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# *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*

Michele Grigolo\*

## **Abstract**

*Shifting from an essentialist to a constructionist perspective on sexual identities, I move from a consideration of the homosexual legal subject, as presently treated under the European Convention on Human Rights, to the elaboration of a universal sexual legal subject. The universal sexual legal subject enjoys two basic rights: the right to choose sexual activity and sexual identity and the right to establish relationships and families in accordance with this choice. The possibility of including these two rights within the Convention presupposes their insertion into a set of sexually neutral standards which grant the universal sexual legal subject equality of choices. By examining the case law of the European Court and Commission of Human Rights on decriminalization of same-sex sexual activity, and family and relationship issues, I question the sexual particularity of the construction of the homosexual legal subject. This analysis of the case law provides the legal material and principles around which the insertion of the two sexual rights into the Convention is discussed. Both sexual rights are located within the right to respect for private and family life (Article 8). Equality of choices can only be guaranteed if the right to marry and found a family (Article 12) is erased and marriage is 'privatised' into Article 8 on an equal footing with other sexual and relational choices.*

## **Introduction**

Under the case law of the European Convention on Human Rights, the homosexual tends to be regarded as the sexually stable and opposite pole of the heterosexual. The right to respect for private life has provided an essential juridical space for this construction. Over time, 'sexual orientation' has assumed the meaning of a *status* and has been treated as a prohibited ground of discrimination. Homosexuals are thus undergoing a process of minoritization within a 'private' juridical space of toleration.

\* PhD candidate, European University Institute. I am grateful to Gregor Noll, George Ulrich, Henning Bech and Andrea Gattini for their precious comments, suggestions and reflections as well as to Robert Wintermute for his support and important suggestions in the final drafting of this article.

The borders of this space are continuously negotiated with the ‘public’ universal heterosexual counterpart. My purpose in this article is to raise critical questions about the legal construction of sexuality in terms of the dichotomy heterosexuality/homosexuality, and to suggest a shift in the legal analysis under the Convention from a ‘homosexual legal subject’ to a ‘universal sexual legal subject’, who enjoys individual and universal sexual rights securing personal sexual *choices*.

This article is divided into four parts. In Section 1, I invoke certain developments in gender and sexuality studies as theoretical support for the deconstruction of the ‘homosexual legal subject’, and the elaboration of the ‘universal sexual legal subject’ and its two basic sexual rights. In Sections 2 and 3, I expose the subtext of the case law of the European Court and Commission of Human Rights (hereinafter the ‘Court’ and the ‘Commission’) and their implicit assumptions regarding sexuality in cases dealing with criminalization of same-sex sexual activity and family issues. In Section 4, I contextualize the universal sexual legal subject and the two basic sexual rights within the provisions and case law of the Convention.

## 1 Constructing and Negotiating Sexuality and Gender: Theorizing the Universal Sexual Legal Subject

The emergence of the ‘homosexual’ in modern Western societies as a cultural, social and sexual category resulted from complex dynamics of discourses and power relations around sexuality and gender. The establishment of heterosexuality as a behavioural and moral standard centred on the traditional biological family<sup>1</sup> has defined the homosexual as the ‘other’: a sexual deviant, labelled over time as ‘sinful’, ‘criminal’ and ‘pathological’. This process of ‘othering’ worked in a way that stabilized genders, but also controlled them, in terms of hetero-normativity.<sup>2</sup> The family secured a space where power relations between the genders (husband and wife) could be maintained and reproduced. The regulation of sexual desire around the semiotic of the phallus<sup>3</sup> and the construction of female sexuality as ‘passive’ led in turn to the ‘disappearance’ of lesbianism.

The traditional reaction to this categorization has been, in the context of identity politics, to ‘essentialize’ the stigma.<sup>4</sup> Homosexuality has been promoted as immutable,

<sup>1</sup> According to Foucault, this is the moment of the ‘interpenetration of the deployment of alliances and that of sexuality ... since the eighteenth century the family has become an obligatory locus of affects, feelings, love ... [S]exuality has its privileged point of development in the family’. See M. Foucault, *The History of Sexuality, Volume One. An Introduction* (1981, Fr. Orig. 1976), at 108.

<sup>2</sup> In this regard, ‘le contrôle de l’homosexualité n’est qu’un aspect du contrôle de l’hétérosexualité’. See Chauney, *Genres, identités sexuelles et conscience homosexuelle dans l’Amérique du XX siècle*, in D. Eribon (ed.), *Les études gay et lesbiennes. Colloque du Centre Georges Pompidou 23 et 27 juin 1997* (1998) 107.

<sup>3</sup> See on this account J. Butler, *Bodies That Matter. On the Discursive Limits of ‘Sex’* (1993).

<sup>4</sup> In the following I will sketch the debate between essentialist and non-essentialist (constructionist) perspectives on identities. For a more accurate review, see K. Woodward (ed.), *Identity and Difference* (1997), and in particular Segal, ‘Sexualities’, *ibid.*, at 183–238.

in order to reinforce claims for recognition.<sup>5</sup> Women have elaborated studies around the specificity of 'being' a woman. Relying on this epistemological assumption of immutability, a battle for social and cultural transformation has been waged and major social, cultural and legal improvements have been achieved.

However, essentialist identity politics are subject to conceptual limits. Apart from the increasing difficulty of uniting a variety of experiences and needs under conceptual categories such as 'woman' or 'homosexual', the major pitfall of the essentialist perspective is that it reinforces the dichotomy within which the 'other' (homosexual, woman, homosexual woman) is defined. As a consequence, the position of the dominant category (the heterosexual man) is confirmed and stabilized. The dichotomy forces the 'dominated' to define itself and politically act within the binary conceptual and cultural limits dictated by the 'dominant'. It is clear, then, that the dependence of the dominated on the dominant, within this theoretical framework, can never be fully escaped.

It is precisely the need to overcome these conceptual limits that has caused a number of feminist and so-called 'queer' theorists to seek to revise essentialism within a constructionist perspective. At the purely theoretical level, it has become evident that, in order to eliminate the dichotomy, it is necessary to contest the poles and problematize the binary construction of gender and sexuality. Instead of taking categories such as 'sex' or 'homosexual' as fixed and given, post-modern 'queer' theorists have stressed their artificiality and their role in reproducing a system of domination. Butler has undermined the very naturalness of the category of 'sex'.<sup>6</sup> In the realm of sexuality, bisexuals have asserted their own specificity.<sup>7</sup> The emergence of transgenderism and transsexualism as identitarian and political phenomena has demonstrated the apparent paradox of building (fixed) identity upon the impossibility of any (fixed) identity.<sup>8</sup> And it has become clear that sexual borders and roles can

<sup>5</sup> See Currah, 'Searching for Immutability: Homosexuality, Race and Rights Discourse', in A. R. Wilson (ed.), *A Simple Matter of Justice? Theorizing Lesbian and Gay Politics* (1995) 51. R. Wintemute, *Sexual Orientation and Human Rights — The United States Constitution, the European Convention, and the Canadian Charter* (1997), esp. at 61–78, 119–129, 174–183, 232–248, and 246 ([a]n immutable status argument is probably to be abandoned').

<sup>6</sup> J. Butler, *Gender Trouble. Feminism and the Subversion of Identity* (1990).

<sup>7</sup> See on this account Hemmings, 'Locating Bisexual Identities. Discourses of Bisexuality and Contemporary Feminist Theory', in D. Bell and G. Valentine (eds), *Mapping Desire. Geographies of Sexualities* (1994) 41. The author makes clear from the outset that 'Anglo-American feminism has still failed to address bisexuality as worthy of theoretical and political attention in its own right' (at 41).

<sup>8</sup> Transgenderism is a huge container of gender identities such as 'pre-operative and post-operative transsexuals, transgenderists (persons living full time in a gender other than their birth sex with no desire to pursue surgery); transvestites (preferred term: crossdresser, those whose gender expression occasionally differs from their birth sex); 'mannish' or 'passing' women, whose gender expression is masculine and who are often assumed to be lesbians, although this is not necessarily the case; 'feminine' men who are often assumed to be homosexual, although they are just as often heterosexual; and intersexed persons, whose sex was arbitrarily assigned after birth and who often manifest physical characteristics, expression or identity that differs from the sex assigned without their consent'. See 'Discrimination against Transgendered People in America', Introduction to the special issue on 'Transgender Issues and Sexual Orientation', 3 *National Journal of Sexual Orientation Law* (1997), available at <http://www.ibiblio.org/gaylaw/issue5/frye1.html>.

themselves be perceived and experienced in different ways along other identitarian axes such as class, ethnicity, nationality, age and disability.

Parallel to this multiplication of sexual identities, queer theorists have shed light on the limits of politics conducted strictly around issues of sexual identity. In particular, they have addressed the ‘shame’ attached to sexual activity as a major premise of homophobia. This shame puts sexual identity politics under constant threat of failure whenever sexual activity and desire emerge in ‘unacceptable’ forms. Thus, while a toleration of certain forms of same-sex sexual activity (those reproducing the roles and overall scheme of the heterosexual norm) is emerging, we may find that those engaging in more disturbing sexual activities and practices without assuming any existing sexual identity are left politically ‘alone’. In general, as Warner points out, ‘sex can be stigmatised, or become a target of phobic reaction, in ways that are not focused on [gay, lesbian, bisexual and transgender identities] . . . So, even an expanded catalog of identities can remain blind to the ways people suffer, often indiscriminately, from gender norms, object orientation norms, norms of sexual practice, and norms of subjective identification’<sup>9</sup>.

Starting from these premises I would propose a shift of focus from ‘homosexuality’, intended to represent the opposite pole of heterosexuality, to ‘sexualities’, intended to represent the multiplicity of sexual choices in terms of both identities and behaviours. Under this analysis, neither homosexuality nor heterosexuality can strictly affirm its immutability. An important element of choice is revealed in the assumption of a personal sexual identity and the pursuit of sexual pleasure.

Parallel to the multiplication of sexual identities and choices, there has been a diversification of the ways people establish relationships and families. In the case of non-heterosexuals, it is intuitive that, from their marginalized position, they have experienced different ways of being and feeling sexually and relationally, thus encountering the constructedness of the socially perceived ‘true’ and ‘natural’ features of sexuality and gender. They have created their own models of relationships and ‘families’, which often do not replicate the typical biological family.<sup>10</sup> Networks of friends, lovers, partners and former lovers and partners have provided for them a positive communitarian environment of socialization.<sup>11</sup> Similarly, many heterosexuals are experiencing, as Giddens puts it,<sup>12</sup> an increased ‘relational mobility’, evidenced by the rise in the number of divorces and the re-creation of a variety of

<sup>9</sup> M. Warner, *The Trouble with Normal. Sex, Politics, and the Ethics of Queer Life* (1999), at 39. Warner lists these undefined and thus rarely considered sexual subjects: prostitutes, people in leather culture, and ‘even fairly conventional heterosexual married couples [who] find they enjoy anal play, sex toys, sex in public places, sadomasochism’ (at 37).

<sup>10</sup> Plummer points out that ‘gay and lesbian experiences must be increasingly recognised in all their rich and diverse forms. Gayness is . . . a sign of the increasingly rich and diverse ways in which late modern societies are coming to organise ways of living together, often in mutual support’. See Plummer, ‘Speaking Its Name. Inventing a Lesbian and Gay Studies’, in K. Plummer (ed.), *Modern Homosexualities. Fragments of Lesbian and Gay Experience* (1992) 3, at 20.

<sup>11</sup> Nardi, ‘That’s What Friends Are For. Friends as Family in the Gay and Lesbian Community’, in K. Plummer (ed.), *Modern Homosexualities*, *supra* note 10, at 108.

<sup>12</sup> See A. Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (1992).

family arrangements. For such persons, a relationship is no longer primarily a means to achieve an end such as reproduction, but it is an end in itself. Detraditionalization of family arrangements, and increased equality between male and female partners, is creating possibilities for self-determination in matters of sexual choices and relationships, with regard to the subject's location in terms of class, age, gender, ethnicity, nationality, and so forth. For Giddens, homosexuals were the pioneers of such self-determination in relationships: it was much harder for heterosexuals to do so because gender expectations played a major role in defining who did what in the (sexual) relationship. In his studies on 'sexual citizenship', Weeks points to the centrality of the individual in pursuing sexual and relational choices because 'traditional ways of life are no longer viable or meaningful for many people, who have no choice but to choose . . . For many that is a profoundly frightening threat; for others it is an opportunity for inventing themselves afresh'.<sup>13</sup>

How can this new perspective on sexuality, gender, relationships and families be translated into the language of human rights?

The homosexual as a legal subject was introduced into the Convention using traditional essentialist narratives. The Convention presents itself as a system of universals constructed around a presumption of heterosexuality. Currently, the universal sexual subject in human rights is the heterosexual. In order to achieve recognition, the homosexual legal subject has been presented as the stable legal counterpart of the heterosexual within a sexual binary logic. The homosexual has thus gained progressive recognition as a 'private' decriminalized sexual subject, with 'sexual orientation' being stabilized as a prohibited ground of discrimination. Claims of 'immutability' have often been made by applicants to relativize moral issues concerning the regulation of homosexuality. The testimony of 'experts' has been solicited to support or contest these arguments in judicial proceedings. However, demands that are more concerned with 'public' interests or situations, most of all issues of family life.<sup>14</sup>

If, on the one hand, essentialist identity politics have delegitimated a process of 'othering' based on strictly negative attitudes, it has also confirmed that 'the' other does exist and that s/he wants rights and recognition as such. This approach has implied the minoritization of issues related to sexuality along the axis of sexual orientation and, consequently, the logical separation from the universal heterosexual subject of human rights. Homosexual rights are claimed and eventually obtained in the light of social changes, but necessarily in terms of their acceptability in relation to the predominant moral and behavioural standards of hetero-normativity. A further major drawback of this approach is that equality becomes itself a normalizing

<sup>13</sup> Weeks, 'The Sexual Citizen', 15 *Theory, Culture & Society*, Special Issue on love and eroticism (1998) 35, at 45.

<sup>14</sup> The heterosexual/homosexual dichotomy is clearly inscribed in the public/private dichotomy characterizing international law. The latter is well detailed in Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law', 85 *AJIL* (1991) 613.

principle, because it pushes people (not only homosexuals) to conform to these particular sexual standards and consider them as natural and indeed 'normal'.

What I would propose, through a conceptual shift from homosexuality to sexualities, is that issues related to sexuality should be deminoritized and universalized within individual sexual rights. Sexualities would be enjoyed within a legal space of sexual and relational self-determination and development, on the basis of personal choice rather than status. The heterosexual and the homosexual, the masculine and the feminine, would be included in this legal space, but they would not in principle define its borders. Within this legal space, two basic choices would be secured by two fundamental sexual rights: 1) the right to choose sexual activity and sexual identity and 2) the right to establish relationships and family in accordance with chosen sexual activity and sexual identity. Equality has to be guaranteed to these choices *as choices*, and not because the subject belongs to a certain sexual status. What human rights would secure within this legal space would be the sexual 'differences' produced by the multiplication of sexual choices in terms of identity, pleasure, relationships, and family life. But most of all, this space would be for everybody.

There are, of course, limits and risks in embracing this constructionist and individualized perspective. Seidman criticizes the progressive destabilization of identities 'productive of rich experiences, subjective stability, and social bonds',<sup>15</sup> as a result of deconstructive analyses of essentialism, and contends that queer theorists have been unable to provide a new ethical order and address 'considerations of power and legitimate normative regulations'.<sup>16</sup>

I hope it is clear that, by problematizing the homosexual/heterosexual dichotomy, I am not seeking to cause the demise of heterosexuality or to deny the richness of gay and lesbian cultures, but to expand the possibilities for other subjects to define themselves in alternative (neither heterosexual nor gay and lesbian) but still valuable ways. I try to maximize the positive implications of the individualism of human rights, by putting the sexual subject in a position to actively assert his/her sexual and relational choices against a tendency to consider himself/herself as a passive subject in need of equality and protection. On the other hand, the very moment I enter the field of legal discourse and apply queer theory to it, I embark on a process that is not entirely individualistic but involves a compromise between individual and collective interests.

In Sections 2 and 3, I move to analyse the case law of the Convention and the way it has constructed the homosexual legal subject. I focus in particular on cases dealing with decriminalization of same-sex sexual activity and family issues in order to define the borders of the narrow space of juridical toleration to which the homosexual is presently relegated.

<sup>15</sup> S. Seidman, *Difference Troubles. Queering Social Theory and Sexual Politics* (1997), at 159.

<sup>16</sup> *Ibid.*, at 158.

## 2 The Homosexual Legal Subject and Criminalization of Same-sex Sexual Activities

The first cases under the Convention related to the criminalization of same-sex sexual activities date back to the 1950s. They were all filed against the Federal Republic of Germany and challenged Para. 175 of its Penal Code. Applicants made their claims under Article 8 on respect for private life<sup>17</sup> in conjunction with Article 14 on non-discrimination.<sup>18</sup> The only ground of discrimination they invoked was 'sex', because Para. 175 did not apply to sexual activity between women (and because sexuality would probably have been too controversial a category). The Commission declared all these applications inadmissible, the criminalization being justified for the protection of health and morals.

At the time, judges employed a language of crime, pathology and deviation when describing homosexuality. To counter such judicial rhetoric, applicants tended to present homosexuality as a dignified and immutable status. In a 1960 case, the applicant claimed that 'all democratic states . . . *tolerate* homosexuality among those who have an *innate* propensity towards it, which is the case with him'.<sup>19</sup> His reasoning continued: 'To make it an offence is a violation of the right to life, the corollary of which is the right to love' and 'love cannot be denied to homosexuals since they too are men'.<sup>20</sup> In these statements, the applicant distinguished between an 'innate' and a 'non-innate' (presumably a chosen) homosexuality: the 'innate' one, characterizing the applicant's sexuality, should be decriminalized. Here, the innate homosexuality is associated with 'love', a part of the way 'men' are that cannot be denied to a particular category of men, that is (innate) homosexuals.

It was not until another German case in 1975 (after Para. 175 had been amended so as to discriminate between men and women only in relation to the age of consent), that the Commission, while still refusing to depart from its case law, held that 'a person's sexual life is undoubtedly part of his private life of which it constitutes an important aspect'.<sup>21</sup> Homosexuality is part of 'sexual life', which is in turn a part of 'private life', indeed an 'important aspect' of it.

The recognition that sexual life is an important part of 'private life' had its first

<sup>17</sup> Art.8 ECHR provides as follows: '1) Everyone has the right to respect for his private and family life, his home and his correspondence. 2) There shall be no interference from public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of the others'.

<sup>18</sup> Art.14 ECHR provides as follows: 'The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

<sup>19</sup> *X v. the FRG* (no530/59) (1960), 3 Y.B., at 188 (emphasis added).

<sup>20</sup> *Ibid.*, at 188 and 189.

<sup>21</sup> *X v. the FRG* (5935/72) (1975), 3 D.R., at 284.

concrete result in 1981, in the well-known case of *Dudgeon v. UK*,<sup>22</sup> which challenged the legislation criminalizing same-sex sexual activity in Northern Ireland. The Court and the applicant both used specific arguments to frame the case. Mr. Dudgeon declared that he had been ‘consciously homosexual from the age of 14’. Following a police search of his home and the seizure of personal papers, he claimed to have suffered and to continue to suffer because of the Northern Irish legislation an unjustified interference with his right to respect for his private life and, under Article 14 combined with Article 8, a discrimination on the basis of ‘sex, sexuality and residence’. ‘Sexuality’ became for the first time a conceivable ground of discrimination, even though it does not appear in the list of grounds expressly mentioned in Article 14. Accordingly, the Court focused on ‘the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of *homosexual orientation* like the applicant’.<sup>23</sup> The Court asked itself if the legislation in question was still “‘necessary in a democratic society” — two hallmarks of which are *tolerance* and broadmindedness’.<sup>24</sup> For the first time, it concluded that ‘[Mr. Dudgeon] has suffered and continues to suffer an unjustified interference with his right to respect for his private life. There is accordingly a breach of Article 8’.<sup>25</sup> The Court restricted the margin of appreciation of the state<sup>26</sup> in this realm and explicitly supported toleration affirming that: “Decriminalisation” does not imply approval’.<sup>27</sup>

Four of the 19 judges disagreed with this conclusion. One of the main points of tension was the conflict between tolerance of individual sexual behaviours and the defence of Irish Christian religious principles. But because Mr. Dudgeon’s homosexuality was presented as a ‘fact’ of the case, a permanent and inescapable condition, there was thus an element of inevitability in his practising it, which weakened the ‘sin’ argument and made interference with it unjustifiable.

Both the majority and dissenting reasoning in *Dudgeon* moved towards the minoritization of homosexuals,<sup>28</sup> even though the Court did not find it necessary to examine the case under Article 14: a declaration that Article 14 had been violated would perhaps have strengthened the (political) ‘status’ of homosexuality to an excessive extent. Moreover, the Court still acknowledged ‘the legitimate necessity in a democratic society for some degree of control over homosexual conduct’, in particular

<sup>22</sup> *Dudgeon v. UK*, judgment of 22 October 1981. Except where another source is indicated, all judgments, reports and admissibility decisions of the Court and Commission cited in this article are available at <http://www.echr.coe.int/hudoc.htm> (Access HUDOC, Title = name of the applicant, Search). ‘Reports’ or ‘Admissibility decisions’ (adm. dec.) must be ticked at the top if applicable.

<sup>23</sup> *Ibid.*, at 60 (emphasis added).

<sup>24</sup> *Ibid.*, at 53 (emphasis added).

<sup>25</sup> *Ibid.*, at 63.

<sup>26</sup> On the margin of appreciation doctrine see Marks, ‘The European Convention on Human Rights and its “Democratic Society”’, 66 *BYbIL* (1995) 209.

<sup>27</sup> *Dudgeon v. UK*, *supra* note 22, at 61.

<sup>28</sup> Essentialist arguments were taken up in following and similarly successful cases on decriminalization of same-sex sexual activity in Ireland and Cyprus. See *Norris v. Ireland*, judgment of 26 October 1988, where Mr. Norris claimed that he suffered ‘depression and loneliness on realising that he was *irreversibly* homosexual’ (at 10, emphasis added); *Modinos v. Cyprus*, judgment of 22 April 1993.



to protect vulnerable youth. This reference was clearly to discriminatory legislation concerning the age of consent to same-sex sexual practices.

After Dudgeon it took nearly 16 years before the Commission condemned discriminatory ages of consent for the first time in *Sutherland v. UK*,<sup>29</sup> where claims of immutability became even stronger and proved essential for its successful outcome. The facts of the case are framed within a typical *récit* on 'coming out',<sup>30</sup> a process of discovery and realization of something which has always existed within the subject. Sutherland 'became aware of attraction to other boys at about the age of twelve' and he felt that 'his sexual orientation was homosexual'.<sup>31</sup> To make sure that the Commission knew that he had made efforts to develop heterosexuality, Sutherland specified that: 'He tried going out with a girl when he was fourteen. They are still friends, but there was no sexual attraction with her, and the experience confirmed for the applicant that he could only find a fulfilling relationship with another man'.<sup>32</sup> Finally, at 16, he met a boy of his same age, 'they had sexual relations, but both worried about the law'.<sup>33</sup> At that time, the age of consent for sexual activity between men was 18, compared with 16 for sexual activity between men and women or between women.

At this point, the Commission compared the 1981 opinion of the British Policy Advisory Committee, holding that 'the sexual pattern of the overwhelming majority of young men is *fixed* by the age of 18 ... [so that] young men of between 16 and 18 could still benefit from the protection of the law',<sup>34</sup> with the conclusions of the 1994 report of the British Medical Association (BMA) invoking equalization as a remedy 'to improve the sexual health of young homosexual and bisexual men'.<sup>35</sup> In particular, the BMA's report found that 'young homosexual men were especially at risk of sexually transmitted infections', probably because they 'feared seeking professional advice because to do so would be to admit to having committed a crime, and because official homosexual organisations operated over-21 policies, to comply with the law as it then stood'. The BMA's report stressed that the average age of first homosexual encounter is 15.7 years, which implies that adolescents under 16 could also benefit from decriminalization. But lowering the age of consent below 16, and challenging the adequacy of an equal age of 16, was not an issue in the case. In striking the

<sup>29</sup> *Sutherland v. UK* (25186/94), report of 1 July 1997.

<sup>30</sup> See Roussel, *Les récits d'une minorité*, in D. Borrillo (ed.), *Homosexualités et droit* (1998) 9. Roussel is quite critical of the pressure imposed on youth to come out as gay or lesbian. He defines such attitude as '*la prescription d'un itinéraire, dont l'observation ou le refus déterminent les qualités spirituelles de l'individu*' (at 33). Asserting one's homosexuality is embarking on a process of definition of one's personal and social identity that puts at the forefront the stigmatized attribute of homosexuality. Not coming out is often read as a form of disloyalty to a discriminated community to which the girl or the boy inevitably belongs, and, ultimately, a proof of a lack of self-acceptance. Roussel raises doubts about this process being '*un épisode parmi d'autres de la coopération entre stigmatisés et normaux*' (at 33).

<sup>31</sup> *Sutherland v. UK*, *supra* note 29, at 17.

<sup>32</sup> *Ibid.*, at 17.

<sup>33</sup> *Ibid.*, at 18.

<sup>34</sup> *Ibid.*, at 23 (emphasis added).

<sup>35</sup> *Ibid.*, at 24.

balance, the Commission pointed out that ‘the risk posed by predatory older men would appear to be as serious whether the victim is a man or a woman’,<sup>36</sup> and concluded that Articles 8 and 14 require an equal age of consent (which could be 14, 16 or 18). Starting from the premise that, by a certain and ‘equal’ age, sexual development towards a homosexual or a heterosexual orientation (regardless of gender) has ended, the Commission saw no need to protect youth after this age, as nothing can be done to alter what are now ‘fixed’ orientations.

In 2003, the Court approved the Commission’s conclusions in *Sutherland* in two cases concerning Section 209 of the Austrian Penal Code<sup>37</sup> (which provided for an age of consent of 18 for male-male sexual activity, compared with 14 for male-female and female-female). But in addition to reiterating the discourses of immutability in *Sutherland*, the Court moved more clearly towards minoritization: ‘To the extent that Article 209 ... embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves be considered ... to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of different race, origin or colour’.<sup>38</sup> This formula is quoted in almost the same terms from successful 1999 cases on the ban on homosexuals from the British armed forces.<sup>39</sup>

Of course, by strengthening the ‘equal status’ perspective, the Court’s approach in the Austrian age of consent cases weakens any argument for human rights protection of sexuality and sexual activity in terms of personal choice. Thus, although the ‘equal status’ argument has worked positively where the issue is formal discrimination in legislation, the same has not been true when unconventional sexual behaviour was engaged in on the basis of a personal choice. This became clear when the Court faced two cases of ‘group sex’, which were decided by the Court in different ways according to the nature of the activities practised.

The first case, *Laskey, Jaggard and Brown v. UK*, involved the applicants and ‘forty-four other homosexual men’<sup>40</sup> who practised sado-masochist sex. During routine investigations, the police by chance came into possession of video films on which their encounters were recorded. They were all charged with inflicting bodily harm under the Offences against the Person Act 1861. On passing a sentence of imprisonment, the British trial judge stressed that ‘the unlawful conduct ... would be dealt with equally in the prosecutions of heterosexuals or bisexuals if carried out by them’,<sup>41</sup> thus avoiding accusations of discrimination on the ground of sexual orientation.

<sup>36</sup> See para. 64. In 2001 the Court struck *Sutherland* out of the list of cases after the ages of consent in the UK were equalized by the Sexual Offences (Amendment) Act 2000. See *Sutherland v. UK*, judgment of 27 March 2001.

<sup>37</sup> *L. and V. v. Austria* and *S.L. v. Austria*, judgments of 9 January 2003.

<sup>38</sup> *Ibid.*, *S.L.*, at 44; *L. and V.*, at 52.

<sup>39</sup> *Smith and Grady v. UK*, at para. 97, and *Lustig-Prean and Beckett v. UK*, at para. 90, judgments of 27 September 1999.

<sup>40</sup> *Laskey, Jaggard and Brown v. UK*, judgment of 19 February 1997, at 8.

<sup>41</sup> *Ibid.*, at 11.

On appeal to the House of Lords (*R. v. Brown*), the applicants argued that the Offences against the Person Act 1861 applied only if there had been a 'lack of consent' on the part of the person wounded or assaulted, and that 'every person has a right to deal with his own body as he chooses'.<sup>42</sup> By three votes to two, the Law Lords rejected these arguments: the majority held that consent was not a defence in this case. They further accused the applicants of corrupting a young man participating in the sexual activity. An entire section of the judgment is devoted to the supposed risk of HIV transmission in the course of their activities. The Court of Appeal distinguished *R. v. Brown* in the subsequent case of *R. v. Wilson*, in which a husband was charged with 'occasion[ed] actual bodily harm for having branded his initials with a knife on his wife's buttocks with her consent'. The Court of Appeal held that the wife's consent was a defence: 'Consensual activity between husband and wife, in the privacy of their matrimonial home, is not, in our judgment, a proper matter for criminal investigation, let alone criminal prosecution'.<sup>43</sup>

Stychin sees in *R. v. Brown* an attempt by the Law Lords to re-pathologize homosexuality.<sup>44</sup> The European Court certainly did not go this far, but neither did it find the Law Lords' decision contrary to the Convention. The Court had doubts as to whether the case involved 'private sexual behaviour'. Even if it did, the interference with private life was justified for the protection of health. It also made it clear that the object of the judgment was 'the extreme nature of the practices involved and not the sexual proclivities of the applicants'.<sup>45</sup> It thus did not accept the allegation of discrimination, compared with *R. v. Wilson*, because the Wilson facts did not present a similar seriousness. Ultimately, as the measures taken against the applicants were not disproportionate, the Court found no violation of Article 8.

This case offers a clear example of the difficulty of conceiving sexual activity and sexuality outside dominant behavioural and moral standards.<sup>46</sup> The applicants were not primarily defined in relation to homosexuality but in relation to sado-masochism. There was no issue of sexual orientation, because the same treatment would have been reserved to heterosexuals in the same situation. However, it is clear that the reference to a similar situation in a heterosexual context was purely theoretical, as no comparable case in a heterosexual context had ever been presented to the Court.<sup>47</sup>

<sup>42</sup> *Ibid.*, at 20.

<sup>43</sup> *Ibid.*, at 30.

<sup>44</sup> In this regard, see C. F. Stychin, *Law's Desire. Sexuality and the Limits of Justice* (1995), at 126–139.

<sup>45</sup> *Laskey et al. v. UK*, *supra* note 40, at 47.

<sup>46</sup> In this respect, the Commission took a negative view of prostitution. See *F. v. Switzerland* (11680/85) (1988) D.R. 55, at 178–181. The applicant, a transsexual, had been arrested when she was still a man 'for having engaged professionally at her residence ... in homosexual relations with [male] adults'. Switzerland criminalized same-sex but not different-sex prostitution. She 'made contacts with her partners by advertising in specialised magazines' (at 180). The Commission affirmed here that prostitution '[does] not belong to the sphere of private life protected by Art.8' (at 181) at all, which meant that the applicant could not challenge the discriminatory regulation of prostitution under Art. 14.

<sup>47</sup> A case of heterosexual sado-masochism is now pending before the Court. See *K. A. & A. D. v. Belgium* (42758/98, 45558/99), admissibility decisions of 23 May 2002 and 15 September 2003.

This reference subtly established a universal (hetero)sexual normativity as the premise of the whole of the Court's reasoning.

What I maintain here is that the limits of sexual orientation could have been overcome by viewing sado-masochism as an alternative means, and ultimately a *chosen* means, of experiencing pleasure, and thus treating it not as 'violence' but as 'sexual expression' that deserves recognition on an equal footing with more traditional sexual expressions. A positive outcome for the applicants could have resulted if the specificity of the sado-masochistic scenario had been considered. The Court described the applicants' activities as consensual, private and 'for no apparent purpose other than the achievement of sexual gratification'.<sup>48</sup> Furthermore, any 'victim' could use a 'code word' to stop an 'assault', and that 'the infliction of pain . . . did not lead to any instances of infection, permanent injury or the need for medical attention'. Meetings 'had taken place over a ten-year period' without presenting injuries of particular gravity. As Weinberg puts it, 'what may appear to the uninitiated observer as a violent act may really be theatrical and carefully controlled "performance" from the perspective of the participants'.<sup>49</sup>

At this point, it is interesting to turn to the second case of 'group sex', *A.D.T. v. UK*.<sup>50</sup> The applicant was charged with committing a crime under the Sexual Offences Acts 1956 and 1967 for having sex 'not in private'.<sup>51</sup> Following a police search of his home, the applicant was arrested and videos were seized, which contained 'footage of the applicant and up to four other adult men, engaging in acts, mainly of oral sex, in the applicant's home'.<sup>52</sup> From the outset, the applicant made it clear that 'there was no element of sado-masochism or physical harm involved in the activities depicted on the video tape'.<sup>53</sup> Furthermore, the Court agreed with him that 'the activities . . . were genuinely *private*'.<sup>54</sup> and that no exception for sexual activity where 'more than two persons take part or are present' existed for male-female and female-female sexual activity. The Government itself admitted that 'the precise extent of permissible legislative interference with group activities is difficult to define'.<sup>55</sup> For the Court, no substantial difference existed between this case and *Dudgeon* apart from the fact that 'the sexual activities involved more than two men'.<sup>56</sup> Therefore, 'given the narrow margin of appreciation' afforded to the state and 'the absence of any public health considerations and the purely private nature of the behaviour',<sup>57</sup> the Court found that

<sup>48</sup> *Laskey et al.*, *supra* note 40, at 8.

<sup>49</sup> See Weinberg as quoted in Stychin, *supra* note 44, at 122.

<sup>50</sup> *A.D.T. v. UK*, judgment of 31 July 2000.

<sup>51</sup> Section 1, para.2 of the 1967 Act deems sexual activity not to take place in private if it occurs 'a) when more than two persons take part or are present, or b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise . . .'.

<sup>52</sup> *A.D.T. v. UK*, *supra* note 50, at 9.

<sup>53</sup> *Ibid.*, at 10.

<sup>54</sup> *Ibid.*, at 37 (emphasis added).

<sup>55</sup> *Ibid.*, at 27.

<sup>56</sup> *Ibid.*, at 34.

<sup>57</sup> *Ibid.*, at 38.

there was no need for such legislation to remain in force, and that the legislation violated Article 8.

I turn now to issues concerning relationships and family, with respect to which the limited space of toleration to which the homosexual is relegated is becoming less tolerable. Legal development is still heavily conditioned by the dominance in the Convention case law of a specific relational and sexual model: the biological family.

### 3 The Homosexual Legal Subject and Family Issues

Within the Convention, family is considered in two articles: Article 8 and Article 12.<sup>58</sup> In Article 8 'family life' is regarded as a sphere collateral to private life, indeed a space ideally free from state intervention, where an individual organizes his/her private life and eventually his/her family life in an autonomous way. But in Article 12 'family' is linked to 'marriage' and protected as an institution by the state.

The Court has always interpreted marriage as a right reserved to opposite-sex couples. There are indeed signals that at some point in the future this interpretation could be expanded. In the 2002 case *Christine Goodwin v. UK*,<sup>59</sup> departing from its previous case law,<sup>60</sup> the Court held that transsexual men and women enjoy the right to marry a person of the opposite sex under the Convention. In particular, the Court held, on Article 12, that 'the inability of *any* couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision'<sup>61</sup> (that is, to marry). The Court also noted that in Article 9 of the European Charter of Fundamental Rights, which corresponds to Article 12 in the Convention, any reference to men and women has been removed. In the future, the Court could find that 'men and women' should not be required anymore to marry each other and allow same-sex couples to marry.

However, if they are excluded from Article 12, homosexuals can only claim to be considered on an equal footing with opposite-sex *de facto* couples and families. Because 'illegitimate' opposite-sex families are still granted limited recognition in the Convention, the situation of same-sex relationships and families (singles or couples with children) is even more precarious, as they have always been refused recognition of having a 'family life'. In the first 1983 case *X and Y v. UK*<sup>62</sup> dealing with issues related to same-sex relationships (regarding immigration rights of one of the partners), the Commission held that 'the applicants' relationship does not fall within

<sup>58</sup> Art.12 ECHR provides as follows: 'Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right'.

<sup>59</sup> *Christine Goodwin v. UK*, judgment of 11 July 2002.

<sup>60</sup> In *Rees v. UK*, judgment of 17 October 1986, a (legally and originally female) transsexual man complained that he was not allowed to marry a non-transsexual woman. The Court stated that marriage in Art.12 'refers to the traditional marriage between persons of opposite biological sex' and that indeed the 'wording ... makes it clear that Article 12 ... is mainly concerned to protect marriage as the basis of the family' (at 49, emphasis added).

<sup>61</sup> *Christine Goodwin v. UK*, *supra* note 59, at 98 (emphasis added).

<sup>62</sup> *X and Y v. UK* (9369/81) (1983), 32 D.R., at 220–222.

the scope of the right to respect for family life<sup>63</sup> but within ‘an *individual’s right to respect for his private life*’,<sup>64</sup> in line with the case law on decriminalization of same-sex sexual practices. In *Simpson v. UK*,<sup>65</sup> regarding the tenancy rights of the surviving partner of a lesbian couple over the common residence, the Commission started from the premise that: ‘Any interference which there may have been with the applicant’s private life falls to be considered in the context of her home’.<sup>66</sup> When rejecting the applicant’s claims, the Commission affirmed that a discrimination based on the sameness of the sexes of the partners ‘can be objectively and reasonably justified’,<sup>67</sup> because ‘the family (to which the relationship of heterosexual unmarried couple living together as husband and wife can be assimilated) merits special protection’.<sup>68</sup>

The Commission’s reasoning in *Simpson* was partially overruled by the Court’s conclusions in *Karner v. Austria*,<sup>69</sup> which also regarded the tenancy rights of a surviving (gay) partner. The case was about the interpretation of ‘life companion’, entitled to succeed in the tenancy contract of the deceased partner, as defined in Section 14 of the Austrian Rent Act. The Court positively recognized a violation of Article 14 combined with Article 8 in the refusal from the Austrian Supreme Court to include a same-sex partner in the definition of ‘life companion’ on an equal footing with opposite-sex unmarried partners. In the light of the principle of proportionality, the Court held here that no ‘weighty reasons’ were advanced by the Government which suggested that discrimination of the same-sex relationship was necessary in order to protect the traditional family. However, as the applicant framed his claims in terms of ‘his right to respect for his home’ (the same perspective taken by the Commission in *Simpson*), the Court declared a violation of this right and found it not necessary ‘to determine the notions of “private life” or “family life”’.<sup>70</sup>

Although the Court’s judgment as a whole represents an important innovation of its case law on same-sex relationships, it remains unclear what impact *Karner* will have in cases where no ‘home’ is at stake and the benefits object of controversy are reserved to married couples. In *Mata Estevez v. Spain*,<sup>71</sup> a case regarding pension rights, the applicant, relying on Article 8 and Article 14, complained that the refusal by the Spanish Government to award him a survivor’s pension, after his male partner’s death, amounted to discriminatory treatment infringing his right to respect for his private and family life. The Court rejected his claims on the ground that, in Spain, ‘marriage constituted an essential precondition for eligibility for a survivor’s pension’ and that indeed Spain does not allow people of the same sex to marry. In the

<sup>63</sup> *Ibid.*, at 221.

<sup>64</sup> *Ibid.*, at 221 (emphasis added).

<sup>65</sup> *Simpson v. UK* (11716/85) (1986).

<sup>66</sup> *Ibid.*, at 3.

<sup>67</sup> *Ibid.*, at 7.

<sup>68</sup> *Ibid.*, at 7.

<sup>69</sup> *Karner v. Austria*, judgment of 24 July 2003.

<sup>70</sup> *Ibid.*, at 33. Focusing on the right to respect for his ‘home’ was probably an intentional move on the applicant’s side in order to avoid controversial debates on the definition of ‘private life’ or ‘family life’.

<sup>71</sup> *Mata Estevez v. Spain* (56501/00) (2001).

Court's view, the reservation of eligibility for survivor's allowances to the spouse pursued the legitimate aim of 'the protection of the family based on marriage bonds'.

*Karner* and *Mata Estevez* indicate that further developments of the case law on same-sex relationships will probably be decided in the near future on a case-by-case basis, depending on the issues at stake, the arguments of the parties, and the perceived need to protect the traditional family and, accordingly, to reserve certain rights to married couples. However, *Karner* implies that, in an appropriate case, the Court might declare that same-sex couples have family life in the same way as unmarried different-sex couples.

I turn now to analyse the Court and the Commission's case law related to same-sex families, that is gay and lesbian couples and singles with children. This case law deserves a separate examination as the presence of children has normally provoked specific debates about their 'best interest', sometimes in opposition to applicants' claims. The Commission was never supportive of applicants' claims when dealing with legal recognition of the non-biological or social parent where a lesbian couple is raising children. In *Kerkhoven and Hinke v. The Netherlands*,<sup>72</sup> the Commission conceded that family life could be at stake, but it also noted that

the relevant legislation in itself does not prevent the three applicants from living together as a family. The *only* problem . . . is the impossibility for the first applicant to establish legal ties [with the child] . . . which *may* become of practical importance *should* the natural mother die or *should* the relationship between the two adults end otherwise. However . . . positive obligations of a State under Article 8 . . . do not go so far as to require that a woman such as the first applicant, *living together* with the mother and the child itself, should be entitled to get parental rights over the child.<sup>73</sup>

In once more dismissing a same-sex family's claims, the Commission minimized ('only') the drawbacks of the lack of legal recognition, portraying them as hypothetical ('may', 'should'). Furthermore, the emotional ties between the social parent, the biological parent and the child are subsumed under a formal description of a status of cohabitation ('living together'). This analytical move leads the Commission to reframe the case in terms of private life and, ultimately, to declare inadmissible the application because 'as regards parental authority over a child, a homosexual couple cannot be equated to a man and a woman living together'.<sup>74</sup>

It is interesting to note that, one year after deciding *Kerkhoven*, in *J.R.M. v. The Netherlands*,<sup>75</sup> the Commission denied that there could be 'family life' between a sperm donor and his biological child born within a lesbian relationship. The Commission stated that 'the applicant's contact with the child . . . forms an insufficient basis for the conclusion that . . . their relationship falls within the scope of "family life"'.<sup>76</sup>

We are then left with the conclusion that the Convention protects the 'family life' of homosexuals only in relation to their biological children. This protection was actually

<sup>72</sup> *Kerkhoven and Hinke v. The Netherlands* (15666/89) (1992).

<sup>73</sup> *Ibid.*, at 1 (emphasis added).

<sup>74</sup> *Ibid.*, at 2.

<sup>75</sup> *J.R.M. v. The Netherlands* (16944/90) (1993).

<sup>76</sup> *Ibid.*, at 1.

accorded by the Court in *Salgueiro Da Silva Mouta v. Portugal*,<sup>77</sup> where the applicant was a homosexual man who had been discriminated against in the granting of custody rights over his eight year-old daughter born within his previous (opposite-sex) marriage. The court of first instance had granted the applicant custody rights, as no anomaly had been found by psychologists in the child's psychological development due to her father's sexual life. The court of appeal reversed this decision. The Strasbourg Court upheld the applicant's complaint and, for the first time in cases involving homosexual issues, declared a violation of Article 8 (Mr Mouta's family life) in conjunction with Article 14. The discriminatory ground was sexual orientation, 'a concept which is undoubtedly covered by Article 14 of the Convention'.<sup>78</sup> The Court relied again on a specific 'experts' reports':<sup>79</sup> the findings of the psychologists that were presented to the court of first instance. On the basis of these reports, the court of first instance ruled with direct knowledge of the facts, while the court of appeal simply reasoned *in abstracto* and came to the opposite conclusion.

The Court did not apply the same approach in *Fretté c. France*,<sup>80</sup> where a gay man was discriminated against at the preliminary phase of deciding whether or not he was eligible to adopt a child under French legislation (which allows adoption by single people). Despite the fact that Mr. Fretté revealed '*qualités humaines et éducatives certaines*' and that '*Un enfant serait probablement heureux avec lui*'<sup>81</sup>, the report of the social services expressed doubts as to whether an unmarried homosexual man should be allowed to adopt a child. The French Council of State ultimately upheld the decision, noting the administration's conclusion that the applicant's '*choix de vie . . . pouvaient présenter des risques importants pour l'épanouissement de cet enfant*'.<sup>82</sup> As in *Mouta*, the point here is whether the relationship between an adult homosexual and a child negatively or positively affects the latter's development. But while in *Mouta* the case concerned the end of a 'heterosexual' family life and the fact that the child was the applicant's biological daughter, *Fretté* confronted the Court with the possibility of a gay man starting a family life with a child through adoption. Accordingly, the Court chose not to consider relevant facts of the case, such as Mr. Fretté's '*qualités humaines et éducatives certaines*'. Instead, the Court engaged in an abstract discussion of the 'best interest of the child', and the difference in treatment was eventually justified because of questionable lack of scientific (and political) consensus.

After analysing the case law of the Convention, it becomes clear that there is an obvious split between a legitimate 'private' decriminalized homosexual subject and his/her unacceptable 'public' demands to establish relationships and families. The Court and the Commission have restricted the margin of appreciation of states with regard to interference in certain 'private' sexual activities. However, when issues of family life are at stake and when positive action from the state might be required to

<sup>77</sup> *Salgueiro Da Silva Mouta v. Portugal*, judgment of 21 December 1999.

<sup>78</sup> *Ibid.*, at 28.

<sup>79</sup> *Ibid.*, at 34.

<sup>80</sup> *Fretté c. France*, judgment of 26 February 2002.

<sup>81</sup> *Ibid.*, at 10.

<sup>82</sup> *Ibid.*, at 16.



secure the applicants' rights, the state has enjoyed a wider margin of appreciation. Starting from these premises, I discuss in the following section the conditions under which the universal sexual legal subject and the two basic sexual rights can be introduced into the Convention.

## 4 From the Homosexual to the Universal Sexual Legal Subject

In Section 1, I defined two basic sexual rights: the right to choose sexual activity and sexual identity and the right to establish relationships and family life in accordance with this choice. As a precondition for the establishment of the universal sexual legal subject and the recognition of individual sexual rights under the Convention, we have to find standards in the Convention upon which the elaboration of these two rights, which are not explicitly mentioned in the Convention, can find a legal basis.

With respect to the first right, I defined the universal sexual legal subject as primarily entitled to assume any sexual identity and engage in any sexual activity to which s/he fully consents. The emphasis here is on respecting the individual's sexual preferences, not his/her belonging to any predefined sexual category. Does the Convention guarantee an 'equality of choices' in this realm?

The case law on decriminalization of sexual practices between men established that sexual life is an important part of private life. This case law referred to homosexuality but was not conceptually limited to homosexuality or any predetermined sexual category. This, I would say, is a very important aspect of *Dudgeon*. However, as we have seen, the concept of 'sexual life' was soon narrowed and limited to a sphere of 'legal and judicial toleration' of the homosexual legal subject.

Although this sphere of 'legal and judicial toleration' does not fully conform to the principle of 'equality of choices', I think that the principle could be guaranteed by reconceptualizing 'private life' and its relation to 'sexual life'. In particular, the Court should consider 'sexual life' and assess its importance for the individual's private life, by making the individual's perspective on assuming a sexual identity and engaging in certain sexual behaviour its primary point of departure for analysing cases. Within this cultural and legal framework, any categorization or minoritization that is too strict risks becoming oppressive, if not artificial. The Court seems to have realized these difficulties in discussing issues of transsexualism. In dealing with cases of recognition of the change of sex in personal documents, the Court has addressed the definitions of 'sex' and 'gender' and the borders between biological and psychological sex. Finally, in *B. v. France*,<sup>83</sup> the Court was forced to ask itself, as Heinze stresses, whether this need to define made sense at all and whether raising questions about it was not in itself 'a diminution of the human dignity of the person involved, of that person's own assertion of sexual identity'.<sup>84</sup>

<sup>83</sup> *B. v. France*, judgment of 25 March 1992.

<sup>84</sup> Heinze, 'Discourses of Sex: Classical, Modernist, Post-modernist', in 67 *Nordic Journal of International Law* (1998) 37, at 69.

It must also be clear, however, that this private choice must find a parallel recognition in the public sphere. Indeed, 'private' is simply the choice of assuming a sexual identity or engaging in sexual behaviour; the 'public' exposure of this choice should not lead to unreasonable or disproportionate repression. The right to choose sexual activity and sexual identity starts, but does not end, within one's private life. If this were the case, 'private life' would become again a simple space of legal toleration, similar to the way in which the homosexual legal subject is treated now. The point is that all sexual choices should participate in the definition of the sexual public space.<sup>85</sup>

The need for a coherent private and public recognition of the right to choose sexual activity and sexual identity leads me to discuss the second sexual right: the right to establish relationships and families in accordance with the chosen sexual activity and sexual identity. We have seen that the case law of the Convention clearly negates equality of choices in this realm, and that the more a relationship or a family differentiates itself from the traditional sexual and biological requirements of 'the' family based on marriage, the less likely recognition becomes. The Court distinguishes between legitimate families, illegitimate families and non-families. It is interesting to consider that, in *X, Y and Z v. UK*,<sup>86</sup> a case concerning the parental rights of a transsexual father, the Court was forced to concede that a family life existed, because a heterosexual transsexual appears in society as belonging to the opposite gender of his/her partner. Yet the Court still dismissed the applicants' claims.

In my view, the major problem here is that no solution permitting equality of choices can be achieved through a reconceptualization or reinterpretation of the present Convention standards on relationship and family life. The point here is that even if marriage were open to homosexuals, discrimination would persist between those who choose to marry and those who do not. What has emerged from the analysis of the case law of the Court and the Commission is that there is a fundamental tension between the possibility of pursuing 'a' personal family life under Article 8, and the way that the life of 'the' family is institutionalized in Article 12. The latter ultimately becomes the paradigm for judging alternative relationships and family lives developed under Article 8. If we consider the acceptability of these standards in terms of sexual neutrality, there is a clear structural problem in having, on one side, a norm in Article 8 granting in principle equality of familial choices and, on the other side, a norm in Article 12 securing a specific choice.

Apart from this structural problem, marriage and 'the' family, by being included in Article 12 as human rights, are invested with universality and entrenched as values. Wilson makes an interesting point about the perceived universality of 'the' family by analysing how the latter is conceived by Rawls in *A Theory of Justice*.<sup>87</sup> Rawls sees 'the

<sup>85</sup> Indeed the public space, in particular the urban space, is being increasingly sexualized. See Bech, 'Citysex. Representing Lust in Public', in *Theory, Culture and Society*, Special Issue on love and eroticism (1998) 215.

<sup>86</sup> *X, Y and Z v. UK*, judgment of 22 April 1997.

<sup>87</sup> Wilson, 'Their Justice: Heterosexism in a Theory of Justice', in W. Angelia (ed.), *A Simple Matter of Justice?* (1995) 146.

monogamous family [as a] major social institution',<sup>88</sup> the space for moral development. This family is a biological one, where the man or head of the household is concerned with the 'continuation of his line'. The family works then as a channel of reproduction and transmission of moral values from the 'private' to the 'public' space where, ultimately, the principles of Rawls' 'well-ordered' society are shaped by all the members of society. But for Wilson, it seems clear that sexual orientation is hardly hidden behind Rawls' 'veil of ignorance', so that the members of society do not consider such particularity in establishing the universal principles of an organized society. They thus rely on heterosexual (familistic) assumptions when constructing such a model. Sexual orientation could perhaps be included in the 'basic liberties' within Rawls' theory, but this space will always be limited because it is granted, in Wilson's words, 'within a predetermined heterosexist society'.<sup>89</sup> It is not hard to recognize in this last passage the present treatment of non-heterosexuals under the Convention.

All this shows that the hetero-normative assumption of 'the' family represents already a strong obstacle in the path of equality under the present standards of the Convention. However, there must also be a consideration of the way equality works as a normalizing force within these standards. Along the Article 12/Article 8 distinction, a number of dichotomies are positioned: heterosexuality/homosexuality, love/sex, legitimate/illegitimate, public/private and, ultimately, good/bad. Equality requires non-heterosexuals to move from the negative to the positive pole of the dichotomy: 'the' family and its structural features in terms of a cohabiting monogamous couple eventually procreating. Firstly, this would guarantee concrete social and economic benefits. It is not surprising then that same-sex couples and families making claims around family issues tended to present themselves as a strictly classical household. They might in fact be living like a traditional family, but we should not underestimate the possibility that this is an appearance designed to increase their chance of success in courts. Secondly, the point here is that, apart from obtaining legal and social benefits that could to a certain extent be obtained through other means (for example, registered partnerships), only marriage can guarantee the symbolic benefits of full equality. Until marriage is a right, it should be demanded because 'when any minority allows itself to be denied a right that is given to others, it is allowing itself to be relegated to a second-rate position'.<sup>90</sup> But then, once equality is obtained, the dichotomies embedded in Article 12/Article 8 will simply be reinforced with respect to those who do not marry. Within the present standards, equality could produce restrictive effects on the choice not to marry, because claims of inclusion in 'the' family reinforce the value and the perceived universality of a particular familial choice. And

<sup>88</sup> J. Rawls, *A Theory of Justice* (1971), at 7.

<sup>89</sup> *Ibid.*, at 164.

<sup>90</sup> This was declared in 1970 by Jack Baker when he applied with his male companion for a marriage licence in Minnesota. D. Teal, *The Gay Militants* (1971), quoted by Warner, 'Normal and Normaller. Beyond Gay Marriage', in 5 *GLQ* (1999), at 122.

if 'the' family is already privileged, claiming the right to access it could result in a reinforcement of this privilege.

This tension cannot be solved by means of creative or expanded interpretation. In particular, no valuable alternative interpretation can solve the structural lack of sexual universality in Article 12. Therefore, it seems to me that equality of choices can be secured only by deleting Article 12 and 'privatizing'<sup>91</sup> marriage into the universal field of self-determination of family life of Article 8, on an equal footing with other relational and familial choices.

Article 8 should thus become the space within which the right to choose sexual activity and sexual identity and the right to establish relationships and families in accordance with this choice find a theoretically coherent and unified treatment. Sexuality is indeed one of those spheres that Feldman refers to as the fields within which the individual exercises 'autonomy', which 'is tied to dignity'<sup>92</sup> and demands respect and recognition for his/her own standards of life. Indeed, at different times and in different contexts, the Court has made clear that the right to choose sexual activity and sexual identity, and alternative possibilities of establishing relationships, lie in principle within the scope of Article 8 and 'private life'. Already in 1977, in *Brüggemann and Scheuten v. Germany*, the Commission argued that 'the right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his [sic] *personality*'.<sup>93</sup> Furthermore, in *Niemietz v. Germany*, the Court also affirmed that 'It would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life . . . Respect for private life must also comprise to a certain degree *the right to establish and develop relationships with other human beings*'.<sup>94</sup> 'Personality' and 'relationships' are not categorized here. Actually, personality is 'the right to be himself [sic]',<sup>95</sup> the right indeed to escape any categorization. The ways a human being 'chooses' to be and to relate to others are always mutually dependent, and always develop and grow in a complex way in which they are not clearly separable. Relationships are established in accordance with the personality of the people involved, which make them always special and unique in terms of how pleasure is experienced, responsibility is shared, power is negotiated and legal arrangements are contracted with regard to the specific requirements of the individuals involved.

<sup>91</sup> That 'marriage' is in the process of being privatized has already been acknowledged. By referring to Giddens, we could say that 'relationships' are much more universal than 'marriages' nowadays. Drawing again from Giddens, Lützen interprets the contemporary shift from marriages to relationships, and the privatization of marriages and relationships, as a kind of 'homosexualization' of society linked to the increased equality of the partners in the relationship and supported in turn by a 'universalist welfare state'. See Lützen, 'Gay and Lesbian Politics: Assimilation or Subversion: A Danish Perspective', in J. Löfström, *Scandinavian Homosexualities, Essays on Gay and Lesbian Studies* (1998) 233, at 237.

<sup>92</sup> Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty', 47 *Current Legal Problems* (1994) 41, at 54.

<sup>93</sup> See *Brüggemann and Scheuten v. Germany*, as quoted in Loucaides, 'Personality and Privacy under the European Convention on Human Rights', 61 *BYbIL* (1990) 175, at 179.

<sup>94</sup> *Niemietz v. Germany*, judgment of 16 December 1992, at 29 (emphasis added).

<sup>95</sup> See Loucaides, *supra* note 93, at 175.

Consider the following examples of the special and unique nature of every relationship. One example is the case of *Laskey et al.*, one of the most important in exposing the Court's prejudices. Can we assume that more than 40 men, who met for 10 years and engaged in sado-masochistic practices, were doing so just for 'sex' and 'flesh', and remained completely indifferent to each other? Or did they actually communicate when having sex and ultimately have a relationship, perhaps one that was merely less common (and more expanded in the number of participants) than other relationships?

A more traditional, but still problematical, example is the relationship that Card reports:

My partner of the past decade is not a domestic partner. She and I form some kind of fairly common social unit which, so far as I know, remains nameless. Along with such namelessness goes a certain invisibility . . . We do not share a domicile. . . . Nor do we form an economic unit. . . . We share the sorts of mundane details of daily living . . . (often in her house, often in mine). . . . In times of trouble, we are each other's main support. Still, we are not married. Nor do we yearn to marry. Yet, if marrying became an option that would legitimate behaviour otherwise illegitimate and make available to us social securities that will no doubt become even more important to us as we age, we and many others like us *might be pushed* into marriage. Marrying under such conditions is not a totally free *choice*.<sup>96</sup>

As much as possible, then, rights and benefits should be granted independently from any marital or other legally recognized status. Indeed the state, by universalizing its welfare system,<sup>97</sup> can put the individual in the position of more actively and independently establishing relational and familial ties. Relationships and families could be founded on a number of valuable grounds such as 'love', but also 'solidarity' and 'friendship': in this sense, the legal possibilities of establishing 'contractual families' outside marriage should perhaps be expanded. As Warner emphasizes in reviewing the preferential social and economic treatment granted to marriage:

Most of these benefits could be extended to other kinds of households and intimate relationships. Very few have necessary ties with couples or other intimate pairs — perhaps only those having to do with divorce. Many, such as health care and tax equality, are social justice issues and should be extended to single people. Others, such as those having to do with property sharing, are specific to households and could be broadened to all cohabiting arrangements (ex-lovers, relatives, long-term intimate friends, etc.). Still others, such as immigration rights, parenting rights, the right to bring wrongful-death actions, and even the prohibition against spousal testimony in court, are attached to powerful intimate commitments, but these need not be thought of as marriages. Such benefits could be extended to domestic partnerships, nondomestic partnerships . . . legal concubinage or common law relations.<sup>98</sup>

The realization that social changes have occurred in matters of family life has led to a new formulation of family-related principles in the European Union Charter of

<sup>96</sup> Card, C., *Against Marriage and Motherhood*, 11 *Hypatia* (1996), available at <[www.indiana.edu/~iupress/journals/hypatia/hyp11-3.html](http://www.indiana.edu/~iupress/journals/hypatia/hyp11-3.html)>, as quoted in Warner, *supra* note 90 at 137–138.

<sup>97</sup> See *supra* note 91.

<sup>98</sup> See Warner, *supra* note 96, at 142–143.

Fundamental Rights:<sup>99</sup> as we have seen in *Christine Goodwin*, Article 9 of the Charter, which is supposed to resemble Article 12 of the Convention, makes no reference to ‘men and women’, and formally separates ‘the right to marry’ and ‘the right to found a family’.<sup>100</sup> This separation is probably a consequence of the rise in the number of countries that have adopted registered partnership legislation or other similar legal arrangements. However, the European Community has so far only accepted in a very limited way a more updated definition of family life in its legislation, in particular on family reunion. The Commission’s proposal for a directive on the right of Union citizens to move and reside within the European Union<sup>101</sup> provides that only ‘spouses’ may join the citizen, while for unmarried partners, registered or in a ‘duly attested relationship’, this right is made dependent on the recognition of relationships and families not grounded on marriage in the host Member State (Article 2). Member States are then simply required to facilitate the family reunion of the citizen with ‘any other family members’ not included in the definition of Article 2 (Article 3), making it harder for members of unconventional families, who may be of particular importance for the Union citizen, to enjoy family reunion.

Examples like this demonstrate how matters of sexuality are still regarded as problematic and sensitive topics. This is true also in many states that are parties to the Convention or members of the European Union. Reluctance to address these topics at the national level greatly limits progress at the international level. Common European standards incorporating the sexual rights I have introduced in this article will be achieved, if ever, as a result of their elaboration and progressive political acceptance at the national level.

<sup>99</sup> Charter of the Fundamental Rights of the European Union (2000/C 364/01), [http://europa.eu.int/comm/justice\\_home/unit/charte/index\\_en.html](http://europa.eu.int/comm/justice_home/unit/charte/index_en.html).

<sup>100</sup> Art. 9 of the EU Charter provides as follows: ‘The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights’.

<sup>101</sup> See *Amended proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, Brussels, 15/4/2003, COM(2003) 199.