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Beyond the Binarism and Heteronormativity
Queer Theory in International Law

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To those who are gay, lesbian, bisexual, or transgender, you are not alone. Your struggle, for the end to violence and discrimination, is a shared struggle. Today, I stand with you. And I call upon all countries and people, to stand with you too.

— Ban Ki Moon

Trans people have always existed and they will forever exist. They will never, no matter what happens, take transjoy away and that has to be protected more than anything.

— Chappell Roan

Riassunto

Il presente lavoro ha come obiettivo quello di fornire un'interpretazione generale su quello che è il complesso lavoro svolto da teoristi, considerando gli elementi centrali della teoria queer affinché possano essere applicati in un contesto legale. Questa tesi è il risultato di uno studio approfondito di lavori scritti nell'arco degli ultimi tre decenni appartenenti a correnti diverse ma simili, e spesso alleate. Vengono analizzati scritti queer e femministi in comparazione. Il fulcro di questa tesi è la teoria queer, nata intorno ai primi anni novanta da teoristi come Butler, Warner, Rubin e Foucault. Il contributo di quest'ultimo è postumo; il suo libro *Storia della Sessualità* svolge tutt'ora un ruolo centrale come studio approfondito della vastità del rapporto che si crea tra sesso e potere, e di come questo possa essere fondamentale in una società neoliberale e capitalista. La complessità e allo stesso tempo semplicità della teoria queer è risultato di un'approfondita ricerca, con la quale i teoristi hanno avuto modo di interpretare e comprendere la società attuale nel suo sistema degenerativo. Nonostante le lotte femministe e le teorie femministe abbiano sottolineato l'importanza di contrastare e sovrastare il patriarcato, la teoria queer applica ulteriori interpretazioni a questo. La similitudine tra le due correnti teoriche è fondata sulla condanna del patriarcato, tuttavia, la seconda svolge un ulteriore passo, introducendo concetti come l'eteronormatività, l'omonormatività e l'occidentalità. Gli aspetti centrali della teoria ruotano intorno a queste principali nozioni, le quali hanno ciascuna un significato specifico. Eteronormativo riguarda l'influenza e l'imposizione della società nel percepire ogni individuo come eterosessuale: le istituzioni principali dello Stato-nazione ruotano intorno all'uomo bianco, eterosessuale e cisgender, quasi del tutto ignorando l'esistenza, in alcuni casi, di altre identità. L'unica identità concepita dalla società eteronormativa è l'unica in grado di portare avanti quelli che sono gli ideali imposti da questa. Per questo motivo l'eteronormatività è ragione di creazione di una gerarchia sociale. Questo uomo "ideale"

associato al patriarcato è l'impersonificazione di ambizione e forza, e il valore centrale del sistema è quello della famiglia in cui l'uomo è figura dominante.

L'omonormatività porta con sé elementi dell'eteronormatività, proteggendola e rendendo più complicato condannarla. Conseguenza negativa dei primi passi sul sentiero della liberazione della comunità queer, che invece di decostruire il modello centrale della società eteronormativa, finisce solo per includere nel gruppo privilegiato degli uomini bianchi e cisgender anche gli uomini bianchi cisgender omosessuali. Un concetto che deriva direttamente dalla società patriarcale è quello del matrimonio, una volta inseguito come obiettivo ultimo dalle comunità gay e lesbiche, ma comunque un'imposizione eteronormativa limitante che conferma solo la struttura gerarchica sociale. Nonostante una crescente diminuzione di patologizzazione della figura queer, rimangono inalterate realtà devastanti. La vita privata della persona queer rimarrà limitata dalle interferenze dovute dallo Stato-nazione, infatti, il diritto garantito da leggi come l'Articolo 8 della Convenzione sui Diritti Umani che riguarda il rispetto della vita privata, senza alcun tipo di interferenza, viene spesso violato. Verrà analizzato anche il concetto di closet e tutto ciò che comporta all'esterno della comunità. La vita queer verrà spesso violata e giudicata sulla base di pregiudizi pressoché infondati. Il concetto di closet viene spesso discusso in considerazione all'identità di genere e dell'orientamento sessuale: una persona queer viene resa intelligibile soltanto nella sua visibilità al di fuori del closet. C'è dunque un'imposizione eteronormativa e occidentale alla quale spesso le persone queer sono soggette a uscire dal closet. Considerando anche alcuni casi, inerenti sia alla discriminazione di genere o inerenti all'articolo 8, si può notare come i giudizi da parte delle Corti (Supreme o Internazionali) valutino il ricorso da parte della vittima sulla base della loro identità e la loro storia, la decisione a volte verte su quanto la vittima sembri queer o se 'out and proud'.

All'interno di queste interpretazioni, viene spesso sottolineato il concetto di omonegazionismo, insieme al divario che si crea tra identità occidentali e 'orientali'. Nella società contemporanea, risulta ancora presente una forte identità occidentale e coloniale, infatti, vi è una tendenza a considerare casi su aspettative prettamente occidentali. Nelle società non-occidentali, l'identità e la cultura, le quali risultano spesso intrinseche, sono percepite diversamente, di conseguenza persone queer e non-bianche non sentiranno la necessità di fare 'coming out' e ciò non toglie loro libertà. Tuttavia, dal punto di vista omonegazionista, una società civile e democratica è una società che si rifà allo standard occidentale. Questo non fa altro che diffondere gli stessi pregiudizi oltre ai confini entro cui sono nati. La comunità queer non occidentale dunque non esprimendo la propria identità di genere e il proprio orientamento sessuale all'estremo, come preteso dalla società occidentale non viene rispettata. Si va, di conseguenza, a creare un'ulteriore gerarchia tra nazionalità e etnie fondate su binarismi legati a 'buono' e 'cattivo', 'civile' e 'incivile'. Questa realtà è conseguenza dell'identità che la guerra di terrore contro i paesi musulmani ha portato l'America a seguito dell'attacco dell'11 settembre, come racconta Puar. La teoria queer presenta molto spesso concetti che denunciano la necessità di progredire oltre, e decostruire, i binarismi che sono stati stabiliti da questa società contemporanea. Allo stesso tempo, la teoria cerca di deviare verso altre realtà che permettano agli individui di associarsi e coinvolgere nuovi aspetti, in modo tale da creare una società armoniosa, ma varia. L'identità è fluida e come tale non va limitata. Oltre ciò, è importante, quando si discute di teoria queer, tener presente il valore che un approccio intersezionale potrà avere sulla società. L'egemonia maschile è limitante, oltre che portatrice di gerarchia distruttiva per tutte le identità ai margini della società. Cogliere l'importanza di cambiare modo di pensare, intersecando genere, orientamento sessuale, etnia, nazionalità, classe sociale, e così via potrà permettere alla società di arricchire gli strumenti legali nella protezione dei diritti, ma

permetterà anche di interpretare e capire la complessità di ogni singolo individuo. Il tentativo costante di omologare ogni persona porta a continui dislivelli sull'applicazione di leggi e interpretazione di quelli che sono i bisogni di ciascuno. Così è accaduto in passato con il concetto di donna; non si ha una definizione precisa di cosa si intende per donna, sia la CEDAW che la Convenzione di Istanbul non hanno visto necessità di fornirne una. Tuttavia, la formulazione di Raccomandazioni Generali da parte della Commissione del CEDAW ha permesso di inserire all'interno della definizione di donna altri aspetti, come ad esempio l'orientamento sessuale, l'identità di genere e l'etnia. Chiaramente, lo strumento legale vuole fornire una struttura chiara che permetta alle donne di risultare intelligibili dinanzi alla legge, tuttavia lascia ancora incomprensioni, che si manifestano nella difficoltà in alcuni casi di interpretare le necessità di una donna in quanto donna lesbica, donna trans o una donna queer richiedente asilo. Queste realtà rimangono tuttora ai margini della società, e ciò risulta nella difficoltà nel fornire un chiaro esempio di strumento legale che possa proteggere tutt*. Ciononostante, il concetto di genere e l'ideologia gender viene tuttora messa in discussione. Butler nel suo ultimo libro 'Chi ha paura del genere?' vuole sottolineare appunto questi elementi, la complessità di cosa implica gender, qualcosa che tutti recitano attraverso abitudini e gesti, infatti, 'gender' è qualcosa che viene recitato non qualcosa che qualcuno possiede. Gender non equivale per forza al proprio sesso biologico, risiede qui la grande differenza. Sesso e genere non per forza si allineano, e non per forza qualcuno ha un genere. La complessità dell'identità risiede nella sua fluidità, non per forza il nostro essere è immutabile, anzi, risulta spesso cambiare in base anche alla cultura, alla religione e alla società in cui siamo immersi. A causa di questa complessità e incapacità di cogliere ogni aspetto di 'identità', la società non ha interesse a farlo. I vari binarismi esistono per rendere più facile creare ordine, dove in realtà non esistono se non per comodità, oltre che per imporre gerarchia e dunque controllo attraverso il potere. Società

occidentali e democratiche sono le stesse che denunciano queste realtà che non colgono, usando sofismi quali la salvaguardia dei bambini o motti propagandistici anti-gender per contrastare l'accettazione di queste realtà. La teoria queer, quindi, vuole portare alla luce tutti gli elementi che in una società contemporanea attuale vengono occultati, distrutti e ricostruiti intorno alle necessità eteronormative e patriarcali, occidentali e neo-coloniali. La necessità di mantenere un divario tra le identità porta alla luce l'incapacità dello Stato-nazione di proteggerle. I principi di Yogyakarta mettono in risalto la facilità con cui leggi già esistenti e fondamentali possano essere adattate per favorire l'inclusione e l'intersezione dei vari aspetti di ogni individuo. La natura non limitante come norma priva di efficacia vincolante diretta permette di venire considerata e interpellata, senza intaccare quelli che sono gli aspetti sovrani di uno stato. La difficoltà di instaurare uno strumento legale conciliante anche con l'identità di genere e l'orientamento sessuale è legato anche al rifiuto degli stati stessi di considerare una tale proposta.

Per concludere, le realtà ai margini della società sono conseguenza di una realtà allarmante, dove in un contesto omonormativo, l'individuo centrale nella gerchia sarà comunque un uomo, bianco e omosessuale. Considerando le figure trans, lesbiche e richiedenti asilo, la teoria queer vuole sottolineare come le discriminazioni nascono dall'incapacità di considerare un approccio intersezionale, ma allo stesso tempo sono frutto di pregiudizi fondati dalla società eteronormativa stessa.

Inoltre, l'essenza della teoria queer oltre che a sottolineare e avanzare le diverse realtà, è il tentativo quindi di contrastare i limiti imposti da parte della società. La necessità più grande è avanzare la teoria queer in quanto curiosa, in quanto complessa e ricca di nozioni che permettono un'ulteriore interpretazione della società odierna. Cogliere la realtà e capire cosa implica uno stato eteronormativo e patriarcale permette a una società di liberarsi finalmente dai binarismi ormai intrinseci della propria identità. Il diritto internazionale, tuttavia, non

può essere cambiato, anche se può essere reinterpretato. Universalizzare questi strumenti legali, porterà le persone che non rientrano all'interno di determinati standard occidentali ed eteronormativi, a realtà sempre più marginali ed escluse dalla possibilità di praticare e godere dei propri diritti in quanto esseri umani. È necessario trovare modo di fornire i giusti mezzi per combattere i pregiudizi che ostacolano l'interpretazione intersezionale degli individui limitando i diritti delle persone queer, fuori dalla società eteropatriarcale. Infine riguardo alla teoria queer, per quanto ci sia un tentativo di dare degli approcci più intersezionali, alcuni studiosi sottolineano la difficoltà dell'attuarla, in modo tale da decostruire totalmente quelle che sono le diverse costruzioni gerarchiche conseguenti a una società fondata sull'essentialismo e l'universalismo.

List of Abbreviations

CAT	Convention Against Torture
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CRPD	Convention on the Rights of Persons with Disabilities
DVA	Domestic Violence Abuse
ECtHR	European Court of Human Rights
FGM	Female Genital Mutilation
GBV	Gender-based Violence
GREVIO	Group of Experts on Action Against Violence Against Women and Domestic violence
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGM	Intersexual Genital Mutilation
ILO	International Labour Organisation
IPV	Intimate Partner Violence
MPSG	Member of a Particular Social Group
SGBV	Sexual gender-based violence
SOGIESC	Sexual Orientation, Gender Identity, and Expression, Sexual Characteristics
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
VAW	Violence against women
WHO	World Health Organisation

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Introduction

Before the dive in the complexity of queer theory and its scholarship, on my behalf the concept of queerness was rather partially incorrect. Queerness has been wrongly interpreted as interchangeable with the LGBTQ+ community and lesbian and gay studies, however, the application of its nuances differs. Queer curiosity is found as the fundamentals of queer theory, it encompasses the long process of understanding the order of things, especially, structured surrounding the ‘cisheteropatriarchy’. Diane Otto in *Queering International Law* inspired this final dissertation, where the complexity of notions and interconnection with contemporary cases has been discussed. Understanding queer theory means accomplishing the dismantling of the grounds constructed on a multitude of binaries that are so intrinsically linked to life that often are left ignored. Queer identity is fluid and diverse: the complete opposite of such binaries, that are founded around the confines of male/female, heterosexuality/homosexuality, white/non-white (Otto, 2018, p. 2). Queer theory, therefore, is to be understood as destabilising and deconstructing, where its significance aligns with the freedom of individuals from the walls imposed by a neoliberal power. Queer theory is understanding also the relation between power and sex, fundamental in the establishment of the theory in the 1990s, inspired also by the works of Foucault. The inspiration also is inevitably linked to the contemporary conditions of queer individuals as being subjected to increasing instabilities, the rise of the far right has been demonstrated as a risk around the world to the same extent.

This final dissertation aims to provide enough information on queer theory to understand its application and configuration. Queer theory aspires to entrench grounding rules and nuances to favour a (utopian) queering of contemporary society. The theory challenges the inequalities to encourage a full inclusion of the ‘abnormal’ and the ‘Other’. Queerness should be refusing to consider the complexity of individuals as limited and conceived within binaries that are obstacles to the fluidity of the self. Hence, sex/gender understood as fixed equals to the restriction as imposed by society. Therefore, queer theory should be conceived as an instrument of proliferation in the inclusion of homosexuals and gender diverse individuals in the broad possibility of international relations and international

law. Yet, to proceed it is necessary to understand queer theory as opposed to ‘assimilation’, in fact, it denounces the imposed heteronormative institutions, by also transcending from its implications among the queer community. It is for such a reason that queer theory also denounces *homonormativity* and *homonationalism*. The objective of queer theory is to use the difficult intersectional approach to understand the relation between power, gender, sexual orientation, race, and nation. Intersectionality aims to engage in these interconnected relations that are ideal to the process of subversion of the normative imposed instruments. Other than that, intersectionality is fundamental to understand the relation between Western and non-Western society, especially, to avoid the sustainment of colonial ideologies alongside the systemic violence associated with racism that is still present in contemporary society. Queer theory is, therefore, a method employed to comprehend the limits, and ideally how to resolve these.

This work is the result of qualitative research, based on the reading and interpretation of central queer theorists’ works, alongside works where the theory itself has been engaged in association with study cases. The complexity of queer theory has been, therefore, discussed and provided as groundings in the interpretation of contemporary society. Additionally, the research question figured as grounding for the creation of such a thesis aligns with understanding queer theory as a method to be implemented and considered within international law and international human rights law. The lack of queer theory interpretations by legal actors has highlighted the difficulty in understanding also the complexity of the identity, which as already mentioned, is fluid. Intersectional approaches, however, are slowly but increasingly being employed in few legal instruments, such as the CEDAW in its General Recommendation and the Istanbul Convention. Overall, the existence of the Yogyakarta Principles is growing as central soft-law instruments in the consideration of already existing legal frameworks, thus queer theory alongside these principles might be ideal in the inclusivity.

The first chapter serves as an introduction and starting point for understanding the grounds of queer theory, while providing also a small introduction on the history of queerness and the importance of progressing beyond the limitations of the binaries. In fact,

in the subchapters, the objective is to provide an overview of the different nuances that are necessary in the overall of the dissertation. Definitions of heteronormativity, alongside the divide between sex/gender, while also providing some examples of the meaning of queerness and the implications that Western society has on each individual. Patriarchy and heteronormativity are to be kept as central concepts and focuses to understand the rest of the work.

The second chapter is probably the most demanding to understand, it is filled with lots of information concerning the nuances introduced in the first chapter. The implementation of certain notions is necessary to understand further elements in association with queer theory and its application. The first part provides more information directly from the key theorists, such as Judith Butler which has a central role throughout the dissertation, and others as well for instance Wittig or Sedgwick. Afterwards, the chapter will focus on some binaries in relation to legal instruments, such as the right to private and family life (Article 8 of ECHR), while also considering the familiar case of *Dudgeon v. UK*. The last subchapters focus firstly on a comparison between feminist doctrines and queer theory, and secondly the impossibility and incapability of queer theory to be considered within legal instruments.

Lastly, chapter three focuses strictly on gender-based violence as the central case study of the dissertation. The first two subchapters' objective is to fully comprehend firstly CEDAW and the Istanbul Convention, the role of gender and women, in order to create a parallel understanding of the implications that such legal instruments have on the queer community as well as providing challenges against the heteronormative structure employed by the international human rights law framework. The last subchapter focuses on the marginalised identities of society in association with discrimination and GBV, the three central identities are lesbians, trans* persons, and the queer refugees and asylum seekers. The objective is to provide an overview and the implications of queering rightly international legal instruments.

1. An Overview of the Evolution of the Queer Community: from Anti-Gay laws to Queer Liberation

1.1. Sodomy and Power Relationship

It has been centuries since the first cases of sodomy have been uncovered and documented in contemporary society, nonetheless the reasoning behind this so-called “issue” has yet to leave the prejudiced mind of the heteronormative contemporary society. Sodomy concerned ‘the other’: different speech, adorned by slang commonly used within the community; different manners, the ways of portraying and expressing their sexuality; different ways of living, cross-dressing or embodying the opposite “sex”. Interestingly, there are cases, however, demonstrating that the “heterosexual” life did not preclude the pleasure of having intercourse with other men, quite the opposite, in fact.¹ Sodomy rather than being perceived as an expression of “femininity”² or associated with the opposite gender, was just another means of demonstrating intrinsically in the male-dominated society, power and control. Furthermore, in the following sub-chapters, I will dive into the role of heteronormativity and hierarchy in shaping modern and contemporary society.

Society has changed since the 17th century when homosexuality was not perceived as dangerous or when private gestures were not considered an open transgression.³ The main issue was that with time came modesty, the pleasure and sexuality sphere became endorsed in just the secrecy of a home. Sexuality was supposed to be freeing, but power was the one in charge. Thus, governments understood the economy's evolution, and with it, came progression and enrichment, but to do so it needed numbers. Eventually, the population became the only virtue and means through which a government has the power to achieve that.⁴ For this specific reason, heterosexuality and reproduction were needed and obliged. As Foucault mentioned often, the relationship between sex and power came also with

¹De Leo, 2023. *Queer: Storia Culturale della Comunità LGBT+*. Einaudi. p.8.

²Foucault (Foucault, M. 1990. *The History of Sexuality*, Volume 1: An Introduction. New York: Vintage Books) noted that *femininity*, in the perspective of the heteronormative growing society, aligned with the female role in the exchanges between male and female, where power was held by the men in the relation with women. Hence, the women had, therefore, a [sexual] *inclination* to submit to men. As a consequence, the sodomite is someone performing a female role in the eye of society, thus, performing a role of submission, which contrasted the expected one of the male figure and his virility.

³*Ivi*, p. 3.

⁴The population was the only means to achieve the basis to consolidate a strong economy, to become a strong power. It is the governments that imposed, as well, strict limitations associated with necessities encompassed by marriage, births, and the concept of fertile or sterile. *Ivi*, p. 25.

repression.⁵ Something arose with the momentum of Christianity, where the relationship between sins and good nature was fundamental. Condemnation of homosexuality was inevitable, because it was contrary to nature, as an extreme form of act against the law.⁶

The 17th century is considered a period in which censorship and restrictions, whether economic or social origin, were emblematic of structural power. Nonetheless, the concept of what was natural and what was unnatural was foundational to the processes of human interactions and relations. Sexuality was, in fact, defined by this exact concept, thus falling outside of this binary would have meant falling outside the heteronormative idea of power. Applying such restrictions to human relations would equal the rejection of sodomy, which is forbidden.⁷ It was considered a crime against nature that should be eradicated: the process, in which the relation between power and sex is found, is to be rejected, excluded, and refused.⁸ In such conditions, power and sex were in a negative relation: power dictates the law, and sex is placed in the binary system of licit and illicit.⁹

In both Locke's, as mentioned in De Leo's *Queer* (2023),¹⁰ and Foucault's works, a homosexual person was not considered as it did previously by the term sodomite which is recidivist. Still, instead, it was instituted in the perception of new species. As already mentioned, homosexual practices are to be expected within the public/private binarism in which one of the crucial issues is the agents of such actions. Besides, the primary problem was that the right to privacy and private life was not formally established until 1948, when Article 12 of the Universal Declaration of Human Rights was adopted. Although it signaled significant progress, challenges remain, that will be discussed in the next chapter.¹¹

In modern society, there has always been a rigid and precise distinction of roles, more importantly, the role of male society regarding masculinity.¹² Heterosexuality is not concerned with sexuality or sexual orientation; it was coined to counterpart "the other" while affirming also the role of "gender". In a male-dominated society, hierarchy is

⁵Foucault, op. cit., p.5.

⁶Foucault, *The History of Sexuality*, p.38.

⁷*Ivi*, p.41.

⁸Foucault presents different features enabling the relation of power with sex, which in the West had already been consolidated. The first one, as mentioned in the paragraph, is the 'negative relation', which encompasses the process of rejection and marginalisation. Afterwards, there is the *insistence of rule*, which states the elements dedicated by law, *the cycle of prohibition*, where sex must be renounced, *the logic of censorship*, where in-existent, illicit and inexpressible are linked, and lastly, *the uniformity of the apparatus*, where power is always exercised over sex. It provides, therefore, a clear framework of the steps governments have done and achieved in the imposition of their power, which translated into further enclosures (Foucault, 1976, p. 83-84).

⁹*Ivi*, p.83.

¹⁰De Leo, op. cit., 9.

¹¹See subchapter 2.2.2 to a deeper interpretation of Article 12 of the UDHR in association with queer cases.

¹²De Leo, op. cit., 11.

inevitable. The role of women goes beyond what entails pleasure, women are the useful tool in a reproductive system. Freedom of women would mean freedom of equal sexuality.¹³ Nonetheless, it is inevitable for women to be considered as such until fertility abandons them too. Women are stuck in a binarism polar or I would rather perceive it as a portion of “unary”/ “monism”, as the only important gender is male, and all the others are to be considered as less relevant compared. Usually, the biggest distinction is made while considering the biological aspects of a person, human dignity is to be concerned with only the male-dominated society. Female society is to be considered as just a subordination of the male society.

The 19th-century bourgeois society is adorned by a multitude of sexualities, but all of these consolidate under the procedures of power. It is a period in time where “perversion” flourishes, and power is preoccupied with avoiding this contagious unnatural perversion in society. Growing is the process in which perversions also become pathological, where the difference between licit and illicit becomes clearer. It is just a consequence of the negative relationship between power and sex, in places where “sex and pleasure are concerned, power can do nothing but say no”.¹⁴ It is because of the condition in which the population is found under power, that secrecy and darkness became the only place in which unnatural acts could happen. With the increase of power through the use of prohibition and criminalisation, some of the realities were abolished or denied of their existence.

Lesbianism could have been the only means through which women were able to free themselves in the expression of their sexuality.¹⁵ Masculinity was intrinsically part of their endeavors; therefore, the lesbian community was able to insert themselves into society at the same level as any other male. ‘Dykes’¹⁶ were part of a society in which women are being considered “imperfect” compared to men and were not considered a threat, since sexualities that did not conceive penetration were not considered as such. It started to become an issue when women started associating with the opposite gender by dressing as them and portraying them. Lesbianism, however, has been overshadowed by matters that did not conceive women, in a way it protected them from being under the radar of the police. At

¹³Halley, J. 2006. *Split Decisions: How and Why to Take a Break from Feminism*. New Jersey: Princeton University Press, p.113.

¹⁴Foucault, *History of Sexuality*, p.83.

¹⁵Wittig will investigate further the concept of lesbianism, where lesbians are considered outside the limits of ‘woman’, since lesbians achieve the complete detachment to the male figure, where women generally are incapacitated.

¹⁶The term ‘Dyke’ is a *slang* often used as a discriminatory or derogatory term to refer to lesbians, whose aspects are non-conforming, generally associated to ‘butches’ or androgynous women. Its origin dates back to the early decades of the XX century.

some point, it happened the opposite, where women found themselves being surrounded by other women. Lesbianism was considered as something that could corrupt the other, for that reason, it became a matter to consider.¹⁷ Being a lesbian means eradicating the roots of heterosexual practices, in particular, negating the role of males in society and their dominance.¹⁸ Thus, the emergence of lesbian feminism offered lesbians and women a role within the women's community.¹⁹ Nonetheless, lesbophobia was an additional reason through which lesbians were forced to cling to feminism in an attempt to retain an intelligible and respectful stance by the community, since the movement and its ideologies allowed them to escape the limitations of the cage imposed by heteronormativity.²⁰ The role of lesbians is the perfect example of proceeding beyond the concept of binarism and heteronormativity, but will be further explained in the few next chapters.

Heterosexuality was in general considered as the root of any women's oppression, to the point in which women found themselves being marginalized and restricted to their genitals and function to society. In other words, patriarchy, as associated with heteronormativity, has its fair part in the struggles of women, while limiting their role to their reproductive function.

Dichotomism between heterosexuality and homosexuality has been evident since the moment the term homosexuality was coined in the 20th century, before that the stark difference between the two sexual orientations was in the correspondence of their acts.²¹ Homosexuality was referred to as "sodomy", which entails *per se* the factual involvement of sexual intercourses between two consensual men, even though the consensual aspect has always come second when considering these deeds. Consent has often been overshadowed by the act *per se*, meaning that religious entities as well as governmental ones focused on the exchange between two individuals rather than the respect and intention behind it. This is another demonstration of the sharp difference between heterosexuality and homosexuality. Butler in *Gender Trouble*²² writes that power is not just a mere exchange between subjects or

¹⁷In contemporary society, as well, lesbians are perceived as threat to the hierarchy order imposed by heteronormative. Lesbians are, often, discriminated on the basis of capacity of turning other women into lesbians as well. See De Leo, op. cit., p.24.

¹⁸Rich, 2003. 'Compulsory Heterosexuality and Lesbian Existence', *Journal of Women's History*, 15(3), p.11.

¹⁹Roseneil, 2002. *The Heterosexual/Homosexual Binary*. Past, present and Future, in Richardson & Seidman, Handbook of Lesbian and Gay Studies. London: Sage Publications, p.31.

²⁰Walters, 1996 'From Here to Queer: Radical Feminism, Postmodernism and the Lesbian Menace (Why Can't Women Be More Like a Fag?)', *Signs*, 21(4), p.849.

²¹Gonzalez-Salzberg, 2019. *Sexuality and Transsexuality Under the European Convention on Human Rights: A Queer Reading of Human Rights Law*. Oxford: Hard Publishing, p.17.

²²Butler, 1990. *Gender Trouble. Feminism and the Subversion of Identity*. New York: Routledge. (Reprinted 2007, 2008, 2010), p.xxx.

a relation of inversion between the subject and an Other, but it operates in the production of the same exact binary frame of gender.²³ Sexuality as coined by Foucault (1976) is the one producing “sex” an artificial concept that extends and disguised the power relations responsible for its genesis.

Heterosexuality before that was not even considered a sexuality, bearing in mind the normalcy through which society has been shaped. As already mentioned, it was not men to be considered effeminate at first but the actual encounter between the two individuals of the male sex, because penetration was conceived in a heteronormative perspective, which entails the exchange between a female and male counterpart. In particular, it is to be considered the role of women in these conditions: the inferiority and objectification of the women in respect of the male role. Thus, as Gonzalez-Salzberg mentioned in his book, homosexuality as an identity implied therefore the construction of heterosexuality.²⁴ The main difference is that heterosexuality is to be considered as normal whereas homosexuality comes with different pathological terms associated. This dichotomy was yet another possibility through which heterosexuals could impose a marginal regime on the community to keep outside the Other.

Within the community itself however internal conflicts were registered in respect of the role of males in society, also considering gay movements, focusing majorly on the white, male, and cis, rather than involving other subjugated individuals and considering yet an intersectional approach to the queer struggle. It was unavoidable to perceive within the community a divisive stance and counter-productivity, but nonetheless there was a tendency of transgression which mattered.²⁵

Heretical and abhorrent sex was considered by the religious attitude, hereafter applied to legal instruments, as a sin deserving one of the worst and most severe punishments. Exchanges between two men in European and American history, in particular, single acts of consensual anal penetration were enough grounds for execution.²⁶ Thus, the role of religion

²³Butler, in this paragraph, questions what is the configuration of such power that constructs gender, in relations to the binary male/female. The element that enables the production resides in the troubling fate of women and the concept of performativity of it, which origin and cause are effects of institutions, practices, discourses, where phallogocentrism and compulsory heterosexuality are imposed (Butler (1990), *Gender Trouble*, p. xxxi).

²⁴Gonzalez-Saltzberg, op. cit., p.16.

²⁵Adam, 2002. *From Liberation of Transgression and Beyond: Gay, Lesbian and Queer Studies at the Turn of the Twenty-first Century*, Richardson & Seidman, *Handbook of Lesbian and Gay Studies*. London: Sage Publications. p. 18

²⁶Rubin, 1992, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’, in Vance, C.S. (ed.) *Pleasure and Danger: Exploring Female Sexuality*. p.11.

and the involvement of the Vatican in queer merits had homosexuality has been considered and perceived as not only inappropriate behavior but a sin, abomination, and perversion.

1.1.1 Anti-Sodomy Laws and the “Homosexual Ban”

The criminalisation of sodomy and the application of anti-sodomy laws were a response to these specific consensual acts, in comparison to the norm. Even before the actual establishment of the **sodomy status**,²⁷ most of the laws used to arrest homosexuals and prostitutes were of Victorian campaigns' origin against the problem of “white slavery”²⁸. Sex law dates from the 19th century and the first anti-obscenity law was established in the United States in 1873.²⁹ Sodomy anti-laws and obscenity laws in some states apply equally to homosexual and heterosexual couples, regardless of their partnership status. In general, some courts have recognised the possibility of committing sodomy in private, whereas in other states homosexual sodomy is considered illegal.³⁰

Alongside, uranism was often considered as associated with predatory practices, for instance, rape, clandestine state of being, grooming, and pedophilia tendencies.³¹ The label “sex offenders” was often used to associate it with rapists or child molesters, demonstrating a stark dichotomy between something that entails sexual assaults to something that is actually consented between two adults. Pathologisation and psychiatric analysis of homosexuals' sexual behaviors were interpreted as a form of mental and emotional inferiority, something that should be found in low-status environments.³² Additionally, pathologisation had imposed on homosexuals the diagnosis of disordered and mentally-ill individuals.

The homosexual ban³³ and censorship means that homosexuals are also forced back into the closet.³⁴ Nonetheless, *queers* were pushed to the margins of society, required to find their own pace and place in society. In general, the safest place for the community was in *bars* or *balls*, thus segregation of *queer* individuals was inevitable. Some considered such

²⁷Rubin, *Thinking Sex*, 5.

²⁸“White Slavery” is a term coined between the 19th and 20th century for referring to women’s sexual enslavement and trafficking in persons.

²⁹Rubin, op. cit., 6.

³⁰Beserra et al., 1973, cited in Rubin, op. cit., p.20

³¹De Leo, *Queer*, 149.

³²Rubin, op. cit. 11.

³³The ‘homosexual ban’ was strictly associated with homosexual individuals, in fact, the objective was to constrict individuals to the walls of the closet, however at the same time they were obliged to *come out* to proceed with investigation and detention (Gonzalez-Saltzber, 2019, p. 67).

³⁴*Ibidem*.

conditions as the creation of “ghettos”³⁵ still heavily controlled by the government and in particular police, the aim was to further marginalise queer community by driving individuals out of San Francisco.³⁶ In general, the queer community ended up considering the closet as the safest option to avoid any repercussions on their identity. Interesting is to consider that male gays were the most subjected in the raids, as well as being kept in files by the police. It was for that specific reason that the Greenwich Village riot happened in 1969, as a reaction to the suffocating heterosexual and heteronormative regime. Stonewall Riots were not the first revolt by the community, but it was the flicker to the creation of a succession of international movements around the world.³⁷

The XX century was for the queer community a century of changes and movements, until the 1950s the conditions were not ideal, considering the two World Wars that had as well repercussions on the gay community (for instance, Nazism and concentration camps). Afterward, the increase in the rebellions and emergence of transgression became monumental for gay liberation, it was a perfect example of what could help to overthrow a society, in which compulsory heterosexuality was well-established within the conscience of the international community.³⁸ Liberation tendencies of the community were related to the overthrowing of the binary gender dynamism expected by the patriarchal and hierarchical society founded on heteronormative expectancies. Male homosexuality was not explicitly protected by the UDHR (Universal Declaration of Human Rights), in consideration also the internment by Nazis.³⁹ An important case was the one brought by two German homosexuals in the 1950s, whom before the newly established European Court of Human Rights (ECtHR) denounced the criminalisation of homosexuality in Germany, which was incompatible with the European Convention on Human Rights (ECHR). Nonetheless, the court dismissed the claim by labeling it as a ‘complaint manifestly ill-founded and it fell within the “health and morals” exceptions’ allowed in protecting the right to privacy.⁴⁰

³⁵De Leo, op. cit., p.220.

³⁶Rubin, op. cit., p.6.

³⁷De Leo, op. cit., p.219.

³⁸Roseneil, op. cit., p.31.

³⁹Otto, 2016. Gender and sexuality diversity: A question of humanity?. *Melbourne Journal of International Law*, 17, 5.

⁴⁰LaViolette and Whitwort, cited in Otto, op cit., 6.

1.1.2 AIDS repercussions on the progress of the *queer* community

Scholars have tried to demonstrate that homosexuality has always existed as a natural variation of the human condition, therefore, as it was for heterosexuality, it should be considered as normalcy and should be tolerated.⁴¹ To the same length, others tried to demonstrate through a scientific approach that could explain that in *queer* individuals there is a gene that is related to the manifestation of such sexuality to avoid further stigmatization of the sexual orientation. Even though progress might have been made, with the AIDS epidemic came anew other forms of discrimination towards the community, thus an increase in the violation and anti-gay movements.⁴² AIDS was renominated as the “gay cancer”⁴³ On the international plane, in each country homosexuality was yet again denounced and perceived as a “punishment from god” for the promiscuity that came with engaging in sexual arrangements between gay men. Governmental intervention was passive, in general, there was a preference of being quiet instead of taking a stance on the matters. Queer people were neglected and had to provide for their own community, however, it led to self-consciousness of their own conditions and thus taking a reactionary stance once again to respond to national public policies and establish their own politics. The only viable response to such conditions was trying to “degay” the sickness and “desexualise” homosexuality, in a way it was not constricted anymore in its acts.⁴⁴

There have been cases in which *queers* were afraid of the diseases themselves and how it already affected the sexual ideology of the community, in such a way that they preferred and considered migration toward safer options.⁴⁵ In contradiction to such reality, there were homophobes whose speeches and actions were turned against the victims of this tragedy that affected the world in general.⁴⁶ As a consequence, in general, the queer community should take AIDS and the repercussions as a means and sign to rethink gay politics and gay activism in contrast and hostile stand vis-à-vis far-right opposition.

⁴¹Birke, 2002. *From Liberation of Transgression and Beyond: Gay, Lesbian and Queer Studies at the Turn of the Twenty-first Century* in Richardson & Seidman, *Handbook of Lesbian and Gay Studies*. London: Sage Publications. p.55.

⁴²Richardson & Seidman, 2002, *Introduction* in *Handbook of Lesbian and Gay Studies*. London: Sage Publications. p. 9.

⁴³De Leo, op. cit., 276.

⁴⁴Engel, 2002, *Making a Minority: Understanding the Formation of the Gay and Lesbian Movement in the United States*, in Richardson & Seidman, *Handbook of Lesbian and Gay Studies*. London: Sage Publications, 393.

⁴⁵Rubin, op. cit., p.17.

⁴⁶Ivi, p. 27.

Homosexual as much as scholars have tried to demonstrate as natural and historical, there is still a strong stigmatisation of sexuality. It heavily depends on historical circumstances, in some cases, as demonstrated, was more tolerated than in other periods of time as well as punished or forbidden. Western countries were more subjugated to these conditions, in particular after industrialisation, Murray as cited in Rubin's work (1992), locates homosexuality as something that circulated and was an extent of such economic evolution.⁴⁷ He located homosexuals, male or female, in places more vulnerable and isolated from the pre-industrial villages, thus the migration that led to the creation of segregation within big cities. Industrialisation brought as well new forms of social stratification as well as inequalities founded in class, and as a consequence the conditions of gender roles and oppression.⁴⁸

George Chancey, as cited by Sedgwick (1990), highlights the phenomenon of the formation of "sexual inversion"⁴⁹ of the nineteenth-century, also known as "sex-role reversal", in which sexual deviances were associated with gender deviances and conflated on their endeavors.⁵⁰ During this century, in fact, the emergence of homosexuality out of inversion, and the establishment of sexual orientations as something independent from degrees of masculinity and femininity, is acknowledged only after some time in the XX century.

In short, the different hierarchies of sexualities that are based on and associated with their values and functions (whether based on religious, psychiatric, or popular), could be posed on parallelism with ideological systems of racism, ethnocentrism, and religious bigotry. It is clear that heterosexuality is considered as the privileged well-being as opposed to the adversity of homosexuals, thus constricted in the margins of society.⁵¹ Additionally, sexuality has been defined as 'good, normal and natural' in relation to heterosexuality and its heteronormative institutions (marriage, monogamy, reproduction), while in comparison the 'bad, abnormal and unnatural' is always associated with homosexual and its non-conforming values.

⁴⁷Rubin, op. cit, p.17.

⁴⁸Rubin, *Thinking Sex*, p.16.

⁴⁹In Foucault works, 'inversion' was the first stage before the configuration of homosexuality, however, in Halperin and Foucault works the concept of homosexual differs. Foucault acknowledged the homosexual on the configuration of effemination, whereas Halperin understands it as the straight-acting homosexual. It differs the perception of the performativity of individuals, nonetheless the important nuance remains in its oppressed nature.

⁵⁰Sedgwick, 1990. Epistemology of the Closet', in *Epistemology of the Closet*. Berkeley: University of California Press. p.46.

⁵¹Rubin, op. cit. p.11.

1.1.3 The Western Matrix of Queer and anti-sodomy laws

Queer theorists have often acknowledged and criticised the Western matrix of the queer community as well as the anti-sodomy laws considering the contemporary features of neocolonialism. It is a matter of fact that when discussing homosexuals, often it is to consider the homonormative one, which figures the white privileged gay and in some cases the white privileged lesbians. In the same way, heterosexuality is associated with the same ethnicity and the concept of kinship in a monogamous established family. One of the issues that will be discussed in the next chapter will be how intersectionality should be better investigated through queer theory. Nonetheless, homosexuality is to be understood as of Western matrix as well as the criminalisation of individuals is of Western import, in particular in the colonies that are commonly being affected and subjugated by the colonisers.⁵²

There are countries of the Global South in which anti-sodomy laws are instituted within their policies, as well as discrimination and criminalisation of queer individuals, is intrinsically part of their norm. The issue to highlight is the role of Western society towards these countries, it is often denounced how Western ideals are projected in these “uncivilised” countries.⁵³ Freedom of expression and human rights are often associated with the West to the point in which those countries that do not align with such doctrines are often considered to be “retrogressive and barbaric”.⁵⁴ Therefore, it should be noted that expecting the same outcome from non-Western countries means erasing and marginalise them in a neo-colonial and imperialist imposition, which would lead to outcasting from the international community.⁵⁵

Imposing Western ideals would be focusing on the reproduction of a society in which the category of men and women is reduced to the identity of the self and its sexual orientation. The liberation movements of the queer community in the West cannot be reproduced in non-Western countries, since it would mean applying in a neocolonial way a

⁵²Rao, 2018. *A tale of two atonements*, n D. Otto Queering International Law, 131-147. New York: Routledge. p.16.

⁵³Lind, 2014. “Out” in International Relations: Why Queer Visibility Matters’, *International Studies Review*, 16(4), p.601.

⁵⁴Kapur, 2018. *The (im)possibility of queering international human rights law*, in D. Otto Queering International Law. New York: Routledge. p.137.

⁵⁵Ivi, p. 138.

new set of “implicit norms of racial purity and domination”.⁵⁶ Despite the positive intentions, considering the Western sexual identities and sexual orientations, as well as gendered identities, as the model and civil society would correspond to a process of exclusion and marginalisation of identities that are not considered within the Western perspective.⁵⁷ Foucault (1976) concludes that the Western conceptualization of sexual categories emerged as a result of social regulation, thus in general in society, the heterosexual/homosexual binary will be based on the foundation of Western culture. It is not limited to the sexual categories but it is as well conceived in the manifestation of the social categories of gender. It is a process through which the West is yet again silencing the diversity of society and culture.

In contemporary society, the rise of queer visibility is associated with the “new gay normal”,⁵⁸ that should serve as a folder for a broader structure against colonisation and westernisation. This condition would mean being on the right and good side as opposed to the bad and wrong side of non-Western countries, which are instead associated with uncivilised and dangerous countries.⁵⁹ The imposition of authentic anti-sodomy laws in colonies and non-Western countries is often associated with colonisers, such as the British Empire. It has been demonstrated that these laws were implemented for those considered hierarchical inferior and thus easily manipulated. Rao (2018) in *Queering International Law* has mentioned that the “British problem” was brought forward during the 2011 CHOGM (Commonwealth Heads of Government Meeting) related to the impositions and roles of Britain toward its colonies and Indigenous people.⁶⁰ Nonetheless, Britain as well as any other colonial country has their fair share of involvement in the installation of discriminatory and violent heterosexual regimes in which homophobia and racism were established in the hierarchical society.

To conclude, through these Western-imposed doctrines, it is clear that everything that is outside of the heteronormative sphere would result in the demonisation of a society. Of course, violations of human rights are still not to be left without impunity, however, the aim was to demonstrate how the Western matrix had a role towards non-Western countries in the

⁵⁶Otto proceeds further by denouncing the reality of contemporary society, which fears extremely the decreasing numbers in the birth rates, however, perceive the opposite increase in immigration as not a resolution (Otto, D. 2018, *Queering International Law*. New York: Routledge. p.241).

⁵⁷Gonzalez-Salzberg, op. cit. p.18.

⁵⁸Lind refers to ‘new gay normal’ by implying the Western interpretation of the homosexual, thus, the new homosexual is supposed to be Western, middle class, white, masculine, and gender normative (Lind, 2014, p.603).

⁵⁹*Ibidem*.

⁶⁰Rao, op. cit., p.16.

sexual categories. Queer could be aligned with the set of white secular norms which would proceed in reinforcing the racist representation of Islam and Muslims as homophobes and culturally backward.⁶¹

1.1.4 The Digital Impact on Queer Community

The digital space has been important for the *queer* community, it is a means through which the generally discriminated individuals could find their places, and other people experiencing the same in their own ways. It brings opportunities to the communities to also create valuable spaces to utilise for their own benevolence. In the internet, there is a liberatory potential through which not only the queer community but as well women and racial minorities are free to express their opinions without the feeling of being silenced.⁶² Platforms permit queer and non-conforming gender/sexual communities to effectively communicate as well as gain more information and knowledge concerning their rights, legal, and health rights.

Through internet, as well as specific platforms, the individuals could perceive the isolation as reduced and feel freer to also engage with other individuals. Nonetheless, in recent years, activism through social networks has impacted and reached in particular youth, establishing therefore an increase in political awareness as well as online discussions. The UN Special Rapporteur for Freedom of Expression has provided information on how the internet facilitates the realisation of an important range of Human Rights.⁶³

As much as the internet is useful and a welcoming space for the queer community, it should be highlighted also the increased surveillance and regulation of it. Limitations on the access to internet and specific content are present in authoritarian regimes as well as democracies. LGBTQ+ contents are often obscured and it is known that some of these regimes promote anti-gay propaganda, for instance, Russia.⁶⁴ Queer communities are affected in these countries and their rights to free speech online as well. In general, countries where internet is

⁶¹The concept highlighted by Kapur is considered by most under the concept of *homonationalism*, which will be discussed in chapter two of this dissertation in more depth. *See*. Kapur, op. cit., p.136.

⁶²Zalnieriute, M. (2018). *The anatomy of neoliberal Internet governance: A queer critical political economy perspective*, in D. Otto Queering International Law. New York: Routledge. p.54.

⁶³The Special Rapporteur notes that by valuing the rapidity of internet, it enables a different amount of rights encompassing the freedom of speech and expression engraved in Article 19 of the ICCPR. These resources are, therefore, of valuable opportunity to explore and enhance the conditions of persons in the political and economic sphere as well (Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/17/27, p.7). *See also* Zalnieriute, op. cit., p.55.

⁶⁴Zalnieriute, op. cit., p.56.

subjected to filtering policies and censorship are often justified as protecting cultural and religious values to preserve heteronormative gender and sexual norms within society.⁶⁵ In other cases, instead, the queer community is not as safe as they would believe on the documentation of UNESCO regarding an increase in physical and psychological bullying and cyberbullying against queer youth on discrimination grounds. The queer community, of course, is at greater risk to experience such forms of online violence, thus the necessity to include better frameworks in the protection of the community online in cyberspace.

1.2 The Hierarchical “Heteronormative” Society

Heteronormativity has been the core of state governmentality by establishing norms to organise every aspect of human nature and attach it to a patriarchal dominant heterosexual kinship. Heteronormativity refers to the institutions and structures of society in which the heterosexual individual is protected and privileged. Heteronormativity is not really about the domination over a person, but how it manifests in every form within society.⁶⁶ Additionally, in a heteronormative society, it is expected the existence of heterosexuality as the solely possible sexual orientation (a man attracted to a woman and vice-versa), therefore, in relation to the same notion, the other assumptions are the concept of gender binarism and sex/gender binarism. Heteronormativity could be considered a “hegemonic system” in which lies all norms, discourses, and practices that are the ones that naturalise and construct heterosexuality.⁶⁷

Taking a break from the heteronormative stance would mean taking a break from the normalcy, which means taking a break from the heterosexual, cisnormative, white, male society, and instead, turning to a sexually free society, where human sexuality and gender expression in its diversity and fluidity is celebrated beyond the binarism.⁶⁸ Hierarchical “heteronormative” society would entail everything known and recognised in society:

⁶⁵Office of the United Nations High Commissioner for Human Rights (OHCHR). 2019. Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law. Geneva: United Nations. https://www.ohchr.org/sites/default/files/Documents/Publications/Born_Free_and_Equal_WEB.pdf.

⁶⁶Butler, *Gender Trouble*, p.139.

⁶⁷Robinson, 2016. ‘Heteronormativity and Homonormativity’, in Naples, N.A. (ed.) *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies*. p.1

⁶⁸Otto by using the concept of taking a break (similar to ‘take a break from feminism’ of Halley), defines the terminology ‘queer’, where the construction of injuries of heteronormativity must be conceived (Otto, op. cit, p.1).

sex/gender binarism, race, indigeneity, and disability; on the other hand, queer curiosity has the role of understanding such orderings and why they are taken as granted and natural.⁶⁹

If heteronormativity exists, of course, its counterpart exists as well: **homonormativity** entails queer as being deployed as dominant formations of sexuality and society, however, some tend to actually define it as utopian.⁷⁰ It is, in fact, considered that gay sexuality exists as the opposite, therefore the satisfaction of same-sex desire could be also found in the public sphere and included in the heteronormative structures and patriarchal institutions of the family. Some theorists often try to argue and explain how non-conforming sexualities' aim should not be to conform to institutions, such as marriage. As a consequence, homonormativity entails as Lisa Duggan provided as a definition that actually some queer sexualities are not acting in contrast and to overthrow the heteronormative society, but rather are sustaining such institutions to the point of depoliticising gay culture by anchoring it to domesticity and consumption.⁷¹ Additionally, it is a condition not found only in the institution of marriage, but as also in other spheres, for instance military. In some cases, it is a way through which the queer community tries to enjoy equal rights and access to domestic privacy for once. Homonormativity, however, advances a demobilised LGBTQ+ constituency that, nonetheless, was able to actually improve the protection of their own non-conforming families. Despite the favourable outcome, conforming to heteronormative institutions would imply that those who do not accept to adhere to these narratives are further marginalised and therefore unintelligible in front of the courts. In general, conforming to heteronormative conditions through homonormativity equals to have access to certain rights without necessarily undermining their structural inequalities.⁷²

1.2.1 How Heteronormativity is Naturalised

Heterosexuality is perceived as compulsory and standardised in institutions, in particular in the role of marriage and family. Hence, heterosexuality shall be considered the elemental form of human association, which is related to intergender relationships.⁷³ The

⁶⁹*Ibidem.*

⁷⁰Kapur, op. cit., p.147.

⁷¹Otto, op. cit., p.201.

⁷²See subchapter 2.2.3 for a more in depth explanation of how homonormativity is employed in society.

⁷³Warner through this passage provides the notion of heteronormativity as associated with Wittig's social construct idea, where living in a society entails living as heterosexual. Ingraham notes further that as heterosexuality, whiteness is conceived in the same extent as product of the dominant universalisation of

family is to be considered as standard in a society in which reproduction is necessary. Heteronormativity attempts to embody the idea that gender conformity and heterosexual align perfectly as its privilege, considering women and men as heterosexual and cisgender, while exaggerating both the femininity and masculinity of its presentations. Heteronormativity to be naturalised needs to adhere completely to these norms, while restricting and marginalising those who actually violate these.⁷⁴

To understand heterosexuality as normative one has to proceed with the illusory relationship and romanticisation of things, while refusing to acknowledge the uncomfortable aspects of it. Heterosexuality, therefore, does not restrict just the limits of gender, but as well defines people and spaces, where individuals are expected to perform in a certain way. Reproduction is conceived universally in a heteronormative way, because it is expected to involve heterosexual intercourse. As a result of the process, every other form of non-heterosexual unions has been criticised, particularly parenting that is not recognised as nuclear heterosexual marriage would harm the child, resulting in the destabilisation of culture and in the destruction of the human condition.⁷⁵

Heteronormativity is omnipresent, even in the system of binary-normativity, where the concept of identity (“who we are”) and the desire (“whom we want to be with”) (Butler 2004) is subjected to four elements – **sex dyadism, gender binarism, gender essentialism, and cisnormativity**.⁷⁶ The assumption that in nature there are two genders, where the concept of gender reflects the biological sex of the individual, and attraction is only possible if aimed at the opposite (biological) sex, is well-endowed within the cultural, legal, and institutional practices. Important is to highlight that both binary-normativity and heteronormativity, which are both the system and the component of it, result in the exercise and employment of compulsory heterosexuality.⁷⁷

Gender binarism allows heterosexuality to flourish perfectly by considering that heterosexual individuals will rely their gender on the biological sex, recognising therefore their normality. In comparison, gender non-conforming queers are easily identifiable and distinguishable based also on their performativity.⁷⁸ Cisgender men will rely on their

society (Ingraham, C. 2002. *Heterosexuality: It's Just Not Natural!* in Richardson & Seidman *Handbook of Lesbian and Gay Studies*, 73-82. London: Sage Publications. p. 75).

⁷⁴Pollit et al. 2021. ‘Heteronormativity in the Lives of Lesbian, Gay, Bisexual and Queer Young People’, *Journal of Homosexuality*, 68(3), p.523.

⁷⁵Butler, 2004. *Undoing Gender*. New York: Routledge. p.14

⁷⁶*Ibidem*.

⁷⁷Gilleri, 2024. *Sex, Gender and International Human Rights Law: Contesting Binaries*. New York: Routledge. p.77.

⁷⁸Butler, op. cit., p.209.

masculinity, while non-heterosexual men tend to rely more on the other end of the spectrum, femininity, which disclose easily their sexual orientation. Unless, the individual is able to overcome such limits and is able to “pass” as heterosexual

1.2.2 Heterosexual/Homosexual Binary briefly Explained

The aim of the heteronormative society is to establish a categorisation in which each natural person is according to the heterosexual/homosexual binary, leading to a hierarchical order in which the homosexual individual is inserted in the “wrong/bad” category.⁷⁹ Heteronormativity entails that a normalised regime perceives each individual as conforming to a sexual imperative and monormative. Moreover, involving kinships of ideal intimate relationship and repronormativity is to be considered in its relations to reproduction.⁸⁰ Lastly, cisnormativity reveals that heterosexual culture assumes that everyone is cissexual, and, therefore, limiting and marginalising trans-individuals. The binarism of heterosexuality/homosexuality therefore circumscribes within the heteronormative society a limited sexual orientation and all other non-conforming ones are erased.

Heterosexuality, in general, appears as the norm, however, queer theorists often highlight that without homosexuality, there would be no norm sexuality. Nonetheless, as mentioned in the previous subchapter, the binarism heterosexuality/homosexuality could be translated into norm/other dyad.⁸¹ In fact, no matter the binarism the aim is to construct a system in which the norms apply to all, not just some individuals.⁸² Heterosexuality was just another way to ensure a hierarchical order in which the homosexual was considered inferior, but in order to sustain such order it needs to involve it. For this reason, heterosexuality is no longer considered as a monolithic entity. Yet the binarism of heterosexuality/homosexuality is undergoing a multitude of challenges, wherein the normativity and naturalness of both have been challenged.⁸³

The heterosexual/homosexual as a part of the heteronormativity structure is legitimised by the gay identity construction that allows it to rely still on its dominant sexual

⁷⁹Gonzalez-Salzberg, op. cit., p.17.

⁸⁰*Ivi*, p.96.

⁸¹Gonzalez-Saltzberg highlights the complexity of sexualities, considering that heterosexuality has been coined to be established as the norm, therefore, it is inevitable that homosexuality is also conceived to represent the other. Additionally, since both are intelligible only when the other is standing, it creates a interconnection between the two (Gonzalez-Saltzberg, op. cit., p.79).

⁸²Richardson & Seidman, op. cit., p.4.

⁸³Roseneil, op. cit., p.33.

code. Thereby, when the binarism is invoked, it is evident that both are involved to the point they are assuming hierarchical forms. Meaning that identifying a gay subject would just reproduce such a stance, since when one is invoked the other comes afterward.

1.2.3 Heteronormativity is an issue in Queer Theory

Heteronormativity considers the heterosexual individual as the subject of their norms, as a consequence, it would create not only a hierarchical distinction between individuals, but also in the sphere of human rights and human dignity. Notably, heterosexual subjects would still remain subject to international human rights as well as within the protection of family rights, where the heterosexual family is the nuclear one. The issue here lies in the role of compulsory heterosexuality, where international law norms are to be considered and interpreted in their heterosexual matrix. It operates in a mode of regulation of identities and cultural as well as social possibilities. Heteronormativity is to be denounced because it does not only emphasise the correct existence of the traditional and nuclear family, but as well punishes and pushes homosexuality toward the margins.

Queer will criticise heteronormativity in society for its role in assuming that what is non-conforming to binarism of gender and the nuclear family will immediately be considered inferior. Additionally, beyond the presumption, heteronormativity will bathe in their privilege compared to every other “deviant” form of gender expression and sexuality.⁸⁴ Heteronormativity’s role within the family laws is depriving women of their own individual rights and independence, once marriage has been established. The nuclear family has been constructed on the model of legitimate sexuality, to favour reproduction.⁸⁵ Femininity is often associated with the female body expected to be natural property and could be verified within the normative framework.

The term’s emergence could be aligned with the articulation and attempts of the queer community to demonstrate their oppression by also using Rich (1980), as cited by Marchia and Sommer, the notion of compulsory heterosexuality.⁸⁶ As Seidman theorised heterosexuality is built on “exclusion, repression and repudiation” of homosexuality.⁸⁷ It is demonstrated that the privileged, even though advanced and highlighted by different

⁸⁴Pollit, et al., op. cit., p.522.

⁸⁵Foucault, *The History of Sexuality*, p.3.

⁸⁶Marchia, & Sommer, 2019. ‘(Re)defining Heteronormativity’, *Sexualities*, 23(3), p.269.

⁸⁷Ivi, p.274.

scholars, is not enough to keep heteronormative as dominant. Social oppression is the actual pervasive force allowing compulsory heterosexuality to maintain such hierarchies in society.

Dealing with heteronormativity means shifting clearly from the margins of society, where women and homosexuals are supposed to be, towards the center of society, where men and heterosexuals are, allowing the system to still assume that gender and biological sex equate the same, but each day heteronormativity is actually being challenged by the sex/gender/sexuality system.⁸⁸

1.2.4 Heteronormativity threatened by Queer Community

The patriarchal structure of society has been slowly but surely being threatened by the increase of the role of queer politics, in which the process of individualisation and detraditionalisation has led to the development of new understanding and expectations of the heterosexual family. Hence, restricting the lives of the queer community to the mere heterosexual norm would embrace the minimalisation of its complexity. Thus, the queer community tends to actually contest these boundaries implemented by the society to question the institutions of marriage and family. Kath Weston, cited by Judith Butler in *Undoing Gender* (2004), has provided another perspective on the concept of kinship that goes beyond the heteronormative institutions of marriage, indeed lesbian and gay non-marital relations are the one that emerges outside of it and through the concept of “found family”.⁸⁹ Some scholars try to confine the concept of kinship and its structure in any case and arrangements of how it appears to heterosexuality.⁹⁰ There are cases of LGBTQ+ parents who resist heteronormativity within their family can be registered, even if the only aspect they withstand is the concept of gender and respect of such.⁹¹ Since heteronormative socialisation needs to survive and succeed, the international community must feel the pressure to maintain its privileged stance, while stigmatising those non-conforming. Despite

⁸⁸Schilt & Westbrook, 2009. ‘Doing Gender, Doing Heteronormativity: “Gender Normals”, Transgender People and the Social Maintenance of Heterosexuality’, *Gender and Society*, 23(4), p.441.

⁸⁹Butler, *Undoing Gender*, op. cit., p.103.

⁹⁰The notion of kinship in association with heterosexuality resides in the rights of founding a family, in the nuclear and heterosexual extension of it. Not only it is essential to state-building projects, but also it prevents non-heterosexual couples to access to reproductive technologies. It is fairly common in contemporary society to impose newly restrictions on innovative technologies to prevent principally queer couples to access to their right to found a family (Otto, op. cit., pp.240-247).

⁹¹Averett discusses the complexity of queering family in her essay. It is clear that in a heteronormative society, the right to raise children should be exposed only to heterosexual parents. Parenting is, often, interlinked to gender conformity and heterosexuality. LGBTQ+ parents due to social pressure often conform to these norms, however, some do actually resist to this binary norms (Averett, 2016. ‘The Gender Buffet: LGBTQ Parents Resisting Heteronormativity’, *Gender and Society*, vol.30 no.2., p.190).

their attempts, such impositions would lead sexual minorities to challenge such restrictions to the point of changing different parts of their lives.

Within heteronormativity lies homophobia, which is legitimised by the fear of lesbian and gay people overthrowing the system that was very well-thought within Western countries. Such homophobic stances are to be perceived in the discrimination of sexual minorities in institutions, in particular family and religious sites, but not to forget the law and state. The inclusion of such characters in heterosexual relationships would lead to the perception of a threat that would cause an inversion of roles, whereas marginalising minorities by denying the same privileges would avoid this outcome. The acts of heteronormativity are legitimised by the discrimination of what is not conforming to gender, sexuality, and lived experiences.⁹²

1.3 The derogatory term Queer becoming a symbol of Pride

1.3.1 Queer as a definition and its critiques

The term Queer has been interpreted in different ways and by many, but before providing the different (yet similar) definitions I believe it is important to cite the one from the *Queer Nation Manifesto* of 1990:

Being queer is not about a right to privacy; it is about the freedom to be public, to just be who we are. It means everyday fighting oppression; homophobia, racism, misogyny, the bigotry of religious hypocrites, and our own self-hatred. (We have been carefully taught to hate ourselves.) [...] Being queer means leading a different sort of life. It's not about the mainstream, profit-margins, patriotism, patriarchy or being assimilated. It's not about executive directors, privilege and elitism.

With this being said, Otto defines queer by its curiosity about what it would entail as the conceptual underpinning of international law.⁹³ There is in general a difference between LGBTQ+ and queer: where the former is thought to indicate specific and fixed identities,

⁹²Robinson, op. cit., p.2.

⁹³Otto, op. cit., p.2.

and the latter, on the other hand, is thought to be a project meant to criticise human rights advocacy globally and locally.⁹⁴

“Queer” before the 1990s was used as a discriminatory term directed to the community, *de facto* it is a term to ridicule gay men and lesbians. Nonetheless, the community decided it was due to take a stance and reappropriate what was once theirs. It is a cry and rebellion against the heteronormative society and the issue adorned with the concept of assimilation that was attributed to the community. Additionally, *queer* is the perfect term on the merits of inclusivity, whereas lesbians and gay are very limiting: queer is genderless, fluid, and is associated with the liberation and freedom of being out.⁹⁵ Some scholars might even say that queer is a radical political stance and has its fair share of exclusion, which is to be dealt with in consideration of intersectionality. Though, queer has the aim to argue and question the normativity of society while avoiding the process of reinforcing the hierarchical and dominant imposition of the heteronormative society.⁹⁶

Queer might even mean everything that is outside of normality, the *Other* (Foucault, 1976), the *abnormal*, as opposed to the majority and dominant population.⁹⁷ It is not about following the mainstream, it is to discover their own identity, while fighting against the hetero(exuals). Queer also means community. Some actually believe it is impossible to separate queer from its history, therefore with the term will always come its negative conception and will never be fully free.

By etymology, the term Queer derives from *torqueo* (twist, bend, torment) in Latin and *quer* (transversal, oblique, diagonal) in Germanic, which afterward has been translated into English to preserve its original meaning (*twisted, odd, strange, faggot* and *deviant*). Therefore, queer is the epitome of everything that deviates from the **straight**, which clearly is uncrooked, thus heterosexual and normalcy.⁹⁸

There are some individuals who have difficulties in accepting ‘queer’ as a term to represent the community. Accordingly, there are a multitude of reasons, for instance, some still misunderstand its aim or are entirely not used to identify themselves as any other term in the place of LGBT acronym. It should be considered as a term aimed to cause curiosity and cause reactionary stance; it is a fight against an opposing regime towards each individual. Queer could be a term that helps in the establishment of one’s identity while avoiding

⁹⁴Kapur, op. cit., p.132.

⁹⁵De Leo, op. cit., p.218.

⁹⁶Otto, op. cit., p.5.

⁹⁷Richardson & Seidman, op. cit., p.1.

⁹⁸Gillieri, op. cit., p.17.

stigmatisation associated with other sexual labels. In general, labels are perceived as necessary and essential to one's selfhood, in particular in Western society.⁹⁹ Queer should be perceived however as not a mere label, but rather a label that is revolutionary, which means taking a stance in universal human rights and intersectional meaningful human society fights in not only sexuality but as well in race, class and gender.¹⁰⁰

Queer is often mistakenly associated and tied to privilege, however, making this type of claim would overlook the complexity of its historical nuances, for instance, factors like gender, ethnicity, and class.¹⁰¹ It is universal, but not oppressive as heterosexuality could be in its position. It is a movement and a statement. Some scholars actually believe that queer is not to be used interchangeably with lesbian/gay sexualities, as well as to consider and involve intersectionality stances in its metaphoric epistemological position. Nonetheless, it is a term associated with freedom of expression, thus queerness defines itself on the basis of what natural persons identify with. Queer, in fact, could be thousands of possibilities, that often overlap or opposes, related to anyone's gender and sexuality. The most important aspect, however, is to maintain the centrality of gayness and its objectives of resisting heteronormative society, while also providing the concept of queer performativity.

1.3.2 The concept of the Closet in the Queer community

As beautiful as the queer term could be, in the community, there is a process to be considered and respected: **coming out of the closet**. 'Coming out' discourse is fundamental and empowering for the community, in particular considering the importance in nowadays society. Before the 'liberation of the queer community', coming out was considered dangerous, where exposing someone's self would lead to awful repercussions for the individual.

Coming out was first acknowledged as a concept in the XIX century: queer people were considered to come out into society, which was often associated with balls in drags similar to debutante dances. It was coming out of the closet and it defined the association with the

⁹⁹Gross, 2018. Homoglobalism: The emergence of global gay governance, in D. Otto Queering International Law. New York: Routledge. p.165.

¹⁰⁰Berlant & Warner, 1994. 'On the Political Implications of Using the term "Queer", as in "Queer Politics", "Queer Studies" and "Queer Pedagogy"', The Radical Teacher, vol.45. *University of Illinois Press*. p.54.

¹⁰¹Berlant & Warner, op. cit., p.55.

community, becoming a member of it alongside the common struggle and striving to fight for.¹⁰²

It limits the concept of the subjectivity of queer individuals in the dualism of visibility and invisibility, the latter in general is done for self-protection, in particular in a period in which the queer is criminalised and it is of risk to expose one's self to such conditions (Kapur, 2018, p.140). Thus, considering coming out as expected and naturalised would consolidate a possible repudiation of the variety of the community, and its genealogies and narrow it to such a simplified concept. The concept of coming out is rooted in the epistemology of the closet and the modern heterosexual/homosexual binary.¹⁰³

In general, the phrase 'coming out' as its literal meaning would be 'to exit something'. This is often metaphorically linked to 'the closet', which would be a place alluding to a secluded and private space, wherein someone could hide and shield its individual's self. It is a rejection of the negative definitions that society has confined homosexuals into, coming out, therefore, is a sign of rebellion.¹⁰⁴ It is freeing for an individual to expose oneself to such discrimination. It is prideful.

It means speaking on one's desire, it is politically meaningful to publicly display someone's vulnerabilities and from invisible, to visible.¹⁰⁵ Initially, there were some significant struggles to assuring that queer individuals were able to fully exercise their rights to self-expression, not only within a private sphere but a public one as well. However, in cases such as *Bączkowski and others v. Poland* (2007), the European Court of Human Rights lawfully recognised that homosexuality is not merely a private matter, but also a public one, and thus deserving of protection under the Convention.¹⁰⁶

For many it is not a feature of their lives, for others it is fundamental, it is still rewarding to know that there are people already out that create a safe space for others.¹⁰⁷ Sedgwick (1990) considers coming out as a matter of crystallising intuitions or convictions that were already present in someone's own individuality. In other cases, someone is accused of being in a 'glass closet', a term that licenses insult and potentially enables the exploitation of the asymmetrical relations of power dynamics in a relationship. Butler (1990) associates the closet with the creation of a new space, the closet to be in, and the other space where

¹⁰²De Leo, op. cit., p.83.

¹⁰³Sedgwick, *Epistemology of the Closet*, op. cit., p.72.

¹⁰⁴Gonzalez-Salzberg, op. cit., p.68.

¹⁰⁵Butler, *Undoing Gender*, op. cit., p.18.

¹⁰⁶Gonzalez-Salzberg, op. cit., p.69.

¹⁰⁷Sedgwick, op. cit., p.68.

one's out of it. To know what it is like to be out means to know what it means being inside one, it creates a place of freedom. "Coming out" is also a process through which it is possible to set an example, a contagious one, that allows the public discourse to tolerate and welcome such a transition of one's identity.

1.3.3 What does it mean to be Queer?

Queer means transgressions, but also it means gaining its own place within society without declining someone's individuality and identity to the limitations of heteronormativity. In the 1990s, it was about reclaiming and finding one's footing toward the recognition that queer community deserved. Through queerness, there was an establishment of groups in which humans could "found their family" through the concept also of "Mother" as an allegory of the traditional family.¹⁰⁸ Queer could capture perfectly the sexual/gendered complexities of one's identity and non-normative sexualities and gender expressions

Queerness is a gesture of rebellion against the invisibility and the closet people had been segregated into, it constitutes any kind of activism that fights against the dominant notion of the natural and nurturer society. Both 'queer' and 'lesbian/gay' function as social identities, however, 'queer' holds a significant role in the political realm, to such a level that it poses an objective to forge a more inclusive international community through integration. Although 'queer' is essential to oppose to the notion of a 'good gay citizen', whose intention is to establish and keep boundaries between public and private domains, it often overlooks the expenses of being assimilated within social structures.¹⁰⁹ To compare gay and lesbian identities to queer ones, it is ideal to specify how the former ones have increasingly acquired a national dimension in the fight for civil rights, though loosening the sight and ability to think of sexuality as global; while the latter provides a framework challenging the politics of identity and posing questions on the discourses left undiscovered by the lesbian/gay discourses.

The "scandalousness" of queerness is a clear reminder of its power within society, through its disruptive nature is able to challenge norms and expose the perception of sexual

¹⁰⁸Warner, 2004. 'Introduction', in *Fear of a Queer Planet: Queer Politics and Social Theory*. Minneapolis: University of Minnesota Press. xviii.

¹⁰⁹Berlant & Warner, op. cit., p.53.

minorities in a heteronormative society. Queer should not be considered as divisive, instead, it is crucial to acknowledge its diversity within the community that allows a wide range of political, social, economic, generational and etc. to be represented.¹¹⁰ Even though historically the term queer was weaponised to marginalise and immobilise all gay men by also politicising discourses of normalcy and normative gender, it is now emblematic of queer to uncover the cracks in the heteronormative façade. The homosexual desire does not align directly with a queer identity, rather queer serves as a conscious challenge to the norms that govern societal structures. Being queer is intertwined with not only the knowledge of its stigmatisation within society, but also the constructs through which this stigma is associated including gender, family, individual freedom, state power, public discourse, consumption, and desire, [...] racial and national ideologies, class identity, truth and trust, censorship, intimate life and social expressions, violence, health care [...].¹¹¹ To be queer is to resist and confront each one of these issues actively, while also challenging the conforming notions of gender differences.

Being queer, as already illustrated earlier, co-occur with a multitude of struggles, which often intersect with those of other identity movements and differ in significant ways, even though they are intermingled. Queerness challenges its relation to liberal logic of choice, agency, and moral discourses on leadership and community, creating tensions in daily life and civil rights context.¹¹²

Being queer means being defined as a form of ‘perverse difference’, therefore queerness can be understood as a postmodern sexual pluralism or a radical deconstruction of traditional identity politics.¹¹³ Queerness culture circumscribes any statement and expression of resistance or contrast to heteronormativity. According to Duggan, as cited by Walters, the notion of a ‘queer community’ focuses on the establishment of a collectivity identity not determined only by sexual partnerships but unified on the shared disagreement on the dominant heteronormative structure of society.¹¹⁴ Queer optimism is to dethrone and dismantle gender constructions, while also welcoming a deeper understanding and articulations of ‘otherness’ beyond the gender binarism. Queerness can therefore challenge gender hegemony, thus allowing a broader articulation of its theoretical and political space

¹¹⁰Berlant & Warner, op. cit., p.55.

¹¹¹*Ibidem.*

¹¹²Walters, 1996. ‘From Here to Queer: Radical Feminism, Postmodernism and the Lesbian Menace (Why Can’t Women Be More Like a Fag?)’, *Signs*, 21(4), p.835.

¹¹³*Ibidem.*

¹¹⁴Walters, op. cit., p.839.

to multiplicity and intersectionality. To conclude, the term queer is still a risk to be used as a unifying umbrella term, because it still has some issues on inclusivity of queer individuals across ethnicities and cultures.

1.4 The importance of Gender and Sexuality and its separation

The binarism of sex/gender structure is one of the most discussed theories in queer theory, and often feminism disagrees with its composition. Feminists, in fact, critique the structure based on its performative social construction rather than its biological role, which limits and demonises gender minorities.¹¹⁵

Gender is treated analytically and as a demonstration of the power relations Foucault denounces, which would entail the intersections with other fields of interest (class, race, nation).¹¹⁶ In general, in International Law it is sexuality that serves as principle of the foundation of norms, on the contrary gender is considered as ‘deviance’ which legitimises and sustains the neoliberal legal order of socially and economically unjust systems.¹¹⁷

It is difficult to establish a separate system in a society that is well-endowed with the concept of what is “natural” and what is “unnatural” based on a heteronormative construction. Heterosexuality will be enforced, nonetheless, by monogamy, the gender binary of male and female, as well as the institutions that rely on the importance of reproduction rights, marriage, and familial rights, where everything outside of it is not to be considered as natural. Criminalisation is thus normalcy within the system.

Butler as one of the most influential theorists of the queer theory actually considers both sex and gender as unnecessary in the international order, I will further provide information on their¹¹⁸ perspective in the next chapter when dealing with the theory itself. Additionally, the role of the theory of performativity, coined by Butler, provides an understanding of gender not being a free choice or of the individual.¹¹⁹ Identity is not questioned as it would have been expected to be, on the contrary it is commonly accepted to associate the concept of identity with its performative character. In general, identity is imposed by elements that are outside our conscience, for instance, the notion of homosexual identity was coined on a medical basis in which the individual was considered as inferior

¹¹⁵Otto, op cit., p.6

¹¹⁶Cynthia Enloe, cited in Otto, op. cit., p.5.

¹¹⁷Ivi, p. 6.

¹¹⁸ Judith Butler uses they/them/theirs pronouns.

¹¹⁹Gonzalez-Saltzberg, op. cit., p.15.

and abnormal. Limiting the conception of gender to the impositions of heteronormativity can undo one's personhood.¹²⁰

Speaking on gender and sexuality denotes dealing with complex concepts and constructions based on the societal organisation. Gender is not exactly something that is possessed but rather it should be understood as a condition of dispossession, a means of existing for or through another, while being dependent on it.¹²¹ Sexuality, on the other hand, is not something merely attributed with, based on one's preferences, but a condition one is disposed toward others, which could be expressed through desire.¹²² Recognising gender as something tied to the norm would be regarded as identical to limiting the concept of masculinity and femininity to normative expectations.

Amidst the establishment of queer theory, gender's definition has evolved significantly, as a consequence it has eventually been differentiated from the term 'sex'. Hence, the roles of both women and men are demonstrated as social construction and subjected to continuous evolution as well.¹²³

Binary-normative embraces four key components: sex dyadism, gender binarism, gender essentialism, and cisnormativity, to its extent also heteronormativity. Whereas, sex dyadism and gender binarism are defined by their connections to a third component: gender essentialism, which establishes a dependency between gender and sex, asserting that gender is biologically determined by sex. Gilleri explains such concept through the use of binary code, where sex (0) dictates gender (0) and sex (1) dictates gender (1). These three components are essential to gather enough information on the fourth element of the binary framework, which is the relation between sexed bodies and genders.¹²⁴

1.4.1 The social construction of Gender and Sexuality

Sex/gender structure has the power to confuse individuals and in general the legal order. By separating the two it creates instability within the system, since it conceives identity where identity means nothing outside of the heteronormative organisation of society. Gender as separated to sexuality, thus gender identity, is commonly acknowledged as the

¹²⁰Butler, *Undoing Gender*, op. cit, p.1.

¹²¹Ivi, p. 19.

¹²²Ivi, p. 33.

¹²³Ivi, p. 182.

¹²⁴Gilleri, op. cit., 75.

basis to which transgender individuals identify oneself.¹²⁵ It is imperative that gender should be imposed on anyone, in fact as a social construction everyone has one, since it has nothing to do with one's biological sex. Impossible is to limit and restrict gender expression within a binary: men and female.

The role of Queer theory is to deconstruct the structure that was heavily imposed for centuries, delinking gender from sexuality as well as delinking from everything that is normalised and naturalised within society or human rights means unavoidably envisions a utopian regime in which freedom is essential.¹²⁶ The aim of the theory is to therefore establish a new approach to sexual subjectivity based on the concept of identity within the heterosexual/homosexual binary, while protecting and avoiding homophobic tendencies.

By definition, sex is to be understood by the differences between male and female, involving biological genitalia and its functions. In comparison, gender is to be considered, instead, as molded by cultural influences, often limited to the notion of what is masculine and what is feminine and of course associated with the biological sex.¹²⁷ To support the notion of cultural impact on gender the separation between sex and gender was established, in particular, to allow the association to the anatomical reality of sex. On the contrary, some scholars actually define sex as not something to be associated with biological genitals or to be assigned at birth, but a clear cultural construct. Briefly, both sex and gender are to be recognised as socially constructed on the basis of cultural influences. The difference is to be constructed in the lack of identity, as a consequence identity is to be acknowledged as the absence of difference.¹²⁸ Individuals are either men or women by traditional views on a basis of heteronormativity, as well as either heterosexuals or homosexuals, both of these views are being challenged by queer theory where either is constructed in a cultural setting. Sex in a sex/society split is actually defined as a 'natural energy' and 'force', other than being both pre-social and anti-social, which exist outside of society as its opposition, which for the security of society needs to be controlled.¹²⁹

Sex is generally accepted at birth, prior to an individual's ability to identify themselves through gender identity. As a result, one is assigned, or in better words

¹²⁵Kapur, op. cit., p.135.

¹²⁶*Ibidem*.

¹²⁷Gonzalez-Salzber, *Sexuality and Transsexuality Under the European Convention on Human Rights: A Queer Reading of Human Rights Law*, p.14.

¹²⁸*Ivi*, p. 15.

¹²⁹Richardson & Seidman, op. cit., pp.6-7.

categorised as female at birth or male at birth, this association is often to be expected to validate someone's identity.¹³⁰

The issue with gender as being associated with binarism and its cultural construction is that there are gender identities that are outside of the margins that have been created: transgender, transsexual, and intersex subjects are the ones affected by this exclusionary stance. Additionally, intersex individuals have been pathologised and considered within medical terms of rigid binarism, however, intersexuality is the perfect example of what lies between what entails female/male genitalia. One other issue that should be considered when dealing with sex as biological is its apparent immutability, which entails the impossibility of actually undergoing for instance sex reassignment surgeries.¹³¹ Considering idealised human anatomy as associated with the structure of sex and gender interchangeably would mean deciding on what is human and what is not, based on the biological aspect of one's individuality.¹³²

Heteronormativity is still the fulcrum of any legal instruments present in international law, in particular taking into account, for instance, the European Convention on Human Rights has its flaws in the sex/gender structure. To consider it briefly, the Convention still confuses the subject of human rights as gendered persons, sex is, however, the common ground when assessing a natural person. The Convention, furthermore, has not provided a specific definition of what constitutes men and women binarism, it is for such reasons often based on arbitrary interpretations.¹³³ Commonly, international legal instruments mistakenly define a natural person based on their sex/gender, which in this case is used interchangeably and not as a separate notion. Even though both are to be considered social constructs, some are still subjugated to a certain dystopian condition. Despite the general misconception of the binarism, legal instruments approach issues of transgenderism and transsexualism differently. Considering the important role of legal institutions and their instruments, individuals based their own individuality and rights on the support to exercise self-determination with respect to their own gender.¹³⁴

¹³⁰The cisgender association of each individual, as presented in Gilleri, is not a grounding interpretation of the IACtHR. In fact, in the consideration of sex as biological, it refers to its genetic, hormonal, anatomical, and physiological characteristics, however, sex assignment is a social determination based on the perception of someone else's genitalia. It interprets *sexo* and *género* as both social construct (Gilleri, op. cit.,93-94).

¹³¹Gonzalez-Salzberg, op. cit., p.86.

¹³²Butler, *Undoing Gender*, p.4.

¹³³Gonzalez-Salzber, op. cit., p.32.

¹³⁴Butler, op. cit., p.7.

Gender is not something someone has, but it is intrinsic to one's own identity of the self. Gender is the fulcrum in which the concept of masculinity/femininity plays alongside the biological aspect of one's self (hormones, chromosomes...).¹³⁵ The association of the matrix of masculine and feminine to one's identity would mean misunderstanding and imply that gender does not align outside the binary, and is thus normative.¹³⁶ Gender is to be imagined as a shell in which the basic notions of binarism are produced and naturalised as well as demolished. It is to be perceived as the new normalcy since it would allow an increase in the inclusion of individuals, whose identities do not align with the norm. Disrupting therefore the concept of binarism would mean acknowledging the multitude and multiplicity of genders.¹³⁷ Irigaray, as cited by Butler (2004) provides another view on the role of "sex" and its separation from gender, she views sex not in a biological interpretation nor as social construct, but merely linguistic one that would exist as the divide between what is social and what is biological.

There are two views on the role of separatism between sex/gender: the first one, separates sexuality from gender, meaning that one individual's gender does not obligingly dictate its sexual practices and vice-versa, and as a consequence engaging in such practices does not automatically assign a gender to that person; the second one, actually, within queer theory argues that gender is not to be limited and reduced to the mere notion of hierarchical heterosexuality, thus any element that is taken outside of the heterosexual framework is less valuable.

Sexual hierarchies establish and consolidate gender. Contrary to beliefs, it is not heteronormativity that shapes gender, rather it is gender hierarchy that fortifies heterosexual relations. Subsequently, gender hierarchies, based on the functional concept of gender, are the ones causing the creation of gender, thus creating a circular thesis.¹³⁸ Gender, therefore, ought not to be limited to the concept of culture as sex would be to nature; rather, gender perceived as discursive is the method through which 'sexed nature' or 'natural sex' is produced and established as pre-discursive, existing before the culture as politically neutral ground surface.¹³⁹ When the cultural aspect of gender and its construct is understood by law means: gender appears to be determined and fixed to its inevitable biological foundation.¹⁴⁰

¹³⁵Gilleri, op. cit.,p. 24.

¹³⁶Butler, op. cit.,p. 42.

¹³⁷Pollit, et al., *Heteronormativity in the Lives of Lesbian, Gay, Bisexual and Queer Young People*, p.537.

¹³⁸MacKinnon, cited in Butler, op. cit., p.xii.

¹³⁹Butler, op. cit., p.10.

¹⁴⁰Butler, op. cit., p.43.

Rubin's commitment to sex and gender separation aims to uphold the ontological notion of sex, which exists before being reproduced and shaped by law, and later being transformed into gender. In order to understand such gender acquisition, it is imperative to know the order of events, based on the existence of prior and subsequent to the law.¹⁴¹ Based on Rubin's essay, *Traffic in Women* (1975), the distinction between sex and gender has to be done through radical formulation, since the individual's identity could be a shell of a multitude of genders. Therefore, if sex equals to not establish limits to the proliferation of gender, of course, gender would proceed outside the concept of binarism.¹⁴²

To conclude, considering sex and gender as social constructs would consider sex as not biological. Instead, it derives from an imaginary boundary between several amounts of sexes. It represents, therefore, a distinction between the object and its characteristics in the way it is being described. Sex is consequentially a social construction based on subjective social influences.

The distinction between sex and gender is made by anchoring the social construction of gender in a biological foundation, these definitions have preserved the dualistic m/f (male and female binary) of the natural order.¹⁴³

¹⁴¹Rubin, cited in Butler, op. cit., p.45.

¹⁴²Butler, op. cit., p.48.

¹⁴³Gillieri, op. cit., p.47.

1.4.2 Women = Sex in the Sex/Gender system

Sex/gender system has been discussed in comparison to the women's expected role within a heteronormative society, in which the mere 'pathetic' role of women is associated with male desire and fantasy.¹⁴⁴ MacKinnon highlights how the heterosexual structure in which men are understood as subordinate to women is the one that produces gender.¹⁴⁵ Additionally, based on her perspective, gender is associated with the creation of the relation between individuals, and thus emerges as the rigid form of sexualisation of inequality between men and women. Reducing women to the mere notion of sexism is done by men.

Gender recognises how, in most cases, it is women that take on multiple roles within a social life cycle, based on the necessities, concerns, and life experiences. For Irigaray, women are the "sex" not just one, women represent the sex that cannot be thought of, in which women are not merely one sex they are multiple. Wittig, in the *Straight Mind and Other Essays*, denounces the abolition of "sex" as a concept so that women can assume universal subject status.¹⁴⁶ Levi-Strauss denounces that a natural or biological female who is transformed into a subordinate "woman" with the consequence that sex is not nature or the raw as gender is to culture or the cook.¹⁴⁷

Wittig believes that "sex" is inherently female, while suggesting as a consequence that there is only one sex: the feminine. On the contrary, male figures are not the ones being 'sexed', which would entail being particular or relative, instead, males are to be considered as universal persons. For Wittig, the 'female sex', if anything, does not imply the formulation of the 'male sex', but it is a confirmation of its own existence (female sex = female sex), as Beauvoir named it as the 'circle of immanence'.¹⁴⁸ Since sex is politically and culturally interpreted on the basis of the individual's body, the distinction between sex and gender crumbles.

It would be emblematic for society to achieve the eradication and elimination of prejudices and customary practices, in which both male and female are constricted within, particularly when considering the idea of superiority and inferiority that are at the foundations of gender

¹⁴⁴Puri, 2002. Nationalism Has a Lot to Do With It! Unraveling Questions of Nationalism and Transnationalism in Lesbian/Gay Studies, in Richardson & Seidman, Handbook of Lesbian and Gay Studies. London: Sage Publications, p.435.

¹⁴⁵Butler, *Undoing Gender*, p.53.

¹⁴⁶Wittig, 1992. 'The Straight Mind', in *The Straight Mind and Other Essays*. Boston: Beacon Press. p.28.

¹⁴⁷Butler, *Gender Trouble*, p.50.

¹⁴⁸Id, *Undoing Gender*, p.154.

roles, as illustrated by Gilleri regarding the article 5 of CEDAW (Convention on the Elimination of any form of Discrimination against Women).¹⁴⁹

Important to highlight is also the role of lesbians mothers' willingness to avoid their sons becoming the typical men subjugated to hegemonic masculinity, a term coined by Connell in 1995, as something that restricts men's gender expressions. The normativity imposed on the binary of sex/gender, leads to an inevitable condition in which the women are always subjects of the male and segregated to their secondary status.¹⁵⁰

Gender specifically endangers the rights of men and women equally, as well as their ability to fully enjoy those equal rights. Simone de Beauvoir, by theorising the concept of the 'second sex', argues that one is not born a woman but becomes one, highlighting therefore the distinction and separation of sex as biological and gender as social construct.¹⁵¹

1.4.3 Critiques on the Separatism

Separatism within the structure of sex/gender plays a significant role in both feminist and queer theory, nonetheless, the pair tends to approach the concept of the distinction or relations between sex and gender differently. In fact, feminism traditionally portrays the interdependence of sex and gender as inevitable (sex = gender), while accentuating how both sex and gender serve as vectors in shaping societal order and legal systems. Traditional feminism, not considering intersectional feminism, often centers its framework around the concept of 'women', overlooking however other possible genders or sexualities. Even though some scholars advocate for a distinct separation between sexuality and gender, others on the other hand argue that sexual orientation is inevitably affected and influenced by gender identity. Nonetheless, it creates a series of problematic consequences to treat gender identity as the cause of sexual orientation, since both are to be distinguished as forms of identities that could intersect. One of the issues is how feminism perceives its own theories based merely on the concept of gender, while lesbian and gay studies are concerned with sexual orientation.

The Vatican had a fair involvement when it comes to gender and its perspective on the issue, in fact generally speaking, is one of the elements unable to separate gender from sex, because often "gender identity" for far-right entities entails homosexuality.¹⁵² Often

¹⁴⁹Gilleri, op. cit., p.85.

¹⁵⁰Averett, op. cit., p.201.

¹⁵¹Beauvoir, cited in, Mayer & McHugh. 2016. 'Part Three: Gender Identity', *The New Atlantis*, 50, p.87.

¹⁵²Butler, op. cit., p.183.

there is a misconception in which homosexuality proliferates genders, in the sense that when one comes out inevitably they cease to be part of the binarism of masculine/feminine. Homosexuality often challenges traditional norms of gender due to inherent tension within queer sexualities. Queer methodology, alongside lesbian and gay studies, favour focusing on the sexual orientation's sphere, where gender is not conceived as the center.

If gender is conceived on the basis of cultural meanings, and that the sexual bodies assume, then gender cannot be said to follow sex in any way. The sex/gender distinction suggests therefore a radical discontinuity between sexed bodies and culturally constructed genders. It is impossible to separate something when there is the presumption that there is a binary gender system, in which inevitably there is a relation between gender and sex, where gender mimics the latter. If we consider therefore that gender is independent of sex, then gender becomes an independent artifice in which an individual could attribute someone's gender based on their discretion.¹⁵³ Others might believe that sex is not immutable, and consequentially sex and gender are socially constructed. Gender, in those circumstances, would already entail sex, and the distinction created among the two is nullified.¹⁵⁴

Gender was often confused with sex, which would serve as a unifying principle and to maintain a process of heterogeneity in which the opposite sex is parallel and fulcrum of one's desire. The categorisation of sex is neither fixed nor natural, rather it is a consequence of the political purpose to classify individuals on the basis of reproductive sexuality.¹⁵⁵ It is a division to be done for the mere interest of the heteronormative and heterosexual society in which the aim is to procreate. As mentioned above, Wittig theorises sex as feminine, therefore there is nothing else outside the femininity and thus gender is built into sex. Furthermore, the distinction between sex and gender is avoidable. Butler (1990) questions the sex/gender distinction based on its generalisation, in which it seems that there is a presupposition concerning the 'body' as pre-existent. The body, which is yet to be sexed, is a passive entity already determined by cultural external sources and experiences, emphasising the importance of depicting these as external to the body. In short, as Foucault theorised, the body is inscribed within by its history and cultural influences, like a blank-canvas to be shaped.¹⁵⁶

Sex/gender are social constructs therefore neither is pre-discursive, innate, or pre-given, and there is nothing natural in the designation of sex, which is conditioned by cultural aspects.

¹⁵³Butler, *Gender Trouble*, op. cit., p.9.

¹⁵⁴*Ibidem.*

¹⁵⁵*Ibidem.*

¹⁵⁶Foucault, cited in Butler, op. cit., p.177.

Since both are social and cultural constructs there is no logical and systematic advantage to establishing a distinction between the two.¹⁵⁷ Woman and man are often confused with the notions of female and male, also in legal instruments: the binarism of woman and man is correctly (based on Butler's perspective) designated as gender, other times solely (and wrongly) associated to sex, and sometimes as both sex and gender interchangeably. Some interpretations of the dichotomy perceive sex = gender, whereas others tend to value nature and nurture, biology and culture are contrary to sex≠gender.

The dichotomism of the idea of what sex/gender or sex = gender should lie basically in the examination of the structure, whether scholars believe in the necessity of a separation or whether scholars believe that sexuality and gender are intrinsically intertwined. Rubin (1975) believes that gender/sex are intertwined because they can be found within patriarchy, but even though they seem related and the arrangement of the structure leads to such outcomes, others believe that gender and sex are not the same thing and should be distinguished.

The majority of scholarship in political science does not rely heavily on the distinction between sex, gender, and sexual orientation. The ideology of gender encompasses three intertwined but distinct components. In general, when political scientists indicate the concept of gender, they tend to merge these interconnected components: in fact, biological sex refers to the reproductive genitalia; the notion of gender refers to masculinity/femininity, and the habitual characteristics within the binarism; and sexual preference refers to sexual orientation.¹⁵⁸

Rubin, as cited by Mayer, argues that since sex and gender are social constructs, they can as a consequence be deconstructed by eliminating such limits and margins imposed on society. This solution would lead to the establishment of a genderless, but not sexless, society in which there would be a general irrelevance on the other's identity (Mayer et al., 2016, p.88).¹⁵⁹

There is in general a significant separation within the queer theory on the role of sex/gender as intertwined or as distinct concepts. The theory that sex/gender are identical phenomena is a limiting interpretation of the multitude and myriad identities that shape behaviors. Deconstructing sex in its components, would actually clarify the assumptions of unifying characteristics of sex/gender/sexual orientations (McDermott and Hatemi, 2011, p.91).¹⁶⁰

¹⁵⁷Butler, op. cit., p.156.

¹⁵⁸McDermott & Hatemi, 2011. 'Distinguishing Sex and Gender', PS: Political Science and Politics, 44(1), 90.

¹⁵⁹Mayer, op. cit., p.88.

¹⁶⁰McDermott & Hatemi, op. cit., p.91.

2. Queer Theory as a Method to Progress beyond the Heteronormativity

As illustrated in the previous chapter, 'queer' is to be perceived as an overall empowering term, which achieved important recognition not only in the sociological field, but also in the application of legal instruments. 'Queer' is, therefore, to be employed as means to dissociate and extricate from the intrinsically established normativity, which is fundamentally present in each human, political, and legal spheres. In the following chapter, the aim is to further demonstrate how 'queer' and 'queer theory' should be implemented in society and the international legal system. However, to do so the research has been done in parallelism of different fields, such as feminist theories, as well as international human rights' instruments.

Generally speaking, 'queer theory' has been coined by important theorists during the last decade of the 20th century, however, other established concepts have been interpreted as cornerstone of the theory itself. In the following section, I will present some of these specific concepts, while also providing more information on the theorists through interpretations of their works. Queer theory has gained more influence, while also creating some more critiques from the established far right movements, in particular, considering the animated debate on the 'ideology of gender' and what it implies in Western society. Overall, the first subchapter will focus on the predominant intellectual of the 90s, whose role has been impactful particularly in sociology and human rights' studies. Furthermore, the intention is to create a comprehensive framework of these notions in order to be able to acknowledge the importance of disentangling from the patriarchal and heteronormative world.

The quantity of notions and foundations of queer theory will be further illustrated in the following subchapters, in fact, the aim is to highlight other important concepts like homonationalism and homonormativity to demonstrate the pregnating role of the theory. In general, the aim of the subchapter is to acknowledge the vehicular way in which established governments and institutions are using such notions to their advantage. In addition, these will be expanded alongside the phenomenon of *pinkwashing*, which is implemented by both the United States and Israel as presented by Jasbin Puar in her works as case-study.

Parallel to queer theory, feminism could be found in each of its facets. In some circumstances, these parallel lines created between the two theories might actually meet and create perpendicular ones, where their notions or concepts are sometimes identical or actually opposed. The most discussed aspect of the post-structural theories is the importance

of implementing further intersectional concepts, such as race, gender, identity. In the third part of this chapter, the main focus will be highlighted by the role of intersectionality in establishing a more cohesive and inclusive framework in queer theory.

The last part of the chapter, instead, will focus again on the legal instruments, where the aim is to actually demonstrate why it is difficult and challenging to implement each notion to the already established legal instruments. Dianne Otto in her book *Queering International Law* has already presented the difficulty of the process, on my behalf, I will provide further insights by other scholars. During the chapter, therefore, the overall aim is to expand on the basic notions already portrayed in the previous chapter, while providing new concepts as well. The primary objective of the chapter is to complete the circle with little left to explain and illustrate, in order to proceed further in the next chapter, where more precise and specific cases will be discussed.

2.1. Foundations of Queer Theory and its Key Theorists

Queer theory, as already mentioned in the previous chapter, is rooted in the concept of ‘abnormal’, evidently its process is to be manifested in the flow of deviating from the usual course in any normal experience. In fact, scholars have been highlighting the importance of its ‘anti-normativity’ impulse,¹⁶¹ where the objective is to understand primarily what sexuality and gender entails as radicalised, estranged, and alienated from heteronormativity. However, Kapur defines its radicality as lost in the pursuit of inclusivity within the human rights field, which will further be discussed throughout the chapter.¹⁶²

The aim of this subchapter is to structure the basis of queer theory through the use of new insights and works of the key theorists of the late 90s, when queer theory bloomed. Highlighting these important works enabled a deeper study of the concepts, so that the implementation of such would be easily understood in the context of other case-studies. The key theorists’ roles of queer theory have been revolutionary, in particular, considering how emblematic the role of feminism has been instead within the legal framework of international and European institutions. Thus, the most appealing aspect of the queer theory is that each theorist has the tendency of referencing to Michel Foucault (1926-1984), a gay french philosopher and sociologist, and one of his most relevant work *History of Sexuality* (published in the 1976) has been found as foundations of the theory. The role of Foucault

¹⁶¹Kapur, *The (im)possibility of queering international human rights law*, p.143.

¹⁶²Ivi, p.132.

will be further presented in the following subchapters, however I would highlight how the objective of the work itself was to develop a theoretical framework on the role of power and sexuality. Foucault, nonetheless, was unable to see how its work has been as important for the creation of another theory. Foucault however is not the only theorist that will be discussed in this dissertation, in fact, there are a miscellaneous of important and relevant ones, whose works have been emblematic of the queer theory.

2.1.1. Understanding the core of Queer Theory

During the last few decades, queer theory has been discussed and interpreted in a multitude of nuances, however, its foundations remain unaltered. In the previous chapter, it has been illustrated the different notions that are associated with such foundations, nevertheless, there are further ones that are yet to be explained. Queer theory, briefly, highlights the most important trouble in the heteronormative society, which has to do with the creation of binary hierarchies of gender and sexuality (men/women, heterosexual/homosexual).¹⁶³ The emergence of the theory itself has been appointed in the 90s, when the term was coined by Teresa De Lauretis in 1991 in *Queer Theory: lesbian and gay sexualities*. Her objective was to denounce the necessity of progress beyond the simple association of being homosexual with concepts of transgression, pathology or ‘life-style’, while highlighting the importance of demanding for equality for once and representation.¹⁶⁴ Therefore, it is in her perspective necessary to establish a neat separation also between ‘queer’ and ‘lesbian and gay’, in particular in the decision of using ‘gay’ or ‘homosexual’ as an umbrella term for the community in general. De Lauretis, in her essay, further highlights how limiting and marginalising is using ‘homosexual’ as a term for lesbians, whose interest is not to be associated with the male counterpart.¹⁶⁵ Overall, queer theory was coined to avoid all the different distinctions to be considered when dealing with the community, since ‘queer’ is a perfect term and difficult to associate with the concept of gender, instead it transcends it. In particular, queer could be the perfect term to distantiate from the dominant, heterosexist categories of gender and for lesbian in queer theory is a way to establish a ‘system of representation’, as well as a possibility to establish new intersectional approaches

¹⁶³Gross, 2018. *Homoglobalism: The emergence of global gay governance*, p.166.

¹⁶⁴De Lauretis, 1991. *Queer Theory: Lesbian and Gay Sexualities. An Introduction*. Differences: A Journal of Feminist Cultural Studies, 3(2), p.iii.

¹⁶⁵Ivi, p.v.

to enlarge the inclusivity desired. Language is, thus, an important vehicle of knowledge and inclusivity that sometimes in society lacks.

One of the debated notions in queer theory is the concept and construct of identity, in particular related to the 'homosexual identity' and 'gender identity'. Generally, in queer theory, identities are perceived as construction related to the dynamic interactions of cultures.¹⁶⁶ When establishing a homosexual identity construct, as already illustrated, is to establish as well a heterosexual one, where identity is to be understood as the absence of difference. Therefore, in order for an identity to emerge and prevail, thus be intelligible, the other one (opposite) must exist as well.¹⁶⁷ For this reason, queer theory tends to be a critique of identity, because of its arbitrary and fictional nature and its objective is to actually deconstruct this naturalised system. Considering that often identity is coined within the binary system of opposites, queer theory must value the deconstructed and deviant form of identity that is impossible to comprehend within a heteronormative binary (men/women, heterosexual/homosexual). However, sexual identity should not be separated from other identities of the self, such as race, class, nationality, gender, or age, especially when the general identity is expected to be equal to the white, male, cis and heterosexual or homosexual. When considering these different identities, the hegemonic and hierarchical figure of the privileged male identity often comes to mind first. Homosexual identities are a constructed product of the 'social environment' and according to the performativity theory theorised by Butler, the queer approach to identity is designed by the fluid and performative character of identity. Some scholars believe that the concept of homosexual identity was coined by the medical field to categorise the community as abnormal.¹⁶⁸ Therefore, queer theory must be understood as a rejection of the exclusionary and regulatory nature of the binary identity, and in particular, the idea of a unified homosexual identity, while retaining the importance of denouncing the instability of the structured dynamic binary of heterosexual/homosexual. An interesting element that has been highlighted by Roseneil in Richardson and Seidman is the struggle of queer theory to engage in 'autocritique' tendencies toward the individual and collective, which creates a further fracture within the system where homo/lesbian/gay identities are being produced.¹⁶⁹

Nonetheless the identity debate has been a heated one within the lesbian and gay legal scholarships, because of its close relation to the binary and its limitations on the

¹⁶⁶ Gonzalez-Salzberg, op. cit., p.17.

¹⁶⁷ *Ibidem*.

¹⁶⁸ Richardson & Seidman, Introduction in *Handbook of Lesbian and Gay Studies*. p.5.

¹⁶⁹ Roseneil, *The Heterosexual/Homosexual Binary: Past, Present and Future*, p.33.

expression of the self. The lesbian and gay identity has been manifested through the expression of nature or nurture, that essentially is the consequence of the societal environment intersected with culture and other influential conditions.¹⁷⁰ To sum up the concept of identity and queer theory, the categories of identity are developed as opposed to the hegemonic one, which is the 'normal' and 'standard' one, where the other is marginalised since lacking the basic requirements of the central identity.¹⁷¹ These conditions are often criticised, because of its importance usage within the human rights field, however will be demonstrated in the next few chapters.

The concept of 'passing' has been another plenty discussed topic throughout queer theory: the notion itself is limited to the appearance within the binaries, in particular sex and gender ones. While 'passing' has different meanings that are also associated with ethnicity, related to queerness is the ability of being associated with the gender in the binary lens as an authentic member of the determined social identity-group.¹⁷² Generally, 'passing' is a term used within the transgender community, where a trans-person (whether ftm or mtf) is capable of presenting successfully as the gender they transitioned into. Such a notion had a fair amount of repercussions within the community, because of 'inauthentic' or 'false claims'.¹⁷³ Scholars in queer theory field have been highlighting that passing has been identified as assumptions that are closely related to essentialism, therefore strictly conveyed by heteronormativity. While 'passing' is a strategic utensil in relation to social stigma, it has its fair share of responsibility. Connell, as mentioned by Pfeffer, has highlighted how 'passing' is recognised as a precise framework that collects the different juxtapositions of one's self identity.¹⁷⁴ 'Passing', therefore, means establishing oneself identity within the binarism, thus, limited within the categorisation of gender. Identity, therefore, within queer theory is perceived as fluid, nonetheless, it is being often criticised by different queer theorists because of its close relations to the centrality of heteronormative categorised systems, which is actually what queer theory aims to deconstruct.

¹⁷⁰Moran, 2002. Lesbian and Gay Bodies of Law, in Richardson & Seidman Handbook of Lesbian and Gay Studies, 291-312. London: Sage Publications, p.300.

¹⁷¹Gilleri, *Sex, Gender and International Human Rights Law: Contesting Binaries*, p.14.

¹⁷²Pfeffer, 2014. "I don't like passing as a straight woman": Queer negotiations on identity and social group membership. *American Journal of Sociology*, 120(1), p.3.

¹⁷³Ivi, p.4.

¹⁷⁴Connell 2009, cited in Pfeffer, op. cit., p.5.

2.1.2. The Patriarchal Hegemonic Masculinity as denounced by Queer Theory

Queer theory as parallel to feminism denounces the impactful issue of both patriarchy and the masculine domination in the universal system. In fact, both feminist and queer theories are involved in the subversion of the male-dominated society, in particular feminism focused its strength in denouncing the oppressing circumstances women have to experience each day. Some scholars argue that ‘universal patriarchy’ fails to recon the unacknowledgement of gender oppression in cultural contexts.¹⁷⁵ Hegemonic masculinity has permeated different fields of society, it entails the centrality of masculine attributes, such as phallogocentrism and phallogocentrism.¹⁷⁶ It is another means through which heteronormativity performs within society, thus this is the reason why hegemonic masculinity is denounced as well as its absolute association with the male identity domination within a particular society. Gilleri has demonstrated through a precise study the multitude of equations in society, when she presents hegemonic masculinity she provides a definition of it through a formula: the dominative formula $[(m_s + m_i) > f]$ illustrates how the ‘systemic $[m_s]$ ’ is combined with the ‘subjective’ $[m_i]$ in comparison to the role of women, while also highlighting how constructed masculinity is deeply rooted within the system and in its acts within an individual.¹⁷⁷

Interestingly hegemonic masculinity is embedded in society not only in comparison to the role of women or other intersectional minorities, but also in relation to other men. In fact, it works also in oppressing natural actions related to the vulnerability of the individuals beyond the simple binarism established by society. It is aggression and it is patriarchal, it is often therefore associated with the powerful role that has been provided by society. It remains oddly essentialist how often hegemonic masculinity is perceived as related to the male figure that is predominant on others, but not to be forgotten is how it also establishes a hierarchy of identities.¹⁷⁸ It is, in fact, unavoidable the consequences of such conditions to other marginalised groups, in particular where identity is central. To consider is also how masculinity within the queer community is not obligately associated with the male figure, but has been connected to other expressions and performative of the gender. Thus, it is a consequence of the heteronormative imposed nuances that men equals dominant hegemonic

¹⁷⁵Butler, *Gender Trouble*, p.5.

¹⁷⁶Irigaray, cited by Butler, op. cit., p.26.

¹⁷⁷Gilleri, op.cit., 105.

¹⁷⁸Ivi, p. 21.

masculinity, therefore what is found outside of such a sphere would actually coincide with 'femininity' mistakenly. There are a multitude of identities established within society, hence acknowledging the impactful role of hegemonic masculinity would equal to limiting their recognition and alienation in relation to the generated hierarchy.

Hegemonic masculinity is often associated with gender and its construct, in fact, the predominant aspect of it is the role that men achieve in a society. Men are subjugated to the patriarchal ideals and expectations, often limiting the expression of the fluidity through which both gender and sexuality could be explored. Male figures tend to avoid progress outside the structure that society has created for them, for such reasons men tend to perceive women and queer identities as inferior, as well as other intersectional fields, such as ethnicity. As a consequence, such hegemonic tendencies are often manifested through aggression and violence in their acts, whether misogynist ones, homophobic ones or racist ones. Alongside the definition and concept of heteronormativity, hegemonic masculinity has to be highlighted as the means through which the former is presented.

2.1.3. The founders of the Queer Theory: Michel Foucault and Judith Butler

Queer theory has a fair amount of theorists, nonetheless there are few that dedicated their expertise and devotion to it. Michel Foucault is an exception, considering that, as already mentioned, his work has been used as foundation of the theory itself, even though queer theory was yet to be developed within the lesbian and gay politics during those years. On the other hand, Judith Butler has devoted their knowledge for decades to the theory and has been acknowledged for their expertise within the queer theory field. In this following subchapter, the objective is provided a summary of the predominant notions provided by these two theorists, afterwards other queer theorists will be illustrated for their involvement within the sociological sphere of the theory.

Michel Foucault in *History of Sexuality* has provided a deep understanding of the relations of different branches to sexuality, in particular volume 1. Some of the notions already mentioned in chapter one will be further analysed here, while using different interpretations of his works by other relevant scholars. Foucault proposes the centrality of sodomy within society, in particular, integrated within the dominant and hegemonic masculine culture, which established a hierarchical order based on the statuses of the ancien

régime.¹⁷⁹ Sexuality was, therefore, often associated with phallocentrism, which explained the role of women as consequence, in particular considering it as not subject of the hierarchical order and limiting it to reproduction. It is clearly established through a binarism that still explains the difference of genders, additionally these differences are further highlighted by the role of genitals and its quality.

As hinted already, Foucault focuses also on the relations of sexuality and power: sex is prohibited and therefore, is being repressed, within the regime of power-knowledge-pleasure that sustains the regime of sexuality.¹⁸⁰ In general, when considering sex and power it refers to the role of governments as well, which are the ones actually imposing such restrictions and limits through the establishment of instruments such as censorship or imposing restricting obligations on reproduction. For such reasons, sodomy was perceived as perverted, since its final product is not systematically related to the normal production of power, which entails the privileged, heterosexual and procreative couple. Thus, sexuality was medicalised and criminalised, while power operated instead as a mechanism of attraction of pleasure.¹⁸¹ ‘Scientia sexualis’ is meant to explain civilisation through the truth of sex, where knowledge in the form of biology, physiology, and psychology are being used to explain the ‘homosexual body’ and ‘hysterical woman’ in relation to power.¹⁸² Power is to be perceived as omnipresent in society, either way it is emancipatory to the projects that actually engage with it rather than opposing it.¹⁸³ In fact, in *Split Decision*, it has been highlighted that strategy, struggles and practices of freedom are not only opposed to power but intrinsically part of it.¹⁸⁴

Law of desire and repression of instincts are at the foundation of the representation of power that actually is the promise of liberation, in which sexual human beings are trapped by the power that holds desire. Power and sex are in a negative relation, where sex and pleasure are manifested and power is the one rejecting their manifestation. Because of power, sex is being placed in a binary system of licit and illicit, and as a consequence all the subjects are subjugated to this dichotomism. Being liberated from these conditions means breaking free from the theoretical privilege of law and sovereignty.¹⁸⁵ Theory of repression

¹⁷⁹Foucault, *The History of Sexuality*, p.37.

¹⁸⁰Ivi, p.11.

¹⁸¹Ivi, p. 45.

¹⁸²Weber, 2016. *Queer International Relations: Sovereignty, Sexuality and Will to Knowledge*. New York: Oxford University Press, p.25.

¹⁸³Halley, *Split Decisions: How and Why to Take a Break from Feminism*, p.130.

¹⁸⁴Ivi, p. 131.

¹⁸⁵Foucault, op. cit., p.83.

justifies authoritarianism and constraining influence by postulating that all sexuality must be subjected to the law.¹⁸⁶ Foucault unaware has provided the necessary instructions to analyse modern sexuality, while also restricting it to the normative framework of society. Foucault in volume 1 provides an overall interpretation of centuries of sexual experiences, declining a linear discourse of the relation between power and sex, in relation to also the concept of private and public matter. It was, in fact, not a public interest until it became one, by the imposition of power. Coercion and knowledge are, therefore, to be discerned, where power through regulatory mechanisms establish what is ‘normal’ through also discipline and surveillance.¹⁸⁷ The theorisation of the policisation of sexuality is the basis for the creation of what now is called and acknowledged as heteronormativity, in opposition to the construction of homosexuality as “species”.¹⁸⁸

Judith Butler is one of the predominant queer theorists of the last three decades: their works have been overall the basis of the theory, in particular their most relevant theory related to the performativity of gender, that I will explain in a bit. Three of their books are being taken as references of this part, *Excitable Speech* (1997), *Undoing Gender* (2004), and *Gender Trouble* (1990).

In *Excitable Speech*, Butler illustrates the importance of language within society, its relation to thoughts and agency. In particular, they present how queer as a “perlocutionary” term has actually been returned to its original speaker.¹⁸⁹ The analysis they demonstrate is associated with the agency of hate speech, focusing on the role of acts and intention behind the language chosen by the interlocutor. Hate speech is to be conceived not only in the form of offensive ideas, as well as the validation of the intention it conveys and conducts.¹⁹⁰ The important nuances related to hate speech towards women and the community will be further discussed in the next chapter. Additionally, Butler highlights also the role of the term “homosexual”, which is often used by others to define someone outside the normative sphere, limiting therefore their freedom of self-describing their own sexuality.¹⁹¹ It is performative for an individual to be able to define oneself as homosexual, therefore the process of coming out and acting out is to be perceived as the desire to be publicly displayed and uttering such words equals to defining their sexual identity. Nonetheless, there is a

¹⁸⁶Foucault, op. cit., p.128.

¹⁸⁷Butler, *Undoing Gender*, p.215.

¹⁸⁸Marchia & Sommer, *(Re)defining Heteronormativity*, p.269.

¹⁸⁹Butler, 1997. *Excitable Speech: A Politics of the Performative*. New York: Routledge. p.3.

¹⁹⁰Butler, op. cit., p.19.

¹⁹¹Butler, op. cit., p.116.

difference between uttering ‘I am a homosexual’ and ‘I am a homosexual and I intend not to act on my desire’, however in the latter the defining term loses its performativity.¹⁹² They also refer to the difference between ‘act’ and ‘representation’ for the queer community, and that difference is found in the sexual practice, representation in fact is related to the constitutive functions of it, while also cultural practices sustain the acts.¹⁹³ Providing Bourdieu’s words to explain performativity, Butler similar to also Foucault illustrates how the effects of social power are the ones establishing authority and limiting the utterance through censorship. Moreover, Bourdieu offers the idea that performativity as related to political discourse is the neglect of the performativity of bodily “speech” and the performativity of the *habitus*.¹⁹⁴ *Habitus* refers to the habitual actions, while being structured by performativity, therefore *habitus* is to be perceived as formed and formative.¹⁹⁵ Performative, as a definition, is not the singular act used by an already established subject, but the different ways in which subjects are called into social being.¹⁹⁶

In *Undoing Gender and Gender Trouble*, Butler proceeds again in deepening the concept of performativity by associating it to gender, instead. In fact, gender, as described by them, is an ‘incessant activity performed’ willingly or not, which establishes the natural performance of gender related to one’s personhood.¹⁹⁷ The objective of this book is to discuss deeper the concept and construction of gender through the lens of queer theory. “Gender is performative not simply to insist on a right to produce a pleasurable and subversive spectacle, but to allegorise the spectacular and consequential ways in which reality is reproduced and contested”.¹⁹⁸ They worded these notions in this way, because of the relations between gender and the norms imposed over subjects, based on the worthiness or not of one’s self. They demand of the queer to fight for their rights, only by doing this queer are being conceived as individuals, and persons. Only through the assertions of rights the meaning of personhood is articulated.¹⁹⁹ Butler claims that gender is not what one “is” nor what one “has”: gender in fact is the apparatus by which masculine and feminine are being produced and naturalised, as well as deconstructed and denaturalised.²⁰⁰ To acknowledge gender is to be distanced from masculinity and femininity, otherwise would

¹⁹²*Ibidem*.

¹⁹³Butler, op. cit., p.123.

¹⁹⁴Bourdieu, cited by Butler (1997). op. cit., p.134.

¹⁹⁵Butler, op. cit., p.135.

¹⁹⁶*Ibidem*.

¹⁹⁷Butler, *Undoing Gender*, p.1.

¹⁹⁸*Ivi*, p. 30.

¹⁹⁹*Ivi*, p. 33.

²⁰⁰*Ivi*, p. 42.

entail the naturalisation of the binarism, which in queer theory is actually being deconstructed. Indeed, Butler has stated that ‘to have a gender’ would entails to fit within a heterosexual relationship of subordination, outside of heterosexual relationship gender should not be assumed as within the binarism. In general, the Other interest is to be recognised, which is structurally just a recognition between intelligible identities.²⁰¹ Related to the notion of passing, the performance of gender could be mentioned: when considering a performance as real and another false, authentic or fake, to the point that the ontology of gender and its judgements fall into a turning point where the latters are undermined or impossible to make.²⁰² ‘Drag’ is the perfect example of the subversion of gender and its norms, it is the demonstration of the performative theory. Drag is performed, it is not just the acts of producing a subversive spectacle but also the allegory of the ways in which reality is actually being constructed and contested.²⁰³ In *Gender Trouble*, Butler illustrates that performativity of gender is actually the demonstration that gender is manufactured, thus constructed through its set of acts that are also often being consequences of environment and culture. In fact, the theory of performativity could be transposed onto race.²⁰⁴ To sum up, both Foucault and Butler had an important role within the queer theory, in particular the latter that has established important notions as ‘performativity’ and the subversion of heteronormativity. In the next few chapters, such notions will be further discovered and deepened as related to other nuances.

2.1.4. Discussing other relevant Key Theorists: Warner, Rubin, Wittig, and Sedgwick

There are plenty of queer theorists that could be discussed as related to interpretation of queer, where its notions have been interpreted and implemented in different ways on different fields. In this subchapter, the objective is to provide further insights of other relevant queer theorists and their ideas on the theory. The order is purely coincidental and not in any way organised by importance.

Michael Warner has gained attention within the queer theory as the author of the concept of ‘heteronormativity’ that has been illustrated in the first chapter. He has highlighted how heterosexual culture has always perceived the heterosexual as the essential

²⁰¹*Ibidem.*

²⁰²Butler, op. cit., p.149.

²⁰³Butler, op. cit., p.216.

²⁰⁴Butler, op. cit., p.345.

part of society and the principle of social union.²⁰⁵ Warner has often associated queer with homosexuality, for such reasons he has been criticised to the limits that such connection could demonstrate.²⁰⁶ Heteronormativity has been revolutionary for the theory itself, the simplicity of such term actually contains a miscellaneous of meanings, which are not limited to just the privileges of heterosexuality in social relations, as well as the structural impact that had on the queer community in the legitimisation of homophobia and basic human needs. In his introduction to *Fear of a Queer Planet*, Warner explains what being queer means in its complexity, the stigmatisation of the self is often related to a multitude of fields, gender, family, the state, class identity and so on.²⁰⁷ In his perspective, queer theory has centered gender after some time, in the same way as feminism acknowledged and treated gender with time. His critiques on queer theory is the necessity to reevaluate social-theoretical discourse, since the revision of also the theoretical languages can define sexual identities better, while overcoming heteronormativity to create a desirable queer world.²⁰⁸ Warner highlights the importance of the environment, in fact, he defines how queer culture has been predominantly dominated by the idea of white, male, and middle-class, thus the relations of queer politics and queer social theory is often associated with capital.²⁰⁹ It is a consequence of the disparity that it is created within the hierarchical order that is reflected as well in the distance in ethnicity; Warner, in fact, emphasises how in identity discourse, queerness, race, and class can never be considered as positioned in parallel lines, instead they are overlapping.²¹⁰ In the introduction to his book, Warner wants to create a framework of what queer theory establishes within society, while also highlighting the utopian desirable queer planet in comparison to the struggles that the queer community has to deal with.

Another relevant theorist is Gayle S. Rubin, who actually is a feminist anthropologist whose works have been used also within queer theory. In this paragraph, two essays will be used to provide more information on her ideas: *Thinking Sex: Note for a Radical Theory of the Politics of Sexuality* (1992) and *Traffic in Women* (in Nicholson, 1997). Rubin's objective is to theorise the role of sexuality within a politicised society, in fact, she believes that a radical theory of sex must be installed through means of identifying, describing, and denouncing injustices and sexual oppression.²¹¹ She emphasises how sexuality is

²⁰⁵ Warner, cited by Ingraham (2002). op. cit., p.75.

²⁰⁶ Green, 2002. Gay but not queer: Toward a post-queer study of sexuality. *Theory and Society*, 31(4), p.532.

²⁰⁷ Warner, 'Introduction', in *Fear of a Queer Planet*, xiii.

²⁰⁸ *Ivi*, p. xvi.

²⁰⁹ *Ivi*, p. xvii.

²¹⁰ *Ivi*, p. xix.

²¹¹ Rubin, 1992. *Thinking Sex*, 9.

intrinsically part of society, thus human sexuality cannot be prescribed biologically: Rubin believes it is impossible to comprehend gender and race politics until such associations are based on biological understandings rather than perceived as social constructs.²¹² She denounces how Western society and culture imbued by Christian ideologies stigmatise the role of sexuality, defining it as something dangerous, in particular those that are perceived outside the limits imposed by heteronormativity.²¹³ As a consequence, the state upholds its interest by implementing a sexual hierarchy based on such limits, while also using sex as a vehicle of sexual oppression: discrimination on the basis of sexual orientation is inevitable on different societal levels, that goes beyond privileges that could mitigate sexual stratification.²¹⁴ In this essay, Rubin provides a fair quantity of examples when dealing with the concept of sex and sexual identity, while also considering it as compared to feminist theories, that I will discuss further in the next sub-chapters. In *Traffic in Women* (1997), Rubin analysis the role of important philosophers as interpreted by social theories, in particular the role of Marx and Engels in relation to feminism and sexuality. Sexuality, in fact, as explained by Engels in his theory of society is positioned on the same length as basic human needs, and it is often associated with the imposed sex/gender system of patriarchy.²¹⁵ The concept of kinship is navigated by Rubin as emblematic of the sex/gender system, in which both defined socially have precedence over biology, and in some cases has been used on incest taboos, in particular kinship has been an issue when considering women conditions within a patriarchal order.²¹⁶ Nonetheless, gender is a socially constructed division of the sexes that is rooted within kinship, where heterosexual norms are being preserved while homosexual ones are repressed. As a consequence, both women and marginalised sexual identities are being subjugated to these realities.²¹⁷

Monique Wittig has been revolutionary in the feminist movements, her expertise and knowledge have been of importance as well for the establishment of queer theory. The works I have read for this dissertation are present in the *The Straight Mind and other Essays* (1992) and are *The Category of Sex, One is Not Born a Woman*, and *The Straight Mind*. In the previous chapter, some of the theories and ideas that she has brought forward have been already discussed, but I will provide a small summary nonetheless. In the first essay, *The*

²¹²Rubin, op. cit., 10.

²¹³*Ivi*, pp. 10-11.

²¹⁴*Ivi*, pp. 21-22.

²¹⁵Rubin, 1997, *Traffic in Women*, p.32-33

²¹⁶*Ivi*, pp.34-38.

²¹⁷*Ivi*, pp.40-41.

Category of Sex, Wittig's intention is to emphasise the role and meaning of sex: she denounces how sexual differences are just another way in which society aims to conceal the fact that social differences are just another consequence of economic, political, and ideological conditions.²¹⁸ Different from other scholars, she highlights that sex is the product of oppression, rather than sex being the oppressor, in fact she emphasises women's conditions as related to sex. Women are generally dominated by male society and are a consequence of social impositions, which are therefore not innate in society. The categorisation of sex could be instead defined as natural, since imposed by heterosexual society, economy, and politics.²¹⁹ It is heterosexual society and the categorisation of sex that actually creates sex, as mentioned already, in fact, oppression creates sexual beings, where authoritarian regimes are being imposed over marginalised identities.²²⁰ In *One is Not Born a Woman*, Wittig proceeds with the interpretation of society through a feminist critique lens, in particular considering the centrality of women as well as associated with sexual orientation in the form of lesbianism. She criticises the idea that lesbianism and matriarchy are the opposite and oppressors of patriarchy and heterosexual society, nonetheless it would be impossible since matriarchy would still be answering with an oppressor entity.²²¹ Wittig provides the words of de Beauvoir in the myth of woman, in which "the origin and cause of oppression is in fact only the mark imposed by the oppressor itself".²²² In the lesbian conditions, refusing to be a woman does not equal becoming a man, however refusing to be heterosexual means refusing the role of women as associated to heteronormative society, in economic, ideological and political power of men.²²³ Wittig defines women as the objects of oppression and appropriation, when knowledge is involved, women become subjects of an operation of abstraction. Through consciousness of oppression, one becomes liberated, in fact sexuality is a way for women to reject and refute the social institution of violence.²²⁴ Lastly, in *The Straight Mind*, Wittig's interpretation of heteronormative society: heterosexual society, in fact, is the oppressor of any abnormal entity and identity that must be dominated. In the straight mind, universality cannot conceive culture, society and politics outside heterosexuality and that means being unconscious.²²⁵

²¹⁸Wittig, *The Category of Sex*, p.2.

²¹⁹Ivi, pp.3-5.

²²⁰Ivi, pp. 7-8.

²²¹Wittig, *One is Not Born a Woman*, p.10.

²²²de Beauvoir, cited in Wittig, op. cit.,p.11.

²²³Wittig, op. cit., p.12.

²²⁴Ivi, p.18.

²²⁵Wittig, *The Straight Mind*, pp.28-31.

Eve K. Sedgwick has been extensively discussed in the previous chapter, in her consideration of the importance of the concept of closet in *Epistemology of the Closet* (1990). I will briefly provide more nuances of interest, other than the ones already presented in the previous chapter. She theorises five axioms, where she categorises five different conditions of the human being as related to the identity: 1) people are different from each other, in which identity is being studied in its multiplicity of facets as for instance, gender, race, nationality, class, and sexual orientation; 2) the study of sexuality is not coextensive with the study of gender, where she theorises clearly the difference in the sex/gender system as well as the dichotomy of heterosexual/homosexual; 3) there cannot be a priori decision on the conceptualisation of lesbian and gay identities, Sedgwick believes there is no common ground where both gay and lesbian experiences could be found; 4) the immemorial ritualised debates on nature versus nurture, where she deconstructs the idea of essentialist/constructivist binary that is used as grounds of the gay ideology; 5) the historical search for a great paradigm shift may obscure the present conditions of sexual identity.²²⁶ Afterwards, in the first chapter, Sedgwick provides her ideology of the closet that has been demonstrated previously.

To conclude, these are some of the important queer theorists that have gained their footing within the theory, nonetheless others have as well impacted queer theory in other ways and will be used further in the next chapters.

2.2. The Role of Heteronormativity in Legal Instruments: Legal Approaches to Sexual Orientation

2.2.1. The Concepts of Homonormativity and Homonationalism

Queer theory has defined plenty of time and underlined over and over again the role of heteronormativity in both societal and legal institutions. In fact, heteronormativity is still very present and criticised on its limits, while also defining its oppressive nature towards all marginalised identities, whether sexual orientation and gender minorities, or even other intersectional identities based on ethnicity, nationality, and so on. Nonetheless, heteronormative institutions have been intrinsically rooted within the social order, to the point that it is inevitable that differentiated identities desire the same exact conditions as an

²²⁶Sedgwick, 1990. *Epistemology of the Closet*. Berkeley: University of California Press.

heterosexual individual. In this case, the opposite of heteronormativity is homonormativity, which differs from the grounds of the heterosexual matrix, while preserving the products of it. Therefore, homonormativity is to be acknowledged as just the homosexual version of heteronormativity, where the homosexual individual (male, gay, white) is perceived as dominant within society. For such reasons, it has been often criticised because of its close interconnection with it and its institutions, for instance, marriage which creates a further marginalisation of certain communities.²²⁷ Homonormativity is another way to sustain the established heteronormativity, while upholding its institutions by projecting those to the queer community, who blindly accept these limits. Over the decades, LGBTQ+ politics interest has been to implement these institutions as basic community needs, for instance involvement in the military, recognition of partnerships, and freedom of assembly.²²⁸ Others might believe that homonormativity is actually ideal, since it enables fair enough treatments towards the community, while also establishing a certain level of protection to LGBT families.²²⁹ However, such strategies are additionally fostering marginalisation of those individuals that prefer to not subjugate to heteronormative limits, commonly identified with queer identities, that are instead deconstructing these institutions. Even so, these conditions would lead also to intelligibility of such individuals within a legal framework, since actively negating the traditional values imposed by heteronormativity. It creates within the community a clear divide as consequence to those implementing and conforming to heterosexual expectancies, since it is important to highlight the relations to racialisation of social formations and white supremacy.²³⁰ The author of the term *homonormativity* is Lisa Duggan (2002) in *The New Homonormativity: The Sexual Politics of Neoliberalism*. Homonormativity is a new genre of neoliberal sexual politics associated with the LGBTQ+ community, as already briefly presented, it involves politics that do not contest the dominant heteronormative assumptions, while encouraging the possibility of ‘demobilised gay constituency’ and a privatised, depoliticised gay culture that ideally is limited to domesticity.²³¹ Duggan provides an overview on the relation between homonormativity and the privacy/public binary, that will be further discussed in the next section, however briefly, highlights the strategy of homonormative institutions to privatise certain rights, thus equality

²²⁷Bernini, 2017. *Le teorie queer: Un'introduzione*. Milano: MIM Edizioni. pp.73-75.

²²⁸Gonzalez-Salzberg, *Sexuality and Transsexuality Under the European Convention on Human Rights*, 110.

²²⁹Ivi, pp.111-112.

²³⁰Robinson, *Heteronormativity and homonormativity*, p.2.

²³¹Duggan, 2002. *The New Homonormativity: The Sexual Politics of Neoliberalism*, in *Castronovo & Nelson, Materializing Democracy*, p.179.

becomes narrow and freedom becomes exclusively interest of the bigotry (Duggan, 2002, p. 190). Kehl (2020) perfectly defines these processes of inclusion as a ‘catalogue of rights and privileges’ aimed to sustain and protect heteronormativity within its established institutions.²³²

The other term that highlights important aspects of a working heteronormative society, in which the subjects are perfectly conforming to the assimilation of heteronormative institutions, is *homonationalism* coined by Jasbir Puar in 2007. Alongside homonormativity, homonationalism has been plenty discussed and debated within queer academic discourse, as well as outside of it. Puar, as cited by Kehl, claims that these nationalist practices have to do with the tendency of queer bodies to exclude others racialised identities, since not suitable or acceptably queer.²³³ Homonationalism is to be considered even more narrowing, since its advocacy is an example of how Western society is perceived to be superior in comparison to non-Western.²³⁴ Homonationalism is a conceptual framework coined around the complexity of gay rights as hinged on racialised and sexualised identities as marginalised through Orientalist and neo-Orientalist projections. Therefore, homonationalism is a critique of LGBT politics that reinforces issues such as exclusion and inequality, rather than addressing the conservatisation of queer identities.²³⁵ Homonationalism is defined as a ‘field of power’ and a ‘process’, rather than being an activity, property, organization, individual, event or attribute, it delines the historical shift in the production of nation-state in the growing inclusion of homonormativity.²³⁶ Puar’s objective is to denounce that homonationalism is being often enabled in different shapes and forms around the world, where the central issue lies within the incapacity of the queer liberal organisations to deconstruct the racial profiling and beliefs grounded in white norms of homosexuality.²³⁷ As an example of homonationalism, Puar demonstrates the capacity of Israel, similar to the United States tendencies, to benefit from it by using a strategy known as *pinkwashing*. The current genocidal state of Israel has the tendency to take advantage of LGBTQ+ rights to divert from its occupation of Palestine.²³⁸ Israeli strategy lies in being perceived as the ideal example of democracy in the Middle East, bringing in a ‘demonised’

²³²Kehl, 2020. Homonationalism Revisited: Race, Rights and Queer Complexities. *Lambda Nordica*, 25(2), 19.

²³³Ivi, pp.20-21.

²³⁴Otto, 2018. Resisting the heteronormative imaginary of the nation-state: Rethinking kinship and border protection, in Otto, *Queering International Law: Possibilities, Alliances, Complicities, Risks*, pp.236-237.

²³⁵Puar, 2013. Homonationalism as Assemblage: Viral Travels, Affective Sexualities, in Sircar & Jain, *New Intimacies, Old Desires: Law, Culture and Queer Politics in Neoliberal Times*. p.3.

²³⁶Ivi, p. 4.

²³⁷Ivi, p. 5.

²³⁸Ivi, p.10.

land the promotion of the community rights, in this way posing itself as juxtaposed to homophobic Palestine. For such reasons, Israel is defined as ‘pioneer of homonationalism’ as its performances related to colonialism, occupation and neoliberalism accommodationism that stabilises the normalisation of homosexuality.²³⁹ Pinkwashing allows Israel to obscure its occupation and restrictive control over Palestinian mobility, which includes the restrictions to queer activists to meet up. The apartheid grounding of such a system oppresses the development of queer communities, juxtaposed to the freedom of Israelis. Additionally, pinkwashing nurtures the promotion of Western stereotypes by fostering Palestinian homophobia, in order to deflect Israeli interest in suppressing Palestinians, in particular queer ones.²⁴⁰ Pinkwashing is the justification of imperial/racial/national violence, in particular in portraying Palestinians, to some extent Muslim identities as well, as homophobic, nonetheless as Palestinian queer organisers argue the beliefs of a country are in any way justification to occupation, thus it is imperial the end of it.²⁴¹ The issue with processes and beliefs aligned to (neo)-colonialist practices is the expectation that non-Western countries follow suit the social progress, meaning the freedom of expression of queer identity, as well as ‘coming out’ and public visibility, automatically establishes an invocation of ‘homophobia’.²⁴² Puar states that:

Pinkwashing is not about sexual identity at all in this regard, but rather a powerful manifestation of the regulation of identity in an increasingly homonationalist world, a world that evaluates nationhood on the basis of the treatment of its homosexuals (Puar, 2017, p.15).

It portrays perfectly the objectives of neoliberal tendencies of Western countries compared to non-Western ones, where the promotion of rights such as freedom, liberation, and basic human rights are often misused by States as a façade and portrayal of progress and civilisation. In particular, the Israel case is even more emphasised by its politicisation of LGBTQ+ rights, leading as well to a legitimisation of its occupation and recognition as a legitimate State. On top of that, Puar theorises ‘homonationalism’ as an analytical apprehension of the formation of a state and structure of modernity, as opposed to limiting it

²³⁹*Ibidem.*

²⁴⁰Puar, op. cit., p.11.

²⁴¹Puar, op. cit., pp.12-14.

²⁴²*Ibidem.*

to the association to identity or adjective to denounce a state/entity.²⁴³ The focus should be on the attempt of Israel in being portrayed also as a ‘haven’ and a ‘heaven’ for the LGBTQ+ community, however, it is key that queer activist groups are denouncing the hierarchical order of rights that these conditions create, the fight for the community rights should not undermine the maintenance and respect of other fundamental rights.²⁴⁴ The critique raised by Puar is the appropriation of queerness to the establishment of a neoliberal nation-state, where queer identities do not encompass as subjects of policies, but also are excluded and sometimes complicit of heteronormative institutions that are actually mastering the process of marginalise such identities.²⁴⁵

The implications of these two terms, *homonormativity* and *homonationalism*, lies in the capacity to convince the international community that processes are done in the respect of inclusivity, while it is only a way to deceive. It is clear that the narrowing limits of such power imposition on the oppressed is perceived as means to impose as well conforming realities. The core of such a problem aligns as well with the necessity of the LGBTQ+ community to anchor itself to homonormativity, homonationalism, and homocolonialism where the centrality of queerness lies within the deconstruction of heteronormative established nation-state.²⁴⁶ Homonormativity and homonationalism treated as ‘global phenomena’ is restricting the complexity of identities, by imposing logics of power and oppression to the good/bad binary, where the non-conforming one (non-Western, non-heterosexual, non-middle class) is marginalised and portrayed as the ‘pervert’.²⁴⁷

2.2.2. The Public/Private Binary in Legal Instruments

Over the different chapters, the words privacy, private life, or public have appeared quite often, in fact, one of the central topics of debate within the queer community and queer legal theory has been the ‘right to private [and family] life’. The right to private life is to be considered one of the fundamental human rights, alongside freedom of expression and freedom of thought. It is posited within different international and regional bodies, for instance, the UN Declaration of Human Rights, alongside the optional protocols ICCPR

²⁴³Puar, op. cit., p.20.

²⁴⁴Upadhyay & Ravecca, 2017. Queer, beyond Queer? in Sircar & Jain, *New Intimacies, Old Desires: Law, Culture and Queer Politics in Neoliberal Times*. Zubaan Publishers. p.476.

²⁴⁵Ivi, p. 483.

²⁴⁶Kehl, op. cit., p.21.

²⁴⁷Weber, cited by Kehl, op. cit., p.26.

(International Covenant on Civil and Political Rights) and ICESCR (International Covenant on Economic, Social, and Cultural Rights), the European Convention on Human Rights, and American Convention on Human Rights (Pact of San José).

The binarism of public/privacy falls within the umbrella binarism of heterosexual/homosexual, in fact, as hinted in chapter one, during the centuries there has been an oscillating continuity in the censorship and freedom of expression of sexuality. In brief, as also presented by Foucault, there has been a tendency of oppressing queer identities by limiting their freedom to domesticity. The paradox lies, particularly, in the process of self-censorship and involuntary disclosure of homosexual individuals, which were obliged to secrecy in the closet and at the same time compelled by the State through intrusive investigations.²⁴⁸ Additionally, in the interpretation of this binarism there is as well the inclusion of heteronormativity and homonormativity, where the subjects of interest of both are generally limited to the Western queerness. There have been a multitude of cases brought before courts of persons of the LGBTQ+ community whose privacy has been interfered with. In this subchapter, the right to privacy within the binarism will be discussed alongside the consideration of the case of *Dudgeon v. The United Kingdom* (application no. 7525/76) at the European Courts of Human Rights will be often used as case study.

Duggan (2002) maps the public/private binary as associated with homonormativity, since it sustains the heteronormative neoliberal institutions by demobilising gay and shrinking its public expression. So, depoliticised queer culture would be focusing more on its domesticity and consumption in the economy of the 'free' market.²⁴⁹ As a response to such oppressive strategies, the homophile movements after the 1950s activated to counter the limits imposed by neoliberal nation-states, thus sought to expand both their private and public rights without state interference, while also challenging the heteronormative interpretation of both marriage and family institutions.²⁵⁰ There have been debates over the legitimacy of sexual activities between consensual adults within the private sphere, as happened in the *Dudgeon* case that will be further discussed. According to Article 17(1) of the ICCPR, persons have the right to be left undisturbed in the privacy of their home, which allows individuals the freedom to express their liberty without intrusion from external interference. It is a precondition for the freedom of expressing one's identity and personality,

²⁴⁸Gonzalez-Salzberg, op. cit., p.67.

²⁴⁹Duggan, *The New Homonormativity*, p.177.

²⁵⁰Ivi, p. 187.

without which other rights cannot be enjoyed.²⁵¹ Some actually argue that the necessity to 'pass' on heteronormative/homonormative grounds has played a part in the disruption of the liability and protection of the secrecy. By reinforcing the clear binary between norm and abnormal, queer individuals who are incapacitated to pass strict heteronormative configurations are forced to exposure and unreliable realities, thus the binary public/private is being fortified. These conditions forced the universalisation and globalisation of progressive expectations as associated to neoliberal institutions.²⁵² Courts of human rights have the responsibility to verify the compliance of States with human rights charters, in particular the value of human dignity must be upheld, since it underpins the corpus of human rights bodies.²⁵³ In fact, according to the ECtHR (European Court of Human Rights), both human dignity, human freedom, and the respect of these obligations are the core essence of ECHR (European Convention on Human Rights).²⁵⁴

The LGBTQ+ community must be recognised as extremely vulnerable to privacy intrusion, in fact, it finds itself at greater risk because of societal stigma, discriminatory laws, and political environments which objective is to target or marginalise the community in general.²⁵⁵ In 1994, the Human Rights Committee, a legal body whose role is to oversee the application of the ICCPR, ruled that a Tasmanian law criminalising sex between men breached the right to privacy.²⁵⁶ It is State's obligation to guarantee the enjoyment of human rights, including non-discrimination and privacy, hence the criminalisation of consensual relations between individuals of the same-sex or gender is to be considered as breach of such obligations.²⁵⁷

*Dudgeon v. UK*²⁵⁸ is the first example of a court ruling for a person identified as homosexual, instead of appreciating the grounds of criminalisation based on sexual orientation. Briefly, I will present the facts of the case: Jeffrey Dudgeon, a 35-year-old homosexual, resident in Northern Ireland has claimed before the ECtHR that allegedly in the country's criminal code certain [sexual] acts between consenting male adults were

²⁵¹Rodley, 2018. International Human Rights Law, in M.D. Evans (Ed.) *International Law*. Oxford University Press. p.795.

²⁵²Rosenfeld, 2009. Heteronormativity And Homonormativity As Practical And Moral Resources: The Case of Lesbian and Gay Elders. *Gender and Society*, 23(5), p.633.

²⁵³Rodley, op. cit., p.793.

²⁵⁴Sørli, 2018. Governing (trans)parenthood: The tenacious hold of biological connection and heterosexuality, in D. Otto *Queering International Law*. New York: Routledge. p.174.

²⁵⁵Zalnieriute, *The anatomy of neoliberal Internet governance: A queer critical political economy perspective*, p.58.

²⁵⁶Gross, op. cit., p.159.

²⁵⁷OHCHR, op. cit., p.42.

²⁵⁸*Dudgeon v. the United Kingdom, 1981*. Application no. 7525/76. [Judgement] European Court of Human Rights. Strasbourg. <https://hudoc.echr.coe.int/eng?i=001-57473>

persecuted (Act 1861, sections 61 and 62; Act 1885, section 11), violating his right to private life (Article 8 of ECHR) and suffering discrimination on sexual grounds (Article 14 of ECHR). The United Kingdom invoked other rulings, in which interference of the applicant's private life occurred but as a necessity in protection of democratic society; the same occurred in the *Dudgeon* case based on the protection of morals (Christianity) and enjoyment of rights and freedom of others.²⁵⁹ It was in the end ruled by the Court as a breach of Article 8 as both male individuals were over the age of 21, alongside the unjustified intrusion and violation of Dudgeon's right to private life.²⁶⁰ Furthermore, the Court emphasises the necessity of such interference should be justified on 'pressing social needs', thus should not be arbitrary to the desire acquired by the authority, however when considering these conditions only serious reasoning are the exception to the interference although the Court will still leave a margin of appreciation to contracting State.²⁶¹ Other than being the first case to be ruled in favour of the homosexual individual, it has been ruled in favour of the application of the right to privacy concerning sexual orientation. Article 8 ECHR, in fact, continues to be successful in queer complaints' cases, particularly, since new interpretations have been included under the article, for instance related also to immigration, employment, and queer family.²⁶² Johnson includes in his book the Commission interpretation of what entails 'private life', which in this case goes beyond the simple protection from public scrutiny, it is further analysed on the basis of the right to establish and develop relationships with other human beings to fulfil persons' personality.²⁶³ Based on the dissenting opinion of Judge Walsh, the private/public sphere was inseparable, private morality and social morality are intertwined based on the fact that persons' private moral conduct could affect as well the moral beliefs of society, thus a threat to democracy as well.²⁶⁴ Nonetheless, the Court's judgement signaled a systematic shift from acknowledging decriminalisation of private acts between consenting homosexual adults as tolerated to recognising the private intimate exchanges as intrinsically worthy of protection regardless of sexual orientation. It maintained, however, the clause of margin of appreciation in the interference on inquiry of democracy values, to protect endangered groups, for instance, minors from influence, exploitation, or harm.²⁶⁵

²⁵⁹Johnson, 2013. *Homosexuality and the European Court of Human Rights*. Routledge. p.131.

²⁶⁰Gilleri, *Sex, Gender and International Human Rights Law: Contesting Binaries*, p.107.

²⁶¹*Dudgeon v the United Kingdom*, op. cit., §51-52.

²⁶²Johnson, op. cit., p.126.

²⁶³*Ivi*, p.128.

²⁶⁴*Ivi*, p. 133.

²⁶⁵*Ivi*, pp.133-134.

Returning to the public/private binary, the compelling debate has been on the exclusion and limitation of the public sphere for homosexuals, since the Court's interpretation of the Convention allowed potential access to right to privacy if such actions are kept within the privacy sphere, and as a consequence undisclosed to the public.²⁶⁶ Parallel to the subchapter on the closet, it creates a divide among the academics, whether some scholars believe it is unfair and oppressive for the community to be rendered as invisible and obliged to regress to the closet as imposed by society, while others actually believe that within contemporary societies the choice should be free for the homosexuals to make as it is beneficial for them to remain within such walls. Nonetheless, the approach of the Article 8 established after the *Dudgeon v the United Kingdom* has influenced following judgements and fortified the division of the binary by strengthening the relation to the closet.²⁶⁷ Paul Johnson in his book has analysed, as well, the case of *F. v the United Kingdom*, and shown that: the applicant was to be deported back to Iran by the respondent state, as consequence the subject claimed that his deportation to a State in which homosexual acts are prohibited should be assessed as disproportionate based on Articles 2 and 3 ECHR).²⁶⁸ Despite the applicant's claim of fear of ill-treatment and persecution in Iran, the European Court of Human Rights found that the burden of proof had not been sufficiently met. Article 8 was also invoked by the claimant; however, the Adjudicator concluded that, considering the acts would occur within the private sphere and the applicant showed no interest in pursuing the relationship, the claim was inadmissible as there was no immediate risk.²⁶⁹ This case would be an example of the Court stressing the necessity of staying in the closet, in the privacy and discretion of it. On the opposite side, some cases required the claimants to 'come out', for instance *Smith and Grady v the United Kingdom*, and *Lustig-Prean and Beckett v the United Kingdom*: the applicants were UK military personnel and faced invasive investigations by authorities under the facade of upholding 'democracy values'. The ECtHR ruled both cases on the violation of Article 8, concluding that the interference was found as disproportionate after the applicants confirmed their sexual orientation.²⁷⁰

²⁶⁶Johnson, op. cit., pp.137-138.

²⁶⁷*Ibidem*.

²⁶⁸Johnson, op. cit., p.139.

²⁶⁹*F. v the United Kingdom*, 2004. Application No. 17341/03, [Judgement] European Court of Human Rights. Strasbourg. <https://hudoc.echr.coe.int/eng?i=001-24020>

²⁷⁰Johnson, op. cit., p.141.

In essence, the issue concerning the Court's various interpretations of Article 8 remains in the reproduction of the 'closet', limiting the expression of queer identity to secrecy and domesticity, as intended by homonormative practices imbued by heteronormative ones. It reflects the same notions that Foucault reported in the relation between power and sex.

2.2.3. The Homonormative Sexual Inclusivity in Legal Instruments

As illustrated previously, both heteronormativity and homonormativity as interpreted by queer theory had imposed hierarchical structure within a multitude of fields, legal instruments as well. Centrality of this subchapter will be homonormative institutions as an illusion of inclusivity in the rights of the queer community. Overall, queer theory's intention is to deconstruct all these impositions, in order to allow prosperity in the true essence of inclusion, by amplifying it in implementing all the marginalised identities in an intersectional framework. In particular, this sub-chapter will focus on the right to marriage of the community, since it exalts and sustains both heteronormativity and homonormativity, as well as concede in some circumstances a form of discrimination by States. In fact, there are different articles in different bills of human rights:

Article 16(1) of UDHR (Universal Declaration of Human Rights)

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Article 12 of ECHR (European Convention of Human Rights)

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 23(2) of ICCPR (International Covenant on Civil and Political Rights)

The right of men and women of marriageable age to marry and to found a family shall be recognized.

ICCPR actually requires States equal treatment of same-sex couples, however, it is not required the recognition of same-sex marriages.²⁷¹ However, it is clear that the troubling aspect of these articles remains the use of ‘men and women’, which limits its limitation in a heteronormative lens. Demonstration that the inclusion of same-sex couples in the institutions of marriage have actually been excluded by delimiting such privileges to the traditional value of both marriage and family.²⁷² Johnson reports the ECtHR interpretation of Article 12 ECHR in the case *Schalk and Kopf v Austria*, which the Court acknowledges that the use of ‘men and women’ could be misleading, however it must be regarded as deliberate.²⁷³ Considering that the Convention in its entirety grants rights to everyone, however, its historical background must as well be evaluated. In general, same-sex marriages as recognised by legislative instruments have been perceived as pinnacle of LGBTQ+ advocacy, even though generally an opposition arose in the protection of traditional (homophobic) values. The institution of marriage remains grounded within patriarchal and cultural values, at the same time also familial values, which for the community is limited and often called ‘queer non-bio kinship’.²⁷⁴ As demonstrated in different occasions, the LGBTQ+ community has been demonised for centuries, in particular the consensual aspect of activities between queer individuals. Some argue that the involvement and recognition of same-sex couples in the institution of marriage is a ‘welcoming’ experience of deviants into the nation-state’s circle of ‘good sexuality’, while others who remain grounded in the radical queer politics are kept outside of that circle.²⁷⁵

As much as queer theory and queer politics are meant to evade the social restrictions imposed by heteronormativity, it is expected of the LGBTQ+ to seek and demand social recognition, as well as legal recognition, in particular in the sphere of civil marriages. There is a clear difference between what entails being part of the LGBTQ+ community and identify oneself through the term queer, as illustrated previously: queer aims to deconstruct what society has spent centuries in establishing, especially the freedom of expression that is guaranteed by law. Hence, LGBTQ+ community has claimed a multiplicity of times that the prohibition and marginalisation of individuals from their enjoyment of human rights and human dignity is rightly considered a form of discrimination on sexual orientation and gender grounds. In particular, according to Special Rapporteur on torture in 2019, States in

²⁷¹Gross, *Homoglobalism: The emergence of global gay governance*, p.159.

²⁷²Johnson, op. cit., p.191.

²⁷³Ivi, p.192.

²⁷⁴Otto, op. cit., p.251.

²⁷⁵Ivi, p.254.

which these rights are not even granted and are actually the advocating violence against women and the community, where intelligible persons are trapped in abusive circumstances.²⁷⁶ Discrimination, as explained by OHCHR, defined by International Law, refers to any action or policy, whose objective is the exclusion, restriction, or differential treatments based on discrimination grounds: it equals the negation of access to enjoyment of their rights of freedom and equal treatment, guaranteed by law.²⁷⁷

Dissenter of same-sex civil marriages tends to argue that the institution of marriage is strictly associated with the traditional value, thus, protecting such values are actually not a form of discrimination or denial of enjoyment of rights of non-heterosexuals individuals, but the respect of the continuity of traditional and familial cultural values.²⁷⁸ Johnson highlights that within European Union Law, there has not been any form of true evolution and progress associated with the inclusion of a more inclusive interpretation of civil marriages, and at the same time the Council of Europe has shown little commitment to engage in contrasting this tendency.²⁷⁹ Warner, as cited by Gonzalez-Salzberg, stresses the invidiousness of institutions, which in his perspective aligns with the intention of rewarding those that subdue these and discipline those outside of it.²⁸⁰ However, such shortcomings should value the importance of validating the identities of those being discriminated against, rather than focusing on the respect of such institutions. Clearly, even in the language chosen for the articles, there has been an intention behind the imposition of binary hierarchies, as well as imposing a classification on the basis of sexual orientation and gender, which is to some extent discriminatory.²⁸¹ Through the sustainment of marriage as traditional and founded in the idea of the heterosexual matrix, it validates as well the naturalisation of heterosexuals, thus it would role the queer theory to deconstruct and denaturalise the existence of marriage. As much as some opponents of same-sex marriages try to argue on the marital grounds on traditional and familial values, rather than the mere concept of sexuality and heterosexuality, it is evident the opposite and the privilege that comes with it.²⁸² As presented in the previous subchapter, generally, same-sex couples or queer individuals were considered within the limits of privacy and domesticity, for such reasons some have argued that recognising civil

²⁷⁶OHCHR, op. cit., p.41.

²⁷⁷OHCHR, op. cit., p.54.

²⁷⁸Johnson, op. cit., p.193.

²⁷⁹*Ivi*, p.194.

²⁸⁰Gonzalez-Salzberg, op. cit., p.25.

²⁸¹*Ivi*, p.32.

²⁸²*Ivi*, p.102.

marriages of LGBTQ+ individuals is difficult for Courts, since it stretches beyond the limits of sexual privacy, into public integration which is still disregarded.

Marriage remains within the institutions an important asset for partnerships, beyond the heteronormative or homonormative foundations. It is, in fact, an institution that is found to be necessary in many contexts, for instance, immigration and hospital visitation rights, which it applies not only to non-heterosexual couples not recognised, but as well to non-married heterosexuals couples. Therefore, marriage as an institution is limiting, and as a consequence, it limits the values of both love rights and partnerships rights.²⁸³ Additionally, there is a fragility in the system of marriage rights, in particular when it comes to partnerships, in which one or both are transgender/transsexual individuals. First of all, there are a multitude of limits imposed on transgender persons, as well as both invalidating and extremely personal, to not considering the issue with lack of recognition of their rights as individuals. It should be noted that within legal instruments, a clear definition of what sex constitutes is yet to be designed, in particular considering the binary of sex/gender. By perceiving sex as fixed to biological figurations, it means sex is immutable, and therefore, it cannot change. However, it should be stated within law that sex is a legal and cultural construct, which interpretation is arbitrary.²⁸⁴ There have been cases, in which the Courts ruled that denying the right to marry to trans individuals in their affirmed gender was not a violation of Article 12, for example, *B. v France* and *Parry v The United Kingdom*. These two cases are examples of the troubling tension between the legal recognition of gender transition and marriage's traditional values, in which the true limitations of acceptance of the applicant's gender was based on the heterosexuality of marriage, in particular since the solution would be the rectification of birth certificates. In the Parry case, the applicant was a transgender woman, married to another woman, whose gender was to be recognised only if the marriage was annulled or dissolved, since same-sex marriages were prohibited by law.²⁸⁵

To conclude, it is limiting nation-states and jurisdictions to associate the culmination of same-sex couples rights to the traditional value of marriage. It belittles the struggles of queer community and the troubling process in progressing to more inclusive frameworks within International Law.

²⁸³Gross, op. cit., p.139.

²⁸⁴Gonzalez-Salzberg, op. cit., p.35.

²⁸⁵Ivi, p. 128.

2.3. Intersectionality and Queer Theory: Feminist and Post-Structuralist Critiques

Intersectionality plays an important role in theories/methods, since it allows the formation of a structure, in which the integration of marginalised identities allows a sensitive perception of inclusion within communities. One of the key roles of intersectionality is the clarification of the discourses of black women, how they are being produced and controlled in the margins of society, in particular correlated to the heteronormative impositions of the ruling class.²⁸⁶ This scholarship has the immediate interest in contextualising the role of women of color, in particular black women, in the hierarchical order of sexual division of labour (Spillers), domestic violence and discrimination (Crenshaw), the unprivileged nature, and public policies.²⁸⁷

There have been differing opinions on the relation between intersectionality and queer theory. In fact, some scholars argue that queer activists focus more on the queer problematics, rather than considering other aspects for instance, race, oppression and economic exploitation, even though the majority of queer activists are people of color, female, or working class.²⁸⁸ Nonetheless, queer individuals, in particular those self-understanding, are conscious and recognise that their stigmatisation is deeply rooted within their gender, family, ideas of individual freedom, and societal systems.²⁸⁹ The objective of this subchapter is to create a framework of the relations between feminist theories and queer theories, in particular to their association with the role of women and intersectionality.

2.3.1. The Women Conditions in Queer Feminist Theory

In the last few chapters, queer theory has been demonstrated in its essence, by providing insights of its structure and its application as a method. In general, queer theory is found to be a theory established in its own definitions, however, as already hinted some of its foundations are a consequence of feminist influences. Often, queer theory has been presented in its deconstructing nature, where the binarism of sex/gender, as well as any other

²⁸⁶Gambino, 2020. "A More Thorough Resistance"? Coalition, Critique, and the Intersectional Promise of Queer Theory. *Political Theory*, 48(2), p.226.

²⁸⁷Ivi, p.227.

²⁸⁸Smith, cited by Gambino, op. cit., p. 229.

²⁸⁹Warner, cited by Gambino, op. cit., p.233.

binarism are to be denaturalised. The role of women is the most discussed in both queer theory and feminist theory, thus it is the reason that some believe queer theory and feminism are supposed to be independent from each other. Both assess the importance of understanding the role of power and oppression, however, both value their doctrines on the centrality of different identities of the self. In a previous subchapter, the dichotomy between sex/gender has been already discussed, since there is generally still a difficulty in making clear the distinction that should be made among the two.

Feminist theory, as defined by MacKinnon, relies on the construct and expression of sexuality, where society has been divided into two sexes, women and men.²⁹⁰ In her interpretation of the feminist theory, she states that: “as work is to Marxism, sexuality to feminism is socially constructed yet constructed”.²⁹¹ The objective of MacKinnon is to denounce the establishment of a hierarchical and oppressive nature of the heterosexual patriarchal society, in which women and the role of women is being limited to their sex. Similarly, Wittig criticises Marxism because of the inability to denounce the women’s conditions, since sexuality is not as liberating as expected, it is instead a site of oppression and institution of violence.²⁹² Nonetheless, both Marxism and Feminism are considered theories of power, where inequality is being discussed. The difference between the two resides in the male-centrality that Marxist ideas are focused on, implying that its perspective of society and the world is aligned with the male desire, while feminists critique the limits of interpreting class through the singularity of sexes.²⁹³ Neither queer theory nor feminism are monolithic interpretation of the identity, hence both interests lies on the simplistic deconstruction of male-centered society, which equals to the denaturalisation of oppressive systems where the marginalised are subjugated.²⁹⁴ It is emblematic of the queer theory to deconstruct the multitude of binaries, whether dualistic [m/f], asymmetrical [m>f], and metonymic [gender=women], however, the distinction between descriptive (positivist) and normative is blurred within the realm of gender.²⁹⁵ Even though gender identity is to be perceived as ever changing, the role of women should be discussed easily by expanding what it entails being woman (transgender women, non-binary...). It is clear that women are

²⁹⁰MacKinnon, 1982. *Feminism, Marxism, Method, and the State: An Agenda for Theory*. *Signs*, 7(3), p.516.

²⁹¹*Ibidem*.

²⁹²Witting, cited by Hennessy, 1993. ‘Queer Theory: A Review of the Differences Special Issue and Wittig’s The Straight Mind’, *Signs*, 18(4), p.970.

²⁹³MacKinnon, op. cit., p.518.

²⁹⁴De Vido, 2023. *Approcci Giuridici Femministi al Diritto Internazionale: Verso un Diritto Eco-Femminista e Post-Umano?* *La Comunità Internazionale* Fasc. 3, p.455.

²⁹⁵Gillieri, *Sex, Gender and International Human Rights Law*, p.20.

subjected to imposed pre-conditions, structured by the oppressive regimes of male-centrality. In queer theory, as it will be further demonstrated, lies the intersection of identities, gender, class, ethnicity, sexuality, as well within gender and sexuality lies intersectionality.

Women's conditions are a consequence of their relation to power, that often resides in the representation of the heteronormative institutions. Power is often associated with the male existence, where the self-made man condemns women to their arbitrary impositions and where the women acquire new consciousness. The women's consciousness leads to powerlessness based on such impositions that are demanded internally or externally, where their femininity equals the desirability which is available to men.²⁹⁶ Moreover, the oppressive nature of women is demonstrated through the isolation, the pain, and objectification of women to the desire of men.²⁹⁷ Male power equals to an increasing amount of conditions to which women are associated with: it resides in the denial of women expression of sexuality or in forcing their own on them; it resides in the exploitation of their force-labour; it resides in the control of their children; it resides in confining their movements; it resides in the use of them as objects and it resides in the withholding from society.²⁹⁸ All of these are demonstrated by Halley in the subordination theory, in which women are belittled to femininity which men find attractive, which sexual attractiveness equals to the availability on male terms: "what defines a woman as such is what turns men on".²⁹⁹ States and society enable the executions of these by imposing, as already presented, the hierarchical structure of heterosexuality, in which the eroticisation of domination allows female subordination.³⁰⁰ Additionally, the biological bodily function of women as limited to reproduction accounts to their subordination, creating consequential conditions of inequality in other fields, for instance the division of labours or sex inequalities.³⁰¹ Firestone, as cited by Gambino, highlights the importance of women as a category of fundamental experience of oppression and she focuses on the marginalisation of identity politics, rather than its intersectionality.³⁰² Based on Marxist perspective, the relationship to power must be noticed in the application of hierarchies that are central in the formation of a ruling normative and institutional class which exercises power.³⁰³ As Foucault explained, the repressive

²⁹⁶MacKinnon, op. cit., p.520.

²⁹⁷*Ibidem*.

²⁹⁸Halley, *Split Decisions*, p.195.

²⁹⁹*Ivi*, p.193.

³⁰⁰MacKinnon, cited by Halley, op. cit., p.110.

³⁰¹MacKinnon, op. cit., p.526.

³⁰²Firestone, cited by Gambino, op. cit., p.235.

³⁰³Gambino, op cit., p.223.

interpretation of power allows the legitimisation of the heterosexual couple, which enforces the norm and safeguard the principles, for instance, of secrecy.³⁰⁴ The family secures both power and hierarchies.

In queer theory, the role of family has been plenty discussed. In fact, in the political side of family a ‘normative discourse’, often aligning with compulsory heterosexuality, and set of institutional practices is found.³⁰⁵ In addition, Firestone theorises that the nuclear family reinforces unequal sexual hierarchy, as well as generates relations that generates and maintains women as marginal subjects.³⁰⁶ Women are expected to not speak upon their homosexuality, since the consequence would entail threatening the imposed heterosexual assumptions.³⁰⁷ Since the lack of independence for women, they are valued on the basis of the embodiment of the male’s desire, in particular the perversion of it which is defined by the attractive (good girls) and the provocative (bad girls).³⁰⁸ Some scholars argue that it is through sexualisation and gender socialisation that women become acquainted with their own being, thus “becomes a woman”.³⁰⁹ It is through the fetishisation/infantilisation of women, to some extent through pornography, that women become the object of desire of males and the desire of pursuing control.³¹⁰

Queer theory on its end aims to represent and value to the same extent all marginalised identities. Nonetheless, queer theory remains a theory which deconstructs heteronormative preconditions, for instance, anti-essentialist queer theorists have argued that biological sex and gender are constructed, based on wrongly assumptions. Gender remains separated from biology, while being produced through societal practices, norms, and performances.³¹¹ Identifying as a man or woman is culturally constructed and imposed, shaped by societal expectations.³¹² Additionally, neither gender or sex are fixed, thus they are consequences of changing identity discourses.

³⁰⁴Gambino, op. cit., p.224.

³⁰⁵Butler, cited by Gambino, op. cit., p.231.

³⁰⁶Gambino, op. cit., p.236.

³⁰⁷Butler, *Excitable Speech*, p.121.

³⁰⁸MacKinnon, op. cit., p.531.

³⁰⁹*Ibidem*.

³¹⁰MacKinnon, op. cit., p.530.

³¹¹Rudy, 2001. Radical Feminism, Lesbian Separatism, and Queer Theory. *Feminist Studies*, 27(1), p.207.

³¹²*Ibidem*.

2.3.2. Feminist Movements and Queer Theory as Juxtaposed

Feminist theory is to be perceived as universal and essential, while its nature is far from the concept of a monolithic entity, it has been fabricated into a multitude of facets and nuances. There are theories of feminism that rely on different ideals: liberal feminism, cultural feminism, materialist feminism, queer feminism, and so on. Upon which, there have been different scholars and ideas constructing their basis. In this subchapter, these feminisms will be discussed, especially in their relations to queer theory. In general, there has been a difference between feminism and queer theory, the former should be focusing on the construction of gender, in particular the conditions of women, while the latter focuses more on sexuality. This is overall shared by most academics, nonetheless with post-structuralist practices and lesbian feminism have often argued on the importance of sexualities and gender as well.

The foundation of feminism resides on the approaches to women's struggles, usually establishing a precise target of liberation from these inequalities that are intrinsically patriarchal and heteronormative. Feminists practices, in fact, engage in challenging these struggles (abortion, rape, lesbianism, sexual harassment, prostitution, female sexual slavery, and so on) to impose liberational components essential to freedom and change women's lives.³¹³ Some feminists denounce the role of pornography in society based on fetishisation of women's identity, whereas Rubin argues the anti-pornography feminists are actually imposing restrictions on the role of sex and categorisation of the good/bad sex binary as conservatives judgements would do.³¹⁴ Between queer theory and feminism, the concept of woman has been overly debated upon, since in most cases it refers to heterosexual cisgender women, who are interpellated in the question of their role.³¹⁵ Mahmoud Ahmadinejad, as cited by Rao, has responded to the "homosexual question" by saying that there are actually no women, in this way the answer allows one to comprehend the importance of gender in its cultural construction rather than limiting the category of woman to sex.³¹⁶ The debate on the concept and meaning of women resides in the tension between queer theorists and feminists. Contrasting what MacKinnon has highlighted on feminist practices, queer activists on their behalf denounces the importance of recognition that people of all genders can experience

³¹³MacKinnon, op. cit., p.529.

³¹⁴Gambino, op. cit., p.219.

³¹⁵Rao, 2014. Queer Questions. International Feminist Journal of Politics, 16:2, p.207.

³¹⁶*Ibidem.*

rape and others, imposing a gender-neutral perspective on the limits of feminist practices.³¹⁷ However, based on Agnes assumptions, some feminists might actually counter the gender neutrality of such recognition, based on the possibility of empowering nature of men to use law to oppress women and worsen the vulnerability of women.³¹⁸ Contemporary feminist theorists, conversely, denounce the concept of woman and its centrality to feminist theories.³¹⁹ The objective is to denounce how women are constantly subjected to male influence and male control, thus, it is necessary to deconstruct the concept of women to liberate them from the misogyny and sexism that had contaminated its nature.³²⁰ French post-structuralist feminist argue that once women are defined, characterised, or speak upon it duplicates misogyny.³²¹

Cultural feminism proposes an ideology where the concept of reappropriation is essential, meaning that concept of female nature and female essence must be attributed to women again by deconstructing the system of oppression.³²² The true enemy of cultural feminism lies in the maleness, especially observing the nature of law and its language, where rationality and objectivity are often associated traditionally with the male figure in comparison to the sensitivity, subjectivity and thought tied to the female nature.³²³ The objectivity of cultural feminist centers around liberation from masculine values, hoping for women to reject the inclusion among the “fathers and sons” or else their condition would be polarised against other women.³²⁴ Women as already demonstrated are subjugated to male dominated society, in particular to a multitude of binary oppositions, for instance, man/woman, culture/nature, positive/negative, however, cultural feminists by asserting this essential gender difference jeopardise women liberation by preserving such binary frameworks.³²⁵ Cultural feminism has been criticised based on the incapability of its response to sexism, where oppressive power perpetuates and reinvoked such opposition implied in the binary.³²⁶ There is a contrasting nature in the relation between cultural feminism and post-structuralist theories, the difference resides in the interpretation of subjectivity: cultural feminism, in fact, value the subjectivity in the fixed interpretation of

³¹⁷Rao, op. cit., p.208.

³¹⁸Agnes, cited in Rao, op. cit., p.208.

³¹⁹Alcoff, 1988. Cultural feminism versus post-structuralism: The identity crisis in feminist theory. *Signs*, 13(3), p.405.

³²⁰*Ibidem*.

³²¹*Ivi*, p. 407.

³²²*Ivi*, p. 408.

³²³De Vido, *Approcci Giuridici Femministi al Diritto Internazionale*, p.461.

³²⁴Daly, cited in Alcoff, op. cit., p.409.

³²⁵Derrida, cited in Alcoff, op. cit., p.417.

³²⁶Alcoff, op. cit., p.415.

the individual, thus, it is intrinsically part of the self in an essentialist perspective; whereas, post-structuralist subjectivity resides in the construction of the category women, where the essentialist perspective of biological determinism is rejected and is fabricated through social and cultural practices.³²⁷ Queer theory is closer to the post-structuralist view of the categorisation of women, in fact, the object of the theory lies in the rejection and deconstruction of binary opposition, and as Butler often presented since gender is associated with performativity, it is impossible to perceive as fixed and not fluid, furthermore expanded by the intersectionality of race and class. Queer theory has been discussed by Sedgwick and others on its decomposition of sex and gender, sexual desire and object of choice, identities and renders subjectivities indeterminate.³²⁸

Lesbian feminism has been overly criticised by queer theory, nonetheless, it has also been used by the theory. Adrienne Rich, in particular, has achieved a pivotal role in both feminist and queer theoretical discourse by proposing two important nuances of “lesbian continuum” and “compulsory heterosexuality”. The former, lesbian continuum is defined as a blurred boundary between lesbianism and heterosexuality, which is to some extent a typification of cultural feminism.³²⁹ The intent of such a concept aims to involve a multitude of women alongside the experiences of the self and their desire associated not necessarily with genital sexual experiences with other women, in addition to create connection among women through historical bonds to establish a place of recognition of the differences.³³⁰ Her desire, in fact, coincides with the creation of a common language, where women sharing the same experiences are to be found, however it has been criticised for its simplistic interpretation of the complexity of human conditions, in particular women and their intersection with cultural and construct elements often associated with race.³³¹ The latter, compulsory heterosexuality has been the focus of critiques, since it challenges the erasure of the lesbian experience from theoretical frameworks, while also encouraging heterosexual feminists to carefully investigate the heterosexual matrix of political institutions, which are the cause of the disempowerment of women.³³² Aligning with her desires, Rich illustrates “the profound and emotional impulses and complementarities drawing women toward women” that is obscured by inclinations based on preference or choice of women towards

³²⁷Alcoff, op. cit., pp.415-417.

³²⁸Walters, *From Here to Queer: Radical Feminism, Postmodernism and the Lesbian Menace*, p.835.

³²⁹Garber, 2001. *Identity poetics: Race, class, and the lesbian-feminist roots of queer theory*. Columbia University Press. p.128.

³³⁰Ivi, p.135.

³³¹Ivi, p.134.

³³²Rich, *Compulsory Heterosexuality and Lesbian Existence*, p.11.

men.³³³ She denounces the limits of women as associated with their gender, which equals women's impossibility to establish an economic and cultural role within patriarchal and heterosexual institutions.³³⁴ Wittig rejects the impositions of compulsory heterosexuality as well and values the deconstruction of the categories of sex, which are naturalised only within the violent heterosexual matrix.³³⁵ Queer theory has overall criticised plenty lesbian feminism as essentialist and reductive, creating a divide between the two. Some academics actually believe that lesbian feminists took a “revisionist approach”³³⁶, arguing that recognised oneself as a lesbian was a political choice as consequence of the oppressive nature of patriarchy, since all women were “born that way” thus it naturalises the lesbian nature of women.³³⁷ However, as Meese argues in her deconstructive reading of lesbian continuum, Rich approach to lesbian feminism is not essentialist or simplistic; on the contrary, she actually aims to move beyond the binary oppositions that women are subjugated to and she attempts a intersectional attitude towards the relational structure she desires.³³⁸ Queer theory challenges lesbian feminism by separating itself from the limits of sexuality studies and gender studies, while it sought a rather inclusive intersectional approach to the feminist frameworks.³³⁹ Nonetheless, both queer theory and lesbian feminism sought the deconstruction of heteronormative / patriarchal structure of society and institutions, while also challenging its oppressive norms to value the expression of the self. The differences among the two would be counterproductive, meaning that the charges against each other are “hardened too often and too quickly in public fora, creating[ing] a dangerous gulf between scholars and activists who can ill afford to be divided”.³⁴⁰

Lastly, radical feminism has been discussed for its marginalisation tendencies, since it focuses and values the importance of women and their liberation by the systematic subordination based on sex.³⁴¹ Radical feminism has been overly discussed in connection to the establishment and proliferation of new gender and sexual subjectivities, which as a consequence sought to reevaluate the meaning of “woman”.³⁴² Rao, in her essay *Queer Questions*, considers Indian queer and feminist activists contemporary debate, where she

³³³Rich, op. cit., 17.

³³⁴Ivi, p. 28.

³³⁵Butler, *Gender Trouble*, p.150.

³³⁶Federman, cited in Garber, op. cit., p.18.

³³⁷*Ibidem*.

³³⁸Garber, op. cit., p.19.

³³⁹*Ibidem*.

³⁴⁰McNaron & Zimmerman, cited in Garber, op. cit., p.6.

³⁴¹De Vido, op. cit., p.461.

³⁴²Rao, op. cit., p.207.

highlights that in Western reality a field of radical feminism regards trans individuals as “victims of a false consciousness”.³⁴³ Transgender individuals are to be perceived as participants or agents of patriarchy that sought to participate and infiltrate in the feminist space, which radical feminists tend to oppose.³⁴⁴ Rudy argues that radical feminists were more focused on the resistance to patriarchal power, rather than incorporating marginalised identities within their framework while also valuing a pragmatic and organic understanding of the relation between sexism and racism.³⁴⁵ Radical feminist view was rather an essentialist notion of identity: they focused on denouncing all men regardless of their race, while grounding its politics on the superiority of women's nature.³⁴⁶ Queer theory and radical feminists are separate methods, in particular radical feminists reject any association with the male figure, even gay men, while queer lesbians value the importance of such a coalition within the community.³⁴⁷ Queer theory aims to challenge the phallogocentric construction of culture, portraying women as sexually active agents and embracing an intersectional approach. Feminists critiques, however, argue that queer theory evokes ideologies that actually valorises men, unintentionally sustaining patriarchal traditions of society, in the process of deconstructing gender.³⁴⁸

2.3.3. The Role of Ethnicity in Lesbianism and Queer Theory

Queer theory is defined by its obligations to avenge the marginalised identities, while deconstructing both societal heteronormative institutions and institutional ruling classes. It is unavoidable the demanding necessity of an increased intersectional application of its method to international legal instruments as well. To some extent, queer theory has also theorised the role of race as construct, alongside gender and sexuality, meaning it is socially produced through processes of negotiation and contestation.³⁴⁹ Butler theorises that performativity could be transposed onto race as well, however, not in the same way gender would do.³⁵⁰ Intersectionality is a term coined by Crenshaw in 1989, which entails the intersection of race and sex.

³⁴³Rao, op. cit., p.208.

³⁴⁴*Ibidem*.

³⁴⁵Rudy, *Radical Feminism, Lesbian Separatism, and Queer Theory*, p.205.

³⁴⁶*Ibidem*.

³⁴⁷Rudy, op. cit., p.215.

³⁴⁸*Ivi*, p.217.

³⁴⁹Valentine, *Queer Bodies and the Production of Space*, in Richardson & Seidman, *Handbook of Lesbian and Gay Studies*. London: Sage Publications, p.145.

³⁵⁰Butler, *Undoing Gender*, p.345.

Queer theory is foremost committed to the process of ‘antinormativity’, however, by expanding the influence of intersectionality, in particular on the basis of Black and Third World Feminism, it would be able to highlight further how power is inevitably recursive.³⁵¹ Colonialism or racism, based on Gambino’s assumptions, are examples of descriptive entities of the ruling class, where the marginal subjects are both punished and legitimation of power.³⁵² Black women must be taught and oppressed in order to pursue and sustain the heteronormative order, as well as the established legitimate nuclear family. There are two perspectives on queer theory and intersectionality: the first one resides in the suggestion of a new way of contrasting power by focusing on the marginalised and nonnormative subjects, while the second one using recursive power to broaden intersectionality and to create a resistance to marginality.³⁵³ In a hierarchical order based on heterosexual traditional values, Black women are the one suffering the most as a consequence of ideologies influencing culture, politics, and institutionalised public policy.³⁵⁴ Black women are vulnerable and susceptible to the changes in society, where the increasing institutionalisation of white supremacy alongside inhumane treatments are deepening the imposition of a regime of marginalisation.³⁵⁵ As already demonstrated in the previous subchapter, homonormativity as well fosters hateful doctrines of racism towards women of colour, in particular non-Western countries, where States are forged as narrow-minded and intolerant of women and sexual minorities.³⁵⁶ In fact, often racism, motherhood and childcare are not to be theorised as “straight issues”, violence transcends the categories of class, color, age, or sexual preference.³⁵⁷ “Race, class, and gender” inevitably overlap as a response to the regime of power,³⁵⁸ in which the vulnerables are at the margin. Black women, briefly, are victims of discrimination on different grounds, their injuries could be a result of sex, race or sexual orientation discrimination, nonetheless the disadvantage of their identities is clear.³⁵⁹

Spelman illustrates how the categories of identity are to be seen as interlocking, since in most cases, these categories cannot be found as separate, for instance, “sexism and

³⁵¹Gambino, *A More Thorough Resistance*, p.221.

³⁵²*Ibidem*.

³⁵³Gambino, op. cit., p.222.

³⁵⁴Spillers, cited in Gambino, op. cit., p.225.

³⁵⁵*Ibidem*.

³⁵⁶Robinson, op. cit., p.2.

³⁵⁷Garber, *Identity poetics*, p.129.

³⁵⁸Warner, *Introduction*, xix.

³⁵⁹Crenshaw, 1989. Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. *University of Chicago Legal Forum*: Vol. 1989: Iss. 1, Article 8, p.150.

racism do not have different ‘objects’ in the case of Black women”³⁶⁰ Garber theorises the relations between gender and women experiences:

Gender essentialism and the ampersand problem obscure the fact that white women experience sexism in the context of white skin privilege, whereas women of color experience sexism in the context of racism. [...] Because gender is constructed and experienced differently in conjunction with various race/class/ethnicities/sexualities. [...] Hence, à la Fuss, gender essentialism must be seen as a specific—racist, classist—construction of gender. (Garber, 2001, p.25).

Garber tries, therefore, to demonstrate that it is impossible to create and theorise a system in which women are experiencing the same conditions, since it is often associated with historical context and cultural values. In fact, considering the heteronormative regime shaped around whiteness and the “well-being of the sexually privileged”³⁶¹ Narratives of women as subjects often remain focused on the white, straight, and middle-class women, while ignoring the conditions of women of colour, working-class women, and lesbians unless it has been rendered explicit.³⁶² It is clear that racialisation has been a historical and traditional process in which innocent genders and sexualities are deserving of recognition, linking to colonial thought and policy making, where the racial hierarchies between bodies racialised as superior or inferior equals to the establishment of marginalisation of the outsiders.³⁶³ Additionally, the creation of the excluded and “the other” often associated with non-Western individuals, whose conditions are demarcated by the association with hateful terms, for instance, “the unwanted im/migrant”³⁶⁴ or “the terrorist”³⁶⁵ Nonetheless, queer theory has been criticised often for its incapability of acknowledging within its methodology the conditions of the racialised sexualised/gendered difference, however, the policing of racialised subjects and policing of queer subjects coincided.³⁶⁶

Rich’s lesbian continuum has been overly discussed and criticised within the theories of gender and sexualities, in particular, the latter has been under critique because of the important erasure of sexuality to prioritise gender over race, in such a way that it limits the

³⁶⁰Spelman, cited in Garber, op. cit., p.25.

³⁶¹Rubin, op. cit., p.152.

³⁶²Garber, op. cit., p.26.

³⁶³Kehl, *Homonationalism Revisited*, p.29.

³⁶⁴Luibhéid, cited in Kehl, op. cit., p.30.

³⁶⁵*Ibidem.* Puar, cited in Kehl.

³⁶⁶Kehl, op. cit., p.31.

expression of identity of women/lesbians.³⁶⁷ However, rejecting the doctrine of lesbian feminism of Adrienne Rich, involves overlooking the relation between political visions and identities of middle-class/white lesbian feminists and working-class/lesbian feminists of colours.³⁶⁸ Nonetheless, critiques towards Rich's theories have been raised, in particular, regarding the conditions of working-class/lesbian of colours, since their conditions in society have often been marginalised or rendered invisible until white academics raised the subject.³⁶⁹ Often, queer theory and lesbian feminism polarisation has been perceived as unproductive, especially considering that queer theory beliefs of lesbian feminism as essentialist, it has been overly discussed in particular to its nature of essentialist or constructivist nature. Nonetheless, the interest of post-structuralist theories should align with the centrality of working-class/lesbians of colour, in particular as presented by Lorde it is crucial of methods to recognise the struggles of women whose voices are yet to be heard, by sharing and examining them towards the desirable outcome.³⁷⁰ It is within the lesbian community that battles on class, race, separatism, and sexual behaviors are discussed and developed, however, lesbian feminism was at first coined as a white lesbian feminist, thus the involvement of multicultural and antiracist beliefs came with the presence of lesbians of colours.³⁷¹ In the 1980s, the anti-essentialist evolution has found academics pursuing deconstructing means to dismantle "race" leaving anti-black racism unchallenged, for instance, the topic of "gay (as) the New Black"³⁷² replacing the struggle of lesbian and gay civil rights with merely a racial equality movement, meaning that Black is reduced to a multiculturalism that limits the interpretation of historical and political value.³⁷³ QPOCs (Queer People of Colour), historically, are diverse and heterogeneous, establishing a community where the concept of individuality of some queer theories is avoided. Additionally, QPOCs have the capacity to approach queerness intersectionality, by integrating elements of analysis and critiques of colonialism, racism, and heteronormativity within their activist and political framework.³⁷⁴

Queer theory still has difficulties in addressing intersectional complexities of identity and oppression. It has often been demonstrated that while queer theory values the

³⁶⁷Garber, op. cit., p.134.

³⁶⁸Garber, op. cit., p.139.

³⁶⁹*Ibidem.*

³⁷⁰Lorde, cited in Garber, p.3.

³⁷¹Fadernma, cited in Garber, p.21.

³⁷²Allen, 2013. Race/Sex Theory "Toward A New And More Possible Meeting." *Cultural Anthropology*, 28(3), p.554.

³⁷³*Ibidem.*

³⁷⁴Upadhyay & Ravecca, *Queer, beyond Queer?*, p.475.

deconstructing process of disrupting binarism, for instance, male/female or gay/straight, it falls short in its engagement of intersectional practices. Deepening its commitment to the creation of a framework in which supporting marginalised identities does not equal the creation of others, it allows the integration of intersectionality without the perpetuation of exclusionary tendencies.

2.4. The Challenges of Queering International Law

2.4.1. Why is it a Challenge?

Queering International Law and queering International Human Rights Law, as well queering more broadly legal instruments, align with the desires and objectives of queer theory. It is clear that queer theory grounds its nuances on the deconstruction of the norms, as in the standards set by society and nation-states, thus denaturalising heteronormative established entities. Despite the attempts of legal instruments to develop an inclusive framework, certain norms focused solely on the traditional principles are unavoidably restricting. Nonetheless, queer theory avoids the process of creating an opposite framework, discussed on the basis of homonormativity, since as already presented would equal a further marginalisation of identities that are non-conforming. Queering International Law is challenging on several grounding issues that will be presented and discussed in this subchapter.

One of the issues often highlighted by scholars is the interpretation of the ‘homosexual’ individual by legal instruments, also in universalistic and essentialist perspectives. The deviant nature of the homosexual is often criticised and denounced by traditional rethorics, alongside the ‘gender-theory’ that is overly accused by governments as well the religious entities. Sexuality and gender ‘deviance’ helped in the sustainment and legitimisation of the neoliberal international legal order.³⁷⁵ Overall, it is common in traditional rethorics to evoke the protection of children in relation to homosexuality, in fact, it is represented as a perverted force that threatens the reproductive system imposed by patriarchal and heteronormative values of societal organisation.³⁷⁶ As a demonstration, several States have implemented laws prohibiting the “propaganda” and “promotion” of homosexuality and gender non-conforming values by justifying on “protection of minors

³⁷⁵Otto, *Introduction*, p.6.

³⁷⁶Bernini, *Le Teorie Queer*, p.100.

and children” grounds.³⁷⁷ Foucault aligns as well the figure of homosexual as species and perverts, which are often analysed and valued as categories that needed form of restrictions.³⁷⁸ In the realm of law, queer lives are relegated to criminality and perversity, as consequence, queering international law has the objective to expose such nurturing realities of the heteronormative instruments, as well as providing new understandings.³⁷⁹ The adjective ‘pervert’ has been used plenty of times to refer to homosexual individuals, however, in some cases it goes beyond sexuality and often is referred within Western discourses associated with the uncivilised and underdeveloped, the “unwanted im/migrant” and the “terrorist” to demonstrate the complexity of the homonationalism.³⁸⁰ Nonetheless, in the evolutive process of the interpretation of the homosexual, from the ‘perverted homosexual’ to the ‘new normal homosexual’: modernity of a state lies in the ability of the homosexual to conform to neoliberal conforming values intrinsically part of the heterosexual/heteronormative construction of society (domesticity, consumption), rather on the ability of distancing from the perversion, by doing so the homosexual (once perverted) acquires a place within the holders of rights.³⁸¹ It is emblematic of International legal instruments to move beyond the limits of heteronormativity and value the complexity of queer and queerness in its ideals.

As presented in the previous chapters, queer theory’s objectivity is to denounce the heterosexual matrix of society, in establishing conforming heteronormative norms. Some queer theorists have raised critiques on the necessity to recognise the complexity of queer and its performative nature within international human rights: the objective is to subvert the limits of the binary opposition and the heteronormative framework in international law.³⁸² Conversely, others have criticised the discourse of gay rights as globalised and neoliberal, in which the homonormative ‘gay agenda’ aligns with a racist and imperialist order.³⁸³ Hierarchy associated with heteronormativity often divides sexuality into opposing categories, for instance the “good” and the “bad”, which often aligns with heterosexuality in

³⁷⁷Reid, 2023. A/HRC/56/49: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. United Nations Human Rights Council. <https://docs.un.org/en/A/HRC/56/49>, p.7.

³⁷⁸Otto, op. cit., p.3.

³⁷⁹Otto, op. cit., p.75.

³⁸⁰Weber, *Queer International Relations*, p.106.

³⁸¹Ivi, p.111.

³⁸²Gross, 2017. Post/Colonial Queer Globalization and International Human Rights: Images of LGbT Rights in Sircar & Jain, *New Intimacies, Old Desires: Law, Culture and Queer Politics in Neoliberal Times*. Zubaan Publishers. p.132

³⁸³Ivi, p. 133.

the first case, followed by heteronormative institutions, and homosexuality in the second.³⁸⁴ As already explained in the subchapter on homonormativity, by valuing the importance of freedom of sex and love within the international human rights movements, it is inevitable the reinforcement of heteronormative institutions as well as homonormativity.³⁸⁵ Queer theory criticises the act of conforming to institutional frameworks, since it actually fosters an illusory perception of inclusivity within a legal framework. In practice, queer theory has demonstrated that it creates further exclusionary views by marginalising LGBTQ+ individuals with non-conforming identities. Additionally, queer theory interest lies in the inclusion of transgender, intersex, or gender non-conforming within the legal instruments providing protection under human rights, opposing the mere adherence to pre-existing norms would equal to avoid the obstruction towards a radical change in the system.³⁸⁶ Subjugating to institutions that value heteronormativity equals an oppressive reality, which entail not only queer individuals but as well other intersectional identities. Queer theory denounces the adaptability through which same-sex couples are willing to conform to the class of ‘domesticated’, monogamous, procreative, it is counterproductive.³⁸⁷ There is a body of work researching the complexities of masculinity in sovereign states, depicting the relationship between gender, law, and the state while determining the guarantors of male dominance. Within gender hierarchies, there are instruments allowing the centrality of male subjects in law and pursuing control over “non-male subjects-objects”.³⁸⁸ Queer theory interrogates the definitions of sexuality and gender, while exposing the problematic naturalised connection of power and privilege in the societal institutions, however, queer practices result incompatible to law reform projects aimed at LGBTQ+ community.³⁸⁹ In short, queer law argues that heterosexuality is promoted by the legal sphere, the same that constricts homosexuality to an essentialist practice.³⁹⁰

Gender identity is another obstacle in queering international law, as a result of the narrow and opinionated society still founded on fixed ideologies of sex/gender, in fact, ‘gender’ in the legal realm is associated with men/women binary. International law, in fact, relies on the assumption that gender is fixed, pre-established in categories, where ‘sex’ is

³⁸⁴Rubin, cited in Gross, op. cit., p.137.

³⁸⁵Gross, op. cit., p.138.

³⁸⁶Gilleri, op. cit., p.24.

³⁸⁷Otto, *Gender and Sexuality Diversity: A Question of Humanity?*, p.11.

³⁸⁸Sen, 2021. A Queer Reading of International Law and its Anxieties. *GMLU Law & Society Review*, 3(1), p.39.

³⁸⁹Mazel, 2022. Queer Jurisprudence: Reparative Practice in International Law. *AJIL Unbound*, 116(116), p.10.

³⁹⁰Beger, 2000. Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)potency of Rights Politics at the European Court of Justice. *Social & Legal Studies*, 9(2), p.250.

biological and natural and gender is constructed and fluid, allowing its transposition onto sex. By echoing this framing, it is inevitable that both sex and sexuality are reinforced within a binary and heteronormativity³⁹¹ In contrast, the modern state creates dichotomies by favoring the practice of identities, where the complexity of masculinities generates a gender fluidity, by articulating non-conforming identities. The dichotomy in question arises as its relation to the distance established from maleness, whether as a necessity to reinforce it or as a consequence of these practices.³⁹² Non-conforming genders (transgenderism, non-binarism) and homosexuality should not be conceived as opposite to heterosexuality, but as a representation of the multitude expressions of the self, diverging from the heteronormative institutions (family, marriage).³⁹³ Overall, one of the issues with heteronormativity, especially in Western law, is the confusion on the differences between sexual identity and sex/gender. The central issue with identity politics is that it creates a context in which identity is perceived as the distinction between presence or absence, constricting the idea of binary to the opposition of heterosexuality and homosexuality as dividing or uniting.³⁹⁴ Additionally, the concept of gender as social construct opposed to religious beliefs and inaccurate based on the relation to “gender ideology”, in most contexts it adapts to whether constrictive implication it wants to transpose, for instance to some might refers to LGBTQ+ rights, abortion rights, or other arguments considered within legal realm.³⁹⁵ In some cases, gender is being targeted because of the multitude of interpretations, whether associated to women or the queer community or the binary of men/women, and often in the international law realm is considered as the latter.

To conclude, international legal instruments are often described as patriarchal and male, queer theory as method reveals the systemic representation of the European, christian male, subjects and objects acquire legitimacy and identity depending on the divergence from the pivotal normative reference frame.³⁹⁶ Queer theory and law reform are marked by the tension in their connection, as a consequence of the insecurity of queer legal scholars in the capacity of law to address the very harm it produced, while queer theory highlights the flaws and limitation of its system with the use of not-so effective analytical tools (Mazel, 2021, p.11).

³⁹¹Sen, op. cit., p.47.

³⁹²*Ivi*, p. 49.

³⁹³*Ivi*, p. 51.

³⁹⁴Beger, op. cit.,p. 256.

³⁹⁵Sosa, 2021. Beyond gender equality? Anti-gender campaigns and the erosion of human rights and democracy. *Netherlands Quarterly of Human Rights*, 39(1), p.8.

³⁹⁶Sen, op. cit., p.28.

2.4.2. International Legal Instruments and the Soft Law of the Yogyakarta Principles

International legal instruments have been exposed often on the basis of their heteronormative underpinnings, nonetheless United Nations entities have, in fact, integrated within their work issues and struggles of both sexual orientation and gender identity. The engagement with queer theory would actually benefit human rights law, especially when the concept of gender remains over-discussed on its definitions and clarity. In this subchapter, some of these issues will be presented alongside the introduction of the role of Yogyakarta principles, a soft law instrument that allows the inclusive interpretation of human rights law.

The 2011 Resolution (A/HR/19/41) of the UN Human Rights Council on Human Rights, Sexual Orientation and Gender Identity expresses concern regarding acts of violence and discrimination based on sexual orientation and gender identity.³⁹⁷ Highlighting that UN mechanism, human rights treaty bodies and special procedures on Human Rights Council documentation on the violations and discrimination against homosexuality and transgender identity over two decades.³⁹⁸ It is important for human rights bodies to recognise ‘basic rights’ in the context of discrimination on sexual orientation and gender identity grounds, for instance the right not to be killed or tortured, valuing the principles of universality and non-discrimination in Article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights”.³⁹⁹ Even at European level, human rights and protection of the rights of the LGBTQ+ community are respected and set by the Council of Europe (CoE) and the European Union, where the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) are ensuring the application and respect of non-discrimination rights by the Member States.⁴⁰⁰ It has been stated by international legal bodies that “all persons should live free from violence and discrimination based on their sexual orientation and/or gender identity” beyond the

³⁹⁷United Nations Human Rights Council. 2011. A/HRC/19/41: *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance*. United Nations. https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf

³⁹⁸UNHRC, op., cit., p.3.

³⁹⁹UNHRC, op. cit., p.4.

⁴⁰⁰ILGA Europe, 2024. Inventory of relevant SOGIESC case law and pending cases before the ECtHR and CJEU. 1. Available at: <https://www.ilga-europe.org/report/inventory-of-relevant-sogiesc-case-law-and-pending-cases-before-the-ecthr-and-cjeu/>

boundaries of Western societies, it is an international standard.⁴⁰¹ Nonetheless, there have been attempts by governments and non-state actors in justifying their opposition against the diversity of sexual orientation or gender identity on the basis of incompatibility on religious or sociocultural grounds.⁴⁰² It demonstrates clearly how traditional values, associated with heteronormative expectations, are often used in disguise and to allow an hostile interpretation of inclusive discourses, in particular considering the human rights obligations. Nonetheless, State-sponsored violence against the queer community are manifested in subtler mechanisms, for instance, in the restriction of reproductive rights, in conversion therapies, and in forced gender reassignment surgeries; additionally, punitive laws aim to generate as well violence of the same extent in various State's infrastructure, such as detention centers or healthcare facilities.⁴⁰³ In fact, across the international plane, in recent years, existing laws have been reinforced by States, as well as imposed new efforts to produce new measures to obstruct freedom of expression, peaceful assembly and association, targeting sexual and gender minorities, impacting as well those already marginalised.⁴⁰⁴ Thus, the security of the rights and freedoms of the LGBTQ+ community are increasingly jeopardised by certain States, equally, in other countries ensuring the protection of their rights and against discrimination is overall sustained.⁴⁰⁵ International Courts' judgements are *inter partes* binding, meaning that other States are not binded or set precedent for future cases.⁴⁰⁶ States accept the court's jurisdiction by ratifying its treaty and agree to comply with specific judgements, but it is not bound by decisions arising from disputes.⁴⁰⁷ The nature of *erga omnes* of IC judgments are the ideal conditions for overcoming the limits and oppressive policies of States, in positive, meaning that domestic legislation can be overturned by international law.⁴⁰⁸ Additionally, justice and rights are historically protective shields, however, in some cases, rights are just an extension of hierarchies based on heteronormativity and binaries.⁴⁰⁹ Morgan argues that legal realm mechanisms, in particular within human rights law, have a normalising effect: disciplinary

⁴⁰¹Borloz, 2023. A/HRC/53/37: *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*. United Nations Human Rights Council. <https://docs.un.org/en/A/HRC/53/37> p.3.

⁴⁰²*Ibidem*.

⁴⁰³Borloz, op. cit., p.3.

⁴⁰⁴Reid, op. cit., p.2.

⁴⁰⁵Reid, op. cit., p.3.

⁴⁰⁶Helfer & Voeten, 2014. *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*. International Organization, 68(1), p.78.

⁴⁰⁷*Ibidem*.

⁴⁰⁸Helfer & Voeten, op. cit., p.79.

⁴⁰⁹Beger, op. cit., p.250.

power is exemplified and the experiences of the diverse are being reframed on the values of the idealised nation-state, by doing so the State is absolved of any fault. Nonetheless, interpreting the Court's construction of homosexuality as normalisation of inequality, would mean overlooking the positive outcomes from its jurisprudence, whereas viewing the IC's judgements as performative it would reiterate the constructive potential of legal discourse.⁴¹⁰

The overly discussed aspect within legal discourse is the concept of gender, which is minimised to the implication of the "gender theory" and restricted to the imposition of traditional values, hence the creation of a "anti-gender movement". Based on the words of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, gender \neq women, on the contrary, gender is a social construction that uphold the roles of both women and men, functions and responsibilities, intersectioning to sexual orientation and gender identity.⁴¹¹ Nonetheless, it is difficult for legal instruments to understand gender as a construct, especially fluid, rather than restrict it to the fixed binary encompassed by society. Additionally, the General Assembly's Third Committee has highlighted that not only the term gender incites debates, but also states are often uninterested in engaging in such and women are further marginalised concomitantly to the extension of gender.⁴¹² Correctly, some argue that human rights advocacy and UN institutions have started assuming gender and sexual orientation as a matter of performativity.⁴¹³ The debate over the notion of gender has been divided into different opinions: feminists have been vocal on the worrisome risk of 'depoliticisation of gender relations' during the 1995 Beijing Conference on Women, oppositely, conservatives groups were worried on the 'over-politicisation of the relations between women and men'.⁴¹⁴ This worrisome hostilities towards the extension of the term gender and its definition poured onto international legal instruments, for instance, the Rome Statute of the International Criminal Court (ICC), the Draft Articles on the Prevention and Punishments of Crimes Against Humanity (CAH) of the International Law Commission (ILC), and the Istanbul Convention. The definition of gender in the Rome Statute has stirred and evoked distress among States Parties when the term was first introduced in 1998, even though it aligned with other international legal instruments adopted by the United Nations.⁴¹⁵ Some have argued that the

⁴¹⁰Morgan, cited in Johnson, op. cit., p.71.

⁴¹¹Otto, op. cit., p.74.

⁴¹²Ivi, p. 75.

⁴¹³Sen, op. cit., p. 48.

⁴¹⁴Baden & Goetz, cited in Sosa, op. cit., p.5.

⁴¹⁵Oosterveld, 2005. Gender and international criminal law: A critique of the treatment of gender in the International Criminal Court's Statute. *Harvard Human Rights Journal*, 18(1), p.56.

definition of gender introduced by the ICC conveyed the erasure of the social construct nature of it.⁴¹⁶ The definition of “gender” of the Rome Statute could be found in Article 7(3): “For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above”.⁴¹⁷ It is a consequence of the overly difficult negotiations, in which the term is a reflection of the conservative concerns about sexuality and the use of “constructive ambiguity” by the negotiators.⁴¹⁸ Other than that, concerns were raised against the possibility of sanctions grounded on sexual orientation rights.⁴¹⁹ Countries during negotiations were adamant on the definition of the term, creating a divide, where countries supported the conception of gender based on the social construction of men and women and their role within society, whereas others insisted on the association of gender to the fixed two sexes solely.⁴²⁰ In the end, it was accepted by the two axis the correlation of gender to the role of men and women in the context of society, since it allowed a “sufficient flexibility as well as precision”.⁴²¹ Overall, in the UN definitions, gender and sex are separated on the basis of their interpretation, the former focusing on its social construction which is influenced by culture and the latter on its innate/biological nature.⁴²² Nonetheless, the Rome Statute has gained quite the critiques regarding the definition of gender, in particular to its association to sex as baseline, because otherwise it would allow gender to be interpreted as extended by including homosexuals, transgendered, and ‘hermaphrodites’.⁴²³ It is, however, distant from the limits of biological determinism, since it would be considered erasure of historical foundations.⁴²⁴ Judith Butler actually theorises that both gender and sex are social constructions, based on performativity, hence, it would be impossible for gender to be constructed upon sex.⁴²⁵ An additional issue arose in the conflation of gender and sex, in fact, it resides in the concept of sexual orientation, it is crucial for the ICC to distinguish gender and sex from sexual orientation since they would be potential grounds for persecution.⁴²⁶

⁴¹⁶Sosa, op. cit., p.5.

⁴¹⁷Article 7(3) in International Criminal Court, 1998. Rome Statute of the International Criminal Court. International Criminal Court. <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>

⁴¹⁸Oosterveld, op. cit., p.57.

⁴¹⁹Sosa, op. cit., p.5.

⁴²⁰Oosterveld, op. cit., p.64.

⁴²¹Streains, cited in Oosterveld, op. cit., p.65.

⁴²²Oosterveld, op. cit., p.67.

⁴²³Oosterveld, op. cit., p.72.

⁴²⁴*Ibidem*.

⁴²⁵Oosterveld, op. cit., p.73.

⁴²⁶Oosterveld, op. cit., p.80.

In 2006, during an international panel of experts in Indonesia, Yogyakarta, experts of different backgrounds and expertise in human rights law drafted principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity called Yogyakarta Principles.⁴²⁷ The construction of these principles have grounding rules based on the already existing articles of human rights instruments, to which these experts adapted such notion with regard to sexual orientation and gender identity inclusivity.⁴²⁸ The Yogyakarta Principles is a non-binding instrument also known as soft law, which principles may be employed by States and non-State actors as well, it is nonetheless a strategic approach to value the importance of recognition of LGBTQ+ community in legal frameworks while also striving to eradicate the criminalisation.⁴²⁹ These principles are designed in an extensive practice of inclusivity in rights by removing discriminatory grounds associated with employment rights, state recognition of parenting, adequate standard of living, participation in public life, and so on.⁴³⁰ The Yogyakarta Principles are not only drafted on the basis of inclusivity, they value open concepts of sexual orientation and gender identity by avoiding a Western interpretation and homogenising notions.⁴³¹

Queering international law, in particular, international human rights law is therefore a task that requires more than inclusive tools, rather it is emblematic of States to act upon the non-discriminatory ideals. Nonetheless, it is clear that traditional values and institutions are still intrinsically part of the instruments as well as institutions, thus queer theory correctly aims the deconstruction of such without however providing analytical and valuable instruments.

2.4.3. Third World Countries as Homophobic – the Westernisation of Ideals

When it comes to sexual identity and gender identity, it is inevitable that their origins are questioned. Clearly, as already mentioned in the first chapter, the Western matrix is often considered within queer theory, particularly in light of intersectionality. In this subchapter, the westernisation of sexuality will be further analysed alongside the concept of universality and globalisation associated with sexual identities. According to queer theory, in fact,

⁴²⁷Otto, op. cit., p.74.

⁴²⁸Gross, op. cit., p.121.

⁴²⁹Mulé, et al. 2016. Recognition and legitimisation of sexual orientation and gender identity (SOGI) at the UN: A critical systemic analysis. *British Journal of Social Work*, 46(8), p.2248.

⁴³⁰Sauer & Podhora, 2013. Sexual orientation and gender identity in human rights impact assessment. *Impact Assessment and Project Appraisal*, 31(2), p.138.

⁴³¹Sauer & Podhore, op. cit., p.141.

sexuality and its societal context should not be restricted to the West, but to the complexity of it in the non-Western countries.⁴³² Gross illustrates how sexuality has already been exported by globalisation as the model of civilisation and westernisation, yet its construction is a postcolonial one already.⁴³³ The ‘global gay’ identity or the ‘international gay’ are cultural products of both neoliberal and capitalist currents, as well as creation of the interaction between the West, the non-West, and globalisation.⁴³⁴ Furthermore, the notion of universality is employed in the comparison between the two settings, by doing so the universal human aims to erase the limits of interpretation through which homosexuality is restricted to Western society and Western-influenced countries.⁴³⁵ Weber uses Clinton’s word: “being gay is not a Western invention; it is a human reality”, however, there are still some who are convinced of its Western matrix.⁴³⁶

As already introduced, the Western matrix of sexual identity and gender identity, to some, is the equivalent of ‘civilisation’ as opposed to the uncivilised practices that reside in the naturalised homophobic assemblages of the non-Western countries.⁴³⁷ The concept of homonationalism and homonormativity in this context can be employed plenty, in fact, the privatisation of rights are part of a neo-colonial agenda, where the aim is to create categories of good and bad, where the former is civilised, progressive, and liberal to its approaches to gay rights, while the latter is limited to a racialised perspective of barbarian.⁴³⁸ This dichotomy is frequent in the manipulative debate manufactured by some Western societies, to further marginalise the different in the crafting of the nation-state. In fact, ‘gay rights holder’ is forged in opposition to the pervert homosexual or the underdeveloped, the ‘unwanted im/migrant’, and the terrorist in the West, where it crafts the complexity of homo(inter)nationalism.⁴³⁹ As it is the creation of such figures and ideals, the vehicular way to deepen these oppressive opinions are through the human rights discourse, where throughout history the concept of human was solely associated with cisgenderism, white, and Christian, even though in recent years it has slowly expanded in its inclusivity although through a lengthy process of recognition.⁴⁴⁰ To some extent, a radical intrinsic part of queer is aligned with white secular norms, and as a consequence racist depictions of Islam and

⁴³²Gross, op. cit., p.131.

⁴³³*Ibidem.*

⁴³⁴Gross, op. cit., p.130.

⁴³⁵Weber, *Queer International Relations*, p.123.

⁴³⁶*Ibidem.*

⁴³⁷Otto, op. cit., p.75.

⁴³⁸Gross, op. cit., p.133.

⁴³⁹Weber, op. cit., p.106.

⁴⁴⁰*Ivi*, p. 107.

Muslims as homophobic and culturally backward can be reinforced.⁴⁴¹ Undoubtedly, placing beliefs of (Western) liberalisation on the notions of human rights and freedom as vehicular of a homophobic representation of the non-West, other than foment racism it obscures the homophobia that flourishes within democracies.⁴⁴² Human rights should be conceived as a liberation for the individuals, however, for some scholars, the process of queer advocacy results in an intervention and a form of cultural imperialism.⁴⁴³ Queer theory is supposed to acquire an anti-normative stance, however, by involving queerness within human rights the risk lies in the normalisation of queer sexualities, losing its radical edge to universality. As a consequence, racial, religious, and cultural divides are conformed and ordered rather than liberated.⁴⁴⁴

Weber uses the term ‘gay rights holder’ to illustrate the issue of illiberalism of liberalism within Western societies, in fact, (neo)liberal, (neo)imperial and (neo)colonial approaches to modernisation are being questioned alongside the portrayal of the non-Western individual (for instance, the im/imigrant).⁴⁴⁵ As previously illustrated, the ‘pervert’ and ‘perverse’ were associated with the homosexuals within a heteronormative hierarchical society, *au contraire* in a homonormative hierarchical society the deviant and pervert eventually becomes the the figuration of the ‘underdeveloped’.⁴⁴⁶ Progress is often associated with the establishment of gay rights, Puar, in fact, critiques this industrial complex because of the marginalisation nature of homonationalism.⁴⁴⁷ Additionally, she denounces ‘docile patriotism’ and ‘gay patriotism’ and their use as subjects of nationalist state policies, which creates a dividing reality of ‘patriotic’ and ‘unpatriotic’ based on conformity to neoliberal values and racialised norms.⁴⁴⁸ To some, ‘gay rights as human rights’ is the solution to exceeding the restriction of homonormativity, homonationalism, and neo imperialism, however, the universality of human rights and gay rights is not about the international protection but rather the liberation of sovereign state from failing to guarantee the protection of all, minorities and marginalised included.⁴⁴⁹ Third World states remain in the shadow of developed States, as a consequence of the intervention that obliges the former to seek neoliberalism as a part of a linear progression to also gain recognition within the

⁴⁴¹Kapur, *The (im)possibility of queering international human rights law*, p.136.

⁴⁴²Ivi, p. 137.

⁴⁴³Ivi, p. 141.

⁴⁴⁴Ivi, p. 143.

⁴⁴⁵Weber, op. cit., p.107.

⁴⁴⁶Weber, op. cit., p.110.

⁴⁴⁷Pura, cited by Weber (2016). op. cit., p.111.

⁴⁴⁸*Ibidem*.

⁴⁴⁹Weber, op. cit., p.138.

international system.⁴⁵⁰ The divide between West and non-West aligns not only on the civilisation and cultural superiority but also in the interpretation of societal hierarchical order as imposed by naturalisation of the system. In the contemporary world, however, the social divide is not as clear, in fact, gender and sexual liberation movements have emerged globally, where new narratives of pride and human rights have arisen in resistance to historical dehumanisation (Otto, 2017, p. 88). Nonetheless, there are still realities in which daily terror pressures the stability of the non-normative communities, furthermore, queer legal advocacy finds itself facing difficult challenges in engaging international human rights law to condemn crimes, violence and discrimination of queer people, while at the same time resisting the reinforcement of sovereign power and sustaining visions of justice beyond the law.⁴⁵¹

⁴⁵⁰Sen, *A Queer Reading of International Law and its Anxieties*, pp.34–35.

⁴⁵¹Otto, *op. cit.*, p.89.

3. Queering Gender-Based Violence

3.1. Overview of Sexual and Gender-Based Violence in International Law Instruments

The objective of this chapter is to create a linear framework of generic aspects and foundations of the sexual and gender-based violence within international law and international human rights law. During the different subchapters the multitude of nuances related to GBV will be discussed and presented. In the first subchapter the objective is to illustrate the framework of GBV and SGBV related to international instruments as stipulated, focusing on the role of women and the critique on the limits of exclusive women-centered CEDAW (Convention on the Elimination of All Forms of Discrimination against Women), while also providing some nuances on the influence of cultural/heteronormative norms. Afterwards, the successive sub-chapter will provide the queer's perspective on the same discriminatory grounds and frameworks, where the objective is to create a comparative analysis in the inclusion of queer identities. In this subchapter a few notions and background information will be summarised to provide a clearer understanding of the grounds and definitions used within legal instruments.

Sexual and gender-based violence as a notion is associated with any injurious act directed toward individuals on the basis of gender differences, and it might translate into any physical, psychological or sexual act in any private or public settings that affect the principle of human dignity.⁴⁵² It is necessary to provide a generic definition on what it entails violence and discrimination. Legal instruments have offered a few interpretations on the notion of violence, for instance, WHO (World Health Organisation) in a 2002 Report on Violence and Health described violence as “intentional use of physical force or power, threatened or actual, against oneself, another person, against a group or community [...]”.⁴⁵³ In the Directive 2012/29/EU of October 2012⁴⁵⁴, violence as in GBV is defined as:

⁴⁵²Desai & Mandal, 2022. *Sexual and Gender-Based Violence in International Law*. Springer Nature Singapore. p.2.

⁴⁵³Ivi, p.15.

⁴⁵⁴Directive 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, preamble. Cited by Sosa and De Vido (2021), *Criminalisation of gender-based violence against women in European States, including ICT-facilitated violence*, Luxembourg, Publications Office of the European Union, p.39.

Violence directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim [...] (Directive 2012/29/EU).

Others have defined violence within the limits of violence and not-violence instead, by defining the nature of the act and intention, and the harm and non-consent.⁴⁵⁵ In sum, violence is to be understood as an indicator of behavior including acts aimed to injure someone's identity based on discriminatory grounds, in the case of GBV and SGBV it is associated with the boundaries of sex and gender. Therefore, within violence, the demonstration of power imbalances are manifested, in particular, considering GBV, the inequality and unequal conditions of the (women) self is further articulated. However, violence as a generic notion is not enough to determine the degree of the crimes, in fact, as already hinted gender-based violence is an example of violence that could be discussed, as well as its further subcategories where the crimes are specified. Violence comes in different shapes and forms, in particular considering the association with gender, which is the foundation of the centrality of women within international legal instruments, such as CEDAW and the Istanbul Convention. Violence involves clearly two or more individuals, where one is the perpetrator and the other is the victim, and the violence happens in the factual actions between the two.⁴⁵⁶ Different levels of seriousness of the harm might be achieved in this interaction, whether intentional or unintentional, whether physical and psychological, but nonetheless, there is the implication that these acts are results of nonconsensual or partial consensual harms.⁴⁵⁷ Additionally, Bourdieu illustrates the notion of 'symbolic violence', which is the inclusion of cultural power as coercive power within the framework of violence.⁴⁵⁸

Generally, sexual violence refers to any event involving sexual acts in the form of violence to individuals of any gender identity or expression. Sexual violence is interpreted as systematic actions aimed to impose power and control over an individual or group, in fact, there are different forms, such as systematic rape, sexual harassment, sexual abuse, and

⁴⁵⁵Walby et al. 2017. Conceptualising Violence And Gender. In *The concept and measurement of violence* (1st ed.). Bristol University Press. p.31.

⁴⁵⁶*Ivi*, p.32.

⁴⁵⁷*Ivi*, p.34.

⁴⁵⁸Bourdieu, cited in Walby et al., *op. cit.*, p.36.

so on⁴⁵⁹. The WHO (2022) has defined sexual violence as a multitude of sexual violent acts involving the penetration of genitals with penis, other body parts or any object, in short, rape is fundamentally a violation of human dignity and is considered within international frameworks as a crime against humanity.⁴⁶⁰ In fact, sexual violence and rape were both recognised under international law within the framework of armed conflicts, afterwards, progressively appeared in human rights sphere, for instance, as a violation of the right to private life, acts of torture, and forms of inhuman and degrading treatment.⁴⁶¹ Sexual violence could be placed within the gender-based violence framework, which is far more complex in its entirety. Gender-based violence is often associated with any type of violence against women (VAW), thus the two terms are often used interchangeably.⁴⁶² GBV has been defined by any harmful acts against any particular individual or group of individuals on the basis of gender⁴⁶³, however the complexity and discussion on the inclusivity of gender-based violence frameworks will be further discussed in the following sub-chapters. Meanwhile, GBV refers to an amount of violent actions that affect the integrity (bodily or mentally) of an individual, more specifically within the human rights realm it refers to actions against women and the breach of the rights of women.⁴⁶⁴ By definition, GBV should entail both women and men, girls and boys, however, the conditions of women and girls are far more

⁴⁵⁹There are different definitions concerning what sexual violence entails to: the WHO has defined sexual violence any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work (WHO, 2022, "Sexual Violence" in *World Report on Violence and Health*, p. 146; available at: https://iris.who.int/bitstream/handle/10665/42495/9241545615_eng.pdf?sequence=1 accessed on 15 January 2025) p.146.

⁴⁶⁰ Rape falls under the Article 2(g) of the Draft articles on Prevention and Punishment of Crimes Against Humanity adopted by International Law Commission in 2019, where "crimes against humanity" means [...] any acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity

(available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf).

⁴⁶¹De Vido, S., & Sosa, L. 2021. Criminalisation of gender-based violence against women in European states, including ICT-facilitated violence. Publications Office of the European Union. p.75.

⁴⁶²Desai & Mandal, op. cit., p.16.

⁴⁶³The definition of GBV provided by Explanatory Report of the Istanbul Convention is:

"Gender-based violence refers to any type of harm that is perpetrated against a person or group of people because of their factual or perceived sex, gender, sexual orientation and/or gender identity"

(available at <https://www.coe.int/en/web/gender-matters/what-is-gender-based-violence> ; accessed on 29 January 2025).

⁴⁶⁴Desai & Mandal, op. cit., p.17.

vulnerable than men, in respect to power imbalances, thus international legal instruments established limits to pursue a visible centrality of women.⁴⁶⁵

There are different stages to GBV, in fact, there is domestic violence (violence within family), violence in the community (rape, sexual harassment, trafficking and so on), and violence perpetrated or condoned by State (GBV during armed conflicts or emergencies).⁴⁶⁶ Domestic violence includes any violence in close relationships, for instance, intimate partner violence or any form of violence which is committed by individuals that are ‘current or former spouses, or partner or other family member of the victim’ (Directive 2012/29/EU, 25 October 2012) that not necessarily are co-habitants.⁴⁶⁷ There are other definitions of what ‘domestic violence’ entails to in international legal instruments, for example, in Article 3(b) of the Istanbul Convention (2011),

“Domestic violence” shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim (Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011, p. 3).

Nonetheless, among the different definitions an issue arose upon the involvement of past relationships, since the limits of cohabitation might change the outcome of the judgement, specially couples who are young or in other cases the gender of the past partner might not match the ‘personal scope of the offence’.⁴⁶⁸ Rape alongside sexual harassment are within the categories of GBV. As already mentioned, rape is defined by its vigorous involvement and repercussion not only on the victim but as well politically, in fact, rape is often associated to war crimes due to its strategic nature, such as the Nanjing Massacre by the Imperial Japanese troops or the Rwanda genocide.⁴⁶⁹ Nonetheless, rape does not affect only women during conflicts, but there have been cases of mass rape where men and boys were targeted to implement control and order by the perpetrators.⁴⁷⁰ The important aspect of rape is the coercive and controlling nature, which allows actors to install fear and control over the

⁴⁶⁵Bouta et al. 2005. Gender-Based and Sexual Violence: A Multidimensional Approach. In Gender, Conflict, and Development. World Bank. p.33.

⁴⁶⁶Desai & Mandal, op. cit., p.40.

⁴⁶⁷De Vido & Sosa, op. cit., p.57.

⁴⁶⁸De Vido & Sosa, op. cit., p.73.

⁴⁶⁹Scully, 2010. Expanding The Concept Of Gender-Based Violence In Peacebuilding And Development. Journal of Peacebuilding & Development, 5(3), p.33.

⁴⁷⁰Bouta et al., op. cit., p.36.

victim, in fact, rape is also present in cohabitation through marital rape, for instance.⁴⁷¹ Sexual harassment is intrinsically part of an established society, where the supervisors are imposing their own control over the subordinates.⁴⁷² As a matter of fact, it is within employment and work environment that sexual harassment is often verified, therefore, for such reason the ILO in Article 1(a) of the Convention No.109 of 2019 has coined the definition, where it establishes the ‘unacceptable behaviours and practices’ of such GBV.⁴⁷³ Nonetheless, the ILO definition is not the only one, also in General Recommendation No. 19 (1992) of the CEDAW, sexual harassment might be defined as ‘unwelcome sexually determined behaviour’,⁴⁷⁴ where the actions might be considered as both physical or verbal. In other cases, the definitions are more generic and spaces over other environments, for instance, the Istanbul Convention as well highlights any form of sexual harassment that is unwanted in Article 40.⁴⁷⁵ Generally, all these forms of GBV are prohibited both at national level and international level, highlighting the deprivation and violations of rights on the basis of gender. It is often assumed that these actions are defined by a single event. However, there have been cases where the victims have experienced repeated actions of such harmful nature, in particular registered among women. Yet, these circumstances might not always count as acts of violence.⁴⁷⁶ In the next subchapter, these definitions will be discussed with women at the center, alongside the legal instruments of CEDAW and the Istanbul Convention.

⁴⁷¹De Vido & Sosa, op. cit., p.75.

⁴⁷²De Vido & Sosa, op. cit., p.86.

⁴⁷³ Article 1(a) of the ILO Convention No.109 (2019) states that:

(a) the term “violence and harassment” in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment;
(https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190)

⁴⁷⁴Article 11 (18) of the CEDAW General Recommendation No. 19 (1992) states:

Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment

⁴⁷⁵De Vido & Sosa, op. cit., p.87.

⁴⁷⁶Walby et al., op. cit., p.38.

3.1.1. Sexual and Gender-based Violence against Women and the International Legal Instruments

Gender-based violence legal instruments have been focusing solely on the role of women, establishing the necessity of creating a framework in which women are protected, while harmful actions are prevented by States. Scholars have often depicted women as vulnerable to societal conditions, in particular, considering the amount of forms and levels of violence to which they are subjected to. Negligence, therefore, is being dispossessed by designing a complete outline within international legal instruments: CEDAW and the Istanbul Convention are two examples. Unequal treatments of women are sources of systematic SGBV, alongside the amount of inequalities to which women are subjugated to in society.⁴⁷⁷ As far as women are concerned, their conditions within a hegemonic and heteronormative hierarchical society are limited in relation to the male figure, in fact, as already hinted before, women are positioned to a clear inferior placement. By comparing women to men, women will always be perceived as increasingly more vulnerable to GBV, because of the clear opposition of genders and roles, additionally, women are often systematically violated.⁴⁷⁸ It is believed that by implementing frameworks more prone and designed to promote gender equality, there is a probability of avoiding and preventing identical circumstances involving violence in the future.⁴⁷⁹ There have been critiques on the centrality of women and the departing nature from gender-neutral interpretations in legal instruments, however, as it has been highlighted by law that women in most cases are the solely affected by some realities, for instance, FGM (female genital mutilation), forced abortion, and forced sterilisation.⁴⁸⁰ Historically, in armed conflicts, women are the most adversely affected, in particular to rape, nonetheless it took time for international legal instruments to recognise the imperial gravity of the act. Women and girls were generally the targets for an amount of war crimes that entailed humiliation, domination, and fear, as well as being subjected to trafficking and internal displacement, for such reason the establishment of centrality of women was a necessity.⁴⁸¹ Women and girls violence was a matter of disproportionality based on conditions occurring both in armed conflict and peace, in fact, it

⁴⁷⁷Davies & True, 2015. Reframing conflict-related sexual and gender-based violence: Bringing gender analysis back in. *Security Dialogue*, 46(6), p.496.

⁴⁷⁸Bouta et al., op. cit., p.35.

⁴⁷⁹De Vido & Sosa, op. cit., p.45.

⁴⁸⁰De Vido & Sosa, op. cit., p.43.

⁴⁸¹Scully, op. cit., p.24.

is disproportionate even within enclosed circumstances based on the outcome affected by physical, psychological, and economic harm.⁴⁸² The use of gender in GBV has been overly discussed, since it is evident that women are the main focus of the frameworks and the ‘others’ are being marginalised from the conception of violence. By focusing on women and providing a centrality within international instruments, women are rendered visible and the process allows an alignment with legal instruments to eliminate any act of violence against women, however, it is enshrined by the binary of male/female.⁴⁸³ There have been two flows of ideas regarding the role of gender as well, one is known as “gender mainstreaming” and the other is known as “gender essentialism”. The former approach aligns with the objective of achieving gender equality, by mobilising the concept of gender discrimination and gender inequality, it is often used within legal instruments whether international, regional or national.⁴⁸⁴ It was established as a concept during the 1995 Beijing Platform for Action and defined in 1996 by the European Commission: the aims of gender mainstreaming aligns with the mobilisation of general policies and measures, by systematically examining the possible effects on both men and women.⁴⁸⁵ It is an approach that allows the involvement and incorporation of gender perspectives alongside the contexts to include a more gender diversity within the legal realm, however, it has been criticised because of the limits of the binary and the incapability to apply intersectionality.⁴⁸⁶ The latter, instead, conceives a singular and universal woman’s experience without an intersectional approach, in particular in the human rights realm, there have been a fair amount of critiques by the anti-essentialist theory because of its marginalisation nature. CEDAW has been heavily criticised, because of

⁴⁸² In Sosa and De Vido’s work, the role of disproportionality has been fairly discussed in consideration of legal instruments and VAW, by reporting Article 3(d) of the Istanbul Convention (“gender-based violence against women” shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately; <https://rm.coe.int/168046031c>) and CEDAW General Recommendation No. 19 (“the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately”; <https://www.refworld.org/legal/resolution/cedaw/1992/en/96542>). It is evident that women are impacted differently and to a disproportionate level when it comes to crimes of violence, in particular, as a cause of the image that heteronormative norms in society have created. (De Vido & Sosa, op. cit., 38).

⁴⁸³Rosenblum (2011) observes how the limits of focusing on the women’s side and improvement are a reinforcement of the binary, which actually it is supposed to be dismantled in order to perceive a change. Clearly, they, the author, are not invalidating the importance of establishing a framework that allows the lives of women to be improved, however, until the binary of male/female stands, it is impossible to achieve a more complete environment. In particular, considering that genderally women are conceived within not only a binary, but also as biologically-driven (universalism) and essentialist perspective. In fact, it is transgender movements that are challenging not only the binary, but also the women-centered feminism (Rosenblum, 2011. Unsex CEDAW, or What’s Wrong With Women’s Rights, 20. Columbia J. Gender & L 98. 104). See also Walby, op. cit., 43; Rosenblum, op. cit., 101.

⁴⁸⁴Walby, op. cit., p.47.

⁴⁸⁵Walby, op. cit., p.50.

⁴⁸⁶Rosenblum, op. cit., p.154.

its interpretation and depiction of women based on sex and culture, even though feminist theorists have rejected the biological essentialism of sex.⁴⁸⁷

CEDAW represents a significant development within legal instruments, its objective is to prohibit any form of violence against women. It was adopted in 1979 by the General Assembly, and it originates from the Declaration on the Elimination of Discrimination against Women of 1967, which differs to some extents but some articles remain asymmetrical (i.e. Article 5 of CEDAW and Article 3 of DEDAW).⁴⁸⁸ The CEDAW Committee promotes an intersectional approach to violence against women, highlighting the form of discrimination on different basis as presented in different General Recommendations, for instance, these grounds align with ethnicity, minority status, colour, language, religion, political opinion, being part of LGBT community, and so on are some of the examples of how the Committee defines GBV.⁴⁸⁹ Different is the case of the Istanbul Convention, where the intersectional approach is not as evident, even though in Article 4(3)⁴⁹⁰ defines discrimination based on any grounds such as sex, gender, race, colour, and so on.⁴⁹¹ Article 1 of CEDAW⁴⁹² has been overly criticised for its exclusivity associated with women, thus it is confined to one sexed identity group, rather than assert discrimination on the basis of sex.⁴⁹³ Some scholars of the queer theory have criticised the Convention on the lack of clarity in the definitions of what ‘women’ refers to, if it can be read as inclusive of

⁴⁸⁷Cf. Rosenblum, *Unsex CEDAW* and Choudhry, 2016. Towards a Transformative Conceptualisation of Violence Against Women - A Critical Frame Analysis of Council of Europe Discourse on Violence Against Women. *The Modern Law Review*, 79(3), pp.406–441.

⁴⁸⁸González Orta, 2023. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW): from its radical preamble to its contemporary intersectional approach. *Women's History Review*, 34(1), p.80.

⁴⁸⁹De Vido & Sosa, op. cit., p.48.

⁴⁹⁰Article 4(3) of the Istanbul Convention states:

The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status. (Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), Istanbul 11/05/2011, available at: <https://rm.coe.int/168008482e>)

⁴⁹¹De Vido & Sosa, op. cit., p.48.

⁴⁹²Article 1 of CEDAW states:

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. (UNGA Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, available at: <https://www.ohchr.org/sites/default/files/cedaw.pdf>)

⁴⁹³Gilleri, 2024. Women, and all of us: Article 5(a) CEDAW as a protection for all gendered individuals. *European Journal of Legal Studies*, 15(2), p.139.

trans individuals or as trans-exclusionary, in particular, while comparing it to the ICERD (International Convention on the Elimination of all Forms of Racial Discrimination) and its intersectionality.⁴⁹⁴ For such reason, Article 5(a) of CEDAW⁴⁹⁵ has been interpreted more freely, even though within an instrument focused solely on women, the language implies a deeper inclusive meaning of ‘gender’ by using ‘men and women’ and thus, securing protection for all gendered individuals.⁴⁹⁶ In short, the CEDAW acts as innovation in the protection of women by obliging the states to actually guarantee measures to ensure gender equality and empowerment. Its objective remains gender equality between men and women, as both treaty obligation and principle of customary international law.⁴⁹⁷ However, Rosenblum has argued that the soft law characteristics of CEDAW’s framework lacks reinforcement power, thus, it is evidently more appealing to States in protection of their sovereignty, even though protocols have enhanced accountability.⁴⁹⁸ The more concerning aspect of these legal instruments resides in the intersectional and inclusive interpretation, the binary approach and the universalist approach to ‘women’ is limiting, thus it is inevitable the difficulty in acquiring both gender equality and an inclusive framework to safeguard the rights of most.⁴⁹⁹

3.1.2. Gender-based Violence: the Cultural and Religious influence

Culture, religion, and heteronormativity play important roles within the international legal instruments, especially considering the conditions of GBV and SGBV. The three affect both male and female individuals in the conditions associated with behaviour and identity, as a consequence it is a challenge to develop a ‘universality of human rights’, moreover, within the limits of such restrictions.⁵⁰⁰ Culture refers to a multitude of elements that are linked to individuals, it encompasses the complexity of the identity by the influence of external agents and actors. Culture also denotes a society and community in which people are able to

⁴⁹⁴Gilleri, op. cit., p.141.

⁴⁹⁵Article 5(a) of CEDAW declares:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

⁴⁹⁶Gilleri, op. cit., p.142.

⁴⁹⁷Šimonović, 2014. Global and Regional Standards on Violence Against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions. *Human Rights Quarterly*, 36(3), p.591.

⁴⁹⁸Rosenblum, op. cit., p.115.

⁴⁹⁹Rosenblum, op. cit., p.140.

⁵⁰⁰Desai & Mandal, op. cit., p.6.

express themselves through the elements attuned to their environment by collectively sharing the same experiences and cultural identity.⁵⁰¹ Culture lies in the institutions as well, for instance, the family, the church, the State, and as a consequence culture shares the same ideologies embedded in the patriarchal (and heteronormative) stratification of society. As much as culture carries the good, it carries the bad as well, nonetheless, culture is respected and protected within international legal instruments.⁵⁰² It is within patriarchy that resides all the traumas carried by women in society, in particular the unequal powers that creates the genealogical gap between men and women. Overall, the unequal and imbalance of power between women and men is set by the binary of superiority/inferiority in which both reside, and to which women are susceptible to, as hinted in the previous subchapter. However, restricting identities to opposite binaries is preventing individuals to be liberated from the clutches that are imposed upon. Additionally, the relation between culture and gender is being often discussed, even within queer theory. Gender is being sought within culture, where culture aligns with the norms of society, thus it generates the construction of gender where ‘gender culture’ is adopted in relation to norms.⁵⁰³ The conditions of gendered domination/subordination are consequences of the symmetrical dualism of men and women, where, based on cultural norms, the male and masculinity are often associated with power, aggression and domination, and on the contrary, female and femininity are associated with dependence, weakness, and submission.⁵⁰⁴ The issue resides in the stereotypisation of gender and gender-based, where both men and women are limited, and often, it transposes outside the binary affecting the ‘other’.⁵⁰⁵ In fact, within patriarchal society, it is historically demonstrated that women’s rights and gender equality are impossible to achieve unless the patriarchal societal and heteronormative perspectives are deconstructed, as queer theory denounces.⁵⁰⁶ In the Preamble of CEDAW, the drafters have highlighted the importance of deconstructing gender-stereotype patterns, in particular associated with the traditional values of men, to avoid any repercussions on the family while achieving a system in which gender

⁵⁰¹Desai & Mandal, op. cit., p.26.

⁵⁰²Culture as a notion is often discussed within international law. In Article 27 of the ICCPR and Article 15 ICESCR, the concept of culture and any association to it is protected and recognised as part of human dignity and value of the individuals. In fact, it is shared by most international legal instruments that everyone is entitled of exercise their own cultural rights, to conserve it as well. Also, in Article 5 of ICERD, everyone should be allowed to participate to cultural lives and activities without discrimination. Therefore, culture is part of community heritage and it is a necessity to foster its survival, through the protection and prevention as a part of human identity (Desai and Mandal, 2022, pp.160-161).

⁵⁰³Desai & Mandal, op. cit., p.162.

⁵⁰⁴Cf. Desai & Mandal, op. cit., 163; Gilleri, op. cit., p.142.

⁵⁰⁵*Ibid.* Gilleri.

⁵⁰⁶Desai & Mandal, op. cit., p.164.

equality is accomplished.⁵⁰⁷ The only solution developed regarding Article 5(a) and its interpretation is not eradicating and eliminating traditional gendered stereotypes, but it is to avoid any further discrimination towards gendered individuals, therefore, for such a reason the only way is to change traditions and culture.⁵⁰⁸ By comparing CEDAW to ICERD, scholars have highlighted the emblematic difference in the application of intersectionality, in fact, when considering gender, race, and ethnicity within ICERD it is clear that all three are not naturally constructed, but are inherited by cultural aspects even though some biological factors remain.⁵⁰⁹ When it comes to ethnicity, as already discussed previously, there is a tendency within international instruments to value the Western ideologies by deconstructing the ethnic minority, where the cultural differences are often perceived in negative and thus marginalised furtherly. However, based on the universal interpretation of human rights, women rights are human rights and human rights are universal, therefore women rights are universal as well, where all women are subjected to oppression by patriarchy.⁵¹⁰ The objective through which women was used as a term resides in the establishment of a ‘cross-cultural’ setting to contrast the increasing fragmentation of the identity of the self and its traits, often associated with class, ethnicity and religion. Nonetheless, the term ‘women’ clearly varies across cultures and States, thus the universalisation of it ignores completely the gender construction embedded in culture and the implications are a marginalisation of the ‘otherness’.⁵¹¹ Moreover, the implementation of a gender-neutral framework is falsely interpreted as ungendered and anti-essentialist, however, there will always be a tendency within international legal instruments to value one gender rather than another for its universalist grounds, even though violent crimes, such as ‘rape’, are considered ‘gender-neutral’ because it affects both women and men. As well, gender invisibility equals to a biased interpretation of gender-neutrality, where the universalist grounds are found,

⁵⁰⁷The Preamble of CEDAW states that: “that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality of men and women”. States parties are therefore obliged to work towards the modification of social and cultural patterns of individual conduct in order to eliminate “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (article 5) (UNGA, Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>). Cf. Gilleri, *Women, and all of us: Article 5(a) CEDAW as a protection for all gendered individuals*, p.149.

⁵⁰⁸Gilleri, op. cit., pp.152-154.

⁵⁰⁹Gilleri, op. cit., p.167.

⁵¹⁰Choudhry, op. cit., p.413.

⁵¹¹Rosenblum, *Unsex CEDAW*, p.127.

additionally, to some scholars gender invisibility equals to a neglect of gender by legal instruments.⁵¹²

Religion is far more complex when it comes to GBV and the role of women in society, other than that religion is to be considered one of the grounds considered discriminatory by international legal instruments. Additionally, considering that religion, as well as customs and culture, are in general not referring to specific communities by limiting its interpretation to a more universalist perspective, it should not be used to justify violence against women.⁵¹³ Among the different reservations held by States regarding CEDAW, some have been interested in the identification of States refusing to the employment of rights of women, since religion believes that it would have a repercussion on the religious norms as well as patriarchal ideologies.⁵¹⁴ As already hinted, Western mediatisation of the ‘otherness’ creates a divide, in particular, it is emblematic that the interpretation of certain traditional values are perceived as non-democratic on the basis of Western ideals. Notably, Islam is the most discussed on the basis of women’s conditions (inferiority in the marital context, poligamy, divorce, adultery), in comparison to the women’s conditions in Christianity, nevertheless both religion’s foundations are set on patriarchal and hegemonic conditions of the male figure interpretation.⁵¹⁵ Inequality and unequal conditions are both embedded in religion, however, it remains ideal not to value those as justification to the actions of violence, for such reason CEDAW among other legal instruments are valuing the change within the traditions, rather than a deconstruction and elimination.⁵¹⁶ The reinforcement of hierarchical and hegemonic attributes are consequences of religious beliefs, for such reasons the system of sex and gender are often associated with conservative ideals.⁵¹⁷ One of the narratives regarding religion and its association to GBV resides in the implication of sexual conservatism and in the belief that religion is the one causing GBV. Consequently, it implies the creation of a divide between religion and secular actors, as well as religion conservationists and sexual progressivists.⁵¹⁸

⁵¹²Walby, op. cit., p.44.

⁵¹³Choudhry, op. cit., p.438.

⁵¹⁴Raday, 2001. Radical Feminism, Lesbian Separatism, and Queer Theory. *Feminist Studies*, 27(1), p.61.

⁵¹⁵Raday, op. cit., p.62.

⁵¹⁶Raday, op. cit., p.66.

⁵¹⁷Jakobsen, 2023. *Because Religion: Does Something Called “Religion” Cause Gender-Based Violence*, in Abu-Lughod et al. *The Cunning of Gender Violence*. 151-175. Duke University Press. p.151.

⁵¹⁸Jakobsen in “Because Religion” in *The Cunning of Gender Violence* (2023) dedicates her chapter to focus on the relation between religion, GBV, and sex/gender. She provides different examples in which the US and its Presidents tend to use *terrorism* discourse to excuse their *war on terror*, in particular, creating an antagonist perception of Islam and by invoking *honour crimes* to implement directives to marginalise further Muslim countries. The interpretation, additionally, of sexual conservatism tends to be used as divisive factor between religion, reinforcing the structure of *us* versus the *other* (the different). Nonetheless, the narrative of

In sum, both culture and religion have different grounds within the interpretation of GBV, all gendered individuals are in one way or another culturally embedded. Hence, it is inevitable the establishment of frameworks that as much as universal need to account for these historical elements.

3.2. Queer Method and Perspective on Gender-Based Violence

CEDAW differs from other international legal instruments, it has been criticised for its asymmetrical scope, focusing on one single category of sex/gender, rather than using a symmetrical one where the binary sex/gender would be conserved.⁵¹⁹ Nonetheless, the Convention has been applied potentially to the LGBTQ+ community cases, as well. The core objective of CEDAW clearly states the importance of a framework where women's rights are protected, as presented previously, generally there are opportunities of interpreting it in its complexity of fighting against gender inequality, hence, queer individuals are protected on these grounds.⁵²⁰ On the basis of the VCLT (Vienna Convention on the Law of Treaties), terms such as 'woman' should align with the object and purpose of the treaty, thus, by interpreting the unclear definition of woman, it would encompass both biological and performative sex/gender, and by doing so the treaty itself would allow a trans-inclusive perspective and still sustain its objectives.⁵²¹ Violence to be considered as gender-based needs solely to be directed against (cis)women, as a consequence, heteronormativity prevents GBV to acknowledge the fluidity and the extent of violence experienced by groups outside the cisgender and heterosexual.⁵²² Some scholars argue that the Convention is limiting not only in the field of inclusivity, but also could be perceived as an imposition of standards regarding women's sexuality rights where women are victims of the reinforcement

categorisation of religions provides all the means to create a hierarchy among these, in particular in relation to terrorism and the public discourses, but overall in all religions there is a level of conservatism and violence against certain category of individuals that Western ideologies are not justified (Jakobsen (2023), *Because Religion*, in *The Cunning of Gender Violence*. Edited by Lila Abu-Lughod, Rema Hammami, and Nadera Shalhoub-Kevorkian, Duke University Press).

⁵¹⁹Gallagher, 2020. Redefining "CEDAW" to Include LGBT Rights: Incorporating Prohibitions against the Discrimination of Sexual Orientation and Gender Identity. *Southern California Interdisciplinary Law Journal*, 29(637), p.638.

⁵²⁰Gallagher, op. cit., p.645.

⁵²¹Meyer, cited in Gallagher, op. cit., p.650.

⁵²²Haynes & DeShong, 2017. Queering Feminist Approaches to Gender-based Violence in the Anglophone Caribbean. *Social and Economic Studies*, 66(1/2), p.106.

of men's centrality.⁵²³ In the Italian context, "femicide"⁵²⁴ as a term is coined to refer to violent homicidal acts against women, where women are victimised. However, contemporary feminists when referring to GBV, their objective is to denounce the rooted "gender stereotypes, sexist prejudices, and (hetero)patriarchal asymmetries" that are deeply intrinsic to Italian culture.⁵²⁵ To aim for universal equality and to sustain the status quo, queers are often marginalised as still a minority, since their interests and their necessities will remain unmet by the universality of international human rights law, in particular the legal instruments in which heteronormativity still reigns.⁵²⁶ Feminist frameworks highlight and denounce a system in which the relations of power reside in inequality, however, some of these are influenced by the unveiled homophobia and transphobia.⁵²⁷ The heteronormative and hegemonic system is, in general, established and fixed on sexism, as though the patriarchal system is focused on heterosexism, as a consequence these systems are interconnected.⁵²⁸ The problem raised by most regarding the essentialist view of feminism, and in this case CEDAW, is the nature with whom exclusivity of the transgender and intersex individuals are permeated with. The unequal relations are consequences of legislatives, in which the heterosexual and gender conforming are protected and sustained. These relations result in a concatenation of invalidating realities for trans* and intersex individuals, it is in these realities that they are considered as abnormalities, and they are dehumanised by these oppressive binary systems of genderism and heterosexual foundations.⁵²⁹ However, trans* and intersex individuals are not solely the one oppressed by the essentialist perspectives, lesbians are often in-between of gay activists and feminist activists, meaning that they are not always considered. In fact, lesbians are subjugated to sexism and misogyny to the same extent, which are the causes of further anti-lesbian violence alongside misogynistic ones.⁵³⁰ It is clear that homophobic violence and hate crimes

⁵²³International Women's Rights Action Watch Asia Pacific (IWRAP Asia Pacific), 2007. Exploring the potential of the UN treaty body system in addressing sexuality rights (WRAW Asia Pacific Occasional Papers Series No. 11). p.8.

⁵²⁴The term is being criticised by both queer and feminist groups, since its definition still sustains the idea of gender-based violence as limited to (all) women, whereas the two discourses aim is to avoid the continuity of asymmetric approach and maintains instead the static system (Peroni, 2015, p. 1565).

⁵²⁵Peroni, C., 2015. Gender-based Violence and 'Femicide' in Queer Italian Movements: Questioning Gender, Sexuality, and the (Hetero)normative Order. *Oñati Socio-legal Series* [online], 5 (6), p.1560.

⁵²⁶Simm, 2020. Queering CEDAW? Sexual orientation, gender identity and expression and sex characteristics (SOGIESC) in international human rights law, *Griffith Law Review*, 29(3), p.389.

⁵²⁷Haynes & DeShong, op. cit., p.106.

⁵²⁸King, cited in Haynes & DeShong, op. cit., p.107.

⁵²⁹Haynes & DeShong, op. cit., pp.106-114.

⁵³⁰Meyer, 2012. An Intersectional Analysis Of Lesbian, Gay, Bisexual, And Transgender (Lgbt) People's Evaluations Of Anti-Queer Violence. *Gender and Society*, 26(6), p.851.

based on sexual orientation are intrinsic in society, where the lives of lesbians and gays are threatened, and to some extent they are not recognised.⁵³¹ Thus, many scholars stress that by engaging in an anti-essentialist view in opposition, the categorisation, in which one is considered as hierarchically important or *per se*, is avoided by considering an intersectional approach instead. Additionally, valuing the interconnection of power and sexuality to other systems of hierarchy avoids the fixed system of identity-based divisions.⁵³²

The role of intersectionality is important when it comes to international legal instruments, as well as any other framework concerning human rights or movements of human rights. Queer theory has tried in different ways to implement intersectionality, sometimes failing rather than establishing an overall movement of inclusivity. CEDAW even if conceived around women and girls, it has applied intersectional approaches in different occasions. GBV happens regardless of hierarchical circumstances, LGBTQ+ individuals experience a multiplicity of violent acts that differs from the ones experienced based on ethnicity, class, nationality or economic status.⁵³³ When considering intersectionality, it is ideal to avoid implying that the subjects of interest are circumscribed in the white and cisheterosexual individual, even in CEDAW or feminist movements women of color or queer women should be regarded at the same level of white women.⁵³⁴ Intersectionality aims to create connection between different spheres of interest, which could be highlighted in CEDAW, CERD and CRPD, for instance, queer and race, gender and sexuality, and disability and sexuality are some examples.⁵³⁵ In fact, an intersectional approach might be the only way to increase the potential of any legal instruments. Hence, vulnerable groups, such as trans women, are inevitably necessitating an inclusive approach other than an intersectional one as well, where a distinction and separation are applied between trans* individuals and masculinity.⁵³⁶ However, Rosenblum alongside others has criticised the trans-inclusive approach, since it might develop an unequal and unbalanced result between trans-men and trans-women, however, such perspective might align easily with TERFs beliefs.⁵³⁷ In the end, there might always be a hierarchy even within the vulnerable ones.

⁵³¹Naidu & Mkhize, 2005. Gender-Based Violence: The Lesbian and Gay Experience. *Agenda: Empowering Women for Gender Equity*, 66, p.35.

⁵³²Kirichenko, 2023. Queer Intersectional Perspective on LGBTI Human Rights Discourses by United Nations Treaty Bodies, *Australian Feminist Law Journal*, 49(1), p.59.

⁵³³Meyer, 2008. Interpreting and Experiencing Anti-Queer Violence: Race, Class, and Gender Differences among LGBT Hate Crime Victims. *Race, Gender & Class*, 15(3/4), p.264.

⁵³⁴Ivi, p. 265.

⁵³⁵Kirichenko, op. cit., p.61.

⁵³⁶Butler, 2024. *Who's Afraid of Gender?* Knopf Canada. p.161.

⁵³⁷Gallagher, *Redefining "CEDAW" to Include LGBT Rights*, p.650.

There are degrees of violence based on gender and sexual orientation, nonetheless, victims in general fear greatly physical violence, rather than verbal abuse, since the implications of the former are far more traumatic and rooted in a heteronormative and religious society.⁵³⁸ Yogyakarta Principles are the perfect example of a legal instrument, even if recognised as soft law, that apply both anti-essentialist perspectives and intersectional approach. In particular, considering that Yogyakarta might as well reiterate Member States to conform to their obligations under international law, thus, providing protection while ensuring freedom and preventing discrimination to all individuals regardless of their identities. States are obliged to ensure the protection of human beings and their rights of freedom without interference⁵³⁹.

3.2.1. Queering Gender-Based Violence: Denouncing Heteronormativity in GBV

Heteronormativity is once again one of the main issues raised as a concern in reference to legal instruments, but most importantly when dealing with gender-based violence, the multitude of disproportionate established hierarchies in society has repercussions on multiplicity of subjects. In fact, heteronormativity resides as well in violence, it is unavoidable for the language utilised within the institutions to marginalise individuals or to some extent erase their existence.⁵⁴⁰ It is violent to address and considers individuals not only in a disrespectful emphasis, but also by assumptions of one's sexual orientation and gender identity, based on heteronormative expectancies and compulsory heterosexuality.⁵⁴¹ Heteronormativity is easily enforced in society, as already often highlighted in previous passages, it is inevitable to sustain such a system that is deeply rooted in both culture and history, nonetheless, queer theory aims to deconstruct its facilities

⁵³⁸Meyer, *An Intersectional Analysis Of Lesbian, Gay, Bisexual, And Transgender (Lgbt) People's Evaluations Of Anti-Queer Violence*, p.850.

⁵³⁹Hamzić highlights the importance of ensuring the freedom to hold and practice both religious and non-religious beliefs. In particular, she writes how based on *Qur'anic* principle "there can be 'no compulsion in religion' ('la ikraha fi'd-din', Qur'an 2:256)", in fact, she mentions that regardless of one's sexual orientation and gender identity, everyone is entitled of the freedom of exercise their beliefs. The interference with this right in public life should be prevented and avoided in respect of the States' obligations. Furthermore, she provides some examples in which Muslim States are reinterpreting their legislation to abandon a monolithic and static model, for instance, Tunisia and Pakistan (Hamzić, 2011, The Case of 'Queer Muslims': Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos. *Human Rights Law Review*, 11(2), 251-265).

⁵⁴⁰King, 2016, The Violence of Heteronormative Language towards the Queer Community. *Aisthesis: The Interdisciplinary Honors Journal*, vol. 7, p.17.

⁵⁴¹King, op. cit., p.18.

to prevent and protect all human beings. Women, in particular, are the most affected by heteronormativity, regardless of their identity and their role, however, there are still a multitude of others that might as well experience the same in different forms. Language is as important, merely its use might affect the outcomes of any circumstances, and in other cases it might favour the normalisation of violence as well.⁵⁴² The sexual script aligning with compulsory heterosexuality are contributors to the sustainment of heterosexual relationships, as well as any process of objectification and domination of femininity are also contributing to the maintenance of such a system, an example could be clearly pornography.⁵⁴³ Alongside heteronormativity, patriarchy produces and maintains the relations of power that are asymmetrical and gendered.⁵⁴⁴ As Peroni reports in her article that: “sexism is not merely a form of male domination on women, but a broad series of relationships and performances that involve, and are produced by, every individual, including women and LGBTQ persons”.⁵⁴⁵ One thing to highlight, that is often ignored by international legal instruments, resides in the violence against men. It is generally to be considered as a consequence of hetero-patriarchy, where the phallocentrism of masculinity is to be sustained, whereas by acknowledging the ‘fragility’ of male individuals the structure established by themselves would collapse. The script of hegemonic masculinity relies on the accordance that men engage in sex to value their masculinity, by also conforming and confirming the structure of the heteronorms, otherwise the proper cisheterosexual culture might be disrupted.⁵⁴⁶ Additionally, the essentialist perspective of violence establishes a hierarchy, in which certain bodies are ‘deserving’ of being raped over others and which genitals are supposed to be wore to avoid it.⁵⁴⁷ It is intrinsic of culture and history that heteronormative narratives are ‘pro-rape’, it is constructed around the men’s hegemonic role in society: men are uncontrollable and must satiate their desires, women are givers of release and are always consensual. Nonetheless, this misogynistic structure of society allows men to make arbitrary decisions over the female’s body, by inscribing the relations of power in the relationships as well, while also blaming women if violence enters the frame as response to women’s denial.⁵⁴⁸ Before considering the role of consent, it is important to demonstrates how this

⁵⁴²King, op. cit., p.19.

⁵⁴³Wright, et al. 2024. Queer joy-centered sexuality education: offering a novel framework for gender-based violence prevention. *International Journal of LGBTQ+ Youth Studies*, p.4.

⁵⁴⁴Peroni, op. cit., p.1560.

⁵⁴⁵Ivi, p.1571.

⁵⁴⁶Wright, op. cit., p.4.

⁵⁴⁷Haynes & DeShong, op. cit., p.116.

⁵⁴⁸Ivi, p.123.

system is reflected also in cases of male rape. Male rape has been raised as an issue by different scholars, in fact, it is often underlined the exclusivity of this type of violence within legal instruments because of its implications. Male rape is considered an ‘homosexual issue’ based upon homophobic thoughts, implying the incapacity of heterosexual identified men to explore and consent to such vile acts against same-sex persons.⁵⁴⁹ The number of cases regarding male rape are limited, in fact, male victimisation is often excluded in the understanding of rape charges. It differs from VAW, because of historical roots of rape interpretation, it is heavily gendered, because of that men are often unrecognised as victims as it would entail a feminisation of such.⁵⁵⁰ It is due to the reinforcement of patriarchal ideals that the binary of dominance and subordination between men and women is conserved. Nonetheless, queer theory aims to deconstruct such binaries, by also highlighting that certain ‘abnormalities’ are evident challenges to the status quo and the hegemonic masculinity, by doing so the hierarchy should be challenged.⁵⁵¹ There are different focuses when considering the traumatic experience of this violence against men: the heterosexuality of the victims is often questioned, perfectly aligning with heteronormative circumstances, male victims are obliged to conceal the crime to avoid repercussions to their identities, and the implications that anal penetration is strictly homosexual.⁵⁵² As a consequence, rape is considered gendered, influenced by social relations and social expectations imposed by the hetero-patriarchy system. In fact, Butler also highlights in her last book that one of the main issues is considering rape only the circumstances in which the penis is involved otherwise the binary of domination is demolished.⁵⁵³

CEDAW is interpreted in different ways, nonetheless, its Recommendations are essential to create a more eventual complete framework for any discriminatory ground associated with gender stereotypes and hierarchies that are impacting both women and men (and hopefully, non-conforming ones). Considering its objective resides in the redress of

⁵⁴⁹Javaid, 2018. ‘Poison ivy’: Queer masculinities, sexualities, homophobia and sexual violence. *European Journal of Criminology*, 15(6), p.749.

⁵⁵⁰Bianco and Hernandez raised different important points regarding rape and its definition within legal instruments. In fact, they underlined two issues in both ICTY definition of rape and in the ICC, the problematic aspects reside in the definition of ‘perpetrator’ and the focus on ‘penetration’. They reported that in Furundžija case, the ICTY defined rape as “penetration (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator.” By focusing on the perpetrator, it ignores the possibility of others being coerced in the intimate acts (as it happened in Češić case), and by focusing on the penetration, it limits the available amount of other forms of violence. It is similar to the definition stipulated by ICC, however, the statute avoids the focus on the penetration (available at: <https://www.ejiltalk.org/male-victims-of-sgbv-and-definitional-challenges/>).

⁵⁵¹Javaid, op. cit., p.751.

⁵⁵²Javaid, op. cit., pp.753-758.

⁵⁵³Butler, *Who's Afraid of Gender*, p.102.

inequality between women and men, however, some binaries remain intrinsically part of society, such as domination and subordination or superiority and inferiority. Gilleri compares CEDAW to other legal instruments, such as UDHR, ICCPR and ICESCR, which are more ‘open-ended lists’ rather than focusing on the personal status of gender-specific rights as the Convention does.⁵⁵⁴ Butler, on the other hand, criticises CEDAW for its stance on sexual harassment assuming heterosexual subordination as the dominant and exclusive criterion, thus reinforcing the gendered norms of heterosexuality.⁵⁵⁵ Similarly, Wittig critiques the restriction on sex imposed by binaries, which limits it to the reproductive aims of compulsory heterosexuality, proposing to dismantle it, truly, reproductive facilities equal further marginalisation of non-conforming genders and some categories of women as well.⁵⁵⁶ Nonetheless, CEDAW thanks to its Recommendations has amplified the interpretation of ‘women’ to include other forms of sexual orientation and gender identity as grounds for discrimination, highlighting the multidimensional aspect of discrimination. The CEDAW Committee by embracing the inclusivity of ‘women’ establishes the inclusion of lesbian, bisexual, transgender and intersex women as well in Recommendations 27 and 28.⁵⁵⁷ Debates, however, are still very present in the implications of ‘unsexing’ or ‘supersexing’ CEDAW: the former would eliminate the category of women by replacing it with sex/gender, adopting therefore a non-identitarian vision, and the latter emphasises the pluralisation of gendered identities by erasing thus any distinction arose.⁵⁵⁸ Article 5(a) is the perfect example of CEDAW trying to reject the fixed imposed constructs of masculinity and femininity, denouncing the binary of dominance and subordination between genders. The binary is not entirely transcended by the text of the article, however, it allows individuals to establish their own gender identities, which aligns with the gender justice’s objectives to combat disadvantage and promote structural changes.⁵⁵⁹ Despite CEDAW showing improvements in the inclusivity frameworks, it still fails to incorporate certain women’s realities that are sustaining the inferiority and passivity of patriarchal narratives. Nonetheless, international law is slowly recognising women as possible perpetrators of violence, challenging the hegemonic stance of linking masculinity with violence and

⁵⁵⁴Gilleri, op. cit., p.33.

⁵⁵⁵Butler, *Undoing Gender*, p.55.

⁵⁵⁶Id. *Gender Trouble*, 26.

⁵⁵⁷Gilleri, op. cit., p.64.

⁵⁵⁸Gilleri, op. cit., p.87.

⁵⁵⁹Gilleri, op. cit., p.127.

disrupting the traditional equation of the dichotomy of men/women as perpetrators/victims.⁵⁶⁰

3.2.2. Queer Violence: Intimate Partner Violence and Intersectionality

Violence against queer individuals has different forms and actors, where homophobia and internalised homophobia play important and demanding roles. The downplay of violence is a consequence of heteronormative sexist practices, where the intersection of different identities interconnect, creating a hierarchy even within the matrix of the violent acts directed against minorities and marginalised individuals. In this subchapter, the focus will be on the heteronormative influence on intimate partner violence in queer relationships (IPV), and the intersectionality of hate crimes. Domestic violence definition and application of its prevention practices reside in the available international legal instruments, meaning that it is focused on the heteronormative matrix. In fact, in Article 3(b) the Istanbul Convention (2011) states that:

“Domestic violence” shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.” (Istanbul Convention, 2011, Article 3(b)).

By considering this definition, its interpretation may consider queer individuals as victims, however, since the Convention focuses on the women’s facility it is inevitable to consider this Article as constricted in these limits. Intimate partner violence, in fact, is still permeated with stigma and discrimination towards queer partnerships, considering the multitude of differences between heterosexual IPV and queer IPV.⁵⁶¹ The marginalisation and repercussions on (queer) survivors have traumatic results on the individual's mental health.⁵⁶² The heteronormative interpretation of IPV resides in the assumption of the gender of the perpetrators, as already highlighted previously, there is a tendency in society to consider the male figure as a standard agent in committing violent acts against women. It

⁵⁶⁰Cf. Gilleri, 2024. Halberstam & Halberstam, 1993. *Imagined Violence/Queer Violence: Representation, Rage, and Resistance*. *Social Text*, 37, pp.187–201.

⁵⁶¹Gram, Lu et al. 2024. “Intimate Partner Violence in Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Relationships: A Call for Research-To-Action Partnerships in Higher Education Settings.” *BMC Global and Public Health*, vol. 2, no. 1. p.1.

⁵⁶²*Ibidem*.

further complicates the understanding process of IPV.⁵⁶³ The pre-established roles within society and the private sphere is the reason behind the IPV limited number and research on the different cases involving the LGBTQ+ community individuals. IPV and its conceptualisation, in fact, is limited to the extent in which the patriarchal power relations of cis-men over cis-women is still hierarchical established and maintained, even though on queer theory basis both gender and sexual identity remain performative and it is futile to value such hegemonic structure if it is meant to be deconstructed.⁵⁶⁴ Overall, IPV is still heavily growing within the community, generally, as non-conforming as it might be, lesbians are the most affected in society.⁵⁶⁵ Often, queer IPV has been compared to heterosexual IPV, wrongly, considering already the implication of the difference between heterosexual relations and same-sex ones. Nonetheless, conceiving queer partnerships as deviant and violent as heterosexual ones is reductive, since same-sex and non-patriarchal relations are generally idealised and violence is less common.⁵⁶⁶ However, the gravity of IPV within queer community is still of concern, where abusive lesbian relationships are the most discussed, since there is a tendency to create an environment in which the victim is humiliated, punished, or limited. On the basis of research, same-sex abuses are often done on purpose to establish coercive and dominant standards within equal partnerships.⁵⁶⁷ It is clear that there are some similarities between heterosexual and LGBTQ+ relationships, in the mapped purpose of manipulate and control the other through awful means, for instance, threats of outing⁵⁶⁸ the victim to family, employment, and any public/private sphere.⁵⁶⁹ The heteronormative interpretation of relationships and domestic violence expects the application of hegemonic construction of male/female binary and its association with dominance/subordination in any partnership, however, there have been cases in butch/femme relations in which the masculinity of the butch does not reflect the

⁵⁶³Kanuha, 2013. "Relationships So Loving and So Hurtful": The Constructed Duality of Sexual and Racial/Ethnic Intimacy in the Context of Violence in Asian and Pacific Islander Lesbian and Queer Women's Relationships. *Violence Against Women*, 19(9), p.1177.

⁵⁶⁴Gram et al., op. cit., p.2.

⁵⁶⁵The misogynist perspective of lesbian IPV is often associated with simplistic tendencies of considering the gravity of the crimes, in fact, some scholars have highlighted the use of "lesbian battering" or "lesbian affairs", reducing the importance of lesbian vulnerability to merely 'gossips' (Kenuha, op. cit., p.1176; Cf. Haynes and Deshong, 2017).

⁵⁶⁶Kanuha, op. cit., p.1178.

⁵⁶⁷*Ivi*, p.1180.

⁵⁶⁸Term used to refer to the involvement of an external agent to reveal the sexual orientation or gender identity of the victim, often done without their consent, it is a violent act which repercussions would affect almost each aspect of the closeted individual.

⁵⁶⁹Ristock, 2009. / *Gay / Bisexual / Transgender / Queer [LGBTQ] Communities Moving Beyond a Gender-Based Framework*. Violence Against Women Online Resources, UK, p.4.

heteronormative assumptions.⁵⁷⁰ Thus, the complexity of non-conforming partnerships are not to be considered outside the limits of heteronormativity and patriarchy. Additionally, stigma and sexism, alongside misogyny, create an obstacle to seeking aid to institutions in society, in fact, queer individuals are reluctant to report cases of abuse, since the repercussions would be damaging to their individuality and to the community as well to some extent. Furthermore, rape is considered in heteronormative terms, where penetration is often necessary as proof, thus, sexual assault by other women is often unrecognised and turns into lack of support.⁵⁷¹

Marginalisation and stigmatisation are further reinforced in the intersectional approach, in particular, when hate crimes and violence are at the intersection of sexual orientation and gender identity with race/ethnicity, nationality, classism, ableism, xenophobia and other forms of dominance. Queer of colours are, therefore, the most affected based on discrimination on multiple sites, the difficulty resides in the actual grounds of the violence, whether hate crimes are sexist or racist driven.⁵⁷² The issue lies in the sustainment and reinforcement of power structures, where oppression is transposed into another system, for instance racism can be reduced to gender oppression.⁵⁷³ Intersectional approach aims to deconstruct the system and structure in which at the center there will always be the cisgender and white middle-class, regardless of gender identity, by doing so the other marginalised identities may be considered in their oppressive stances.⁵⁷⁴ In particular, considering that black women experience discrimination differently from white women, thus, universalisation of womanhood is damaging. The supremacist discourse and social control instruments are rooted in institutional powers, which means is found in the perpetuation of hate crimes: prejudices and other forms of violence against queer people are determined on sexuality or gender identity grounds, whereas when considering black queer individuals or queer people of colour, in comparison, it is difficult to assess the grounds of hate crimes.⁵⁷⁵ It depends on the circumstances, in fact, often queer people of colour, victims of discrimination and violence, are unable to determine the origin of hate crimes.⁵⁷⁶ Intersectionality should not be understood as an ‘additive’ to current understandings of

⁵⁷⁰Kanuha, op. cit., p.1188.

⁵⁷¹Ristock, op. cit., 5-6. Cf. Rausch, 2016. Systemic Acceptance of Same-Sex Relationships and the Impact on Intimate Partner Violence Among Cisgender Identified Lesbian and Queer Individuals. *Journal of Creativity in Mental Health*, 11(3-4), p.271.

⁵⁷²Kanuha, op. cit., p.1177.

⁵⁷³Collins, cited in Meyer, op. cit., p.264.

⁵⁷⁴Meyer, op. cit., p.365.

⁵⁷⁵Meyer, op. cit., p.268.

⁵⁷⁶Meyer, op. cit., p.271.

domestic violence, nor should create categories of abuse cases, if the centrality remains focused on the white female as norm: intersectionality should be a way to challenge the binaries that are often overused and oversimplified.⁵⁷⁷ Anti-queer violence is often portrayed in traditional narrative, where the subject is often limited to the middle-class gay, which as a consequence reinforces the social and economic inequalities of queer people of colour.⁵⁷⁸ If homophobia is being privileged over racism and classism, it would be a failure to challenge the broader systems of oppression. It is inevitable to reinforce the hierarchy that is established within the existing inequalities, it is necessary to address in the same extent all the forms of violence.⁵⁷⁹

3.3. The Marginalised of GBV: the Lesbian, the Transgender and the Queer Refugee

3.3.1. The Forgotten Lesbianism

Lesbianism is where queer theory might shine the most in its complexity of deconstructed norms, where the implications of compulsory heterosexuality and heteronormativity are inextricably inextricable. The construction of womanhood is demolished as Wittig theorised in her works. Wittig believes that lesbianism is the means of overthrowing compulsory heterosexuality, since the imposition of sex/gender binary is the root of the sustainment of heteronormativity as well.⁵⁸⁰ Lesbianism is considered as a third-gender that implies a process of creating a concept that is actually beyond the normative categories of sex, for such a reason, Wittig tends to separate the lesbian from the concept of woman.⁵⁸¹ Compulsory heterosexuality resides in the continuous reinforcement of the binary, which is naturalised through the validation of heterosexual desire where identities are produced.⁵⁸² Furthermore, Wittig proceeds by theorising that lesbians are neither a man nor a woman, because women are constructed to stabilise the binarism and men. Whereas,

⁵⁷⁷Ristock, op. cit., p.10.

⁵⁷⁸Meyer, *An Intersectional Analysis Of Lesbian, Gay, Bisexual, And Transgender (Lgbt) People's Evaluations Of Anti-Queer Violence*, pp. 5-7.

⁵⁷⁹Cf. Meyer, 2012; Ristock, 2005.

⁵⁸⁰Wittig, cited in Butler, *Gender Trouble*, p.26.

⁵⁸¹Butler, op. cit., pp.27-28.

⁵⁸²Butler, op. cit., p.31.

lesbianism implies that beyond the desire for other women, it challenges the male-dominant sexual order by living independently from men and thus, lesbians are the site in which heterosexuality is refused.⁵⁸³ Nonetheless, lesbianism is a life-saving political resistance to patriarchal standards, even though their realities are still heavily dictated by their vulnerability in the exact same entrenched patriarchal norms that result in devastating repercussions on the individuals.⁵⁸⁴ Additionally, lesbianism has been suggested as the foundation for women of natural origin, on the contrary, heterosexuality should be perceived as the constructed cultural project of compulsory heterosexuality.⁵⁸⁵ In Butler's perspective the concept of natural women does not exist, it resides in the performative unity of body, gender and desire, nonetheless lesbians are still conceived as a category that lies outside the normative sex/gender.⁵⁸⁶ Lesbians rights are perceived in the heteronormative society as the establishment of an 'unnatural gender' and the destruction of motherhood, in particular maternity which creates a 'culture of death', which overall is highly homophobic and misogynist.⁵⁸⁷

Lesbianism could be valued as a site of liberation for women, in particular from the constricting nature of heterosexuality. However, lesbians are still victims in the heteronormative organised society, where the unbalanced relation of power is affecting them as well. Lesbians are visible and intelligible only when violence is involved, discrimination and other forms of violence are sites of recognition, for such reason the Committee has shown increasing concern on such violence, considering also transgender violence.⁵⁸⁸ In general, even if pleasure should be placed as the first site in lesbian and women's sexuality, it is often associated as a place of violence and harm, especially inequality that causes many encounters as extremely dangerous for women.⁵⁸⁹ Lesbians, in fact, are subjected to discrimination on gender identity basis, which is the only site that they share with cisheterosexual women and is the grounds addressed by CEDAW. However, lesbians as sexual minorities experience even further forms of violence, such as marginalisation both economically and socially, demonisation, persecution, family control, loss of sexual

⁵⁸³Butler, op. cit., 153. Cf. Richardson & Seidman, *Introduction*, p.4.

⁵⁸⁴OHCHR, *Born Free and Equal*, 48. Cf. Calhoun, 1995. *The Gender Closet: Lesbian Disappearance under the Sign "Women."* *Feminist Studies*, 21(1), p.10.

⁵⁸⁵Calhoun, op. cit., p.17.

⁵⁸⁶Ivi, p.27.

⁵⁸⁷Butler, *Undoing Gender*, p.188.

⁵⁸⁸Eves, 2004. *Queer Theory, Butch/Femme Identities and Lesbian Space.* *Sexualities*, 7(4), 496. See also OHCHR, p.17.

⁵⁸⁹Otto, 2014. *Between Pleasure and Danger: Lesbian Human Rights.* *European Human Rights Law Review* 2014(6). p.618.

autonomy translated into forced marriages.⁵⁹⁰ The vulnerability of lesbians is so rooted in their individuality and identity that often their conditions are denied, negated, or forgotten and as a solution their invisibility is the ideal, if corrective treatments or conversion therapies are not sufficient in the eyes of heteronormative society.⁵⁹¹ Lesbians are further marginalised even when sexual orientation is being chosen over ‘lesbians’ in international legal instruments, in particular when they are limited to the association with male homosexuality which would equal further erasure of lesbianism.⁵⁹² The forgotten lesbians are a consequence of a society in which considering the amount of vulnerability within the private/public sphere is perceived as yet not enough to value recognition, nonetheless, progress has been made through implementation of clauses in CEDAW General Recommendations.⁵⁹³

There are different issues in a heteropatriarchy society, where queerness and lesbianism's only objective is to dismantle the heavily promoted centrality of the binary sex/gender. Especially, the violent impositions of the binary associated with sex as biological and strictly assigned at birth, whereas the forms of expressions and identity should go beyond the Westernised conceived concept of male/female, masculine and feminine. Queer forms of expression, aligned with gender, are all forms of violence against the heteropatriarchy impositions.⁵⁹⁴

⁵⁹⁰Otto, op. cit., p.619. See also OHCHR, *Born Free and Equal*, p.48.

⁵⁹¹Otto, op. cit., p.620.

⁵⁹²Gartner, 2005. *Articulating Lesbian Human Rights: The Creation of a Convention on the Elimination of All Forms of Discrimination against Lesbians*. UCLA Women's Law Journal, 14(1), p.63.

⁵⁹³CEDAW General Recommendation no.28 para. 8 (UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, <https://www.refworld.org/legal/general/cedaw/2010/en/77255>) states that:

“Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men.”

The Recommendation as an example provides, overall, a deeper analysis and intersectional approach of the centrality and role of gender identity and sexual orientation in the basis of violence against women. Similar, General Recommendation no.35 para. 12 (UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (1992), CEDAW/C/GC/35, 26 July 2017, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35-2017-gender-based>) highlights the multitude of differences that could affect women differently, in particular, stating for instance ‘lesbian, bisexual, transgender [...]’ as grounds of discrimination. It is extremely important to consider the valuable nuances of the women's conditions in a heteronormative society. Nonetheless, issues remain in the application of CEDAW and Member States in respecting their obligations under the Convention.

⁵⁹⁴Mestre i Mestre & De Vido, EL*C (2024): *Lesbianising the Istanbul Convention. Research on the Implementation of the Convention to Protect LBT Women*. pp.6-7.

3.3.1.1. The Butch/Femme Parody

Butch/femme⁵⁹⁵ is the perfect binary, where queer theory could be found in terms of destabilising the heterosexual structure of society, in particular the portrayal of heterosexuality and heterosexual relationships. There have been different interpretations of this binary, as well as critiques. Butler, in particular, highlights the importance of butch and femme roles as far from the assimilation of heterosexual couples or simple ‘replicas’ or ‘copies’, it would be underestimating the complexity of the resignification of the hegemonic categories.⁵⁹⁶ Some academics might argue that queer theory has reevaluated butch/femme identities as fluid, rather than fixed, while being shaped by and exceeding normative heterosexuality.⁵⁹⁷ In other interpretations, even though queer theory perceives this binary as subversive, it focuses on the limits of the binary and risk of reversing to an essentialist theory, rather than focusing on the inclusion of different variabilities such as race, economic conditions and so on.⁵⁹⁸ Carole-Anne Tyler is one of the critiques of the butch/femme binary, because of the reinforcement of heterosexuality as authentic or natural: she believes that the role of ‘femme’ is still intrinsic of heterosexual norms, also posing challenges to the lesbian identity and representation.⁵⁹⁹ Another point raised by critiques is often the association of the binary to ethnicity, in fact, femme is often portrayed as the ‘white’ and butch on the opposite is associated with ‘black’, reinforcing a racialised hierarchy in which whiteness is associated with femininity, and blackness with phallogentrism and masculinity.⁶⁰⁰ However, butch/femme have regained and reclaimed their queerness by demonstrating their performative nature in action, in particular the ways in which lesbians ‘do’ gender in relation to femininity/masculinity.⁶⁰¹ The gender narratives associated to butch and femme are

⁵⁹⁵Defining butch and femme as terms is complex because of the implications of their identities. Generally, butch is perceived as an androgynous lesbian within the spectrum of masculinity, their gender expression is therefore conceived in these limits, while femme is the opposite, a lesbian in tune to their feminine side. For such reason, some critiques have raised the problematic interpretation of the binary as the former a threat to move lesbianism towards male-dominated field and the latter on the contrary as a threat to move towards heterosexuality (Martin, B. (1994). *Sexualities without Genders and Other Queer Utopias*. *Diacritics*, 24(2/3), 104–121).

⁵⁹⁶Butler, *Gender Trouble*, p.169.

⁵⁹⁷Halberstam, cited in Eves, *Queer Theory, Butch/Femme Identities and Lesbian Space*, p.481.

⁵⁹⁸*Ibidem*.

⁵⁹⁹Tyler, cited in Martin, 1994. ‘Sexualities without Genders and Other Queer Utopias’, *Diacritics*, 24(2/3), p.112.

⁶⁰⁰Martin, *op. cit.*, p.115.

⁶⁰¹Eves, *op. cit.*, p.482.

conceived to offer a better protection from heteronormativity, because of the performative nature of butch gender as non-conforming and ambiguous.⁶⁰²

Lesbian utopia is the ideal place to experience the complexity of its non-conforming nature. However, the utopian perception ignores the amount of discrimination and violence originated from a third actor, as well as cases of domestic violence and IPV within same-sex couples. Butch/femme are often stereotyped as the site of DVA (domestic violence abuse) and IPV: neither roles are centered around the unbalance of power associated often with privilege and power, however, they are victims of a hierarchical system in which power is promoted often through violence.⁶⁰³ Hence, in butch/femme binary, violence does not relate to whose role is more masculine than the other, in fact, there have been more cases in which the abusive ones are the femmes in woman-to-woman abuse.⁶⁰⁴ It is inevitable to consider the perpetrator of violence the one closer to the 'masculinity' in appearance, highly based on the assumptions of transposed heteronormative in queer relationships.⁶⁰⁵ Another demonstration that gender stereotyping and gender mainstreaming is damaging. As already mentioned previously, it is highly improbable that women in same-sex relationships are willing to report such violence, because of the amount of repercussions that would be subjected to, whether humiliation, discrimination or invalidation. IPV affecting same-sex relationships are affecting the stereotyping of these relations as equal, however, power imbalances could be perceived to the amount of control one's partner has on the other.⁶⁰⁶

3.3.1.2. The Underrepresentation of Lesbians in Legal Instruments

Lesbians are marginalised and isolated from not only society, but also in the political sphere where their invisibility has been perceived even in the lack of documents. Lesbians have often sought to achieve the recognition, in particular, the protection in international human rights law.⁶⁰⁷ Otto highlights that the history of lesbians is full of pleasures and pain, leading to their vulnerability and abuses, demanding the recognition they are deserving.⁶⁰⁸ Lesbians sufferings are often associated with the inability and lack of sexual autonomy of women, as a consequence they are punished as well on the heterosexual expectancies of

⁶⁰²Eves, op. cit., p.488.

⁶⁰³Knight & Wilson, 2016. *Lesbian, Gay, Bisexual and Trans People (LGBT) and the Criminal Justice System*. Palgrave Macmillan UK. p.186.

⁶⁰⁴Kanuha, op. cit., p.1188.

⁶⁰⁵Knight & Wilson, op. cit., p.186.

⁶⁰⁶Knight & Wilson, op. cit., pp.189-190.

⁶⁰⁷Otto, *Between Pleasure and Danger: Lesbian Human Rights*, p.618.

⁶⁰⁸*Ibidem*.

conforming and reproductive facilities.⁶⁰⁹ Even though CEDAW Committee's General Recommendations are increasing the intersectional approach, there are still possibilities of better improvement. There have been scholars attempting to establish a similar legal instrument to provide further protection to lesbians individuals, fantasised as 'CEDAL', which is a lesbian specific document to educate and encourage states in the application of their obligations in the protection of human rights.⁶¹⁰ However, the implication of the establishment of a new instrument in a society where discrimination and limitations are affecting the LGBTQ+ community would be damaging, other than being almost impossible because States would oppose. ICESCR Committee's General Comment 16, reported by Otto, defines a brief reference in removing restrictions on women's reproductive health, and the CERD Committee in General Recommendation 25 recognises may have racial specific forms directed at women whilst offering only some examples without mention of sexual orientation.⁶¹¹ In general, when it comes to lesbians violence has a multiplicity of forms, among these Governments play a role too in the persecution of lesbians because of their unnatural and abnormal non-conforming nature.⁶¹² However, considering international human rights law, for instance UDHR contains enumeration of race, gender, religion and language, which establishes its broad-open interpretation and language.⁶¹³ Gartner makes an interesting point by writing that: "lesbian women cannot effectively use a system to claim that their rights have been violated if the system itself does not recognize a right to be free of human rights violations".⁶¹⁴

The 2011 Istanbul Convention has been used to address and combat GBV against LBT women and non-binary persons as well, especially to avoid repetition and replication of discrimination within heteronormative societies.⁶¹⁵ Similar to CEDAW, IC does not provide a clear definition of what constitutes 'woman' as a term, however, it has been interpreted as

⁶⁰⁹Otto, op. cit., p.619.

⁶¹⁰Gartner, op. cit., pp.72-74.

⁶¹¹Otto, op. cit., p.626.

⁶¹²Gartner, op. cit., p.63.

⁶¹³There are plenty of articles in UDHR that are open for arbitrary interpretation and valuable to considering lesbians rights too. For instance, article 1 of UDHR states that "all human beings are born free and equal in dignity and rights. [...]" or article 2 "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]" or further articles establishing the right to life, privacy, freedom of expression and so on. However, as already discussed in chapter two, some of these articles have been violated by States and Courts have interpreted it accordingly to the cases. Cf. HaleyNelson, 2005. Sexualized Violence Against Lesbians, *Peace Review: A Journal of Social Justice*, 17:2-3, p.164.

⁶¹⁴Gartner, op. cit., p.171.

⁶¹⁵Mestre i Mestre & De Vido, op. cit., p.4.

a total or partial identification of women.⁶¹⁶ As already mentioned, an essentialist approach to discrimination and violence would create a hierarchy of pain in vain, considering that women experience violent acts differently based on the grounds of discrimination. Consequence of the underrepresentation of lesbians' violence in legal instruments and Courts' cases may be verified in the inability of States to respond adequately, fitted, and effectively to victims' necessities. GREVIO, in response, intervened to encourage states to improve their research and implementation of an intersectional approach by including lesbians.⁶¹⁷ Criminal law is inherently gender-neutral, however, by incorporating a lesbian specific perspective in IC's provisions on certain aggravating circumstances it would offer a transformative opportunity to value and enhance prevention and protection for lesbians against GBV.⁶¹⁸

The *O.N. and D.P. v Russian Federation* No. 119/2017, as a case study example, concerns the failure of the Russian Federation to investigate and prevent violent acts against two lesbian women, which were motivated by homophobia. The facts of the case presents two lesbian women in a long-term relationship who were sharing a moment of affection, by exchanging hugs and kisses, when they were harmed by violent acts from a man on homophobic grounds. Based on the exhaustion of domestic remedies, after the ineffective investigation provided by the Russian authorities and police, and the Cassation Court's failure to acknowledge the matter, the authors referred to the Committee of CEDAW, citing the violation of Articles 1, 2 (a), (c), (e), (f) and 5(a) of CEDAW. The Committee examined the admissibility and merits of the case, ultimately determining that the ineffective investigation of the police (delaying the case for two years) and Russian Federation failure to respond to its due diligence obligations under the Convention. In response, the Committee raised different points by urging the Member State to take further action in the implementation of the provisions in protection and prevention of gender-based violence, by also suggesting the nullification of the "homosexual propaganda".⁶¹⁹ This case is an example of the systemic violence imposed on individuals regarding the (im)possibility of denouncing harmful and violent acts. As already mentioned, in the majority of LGBTQ+ violence cases, victims are willing to avoid reporting crimes, because of the failure of institutions to access these in a non-discriminative way. Furthermore, the Committee alongside the IC Committee

⁶¹⁶Mestre i Mestre & De Vido, op. cit., p.6.

⁶¹⁷Ivi, p.12.

⁶¹⁸Ivi, p. 26.

⁶¹⁹*O.N., D.P. v. Russian Federation*, CEDAW/C/75/D/119/2017

have pressured States to establish a system of training of authorities to avoid further discriminations.

3.3.2. Transgenderism and its Isolating Experience

Transgender and transsexual people are the most affected individuals in the heteronormative society, however, their distress is often overlooked and invisible to the strife of others. It is difficult for trans* individuals to become intelligible, nonetheless, there have been progresses in the international legal scene. The susceptibility of trans* persons to discrimination and violence is a consequence of the egoistic and difficulties in acknowledging the complexity of gender identity and expression. Overall, in contemporary society, the establishment of the notion of ‘anti-gender ideology’ influenced negatively the critical comprehension of individuals, which is clearly a bridge between the ideals of the far right, the Vatican, and certain trans-exclusionary identities that engraved in civil society a ‘moral panic’ that could create repercussions on the traditional values of society.⁶²⁰ ‘Moral panic’ is vehicle of political purposes, generally, it is results of ‘social problem’⁶²¹, where the conditions of society and its ‘public morals’ are threatened by the abnormal issues, which also creates hostile environments and prejudices that arise against the undermined entity.⁶²² Nonetheless, there is still confusion on the weight and importance of the progress that has been made, especially on the rising of the far right globally which is clearly a risk for trans* individuals and the LGBTQ+ community as well. The recognition of trans* rights and inclusivity within legal instruments has still room for improvement, however, two important Courts’ cases are pioneers of the process: the *Goodwin v UK* and the *I. v UK*, decided by the ECtHR, which share similar facts. Christine Goodwin and I., two british transgender women who had undergone gender affirming operations, experienced discrimination and harassment in the workplace. Goodwin suffered humiliation because her NI (National Insurance)

⁶²⁰O’Connor, et al. (2022). Transcending the Gender Binary under International Law: Advancing Health-Related Human Rights for Trans* Populations. *Journal of Law, Medicine & Ethics*, 50(3), p.420.

⁶²¹By using ‘social problems’, Mestre i Mestre provides a multitude of agents that are roots of the ‘problems’ that could affect society by the perception of threatening situations or the necessity of awareness of certain circumstance. She lists a few examples, such as, “activists, politicians, researchers, academics, the mass media, influencers”. Moral panic is, therefore, consequence of notions arose by individuals that has repercussions on the society as a whole, whether it impacts society positively or negatively (Mestre i Mestre, *Trans Justice Fights Trans Moral Panic*, 2022, p. 60).

⁶²²Mestre i Mestre, 2002. *Trans Justice Fights Trans Moral Panic*. *The Age of Human Rights Journal*, 18(18), 60. See also Reid, G. (2023). A/HRC/56/49: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. United Nations Human Rights Council. p.5 <https://docs.un.org/en/A/HRC/56/49>.

number remained unchanged, which created a series of complications. Meanwhile, I. was obliged to produce her original birth certificate with pre-operations information. The applicants' claims concerned the legal restriction, prohibiting the obtaining of new birth certificates. These restrictions had consequences on Goodwin's right to marry and social security, and I resulted in barriers for securing educational purposes. The claimants denounced the breach of obligations by the State on Articles 8, 12, 13 and 14 of the Convention (ECHR).⁶²³ The ECtHR ruled in favour of transgender persons for the obligation of gender recognition, therefore, the United Kingdom was required to modify the birth certificate of the applicants. The redefinition of the implications of legal gender and recognition of transgender individuals demonstrated the possibility of the Court to move beyond the limits of the gender binary.⁶²⁴

Recognition of gender as a social construct, however, is not the only ideal to progress beyond the restrictions of the gender binary. The meaning of trans* and its identity is far more complex than the liberation from the gender binary, some scholars actually argue that the binary is not as much of a harm to trans* individuals, in fact, there are transsexual individuals whose interest is becoming a 'biological man' or 'biological woman', 'realness'⁶²⁵ and therefore to avoid the 'performative' aspect of gender.⁶²⁶ The common misconception present also in legal instruments resides in interpreting sex and gender as the same, as already discussed in chapter one, gender is a social construct and is performative. Some transgender advocates suggest to subvert the sex determinism clause of Courts, where sex is mutable through medical interventions, and one's gender identity is *immutable*⁶²⁷ instead.⁶²⁸ The process would, however, harm the gender minorities that are actually fluid or non-conforming.⁶²⁹ Trans* individuals and their gender expressions are not limited to the

⁶²³ECtHR value the respect for human dignity and human freedom. By recognising gender as a social construct and no longer associated strictly to biological sex, article 8 and the freedom to establish gender is an essential part of the ECHR (Anniken Sørli, *Governing (Trans)Parenthood, Queering International Law*, 2018, p. 175).

⁶²⁴Sørli, *op. cit.*, 174; See also: *Goodwin v UK*, 2002, ECtHR Application no. 28957/95; *I. v UK*, 2002, ECtHR Application no. 25680/94.

⁶²⁵Gender 'realness' and 'the real' are two notions that aligns with the complexity of trans* individuals compared to cis individuals: the former equals to the process of appropriation of the characteristics and attributes of the cis/the real which translates into the transsexuals, whereas the latter is the condition that always existed within the binary of gender and its 'elasticity' (Davis, 2014, *Sex-Classification Policies as Transgender Discrimination*, p. 50)

⁶²⁶Davis, 2014. *Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique*. *Perspectives on Politics*, 12(1), pp.49-50.

⁶²⁷Interpreting gender as *immutable* allows to focus on one's identity by their sense of self, whereas sex is subjected to determinism which is the one harming trans* minorities.

⁶²⁸Apsani, 2018. *Are Women's Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause*. *California Law Review*, 106(5), p.1721.

⁶²⁹*Ivi*, p.1720.

Western binary of male/female, in fact, trans* could be gender-fluid, gender-queer, non-binary, as well as cultural realities such as *two-spirit* (indigenous North Americans), *hijra* (Bangladesh, India, Pakistan), *travesti* (Argentina), *kathoey* (Thailand) and so on, which are supposed to be universally protected human beings.⁶³⁰ Nonetheless, trans* individuals, especially trans women experience discrimination and marginalisation by both society and kinship, it is therefore still difficult to gain as much visibility as they would require.⁶³¹ To recognise trans* individuals are necessary and essential to value the importance of legitimating their personhood and human dignity, by also protecting their identity and self-determination without the obligation to respect inhuman and degrading pre-conditions.⁶³² Article 8 of ECHR (right to private and family life) has been interpreted as its basic features the “rights for individuals to define their sexual identity” alongside the emphasis on the personal autonomy that includes the “principle of self-determination, of which freedom to define one’s sexual identity”.⁶³³ Despite these inclusive aspect, trans* individuals experience restrictions to access health rights and facilities.⁶³⁴ “Gender dysphoria” is a medical conditions that is associated with trans* individuals, which in the medical world the untreatment of this condition results in damaging consequences, such as increase in suicide rates, especially in trans* youth.⁶³⁵ Transwomen remain the most affected by discrimination and harassment, yet feminists and other women, rather than empathise with their conditions, tend to feel threatened because of the implications on their ‘biological sex’.⁶³⁶ The exclusionary reality of transwomen is a consequence of a hierarchy of inclusion, where the degree of discrimination and harassment is based on hegemonic construction of traditional gender, even though often trans women and ciswomen experience similar conditions.⁶³⁷

⁶³⁰Borloz, 2023. A/HRC/53/37: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. United Nations Human Rights Council. <https://docs.un.org/en/A/HRC/53/37>

⁶³¹Lanham, et al. 2019. “We’re going to leave you for last, because of how you are”: Transgender women’s experiences of gender-based violence in healthcare, education, and police encounters in Latin America and the Caribbean. *Violence and Gender*, 6(1), p.38.

⁶³²*Ibidem*.

⁶³³Mestre i Mestre, op. cit., p.76.

⁶³⁴O’Connor et al., op. cit., p.410.

⁶³⁵Butler, *Who’s Afraid of Gender*, p.105.

⁶³⁶Butler, op. cit., p.161.

⁶³⁷Apsani, op. cit., p.1705.

3.3.2.1. TERFs and (De)Pathologisation

Trans* individuals face multitude of difficulties, starting from the issue of pathologisation, through discrimination to TERFs attitudes against their identity. The intersectionality affects particularly trans* on different grounds, race, class and sexual orientation are the predominant categories that intersect their gender expression and identity. Pathologisation as starting point is the epitome of trans* marginalisation and isolation from societal environments. It is a procedure that has been affecting trans* individuals before transsexuality was considered in the medical and academic discourse, hence, trans* was listed as ‘gender identity disorders’ under the Chapter V of the WHO International Classification of Diseases (ICD-10) which enclosed ‘mental and behavioural disorders’.⁶³⁸ By associating trans* to mental illnesses, it affected not only their conditions in society, but also their rights especially non-discrimination right and right to health. Trans* individuals, for such reasons, were overly accusing the implication of being perceived as abnormal and a deviation.⁶³⁹ The unequal treatment between trans* and cis in the medical field, as well as the access to health facilities without fearing discrimination is a clear dubious fair treatment under states obligation, in particular under Article 12 of the ICESCR.⁶⁴⁰ Additionally, pathologisation of trans* people required an invasive mental health evaluation alongside diagnostication with ‘gender dysphoria’ to access hormonal and surgical interventions.⁶⁴¹ Trans* individuals are affected not only by pathologisation in the medical field, but also by Governments that have imposed an amount of inhuman and degrading unnecessary procedures to have their gender legally recognised, for instance sterilisation.⁶⁴² Around 2009, transsexuality was first removed in the chapter dedicated to mental disorders, thus the slow procedure of depathologisation began. Depathologisation was considered a right of trans*, which would also allow trans* individuals to combat stigmatisation, while also ensuring access to healthcare without any form of discrimination, where the States have obligations to respect, protect, and fulfill.⁶⁴³

⁶³⁸Theilen, 2014. Depathologisation of transgenderism and international human rights law. *Human Rights Law Review*, 14(3), p.328.

⁶³⁹*Ibidem*.

⁶⁴⁰Article 12(1) of the ICESCR states that: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

⁶⁴¹O’Connor et al., op. cit., p.413.

⁶⁴²O’Connor et al., op. cit., p.410.

⁶⁴³Principle 18 of the Yogyakarta Principles regarding medical treatment states that: “No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person’s sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to

The stigmatisation of trans* individuals are not only a consequence of the pathologisation of their identity, but also from the discriminatory perception raised by TERFs.⁶⁴⁴ Generally, there has been an increase in transnational movements opposing gender equality, as well as general anti-gender movements alongside TERFs.⁶⁴⁵ The TERF movement has been found in the United States since the 1960s, when the “Declaration on Women’s Sex-Based Rights” was first written. The document has the objective to denounce the ambiguity and confusion in the understanding of ‘gender’ within legal instruments, yet their interpretation aligns with the essentialist view of women and girls, alongside the implications that transwomen are ‘men’ claiming to be women corroding thus the reproductive rights and ‘motherhood’ concepts.⁶⁴⁶ The denial of biological sex is being denounced by trans-exclusionary individuals, since it is because of birth-sex that women are killed, and by recognising gender as central means dehumanise cis women conditions. For such reason, Mestre i Mestre cites the words in the *Argumentative* of the PSOE (Partido Socialista Obrero Español), expressing their feelings on trans-inclusivity:

Trans rights must be framed within the limits of legal certainty. Thus, contrary to the belief of those defending the idea that feelings, desires, self- expressions, or self-determination can achieve full legal recognition, the right to self-determination of sexual identity is non-existent and lacks legal rationality. Modifying one’s sexual identity requires a continuous situation of transsexuality duly certified (Mestre i Mestre, 2022, p. 66).

Clearly, the objective of the party is to censor and strip individuals of their trans-rights to promote the notion of their sex-based ideologies. Overall, Spanish trans-exclusionary activists are willing to recognise transsexuals, however, they draw a line at transgenders since it would allow ‘men’ to be recognised as women without external diagnosis or

be treated, cured or suppressed.” Demonstrating, therefore, the positive obligations that States should respect to avoid interfering and cause any further discrimination in the process of destigmatise and depathologise trans* individuals, especially (Principle 18 is available at: <https://yogyakartaprinciples.org/principle-18/>). See also, O’Connor, op. cit., 412; Theilen, op. cit., p.337.

⁶⁴⁴TERFs as term means *trans-exclusionary radical feminists*, they also refer to themselves as ‘gender critical’.

⁶⁴⁵Mestre i Mestre, op. cit., p.71.

⁶⁴⁶In the Declaration, the TERF movement actually refers to legal instruments, for instance, citing General Recommendations of CEDAW and interpreting that: “‘gender identity’ to challenge individuals’ rights to refer to sexual orientation on the basis of sex rather than gender identity, which enables on their perspective ‘men’ who claim to be women to seek the category of lesbian, which undermines rights of lesbians and is a form of discrimination against women” (available at: https://www.womensdeclaration.com/documents/78/DECLARATION_-_FINAL_VERSION_AMENDED.pdf) . See also, O’Connor et al., op. cit., p.415.

respecting bodily requirements.⁶⁴⁷ Butler has extensively discussed the damaging role of TERFs, whose interest aligns with the general interpretation of gender ideology with the far rights (and fascists beliefs) and the religious institutions, such as the Vatican. Butler in *Who's Afraid of Gender?* (2024) spends an entire chapter to denounce TERFs alongside their trans-exclusionary beliefs that affect trans* minority as a whole. Firstly, TERFs claim proprietary rights to the women category, even though gender categories have preceded human beings. This form of property, denies trans* individuals of their rights to self-determination, thus they are victims of their deadnames and they are negated of their existence.⁶⁴⁸ Trans-exclusionary feminists, additionally, establish what the category of woman entails to, thus they are claiming that transwomen cannot be women or they belong to a 'second-class' order of women.⁶⁴⁹ To cite Butler:

The category of “woman” does not say in advance how many people can participate in the reality it describes, nor does it limit in advance the forms that that reality can take. In fact, feminism has always insisted that what a woman is is an open-ended question, a premise that has allowed women to pursue possibilities that were traditionally denied to their sex (Butler, *Who's Afraid of Gender*, 144).

Therefore, transwomen are being denied of their existence, often reduced to their dysphoric body. Nonetheless, trans women suffer and face violence and harassment constantly, without the possibility of seeking shelter or remedy, since they are being associated with the male sex because of their biological sex. The minimisation of transwomen's struggles is common in society, since the violent desire and raping culture is intrinsically associated with the male's genitalia. Hence, their conditions are dominated by the established hegemonic masculinity. There have been cases in which transwomen were denied access to domestic violence survivors, however, it is ideal to remind that rape is **unwanted** penetration, thus anything can be a tool and it is dehumanising to perceive transwomen within their biological identity. Furthermore, this interpretation would equal in essentialist perspective of the violent aspect of male identities.⁶⁵⁰

⁶⁴⁷Mestre i Mestre, op. cit., p.70.

⁶⁴⁸Butler, op. cit., pp.138-139.

⁶⁴⁹Butler, op. cit., p.144.

⁶⁵⁰Butler, op. cit., p.159. Cf. Aspani, 2018.

3.3.2.2. The Demonised Intersexuality

OHCHR definition of intersexuality states that “intersexual people are born with sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit typical binary notions of male or female bodies.”⁶⁵¹ For the IACtHR, an intersex person has a sexual anatomy, reproductive organs, and chromosomal traits which do not meet typical definition of a man or woman.⁶⁵² Thus, intersexual children conditions differ from the heteronormative interpretation of gender identity and it has been yoked beneath the transgender umbrella because of its deviant formulation of biological characteristics.⁶⁵³ Intersexuality does not equal a single gender identity, in fact, intersex persons could have a multitude of gender identities.⁶⁵⁴ However, one aspect that has been discussed within international human rights instruments is the inhuman and degrading procedures required without exactly informed consent. In fact, intersexual children are subjected to medical interventions to align with binary sex stereotypes.⁶⁵⁵ There have been cases in which procedures aimed to form of intersex children’s genitals have been considered under the IGM (Intersex Genital Mutilation), coined in the 1996, derivating from FGM (Female Genital Mutilation) and its objective is to denounced the violations of intersex human rights.⁶⁵⁶ An increase in movements concerning intersex rights has been registered, during 2016 ‘Intersex Awareness Day’, a group of international human rights experts and bodies declared necessary of States to prohibit any further “harmful medical practices on intersex children, including unnecessary surgery and treatment without their informed consent, and sterilization’ carried out ‘in an attempt to forcibly change their appearance to be in line with societal expectations about female and male bodies’”.⁶⁵⁷

Even though intersex people had difficulties in reporting the medical cases, there have been human rights frameworks actually enabling attempts to address both inhuman

⁶⁵¹Definition retrieved from the OHCHR’s site, which is available at <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people>.

⁶⁵²Gilleri, Sex, Gender and International Human Rights Law., p.53.

⁶⁵³OHCHR, op. cit., p.35. Cf. Davis, op. cit., p.47.

⁶⁵⁴Gilleri, op. cit., p.149.

⁶⁵⁵OHCHR, op. cit., p.35.

⁶⁵⁶Bauer, et al. 2020 Intersex human rights, *The International Journal of Human Rights*, 24:6, p.726.

⁶⁵⁷Gilleri cited the report of the OHCHR regarding the Intersex Awareness Day (Gilleri, op. cit., 138). Available at: OHCHR, ‘Intersex Awareness Day: End Violence and Harmful Medical Practices on Intersex Children and Adults, UN and Regional Experts Urge’ (OHCHR, 24 October 2016). <https://www.ohchr.org/en/press-releases/2016/10/intersex-awareness-day-wednesday-26-october?LangID=E&NewsID=20739>

medical treatments and IGM. Nonetheless, medically unnecessary surgeries have been denounced and reported by human rights bodies, it took almost 20 years to actually frame the conditions.⁶⁵⁸ IGM has been recognised as a form of torture, cruel treatment, and violation of bodily integrity by the majority of global institutions, including the UN and Council of Europe.⁶⁵⁹ The CEDAW Committee refers to intersex cases by using ‘intersex women’, since it often juxtaposes the relations between discrimination on gender identity and sexual orientation and intersexuality.⁶⁶⁰ In General Recommendation No. 35, the Committee refers to intersexuality as interlinked and interconnected to discrimination against women, alongside being lesbian, bisexual or transgender.⁶⁶¹ Girls with intersex characteristics and attitudes have been subjected to medical treatments, non-consensual, which have left the subjects with long-term psychological sufferings, additionally, cases of infanticide have been documented as well.⁶⁶² Furthermore, cases of intersexual women experiencing discrimination on the basis of their conditions are often highlighted within the sports’ environment. Intersexual athletes have faced awful and inhuman treatments in justification of ‘fair practices’ during international competitions, where their physical and genital characteristics are judged on the basis of heteronormative binary and impositions of linear male/female binary. Courts have recognised the importance of the rights to private life and family (Articles 8 and 13 of ECHR), and self-determination that are often overlooked by certain criterias imposed by international sports’ committee.⁶⁶³ The gender binary’s coercive impositions on athletes equal to unfair treatments and practices (contraceptive pill, injections and others aimed to lower testosterone’s levels), consequence of non-sufficient information, but highly suggested chirurgical interventions or medical therapies. By belittling and imposing binaries on intersex* individual conditions, it is clear the amount of discrimination that they are subjected is consequence of a system reinforced by the patriarchal subordination of women.⁶⁶⁴

⁶⁵⁸Bauer et al., op. cit., p.727.

⁶⁵⁹*Ibidem*.

⁶⁶⁰Gilleri, op. cit., p.158.

⁶⁶¹*Ibidem*.

⁶⁶²Information acquired from the UN campaign Free & Equal Factsheet available at: https://www.unfe.org/sites/default/files/download/UNFE%20LGBTIQ%2B%20Women%20Factsheet%20-%20EN_0.pdf

⁶⁶³De Vido, La Regolamentazione Dell’attività Sportiva alla Prova aelle Caratteristiche Sessuali e del Genere: Il Rispetto dei Diritti Umani in Caster Semenya, *Concorrenza e Mercato*, forthcoming. pp. 7-9.

⁶⁶⁴Sara De Vido notes in addition that gender-based discrimination, alongside sexual orientation and gender identity discrimination, is result of societal practices that impose subordination conditions on women. In the cases of intersexual individuals, furthermore, the right to self-determination is overlooked. Nonetheless, inhuman treatments on intersexual individuals are considered overly normalised within the heteronormative construction of society. The demonisation of sexual and gender minorities is clearly framed and generally

IGM has been recognised as a non-derogable human rights⁶⁶⁵, therefore, it is recommended that states investigate inhuman treatments of intersex persons. The interventions performed on intersex children are often ‘irreversible, procedures can cause permanent infertility, pain, incontinence, loss of sexual sensation, and lifelong mental suffering, including depression’.⁶⁶⁶ Therefore, there have been different legal instruments adapted and issued, for instance, Article 7 of the ICCPR⁶⁶⁷ has been used to urge States to take necessary measures to protect intersex individuals. IGM has yet to be further considered in comparison to FGM, nonetheless, it is still valued as non-derogable rights alongside forced marriage and honour killings.⁶⁶⁸ The CAT in General Comment 2, para 18, that the protection of human beings from inhuman and degrading treatments as the one listed previously are the responsibility of the State.⁶⁶⁹ Even though there have been progress in recognition of intersex individuals, there is still room for improvement, considering that parents are still faced with little information as well as any psychological support in the implications of intersex parenthood.⁶⁷⁰ Despite the advancement done in considerations of intersex individuals’ rights, they continue facing significant legal and medical barriers.

3.3.3. Queering Discrimination against Queer Refugees and Asylum Seekers in Legal Instruments

Queer migrants face a varied range of discrimination during migration from their country of origin to the third country of arrival. The amount of violence begins clearly in the home country, where they experience discrimination and violence on the basis of sexual orientation and gender identity, and consequently value the necessity of leaving for fear of persecution or worse outcomes. Despite fleeing their home countries to avoid facing any

accepted. It is clear that the standard of the individuals are based on Western criterias, resulting therefore in discrimination against any individual outside of the white, male, abled, cis, and heterosexual (De Vido, op. cit., pp.16-17).

⁶⁶⁵Non-derogable human rights generally offer the strongest protections, but also sanctions-wise, which includes persecution of perpetrators, and guarantee access to redress and justice (Bauer et al., 2020, p. 731).

⁶⁶⁶OHCHR considerations on intersex persons available at: <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people>

⁶⁶⁷Article 7 of the International Covenant on Civil and Political Rights declares that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” (available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-right> §)

⁶⁶⁸Bauer et al., op. cit., p.731.

⁶⁶⁹Bauer et al., op. cit., p.732.

⁶⁷⁰FRA Focus, (2015). *The Fundamental Rights Situation of Intersex People*, Vienna. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-focus-04-intersex_en.pdf

further dishuman treatment is their objective, queer individuals are also subjected to abuses in the transitory countries and in the recipient countries as well.⁶⁷¹ However, seeking international protection is a difficult procedure, in which asylum seekers are compelled to demonstrate their conditions through the limits of credibility and burden of proof. The procedure requires an adequate amount of proof regarding their identity and their identity in their country of origin. Thus, credibility will be further discussed throughout this subchapter. Before that, it is necessary to consider the ground lines of queer theory concerning queer refugees and legal instruments interpretations of their cases.

Queering the world is purely utopian, however, aiming for potential changes and concrete possibilities of a more inclusive and intersectional one, while dismantling limited normatives and colonial rules would be epistemological.⁶⁷² The world, notions of nation and home are permeated and saturated of cisheteronormative and patriarchal beliefs, which inevitably reveals the difficulty in the evaluation of the 'abnormal', alongside the Western colonial perspective of third-world countries and sexuality.⁶⁷³ There are still tendencies of Western societies of valuing colonial power in the strategic impulse of controlling and imposing democratic morals. Thus, in considering queer refugees through the limited interpretation of identity associated with sexual orientation and gender identity, the consequence amounts to further discriminatory judgements. In the dichotomy of in/visibility,⁶⁷⁴ homonationalist reasoning demonstrates the impossibility of recognition of the complexity of non-Western identities, in particular queerness. The implications that a global queer community has to respect the standards imposed by Western society, where other binaries of 'good' and 'bad', 'positive' and 'negative' or even 'real/true' and 'fake/untrue' are aligned with.⁶⁷⁵ Researches among lesbian migrant women have demonstrated that as individuals they refuse to compell and comply with Westernised norms of queerness, it is a call for resistance against the discriminatory and racialised implications of the West.⁶⁷⁶ Heteronormativity imposes a structured and restricted framework, where

⁶⁷¹Heidari et al, 2024. Liminality and transactional sex among queer refugees: Insights from Lebanon, Turkey, Greece, and Switzerland. *Journal of Refugee Studies*. p.2.

⁶⁷²*Ibidem*.

⁶⁷³Lee, 2018. Tracing the Coloniality of Queer and Trans Migrations: Resituating Heterocisnormative Violence in the Global South and Encounters with Migrant Visa Ineligibility to Canada. *Refuge*, 34(1), p.61.

⁶⁷⁴This binary could be referred to in different ways, the purport resides in the relation between Western expectancies of queerness in refugees and the non-Western ones. Throughout the sources, the dichotomy has been fairly discussed, alongside the implications in the credibility procedures of asylum interviews. To sum up, in/visibility equals to indiscretion and discretion, hypervisibility and invisibility, 'out and proud' or closeted, and all are limits to the refugees' conditions.

⁶⁷⁵Liinason, 2020, Challenging the visibility paradigm: Tracing ambivalences in lesbian migrant women's negotiations of sexual identity, *Journal of Lesbian Studies*, 24(2), pp.112-113.

⁶⁷⁶Liinason, op. cit., p.114.

binary of public/private and sex/gender are rendered norms on the basis of patriarchal ideologies that uphold the ‘dominant racial/ethnic, economic and settler/colonial interests’.⁶⁷⁷ Alongside, the essentialist view of sexual orientation and gender identity as attributed to queer refugees, who remain marginalised individuals, minimise the gravity of the violence that they are affected with. However, it is emblematic to avoid the colonialist logic of reducing their struggles to queer people that are ‘victimised’ by their culture and need rescue, it would translate into systemic violence which translates into racism.⁶⁷⁸ Additionally, queer theory and queer migration scholarship seek to enable the understanding of the complexity of migrants as intersecting power, race, gender, class, nationality and sexual orientation.⁶⁷⁹ The importance of queer migration is to acknowledge these complex relations without focusing strictly on the categories of sexual orientation and gender identity, but to critically understand and assess hierarchies in migration.⁶⁸⁰ Luibhéid values this scholarship as valorising the subjects rendered ‘invisible, unintelligible, and unspeakable’ in both queer and migration studies.⁶⁸¹ Queer migration highlights the importance of coalition, since the identity of queer refugees is dynamic, enriched by the complexity of their experiences, and their relation to power.⁶⁸² Queer theory must challenge the stereotypisation of Western binaries, precluding the universality of the visibility of LGBTQ+ narratives and restrict associating the complexity of the closet with liberation, when queer migrants are subjected to performative falsification of selfhood to be recognised in their claims⁶⁸³ Homonationalism is important in understanding the influence in the asylum processes, where the recognition of inclusivity of the LGBTQ+ community enriches the perspective on sovereignty.⁶⁸⁴ As already demonstrated in chapter two, homonationalism is ideal to sustain the divide between Western liberal society, and the oppressive nature of non-Western one, created by the West, based exclusively on the recognition of queer rights.⁶⁸⁵ Queer refugees in their asylum claims might sustain this narrative, based on the experiences they faced in

⁶⁷⁷Luibhéid, 2020, “Treated neither with Respect nor with Dignity”: Contextualizing Queer and Trans Migrant “Illegalization,” Detention, and Deportation queer migration and trans, in Luibhéid E., & Chávez K. R *Queer and trans migrations : dynamics of illegalization, detention, and deportation*. University of Illinois Press. p.20.

⁶⁷⁸Luibhéid, op. cit., p.23.

⁶⁷⁹Luibhéid, 2008. *Queer/migration: An unruly body of scholarship*. GLQ: A Journal of Lesbian and Gay Studies, 14(2-3), 169-190. Duke University Press. p.169.

⁶⁸⁰Luibhéid, *Queer/migration*, p.171.

⁶⁸¹*Ibidem*.

⁶⁸²Chávez, 2013. Introduction, in *Queer Migration Politics*. University of Illinois Press. p. 7.

⁶⁸³Shaw & Verghese, 2022. LGBTQI+ refugees and asylum seekers: A review of research and data needs. p.14

⁶⁸⁴Danisi et al. 2021. *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on grounds of Sexual Orientation and Gender Identity*. Springer International Publishing. p.80.

⁶⁸⁵Danisi et al., op. cit., p.78.

their ‘backward’ homophobic country of origin.⁶⁸⁶ It is, therefore, necessary to establish a clear intersectional approach when considering queer refugees and their claims.

Intersectionality is demanding but necessary, in particular, considering the nature of women and their complexity as well. In the context of migration especially, it is imperative to regard the connection between women, race, sexual orientation, gender identity, and class. For legal instruments, it is difficult to classify asylum claimants as interconnected, in fact, women are either subjected to GBV, thus fleeing their origin country on such a basis, or are lesbians escaping homophobia and discrimination.⁶⁸⁷ Yet, the Istanbul Convention seeks to access women refugees backgrounds by using intersectionality, however, the issue highlighted is the incapacity of accessing women as heterogeneous rather than homogeneous. In fact, queer women are affected by not only GBV, if heteronormative passing, but also by homophobic or transphobic discriminatory grounds.⁶⁸⁸ Article 60 of the Istanbul Convention⁶⁸⁹ recognises that women regardless of their sexual orientation, gender identity, ethnicity and so on, experience GBV and are one of the roots of fleeing their origin countries.⁶⁹⁰ Soft-law instruments have highlighted, as well, the importance of intersectionality in SOGIESC cases, in particular, to combat GBV. The Yogyakarta Principles are the examples in the process of recognising the intersection of different grounds, that are as well place of origins for discrimination, in fact, in the preamble they provide a list of all the aspect that must be considered in the interpretation of cases concerning SOGIESC-factors.⁶⁹¹ Furthermore, in the CEDAW General Recommendations No. 28 and 32, it has recognised the importance of valuing the ‘most marginalised’ sufferings from intersectional discrimination, as well as the gender-related dimensions of refugee status.⁶⁹² Additionally, the CEDAW Committee has entrusted in its procedural

⁶⁸⁶Danisi et al., op. cit., p.81.

⁶⁸⁷Dustin, 2022. Pathways to Refugee Protection for Women: Victims of Violence or Genuine Lesbians? *Refugee Survey Quarterly*, 41(3), p.1.

⁶⁸⁸Queer refugees women experiences discrimination on different levels and gravity, by failing in understanding the role of intersectionality, it is inevitable to miscalculate the vulnerabilities that expose women to crimes of rape, forced marriage or coercion before and during their asylum process. See also Tschaler, 2021. *The Istanbul Convention and queer women seeking asylum (Policy Report 65)*. University of Bristol. 2.

⁶⁸⁹Article 60 of the Istanbul Convention (available at: <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatyid=210>) notes that Member States must take legislative or other measures to recognise GBV against women as a form of persecution under Article 1, (A)2 of the 1951 Refugee Convention and recognise the seriousness of the harm.

⁶⁹⁰Dustin, op. cit., p.2.

⁶⁹¹Venturi, 2023. Beyond the rainbow? An intersectional analysis of the vulnerabilities faced by LGBTIQ+ asylum-seekers. *European Journal of Migration and Law*, 25, p.480.

⁶⁹²Ivi, p.483.

requirements that State parties guarantee a fair interview in respect of their status, while valuing a sensitive approach regarding their intersectional experiences.⁶⁹³

Queer refugees experiences are, therefore, packed with inhuman and degrading treatments that are often associated with their identity, which could encompass both sexual orientation and gender identity. Before exploring some of these, it is necessary to provide some legal information. In international law, asylum is not a guaranteed right, however, Article 14 of UDHR⁶⁹⁴ obliges Member States to allow individuals to seek asylum, however, they are obliged to prove cases of persecution as defined by the 1951 Refugee Convention. As a matter of fact, the 1951 Refugee Convention and its 1967 Protocol provide definitions and necessary criteria. Article 1A(2) of the 1951 Refugee Convention notes that refugees must demonstrate “well-founded fear for being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” and “is unable or is unwilling to avail himself of the protection of that country”.⁶⁹⁵ These five grounds are central in the recognition of refugee status, resulting in the complexity of understanding under which ground queer refugees fall under. Membership of a particular social group (MPSG) has different interpretations and it is by far the most complex of the five grounds, thus it is necessary to value it as associated with the other grounds. However, there are three criterias that must be considered in the asylum claimants, provided by *AG Canada v Ward*, when considering the basis of anti-discrimination and fear of persecution.⁶⁹⁶ In 2002, the UNHCR provide a definition, in the *Guidelines on International Protection: Gender-Related Persecution*, regarding these criterias by listing first the *immutability* or innate/unchangeable characteristic of the group, and second this characteristic must be otherwise fundamental to identity, conscience or the exercise of one’s human rights.⁶⁹⁷ These characteristics align principally with the perception of sexual orientation, which is considered as immutable, and as consequence, sexual minority is fundamental to human dignity, on contrary, gender identity is defined as mutable which complicates more the complexity of the membership of PSG.⁶⁹⁸ Nonetheless, in considering sexual orientation immutable, it means to consider it

⁶⁹³Ivi, p. 484.

⁶⁹⁴Article 14 of UDHR states that: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” (Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>).

⁶⁹⁵The full original article included further elements that limited the interpretation to fear associated with events occurred before 1951, however, these were dropped by most States. The full article can be found at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees>.

⁶⁹⁶Gilbert and Rüsich, 2018, International Refugee and Migration Law, in M.D. Evans *International Law* (5th ed). Oxford, p.817.

⁶⁹⁷Dustin, op. cit., p.403.

⁶⁹⁸Gauderman & Torres 2023. *The Fragility of Particular Social Groups*. University of California Press EBooks, p.77.

within the heteronormative framework. Sexual orientation as an identity, therefore, is fixed, limited to the universal homogeneity, which equals for queer refugees to respect the limitations imposed by Western essentialist perspective notions of identity, thus valuing homonormativity as well.⁶⁹⁹ The lack of intersectionality further complicates the interpretations of the LGBTQ+ conditions, whether it is associated with their gender (Istanbul Convention) or as MPSG on the basis of sexuality (Qualification Directive 2011, 95/EURcast).⁷⁰⁰ ⁷⁰¹ To access asylum and be recognised as refugees, queer migrants must face the process of *credibility*, which by meaning is the capacity of being believed. Credibility assessment is the procedure through which the asylum applicants can be believed on the basis of the facts and information they provided, afterwards the qualification to refugees is established by the decision-maker. Considering sexual orientation, queer women experience several obstacles in producing valuable evidence in relation to their sexuality or the GBV experienced on these grounds.⁷⁰² Additionally, as already hinted, it is difficult to provide evidence as expected by heteronormative and homonormative standards for applicants that generally are fleeing global south countries, which are yet to be subjected to Western expectations, thus, it is almost obligatory for queer applicants to pass as heterosexual.⁷⁰³ It is, therefore, ideal for queer refugee claimants to adapt to Western sexual stereotypes, since decision-makers fail to consider elements of discretion as protection from discrimination and persecution.⁷⁰⁴ Credibility assessment is also contentious and problematic, since the adverse process equals denial of the refugee status as consequence of inability of providing enough burden of proof or coherent and plausible testimony, overlooking the possibility of forgetting memories as result of traumatic experiences.⁷⁰⁵ Additionally, the 1951 Refugee Convention established Article 33⁷⁰⁶, known as the

⁶⁹⁹Shakhsari, 2014. The queer time of death: Temporality, geopolitics, and refugee rights. *Sexualities*, 17(8), p.1002.

⁷⁰⁰The scope of the Qualification Directive is to implement further definitions and guidelines to harmonise the interpretation of refugees claimant cases to allow protection. In the QD 2011, the UNHCR defines the inclusion of gender identity and sexual orientation within the MPSG, that may be related to certain legal traditions and customs (FGM, forced sterilisation, abortion), which should be considered as well-founded fear of persecution (Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0095>).

⁷⁰¹Tschaler, op. cit., p.3.

⁷⁰²Dustin, op. cit., p.398.

⁷⁰³Shakhsari, op. cit., p.1003.

⁷⁰⁴Dustin & Held, 2018. In or out? A Queer intersectional approach to ‘Particular Social Group’ membership and credibility in SOGI asylum claims in Germany and the UK (Version 2). University of Sussex, p.75.

⁷⁰⁵Scavone, 2023. Queer evidence: The peculiar evidentiary burden faced by asylum applicants with cases based on sexual orientation and identity. *Elon Law Review*, 5, p.399.

⁷⁰⁶Article 33(1) of the 1951 Refugee Convention states: “No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political

non-refoulement principle, to ensure protection of asylum seekers from being returned to their country of origin, where they may still face persecution. The principle is also widely regarded as *jus cogens*, since it is recognised as fundamental and qualifies also as customary international law.⁷⁰⁷ The 1967 Protocol has expanded its scope. Similarly, Article 61 of the Istanbul Convention has transposed the same principle but focuses its application to cases of GBV against women.⁷⁰⁸

It is difficult to assess credibility without a fair amount of evidence to sustain the claims, in particular, considering that often the applicant's suffered violence is left unreported to avoid further risk of persecution in the country of origin as well as transitory countries. Two examples provided by Dustin of two lesbians women, one Pakistani and the other Zimbabwean, both forced to marry and experienced rape by husbands. The former provided enough detailed and compelling evidence about her identity as lesbian and her trauma to confirm her refugee status in the UK, whereas the latter, Angel, because of PTSD during the assessment provided inconsistent and unreasonable explanation and for such reason her status was denied.⁷⁰⁹ These two stories are demonstrations of the violence that women, in particular queer women, experience in their country of origin because of their sexual orientation and/or gender identity. Besides the overlooked obstacles and difficulty that trauma has on the recollection of traumatic experiences on victims.⁷¹⁰ Moreover, rape is yet to be acknowledged as actual violent crime against the body integrity of a individual, in fact, some immigration officers believe rape is a "private criminal act", meaning that the culture of rape is so embedded in society to ignore the gravity on the victim.⁷¹¹ Queer asylum seekers have perceived themselves in the liminal space, or in-between the illegality and the lack of recognition, which have extreme consequences on the mental health of the individual.⁷¹² Overall, queer refugees have been diagnosed with depression or other mental illnesses, especially trans* individuals. Furthermore, there have been cases of transactional sex, mostly lesbian women and trans* women have used it as a survival strategy to access brokers, smugglers or crossing borders. By doing so, they were victims of growing abuse

opinion.”

(Available

at:

<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees>)

⁷⁰⁷Gilbert and Rüsçh, op. cit., p.826.

⁷⁰⁸Article 61 of the Istanbul Convention states that: “Parties shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment” (Available at: <https://rm.coe.int/168008482e>).

⁷⁰⁹Dustin, op. cit., pp.406-407.

⁷¹⁰Dustin, op. cit., p.414.

⁷¹¹Hauderman & Torres, op. cit., p.83.

⁷¹²Haidari et al., op. cit., p.2.

and violence, which transposed even in refugee camps to provide food and money since accessing funds was impossible. It established a journey of SGBV and exploitation that had a repercussion on the individuals other than creating a marginalised reality, where their vulnerability flourished. Being out and proud would have been just another reason to be discriminated against.⁷¹³

⁷¹³*Ibidem.*

Conclusion

The objective of this dissertation was to provide a linear and clear overview of the concept of *queer theory*, providing enough information to give an in-depth knowledge to discuss and interpret its role within the international human rights law. The decision to focus on certain aspects, rather than others, was a result of researches in both the sociological field and international human rights field. Regardless of its fair number of practices, queer theory's objective is still unclear and fairly dystopic. In fact, in contemporary society, there is an overall confusion around the difference between queer theory and lesbian/gay studies. Additionally, there is within the theory a division among the importance of intersectionality, alongside its fundamental scopes and purposes.

Clearly, in queer theory there is still room for improvement in its concepts and nuances. The deconstruction of binaries and heteronormativity is a starting point, however, the implementation of such is fairly new. Considering contemporary society, the magnitude of struggles that society is facing with the rise of fascism again, and the destruction of the world by the hands of climate change, it is fair to say that queer individuals are firmly constricted at the margin of societal structure. Queer theory's objective is, therefore, to create and establish a society, in which neoliberal and colonial rules are dismantled, where the universality of international human rights law might be satisfied in the intersectional approach of inclusivity. Some scholars may argue that the inclusion in legal instruments is not as rewarding as it might be thought, civil partnerships and gay marriages are an example. Gay marriages are a starting point, however, it must be not stopped there. Especially, when the amount of discrimination to which queer persons are subjected is an example of the failure of international human rights. Trans* individuals and intersex* individuals, as discussed, are experiencing a slow decrease in the recognition and acknowledgement of their differences. The performative aspect of trans* individuality is, fairly, uncommon among society, even though the concept of gender and performance is intrinsic to each intelligible individual. The rise of the concept of 'gender ideology' as described by the Vatican and the far-right parties generate discrimination to the point of stripping individuals of their right to self-determination. Gender is yet to be conceived outside of the concept of 'property', established by capitalism and neo-liberal values. Allowing the integration of queer values would amount to a fair practice, where individuals are judged on an inclusive basis, where the hierarchical order of things crumbles. Deconstructing the concept of binaries and heteronormativity, might enable the expansion of frameworks, language, and facts.

A predominant and demanding issue to raise awareness about is the limitations that Western society establishes on the world as a whole. The imposition of these limits have already been present during colonialism era, and still are deeply rooted in the ideologies of the West. Homonationalism has been discussed on the limits of impositions and expectations of Western States, while also valuing the prejudices permeated by racism and xenophobia directed toward queer identities. It might amount to the *saviour complex* of the white nature, aimed at veiling racism. The concept of *pinkwashing*, furthermore, is an awful political practice of exploiting queer individuals to conceal the images of a genocide, where a process of ethnic cleansing is in progress in the state of Palestine. It clearly demonstrates the values that States and Governments have toward the community. Donald Trump is threatening daily the lives of the community, by implementing again restrictions to already approved rules; Giorgia Meloni is denouncing the importance of the nuclear and natural family. Heteronormativity is easily sustained by the sovereignty of the States, by gradually implementing once again fascist rhetorics that aim to violate human dignity and the rights of each individual. Article 1 of UDHR states that: “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” However, in the establishment of these rhetorics by governments, the rights of ‘all human beings’ is translated into the rights of few, already entrenched in the heteropatriarchal hierarchy. By doing so, it would create a further gap between individuals, where the coalitional front might collapse to prevent one’s survival. Nonetheless, international courts have made progress in the interpretation of important legal instruments by considering also intersectional values. For instance, the CEDAW Committee has structured through General Recommendations a more in-depth definition of ‘woman’, as well as the Istanbul Convention. One thing that the GREVIO has suggested is the implementation of professional training, which might be a salient feature to protect the rights of individuals, and prevent at the same time the worsening of discriminatory practices. Guaranteeing human rights is necessary to prevent further marginalisation and isolation of the queer community. Valuing the right to private and family life is, therefore, a fundamental right that queer individuals are entitled to.

The dissertation, in the end, is the product of *queering* not only international legal instruments, but also life. Perceiving the reality before our eyes, recognising what is at risk and knowing how reality could ideally be, through queer theory, is what empower us to fight for the rights; to safeguard and to improve.

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