 Ryazan Region Law No. 182-OZ of December 4, 2008, 'On Administrative Offences' [Закон Рязанской области от 4 декабря 2008 г. № 182-ОЗ «Об административных правонарушениях»] [Zakon Ryazanskoii oblasti ot 4 dekabrya 2008g. No. 41-OZ 'Ob administrativnykh pravonarusheniyakh']] provides: 'Public actions aimed at propaganda of homosexuality (sodomy and lesbianism) among minors – shall entail the imposition of an administrative fine on citizens in the amount of one thousand five hundred to two thousand rubles; on officials – from two to four thousand rubles; for legal entities – from ten to twenty thousand rubles.

As a consequence like I have mentioned, regions like Kaliningrad have escalated their interference in the freedom of expression of gay men and lesbians that has resulted in cases, fines and arrest.⁵¹⁰ In November 2013, the United Rights Committee decided on the case of Irina Fedotova vs. Russian Federation (Communication No. 1932/2010)⁵¹¹, that Russia had violated her rights of freedom for expression and to be free from discrimination. In March 2009, she had displayed posters declaring ‘Homosexuality is normal’ and ‘I am proud of my homosexuality’ near a secondary school in Ryazan.⁵¹² The Ryazan Law on Administrative Offences prohibited “public actions aimed at propaganda of homosexuality among minors.”⁵¹³

Fedotova was arrested, convicted, and ordered to pay a fine of 1,500 RUB (circa €36). The Human Rights Committee ordered the Russia to reimburse the fine paid by Fedotova as well as her legal costs and to ensure that the relevant provisions of domestic law are made compatible with articles 19 and 26 of the Covenant.⁵¹⁴

In its decision, the Human Rights Committee emphasized that limitations for the purpose of public morals, which are derived “from many social, philosophical and religious traditions,” could not be based exclusively on a single tradition.⁵¹⁵ Furthermore, any such limitations must be comprehended through the guise of universal human rights doctrine and the prevention of discrimination based on personal beliefs. The Committee recalled that the “prohibition against discrimination under Article 26 comprises also discrimination based on

⁵¹⁰“Annual Review 2013 | ILGA-Europe,” accessed October 30, 2020, <https://www.ilga-europe.org/annualreview/2013>.

⁵¹¹ *Fedotova v. Russian Federation, Communication No. 1932/2010, 30 November 2012: Russian Federation*, available at <https://www.icj.org/sogijurisprudence/fedotova-v-russian-federation-communication-no-19322010-30-november-2012-russian-federation/> (last visited 30 October 2020).

⁵¹² “Russia: Human Rights Groups Hail Historic Decision on Homosexual Propaganda Ban,” *International Commission of Jurists* (blog), November 27, 2012, <https://www.icj.org/russia-human-rights-groups-hail-historic-decision-on-homosexual-propaganda-ban/>.

⁵¹³ Section 3.10 of the Ryazan Region Law on Administrative Offences of 4 December 2008 (Ryazan Region Law).

⁵¹⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁵¹⁵ Finola Flanagan, Mr Jan Velaers, and Mr Vladimir Djerić, “Adopted by the Venice Commission at Its 95th Plenary Session (Venice, 14-15 June 2013),” 2013, 14.

sexual orientation.”⁵¹⁶ The Committee stated that Russia “has not shown that a restriction on the right to freedom of expression in relation to ‘propaganda of homosexuality’ – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria.”⁵¹⁷ In the same vein, the Human Rights Committee (HRC), in the case of Fedotova, duly distinguished “actions aimed at involving minors in any particular sexual activity” from “giving expression to [one’s] sexual identity” and “seeking understanding for it”.⁵¹⁸ In this case, the Committee observed that the State party failed to demonstrate why it was necessary for the protection of minors, to restrict the author’s right to freedom of expression of her sexual identity even if she intended to engage children in the discussion of issues related to homosexuality.⁵¹⁹

Referring also to the reports of the United Nations Committee on Human Rights on the case of Fedotova v. the Russian Federation and the Recommendation CM/Rec(2010)5 of the Committee of Ministers, the Venice Commission considered : “ ... that the prohibition of “propaganda of homosexuality” as opposed to “propaganda of heterosexuality” or sexuality generally – among minors, amounts to a discrimination, since the difference in treatment is based on the content of speech about sexual orientation and the authors of the provisions under consideration have not put forward any reasonable and objective criteria to justify the prohibition of “homosexual propaganda” as opposed to “heterosexual propaganda.”⁵²⁰ The anti-propaganda laws are understood to fall into the scope of article 10 (freedom of expression), article 11 (freedom of assembly), and article 14 (prohibition of discrimination).⁵²¹ In the analysis of the Venice Commission, they have applied the same method as the Court itself to decide whether the laws are violating certain convention rights or not. The Venice Commission states that the laws of the Russian Federation are interfering with the freedom of assembly and expression. Because the Articles 10 and 11 are qualified rights, meaning any interference with

⁵¹⁶ Ibid,19.

⁵¹⁷ Ibid,19

⁵¹⁸ Ibid,16.

⁵¹⁹ *Fedotova v. Russian Federation*, (n 494), at para 10.8.

⁵²⁰ Finola Flanagan, Mr Jan Velaers, and Mr Vladimir Djerić, “Adopted by the Venice Commission at Its 95th Plenary Session (Venice, 14-15 June 2013),” 2013, 20.

⁵²¹ Kerf, “Anti-Gay Propaganda Laws,” 41.

said rights is not necessarily a violation of the Convention.⁵²² A justified interference needs to be prescribed by law, serve a legitimate aim and must be deemed necessary in a democratic society. The prohibition of non-traditional relationships meets the first requirement: prescribed by law - but the first condition is not met, because the citizens cannot understand or foresee which type of actions is prohibited. Even though the first condition is prescribed by law, the law does not pursue legitimate aim in a democratic society. The Commission considers that the rights of minors are not protected through prohibition of public debate, on the contrary it's in the minors' best interest to receive relevant information about sexuality and homosexuality. In the last part, the Article 14 does not refer to sexual orientation, but the Commission states that Russia Federation fails to deliver reasonable and objective arguments as to why propaganda of homosexuality is forbidden, whilst heterosexuality is not discriminated in general.⁵²³

The lawmakers subsequently in 2013 drafted a separate bill proposing to deprive parents who had engaged in same sex relations of custody to their children, but the draft was recalled.⁵²⁴ However a law was passed prohibiting foreign sex couples from adopting children, as a government official said about this legislation will allow only “traditional families.”⁵²⁵ The language used by the lawmakers mistakenly gives the impression as far as Russian children being snatched thought adoption and tricked into unsuitable relationships with adults as part of the gay propaganda. The state according to some feminist organizations, who suggested instead of blaming the demographic crisis on the western propaganda and liberal values, they should instead stop ignoring the real issues in childbearing created by the state or the imposition of the gender norms of the Church. The feminist initiative argued that the State criticized the devaluing of same sex relationships between women, because of the default issue of using propaganda for promoting heterosexuality that was exhibited in schools, media, movies and etc. The default message of a patriarchal family endorsed by the State, was a major target of

⁵²² Flanagan, Velaers, and Djeric, “Adopted by the Venice Commission at Its 95th Plenary Session (Venice, 14-15 June 2013),” 8.

⁵²³ “The Right to Non-Discrimination and the Russian ‘Anti-Gay Propaganda’ Legislation,” accessed November 20, 2020, <https://lawreview.elsa.org/the-right-to-non-discrimination-and-the-russian-anti-gay-propaganda-legislation>.

⁵²⁴ “Закон о Лишении Геев Родительских Прав Вернут в Госдуму,” accessed October 29, 2020, <https://lenta.ru/news/2013/10/20/again/>.

⁵²⁵ “Putin Backs Banning Adoption by Foreign Same-Sex Couples | Reuters,” accessed October 29, 2020, <https://www.reuters.com/article/uk-russia-putin-adoption-idUKBRE9530R220130604>.

attract by the feminist initiate, because they entailed only love between a man and woman, along with the creating of a nuclear family with children as the primary image of reference.⁵²⁶ The recurrent vagueness of the law by the Russian officials description of the presupposed threat of homosexuality decries certain performance in the prohibition behind the ban of homosexual propaganda.⁵²⁷ According to Mortensen, the propaganda charged description may have not existed for those people accused for the offences concerning obscenity or blasphemy, factoring those things into law made every factual information about LGBT issues or non-heterosexual permissible for censorship by the state.⁵²⁸ The discourse of the Russian politicians along with the human rights activist was heated due to each other side accusing their political opponents of Nazism. Alexeyev, the prominent LGBT activist, who was the first one to be fined 4000 rubles under the gay propaganda law, criticized the reporting of the western media, due to their hypocritical coverage on this manner.⁵²⁹

As far we can see there is a certain Western influence that is vital to the creation of this Russian propaganda ban, because Europe has been responsible according to Mortensen as much as for the exporting of homophobia as it has the tolerance of homosexuality. Even though the Russian federal law recycled key formulations from its regional predecessors, Mortensen suggest that its true originator was the Britain's Section 28⁵³⁰. Margaret Thatcher basically

⁵²⁶ Valerie Sperling, *Sex, Politics, and Putin: Political Legitimacy in Russia*, Oxford Studies in Culture and Politics (Oxford: Oxford University Press, 2015), 265-266.

⁵²⁷ Stehn A. Mortensen, "Discursive Propagation in Putin's Russia: Prohibiting 'Propaganda of Non-Traditional Sexual Relations,'" *Zeitschrift Für Slavische Philologie* 72, no. 2 (2016): 349–81, <https://www.jstor.org/stable/26583038>.

⁵²⁸ "Минкультуры Отказалось Смягчать Закон о Запрете Мата в Кино," РБК, accessed December 22, 2020, <https://www.rbc.ru/rbcfreenews/55765edf9a79476fc339304b>; Daniel Weiss, "The New Russian Legislation on Blasphemy and Swearing: The Parliamentary Debates. To Appear in: *Zeitschrift Für Slavische Philologie* Special Issue: The Culture and Politics of Verbal Prohibition in Putin's Russia Guest Editors: Michael S. Gorham and Daniel Weiss," 15, accessed December 22, 2020, https://www.academia.edu/30924206/The_New_Russian_Legislation_on_Blasphemy_and_Swearing_the_Parliamentary_Debates_To_appear_in_Zeitschrift_f%C3%BCr_Slavische_Philologie_Special_Issue_The_Culture_and_Politics_of_Verbal_Prohibition_in_Putin_s_Russia_Guest_Editors_Michael_S_Gorham_and_Daniel_Weiss.

⁵²⁹ Marc Bennetts, "Russia's Anti-Gay Law Is Wrong – but so Is Some of the Criticism from the West | Marc Bennetts," *The Guardian*, February 5, 2014, sec. Opinion, <https://www.theguardian.com/commentisfree/2014/feb/05/russia-anti-gay-law-criticism-playing-into-putin-hands>.

⁵³⁰ 20 Local Government Act 1988: "A local authority shall not—(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality; (b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship" (legislation.gov.uk)

instituted a ban on any promotion of homosexuality in schools, or any distribution of books that have gay-friendly attitudes in the libraries.⁵³¹ In addition to Britain, the financing of American evangelicals in supporting anti-gay legislation and abortion in Russia is evident. For instance Maria Levintova in her *Mother Jones* described the close political, institutional and financial ties between : US evangelicals from the World Congress on Families, the President of the National Organization for Marriage, Brian S. Brown, for News producer, Jack Hanick, and, from the Russian side, Chairman of the Duma Committee on Family, Women and Children, Elena Mizulina, Russian Orthodox billionaires Malofeev and Mr and Mrs Iakunin from the Sanctity of Motherhood Program, Arch priest Dmitrii Smirnov, and sociology scholars Aleksei Komov (also Russian representative of WCF) and Anatolii Antonov of Moscow State University.⁵³² She documents in her article in what way these gatherings helped establish relationships with key Russian government officials, such as the member of the Russian Duma, Elena Muzilina, the country's foremost legislator on anti-gay issues, who had met with the President of National Organizion Marriage two days after the lower chamber of parliament approved her gay propaganda ban, to discuss on a further legislation about the adoption ban on gay people.⁵³³ The 2013 law provided a scenario where there is question on who has the final say in these rulings about human rights in Russia.⁵³⁴ This law according to Stricklan is:

“Is an obvious affront not only to domestic human rights protections recent rulings of the CCRF, a deliberate challenge to the Russian constitution's unusual openness to international human rights law.”⁵³⁵ Second, the ECtHR has marked out an unmistakable

⁵³¹ Mortensen, “Discursive Propagation in Putin’s Russia,” 359.

⁵³² “How US Evangelicals Helped Create Russia’s Anti-Gay Movement – Mother Jones,” accessed October 29, 2020, <https://www.motherjones.com/politics/2014/02/world-congress-families-russia-gay-rights/>.

⁵³³ Ibid.

⁵³⁴ Stricklan, “Testing Constitutional Pluralism in Strasbourg.”

⁵³⁵ Ibid,

path of protecting the freedom of assembly⁵³⁶ from limitation due to discrimination against LGBT Europeans.”⁵³⁷

Furthermore, ECHR leaves Russia aggrieved with these rulings, due to the small constituency of LGBT members, pressure will have to come from outside according to Stricklan. The defiance of Russia of the perceived hostility of the court might promote other members in leaving or openly challenging the binding and constitutional order of the ECHR.⁵³⁸ In 2010 Anton Burkov published his PHD thesis on this issue, where he states substantially the binding nature of the European Convention into the Russian domestic judiciary, in the foreword of his doctoral work - Anatoliy Kovler famous lawyer and a presiding judge in Strasbourg from 1999-2012 states:

“The incorporation of the European Convention into the legal system of the Russian Federation and the necessity of the application by the national courts of the Convention itself, and also the precedents given by the European Court, are confirmed by the rulings of the highest courts of the Russian Federation. First and foremost are the many Resolutions and Decisions of the [CCRF], in which are to be found the reflection of the practice of application of the Convention to the widest spectrum of legal problems.”⁵³⁹

Kovler elaborates on the 17-year anniversary since the Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on the territory of the Russian Federation. He states that when ratifying the Convention by the Federal law of March 30 1998, the State Duma sent: “a clear signal that as a signatory to the Convention the Russian Federation recognizes the jurisdiction of the European Court of Human Rights as binding in matters of interpretation and application of the Convention and the Protocols thereto in case of breach by

⁵³⁶ See more: Frédéric Edel, “Case Law of the European Court of Human Rights Relating to Discrimination on Grounds of Sexual Orientation or Gender Identity,” n.d., 128.

⁵³⁷ Stricklan, “Testing Constitutional Pluralism in Strasbourg.”, 193.

⁵³⁸ Ibid.

⁵³⁹ A. Burkov, *Konventsiya o zashchite prav cheloveka v sudakh Rossii (The Convention on Human Rights in the Courts of Russia)*, 2010. Moscow, Wolters Kluwer, p.iv.

the Russian Federation of the provisions of the compacts if committed after they become binding upon the Russian.”⁵⁴⁰

According to Zorkin, he states how the Constitutional Court set out on the issue of the relationship between the legal force of the Russian Constitution and the European Convention. On this subject, in July 14, 2015, the state representatives of the Duma⁵⁴¹ challenged the constitutionality of the norms of the Russian legislation which prescribes to the authorities to abide with the judgments of the ECHR even if they contradict the Constitution of the Russian Federation.⁵⁴² As Zorkin reiterates in his speech:

“The Constitutional Court recognized the provisions of the contested laws as not inconsistent with the Constitution of the Russian Federation. However, in the Court's opinion, these provisions do not exclude the possibility that state bodies, whose competence includes the implementation of international treaties, having come to the conclusion that it is impossible to execute the judgment of the ECHR due to its discrepancies with the Constitution of the Russian Federation, may apply to the Constitutional Court to resolve the problem in accordance with the Constitution of the Russian Federation.”⁵⁴³

The main problem of the Constitutional Court of Russia according to Marianna Abramova its: “inability to harmonize its legal system with the European legal

⁵⁴⁰ Federation (Article 1 of the Federal Law of 30 March 1998, no. 54-FZ, “On ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto”) ; Anatoly I. Kovler, “European Convention on Human Rights in Russia,” *L'Europe En Formation* n° 374, no. 4 (2014): 116–35, <https://www.cairn.info/revue-l-europe-en-formation-2014-4-page-116.htm>.

⁵⁴¹ Resolution of July 14, 2015 No. 21-P on the case on checking the constitutionality of the provisions of Article 1 of the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto", paragraphs 1 and 2 of Article 32 of the Federal Law "On International Treaties Russian Federation ", parts one and four of Article 11, paragraph 4 of part four of Article 392 of the Civil Procedure Code of the Russian Federation, parts 1 and 4 of Article 13, paragraph 4 of Part 3 of Article 311 of the Arbitration Procedure Code of the Russian Federation, parts 1 and 4 of Article 15, paragraph 4 of part 1 of Article 350 of the Code of Administrative Procedure of the Russian Federation and paragraph 2 of part 4 of Article 413 of the Code of Criminal Procedure of the Russian Federation.

⁵⁴² “Speech by the Chairman of the Constitutional Court of the Russian Federation,” accessed October 27, 2020, <http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=75>.

⁵⁴³ Ibid.

landscape, and to uphold its own constitutional identity.”⁵⁴⁴ On the matter of gender prejudices, Abramova states the problem is not the legal system of the Russian federation but the “gender-biased” traditions of its citizens. Due to the garnering of support by its citizens for the Russian legislative in accordance of one social group against the other, there was a legislative prohibition on ‘non-traditional sexual relationships’⁵⁴⁵ according to M. Issaeva and M. Kiskachi in 2014 under the guise Orthodox Church⁵⁴⁶ as the main agent in asking for the banning of gay sex, similar to the criminalization in the Stalinist times.⁵⁴⁷ The federal propaganda law did not specify the prosecution of non-traditional sexuality, but the law is clearly self-evident in targeting homosexual relations, in the original draft the law “propaganda for homosexuality “while the press referred to it as gay propaganda. After the pride marches in Moscow in 2006, every each one the yearly marches were announced but the disbanded and put the LGBT rights agenda in the national spot line.⁵⁴⁸ As previously mentioned, the alliance between right wing activist, communist, parents’ organization and the most important element the Orthodox Church has contributed in creating an anti-lgbt rhetoric as the norm in the public sphere according to Zdravomyslova.⁵⁴⁹

Keller addresses how the subsequent banning of homosexual propaganda was a media spectacle, the fines apropos to the law that was implemented didn’t represent such a drastic deterrence as much as the message of queer visibility, prosecution of the gay members.⁵⁵⁰ The tropes utilized against homosexual as an minority group, the narrative being employed from

⁵⁴⁴ Marianna Abramova and Marianna Abramova, “Constitutional Justice of Russia within the Judicial Landscape of Contemporary Europe,” *Revista Derecho Del Estado*, no. 40 (June 2018): 21–44, <https://doi.org/10.18601/01229893.n40.02>.

⁵⁴⁵ Кодекс об административных правонарушениях Российской Федерации (КоАП РФ) [Code of Admin. Offenses of the Russian Federation], Dec. 30 2011, No. 195-FZ, Art. 6.21 (as of Oct. 21, 2013).

⁵⁴⁶ “Russian Church Leader Proposes Criminalizing Homosexuality,” accessed October 27, 2020, <https://www.advocate.com/news/world-news/2014/01/10/russian-church-leader-proposes-criminalizing-homosexuality>.

⁵⁴⁷ Maria Issaeva and Maria Kiskachi, “Immoral Truth vs. Untruthful Morals? Attempts to Render Rights and Freedoms Conditional upon Sexual Orientation in Light of Russia’s International Obligations,” *Russian Law Journal* 2, no. 1 (February 17, 2015): 81, <https://doi.org/10.17589/2309-8678-2014-2-1-81-105>.

⁵⁴⁸ Emil Persson, “Banning ‘Homosexual Propaganda’: Belonging and Visibility in Contemporary Russian Media,” *Sexuality & Culture* 19, no. 2 (June 2015): 256–74, <https://doi.org/10.1007/s12119-014-9254-1>.

⁵⁴⁹ Elena Zdravomyslova, “Sexual Liberation and the Conservative Turn: How are they Compatible?” Keynote speech at Love and Sex after Communism. Workshop at Uppsala University, (October 2013): 10–12.

⁵⁵⁰ See more: Douglas Kellner, *Media Spectacle* (Psychology Press, 2003).

the people that were creating this spectacle was about protecting the majority from a lifestyle and norms that were detrimental to their social lives, therefore the Russian government objective was to privately hide their sexuality.⁵⁵¹

Therefore here I would like to readdress the statement of judge Zorkin on the eve on the 20th years of the Constitution where he decries the obligations of the Russian judiciary as limitless tolerance; but also he decries the attempts of the forceful imposition of legal and psychological innovation into Russian society, which in his opinion was still traditional.⁵⁵² Emil Persson reiterates on that notion of Zorkin statements, during the time when the European Court of Human rights considered the illegality of the ban on parades, the chairman of the Constitutional Court of the Russian Federation used an example of an imagined parade in the Dagestan to point out the absurdness of the decision to organize such event.⁵⁵³ In Zorkin point of view, he propagates that the changes proliferated will deeply diminish the moral norms and impact Russia's stability and statehood.⁵⁵⁴ As we shall see, domestic institutional resistance to the ECtHR system has been strong from the CCRF, however with the ruling on the issue of *Markin v. Russia*⁵⁵⁵, it represents a landmark in the deterioration between the ECtHR and the CCRF. Dissatisfied with the courts conclusion, the military court appealed to the ECtHR ruling to the CCRF.⁵⁵⁶ The Constitutional Court reaffirmed that ECHR and CCRF share the same competence on the manner, but due to the Russian Constitution being supreme to a treaty regime, the Supreme Court implied that it retains authority to interpret human rights provision in the constitution in contradiction from the ECHR rulings as it sees fit, as the official press

⁵⁵¹ Persson, "Banning 'Homosexual Propaganda,'" 11.

⁵⁵² See more on Zorkin's view on traditional values being supplanted by Russia's obligation to international norms regarding the discrimination of sexual minorities :Dmitry Mareshin, "Russian Law Journal. Vol.II (2014) Issue1," *Russian Law Journal*, accessed March 19, 2021, https://www.academia.edu/6469431/Russian_Law_Journal_Vol_II_2014_Issue1.

⁵⁵³ Persson, "Banning 'Homosexual Propaganda,'" 17.

⁵⁵⁴ Issaeva and Kiskachi, "Immoral Truth vs. Untruthful Morals?," 94.

⁵⁵⁵ Judgment on the merits delivered by the Grand Chamber: *Markin v. Russia*, App. No. 30078/06 (ECtHR,22 March 2012).

⁵⁵⁶ See Postanovlenie Konstitutsionogo Suda RF ot 6 dekabrya 2013 g. N 27-P [Ruling of the Constitutional Court RF of 6 Dec. 2015 N. 27-P], ROS. GAfeZ., Dec. 8, 2013, [http:// www.rg.ru/2013/12/18/ks-dok.html](http://www.rg.ru/2013/12/18/ks-dok.html) [hereinafter Markin CCRF decision].

release of the Constitutional Court states : Consequently, the supremacy of the Constitution of the Russian Federation itself would be challenged.”⁵⁵⁷

The case of *Alekseyev vs Russia*⁵⁵⁸ represents the tip of the iceberg of an international confrontation from the Western states when it comes to relations with Russia towards their harsh stances against homosexuality adopted by the Russian Parliament and Vladimir Putin. While Russia has been already condemned in *Alekseyev vs Russia*, it continued to ban Gay parades after 2010. Concerted effort by Russia to silence the LGBT minority was met with critical reactions from the CoE (Council of Europe) and the EU. Some European commentators were considering Russia’s crackdown as an item falling under the ‘Pink Agenda’.⁵⁵⁹ There were calls by Parliament members like Sophie in’t Veld for Russia to leave the CoE if they cannot abide by norms of the Convention on Human Rights.⁵⁶⁰ According to Ammaturo the classification of Russia as homophobic and transphobic directly strengthens the dichotomy between illiberal and liberal members of CoE. The European strategies aimed at opposing Russia on their stances on homosexuality, the reimposing norms by the West had resulted in stiffening of anti-gay measures and the rhetoric.⁵⁶¹ The European states and the supra-national institutions tried to demarcate themselves from Russia’s homophobia with their efforts to create a queer-friendly environment. Kulpa and Mizielinska commented on the western attitudes towards Eastern European countries, how these countries lack of human rights standards had to catch up with the benevolent help of the western states.⁵⁶² These political negotiations have a negative consequence on the lives of the sexual minorities, because they are considered as being coopted subjects in homonormative terms and outcast in heteronormative terms. The Council of Europe, specifically through the work of the European Court of Human Rights plays

⁵⁵⁷ Ekaterina Mishina, A Rubik’s Cube from Russia’s Constitutional Court, INSTITUTE FOR MODERN RUSSIA (May 6, 2014), <http://imrussia.org/en/rule-of-law/633-a-rubiks-cubefrom-russias-constitutional-court>.

⁵⁵⁸ *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2011).

⁵⁵⁹ Francesca Romana Ammaturo, “The ‘Pink Agenda’: Questioning and Challenging European Homonationalist Sexual Citizenship,” *Sociology* 49, no. 6 (2015): 1160, <https://www.jstor.org/stable/44016777>.

⁵⁶⁰ Phillip M. Ayoub, David Paternotte, and Ethan Rundell, “The International Lesbian and Gay Association (ILGA) and the Expansion of LGBT Activism in a Unified Europe,” *Critique Internationale* No 70, no. 1 (March 8, 2016): 55–70, https://www.cairn-int.info/article-E_CR11_070_0055--the-international-lesbian-and-gay.htm.

⁵⁶¹ Ammaturo, “The ‘Pink Agenda,’” 1161.

⁵⁶² Robert Kulpa, ed., *De-Centring Western Sexualities*, 1st edition (London New York: Routledge, 2016), 46.

a crucial role in portraying Europe as a tolerant, open and respectful towards sexual minorities. Simultaneously, they identified intolerant and homophobic ‘others’ within and outside of their borders.⁵⁶³ Last, according to De Kerf, the Court as a spokesperson of Western values, it needs credibility when confronted with anti-propaganda laws. Because of the way of the debate is entangled with traditional values in Russia, the Court needs to be extra careful when it comes to condemning the laws as violation of the convention.⁵⁶⁴ Justine De Kerf says that if the Court does not appear to be dependable in its commitment to the full protection of the Convention’s rights of every citizen within its jurisdiction, regardless of their sexual orientation or gender identity, a future judgment condemning laws Kerf says could potentially be seen as Russophobia, estranging the Russia citizens in the process from the human rights debate.⁵⁶⁵ According to De Kerf, it appears that: “the Russian authorities are trying to create a rift between the West, with traditional values on one side and universal human rights - LGBT rights included - on the other side.”⁵⁶⁶ As Cai Wilkinson mentions the ‘traditional values’ concept threatens to “limit both the scope and the meaning of human rights norms.”⁵⁶⁷ Traditional values according to Wilkinson : “... replace the universalism of norms with moral relativism and conditionality, while sexual orientation and identity are placed beyond the scope of human rights norms due to being in conflict with moral norms and the responsibility of the individual society.”⁵⁶⁸

Because of susceptibility of populism and the inability of homonormative LGBT activism to launch a sustained defense of sexual diversity, Wilkinson states that the traditional values narrative is so dangerous for both the current international norms and very notion of universal human rights, with the Russian anti-gay propaganda law providing a warning of the potential of traditional values to be used to legitimate regimes of moral regulation which are

⁵⁶³ Ammaturo, “The ‘Pink Agenda,’” 1161.

⁵⁶⁴ Justine De Kerf, “Anti-Gay Propaganda Laws: Time for the European Court of Human Rights to Overcome Her Fear of Commitment,” *DiGeSt. Journal of Diversity and Gender Studies* 4, no. 1 (2017): 46, <https://doi.org/10.11116/digest.4.1.2..>

⁵⁶⁵ Ibid

⁵⁶⁶ Ibid.

⁵⁶⁷ Wilkinson, “Putting ‘Traditional Values’ into Practice,” 374.

⁵⁶⁸ Ibid.

incompatible with human rights.⁵⁶⁹ When it comes to Poland, after it gained full independence in 1989, a process of widely understood political, economic and social changes began. Social transformation after the collapse of the Soviet Union happened much faster in Poland than in Russia, as both countries had different starting points.⁵⁷⁰ Unlike Russia on the other hand, Poland had established its LGBT political organizations in the 1990s after the fall of the Soviet Union. Its association with the European Union along with Poland's compliance with the Equality Directives brings another layer of analyzing a country that lately has proven increasingly resistant to 'LGBT ideology'. In the next subchapter, we will analyze the Polish LGBT movement and its struggles against increasing right wing ideology mainly promulgated to cause division in the Polish society and drive its LGBT members apart.

3.3 Poland's EU accession and the backlash against LGBT movements

In the 1990s, the political opportunity for creating a structure in order to express political pluralism and the fall of communism created a space where the absence of the EU conditionality allowed forming of new associations for expressing of homosexuality in the public space.⁵⁷¹ Aside from social taboos, the end of state censorship made it possible for profound changes in citizen's personal lives. Considering the political agenda of the church, the culture of silence was apparent in the Polish society in the 1990s, at the Church's behest abortion was banned in 1993, religious instructions instituted in public schools along with the signing of the concordat with Rome in 1997 provided the Church with a stamp of authority to impose its power on society. Therefore, the issue of gay rights did not present a threat to the aforementioned religious institutions.⁵⁷²

By the time of 1997, the gay rights movement was falling in decline and, - according to Connor O'Dwyer it was the Church that took a resounding role during the AIDS epidemic

⁵⁶⁹ Ibid.

⁵⁷⁰ "Respecting European standards concerning human rights of LGBT people in Poland and in the Russian Federation., a comparative analysis," *Reality of Politics. Estimates - Comments - Forecasts*, no. 7 (2016): 56–67, <https://www.cceol.com/search/article-detail?id=563007>.

⁵⁷¹ Piotr Żuk and Paweł Żuk, "'Democracy Is Not for Everyone': Nationalist Homophobia in Eastern Europe and Opposition to Liberal Democracy in the European Union," *Communist and Post-Communist Studies* 53, no. 3 (September 1, 2020): 1–21, <https://doi.org/10.1525/cpcs.2020.53.3.1>.

⁵⁷² Ramet.S(2006) Thy will be done: The Catholic Church and Politics in Poland since 1989. In: T. Byrnes and P. Katzenstein (eds.) *Religion in an Expanding Europe*. Cambridge: Cambridge University Press, pp. 117–147.

in creating a network of fledgling HIV/AIDS services with the cooperation of the state.⁵⁷³ The only registered LGBT organization was the Association of Lambda Groups (*Stowarzyszenie Grup Lambda*)⁵⁷⁴ which emerged in 1991, the purposes of the group - mainly organized on a local level as in informal group - being the creation of an image of a 'positive consciousness of homosexual men and women, propagating safer sex and cooperating with public institutions regarding HIV/AIDS prevention'.⁵⁷⁵ According to Gruszczynska the Lambda Groups were: against public activism, claiming that increased visibility might be harmful to homosexual persons by attracting unwanted attention and fueling violence'.⁵⁷⁶ By the year 1997 these groups were defunct, Conor's own research determines despite the few attempts of constitutional lobbying for the inclusion of sexual orientation as one of the grounds for discrimination which was banned constitutionally, efforts proved unsuccessful.⁵⁷⁷

Therefore, since the 1997 these human rights reports have been published in which the progress of LGBT rights agenda is being examined by the European Parliament and the Council.⁵⁷⁸ To a certain extent, the European Commission in its annually published report notifies the applicant's progress with the Copenhagen criteria, where it determines, inter alia, human rights situation of the applicant state.⁵⁷⁹

More importantly, the European Parliament is the only institution which seriously raises the issue over the rights of sexual minorities in the context of enlargement.⁵⁸⁰ However, their

⁵⁷³ Conor O'Dwyer, "Does the EU Help or Hinder Gay-Rights Movements in Post-Communist Europe? The Case of Poland," *East European Politics* 28, no. 4 (December 1, 2012): 332–52, <https://doi.org/10.1080/21599165.2012.721094>.

⁵⁷⁴ "O HISTORII RUCHU LGBT W POLSCE," *Liga Dla Tolerancji* (blog), September 9, 2013, <https://ligadlatolerancji.wordpress.com/o-historii-lgbt-w-polsce/>.

⁵⁷⁵ Kerstin Jacobsson and Steven Saxonberg, *Social Movements in Post-Communist Europe and Russia* (Routledge, 2015), 35.

⁵⁷⁶ "Sowing the Seeds of Solidarity in Public Space: Case Study of the Poznan March of Equality - Anna Gruszczynska, 2009," accessed December 3, 2020, 33. <https://journals.sagepub.com/doi/10.1177/1363460709103893>.

⁵⁷⁷ Kliszczyński, Krzysztof. "A child of a young democracy: the Polish gay movement, 1989-1999." *EAST EUROPEAN MONOGRAPHS* (2001): 161-168.

⁵⁷⁸ Bell, *Equality for Lesbians and Gay Men*, 88.

⁵⁷⁹ Graff, Agnieszka. "We are (not all) homophobes: A report from Poland." *Feminist Studies* 32, no. 2 (2006): 434-449.

1998 report issued a general warning that would allow any accession talk to countries like Poland that: “through its legislation or policies violate the human rights of lesbians and gay men.”⁵⁸¹ Since Poland’s commencement of EU integration in 1998 started, the European Parliament notified the blocks accession of any human rights violations, the gay rights in the public sphere and in the market were on the agenda as non-negotiable. Poland’s framing of the gay issues as: “personal weakness and HIV prevention was counterposed to the European law and human rights. “⁵⁸² The cumulative effect of the evolving European Convention case law is to resolve any concerns towards the international human rights law involving the protection of gay and lesbian rights. Given that the Article 6 (2) links the Union with the standards of the ECHR, there was a firm foundation for Poland as an applicant county for EU integration in 1990s that predisposes requirements for the proper treatment and compliance in case law of the Court of Human rights.⁵⁸³ As a specific example for discrimination involving the public/private sphere, the case of *A.D.T. v. United Kingdom* provides that the conviction of Mr. A.D.T in this case is a clear discrimination, and the presence of the state’s legislation protecting public morals (On 2 April 1996 the applicant was charged with gross indecency between men contrary to section 13 of the Sexual Offences Act 1956) as result of his sexual orientation therefore according to the Court, this will not be compatible with the Article 8 on the rights to respect for private life.⁵⁸⁴

Along with the framing of these issues, 1998 proved as a significant year for gay rights activists due to the political opportunity for creating structure in accordance with the European integration. The adoption of the Roth report⁵⁸⁵ – named after the German Green Party lawmaker and member of the European Parliament, Claudia Roth – and the resulting Resolution on Equal

⁵⁸¹ par. J, Urgency Resolution on equal rights for gays and lesbians in the European Community; adopted 17 September 1998, B4-0824 & 0852/98, PE 272.005/79, accessed November 19, 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:51998IP0824&from=CS>.

⁵⁸² O’Dwyer, “Does the EU Help or Hinder Gay-Rights Movements in Post-Communist Europe?” :332–52, <https://doi.org/10.1080/21599165.2012.721094>.

⁵⁸³ Europe, I. L. G. A. "Equality for Lesbians and Gay Men: A Relevant Issue in the EU Accession Process." *Brussels: ILGA Europe*. Available at: [www.ilga-europe.org/home/publications/reports_and_other_materials/%28offset 29](http://www.ilga-europe.org/home/publications/reports_and_other_materials/%28offset%2029) (2001): 45.

⁵⁸⁴ Judgment, Merits and Just Satisfaction: *ADT v United Kingdom App No 35765/97, ECHR 2000-IX*.

⁵⁸⁵ Report on the Committee on Civil Liberties and Internal Affairs on equal rights for homosexuals and lesbians in the EC. Session Documents 1994, Document A3-0028/94, 26 January 1994.

Rights for Homosexuals and Lesbians in the European Community (A30028/94) previously mentioned marked a critical step in recognizing the rights of gays and lesbians.⁵⁸⁶ Along with the implementation of the Article 13⁵⁸⁷, which included sexual orientation in the list of discriminations, the EU in 2000 implemented this article through Directive 2000/78/EC⁵⁸⁸ which is binding by its member states.⁵⁸⁹

In the case of the gay rights groups, Grabbe argues that: “neither accession to the EU for Poland nor the social learning — the Europeasation process in the post-communist politics where the EU uses its leverage or the ‘EU model’ — have found a reflective role on the institutions and the policy making in Poland.”⁵⁹⁰ The social learning mechanism is described as a process where both applicants and members are persuaded about the appropriateness of the EU norms. According to Schimmelfennig and Sedelmeier, they also mention how the participation of national-level policy makers and other political elites in the EU networks can affect policy, and secondly through the activity of the transnational networks of domestic and European actors, who exert pressure on national governments and endorse European norms in the domestic discourse.⁵⁹¹ Schimmelfennig and Sedelmeier consider how the fostering of domestic networks along with the participation of European institutions can increase the

⁵⁸⁶ Massimo Prearo, “David Paternotte, Revendiquer le « mariage gay ». Belgique, France, Espagne. Bruxelles, éditions de l’Université de Bruxelles, 2011, 216 p.,” *Cahiers d’histoire. Revue d’histoire critique*, no. 119 (April 1, 2012), <http://journals.openedition.org/chrhc/2846>.

⁵⁸⁷ "Without prejudice to the other provisions of this Treaty, and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

⁵⁸⁸ “Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation,” Pub. L. No. 32000L0078, OJ L 303 (2000), <http://data.europa.eu/eli/dir/2000/78/oj/eng>.

⁵⁸⁹ *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts* (Luxembourg: Lanham, Md: Office for Official Publications of the European Communities; Bernan Associates [distributor], 1997).

⁵⁹⁰ Heather Grabbe, *Europeanization Goes East: Power and Uncertainty in the EU Accession Process, The Politics of Europeanization* (Oxford University Press), accessed November 22, 2020, 303–330, <https://oxford.universitypressscholarship.com/view/10.1093/0199252092.001.0001/acprof-9780199252091-chapter-13>.

⁵⁹¹ Schimmelfennig, Frank, and Ulrich Sedelmeier, eds. *The Europeanization of central and eastern Europe*. Cornell university press, 2005,18.

perception of norm ownership, in this case this norm ownership can serve a channel for financial support and legitimizing the otherwise indifferent gay rights domestic groups.⁵⁹²

The EU and its associated institutions such as the Council of Europe have promoted nondiscriminatory norms in the post-communist states.⁵⁹³ Nondiscriminatory policies against homosexuals that are promoted by the EU are enshrined in the EU labor law and requirement for accession.⁵⁹⁴ Additionally, one part of the social learning experiment of the EU institutions was bringing the activists into contact and collaboration with the West European rights organizations in a way that was not possible before the 1990s. O’Dwyer argues that those contacts and transnational linkages increase the domestic groups organizational resources but also their knowledge and self-confidence.⁵⁹⁵ But, there are two possible reasons to question the social learning and the integration process into the field of gay rights activism according to O’Dwyer, he states that the Europeasation process is unable to deal with the post accession in the cultural sense of changing the culture of political governing.⁵⁹⁶ As we have seen thus far, the promotion of European values has been portrayed in a highly negative way as rights entrenchment, because of the political backlash and the wrong assumption of imposition of foreign norms.⁵⁹⁷ Finally, the pressure from Europe on Poland’s human rights record proved ineffective, because this process of imposition of norms, it undermined the gay rights groups movements by substituting their work for the organization matrix of the EU institutions.⁵⁹⁸

In 2001, a new type of organizations emerged in Poland, the newly constructed branch of the International Lesbian and Gay Cultural Network called ILGCN-Polska was created.⁵⁹⁹

⁵⁹² Ibid,19-20.

⁵⁹³ Jacoby, Wade. *The Enlargement of the European Union and NATO: Ordering from the Menu in Central Europe*. Cambridge: Cambridge University Press, 2004. doi:10.1017/CBO9780511756221.

⁵⁹⁴ O’Dwyer, “Does the EU Help or Hinder Gay-Rights Movements in Post-Communist Europe?”: 332–52, <https://doi.org/10.1080/21599165.2012.721094>.

⁵⁹⁵ Ibid.

⁵⁹⁶ Ibid.

⁵⁹⁷ “Poland Rejects International Criticism over LGBT Rights,” AP NEWS, September 28, 2020, <https://apnews.com/article/andrzej-duda-poland-archive-warsaw-4905350bd92610427c12bfc4a58a1caa>.

⁵⁹⁸ Beata Zawrzel, “COVER PHOTO : People Wearing Black Bands on Their Eyes and Mouth Demonstrate in Stolen Jus- Tice Silent Protest at the Main Square in Krakow, Poland on 21 January, 2018.,” n.d., 96.

⁵⁹⁹ Created at the ILGA conference in 1992, ILGCN is a loosely knit transnational network with a main office in Sweden and a few representatives in countries around the Baltic Sea. See: <http://www.ilgcn.tupilak.org>

On May 1, it organized the first equality parade (Parada Równości) in Warsaw, despite getting limited media coverage it brought almost 300 participants. The activists called on the Polish president to respect minority rights and reminded him how their rights are constantly violated.⁶⁰⁰ From there on after, participants all over Poland gathered in Warsaw in 2002 and 2003 increasing the numbers to 2000 and 3000 respectively.⁶⁰¹ Along with ILGCN, another organization called Campaign against Homophobia (Kampania Przeciw Homofobii) was created, this organization became an official partner for ILGA-Europe and the European Council.⁶⁰² According to Agnès Chetaille, the changing profiles of the organizations cannot be attributed only on the mass consumerism of cultural products or the greater mobility of the Polish population, along with the influence of new information and communication technologies.⁶⁰³

The transnational network had a lasting influence on the Polish NGO-s' action range, discursive strategies, and politics of representation. The socializing effects of conducting fieldwork to determine the level of discrimination and drafting reports in order to help ILGA-Europe and provide the European institutions with enough information about the situation in Poland cannot be underestimated.⁶⁰⁴ The sharing of survey methodology along with ways of using the survey results in influencing the European institutions marked the first knowledge transfer between ILGA-Europe and local organizations like in past with (Lambda Warszawa and later Kampania Przeciw Homofobii). A specific toolkit was transferred to domestic groups that was designed to produce a specific type of knowledge in line with the readability requirements of European institutions.⁶⁰⁵ More significantly, they were integrated in a

⁶⁰⁰ Anna Gorska, "LESteśmy Na Dniach Równości - Porozumienie Lesbijek (LBT) Zaprasza!," accessed November 27, 2020, [https://kobiety-kobietom.com/feminizm/art.php?art=3569&nadtytul=Wydarzenia,%20relacje&t=LESte%B6my%20na%20Dniach%20R%F3wno%B6ci%20-%20Porozumienie%20Lesbijek%20\(LBT\)%20zaprasza!](https://kobiety-kobietom.com/feminizm/art.php?art=3569&nadtytul=Wydarzenia,%20relacje&t=LESte%B6my%20na%20Dniach%20R%F3wno%B6ci%20-%20Porozumienie%20Lesbijek%20(LBT)%20zaprasza!)

⁶⁰¹ Ibid.

⁶⁰² "Annual Report 2000-2001 | ILGA-Europe," accessed November 27, 2020, <https://ilga-europe.org/who-we-are/organisational-documents/annual-reports/annual-report-2000-2001>.

⁶⁰³ Agnès Chetaille, "Une « autre Europe » Homophobe ? : L'Union Européenne, Le Nationalisme Polonais et La Sexualisation de La « division Est/Ouest »," *Raisons Politiques* 49, no. 1 (2013): 119, <https://doi.org/10.3917/rai.049.0119>.

⁶⁰⁴ Chetaille, "Is the 'Other Europe' Homophobic?," 15.

⁶⁰⁵ Ibid.

technological knowledge apparatus which accounted not only the operational functioning of the reporting of the current discrimination ratio in Poland, but measure the homosexual population of their country.⁶⁰⁶

In many ways, the accession in the European Union, did not made Poland along with many other members states, increase its efforts in accepting the EU norms; more prominently this process didn't create a platform for the gay rights groups to increase their influence but on the contrary, the process of major rights reversal and political backlash happened in Poland.⁶⁰⁷ Furthermore, the organizational aspect of the Poland's domestic gay rights group has developed its organizational capacity as soon as Poland accessed the EU institutions. Since 2005, these groups managed to create stronger and better organized gay rights movements due to the political backlash from the far-right forces.⁶⁰⁸ The anti-gay politics of Poland made a good test for the successful reference on Europeanisation norms policy, because Poland diverges itself from the liberal democratic standards, also Poland does not allow participation in public life along with the threat prevention against homosexuals.⁶⁰⁹

Anti-gay mobilization and the failure of institutions to protect their rights along with official failure to prosecute those groups that threaten the rights of minorities, this meant that the administrative chicanery by public officials didn't allow their rights to be exercised.⁶¹⁰ The usage of legislation and the state sponsored violence contributed to the norm violations in the case of Poland. Along with the official's arguments about limiting the rights of homosexuals and question of the participation in public life endorsed by the same public officials constitute norm breaking.⁶¹¹

⁶⁰⁶ See *Kampania Przeciw Homofobii, Tęczowe rodziny w Polsce. Prawo i rodziny lesbijskie i gekowskie* (Rainbow Families in Poland: The Law and Lesbian and Gay Families), (Warsaw, 2010), 7.

⁶⁰⁷ O'Dwyer, Conor, and Katrina ZS Schwartz. "Minority rights after EU enlargement: A comparison of antigay politics in Poland and Latvia." *Comparative European Politics* 8, no. 2 (2010): 220-243.

⁶⁰⁸ Buzogány, Aron. "Joining Europe, not sodom: LGBT rights and the limits of Europeanization in Hungary and Romania." In *National Convention of the American Association for the Advancement of Slavic Studies (AAASS)*, pp. 20-23. 2008.

⁶⁰⁹ O'Dwyer and Schwartz, "Minority Rights after EU Enlargement": 220–43, <https://doi.org/10.1057/cep.2008.31>.

⁶¹⁰ O'Dwyer and Schwartz, "Minority Rights after EU Enlargement."

⁶¹¹ Ibid.

Antigay mobilization besides denying the sexual minorities from exercising their rights in the public sphere, this is evidently consistent in the light of the conflicts over the participation in gay pride parades in 2005 in Poznan, that has been apparently denied by the Polish officials.⁶¹² Polish authorities have faulted to protect the rights of sexual minorities according to the European Parliament, the European Court of Human Rights, Amnesty International⁶¹³, the United Nations⁶¹⁴ and the Lesbian and Gay Association.⁶¹⁵ Members of the major political powers that were far rights extremist during the period of 2005-2006 expressed their distaste of the homosexual minority, even kept using hate speech during the public outings. This behavior was manifested with the dismissal of the C.E.O. of the National In-Service Teaching Centre for publishing “Compass” – a Council of Europe manual on human rights, where gay was mentioned.⁶¹⁶ The Minister of education Roman Giertych who from 2005 till 2007 led an attack on the sexual communities in schools, he was responsible of the firing of the national director due to distributing a Council of Europe handbook on tolerance that included several paragraphs on homosexuality. Later on, Giertych threatened the teachers with firings after he unveiled his legislation that was against the promotion of homosexuality in schools, this legislation was not only a monetary fine but an imprisonment charge. This sanctioning of prejudice from the minister of education allowed the far-right supporters consisting of

⁶¹² Agnieszka Graff, “We Are (Not All) Homophobes: A Report from Poland,” *Feminist Studies* 32, no. 2 (2006): 434–49, <https://doi.org/10.2307/20459096>.

⁶¹³ Amnesty International. (2006) Lesbian, Gay, Bisexual and Transgender Rights in Poland and Latvia, web.amnesty.org/library/Index/ENGEUR010192006?open&of=ENG-375.

⁶¹⁴ UN Human Rights Committee (HRC), UN Human Rights Committee: Concluding Observations: Poland, 2 December 2004, CCPR/CO/82/POL.

⁶¹⁵ 30 August 2006: at a meeting with the Polish Prime Minister, Jaroslaw Kaczynski, the President of the European Commission, Jose Manuel Barroso expressed concerns regarding a number of issues, including LGBT rights. In a subsequent press conference, he said that he had “shared with the Prime Minister some of the concerns that have been expressed in some sectors of public opinion in Europe about Poland he was very clear in his response in these sensitive matters, from non-discrimination to the death penalty”. Kaczynski responded, insisting that he was neither homophobic nor anti-Semitic. “Please do not believe in the myth of an antisemitic, homophobic and xenophobic Poland.” [While LGBT activists will have good reason to question Kaczynski’s sincerity, this incident does illustrate the high-level pressure being applied by the EU on one of its members], see more on this issue: “Prides against Prejudice: A Toolkit for Pride Organising in a Hostile Environment,” *HS*, September 2006, 52, <https://tandis.odihr.pl/handle/20.500.12389/20122>.

⁶¹⁶ Mirosława Makuchowska, Michał Pawłęga, and Kampania Przeciw Homofobii, *Situation of LGBT Persons in Poland: 2010 and 2011 Report* (Warsaw: Campaign Against Homophobia, 2012), 13.

hooligans and football fans to threaten and intimidate gay and lesbian members into denying to disclose their sexuality.⁶¹⁷

The homophobic nationalism these groups and their public officials display was based on combination of religious factors, more specifically their references were to the Polish legacy, they believed their country was vilified through the many occupations in its history.⁶¹⁸ Therefore, the communist background of repression- allowed Poland to exhibit herself as a defender of the hero-normative order.⁶¹⁹ As a result of these factors, according to Agnieszka Graff, during these precise moments, when Poland entered the European Union, the European vision arrived along with the denial of the rights of homosexuals and their presence in the Polish society.⁶²⁰ Poland's opposition came along with the rhetoric of portraying an alternate image of resistance, right wingers depicted this hero-normative discourse as a symbol of Polish sovereignty and independence from the European Union.⁶²¹ Therefore, Graff stated in 2010 noting how during this period:

not only were gays and lesbians being stigmatized in the name of patriotism but national sentiment was now regularly expressed through the exclusion of the sexual (rather than the ethnic or cultural) other. Thus, it is not just that homophobia was becoming politicized or that politicized homophobia was displacing other existing forms of gay bashing . . . but that homophobia was becoming the new discourse of patriotism.⁶²²

As previously mentioned by Agnieszka Graff, after Poland's accession, right-wing forces portrayed Europe as morally corrupt, juxtaposing how the 'European perversion' will not extinguish the 'healthy Polish traditionalism', also politically these right wingers were

⁶¹⁷ Makuchowska, Pawłęga, and Kampania Przeciw Homofobii, *Situation of LGBT Persons in Poland*, 13.

⁶¹⁸ Yasuko Shibata, "The Fantasmatic Stranger in Polish Nationalism: Critical Discourse Analysis of LPR's Homophobic Discourse," *Polish Sociological Review*, no. 166 (2009): 266, <https://www.jstor.org/stable/41275102>.

⁶¹⁹ Agnieszka Graff, "Report from the Gender Trenches: War against 'Genderism' in Poland," *European Journal of Women's Studies* 21, no. 4 (November 1, 2014): 434, <https://doi.org/10.1177/1350506814546091>.

⁶²⁰ Agnieszka Graff, "Looking at Pictures of Gay Men: Political Uses of Homophobia in Contemporary Poland," *Public Culture* 22, no. 3 (September 1, 2010): 583, <https://doi.org/10.1215/08992363-2010-010>.

⁶²¹ Graff, "Looking at Pictures of Gay Men," 591;600.

⁶²² Agnieszka Graff, 2010, "Looking at Pictures of Gay Men: Political Uses of Homophobia in Contemporary Poland," *Public Culture* 22 no. 3 (2010): 590.

expressing their capabilities to resist the pressure from the EU to conform to EU- imposed standards.⁶²³ Furthermore, these homophobes dismissed the EU resolutions⁶²⁴ that are meant to act as a response to their state-sanctioned homophobia .⁶²⁵ This is the reverse of the Dutch example of homo tolerance in accordance with the EU policy, serves as an index for democracy and civilization development, in both cases sexual boundaries are assumed to coincide with the national ones as Graff notes: “they are underpinned by the same gendered and culturalist binaries.”⁶²⁶

3.4 ECtHR case of *Bączkowski and Others v. Poland*; the institutional ban on equality parades in Poland

On May 2007, the European Court of Human rights rendered a judgement in the case of *Bączkowski and Others v. Poland*.⁶²⁷ In its judgement: “the Court stated that Poland violated Article 11 (freedom of association and assembly), Article 13 (right to effective remedy) in conjunction with the Article 11 of the convention for the protection of Human Rights and Fundamental Freedoms.”⁶²⁸ Indeed, the applicants of the case-the Foundation for Equality and group of active planned to hold a march to increase awareness of the discrimination of minorities. The administrative authorities acting on the behalf of the Mayor of Warsaw, refused to grant the applicant permission for the march or any other assemblies.⁶²⁹ Moreover, The ECtHR states: “as a number of requests had been submitted to organize other assemblies on the same day the tenor of which ran counter to the ideas and intentions of the applicants,

⁶²³ Ibid

⁶²⁴ LGBT RIGHTS: how supranational institutions and activist groups struggle to prevent state-sanctioned political homophobia on sexual minorities.

⁶²⁵ Graff, “Looking at Pictures of Gay Men,” 590-591,600-601; cf. O’Dwyer and Schwartz, “Minority Rights after EU Enlargement.”

⁶²⁶ Ibid, 584,601; cf. Kulpa, *De-Centring Western Sexualities*; Bojan Bilic, ed., *LGBT Activism and Europeanisation in the Post-Yugoslav Space: On the Rainbow Way to Europe*, Palgrave Studies in European Political Sociology (Palgrave Macmillan UK, 2016), <https://doi.org/10.1057/978-1-137-57261-5>.

⁶²⁷ *Bączkowski and Others v. Poland*, App. No. 1543/06, (ECtHR, 3 May 2007).

⁶²⁸ Sina Van den Bogaert, “ECHR Rules on Illegal Ban of Warsaw Equality Parade: The Case of *Bączkowski and Others v. Poland*,” *German Law Journal* 8, no. 9 (September 1, 2007): 889, <https://doi.org/10.1017/S2071832200006039>.

⁶²⁹ *Bączkowski and Others v. Poland*, at para.11.

permission had to be refused in order to avoid any possible violent clashes between participants in the various demonstrations.”⁶³⁰ Therefore, the authorities mentioning of the safety concern with counter-marches, made no sense. Nonetheless, the counter march received its permit nonetheless, all groups except the ones representing homosexuals were granted permissions as requested for their demonstrations.⁶³¹ On January 18, 2005, the Constitutional Court of Poland declared that it was a unconstitutional misuse of the traffic law by the Mayor’s office did not allow permits for the Equality march, the court explicitly stated that constitutional freedom of peaceful assembly may not be subjected to licensing-a notification must suffice according to the Court.⁶³² Following the appeals process, The Polish Supreme Court : “declared that the reason given for the banning of the marches were insufficient to justify restrictions on assembly.”⁶³³ The organizers of the Poznan March did not bring their case in front of the European Court of Human rights.⁶³⁴ However, the organizers of the Warsaw march, with the help of the Helsinki Foundation for Human Rights⁶³⁵ in Warsaw did.

As previously mentioned, in regards to the case of *Bączkowski and Others v. Poland*, the Court dismissed the Government’s preliminary objections. These objections were that the applicants could not claim the status of victims, since the appellate proceedings had quashed the earlier decisions, and that there had not been an exhaustion of domestic remedies.⁶³⁶ With respect to the Article 11 claim, the Court discussed: “the positive obligation of States to secure the effective enjoyment of freedom of association and assembly, particularly for minority

⁶³⁰ Ibid, at para 14.

⁶³¹ Ibid.at para 15-16.

⁶³² Further, according to the court, after receiving an advance notification of a public assembly (including its purpose), the duty of the authorities is to undertake all necessary steps to secure its safety. Accordingly, the only basis for banning public assemblies is now the 1990 law on assemblies.

⁶³³ “Memorandum to the Polish Government,” Commissioner for Human Rights, accessed December 20, 2020, https://www.coe.int/en/web/commissioner/country-monitoring/poland/-/asset_publisher/rgDH7Zss0nLx/content/memorandum-to-the-polish-government.

⁶³⁴ On 5 December, the European Court of Human Rights (ECtHR) declared admissible the case of *Tomasz Bączkowski and others vs. Poland* concerning the ban on the 2005 “Equality March,” thereby making it clear that the case raised important legal and factual issues and will be considered materially by the ECtHR.

⁶³⁵ HELSINKI FOUNDATION FOR HUMAN RIGHTS, https://lib.ohchr.org/HRBodies/UPR/Documents/Session1/PL/HFHR_POL_UPR_S1_2008_HelsinkiFoundationforHumanRights_uprsubmission.pdf

⁶³⁶ *Bączkowski and Others v. Poland* (n 423).

groups as they are more vulnerable.”⁶³⁷ While acknowledging that the assemblies were held on the planned dates, there was an official ban in force at that time. The presumption of legality is an important part of the effective exercise of freedom of assembly.⁶³⁸ The applicants claimed a violation of Article 13, arguing that there had been no effective domestic remedy because there was no procedure available to them which would allow them a final decision prior to the planned demonstration date.⁶³⁹ The Court considered that an effective remedy in this case implied obtaining a final ruling before the planned event, particularly because the timing of such events is often crucial to the political and social weight of the events.⁶⁴⁰ The Court found there had been : “ a violation of Article 13 in conjunction with Article 11 because domestic law did not provide a reasonable time-limit within which authorities should provide decisions.”⁶⁴¹

With respect to the Article 14 discrimination claim: “the Government argued that there was no link between the personal opinions expressed against “homosexual propaganda” by the Mayor in the interview in *Gazeta Wyborcza* and the decisions, given in his name, refusing permission to the applicants. “⁶⁴² The Court did not agree with those notions, articulating to the government the obligations from elected politicians in the executive branch with regards to their responsibility in permitting the expression of freedom of expression.⁶⁴³ In conclusion taking into account the entire case: “the Court found the Mayor’s opinions could easily have affected the decision-making process, and there had therefore been a violation of Article 14.”

⁶⁴⁴

In the *Bączkowski* case, the European Court of Human Rights found Poland responsible for: “having violated the right to assembly, the right to an effective remedy in cases

⁶³⁷ Ibid. at para.64.

⁶³⁸ Ibid, at para.67.

⁶³⁹ Ibid, at para.84.

⁶⁴⁰ Ibid, at para.82.

⁶⁴¹*Bączkowski and Others v. Poland (n 423), at para. 83.*

⁶⁴² Ibid.

⁶⁴³ Ibid, at para. 98.

⁶⁴⁴ Ibid, at para. 98.

of an unlawful refusal to hold an assembly and the right not to be discriminated against in administrative procedures aiming at obtaining permission to assembly.”⁶⁴⁵ In its judgement, the Court: “reiterated that it attaches particular importance to pluralism, tolerance and broadmindedness and that the positive obligation of a State to secure genuine and effective respect for freedom of association and assembly⁶⁴⁶ is of particular importance to those with unpopular views or belonging to a minority, because they are the most vulnerable to victimization.”⁶⁴⁷

The concept of broadmindedness, however, is also connected to an evaluation to Polish society contrasted with ‘a society that functions in a healthy manner’.⁶⁴⁸ According to Ammaturo, in implicitly defining Poland as a narrow-minded country, the Court places its emphasis on the malfunctioning of society. Its narrow-mindedness is seen as being caused by a democratically ill society that prevents people from freely associating and marching on the street.⁶⁴⁹ Ammaturo, in his opinion, thinks, the picture that the Court paints 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 takes place.”⁶⁵⁰

The Warsaw Equality March was not the only planned march in 2005 that was organized that year for a pro-LGBT cause. In November 2005, The Poznan Equality March⁶⁵¹

⁶⁴⁵ den Bogaert, “ECHR Rules on Illegal Ban of Warsaw Equality Parade,” 902.

⁶⁴⁶ Recommendation CM/Rec (2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity: “1081st Meeting – 31 March 2010”.

⁶⁴⁷ Ibid; Human Rights Watch, Lithuania: Don't Revive Censorship Law, 13 July.

⁶⁴⁸ *Bączkowski and Others v. Poland* (n 423), at para.62.

⁶⁴⁹ Ammaturo, “The ‘Pink Agenda,’” 1159.

⁶⁵⁰ Ibid.

⁶⁵¹ The “Equality March” was organized by feminist and LGBT movements in Poznań to promote equality between sexes and respect for minorities, especially the homosexual minority. The march was scheduled to take place on 19 November 2005 but was banned by local authorities with the official justification that it posed a threat to public safety and order as well as a material threat to property due to the high probability of POLAND 133 IHF REPORT 2007 HUMAN RIGHTS IN THE OSCE REGION counter-demonstrations taking place at the same time. Eventually, the march nevertheless took place as an act of civil disobedience and was brutally dispersed by the police. A week later, numerous protests were held throughout Poland under the motto „The Reanimation of Democracy: The Equality March Goes On. “

was banned by the Poznan Mayor - Ryszard Grobelny who cited security reasons, but the activist mention in their arguments how he surrendered under the demands of far-right groups and the Catholic clergy, who believed the march was immoral.⁶⁵² In the banned Poznan demonstration, the police did not intervene when members of All Polish Youth -- the attack-dog militia of the virulently anti-gay, anti-Semitic, extreme-right League of Polish Families party harassed the demonstrators, instead the police arrested the gay demonstrators.⁶⁵³ The Poznan March was a testimony to a new and aggressive government under the auspices of Lech Kaczynski, leader of the ultra-conservative, pro-catholic and homophobic Prawo i Sprawiedliwość, PiS (Law and Justice party).⁶⁵⁴ Between 2001 and 2003, Kaczynski had been a party leader of the PiS and use the an anti-LGBT stance to profile his party and himself for upcoming elections the 2005–2007 Polish government was based on PiS and LPR, and in 2005–2010 Kaczynski was the president of Poland).⁶⁵⁵ It was Kaczynski that allowed the All-Polish Youth to organize counter demonstrations called the “Parade of Normality.”⁶⁵⁶

⁶⁵² The voivodeship administrative court in Poznan ruled that the ban of the Equality March in November by Ryszard Grobelny, the mayor of Poznan, was illegal under the Polish and European laws. The Equality March was supposed to promote the equality of minority groups in Poland. It took place despite the ban on Nov. 19, and the police in Poznan briefly detained and interrogated 68 demonstrators, who protested against discrimination based on sexual orientation, gender, race, and disability. For more see: “Search - Legislationline,” accessed November 28, 2020, <https://www.legislationline.org/searchn2/runSearch/1/key/Poznan+Equality+march/rows/10>.

⁶⁵³ DIRELAND: GAY POLAND PROTESTS OFFICIAL GAY-BASHING,” accessed November 28, 2020, https://direland.typepad.com/direland/2005/11/gay_poland_prot.html

⁶⁵⁴ “DIRELAND: GAY POLAND PROTESTS OFFICIAL GAY-BASHING.”

⁶⁵⁵ Abby Peterson, Mattias Wahlström, and Magnus Wennerhag, “Pride Parades and LGBT Movements,” n.d., 71.

⁶⁵⁶ Marta Selinger, “Intolerance Toward Gays and Lesbians in Poland,” *Human Rights Review* 9, no. 1 (March 1, 2008): 19, <https://doi.org/10.1007/s12142-007-0026-2>.

3.5 The lack prosecution concerning the discrimination of sexual minorities by the Polish authorities and their disregard of European norms

As Selinger remarks, only in a few circumstances the law in Poland recognizes homosexuals as minority deserving protection. Even when there are forms of protections, they are due to Polish EU requirements for accession.⁶⁵⁷ The difficulties for the activists, fighting for any mentioning of sexual orientation in the Polish constitution and protection against the use of article 31.3 proved to be a general problem faced by gays and lesbians.⁶⁵⁸ Therefore, Mayors Lech Kaczynski and Ryszard Grobelny were claiming that they were acting on the basis of this article, which states:

“Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary, in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.”⁶⁵⁹

Council Directive 2000/78 required amendments to the Polish Labor Code and the employment and counteracting with unemployment act.⁶⁶⁰ These documents that were amended in 2002 and 2004 are the only Polish legal acts that mention sexual orientation. In the Labor code⁶⁶¹, sexual orientation shows up in the category of illegality of discrimination in hiring (Art. 11³), equal treatment and access to professional training (Art. 18^{3a}) and in

⁶⁵⁷ Selinger, “Intolerance Toward Gays and Lesbians in Poland,” 6.

⁶⁵⁸ Ibid, 6.

⁶⁵⁹ “The Constitution of the Republic of Poland,” accessed December 1, 2020, <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

⁶⁶⁰ Council Directive 2000/78/EC, (n 207).

⁶⁶¹ The Labor Code (LC) prohibits any discrimination in employment, direct or indirect, on the grounds of, including but not limited to, sexual orientation (art. 113 LC). It applies both to private and public sector. The act also introduces the concept of equal treatment in employment which is violated if, inter alia, LGB employees are subject to unjustified unequal treatment regarding access to employment, its termination and working conditions (including promotion, pay, access to training in skill development) – art. 183a – 183d LC. Among the forms of discrimination, LC lists harassment, including sexual harassment. These are prohibited under art. 183a (5)(2) and art. 183a (6) LC. To safeguard this prohibition, an employer is obliged to counteract such discrimination (Art. 94 LC). A violation of the principle attracts liability to damages (Art. 183d LC), for more on the Polish Labor Code see: Piotr Godzisz and Pawel Knut “LGBTI rights in Poland. Measures to combat discrimination and violence on grounds of sexual orientation, gender identity and sex characteristics.”

counteracting discrimination in the workplace (Art. 94, 2b).⁶⁶² A very significant in terms of the implementation of the Directives took place in 2010. The 2010 Equal Treatment Act – the act on the Implementation of Certain Provisions of the European Union in the field of Equal Treatment (hereafter the ‘ ETA’) – entered into force on 1 January 2011.⁶⁶³ For many years there was no single act comprising a single ban on discrimination on all grounds, and relevant provisions were scattered across many different legal acts.⁶⁶⁴ Poland had previously made limited effort to comply with EU law at the point of accession.⁶⁶⁵ The three substantive amendments to the labor code (2001, 2003, 2008) brought Polish labor law generally in line with the Equality Directives. However, the provision of the Article 183a (3)⁶⁶⁶ defining direct discrimination is still erroneous probably to technical translation error.

Even if the 2010 ETA seems to fully implement the Directives 2000/43 and 2000/78, this raises some doubts. The most important doubts to new equality body—The Act on the Implementation of the Certain Provisions of the European Union in the field of Equal Treatment—finally designates an equality body to in the existing Ombudsman’s office (Commissioner for Civil Rights Protection – Rzecznik Praw Obywatelskich).⁶⁶⁷ The law appropriately amended the existing Ombudsman act but according to the Polish constitution and the 2010 ETA, the new competences by the Ombudsman are limited where the conflicts are between private parties. Other considerations on the part of the Polish Constitution, as well

⁶⁶² PIOTR GODZISZ and PAWEŁ KNUT “LGBTI rights in Poland. Measures to combat discrimination and violence on grounds of sexual orientation, gender identity and sex characteristics,” Kampania Przeciw Homofobii, Lambda, Warszawa (2010), 88.

⁶⁶³ Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment [hereafter ‘the Equal Treatment Act’ or ‘ETA’], Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania; Dz.U. 2010 nr 254 poz. 1700.

⁶⁶⁴ Łukasz Bojarski, “COUNTRY REPORT 2013 POLAND,” n.d., 182, 3.

⁶⁶⁵ Ibid.

⁶⁶⁶ Art. 183a. Prohibition against discrimination in employment, § 3: Direct discrimination is taken to occur where one employee, on one or more grounds referred to in § 1, has been, is or would be treated in a comparable situation less favorably than other employees.

⁶⁶⁷ Katarzyna Wilkołaska-Żuromska, “Report on the Activity of the Human Rights Defender (Ombudsman in Poland) in the Area of the Equal Treatment in 2013 and the Observance of Equal Treatment Principle in the Republic of Poland,” accessed March 10, 2021, https://www.academia.edu/10285624/Report_on_the_Activity_of_the_Human_Rights_Defender_Ombudsman_in_Poland_in_the_Area_of_the_Equal_Treatment_in_2013_and_the_Observance_of_Equal_Treatment_Principle_in_the_Republic_of_Poland.

as the labor law, it does not contain an extensive list of grounds of discrimination. However, the ETA, by verbatim implementation of the Directives compared to the labor law, it provides for an exhaustive list of grounds of discrimination, thus potentially limiting protection of certain groups.⁶⁶⁸

For instance, the concluding observations of the UN Human Rights Council were adopted 26 October 2010, on the same day as the Act on the Implementation of Certain Provisions of the European Union in the Field Equal Treatment was adopted by the Sejm. The Council expressed their concern about the draft of the Equal Treatments Act, which according to them was not exhaustive enough and did not cover discrimination on the basis of sexual orientation, disability, religion or age in the fields of education, social protection and housing.⁶⁶⁹ Therefore the recommendations of the Committee recommended that Poland should further amend the Equal Treatment Act so that the discrimination based on all grounds and in all areas would be adequately covered.⁶⁷⁰ In his recent report, the Commissioner for Human Rights (RPO) emphasized the need for changing the law to include the protection of LGBT people in health care settings as it would allow civil proceedings and compensation in case of discrimination.⁶⁷¹ The healthcare system for example neither perceives nor meets the needs of the LGBT patients. The LGBTI issues are absent from the national health plans, suicide prevention programmes, training course of materials for health safety. The National Health Programme adopted in 2016 and covering the years of 2016-2020 does not cover any LGBTI patients.⁶⁷² More importantly, the health reports that are published annually by public

⁶⁶⁸ Bojarski, "COUNTRY REPORT 2013 POLAND," 5.

⁶⁶⁹ Ibid.

⁶⁷⁰ "Concluding Observations of the Human Rights Committee :," November 15, 2010, 2. <http://digitallibrary.un.org/record/694026>.

⁶⁷¹ RPO, *Równe Traktowanie Pacjentów – Osoby Nieheteroseksualne w Opiece Zdrowotnej Analiza i Zalecenia* (RPO 2014), 38.

⁶⁷² Ordinance of the Council of Ministers of 4 August 2016 on the National Health Program for 2016–2020, available for download: <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20160001492>

institutions do not refer to health care for LGBTI persons, apart from raising issue of the increasing cases of HIV infections in the group of men having sex with men.⁶⁷³

At European level, the European Commission on Racism and Intolerance (ECRI) has called on the Council of Europe Member States to ensure that national laws, including criminal laws, enable to criminalize different forms of hate speech and that those crimes involving hate speech, the creation of racist groups, genocide, racist motivation should constitute an aggravating circumstance.⁶⁷⁴ In its Recommendation CM/Rec(2010)5, the Council of Europe's Committee of Ministers recommends that that member states should "ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance."⁶⁷⁵ This implies that Member states must "ensure that law enforcement structure, including the judiciary must be trained in order to identify such crimes in order to provide adequate assistance to the victims and witnesses."⁶⁷⁶

Directive 2012/29/EU⁶⁷⁷ of the European Parliament and the Council of 25 October establishing minimum "standards on the rights, support and protections of victims of crime" and replacing it with the Council Framework decision 2001/220/JHA⁶⁷⁸ lays down procedural guarantees for victims of gender-based violence.⁶⁷⁹ It encompasses persons of non-conforming sexual orientation, gender identity or expression. Recital 17 stipulates that: "that violence

⁶⁷³ GUS, "Stan zdrowia ludności Polski w 2014 r.," [stat.gov.pl](https://stat.gov.pl/obszary-tematyczne/zdrowie/zdrowie/stan-zdrowia-ludnosci-polski-w-2014-r-6,6.html), accessed December 2, 2020, <https://stat.gov.pl/obszary-tematyczne/zdrowie/zdrowie/stan-zdrowia-ludnosci-polski-w-2014-r-6,6.html>.

⁶⁷⁴ See ECRI, General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, adopted on 13 December 2002, para.18 and 21, available at https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/Recommendation_7_en.asp#P127_11468.

⁶⁷⁵ Appendix to CoE Recommendation CM/Rec (2010)5, (n 503), at para.2, accessed December 3, 2020.

⁶⁷⁶ Appendix to the Recommendation CM/Rec (2010)5, at para. 3.

⁶⁷⁷ "Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA," Pub. L. No. 32012L0029, OJ L 315 (2012), <http://data.europa.eu/eli/dir/2012/29/oj/eng>.

⁶⁷⁸ "2001/220/JHA: Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings," Pub. L. No. 32001F0220, 082 OJ L (2001), http://data.europa.eu/eli/dec_framw/2001/220/oj/eng.

⁶⁷⁹ "An Analysis of the Victims' Rights Directive from a Gender Perspective," European Institute for Gender Equality, accessed December 3, 2020, <https://eige.europa.eu/publications/analysis-victims-rights-directive-gender-perspective>.

directed against a person because of that person's gender, gender identity or gender expression, or which affects persons of a particular gender disproportionately, is to be understood as gender-based violence.⁶⁸⁰ It also urges the States to take into account: "take into account the personal characteristics of the victim such ... gender and gender identity or expression... sexual orientation... and the type or nature and the circumstances of the crime such as whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive."⁶⁸¹

The ECHR requires the states to restrict the freedom of expression, i.e. hate speech, in order to protect "the reputation of or rights of others"⁶⁸², which the ECtHR indicated should include the basis of sexual orientation, with its landmark decision in 2012 *Vejdeland and Others v. Sweden*.⁶⁸³ ECtHR has stated consistently that hate speech and hate crimes against person on the basis of sexual orientation or gender identity or expression contain : " Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favor combating racist speech in the face of freedom of expression exercised in an irresponsible manner." ⁶⁸⁴ More importantly, these principles are back by the European Commission against Racism and Intolerance's General Policy Recommendation No. 15 on combating hate speech, which on part of sexual orientation and gender identity understands hate speech as : "the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a

⁶⁸⁰ Ibid,17.

⁶⁸¹ Preamble to the Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, para. 56

⁶⁸² *Vejdeland and Others v. Sweden App No. 1813/07, (ECtHR, 9 May 2012), concurring opinion of judge Yudkivska joined by judge Villiger.*

⁶⁸³ *Vejdeland and Others v. Sweden (n 664)*

⁶⁸⁴ *Féret v. Belgium App No. 15615/07, (ECtHR, 16 July 2009) at para. 73); Vejdeland and Others v. Sweden at para. 55; Alexandra Timmer, "Anti-Gay Hate Speech: Vejdeland and Others v. Sweden," *Strasbourg Observers* (blog), February 14, 2012, <https://strasbourgobservers.com/2012/02/14/anti-gay-hate-speech-vejdeland-and-others-v-sweden/>.*

person or group of persons and the justification of all the preceding types of expression, on the ground of . . . gender identity, sexual orientation.”⁶⁸⁵

The legal protection afforded to lesbian, gay and transgender people against crimes motivated by prejudice is insufficient in Poland. The Polish Criminal Code (CC) explicitly recognizes and sanctions actions directed against victims on the grounds of: race, ethnicity nationality and religion while sexual minorities including persons of non-confirming gender identity or sexual orientation are not protected under any hate crimes. Currently, the sexual orientation or gender identity and expression are not covered in the criminal code, meaning that the victim of a hate crime has to proceed with a “private prosecution”⁶⁸⁶ according to Euromed rights, which means that the victim has to know the name of her perpetrator and collect the evidence for themselves. This is not same when it comes to race or religion.⁶⁸⁷ The criminal code doesn’t include general rules when it come to the courts sentencing, while determining if a crime comes with a bias motive should they need to inflict harsher penalties on the perpetrator.⁶⁸⁸ Therefore, Lambda Warsaw suggest amending the code so it can investigate *ex officio* and attract higher penalties for those crimes committed with bias motivation. Based on this legal loophole, incitement of hatred on ground of sexual orientation and gender identity are not treated as criminal offences at all.⁶⁸⁹ The absence of laws specifically dealing with hate crimes in Poland means that the police and prosecutorial offices

⁶⁸⁵ “ECRI General Policy Recommendation N°15,” European Commission against Racism and Intolerance (ECRI),37, accessed December 3, 2020, <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.15>.

⁶⁸⁶ A private prosecution is a criminal proceeding initiated by an individual private citizen or private organization instead of by a public prosecutor who represents the state.

⁶⁸⁷ “A Dive into the LGBT-Phobic Propaganda of the Polish State,” EuroMed Rights, accessed December 3, 2020, <https://euomedrights.org/publication/are-the-lgbtqi-invading-poland-a-dive-into-the-lgbt-phobic-propaganda-of-the-polish-state/>.

⁶⁸⁸ Lambda Warsaw, Association for Legal Intervention, “The Diversity Workshop, Joint Submission to the Universal Periodic Review (Third Cycle) - Poland,” 8 September 2016,2.

⁶⁸⁹ . Lambda Warsaw, Association for Legal Intervention, “The Diversity Workshop, Joint Submission to the Universal Periodic Review (Third Cycle) - Poland,” 8 September 2016,3.

are not required to unearth any alleged transphobic or homophobic motive behind an attack on a sexual minority.⁶⁹⁰

3.6 LGBT-Free zones, the right-wing attack on the gender ideology

In 2019 the Mayor of Warsaw signed a declaration in support of LGBT people⁶⁹¹, the idea was to pledge a support for the community. The declaration had commitments, mainly on the education side, namely it included combating discrimination and sex education about self-identification.⁶⁹² Since the declaration drew on World Health Organization (WHO) recommendation⁶⁹³, the wording of the WHO was not particularly careful of to the political climate, controversy resulted from the usage of ‘masturbation’ that meant in WHO’s definition: as applicable to the natural sex development of a child. Therefore, the right-wing media and Ultra-Catholics seized on this term in their assault of gender ideology, claiming they are fighting against this declaration in order to stop pedophilia.⁶⁹⁴ As the example for this religious fundamentalism, the education superintendent of the Małopolskie Voivodship spoke out against the declaration, this is an official infamous for her opposition of the LGBT movement having notably declared that ” [they] have one goal to destroy the world we live in and to build a neo-barbarian world “”.⁶⁹⁵ Similar response came from the Poland’s Commissioner for Children Rights, Mikołaj Pawlak, reiterating in 2019 how this declaration is unconstitutional and goes against the traditionalist value of marriage “ as being exclusively a union between a man and a woman.”⁶⁹⁶ In September 2020 Pawlak made another serious allegation, he spoke against the

⁶⁹⁰ Amnesty International, Targeted by Hatred, Forgotten by Law: Lack of a Coherent Response to Hate Crimes in Poland, 17 September 2015, EUR 37/2147/2015.

⁶⁹¹ “Rafał Trzaskowski Podpisał Deklarację LGBT+. ‘Warszawa Musi Być Miastem Przyjaznym,’” PolskieRadio24.pl, accessed December 4, 2020, https://polskieradio24.pl/art1222_2265307.

⁶⁹² Telewizja Polska S.A, “LGBT Warsaw Declaration Stirs Emotions in Polish Politics,” accessed December 4, 2020, <https://polandin.com/41692741/lgbt-warsaw-declaration-stirs-emotions-in-polish-politics>.

⁶⁹³ “International Technical Guidance on Sexuality Education. An Evidence-Informed Approach,” accessed December 4, 2020, <https://www.who.int/publications/m/item/9789231002595>.

⁶⁹⁴ “A Dive into the LGBT-Phobic Propaganda of the Polish State.”

⁶⁹⁵ “Małopolska Kurator Oświaty o LGBT: Mają Jeden Cel. Zniszczyć Świat, w Którym Żyjemy, i Zbudować Neobarbarzyński,” gazetapl, accessed December 4, 2020, <https://krakow.wyborcza.pl/krakow/7,44425,26247323,malopolska-kurator-oswiaty-o-lgbt-maja-jeden-cel-zniszczyc.html>.

⁶⁹⁶ S.A, “LGBT Warsaw Declaration Stirs Emotions in Polish Politics.”

sexual educators allegedly introducing medicines to change the sex of the child with the parents' consent, his statements came without any evidence which prompted a demand for his resignation by the opposition.⁶⁹⁷

This anti-LGBT ideology was first started by the PiS leading to the European parliamentary elections in May 2019, like in previous times tried to take advantage politically; the Law and Justice Party leader Jaraslow Kaczyński party's rhetoric has often misrepresented efforts to advance gender equality and end discrimination, meanwhile PiS using traditional values to undermine women's and LGBT groups.⁶⁹⁸ It was an unprecedented effort by the PiS to create sexual antagonisms and create a social/civilization crisis in Poland. Leading party members and media associated to PiS tried to strategically interlink homosexuals and pedophiles rings menacing children while sprouting Catholic doctrine about marriage and family.⁶⁹⁹ The archbishop of Krakow, during the commemoration of the 75th anniversary of the Warsaw Uprising, warned about the 'rainbow plague', comparing it to Nazism and Soviet Communism.⁷⁰⁰ Ahead of the elections in October 2019, PiS increased its homophobic attacks on LGBT ideology and its rhetoric of victimization of the Polish nation being threatened by foreign traitors and actors brough homophobic violence. In the city of Białystok participants of the equality march were brutally attacked by far-right groups, who were swearing and hurling abuse at the marchers, the right-wing counter protestors were screaming words about their 'fealty to God' and fatherland while throwing: rocks, bottles, rotten eggs and punches at the participants.⁷⁰¹ Following these events, regional PiS officials managed to declare cities and

⁶⁹⁷ "Rzecznik Praw Dziecka Straszy Tabletkami i Zawiadamia Prokuraturę. Będzie Wniosek o Jego Odwołanie," accessed December 5, 2020, <https://wyborcza.pl/7,75398,26261349,rzecznik-praw-dziecka-straszy-tabletkami-jest-juz-wniosek-o.html>.

⁶⁹⁸ "Sex Education Under Fire Again in Poland," Human Rights Watch, March 19, 2019, <https://www.hrw.org/news/2019/03/19/sex-education-under-fire-again-poland>.

⁶⁹⁹ Randi Gressgård and Rafal Smoczynski, "Noble Polish Sexuality and the Corrupted European Body," November 19, 2020,20. <https://doi.org/10.17356/ieejsp.v6i3.656>.

⁷⁰⁰ Lauren Chadwick, "Archbishop Warns of 'rainbow Plague' amid LGBT Tensions in Poland," euronews, August 2, 2019, <https://www.euronews.com/2019/08/02/archbishop-warns-of-rainbow-plague-amid-lgbt-tensions-in-poland>.

⁷⁰¹ Jacek Dehnel, "The Struggle for LGBT Equality: Pride Meets Prejudice in Poland," the Guardian, July 28, 2019, <http://www.theguardian.com/world/2019/jul/28/lgbt-gay-rights-poland-first-pride-march-bialystok-rage-violence>.

certain provinces in conservative south-east Poland a ‘LGBT ideology free zones’.⁷⁰² Subsequently, the mayor of Kalwaria Zebrzydowska, Augustyn Ormanty, tried to pass on a resolution that clearly states that gay ideology is annihilating Polish traditions. His resolution was rejected by the local council with a milder version protecting traditional values, however these efforts showcase how through legally dubious instances, Polish authorities are demonstrating symbolic violence over the LGBT population, in order to aggravate the moral national panics.⁷⁰³

The wave of resolutions for LGBT free zones taken since March 2019 by over 97 units of local self-government including 42 municipalities (gmina), 38 counties (powiat) and 5 voivodships (*województwo*), these overall areas amount to more than fourth of the territory of Poland. The sample document of this first-generation resolutions is just a simple one-page document with little variations in the 50 communities, their declaration is the fight against the ‘LGBT ideology’.⁷⁰⁴ The common strategy of these communities is to argue how these resolutions are not directed against any concrete LGBT person but against the LGBT ideology and their abstract ideas.⁷⁰⁵ Following much of the criticism of these resolutions, the administrative court in Gliwice, southern Poland, has annulled the resolution of the Istebna Commune Council contested by a Polish ombudsman on September 2 on the suppression of LGBT ideology.⁷⁰⁶

The court found that by adopting this resolution, the commune council violated the law by discriminating against people of non-heterosexual orientation, in his justification the Court pointed out : that the term “LGBT ideology” has not been specified in the current social

⁷⁰² “A Third of Poland Declared ‘LGBT-Free Zone,’” *Balkan Insight* (blog), February 25, 2020, <https://balkaninsight.com/2020/02/25/a-third-of-poland-declared-lgbt-free-zone/>.

⁷⁰³ Julian Coman, “Family, Faith, Flag: The Religious Right and the Battle for Poland’s Soul,” *The Guardian*, October 5, 2019, sec. World news, <https://www.theguardian.com/world/2019/oct/05/family-faith-flag-catholic-religious-right-battle-polands-soul>.

⁷⁰⁴ Marta Bucholc, “Fencing Off the Difference. On „LGBT-Free Zones“ in Poland” 2020 (August 26, 2020): 1.

⁷⁰⁵ “Life inside Poland’s ‘Gay-Free Zones,’” Channel 4 News, March 5, 2020, <https://www.channel4.com/news/life-inside-polands-gay-free-zones>.

⁷⁰⁶ “Court Quashes ‘Anti-LGBT’ Resolution,” accessed December 6, 2020, </court-quashes-anti-lgbt-resolution/post/127699>.

situation in Poland, that it is not a clear, precise or at least uncontroversial concept.⁷⁰⁷ As far as the European Parliament and the European Commission have repeatedly taken a stance against these resolutions, the EC tried to verify whether local governments that adopted these anti-LGBT resolutions are still collecting money from the EU and are using them to violate human rights.⁷⁰⁸

Also in 2019, the Polish Commissioner for Human Rights tried to appeal against the nine most flagrant resolutions to the administrative court.⁷⁰⁹ Furthermore, the EU decided to reject grants under a twinning programme to six Polish cities because of their attitudes towards the LGBT community, the bloc's Equality Commissioner Helena Dalli stressed then that : "EU values and fundamental rights must be respected by member states and public authorities".⁷¹⁰ Nonetheless these actions by the EU have not stopped the central government from hitting back at the EU.

Justice Minister Zbigniew Ziobro, the leader of the right-wing, Catholic-nationalist United Poland party, handed over a symbolic cheque of 250,000 zloty (€57,000) to the mayor of Tuchow at a ceremony on Tuesday, one of the towns that had lost EU funding due to their adoption of LGBT free resolution.⁷¹¹ Ziobro doubled down on his criticism of Brussels accusing them of discrimination of the local governments along with praising the municipalities : for safeguarding traditional family values which he said were "the best guarantors of crime and violence prevention".⁷¹² From these provided examples, we can see when incorporating religious elements into the ethno-national ideological matrix, it can be

⁷⁰⁷ Ibid.

⁷⁰⁸ "The European Commission Intervenes on 'LGBT-Free' Zones in Poland," Rule of Law, June 2, 2020, <https://ruleoflaw.pl/the-european-commission-intervenes-on-lgbt-free-zones-in-poland/>.

⁷⁰⁹ Ibid.

⁷¹⁰ "EU Funding Withheld from Six Polish Towns over 'LGBT-Free' Zones," euronews, July 29, 2020, <https://www.euronews.com/2020/07/29/eu-funding-withheld-from-six-polish-towns-over-lgbtq-free-zones>.

⁷¹¹ Alice Tidey, "Poland to Give Money to 'LGBT Free' Towns Denied EU Funding," euronews, August 19, 2020, <https://www.euronews.com/2020/08/19/poland-to-give-money-to-lgbt-free-towns-denied-eu-funding>.

⁷¹² "Polish Party Roars Back at EU on LGBTI Fines," EUobserver, accessed December 6, 2020, <https://euobserver.com/justice/149097>.

determined how through these lenses LGBT rights and freedoms can be perceived as detrimental to the national sovereignty, religion and tradition.⁷¹³

The crisis narratives of anti-genderism plan to galvanize the conservative population of Poland to protect the already established patriarchal system and its established gender roles, same as Russia they are driven over the anxieties of depopulation.⁷¹⁴ Therefore, Elżbieta Korolczuk and Agnieszka Graff stress that the interests of the Vatican, the Russian Federation and the Evangelicals in the United States are united in yearning for universalism, they are symbolically portraying themselves as the defender of the united values of the European civilization, as they claim how these European values are represented by their Christian faith.⁷¹⁵

3.7 Serbia's Europeanisation process is not a guarantee for protection of LGBT rights

The discourse and the practices of nationalism have presented an interesting topic in analyzing the Serbian situation in recent times. Nationalism and Europeanization have combined to create a domestic problem for Serbia when in relations to LGBT rights. Especially, the matter of national identity has been confronted with the imposition of foreign norms in the European integration process along with the LGBT issue.⁷¹⁶ According to LGBT activists and scholars, ethnic, religious and heteronormative nationalism and state identity have been wavered with skepticism and rejection regarding the European idea. Firstly, the anti-gay resistance has been a problem for LGBT activists because of the religious and nationalist rhetoric's which have framed the LGBT rights as a 'threat to the nation' and specifically the traditional gendered ways.⁷¹⁷ Unlike Croatia, there is a divergence between Serbia and Croatia with the identity issues towards Europe and Europeanness. In retrospect, nationalism has

⁷¹³ Srdjan Sremac and R. Ruud Ganzevoort, *Religious and Sexual Nationalisms in Central and Eastern Europe: Gods, Gays and Governments* (BRILL, 2015): 4, <https://doi.org/10.1163/9789004297791>.

⁷¹⁴ Elżbieta Korolczuk and Agnieszka Graff, "Gender as 'Ebola from Brussels': The Anti-Colonial Frame and the Rise of Illiberal Populism," *Signs Journal of Women in Culture and Society* 43 (May 22, 2018): 803.

⁷¹⁵ Korolczuk and Graff, "Gender as 'Ebola from Brussels,'" 805-807.

⁷¹⁶ Safia Swimelar, "Nationalism and Europeanization in LGBT Rights and Politics: A Comparative Study of Croatia and Serbia," *East European Politics and Societies* 33, no. 3 (August 1, 2019): 603–30, <https://doi.org/10.1177/0888325418805135>.

⁷¹⁷ Ibid.

presented a domestic issue for implementing any European legislative toward sexual and gender inclusion.⁷¹⁸

In the debates over Pride Parades, the EU accession, homophobia, masculinity, traditional values and nationalism have connected in creating a sense of unity and belonging in the Serbian society compared to the creation of new identities in the European likeness. Along with the threatened socioeconomic situation and the war ongoing, they have promoted violent nationalistic politics that offered “militarism as a way of winning back both individual manliness and national dignity.”⁷¹⁹ The role of the Church and their religious nationalism are important to the State and its national identity; consequently, it was interpreted how the Parades were an assault on the collective ethnonational body. The Church’s claim as the protector of tradition and moral values, is - exactly in hostility to the decadent West that seeks to impose homosexuality.⁷²⁰ The Church indeed made explicit connection between homosexuality and the European Union and put itself at the forefront of defending the traditional values.⁷²¹ While the Orthodox Church condemned officially the violence over the Pride participants, their representative used extreme nationalistic discourse and they did little to distance from the hooligans and the ultra-right wingers who were advocating for violence towards the Pride participants.⁷²² The idea of LGBT rights being a foreign threat shows a political homophobia that understands the State’s use of external threats to critique or condemned homosexuality.⁷²³ Simply put, parts of the public feel betrayed by elites beholden to the EU and supposed foreign actors, and therefore the nationalism helps them with the expression of the their anger of

⁷¹⁸ Ibid.

⁷¹⁹ Jessica Greenberg, “Nationalism, Masculinity and Multicultural Citizenship in Serbia,” *Nationalities Papers* 34, no. 3 (July 1, 2006): 322, <https://doi.org/10.1080/00905990600766628>.

⁷²⁰ Srdjan Sremac et al., *For the Sake of the Nations: Media, Homosexuality and Religio-Sexual Nationalisms in the Post-Yugoslav Space, Religious and Sexual Nationalisms in Central and Eastern Europe* (Brill, 2015),54, https://doi.org/10.1163/9789004297791_005.

⁷²¹ Tamara Pavasovic Trost and Koen Sloomaeckers, “Religion, Homosexuality and Nationalism in the Western Balkans: The Role of Religious Institutions in Defining the Nation,” 2015, 166.

⁷²² Ibid, 165.

⁷²³ *Global Homophobia: States, Movements, and the Politics of Oppression* (University of Illinois Press, 2013),224. <https://www.jstor.org/stable/10.5406/j.ctt3fh5hk>.

betrayal.⁷²⁴ The opposition to LGBT ideology had a multifaced rhetoric constructing the portrayal of the Pride parades as a conflict between an elitist and populist vision on citizenship, its entitlements and regimes of inclusion and exclusion.⁷²⁵ It was two original concepts of gender, class, national belonging and the very ontology of the citizen subject.⁷²⁶

Pride Parades are a powerful example of contestation between Serbia and EU, as in 2010⁷²⁷ the LGBT issues were gaining some ground and public recognition within the increased EU scrutiny. The state allowed Pride Parades to take place; however, it resulted in the violence incited by hooligans and right-wing organizations despite almost six thousand police.⁷²⁸ The competitive narratives showed the State's interpretation for EU integration showed their excessive protection of Pride even though they did not take preventive measures to stop the anti-gay riots. As Sloopmakers explains about the Parade:

“On the one hand, EU support for the event was formalized when Vincent Degert, then head of the EU Delegation to Serbia, signed a petition to support the 2010 Belgrade Pride.⁷²⁹ The Serbian government, on the other hand, also linked the Pride discursively to the EU integration process, as political leaders publicly expressed their support for Pride by explicitly linking it to the EU's values. In fact, the government used the Pride so as to demonstrate its pro-EU credentials by seemingly co-organizing of the event. However, while the government indeed provided the conditions for Pride to happen, it

⁷²⁴ Greenberg, “Nationalism, Masculinity and Multicultural Citizenship in Serbia,” 335.

⁷²⁵ Marek Mikuš, “‘State Pride’: Politics of LGBT Rights and Democratisation in ‘European Serbia,’” *East European Politics and Societies* 25, no. 4 (November 1, 2011): 834–51, <https://doi.org/10.1177/0888325411426886>.

⁷²⁶ Greenberg, “Nationalism, Masculinity and Multicultural Citizenship in Serbia,” 321–41.

⁷²⁷ Savić, Marija. "Godišnji izveštaj o položaju LGBTIQ populacije u Srbiji za 2010. godinu." (2011), http://www.labris.org.rs/sites/default/files/izvestaj_2010_SR.pdf

⁷²⁸ Associated Press, “Serbia Police Clash with Far-Right Rioters at Gay Pride March,” the Guardian, October 10, 2010, <http://www.theguardian.com/world/2010/oct/10/serbia-police-rioters-gay-pride>.

⁷²⁹ “Gay Straight Alliance | GSA | ‘Freedom Is Not given, It’s Taken’ – Annual Report on the Status of Human Rights of LGBT People in Serbia for 2011,” accessed December 10, 2020, <http://en.gsa.org.rs/2012/05/annual-report-2011/>.

did not take any preventative measures to stop the anti-gay riots that followed the 2010 Pride from happening.”⁷³⁰

Slootmakers shares how the first ban on the parade in 2009 met a lot of EU criticisms the 2010 needed Serbia show a clear path to the EU, so Slootmakers comments on the politics:

“the government needed to regain public support by illustrating that security was being taken seriously and that the state was able to protect its citizens. The final push in favor of the 2010 Pride Parade was the fact that the government was able to use the EU pressure to externalize responsibility for Pride: it could blame the EU for the event and its consequences domestically, while in the international arena it could claim credit for allowing the Parade, which was quickly labelled the first successful Pride in Serbia.”⁷³¹

As Serbia moved towards signing the EU accession, the LGBT rights heated. After the 2013 parade was cancelled in advance by authorities, the ambassadors of fifteen European countries sent the Prime Minister Dacic noting that LGBT members need have the right of freedom of assembly, how Serbia needs to uphold its European obligations, and noting that Serbia shares values such as tolerance and non-discrimination with their European neighbors and a successful pride parade would be evidence of progress in Serbia.⁷³² Serbian officials finally allowed the parade in 2014, only because of the EU requirements, but they exposed their political homophobia in the public. They wanted to show how they allowed freedom of assembly and to show how they are pro-gay rights; in the meantime, the officials were undercutting the support for the march with their public statements.⁷³³ Then, Prime Minister Vucic stated that Pride was not occurring because of EU obligations nor to show they are

⁷³⁰ Filip Ejodus and Mina Božović, “Europeanisation and Indirect Resistance: Serbian Police and Pride Parades,” *The International Journal of Human Rights* 23, no. 4 (April 21, 2019): 493–511, <https://doi.org/10.1080/13642987.2016.1161212>; Koen Slootmaeckers, “The Litmus Test of Pride: Analysing the Emergence of the Belgrade ‘Ghost’ Pride in the Context of EU,” n.d., 7.

⁷³¹ “Belgrade Pride 2014: Where There Is a Need, There Is Tolerance?,” *Balkanist* (blog), October 7, 2014, <https://balkanist.net/belgrade-pride-2014-where-there-is-a-need-there-is-tolerance/>.

⁷³² Fonet, “Ambasadori 15 zemalja pisali Dačiću: Omogućite miran i ugodan prajd u Beogradu,” Blic.rs, accessed December 10, 2020, <https://www.blic.rs/vesti/drustvo/ambasadori-15-zemalja-pisali-dacicu-omogucite-miran-i-ugodan-prajd-u-beogradu/sl1m0wlq>.

⁷³³ Filip Ejodus and Mina Božović, “Europeanisation and Indirect Resistance: Serbian Police and Pride Parades,” n.d., 14.

inclined towards pro-gay rights instead of the Church, but only because of the need “... to show that the Constitution and the laws and rights of all people are respected in the country.”⁷³⁴

Afterwards, Vucic reiterated that LGBT activists got what they wanted, therefore the critics of his should back down, somehow Vucic in his statements continued to undermine the parade, as in 2016 he stated that he is not a big fan of these parades and would rather attend the wedding of his former defense minister ‘son (he alluded this event will have five times more participants than the parade) and subsequently he emphasized the need of insuring Serbia’s security preparation for the upcoming march.⁷³⁵ Prime Minister Vucic’s response was predicated in satisfying both the European line of respecting free assembly of the LGBT society while not supporting it by appealing to the nationalist wing of his supporters.⁷³⁶ Gould and Moe argue in their research about how the nationalists try to justify their claim on power by promising to protect their traditional values from external threats from within, by associating homosexuals, the nationalist cling to power therefore painting the LGBT society as foreign agents will allow their rhetoric to function in governing as the protector the Serbian state.⁷³⁷ The recent political changes affect the argument in accommodating both sides in relation with the appointment of the first lesbian Prime Minister in 2017, Ana Brnabic is a case of pink washing in order to appease Brussels, but also from Vucic’s statement how he cares only about her work, the government send message to the conservative, that we really do not care about LGBT rights.⁷³⁸

Many international organizations such as Amnesty International and Human Rights Watch have reported limited progress in the advancement of LGBT rights. According to

⁷³⁴ Tanjug, “Vučić: Ponosan sam na građane koji su ispoštovali Prajd,” *Politika Online*, accessed December 10, 2020, <http://www.politika.rs/sr/clanak/306415>.

⁷³⁵ “Vučić o Prajdu: Pre Bih Otišao Na Svadbu Sina Bate Gašića - B92,” accessed December 11, 2020, https://www.b92.net/info/vesti/index.php?yyyy=2016&mm=09&dd=18&nav_category=11&nav_id=1178200.

⁷³⁶ “Nakon četiri godine održan drugi beogradski Prajd,” *Radio Slobodna Evropa*, accessed December 11, 2020, <https://www.slobodnaevropa.org/a/sve-spremno-za-prajd-policija-na-ulicama-beograda/26609830.html>.

⁷³⁷ John A. Gould and Edward Moe, “Nationalism and the Struggle for LGBTQ Rights in Serbia, 1991–2014,” *Problems of Post-Communism* 62, no. 5 (September 3, 2015): 273–86, <https://doi.org/10.1080/10758216.2015.1041840>.

⁷³⁸ Lazara Marinković, “Powers That Be: Why Having an Openly Lesbian Prime Minister Hasn’t Solved Serbia’s LGBTQ Crises,” *The Calvert Journal*, accessed December 9, 2020, <https://www.calvertjournal.com/features/show/9865/being-lgbtq-serbia-lesbian-prime-minister-brnabic-pride>.

Human Rights Watch the attacks and harassment targeting: “lesbian, gay, bisexual and transgender people occurred regularly.” Serbian LGBT organization DA SE ZNA recorded: “... between August 2016 and August 2017, 79 incidents against LGBT people, including nine physical attacks, 12 threats and 56 cases of hate speech, mainly on social media.”⁷³⁹ While Amnesty stated how “the authorities responded inadequately to attacks on the LGBTI community, and failed to collect data on hate crimes, with only one prosecution concluded to date,” after the September Pride March police stopped protecting the Pride Info Center.⁷⁴⁰ According to the US Department of State Human Rights: “Although the law prohibits discrimination based on sexual orientation and gender identity, violence and discrimination against members of the LGBTI community [are] serious problems.”⁷⁴¹ The 2015 survey shows : “ The general population rejects same-sex marriage, but is prepared to see some marriage-related rights extended to same-sex couples.”⁷⁴² More importantly, this survey shows how the general population : “ perceives discrimination and violence against LGBTI citizens to be far less in frequency and scope.”⁷⁴³ Therefore, the appointment of Brnabic represent an instrumentalization of LGBT issues. According to Koen Slootmaeckers this is intended: “to fool and distract the international observers from what is happening in Serbia.”⁷⁴⁴

Opportunely, the European Court of Human rights opined in 2017 about the ban on parades in 2009, 2010 and 2011. ⁷⁴⁵ The Court has recognized the rulings of the Constitutional Court of Serbia regarding the banning of several parades; the Court did not deem it necessary to decide on the bans, whether they have breached Freedom of Peaceful Assembly and Freedom

⁷³⁹ “World Report 2018,” Human Rights Watch, December 13, 2017,472, <https://www.hrw.org/world-report/2018>.

⁷⁴⁰ “Everything You Need to Know about Human Rights in Serbia,” accessed December 11, 2020, <https://www.amnesty.org/en/countries/europe-and-central-asia/serbia/report-serbia/>.

⁷⁴¹ United States Department of State, 2016 Country Reports on Human Rights Practices - Serbia, 3 March 2017.

⁷⁴² jfrant_2, “NDI Poll on LGBTI Issues in the Balkans Is a Call to Action,” Text, October 28, 2015, https://www.ndi.org/LGBTI_Balkans_poll.

⁷⁴³ Ibid.

⁷⁴⁴ “Serbia’s New Lesbian Prime Minister: A Symbolic Step Forward?,” *Balkanist* (blog), June 17, 2017, <https://balkanist.net/serbia-new-prime-minister/>.

⁷⁴⁵ “ECtHR Decision: Belgrade Pride Bans Were Unconstitutional,” *Civil Rights Defenders* (blog), February 10, 2017, <https://crd.org/2017/02/10/ecthr-decision-belgrade-pride-bans-were-unconstitutional/>.

of Expression. ⁷⁴⁶ The Court stated how the positive trend of 2014 and 2015 pride parades passing without an incident and with government permission, could be deemed as a positive trend. The Court stated that the applicants which focused on the previous years: “could not be applied and were therefore resolved because significant change had resulted from 2014 to 2016” and under the Courts jurisdiction: “it finds that they do not disclose any appearance of a violation of the rights and freedoms⁷⁴⁷ set out in the Convention. It follows that these complaints must be rejected as being manifestly ill-founded, under Article 35 §§ 3 (a) and 4 of the Convention.”⁷⁴⁸ Since Serbia has violated previously its constitutional law and failed up to live to international standards, the ECHR decision goes in addressing the issue.⁷⁴⁹ However, as Ayoub and Swimelar will argue that civil society organizations (CSOs) collaborate with law enforcement to ensure protection in the law, but they have more leverage to norm violations when they are collecting data and protection on the group.⁷⁵⁰ As Puck Overhaart summarizes: “EU institutions cannot adequately protect LGBT+ rights themselves, neither can CSOs. Where the European Union can pressure a country to enact laws, it needs CSOs to help hold governments and civil society accountable to enact substantive change Neither can succeed without support from the other.”⁷⁵¹

Despite the diplomatic mask presented by the Serbian government before the EU in the purported efforts in liberalizing the society and ensuring more inclusive practices regarding marginalized groups, including LGBT community, the aforementioned decisions and reports

⁷⁴⁶ “ICJ and ILGA-Europe Joint Submissions in Milica Đorđević and Others v. Serbia,” *International Commission of Jurists* (blog), November 18, 2014, <https://www.icj.org/icj-and-ilga-europe-joint-submissions-in-milica-dordevic-and-others-v-serbia/>.

⁷⁴⁷ *Aalbersberg v. Netherlands*, Comm.1440/2005, U.N. Doc. A/61/40, Vol. II, at 671 (HRC 2006).

⁷⁴⁸ Decision on *Dordevic and Others v. Serbia*, 5591/10 17802/12 23138/13 25474/14 (ECtHR February 2017), at para. 61.

⁷⁴⁹ “An Important Victory for Freedom of Assembly,” *Civil Rights Defenders* (blog), May 2, 2013, <https://crd.org/2013/05/02/an-important-victory-for-freedom-of-assembly/>.

⁷⁵⁰ Safia Swimelar, “The Journey of LGBT Rights: Norm Diffusion and Its Challenges in EU Seeking States: Bosnia and Serbia,” *Human Rights Quarterly* 39 (November 1, 2017): 910–42, <https://doi.org/10.1353/hrq.2017.0054>; Phillip M. Ayoub, “With Arms Wide Shut: Threat Perception, Norm Reception, and Mobilized Resistance to LGBT Rights,” *Journal of Human Rights* 13, no. 3 (July 3, 2014): 337–62, <https://doi.org/10.1080/14754835.2014.919213>.

⁷⁵¹ Puck Overhaart, “Members’ Privilege: The Influence of EU Membership and Accession on LGBT+ Rights Protection in Croatia and Serbia,” *SLC Undergraduate Writing Contest* 3 (April 2, 2020), <https://journals.lib.sfu.ca/index.php/slc-uwv/article/view/1091>.

by the European Court, the CSOs and international human rights watchdogs, Serbia has been largely stagnating regarding the status of the rights of the LGBT community. Finally, despite Brnabic's appointment, as a puppet for Vucic's degradation of democracy in Serbia, this charade cannot be tolerated by respectable European institutions, because if Brnabic does not improve the lives of LGBT people or speak up, who will? ⁷⁵²

3.8 Croatia's conflict with European values in relations to same sexual communities

Croatia throughout its history has struggled with their ever present religious and ethnic nationalism. Therefore, the historical closeness to the Habsburg legacy has enabled Croatia to proclaim condescendingly to its Balkan neighbors that they belong to Europe unlike them. Even during the 90s Yugoslav War⁷⁵³, when Croatia was under the reign of then President Franjo Tudjman, its nationalism was overt and exclusionary, their identity was being constructed as European.⁷⁵⁴ Getting European membership for Croatia was not just a foreign policy goal, but greater goal for identity issues and civilization discourse as their part in the de-balkanization process of recognizing Croatia as part of Europe, and excluding the Balkans.⁷⁵⁵ In order to avoid the Balkan label, a Balkan society according to Ivajlo Ditchev must prove itself, in their desperation they have to negotiate an image of rapid change, compliance with standards, and the acquisition of all attributes of European nation states.⁷⁵⁶ Butterfield has argued that EU itself has itself constructed hierarchies of Europeanness in its leverage to Croatia in relation to LGBT rights: "These outside observers of the region have produced their

⁷⁵² "Away from the Media's Gaze, Ana Brnabić Is Failing to Advocate for LGBT Equality in Serbia | View," euronews, September 23, 2019, <https://www.euronews.com/2019/09/23/away-from-the-media-s-gaze-ana-brnabic-is-failing-to-advocate-for-lgbt-equality-in-serbia>.

⁷⁵³ Phillip M. Ayoub, "With Arms Wide Shut: Threat Perception, Norm Reception, and Mobilized Resistance to LGBT Rights," *Journal of Human Rights* 13, no. 3 (July 3, 2014): 334, <https://doi.org/10.1080/14754835.2014.919213>.

⁷⁵⁴ "Balkan Is Beautiful: Balkanism in the Political Discourse of Tudman's Croatia - Maple Razsa, Nicole Lindstrom, 2004," accessed December 14, 2020, 628-650, https://journals.sagepub.com/doi/abs/10.1177/0888325404266939?casa_token=wygegg7GQwwAAAAA:O7mmr8Ah5Qh6E-ePMqSTMX517Y1u3DG9HYLZsvKMCn7zGFhY99UyhparJN5UZl6iKt_MWlg6Nk.

⁷⁵⁵ Safia Swimelar, "Nationalism and Europeanization in LGBT Rights and Politics: A Comparative Study of Croatia and Serbia," *East European Politics and Societies* 33, no. 3 (August 1, 2019): 613, <https://doi.org/10.1177/0888325418805135>.

⁷⁵⁶ Ivajlo Ditchev, "The Eros of Identity," *Balkan as Metaphor: Between Globalization and ...*, accessed December 15, 2020, 235-250 https://www.academia.edu/1194937/The_eros_of_identity.

own scales using sexual rights or degrees of homophobia as tools for measuring European identity.⁷⁵⁷ For Croatia, these comparisons at times seem to have designated them to a sort of elevated status.”⁷⁵⁸ Post war Croatian identity emphasized on its uniqueness, its European heritage along with the clear distinction qualities from the other Balkan nations in its EU accession process.⁷⁵⁹ Pride parades in Croatian society are an interesting topic of contestation of Croatian identity. Croatia has been able to hold gay parades ever since 2001, but ever since then the need for police escorts protecting the marchers there were still question over the issue of an intense security provided for the participants.⁷⁶⁰ The violence that occurred in the Split gay parade has presented Croatian leaders and activist of the work they need to achieve in order to respond to way that will highlight the temporary understanding of Croatian identity.⁷⁶¹ Due to having a large opposition at the gay parade mainly coming from hooligans and religious groups in front of a European presence of dignitaries and functionaries, Croatia was criticized heavily for the negative reaction of its citizens.⁷⁶² Many scholars that work on the issue of homonationalism, Jon Binnie and Kulpa have a problem with the western hegemony towards eastern Europe, especially with western activist intervening with the work of LGBT groups in CCE.

According to Binnie, he explains his “levered pedagogy” on which the western countries utilize their power like this: “The logic goes something like this: you are less

⁷⁵⁷ Nicole Butterfield, “Sexual Rights as a Tool for Mapping Europe: Discourses of Human Rights and European Identity in Activists’ Struggles in Croatia,” *Queer Visibility in Post-Socialist Cultures*, accessed December 15, 2020, 25
https://www.academia.edu/19882496/Sexual_Rights_as_a_Tool_for_Mapping_Europe_Discourses_of_Human_Rights_and_European_Identity_in_Activists_Struggles_in_Croatia.

⁷⁵⁸ Ibid,28

⁷⁵⁹ Dejan Jović, “Croatia and the European Union: A Long Delayed Journey,” *Journal of Southern Europe and the Balkans* 8, no. 1 (April 1, 2006): 85–103, <https://doi.org/10.1080/14613190600595598>.

⁷⁶⁰ “Zagreb Unique in Balkans As It Holds 9th Gay Pride Parade,” *Balkan Insight* (blog), June 21, 2010, <https://balkaninsight.com/2010/06/21/zagreb-unique-in-balkans-as-it-holds-9th-gay-pride-parade/>.

⁷⁶¹ Koen Slotmaeckers, Heleen Touquet, and Peter Vermeersch, eds., *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice*, Gender and Politics (Palgrave Macmillan UK, 2016),29, <https://doi.org/10.1057/978-1-137-48093-4>.

⁷⁶² Bojan Bilic, ed., *LGBT Activism and Europeanisation in the Post-Yugoslav Space: On the Rainbow Way to Europe*, Palgrave Studies in European Political Sociology (Palgrave Macmillan UK, 2016), 45, <https://doi.org/10.1057/978-1-137-57261-5>.

developed than us because you treat your gays badly.⁷⁶³ Thus, the western state becomes the guarantor of lesbian and gay rights versus the threat constituted by the savage brutal other.”⁷⁶⁴ On the other hand Butterfield argues that: “discrimination based on sexual orientation or Pride parades in Europe ... have become key issues like many other women’s issues before through which activists and governments are (re)fortifying the boundaries between so-called developed and undeveloped societies.”⁷⁶⁵

Ayoub disagrees with the noting of Butterfield about marginalization of same sex sexual societies and exclusion on the race, gender and social.⁷⁶⁶ He points out that neither exclusion or marginalization is happening in Croatia, unlike the western societies, lgbt activist are scrupulously attentive in their inclusion strategies to all ethnicities, gender due to the large presence of women, especially the Split Parade and the class prominence is not that viable as western countries.⁷⁶⁷ The conflict in the 1990s complicates assumptions of western perception of the Balkan identity, one of primitives, but forgets to analyze the root of the homonationalist and the gender roles that are attributed when the conflict of such magnitude that contributes to the repatriarchalization of society.⁷⁶⁸ Mostly, leaders on all sides in the conflict alluded to the LGBT members as being traitors to the nation. The framing of this idea as I have described in Serbia in connection to Europeanness is portrayed as a symbol to lgbt representation and acceptance of same sexualities, indeed this type of framing construct conflicts in the cultural sphere that are representing an idea of Europe as an object of impositions concerning civilizational values.⁷⁶⁹ After the violence that occurred during the 2011 Split parade, Croatian

⁷⁶³ Jon Binnie, *The Globalization of Sexuality* (London ; Thousand Oaks, Calif: SAGE, 2004),76.

⁷⁶⁴ Ibid.

⁷⁶⁵ Nárcisz Fejes and Andrea P. Balogh, *Queer Visibility in Post-Socialist Cultures* (Intellect Books, 2013),1985-1986.

⁷⁶⁶Bojan Bilić and Sanja Kajinić, eds., *Intersectionality and LGBT Activist Politics: Multiple Others in Croatia and Serbia* (Palgrave Macmillan UK, 2016),22-23, <https://doi.org/10.1057/978-1-137-59031-2>.

⁷⁶⁷ Phillip Ayoub and David Paternotte, *LGBT Activism and the Making of Europe: A Rainbow Europe?*, Gender and Politics (Palgrave Macmillan UK, 2014), 216,<https://doi.org/10.1057/9781137391766>.

⁷⁶⁸ Ibid,218.

⁷⁶⁹ Katja Kahlina, “Local Histories, European LGBT Designs: Sexual Citizenship, Nationalism, and ‘Europeanisation’ in Post-Yugoslav Croatia and Serbia,” *Women’s Studies International Forum* 49 (March 1, 2015): 73–83, <https://doi.org/10.1016/j.wsif.2014.07.006>.

president claimed that this attack didn't represent the European face of Croatia.⁷⁷⁰ Either way, between the president condemnation and the Croatian prime minister statement that: "We built a stronger state so we can play a more substantive role in the world's affairs."⁷⁷¹ Croatia's response to the anti-gay backlash created increased support for civil society in and a larger turnout. The number of participants during subsequent parades in 2013 or 2015 jumped to approximately 10-15 thousand people.⁷⁷²

Furthermore, these social issues did not detract the Croatians from acknowledging the important role of Catholic church in the identity struggle when adopting LGBT views.⁷⁷³ The Church's initiative unlike Poland is towards family issues, not sovereignty, their methods very subtler and comparably to Serbia in relations to traditional issues similar. The Church initiated a campaign called U ime obitelji ("In the Name of the Family") which led to massive petition that drove the State in 2013 to organize a constitutional referendum on the matter of the definition of marriage.⁷⁷⁴ There are plenty of similarities to be identified between the campaign of the Catholic Church and their arguments with the Russian state. Concerning the preservation of "traditional Croatian" values, preservation of children's moral outlook, but more importantly the Church's focus on the issue of depopulation.⁷⁷⁵ The way nationalism and homophobia interlinked it's the to provide an argument for allowing purity of a society deluded by foreign ideals.

⁷⁷⁰ "Croatian Leader Slams 'Shameful' Gay Pride Parade Violence," accessed December 16, 2020, https://www.rferl.org/a/croatia_leader_slams_shameful_gay_pride_parade_violence/24232632.html.

⁷⁷¹ "General Assembly Seized with 'War on Climate Change' as Island Nations Warn Political Cowardice Leaves Them One Strong Hurricane Away from Collapse | Meetings Coverage and Press Releases," accessed March 6, 2021, <https://www.un.org/press/en/2012/ga11296.doc.htm>.

⁷⁷² "Thousands Take Part in Zagreb Pride," accessed December 16, 2020, <https://www.total-croatia-news.com/item/12387-thousands-take-part-in-zagreb-pride>.

⁷⁷³ *Global Homophobia: States, Movements, and the Politics of Oppression* (University of Illinois Press, 2013), 116, <https://www.jstor.org/stable/10.5406/j.ctt3fh5hk>.

⁷⁷⁴ Index on Censorship, "Croatia's Referendum: Religious Institutions, Right Wing Flex Their Muscles on Gay Marriage," *Index on Censorship* (blog), December 2, 2013, <https://www.indexoncensorship.org/2013/12/croatia-religion-referendum/>.

⁷⁷⁵ Koen Sloopmaeckers and Indraneel Sircar, "Marrying European and Domestic Politics? The Marriage Referendum in Croatia and Value-Based Euroscepticism," *Europe-Asia Studies* 70, no. 3 (March 16, 2018): 321-44, <https://doi.org/10.1080/09668136.2018.1457136>.

The major advocate for the Church's position on the issue of the referendum came from the Zagreb's Archbishop cardinal Josip Bozanic, who was named a "homophobe of the year" during the 2013 pride parade.⁷⁷⁶ His statements about the referendum and LGBT view revolved around the family centered rhetoric, he stated : " marriage is the basis of the family, a cell of society" and "we shouldn't neglect the primary right of children, who are the only ones who should be privileged."⁷⁷⁷ For example, Cardinal Bozanic's demand concerning the church was to protect the union of a man and a woman for the "future of the Croatian nation," this statement was frequently mentioned during the referendum.⁷⁷⁸ Homophobia was showed along with nationalism in places like Vukovar, battlefields made famous in the Yugoslav war ⁷⁷⁹, where he insisted that the referendum was a "serious question for the homeland."⁷⁸⁰ Along with other parishioners like Andro Ursić, Dr. Adalbert Rebić, bishop Valentin Pozaić, and Franjo Jurčević they were condoning the hate speech and the explicit violence that was occurring during the Serbian gay parade in 2011.⁷⁸¹ In short, weaker threat perceptions were occurring because of Croatia's identity being constructed from 2000 to 2014 as being fond of Europe unlike the other Balkan identities which Croatia tried to disassociate from, the domestic nationalism exhibited by political elites and religious institutions was less potent than Serbian for example.⁷⁸² That's why nationalism in Croatia vis-à-vis Europeanization has tried to emphasize its non-Balkan, non-Serb and European elements, while supporting the Catholic Church that had conflicts with some LGBT rights.⁷⁸³ According to Anja Vladisavljevic : " Five years after a referendum

⁷⁷⁶ Ibid, 334.

⁷⁷⁷ Ibid.

⁷⁷⁸ "Bozanić: Brak je u opasnosti da bude diskriminiran," accessed December 16, 2020, <https://www.index.hr/clanak.aspx?id=712608>.

⁷⁷⁹ "Kardinal Bozanić: Crkva podupire inicijativu," Portal Hrvatskoga kulturnog vijeća, April 29, 2013, <http://www.hkv.hr/vijesti/hrvatska/15003-kardinal-bozanic-crkva-podupire-inicijativu-u-ime-obitelji.html>.

⁷⁸⁰ "Bozanić: Referendumom Se Ne Ide Protiv Nikoga - Večernji.Hr," accessed December 16, 2020, <https://www.vecernji.hr/vijesti/bozanic-referendumom-se-ne-ide-protiv-nikoga-904796>.

⁷⁸¹ "Kastavski Župnik Osuđen Zbog Poticanja Na Nasilje i Mržnju - Tportal," accessed December 16, 2020, <https://www.tportal.hr/vijesti/clanak/kastavski-zupnik-osuden-zbog-poticanja-na-nasilje-i-mrznju-20110323>.

⁷⁸² Katja Kahlina, "Local Histories, European LGBT Designs: Sexual Citizenship, Nationalism, and 'Europeanisation' in Post-Yugoslav Croatia and Serbia," *Women's Studies International Forum* 49 (March 1, 2015): 73–83, <https://doi.org/10.1016/j.wsif.2014.07.006>.

⁷⁸³ Swimelar, "Nationalism and Europeanization in LGBT Rights and Politics," 623.

effectively banned gay marriage in Croatia, conservatives behind the vote will gather in a 5-star Zagreb hotel to mark the anniversary. Gay couples, however, have moved on to a new fight – for the right to foster or adopt children.”⁷⁸⁴

⁷⁸⁴ “TIMELINE: LGBT Rights in Croatia Five Years after Referendum,” *Balkan Insight* (blog), November 28, 2018, <https://balkaninsight.com/2018/11/28/timeline-lgbt-rights-in-croatia-five-years-after-referendum-11-27-2018/>.

Conclusion

The objective of this thesis was to discuss the evolution of the global LGBT movement, but also to get to the bottom of the steps it took those activists to reach their objective through the direct organization, and how politicization of LGBT rights historically led to more discrimination. However, what proved difficult in conducting this research is the perception of contemporary authors who disregard the period after the Second World War, the methods in which the perception of society of homosexuality and the social and legal constraints it took on sexual minorities. In the first chapter of this thesis, there is an examination in a chronological order of the gay movement in relation to Stonewall and its homophile predecessors. More importantly when discussing the politicization and the effect of institutions on gay lives, whether it was the back then sodomy laws or the American Psychiatric Association treating homosexuality as an illness.

This thesis describes the current trend of politicization of homosexuality in Central and Eastern Europe, where the same methods of violence are instigated to subdue the fight for gender equality and end the discrimination based on sexual orientation. The first chapter attempted to show how the situations has progressed in the United States but also the similarities in the more conservative societies in the 21st century. The intention is to provide a context about the meagre standards in which the sexual minorities tried to comfort to the heteronormative society. Therefore, in the 1950s and 1960s there was a repudiation regarding the role of gay people in the Civil Rights Era struggle in comparison to the feminist issues or the black freedom movement. The messaging was incorporated in a subtle way to fit in the society vision of America and in regards to the establishing role in subduing these movements in creating a permanent change. What Stonewall has achieved in my view, is allow the corporatization and subtle proliferation of language that was homophobic but tolerated these minorities to point.

However, throughout this thesis I have discussed about the clear efforts from establishment agents in the political parties to invite the sexual minority into creation of anti-discrimination legislature. Their involvement resulted in an organizational transformation of the LGBT movement, the downturn of this radicalized movement was consequential, due to their progressive demands in regards to marriage equality and socio-economic structure of the American nation. The destruction of the progressive movements that encompassed more that

LGBT rights provided a wedge between various organizations such as GLF and the Black Panther in order to be placed inside a structure where the gay movement will be systematically controlled and managed. Clearly the more radical and politicized the gay movement became in the United State at the beginning of the 1970s, it was perceived as a danger to the patriarchal and heteronormative order of the American society. Because their demands in current times are clearly seen as a norm all around the world, inconsiderate to the fact of global LGBT recognition, we can see in this thesis, the cultural pushback against gay rights can create an unstable condition involving minorities.

The methods in which the state and police apparatus used to implement against sexual minorities in the United States left a blueprint for Central and Eastern European countries to emulate when it comes to preserving their traditional and cultural norms. In the second chapter, I will explicitly show the European approach in dealing with gender equality, while their approach took 30 years of efforts to materialize with the enactment of the Equality Directives. Under the guise of the European Union the protection of LGBT members came into the domain of employment and vocational training. My objective was to showcase the formalistic approach of the European Union that did not materialize in reality with the constant right-wing backlash. Furthermore, this approach from the EU did not allow its Member States from enacting policies that expand services for its sexual minority. Consequently, pre-accession Europe in the early 2000s, the Commission had problems with its pre-screening process that resulted in their reserved approach, due to state of European law, the Commission did not solve the issue of implementation of anti-discrimination policies in the new Member States of the European Union.

The role of the European Court, in particular the function of the ECJ is highlighted by making the lives of gay people difficult with the drafting of rulings such as *Grant or Leger*. The European experience with its expansion in eastern countries has created a precedent in which new Member State can draft policies and administer hate speech. The politicization factor of the second chapter is showcased in which the European Community legislator fails to provide a safeguard for LGBT members. The aforementioned Equality Directives, along with the rulings of the ECJ are inadequate to provide same sex recognition on a universal level. The role of the European Courts in accommodating the national courts of its member states, where gay members in the homophobic societies such as Croatia, Poland or Hungary are victims of public prejudice and stereotyping on the daily basis.

The most important issue is the homophobic spillover of the pre-process monitoring of the European Commission in welcoming Eastern European countries in the Union. The commission promotion of gay rights during the screening of these Eastern Countries had little backing from the EU's *acquis*, making it difficult to create a culture of tolerance. The narrowness of the European institution in defining multiple discrimination or the meaning of non-discrimination based on sex, has allowed political actors from the accession countries to suppress any legislation which in a meaningful way defines discrimination based on sexual discrimination. The transposition of the Equality Directive 2000/78/EC in a proper way is made more difficult by the refusal of the national legislature of the Member States to implement them in a proper way.

More importantly the failure of the European Community to broaden the Equality Directive or to provide specific powers to its institutions has been epitomized with the status quo produced from the passage of the Treaty on the European Union. The ECJ's unwillingness to be receptive to the needs of its gay citizens has been restrained by its conservative approach in deciding cases revolving sexual discrimination. Other causality for the further politicization of LGBT rights, it is cautious approach by the European parliament in relation to its Members has left the matter of gay rights to national legislatures to decide, creating a perilous problem that couldn't resolve its itself in the foreseeable future. However, there is a parallel notion in the works of the European institutions in prohibiting the expression and organizing of LGBT activists, unlike the countries like Russia and Serbia, the institutions in Croatia and Poland quickly reacted in condemning the efforts of some levels of government in instating bans on marches.

Ultimately, this thesis examines the considerable influence of CoE in counteracting the efforts of regimes in Russia and Serbian to politicize and negatively affect the lives of the lives of the LGBT minorities in their countries. The key role played of the ECtHR in confronting discriminatory treatment of Russia, Serbia, Poland and Croatia amongst others in addressing the violation of the human rights and the fundamental rights. However, the resistance of the judicial activism from the ECtHR against the Russian and Serbian institutions has provided an unsuccessful process from the LGBT community, they are losing trust in the European institutions. More importantly the failed applications to the ECtHR coming from the activists on grounds in these countries, show the precarious situation they are put through while fighting

for their rights. Especially, the issues involving organizing pride parades or trying to register a pro-gay organization has been rebuffed by the ECtHR, a clear example regarding the neglect by the ECtHR. The ambition of the LGBT activists in dealing with this process of less than substantial recognition of their rights, especially on the marriage equality part, whether they are part of the European Union or a member of the CoE like Russia, has made their lives a living struggle. The inadequate role of the ECtHR is more a less tested on a daily bases by the gay propaganda laws or the LGBT-free zones, creating a system of political failure to establish a framework in protecting: Polish, Russian or Serbian nationals from ill-treatment from their native countries after criticizing their homophobic practices in front the European institutions.

The conclusions of this thesis are not entirely new, but they demonstrate the need for further efforts in protecting and advancing LGBT rights even in the most developed countries, and those of interrupted processes of democratization alike. This research offers significant assistance for addressing the increasing violence against LGBT members that is saturating in European countries. Therefore, in the distant future, European institutions have to be incredible careful with their upcoming integration process in the Western Balkans, where utilization of political homophobia is a daily reminder of the outgoing struggle of LGBT members being vilified for political posturing.

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