An Alternative to Legal Transplants:
Cultural Translation as a Less Imperialistic Law-Making Method.
The Case of Turkey and the LGB Rights Concept.

Submitted by Elif Ceylan OZSOY to the University of Exeter
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I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

Signature:

Table of Contents

Abstract

Through Judith Butler's concept of 'cultural translation', this dissertation seeks to provide a less imperialistic law-making mechanism as it relates to the lesbian, gay and bisexual rights concept (hereinafter 'the LGB rights concept') in Turkey, which currently relies heavily on legal transplantation. In search of a new law-making method, this thesis first deconstructs 'legal transplantation' as that which creates various asymmetrical relations that amount to consolidating Western imperialism. Critical legal scholars have shown great interest in revealing the imperialistic consequences of the law-maker West and the law-taker non-West. This thesis aims to add another dimension to these discussions by placing 'imitation', as advanced by Judith Butler, at the heart of its analyses. It scrutinises legal transplantation through the various imitations/repetitions it embodies and explores the role of imitation in law-making as law-taking. It does so by evaluating legal change by means of legal transplantation through the example of the Turkish experience with the LGB rights concept, and uses Judith Butler's understanding of imitation/repetition, as advanced in her gender performativity concept, to achieve this evaluation This thesis attempts to expand our understanding of law-making as law-taking by unveiling their performative force, which humanises the subject in a way that is similar to the processes of gendering it. In doing so, this thesis aims to transfer the analyses that postulate the gendered body as performative to the rubric of human rights law, and argues that humanisation of the body through granting rights is performative as well. Though the occasion arises for subversion from these various imitations, it introduces a new law-making method, cultural translation, transforming the realm of limited possibilities for human rights into the realm of the possible.

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Chapter 1 Introduction

1.1 Introduction

Focusing the analysis on the performative nature of law-making as law-taking, this thesis produces a wealth of evidence regarding the problems associated with human rights. Through the lens of American philosopher Judith Butler, it reveals the embedded imperialistic features of current law-making by splitting this process into several common traits that impede the possibility of less imperialistic law-making. These include: recognition/intelligibility through historically delimitated schemas of human rights; forcible citation of a norm; controllability of norms and their preceding the moment of imitation; and the famous universal versus cultural crisis. Taken together, they function as machinery that limits the emergence of different possibilities of speaking the language of rights. Addressing these problems is also a very useful trajectory to follow in pursuit of a new law-making method. Applying Butler's theory of cultural translation to the area of human rights reveals the minimal requirements for a different law-making method to be able to flourish, one in which different understandings of what lesbian, gay and bisexual (LGB) rights[1] entail enter into

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[1] I am using Lesbian Gay and Bisexual rights rather than Lesbian Gay Bisexual Trans and Intersex+ rights. The reason for narrowing it down to LGB rights concept is solely academic. Despite my initial eagerness to conduct research on the LGBTI+ rights concept, I came to an understanding that I must narrow my focus in light of the different legal paths that sexual orientation and gender identity follow. The limits of the PhD thesis compelled me to choose between body politics and same-sex attraction. This is how I ended up focusing my scope to the LGB rights concept. I am not using the LGB rights concept to exclude Trans, Intersex, +. The deployment of the LGB rights concept in this thesis is simply illustrative. In other words, I am using the LGB rights concept as an example to illustrate the impediments of the current law-making. In this sense, I am not excluding the rights plight of Trans, Intersex and + people, but am instead tightening my focus for the sake of methodology and the limits of a

an endless cultural translation process and where the ambivalence of what will come out from this conversation empowers the emergence of anti-imperialism. Cultural translation is thus an instrument that unlocks the possibilities suppressed by the current law-making regime. This return of the unauthorised destabilises the concepts through which law-making becomes an unmaking, an undoing of law. As a result, the realm of constraint evolves into the realm of the possible.

1.2 Legal transplants are imperialistic

The LGB rights concept has become one of the centrepieces of human rights in the 21st century.[2] It is now rapidly diffused throughout the world but with various problems attached. On the one hand, the LGB rights concept has become an indicator within international politics and human rights discourse as that which distinguishes 'civilised' from 'savage' in a way that reinforces Western

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PhD research. To do otherwise would have required the addition of at least two further chapters to evaluate the legal history of body politics and gender appearances in the West and non/less West. For these reasons, I chose to focus on law-making regarding same-sex intimacy in this thesis. Moreover, as a lesbian myself, I felt politically more comfortable evaluating and challenging the LGB rights concept as I am a subject of this category.

[2] Leticia Sabsay, 'Queering the Politics of Global Sexual Rights?' (2013) 13(1) Studies in Ethnicity and Nationalism 80–90; Rahul Rao, 'Echoes of Imperialism in LGBT Activism' in Kalypso Nicolaïdis, Berny Sèbe and Gabrielle Maas (eds.), *Echoes of Empire: Memory, Identity and Colonial Legacies* (I.B. Tauris 2015); Rahul Rao, 'Global Homocapitalism' (2015) 194 Radical Philosophy 38–49; Patrick Awondo, Peter Geschiere and Graeme Reid 'Homophobic Africa? Toward A More Nuanced View' (2015) 55 (3) African Studies Review 145; Aeyal Gross, 'Post/Colonial Queer Globalisation and International Human Rights: Images of LGBT Rights' (2013) 4(2) Jindal Global Law Review; Joseph Massad, 'Re-Orienting Desire: The Gay International and the Arab World' (2002) 14(2) Public Culture 361–386.

superiority. On the other hand, the tradition/culture counterargument,[3] generated by non/less-Western[4] (in this thesis, 'non-Western' also covers non/less-Western) countries where homophobic violence is not condemned, overlaps with the cultural relativism critiques generated by critical scholars and activists that challenge universality and address the issue of the heteronormative–Western fabrication of the LGB rights concept.[5] Cultural

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[3] Cultural relativism is a doctrine that postulates that moral codes vary culturally. This doctrine asserts that there cannot be one universal moral code. Thus every culture determines its own moral values. This means that cultural and moral values are relative. The culture argument against LGB rights postulates that homosexuality is a moral issue and that granting rights to homosexuals needs to be determined according to the moral values and culture of a society. The West cannot impose its moral standards upon cultures where homosexuality is considered immoral.

[4] I acknowledge that neither the West nor the non-West are a singular unit of power. I first decided to highlight this fact by using the concept 'non/less-West' in this thesis. However, mentioning 'non/less' every time I used West became eye-straining. In addition, this research does not use West and/or non/less West as geographical terms. West refers to an ideology that developed through history, intertwining with imperialism and colonialism. The West concerns whichever site of power and States govern the norms of the universal and impose those norms upon the non/less-West. Given this, representations of the West and non/West are temporary and subject to change in time and space. The Western ideology has been represented by varying states and powers throughout history, almost all symbolising imperialism. The current law-making method is a consequence and a product of capitalism, imperialism, colonialism, liberalism and neo-liberalism in which the West and non-West always maintain a binary opposition to each other. In this sense, those who govern, control and force the rules of the universal on others can be defined as the 'West' and those who are absent in this construction of the universal and are compelled to implement those rules can be described as 'non/less West'. Relevant to this thesis is the compulsion of the singular, and thus universal, LGB rights concept upon other jurisdictions as a denominator of democracy, which demonstrates a profound example of Western ideology.

[5] Nicholas Bamforth, 'An "Imperial' Strategy"?' in Robert Leckey and Kim Brooks (eds), *Queer Theory Law, Culture, Empire* (Routledge 2011); Leticia Sabsay, 'Queering the Politics of Global Sexual Rights?' (2013) 13(1) Studies in Ethnicity and Nationalism 80–90; Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) EJIL 1023–1044; Paul Johnson, *Homosexuality and The European Court of Human Rights* (Routledge 2014), 233–234; Francesca Romana Ammaturo, 'The Right to a

relativism does not only apply to foreign cultures. It has also been invoked by subcultures within a country. Western LGB individuals argued that their sexual orientation was not immoral and challenged the law's treatment of heterosexuality as the universal sexual orientation. This long struggle led to admission of homosexuals to human rights protection, however, through accepting the heteronormative structures of the human rights system. It is argued that the LGB rights concept's function is limited to the creation of an 'acceptable homosexual' who fits into the neo-liberal system.[6] This overlap constitutes a two-way deadlock for LGB persons, especially in non-Western countries such as Turkey. Firstly, any critique concerning universality and the Western benchmarks embedded in the LGB rights concept empowers homophobic state discourse. Secondly, there seems to be no alternative other than the Western-constructed LGB rights concept to refer to. This paradox has been addressed by a number of critical scholars. Nicholas Bamforth argued that, instead of universality, relativism plays an imperial role in the context of LGB rights by providing a justification for discrimination against LGB persons.[7]

Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe' (2014) 23(2) Social & Legal Studies 175–194; D.Ø. Endsjø, 'Lesbian, Gay, Bisexual, and Transgender Rights and the Religious Relativism of Human Rights' (2005) 6(2) Human Rights Review 102–110; Radhika Coomaraswamy, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2002–2003) Geo Wash Int'l L Rev 483; Momin Rahman, 'Queer Rights and the Triangulation of Western Exceptionalism' (2014) 13(3) Journal of Human Rights 247–289; Cai Wilkinson, 'Putting "Traditional Values" Into Practice: The Rise and Contestation of Anti-Homopropaganda Laws in Russia' (2014) 13(3) Journal of Human Rights 363–379; UNHRC, Res 16/3 'Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind' (8 April 2011) UN Doc A/HRC/RES/16/3.

[6] Ibid.

[7] Bamforth (n 5).

He suggests the deployment of Western-constructed concepts which embody universality to help locally disempowered groups, including LGB persons.[8] His argument reformulates the universalisation of Western-made laws. In this sense, the more accurate picture is provided by Rahul Rao, who describes the dilemma of non-Western LGB individuals as being surrounded by malevolent homophobia from their countries and condescending rescue from the West.[9]

This paradox resonates with concerns I had during my experience as an activist and lawyer in Turkey. The legal strategy we were directed to employ was the promotion of the LGB rights concept developed in the West.[10] On the one hand, these rights concepts were the only available language to speak of the rights of LGB people. On the other hand, they were consolidating the historical pattern in which rights are made in the West and imitated by the non-West. Another problem was that referencing the EU or Western legal lexicon with the aim of improving the legal situation of LGB individuals contributed to strengthening the culture/tradition versus universal discourse through which homophobia was coupled with culture, and LGB rights were equated to the universalist human rights approach. This pairing, again, coincides with the imperialistic pattern of law/right-making in the sense that it reinforces the assumption that the non-Western is incapable of law/right-making and their laws cannot qualify as universal.

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[8] Ibid.

[9] Rahul Rao, *Third World Protest: Between Home and the World* (Oxford University Press 2010) 192.

[10] Cynthia Weber, *Queer International Relations* (Oxford University Press 2016) 107.

Critical legal scholars, especially post-colonialist legal scholars, draw attention to the fact that the historical pattern through which knowledge, morals and laws are exported from the West, and thereby the notion that the non-West is civilised by the West, is still present.[11] The recent Western value that follows this historical pattern has been the LGB rights concept. Rahul Rao identifies this as homocolonialism,[12] in which the LGB rights concept becomes the new indicator to distinguish the developed from the undeveloped, and the civilised from the savage.[13] This function reinforces the aforementioned binary coupling of culture with the non-West and universality with the West.

Further to this, Rao argues that contextualising homophobia as an entirely cultural phenomenon creates an illusion that there is no need for the West to question the heteronormativity of their neo-liberal universal human rights system from which the LGB rights concept stems.[14] In his article, 'Global Homocapitalism', Rao discusses the reasons why the World Bank imposes economic sanctions against Uganda on the grounds of recriminalising homosexuality.[15] Focusing on capitalist institutions that take a serious stance towards LGB rights, he concludes that the LGB rights concept functions as an

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[11] Rao, 'Echoes of Imperialism in LGBT Activism' (n 2).

[12] Ibid.

[13] Ibid; Rao, 'Global Homocapitalism.' (n 2); Patrick Awondo, Peter Geschiere and Graeme Reid 'Homophobic Africa? Toward A More Nuanced View' (2015) 55(3) African Studies Review 145; Gross (n 2); Massad (n 2); Emily E. Holley 'International Anti-LGBT Legislation: How Nationalistic Cultural Warfare Supports Political Motivations' (2015) 24 Tul J L & Sexuality 179.

[14] Rao, 'Echoes of Imperialism in LGBT Activism' (n 2); Rahul Rao, 'Global Homocapitalism' (2015) 194 Radical Philosophy 38–49.

[15] Rao, 'Global Homocapitalism' (n 2) 38–49.

imperialistic instrument in the service of the neo-liberal system,[16] something he terms 'global homocapitalism'.[17] Similarly, Joseph Massad uses the term 'Gay International', through which he addresses missionary tasks embedded within the Western gay rights policies.[18] He asserts that the LGB rights concept is, indeed, the installation of the Western binary understanding of same-sex desire in an orientalist and imperialistic fashion.[19] Thus, transplanting this Western concept makes same-sex desire less intelligible within the recipient non-West jurisdiction. Therefore, it can be deduced from his argument that imposing the Western sexual lexicon on the non/less-West aims to develop a singular approach, which is based on the Western same-sex experience. Similarly, Aeyal Gross argues that attempts to develop one singular global gay identity brings about the promotion of one universal formula for LGB rights.[20]

Altman and Symons describe this Western predominance, and the anti-West discourse attached to the sexual orientation and gender identity (SOGI) issues, as a new Cold War developing around the LGB rights concept.[21] This interpretation reflects polarisation at the UN, where the anti-LGB rights bloc is headed by Russia and consists of anti-Western countries, while the pro-LGB

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[16] Ibid.

[17] Ibid.

[18] Massad (n 2).

[19] Ibid.

[20] Gross (n 2).

[21] Dennis Altman and Jonathan Symons, *Queer Wars* (Polity Press 2016) 11.

rights bloc is predominantly composed of the USA and the other Western states.[22]

Given this picture, the LGB rights concept not only evokes Western imperialistic history but is also associated with the current neo-liberal and post-Cold War policies. This situation triggers four main trends regarding LGB rights. The first trend is resistance to the admission of LGB people to the inherently imperialistic human rights regime. This strand manifests itself especially via an anti-marriage attitude (both same-sex and opposite-sex) within the West. It is not necessarily homophobic, but, by contrast, has emerged from LGB activism and identifies itself as the queer movement.[23] The second trend is a combination of religious, moral and nationalist accounts that stipulate the superiority of heterosexuality. According to this approach, the LGB rights concept poses a threat to the very existence of their culture. In this way, homophobia is entrenched within religious, moral and national values. The third approach is the equal rights movement. Here, recognition of LGB individuals by the human rights regime solves the problems. The last, and relatively new trend, seeks to find an anti-imperialistic alternative path to the neo-liberal and post-colonialist attitudes surrounding the LGB rights concept. Despite the vivid discussion and precise

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[22] Wilkinson (n 5); A/HRC/RES/16/3 (n 5); UNCHR, Seventeenth session, Follow-up and Implementation of the Vienna Declaration and Programme of Action 'Human Rights, Sexual Orientation and Gender Identity' (15 June 2011) UN Doc A/HRC/17/L.9/Rev.1.

[23] See the discussion on queer rights as a response to Altman and Symons: Anthony J. Langlois, 'Queer Rights?' (2017) 71(3) Australian Journal of International Affairs 241–246.

identification of the problems, this fourth trend does not seem to have yet produced an alternative to the international human rights structure.[24]

The four trends outlined above appear to address the same issue: *recognition of LGB individuals*. This is problematic because it is the language of 'rights', which constrains and governs the system of recognition. This means that the only means to enhance the conditions of LGB individuals involves the implementation of the LGB rights concept as that which is already established in the West.[25] This one method of recognition has been transferred through legal transplantation to the non/less-West, which has always been the predominant vehicle in terms of carrying Western laws to the non-West. At this point, I argue that imposition of Western laws on the non-West is only the consequence of the underlying problem. I name the underlying problem that needs to be tackled as the law/right-making method. This research seeks to contribute to the fourth trend by investigating a new law-making method as an alternative to legal transplantation of the LGB rights concept. It does so by diverging from the literature and challenging the foundations of these laws, that is, how they are made. As I will analyse in the next chapter, legal transplantation is not only the imitation of Western laws by the non-West but also the making of new Western categories of rights through repetition of the previous Western rights structures. In this way, I depart from the traditional understanding of legal transplantation, which defines it as a solely law-taking process. I argue that legal transplantation is, simultaneously, a law-making and law-taking method through which the LGB

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[24] Altman and Symons (n 21) 11.

[25] Travis S. Webert L. Lin 'Freedom of Conscience and New "Lgbt Rights"' (2015–2016) 2 J Glob Just & Pub Pol'y 277.

rights concept[26] has been made by the West and imitated by the non-West. Thus, the law-maker is also a law-imitator, as will be elaborated upon later in this thesis. I must note that I acknowledge Jon Binnie's critiques about the postcolonial queer scholarship for undervaluing the agency of non-Western countries.[27] However, I find his view slightly problematic and, as I point out several times in different chapters, the agency of the non-West is as limited as the agency of the West because the law-making itself is already limited by pre-existing structures of human rights, which are historically Western formulations.

1.3 Judith Butler: imitation, subversion and cultural translation

During my practice as a lawyer, such thoughts led me to pursue a master's degree in international human rights law and eventually a PhD thesis. My initial idea was to undertake empirical legal research in order to understand the ways in which legal homophobia establishes itself in Turkey. Doing this would provide me with evidence to demonstrate that the Western-constructed LGB rights concept is not a solution for Turkey owing to the different dynamics of homophobia there. However, over time, the direction of my research changed when I discerned that the key to addressing the impediments of a rights-based solution was to focus on the law-making and law-taking processes in a theoretical sense. The reason for this departure from my initial research question was that I began to understand that framing the problem as a failure to implement the LGB rights concept or human rights in general would not tackle the root cause of the problem. In contrast, building the research question on

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[26] This applies to all rights categories and not only to the LGB rights concept.

[27] Jon Binnie, *The Globalization of Sexuality* (SAGE Publications 2004) 72.

human rights violations indeed reduces the problem to an implementation failure of the non-West. It re-establishes the culture versus universal crisis in the sense that failures are generally presented as evidence of non-compliance with the universal human rights standards by the non-West, which 'ought' to follow the tutelage of the West. Thus, I instead identify the main problem as the law/right-making method: legal transplantation.

Diffusion of legal texts from the West to the non/less-West has a considerable history. This has been analysed from different legal standpoints and critical scholars especially have shown a great interest in this trade in laws between the West and the non-West. One of the significant approaches to this area has been to analyse law as a text and draw conclusions, particularly from the perspective of Derrida's concept of iterability[28] and the relationship between the original and the other.[29] Analyses that derive from this strand, namely postcolonial legal studies, conclude that the original text will be interpreted by the other. In this way, the other is also involved with the production of legislation through resignifying the original.[30] If we transfer this to the law-making and

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[28] Iterability was first coined in 1971 by Jacques Derrida. Iterability as a concept appears very similar to repetition. However, it is not simply repeating but also changing the subject. Iterability always embodies an alteration. This alteration happens improvisionally. For further reading see Geoffrey Bennington, *Jacques Derrida* (Chicago University Press 1993).

[29] Simon Glendinning, 'Derrida and the Philosophy of Law and Justice' (2016) 27(2) Law and Critique 187–203.

[30] Pierre Legrand, 'What "Legal Transplants"?' in David Nelken and Johannes Feest (eds), Adapting Legal Cultures (Hart 2001); Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht J Eur & Comp L 111; Dianne Otto, 'Postcolonialism and Law?' (1999) 15(1) Third World Legal Studies; Makau W. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201–245; Makau

taking discussion,[31] we can deduce that the law-maker's original law will be interpreted in a different way, and its application will eventually be more nuanced than in the initial jurisdiction.[32] This fashion of discussion resonates with implementation arguments in the sense that both assume that there is one original text that is interpreted by the imitator correctly, incorrectly or differently.[33] Even though these various interpretations can indicate that the imitator is not passive and is producing law/rights as well, there is still the text that precedes the moment of the imitation, thereby leading to an 'original versus copy' binary relationship. Scholarly work regarding legal transplantation is built upon the idea that laws are made in advance by one jurisdiction and imitated by another. While critical analyses tend to explain this using terms such as interpretation, cultural differences and different legal cultures, the mainstream neo-liberal understanding of human rights defines this as an implementation/application problem. In either case, the assumption is that there is an original law-maker and an imitator law-taker. As such, the legal corpus of the non-West can only be a derivative version of the laws made by the West.

With these discussions in mind, any attempt to analyse the legal situation of LGBs in Turkey requires that the law-making method be addressed

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W. Mutua, 'The Ideology of Human Rights' (1996) 36 Virginia Journal of International Law.

[31] We can break down legal transplantation into two stages: law-making and law-taking. Relevant to this research, the law-maker is the West and the law-taker is the non-West.

[32] Pierre Legrand, 'What "Legal Transplants"?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001); Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht J Eur & Comp L 111.

[33] Similar arguments are made by Pierre Legrand, a prominent comparative scholar, to whose works I refer when discussing legal transplants.

theoretically. Academic and activist discussions regarding the LGB rights concept must be emancipated from the widespread approach that takes the current law-making/taking method for granted. The literature concentrates its critiques on the outcomes of this law-making/taking method. The objections to the rights categories that this law-making method produces are limited to their inapplicability to non-Western cultures, which implicitly presents the non-West as cultural, and subordinate to the West. This method limits our assessments to how well the non-West implemented the already-existing rights categories made by the West, or to how far they departed from the West. In either case, the benchmark is the West. I argue that the only way to challenge the Western benchmarks is to challenge how these laws are made. Therefore, there is a need to subject the law-making method to scrutiny and to discuss a different, less imperialistic way of making law.

This law-making method also leads us to overlook the fact that the LGB rights concept is problematic within the West as well. The glorification of Western standards of human rights creates an illusion that the Western human rights regime has no shortcomings. The liberal non-West, such as, for example, non-governmental organisations (NGOs), are captivated by the idea of adopting the same standards as the West so that they can join civilisation. In this effort, the non-West does not examine how the West enforces these rights. In their recent book, *Queer Wars*, Altman and Symons acknowledged these impediments relating to the LGB rights concept and ask a very important question: What is the point of human rights if the international community cannot police them?[34]

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[34] Altman and Symons (n 21) 70.

This marks another dimension of the problem: installing the LGB rights concept at the expense of being subjected to the neo-colonialist, neo-liberal policies does not guarantee their enforcement. Unfortunately, their discussion of what we should do does not seem to offer a comprehensive trajectory to follow other than describing an abstract formulation, that is, 'new global forms of fluidity in which neither sexuality nor gender is perceived as immutable'.[35] My answer to 'what we should do' is change the way we make laws/rights. I suggest a new law/right-making method through Judith Butler's discussion of 'cultural translation' and the underlying theories that give rise to it, which, in my view, evidences a promising alternative.

Reading Judith Butler's performativity and the cultural translation concept, which is heavily influenced by Homi Bhabha, sparked a new direction in my thinking. Blending these two concepts urged me to draw these analogies: if the effect of gender is produced through the stylised repetition of acts then can we conclude that the effect of rights is also fabricated through the stylised imitation they embody?[36] If gender is a kind of doing, which means that 'gender is a practice of improvisation within a scene of constraint',[37] can we infer that this way of right-making and -taking is limiting our understanding of what rights are to a single rights scheme, through the forcible citation of pre-existing rights

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[35] Ibid. 77.

[36] Judith Butler, *Gender Trouble* (Routledge 2006) 191.

[37] Judith Butler, *Undoing Gender* (Routledge 2004) 1. For further discussion on this, see Tracey McMullen, 'The Improvisative' in George E. Lewis and Benjamin Piekut (eds), *The Oxford Handbook of Critical Improvisation Studies, Volume 1* (Oxford 2016).

structures at the expense of recognition and intelligibility? Subsequently, is the availability of one right/law-making method itself the problem?[38]

As mentioned above, there is a significant academic gap in the analysis of the theoretical side of these law-making and law-taking processes (legal transplantation) pertaining to the LGB rights concept. I will attempt to address this gap by deconstructing the right-making and right-taking processes through the various imitations they embody, with the aim of culminating in a new law-making method derived from the cultural translation concept.

Judith Butler's theories have been used by a number of legal scholars, namely Martha Merrill Umphrey,[39] Ritu Birla,[40] Karen Zivi,[41] Elena Loizidou[42] and Kathryn McNeilly,[43] among others. This thesis adds to this scholarship by utilising Butler's philosophical insights to analyse the law-making and law-taking processes as a form of imitation, thereby breaking the regency of the current law-making method. Although Turkey and LGB rights will be the focus of this study, the findings and analyses apply equally to law-making and taking in general. Thus, this thesis concerns the historical structure of law-making, the

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[38] Butler, *Undoing Gender* (n 37) 39.

[39] Martha Merrill Umphrey, 'Law in Drag: Trials and Legal Performativity' (2011) CJGL 21(2) 114-129.

[40] Ritu Birla, 'Performativity between Logos and Nomos: Law, Temporality and the Non-Economic Analysis of Power' (2011) CJGL 21(2) 90-113.

[41] Karen Zivi, *Making Rights Claims* (Oxford 2012).

[42] Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (Routledge 2007).

[43] Kathryn McNeilly, 'Gendered Violence and International Human Rights: Thinking Non-discrimination Beyond the Sex Binary' (2014) 22 Fem Leg Stud 263–283. See also Kathryn McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power* (Routledge 2018).

emergence of new rights categories and their diffusion trajectory from West to non/less-West. In this way, perhaps ambitiously, the intention is, by following Butler's theories, to trigger a discussion encompassing the discovery of an alternative right/law-making method that is non/less imperialistic.

Judith Butler is not the only scholar who works on performativity and formation through imitation.[44] The reason that Butler is useful for this research is twofold. Firstly, Butler critically reveals how the LGB subject is formed performatively by means of imitation. Given that the prerequisite for fabricating the rights of a subject is the formation of that subject, and that granting rights closely relates to constructing immutable identity categories, Butler's insight regarding the formation of the LGB subject will be complementary to the analysis of its legal formation. In this way, legal recognition intertwines with identity formation, and reference to Butler's understanding of imitation will uncover the parallel elements between these processes. The fact that Butler's theory of gender performativity also acknowledges the material effects of this formation process

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[44] Gabriel Tarde puts imitation at the heart of every subject creation. He deems that imitation is the universal rule of development. In each and every imitation there is innovation hidden, thus it is never a mechanical repetition. According to him, every being is by nature an imitator. He further argues that everything including science and society are created via universal repetition. In his words: 'All resemblances of social origin in society are the direct or indirect fruit of the various forms of imitation, custom-imitation or fashion-imitation, sympathy-imitation or obedience-imitation, precept-imitation or education-imitation; na'ive imitation, deliberate imitation, etc. In this lies the excellence of the contemporaneous method of explaining doctrines and institutions through their history.' Gabriel Tarde, The Laws of Imitation (BiblioLife 2009) 14.

For a discussion about the differences between Derrida and Austin's use of imitation from Butler's see: Sara Salih, 'On Judith Butler and Performativity' in Karen Lovaas, Mercilee M. Jenkins (eds), *Sexualities and Communication in Everyday Life: A Reader* (SAGE Publications 2007).

enables one to undress the textual, discursive and material formations of the human under different normative conditions, including human rights.[45]

As will be discussed in Chapter 6, Butler's performative theory is itself a practice of cultural translation. Butler's style of discussing performativity draws upon a number of other philosophers' analyses regarding performativity. She expands upon speech act theory and enriches her analysis of performativity to discursive, textual, bodily and vocal performances.[46] The way she discusses these different approaches is also a practice of cultural translation. In this sense, Butler's performativity theory puts Derrida, Austin and Foucault in a conversation and provides an example of the translatability of concepts and how subject formation and recognition are performatively governed. She takes the works of other scholars who write on text, discourse, performance and speech act theories and combines them into a cultural translation process through which a broader and inclusive amalgam of performativity is addressed. As a consequence, gender performativity provides us with a method that reveals the endless process of producing intelligible/recognisable forms of being, knowing, doing and becoming through the imitation of pre-existing conventions. 'Performance' in Butler's work encompasses various forms, including speech, text, discourse and bodily acts, and this interpretation gives a more realistic correspondence with the power that law-making mechanisms have upon our lives.

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[45] Judith Butler, *Bodies That Matter* (first published 1993, Routledge 2011) XXV.

[46] Judith Butler, *Notes Toward a Performative Theory of Assembly* (Harvard University Press 2011) 11.

The second reason for using Butler relates to her insight regarding performativity theory being entwined with cultural translation. Her analysis of performativity does not only deconstruct the subject's creation by means of imitation but also links this to cultural translation theory. I interpret these concepts as interlinked in Butler's work. Thus, discussing the potential of cultural translation as a new law/right-making process requires the deconstruction of the law/right-making mechanisms through the performativity theory advanced by Butler.

I will use Turkey as a case study to demonstrate the impediments to contemporary law-making, as well as to test the potential of cultural translation as a law-making method. This does not mean that this research is Turkey/Anatolia-specific.[47] On the contrary; this research relates to law-making in general. However, Turkey stands as a prominent example, partly owing to the researcher's knowledge and experience regarding Turkey. More importantly, though, Turkey provides a very good example as a non-Western country that has for centuries committed to imitating Western laws. Thus, Turkey's legal history is a fruitful resource to reveal the consequences of legal transplantation.

Turkey's law-making method heavily relies on legal transplantation.[48] I will explain the complex legal situation regarding LGB individuals later in detail, but

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[47] Ideologically, I prefer using Anatolia instead of Turkey, because the idea of nation states is not appealing to me. In my personal and political life I tend to replace names of the nation states with names of the lands they occupied. I wanted to reflect this view on my thesis but at the same time I did not want to tire readers with various new terms. For this reason I will use Turkey in this research.

[48] Esin Örücü, 'A Legal System Based on Translation: The Turkish Experience' (2013) 6 J Civ L Stud 445.

if LGB rights were to be introduced, this would be imitating the Western LGBTI rights concept for the Turkish lexicon. This is seen as the only way to achieve legal change. As a result, in order to receive minimal protection, vulnerable groups have been compelled to refer to these rights since some degree of protection is better than none. This has been the pattern of thinking that has consolidated and legitimised this way of law-making/law-taking. However, official state opinion in Turkey, and in some other non/less-Western countries, asserts that their cultural values contradict the full recognition of the Western-constructed LGB rights concept. In other words, owing to international/Western pressure, these countries display a hypocritical international discourse.[49] Western-imposed and fabricated LGB rights concepts receive hesitant reactions within the non/less-West. However, what could be done other than imitating the existing rights concepts has not attracted sufficient scholarly interest. The available research on LGBs in Turkey, including my previous work, is limited and largely concentrated on the violations and failures of the Turkish State to implement the LGB rights concept, and generally suggests a legislative reform

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[49] LgbtiNewsTurkey, 'Bulent Arinc's Statement at the UPR about LGBT Rights' (3 February 2015) <http://lgbtinewsturkey.com/2015/02/03/deputy-pm-bulent-arincs-statement-on-lgbt-at-the-universal-periodic-review/> accessed 12 April 2015; LgbtNewsTurkey, 'Deputy Prime Minister Arinç Criticizes Istanbul Pride: "They Get Completely Naked in Broad Daylight"' (3 July 2015). <http://lgbtinewsturkey.com/2015/07/03/deputy-prime-minister-arinc-criticizes-istanbul-pride-they-get-completely-naked-in-broad-daylight> accessed 14 July 2015; Scott Roberts, 'Row Between Netherlands and Turkey over Lesbian Foster Couple Overshadows Prime Ministerial Visit' (21 March 2013) <http://www.pinknews.co.uk/2013/03/21/row-between-netherlands-and-turkey-over-lesbian-foster-couple-overshadows-prime-ministerial-visit/> accessed 27th April 2015;Turkish Parliament 24th term, 3rd legislative Year 112th meeting on 29 May 2013 <http://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21957&P5=B&page1=43&page2=43&web_user_id=13696951> accessed 12 April 2015.

to adopt those rights.[50] These scholarly works have not enquired into the method of this legislative reform. Legal transplantation has not been identified as the source of the problem. The emphasis is primarily on the lack of legal protection; the law/right-making method for this legal protection is left unquestioned. Thus, the discussion is limited to implementation, adoption and recognition of the already-existing schema of rights. Importing rights from the West is taken for granted. None of the available literature on Turkey pertaining to LGB's legal problems calls legal transplantation, as the law-making method,

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[50] Turkish Parliament 24th term, 3rd legislative Year 112 (n 48); Social Policies Gender Identity and Sexual Orientation Studies Association (SPoD), Kaos GL Association, International Gay and Lesbian Human Rights Commission, 'Human Rights Violations of Lesbian, Gay, Bisexual and Transgender (LGBT) People in Turkey: A Shadow Report Submission to the 106th Session of the Human Rights Committee' (15 October–2 November 2012) <http://iglhrc.org/sites/default/files/Turkey%20Shadow%20Report%202012.pdf> accessed 12 April 2015; Zehra F. Kabasakal Arat and Caryl Nuňez, 'Advancing LGBT Rights in Turkey: Tolerance or Protection?' (2017) 18 Hum Rights Rev 1–19; Michael McClain and Olenka Waite-Wright (2016) 'The LGBT Community in Turkey: Discrimination, Violence, and the Struggle for Equality' 7 Creighton Int'l & Comp L J 152; Ceylan Engin, 'LGBT in Turkey: Policies and Experiences' (2015) 4 Soc Sci 838–858; Mustafa Bilgehan Ozturk, 'Sexual Orientation Discrimination: Exploring the Experiences of Lesbian, Gay and Bisexual Employees in Turkey' (2011) 64 Human Relations 1099–1118; Mehtap Dogan, 'On IDAHOT, LGBTI Individuals Face Countless Problems in Turkey' (2015) <http://lgbtinewsturkey.com/2015/05/15/on-idahot-lgbtis-face-countless-problemsin-turkey> accessed 18 October 2016; Zeynep Bilginsoy, 'Evaluating Hate Murders Based on SOGI in TURKEY: Shortcomings and Proposals' <http://lgbtinewsturkey.com/2014/11/30/infographic-hate-murders> accessed 18 October 2016; Volkan Yilmaz and İpek Göçmen, 'Summary Results of the Social and Economic Problems of Lesbian, Gay, Bisexual and Transsexual (LGBT) Individuals in Turkey Research' (2015) 4 Center for Policy and Research on Turkey 97–105; Volkan Yilmaz and Sinan Birdal, 'LGBT Rights in Turkey: The Long Road to Tolerance' (2012) 2(5) The Turkish Review; Serkan İlaslaner 'LGBT Movement in Turkey: Genealogy, Particularity and Embeddedness into a Broader Universe' (2014) III(4) 25–42; Centre for Policy Analysis and Research on Turkey (ResearchTurkey); Louis A. Fishman, 'Turkey and Lgbt Rights: A Historical and Global Perspective' (2013) 11(4) Turkish Policy Quarterly; Sezen Yalcin, 'Civil Society In Turkey's Shrinking Political Space' (2015) 13(4) Turkish Policy Quarterly.

into question.[51] The critiques regarding legal transplantation of LGB rights are openly expressed in a homophobic fashion by the government and high-profile politicians on the grounds that the Western-constructed LGB rights concept goes against Turkish culture and family values.[52]

These analyses direct the thesis towards a method that is a combination of a historical and theoretical deconstruction of legal transplantation of the LGB rights concept and towards the discovery of a new right-making method, namely cultural translation. Butler's theories seem to be addressing all the core concepts of my research, namely: imitation within the legal transplantation; inclusion and exclusion mechanisms within the current right-making regime; and an alternative construction method: cultural translation. My theoretical framework is developed from Judith Butler's various works and discussions, as have the method and design of my research. Accordingly, this thesis is divided into two main parts. The first part focuses on the delimited ways of being legally intelligible, and the second part elaborates on the realm of the possible. The first part deconstructs the current human rights regime and law/right-making-

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[51] Ibid.

[52] LgbtiNewsTurkey 'Bulent Arinc's Statement at the UPR about LGBT Rights' (n 49); LgbtiNewsTurkey, 'Deputy Prime Minister Arinç Criticizes Istanbul Pride: "They Get Completely Naked in Broad Daylight"'(n 49); Turkish Parliament 24th term, 3rd legislative year 112th.

[52] Turkish Parliament 24th term, 3rd legislative year 112th (n 48); Human Rights Violations of Lesbian, Gay, Bisexual and Transgender (LGBT) People in Turkey: A Shadow Report Submission to the 106th Session of the Human Rights Committee 15 October–2 November 2012 by Social Policies Gender Identity and Sexual Orientation Studies Association (SPoD), Kaos GL Association, International Gay and Lesbian Human Rights Commission <http://iglhrc.org/sites/default/files/Turkey%20Shadow%20Report%202012.pdf> accessed 12 April 2015.

taking processes, notably legal transplantation. The second part, the realm of the possible, introduces a new method for human rights-making: cultural translation.

Revisitation is part of my methodology. There is a spiral of revisitations in this thesis. In Part II the same concepts will be reanalysed as outlined in Part I, but from a different perspective. Butler also uses this as a method and analyses the same issue from different perspectives. This methodology is consistent with the theoretical approach of this thesis, and with Butler. In the first part I will analyse the law/right-making through gender performativity; in the second I will elaborate on the same law/right-making method through cultural translation. Throughout the thesis, the concepts and conclusions will be revisited repeatedly. While seemingly repetitive, it is done for the sake of methodology.

Part I of the thesis, 'The realm of delimited ways of being intelligible', consists of three chapters. Chapter 1 is dedicated to the introduction and method and introduces the main arguments of this thesis, including the method and design it is going to apply. It discusses the current status of the LGB rights concept and asserts the ways in which the LGB rights concept functions as an imperialistic tool. The assumption behind previous approaches has been that there are no other ways to make law, and fabrication of rights happens within a limited episteme and jurisdiction. This historical pattern creates a strong background for the presumption that law/right-making belongs to the Western lexicon and imitating is the fate of the non/less-Western. The right/law-making process has not been called into question sufficiently owing to the strong assumption that there is only one way of speaking the language of rights. The universality attributed to human rights adds to this assumption in that it postulates that there

are no other ways to address rights. This singularity functions as a compulsion whereby some groups refer to Western laws not because they think these sets of rights provide a remedy but because they are the only institutional protection available. There are no other ways to address a human rights issue. For this reason, rights made through this type of law-making are operational as the alternative is no rights. Chapter 1 argues that the main problem is the law-making method, legal transplants. It further maintains that Judith Butler's theories are a proper lens to both deconstruct and discuss an alternative to this imperialistic law-making. Scrutiny of the current right-making method is not only problematic in the non/less-West but also in the West. This further justifies the need for a new law-making method.

The second chapter discusses the way in which the LGB rights concept has emerged within the schema of human rights and how it diffused to a non-Western country: Turkey. I aim to depict the history of the law-making stages of the LGB rights concept within the West. In addition to this, this chapter will examine the performative law-making tradition in the West. It also evaluates the legal arguments that the LGB rights concept had been built upon, such as right to respect for private life. At the same time, it will investigate the opposition to LGB rights, which is clearly apparent, especially at the level of UN discussions, and evaluate Turkey's encounter with the LGB rights concept, mapping out the disparities between Turkey's international and national approach.

Within the realm of delimited ways of being intelligible, there have been two positive law-making performances within Turkish legal history in terms of the LGB rights concept. The first one is the decriminalisation of homosexuality and the second the inclusion of the term sexual orientation to the Turkish corpus

through ratification of the European Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).[53]

The third chapter evaluates the first LGB-related legal transplant within the legal history of Turkey and debunks the widespread idea that the Ottomans decriminalised homosexuality in 1858. Drawing upon the theoretical analyses reached in the theory chapter, I will trace the false dichotomies and assumptions constructed historically through legal transplants, which seem to overshadow the assessment of the legal situation of LGB individuals in Turkey. The aim of this chapter is to demonstrate the imperialistic consequences of the current right/law-making regime and how terminology such as decriminalisation does not reflect the non-Western experience with homosexuality. Furthermore, delimiting recognition to Western ways of being intelligible makes the non-West's legal history insignificant, and thereby leads to inaccurate conclusions such as the Ottomans' decriminalisation of homosexuality.

Chapter 4 aims to dissect the legal foundations of the culture rhetoric that emerges against any claims that might ameliorate the conditions of homosexuals. This chapter traces the history of how law-makers defined culture as being in opposition to homosexuality and investigates the parliamentary discussions relating to homosexuality and the LGB rights concept through the Turkish Parliamentary General Assembly minutes from 1920 to 2016. In the second section of this chapter, I investigate the first statutory appearance of the term 'sexual orientation' within the Turkish lexicon. I outline the ways in which

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[53] Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) (2011).

the universal argument fractured the culture resistance within the Turkish law/right-making example. This chapter also investigates the conditions that led to the first legal transplantation of sexual orientation protection by means of the Istanbul Convention. However, ironically, the legal situation for LGB people in Turkey worsened after the inclusion of SOGI into the Turkish legal corpus.

The second part of this thesis is called 'The realm of the possible' and consists of three chapters. Chapter 5 shows the performative construction of humanity through the imitation of pre-existing human rights structures by drawing comparisons between gender performative theory and human rights-making. It will break legal transplantation into its essential components and analyse each phase through the lens of performativity theory. This approach will avoid implicit orientalist/imperialist analyses that identify the problem as the law-taker's failure to implement the rights, thereby putting insufficient emphasis on the West's failures in the right-making process. It explains what the realm of delimitation entails. Acknowledging the lack of scholarly interest in the identification of the common feature of imitation, which is embedded in either way of making and taking the LGB rights concept as a legal structure, this chapter analyses these processes theoretically, utilising the imitation they both deploy through Butler's performativity theory. I engage closely with Judith Butler's gender performativity theory and how the role of imitation/repetition in subject formation can be conveyed to deconstruct the legal formation of norms that bring about legal recognition. I proceed upon the notion that imitation is fundamental to LGB subject formation, as well as the fabrication of the LGB rights concept. With reference to Butler's conceptualisation of imitation, I aim to discover the role it

plays within right-making and right-taking processes and deconstruct these processes theoretically through her lens.

Chapter 6 elaborates on the potential of cultural translation as an alternative law/right-making process as opposed to legal transplantation. It aims to discover minimal conditions for a non-neo-liberal and non-imperialistic law-making method to arise. It discusses a number of principles of cultural translation as a new law-making method: for instance, the only norm should be possibility itself. These possibilities/norms must be discovered in the midst of cultural translation; they should be neither known in advance nor formed before the moment of imitation/creation. Their uncontrollability must be safeguarded and universality should be regarded as an unknown or not yet known, incomplete concept. This chapter also opens up a discussion about the main principles of the rule of law, such as stability, immutability, certainty and predictability. It addresses the questions that a comparison of the terminology between cultural translation and the rule of law poses: is instability in cultural translation necessarily arbitrary? How can we have protection of rights while they are ambivalent and unpredictable? In what ways does this approach, which advocates temporary, open-ended norms, differ from the living instrument principle?[54]

In the seventh chapter, I will imagine cultural translation as a law-making method. I will revisit the human rights structures related to the LGB rights concept using the cultural translation method and attempt to reformulate them

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[54] 'Living instrument' is a legal principle mostly referred to by the European Court of Human Rights meaning that the convention should be interpreted according to present-day conditions.

in a way that accommodates possibility itself as the only norm. This method is also called the 'return of the excluded' and 'reclaiming universality'.[55] Following Butler's insight, every repetition creates possibility, which, in turn, enables the excluded to interfere in the current right-making process and to perform a radical resignification of this process. In this chapter, the historical categories of human rights relating to the LGB rights concept will be subjected to subversive rearticulation. My aim is to commence a conversation among these different understandings of certain rights categories and emancipate them from their stabile, repetitive, pre-existing imperialistic features following the cultural translation concept and discuss the possibility of right to be possible and temporary normative conditions for a livable life for LGB people. This will constitute my humble yet ambitious attempt to demonstrate how rights would be articulated, or not be articulated, if they were made via the cultural translation concept. This process can also be called 'undoing rights' following Butler's undoing of the gender concept.[56]

To be able to suggest an alternative law-making method, I will proceed by analysing every single stage of the current law-making procedure – legal transplants – following the imitations entrenched within this process. I will, in other words, trace imitations embedded within the law-making and law-taking of the LGB rights concept. With this aim, Chapter 2 commences with the first imitation entrenched in this rights concept: law-making in the West and the emergence of the LGB rights concept through imitating the pre-existing Western

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[55] Judith Butler, 'Competing Universalities' in Judith Butler, Ernesto Laclau and Slavoj Zizek (eds), *Contingency, Hegemony, Universality* (Verso 2000).

[56] Butler, *Undoing Gender* (n 37).

rights categories. I will, first evaluate the emergence of the LGB rights concept within the Western realm, with a special emphasis on the role of the European Court of Human Rights in the fabrication process. I will examine the diffusion of this rights category and reactions to it. In the last section, Turkey's encounter with the LGB rights concept will be demonstrated.

Part I The realm of delimited ways of being intelligible

Chapter 2 The LGB rights concept and Turkey's encounter with it

2.1 Humanisation of LGB individuals through human rights

> The only language to speak the rights of human: Human rights should be viewed not only as the absolute yardstick which they are, but also as a synthesis resulting from a long historical process. As an absolute yardstick, human rights constitute the common language of humanity. Adopting this language allows all peoples to understand others and to be the authors of their own history. Human rights, by definition, are the ultimate norm of all politics.[1]

2.1.1 Introduction

This chapter explains the recognition process of LGB people by the international human rights regimes. It investigates the ways in which the LGB rights concept happened to emerge from the human rights structures and examines how the LGB rights concept was formulated. The aim of this chapter is to substantiate my main argument, which problematises law/right-making mechanisms in general and, more specifically, in relation to LGB rights in Turkey.

2.1.2 How are rights made?

Contrary to what the name suggests, LGB rights are not a new category of human rights. It is inclusion of LGB persons within human rights. In this sense, human rights structures do not change but the 'human' who is equipped of rights expands. The inclusion into human rights then becomes a matter of qualification, an upgrade from non-human to human. Butler suggests asking these questions:

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[1] UNGA, 'Address by the Secretary-General of the United Nations at the Opening of the World Conference on Human Rights' (14 June 1993) UN Doc A/CONF.157/22 (p. 3).

> Which populations have qualified as the human and which have not? What is the history of this category? Where are we in its history at this time? Finding out the limits of their [rights'] inclusivity and translatability, the presuppositions they include, the ways in which they must be expanded, destroyed, or reworked both to encompass and open up what is to be human and gendered.[2]

According to Butler's terminology and theory, inclusion is associated with desire for recognition, which results in formation of a legally intelligible human subject through imitating pre-existing, thus delimited, conventions.

It is worthwhile starting by considering the different aspects on inclusiveness. As broadly evaluated in the theory chapter, there are two main approaches to the development of human rights. The first approach derives from natural rights theory, which basically claims that all humans are equipped with human rights automatically from the moment they were born. The second approach considers human rights as a mechanism that every human category requires to be recognised by to be able to have rights. Although the wordings of the international covenants indicate that all human are born free with rights, the current law/right-making, with regards to hard law,[3] does not operate as such. Unless a category is recognised by international human rights people within that category cannot exercise their human rights. As a result, some are excluded and some are included into the human rights system and recognition functions as a tool that brings about inclusion.

Up until this point, the literature on exclusion has been illustrated as a dehumanisation process in terms of LGB individuals. This might suggest that inclusion into the human rights system is the solution. It is not. It is the only way

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[2] Judith Butler, *Undoing Gender* (Routledge 2004) 38.

[3] Legal documents, conventions that have a binding force upon states.

available for the excluded to speak the language of rights. In this sense, it is not a solution but a compulsion.

The LGB demand for inclusion is driven by two major motivations. The first is equality, or, more precisely, being able to exercise human rights in the same way as heterosexuals. The second can be framed as normalisation. There are critical views on demanding inclusion to become equal. For example, Joshi argues that including LGB persons in 'the injustice of legal, financial and social benefits being tied to marital status' would only have the guarantee of being included in an unjust institution, such as marriage, under the name of equality.[4] Joshi continues this evaluation by arguing that inclusiveness can only remedy injustice caused by exclusion, and would not transform the unjust nature of the institution itself.[5] The binary manifestation of LGB identity resulted in imitating heterosexual structures embedded in the human rights system without generating a critical approach to their content.[6] This is often referred to as a neo-liberal influence on LGB movement, and is thus critiqued for promoting equality with heterosexual persons as its final destination.[7]

Another way of reading LGB individuals' demand for inclusion is a claim for normalisation. In this sense the LGB agenda could not go beyond demanding

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[4] Yuvraj Joshi, 'The Trouble with Inclusion' (2014) 21 Va J Soc Pol'y & L 207.

[5] Ibid.

[6] Carlos A. Ball, *From the Closet to the Courtroom* (Beacon Press 2010).

[7] Although there are movements against this formulation of LGB rights as well as feminist and queer critiques against mainstream LGB claims before legal institutions have rested upon this assumption further reading: Peter Drucker, 'The Fracturing of LGBT Identities under Neoliberal Capitalism' (2011) 19(4) Historical Materialism 3–32; Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 Law & Contemp Probs.

legitimacy or naturality by using the pre-existing concepts and being reformulated according to the historical structures.[8] In relation to this aspect, Judith Butler emphasised precisely that identity politics would only strengthen the naturalisation process of heterosexuality.[9] In her view, binary oppositions – for example, heterosexual versus homosexual – serve the phantasmatic ideal of heterosexuality.[10] In other words, one side of the binary opposition establishes itself as the *real*, the *original*, whereas the other always remains a secondary or derivative concept, which seeks an upgrade to the level of the original. The legal resolution for this binary crisis has been the ideal of equality. However, in order to qualify as a status protected by equality provisions, a concept must be defined in an immutable form, and adhere to the binary opposition.[11] The current human rights approach constructs a convenient LGB that could be definable in a binary dichotomy, and consequently the LGB rights concept emerges through imitation of heteronormative principles.

The first method of inclusion happens through a broad reinterpretation of existing human rights instruments. This method implies that LGB individuals as human beings are inherently included within human rights protection, and in this sense corresponds to natural law theories. The Universal Declaration of Human

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[8] Michel Foucault, *The History of Sexuality Vol. One; An Introduction* (Pelican 1981) 101.

[9] Judith Butler, 'Imitation and Gender Insubordination' in Henry Abelove (ed.), *The Lesbian and Gay Studies Reader* (Routledge 1993) 307–320.

[10] Ibid.

[11] Ibid.

Rights (UDHR), as a soft law[12] document, which is also regarded by some as a customary law source precisely because it provides a legal way to overcome states' reluctance to drafting new human rights treaties.[13] The UN's discourse on LGB rights adds another dimension by underscoring the existing obligations of states, stemming from the very fact that the terms 'all human beings' and 'everyone'[14] already include LGB persons. This UN narrative depends on a holistic interpretation of the UDHR principles, the Charter of the United Nations and the non-exhaustive character of non-discriminatory clauses in the International Covenant on Civil and Political Rights, as well as other human rights treaties.[15] This sexual orientation and gender identity (SOGI)-inclusive interpretation is carried out by the treaty bodies of these conventions while deciding on individual complaints or country-based reports.[16] By virtue of these legal arguments, the sovereign state as the supreme authority is deemed to be obliged to provide LGB rights without any further recognition. The UN places the

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[12] Legal documents, conventions, guidelines that do not have binding force upon states.

[13] Anthony D'Amato, Human Rights as Part of Customary International Law:A Plea for Change of Paradigms" (2010),Faculty Working Papers, Paper 88 http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88 accessed 18th December 2017; Vojin Dimitrijevic, 'Customary Law as an Instrument for the Protection of Human Rights' (2006) http://www.ispionline.it/it/documents/wp_7_2006.pdf accessed 20th December 2017.

[14] Universal Declaration of Human Rights (1948).

[15] UNHRC, Nineteenth session Agenda items 2 and 8 'Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General' (17 November 2011) UN Doc A/HRC/19/41.

[16] International Commission of Jurists, 'Sexual Orientation and Gender Identity in Human Rights Law, References to Jurisprudence and Doctrine of the United Nations Human Rights System' (2010).

emphasis on the obligations of states, as well as highlighting that they are not inventing new rights categories. Hence LGB rights are already embedded in the obligatory human rights documents.[17] The UN's strategy has influenced other international organisations as well. For example, the African Commission on Human and Peoples' Rights adopted a Resolution on Protection Against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity,[18] which relies on the same method of interpretation of human rights.

The European Convention on Human Rights (ECHR), which was drafted with reference to the UDHR,[19] contributed to the idea that the protection of sexual orientation is inherent in the existing human rights documents. After 1981, the ECHR engendered LGB-inclusive interpretations of the ECHR by virtue of its jurisprudence.[20] The American Convention of Human Rights, which also referred to UDHR in its preamble, has been interpreted in a LGB-inclusive way by the Inter-American Court of Human Rights.[21]

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[17] Jack Donnelly, 'State Sovereignty and International Human Rights' (2014) 28 Ethics & International Affairs 225–238.

[18] The African Commission on Human and Peoples' 55th ordinary session Res 275 'Resolution on Protection against Violence and Other Human Rights Violations against Persons on the basis of Their Real or Imputed Sexual Orientation or Gender Identity' (28 April to 12 May 2014).

[19] Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

[20] Paul Johnson, *Homosexuality and The European Court of Human Rights* (Routledge 2014) 4; *Dudgeon v The United Kingdom* (7525/76, 22 October 1981).

[21] Omar G. Encarnación, 'Latin America's Gay Rights Revolution' (2011) 22(2) Journal of Democracy.

The African Court on Human and Peoples' Rights (ACtHPR), which places a stress on UDHR in its preamble, has not ruled a LGB-inclusive decision yet. Paul Johnson offers a different perspective by pointing out that ECHR judgments before 1981 were not receptive to LGB claims, and when the tendency of the ACtHPR to cite European Court of Human Rights (ECtHR) case law in its judgments is taken into consideration, he predicts that the ACtHPR will rule in favour of LGBs in the future.[22]

This brief look at regional and international human rights instruments suggests that there is an interaction between different regional courts, which are heavily inspired by the UDHR. Although there is no direct reference to sexual orientation in any of these human rights documents, interpretations made by the courts/committees have opened a gateway for LGB individuals.

An attempt to improve this LGB-inclusive interpretation of human rights emerged in 2007 from a project led by the International Commission of Jurists and the International Service for Human Rights, which gathered a group of human rights experts from different countries to draft the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.[23] The main goal of the Yogyakarta Principles has been to clarify the concrete obligations of states under international human

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[22] Paul Johnson, 'Homosexuality and the African Charter on Human and Peoples' Rights: What Can Be Learned from the History of the European Convention on Human Rights?' (2013) 40(2) Journal of Law and Society 249–279.

[23] Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2006).

rights law.[24] In an endeavour to encourage states to expand their existing obligations to LGB persons, the Yogyakarta Principles laid down modest standards, with the purpose of optimising the situation.[25] These principles were reviewed in 2017 and 10 new principles were added to Yogyakarta on 10 November 2017.[26]

In terms of normative inclusion, in 1997 the Treaty of Amsterdam, which amended the Treaty on European Union, appears to be the first international treaty that embodies sexual orientation within its context.[27] After several amendments to the Treaty on European Union, these principles were rendered into Article 19 of the Treaty on the Functioning of the European Union.[28] Another important treaty that includes sexual orientation is the Charter of Fundamental Rights of the European Union.[29] Since the Treaty of Lisbon came into force, the charter has been turned into a legally binding legislation for all EU countries with primacy over any contradictory national law.[30] Mos argues

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[24] Ibid.

[25] Ryan Richard Thoreson, 'Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name' (2009) 8(4) Journal of Human Rights 323–339.

[26] Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (2017).

[27] The Treaty of Amsterdam (1997).

[28] The Treaty on the Functioning of the European Union (2007).

[29] The Charter of Fundamental Rights of the European Union (entry into force 2000; legally binding over the member states since 2009).

[30] Martijn Mos 'Conflicted Normative Power Europe: The European Union and Sexual Minority Rights' (2013) 9(1) Journal of Contemporary European Research 78-93.

that the EU's enforcement of normative regulations on LGB rights is a departure from the international tendency, which relies heavily on declaratory and non-binding policies, and therefore constitutes a transition from soft law to hard law instruments.[31]

The Council of Europe (CoE), another international institution, consisting of countries classed as Greater Europe,[32] followed this normative policy with the European Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).[33] Thus the Istanbul Convention became the second international human rights treaty to list sexual orientation within its text.[34] The CoE also adopted two resolutions about protecting LGBT people's rights, both in 2015.[35]

Given these circumstances, it can be deduced that normative and declaratory efforts for the reception of LGB individuals have drastically increased within the

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[31] Ibid.

[32] Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom.

[33] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (2011).

[34] Ibid.

[35] Parliamentary Assembly of the Council of Europe Resolution 2048 (2015), adopted on 22 April 2015, 'Discrimination Against Transgender People in Europe'; Congress of Local and regional Authorities Resolution 380, 28th session (24–26 March 2015), 'Guaranteeing Lesbian, Gay, Bisexual and Transgender (LGBT) People's Rights: A Responsibility for Europe's Towns and Regions'.

international human rights system in the last two decades. These efforts have developed into a de facto situation reflected within the UN system, whereby six of the eight principal human rights treaty bodies regularly mention sexual orientation. This can be observed in the following reports: States Raise Questions Regarding the Situation of LGBs on Peer Review (Universal Periodic Review); and Special Procedures and Rapporteurs Issue their Reports Concerning Sexual Orientation.[36] However, a study on the Human Rights Committee, conducted by Gerber and Gory, portrays a picture that reveals a different insight. According to this study, the HR Committee mentioned LGB issues in 54 concluding observations from 2003–2013: 11 of these were in a positive manner, while 43 were recommendations for the improvement of LGB rights.[37] Another finding of this study reveals that the same committee members raised questions regarding LGB issues during periodic review procedures. Interestingly, the committee members who never challenged member states over LGB rights are from states where same-sex relations are still criminalised.[38] This correlates with the counter-bloc that the pro-LGBTI rights struggle triggered within the UN system.[39] A backlash organised against the draft resolution initiated by Brazil in 2003 on sexual orientation and human rights exemplifies a clear picture of this counter-bloc. This resolution received a hostile reaction from five states, which are also members of the Organisation of

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[36] International Commission of Jurists (n 16).

[37] Paula Gerber and Joel Gory, 'The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could It Be Doing?' (2014) 14 Human Rights Review 403–439.

[38] Ibid.

[39] Ibid.

Islamic Cooperation.[40] These states proposed the removal of sexual orientation from the resolution text and gained the support of the Holy See.[41] Their argument included a number of layers: firstly, they emphasised that none of the binding UN treaties involved sexual orientation; secondly, sexual orientation would be against the protection of family and children; and, finally, sexual orientation was outside the scope of human rights, being a cultural issue.[42] This argument has been used to undermine any efforts to empower LGB rights concept. In this way, the culture argument managed to hinder consensus and left the recognition of sexual orientation to state discretion.[43] Therefore, strategies involving an appeal to the moral duty of states to respect and recognise LGB rights have given rise to an unintended formulation of moral duties in favour of traditional values.[44]

Following from the above, it can be seen that the protection of LGB rights has turned into a battle between two blocs, namely states which are against LGB rights concept and those which are proponents of it.[45] Although legal attempts to establish the recognition of LGB rights are still far from full realisation, they

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[40] UNECOSOC 'Draft Resolution: Human Rights and Sexual Orientation (2003) UN Doc E/CN.4/2003/L.92.

[41] Gerber and Gory (n 37).

[42] Ignacio Saiz, 'Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN' Working Papers, N.2 (November 2005) <http://www.sxpolitics.org/es/wp-content/uploads/2009/03/workingpaper2.pdf> accessed 5 March 2015.

[43] Ibid.

[44] Ibid.

[45] Momin Rahman, 'Queer Rights and the Triangulation of Western Exceptionalism' (2014) 13(3) Journal of Human Rights 247–289.

elicit a strong opposition within legal frameworks. In this respect, Russia's adoption of anti-gay propaganda laws, the recriminalisation of same-sex relations and propaganda in Uganda, Nigeria and India evidence recent opposing efforts. On one hand, sexual orientation within the international human rights legal context is developing; yet, on the other, a new coalition has formed under the name of protecting 'traditional values' by claiming cultural relativism.[46] In 2011, a Russian-pioneered UN Human Rights Council resolution titled 'Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind' was adopted by a vote of 24 to 14, with seven abstentions.[47] This has been regarded as a consequence of the so-called recriminalisation trend within the UN.[48] Subsequently, this resolution was challenged with a recent resolution, titled 'Human rights, sexual orientation and gender identity', which was adopted in June 2011 by 23 in favour, 19 against, with three abstentions,[49] and followed by a recent resolution in September 2014 by a vote of 25 in favour, 14 against and seven abstentions.[50] These resolution crises offer a clear picture of the tension that

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[46] Cai Wilkinson, 'Putting 'Traditional Values' into Practice: The Rise and Contestation of Anti-Homopropaganda Laws in Russia' (2014) 13(3) Journal of Human Rights 363–379.

[47] UNHRC Res 16/3 (8 April 2011) 'Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind' UN Doc A/HRC/RES/16/3.

[48] Wilkinson (n 46).

[49] UNCHR, Seventeenth session, Follow-up and Implementation of the Vienna Declaration and Programme of Action 'Human Rights, Sexual Orientation and Gender Identity' (15 June 2011) UN Doc A/HRC/17/L.9/Rev.1.

[50] OHCHR, 'Human Rights Council adopts resolution on sexual orientation and gender identity and concludes twenty-seventh session' (26th September 2014)

exists concerning the reception and consideration of sexual orientation within the UN human rights system. This tension is reflected in the ECtHR, where seven Russian NGOs[51] and three Ukrainian NGOs[52] have intervened in cases relevant to LGB rights, especially regarding same-sex marriage.[53]

More recently, these two blocs clashed in 2016 when the Human Rights Council Resolution 32/2 mandated an independent expert on SOGI, namely Vitit Muntarbhorn.[54] Reflecting the division around the LGB rights concept, Botswana on behalf of the African Group initiated a resolution for the deferral of the mandate of the independent expert on SOGI, questioning the validity of this mandate.[55] The African Group expressed their concerns as follows:

> The Group is therefore concerned that non-internationally agreed notions such as sexual orientation and gender identity are given attention, to the detriment of issues of paramount importance such as the right to development and the racism agenda. We are alarmed that the Council is delving into matters which fall essentially within the domestic jurisdiction of States counter to the commitment in the United Nations Charter to respect

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<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15109&LangID=E> accessed 26 February 2015.

[51] Family and Demography Foundation, For Family Rights, Moscow City Parents Committee, Saint-Petersburg City Parents Committee, Parents Committee of Volgodonsk City, the regional charity 'Svetlitsa' Parents' Culture Centre, and the 'Peterburgskie mnogodetki' social organisation.

[52] The Parental Committee of Ukraine, the Orthodox Parental Committee, and the Health Nation social organisation.

[53] *Oliari and Others v Italy* (ECHR, App Nos 18766/11 and 36030/11), 21 July 2016, para 6 (although they were given permission to intervene, the Court received no submissions by these NGOs).

[54] UNCHR, Thirty-second session, 'Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity' (28 June 2016)UN Doc A/HRC/32/L.2/Rev.1

[55] UNCHR, 'Submission by Botswana on behalf of the States Members of the United Nations that are members of the Group of African States' (3 November 2016) UN Doc A/C.3/71/L.46.

> the sovereignty of States and the principle of non-intervention. More importantly, it arises owing to the ominous usage of the two notions: sexual orientation and gender identity. We wish to state that those two notions are not and should not be linked to existing international human rights instruments. In this regard, the African Group has tabled a resolution to defer the consideration and action on Human Rights Council resolution 32/2 of 30 June, 2016 in order to engage in further discussion and consultations on the legality of the creation of this mandate. We therefore call for the suspension of the activities of the appointed Independent Expert pending the determination of this issue.[56]

The mandate was suspended until its legal basis was re-evaluated in another session.[57] Despite the efforts of the African Group, on 21 November 2016 the mandate was once again adopted, this time by a vote of 84–77, with eight abstentions.[58]

If the entire discussion and resolution disputes are interpreted together, the counterarguments of the opposition concentrate on three aspects; firstly, universalised human rights categories cannot be expanded through interpretation to include LGB individuals; secondly, international law should not intervene in the moral and cultural values of states; and, thirdly, LGB rights contradict the protection of family/traditional values. It should be borne in mind that these arguments had previously been reiterated by states that are currently receptive to the idea of LGB rights: for example, in 1994 in *Toonen v Australia* a

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[56] Statement of the African Group on the Presentation of the Annual Report of the United Nations Human Rights Council Delivered by H.E. Mr Charles T. Ntwaagae Ambassador And Permanent Representative of Botswana to the United Nations 7'1 Session Of The United Nations General Assembly, 4 November 2016, New York <https://www.outrightinternational.org/sites/default/files/BotswanaonbhlfofAfricanStates.pdf> accessed 10 October 2017.

[57] A/C.3/71/L.46 (n 55).

[58] UN SOGI Expert voting results <http://www.un.org/en/ga/third/71/docs/voting_sheets/L.52.pdf> accessed 17 July 2017.

gay activist complained before the Human Rights Committee that Tasmanian laws decriminalising same-sex relations between two consenting adults were violating his right to privacy in a discriminatory manner.[59] The Committee found a violation of the International Covenant on Civil and Political Rights (ICCPR) in its Communication, which is regarded as one of the milestone achievements for the LGB rights concept on the international level. In this case, Tasmania responded with the same opposing arguments, stipulating that moral issues should be a matter of domestic law in this case.[60] Nevertheless, Tasmania became the first state in Australia to recognise same-sex partnerships, with legislation that entered into force in 2004.[61] Then the tradition/morality arguments are an initial reaction to LGB demands in the West. This also manifests that Western states once used the same homophobic arguments against the LGB rights concept. On the other hand, this also endorses the developed West versus undeveloped non-West crisis. Neville Hoad summarises this approach as 'we were like them, but have developed, they are like we were and have yet to develop'.[62] However, this shows that the framework for legal homophobia is also a Western production. As the non-Western legal experience with same-sex intimacy has long been silenced, the only available language to speak for and against these rights are of Western origin. In this sense, the non-West is actually imitating either the new Western approach or the older version

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[59] Toonen v Australia, Communication No. 488/1992 (UN Doc CCPR/C/50/D/488/1992, 31 March 1994).

[60] Ibid.

[61] Tasmania Relationships Act 2003.

[62] Neville Hoad, 'Arrested Development or the Queerness of Savages: Resisting Evolutionary Narratives of Difference' (2000) 3 Postcolonial Studies 133–148.

of it. In either case, Western domination within law/right-making has been reinforced under the name of rejecting it. The optimal expectation from the undeveloped, non-Western country is to imitate the updated Western laws. I agree with Neville Hoad's insight regarding the developed West and undeveloped non-West regarding the LGB rights concept, however I am inclined to analyse this situation from a different perspective. This also shows that the non-West has been silenced on matters of sexuality on the basis that its history is insignificant, thus the rivalry between the West and the non-West is proceeding through the arguments produced by the West in the past and present.

In an attempt to substantiate this argument, it is worthwhile examining the case law of various international courts and quasi-judicial mechanisms regarding LGB individuals to analyse how the arguments of both sides have evolved and resulted in the construction of a legally affirmative LGB person within the human rights context. The focus will be on the ECtHR and the UN treaty bodies. The reason for this is that a case study of Turkey would fall under the jurisdiction of these institutions and, most importantly, ECtHR case law provides a concrete timeline of evidence depicting stages and arguments through which sexual orientation claims found success in court.

2.1.3 ECtHR's role in the international recognition of the LGB rights concept

The ECtHR's interpretation methods have turned the court into an optimal forum for new categories of rights that were not enumerated within the convention

text.[63] It is accepted that the first international achievement for LGB claims happened by virtue of ECtHR case law, namely with the *Dudgeon v The UK* judgment (1981).[64] Before *Dudgeon v The United Kingdom*, the European Commission of Human Rights[65] was disinclined to accept LGB-related applications.[66] The Commission's attitude towards LGB issues before *Dudgeon* can be examined through applications, which were brought against Germany between 1957 and 1975 and referred to as *X v Germany*,[67] and the cases brought against the UK[68] between 1972 and 1981.[69] In the German cases, the Commission held that sexual orientation was not an immutable status and thus did not fall under the scope of the convention. It also ruled that same-sex relations could be prohibited and criminalised on health and morality grounds.[70] The Commission's rulings associated homosexuality with crime, deviance and

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[63] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2009) 11.

[64] *Dudgeon v The United Kingdom* (n 20).

[65] Ibid; on the entry into force of Protocol 11 on 1 November 1998 the European Commission on Human Rights was replaced by the European Court of Human Rights <http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm> accessed 21 June 2016.

[66] Johnson, *Homosexuality and The European Court of Human Rights* (n 20) 40.

[67] *X v The Federal Republic of Germany* App No 2566/65 (ECtHR, 6 February 1962); *X v The Federal Republic of Germany* App No 4119/69 (ECtHR, 21 July 1970); *X v The Federal Republic of Germany* App No 5935/72 (ECtHR, 30 September 1975).

[68] *X v The United Kingdom* App No 7215/75 (ECtHR, 7 July 1977); *X v The United Kingdom* App No 7525/76 (ECtHR, 3 March 1978).

[69] Laurence R. Helfer and Erik Voeten, 'International Courts as Agents of Legal Chance: Evidence from LGBT Rights in Europe' [2014] International Organization 77–110.

[70] *W.B. v. Germany* App. No. 104/5 (ECtHR, 17 December 1955); Johnson, Homosexuality and The European Court of Human Rights (n 20) 40.

disease[71] and, between 1957 and 1981, the ECtHR found state interference in homosexuals' private life as legitimate under the scope of the convention.

Applications to the ECtHR before *Dudgeon*,[72] especially the German cases, claimed breaches of Article 8, the right to respect for private and family life. However, their focus was essentially on Article 6 of the convention, which guarantees the right to a fair trial.[73] The arguments within these cases were about convictions that had been given on false witness statements, thereby failing to comply with the convention provisions. Article 8 was only mentioned owing to correspondence between a witness and the applicant. The arguments related to Article 8 were about the prohibition of correspondence between the convicted same-sex couple by the German authorities, and did not raise any claims referring to the state-free nature of the private sphere.

Another strand of pre-*Dudgeon* applications pertained to the criminalisation of homosexuality in the UK. Unlike the German cases, these applications challenged Article 8 and Article 14 of the convention, the latter protecting against discrimination. In *X v The United Kingdom*,[74] the UK government argued that 'the law was clearly inspired by the need to protect the rights of children and adolescents and enable them to attain true autonomy in sexual

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[71] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) EJIL 1023–1044.

[72] *Dudgeon* (n 20).

[73] *X v The Federal Republic of Germany* App No 2566/65 (ECtHR, 6 February 1962); *X v The Federal Republic of Germany* App No 4119/69 (ECtHR, 21 July 1970); *X v The Federal Republic of Germany* App No 5935/72 (ECtHR, 30 September 1975).

[74] *X v The United Kingdom* App No 7215/75 (ECtHR, 12 June 1979).

matters'.[75] This approach is very similar to the arguments raised by the opposition to LGB rights at the UN level.

Another attempt to gain inclusion of LGB persons in the convention before *Dudgeon* was *Handyside v UK* (1976), in which a publication involving information about homosexuality was seized and confiscated by the local authorities. In this case, discussion was restricted to Article 10, the right to freedom of expression and information. The court referred the issue to the authority of local judges as the margin of appreciation was wider in terms of morality.[76] In *X v UK* (1977), the applicant's conviction was found proportional because the applicants were 18, and protection of youth was a legitimate reason for state interference in private life. In a later case, *X v UK* (1978), a different set of arguments was forwarded which posited that criminalisation of homosexuality not only breached Article 8 but also Article 11, which is the right to be freedom of assembly and association, as the environment these criminal laws create endangers the right to expression of homosexuals. In his words:

> [T]hat explicit association in groups, clubs or societies by homosexual persons could be indictable and that counselling activities, befriending agencies and the like, so far as relating to homosexual persons, are of uncertain legal status.[77]

Regarding this list of complaints, the court held that there was no evidence proving these allegations. Moreover, the applicant's arguments were indicating

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[75] Daniel J. Kane, 'Homosexuality and the European Convention' (1988) 11 Hastings Int'l and Comparative Law Review 447–486.

[76] *Handyside v The United Kingdom* App No 5493/72 (ECtHR, 7 December 1976) para 48.

[77] *X v United Kingdom* App No 7525/76 (n 68) 130.

facts regarding the public appearance of homosexuality, which does not fall under the scope of decriminalisation.[78]

Before the judgment in *Dudgeon*, 19 applications had been made regarding LGB persons, and in none of them had been found any violation of the convention provisions.[79] *Dudgeon v UK*, which was about the prohibition of same-sex male acts under the age of 21, built its case on several arguments: firstly, they argued that homosexuality was innate, which had been relied on in almost all previous cases; and, secondly, the prohibition of homosexual acts between consenting adults violated the right to respect for private life and also constituted a breach of the anti-discrimination clause (Article 14).[80] Unlike the early cases, the court found a violation in the *Dudgeon* case, thereby demonstrating a notable shift in its interpretation of homosexuality by, to some extent, rebutting the classical state defences against the protection of LGB individuals. According to the court:

> In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. 'Decriminalisation' does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.… The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct…[81]

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[78] Ibid.

[79] Johnson, *Homosexuality and The European Court of Human Rights* (n 20) 232.

[80] *Dudgeon v United Kingdom* (n 20).

[81] Ibid.

The reasons behind this shift were far from ideal and the claims brought under grounds of discrimination were rejected from examination. Yet the *Dudgeon* case is still remarkable for being the first case in which homosexuality was interpreted as falling under the scope of the convention. Numerous conclusions can be drawn from this victory before the court: firstly, Article 8 functioned as a gateway for LGB claims to be included in the convention; secondly, Dudgeon's arguments were found to coincide with the 'present-day conditions'[82] of the convention, which is a living instrument; and, thirdly, the court followed the concept of decriminalisation of homosexuality concept, which limited homosexual acts between adults over 21 to the private sphere. Besides the legal environment, which changed in favour of LGBs within CoE member states following *Dudgeon*, the form of arguments made in the case also optimised the conditions for the court to provide limited protection for homosexuality under the scope of the convention. Although the criminalisation of homosexuality has been challenged under Articles 3, 6 and 11 (see above), the most important gain is the expansion of the protection offered by Article 8 to cover the private manifestation of same-sex relations between consenting adults.[83] That said, the court still sees 'no useful legal purpose' in examining the case under Article 14 (Prohibition of Discrimination).[84] As mentioned before, the emphasis made on the innate and immutable character of homosexuality in *Dudgeon* corresponds with Michelle Grigolo's evaluations, which posit that the construction of

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[82] *Tyrer v The United Kingdom* Series A no 26 (ECtHR, 25 April 1978).

[83] *Dudgeon v The United Kingdom* (n 20) para 60.

[84] Ibid.

homosexuality within ECtHR is based on essentialism.[85] He continues by stating that the development of LGB claims within court cases has been built on binary dichotomies such as public/private and heterosexual/homosexual.[86] Despite the wide range of claims made after the *Dudgeon* ruling, only two applications regarding criminalisation within the private sphere that clearly present homosexuality as a notion of private life were found to be in breach of the convention, which again corroborates Grigolo's argument.[87]

From the *Dudgeon* judgment in 1981 until 1999, 28 applications related to LGB individuals were brought before the court. These applications varied in terms of the issues they raised, such as immigration, employment, parental rights, minimum age of consent, family life and group sex.[88] However, almost all claims were uniform in the articles they invoked, which were Articles 8 and 14.[89] After 1996, the court started to accept violations other than the criminalisation of private sex between adults. For example, *Smith and Grady v UK* addressed the issue of the prohibition of homosexuality in armed forces; in *Salgueiro Da Silva Mouta v Portugal*,[90] the court ruled that parental rights qualified for protection

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[85] Grigolo (n 71).

[86] Ibid.

[87] *Norris v Ireland* App No 10581/83 (ECtHR Grand Chamber 26 October 1988); *Modinos v Cyprus* App No 15070/89 (ECtHR Grand Chamber 22 April 1993).

[88] Johnson, *Homosexuality and The European Court of Human Rights* (n 20) 233–234.

[89] Ibid.

[90] *Salgueiro Da Silva Mouta v Portugal* App No 33290/96 (ECtHR, 21 December 1999).

under Article 8 in conjunction with Article 14; and, finally, in *Sutherland v UK*,[91] the court found the minimum age of consent rules to be in violation of Articles 8 and 14.[92]

If the attitudes of the ECtHR are broken into periods before *Dudgeon*, the first period would be when attempts to be included in the protection of the ECHR began to take place. The second phase started following *Dudgeon* (1981), when convention protection was offered to decriminalisation issues. The third period started in 1996 with a broadening of the protection to include Article 14.

This third period continued until 2008. The violations addressed within that period concentrated on the minimum age of consent and the prohibition of homosexuality within the military forces, except for *Karner v Austria*,[93] where the issue was discrimination in housing provision, *Kobenter and Standard Verlags GMBH v Austria*,[94] in which the court ruled that freedom of expression covered conviction for publications including defamatory marks regarding LGB persons, such as 'nazi-methods should be applied to them!', and in *Bączkowski and Others v Poland*,[95] where the court found a violation of freedom of

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[91] *Sutherland v UK* App No 25186/94 (ECtHR Grand Chamber, 27 March 2001).

[92] *Smith and Grady v UK* App Nos 33985/96, 33986/96 (ECtHR Grand Chamber, 27 September 1999); *Salgueiro Da Silva Mouta v Portugal* (n 90); *Sutherland v UK* (n 91).

[93] *Karner v Austria* App No 40016/98 (ECtHR, 24 July 2003).

[94] *Kobenter and Standard Verlags GMBH v Austria* App No 60899/00 (ECtHR, 2 November 2006) para 9.

[95] *Bączkowski and Others v Poland* App No 1543/06 (ECtHR, 5 May 2007).

assembly in conjunction with Article 14 concerning an order by the mayor that banned Warsaw Pride.[96] This approach was followed in *Alekseyev v Russia*.[97]

The last phase of case law started in 2008 and has continued till the present day. Case law during this period has concentrated on civil partnerships, family life and adoption.[98] In this phase, no increase can be observed in the number of rulings that found for breaches of provisions other than Article 8 and 14. However, some remarkable decisions were given, such as *X v Turkey*,[99] where for the first time a violation of Article 3, the right not to be tortured, was found in a LGB-related claim.[100] The notable consideration of same-sex relations as a form of family life happened for the first time in *Schalk and Kopf v Austria* (obiter dictum).[101] And in the recent decision of *Oliari and Others v Italy* the ECtHR strongly confirmed that a same-sex couple living in a stable de facto partnership fell within the scope of both private life and family life.[102] While true that the majority of LGB-related claims continue to be examined under the respect for *private* life, the court has started to establish precedent regarding the notion of 'family life'.

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[96] *Karner v Austria* (n 93); *Kobenter and Standard Verlags GMBH v Austria* (n 94) para 9; *Bączkowski and Others v Poland* (n 95).

[97] *Alekseyev v Russia* App Nos 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010).

[98] *Fretté v France* App No 36515/97 (ECtHR, 26 February 2002); *E.B. v France* App No 43546/02 (ECtHR, 22 January 2008); *Gas and Dubois v France* App No 25951/07 (ECtHR 15 March 2012); *X v Austria* App No 19010/07 (ECtHR, 19 February 2013).

[99] *X. v Turkey* App No. 24626/09 (ECtHR, 9 October 2012).

[100] Ibid.

[101] *Schalk and Kopf v Austria* App No 30141/04 (ECtHR, 24 June 2010).

[102] *Oliari and Others v Italy* (n 53) paras 164, 176.

The general area where homosexuals have gained access to protection has been in the private sphere, in relation to right to respect for private life, since their first successful case, *Dudgeon*, in 1981.[103] Although the protection offered for LGB claims has expanded since then, there is still a legal tendency to frame LGB individuals within the private sphere. Johnson argues that limiting LGB claims to the private sphere is an imitation of 'the closet', by which he refers to Eve Sedgwick's description of a defining structure for gay oppression.[104] Thus it can be concluded that the public diffusion of homosexuality has been kept under control by the court by virtue of constant case law. Homosexuality's association with private life on the one hand opened a gateway for LGB individuals to access the international legal protection. However, on the other hand, this has restricted LGB persons within the sphere of private life by reproducing a binary understanding of the issue. This has contributed to the common assumption that the imitation of institutions generated for heterosexuals is emancipatory for LGB individuals. Subsequently, inclusion into the human rights system through respect for the private life principle not only reduced same-sex relations to a private matter but also confirmed that heterosexuality is the only legitimate sexual orientation that can appear in the public sphere without any conditions. Therefore, it can be said that LGB individuals' demand to become part of this system has required a convenient formulation of their claims into a structure that is compatible with the system's

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[103] *Dudgeon v The United Kingdom* (n 20).

[104] Johnson, *Homosexuality and The European Court of Human Rights* (n 20) 105.

heteronormative foundation.[105] There is an inevitable compromise underpinning this demand–grant relationship. There are exceptions to state-free private life. States can interfere to private life in accordance with the law and so far as necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[106]

LGB individuals enjoy their 'freedom' within their private sphere, but with all of these limitations. It can be argued that the previous steps taken in favour of LGB rights suggest that this process will continue and evolve into a fairer situation. However, this process turns out to be the construction of a legally acceptable LGB identity that can be accommodated within this system of human rights. In 1988, Daniel Kane foresaw the consequences of right to private life arguments by evaluating 'the theoretical flaws of right to privacy for achieving equality under the law for homosexuals'.[107] His rationale was: '[t]he right of privacy limits the degree of state interference with homosexual persons' privacy. It does not, however, provide the legal framework on which to eliminate that interference.'[108] This whole interplay within the human rights corpus seems to be demonstrating an example of what John Rawls described as 'realistic utopia', in which toleration, reconciliation and decent hierarchy play

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[105] Butler (n 2) 43; Francesca Romana Ammaturo, 'The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe' (2014) 23(2) Social & Legal Studies 175–194.

[106] European Convention on Human Rights, Article 8(2).

[107] Kane (n 75).

[108] Kane (n 75).

fundamental roles in order to maintain the 'Law of People … a particular political conception of right and justice that applies to the principles and norms of international law and practice'.[109] Following from Rawls, Drucilla Cornell posits that Western laws are introduced as the only way to deliver rights and justice to people.[110] Quite apart from delivering justice and rights to non-Western countries, it is doubtful whether they are able to bring rights and justice to SOGI claims within Western frontiers.

2.1.4 Would pre-existing human rights categories accommodate LGB individuals?

The willingness to be included in this historically patriarchal and heteronormative system has been heavily criticised by gay and feminist scholars. It has been argued that LGB individuals' recognition within the human rights system through international case law sustains a presupposition of heteronormative supremacy, and equality claims do not go beyond admission to heteronormative institutions.[111] LGBs' tendency to imitate heteronormative concepts correlates with some non-Western countries' transplanting Western laws by considering them as optimal legislative formations. When evaluating the case study, Turkey, this issue will be illustrated in more details.

As mentioned above, the binary and stable formulation of these rights have been the centrepiece of the critiques. Thus, alternative contextualisings of these

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[109] John Rawls, *The Law of Peoples* (Harvard University Press 2000) 3, 12.

[110] Drucilla Cornell, *At the Heart of Freedom Feminism, Sex, And Equality* (Princeton University Press 1988).

[111] Ammaturo (n 105).

problematic rights categories have been proposed, in an attempt to achieve gender-neutral and non-binary formulations. Firstly, it is proposed that the 'right to relate' replace the 'right to respect for private and family life'. The right to relate posits a gender-neutral reference for intimate relations without associating them with either the private or public sphere.[112] Waaldijk argues that, regarding LGB individuals, in order to achieve a full realisation, the right to relate should be complemented with the 'right to come out' and the 'right to come together'. He profoundly asks, in a system where public activity of LGB persons is suppressed, how LGB individuals can develop relationships without coming out and coming together in public spaces. Their 'freedom' in the private sphere cannot be exercised without coming out in places that are more or less public. Relationships do not start immediately within the private space, yet LGB persons are expected to avoid pre-relationship attraction and affection in public places.[113]

Continuing to consider the alternative formulations of the respect for private life principle, the ECtHR mentioned that it included a certain degree of right to respect for private life.[114] Remarkably, the Inter-American Court recognised 'the right to establish and develop relationships with other human beings' within the

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[112] Kees Waaldijk, 'The Right to Relate: Lecture on The Importance of "Orientation" in Comparative Sexual Orientation Law' (2013–2014) 24 Duke J Comp & Int'l L 161.

[113] Ibid.; at this point, I stress the fact that this formulation of legalisation of same-sex intercourse has led to two important problems in Turkey, which will be dealt with in detail in the following chapters: firstly, the determination of decriminalisation through this Western benchmark; and, secondly, the fatal outcomes of privatisation of homo-affection in unjust provocation cases (Turkish formulation of the gay panic defence).

[114] Waaldijk (n 112); *X v Iceland* App No 6825/74 (ECtHR, 18 May 1976).

scope of private life in their reasoning for the judgment on *Cantu v Mexico*, where state agents (soldiers) raped an indigenous woman.[115]

The formulation of the private/public dichotomy embodies a very problematic taxonomy, which operates coherently with other binary constructed concepts, as critiqued by feminist scholars from different academic disciplines.[116] The private sphere/life discourse in law postulates two main assumptions: firstly, that there exists a space free from state interference; and, secondly, that this is the space where 'improper' acts are piled. The first facilitates ignorance of domestic violence and other crimes perpetrated within the state-free realm, and the latter corresponds to the invisibility of women and LGB individuals in the public sphere. The most common strategy (perhaps the most common trap) has been pursuing as a LGB rights policy which heavily relies on equality and non-discrimination clauses, and underestimates or overlooks the heteronormative and binary structures, such as the private/public sphere divide, upon which these clauses are founded.[117] In this sense, feminist experience within international human rights law is instructive. Diane Otto argues that a shift in

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[115] *Rosendo Cantu v Mexico* (IACtHR, 31 August 2010).

[116] Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (Stanford 1989); Anita L. Allen & Erin Mack, 'How Privacy Got Its Gender' (1990) 10 N ILL U L REV. 441; Catharine A. Mackinnon, *Toward A Feminist Theory of the State* (Harvard University Press 1989); Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 Harv Hum Rts J 87; Dianne Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry' in Margaret Davies and Vanessa Munro (eds), *A Research Companion to Feminist Legal Theory* (Ashgate, 2013); University of Melbourne Legal Studies Research Paper No. 620.

[117] Kathryn McNeilly, 'Gendered Violence and International Human Rights: Thinking Non-discrimination Beyond the Sex Binary' (2014) 22 Fem Leg Stud 263–283.

feminist discourse within the international human rights realm from the binary female/male asymmetry to a plural and fluid understanding of sex/gender would provide new opportunities for feminists.[118] She proposes that a shift in vocabulary would be the optimal strategy since the biological determinist and binary construction of female identity enables male supremacy to reproduce itself.[119]

If we return to LGB individuals' experience with international human rights law, Butler clearly portrays this interplay as follows:

> We have an interesting political predicament, since most of the time when we hear about 'rights', we understand them as pertaining to individuals, or when we argue for protection against discrimination, we argue as a group or a class. And in that language and in that context, we have to present ourselves as bounded beings, distinct, recognizable, delineated, subjects before the law, a community defined by sameness. Indeed, we had better be able to use that language to secure legal protections and entitlements. But perhaps we make a mistake if we take the definitions of who we are, legally, to be adequate descriptions of what we are about. Although this language might well establish our legitimacy within a legal framework ensconced in liberal versions of human ontology, it fails to do justice to passion and grief and rage, all of which tear us from ourselves, bind us to others, transport us, undo us, and implicate us in lives that are not are own, sometimes fatally, irreversibly.[120]

If we analyse Arendt's and Butler's insights together, we can deduce that the loss of the right to have rights entails a loss of a meaningful place in the common world and an enclosure in private, which would be challenged by LGB individuals' legal situation, where in this case enclosure within the private

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[118] Otto (n 116).

[119] Barbara Stark, 'International Law and Its Discontents: The Normative Implications, and Strategic Opportunities, of Complexity' (2012) 106 Proceedings of the ASIL Annual Meeting 167; Otto (n 116).

[120] Butler (n 2) 20.

sphere is a condition to allow the LGB individuals the right to have rights.[121] This restraint within the private sphere has been the benchmark since the decriminalisation of homosexuality was reduced to legalisation of private and consensual same-sex intercourse. Consequently, although right to respect for private life functioned as a gateway for the humanisation of LGB individuals, it also created a legal and historically heteronormative closet for them. At this point, it is important to remember that the historical function of the marriage institution has been as a closet for women and it has been ranked as a human right this century. Correspondingly, the marriage equality discourse has been criticised as a demand to share heteronormative privilege rather than a legitimate human rights claim.[122]

Despite these critical views, LGB persons' demand for legal recognition has become apparent and dominates the LGB agenda. There appears to be a mutually constructive interplay between states and LGB rights in the creation of a legally acceptable homosexual. Respect for private life, consent, prohibition of discrimination, and equality principles have played an essential role in the decriminalisation of homosexuality, through which both the limits and the content of the LGB rights concept has been configured. In other words, it can easily be predicted that without these concepts this Western version of the LGB rights concept would barely function within a legal jurisprudence. Then, the legal rationale behind the decriminalisation of homosexuality is the keystone for the LGB rights concept. Given that, in light of its definition, the decriminalisation

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[121] Serena Parekh, *Hannah Arendt and the Challenge of Modernity* (Routledge 2008) 12.

[122] Ammaturo (n 105).

of homosexuality only legalises same-sex relations taking place in the private sphere, the LGB rights concept has been developed through the right to respect for private life.

2.1.5 The LGB rights concept's paths of diffusion

> [T]echnology of legislation as a technique of discipline hindered the ideal of freedom[123]

Since the reception of LGB rights into the international human rights system, the framework for defining who is eligible to enjoy human rights has been broadened. Thus, the international promotion of a new threshold of the definition of the human has increased. As discussed above, although there is not currently any international norm codification in respect of LGB rights, Western recognition of the concept has evolved into a level that a democratic state ought to follow.[124] Therefore, it can be concluded that the Western recognition has had a constructive effect in the 'humanisation' of LGB individuals.

Proceeding from this analysis, it can be argued that there is a vertical and implicitly hierarchical relationship between the West and the non-West whereby laws are fabricated by the West and distributed to other states, addressing legal change under different names such as colonialism, imperialism, trade, neo-colonialism and globalism. It is the assumption that human rights are universal

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[123] Costas Douzinas, *The End of Human Rights* (Hart Publishing 2000) 110.

[124] Judith Butler, 'Sexual Politics, Torture, and Secular Time' (March 2008) 59(1) The British Journal of Sociology 1–23; Brian Greenhill, 'Norm Diffusion in IGO Networks: The Case of Gay Rights and Women's Rights' (Hauser Globalization Colloquium, New York University School of Law, September 2012).

which has added to the diffusion of Western-constructed concepts.[125] The LGB rights concept is relevant to legal change. Friedman interprets these power relations as evolutionary: 'Legal change is a "natural" Darwinian process in which less developed systems will evolve towards the more mature ones'.[126] According to Watson, legal transplants are the main source of this legal change.[127] However, borrowing legislation from a country does not guarantee the emergence of new concepts that will develop through use of this legislation. Therefore, it can be concluded that transplanting brings about a permanent cycle of borrowing. In this sense, non-Western becomes dependent on the inventions/fabrications of the West in the legal area as well.

Drawing from Agamben's insight, inclusion of new rights is a prerequisite for the sustainability of the human rights system. In his words: '[There is a] constant need to redefine the threshold in life that distinguishes and separates what is inside from what is outside'.[128] Thus, it can be deduced that in each new category of rights recognised by the West the binary relationship between the law-maker and the law-taker will be reproduced, and consequently the West will maintain its 'parent legal system'[129] position.[130] In this sense, new rights

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[125] William Twining, 'Implications of "Globalisation" for Law as a Discipline' in A. Halpin and V Roeben (eds), *Theorising the Global Legal Order* (Hart Publishing 2009).

[126] Lawrence Friedman 'On Legal Development' (1969) 24(11) Rutgers Law Review 26–64.

[127] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993) 95.

[128] Giorgo Agamben, *Homo Sacer, Sovereign Power and Bare Life* (Stanford University Press 1998) 131.

[129] Twining (n 125).

categories do not only benefit the members of this new recognised group but are also needed for the endurance of the human rights structures.

On the other hand, through the lens of a positivist liberal perspective, this constant need, and the entire process associated with it, has been envisaged as the development of the human rights system.[131] Moreover, from this same perspective, the diffusion of human rights concepts could be seen as an indicator of the universality of human rights. It is important to mention that this thesis is not against legal cooperation between different legal jurisprudences or the borrowing of laws from different legal cultures. However, it problematises the constant situation where norm diffusion tracks in a one-way direction: from West to non-West. This pattern can be seen in the fabrication of these rights as well. Diffusion of a new rights category to another country is called transplanting, and I identify the fabrication of this new category as inner-transplanting, that is, producing rights through imitating the pre-existing structures. This inner norm imitation also flows one way, where the stronger enslaves the weaker. I will examine this argument in detail in Chapter 5.

In light of the previous analyses, in the following section I focus on the diffusion of LGB rights legislation among different states, especially in Europe. After depicting the general situation in other states, I will analyse Turkey's contemporary attitude towards the LGB rights concept and continue by demonstrating the codification attempts and counterarguments surrounding this 'new' concept in Turkey.

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[130] Watson (n 127) 21.

[131] Friedman (n 126).

With the exemption of South Africa, which in 1996 became the first country to include sexual orientation in its constitution under anti-discrimination provision, legislation in favour of LGBs has mostly taken place in America and Europe.[132] According to ILGA's research, by May 2014 42 countries in Europe had anti-discrimination laws protecting LGBs.[133] The remaining six states with no such laws were Belarus, Russia, Turkey, Ukraine, Armenia and Azerbaijan.[134] After the entry into force of the Lisbon Treaty, the European Union Charter of Fundamental Rights became the first international treaty to include sexual orientation within its context. Regarding the harmonisation of laws within the member states, the charter's provisions automatically became a part of the national legislation of EU member states.[135] Thus, prohibition of discrimination on sexual orientation grounds gained normative power within the EU realm. However, the EU's normative approach attracts both negative and positive critiques. On the one hand, when international institutions' general tendency towards soft law is taken into account, the EU's normative efforts are found to be encouraging. But, on the other hand, the language it employs referring to sexual orientation has been found to be discriminatory in terms of its unitary

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[132] Paul Johnson, 'Homosexuality and the African Charter on Human and Peoples' Rights: What Can Be Learned from the History of the European Convention on Human Rights?' (n 22).

[133] ILGA, State-Sponsored Homophobia 2014 (2015) <http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf> accessed 21 June 2016.

[134] ILGA Europe, 'Rainbow Europe' <www.ilga-europe.org/rainboweurope> accessed 4 March 2015.

[135] The United Kingdom, Poland and the Czech Republic opted out from the Treaty of Lisbon (2012).

emphasis on 'LGBT' identities, as opposed to the definition given in the Yogyakarta Principles.[136]

With respect to Europe, the inclusion of sexual orientation status in anti-discrimination provisions started with Norway in 1981, the same year that the ECtHR delivered the *Dudgeon v UK* decision. In an attempt to clarify what conditions would encourage states to adopt legislation regarding LGB individuals, research conducted on the role of international courts in legal reforms provides significant statistics.[137] This research, 'International Courts as Agents of Legal Chance: Evidence from LGBT Rights in Europe' reveals the interesting fact that there is a negative correlation between the effect of ECtHR judgments and public support for LGB persons. In other words, in countries where public support is lower, the effect of judgments becomes stronger.[138] Another finding is on the *erga omne* effect of ECtHR judgments on countries that are not parties to it. These judgments can be considered policy declarations by the ECtHR on a subject issue, and non-defendant states may use them as a reference to change their legislation in order to stay harmonised with ECHR values, as well as prevent possible rulings against them. However, state attitudes have been diverse, and there are still CoE member countries retaining their policies and legislation against ECtHR rulings.[139] Therefore, it can be said that there is no one, uniform way that judgments affect states' legislative

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[136] Mos (n 30).

[137] Laurence R. Helfer and Erik Voeten, 'International Courts as Agents of Legal Chance: Evidence from LGBT Rights in Europe' [2014] International Organization 77–110.

[138] Ibid.

[139] Ibid.

actions. While for some countries soft law is sufficient to trigger a legal change, in others even legally binding treaties or judgments are not able to overcome their resistance.

Examining the diffusion of pro-LGB legislation in Europe, Kees Waaldijk discovered a standard sequence in the legal recognition of LGB individuals.[140] The instrument he devised to predict the legal future of the LGB rights concept has been developed from past patterns, which gradually evolved into legal recognition in Europe. This pattern consists of six main levels, each of which has intermediate sub-steps. The first level is a total ban on homosexuality; the second decriminalisation; the third equalisation of age consent; the fourth introduction of anti-discrimination laws; the fifth introduction of legal partnership; and the sixth and the final level is introduction of parenthood rights.[141]

It has been shown that there is a counter-trend, led by Russia, influencing Eastern European countries.[142] Recalling the discussion made in the previous section, this so-called recriminalisation trend has become active within international mechanisms. In Russia's response to the *Alekseyev v Russia*[143] case, it was clearly articulated that a LGB-themed march would be propaganda for homosexuality, which would not be morally acceptable. Moreover there was

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[140] Kees Waaldijk, 'Standard Sequences in the Legal Recognition of Homosexuality, Europe's Past, Present and Future' (1994) 4 Australian Gay and Lesbian Law Journal.

[141] Ibid.

[142] Francesca Romana Ammaturo, 'The "Pink Agenda": Questioning and Challenging European Homonationalist Sexual Citizenship' [2015] Sociology 1–16.

[143] *Alekseyev v Russia* (n 97) paras 60, 61.

no consensus between the CoE member states as to the extent to which homosexuality was accepted in each country.[144] This retrogressive policy against all the steps taken forward triggered some legislative attempts in countries within Europe, such as Armenia, Belarus, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova and Ukraine.[145]

Ostensibly, recriminalisation or criminalisation of homosexuality is not a Western value. However, the ECtHR decisions regarding the deportations of LGB asylum seekers to their country of origin where same-sex relations are criminalised or subject to the death penalty cast a doubt on the coherency of this Western value.[146] The ECtHR hesitates to create a precedent regarding the homosexual asylum seekers in the member of CoE countries.[147] The court demonstrates its unwillingness to create a precedent for LGB asylum seekers in almost every single deportation application.

M.E. v Sweden (2014) is a telling example in demonstrating the court's attitude in this matter. In this case, the applicant who got married to his Swedish partner was asked to go back to his country of origin for a short period of time, during

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[144] Ibid.

[145] Human Rights First, 'Fact Sheet on Spread of Russian Anti-propaganda laws' (2015) <http://www.humanrightsfirst.org/resource/spread-russian-style-anti-propaganda-laws> accessed 3 March 2015.

Kaleidoscope Trust, '2013 in Review: The Rights of the LGBT People Globally' (2014) <http://kaleidoscopetrust.com/usr/library/documents/main/global-lgbt-rights-2013.pdf> accessed 26 February 2015.

[146] *A.E. v Finland* App No. 30953/11 (ECtHR, 22 September 2015).

[147] Paul Jonhson, 'The European Court of Human Rights and Gay Asylum Seekers: A Shameful History?' (22 October 2015) <http://echrso.blogspot.co.uk/2015/10/the-european-court-of-human-rights-and.html> accessed 11 October 2017.

which the Swedish authorities could decide on the family union of same-sex partners. The applicant argued that his short-term expulsion to Libya would put his life in an imminent risk. The court ruled:

> Moreover, having regard to the country information on Libya, the Court notes that, since the overthrow of Gadhafi in 2011, the situation in Libya has been, and continues to be, insecure and unclear as to the direction the country is taking. Consequently, there is also only little and varying information about the situation for homosexuals in Libya, making it difficult for the Court to make an evaluation of this matter. Although it is clear that homosexual acts are punishable by imprisonment under Articles 407 and 408 of the Libyan Penal Code, the applicant has not presented, and the Court has not found, any information or public record of anyone actually having been prosecuted or convicted under these provisions for homosexual acts since the end of Gadhafi's regime in 2011. Thus, while having regard to the fact that homosexuality is a taboo subject and seen as an immoral activity against Islam in Libya, the Court does not have sufficient foundation to conclude that the Libyan authorities actively persecute homosexuals. The Court Maintains that:
>
> … the present case does not concern a permanent expulsion of the applicant to his home country but only a temporary return while the Migration Board considers his application for family reunion…. [T]he Court finds no reason to believe that the applicant's sexual orientation would be exposed so as to put him at risk of treatment contrary to Article 3.[148]

According to ECtHR case law it is legitimate to expel a non-CoE citizen to their country of origin where homosexuality is punished by the death penalty. Paul Johnson observes another, perhaps more worrisome pattern in these LGB-related expulsion applications to the court.[149] In majority of these applications, the member states granted permanent or temporary residence during the

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[148] *M.E. v Sweden* App No.71398/12 (ECtHR, 26 June 2014), paras 87, 89.

[149] Paul Johnson, 'The Council of Europe and the European Court of Human Rights' in Andreas R. Ziegler (ed.), *International LGBTI Law: Sexual Orientation and Gender Identity Law from an International Comparative Perspective*, draft on 3 March 2017 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2927098> accessed 11 October 2017.

course of the proceedings.[150] Although Article 37 of the ECHR[151] provides the court with the authority to pursue violations, the court decided to strike out the applications depending on the residence permits given, in some cases disregarding the applicant's request to continue their applications in LGB-related expulsion cases.[152]

In light of all these discussions, diffusion of LGB rights concept can be summarised as happening through two main channels: firstly, by means of the case law or soft law generated through broad interpretations of pre-existing regional and international human rights treaties, and by extending the human within the human rights concept; and, secondly, by the normative adoption of the concept through adding sexual orientation to the lexicon. This is done in compliance with the pre-existing structures of protected grounds. Both of these channels promote the same configuration of the LGB rights concept – imitating the previous structures – therefore both involve imitation. Regardless of the channel the LGB rights emerges through, this rights concept, like all other rights categories, is fabricated by imitating the pre-existing structures. It repeats the scheme of rights/laws to be recognised and intelligible by the very schemes it repeats. Ironically, intelligibility is still a prerequisite in order to oppose to this concept. This can be clearly observed in the argument of the opponents that

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[150] As cited in Paul Johnson's paper (n 149): *Sobhani v Sweden* App No. 32999/96 (ECtHR, 10 July 1998); *A.S.B v The Netherlands* App No. 4854/12 (ECtHR, 10 July 2012); *A.E. v Finland* (n 146); *M.B. v Spain* App No. 15109/15 (ECtHR 13 December 2016).

[151] However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

[152] n (150).

follows the same path as LGB rights' first channel of expansion, which is justification of the concept through pre-existing international human rights principles. In this regard, opponents refer to pre-existing human rights concepts as well. They refer to protection of children and the right to respect for family life as a rationale for their opposition on the international level and have developed a different interpretation of these principles that would enable them to prohibit the public and private appearance of homosexuality.

These legal trends encircling LGB individuals seem unlikely to be settled soon. Aside from the tension between mainstream LGB demands to be fully included in the pre-existing human rights system, and critiques against this liberal establishment of homosexuality from queer and feminist circles, the revival of criminalisation is on the increase. This triangle brings about a situation where LGB-related demands are dominated by the Western-constructed LGB rights concept. Although it is a fact that the LGB rights concept pledges benefits for LGB persons, the sole remedy it imposes is imitation of heteronormative structures. In this way, the LGB rights concept not only suffers from a tendency to overstatement concerning the level of emancipation it allows but also incorporates universality, which is inherent in the structure it imitates. This brings about a situation where a clash between the proponents and opponents of the LGB rights concept triggers imperialistic tendencies. Analysing the situation through the benchmark of the West creates a turmoil. These interweavings, no doubt, make it difficult to discuss the legal situation of LGB persons without falling into the trap of false assumptions and dichotomies. Thus the legal realm should be decolonised through investigating non-Western legal

experience with same-sex intimacy outside of the boundaries of the Western thresholds.

Prior to elaborating the Turkish legal history regarding same-sex intimacy, in the next section I will endeavour to depict the contemporary Turkish encounter with the LGB rights concept.

2.2 Turkey's encounter with the LGB rights concept

The central focus of this section is to analyse contemporary Turkey's encounter with the LGB rights concept.[153] In an attempt to break down Turkey's contemporary strategy, its arguments for and against the normative adoption of the LGB rights concept will be investigated. In this section, I will outline the Turkish state's response to the LGB rights concept at the international level and its contemporary reaction to the growing legal developments with regards to sexual orientation law.

Turkish legislation secures the fundamental rights of all citizens on the constitutional level and accommodates an inviolable and inalienable rights approach.[154] It embodies equality and anti-discrimination provisions within its constitution.[155] Apart from the military regulations,[156] there are no references to

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[153] For a discussion about Turkey's attitude towards LGBT rights see: Zehra F Kabasakal Arat and Caryl Nuňez, 'Advancing LGBT Rights in Turkey: Tolerance or Protection?' (2017) 18 C Hum Rights Rev 1.

[154] Turkish Constitution Official English Translation <https://global.tbmm.gov.tr/docs/constitution_en.pdf> accessed 20 May 2015.

[155] Article 10—All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.

LGB persons or sexual orientation in any domestic law. However, after the ratification of the European Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention),[157] which includes the term 'sexual orientation' in its text, there are now legal grounds to

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Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice.

No privilege shall be granted to any individual, family, group or class.

State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.

Article 12—Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable.

The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his or her family, and other individuals.

[156] A: Military School Regulation, Article 61, which defines reasons for expulsion, explicitly lists homosexuality as an immoral act:

B: Article 17/3 'Psychosexual Disorder', List of Illnesses and Disorders Annexed to Turkish Military Forces Health Competency Regulation, adopted by Council of Ministers on 8 October 1986 Regulation number : 86/11092,Official Gazette Publication Date and No: 24/11/1986 – 19291

(The Human Rights Commissioner's Report comments: 'In Turkey, Article 17/3, Appendix of the Armed Forces Health Regulation, states that gay men are "unfit to serve" in the army. The Turkish military uses the DSM II ("Diagnostic and Statistical Manual of Mental Disorders") dating from 1968 whereas the medical community currently uses DSM IV – 2000. According to DSM II, homosexuality is a psychosexual disorder and those who have this "pathology" are considered "unfit to serve" in the Turkish Armed Forces.' (Discrimination on grounds of sexual orientation and gender identity in Europe, report by Thomas Hammarberg, Council of Europe, September 2011, p 105).

'Openly gay men were not allowed to perform military service for "health reasons" due to their sexual orientation; those requesting military exemption for reasons of sexual orientation must undergo an invasive burden of proof. LGBT groups complained that gay men were required to show photos of themselves in overt sexual positions and to undergo thorough medical evaluations to prove their homosexuality to military officials' (Sexual Orientation/Gender Identity References—U.S. Department of State Human Rights Reports for 2009 p 48).

[157] The European Convention on Preventing and Combating Violence against Women and domestic violence (the Istanbul Convention) (2011).

argue that Turkish legislation includes 'sexual orientation' in its corpus. This happens because of Article 90 of the Turkish Constitution, which allows international covenants on fundamental rights to supersede national law in the case of a norm conflict.[158] Thus, by virtue of Article 90, sexual orientation is worded in a legislative text for the first time in Turkish legal history.

Before evaluating Turkey's policy, it would be instructive to touch upon the reasons which have impelled it to articulate its position concerning LGB rights.

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[158] Ratification of International Treaties (As amended on 22 May 2004).

ARTICLE 90—The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification.

Agreements regulating economic, commercial and technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the state, and provided they do not infringe upon the status of individuals or upon the property rights of Turkish citizens abroad. In such cases, these agreements must be brought to the knowledge of the Turkish Grand National Assembly within two months of their promulgation.

Agreements in connection with the implementation of an international treaty, and economic, commercial, technical, or administrative agreements which are concluded depending on the authorisation as stated in the law shall not require approval of the Turkish Grand National Assembly. However, agreements concluded under the provision of this paragraph and affecting economic, or commercial relations and the private rights of individuals shall not be put into effect unless promulgated.

Agreements resulting in amendments to Turkish laws shall be subject to the provisions of the first paragraph.

International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

Turkey has ratified many of the UN human rights treaties[159] and is an official candidate for membership of the EU. As an imperative part of the accession process, Turkey announced a legal programme, the National Programme for the Adoption of the Acquis, because, according to the Copenhagen Criteria, a country must achieve stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities in order to complete the accession process.[160] Turkey has been called upon to ensure that equality is guaranteed regardless of sexual orientation.[161] Given the developments regarding LGB rights within the EU legal corpus, as mentioned in the preceding sections, the promotion of LGB rights has become more evident and candidate states are urged to articulate their policy about LGB rights.

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[159] Conventions and ratification dates: CAT – Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 2 August 1988; CAT-OP – Optional Protocol of the Convention against Torture, 27 September 2011; CCPR – International Covenant on Civil and Political Rights, 23 September 2003; CCPR-OP2-DP – Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, 2 March 2006; CED – Convention for the Protection of All Persons from Enforced Disappearance; CEDAW – Convention on the Elimination of All Forms of Discrimination against Women, 20 December 1985; CERD – International Convention on the Elimination of All Forms of Racial Discrimination, 16 September 2002; CESCR – International Covenant on Economic, Social and Cultural Rights, 23 September 2003; CMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 27 September 2004; CRC – Convention on the Rights of the Child, 4 April 1995; CRC-OP-AC – Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 4 May 2004; CRC-OP-SC – Optional Protocol to the Convention on the Rights of the Child on the Sale of Children Child Prostitution and Child Pornography, 19 August 2002; CRPD – Convention on the Rights of Persons with Disabilities, 28 September 2009.

[160] Delegation of the European Union to Turkey', 'Turkish-EU Relations' <http://avrupa.info.tr/eu-and-turkey/history.html> accessed 15 May 2015; Copenhagen Criteria (1993) <http://europa.eu/rapid/press-release_DOC-93–3_en.htm?locale=en> accessed 5 June 2015.

[161] European Parliament 2010 Progress Report SEC (2010) 1327.

Turkey is a member of the CoE and has been a party to the ECHR since 1954.[162] The statistics of the ECtHR reveal that the majority of the judgments it delivered between 1959 and 2016 concerned Turkey's violations of the convention. In this, Turkey was followed by Italy, Russia, Romania and Ukraine.[163] Three of the 3,270 judgments that established Turkey's high score were on the subject of the LGB rights concept.[164]

The first case, *Halat v Turkey*,[165] was about the authorities' failure to investigate the ill-treatment of a trans woman in police custody, for which Turkey was found to be in violation of Article 3 (prohibition of torture) and Article 13 (effective remedy) of the ECHR. The second was *X v Turkey*,[166] where the detention conditions for a gay prisoner were found to be in violation of, again, Article 3 (prohibition of torture), but this time in conjunction with Article 14 (prohibition of discrimination). The third case was *Kaos GL v Turkey*.[167] *Kaos Gay and Lesbian Magazine* is the oldest and probably the first LGBTI-themed magazine in

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[162] ECHR, Turkey: Country profile: <http://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf> accessed 11 April 2015.

[163] ECHR, 'Overview from 1959–2016' (2017) <http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf> accessed 19 September 2017.

[164] There is a recent judgment about gender re-assignment process of a transgender person, which is out of the scope of this thesis thus not mentioned *Y.Y. v Turkey* (no.14793/08), 10 March 2015.

[165] *Halat v Turkey* App No 23607/08 (ECtHR, 8 November 2011).

[166] *X. v Turkey* (n 99).

[167] *Kaos GL v Turkey* App No 4982/07 (ECtHR, 22 Nov 2016).

Turkey, first published in 1994.[168] The Ankara chief prosecutor decided to seize the 28th issue of *Kaos GL Magazine* and shut it down for more than five years, alleging that the content of the 28th issue was contrary to public morality. In its defence in the litigation, the Turkish government underscored that Article 10 of the Turkish Constitution guarantees equality, thus the decision was not discriminatory. Turkey was exercising the limitations provided by Paragraph 2 of Article 10 of the ECHR.[169] Thus their interfere to Kaos GL's freedom of expression was legal under the scope of the convention. However, the ECtHR decided that the measures taken by Turkey were excessive and Article 10 of the ECHR was violated.[170]

It is noteworthy that these successful cases that managed to make their way to the ECtHR are about Article 3 and Article 10, which Turkey has often been found by the court to be in violation of.[171] Therefore, notably, unlike the majority

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[168] Kaos GL Magazine <http://www.kaosgldergi.com/dergi.php> accessed 19 September 2017.

[169] Freedom of expression, ECHR Article 10:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[170] *Kaos GL v Turkey* (n 167).

[171] ECHR, 'Overview from 1959–2016' (n 163).

of the LGB-related case law within the jurisprudence of the ECtHR, Turkish LGB-related cases are not about Article 8 of the convention and, in this sense, demonstrates a different legal picture. I will return to this in the following paragraphs.

According to a number of human rights reports drafted about Turkey, violations regarding LGB persons are not limited to ill-treatment and freedom of expression cases.[172] They range from hate crimes to discrimination in public and private spheres.[173] A very common finding of these reports is the lack of legal protection.[174] Correspondingly, reports reiterate the necessity for new legislation that would guarantee the rights of LGB individuals and the prohibition of discrimination against SOGI.[175]

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[172] European Commission, 'Enlargement Strategy and Main Challenges 2014–15 /Turkey' (2014) COM(2014)700,8.10.2014, 53–59 <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf> accessed 31 March 2015; United States Department of State Bureau of Democracy, Human Rights and Labor, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dlid=220341> accessed 31 March 2015; UNHRC, Twenty-first session, 'Draft Report of Working Group on the Universal Periodic Review Turkey' (29 January 2015) UN Doc A/HRC/WG.6/21/L.12; UNHCR, Twenty-first session 'Working Group on the Universal Periodic Review' (19–30 January 2015) UN Doc A/HRC/WG.6/21/TUR/3;UNHCR, Twenty-first session 'Working Group on the Universal Periodic Review' (19–30 January 2015) UN Doc A/HRC/WG.6/21/TUR/2.

[173] Ibid.

[174] Ibid.

[175] European Parliament Resolution of 10 June 2015 on the OLAF Supervisory Committee's annual report 2014 P8_TA-PROV(2015) 0226 OLAF Supervisory Committee's annual report 2014 (2015/2699(RSP)), para 29:

Calls on Turkey to undertake serious efforts to protect the rights of the LGBTI community, and takes the view that the creation of a specific body to combat discrimination, hate speech, racism, xenophobia, anti-Semitism and intolerance would reinforce individual rights in Turkey; calls on Turkey to enact

Since the first appearance of human rights violations of LGB individuals in an EU progress report in 2008, aside from the ratification of the Istanbul Convention in 2011, Turkey has not improved its national legislation in accordance with the recommendations.[176] There have been attempts to include the term 'sexual orientation' into national legislation during the last decade. The

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comprehensive anti-discrimination legislation, including the prohibition of discrimination and hate speech on the grounds of ethnicity, religion, sexual orientation, gender or gender identity, and to include the prohibition of such discrimination in a new constitution; expresses concern at the frequent attacks on transgender persons and the lack of protection provided to LGBTI persons against acts of violence; strongly regrets that hate crime against LGBTI people often remains unpunished or that offenders' sentences are reduced for the victim's 'unjust provocation'; reiterates its call on the Government of Turkey to instruct the Turkish Armed Forces to end their classification of homosexuality and transsexuality as a 'psychosexual illness' 'Enlargement Strategy and Main Challenges the grounds of ethnicity, religion, sexual orientation, gender or gender identity, and to include the prohibition of such discrimination in a new constitution; expresses concern at the frequent attacks on transgender persons and the lack of protection provided to LGBTI persons against acts of violence; strongly regrets that hate crime against LGBTI people often remains unpunished or that offenders' sentences are reduced for the victim's 'unjust provocation'; reiterates its call on the Government of Turkey to instruct the Turkish Armed Forces to end their classification of homosexuality and transsexuality as a 'psychosexual illness'.

European Commission, 'Enlargement Strategy and Main Challenges 2014–15 /Turkey' (2014) COM(2014)700,8.10.2014, 53–59 http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf on 31st March 2015; Amnesty International "Not an illness nor a Crime" Report on LGBTI's human rights in Turkey (2011) http://www.amnestyusa.org/sites/default/files/notillnessnorcrime.pdf at 27th April 2015 on 11:09; Kaos GL, 'Human Rights Report for LGBT 2012' (2013) <http://www.kaosgldernegi.org/resim/yayin/dl/lgbt_human_rights_report_of_2012_in_turkey_by_kaos_gl.pdf> accessed 27th April 2015; European Commission, 'Enlargement Strategy and Main Challenges 2014–15 /Turkey' (2014) COM(2014)700,8.10.2014, 53–59 <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf> accessed 31 March 2015.

[176] European Commission Enlargement Strategy and Main Challenges 2008–2009 /Turkey COM(2008) 674, SEC(2008) 2699, 5.11.2008 <http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/turkey_progress_report_en.pdf> accessed 27 April 2015.

same pattern was followed during the legislation procession of the Law on Foreigners and International Protection (2013)[177] and the 6th Democratization Reform Package (2014), which separately includes hate crimes and anti-discrimination provisions.[178] Despite these unsuccessful attempts, numerous MPs from two opposition parties (Cumhuriyet Halk Partisi from CHP and Halkin Demokrasi Partisi from HDP) have insisted on using legislative mechanisms to propose laws protecting the rights of LGB individuals. They even reproposed laws previously declined by parliament.[179] All these brand new parliamentary efforts show that there is a quest for normative protection to the extent that it has caused political tension among the parties represented in the parliament. This political tension accelerated during the June 2015 general parliamentary

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[177] Submission to the 106th Session of the Human Rights Committee (15 October–2 November 2012), Human Rights Violations of Lesbian, Gay, Bisexual and Transgender (LGBT) People in Turkey: A Shadow Report by Social Policies Gender Identity and Sexual Orientation Studies Association (SPoD), Kaos GL Association, International Gay and Lesbian Human Rights Commission (IGLHRC) <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LGBT_HRC_Turkey_HRC106.pdf> accessed 13 April 2015.

[178] Law No 6529, Amendments on some legislation in order to improve the fundamental rights and freedoms (2 March 2014) published in the Official Gazette on 13 March 2014.

[179] Sebahat Tuncel MP – People's Democratic Party, 1 November 2012, issue number 2–0950 on inclusion of sexual orientation to hate crime laws, Sebahat Tuncel MP – People's Democratic Party, 12 December 2013, issue number 2–1907 on Misdemeanour Law; Melda Onur MP – People's Republic Party, 17 January 2014 issue number 2–1965 on inclusion of sexual orientation to hate crimes and homophobic applications of unjust provocation clause; Aykan Erdemir MP – People's Republic Party, 25 February 2015 issue number 2–2751 on labour law and criminal law; Suheyl Batum MP – People's Republic Party, 8 April 2015 issue number 395561 on inclusion of sexual orientation to hate crime laws.

election. Two opposition parties, CHP[180] and HDP,[181] mentioned LGB rights and anti-discrimination policies in their manifestos. Moreover, one openly gay activist was nominated as a candidate by HDP, and a trans Christian activist was nominated by the newly formed Anatolia Party.[182] As a response to these developments, Deputy Prime Minister Arinç, whose speech at the UN will be unpacked in the following paragraphs, stated in a humiliating tone that marginal groups, such as LGB persons, support HDP. In other words, he underlined that LGB persons had no place in his morally 'precise' party (AKP). After 2015 Turkey went into a state of turmoil in terms of politics: aside from the effects of war in neighbouring Syria, a number of terror attacks were followed by a coup attempt and the declaration of a state of emergency, which are outside the scope of this thesis. In spite of these political developments, CHP and HDP did not abandon using parliamentary instruments regarding human rights violations towards LGB individuals. These parties continue to propose laws that are inclusive of LGB individuals.[183]

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[180] Kaos GL, 'Turkish Main Opposition Promises to Fight Anti-LGBT Discrimination' (20 April 2015) <http://kaosgl.org/page.php?id=19225> accessed 28 April 2014.

[181] Firat News, HDP Election Manifesto <http://en.firatajans.com/news/hdp-announces-election-manifesto> accessed 28 April 2014.

[182] Kaos GL 'Gay and Trans Candidates to Run for Turkish General Elections' (8 April 2015) <http://kaosgl.org/page.php?id=19141> accessed 29 April 2015. The first trans woman on a party candidate list was Demet Demir from ODP (Freedom and Democracy Party) in 2007.

[183] Mahmut Tanal MP – People's Republic Party, law proposal concerning to LGB rights on 5 May 2017 <http://www2.tbmm.gov.tr/d26/2/2–1721.pdf> accessed 16 July 2017; Meriç Tafolar, 'LGBTİ bireyler için 22 maddelik torba kanun teklifi' (8 July 2015) <http://t24.com.tr/haber/lgbti-bireyler-icin-22-maddelik-torba-kanun-teklifi,302243> accessed 13 July 2015; Filiz Keresteciogluu, MP – People's Democratic Party, Issue number: 89122 Date:

The government does not have a policy document about LGB individuals. Turkey's strategy under the governance of AKP can be analysed through its formal attitude expressed in the international realm, parliamentary speeches, and state responses to ECtHR cases, international reports etc. The formulation of Turkey's strategy can be broken down into four principles. Firstly, same-sex attraction is either an illness or a condemned lifestyle; secondly, LGB persons can qualify for limited state protection only when they become victims of violence; thirdly, they cannot be nominated as bearers of rights in any national legislation; and, fourthly, in the event of international pressure, especially stemming from the EU accession process, the maximum degree of national protection should not exceed the minimal level that is internationally acceptable. I will attempt to substantiate every point of this strategy in the coming paragraphs through the international and national articulations of the government's legal attitude towards SOGI issues.

In 2001, Recep Tayyip Erdoğan explicitly articulated on a TV show that 'It is imperative that homosexuals are granted legal protection.… I do not find the way they are treated humane.'[184] This speech happened prior to his election.[185] Recep Akdağ, minister of health, said on 9 March 2010:

20th March 2017 <http://www2.tbmm.gov.tr/d26/7/7–12296sgc.pdf> accessed 17 July 2017; Filiz Kerestecioglu, MP – People's Democratic Party, Issue number: 7/6616 Date: 17 June 2016, <http://www2.tbmm.gov.tr/d26/7/7–6616s.pdf> accessed 17 July 2017.

[184] <https://www.youtube.com/watch?v=-bp6grWsIJA> accessed 20 September 2017.

[185] Kaos GL, '2001'den 2015'e AKP'in LGBTİ tarihi' (2 September 2015) <http://kaosgl.org/sayfa.php?id=20109> accessed 20 September 2017.

> Same-sex marriage is not an issue that Turkish society can accept. We must leave it to personal freedom. We must do what is required for the proper development of children's sexual education. The healthiest relationship is a monogamous relationship between a man and a woman. Truth be told, homosexuality as experienced by those in Turkey is very difficult. It can be cause for discrimination. Society must be tolerant and merciful. There are clearly elements that distinguish a homosexual relationship from a normal one.[186]

In 2010, the state minister responsible for women's and family issues, Selma Aliye Kavaf, stated in a newspaper interview that homosexuality was a biological disorder, an illness that has to be cured.[187] Despite the reactions she received, Kavaf has not apologised.[188] On 18 May 2012, Mehmet Ali Şahin, Member of the Constitutional Reconciliation Committee and AKP (Justice and Development Party) MP, stated:

> Now this is a very sensitive issue, particularly a very sensitive issue for our society. They want us to see this as normal, that is, they want us, the constitution makers, to take sexual orientation and such as normal and to make regulations that protect their rights and laws. This is not a lack, to act like this is not a lack, etc. Now this is put on record, but I say with sincerity that if my 22 year old daughter comes to me and says she wants to marry her girlfriend or a 20 year old son comes to me and says he wants to marry his boyfriend, I cannot say fine, sorry. I would be very sad. If you want me to do something that would make me very sad, let me speak candidly and say I cannot.… Then tell me what this is, explain to me! What is perversion? I mean, what is, excuse me, what is sexual orientation, gender identity, explain to me, what are you referring to?… You mean to tell me 'you must see these as legitimate.' You are not going

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[186] Milliyet,'Escinsellik Kisisel Ozgurluk' (10 March 2010) <http://www.milliyet.com.tr/escinsellik-kisiselozgurluk/guncel/haberdetay/10.03.2010/1209258/default.htm> accessed 22nd September 2017.

[187] (n 177).

[188] Protest video <https://www.youtube.com/watch?v=47qz0EiBho4> accessed 15 April 2015 (Turkish banners: 'do not hate apologize from homosexuals').

> to treat them differently. As a father, you must not say 'No, get lost, I will strangle you, I will kill you'.[189]

On 29 May 2013, during the parliament discussion of this investigation proposal, the ruling Justice and Development Party (AKP) MP Turkan Dagoglu expressed the position of the ruling party, as required by the procedural regulations of the Turkish parliament. In her speech at the parliament, she stated that, although being LGB is an illness[190] and an abnormal behaviour, as a party they value everyone owing to their being created by God.[191]

Dagoglu went further by firstly drawing attention to the unwanted lifestyle attached to this 'illness', and, secondly, pointing out that sexual orientation cannot be classified as a matter of democracy.[192] She also clarified that the limited protection potentially offered would only stem from the fact that these 'sick' people, LGB persons, were created by God. Again in 2013, regarding the adoption of a Turkish child by a lesbian Dutch couple, Prime Minister Erdoğan (who has been president since 2014) referred to God and religion. Erdoğan brought this issue forward in the Netherlands during a joint press conference

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[189] LgbtNewsTurkey,'AKP's LGBTI History from 2001 to 2015' (26 September 2015) <https://lgbtinewsturkey.com/2015/09/26/the-akps-lgbti-history-from-2001–2015> accessed 20 September 2017.

[190] She substantiated this information by manipulating the studies conducted by the American Psychiatric Associations in 1974 and 1992, without mentioning the recent position of the American Psychiatric Association that same-sex attraction is not an illness. For the association's views on LGBTs: American Psychiatric Association <http://www.psychiatry.org/lgbt-sexual-orientation> accessed 12 April 2015.

[191] Turkish Parliament 24th term, 3rd legislative Year 112th meeting on 29 May 2013 <http://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21957&P5=B&page1=43&page2=43&web_user_id=13696951> accessed 12 April 2015.

[192] Ibid.

with his Dutch counterpart by stating that homosexuality is a preference which conflicts with Islamic culture.[193] Furthermore, he asked for the return of the child to Turkey, to be raised in his culture, in which homosexuality was not acceptable.

A different reasoning was followed in a more recent speech on human rights violations of LGB individuals in Turkey, delivered on 27 January 2015 at the UN by Deputy Prime Minister Bulent Arinç (AKP) during the second cycle of Turkey's Universal Periodic Review. In this speech, which was actually made in response to questions raised by other states regarding LGB rights in Turkey, Arinç departs from the rhetoric articulated by his colleagues.[194] If his speech is

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[193] Scott Roberts, 'Row Between Netherlands and Turkey over Lesbian Foster Couple Overshadows Prime Ministerial Visit' (21 March 2013) <http://www.pinknews.co.uk/2013/03/21/row-between-netherlands-and-turkey-over-lesbian-foster-couple-overshadows-prime-ministerial-visit/> accessed 27 April 2015.

[194] 'The principle that everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion, sect and other such grounds is organised by the Constitution's Article 10. Due to the expression "and other such grounds" in the aforementioned article, types of discriminations are not limited but rather exemplified, and there is no question that other types of discrimination are left outside the scope. That there is no special regulation for LGBTs does not mean that this group's rights are not legally guaranteed.

'On the other hand, pursuant to our Constitution's Article 90, the international agreements we ratify are considered law. The Council of Europe Convention on preventing and combating violence against women and domestic violence – Istanbul Convention –, which we ratified without reservations, includes provisions which state that there can be no discrimination on the basis of sexual orientation.

'In our country, like in all democratic states of law, perpetrators who commit murder and acts of violence against individuals of LGBT and all kinds of hate crimes are identified, the necessary investigations are started in order to bring them to justice, and the process is conducted by legal authorities scrupulously. The claims that the reasoning of unjust provocation constitute a routine in the reduction of penal responsibility do not match with the real situation that is

deconstructed, the arguments of the deputy minister may be identified in three points. He first underlines that the phrases 'other such grounds' and 'everyone' within the equality provisions also include LGB persons; secondly, he mentions that sexual orientation is now a part of Turkish legislation by virtue of the Istanbul Convention; and, thirdly, he denies penalty mitigations in gay hate crime cases.

The day after this speech was delivered at the UN, the Turkish police attacked the Istanbul Pride parade brutally by using water cannons and firing rubber bullets and pepper spray on 27 July 2015.[195] Arinç, who, as has been said, delivered a LGB rights-inclusive speech at the UN, on this occasion portrayed an attitude conflicting with his international remarks and, in July 2015, justified the police brutality with these words:

> Unfortunately, I am ashamed to say this in a place where our lady sisters are present but some people turn this into pride.[196] These things are not liked in our belief, our traditions, our customs and mores, and our society's structure.
>
> But it is extremely saddening that they get completely naked in broad daylight, challenging and having fun in the middle of Istanbul, and

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revealed by tangible court decisions.' LgbtiNewsTurkey, 'Bulent Arinc's Statement at the UPR about LGBT Rights' (3 February 2015) <http://lgbtinewsturkey.com/2015/02/03/deputy-pm-bulent-arincs-statement-on-lgbt-at-the-universal-periodic-review/> accessed 12 April 2015.

[195] Guardian 'Turkish Riot Police Fire Water Cannon and Rubber Pellets at Pride Revellers' (28 June 2015) <http://www.theguardian.com/world/2015/jun/28/riot-police-fire-water-cannon-and-rubber-pellets-at-gay-pride-revellers> accessed 13 June 2015.

[196] Further explanation for the translation: he means that he does not want to talk about lesbian, gay, bisexual, trans publicly especially in front of women and he finds it unacceptable that these sexual orientations and gender identities are associated with decent terms such as pride or honour.

> unfortunately, parliamentarians from the CHP and HDP are supporting them.[197]

If all these speeches are examined together, it is possible to observe that national and international rhetoric contrast significantly with each other. In the national version, democracy is rejected as grounds for protection, and homosexuality is portrayed as something against Turkish culture and tradition. However, in the international version, Turkey is identified as a democratic state, which provides adequate protection for everyone including LGB individuals, and has even incorporated sexual orientation into its corpus.

More evidence for this hypocritical attitude may be seen within Turkey's UPR statements and its response to the recommendations made by member states. Only Norway's recommendations enjoyed Turkey's support: the Norwegian delegation asked Turkey to 'ensure that actors in civil society, including marginalized groups such as those representing LGBT persons, be included in the implementation and follow-up human right obligations, including UPR recommendations'.[198] Moreover, Slovenia's recommendation that Turkey ensure the investigation, prosecution and punishment of any act of discrimination or violence motivated by the victim's sexual orientation or gender identity be classed under the already implemented or in the process of

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[197] LgbtiNewsTurkey, 'Deputy Prime Minister Arinç Criticizes Istanbul Pride: "They Get Completely Naked in Broad Daylight"' (3 July 2015) <http://lgbtinewsturkey.com/2015/07/03/deputy-prime-minister-arinc-criticizes-istanbul-pride-they-get-completely-naked-in-broad-daylight> accessed 14 July 2015.

[198] UNHRC, Twenty-first session, 'Draft Report of Working Group on the Universal Periodic Review Turkey' (29 January 2015) UN Doc A/HRC/WG.6/21/L.12 para 148.128.

implementation section (although there is a Constitutional Court decision contrary to this).[199] I will discuss this decision in the fourth chapter.

Below are some examples of Turkey's official responses to recommendations from various states during the second cycle of the UPR regarding the LGB rights concept:

> 150.24. Israel's recommendation: Enact comprehensive anti-discrimination legislation, including a prohibition on discrimination on grounds of ethnicity, sexual orientation and gender identity.[200]
>
> Turkey's response: Not accepted.
>
> In view of the scope of the recommendation. Article 10 of the Constitution safeguards equality before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds. Thanks to the phrase 'or any such grounds', grounds for prohibition of discrimination are just exemplary, not limited to those listed in the Article. Furthermore, a comprehensive law on anti-discrimination and equality has been drafted. The final text of the draft law is subject to the decision of the competent legislative authorities.[201]
>
> 150.31. Argentina's recommendation: Promote measures against discrimination based on sexual orientation and gender identity, including the investigation, and, where appropriate, the sanction of those responsible of acts of discrimination and violence against LGBTI persons.[202]
>
> Turkey's response: Already implemented.
>
> As in any democratic country governed by the rule of law, perpetrators of acts of discrimination and hate crimes against LGBTI persons are held to account and the judicial processes are diligently carried out. See also explanation 150.24 provided for recommendation.[203]

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[199] Ibid. para 149.32.

[200] Ibid. para. 148.128.

[201] UNHCR Twenty-ninth session 'Report of the Working Group on the Universal Periodic Review- Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review – Turkey' (10 June 2015) UN Doc A/HRC/29/15/Add.

[202] (n 198) para. 149.32.

[203] (n 201).

> 150.33. Chile's recommendation: Deal with cases of violence and discrimination based on sexual orientation, both in law and in practice, by publishing disaggregated data on complaints of violence against LGBTI persons.[204]
>
> Turkey's response: Not accepted. As there is no practice of publishing disaggregated data on complaints of violence against LGBTI persons. However, see responses to recommendations 150.31 and 150.24.[205]
>
> 150.34. Finland's recommendation: Focus on the overall implementation of its non-discriminatory provisions and to extend them to include the grounds of sexual orientation and gender identity. The implementation of overall anti-discrimination policies in Turkey should include all forms of discrimination.[206]
>
> Turkey's response: Not accepted. See response to recommendation 150.24.[207]

Another nine recommendations that proposed the adoption of SOGI into Turkish national legislation were postponed to be answered in the 30th meeting of UNHRC.[208] The Turkish representatives at the UPR review depicted Turkey's attitude towards its international obligations in these words*:*

> Out of the 278 recommendations, 215 enjoyed Turkey's support, some of them considered to be already implemented. This meant that Turkey had accepted roughly 80 per cent of the recommendations which was proof of its strong commitment to the Universal Periodic Review.[209]

None of these official responses mentions culture or traditional discourse in opposition to the national rhetoric articulated several times by the Turkish prime

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[204] (n 198) para. 12, 148.128.

[205] (n 201).

[206] (n 198) paras 12, 148.128.

[207] (n 201).

[208] (n 98) paras 12, 150.24, 150.25, 150.27, 150.28, 150.30, 150.31, 150.32, 150.33, 150.34.

[209] OHCHR, 'Human Rights Council adopts outcomes of Universal Periodic Review of Sweden, Grenada, Turkey and Kuwait' (26 June 2015). <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16157&LangID=E> accessed 13 July 2015.

minister, ministers and ruling party MPs. This controversy can be observed in Arinç's speech at the UN in January 2015, which stipulated that LGB individuals are protected under the Turkish legal corpus without any need for further legislation. He assured the international community that the absence of an explicit regulation addressing LGB individuals did not exclude them from legal protection, and that the inclusiveness of 'everyone' and 'and other such grounds' complied with the international legal trend that first emerged in the reasoning of the *Toonen v Australia*[210] decision delivered by the Human Rights Committee in 1994.[211] This also corresponds to the UN's stance that presumes that LGB rights are already embedded in the existing human rights conventions by placing the emphasis on the term 'everyone', thus there is no need for new legislation.[212] This is actually the minimal level of LGB rights expected from states. At this point, I would argue that, contrary to the intended outcome of this interpretation, the UN's approach provides justification for countries like Turkey to refrain from recognition of explicit LGB protection and allows a space for them to establish a pattern of hypocrisy.

The second emphatic point in Arinç's speech at the UN was the internalisation of the term 'sexual orientation' via ratification of the Istanbul Convention. It is remarkable to reiterate that in his more recent speech regarding Istanbul Pride he mentioned LGB persons as: 'These things are not liked in our belief, our

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[210] *Toonen v Australia* (n 59).

[211] Ibid. para 8.7.

[212] UNHRC, Nineteenth session Agenda items 2 and 8 'Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General' (17 November 2011) UN Doc A/HRC/19/41.

traditions, our customs and mores, and our society's structure'.[213] Notably, this tradition/morality narrative against LGB individuals has not been mentioned at the international level. Therefore, the Turkish authorities have adopted different strategies at the national and international levels to counter the LGB rights concept. There is a significant gap between their domestic and international discourse. This hypocrisy adds to the confusing pattern that may also be traced in ECtHR case law, which departs from the majority of LGB cases in the Turkish example. Turkey's attitude has resulted in unforeseen, arbitrary and, most likely, unintended consequences, which complicates analysing the legal situation of LGB persons in Turkey.

One of the recent practices that obscure Turkey's legal policy in terms of LGB rights is ratification of the Istanbul Convention. Despite the fact that national legislation about implementation of the convention excluded the term sexual orientation, Turkey ratified the Istanbul Convention as, according to Article 90 of the Turkish Constitution, the international version, which includes the term sexual orientation, prevails. It can be argued that even though at first sight the explicit wording of 'sexual orientation' might seem to contradict Turkey's LGB rights strategy, in fact it adheres to the rhetoric that underpins it, limiting LGB individuals' legal existence to the victim status of female LGB persons. If the text of the Istanbul Convention is read carefully, it will be seen that Article 4, the only provision including 'sexual orientation', addresses prohibition of

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[213] LgbtiNewsTurkey, 'Deputy Prime Minister Arinç Criticizes Istanbul Pride: "They Get Completely Naked in Broad Daylight"' (n 197).

discrimination regarding the measures to protect the rights of victims.[214] Therefore, the legal acceptance of LGB persons is circumscribed by the victim protection measures in domestic violence and violence against women cases, which meet the Turkish way of dealing with this relatively new international trend of LGB rights. This also corresponds to the aforementioned Turkish strategy that aims to maintain the minimal level of protection accepted by the international community.

Despite sharing with Russia a culture and tradition rhetoric against the LGB rights concept, Turkey's international attitude dramatically differs from Russia's.[215] While Russia champions anti-LGB rights campaign at the UN, Turkey maintains a low profile pertaining to LGB-related international developments. In this sense, Russia's domestic and international politics are coherent with each other. However, Turkey's politics mostly display fluctuations, if not contradicting its domestic rhetoric. On the one hand, Turkey has refrained from promoting the decriminalisation of homosexuality by declining to support a

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[214] Article 4(3)—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.

[215] The Federal Law 'On protecting children from information causing harm to their health and development' amended on 29 June 2013 to include prohibition of homosexual propaganda (or propaganda of non-traditional sexual relationships, in the language of the law) to minors. Federal Law No. 135-FZ of 29 June 2013 'On Amending Article 5 of the Federal Law "On Protecting Children from Information Causing Harm to Their Health and Development" and Other Legislative Acts of Russian Federation with the Aim to Protect Children from Information Promoting Renouncing of Traditional Family Values'. Official Russian Internet Portal for Legal Information <www.pravo.gov.ru> accessed 15 March 2015.

EU-sponsored amendment to the UN resolution on extra-judicial executions and other unlawful killings, which calls on all states to decriminalise homosexuality; it has also not voted for, or even abstained from any of the UN General Assembly and Human Rights Council resolutions relating to the LGB rights concept.[216] On the other hand, it does not participate in the opposite coalition, headed by Russia, which promotes 'traditional values' against the rise of LGB rights.[217] It is evident that Turkey has opted to maintain silence about LGB issues at the international level. Given this situation, it may be concluded that Turkey declines to articulate a position on LGB issues at the international level.[218] Nevertheless, Turkey demonstrated an inconsistent stance on this position by voting in 2016 in favour of the mandate of the independent expert on protection against violence and discrimination based on sexual orientation and

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[216] UNHCR Res 57/214 (25 February 2003) UN Doc A/RES/57/214; UNHCR Res 59/197 (10 March 2005) UN Doc A/RES/59/197; UNHCR Res 61/173 (19 December 2006) UN Doc A/RES/61/173; UNHCR Res 63/182 (16 March 2009) UN Doc A/RES/63/182; UNHCR Res 65/208 (30 March 2011) UN Doc A/RES/65/208; UNHCR Res 17/19 (17 June 2011) UN Doc A/HRC/RES/17/19; UNHCR Res 67/168 (15 March 2013) A/RES/67/168; UNHCR Res 69/182 (30 January 2015) UN Doc A/RES/69/182; UNHCR Res 32 (26 September 2014) UN Doc A/HRC/RES/27/32; UNHCR Res 32/2 (30 June 2016) UN Doc A/HRC/RES/32/2.

[217] UNHCR Res 57/214 'Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind' (25 February 2003) UN Doc A/RES/57/214.

[218] Thomas Risse and Stephen C. Ropp, 'International Human Rights Norms and Domestic Change: Conclusions' in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, first published 1999, 2007) 234–278; Leslie Moran, *The Homosexuality of Law* (Psychology Press 1996).

gender identity.[219] This voting happened right after Turkey's ban and brutal police attacks on Istanbul Pride for the second consecutive year.[220]

Indeed, Turkey's method of fulfilling its international obligations could even have the effect of worsening the situation for LGB individuals. This can be exemplified through Turkey's reaction to an ECtHR decision *X v Turkey*,[221] in which the solitary confinement of a gay prisoner as a measure to prevent possible homophobic incidents from other prisoners was found to be in violation of the convention. In an action which was far from the actuality of the findings of the ECtHR, Turkey used this decision as grounds to establish an LGBTI prison.[222] The Turkish Ministry of Justice stated in a written response to a parliamentary question that it was planning to build separate prisons to ensure the safety of LGBTI prisoners, as addressed in the *X v Turkey* judgment.[223] Moreover, the method they chose to distinguish LGBTI prisoners from others was twofold: prisoners who proclaimed themselves to be LGBTI, and others whose status would be determined through a medical examination, which would

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[219] A/HRC/32/L.2/Rev.1 (n 54); UN SOGI Expert voting results (n 58).

[220] Pride Istanbul Official Page <http://en.prideistanbul.org/home> accessed 20 September 2017.

[221] *X v Turkey* (n 99).

[222] Bekir Bozdag (Minister of Justice), Official respond to a parliamentary query of MP Veli Agbaba regarding the problems of vulnerable prisoners including LGBTs (issue no 56020453/2013–610.01–969/725/1283, 2 April 2014) <http://www2.tbmm.gov.tr/d24/7/7–33830sgc.pdf> accessed 19 April 2015; Huffington Post, 'Turkey's Separate Gay Prisons Plan Angers Local LGBT Groups' (14 April 2014) <http://www.huffingtonpost.com/2014/04/15/turkey-gay-prison-plan-_n_5153478.html> accessed 15 April 2015; Safak Timur, 'LGBT'lere Ozel Hapishane: Tecrit mi, guvenlik mi?' (19 April 2014) <http://www.bbc.co.uk/turkce/haberler/2014/04/140417_lgbt_ozel_hapishane> accessed 15 April 2015.

[223] Ibid.

most likely bring about severe human rights violations of LGBTI prisoners. As contrived as it may sound, this attitude endorses Pinar Ilkkaracan's argument that the strategy of the Turkish state regarding LGB individuals has ranged from non-recognition to absolute discrimination in an increasingly hostile fashion.[224] Following her argument, it can be added that this hostile fashion has been developed through pitfalls in international law.

As has been shown, Turkey's LGB rights policy targets the minimum internationally acceptable level. Furthermore, Turkey benefits from an overstatement of LGB rights in that homosexuality is not explicitly classed as a penalty within the Turkish Penal Code. The EU accession process has been the prominent motivation for human rights reforms through legal transplantation, and has overlapped with the emergence of the LGB rights concept and the rise of a neo-liberal conservative Islamic government in Turkey. A recent study demonstrates that inclusion of LGB individuals into social life through legal recognition is in a positive correlative to economic development.[225] Although a significant correlation was found between these two factors, the results of this study could not discern whether economic development necessitates LGB inclusion, or whether the recognition of LGB rights paves the way for economic development. However, the figures reveal that 'it is very likely that LGBTI

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[224] Pinar Ilkkaracan,'Democratization in Turkey from a gender perspective' in C. Rodriguez, A. Avalos, H. Yılmaz and A. I. Planet (eds), *Turkey's Democratization Process* (Routledge 2014) 171.

[225] Mary Virgina Lee Badgett, Sheila Nezhad, Kees Waaldijk and Yana van der Meulen Rodgers, 'The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies' (November 2014) <http://www.usaid.gov/sites/default/files/documents/15396/lgbt-inclusion-and-development-november-2014.pdf> accessed 21 May 2015.

inclusion and economic development are mutually reinforcing each other'.[226] There is no doubt that indicators of economic development are measured according to neo-liberal values. Economic development actually means the implementation of neo-liberal policies. As such, the findings of this study correspond with the fact that the LGB rights concept functions as an imperialistic instrument to the service of the neo-liberal system and divides civilised from savage and developed from undeveloped.[227] The Turkish government is willing to comply with neo-liberal global policies. However, this is coming at the price of LGB recognition. As was explained earlier, the LGB rights concept coincides with neo-liberal ideals.

Economic development, especially through potential EU membership, is a major motivation for Turkey and could be the reason why LGB rights are following a very different route in Turkey when compared with countries that already have LGB rights in their legislation. However, a number of studies concur with the finding that the EU accession process plays the most significant role in relation to the LGB movement.[228] In addition to this, EU and some Western countries have been funding LGB associations for over a decade.[229] This subtly shapes the non-governmental LGB political scene in accordance with the Western-

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[226] Ibid.

[227] Rahul Rao, 'Global Homocapitalism' (2015) 194 Radical Philosophy 38–49.

[228] Volkan Yilmaz and Sinan Birdal, 'LGBT Rights in Turkey: The Long Road to Tolerance' (2012) The Turkish Review, 5th issue, 2nd volume; Serkan İlaslaner. 'LGBT Movement in Turkey: Genealogy, Particularity and Embeddedness into a Broader Universe' (April, 2014) III(4) ResearchTurkey 25–42 (April, 2014); Louis A. Fishman, 'Turkey and Lgbt Rights: A Historical and Global Perspective' (2013) 11(4) Turkish Policy Quarterly.

[229] Louis A. Fishman, 'Turkey and LGBT Rights: A Historical and Global Perspective' (2013) 11(4) Turkish Policy Quarterly.

fabricated LGB rights concept. Thus, this concept of LGB rights remains the only way to speak the language of rights. In either case, it is evident from all these discussions that Turkey does not want to be internationally classed with those countries that are explicit in their opposition to the LGB rights concept. The motivation for this may be controversial. Nevertheless, hypocrisy has led to this conclusion.

To sum up, it can be clearly seen that Turkey is under pressure from international institutions, pro-LGB MPs and the national LGB movement to convince the resistant state to introduce LGB-inclusive laws.[230] Moreover, certain NGOs and political groups have escalated their support for the LGB agenda, especially after the LGB bloc's direct and visible involvement at the Gezi Park uprising in 2013.[231] All these developments led to a presumption that Turkey would normatively adopt LGB rights eventually; at the very least, data on the composition of the parliament in 2015 suggested that political pressure in favour of LGB rights would increase. However, the political atmosphere dramatically changed in Turkey after the 2015 elections. Turkey's EU accession process is not progressing as had been assumed, especially following Turkey's declared state of emergency. These developments weaken the instruments that would facilitate the introduction of the LGB rights concept in Turkey.

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[230] Ibid.

[231] Sezen Yalcin, 'Civil Society In Turkey's Shrinking Political Space' (2015) 13(4) Turkish Policy Quarterly.

2.3 Conclusion

This section has investigated Turkey's encounter with the LGB rights concept. In parallel with the findings of the first section, the common element underpinning the counterarguments in Turkey appears to be the narrative of 'tradition'. There is no doubt that the Turkish state is not receptive to the LGB rights concept. There are two important manifestations of this opposition. Firstly, sexual orientation initially appears from the weakest, the most problematic provisions of Turkey's human rights record, instead of following the demands of LGB individuals/associations. This low ranking hinders Turkey from explicitly resisting international pressure, and from this point hypocrisy emerges. Secondly, and correspondingly, Turkey dissembles its actual LGB policy by embodying a hypocritical attitude towards the international thresholds. This Turkish style of hypocrisy is often described as a two-steps-forward-one-step-back strategy, whereby Turkey draws on the pitfalls of the international human rights system and portrays an unusual attitude that also creates an illusion of 'development'.[232]

The above connects with the central focus of this research, namely legal transplantation, in two ways. Firstly, this vicious circle of law-making progress contributes to inaccurate assumptions made through Western structures and overlooks the fact that the Turkish/Ottoman legal chronicle might have a different experience with same-sex attraction, and this might be blurring the line

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[232] Emre Peker, 'Turkey's Janissary March to Join EU: Two Steps Forward, One Back' (5 December 2013) <http://blogs.wsj.com/emergingeurope/2013/12/05/turkeys-janissary-march-to-join-eu-two-steps-forward-one-back> accessed 21 May 2015.

between decriminalisation and criminalisation in the present time. Turkey's law-making method, legal transplantation, seems to be creating a state of oscillation in which the legal situation of LGB individuals is becoming unintelligible through Western structures such as decriminalisation. As outlined in the previous section, the LGB rights concept develops through the benchmarks of decriminalisation. Thus, respect for the private sphere, equality and prohibition of discrimination provisions, which were foundational in the decriminalisation of homosexuality, are also bedrocks for the LGB rights concept. In other words, concepts that played a role in decriminalisation have also shaped the content of LGB rights. This section explained that these principles, which are a prerequisite for the LGB rights concept to function, operate in a different framework within Turkish jurisprudence. This can also be observed through a bizarre concept of decriminalisation, where contemporary Turkey's formal opposition to LGB-related claims are on the level of arguments that were used to oppose the decriminalisation of homosexuality within ECtHR case law during the 1970s and 1980s. In other words, the contemporary Turkish narrative is consistent with the courts' standpoint before and during *Dudgeon*, when homosexuality was associated with morality and health issues, and state control over it was considered legitimate. Yet Turkey is classed as a country that has decriminalised homosexuality.

It is thus necessary to investigate the decriminalisation process in the Turkish legal history in an attempt to unravel the legal benchmarks for decriminalisation in that jurisdiction. Regarding the constructive effect of decriminalisation on the LGB rights concept, misinterpretation of the decriminalisation of homosexuality in Turkey will no doubt lead to fallacious conclusions. Thus, the most

widespread assumption that homosexuality was decriminalised in 1858 during the Ottoman Empire through the adoption of 1810 French Penal Code needs to be investigated.

Secondly, the culture and tradition argument generated by Turkey requires further elaboration. Given the long tradition of legal transplantation, Turkey's legally synthetic nature casts a doubt on authenticity of these arguments. The question is how, if Turkey had implanted Western laws since the 19th century, it had preserved its tradition and culture? If the legal lexicon has already been replaced by Western laws, how should we describe tradition and culture in Turkey? Turkey's dependency on Western legislation urges us to further investigate and unfold the legal tradition of Turkey regarding same-sex attraction through Turkish and Ottoman legal history, upon which the next chapter will embark.

Chapter 3 The first legal transplant: Decriminalisation of homosexuality by the Ottoman Empire in 1858

3.1 Introduction

In this chapter I revisit the first legal transplant regarding the LGB rights concept within the Turkish corpus: the decriminalisation of homosexuality by the Ottoman Empire in 1858 through the adoption of the 1810 French Penal Code. As mentioned in Chapter 2, the decriminalisation of homosexuality is considered to be the baseline of the LGB rights concept. This chapter provides a historical and critical investigation of the first legal implant of the LGB rights concept within the Ottoman penal regime and will critically analyse what happened in the name of decriminalisation in 1858.

3.2 Criminalisation of same-sex desire in the Ottoman era

3.2.1 Why looking at the history of criminalisation is a prerequisite

Numerous sources report that Turkey decriminalised homosexuality earlier than many other European countries through its adoption of the 1810 French Penal Code in 1858 during Ottoman times.[1] That said, there has never been any

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[1] United Nations Free and Equal Campaign video, decriminalisation map <https://www.unfe.org/the-history-of-the-right-to-love-if-youre-gay/> accessed 19 September 2017; sources of the map: ILGA, Britannica, BBC, Human Rights Watch, OutRight Action International, Equaldex, Stonewall, Gay and Lesbian Archives of the Pacific Northwest, and Journal of African Law, Routledge International Encyclopedia of Queer Culture, and GLBTQ Archives; Kees Waaldijk, 'The Legal and Sexual Recognition of Homosexuality in the Netherlands' in Robert Wintemute and Mads Tønnesson Andenæs (eds), *Legal Recognition of Same-sex Partnerships: A Study of National, European and International Law* (Hart Publishing 2001); Aimilla Vaulvouli, 'LGBT movements, Biopolitics and New Criminology a Preliminary Research' in Stratos Georgoulas (ed.) *The Eastern Mediterranean Region The Politics of Criminology: Critical Studies on Deviance and Social Control* (Lit Verlag 2012); Pierre Hurteau, *Male*

scholarly study that actually examines this claim to determine whether or not it is true. The concept of decriminalisation as it relates to homosexuality emerged from within Western legal history and is framed by Western legal theory. It refers to the legalisation of consensual private sexual activities.[2] There is a tendency to assess a country's status regarding the criminalisation of homosexuality from this Western benchmark without looking at the specific country's legal history and experience in relation to same-sex desire.

This line of analysis is problematic in numerous ways. Firstly, it is limited to consensual private-sphere same-sex conduct, which is how Western criminal theory draws the line for homosexuality. Secondly, this line of assessment also

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Homosexualities and World Religions (Palgrave Macmillan 2013) 145; Kees Waaldijk, 'Civil Developments: Patterns Of Reform in the Legal Position of Same-Sex Partners In Europe' (2000) 17 Can J Fam L 62; Tehmina Kazi,'The Ottoman Empire's Secular History Undermines Sharia Claims' (7 October 2011) <http://www.theguardian.com/commentisfree/belief/2011/oct/07/ottoman-empire-secular-history-sharia> accessed 21 June 2015; ILGA, State-Sponsored Homophobia 2014 (2015) <http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf> accessed 21 June 2016; Daniel Ottosson, 'LGBT World Legal Wrap Up Survey' (2006) ILGA <https://www.stonewall.org.uk/documents/world_legal_wrap_up_survey__november2006_1.pdf> accessed 21 June 2015; Achim Hildebrandt, 'Routes to Decriminalization: A Comparative Analysis of the Legalization of Same-Sex Sexual Acts' (2014) 17(1–2) Sexualities 230–253; E Bruce-Jones and LP Itaborahy, 'State-Sponsored Homophobia. A World Survey of Laws Prohibiting Same-Sex Activity between Consenting Adults' (2011) <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia> accessed 21 June 2016; Aengus Carroll and Lucas Paoli Itaborahy, 'A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love 2015' (2016) <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf> accessed 4 March 2016; Aengus Carroll and Lucas Paoli Itaborahy, A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf> accessed 4 March 2016; Equaldex, 'LGBT Rights in Turkey' <http://www.equaldex.com/region/turkey> accessed 13 September 2017.

[2] Carrie L Buist and Emily Lenning, *Queer Criminology* (Routledge 2016) 2, 26.

presumes that every country has had the same historical experience in terms of criminalising sodomy/same-sex desire and thus one single framework for decriminalisation would legalise homosexuality. This pattern of thought presumes that there is one recipe for decriminalisation, which would improve the legal status of homosexuality in all jurisdictions. In other words, any country complying with the Western benchmark is deemed to have decriminalised homosexuality. The consequence of this problematic and universalist[3] standard for decriminalisation leads us to question whether using this Western benchmark as a way of certifying which countries have decriminalised homosexuality is a secure method or instead one that leads to speculative and false conclusions as neo-orientalist artefacts.[4] This chapter argues that the legal and academic framework of the decriminalisation of homosexuality depicts another imperialist feature of legal transplantation by disregarding non-Western legal history, thereby making it insignificant and immaterial for law-making. In this sense, subjecting these analyses to scrutiny will also contribute to decolonising the framework of the decriminalisation of homosexuality itself.

By way of explanation, the Ottomans went through a comprehensive penal reform during the late 19th century. They adopted the 1810 French Penal Code, which had been influential throughout Europe at that time. The contentious

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[3] This thesis uses the universal as in Judith Butler's definition. The universal is always incomplete and parochial. In this sense, the Western claim for universality is related to its hegemony, which gives the West the power to define and redefine the thresholds of what is universal. In this thesis, the terms universal and universality will address this Western hegemony in standard setting in a critical sense. Judith Butler, Ernesto Laclau and Slavoj Zizek, *Contingency, Hegemony, Universality* (Verso 2000).

[4] Rahul Rao, 'The Location of Homophobia' (2014) 2(2) London Review of International Law.

article of the 1858 Ottoman Penal Code that this chapter is examining is as follows:

> Art. 202—The person who dares to commit the abominable act publicly contrary to modesty and sense of shame is to be imprisoned for from three months to one year and a fine of from one Mejidieh gold piece to ten Mejidieh gold pieces is to be levied.[5]

This is a translated version of Article 330 of the French Penal Code, which decriminalised homosexuality in France.[6] In reality, this is a partial decriminalisation, which reduces decriminalisation to the legalisation of the private-sphere same-sex activities. In his study, Kees Waaldijk looked at the standard sequences in the legal recognition of homosexuality in Europe. He identified that the decriminalisation process appears as the first stage of what is called the LGB rights concept. The decriminalisation amounts to the legalisation of private same-sex acts/sex, whereas public displays of affection are separated from decriminalisation.[7] The baseline for legal recognition of same-sex desire is, therefore, decriminalisation. Following his insight, decriminalisation creates a ground for legal recognition in the European context. It is a common practice within scholarly studies to examine a country's legal status regarding same-sex relations in accordance with these Western indicators.

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[5] Penal Code of the Ottoman Empire (1858) <https://archive.org/stream/TheImperialOttomanPenalCode/OttomanPenalCode#page/n167/mode/2up> accessed 11 June 2015.

[6] This affirmed and maintained the position taken by the 1791 French Penal Code regarding the decriminalisation of homosexuality.

[7] Kees Waaldijk, 'Standard Sequences in the Legal Recognition of Homosexuality, Europe's Past, Present and Future' (1994) 4 Australian Gay and Lesbian Law Journal.

Although these classifications reflect European legal history, its universalisation has brought about a tendency to assess a country's status regarding the decriminalisation of homosexuality through this Western benchmark, without looking at this country's legal history and experience with homosexuality. This approach is evident in the 2015 world survey of state-sponsored homophobia, sponsored by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), which listed Turkey as a country that decriminalised homosexuality in 1858. The survey defines decriminalisation of homosexuality as either the abolition of laws criminalising consensual same-sex acts in private or no mention of same-sex intimacy in the penal codes.[8] These assessment criteria follow the Western formulation of decriminalisation of homosexuality. The ILGA report provides a typical example of how non-Western states are assessed through Western formulations of the decriminalisation of same-sex intimacy:

> [Decriminalisation] 1858 The Turkish Imperial Penal Code of 1858 (thought to be based on the 1810 French Penal Code) makes no mention of consensual same-sex sexual acts between adults, and neither does the current Penal Code.[9]

However, prior to 1858, there were two other Ottoman penal codes (1840 and 1851), which did not mention consensual sodomy or private same-sex acts. As I will examine in detail later, the significant difference between those penal codes is that the 1858 code adopted the French Penal Code, which was the most

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[8] Carroll and Itaborahy (n 1).

[9] Aengus Carroll and Lucas Ramon Mendos, 'A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love 2016' (2017) <http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf> accessed 11 September 2017.

influential penal code in Europe in terms of decriminalising homosexuality, whereas the 1840 and 1851 codes did not borrow from any European penal codes.[10] This allows me to conclude that there is a disposition to read a legal reform based on legal transplantation through the legal consequences of that legislation brought about in the parent jurisdiction. In other words, the parent jurisdiction's legal history (France) is replaced with the law-taker's history (the Ottomans), with no reference being made to the law-taker's history when analysing the decriminalisation. As mentioned before, it is very problematic that, although numerous sources refer to the 1858 penal reform as Turkey's decriminalisation of homosexuality, I have not come across any scholarly work that examines that legal reform with reference to pre-1858 conditions. Similar to the ILGA report mentioned earlier, other sources that state decriminalisation of homosexuality in Turkey as happening in 1858 seem to arrive at that conclusion, relying on the absence of punishments assigned to private same-sex activity in the 1858 Penal Code. The fact that the borrowed French Penal Code decriminalised homosexuality in its own jurisdiction led to a presumption of the same impact within the Ottoman realm, without looking at how the Ottomans criminalised homosexuality before that penal reform. This Western-centric approach later brought about an invisibility in queer criminology studies, as argued by Jordan Blair Woods. He asserts that criminological studies relating to decriminalisation decreased dramatically after the 1970s, when private same-

[10] Tobias Heinzelmann, 'The Ruler's Monologue: The Rhetoric of the Ottoman Penal Code of 1858' (2014) 54 Die Welt Des Islams 292–321; Prof. Dr Ahmed Akgündüz, *Osmanli Kanunnâmeleri ve Hukukî Tahlilleri, Cilt I* (Osmanli Arastirma Vakfi 2006).

sex intercourse did not constitute a crime in the majority of the West.[11] Following Wood's insight, decriminalisation studies shifted to assess non-Western states' compliance in relation to the Western threshold. This facet led to a fabrication of the LGB rights concept in the service of neo-colonialism in the sense that the non-West's civilisation status is determined according to their deployment of the LGB rights concept as fabricated by the West.[12]

At this point, I would suggest a further and critical evaluation of the decriminalisation of homosexuality[13] in Turkey through an examination of its history of criminalisation. Investigating the Ottoman penal regime before 1858 seems to offer an anti-imperialistic way of analysing the decriminalisation of homosexuality. This trajectory can emancipate the analysis from Western-centric indicators. Using Western history as a threshold leads to the association of decriminalisation of homosexuality with the absence of penalties prescribed for private same-sex intercourse. However, the decriminalisation of homosexuality cannot be a fixed term; its content varies according to different

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[11] Jordan Blair Wood, 'The Birth of Modern Criminology and Gendered Constructions of Homosexual Criminal Identity' (2015) 62(2) Journal of Homosexuality 131–166; Momin Rahman, 'Triangulation of Western Exceptionalism' (2014) 13 Journal of Human Rights 274–289; Katerina Dalacoura, 'Homosexuality as Cultural Battleground in the Middle East: Culture and Postcolonial International Theory (2014) 35(7) Third World Quarterly 1290–1306.

[12] Rahman (n 11).

[13] Although it is referred to as decriminalisation of homosexuality in modern legal language, it is indeed decriminalisation of same-sex intimacy. Some refer or translate the historical appearance of same-sex relations as sodomy. However, sodomy covers other sexual behaviours as well, thus not specifically a term for same-sex desire. I will refer to sodomy where it only means same-sex intercourse/relation. I will use same-sex intercourse/desire/relation more frequently.

legal cultures. Decriminalisation means that what was criminalised is no longer a crime. As such, decriminalisation of same-sex relations must occur in different formulations according to how it had been criminalised before. For instance, a country that has never criminalised same-sex relations cannot be analysed using the same indications as a country which imposed the death penalty for homosexuality. Accordingly, it seems necessary to verify a country's decriminalisation status by referring to its own legal history, to what the punishment for same-sex intercourse/sodomy was before decriminalisation in accordance with Western standards. This has the potential to unravel the myth of decriminalisation of homosexuality in Turkey in 1858. I will proceed by addressing this question regarding the Ottoman/Turkish legal history in order to deconstruct what exactly happened through the adoption of the French Penal Code, which is deemed to have decriminalised homosexuality in the Ottoman Empire and Turkey in 1858.

3.1.2 Sexual penal regime and criminalisation of same-sex relations in the Ottoman Empire

The Ottoman Empire's legal system operated through legal pluralism, meaning that there were multiple judicial systems coexisting at the same time, allowing people living under the Ottoman jurisdiction to do forum shopping.[14] Religious and state courts had different duties; minorities were allowed to establish their own religious courts, which were limited to ruling on family and personal issues; whereas criminal, tax, and land law issues were centralised and governed by

[14] Avi Rubin, *The Ottoman Nizamiye Courts Law and Modernity* (Palgrave Macmillan 2011) 67.

state law.[15] People were categorised according to their religion (or, in rare cases, their ethnicity). Their rights, in other words, were allocated according to their religious grouping. It can, therefore, be said that Ottoman citizenship was built on collective rights, which is often referred to as the millet system.[16]

In terms of public law, especially criminal law, shari'a laws could not be imposed on the non-Muslim population. This led to Ottomans employing a unified public law that would apply to all citizens but maintaining a plural legal system in relation to private law.[17] The Ottomans began to adopt a unified, singular penal regime in the 15th century. Contrary to the common practice within Islam, the Ottomans had sultan-drafted, secular criminal laws, which were operational alongside Sharia laws. The first Muslim sultan known to introduce a secular criminal law was Fatih Sultan Mehmet (15th century).[18] By doing this, the Ottoman Empire of the era revealed its own understanding of secularism.[19] Although secular and religious laws coexisted within the Ottoman legal system, the Sultans' intervention within the area of religious law could be regarded as

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[15] Karen Barkey, Aspects of Legal Pluralism in the Ottoman Empire, in Lauren Benton and Richard J. Ros (eds), *Legal Pluralism and Empires 1500–1850* (NYU Press 2013) 83–107.

[16] Ruth A. Miller, 'Rights, Reproduction, Sexuality, and Citizenship in the Ottoman Empire and Turkey' (2007) 32(2) Journal of Women in Culture and Society.

[17] Heinzelmann (n 10).

[18] Akgündüz (n 10) 131.

[19] Kent F. Schull, 'Comparative Criminal Justice in the Era of Modernity: A Template for Inquiry and the Ottoman Empire as Case Study' (2014) 15(4) Turkish Studies 621–637.

one of the initial signs of Ottoman secularism.[20] It is worthwhile mentioning that there is a disagreement between Turkish scholars in terms of criminal codes introduced by Ottoman sultans. Some argue that these codes were not altering the punishments prescribed by shari'a. They were downgrading *hadd* crimes (crimes listed in the Quran) to *ta'zir* crimes (crimes not listed in the Quran), when strictly framed *hadd* crimes could not be proved. Therefore, state authorities could decide the level of punishment and this was complementary to shari'a.[21] However, this assessment is refuted by some other scholars on a number of levels. Firstly, they stress the wording of these Ottoman Penal Codes, in which it is mentioned that these crimes should be proven according to the Quran. This meant that the standard of proof was not changed but the punishments were set differently than that the Quran imposed.[22] Secondly, it was argued that these laws were in compliance with the Quran and only filled gaps in application. However, in the Ottoman example, the codifications made by the sultans went further to recast penalties for adultery (*zina*), which is listed as a crime in the Quran. Another explanation for these secular codes could be drawn from the fact that the Ottomans were following the Hanafi school of law,

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[20] The process of systemic codification started with Beyazid II (1481–1512): Colin Imber, *Ebu's-suùd: The Islamic Legal Tradition* (Edinburgh University Press 1997) 40–57.

[21] Ömer Lütfi Barkan, 'Kanunname' (1999) VI İA. 186, 194; Halil İnalcık, 'Türk Devletlerinde Sivil Kanun Geleneği' (1999) 58 Türkiye Günlüğü 10.

[22] Cihan Osmanağaoğlu, 'Klasik Dönem Osmanli Hukukunda Zina Suçu ve Cezasi' (2008) LXVI İÜHFM C 109–178; İsmail Acar, 'Islamic Criminal Law And Ottoman Criminal Codes' (2001) XIII–XIV D.E.Ü.İlahiyat Fakültesi Dergisi Sayı 53–68; Akgündüz, Kanunnameler (n 10) 70–71.

which allowed accommodation for state-made penal codes for the crimes that were categorised as *taz'ir*.[23]

Another source of law-making was *fetvas* in the Ottoman Empire. *Fetvas* were legal opinions of high-profile jurists.[24] Despite having weight within legal practice, they were not binding as the sultans' codifications were. The *kadis* (judges) were not compelled to comply with *fetvas*[25] and were able to disregard them. However, if the *fetva* was one promulgated by Seyh-ul Islam (the head of legal affairs in the Empire) then the judge should provide legal reasons referring to shari'a and the laws of the sultan.[26] The main aim of the *fetvas* was to solve complicated legal issues that had not been addressed by the Quran and/or the sultans' laws.[27] In practice, though, very basic issues and other issues already addressed in the Quran and sultans' codifications were directed to the *fetvahanes* (*fetva* houses). This did not create turmoil in practice as *fetvas* did not supersede either the Quran or the sultans' laws.

Another source would be case law relating to the penalties incurred in legal practice for same-sex intercourse. Given that the Ottoman legal system extended to three continents, the entire Ottoman legal archive is impossible to examine. I have narrowed down my examination to 36 volumes of case law archives from different legal jurisdictions in Istanbul including Rumeli, Galata,

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[23] Akgündüz Kanunnameler (n 10) 131.

[24] Uriel Heyd, 'Some Aspects of the Ottoman Fetvā' (1969) 32(1) Bulletin of the School of Oriental and African Studies, University of London 35–56.

[25] Ibid.

[26] Ibid.

[27] Ibid.

Uskudar, Eyup and Haskoy. Istanbul provides a good sample for this research. As the capital city, it was habituated by a variety of nations and religions living under the reign of the Ottomans and mirrors a broad range of Ottoman penal history. Secondly, the case law from this area has been translated into old Turkish, which I can understand without a need for a translator.

My analysis focuses on the sultan-drafted penal codes in seeking to unravel the decriminalisation narrative and the penal regime towards same-sex intimacy within the Ottoman Empire. As this research examines law/right-making mechanisms, an essential aspect of my examination must be the substantive law and how it is made. Moreover, sultan-made laws were binding penal codification alongside with the Quran.

My rationale for disregarding a multitude of *fetvas* is threefold: they were not binding, they were not codified and, despite being authoritative and having some weight in the legal system, they were legal opinions and not laws. Perhaps most importantly, they were formulated as short expressions, no longer than a sentence, and in many cases the answer consisted of just one word: yes or no.[28] The exception to this format is when a Sultan asked for the legal opinion of a Seyh-ul Islam. In this case the answer, the *fetva*, would be a long text with references to the Quran, secular laws, precedents and legal reasoning. An example for a *fetva* can be given from Ebu Suud Efendi, the Seyh-ul islam of Kanuni Sultan Suleiman:

> Question: Zeyd hurts his wife Hind in many ways. If the *kadi* [judge] knows about it, is he able to separate Hind from Zeyd?

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[28] Ibid.

Answer: He is able to prevent his hurting her by any means possible.[29]

Sometimes *fetvas* might contradict each other. Nonetheless, as they were not binding, they could not reflect the formal penal regime of the Ottoman as powerfully as the sultan-drafted binding laws. *Fetvas* could not contradict the sultan's laws and thus did not have the power to introduce a new and different penalty to the ones inscribed by the sultan.[30] However, I will mention *fetvas* when necessary to give a broader sense of the legal atmosphere regarding the de/criminalising of same-sex intimacy.

At this point, whether same-sex intercourse/sodomy was one of the crimes listed in the Quran (*hadd* crimes) gains importance.[31] Interpretation of same-sex relation/intercourse/intimacy in the Quran deserves further elaboration. Not all Islamic legal scholars interpret the Quran in exactly the same manner regarding its attitude towards same-sex conduct. While they are largely in agreement that sodomy/*livata*/same-sex intercourse was not an approved manner of sexual intercourse, dispute rests upon the nature of the punishment that should be employed.[32] Since the Quran does not explicitly refer to homosexuality, Islamic legal scholars make conclusions about the appropriate penalty by drawing an analogy with other sexual rules, and the Prophet Lot's story, that is, the tale of

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[29] Elyse Semerdijan, Gender Violence in Kanunnames and Fetvas in Amira El-Azhary Sonbol (ed.), *Beyond the Exotic: Women's Histories in Islamic Societies* (Syracuse University Press 2005) 191.

[30] Heyd, 'Some Aspects of the Ottoman Fetvā' (n 24) 35–56.

[31] Samar Habib, *Islam and Homosexuality, Volume 1* (Greenwood Publishing 2010) 210.

[32] Ibid.

Sodom and Gomorrah in the Bible.[33] McBrayer has stressed that Sodom and Gomorrah has also been referential for Christian scholars in reaffirming that homosexuality is a morally wrong behaviour.[34] The nature of the punishment for homosexuality constitutes a long-standing debate for Islamic scholars. Scholars such as Imam Maliki, Imam Shafi Zuhri, Said B. Museyyeb and Suyani Sevri accept that homosexuality is implicitly classed as a crime (or crimes) in the Quran, and therefore falls under the scope of *hadd*[35] punishments.[36] By drawing a parallel between fornication, adultery and homosexual conduct, they argue that the punishment should be stoning to death (*recm*).[37] Yet, scholars such as Ebu Hanafi, Immaiye and Zahiriye counter this assumption that homosexuality was implicitly one of the *hadd* crimes listed in the Quran.[38] They disagree with

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[33] Genesis 18:20–19:29.

[34] Justin P. Mcbrayer Christianity, 'Homosexual Behavior and Sexism' (2012) 11(31) Think 47–63.

[35] Hugh Kennedy, 'Al-Jahiz and the Construction of Homosexuality at the Abbasid Court' in April Harper and Andaroline Proctor (eds), *Medieval Sexuality; A Casebook* (Routledge 2008):

(1) Provisions regarding offences against persons, i.e. homicide and wounding, subdivided into (a) those regarding retaliation (qis.as.) and (b) those regarding financial compensation (diya). (2) Provisions regarding offences mentioned in the Koran and constituting violations of the claims of God (huquq Allah), with mandatory fixed punishments (hadd, plural hudud); these offences are: (a) theft (b) banditry (c) unlawful sexual intercourse (d) the unfounded accusation of unlawful sexual intercourse (slander) (e) drinking alcohol (f) apostasy (according to some schools of jurisprudence). (3) Provisions concerning discretionary punishment of sinful or forbidden behaviour or of acts endangering public order or state security (tazir and siyasa).

[36] Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press 2006) 7.

[37] Kennedy (n 35).

[38] Javaid Rehman and Eleni Polymenopoulou, 'Is Green a Part of the Rainbow? Sharia, Homosexuality, and Lgbt Rights in the Muslim World' (2013–2014) 37

the affiliation of *livata* (sodomy) with heterosexual adultery since *livata*, by its very nature, does not result in procreation, and thus is not capable of ruining a lineage.[39] In light of these discussions, the Hanafi school of law departs from other schools in Islam by largely accepting that sodomy falls under the scope of the *ta'zir* crime type, is a minor crime as not listed in the Quran, and its regulation should, therefore, be left to the *kanun* (secular law).[40] In other words, the punishment for sodomy would depend on the discretion of the state where *livata* (sodomy) had taken place.[41] Hanafi jurisprudence did formulate secular

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Fordham Int'l L J 1; Kennedy (n 35); Sara Omar, 'From Semantics to Normative Law: Perceptions *of Liwat* (Sodomy) and *Sihaq* (Tribadism) in Islamic Jurisprudence (8–15 Century CE)' (2012) 19 Islamic Law and Society 222–256.

[39] Kennedy (n 35).

[40] Habib (n 31) 210; Akgündüz, Osmanli Kanunnâmeleri ve Hukukî Tahlilleri, Cilt I (n 10) 131; Prof. Dr Ahmed Akgündüz, Osmanli Kanunnâmeleri ve Hukukî Tahlilleri, Cilt II (Osmanli Arastirma Vakfi 2006) 13.

[41] 'The Difference between HADD and TAZIR Punishments:

'The major differences between these two are: Hadd is applied for most serious crimes while Tazir is applied on relatively minor crimes

'The objective of Hadd is prevention of a crime by following the principle of retaliation and keeps everyone in the limits prescribed by Allah

'To object of Tazir is reformation and correction of the offender

'The procedure of trial in Hadd is complicated. The procedure of trail in Tazir is simple as according to same jurists judge can even render judgement on the basis of his own knowledge

'The penalty of Hadd cannot be commuted while the penalty of Tazir can be commuted

'Pardon cannot be granted in Hudud (plural of hadd) cases but the Judge has right to Pardon the Rapist in Tazir cases

'In Hudud, the standard of evidence is very high as to the number and qualification of witnesses and the conditions under which hadd may be imposed and any doubt would be sufficient to prevent the imposition of hadd

state laws for punishment, and recommended options ranging from physical chastisement to the death penalty; only early Hanafi scholars are reported to have excluded the death penalty from the list of punishments for sodomy.[42] Yet these options allowed the Ottomans to determine their own appropriate punishment for sodomy[43] as they were following Hanafi jurisprudence.[44]

One final point is made by Semerdijan, who notes that the unsettled dispute regarding the classification of sodomy within Islamic legal circles of the time leaves room for differing and tolerant attitudes towards this act.[45] In particular, followers of the Hanafi school of law were allowed to introduce a secular penalty for sodomy. As same-sex relations and sodomy were considered *ta'zir* crimes, which were left to the sultan's discretion and state penal codes, I will focus on the sultan-drafted secular codes as my main sources. Although Islamic law including the Ottoman legal regime was derived from manifold sources, the judges (*kadis*) were obliged to apply only the Quran (Sha'ria) and sultan-drafted codes or *kanuns*.[46]

'In Tazir, the standard of evidence is not so high' Raheel Hassan 'Tazir Crimes' <https://raheelq.wordpress.com/tag/tazir> accessed 9 June 2015.

[42] Habib (n 31) 210.

[43] Miller, 'Rights, Reproduction, Sexuality, and Citizenship in the Ottoman Empire and Turkey' (n 16); Acar (n 22).

[44] It should be noted here that the Ottomans did not employ shari'a prescriptions concerning fornication and any other sexual crimes.

[45] Elyse Semerdjian, *Off the Straight Path, Illicit Sex, Law and Community in Ottoman Aleppo* (Syracuse University Press 2008) 40.

[46] Uriel Heyd, *Studies in Old Ottoman Criminal Law* (Oxford University Press 1973) 215, 216; Akgündüz, *Islam ve Osmanli Hukuku Kulliyati, Kamu Hukuku* Vol I (n 10) 515.

As mentioned before, Fatih Sultan Mehmet (Mehmet the Conqueror) drafted the first secular criminal code of the Ottoman Empire in 1488.[47] The modern Turkish translation of this code does not explicitly mention sodomy.[48] The second penal code was drafted by Beyazid II, who reigned over the Ottoman Empire after Mehmet the Conqueror. This penal code was very similar to Fatih's and also did not prescribe any penalties for sodomy in its text (15th century).[49] After Beyazid II, Yavuz Sultan Selim also codified a criminal law in which no penalties were incurred for sodomy and/or same-sex intimacy (16th century).[50] However, according to Acar, these codifications incurred a fine as punishment for sodomy (*livata*) as their punishment was derived from interpretation of fornication.[51] According to this argument, it is best to stay loyal to the textual interpretation unless there is evidence that suggests same-sex intercourse, *livata*, or sodomy were interpreted under the scope of fornication and therefore penalised without being explicitly mentioned. That said, Acar does not provide any evidence that would validate his analysis. Moreover, penalising same-sex intimacy does not adhere to the Hanafi school of law's classification of *livata* (same-sex intercourse), which is regarded as outside of fornication. Thus, Acar's argument is thus suspect in that it postulates that same-sex intercourse

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[47] Akgündüz, *Osmanli Kanunnâmeleri ve Hukukî Tahlilleri, Cilt I* (n 10) 347; Acar (n 22).

[48] Akgündüz, *Osmanli Kanunnâmeleri ve Hukukî Tahlilleri, Cilt I* (n 10) 347.

[49] Akgündüz, *Osmanli Kanunnâmeleri ve Hukukî Tahlilleri, Cilt I* (n 10) 39; Acar (n 22).

[50] Prof. Dr Ahmed Akgündüz, *Osmanli Kanunnâmeleri ve Hukukî Tahlilleri, Cilt III* (Osmanli Arastirma Vakfi 2006) 88, 89; Acar (n 22).

[51] Acar (n 22).

was penalised under the provisions that regulate fornication by Fatih the Conqueror, Beyazid II and Yavuz Sultan Selim.[52]

Suleiman the Magnificent, who is also known as the Lawgiver, introduced the last authentic penal code of the Ottoman Empire, possibly between 1539 and 1541. This code explicitly mentioned sodomy/*livata*/same-sex intimacy for the first time within Ottoman penal history.[53] The first section of this legislation, Articles 27, 32, 33 and 35, were about same-sex sexual activities and pederasty:

> 27—Furthermore, if a person's son yields to a pederast—if [the youth] is of age [*balig*[54]], [the *cadi*[55]] shall chastise the youth severely and a fine of one akce shall be collected for each stroke; and if he is not of age, his father shall be chastised because he has not guarded [him], but no fine shall be collected.
>
> …
>
> 32—If a person who is of sound mind [and] of age commits sodomy—If he is married and rich, a fine of 300 akce shall be collected from him; and a person in average circumstances a fine of 200 akce shall be collected; and from a poor person a fine of 100 akce shall be collected; and from a person in worse circumstances a fine of 50 or 40 akce shall be collected.
>
> 33—And if the person who commits sodomy is unmarried—From a rich one 100 akce shall be collected as a fine, from one in average circumstances 50 akce, and from a poor one 30 akce,
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> …

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[52] Omar (n 38).

[53] Farhat J. Ziadeh, 'The Criminal Law, The Oxford Encyclopedia of the Islamic World' <http://www.oxfordislamicstudies.com/article/opr/t236/e0170> accessed 31 March 2015.

[54] According to the Hanafi school of law, females reach the age of puberty at nine, males at 12 years old.

[55] This is translated as 'judge'.

> 35—If little boys from among the townspeople or peasants (turks) perform sexual acts with one another, the cadi [judge] shall punish them a fine of 30 akce shall be collected from each one.[56]

The prominent feature of these codes is the nature of the punishments. Unlike its Western European counterparts, which are detailed further below, the penalty for sodomy was monetary punishment, which differed according to the wealth and social status of the offender. The lenient characteristics of this set of codes become evident when compared to the severe punishments in Western Europe at that time.[57]

The punishment for sodomy in Western Europe from the 16th to the 19th century was the death penalty. In the German Empire, sodomy was punishable by death (1532),[58] while in English law buggery had been introduced as a crime punishable by death during the reign of Henry VIII (1509–47); this penalty continued until 1861, when it was reduced to life imprisonment.[59] In France, until 1810 sodomy was punishable by death, in addition to the confiscation of the property of the offenders.[60] In Geneva, from the 14th to the 17th century, the

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[56] Heyd, *Studies in Old Ottoman Criminal Law* (n 46) 103.

[57] Wayne R. Dynes and Stephen Donaldson, *Homosexuality: Discrimination, Criminology and the Law* (Garland Publishing 1992) VIII.

[58] Maria R. Boes, 'On Trial for Sodomy in Early Modern Germany in Sodomy' in Tom Betteridge (eds), *Early Modern Europe* (Manchester University Press 2002) 29.

[59] Leslie Moran, *The Homosexuality of Law* (Psychology Press 1996) 33.

[60] Michael Goodrich, 'Sodomy in Medieval Secular Law' (1976) 1(3) Journal of Homosexuality 295–302; Michael David Sibalis, 'The Regulation of Male Homosexuality in Revolutionary and Napoleonic France, 1789 – 1815' in Jeffrey Merrick and Bryant T. Ragan (eds), *Homosexuality in Modern France* (Oxford University Press 1996).

punishment was death by burning, hanging or drowning.[61] Similarly, in Spain[62] and the Dutch Republic,[63] sodomy carried with it the death penalty.[64] It should be noted that the emergence of sodomy as a serious offence in Western Europe started from the 12th century and was due to the diffusion of Roman Law.[65] By the 15th century, sodomy had been codified as an offence punishable by death throughout Europe.[66] This evidence clearly shows that the Ottoman Penal Code was more tolerant of sodomy than its Western European counterparts.[67] This also confirms that the Ottoman and the Western penal regimes in relation to same-sex intimacy were different from each other. An activist, Ibrahim Eren, analysed this situation very accurately, arguing that leniency towards same-sex intimacy allowed men who were attracted to men to

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[61] Eric Berkowitz, *Sex and Punishment: 4000 Years of Judging Desire* (The Westbourne Press 2012) 231.

[62] Zeb Tortorici, 'Against Nature: Sodomy and Homosexuality in Colonial Latin America' (2012) 10(2) History Compass 161–178; Cristian Berco, 'Producing Patriarchy: Male Sodomy and Gender in Early Modern Spain Source' (2008) 17(3) Journal of the History of Sexuality 351–376.

[63] Dirk Jaap Noordam, 'Sodomy in the Dutch Republic, 1600–1725' (1989) 16(1–2) Journal of Homosexuality 207–228.

[64] Arthur N. Gilbert, 'Conceptions of Homosexuality and Sodomy in Western History' (1981) 6(2) Journal of Homosexuality 57–68.

[65] Gilbert (n 64); Ludwig von Bar, *A History of Continental Criminal Law* (The Law Book Exchange, first published in 1916, 2007) 260; Henry F. Fradella, 'Legal, Moral, and Social Reasons for Decriminalizing Sodomy' (2002) 18(3) Journal of Contemporary Criminal Justice 279–301.

[66] Ibid.

[67] E. William Monter, 'Sodomy and Heresy in Early Modern Switzerland' (1981) 6(1) Journal of Homosexuality 41–55.

write poetry for their male beloveds in the Ottoman Empire while their Western counterparts were reduced to ashes in the West owing to death penalties.[68]

Ottoman and Western European legislation are analogous in that they regulate sodomy under the same sections as fornication and bestiality.[69] However, the Ottoman Penal Code departed from the European by following the shari'a order of assigning different penalties to different economic and marital statuses.[70] Penalties were relative to the offender's status, such as married/unmarried, Muslim/non-Muslim.[71] Exemplifying this was the fact that sodomy committed by a married man was penalised more heavily than sodomy committed by an unmarried man. It is also important to note that no distinctions were made in favour of female offenders regarding sexual crimes, and equal punishment was prescribed for heterosexual adultery and homosexual sodomy.[72] Unlike the modern criminal law system, which relies on the status of the victim, the Ottoman system determined punishment in accordance with the status of the offender.

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[68] Murat Hocaoglu, *Escinsel Erkekler, Yirmi Bes Taniklik* (Metis Yayinlari 2002) 87–88, cited in Serkan Delice, 'Friendship, Sociability, and Masculinity in the Ottoman Empire: An Essay Confronting the Ghosts of Historicism' (2010) 42 New Perspectives on Turkey 103–125.

[69] Berkowitz (n 61).

[70] Dror Ze'evi, *Producing Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500–1900* (University of California Press 2006) 60.

[71] Ibid.

[72] Ibid. 64.

As has been explained, the punishment given for sexual crimes between consenting adults were monetary.[73] The exemption to this fine punishment pattern was pederasty,[74] which was penalised by flogging as well as monetary punishment.[75] Although pederasty was subject to a heavier punishment than sodomy, it was still a more lenient penalty than that of the European penal codes of that century.

There is an argument that the employment of fine punishments in the Ottoman criminal law system was a departure from Islamic criminal law (shari'a), which does not recognise monetary penalties.[76] This was clearly shown in a study that revealed that the monetary form of punishment was common in the time of the Byzantine Empire, and among many Ottoman dynasties.[77] From this perspective, the Lawgiver Suleiman's set of codes has been interpreted as a state intervention to shari'a.[78] The Ottoman legal approach constitutes an amalgam of the Mongol dynasty and other Anatolian legal traditions with that of

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[73] Ibid.

[74] Pederasty could be defined as emotional and sexual relationship between an older man and a male youth. See: John R. Ungaretti, 'Pederasty, Heroism, And the Family in Classical Greece' (1978) 3(3) Journal of Homosexuality 291–300.

[75] Ze'evi, *Producing Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500–1900* (n 69) 65

[76] Dror Ze Evi, Changes in Legal-Sexual Discourses: Sex Crimes in the Ottoman Empire (2001) 16(2) Continuity and Change 219–242; Harun Cetin, *Islam and Homosexuality* (Etkin Publications 2015).

[77] Metin M. Coqgel, Boíaç Ergene, Haggay Etkes and Thomas J. Miceli 'Crime and Punishment in Ottoman Times: Corruption and Fines' (2013) xiii(3) Journal of Interdisciplinary History 353–376.

[78] Guy Burak, 'The Second Formation of Islamic Law: The Post-Mongol Context of the Ottoman Adoption of a School of Law' (2013) 55(3) Comparative Studies in Society and History 579–602.

Islam.[79] Suleiman the Magnificent codified all these different legal approaches into one legislative code in an attempt to unify application of the law, prevent arbitrariness and establish state control over the multiple courts operating in their plural legal systems.[80]

According to an archival study conducted by Zarinebaf, sexual offences constituted 0.6% of the case law in the Ottoman Empire between 1721 and 1725, and the act of sodomy (as in same-sex intercourse/relation/intimacy) was rarely prosecuted. One reason for this was that the standard of proof was set very high in terms of sexual crimes in general within the Ottoman penal regime.[81] One of the cases noted within the registry of the case law in Uskadar/Istanbul was the 1562 case in which Imirza B. Sevindik alleged that Veli and Musa forced his sons to *livata* (have intercourse).[82] However, as he could not find any witnesses, this allegation could not be proved. It was noted by the *kadi* that the accused could not be prosecuted without any evidence.[83]

When prosecution occurred, the punishment was only monetary.[84] An example of this was the 1524 case in which Timurhan b. İsmail Levend Pîri was tried because he displayed inappropriate sexual behaviours on a street in Istanbul.

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[79] Ibid; Cornell H. Fleischer, *Bureaucrat and Intellectual in the Ottoman Empire the Historian Mustafa Ali 1541–1600* (Princeton University Press 1986) 197.

[80] Burak (n 77).

[81] Heyd, *Studies in Old Ottoman Criminal Law* (n 46).

[82] Uskudar Case-Law Registry 26, Vol 7, 11.

[83] Ibid.

[84] Fariba Zarinebaf, *Crime and Punishment in Istanbul, 1700–1800* (University of California Press 2010) 116.

According to the case report he was kissing Muslim boys on the street. It was noted that *ta'zir* punishment was administered.[85]

There is a scholarship that endeavours to obscure this Ottoman penal regime's leniency towards same-sex intimacy by arguing that the death penalty was theoretically possible in *ta'zir* crimes. Although scholars such as Akgündüz and Acar have examined Ottoman case law for more than 20 years they have not provided any case law or codification that confirms their argument.[86]

Comparing this with the situation in Western Europe, although it has been pointed out that the application of sodomy laws was not frequent in Western Europe,[87] a documentary collection of police and court archives on sodomy in early modern France, and a broader study by Crompton and Fone,[88] cast significant doubt on this observation. They reveal numerous cases between the 13th century and the 18th century in which 'sodomites' were burned alive.[89] The same studies also reveal that penalties were gradually reduced to imprisonment, starting from the mid-18th century.[90] Supporting these studies,

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[85] Uskudar Case-Law Registry 05, Vol 3, 106.

[86] Akgündüz (n 39) Acar (n 22).

[87] Boes (n 58); Richard Godbeer and Douglas L. Winiarski, 'The Sodomy Trial of Nicholas Sension, 1677: Documents and Teaching Guide' (2014) 12(2) Early American Studies: An Interdisciplinary Journal 402–443.

[88] Jeffrey Merrick and Bryant T. Ragan JR, *Homosexuality in Early Modern France, A Documentary Collection* (Oxford University Press 2001); Louis Crompton, *Homosexuality and Civilisation* (Harvard University Press 2006); Byrne Fone, *Homophobia: A History* (Picador 2001) 238.

[89] Ibid.

[90] Merrick and Bryant (n 88).

historical research has led to the assertion that public trials for sodomy reached a level of paranoia, especially in Britain during Victorian times.[91]

The Ottoman Penal Code of Suleiman the Magnificent regulated that same-sex intercourse/intimacy was a minor crime and in this sense not only departed from severe interpretations of the Quran but also revealed a disparity with severe Western penal regimes. Furthermore, during this same period of Ottoman history, there was a wide range of literature[92] and artwork[93] (miniatures) favouring same-sex desire (mostly among men).[94] The two important conclusions that may be drawn from these facts are: firstly, the penal regime regarding same-sex desire in the Ottoman era historically differs from the Western experience; and, secondly, there had been a period when there was a legal and social accommodation of same-sex intimacy/sodomy within Ottoman/Turkish history. In addition to the lenient nature of the penal regime, and the previously mentioned literature and art regarding same-sex desire, it

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[91] H. G. Cocks, 'Making the Sodomite Speak: Voices of the Accused in English Sodomy Trials' (2006) 18(1) Gender & History 87–107.

[92] Murat Bardakçı, Osmanli'da Seks (Kutupyildizi Kitapligi 1992).

[93] Sawaqub al-Manaquib's collection of miniature arts includes homoerotic art illustrations; one of these is called 'Spilling the Wine'. This book can be found in the Topkapi Palace Library in Istanbul and The Morgan Library in New York: Wikipedia,'Al Manaquib Miniatures' <https://upload.wikimedia.org/wikipedia/commons/b/bc/An_ottoman_miniature_from_the_book_Sawaqub_al-Manaquib_depicting_Homosexuality.jpg> accessed 8 July 2015.

[94] Randolph Trumbach, 'Sodomitical Subcultures, Sodomitical Roles and the Gender Revolution of the Eighteenth Century: The Recent Historiography' (1985) 9 Eighteenth Century Life 109–121; Stephen O. Murray, 'Corporealizing Medieval Persian and Turkish Tropes' in Stephen O Murray and Will Roscoe (eds), *Islamic Homosexualities* (New York University Press 1997); Dror Ze Evi, 'Changes in Legal-Sexual Discourses: Sex Crimes in the Ottoman Empire' (n 76); Patrick Higgins, *1950s Heterosexual Dictatorship: Male Homosexuality in Postwar Britain* (Fourth Estate 1996) 56.

has also been argued that there were institutional traces of sodomy within the Ottoman Empire. For example, boys called inner-servants (*ic-oglan*) sexually served the sultans in the harem.[95] Research has also unveiled the existence of a sub-army branch called *civeleks*, whose main function in the army was to have same-sex relationships with the *yenicheris* (janissaries).[96]

As has been shown, there is not enough evidence to suggest that the Ottomans attached any importance to the Western perception that labelled them as a locus of sodomy until the decline of the Empire began. In the overlapping period between the deterioration of the Ottoman Empire and the rise of the Western nation states, the Ottoman authorities sought solutions to the decline of Empire in Western formulations, which were, however, applied in a most radicalised Islamic way.[97] This was followed by a number of reforms and the adoption of Western laws to ensure the survival of the Empire. The following section will outline and critically examine the conditions that paved the way for a penal reform in the Ottoman Empire.

3.3 Penal reforms in the 19th-century Ottoman Empire

The motivation underlying the above-noted reforms has been subject to a variety of interpretations. According to Weber, these legal reforms were only

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[95] Murray (n 94); Bardakçı (n 92); Sema Nilgün Erdoğan, *Sexual life in Ottoman Society* (Dönence Basım ve Yayın Hizmetleri 1996).

[96] Ibid; Edward Said, *Orientalism* (Penguin 1977) 5.

[97] Vedat İnal, 'The Eighteenth and Nineteenth Century Ottoman Attempts to Catch Up with Europe' (2011) 47(5) Middle Eastern Studies 725–756; Ruth A. Miller, *Legislating Authority, Sin and Crime in the Ottoman Empire and Turkey* (Routledge 2005) 15.

perfunctory and did not go beyond the 'reform as reaction' mentality.[98] Miller assesses these arguments in her book in a different manner, and comes to the conclusion that the Ottoman reforms were triggered by self-consciousness, although encapsulating traces of reaction at the same time. She maintains that the Ottomans were pursuing a global trend, at the same time as the British and the French, which entailed creating a unified national identity.[99] Consequently, the Ottoman reforms were not only related to imperial decline but also to the historical fact that all states and empires underwent legal reforms during the 19th century.[100] Although Miller acknowledges the fact that the Ottomans were in a quasi-colonial relationship and losing their economic and military power against Western states, she asserts that reforms were undertaken by the Ottoman authorities with the aim of engendering a centralised state power.[101] These new laws, codified via the Tanzimat reforms, not only served to establish this powerful state ideal but also became its symbol.[102] The plurality of nations, religions, languages and sexualities were seen as indicators of weakened state power. Weber's analyses of Islamic law sheds a light on how plurality in Islamic law became associated with regression.[103] Thus the Ottomans started to centralise these concepts through legal reforms to stop regression.

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[98] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978).

[99] Miller (n 97) 15–33.

[100] Ibid. 15–33.

[101] Ibid. 33.

[102] Ibid.

[103] Weber (n 98).

Another argument that assesses the reasons that drove the Ottomans to this legal change focuses on the legal differences between Muslims and non-Muslims prescribed by previous Ottoman Penal Codes.[104] The Ottoman legal system was operating in a way that favoured Muslim citizens by restricting the rights of non-Muslims.[105] This legal approach brought about inequality between citizens and led to problems among foreigners who were doing business within the Ottoman jurisdiction. This issue of inequality appeared to be one of the reasons for the surrender to Western powers.[106]

By the 19th century, the Ottoman Empire was in a state of major economic and political failure, and, although a detailed analysis of the reasons for this is outside the scope of this thesis, this situation was one of the reasons for legal reform.[107] The Ottoman legal reforms in the 19th century aimed to remedy retrogression by redesigning the legal system.[108] The Ottomans reformed their legal system in order to survive in the new nation state world. In so doing, they reasoned that incorporating Western laws in their amalgam of legislation would empower the Empire and prevent its decline.[109] This reform process is generally called the Westernisation and secularisation of the Empire.[110] Nevertheless,

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[104] Stanford J. Shaw and Ezel Kural Shaw, *History of the Ottoman Empire and Modern Turkey, Volume II* (Cambridge University Press 1977) 153.

[105] Peters (n 36) 131.

[106] Peters (n 36); Ze'evi (n 70) 72.

[107] Shaw and Shaw (n 104) 153.

[108] Ibid.

[109] Ibid.

[110] Shaw and Shaw (n 104) 153; Ehud R. Toledano, 'The Legislative Process in the Ottoman Empire in the Early Tanzimat Period' (1980) 1(2) International

Schull disagrees with the argument that the Ottoman reforms can be attributed to the Westernisation of the Empire.[111] He argues that modernity was not a concept with which the Ottomans were totally unfamiliar, nor did it have no role to play in its development. Instead, this process, Schull argues, is more accurately categorised as a transition to modernity instead of Westernisation.[112] He posits that the law reforms were actually an attempt to become modern in an Ottoman way. Rubin takes a similar view, arguing that the assumption that modernity could only be developed through Westernisation is a misleading analysis of Ottoman legal history.[113] The laws adapted from different legal cultures were selectively chosen from a spectrum of available Western laws and they were blended with a distinctly Ottoman approach.[114] In fact, as discussed by Zarinebaf, the Ottoman legal system was far more organised and hierarchical than the French system.[115] As a result, the Ottoman reforms could not be identified as a linear development from 'underdeveloped' to 'civilised'. Rather, it was an attempt to combine these different legal systems. Yet, given that the Ottoman legal system itself was already hybrid, Miller's argument appears to portray the situation more accurately. She explains that the reforms

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Journal of Turkish Studies 99–106; Bernard Lewis, *The Emergence of Modern Turkey* (Oxford University Press 1968).

[111] Kent F. Schull, 'Comparative Criminal Justice in the Era of Modernity: A Template for Inquiry and the Ottoman Empire as Case Study' (2014) 15(4) Turkish Studies 621–637.

[112] Ibid.

[113] Avi Rubin, 'Ottoman Judicial Change in the Age of Modernity: A Reappraisal' (2009) 7(1) History Compass 119–140.

[114] Schull (n 111).

[115] Zarinebaf (n 84) 178.

were a blending of Ottoman legal tradition with Western law. However, instead of harmonising as a legal code, they resulted in the abolishment of the Ottomans' traditional dual operation of religious and secular laws in a modern unified structure.[116] The inclusion of Western laws in the pre-existing amalgam meant that the previous balance between shari'a and secular Ottoman laws could not be achieved. This can be seen when the Ottoman Empire introduced new sets of penal codes in 1840, 1851 and 1858,[117] all of which sought to blend modern Western codifications with the Ottoman approach, while at the same time declaring loyalty to the shari'a more strongly than Suleiman's penal code had done.[118] The result was that this reforming process created a bizarre system incorporating a more religious and authoritarian state despite the adoption of secular Western laws and structures.[119]

3.3.1 Transplantation of the 1810 French Penal Code

Nineteenth-century Western criminal law was undergoing a change as well. As mentioned before, the modernisation of criminal law resulted in legal reforms in many European countries. One aspect of this reform movement was the re-evaluation and reframing of the punishments for sodomy by Enlightenment

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[116] Ruth A. Miller, Apostates and Bandits: Religious and Secular Interaction in the Administration of Late Ottoman Criminal Law' (2003) 97 Studia Islamica 155–178.

[117] Dr Mehmet Gayretli, '1858 Osmanli Ceza Kanununun Kaynagi Uzerindeki Tartismalar ve Bu Kanuna Ait Taslak Metnin Bir Kismisla Iligili Degerlendirmeler' <http://www.e-akademi.org/makaleler/mgayretli-2.pdf> accessed 12 February 2017.

[118] Miller (n 97) 32.

[119] Miller (n 116).

thinkers. For example, scholars such as Montesquieu, Beccaria and Voltaire opposed the criminalisation of sodomy on the grounds that obtaining proof was difficult due to its private nature, and that the punishments were not proportional.[120] While the decriminalisation of homosexuality had happened following these discussions, the legal motivation underpinning the replacement of the former Ottoman penal regime regarding same-sex intimacy with the French regime is obscure and there is no evidence that suggests that a discussion had taken place in justification of this.

Before deconstructing the nature and outcomes of this legal transplant, it would be useful to evaluate the adopted French Penal Code and its sphere of influence at that time. Unlike the Ottoman Empire's voluntary borrowing of this code, the Netherlands adopted French legislation owing to being invaded by France and, as a consequence, was forced to decriminalise sodomy.[121] However, it recriminalised sodomy very soon after gaining independence from France.[122] The 1810 French Penal Code had been influential throughout Europe, with both Belgium and Luxembourg adopting it. This supports the argument that not only the Ottoman Empire but the whole of Europe was under

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[120] Melvin Richter, *The Political Theory of Montesquieu* (Cambridge University Press 1977) 95; Cesare Beccaria, *On Crimes and Punishments* (Translation: David Young, Hackett Publishing 1986, first published in 1764) 58; George E. Haggerty, *Gay Histories and Cultures, An Encyclopaedia Volume II* (Garland Publishing 2000) 203, 344.

[121] Michael David Sibalis, 'The Regulation of Male Homosexuality in Revolutionary and Napoleonic France, 1789 – 1815' in Jeffrey Merrick and Bryant T. Ragan, Jr. (eds), *Homosexuality in Modern France* (Oxford University Press, 1996).

[122] Ibid.

the influence of a wave of legal reform.[123] Even France continued to reform its legislation and adopted new regulations in 1863 and 1882, raising the age of consent to 13 as well as restricting the public appearance of same-sex relations.[124] With another legal reform in the 1880s, same-sex contact in the public sphere was criminalised and, finally, in 1942 under the Vichy government, the age of consent was raised to 21 for same-sex relations in the private sphere.[125] The French authorities amended the 1810 Penal Code several times before 1858. However, in 1858 the Ottomans borrowed the initial version of the 1810 French Penal Code.

Numerous sources report that penalties against sodomy had been repealed by the adoption of the 1810 French Penal Code in 1858 under the Tanzimat reforms.[126] As contradictory as it may sound, according to Turkish historian Hur, normalisation of heterosexuality and condemnation of homosexuality started at the same time as the Tanzimat reforms.[127] Hur's argument corresponds with

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[123] Catherine Elliot, *French Criminal Law* (2nd ed., Routledge 2011) 9.

[124] Sibalis (n 121).

[125] Ibid.

[126] Wintemute, Tønnesson Andenæs (n 1); Vaulvouli (n 1); Hurteau (n 1) 145; Kazi (n 1); ILGA Report, State-Sponsored Homophobia, 2014 (n 1); Waaldijk, 'Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe' (n 1).

[127] Ayse Hur, 'Elinde Tesbih, Evinde Oglan, Dudaginda Dua' (10 November 2013) <http://www.radikal.com.tr/yazarlar/ayse_hur/elinde_tesbih_evinde_oglan_dudaginda_dua-1159964> accessed 5 June 2015.

Miller's view that these reforms were built on a religious narrative and not that of liberal modernism, despite the adoption of modern Western legal structures.[128]

The 1810 French Criminal Code removed punishment for sodomy/same-sex intimacy and employed a new sexual regime.[129] The Ottomans adopted this new penal structure. However, as ironic as it may sound, the same article that decriminalised sodomy by restricting it to private, consensual same-sex intercourse in France, did not have the same effect in the Ottoman Empire – and later in Turkey. On the contrary: it disturbed the traditional liberty that same-sex intimate people had enjoyed for centuries despite the adoption of identical articles. In the following section the discussion focuses on various misleading analyses which have led to the inaccurate conclusion through the analogies that overlook Ottoman criminal history regarding same-sex intimacy. It critically assesses the widespread conclusion that Turkey decriminalised homosexuality in 1858 during the Ottoman era by applying Western benchmarks to the Ottoman situation.

3.3.2 Did the Ottomans decriminalise homosexuality in 1858?

Following the penal codes authored by Suleiman the Magnificent in the 16th century, the last Ottoman Penal Code (1858), which allegedly decriminalised sodomy/same-sex intimacy, included these articles that regulate sexual offences:

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[128] Miller, *Legislating Authority, Sin and Crime in the Ottoman Empire and Turkey* (n 97) 32.

[129] Haggerty (n 120) 344.

> Art. 139—From the person who contrary to public morals prints or causes to be printed, or publishes in verse or in prose, any things relative to jest or satire or indecent pictures or images; a fine of from one Mejidieh gold piece to five Mejidieh gold pieces shall be taken and he shall be imprisoned for from twenty-four hours to one week.[130]
>
> …
>
> Art. 201—Whoever dares to behave contrary to public decency by making it a habit to incite and entice young persons from amongst males or females to obscenities by perverting or deceiving them or facilitating the means of the coming about thereof is punished with imprisonment for from one month to one year; and if this matter of perverting or deceiving in this manner proceeds from persons who are the father or mother or guardian, they are to be punished with imprisonment for from six months to one year and a half.
>
> Art. 202—The person who dares to commit the abominable act publicly contrary to modesty and sense of shame is to be imprisoned for from three months to one year and a fine of from one Mejidieh gold piece to ten Mejidieh gold pieces is to be levied.[131]

After the adoption of this French Penal Code, the Ottoman authorities amended their penal code several times. However, *livata*, homosexuality or any other expression that explicitly refers to same-sex intimacy were absent in the legal texts. Yet, at the same time, with each amendment, they adopted more restrictions on public expressions of sexuality, including same-sex attraction.[132] Thus, Article 202 was amended by an addendum dated 3 Jemazi'ul-Akhir, 1277 (17 December 1860), the text of which is as follows:

> Those who address impertinent innuendos to young persons either males or females are to be imprisoned for from one week to one month and those who act outrageously with their hands for from one month to three months.
>
> Those who in female attire enter places which are the abode of women are, for this act alone, to be imprisoned for from three months to one year, and if after their so entering in disguise they have set themselves to do a

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[130] Penal Code of the Ottoman Empire (1858) (n 5).

[131] Ibid.

[132] Ibid.

> Jinayet[133] or Junha legally necessitating a more severe punishment than this punishment, they are to be punished with the punishment for such act.[134]

A further addendum (No. 2) to Art 202 was made on 6 Jemazful-Akhir, 1329 (4 June 1911), the text of which is as follows:

> If, with the intention of committing obscenities contrary to public decency, women are made to dance in open places, or in semi-open places such as vineyards and gardens which the people may easily become aware of, the persons who make them dance and the women who voluntarily so dance are to be punished with imprisonment for from one month to one year.[135]

According to widespread positivist assumption, these articles implanted from the French Penal Code in 1858 decriminalised homosexuality in the Ottoman Empire owing to the absence of penalties addressing private same-sex activities. This poses an important question. What would happen if we changed the benchmark of this analysis? Would we come to the same conclusion if we reanalyse these laws through a generic definition of decriminalisation instead of examining them through the Western concept of decriminalisation of homosexuality? The definition of decriminalisation is given as 'a deliberate legislative action to remove a particular form of conduct from the list of offences'.[136] If this definition of decriminalisation is broken down into its compounds, they are: (1) deliberate legislative action; and (2) removal of a particular form of conduct from the list of offences.

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[133] *Jinayet* and *Junha* are types of crimes within the Ottoman criminal law.

[134] Penal Code of the Ottoman Empire (1858) (n 5).

[135] Ibid.

[136] Kimmo Nuotio,'Theories of Criminalisation and the Limits of Criminal Law: A Legal Cultural Approach' in RA Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo and Victor Tadros (eds), *The Boundaries of Criminal Law* (Oxford University Press print publication 2010, Oxford Scholarship Online September 2011).

Regarding the 'deliberate legislative act' condition in the definition, as mentioned above, the 1810 French Penal Code inspired the 1858 Ottoman code.[137] This leads to the question of whether the authorities examined the whole French text in detail before transplanting, and whether they subsequently became aware of the fact that they were also adopting the articles regulating same-sex desire. The most important argument against this would be that the 1858 Ottoman Penal Code consisted of 264 articles, whereas the 1810 French Penal Code had 484 articles, which would suggest that the Ottomans did not copy the French Penal Code in its entirety and were more selective than is generally presumed.[138] A further point to add is that the 1858 Ottoman Penal Code maintained some types of shari'a penalty, such as blood money.[139] This evidence suggests that the Ottomans did not adopt the whole French code without any pre-examination; on the contrary, they deliberately chose sections and opted to blend some of the content with the Ottoman criminal approach, while implanting others directly. In the light of this evidence it can be concluded that this adoption was a deliberate legislative act.

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[137] Heinzelmann (n 10) 292–321 (argues that the 1832 French code was also inspirational).

[138] The Penal Code of France (1810) <http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_penal_de_1810.htm> accessed 11 June 2015; Penal Code of France (1810) <http://www.napoleon-series.org/research/government/france/penalcode/c_penalcode.html> accessed 26 December 2017; Gayretli (n 117); Heinzelmann (n 10) 292–321; Rubin, 'Ottoman Judicial Change in the Age of Modernity: A Reappraisal' (n 113).

[139] *Diyet* – blood money – is the amount of money the murdered had to pay to the family of the murder victim, similar to compensation. Penal Code of the Ottoman Empire (1858) (n 5) Article 183.

The second condition is characterised as the removal of a particular form of conduct from the list of offences. As reiterated before, assumptions attained through Western benchmarks are problematic. Thus, determination of which conducts were removed by the Ottomans requires a comparison between the Ottoman Penal Codes. A non-imperialistic approach to this question would be to refer to the meaning of the word 'decriminalisation', which is to take something that used to be a crime and make it no longer a crime. If we compare the 16th-century Ottoman Penal Codes with the 19th-century Ottoman Penal Codes, we can determine whether or not the Ottomans actually decriminalised same-sex intimacy.

An attempt can be made to enumerate the conducts, which were listed as offences by the 16th-century and 19th-century penal codes. This is set out in the following paragraphs.

In terms of pederasty, the 16th century penal code, Article 27,[140] prescribes that the minor/or his father is to be punished by chastising plus monetary punishment; however, the 19th-century penal code[141] is silent regarding assigning punishments for minors or their fathers. Concerning the public appearance of pederasty, the 16th-century penal code, Article 20,[142] stipulates that an offender (either male or female) kissing a boy on his way (in the streets), addressing indecent words to him or approaching to him[143] will be chastised,

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[140] Heyd, *Studies in Old Ottoman Criminal Law* (n 46) 102.

[141] Penal Code of the Ottoman Empire (1858) (n 5).

[142] Heyd, *Studies in Old Ottoman Criminal Law* (n 46) 100.

[143] In the Turkish language there are no gender pronouns ('O' refers to he/she/it); this might cause translation problems in terms of determining the sex

which could be transferred to monetary punishment and could lead to imprisonment depending on the discretion of the judge, whereas the 19th-century penal code, Article 202,[144] set forth that the public outrage against modesty shall be imprisonment from three months to one year. A further amendment to this Article in 1860[145] prescribes that 'impertinent innuendos to minors of either sex is to be punished with imprisonment from one month to three months and acting outrageously with their hands from one month to three months'.[146]

In terms of same-sex intimacy/sodomy, the penalty assigned by the 16th-century penal code, Articles 32, 33 and 35, was as follows: 'if the age of puberty has been reached, punishment varies from 300 akce to 400 akce depending on the marital, economic and religious status of the offender'.[147] However, the 19th-century penal code, Article 202, dictates that public outrage against modesty should be punished with (*alenen fiil-i seni icra*) imprisonment for three months to a year.[148] Interpretation of what was decriminalised and criminalised in Article 202 needs further elaboration.

Given this picture, it would be quite hasty to deduce that with the adoption of French Penal Code in 1858 homosexuality was decriminalised in the Ottoman

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of the perpetrator in these codes. However, the victim was mentioned as a male and in either case perpetrator includes male persons. Therefore, this article covers pederasty.

[144] Penal Code of the Ottoman Empire (1858) (n 5).

[145] Ibid.

[146] Ibid.

[147] Heyd, *Studies in Old Ottoman Criminal Law* (n 46)103.

[148] Penal Code of the Ottoman Empire (1858) (n 5).

Empire, at least without first examining the new dynamics of the punishment system adopted through this law. With this dramatic change in the criminal system, it is pivotal to deconstruct whether the textual absence of private same-sex activity in this penal code could mean that it was decriminalised.

Before delving into examining Article 202 in detail, there are three general conclusions that could be drawn from the above comparison. Firstly, the 1858 Penal Code deployed imprisonment as the main punishment, departing from monetary punishments, and thus became more authoritarian. Following the same pattern, the criminalisation of abortion occurred for the first time in Ottoman/Turkish history with the adoption of 1810 French Penal Code, and this is another example that supports the fact that change in their sexual regime resulted in authoritarianism and a harsher sexual regime.[149] Secondly, a modern criminal approach was adopted. Thus, the legal system started regulating punishments according to the victim and not the offender. Moreover, there was a change in the unstructured and relative terminology. For example, thresholds such as reaching the age of puberty, which might vary from one person to another, were replaced with generic, stable thresholds that would be applied to everyone equally. This was also followed in terms of the public/private distinction as well. The penalties bluntly included the term private and public in the text of 1858 Penal Code. Thirdly, the lack of public and private emphasis regarding sodomy in the 16th-century penal code, Articles 32, 33 and 34,[150] implies that both public and private sodomy were to be punished equally

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[149] Miller, 'Rights, Reproduction, Sexuality, and Citizenship in the Ottoman Empire and Turkey' (n 16).

[150] Heyd, *Studies in Old Ottoman Criminal Law* (n 46) 103.

by monetary means. However, Article 220 in the 1858 Ottoman Penal Code, which allegedly decriminalised homosexuality, prescribes imprisonment for public indecency.

If we proceed with our analysis of the articles of the 1858 Ottoman Penal Code, it can clearly be seen that sodomy (male-to-male same-sex intercourse and intimacy) and its modern version, homosexuality, disappeared from Ottoman legal discourse. However, it would be perhaps too optimistic to conclude that homosexuality/sodomy was decriminalised as a consequence of this disappearance, particularly when the shift in criminal and sexual regimes at that period of the Ottoman Empire is taken into consideration. There is a vast amount of literature which suggests that the structure of the sexual regime was turned upside-down through the adoption of Western laws in the cause of modernisation, economic growth and/or a sense of inferiority in the late 19th century.[151] Hurteau summarises this change and its negative outcome for Ottoman society as follows: '[The] Western medical model of the pervert emerged at the turn of the twentieth century, and overruled a tradition of social tolerance vis-à-vis homosexual practices in Ottoman society'.[152]

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[151] Ze'evi, 'Changes in Legal-Sexual Discourses: Sex Crimes in the Ottoman Empire' (n 76) Heyd, *Studies in Old Ottoman Criminal Law* (n 46) 95; Peter Drucker, 'Byron and Ottoman love: Orientalism, Europeanization and Same-sex Sexualities in the Early Nineteenth-Century Levant' (2012) 42(2) Journal of European Studies 140–157; İrem Özgören Kinli, 'Reconfiguring Ottoman Gender Boundaries and Sexual Categories by the mid-19th Century' (2013) 50(2) Política y Sociedad 381–395.

[152] Pierre Hurteau, *Male Homosexualities and World Religions* (Palgrave Macmillan 2013) 145.

Expanding upon his argument, one of the dramatic signs of this change could be seen in the language deployed for the regulation of sexual crimes. There is a notable difference between the last authentic Ottoman Penal Code and the one that Kanunname-i Ceza (1858) borrowed from the French Penal Code. The latter departed sharply from the former as a result of following the French structure in regulating sexual offences.[153] In the Ottoman Penal Code, sexual offences were articulated and named, whereas the Kanunname-i Ceza (1858) was silent on sexual acts and, moreover, used indirect language. In this regard, some scholars have argued that the Ottomans' legal discourse on sexuality, including same-sex relations, shifted after the adoption of these laws.[154]

A certain amount of evidence could be given in defence of this argument. Firstly, Ottoman reformers codified sexual offences under the section 'About Crimes Concerning Violation of Honour [*Irz*[155]]',[156] following the French version, which bracketed them in the section on 'public offences against decency'[157] or, in an alternative translation, 'attacks on morals'.[158] The phrase 'abominable act'

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[153] Ze'evi, *Producing Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500–1900* (n 70) 72.

[154] Dror Ze'evi, 'Hiding Sexuality: The Disappearance of Sexual Discourse in the Late Ottoman Middle East, Social Analysis' (2005) 49(2) The International Journal of Social and Cultural Practice 34–53.

[155] *Irz* in modern and Ottoman Turkish refers to a person's sexual integrity and purity.

[156] Ze'evi, *Producing Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500–1900* (n 70) 72.

[157] Sibalis (n 121).

[158] Penal Code of France (1810).

was used instead of same-sex intimacy.[159] In a study of the translation from the Turkish text, it was remarked that 'the abominable act or infamous act is literal, and includes outrage either by way of natural or unnatural intercourse (i.e., sodomitical or sexual)'.[160] Secondly, the Ottomans abandoned shari'a-stemmed classifications such as Muslim/non-Muslim and married/unmarried, and replaced them with adult/minor, consent/force and public/private.[161] They also significantly altered the monetary punishment for sexual crimes and instead employed imprisonment for up to six months for indecency and violation of honour.[162] Thus instead of using the language employed by the 16th-century Ottoman Penal Code, the Western-influenced Kanunname-i Ceza deployed vague, ambivalent terminology by which the same-sex/sodomy discourse disappeared from legal texts in the 19th century. It is important to note that not only sodomy but also other 'unnatural' sexual acts, such as bestiality, vanished from the text of the 1858 Ottoman Penal Code.[163]

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[159] John A. Strachey Bucknill, Haig Apisoghom S. Utidjian, *Ottoman Penal Code, A Translation From the Turkish Text – with latest additions and amendments together with annotations and explanatory commentaries upon the text* (Oxford University Press 1913) 150.

[160] Ibid.

[161] Ze'evi, *Producing Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500–1900* (n 70) 73.

[162] Ibid. 72.

[163] Criminalisation of fornication was not mentioned but there was another article regulating amnesty for the husband from killing his wife or the man she committed adultery with. Article 188—He who has seen his wife or any of his immediate female relatives with a man committing adultery, he may beat, injure, or kill one or both of them, in these cases, he will be exempt from penalty.

3.3.3 Why the 1840 and 1851 Ottoman Penal Codes are not considered to have decriminalised homosexuality?

If the textual absence of private same-sex intimacy as an offence is the basis of decriminalisation claims, why are the previous Ottoman Penal Codes, introduced in 1840 and 1851, which also did not contain any reference to sodomy or same-sex intercourse, not declared to have decriminalised homosexuality?[164] Several scholars working on Ottoman criminal law share a view that the 1840 and 1851 penal codes did not regulate every type of crime, but instead focused on urgent issues with an emphasis on 'life, property, and honour', which would save the Empire from decline.[165] According to Miller, these laws functioned as a reformulation of the state and authority through modern principles.[166] By virtue of these penal codes, the sultan's monarchy was gradually replaced by a modern authoritarian state: firstly, by adopting the principle of equality before the law (of everyone, including the sultan) and, secondly, through subrogating the sultan's status with the state, which became the only reference of sovereignty within the 1851 Penal Code.[167]

Similarly, it is argued that the 1840 and 1851 penal codes only regulated crimes that are not mentioned in the Quran.[168] This implies that the aim of these penal

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[164] Ahmet Gokcen, 'Tanzimat Period Penal Codes' (Master Thesis, University of Istanbul, 1987).

[165] Miller, *Legislating Authority, Sin and Crime in the Ottoman Empire and Turkey* (n 97) 32; Gokcen (n 164).

[166] Miller, *Legislating Authority, Sin and Crime in the Ottoman Empire and Turkey* (n 97) 43.

[167] Ibid.

[168] Gokcen (n 164).

codes was to engender a law that would also cover non-Muslims, remedy the injustice between the Muslim and non-Muslim populations, and perhaps encourage the latter to stay within the Empire. Shari‘a was still operational: offences described in the Quran were only applicable to Muslims and same-sex intimacy could be criminalised following the Quran. This line of argument would lead to an assumption that, although sodomy/same-sex intimacy was not listed as a crime in these secular penal codes, it could still have been punishable by Islamic law. However, as mentioned before, the Ottomans were following the Hanafi school of law, which classes sodomy as a *ta'zir* crime (misdemeanour), the penalty for which fell under the discretion of the state. The state did not prescribe any penalties in the1840 and 1851 penal codes. Therefore, the absence of sodomy/same-sex intercourse as an offence within these criminal codes cannot be explained through the fact that that shari'a law was still operational within the Ottoman Empire since the Hanafi school of law leaves the regulation of same-sex intercourse to state law. Moreover, this line of argument does not explain the shift that occurred within Ottoman criminal law and correspondingly fails to address why the previous Ottoman codes explicitly criminalised sodomy/same-sex intimacy (with monetary penalties) and why they stopped mentioning it in subsequent penal codes. As a result, there were no punishments explicitly assigned to same-sex activity in these penal codes, just like the later 1858 Penal Code. However, they were not deemed to have decriminalised homosexuality. They were criminal codes as well and if the criterion is the absence of punishment assigned to private same-sex intimacy, both the 1840 and 1851 Ottoman Penal Codes fulfil this requirement and deserve to be recognised as having decriminalised homosexuality. However, it is largely accepted that it was the 1858 Penal Code that led to

decriminalisation. The reason for this conclusion stems from the fact that 1858 Penal Code implanted the French Penal Code, which decriminalised homosexuality in France. The assumption has been that one formulation of decriminalisation could decriminalise same-sex intimacy in every country. However, the French formulation was built on decriminalisation in private and did not consider public appearance of same-sex intimacy as a component of the decriminalisation framework.

3.3.4 Penal regime regarding the public appearance of same-sex intimacy

As is revealed in the previous paragraphs, the 16th-century laws punished sodomy with a fine regardless of where it happened. There was no reference to the language of public or private in these codes. As such, could it be argued that the notion of public/private was not a classification within the 16th-century penal code? If the text of the Kanuni codification is subjected to scrutiny, it can be revealed that there was an expression that might imply the public sphere, namely, 'approaches him on his way' in Article 20,[169] which criminalises the public appearance of pederasty. Thus, the public and private division was already acknowledged by Kanuni the Lawgiver's penal code. Further evidence could be found in the case law mentioned earlier, where Timurhan b. İsmail Levend Pîri was tried in 1554 because he displayed inappropriate sexual behaviours on a street in Istanbul. According to the case report, he was kissing

[169] Uriel Heyd, *Studies in Old Ottoman Criminal Law* (n 46) 100.

Muslim boys on the street and, *ta'zir* punishment was accordingly administered.[170]

In light of the above, the widespread assumption that homosexuality was decriminalised in 1858 overlooks the fact that the public appearance of same-sex attraction was criminalised far more heavily than had been the case under the codes of Suleiman the Magnificent. The punishment given for public homosexuality in the 1858 Ottoman Penal Code was imprisonment from three months to one year, under the name of the 'abominable act publicly contrary to modesty'. This is clearly a misleading consequence of reading Ottoman history from Western benchmarks, which brings about the restriction with the criminal status of the private consensual same-sex activity. It can thus be concluded that, with the adoption of the 1810 French Penal Code, the Ottomans started to associate heterosexuality with the public sphere and homosexuality with the private sphere. Irem Kirimli argues that what was in fact adopted in the 1810 French Penal Code was the binary understanding of Western sexuality, thereby institutionalising heterosexuality as the only sexual orientation that could appear in the public sphere in the Ottoman Empire by means of legal transplants.[171]

As discussed previously, one rationale underpinning the decriminalisation of homosexuality within the Western domain was that obtaining proof was difficult owing to its private nature. This private nature of same-sex intimacy could be a result of heavy punishments deployed by the Western criminal penal codes. As the punishment was very harsh in the West, same-sex relations had to be more

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[170] Uskudar Case-Law Registry 05, Vol 3, 106.

[171] Kinli (n 151).

discreet than they had been in the Ottoman Empire. In addition to this, in Ottoman history, the public appearance of same-sex intimacy was a commonplace occurrence, especially in literature and arts.[172] Given this public dimension of same-sex intimacy in the Ottoman Empire, private nature, in this sense, cannot be the only trajectory for Ottoman history. Research about the decriminalisation of homosexuality cannot only assess the private appearance of same-sex intimacy. When the 1858 Penal Code limited same-sex intimacy to the private sphere, this brought about the criminalisation of same-sex discourse within the public sphere in the Ottoman Empire and the disappearance of art and literature about same-sex desire. While the monetary punishment was no longer applicable to private same-sex intimacy, public same-sex intimacy had been criminalised more heavily with the 1858 Ottoman Penal Code. The punishment for the public appearance raised dramatically, from monetary punishment to three months' to one year's imprisonment, with the transplantation of 'public abominable act' from the 1810 French Penal Code.

3.3.5. What does public abominable act refer to?

Public perpetration of same-sex intimacy was subjected to monetary punishment in the Penal Code of Suleiman the Magnificent, which was in force from the 16th century till 1840. Nevertheless, in Article 202 in the 1858 Penal Code,[173] which is considered to have decriminalised homosexuality, there is a correlation with 'public' and 'abominable acts'. From this, it has been argued that private and consensual same-sex intercourse was not an offence and was

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[172] Ibid; Delice (n 68).

[173] Penal Code of the Ottoman Empire (1858) (n 5).

thereby decriminalised. However, I argue that this conclusion confuses the disappearance of same-sex discourse with decriminalisation. In other words, public appearance of homosexuality or discourse of same-sex intimacy was subject to punishment without explicitly articulating it. The explicit expression of same-sex desire vanished from legal texts through the installation of Western laws.

Western laws facilitated the transmission of new/modern moral structures of the Western bourgeoisie to the Ottoman system.[174] The purity and superiority of Western discourse resulted in the silencing of any discussion about sexuality.[175] As shown by Foucault, this silencing reaches back to the Victorian Era, and completely changed sexual discourse in the 19th century.[176] Victorian attitudes towards sexual matters meant that modern Western codifications tended to conceptualise sexual offences without actually mentioning them.[177] In English law, this approach led to sodomy being known as 'the crime not fit to be named'.[178] When referring to sexual crimes, terms such as 'unnatural' and 'indecent' were preferred.[179] In this way, bracketing sexual terminology created an enigma, which resulted in the replacement of the word sodomy/*livata* with 'indecency' and 'immorality', thereby disguising same-sex intimacy.

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[174] Michael Foucault, *The Will to Knowledge, The History of Sexuality:1* (Penguin, first published in 1976, 1998) 3.

[175] Ibid. 38.

[176] Ibid. 3.

[177] Ze'evi, *Producing Desire: Changing Sexual Discourse in the Ottoman Middle East* (n 70) 74.

[178] Arthur N. Gilbert, 'Conceptions of Homosexuality and Sodomy in Western History' (1981) 6(1–2) Journal of Homosexuality 57–68.

[179] Ibid.

Kinli analyses this shift in the sexual regime through Elias's theory of the 'civilizing process',[180] which suggests that civilisation occurs through the 'advancing threshold of shame and embarrassment'.[181] This interpretation means that the previously argued Western assumption that associates the Ottomans with sodomy created a sense of embarrassment towards the Western morality narrative during the period of decline in the Ottoman Empire. This reinforced the Ottoman reformers' tendency to bracket sexual expressions while codifying their new laws as an attempt to meet the threshold of that era's morality.[182]

Ze'vi argues that the disappearance of sexual discourse during the 19th century did not only occur within the legal realm; it also disappeared from the medical and literary domains in the same century.[183] This poses an important question: why did the alleged decriminalisation of sodomy lead to an intolerance towards it within the medical and literary fields? As has been mentioned, in the Ottoman Empire prior to the 19th century there had been a wide range of literature, poetry and artwork dedicated to male-on-male same-sex relations. Contrary to the expected function of decriminalisation, it actually reduced the public appearance of same-sex sexuality in the Ottoman era. This reinforces my argument that the public appearance of sodomy was criminalised more heavily than it used to be with the adoption of Western penal structures regarding

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[180] Norbert Elias, *The Civilizing Process* (Blackwell 1982), cited in Kinli (n 151).

[181] Kinli (n 151).

[182] Ze'evi, 'Hiding Sexuality: The Disappearance of Sexual Discourse in the Late Ottoman Middle East, Social Analysis' (n 154); Kinli (n 151).

[183] Ze'evi, 'Hiding Sexuality: The Disappearance of Sexual Discourse in the Late Ottoman Middle East, Social Analysis' (n 154).

same-sex intimacy. Thus, it can be concluded that it was not actually decriminalisation but a new formulation of same-sex intimacy which was transplanted from France. In this new framework of decriminalisation, same-sex intimacy was confined to the private sphere and any public reference to it was diminished and assigned heavier punishments within the Ottoman experience.

In the West, decriminalisation coincided with the medicalisation of homosexuality. In other words, homosexuality emerged as a disease that required diagnosis.[184] In this sense, discussions around same-sex attraction did not stop but were directed to a different realm, namely that of medicine. However, the Ottomans, and later Turkey, could not produce any policy regarding same-sex attraction other than silencing it.[185] Thus this discourse totally vanished from their culture, and in this way decriminalisation ironically brought with it the condemnation, and even criminalisation, of same-sex intimacy.[186] According to Miller, this process was a transmission towards the development of the nation state, during which legal standards were set which included attitudes towards sexuality.[187] Following her analysis, it can be concluded that the space sodomy used to enjoy and occupy in the Ottoman Empire was narrowed to the private sphere by means of legal transplants.

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[184] R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros, *The Boundaries of the Criminal Law* (Oxford Scholarship Online, printed published 2010, online published 2011) 26; Kinli (n 151).

[185] One of the reasons could be that the Ottomans' loss of leadership within medical and scientific realms led to handing over production of knowledge to the Western world.

[186] Ze'evi, 'Hiding Sexuality: The Disappearance of Sexual Discourse in the Late Ottoman Middle East, Social Analysis' (n 154).

[187] Miller, 'Rights, Reproduction, Sexuality, and Citizenship in the Ottoman Empire and Turkey' (n 16).

3.4. Are the Western and Ottoman understandings of private sphere the same?

Another line of argument challenging the decriminalisation narrative can be drawn from the differences in the private sphere between the West and the Ottoman Empire/Turkey. With this new sexual regime adopted, same-sex intimacy disappeared, or, through a different perspective, became legalised in the private sphere in pursuit of the Western benchmark. Similarly, the understanding of what constituted the public and private spheres was reconstructed according to Western legal thought. However, two problems arose owing to the emergence of the private sphere within Ottoman jurisprudence. Firstly, as will be detailed below, it was the strict and radical interpretation of private life, in accordance with Islamic law and a reaction to Western laws, which was adopted by the Ottoman Empire.[188] Consequently, the second problem that emerged was that the private sphere remained the domain in which non-state laws governed.

The first issue is that Islamic rules started to dominate the private sphere more strictly. As in the Western conceptualisation, the Ottomans tended to class the public sphere as a realm falling under the scope of secular laws. However, they departed from the Western conceptualisation by considering the private sphere as a realm in which Islamic laws operated.[189] Traces of this understanding can

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[188] Ibid.

[189] Karen Barkey, 'Aspects of Legal Pluralism in the Ottoman Empire' in Lauren Benton and Richard J. Ros (eds), *Legal Pluralism and Empires 1500–1850* (NYU Press 2013) 83–107; Laura Knoppers, 'Gender and the Public Sphere in Habermas and Milton: New Critical Directions' (2014) 11(9) Literature Compass 615–624; Miller, 'Rights, Reproduction, Sexuality, and Citizenship in theOttoman Empire and Turkey' (n 16).

be seen in the early Ottoman division of the duties of religious and state courts, in which the jurisdiction of religious courts was limited to ruling on family and personal issues, whereas criminal, tax and land law issues were centralised and governed by state law.[190]

Another line of argument that reinforces the previous analysis is that the Ottomans increased the magnitude of shari'a rules within the 1858 Penal Code while taking the French Penal Code as a reference point. Miller points out the contradiction in that the Ottoman legal system became more religious despite adopting secular laws.[191] As one example in support, the first article of this penal code stressed the importance of shari'a, unlike the 16th-century Ottoman Penal Code:

> Art. 1 – Whereas the punishment of offences taking place directly against the Government lies with the State, and the consideration that offences taking place against a person disturb the public tranquillity likewise concerns the State, this Code also guarantees and secures the determination of the degrees of the punishment the fixing and execution of which lie with the order of the Supreme Authority according to the Sharia, without prejudice; in any case of the personal rights prescribed by the Sharia.[192]

This article clarified that the function of the 1858 Penal Code was twofold: firstly, to address crimes targeting the state and the public, which constituted the secular elements of the code; and, secondly, securing a penalty regime and personal rights as prescribed by the shari'a. This article also demonstrates that private or personal matters fell under the jurisdiction of shari'a. Given that the

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[190] Barkey (n 189).

[191] Miller, *Legislating Authority, Sin and Crime in the Ottoman Empire and Turkey* (n 97) 155–178.

[192] Penal Code of the Ottoman Empire (1858) (n 5).

main goal of these reforms was to centralise the plurality of laws into one legislative code, what was attempted was the melding of shari'a, Western laws and the Ottoman legal experience. Despite this effort, harmonisation could not be achieved. The public sphere became more associated with secular laws, whereas the private sphere fell under the scope of religious law, and religious concepts began to be interpreted more strictly.[193]

The assessment of the decriminalisation of homosexuality within Ottoman/Turkish legal history through the private sphere benchmark creates another problem: where the very construction of the private differs drastically from the Western understanding, non-reference to private, consensual same-sex activity in the penal code might not necessarily constitute evidence of decriminalisation. During the initial stages of secularism in the West, the aim was to exclude religion from the public sphere and direct it to the private sphere, in a way that was similar to the Ottoman system. However, the private sphere became more associated with individual freedoms, especially in the later stages of the development of human rights in the West. On the other hand, in the Ottoman Empire, and in Turkey as well, an individual may be categorised as vulnerable if they are not involved in an extended family or a group.[194] The Ottoman/Turkish legal tradition is different from the Western formulation of the private sphere, in which the individual is the nucleus of society. Serpil Sancar argues that the main difference between the Western and Ottoman/Turkish frameworks of the private sphere is that, in the West, the private sphere is

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[193] Ibid.

[194] Zarinebaf, *Crime and Punishment in Istanbul, 1700–1800* (n 84) 132.

associated with the individual, whereas at the core of the Ottoman Turkish concept of private sphere is the family.[195] Unlike the Western idea of the private sphere, where the individual is, supposedly, free and on her own, in the Ottoman/Turkish example the private sphere became a place where the individual was judged by non-state laws and morality.[196] This understanding of the private sphere gives honour crimes targeting women and LGB persons a convenient ground for justification. Under any assessment criteria, the absence of punishment for private same-sex intimacy does not necessarily bring about decriminalisation in the Ottoman Empire/Turkey. A very good example in support for this argument is the success rate of gay advance defences within the Turkish judiciary. Although I will examine the application of the unjust provocation article in LGB hate crimes in more detail in the next chapter, in brief, the Turkish judiciary mitigates punishment if the perpetrator portrays the situation in a homophobic scenario, meaning that they had to kill the LGB victim in order to defend their heterosexuality. In this sense, heterosexual morality functions as a non-state law, which allows perpetrators to 'punish' LGB individuals. Given the impunity for crimes against LGB victims, especially those perpetuated by their family members, such as Ahmet Yildiz,[197] the private

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[195] Serpil Sancar, Turkiye'de Kadinlarin Hak Mucadelesini Belirleyen Baglamlar (2006) <http://panel.stgm.org.tr/vera/app/var/files/t/u/turkiyede-kadinlarin-hak-mucadelesi-serpil-sancar.pdf> accessed 17 September 2017.

[196] Miller, 'Rights, Reproduction, Sexuality, and Citizenship in the Ottoman Empire and Turkey' (n 16); Burcu Özdemir, 'The Role of the EU in Turkey's Legislative Reforms for Eliminating Violence against Women: A Bottom-Up Approach' (2014) 16(1) Journal of Balkan and Near Eastern Studies 119–136.

[197] Ahmet Yildiz, a Kurdish student and a gay man, was 26 years old when he was killed in what has been described by activists as a gay 'honour killing'. In July 2008 Ahmet was shot leaving the apartment he shared with his fiancé, Ibrahim Can. The sole suspect is Ahmet's father.

sphere became the realm where non-state rules and strict morality are imposed on LGB individuals. This is endorsed by the judiciary in several ways through legal mechanisms such as penalty mitigating, impunity and ineffective investigation.[198]

3.5 Conclusion

The transplantation of Western codes into the Ottoman sexual regime brought about a resignification of former understandings of same-sex attraction, and, in this way, condemnation, disappearance and 'decriminalisation' of homosexuality all happened simultaneously.[199] This supports Moran's insight that silence, absence and invisibility are instruments that construct the heterosexual as a privileged sexual object.[200] Thus, the adoption of the French Penal Code in 1858 was, indeed, the implantation of these instruments into the Ottoman corpus.

Ibrahim Can claims Ahmet was receiving threats of violence from his family at the time and had filed a criminal complaint in October 2007 in order to be awarded protection from the authorities. The complaint was never investigated. His family never collected the body for burial. Three months after the murder, Ahmet's father was finally identified as a prime suspect and a warrant was issued for his arrest. By then, he was believed to have fled to Iraq. An international arrest warrant was issued in 2011 after a new judge was assigned to the case. Ahmet's father has still not been apprehended. Mentioned in Amnesty International, 'Case Study Ahmet Yildiz' (May 2016) <https://www.amnesty.org.uk/files/power_of_the_pen_may_2016_-_ahmet_yildiz_0.pdf> accessed 5 June 2017.

[198] A detailed examination of Turkish judiciary through these concepts can be found in Chapter 4.

[199] Hur (n 127).

[200] Moran (n 59) 33.

Through any assessment criteria, it appears to be an overstatement to interpret what happened in 1858 as a decriminalisation of homosexuality. It is evident that the disappearance of sodomy/same-sex terminology from the Ottoman Penal Code has been confused with the removal of punishments. The universalist,[201] that is, Western benchmarks embedded within the thresholds of decriminalisation brought about this false and imperialistic assumption. However, what happened was the disappearance of same-sex discourse including any references to it. This disappearance included the explicit wording of same-sex intimacy in penal codes that would in a way confirm the existence of homosexuality.

As has been clearly revealed in this chapter, Ottoman penal codes prior to the 19th century did not impose heavy punishments for sodomy; instead, the penalty was financial. However, in France and other Western countries, punishment for the same crime was death. The new criminal legislative system adopted by French legal authorities could be read as a moderation of punishments for sodomy in France, which gradually relaxed from burning to hanging, then to imprisonment, and finally to the decriminalisation of private same-sex acts,[202] whereas, in the Ottoman case, punishing sexual offences with imprisonment was in fact increasing the punishments. Therefore, the assumption that the Ottoman Empire decriminalised homosexuality is an overstatement when the previous penal codes of the Ottoman Empire are taken into consideration. The

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[201] As noted before, this thesis's reference to universal as Western seeks to address the hegemony of Western, in particular legal, philosophy in terms of defining the thresholds of universal.

[202] E. William Monter, 'Sodomy and Heresy in Early Modern Switzerland' (1981) 6(1–2) Journal of Homosexuality 41–55.

Ottomans adopted the Western understanding of homosexuality that entails legalising private consensual same-sex intercourse and penalising its public appearance. However, this brought about the disappearance of same-sex discourse within the penal codes. At the same time, adoption of this new sexual regime led to loss of social tolerance towards same-sex attraction and the punishment of its public appearance with imprisonment under the terms ‘indecency’, ‘abominable act’ and ‘contrary to modesty’.

The acceleration of intolerance against same-sex attraction actually began with its decriminalisation according to Western standards, and, as ironic as it may sound, condemnation, decriminalisation and disappearance happened at the same time as decriminalisation. Then, what happened in 1858 cannot be identified as a decriminalisation of homosexuality. It is evident that analysing the disappearance of sodomy/same-sex discourse from the Ottoman criminal code though Western benchmarks has brought about a misreading of what really happened in 1858. The legal and social understanding of same-sex intimacy was silenced and this was fallaciously referred as decriminalisation.

Most importantly, the impact of this shift in the legal regime regarding gender and sexuality has not been about the present penal status of homosexuality; it also recreated a history retroactively. In other words, silencing same-sex discourse not only constructed the future legal regime but also silenced the old Ottoman tradition of leniency towards same-sex desire within the law as well as its appearance within art and literature. In this sense, it transposed history, and in doing so it disconnected the present system from its previous legal traditions. Thus, the Ottomans replaced their more lenient approach to same-sex intimacy with this new silencing ideology through legal transplants. The legal history of

the Ottomans has been insignificant in the assessment of the decriminalisation of homosexuality. The Western benchmark, which has no penalties for private, consensual same-sex intimacy, became the essential denominator of the decriminalisation of homosexuality. Without looking into a country's legal history, the fact that there is no mention of private same-sex intimacy in its penal code suffices to conclude that that country has decriminalised homosexuality. In this way, the Ottoman experience of the criminalisation and decriminalisation of homosexuality has been excluded from the concept of decriminalisation of homosexuality and the Western formulation of decriminalisation of same-sex intimacy has been universalised. This brought about the disappearance of the Ottoman penal experience of same-sex intimacy. An imperialistic approach to the decriminalisation of homosexuality brought about the widespread conclusion that Turkey decriminalised homosexuality in 1858 during the Ottoman era by applying Western benchmarks to the Ottoman situation. However, legal transplantation brings about replacing non-Western with Western history. In the Ottoman example, the non-West, the Ottoman Empire, has been assessed through the Western standards of decriminalisation.

This chapter provided an alternative reading of the Ottoman penal history regarding the decriminalisation of same-sex intimacy, which is considered the bedrock of the LGB rights concept. This has been the first legal transplant of the Ottoman Empire/Turkey regarding the LGB rights concept. As this chapter proved that leniency towards same-sex intimacy has been part of Ottoman/Turkish legal history, this requires a detailed examination of the construction of the culture/tradition argument within Turkey. In the following

chapter I trace the later legal implants to analyse the reception of the LGB rights concept in more detail and scrutinise the ways in which the culture/tradition argument fabricated itself against this concept.

Chapter 4 Culture narrative and the last legal transplant: Istanbul Convention

> Mr Demirel, are you going to import homosexuality, lesbianism and Aids to Turkey? Will you be the vendor of the West?[1]

4.1 Introduction

This chapter provides a critical reading of Turkish legal rhetoric towards the LGB rights concept, culture versus homosexuality, and critically examines the last transplant regarding the LGB rights concept. Scrutinising the new republic's law-making method, this chapter elaborates the emergence of homosexuality in Turkish parliament general assembly records, including the adoption of sexual orientation into the Turkish legal lexicon through the last transplant regarding the LGB rights concept: the Istanbul Convention.

4.2 Culture narrative against Western laws

The collapse of the Ottoman Empire gave rise to the Republic of Turkey. Turkey abrogated all of the Ottoman legislation and instead transplanted laws from various Western countries.[2] The Republic of Turkey – for some a successor, for others a continuation of the Ottoman Empire[3] – was founded in 1923 under the

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[1] Turkish Parliament Session: 52 Page: 720 Date: 25 December 1992 >https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d19/c026/tbmm19026052.pdf> accessed 25 December 2016.

[2] Esin Örücü, 'A Legal System Based on Translation: The Turkish Experience' (2013) 6 J Civ L Stud 445.

[3] First Treaty of Lausanne, adopted 24 July 1923 (Turkey, France, British Empire, Kingdom of Italy, Japan, Greece, Kingdom of Serbs, Croats and Slovens) (entered into force 6 August 1923); Emre Öktem, Turkey: Successor or Continuing State of the Ottoman Empire? (2011) 24 Leiden Journal of International Law 561–583.

leadership of Mustafa Kemal Atatürk.[4] The essential goal was to establish a modern, secular republic that would reach the level of Western civilisation.[5] He articulated this as follows: '*The West has always been prejudiced against the Turks, but we Turks have always consistently moved towards the West. In order to be a civilized nation, there is no other alternative'*.[6] Despite adopting Western legislation in late Ottoman times, the legal system remained pluralistic until the collapse of the Ottoman Empire. The new republic aimed to establish a singular, unified legal system that was in compliance with the Western secular modern state model.

After abrogation of all laws and institutions remaining from the Ottoman Empire, Turkey adopted new laws, which were selected from various Western countries. Family law was borrowed from Switzerland,[7] criminal law from Italy,[8] administrative law from France[9] and commercial law from Germany.[10]

Turkey has been subjected to many legal reforms since its foundation, and the law-making method has always been one of transplantation from different

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[4] Ibid.

[5] Dankwart A. Rustow, 'Atatürk as Founder of a State' (1968) 97(3) Daedalus 793–828.

[6] William Hale, *Turkish Foreign Policy 1974–2000* (Frank Case Publishers 2000) 38.

[7] Paul J. Magnarella, 'The Reception of Swiss Family Law in Turkey' (1973) 46(2) Anthropological Quarterly 100–116.

[8] Stephen Skinner, 'Tainted Law? The Italian Penal Code, Fascism and Democracy' (2011) 7 International Journal of Law in Context 423–446.

[9] Esin Orücü, 'Conseil D'etat: The French Layer of Turkish Administrative Law' (2000) 49 International and Comparative Law Quarterly 679–700.

[10] Örücü, 'A Legal System Based on Translation: The Turkish Experience' (n 2).

foreign legislations.[11] This has been a contentious issue among intellectuals and politicians, and some have disputed the idea of legal transplantation on the basis that Western laws do not reflect the cultural values[12] of Turkish society.[13] This cultural values versus Western laws discussion dates back to the late Ottoman and early Republic times, and is still an ongoing debate.

Elaborating upon Turkish law-makers' attitudes towards the Istanbul Convention, which includes sexual orientation in its text, enables the discussion of the changes that occurred after the inclusion of sexual orientation into the legal corpus of Turkey. In this chapter, I will first examine the parliamentary sessions of the new Turkish Republic to discover the ways in which legal transplantation became not just the primary but the only method of law-making in Turkey, and to reveal how, within the 1920–1926 founding period, 'culture' was portrayed as being dialectically opposed to legal transplantation. Moving on from this, I will explore how the culture argument was/became intertwined with anti-homosexuality discourse by examining the Turkish parliamentary session minutes from 1920 until 2017. Finally, I will delve into the last legal transplant regarding the LGB rights concept: the Istanbul Convention, in which sexual orientation is explicitly worded as a protected status and which Turkey ratified

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[11] Ibid.

[12] Culture and tradition were used interchangeably at that time within the discussions and therefore I am going to follow the same direction and use these terms interchangeably.

[13] Gulnihal Bozkurt, 'Mahmut Esat Bozkurt'un Laik Hukuka Gecise Katkilari' <http://web.deu.edu.tr/ataturkilkeleri/pdf/cilt2sayi4.5/c2_s4–5_gulnihal_bozkurt.pdf> accessed 26 December 2016.

without any reservations. Thus, in Turkey, the term 'sexual orientation' has been part of legislation since the entry into force of the Istanbul Convention in 2014.

4.2.1 The early republic period: 1920s

The first parliament of the Turkish Republic, called the Turkish Grand National Assembly, was opened on 23 April 1920.[14] One of the tasks of this new assembly was to establish a new legal system.[15] The introduction of legal implants from the West was always a contentious issue among the law-makers of the early republic and there were different opinions pertaining to copy and pasting laws from the Western states. The most popular argument against Western laws was that of cultural differences, arguing that Turkey and the West have different values, beliefs and morals, which were irreconcilable. Turkish intellectuals also had diverse opinions about the imitation of Western laws. One of the most prominent poets, Namik Kemal, was strongly opposed to the adoption of the Western lexicon.[16] He instead advocated for shari'a and the development of a legal system that relied upon Islamic culture.[17]

At the parliamentary level, the future of the legal system was discussed in several sessions. During the session that took place on 29 November 1921,

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[14] Hakan Ozoglu, *From Caliphate to Secular State: Power Struggle in the Early Turkish Republic* (Praeger 2011) 3.

[15] Ibid.

[16] Cengiz Otaci, Osmanli Devletinde Hukukun Romanizasyonu (2006) <http://hukukdergi.erzincan.edu.tr/wp-content/uploads/2015/10/2006_X_10> accessed 11 July Muharrem Balci, Islah, Resepsiyon ve Uyum Calismalarinin Tahlili (20 May 2000) <http://www.muharrembalci.com/yayinlar/tebligler/52.pdf> accessed 11 July 2017.

[17] Balci (n 16).

Behcet Bey expressed his concerns about cultural differences between West and East.[18] He rejected the notion of implanting Western laws, maintaining that Western legislation had been tried by the Ottomans and had not been received well.[19] Thus he was of the opinion that the new republic was capable of constructing its own legal regime, and, consequently, he disagreed with the idea that Western laws should be implemented into the corpus of the new republic.[20]

Yusuf Ziya Bey[21] also criticised the tendency towards total abandonment of the old laws. Instead he suggested the development of a Turkish corpus based on the needs of the newly founded republic.[22] In his speech at the parliament, Yusuf Ziya Bey acknowledged the fact that the Turkish Republic was in dire need of the implementation of a legal regime. However, he thought that if this were done imprecisely, such as by thoughtlessly imitating Western laws, this would cause bigger problems in the future.[23] Later, in 1922, at another

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[18] Turkish Parliament Session: 119, Page: 395, Date: 29 Nov 1921 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d01/c014/tbmm01014119.pdf> accessed 26 December 2016.

[19] Ibid.

[20] Ibid.

[21] *Bey* means mister in Turkish and before the Surname Law men were addressed as *Bey* and women as *Hanim* after their first names. I will not translate this into English as it spoils the whole meaning and the historical implications of the names of that period.

[22] Turkish Parliament Session: 119, Page: 399, Date: 29 Nov 1921 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d01/c014/tbmm01014119.pdf> accessed 26 December 2016.

[23] Turkish Parliament Session: 119, Page: 398, Date: 29 Nov 1921 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d01/c014/tbmm01014119.pdf> accessed 26 December 2016.

parliament session, Ali Sukru Bey argued that reference to Western laws and philosophies had turned Turkey into the captain of a ship who had lost his direction in a heavy storm.[24] Conversely, Besim Atalay, another member of the first Turkish parliament, asserted that it was necessary to follow the West and adopt their laws in order to be civilised.[25] This strand of law-making portrayed the adoption of Western laws as a condition of becoming part of the 'civilised' West.

Mahmut Esat Bozkurt, the minister of justice at that time, was the architect of all of the early republic's legal transplants and led a commission that was responsible for creating a legal system for the new modern republic.[26] For him, Ottoman laws did not reflect the present culture of the republic[27] because their primary purpose was to protect the reign of the Empire. Bozkurt strongly supported transplanting Western laws. However, as the Ottomans had already implanted Western laws, Bozkurt had to explain why the early Turkish Republic required imitation of a Western penal code. He pointed out that the Ottoman sultans only borrowed the articles that favoured the continuation of their power.[28] Thus, the Ottomans had mixed the French Penal Code with religious

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[24] Turkish Parliament Session: 74, Page: 394, Date: 15 July 1922 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d01/c021/tbmm01021074.pdf> accessed 26 December 2016.

[25] Turkish Parliament Session: 57, Page: 233, Date: 17 February 1926 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d02/c022/tbmm02022057.pdf> accessed 26 December 2016.

[26] Bozkurt (n 13).

[27] Ibid.

[28] Turkish Parliament Session: 64 Page: 4 Date: 1 March 1926 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d02/c023/tbmm02023064.pdf> accessed 26 December 2016.

norms.[29] According to him, this amalgam of secular French law with Islamic norms resulted in the failure of the 1858 Ottoman Penal Code.[30] This combination had ruined the holistic nature of the modern French law, and consequently caused problems in its application in Turkey.[31] This meant that the harmony of the French Penal Code was impaired when it was blended with Ottoman laws.[32] As a result, the 1858 Ottoman Penal Code was not solely a Western code. This allowed Bozkurt to conclude that the new republic should not combine Western laws with domestic rules but implant the whole text of a Western body of legislation without changing it.[33] He went further to argue that the French Penal Code had gone through several reforms, but these reforms had not been implemented by the Ottomans into their corpus.[34] As such, the 1858 Ottoman Penal Code cannot be considered a Western/French code and this was, therefore, another reason why the early Turkish Republic had to change the penal code inherited from the Ottomans.

Another reason Bozkurt gave for the necessary transplantation of Western laws was that law-making is time-consuming and the newly founded Republic was

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[29] Ibid.

[30] Turkish Parliament Second Term, Session 23. Volume 64. Page 4 <https://www.tbmm.gov.tr/develop/owa/td_v2.sayfa_getir?sayfa=4:5&v_meclis=1&v_donem=2&v_yasama_yili=&v_cilt=23&v_birlesim=06> accessed 26 December 2016.

[31] Ibid.

[32] Turkish Parliament Session: 64 Page: 4 Date: 1 March 1926 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d02/c023/tbmm02023064.pdf> accessed 26 December 2016.

[33] The Turkish parliament included capital punishment to its penal code separately from the implanted Italian Penal Code.

[34] Turkish Parliament (n 30).

surrounded by enemies. Thus, in the interests of time, the regime had no choice but to translate and adopt Western laws.[35] In various parliamentary discussions, he addressed the critiques pertaining to the issue of cultural difference.[36] In 1921, in defence of legal implants from the West, he stated, quoting the Prophet Muhammed, that Turkey must acquire science even if it belonged to its enemy.[37] Therefore, he suggested that Turkey must borrow the whole text of the most developed criminal code within the secular West at the time, which was, according to him, the Zanardelli Italian Penal Code.[38]

The construction of the cultural difference narrative in opposition to Western laws initially started during the parliamentary debates between 1920 and 1926. Mahmut Esat Bozkurt's response was twofold. Firstly, he maintained that the old laws from the Ottoman Empire could not be identified as a manifestation of culture since they were not reflective of national culture. They were rather a bizarre combination of French and the old Ottoman legal tradition.[39] He pointed out that neither Ottoman laws nor the Quran were the source of culture in the newly founded republic. It was a secular revolution and, therefore, the legal regime should follow the Western legal lexicon. Thus, it can be observed that

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[35] Bozkurt (n 13).

[36] Ibid.

[37] Turkish Parliament Session: 134, Page: 305–308, Date 17 January 1921 <https://www.tbmm.gov.tr/develop/owa/td_v2.goruntule?sayfa_no_ilk=305&sayfa_no_son=308&sayfa_no=306&v_meclis=1&v_donem=1&v_yasama_yili=&v_cilt=7&v_birlesim=134> accessed 26 December 2016.

[38] Turkish Parliament (n 30).

[39] Gulnihal Bozkurt, 'Mahmut Esat Bozkurt'un Laik Hukuka Gecise Katkilari' <http://web.deu.edu.tr/ataturkilkeleri/pdf/cilt2sayi4.5/c2_s4–5_gulnihal_bozkurt.pdf> accessed 26 December 2016.

the proponents of legal transplantation interpreted culture differently from its opponents. According to the opponents of transplantation, the Ottoman legal system, with its emphasis on religion, *was* culture, whereas the proponents of Western legal transplantation held that the Ottoman laws did not reflect culture. In other words, what proponents referred to as culture was the national revolution that was carried out by the Turkish nation.[40] Religious and nation-based cultural definitions were in competition with each other. In addition, nation-based cultural proponents supported the idea of universal secular values.[41]

The second layer of his response against culture arguments can be found in Mahmut Esat's assertion that the old laws of the Ottoman Empire cannot represent culture as they incorporated foreign laws. One way of analysing his argument is through the feature of culture: '[t]raditional cultural practices reflect the values and beliefs held by members of a community for periods often spanning generations'.[42] This means that culture is not necessarily native; it can also signify accumulation of past legal traditions, including non-native, foreign ones. In this sense, once the foreign law has been implanted and remains in use for some time, this once-foreign element becomes part of the culture.

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[40] Türkiye Büyük Millet Meclisi 2. Dönem 23. Cilt 64. Birleşim – Sayfa 4 <https://www.tbmm.gov.tr/develop/owa/td_v2.sayfa_getir?sayfa=4:5&v_meclis=1&v_donem=2&v_yasama_yili=&v_cilt=23&v_birlesim=06> accessed 26 December 2016; Bozkurt (n 13).

[41] Ibid.

[42] MJ Malueke, 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 Potchefstroom Elec L J 1.

When same-sex intimacy was criminalised in the West, the West identified the Ottoman as the locus of sodomy.[43] Homosexuality was a foreign, mostly an Eastern, vice according to the West.[44] It is interesting to observe that, regarding the same-sex issue, this foreign thread discourse has been exchanged between the West and East throughout history. This exchange intensifies the accuracy of the argument that tradition versus LGB rights discourse in Turkey is a false dichotomy constructed via legal transplantation from the West, through which a resignification of homophobic tradition occurred. This resignification most likely originated from a sense of historical resentment against being associated with sodomy. These discourses appeared in different centuries yet contain parallels in identifying same-sex related concepts as a foreign element to culture and as being potentially destructive of the national identity. As discussed previously, a tolerance towards same-sex attraction existed for a substantial period of time within Ottoman history, and this challenges the culture versus LGB rights discourse within the Republic of Turkey. In the example of the Ottoman Empire/Turkey, tradition/culture was leniency towards sodomy[45] and, ironically, Turkey now asserts that West is lenient towards same-sex intimacy, ignoring its own history.

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[43] Dror Ze'evi, Producing *Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500–1900* (University of California Press 2006) 60; Dror Ze'evi, 'Hiding Sexuality: The Disappearance of Sexual Discourse in the Late Ottoman Middle East, Social Analysis' (2005)49(2) The International Journal of Social and Cultural Practice 34–53.

[44] Ibid.

[45] Sodomy covers more than same-sex intimacy, however in this thesis wherever sodomy is used it only refers to the same-sex intimacy.

Legal transplantation as a mechanism for legal reform/change *is* a cultural aspect of the Ottoman Empire/Turkey.[46] This can be defined as a voluntary way of departing from one's ancestry and adopting those which are created through an alien line of ancestry/history. In this sense, Turkey's understanding of legal tradition in particular does not follow the conventional elements of tradition/culture; as it is based on the adoption of foreign laws. Turkish/Ottoman legal history resignified the attitude towards same-sex attraction in an contrary manner by transplanting the French Penal Code. Therefore, the Ottomans departed from their ancestors' attitude of tolerance and constructed a new, intolerant discourse by adopting Western laws. In this way, what is referred to as tradition in today's Turkey actually stems from an old legal transplant. Thus the tradition versus LGB rights dichotomy is fallaciously constructed.

This culture of legal change via adopting foreign laws can be observed from Turkey's legislation shopping among various jurisdictions. In other words, Turkey did not follow the same legal tradition for a 'parent'[47] law in every reform. For example, the recent Turkish Penal Code (2004) departed from its 1926 precedent, which borrowed heavily from the Italian Penal Code, and was instead based on the German Penal Code.[48] Turkish legislation is comprised of

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[46] Örücü, 'A Legal System Based on Translation: The Turkish Experience' (n 2).

[47] William Twining, 'Implications of "Globalisation" for Law as a Discipline' in Andrew Halpin & Volker Roeben (eds), *Theorising the Global Legal Order* (Hart Publishing 2009) 39–59.

[48] Adem Sozuer, 'Reform of the Turkish Criminal Law [2006] HPD 210–226; Adem Sozuer, Die Reform das türkischen Strafrechts, Zeitschrift für die gesamte Strafrechtswissenschaft (2007) 3 Heft 717–750.

numerous Western laws. Consequently, Turkey is described by Örücü as a legally synthetic country.[49]

The 1858 Ottoman Penal Code was replaced by the 1926 Turkish Criminal Code, which implanted the 1889 Italian Penal Code,[50] also called the Zanardelli Penal Code.[51] It is worth mentioning that it was one of the few Western penal codes that was silent on homosexuality. In a similar way to the 1858 Ottoman Penal Code, the 1889 Italian Penal Code is deemed to have decriminalised homosexuality in Italy.[52] The Zanardelli Penal Code replaced the Napoleonic-era codes, which criminalised homosexuality. The fact that homosexuality was not mentioned in the Zanardelli Penal Code was interpreted as its decriminalisation.[53] In fact it, was deliberately silenced by the Italian authorities, which argued that 'ignorance of the vice was more'[54] deterrent than its promotion through the law.[55] By adopting this Code in 1926, Turkey maintained its silence on homosexuality similar to that which was employed by the 1858 Ottoman Penal Code.

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[49] Örücü, 'A Legal System Based On Translation: The Turkish Experience' (n 2).

[50] Draft Turkish Penal Code 2003 <http://www2.tbmm.gov.tr/d22/1/1–0593.pdf> accessed 17 July 2017.

[51] Skinner (n 8).

[52] Giovanni Dall'Orto, '"Socratic Love" as a Disguise for Same-Sex Love in the Italian Renaissance' (1989) 16(1–2) Journal of Homosexuality; Marina Franchi, 'Mediated Tensions: Italian Newspapers and the Legal Recognition of de facto Unions' (PhD thesis, London School of Economics, 2015).

[53] Chiara Beccalossi, *Female Sexual Inversion: Same-Sex Desires in Italian and British Sexology c 1870–1920* (Palgrave 2012) 36, 37.

[54] Ibid. 37.

[55] Ibid.

To understand why the Turkish Republic chose the Zanardelli code, the general reasoning of the draft Turkish Penal Code in 2003 provides more insight. In the 2003 Code, a few paragraphs are dedicated to Turkish penal history. Here, it states that, among European penal codes, Zanardelli was pioneering as extremely liberal and humanistic and was the most lenient penal code of the time.[56] Some scholars have argued that the Zanardelli Penal Code introduced a different trend towards the oppression of homosexuality by distinguishing between criminal activity and morality. Consequently, the absence of penalties attached to homosexuality in the Italian criminal code actually derive from this approach. The Zanardelli code transferred the issue of homosexuality from the scope of criminal law to the religious, social realm,[57] which is profoundly described by Dall'Orto as a form of repressive oppression. Dall Orto asserts that it was not an actual decriminalisation but a manifestation of repressive tolerance towards homosexuality.[58] He also points out that the Italian authorities at that time decided that censorship and ignorance would be a far more efficient strategy against homosexuality than its criminalisation.[59]

On the other hand, some scholars have argued that the reason behind Italy's (and the Ottomans') inclination towards silence on matters regarding homosexuality stems from the fact that both Italy and the Ottoman Empire were portrayed as loci of male homosexuality within the West, especially by British

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[56] Draft Turkish Penal Code (n 50).

[57] Ibid.

[58] Dall'Orto (n 52).

[59] Ibid.

books on European travel.[60] This, according to these scholars, engendered an attitude of denial that went even further by removing any explicit reference to homosexuality from their legal materials, with the aim of demonstrating that homosexuality did not exist in their countries and thereby debunking Western travellers' so-called observations.[61]

Interestingly, Italy is also reported to have decriminalised homosexuality in 1889, very close to the time of the Ottomans' alleged decriminalisation of homosexuality.[62] These historical similarities between the Ottoman Empire and Italy suggest that the association of both countries with homosexuality brought about a silencing of same-sex discourse. Turkey transplanted the 1930 Italian Penal Code in 1938.[63] This penal code was introduced by Mussolini and the emphasis was on the nexus between Italian nationality and heterosexual family values.[64] Mahmut Esat Bozkurt stated that the Turkish revolution needed to be

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[60] Peter Drucker, 'Byron and Ottoman Love: Orientalism, Europeanization and Same-Sex Sexualities in the Early Nineteenth-century Levant' (2012) 42(2) Journal of European Studies 140–157; Jeffrey L Schneider, Secret Sins of the Orient: Creating a (Homo)textual Context for Reading Byron's The Giaour (2002) 65 College English 1, 81; Peter M. Nardi, 'The Globalization of the Gay & Lesbian Socio-Political Movement: Some Observations about Europe with a Focus on Italy' (1998) 41(3) Sociological Perspectives 567–586; Michael Rocke, *Forbidden Friendships: Homosexuality and Male Culture in Renaissance Florence* (Oxford University Press 1996).

[61] Ibid.

[62] Robert Wintemute, 'Sexual Orientation and Gender Identity Discrimination: The Case-law of the European Court of Human Rights and the Court of Justice of the European Union, 29 July 2016 (Summer School on SOGI and International Law, Leiden University, August 2016).

[63] Prof. Dr Durmuş Tezcan,'Cezai Konularda Turk-Italyan Iliskileri' (1994) Ankara Universitesi SBF Dergi, Cilt 49 Sayi <http://dergiler.ankara.edu.tr/dergiler/42/462/5291.pdf> accessed 24 December 2016.

[64] Drucker (n 60); Schneider (n 60); Nardi (n 60); Rocke (n 60).

extremely well protected, and so they were introducing the most deterrent and harsh penal code in the secular West, which was the Italian Penal Code.[65] The only change that the Turkish parliament made while adopting the Italian Penal Code was to include capital punishment, thereby making the penal code more severe.[66] It is noteworthy to emphasise that, unlike the Ottomans, Turkey did not implant the French penal tradition; instead, it looked to Italy for its penal code. One of the reasons for this could be that the new laws introduced by France following its 1810 Code, such as those relating to age of consent etc. (see previous chapter for further information), gradually broke the silencing ideology towards homosexuality. The only Western penal code that does not mention same-sex relations and homosexuality during that time was the Italian Penal Code.

The prohibition against same-sex attraction can be traced back to the West and later embraced by non-Western countries. It was actually the Ottomans' more lenient attitude to sodomy/same-sex attraction which led to the orientalist[67] assumption that same-sex relationships within the Ottoman Empire were more widespread than in the West.[68] Having severe punishments for same-sex actions was thus considered as a sign of Western purity (as well as superiority),

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[65] Bozkurt (n 13).

[66] Turkish Parliament Session :57, Page: 233, Date: 17 February 1926 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d02/c022/tbmm02022057.pdf> accessed 26 December 2016.

[67] 'Orientalism is fundamentally a political doctrine willed over the Orient because the Orient was weaker than the West, which elided the Orient's difference with its weakness'. See Edward Said, *Orientalism* (Penguin 1977) 204.

[68] Drucker (n 60).

as compared to the supposed perversions of the East.[69] Eighteenth-century European literature, especially British texts, provides numerous examples of orientalist portrayals of sodomy as a non-Western vice.[70] According to some European, especially British, writers, the Ottoman Empire/Turkey was the locus of sodomy.[71] Hence, sodomy was depicted as a foreign threat, which could destroy Western morality and its sexually appropriate regime.[72] Given these arguments, the sodomite was conceptualised as a foreign element associated with the cultural and moral inferiority of the East, especially the Ottoman Turks. The result of this would be that the perception of the moral superiority and purity of the Western narrative, to some extent, emerged through the disdain it inspired for sodomy-affiliated cultures such as the Ottomans.

This strand of thought had a pivotal role in establishing nation state ideology through the effeminisation of sodomy-tolerant nations by categorising them as easy to conquer because they were less disciplined, less militarised and less 'manly' than the West.[73] Kabbani demonstrates the ways in which this binary gender regime played a role in state-level politics: 'To perceive the East as a sexual domain, and to perceive the East as a domain to be colonised, were complementary aspirations'.[74] Apart from its contribution to colonialism, this

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[69] Drucker (n 60); Schneider (n 60).

[70] Schneider (n 60) 81.

[71] Ibid.

[72] Ibid. 65, 1, 81.

[73] Ibid.

[74] Rana Kabbani, *Imperial Fictions, Europe's Myths of Orient* (Indiana University Press 1986) 59.

belief also planted a sense of inferiority within the Ottoman Empire, which was transferred to Turkey. Since the 18th century, the Western narrative regarding tradition/culture was associated with the moral purity and superiority of the West, implying that sodomy or same-sex sexual practices had not been tolerated among Western ancestral cultures and thus were alien to Western culture. Consequently, it would not be an overstatement to conclude that the emergence of the tradition/culture dichotomy against sodomy/same-sex intimacy occurred in the West.[75] Is it not ironic then that, while in the 18th century tolerance of same-sex desire was considered a threat to the West, in the 21st century the LGB rights concept, which has been structured and framed by the West and is affiliated with democracy, is being understood as a threat to the non-West. In other words, the Western idea of foreign vice as a threat to national discourses has been implanted by the non-West as an argument against the Western-constructed LGB rights concept.

If we return to the 1926 Turkish Penal Code, which imitated the Zanardelli Penal Code, we note that the 1926 Turkish Penal Code punishes 'indecent/immoral acts in public' under Article 419.[76] This article has been interpreted as covering the *public* appearance of homosexuality alongside bestiality. In 2004, four male soldiers were persecuted for performing sexual acts in a military base under this interpretation.[77] Although private same-sex acts have not been included within

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[75] Wayne Morrison*, Theoretical Criminology: From Modernity to Post-Modernism* (first published in 1995, Cavendish Publishing Limited 1997) 37.

[76] Turkish Penal Code (1926) promulgated.

[77] Uyusmazlik Mahkemesi Ceza Bolumu, 2004/10 E. 2004/9 K. Tarih: 01 Mart 2004.

the penal code, Article 419 has revealed how the law recognises homosexuality as indecent/immoral. The Turkish Penal Code has never mentioned homosexuality explicitly; it has, however, categorised it as an immoral act.

Legal silence against homosexuality continued within the Turkish legal corpus until the entry into force of the Istanbul Convention in 2011, which explicitly worded SOGI as protected statuses.[78] Since the beginning of the 2000s, sexual orientation was proposed as a protected status by some draft laws. Finally, in 2011, sexual orientation was added to the Turkish legal corpus. Although the laws were silent on homosexuality, it had been discussed by Turkish law-makers on several occasions since the establishment of the Turkish parliament in the 1920s.

In conclusion, in this section I have evaluated the construction of the culture narrative against the adoption of Western laws until the 1970s. Henceforward, I will examine the parliamentary sessions in which homosexuality was mentioned explicitly in relation to culture, with the aim of depicting the ways in which the culture rhetoric has become intertwined with homophobia in the Turkish law/right-making experience.

4.2.2 Culture narrative against homosexuality: from 1970s to 2017

The first mention of homosexuality in a parliamentary discussion happened in 1975. An MP, Yigit Koker, criticised Ismail Ipekci, the head of the government's

[78] Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention); it is reported that Adem Sozuer, professor of criminal law and dean of the Istanbul Faculty of Law, convinced the subcommission to add sexual orientation to the 2004 draft penal code. <http://www.milliyet.com.tr/2004/03/06/pazar/paz05.html> accessed 27 April 2015.

television channel (TRT), for broadcasting a music video of Dolmabahce mosque and Atatürk's residence in Trabzon with a background song about homosexuality by Charles Aznavour.[79] He accused the head of the TRT of attempting to destroy Turkish cultural values and portrayed this act as a hidden agenda of the minister, Ismail Cem, who was in charge of governing the TRT.[80] In this discussion, homosexuality was clearly located as against Turkish national and cultural values.[81] Later, in 1976, during the budget discussions of the Ministry of Tourism, Faiz Saylar made a speech about the perils of homosexual tourists travelling to Turkey.[82] He pointed out that these homosexual tourists were harmful to Turkey, implying their potential to impair the cultural values of Turkish people.[83] In another session, in 1978, Ferhat Altintas mentioned a piece that was published by the Ministry of Culture's magazine to raise awareness of the hazards of homosexuality.[84] He read that piece in parliament: 'the spread of sexual deviance is a disaster for every society … it is a known fact that the homosexual lobby sends spies to every country'.[85] These three parliamentary speeches depict homosexuality as a

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[79] Turkish Parliament Session: 23 Page: 580 Date: 28 January 1975 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/CS__/t14/c018/cs__14018023.pdf> accessed 30 December 2016.

[80] Ibid.

[81] Ibid.

[82] Turkish Parliament Session: 64 Page: 403 Date: 23 February 1976 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/MM__/d04/c016/b064/mm__040160640403.pdf> accessed 30 December 2016.

[83] Ibid.

[84] Turkish Parliament Session: 155 Page: 247 Date: 7 June 1978.

[85] Ibid.

foreign, most likely a Western, vice that is destructive of the moral values of the Turkish nation. These homophobic concerns raised by MPs even portray the appearance of homosexuality as a planned invasion by the West in collaboration with Western allies in Turkey.

It is important to note that, at that time, LGB rights in the West were less progressive than was the case in Turkey. Private, consensual same-sex was criminalised in a number of Western countries and private, consensual same-sex relations were subject to age restrictions higher than those of private consensual heterosexual relations almost everywhere in Europe.[86] Similar arguments about homosexuality articulated within the Turkish parliament had been justified by the ECtHR. Until 1981, the ECHR had consistently declared the applications challenging decriminalisation of homosexuality inadmissible on health and moral grounds.[87] Thus the Westernisation of homosexuality in Turkey started earlier than the construction of the LGB rights concept in the West and this helped construct the LGB rights concept.

In 1978, the first parliamentary discussion about homosexuals in Turkey took place, in debates about the problems of juvenile prisons.[88] Mehmet Ozgunes raised the issue of homosexual guardians.[89] It was the first time within a

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[86] Wintemute (n 62).

[87] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) EJIL 1023–1044.

[88] Turkish Parliament Session: 62 Page: 661 Date: 1 June 1978 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/MM__/d05/c006/b155/mm__050061550247.pdf> accessed 30 December 2016.

[89] Turkish Parliament Session: 62 Page: 661 Date: 1 June 1978 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/MM__/d05/c006/b155/mm__050061550247.pdf> accessed 30 December 2016.

parliamentary session that the subject matter was a homosexual person from Turkey and not a foreigner, albeit portrayed as a rapist. Later, in 1985, in a written response to a query regarding measures taken against AIDS, the minister of health, Mehmet Aydin, mentioned that homosexuality was one of the causes of HIV.[90] He emphasised the fact that homosexuals were few in numbers in Turkey owing to Turkish culture and traditions. However, there was a possibility that this disease might affect Turkey through tourism. It was therefore for this reason, he informed parliament, that health staff had knowledge about AIDS.[91]

In 1986, the government proposed an amendment to the Duties and Powers of the Police Law though which the police were given more power to fight against homosexuality.[92] In the rationale for the proposal, it was bluntly articulated that the police needed this additional power in order to collect fingerprints and photographs of homosexuals. However, in the text of the law, homosexuality was not mentioned; instead, a term which can be translated as 'those who present themselves to sexual pleasure of others' was used.[93] The rationale for the use of this term is as follows:

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[90] Turkish Parliament Session: 62 Page: 661 Date: 1 June 1978 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/MM__/d05/c006/b155/mm__050061550247.pdf> accessed 30 December 2016.

[91] Turkish Parliament Session: 43 Page: 393 Date: 13 December 1985 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d17/c022/tbmm17022043.pdf> accessed 30 December 2016.

[92] Turkish Parliament Session: 111 Page: Date: 11 June 1986 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d17/c018/tbmm17018111.pdf> accessed 25 December 2016.

[93] MADDE GEREKÇELERİ Madde 1. — Meri Kanunun 5 inci maddesine F bendi eklenmesi hakkında değişiklik. Bugün bütün dünyada aktüel bir konu

> Impairment of morality gained importance because male and female homosexuals and the ones who mediate for them became an actual issue around the world … although the term 'those who present themselves to the pleasure of the others' is mentioned in the text of the legislation in section D, this is not clear enough, thus it requires further explanation in the rationale. In order to track those people [male and female homosexuals and those who mediate for them] it is necessary to collect their fingerprints and photographs [by the police].[94]

During the parliamentary session where this proposal was discussed, Ozer Gurbuz challenged this amendment proposal by criticising the government for criminalising homosexuality, which was not provided with punishment by the existing Turkish Penal Code.[95] He also mentioned that Article 419 of the Turkish Penal Code protects society from indecency and shameless acts performed in public, and thus if the police encountered indecent and shameless acts in public they already had legal grounds and authority to start an investigation; as a result, further powers were not needed.[96] He continued to argue that homosexuality cannot be detected through appearance, and thus if police were given this authority it would provide the police with an arbitrary power to ask everyone to see their IDs and collect their fingerprints on suspicion of

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haline gelen kadın, erkek eşcinsel kişiler ile bunlara aracılık edenlerin durumu, toplum içinde ahlakî ve manevî duyguları zedelemesi bakımından oldukça önem taşımaya başlamıştır. Kanunun «D» bendine her ne kadar «kendilerini başkalarının zevkine terkedenlerin» ifadesi var ise de bu hüküm açık değildir, tefsire ihtiyaç hissettirmektedir. Bu kişilerin faaliyetlerini takip ederek, gereken önleyici zabıta tedbirlerinin alınabilmesi bakımından kanunda açıkça belirtilmek suretiyle parmak izlerinin ve fotoğraflarının alınması gerekli görülmüştür.

Turkish Parliament Session: 111 Page: 343 Date: 11 June 1986 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d17/c018/tbmm17018111.pdf> accessed 25 December 2016.

[94] Ibid.

[95] Turkish Parliament Session: 111 Page: 157 Date: 11 June 1986 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d17/c018/tbmm17018111.pdf> accessed 25 December 2016.

[96] Ibid.

homosexuality.[97] In the same session, another MP, Ahmet Sirri Ozbek, criticised this explicit reference to homosexuality, relying on one of the fundamental principles of criminal law: *nulla poena sine lege* (no punishment without law).[98] He argued that if there are no punishments attached to being homosexual in the Penal Code then the police cannot indirectly treat homosexuality as a crime.[99] Although the law only mentioned 'Those who are acting against public morality shamelessly or behaving in a way that cannot be accepted by the public order',[100] it was argued that this law was needed to combat homosexuality. Another MP, Aydin Guven Gurkan, posed a question to the government, asking whether the articulation of 'those who present themselves to sexual pleasure of others' in the proposed law was the government's definition of homosexuality.[101] The minister of the interior, Yildirim Akbulut, responded that it did not solely describe homosexuality, but homosexuality fell under the scope of this definition.[102] It is apparent from this discussion that the government was of the opinion that the Turkish Penal Code's text implicitly includes criminalisation of homosexuality, unlike the interpretation by the main opposition Social Democrat Party. The government

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[97] Ibid.

[98] Turkish Parliament Session: 111 Page: 168 Date: 11 June 1986 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d17/c018/tbmm17018111.pdf> accessed 25 December 2016.

[99] Ibid.

[100] Ibid.

[101] Turkish Parliament Session: 111 Page: 165 Date: 11 June 1986 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d17/c018/tbmm17018111.pdf> accessed 25 December 2016.

[102] Ibid.

was thinking that homosexuality was still criminalised, therefore they had not hesitated to explicitly mention homosexuality in the rationale of the law as a criminal offence. Ultimately, the law passed. However, the opposition party took it to the Constitutional Court, which later overturned the law.[103] The above discussions cast a doubt on the penal status of homosexuality in Turkey. Drawing on the response by Yildirim Akbulut to Aydin Guven Gurkan's question, it can be deduced that homosexuality was considered a crime by the government even though the Penal Code did not explicitly punish same-sex acts. If we examine the Turkish Supreme Court's (Yargitay) case law from those years, the decriminalisation of homosexuality becomes even more disputable. The Yargitay Second Chamber mentions homosexuality as an offensive act together with prostitution and the drug trade.[104] In the following section, I will elaborate on these decisions in detail.

If we return to the parliamentary sessions, from the above discussion it could be concluded that the Social Democrat Party was opposed to homophobia. However, later, in 1989, one of the MPs of the Social Democrat Party, Yasar Yilmaz, ironically opposed the government's decision to import meat from foreign countries by arguing that it was a scientific fact that hormones in meat cause homosexual tendencies and, therefore, imported meat posed a danger to public health.[105] This suggests that there was not a clear policy regarding

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[103] Turk Anayasa Mahkemesi, E. 1985/8, K. 1986/27 T. 26 Kasim 1986.

[104] Yargitay 2. Hukuk Dairesi E. 1984/8323 K. 1984/8594 T. 30 Ekim 1984.

[105] Turkish Parliament Session: 70 Page: 199 Date: 28 March 1989 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d18/c024/tbmm18024070.pdf> accessed 25 December 2016.

homosexuality within the Social Democrat Party, and it was still classed as an undesired sexual orientation.

In the 1990s, the first appearance of homosexuality in a parliamentary session was in Melih Gokcek's speech, where he aimed to raise awareness about the cultural erosion that Turkey was going through by emphasising the increase of homosexuality within society, especially within the sex work industry.[106] He expressed his concerns about the rise of homosexuality as a cause of decline in cultural, national, traditional and moral values in Turkish society.[107]

At another session about the budget for the following year, Ibrahim Halil Celik made a very important speech, in the sense that it bluntly draws attention to the link between legal transplants and homosexuality. It is a very clear articulation of the culture rhetoric that is intertwined with homosexuality:

> Dear Members of the Parliament, our state policy has been becoming an imitation of Western civilisation since Tanzimat. We have implanted their alphabet, clothes and changed everything that was essential to our culture; what made us ourselves. Yet, we are not accepted as Western: Europe does not accept us.… This is enslavement, a murder , this is a moral captivity. You are saying that the Ottomans, Seljuks were bad, long live Western and Byzantine civilisation!… What Prime Minister Suleyman Demirel said during his visit to England: 'Are you afraid of fundamental Islam? I am the antidote. I will not only import your whiskey but all your values to Turkey and the Middle East'. This poses a question Mr Demirel, are you going to import homosexuality, lesbianism and Aids to Turkey? Will you be the vendor of the West?[108]

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[106] Turkish Parliament Session: 24 Page: 571 Date: 9 January 1992 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d19/c002/tbmm19002024.pdf> accessed 25 December 2016.

[107] Ibid.

[108] Turkish Parliament Session: 52 Page: 720 Date: 25 December 1992 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d19/c026/tbmm19026052.pdf> accessed 25 December 2016.

Following an inquiry launched by 14 MPs regarding moral impairment within Turkish society and dangers to family values, the parliament dedicated a session to discuss their motion.[109] Okkes Sendilliler, in defence of their motion, cited some magazines which mentioned which lesbians in high society, to warn the parliament that lesbianism was increasing in society and endangering family values.[110]

In a similar motion in 1994, submitted by Zeki Unal, asking government to take necessary measures against moral and cultural collapse within society, he dedicated a significant amount of his speech to same-sex marriages in the West:

> We were terrified to watch on a private TV channel two men kissing each other at their wedding ceremony in Germany. The most upsetting part was that one of them were of Turkish origin. This is what Europe is. So what about the USA, are they any better? … There was a photo of two men kissing each other after their wedding in a local newspaper in New Seattle. This is the West that we are imitating, this is their real face.[111]

In 1996, a group of MPs submitted a motion about the measures that needed to be taken regarding the moral decline promoted through the media. One of the MPs who submitted the motion, Kazim Arslan, argued that scenes portraying homosexual behaviour should not be broadcasted on TV channels.[112] Later, in

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[109] Turkish Parliament Session: 34 Page: 374 Date: 30 November 1993 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d19/c044/tbmm19044034.pdf> accessed 25 December 2016.

[110] Ibid.

[111] Turkish Parliament Session: 36 Page: 480 Date: 16 November 1994 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d19/c071/tbmm19071036.pdf> accessed 25 December 2016.

[112] Turkish Parliament Session: 20 Page: 134 Date: 20 November 1996 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d20/c014/tbmm20014020.pdf> accessed 2 January 2017.

1998, the parliament established a commission on the application of CEDAW. This Commission's report was submitted on 3 March 1998 to the General Assembly, and the only mention of homosexuality was that male prostitution should be regulated owing to the increasing number of homosexual sex workers.[113]

In 2001, Mesut Turker delivered a speech about the impediments of departing from Turkish tradition and replacing it with Western culture. He continued by arguing that the fact that the mayor of Paris was homosexual depicted the level of indecency that the West had reached.[114] The West had not abandoned its imperialistic agenda to impose their sick culture on other countries, and thus Turkey should stop imitating their laws to prevent moral corruption.[115] The response from the Ministry of the Interior was that marriage was regulated under Turkish Civil Law, and there was no chance that same-sex marriages would be permitted under Turkish legislation.[116]

In 2002, before the general elections, Prime Minister Recep Tayyip Erdoğan said on a TV show that homosexuals must be protected by law and added that

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[113] Turkish Parliament Session: 13 Page: 34 Date: 3 November 1998 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d20/c064/tbmm20064013.pdf> accessed 2 January 2017.

[114] Turkish Parliament Session: 72 Page: 193 Date: 21 March 2001 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d21/c057/tbmm21057072.pdf> accessed 2 January 2017.

[115] Turkish Parliament Session: 72 Page: 193 Date: 21 March 2001 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d21/c057/tbmm21057072.pdf> accessed 2 January 2017.

[116] Turkish Parliament Session: 114 Page: 409 Date: 21 June 2005 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d22/c088/tbmm22088114.pdf> accessed 2 January 2017.

ill-treatment of homosexuals was inhumane.[117] His election campaign placed an immense emphasis on the EU accession process and human rights. Following his success in elections, the first very significant attempt to include sexual orientation within the Turkish lexicon took place during the penal code reform in 2004. In fact, the term 'sexual orientation' managed to be included in the 'prohibition of discrimination' article through the particular efforts of the scholars who wrote the first draft.[118] However, when the first draft was examined by parliament's legislation commission, the words 'sexual orientation' were removed on the grounds that 'or any such considerations' mentioned in the equality provision of the Turkish Constitution provided the necessary protection.[119] In clear contradiction to Recep Tayyip Erdoğan's pre-election statement regarding legal protection for homosexuality, his party removed sexual orientation from the draft law.

In 2005, with the aim of implementing EU legislation, the government proposed a new Citizenship Law. In response to this new law, which was mandatory for the EU accession process, an MP, Mehmet Sirin, raised concerns via a written query addressing the Ministry of the Interior, which was responsible for drafting this law. Sirin asked five questions, and two key ones were: 'Does the draft

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[117] <https://www.youtube.com/watch?v=-bp6grWsIJA> accessed 5 January 2017.

[118] Sozuer (n 78).

[119] Ulaş Karan, 'Türk Hukukunda Ayrimcilik Yasağive Türk Ceza Kanunu'nun 122. Maddesinin Uygulanabilirliği' (2007) TBB Dergisi, Sayı 73; Turkish Parliament, 22th Term, 2ndh Legislation Period, 124. Meeting 26 September 2004 <http://www.tbmm.gov.tr/develop/owa/tutanak_g_sd.birlesim_baslangic?PAGE1=1&PAGE2=1&p4=12545&p5=B> accessed 13 April 2015.

Citizenship Law include any regulations regarding homosexuality in compliance with the international treaties Turkey ratified? Does this law allow same-sex marriages?'[120] In his response, the minister of the interior, Abdulkadir Aksu, emphasised that marriage was already regulated between male and females under Turkish Civil Law and permission for same-sex marriages was not even possible.[121]

In 2010, during the parliamentary session dedicated to the 90th anniversary of the foundation of the Turkish Republic, Hasip Kaplan expressed the view that the republic needed to change its constitution and add sexual orientation as one of the protected grounds.[122]

In 2012, the EU Harmonization Commission invited NGOs to express their opinions about the draft Law on Foreigners and International Protection.[123] The president of the Human Rights Association, Ozturk Turkdogan, criticised the

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[120] Turkish Parliament Session:114 Page:409 Date: 21st June 2005 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d22/c088/tbmm22088114.pdf> accessed 2 January 2017.

[121] Turkish Parliament Session:114 Page:409 Date: 21st June 2005 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d22/c088/tbmm22088114.pdf> accessed 2 January 2017.

[122] Turkish Parliament Session: 88 Page: 823 Date: 19 April 2010 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d23/c066/tbmm23066088.pdf> accessed 2 January 2017.

[123] Submission to the 106th Session of the Human Rights Committee (15 October–2 November 2012), Human Rights Violations of Lesbian, Gay, Bisexual and Transgender (LGBT) People in Turkey: A Shadow Report by Social Policies Gender Identity and Sexual Orientation Studies Association (SPoD), Kaos GL Association, International Gay and Lesbian Human Rights Commission (IGLHRC) <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LGBT_HRC_Turkey_HRC106.pdf> accessed 13 April 2015.

draft law for the lack of discrimination provision.[124] Following this, he raised the issue of sexual orientation, arguing that discrimination against LGBT individuals is mentioned in every international report about Turkey, and thus Turkey should deal with such criticisms and eventually introduce sexual orientation into the Turkish corpus.[125]

The same pattern was followed during the legislation processes of the Law on Foreigners and International Protection (2013)[126] and the 6th Democratization Reform Package (2014), which separately involve hate crimes and anti-discrimination provisions.[127] Despite these unsuccessful attempts, numerous MPs from two opposition parties (CHP – Republic and People Party – and HDP – People's Democratic Party) have insisted on using legislative mechanisms to propose laws protecting the rights of LGB individuals. They have even reproposed laws already rejected by parliament. Sebahat Tuncel has twice proposed the inclusion of sexual orientation within hate crime laws.[128] Her rationale starts with the emergence of hate crime legislation within the United

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[124] Turkish Parliament EU Harmonization Commission Meeting, Session 1, Page: 12 Date: 6 June 2012 <https://www.tbmm.gov.tr/komisyon/abuyum/belgeler/2014/AB_uyum_komisyonu_24_donem_3_yasama_yili_faaliyet.pdf> accessed 16 June 2017.

[125] Ibid.

[126] Submission to the 106th Human Rights Committee (n 124).

[127] Law No 6529, Amendments on some legislation in order to improve the fundamental rights and freedoms (2 March 2014) (published in the Official Gazette on 13 March 2014).

[128] Sebahat Tuncel MP – People's Democratic Party, 1 November 2012, issue number 2–0950 <http://www2.tbmm.gov.tr/d24/2/2–0950.pdf> accessed 25 December 2016.

States and provides examples of hate crimes in order to demonstrate that Turkey's minorities, including LGB individuals, also need such protection.[129]

In the following years, there have been a few parliamentary efforts to ameliorate LGB people's legal status. Sebahat Tuncel, an HDP MP, suggested that public morality is a term that is used against LGB people by the Turkish authorities and should be removed from the Misdemeanour Law.[130] A proposal from a CHP MP, Melda Onur, on the inclusion of sexual orientation within the hate crimes and homophobic applications of unjust provocation clause has still not been discussed by the Commission, and has been pending since 2014.[131] However, it is noteworthy that Onur's rationale was largely about the murder of women, and there was no evaluation of sexual orientation.[132] Aykan Erdemir[133] proposed that protection on grounds of sexual orientation should be added to labour law and criminal law. Suheyl Batum[134] proposed the inclusion of sexual orientation to hate crime laws.[135]

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[129] Ibid.

[130] Sebahat Tuncel MP – People's Democracy Party, 12 December 2013, issue number 2–1907 on Misdemeanour Law <http://www2.tbmm.gov.tr/d24/2/2–1907.pdf> accessed 16 July 2017.

[131] Melda Onur MP – People's Republic Party, 17 January 2014, issue number 2–1965 <http://www2.tbmm.gov.tr/d24/2/2–1965.pdf> accessed 25 December 2016; status pending <https://www.tbmm.gov.tr/develop/owa/tasari_teklif_sd.onerge_bilgileri?kanunlar_sira_no=147907>

[132] Ibid.

[133] MP – People's Republic Party, 25 February 2015, issue number 2–2751 on labour law and criminal law.

[134] MP – People's Republic Party, 8 April 2015, issue number 395561.

[135] Sebahat Tuncel MP – People's Democratic Party, 1 November 2012, issue number 2–0950 on inclusion of sexual orientation to hate crime laws, Sebahat

In 2014, during the parliamentary discussion on the hate crime and discrimination law, six other MPs from HDP and CHP also proposed that sexual orientation must be added to the provision. However, it was declined by the majority of the parliament.[136]

Another important development in 2015 was an election campaign that was launched by the Association for Social Policies, Gender Identity and Sexual Orientation (SPoD). Twenty-two elected MPs[137] signed the 'LGBTI Rights Pledge',[138] by which they commit to promoting LGBTI rights in parliament.[139]

Tuncel MP – People's Democratic Party, 12 December 2013, issue number 2–1907 on Misdemeanour Law; Melda Onur MP – People's Republic Party, 17 January 2014, issue number 2–1965 on inclusion of sexual orientation to hate crimes and homophobic applications of unjust provocation clause; Aykan Erdemir MP – People's Republic Party, 25 February 2015, issue number 2–2751 on labour law and criminal law; Suheyl Batum MP – People's Republic Party, 8 April 2015, issue number 395561 on inclusion of sexual orientation to hate crime laws.

[136] Turkish Parliament Session: 71 Page: 177 Date: 1 March 2014 <https://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=22107&P5=H&PAGE1=177&PAGE2=&web_user_id=15227986> accessed 6 January 2017.

[137] LgbtiNewsTurkey, '22 MPs in Turkey's New Parliament Will Support Lgbti Rights' (9 June 2015) <http://lgbtinewsturkey.com/2015/06/09/mps-in-turkeys-new-parliament-will-support-lgbti-rights> accessed 13 June 2015.

[138] I, the undersigned, as a candidate for the Parliament, commit, if elected to the Parliament in the 7 June 2015 General Elections, to:

Display an approach that protects all human rights, including the rights pertaining to sexual orientation and gender identity,

Work in the Grand National Assembly of Turkey (Parliament) towards gaining recognition for lesbian, gay, bisexual, trans, and intersex rights, as protected by international human rights laws and regulations, and to ensure that Turkey fulfills its responsibilities as a party to any and all international human rights treaties,

Strive to ensure that the new Constitution drafting process, which is to begin after the elections, is transparent and inclusive,

None of the ruling party candidates has signed this pledge. One of the signatories, Mahmut Tanal, immediately issued a legislative proposal regarding LGBTI rights in July 2015, and this proposal is still pending before the Assembly.[140]

All of these brand new parliamentary efforts show that there is, to an extent, a quest for normative protection that has caused political tension among the parties represented in the parliament. This political tension accelerated during the June 2015 general parliamentary election. Two opposition parties, CHP[141]

Make efforts to amend laws that ignore discrimination on the basis of sexual orientation and/or gender identity in every aspect of life and to ensure that LGBTIs have access to the justice system,

Develop egalitarian social policies in order to make sure that LGBTIs are not excluded from or discriminated against in the spheres of education, health, employment, and housing, and that they have equal access to social services in these spheres,

Make LGBTI rights visible within my political party, in order to ensure equality in political representation and in political participation,

Take the necessary steps for the inclusion of openly-out LGBTI persons in every political position without them facing any discrimination,

And cooperate with other parties' parliamentarians who defend LGBTI rights and join them in leading the efforts towards the establishment of a permanent structure within the Assembly for this purpose

LgbtiNewsTurkey, 'The Hdp Istanbul Candidates Sign the Lgbti Rights Pledge'(2015) <http://lgbtinewsturkey.com/2015/04/24/the-hdp-istanbul-candidates-sign-the-lgbti-rights-pledge/#more-2845> accessed 28 April 2015.

[139] (n 138).

[140] Meriç Tafolar, 'LGBTİ bireyler için 22 maddelik torba kanun teklifi' (8 July 2015) <http://t24.com.tr/haber/lgbti-bireyler-icin-22-maddelik-torba-kanun-teklifi,302243> accessed 13 July 2015.

[141] Kaos GL, 'Turkish Main Opposition Promises to Fight Anti-LGBT Discrimination' (20 April 2015) <http://kaosgl.org/page.php?id=19225> accessed 28 April 2014.

and HDP,[142] mentioned LGBTI rights and anti-discrimination policies in their manifestos. Moreover, one openly gay activist was nominated as a candidate by HDP, as was a trans Christian activist by the newly formed Anatolia Party.[143] As a response to these developments, Deputy Prime Minister Arinç, whose speech at the UN will be mentioned in the following paragraphs, stated in a humiliating tone that marginal groups, such as LGB persons, support the HDP. In other words, he underlined the fact that that LGB persons had no place in his morally precise party (AKP).

In 2016, during a law-making commission meeting on international collaboration regarding criminal matters, Bedia Ozgokce proposed an additional article to the draft law.[144] In her proposal, she suggested that it must be assured that a person who is going to be deported will not be subjected on return to torture or persecution due to their sexual orientation.[145] The rationale for this proposal was to prevent mediating criminalisation of homosexuality in other countries under the name of international collaboration. The rationale asserts that there are more than 20 countries, including Iran, Russia, Yemen and India, where homosexuality is criminalised, and continues to assert that Turkey's return of a

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[142] Firat News, HDP Election Manifesto <http://en.firatajans.com/news/hdp-announces-election-manifesto> accessed 28 April 2014.

[143] Kaos GL 'Gay and Trans Candidates to Run for Turkish General Elections' (8 April 2015) <http://kaosgl.org/page.php?id=19141> accessed 29 April 2015. The first trans woman on a party candidate list was Demet Demir from ODP (Freedom and Democracy Party) in 2007.

[144] Turkish Parliament Justice Commission, Session: 7 Page: 21 Date: 6 April 2016 <https://www.tbmm.gov.tr/develop/owa/komisyon_tutanaklari.goruntule?pTutanakId=1565> accessed 2 January 2017.

[145] Ibid.

homosexual to one of these countries might facilitate the criminalisation of homosexuality, unless Turkey is certain that the reason for the criminal charges in these countries is not about the sexual orientation of the deportee.[146] The proposal aims to prevent Turkey from deporting homosexuals to countries where homosexuality is a crime.[147] However, this proposal was declined by the majority of the Commission, and the Ministry of Justice expressed the position of the government towards this proposal as follows:

> Regarding this sexual orientation proposal, we, the Government, are against it. We do not agree with this. This is our political position. Our approach towards this issue is very clear, we are against it as a conservative democratic party. Some other parties like HDP might be in favour of it, they are different.[148]

Again in 2016, during one of the meetings of the Health Commission, representatives of unions and NGOs were invited to provide their insights about the draft law on the international workforce.[149] Cahide Sari, from KESK (the Confederation of Public Employees Trade Unions), criticised the draft on the basis that it was not inclusive of LGBT individuals.[150] During the discussion on the Human Rights and Equality Institution Draft Law with Equal Opportunities for Women and Men Commission's meeting in 2016, Candan Yuceer drew

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[146] Ibid.

[147] Ibid.

[148] Turkish Parliament Justice Commission, Session: 7 Page: 22 Date: 6 April 2016 <https://www.tbmm.gov.tr/develop/owa/komisyon_tutanaklari.goruntule?pTutanakId=1565> accessed 2 January 2017.

[149] Turkish Parliament Health Commission, Session: 1 Page: 16 Date: 28 June 2016 <https://www.tbmm.gov.tr/develop/owa/komisyon_tutanaklari.goruntule?pTutanakId=1682> accessed 16 July 2017.

[150] Ibid.

attention to the absence of sexual orientation in the text of the draft law.[151] She highlighted the contradiction that this draft law was made in accordance with the EU accession process yet failed to be inclusive of LGBT individuals, which was in opposition to the EU policy.[152]

Apart from these discussions, LGB issues were brought to the parliament's attention 32 times at various sessions between 2012 and 2016 by two opposition parties, namely HDP and CHP.[153] Discussions pertaining to LGB individuals were either grounded on the EU accession process or mentioned with other precarious groups in Turkey, and violations they had been subjected to were addressed in order to persuade the parliament that legal protection was needed.

Turkey has experienced extraordinary political climate conditions since the 2015 general elections. I will not go in to the reasons for this political turbulence, but

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[151] Turkish Parliament, Equal Opportunities for Women and Men Commission, Session: 4 Page: 12 Date: 16 February 2016 <https://www.tbmm.gov.tr/develop/owa/komisyon_tutanaklari.goruntule?pTutanakId=1489> accessed 16 July 2017.

[152] Ibid.

[153] Turkish Parliament Session: 75 Page: 55 Date: 7 March 2012 <https://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21142&P5=B&page1=55&page2=55&web_user_id=15227008> accessed 7 January 2017; Turkish Parliament Session: 75 Page: 74 Date: 7 March 2012 <https://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21142&P5=B&PAGE1=74&PAGE2=&web_user_id=15227986> accessed 6 January 2017; Turkish Parliament Session: 24 Page: 90 Date: 2 January 2013 <https://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21868&P5=B&PAGE1=90&PAGE2=&web_user_id=15227857> accessed 26 December 2016; Turkish Parliament Session: 75 Page: 74 Date: 7 March 2012 <https://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21142&P5=B&PAGE1=74&PAGE2=&web_user_id=15227986> accessed 6 January 2017.

on the night of 15 July 2016 a coup attempt took place,[154] and consequently, on 20 July, the Turkish government declared a state of emergency.[155] As part of this extraordinary regime, Turkey also derogated from the ECHR under Article 15.[156] The state of emergency has been extended five times and was still in force in July 2017.

Following the coup attempt, an important referendum took place on 16 April 2017, where a party-led presidential system replaced the former impartial and ceremonial presidency by a vote in favour from 51.3 per cent of the population.[157] This result empowered the politics of AKP, the ruling party. The law-making method has not changed as the parliament still operates within this system. The law/right-making method is still legal transplantation.

After all these unfortunate developments, parliamentary discussions on LGBTI+ rights has seen a considerable decline. Some MPs continued their parliamentary actions: for example, Mahmut Tanal resubmitted his draft law regarding inclusion of SOGI into the Turkish corpus, which he had first

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[154] Patrick Kingsley and Alice Ross, 'Turkey's Prime Minister Declares Attempted Coup Is Over' (16 July 2016) <https://www.theguardian.com/world/2016/jul/16/turkey-coup-attempt-president-declares-his-government-remains-in-charge> accessed 17 July 2017.

[155] BBC, 'Turkey Coup Attempt: State of Emergency Announced' (21 July 2016) <http://www.bbc.com/news/world-europe-36852080> accessed 16 July 2017.

[156] ECHR, 'Guide on Article 15 of the European Convention on Human Rights Derogation in Time of Emergency' (Updated 30 April 2017) <http://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf> accessed 16 July 2017.

[157] Alexandra Topic, 'Turkey Referendum: Erdoğan Wins Vote amid Dispute over Ballots – As It Happened' (Guardian, 16 April 2017) <https://www.theguardian.com/world/live/2017/apr/16/turkey-referendum-recep-tayyip-erdogan-votes-presidential-powers> accessed 16 July 2017.

proposed in 2015.[158] Also, on 20 March 2017, Filiz Keresticioglu submitted two written queries regarding LGB individuals.[159] One was about discrimination on the bases of SOGI in terms of employment, to which the minister of labour and social security, Dr Mehmet Muezzinoglu, stated in his short written response that there was no discrimination based on sex, religion, nationality or any other grounds, but without explicitly mentioning sexual orientation, gender identity or LGBTI individuals.[160] The second was about the bans on Pride parades in Turkey, in particular a brutal police attack on LGBTI individuals following the prohibition of Istanbul Pride by the governor of Istanbul in both 2015 and 2016.[161]

Consequently, it can be seen that the normative tendency towards the LGB rights concept has come from the opposition parties, and the apparent majority of the parliament, the ruling party, has been hindering their efforts. However, the last legal transplant pertaining to the LGB rights concept, the Istanbul Convention, had been signed and ratified by the ruling party in 2012 and entered into force on 1 August 2014, whereby the wording of sexual orientation entered the realm of the Turkish corpus.

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[158] Mahmut Tanal MP – People's Republic Party, law proposal concerning to LGB rights on 5 May 2017 (re-submission) <http://www2.tbmm.gov.tr/d26/2/2–1721.pdf> accessed 16 July 2017; Tafolar (n 141).

[159] Filiz Keresteciogluı, MP – People's Democratic Party, issue number: 89122 Date: 20 March 2017 <http://www2.tbmm.gov.tr/d26/7/7–12296sgc.pdf> accessed 17 July 2017

[160] Ibid.

[161] Ibid.

Before examining the consequences of the implementation of sexual orientation through the Istanbul Convention, I will evaluate higher-court case law to depict the ways in which parliamentary activities have been reflected within the judiciary. I will selectively examine the case law which I find expositional with regards to the Turkish judiciary's approach towards same-sex issues. I will concentrate on different ways of criminalising same-sex relations, and the description of homosexuality by the judiciary.

4.3 Homosexuality and the Turkish judiciary

The previous Turkish Penal Code (1926, Article 419) penalised indecent acts in public with from 15 days' to two months' imprisonment, and if the act reached the level of public sex, then the punishment increased to from six months' to two years' imprisonment with an additional monetary fine.[162] As mentioned before, the 1926 Turkish Penal Code had been implanted from Italy. The question is whether Article 419 penalises homosexuality without mentioning it explicitly. If the case law regarding Article 419 is examined, it can be seen that bestiality, public sex and homosexuality fall under the scope of this article.[163] In 2004, the Highest Court of Jurisprudential Dispute examined a case about four homosexual soldiers who had sexual intercourse and carried out other sexual activities with each other several different times at the military base. The question was whether these acts should be tried by the military penal courts or the criminal courts. Drawing on the content of the ruling, there were no legal

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[162] Turkish Criminal Code (1926) promulgated Article 419.

[163] Kazanci, List of cases, Penal Code Article 415–426 Turkish Court of Appeals <http://www.kazanci.com/kho2/ibb/765/m415–426.htm#419> accessed 13 July 2017.

doubts that their actions were not crimes. Thus we can deduce that Article 419 had covered homosexual intercourse and other same-sex sexual activities. Therefore, public appearance/affection of homosexual relations could have been penalised under the 'other sexual activities' phrase. This article was repealed in 2004, and now only public sexual intercourse and exhibitionism are subject to punishment according to the new Turkish Penal Code (2004), Article 225.[164]

In 2012, Danistay, the highest administrative appeal court, ruled on a case where a primary school teacher was dismissed owing to being homosexual. The appellant teacher objected to the decision issued by the Ministry of Education, but the domestic administrative court ruled that his homosexuality constituted a legal ground for his dismissal as it was one of the listed statuses in the regulation that are incompatible with being a teacher. The 12th Chamber of the Danistay examined the appeal and overruled the local court's decision, stating that dismissal of the appellant was a breach of ECHR Article 8, citing *Dudgeon v UK*, *Smith and Grady v UK*, *Lustig-Prean and Beckett v UK*, *Perkins* and *R. v UK* and *Beck, Copp and Bazeley v UK*. However, it was noted that the ruling was made in the light of the fact that there was no evidence that the appellant teacher had had sexual intercourse with their[165] students and had been externalising their homosexuality from the school. The Danistay clearly articulated that same-sex relations in the private sphere (*mahrem alan*) cannot be prosecuted, either through administrative laws or penal codes. In this sense,

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[164] Turkish Penal Code (2004).

[165] Singular unisex pronoun.

I would argue that the actual discussion of decriminalisation of homosexuality has taken place in this ruling. In conjunction with the new Penal Code, this judgment by the Danistay clarified the ambiguity surrounding criminalisation of homosexuality in Turkey. A high judicial court explicitly articulated that private, consensual same-sex relations are not punishable, and thus ended the silence and ambiguity of the law. However, this ruling is not equivalent to legislation. The Turkish legal system is based on civil law, in which higher-court rulings can be binding on the other courts on very rare occasions. Unfortunately, this ruling was not one of them.

Another path to examine the ways in which the Turkish judiciary has engaged with homosexuality is embedded in the way it approaches gay advance defences. Gay advance or gay panic defences in Turkey are raised mostly in two ways: either an accused alleges that the victim attempted/suggested sexual intercourse which offended or provoked the accused, and thus they killed the victim, or they had sexual intercourse with the victim in which the victim had a passive role. They then asked to be active, and this again provoked the accused to kill the victim in order to defend their sexual orientation.[166] The judiciary mitigates punishments in murders where – especially male – gays are murdered through applying the unjust provocation article, regulated under Article 29 of the Turkish Penal Code (2004):

> Article 29—1) A person committing an offense with effect of anger or asperity caused by the unjust act is sentenced to imprisonment from

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[166] Elif Ceylan Ozsoy, 'Is the Proposition of Homosexual Intercourse an Unjust Provocation?' Bianet, 17 March 2009 <https://lgbtinewsturkey.com/2013/11/06/unjust-provocation/#more-512> accessed 14 July 2017.

> eighteen years to twenty-four years instead of aggravated life imprisonment, and to imprisonment from twelve years to eighteen years instead of life imprisonment.

To simplify the requirements for unjust provocation, there must be an act that constitutes provocation, and this act that constitutes provocation must be an 'unjust act'. The unjust act must induce a feeling of grievous anger or violence in the perpetrator, and there must be a causal connection between the crime committed and the unjust act (causality). The application of unjust provocation is not possible if there is no unjust act by the murdered/victim.

If the courts are consistently applying this article to mitigate penalties for gay murderers, they must be defining the acts of the gay victim as unjust acts. Drawing upon the facts of the case law, we can briefly list the actions that the Court of Appeals has considered unjust in various other case law:

> Proposing homosexual intercourse, extortion, noise under the influence of alcohol, insult, violating the immunity of domicile, breaking a house's window, pushing, pushing off the bed or insulting one after sexual intercourse is proposed, wounding by stabbing, cursing loudly and kicking, assault with sticks, insults on the phone, walking towards someone with a knife, cursing and insulting, restricting freedom and threatening, rape, beating and chasing someone with an iron bat, wounding with a knife, punching, holding a knife, bothering a daughter, bothering with anonymous phone calls, beating, cursing, hitting on someone's wife or sister, throwing rocks, kidnapping the defendant's daughter and restricting her freedom, beating, head-butting, chasing, breaking a workplace's windows, swearing, threatening with a knife, starting a fight and slapping, blaming one for theft, physical assault, swearing and assaulting with a knife, adultery, violating the immunity of domicile.[167]

If we examine what an unjust act is, Article 29's reasoning defines it as follows:

> The term unjust act means the behavior is not approved by the legal order. The article can be applied only if there is an act towards the person who

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[167] Kazanci, List of cases, Penal Code Article 21–36 Turkish Court of Appeals <http://www.kazanci.com/kho2/ibb/5237/m21–36.htm#29> accessed 13 July 2017.

> committed the unjust act. The reason that the term unjust act is added to this article is to hinder penalty mitigations in so called honor crimes, where a sister or spouse is killed by male family members. Application of unjust provocation in the previous penal code to honor crimes was a legal mistake.[168]

In the light of this reasoning, we can deduce that if the defendant to whom homosexual intercourse is proposed benefits from the unjust provocation penalty mitigation, then proposing homosexual intercourse is an unjust act.

Interestingly, the reasoning bluntly asserts that unjust provocation cannot be

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[168] Maddede ceza sorumluluğunu azaltan bir neden olarak haksız tahrik hâli düzenlenmiştir.

Haksız tahrikin ana koşulu, yapılan haksız hareketin fail üzerinde bir hiddet veya şiddetli elem meydana getirmesi ve suçun işlendiği anda failin bu durumda bu etki altında bulunması olduğundan, madde söz konusu psikolojik hâlleri belirtecek biçimde kaleme alınmıştır. Gazap, aslında hiddetlenmeyi ifade eder; şedit bir elem deyimi psikolojik bakımdan aslında hareketsizliğe, pasifliğe yöneltici bir ruh hâli ise de, burada söz konusu olan hiddete yönelten bir elemdir. Bu itibarla sadece hiddet sözcüğünün kullanılması bu hâli de kapsar idi. Ancak uygulamada duraksamalara neden olmamak için metinde her iki sözcüğün kullanılması uygun sayılmıştır.

Hiddet veya şiddetli elemin haksız bir fiil sonucu ortaya çıkması gerekir. Maddeye bu ibarenin eklenmesinin amacı, ülkemizde özellikle “töre veya namus cinayeti” olarak adlandırılan akraba içi öldürme suçlarında haksız tahrik indiriminin yanlış biçimde uygulanmasının önüne geçmektir.

Maddedeki düzenleme nedeniyle bir suçun mağduruna yönelik olarak gerçekleştirilen fiiller dolayısıyla fail haksız tahrik indiriminden yararlana-mayacaktır. Örneğin cinsel saldırıya maruz kalmış kadına karşı babanın veya erkek kardeşin işlediği öldürme fiilinde, haksız tahrike dayalı olarak ceza indirimi yapılamayacaktır. Maddedeki haksız fiil terimi, bir davranışın hukuk düzenince tasvip edilmediği anlamına gelmektedir. Ancak böyle bir haksız fiili yapan kişiye karşı yönelik fiilin varlığı durumunda maddenin uygulanması söz konusu olabilecektir.

Bu düzenlemede ayrıca 765 sayılı Türk Ceza Kanununda yer alan adi ve ağır tahrik ayırımı kaldırılmıştır. Tahrik hâlinde verilecek ceza bakımından aşağı ve yukarı sınırlar kabul edilmek suretiyle olayın özelliğine göre uygulamada takdir olanağı tanınması amaçlanmıştır. Hâkim tahrikin ağırlık derecesine göre yapılacak indirimi saptayabilecektir. Ancak bu indirimin yapılabilmesi için haksız fiilin bir hiddet veya şiddetli elem etkisi doğurabilecek ağırlıkta olması gerekir. Bu nedenle böyle bir etkiyi meydana getirebilecek ağırlıkta olmayan haksız fiiller bakımından hükmün uygulanması söz konusu olmayacaktır.

applied to honour killings. Thereby it is acknowledged that the victim's behaviour in an honour killing cannot be identified as an unjust act. However, the judiciary identifies proposing homosexual intercourse as an unjust act. Therefore, the key concept is 'unjust act'.

If proposing homosexual intercourse is an unjust act, then proposing homosexual intercourse is a behaviour that is not approved of by the legal order. This interpretation of the judiciary considerably impairs the notion that homosexuality is not criminalised in Turkey. If proposing same-sex relations is considered an unjust act then how can LGB individuals enjoy their sexual orientation, even in private with consenting adults? Furthermore, it also poses a question: if proposing same-sex relations is an unjust act, then are we permitted to discuss LGB individuals' rights to express their sexual orientation?

I would like to investigate these two questions separately. Firstly, I will evaluate the right to express one's sexual orientation through the right to form an association decisions given by the Court of Appeals. The question is that if expressing a sexual interest in a same-sex person is considered an unjust act, then how could the Court of Appeals conclude that LGBTI people also have a right to form assemblies and associations? Are these case laws contradictory?

The judiciary has allowed LGBTI associations to gain official recognition through case law. In 2006, the Beyoglu Third Civil Court of First Instance ruled for the closure of LambdaIstanbul, relying on the Turkish Constitution and Turkish Civil Law together with ECHR Article 11, which is a qualified right that allows restrictions on freedom of assembly and association. The justification for this decision concentrated on two grounds. Firstly, the association's objectives were contrary to public morals; and, secondly, LambdaIstanbul's aims fell under the

scope of the Article on the Protection of the Family and Children, which commands the court to take all necessary measures, including closure of the association, to preserve the safety and security of the Turkish family.[169] The

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[169] Turkish Constitution XI. Rights and freedoms of assembly

A. Freedom of association

ARTICLE 33—(As amended on October 3, 2001; Act No.

4709) Everyone has the right to form associations, or become a member of an association, or withdraw from membership without prior permission.

No one shall be compelled to become or remain a member of an association.

Freedom of association may be restricted only by law on the grounds of national security, public order, prevention of commission of crime, public morals, public health and protecting the freedoms of other individuals.

The formalities, conditions, and procedures to be applied in the exercise of freedom of association shall be prescribed by law.

Associations may be dissolved or suspended from activity by the decision of a judge in cases prescribed by law. However, where it is required for, and a delay constitutes a prejudice to, national security, public order, prevention of commission or continuation of a crime, or an arrest, an authority may be vested with power by law to suspend the association from activity. The decision of this authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his/her decision within forty-eight hours; otherwise, this administrative decision shall be annulled automatically.

Provisions of the first paragraph shall not prevent imposition of restrictions on the rights of armed forces and security forces officials and civil servants to the extent that the duties of civil servants so require. The provisions of this article shall also apply to foundations.

CHAPTER THREE

Social and Economic Rights and Duties

I. Protection of the family, and children’s rights

ARTICLE 41—(Paragraph added on October 3, 2001; Act No.

4709) Family is the foundation of the Turkish society and based on the equality between the spouses.

Turkish Court of Appeals overruled this decision in 2008 by arguing that everyone, including LGBTI individuals, has a right to form associations in order to establish solidarity within their community. These decisions established an extremely problematic list of criteria through which shutting down a LGBTI association would be lawful. The Court of Appeals' LambdaIstanbul decision made it clear that if a LGBTI association's activities are found to be promoting, encouraging or/and spreading sexual orientations such as lesbian, gay, bisexual, transvestite and transsexual[170] by trespassing upon the threshold of solidarity, LGBTI associations could be closed at any time under Turkish legislation.[171] After this decision, in 2009, a similar closure case against Siyah Pembe Ucgen Izmir (Black Pink Triangle Izmir) association was launched but dismissed by the court with a reference to the Court of Appeals' LambdaIstanbul case law.[172] Therefore, the legal framework for the right to

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The State shall take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice.

(Paragraph added on September 12, 2010; Act No. 5982) Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests.

(Paragraph added on September 12, 2010; Act No. 5982) The State shall take measures for the protection of the children against all kinds of abuse and violence.

[170] At that time the LGBTI movement was using the terms transvestites and transsexual; later they were replaced with the term trans individual.

[171] Yargitay 7. Hukuk Dairesi E. 2008/4109, K. 2008/5196, T. 25 Kasim 2008.

[172] İzmir 6. Asliye Hukuk Mahkemesi E. 2009/474, K. 2010/186, T.30 Nisan 2010.

association has been reduced to solidarity among LGBTI individuals.[173] If we interpret this in light of the criminal courts' understanding that concurs that proposing homosexual sexual intercourse is an unjust act, we can conclude that homosexuals, individually or collectively, only become illegal when approaching a person whose sexual orientation is deemed to be heterosexual.

A second issue to examine during criminal proceedings is why murdering a person who proposed sexual intercourse to a same-sex person is not considered as an aggravating circumstance but a mitigating one. The Turkish Constitutional Court examined an application launched by Ahmet Ozturk's sister's lawyer.[174] Ahmet Ozturk had been killed with nine stab wounds by the perpetrator, who alleged that the victim propositioned him sexual intercourse. The first instance court reduced the perpetrator's penalty because Ahmet's actions were unjust. Ahmet's family lawyer objected to this decision, claiming that the court had not carried out an efficient investigation and had not investigated the possibility of a hate motive on the part of the perpetrator. Moreover, the lawyer stressed that the court had overlooked the fact that the victim and the perpetrator met at a gay bar and exchanged money for sexual intercourse and the perpetrator had invited the victim to his place, where they were sharing the same bed when the perpetrator stabbed the victim nine times because he allegedly felt provoked. However, the Constitutional Court ruled that there was no need to further investigate whether the perpetrator had committed

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[173] At the moment there are –at least – 13 registered LGBTI associations. This is to be confirmed. I launched an inquiry to the head office of Department of Associations asking the exact number of LGBTI association in 2015. I am still awaiting response to my inquiry.

[174] Turk Anayasa Mahkemesi, Basvuru No 2013/1948, T. 23 Ocak 2014.

a hate crime or not. In this way, the Constitutional Court fully legitimised the gay advance defence without stipulating for an effective investigation duty by the courts.[175]

The Constitutional Court further supported this approach in its handling of an application where it was asked to evaluate whether movies containing gay and lesbian sexual intercourse scenes should be legally classified as involving unnatural sexual acts.

According to Turkish Penal Code Article 226/4:

> (4) Any person who produces products containing audio-visual or written material demonstrating unnatural sexual intercourse by using sex, or with animals, or a corpse, and engages in import, sale, transportation or storage of the same, and presents such material for others' use, should be punished with imprisonment from one to four years.

In its ruling, the Turkish Constitutional Court referred to the ECtHR's *Handyside v UK*[176] judgment and maintained that the ECtHR did not find state interference in the distribution of homosexual intercourse scenes or pictures to be in violation of the ECHR. The Turkish Constitutional Court gave this decision in 2014. However, the main case law they relied upon – *Handyside v UK* (1976) – involved a publication involving information about homosexuality being seized and confiscated by the local authorities. In this case, discussion was restricted to Article 10, the court referring the issue to the authority of local judges, and keeping the margin of appreciation wider in terms of morals.[177] This case was

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[175] Ibid.

[176] *Handyside v The UK* App No 5493/72 (Commission Decision 7 December 1976).

[177] Ibid. para 48.

ruled upon before *Dudgeon v UK* (1981), which is considered the key case in the decriminalisation of homosexuality at the ECtHR level.[178]

After *Handyside*, the ECtHR examined similar cases, one of them being *Kaos GL v Turkey*, where Turkey was found in violation of the convention by seizing *Kaos Gay and Lesbian Magazine*'s 28th issue in July 2006.[179] Reference to *Handyside* (1976) instead of *Kaos GL* (2006) reveals the Turkish judiciary's preferred legal interpretation of same-sex relations. Turkish courts prefer to refer to outdated case law, which is pre-*Dudgeon* and thus pre the decriminalisation of homosexuality.

It can be seen from these examples that the Turkish judiciary's attitude towards same-sex desire is a complex one, which substantiates the argument that posits it is not possible to reach accurate conclusions by following the thresholds of Western legal philosophy. Ironically, some of these homophobic High Court decisions: for example, the Ahmet Ozturk decision, were mostly ruled upon after Turkey signed the Istanbul Convention in 2011, which installed the term 'sexual orientation' into the Turkish legislation, thereby becoming the last legal transplant pertaining to the LGB rights concept.

4.4. The Istanbul Convention: the last transplant

Interestingly, in 2011, Turkey became the first country to sign the European Convention on Preventing and Combating Violence against Women and

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[178] *Dudgeon v The United Kingdom* App No 7525/76 (ECHR, 22 October 1981).

[179] *Kaos GL v Turkey* App No 4982/07 (ECtHR, 22 November 2016).

Domestic Violence (the Istanbul Convention),[180] which includes the term 'sexual orientation' in its text. As explained in Chapter 2, because of Article 90 of the Turkish Constitution, there is now a legal ground to argue that Turkish legislation includes 'sexual orientation' in its corpus.[181] This was also confirmed by Deputy Prime Minister Bulent Arinç at the UN on 27 January 2015:

> … On the other hand, pursuant to our Constitution's Article 90, the international agreements we ratify are [considered] law. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence – Istanbul Convention –, which we ratified

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[180] Istanbul Convention (n 78).

[181] Deputy Prime Minister Bulent Arinç's whole speech at the UN, 27th January 2015, for Turkey's second UPR cycle:

'The principle that everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion, sect and other such grounds is organised by the Constitution's Article 10. Due to the expression "and other such grounds" in the aforementioned article, types of discriminations are not limited but rather exemplified, and there is no question that other types of discrimination are left outside the scope. That there is no special regulation for LGBTs does not mean that this group's rights are not legally guaranteed.

'On the other hand, pursuant to our Constitution's Article 90, the international agreements we ratify are [considered] law. The Council of Europe Convention on preventing and combating violence against women and domestic violence – Istanbul Convention–, which we ratified without reservations, includes provisions which state that there can be no discrimination on the basis of sexual orientation.

'In our country, like in all democratic states of law, perpetrators who commit murder and acts of violence against individuals of LGBT and all kinds of hate crimes are identified, the necessary investigations are started in order to bring them to justice, and the process is conducted by legal authorities scrupulously. The claims that the reasoning of unjust provocation constitute a routine in the reduction of penal responsibility do not match with the real situation that is revealed by tangible court decisions.'

Translated by LgbtiNewsTurkey, 'Bulent Arinc's Statement at the UPR about LGBT Rights' (3 February 2015) <http://lgbtinewsturkey.com/2015/02/03/deputy-pm-bulent-arincs-statement-on-lgbt-at-the-universal-periodic-review/> accessed 12 April 2015.

> without reservations, includes provisions which state that there can be no discrimination on the basis of sexual orientation.

In this sense, one of the recent law/right-making practices that obscures Turkey's legal policy in terms of LGB rights is this ratification of the Istanbul Convention. Despite the fact that national legislation excluded the term 'sexual orientation', as mentioned before, there are number of other legal analyses that could be based on Turkey's ratification of the Istanbul Convention, as, according to Article 90 of the Turkish Constitution, the international version that includes the term 'sexual orientation' prevails.

The Turkish government's decision to sign the Istanbul Convention contradicts its explicitly expressed legal strategy during parliamentary discussions. This situation raises a question: how did this same majority of the Turkish parliament, which declines any efforts in favour of LGB persons, ratify the Istanbul Convention, which includes the term 'sexual orientation' in its text? To answer this question, there are several aspects that need to be taken into consideration. Firstly, could this be interpreted as a shift in the government's strict policy towards homosexuality? The Istanbul Convention was signed in 2011 and entered into force in 2014. Recalling the parliamentary law-making discussions, the ruling party's approach towards adding sexual orientation to the Turkish lexicon has been consistently negative. Even after ratifying the Istanbul Convention, which contains sexual orientation in its text, some ministers and ruling party MPs expressed the view that they were a conservative party and would refuse inclusion of sexual orientation into Turkish

legislation during debates in various parliamentary sessions.[182] Prior to and after ratifying the Istanbul Convention, they have maintained their policy against the protection of sexual orientation by repeatedly arguing that this concept is against cultural values. Thus the Istanbul Convention has not changed the rhetoric of the ruling party, nor is it a turning point for Turkey in terms of its approach towards the LGB rights concept. This leads to an assumption that the government signed and ratified the convention without acknowledging that it included sexual orientation in its text. However, the Turkish government was represented during the *travaux preparatoires* of the Istanbul Convention, where the Ad Hoc Committee for Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) held nine meetings to formulate the convention.[183] CAHVIO's 5th and 8th meeting reports reveal that the Russian delegation expressed its reservations to the inclusion of the term 'sexual orientation' during the *travaux preparatoires* numerous times.[184] The 3rd meeting report summaries the position of the Russian Federation as follows:

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[182] Turkish Parliament Justice Commission, Session: 7 Page: 22 Date: 6 April 2016 <https://www.tbmm.gov.tr/develop/owa/komisyon_tutanaklari.goruntule?pTutanakId=1565> accessed 2 January 2017.

[183] Istanbul Convention (n 78).

[184] The Ad Hoc Committee for preventing and Combating Violence against Women and Domestic Violence (CAHVIO) Report of the 8th Meeting (13–17 December 2010) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593f8f> accessed 7 January 2017; The Ad Hoc Committee for Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) Report of the 5th Meeting (1–3 December 2009), page 3 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593859> accessed 7 January 2017.

> In particular, the Russian Federation stressed its view that the scope of the future convention should not extend to same-sex relationships and that the grounds for discrimination should not include 'sexual orientation'.[185]

Turkey was silent about the term 'sexual orientation' during these meetings and was the first country to sign the convention without any reservations.[186] This could derive from the fact that Turkey has been legally extremely ineffective in combating violence against women. Consequently, one of the landmark decisions of the ECtHR regarding domestic violence is a complaint against Turkey, in which the court found very severe violations on a level that amounts to a breach of Article 3 of the convention, which prohibits torture and inhuman or degrading treatment.[187] Owing to the massive deficiency of the Turkish state in combating violence against women, Turkey became the first country to be found in violation of Article 3 (prohibition of torture) of the ECHR in a domestic violence case.[188] In these circumstances, Turkey's failure to prevent and investigate women's murders put Turkey in the position of having to prove to the international community that it was determined to tackle this issue. Thus it accepted all the recommended measures without making any objections. In this sense, it can be argued that Turkey became the first country to ratify the convention without any reservations.

There is a remarkable overlap between the human rights concepts of which Turkey has a clear record of frequent violation and the concepts through which

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[185] The Ad Hoc Committee 5th Meeting (n 185).

[186] CoE <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures> accessed 7 January 2017.

[187] *Opuz v Turkey* App No 33401/02 (ECtHR, 9 June 2009).

[188] Ibid.

LGB rights first made their appearance: these are domestic/gender-based violence and prohibition of torture. This picture suggests that the human rights concepts, for the constant violation of which Turkey has been internationally named and shamed many times, constitute a gateway for LGB rights. Therefore, it can be concluded that LGB rights do not emerge according to the needs of LGB individuals but from the weakest concepts of the Turkish legal system. This law-making/taking method, legal transplantation, often functions as a tool to weaken the justice system, contradicting its formal objective, which is changing the law for the better. Thus newness enters the legal lexicon through the weaknesses of the recipient jurisdiction.

Interestingly, the term 'sexual orientation' was not mentioned during the parliamentary approval session of the Istanbul Convention, unlike other sessions, where proposals about inclusion of sexual orientation were discussed.[189] The silent gap between the signature and ratification process led Gulsum Bilgehan, a MP from CHP, to submit a written question to the head of the parliament, Cemil Cicek, with the intention of following up on the status of the Istanbul Convention.[190] In his answer, Cicek accused Bilgehan of interfering with the state's foreign policies.[191] The convention was finally ratified on 25

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[189] Turkish Parliament Session: 23, Date: 24 November 2011 <https://www.tbmm.gov.tr/tutanak/donem24/yil2/bas/b023m.htm> accessed 4 January 2017.

[190] Mehves Evin,' Kadinlara Mujde' (2 December 2009) <http://cadde.milliyet.com.tr/2009/12/02/YazarDetay/1451240/kadinlara_bir__mujdem__var_> accessed 7 January 2017.

[191] Ibid.

November 2011, seven months after it was signed.[192] This confirms Nicole Pope's argument that, despite being the first state to sign the convention, Turkey has been procrastinating about its enforcement.[193] In addition to this, the term 'sexual orientation' is translated as 'sexual choice' in the formal Turkish version of the convention.[194]

A similar attitude could also be observed in the national law on violence against women.[195] The Istanbul Convention imposes an obligation on the signatory states to secure the protection of this convention with a national law. Thus Turkey introduced a new law, called the Protection of Family and Combating Violence against Women Law,[196] to ensure the implementation of the convention at the national level after the ratification of the Istanbul Convention. As the name of the legislation suggests, Turkish authorities highlighted the protection of family instead of women as individuals and, more importantly, they declined to mention 'sexual orientation' in the text of the national law, contrary to its international version.[197] During the parliament negotiations, Aylin

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[192] Turkish Parliament, Session: 23, Date: 24 November 2011 <https://www.tbmm.gov.tr/tutanak/donem24/yil2/bas/b023m.htm> accessed 4 January 2017.

[193] Nicole Pope, 'Good on Paper, Poor in Practice: Combating Gender Violence in Turkey' (2014) 4(6) Turkish Review 600–604.

[194] Turkish Parliament (n 193).

[195] Turkish Parliament Session: 75 Page: 74 Date: 7 March 2012 <https://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21142&P5=B&PAGE1=74&PAGE2=&web_user_id=15227986> accessed 6 January 2017.

[196] Ailenin Korunmasi ve Kadina Karşi Şiddetin Önlenmesine Dair Kanun, 8 March 2012.

[197] Ibid.

Nazlikaya, an MP from CHP, stressed the hate crimes and violence against LGBT individuals, criticising the government for not including SOGI in the text of the law.[198] More specifically, Sena Kaleli, an MP from CHP, asserted that it was very unfortunate that sexual orientation was not one of the protected grounds under the national law on combating domestic violence.[199]

Despite the critiques from within the Turkish parliament, Turkish authorities ignored the fact that the Istanbul Convention includes the term 'sexual orientation' and excluded it from the national law. However, by removing the term from the national legislation, Turkey has displayed a hypocritical attitude towards its international obligations, which stem from international treaty law.[200]

This hypocritical attitude was also maintained during the elections for a 'Group of Experts on Action against Violence against Women and Domestic Violence' (GREVIO), as prescribed by the convention. The Ministry for the Family and Social Policies did not allow LGBTI and feminist associations to participate in the election of these experts.[201] It was reported by the *Kaos GL*[202] that the NGOs which were chosen to work in collaboration with the Ministry were the

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[198] Turkish Parliament Session (n 196).

[199] Turkish Parliament 24th Term, 2nd Legislation Period, 76. Meeting 8 March 2012 <https://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21143&P =B&page1=35&page2=35&web_user_id=15574403> accessed 12 April 2015.

[200] Pope (n 194).

[201] Kaos GL, 'Istanbul Convention – GREVIO Election: This election should not count!' (29 December 2014) <http://www.kaosgl.com/page.php?id=18363> accessed 13 April 2015.

[202] One of the leading LGBTI+ associations, magazines and news portals in Turkey.

ones that condemned the inclusion of sexual orientation in the convention on the grounds that LGB persons are harmful to 'society and the Turkish family structure'.[203]

In terms of SOGI-related issues, Turkey's behaviour on international platforms sharply contradicts its national attitude. A number of examples can be given to depict this contradiction. The first and latest took place in 2016 regarding the establishment of the UN's independent SOGI expert. On 28 June 2016, the Human Rights Council adopted a resolution to appoint an independent expert on protection against violence and discrimination based on SOGI.[204] In an aim to impair and further shut down the established independent expert position, a resolution demanding the deferral of the SOGI expert's mandate was submitted by the African Group, which was later co-sponsored by the majority of the Islamic countries and Russia.[205] The voting regarding this resolution happened during the third committee of the 71st session of the UNGA, where Turkey voted in favour of the independent expert's mandate.[206]

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[203] Kaos GL, 'Istanbul Convention – GREVIO Election: This election should not count!' (n 202).

[204] UNCHR, Thirty-second session, 'Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity' (28 June 2016) UN Doc A/HRC/32/L.2/Rev.1

[205] UNCHR, 'Submission by Botswana on behalf of the States Members of the United Nations that are members of the Group of African States' (3 November 2016) UN Doc A/C.3/71/L.46.

[206] UN SOGI Expert voting results <http://www.un.org/en/ga/third/71/docs/voting_sheets/L.52.pdf> accessed 17 July 2017.

In other words, Turkey did not collaborate with the anti-LGB coalition and voted to safeguard the mandate of the SOGI expert.[207] Ironically, the opposite attitude was displayed at the national level when the ruling party (Justice and Development Party, AKP) was challenged by 59 MPs from the main opposition party, the People's Republic Party (CHP), via an investigation proposal called 'The problems of LGBT persons and measures to be taken by the Parliament'. Although this happened three years prior to the UN independent expert mandate, in terms of sexual orientation the government's attitude displayed a significant regression. On 29 May 2013, during the parliament discussion of this investigation proposal, the AKP MP Turkan Dagoglu expressed the position of the ruling party, as required by the procedural regulations of the Turkish parliament. In her speech at the parliament, she stated that, although being LGBT is an illness[208] and an abnormal behaviour, as a party they value everyone owing to their being created by God.[209] She continued by emphasising that they were against all kinds of violence, regardless of the sexual orientation of the victim, and the laws were codified to protect everyone,

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[207] <http://webtv.un.org/meetings-events/general-assembly/main-committees/3rd-committee/watch/third-committee-53rd-meeting-71th-general-assembly/5219431506001#full-text> accessed 25 October 2017.

[208] She substantiated this information by manipulating the studies conducted by the American Psychiatric Associations in 1974 and 1992, without mentioning the recent position of the American Psychiatric Association that promulgated that same-sex attraction is not an illness for association's views on LGBTs. See: American Psychiatric Association <http://www.psychiatry.org/lgbt-sexual-orientation> accessed 12 April 2015.

[209] Turkish Parliament 24th term, 3rd legislative Year 112th meeting, 29 May 2013 Records <http://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21957&P5=B&page1=43&page2=43&web_user_id=13696951> accessed 12 April 2015.

not just one particular sexual orientation.[210] However, she also highlighted that in the name of democracy they could not be asked to accept, which in a way is promoting, a lifestyle that was condemned by the Turkish nation/culture.[211] Consequently, the ruling party refused to investigate the problems that LGBTI persons are facing in Turkey. However, at the international level, it voted in favour of an international expert whose mandate briefly stipulates investigating those very problems LGBTI persons are encountering.

Following Dagoglu's utterance, it can be deduced that, even though at first sight the explicit wording of 'sexual orientation' might seem to contradict Turkey's LGB rights strategy, in fact it adheres to the rhetoric that underpins it, limiting LGB individuals' legal existence to victim status. Thus the only responsibility of the state towards LGB individuals derives from the duty to protect everyone from violence, which includes LGBTs. If the text of the Istanbul Convention is read carefully, it will be seen that Article 4, the only provision including 'sexual orientation', addresses prohibition of discrimination regarding measures to protect the rights of victims.[212] Therefore, the legal acceptance of LGB persons

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[210] Turkish Parliament 24th term, 3rd legislative Year 112th meeting, 29 May 2013 Records <http://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21957&P5=B&page1=43&page2=43&web_user_id=13696951> accessed 12 April 2015.

[211] Turkish Parliament 24th term, 3rd legislative Year 112th meeting, 29 May 2013 Records <http://www.tbmm.gov.tr/develop/owa/tutanak_sd.birlesim_baslangic?P4=21957&P5=B&page1=43&page2=43&web_user_id=13696951> accessed 12 April 2015.

[212] Article 4(3)—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

is circumscribed by the victim protection measures in domestic violence and violence against women cases, which meets the Turkish way of dealing with this relatively new international trend of LGB rights. Another reason for this compromise or contradictory behaviour on the part of Turkey could be found in an explanatory note on the Istanbul Convention, which clarifies that Article 4 Paragraph 3, which lists sexual orientation as a protected status, does not induce a general duty to prohibit discrimination: it is only valid for the application of the Istanbul Convention, whereas the anti-discrimination clause in Paragraph 2, which does not include sexual orientation, goes beyond the Istanbul Convention.[213] This carefully defined sphere of the protection pertaining to sexual orientation most likely played a positive role for countries such as Turkey in the sense that ratification of the Istanbul Convention does not impose any duty regarding sexual orientation exceeding the ambit of the Convention. Given the scope of the convention, the term 'sexual orientation' in Article 4 Paragraph 3 allows domestic violence complaints from lesbian couples even though same-sex partnership is not legally recognised in Turkey. Under this legally ambivalent situation, although no complaint has yet been reported, it is hard to

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with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.

[213] 54. The extent of the prohibition on discrimination contained in paragraph 3 is much more limited than the prohibition of discrimination against women contained in paragraph 2 of this article. It requires Parties to refrain from discrimination in the implementation of the provisions of this Convention, whereas paragraph 2 calls on Parties to condemn discrimination in areas beyond the remit of the Convention. See: CoE, 'Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence Treaty Series – No. 210 (2011) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383a> accessed 7 January 2017.

predict how courts would react to these complaints made by female same-sex couples.[214] Given this, Turkey is most likely the only country that opts out from equality and prohibition of discrimination against LGB individuals in general, but grants protection to domestic violence claims by lesbian couples before even recognising the same-sex partnership.[215]

At this point, the remarkable difference between the Western legal history of LGB rights and the Turkish example becomes very clear. In the Western example, the gateway for the LGB rights concept has been hate crime laws, anti-discrimination and the respect for private life (Belgium: hate crimes in 2007[216] and prohibition of discrimination in 2003;[217] France: hate crimes in 2004 and anti-discrimination in 1985;[218] Canada: hate crimes in 1985;[219] Greece:

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[214] There are cases that protection orders for trans women had been issued by courts however these cases do not fall under the sexual orientation claim.

[215] Istanbul Convention (n 78).

[216] ECRI 'Report on Belgium' (fifth monitoring cycle) (Adopted on 4 December 2013 Published on 25 February 2014) <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/belgium/BEL-CbC-V-2014–001-ENG.pdf> accessed 16 April 2015.

[217] Belgium Law of 25 February 2003 on the fight against discrimination, amending the Law of 15 February 1993 Equal Trust' Belgium Discrimination Based on SoGI' <http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Belgium%20-%20sexual%20orientation%20-%20employment%20-%20law%20_Piper_.pdf> accessed 17 April 2015.

[218] The social situation concerning homophobia and discrimination on grounds of sexual orientation in France, see: Danish Institute for Human Rights, 'The social situation concerning homophobia and discrimination on grounds of sexual orientation in France' (March 2009) <http://fra.europa.eu/sites/default/files/fra_uploads/373-FRA-hdgso-part2-NR_FR.pdf last accessed 17th April 2015.

[219] The Hungarian Civil Liberties Union, 'Comparative Hate Crime Research Report' (April 2014) <http://ohrh.law.ox.ac.uk/wordpress/wp-

hate crimes in 2008[220] and prohibition of discrimination in 1997;[221] UK: hate crimes in 2003[222] and prohibition of discrimination in 2010;[223] Sweden: Prohibition of Discrimination Act in 1999, which included sexual orientation;[224] Germany: hate crimes in 2001[225] and prohibition of discrimination in 2006;[226] Romania: hate crimes in 2009[227] and prohibition of discrimination in 2002.[228]). However, in the Turkish example, the first appearance of sexual orientation as a

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content/uploads/2014/05/Oxford-Pro-Bono-Publico-Comparative-Hate-Crime-Research-Report-April-2014.pdf> accessed 16 April 2015.

[220] Ibid.

[221] European Equality Network, The Greek Constitution, Art 103 and Law 2477/1997 <http://www.non-discrimination.net/countries/greece> accessed 17 April 2015.

[222] Criminal Justice Act 2003, Art 145.

[223] Equality Act 2010, Art 12.

[224] Act 1999:133 Prohibiting Discrimination in Working Life due to Sexual Orientation in Sweden. See: Erika Björklund, 'Issue Histories Sweden: Series of Timelines of Policy Debates Institute for Human Sciences' (2007) QUING Project <http://www.quing.eu/files/results/ih_sweden.pdf> accessed 17 April 2015.

[225] Alke Glet, 'The German Hate Crime Concept: An Account of the Classification and Registration of Bias-Motivated Offences and the Implementation of the Hate Crime Model into Germany's Law Enforcement System' (2009) Internet Journal of Criminology <https://docs.wixstatic.com/ugd/b93dd4_87744cd433c84bf3981395a2f13f6444.pdf> accessed 17 April 2015.

[226] ILGA Europe 'Laws against Homophobic Hate Crime and Hate Speech in Europe' (2009) <http://www.ilga-europe.org/home/issues/hate_crime_hate_speech/ilga_europe_reports> accessed 17 April 2015.

[227] Legislation Online, 'Romanian Criminal Code – Law No. 289/2009, art 77' <http://www.legislationline.org/documents/action/popup/id/9033> accessed 17 April 2015.

[228] Mihnea Ion Nastase, 'Gay and Lesbian Rights' in Henry F. Carey (ed.), *Romania Since 1989: Politics, Economics, and Society* (Lexington Books 2004) 320.

term in national legislation happens through domestic violence regulations, moreover by virtue of an international covenant.[229] Contrary to the culture rhetoric, which had been uttered a number of times during the parliamentary discussions, the Istanbul Convention was introduced without even discussing the term sexual orientation it implants in the Turkish corpus. As aforementioned, the sexual orientation term was ignored, excluded from the national law that seeks to implement the Istanbul Convention, and emphasis was given to the family by contrast to the international version of the legislation. A second piece of evidence for this pattern reversal within the Turkish legal corpus is demonstrated through the inclusion of the term 'sexual orientation' within national legislation. As discussed before, in the Western conceptualisation, the respect for private life clause has played a key role in the recognition of LGB rights, whereas in the Turkish example this is happening in a completely opposite direction: via combating domestic and gender-based violence, which allows the state to interfere in the private sphere. This constitutes an exemption from the supposedly state-free realm guaranteed by the respect for private life concept constructed by Western liberal thought.[230] Domestic violence within

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[229] It is important to highlight that discussions about domestic violence regarding same-sex couples have taken place generally after the legal recognition of same-sex partnership in the Western world and generally refer to violence perpetrated by partners; however, in the Turkish concept, it covers large families including parents, siblings, uncles etc. Further reading: Sharon Stapel, 'Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian, Gay, Bisexual, and Transgender Survivors of Domestic Violence' (2007/08) 52 New York Law School Review; Xavier L. Guadalupe-Diaz & Jonathan Yglesias '"Who's Protected?" Exploring Perceptions of Domestic Violence Law by Lesbians, Gays, and Bisexuals' (2013) 25(4) Journal of Gay & Lesbian Social Services 465–485.

[230] Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10(2) European Journal of International Law 387–395.

same-sex couples was never a starting point for the LGB rights concept in the Western world.[231] In other words, in Western legal terms, LGB rights emerged through the principle that private life should not be interfered with by the state; however, in Turkey, the first legal appearance of sexual orientation has constituted a justification for state interference in the private sphere.

All these analyses suggest that the intention of the Turkish law-makers was not to provide legal protection for LGB persons by ratifying the convention: Turkey maintained its ambivalent position towards homosexuality and acted in compliance with its historical pattern of law-making. Similar to silencing same-sex discourse after the alleged decriminalisation of homosexuality via the first transplant by the Ottomans, Turkish law-makers also silenced the legal discourse once again after the last transplant by removing sexual orientation from the national legislation. Therefore, just as the question we asked for the assumption of decriminalisation in the Ottoman era, almost two centuries later we are investigating this same question for the inclusion of the term sexual orientation via the Istanbul Convention: were they aware of the fact that the Istanbul Convention includes the term sexual orientation as a protected status? Did the law-makers deliberately ratify the Istanbul Convention acknowledging the convention's positive legal impacts on same-sex partners or did they feel compelled to do so? Did they silence homosexuality within the national level as a strategy to manage international pressure? This indicates that, from the first transplant in 1858 to the last transplant in 2011, the intention of the Turkish law-

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[231] Natalie E, Serra, 'Queering International Human Rights: LGBT Access to Domestic Violence Remedies' (2013) 21(3) The American University Journal of Gender, Social Policy & the Law 583–607.

makers in adopting these laws was and is still a highly contentious issue. Thus the conclusion one can arrive at is that the legal transplantation of laws about homosexuality has functioned as an enigmatic legal activity, which has prevented any analysis of LGB individuals' actual legal situation in Turkey; in fact, it has obscured it.

4.5 What do these parliamentary discussions reveal?

Since the foundation of the Turkish Republic in the 1920s, up to the late 1970s, we can observe that the cultural rhetoric has been formed against implanting a Western legal system and legislations. The main discussion during the establishment period of the Republic was the possibility of engendering legal rules without installing Western-made laws. The decline of the Ottomans was also attributed to copying and pasting laws from the West, which failed in practice owing to not being suitable to the centuries-long, well-established Ottoman legal culture. The opponents of Western legal transplantation were on the one hand endorsing the idea of revolutionary change and bringing the Ottoman monarchy to the end, and on the other hand supporting imitating Western laws, just as the Ottomans had in the 19th century. How could it be a revolution when the laws were all implanted from the West just as the late Ottoman legal system had been, which the new Turkish Republic sought to overthrow and change? This irony reveals important aspects about the historical construction of the culture rhetoric within the legal area. It can be deduced that the founders of the republic considered law separate from religion, in the sense that secular laws were a type of universal text articulated by the West. As these Western laws were also secular, the new republic was not importing anything against Islam. According to their understanding, the Ottoman legal policy that

imitated laws from the West failed because the Ottomans did not secularise the laws; on the contrary, they mixed Islamic religious rules with Western laws. The proponents of the culture discourse did not want to change this amalgamated approach. The early authors of the culture rhetoric did not want to subordinate the role of religion within the legal system of the newly founded republic. Thus the initial culture rhetoric followers were supporting an amalgamated legal regime that would be a mixture of Western and religious laws. This articulation of the culture discourse complies with the definition of culture and tradition, which basically indicates loyalty to the past. In this sense, the proponents of the culture discourse during the early republic were not inclined to change the Ottoman approach to legal transplantation. Their inclination was to mix the Ottoman religious rules with Western-made laws.

Since 1970s, the main focus of the culture rhetoric has become homosexuality and Western morality. As mentioned before, during the late twentieth century the LGB rights concept did not attain much success in Europe. It can be identified as the period of decriminalisation. If we limit our analyses to positive law, we can infer that Turkey was ahead of a number of European states until the early 1990s.[232] Since Turkey had allegedly decriminalised homosexuality in 1858, it had never introduced unequal age of consent rules but, ironically, leniency towards same-sex relations was associated with the West and as being against the culture of Turkey.[233] Until the 1990s, Western and Turkish

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[232] Belgium (1985), Spain (1988), Iceland (1992), Finland (1998), France (1982).

[233] Turkish Parliament Session: 52 Page: 720 Date: 25 December 1992 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d19/c026/tbmm19026052.pdf> accessed 25 December 2016.

states had more or less similar arguments against homosexuality: morality and health.[234] The ECHR ruled that homosexuality could be criminalised owing to health and moral reasons in 1955.[235] The UK argued in *Sutherland* in 1997 that a higher minimum age of consent for homosexual males than for heterosexuals did not violate the convention: thus discrimination was justified.[236] In 1987, the ECHR declared *S v The UK* inadmissible as the Commission found the different treatment of same-sex and opposite-sex couples by contracting states had been justifiable under the convention:[237]

> The Commission considers that the family (to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated) merits special protection in society and it see no reason why a High Contracting Party should not afford particular assistance to families. The Commission therefore accepts that the difference in treatment between the applicant and somebody in the same position

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[234] Section 28, UK Local Government Act 1988:

28.—(1) The following section shall be inserted after section 2 of the [1986 c. 10.] Local Government Act 1986 (prohibition of political publicity)—

2A.—(1) A local authority shall not—

(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;

(b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship;

UK Government's Response in *X v The United Kingdom* App No 7525/76 (ECHR, 3 March 1978): 'Article 14 did not exclude the possibility of differentiating between the sexes in measures taken with regard to homosexuality for the protection of health or morals under Article 8, paragraph 2. The present complaint under Article 14 should be declared inadmissible for similar reasons'.

[235] *W.B. v. Germany* App. No 104/5 (ECHR, 17 December 1955).

[236] *Sutherland v The United Kingdom* App No. 25186/94 (ECHR, 1 July 1997).

[237] *S v The United Kingdom* App No. 11716/85 (ECHR, 14 May 1986).

> whose partner had been of the opposite sex can be objectively and reasonably justified.[238]

In 1997, sexual orientation was added as a protected ground to Article 19 of the Treaty on the Functioning of the European Union.[239] Despite the fact that leniency towards homosexuality had been an integral part of the Ottoman legal culture, the Turkish culture rhetoric had been transformed from being against legal transplantation to specifically being against Western morality, which started to become more lenient towards same-sex relations, as the Ottomans had been.

In the 2000s, the West was finally able to frame a structure for the legal recognition of homosexuality within its corpus. It now started to put pressure on the non-West. This is where the culture rhetoric formed in the 1990s starts to intertwine with anti-imperialism. Emergence of reports and research examining non-Western states according to Western classifications and investigating legal history regarding homosexuality according to Western benchmarks also correspond to this time period.

In the 1920s the culture/tradition argument was mainly against secularism and implanting Western laws without combining them with Islamic rules. The main separation was between nation and religion. The culture argument has been used against transplanting Western laws.

In 1970s homosexuality started to appear within the parliamentary discussions. In these discussions, the West was associated with homosexuality. The

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[238] Ibid.

[239] The Treaty on the Functioning of the European Union.

culture/tradition argument this time emerged intertwined with homosexuality. I found that, starting from the 1970s, opposition to legal transplants and homosexuality intersects.

Since then, the opposition to West and homosexuality has become inseparable. Another important finding is that this joint culture/tradition counterargument that combines homosexuality and the West emerged in Turkey long before the LGB rights concept was founded in the West. Only in 1981, the ECtHR ruled in *Dudgeon v UK* that the criminalisation of same-sex intercourse in the private sphere was a violation of the convention.[240] The UK's arguments in *Dudgeon* were very similar to the discussions held in the Turkish parliament and judiciary in the same time period. Until the 1990s, Western and Turkish states had more or less similar arguments against homosexuality: morality and health.[241] Interestingly, the culture/tradition argument against Western-promoted homosexuality had been present even in the 1970s, when the Turkish and Western formal discourses were almost identical.

This evidence supports my further argument that challenges the authenticity of the culture/tradition objection to the human rights of LGB individuals. After the late 1990s and 2000s the West started to utilise the LGB rights concept as a denominator of civilisation. After this period, the culture/tradition argument reflected a predicament against this Western pressure. In the Turkish example, previously implanted Western laws presented as culture/tradition, by contrast

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[240] *Dudgeon v The United Kingdom* (n 179).

[241] Section 28, UK Government's Response in *X v The United Kingdom* App No 7525/76) (n 235).

with recent Western laws. In other words, the non-West imitates an outdated Western standard and reformulates it as a cultural stance against installing the latest version of Western laws. This partially represents an anti-imperialistic attitude. The non-West is exhausted of the pressure of catching the most recent Western standards. The non-West is always falling behind the developments and the West maintains its tutelage.

4.6 Conclusion

The chronicle of the culture rhetoric within the Turkish corpus indicates that the contextualising of culture against the LGB rights concept is historically linked with the law/right-making method: legal transplantation. The opposition to this law/right-making method underpins the culture versus LGBTI rights concept. Opposition to the LGB rights concept today has its roots in opposition to legal transplantation during the 1920s. Therefore, the data in this chapter reveals that the culture rhetoric against the LGB rights concept is entrenched within the law-making method.

Although law/right-making efforts regarding same-sex relations have become significant in Turkey in the last decade, all the attempts at LGB rights codification within the Turkish parliament have relied on the Western formulation of the LGB rights concept. The aforementioned parliamentary draft laws refer to Western laws in their rationale. Thus the method of law/right-making does not seem to be changing: it is still legal transplantation. The first transplant – the decriminalisation of homosexuality in 1858 – and the last transplant – the Istanbul Convention (2011) – pertaining the LGB rights concept allow me to infer that Turkey will keep imitating the pre-existing structures

unless a non/less imperialistic law-making method is discovered to deconstruct the realm of delimited ways of being possible.

In Part II of this thesis, my focus is on unlocking these delimitations and transporting the findings to the realm of the possible to be able to fantasise an alternative law-making to legal transplantation, which proved to be an imperialistic instrument. I will revisit Ottoman and republic analyses through the theoretical perspective that will be elaborated in the following part. Chapter 5 will provide a theoretical approach to deconstructing legal transplantation through the imitations it embodies using Butler's concept that gender is performative. Chapters 6 and 7 both introduce and test the possibilities that cultural translation as a law-making method offers.

Part II The realm of the possible

> For those who are still looking to become possible, possibility is a necessity.[1]

This part of the thesis explores the realm of the possible, and the potential of cultural translation for less imperialistic law/right-making. As mentioned repeatedly, Loizidou discusses the paradoxical deployment of law in Butler's works.[2] The law has at least two contradictory aspects, according to Butler. The first one is the normative imperialistic power intrinsic in law/right-making and the second is the possibility of subversion embedded within the same law-making process. In the first part of the thesis, the emphasis was on showing the extent of the realm of limited ways of being possible.

In this part of the thesis, I attempt to discuss another aspect embedded within Butler's works: cultural translation. Doing so perhaps adds a third aspect of law in Butler's work. Thus far, Butler's approach to law has been analysed through two aspects: the critique of law-making and the occasion for subversion, which is also embedded within the law-making. My interpretation of Butler's understanding of law adds a third aspect: cultural translation as law-making; in other words, how law-making can be done in a less imperialistic way. This part of the thesis elaborates on how the occasion for subversion can function as a new law-making: cultural translation. In other words, given that current law-making happens within the delimited ways of being possible, as examined in the previous part, this part of the thesis examines law-making when the scene of constraint is subverted and *the* realm of the possible emerges from this

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[1] Judith Butler, *Undoing Gender* (Routledge 2004) 31.

[2] Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (Routledge 2007) 126; Elena Loizidou, 'Butler and Life: law, sovereignty, power' in Terrel Carver and Samuel A. Chambers (eds), *Precarious Politics* (Routledge 2008).

subversion. This part consists of three chapters. Chapter 5 discusses the formation of rights through imitation. The following chapter examines cultural translation theoretically. The seventh chapter is an attempt to depict how could cultural translation work in practice, as a law-making method.

Chapter 5 Formation of rights through imitation

5.1 Introduction

This chapter outlines the theoretical foundation, which will be applied to the material outlined in Part I of this thesis regarding delimited ways of being intelligible, following the dual deployment of law in Butler's works.[1] The law has at least two aspects, according to Butler: the first one is the normative imperialistic power that is intrinsic to law/right-making.[2] The second is the possibility of subversion, which is embedded within the same law-making process. On the one hand, law empowers imperialistic power relations; on the other, it has the potential to transform it.[3] In this chapter I will scrutinise current law/right-making using Butler's understanding of 'imitation' as a key concept. As such, this chapter is mainly dedicated to a critique of law/right-making and taking processes.

In light of the theoretical discussions regarding the performative nature of law/right-making, and the detrimental consequences of this current method, the occasion from which the possibility for subversion or transformation emerges will be determined. This will enable the research to build its further arguments on this theoretical bedrock. The discussion will continue in Chapters 6 and 7 on

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[1] Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (Routledge 2007) 126; Elena Loizidou, 'Butler and Life: law, sovereignty, power' in Terrel Carver and Samuel A. Chambers (eds), *Judith Butler's Precarious Politics*: Critical Encounters (Routledge 2008).

[2] Please note that rights fall under the conception of law for this thesis, thus law-making includes right-making.

[3] Karen Zivi, 'Rights and the Politics of Performativity' in Terrell Carver and Samuel A. Chambers (eds), *Judith Butler's Precarious Politics:* Critical Encounters (Routledge 2008).

how this occasion can be utilised to accommodate cultural translation as a law/right-making method.

This chapter begins with evaluating the current law/right-making method: legal transplants. This will be followed by a section on Butler's gender performativity theory. In the final part, I will apply gender performativity to legal transplantation and to the LGB rights concept. The analogy between the belief that liberty is possible via transplanting laws from Western countries and the idea that liberation of LGBs is equivalent to imitating laws that regulate and protect heterosexuality will be elaborated with the help of the theoretical analyses provided in this chapter.

5.2 Legal transplants and gender as performative

5.2.1 Legal transplants

Legal transplantation has been regarded as one of the prominent ways of engendering legal change and law-making, particularly in Turkey since the late Ottoman times.[4] According to Alan Watson, legal change happens through legal transplants.[5] He coined the term 'legal transplants' in the 1970s, by defining it as follows: 'The moving of a rule or a system of law from one country to another'.[6] This method has been defined differently as 'circulation of legal models', diffusion of law, 'transplants', 'borrowing', 'circulation', 'cross-

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[4] Esin Orücü, 'Comparatists and Extraordinary Places' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge 2003) 467, 477.

[5] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993) 95.

[6] Ibid.

fertilization', 'migration', 'engagement', 'influence', 'transmission', 'transfer' and 'reception' by comparatist scholars: the number of different terms developed reflects the controversial status of this concept.[7] The key definition for each of these terms could be reduced to the admission of foreign legal ideas and texts to a local legal corpus. This admission could derive from an obligation; it could also happen voluntarily. For example, it could aim for uniformisation (copy and paste) or harmonisation (tuning foreign law with the domestic corpus).[8]

Apart from the terminology dispute, there are also contesting arguments relating to the underlying rationale behind legal transplants. Supporters of legal transplantation belong to different strands of thought. Thus there are various explanations of why laws move from one jurisdiction to another. One comparative law scholar, Miller, identifies four main trends in legal transplantation.[9] Firstly, borrowing law from another country or institution is cost-saving.[10] In this way, instead of investing in law-making processes, a state

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[7] Michele Graziadei,'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, first published November 2006, published online September 2012); Vlad F. Perju, 'Constitutional Transplants, Borrowing, and Migrations' in M. Rosenfeld and A. Sajo (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012); Sujit Choudhry, *The Migration of Constitutional Ideas* (Cambridge University Press 2007) 20–23.

[8] María Paula Reyes Gaitán, 'The Challenges of Legal Transplants in a Globalized Context: A Case Study on "Working" Examples' (master's thesis, University of Warwick, October 2014).

[9] Jonathan M. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51(4) The American Journal of Comparative Law 839–885.

[10] Further reading regarding the cost of amending legislations: Peter Grajzl and Valentina Dimitrova-Grazjl, 'The Choice in the Lawmaking Process: Legal

borrows laws and institutions from other states' legal corpora. In so doing, they import a legislation that works in a foreign jurisdiction, assuming that it will work in their context, thereby saving costs. As articulated by Watson, '[b]orrowing is much easier than thinking. It saves time and effort'.[11]

The second reason derives from what is called 'externally-dictated transplantation'.[12] Since having common standards facilitates state involvement with international trade and international relations, states tend to adopt widespread and common legal regulations, in order to comply with international standards.[13] Given that these common standards generally reflect the values and interests of developed Western countries, this method contributes to a monopoly of law and globalisation, bringing about the diffusion of Western laws.[14] For instance, some international institutions, such as the World Bank and the International Monetary Fund, operate through conditional imposition, which adds to this Western domination whereby adoption or repeal of a particular legislation is a precondition for providing loans or other financial

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Transplants vs. Indigenous Law' (2009) 5(1) Review of Law and Economics 615–660.

[11] Alan Watson, 'The Birth of Legal Transplants' (2012–2013) 41 Ga J Int'l & Comp L 605.

[12] Miller (n 9); Julie Mertus & Elizabeth Breier-Sharlow, 'Power, Legal Transplants, Harmonization' (2003–2004), 81 U Det Mercy L Rev 477.

[13] Ibid.

[14] Christian Reus-Smit, *Individual Rights and the Making of the International System* (Cambridge University Press 2013) 161; Miller (n 9).

benefits to the developing countries.[15] This attitude is articulated as 'the neo colonial continuation of Western tutelage'.[16]

The third type of transplantation is identified as the 'entrepreneurial transplant', which was theorised by Dezelay and Garth.[17] This method of transplantation operates through individuals or groups who are working for the adoption of a foreign law into the legal corpus of their country.[18] This method also includes

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[15] Ivano Alogna, 'The Circulation of the Model of Sustainable Development: Tracing the Path in a Comparative Law Perspective' in Volker Mauerhofer (eds), *Legal Aspects of Sustainable development: Horizontal and Sectorial Policy Issues* (Springer 2016).

A very precise example for this would be the World Bank president Jim Kim's suspension of Uganda's health care fund owing to its new law that criminalises homosexuality. Although this action appears to be a support to LGB agenda on the surface, indeed it will most likely lead to counter-effects. It has already been envisaged as a western pressure on Uganda's sovereignty: 'Mr Opondo said not everything the West said was correct and there should be mutual respect for sovereign states.

'There was a time when the international community believed slave trade and slavery was cool, that colonialism was cool, that coups against African governments was cool,' Thus, Jim Kim's position has been profoundly articulated in the Economics as: Right Cause, wrong battle: The Economist, 'Right Cause, Wrong Battle' (12 April 2014) <http://www.economist.com/news/leaders/21600684-why-world-banks-focus-gay-rights-misguided-right-cause-wrong-battle> accessed 1 May 2015. Also see: World Bank, 'World Bank Group President Jim Yong Kim: Discrimination by Law Carries a High Price' (28 February 2014) <http://www.worldbank.org/en/news/opinion/2014/02/28/world-bank-group-president-jim-yong-kim-discrimination-law-price> accessed 24 December 2015; BBC, 'World Bank Postpones $90m Uganda Loan over Anti-gay Law' (28 February 2014) <http://www.bbc.co.uk/news/world-africa-26378230> accessed 24 December 2015).

[16] A. Angie and B.S. Chimmi, 'Third World Approaches to International Law and Individual Responsibility in International Conflict' (2003) 2 Chinese Journal of International Law 77–103.

[17] Yves Dezalay and Bryant Garth, 'The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001).

[18] Ibid.

groups that refer to foreign laws in order to reinforce their arguments/goals within the domestic context. In this sense, NGOs, policy groups and political parties that promote the introduction of foreign laws would fall under this typology.[19] This method is more common within developing countries; however, it is not very easy to distinguish the entrepreneurial transplant from the externally dictated transplant. The compulsory nature is not always formally articulated. However, it is evident that the presence of the same laws facilitates trade and/or other kinds of interaction between developed and developing states.

The fourth category of transplantation is called the 'legitimacy-generating transplant'.[20] Graziadei argues that the most common motivations of states' tendency to use legal transplantation as a tool for development both in legal and economic fields is 'the desire to follow prestigious models'.[21] In this type, the prestige of a foreign law or model motivates a legislator to borrow it.[22] Following the end of a dictatorship or civil war, this method operates as a quick way to rebuild democracy, and the adoption of laws from a reputable democratic country displays strong intention of recovery from an authoritarian regime.[23]

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[19] Ibid.

[20] Miller (n 9).

[21] Graziadei (n 7).

[22] Miller (n 9).

[23] Miller (n 9).

All of these types of legal implant indicate that legislation can travel from one jurisdiction to another and bring about a legal change. The factor underpinning all these listed reasons is the idea that law develops via legal borrowings. This assumption relates to the argument that rules can perform in different jurisdictions regardless of cultural boundaries, and through this borrowing between different legal systems law is proved to be universally valid.[24]

Defending legal transplants as an essential mechanism for legal development supports the idea that law is a stand-alone phenomenon that surpasses cultural differences and national borders.[25] In other words, a law is a law, unreflective of any social rules. This idea of legal development, therefore, is opposed to the mirror theory, which posits that laws must reflect society's values.[26] Watson goes further and posits 'an insulation theory', according to which laws only develop from legal history, regardless of their political, social and economic circumstances.[27] Legal history is, according to him, the history of legal transplants among different jurisdictions.[28] Thus, he thinks law is an autonomous concept and should not be regarded as a mirror of societal values. Another critique Watson raises against mirror theory is that society is not a single community. Thus law cannot reflect societal values as a whole. This fact

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[26] Watson, 'The Birth of Legal Transplants' (n 11).

[25] William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43(4) The American Journal of Comparative Law 489–510.

[26] Ibid.

[27] Ibid.

[28] Ewald (n 25); Alan Watson, *Roman and Comparative* (University of Georgia Press 1991) 97–98; Alan Watson, *The Evolution of Law* (Johns Hopkins University Press 1985) 119.

will bring about a legal system that mirrors the benefits of some, most likely the elites, but not all. Therefore, he concludes that mirror theory will inevitably fail to administer societal values into law.[29]

As mentioned above, he is of the opinion that laws are and should be autonomous from society, economy and politics. Another way of framing Watson's argument is that laws supersede cultural boundaries; they can communicate with foreign laws but not with the local economic, social norms of their country.[30] Consequently, according to Watson, law is disassociated from other disciplines. This autonomous nature of law enables it to move from one jurisdiction to another. This strand of thought coincides with the argument that there is a universally valid law that is applicable for all jurisdictions.

Nevertheless, not all scholars accept the idea that laws are autonomous from social, economic and political contexts. This leads us to the main dispute between opponents and proponents of legal transplantation: whether laws can travel and function in a different legal lexicon.[31] The basis of this disagreement derives from the fact that every law signifies a meaning within the context of the departure jurisdiction, which will be rearticulated by the recipient and will be translated into other meaning and, therefore, another law.[32] As can be

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[29] Ibid.

[30] Alan Watson, *The Evolution of Law* (Johns Hopkins University Press 1985) 119.

[31] Pierre Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 Maastricht J Eur & Comp L 111; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies' (1998) 61 Modern Law Review 11, 18.

[32] Legrand (n 31).

understood from this argument, laws are not autonomous and they cannot be isolated from culture and society. One of the leading scholars of this strand of thought, Pierre Legrand, opposes the idea that laws can be universally valid. He critiques 'legal change as legal transplants'[33] as being formalistic and upholding a synthetic vision of law.[34] Consequently, Legrand thinks that transplants are impossible.[35] According to him, law and society are interrelated and laws and their meanings are only intelligible through culture.[36] He argues that laws cannot be reduced to formalistic regulations. On the contrary: laws are affiliated to social and cultural context.[37] Thus, every legal borrowing will gain new meaning within the recipient jurisprudence.[38] Therefore, if a piece of legislation travels to another legal venue, it will be rearticulated by the recipient culture and become a different law than it was within the jurisdiction it originated from.[39] In other words, that law will change according to the culture of the recipient jurisdiction; and thus become a new law.[40] This confirms that law is not a stand-alone phenomenon but intertwines with the social dynamics of a jurisdiction.[41]

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[33] Ibid.

[34] Pierre Legrand, 'What "Legal Transplants"?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001).

[35] Legrand (n 31).

[36] Ibid.

[37] Ibid.

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001).

Therefore, laws are not universally applicable; they are instead limited by cultural boundaries.[42]

Regarding the possible failures of legal transplants due to cultural boundaries, John Jupp's recommendations could provide useful insight.[43] He draws attention to the possibility of failure of reception, unless legal traditions and history of the recipient country are taken into consideration.[44] With the aim of preventing this failure, some measures must be taken in terms of capacity building prior to the legal borrowing. This will minimise the unintended consequences of legal transplantation and enhance the success of the imitation.[45]

Gunther Teubner's insight adds another dimension to the cultural limits of a legal implant. He interprets the relation between society and law as co-evolutionary, yet following a different trajectory.[46] According to him, social and legal realms are in a 'binding arrangement'; consequently, when a foreign law is

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[42] This understanding of law, and legal transplants tunes with postcolonial legal scholarship and how one-way direction from west to non-west has an historical pattern For further reading: Makau W. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201–245; Makau W. Mutua, 'The Ideology of Human Rights' (1996) 36 Virginia Journal of International Law; Sara Ramshaw, 'Improvising (Il)Legality: Justice and the Irish Diaspora, N.Y.C., 1930–32' (2013) 3(1) Irish Journal of Legal Studies.

[43] John Jupp, 'Legal Transplants as Solutions for Post-Intervention Criminal Law Reform: Afghanistan's Interim Criminal Procedure Code 2004' (2013) 61 Am J Comp L 51.

[44] Ibid.

[45] Ibid.

[46] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61(1) Modern Law Review 11–32.

imported it will be reconceptualised separately by the legal and social context.[47] This will inevitably disturb the interdependent, hence autonomous, relationship between these two realms within the recipient country.[48] Thus, any legal implant will function as a legal irritant within a recipient jurisdiction, thereby leading to a conflict between social and legal realms.[49] In this way, Teubner acknowledges the role law plays in relation to other subsystems.[50] However, he thinks that not only law but also the social realm will resignify the new law. He therefore argues that social and legal cultures will be drawn into a crisis in an attempt to reconceptualise the new law.[51] This crisis will make the foreign law not only a legal irritant but a social irritant as well. Teubner critiques Legrand for his understanding of culture in a singular form and for overlooking the possibility of multiple resignifications of a foreign law in a recipient jurisdiction.[52] This shifts the legal culture versus the universal law crisis into a more complex situation, where a legal transplant is challenged by its own society, foreign law and presumably by other subsystems.[53] Thus, in either case, a foreign law functions

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[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] Gunther Teubner, 'The Transformation of Law in the Welfare State' in Gunther Teubner (ed.), *Dilemmas of Law in the Welfare State* (Walter de Gruyter 1985).

[51] Teubner (n 46).

[52] Ibid.

[53] Inspired by Luhmann's autopoietic law, Teubner advances a theory called reflexive law theory in which law, economy, cultures, social realms are regarded as subsystems: 'I develop a new perspective on the process of legal and social change that permits me to point to a new "evolutionary" stage of law, which I call "reflexive law." This stage, in which law becomes a system for the coordination of action within and between semi-autonomous social subsystems,

as an irritant.[54] Accordingly, Teubner's insight is in disharmony with the approaches that reduce the legal transplantation discussions to a repulsion versus interaction dichotomy.[55] This discussion trend deems that a foreign law will either be accepted or declined by the recipient jurisdiction. However, Teubner identifies this binary framing as a false dichotomy that overlooks the fact that, in any case, even if the foreign law is welcomed, a legal transplant will irritate the recipient lexicon because it will disturb the interaction among and within various autonomous subsystems, including the law.[56]

Recalling the earlier discussion, proponents of legal transplants are inclined to read law through structuralist and positivist approaches, according to which law and rights are regarded as universally valid and centred structures.[57] This line of thinking justifies the idea that law is a stand-alone phenomenon, which surpasses cultural and social differences and thus can travel to any jurisdiction. Another conclusion which can be made from this understanding of law is that laws/rights are made in one jurisdiction and that others repeat or imitate this already-made law. This leads to a binary and inherently hierarchical relationship between the law-maker and the law-taker while at the same time creating a convenient environment for imperialism and power relations to flourish by

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can be seen as an emerging but as yet unrealized possibility, and the process of transition to a truly "reflexive" law can be analysed': Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) Law & Society Review.

[54] Teubner (n 46).

[55] Ibid.

[56] Ibid.

[57] Stephen Moebius, 'Imitation, Repetition and Iterability' (2004) 5(2) Distinktion: Scandinavian Journal of Social Theory 55–69.

means of legal transplants. In a broader sense, Twining prefers to define the moving of law from one jurisdiction to another as the 'diffusion' of law.[58] He points to the scholarly trend of identifying this diffusion as a one-way transfer, which is from developed to less developed countries, from the West to the non-West.[59] Proceeding from this analysis, it can be argued that there is a vertical and implicitly hierarchical relationship between West and non-West whereby laws are fabricated by the West (and/or in compliance with Western legal theory) and distributed to other states addressing legal change under different names, such as colonialism, imperialism, trade, neo-colonialism and globalism.

The universality of human rights paves the way for the transplantation of Western-constructed rights concepts.[60] According to Freidman, legal development is similar to Darwinian evolution theory, where developing legal systems imitate developed ones.[61] In this way, legal transplants become one of the tools of this asymmetric power relation. Thus, it can be deduced that, in each new category of rights recognised by the West, the binary relationship between the law-maker and the law-taker will be reproduced, and consequently the West will maintain its 'parent legal system' position. The emergence of the LGB rights concept sits in the heart of these discussions as its diffusion follows the same path: from West to non-West.

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[58] William Twining, 'Diffusion of Law: A Global Perspective' (2004) 36(49) The Journal of Legal Pluralism and Unofficial Law 1–45.

[59] Ibid.

[60] William Twining, 'Implications of "Globalisation" for Law as a Discipline' 52; Cynthia Weber, *Queer International Relations* (Oxford University Press 2016) 107.

[61] Lawrence Friedman 'On Legal Development' (1996) 24(11) Rutgers Law Review 26–64.

Gunter Frankenberg's analysis of IKEA brings in a different perspective by arguing that transplants do not take place between two legal systems but rather occur on a global constitutional basis. Thus, there are no Western-fabricated laws. According to this theory, law-making through legal transplants operates as:

> a supermarket, where standardized constitutional items – grand designs as well as elementary particles of information – are stored and available, pret-a-porter, for purchase and reassemblage by constitution makers around the world.[62]

This model asserts that rules have no origin since they would have no meaning without being reconceptualised through the IKEA model. Thus, transplantation cannot be reduced to a law-taker/law-maker relationship between states. However, according to the IKEA model, commodification allows laws to travel across legislations.[63] This approach draws a parallel with Watson's argument that laws could travel from one jurisdiction to another, but, at the same time, departs from it, stressing that laws do not belong to any one jurisdiction. In this process, laws do not originate from a specific jurisdiction but are recontextualised in the jurisdictions that borrow them.[64] This approach is associated with the strand of thought that underscores the universal nature of human rights norms.[65] Consequently, it is argued that diffusion of human rights

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[62] Gunter Frankenberg. 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 Journal of International Constitutional Law 563.

[63] Ibid.

[64] Ibid.

[65] James G. March and Johan P. Olsen, 'The Institutional Dynamics of international Political Orders' (2005) 52(4) International Organization 943–969; Ian Hurd, 'Legitimacy and Authority in International Politics' (Spring, 1999) 53(2) International Organization; Kathryn Sikkink, 'Transnational Politics, International

concepts cannot be deemed adoption of a foreign law, since international norms constitute a 'logic of appropriateness'[66] that no longer belongs to a state or a group of states but to all modern states.[67] Interestingly, some scholars argue that the Western emphasis within law/right-making has been losing its exclusive meaning.[68] However, given the limited contribution of developing countries to the international law-making process, the non-national or non-Western nature of the international law is subject to criticism.[69] The fact that the structures of international rights/laws have historically been developed by means of Western legal and philosophical thought adds to this dubiousness. Wiener's insight further advances this argument by stressing a trend in international law-making that relies on borrowing laws from national legal corpora.[70] In this way, international law can also be a product of legal transplantation, or what Wiener terms vertical or trans-echelon borrowing.[71]

Relations Theory, and Human Rights' (1998) 31(3) Political Science and Politics 517–523.

[66] March and Olsen (n 65).

[67] March and Olsen (n 65); Sikkink (n 65).

[68] Esin Örücü, Mixed and Mixing Systems: A Conceptual Search' in Elspeth Attwoolland and Sean Coyle (eds), *Studies in Legal Systems: Mixed and Mixing* (Kluwer 1996); Orücü (n 1); Samuel Huntington, *Who Are We? The Challenges to America's National Identity* (Simon & Schuster 2004); Kishore Mahbubani, *The New Asian Hemisphere: The Irresistible Shift of Global Power to the East* (New York Public Affairs 2008).

[69] Christian Reus-Smit, *Individual Rights and the Making of the International System* (Cambridge University Press 2013) 161; Rosaline Baindu Cowan, 'The Effect of Transplanting Legislation From One Jurisdiction to Another' (2013) 39(3) Commonwealth Law Bulletin 479–485.

[70] Jonathan B. Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 Ecology Law Quarterly 1295–1372.

[71] Ibid.

However, it should be noted that it is very rare that international law borrows from the non-Western lexicon. Owing to this Western domination in international law-making institutions,[72] what are called international standards are also governed by Western values, regardless of the number of participants from non-Western countries in the international law-making processes. Even though non-Western countries do participate within the international law-making mechanisms, the structure of international law still follows Western formats/texts and concepts. This brings about a coupling of universality with the West and culture with the non-West. Yet the battle against Western domination within international law seems to be continuing under the pretext of universal versus culture crisis.[73]

One approach to legal transplantation could be that globalisation necessarily brings about unification of legislations, making legal borrowings inevitable.[74] In

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[72] Although it is generally accepted that Western domination was no longer the fact after 1955 within international law-making, namely the UN, however the structure of international law maintained its compliance with Western legal philosophy. Luhmann and Teubner's discussions on autopoietic law profoundly describes how Western laws develop through self-referentiality. International law, whose foundations were constructed by the western philosophy, evolves through reference to these foundational texts/conventions, which brings about its loyalty to the Western legal structures. Evan Luard, *A History of the United Nations. Volume I: The Years of Western Domination, 1945–1955* (Macmillan, 1982); Gunther Teubner (ed.) *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter 1987).

[73] Martin de Jong and Suzan Stoter, 'Institutional Transplantation and the Rule of Law: How This Interdisciplinary Method Can Enhance the Legitimacy of International Organisations' (2003) 2(3) Erasmus Law Review.

[74] Irma Johanna Mosquera Valderrama, 'Legal Transplants and Comparative Law' [2004] International Law Journal 261–276; Lawrence Friedman, 'Erewhon: The Coming Global Legal Order' (2001) 37 Stan J Int'l L 347; Mark Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49 Virginia Journal of International Law 985, 987.

this view, all legal realms are deemed to be open to foreign laws. This insight associates with what Waldron argued: that foreign law is becoming the new *jus gentium* (the law of nations). Nonetheless, this openness seems to be predominantly applied to non-Western countries, as globalisation functions as the expansion of Western legal structures.[75] Therefore, globalisation facilitates the transplantation of Western laws and unification of legislations with reference to Western legal structures.[76]

If we analyse the main common features within these conflicting strands of argument in terms of defining what a legal transplant is, it is evident that all definitions are in an agreement that legal transplantation embodies *repetition* and *imitation*. It is, basically, the repetition/reiteration/imitation of a legal text or a concept by other legal realms. In order to repeat a foreign legal text, two different jurisdictions are required, namely a law-maker and a law-taker. The law-taker makes its laws in reference to foreign legal texts.

Luhmann's autopoietic legal theory postulates an alternative law-making method to legal transplantation. In this autopoietic/autonomous law/right-making style, a jurisdiction 'produces and reproduces its own elements by the interaction of its elements'.[77] Thus, autopoietic law operates through self-

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[75] Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium' (2005) 119 Harvard Law Review 129.

[76] Valderrama (n 74); Tushnet (n 74); Friedman, 'Erewhon: The Coming Global Legal Order' (n 74); Makau W. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201–245; Makau W. Mutua, 'The Ideology of Human Rights' (1996) 36 Virginia Journal of International Law.

[77] Gunter Teubner, 'Introduction to Autopoietic Law' in Gunter Teubner (ed.) *Autopoietic Law, A New Approach to Law and Society* (Walter de Gruyter

referentiality.[78] Unlike laws developed by citing another jurisdiction's legislation, such as legal transplantation, autopoietic laws are self-produced. They constitute a closed system that does not interact with other jurisdictions operationally but which are, however, cognitively open for communications.[79] In Luhmann's theory, '[c]ommunicative sub-systems are operationally closed because they select and adapt information coming from outside according to the internal logic of the system'.[80] One might stress the similarities between Legrand's description of legal transplantation, which entails resignification of an external legal text by the recipient lexicon, thereby transforming into law different from the original. Given that the autopoietic system is operationally closed, although it can gain ideas from foreign laws it converts them into legal texts itself in reference to its pre-existing structures. Therefore, the main difference between legal transplantation and autopoietic laws is that the former is open to imitating foreign legal texts, while the latter only allows foreign law into its corpus on a cognitive level. This interpretation enables us to couple the West with autopoietic law-making, and acknowledge that the non-West is inclined (or compelled) to rely on legal transplantation as a law-making method. However, as ironic as it may sound, autopoietic laws and legal transplants

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1987); See Niklas Luhmann, *Rechtssoziologie* (2nd ed. 1983) (English translation, *A Sociological Theory of Law*, E. King & M. Albrow trans. 2nd ed. 1985) Niklas Luhmann, 'Law as a Social System' (1988–1989) 83 Nw U L Rev 136.

[78] Gunter Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18(2) Law & Society Review 291–301.

[79] Luhmann (n 77) 1983; Luhmann (n 77) 1988–1989.

[80] John Gillespie, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2008) 40 International Law and Politics 657.

overlap in that they both develop through imitation/reiteration. While the latter imitates a foreign legal text, the former recursively imitates its own pre-existing structures.[81] Theoretically, legal transplantation necessarily involves autopoietically developed legislation in order to reiterate it. In conclusion, these two theories that deal with legal change and law-making seem to have a common feature: imitation/repetition. This makes imitation a key theoretical concept in analysing law/right-making and legal change. For this reason, this section will continue by analysing the legal transplantation through the imitation theory employed by Judith Butler.

5.2.2 Performativity theory

5.2.2.1 Why this theory?

The human rights regime does not offer protection to all.[82] Some are not qualified for this protection. The offered protection does not happen automatically; it comes at the price of forming an immutable identity category in a way that complies with the established thresholds of being human within human rights law.[83] This might sound contradictory, considering the language of the UDHR, which prescribes that 'all human beings are born free and equal in dignity and rights',[84] but becoming a human who is equipped with rights

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[81] Richard O. Lempert, 'Built on Lies: Preliminary Reflections on Evidence Law as an Autopoietic System' (1997–1998) 49 Hastings L J 343.

[82] Bonny Ibhawoh, 'Human Rights for Some: Universal Human Rights, Sexual Minorities, and the Exclusionary Impulse' (2014) 69(4) International Journal 612–622.

[83] Costas Douzinas, *The End of Human Rights* (Hart Publishing 2000) 116.

[84] UDHR (1948).

requires certain conditions. This reflects the shift within the human rights discourse from natural rights to positivism. The UDHR played a critical role in the construction of a legal and political modern matrix; it replaced the authority loop that occurred in the absence of social and religious forces and transferred sovereignty from God to states, which were created and governed by man.[85] Costas Douzinas summarises this crucial shift in the history of rights with a reference to Nietzsche: 'God is dead and the new god is the international law'.[86] According to his argument, international human rights law has been equipped with power to create humans/humanity. From this perspective, natural rights have been transformed into a secular, rational and universal rights system through the modern human rights concept.[87] By doing this, the modern system not only assembles natural rights within a positivist prescription but also generates a moral dimension within international law and places the duty for its implementation on states.[88]

The significant moral duty of a state is to prevent the abuse of its powers. It is widely agreed that human rights are shields for the weak individual against a powerful sovereign state.[89] Hence, the human rights system attempts to moralise nation state politics, thereby providing an international human rights

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[85] Serena Parekh, *Hannah Arendt and the Challenge of Modernity* (Routledge 2008) 22.

[86] Cited in Douzinas, *The End of Human Rights* (n 83) 116.

[87] Louis Henkin, *The Rights of Man Today* (Stevens & Sons 1978) 5.

[88] Michael K. Addo, *The Legal Nature of International Human Rights Law* (Martinus Nijhoff Publishers 2010) 21.

[89] Douzinas (n 83).

system beyond national protection.[90] As mentioned above, as a manifesto of this international system, the UDHR has a strong emphasis on the universality and inalienability of human rights and has been followed in various human rights treaties that incorporate the international human rights mechanism.[91] However, Arendt argues that the international human rights system, with its emphasis on inalienability and universality, is a perfunctory tool for states, and these concepts are non-existent in reality.[92] She points out that this paradox causes a misconception and profoundly reveals the fact that what is called human rights is indeed civil rights, which are attached to citizenship rather than being human.[93] Yet she finds this paradox meaningful within the evolution of the human rights system. It is meaningful in the sense that international human rights reveal an unnatural process which requires recognition, unlike natural law theory, which implies that all humans are born free and equal with their rights. Arendt's 'right to have rights' debunks this myth by revealing the fact that humans are not born equal but become equal.[94] The contradiction embedded in the process of human rights is captured precisely in this phrase.[95] Another scholar, Baxi, identifies this contradiction as a transformation process of contemporary human rights, with a departure from 'natural rights' and a

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[90] Costas Douzinas, 'Critique and Comment, The End(s) of Human Rights' (2002) 26(2) Melbourne University Law Review 445.

[91] UDHR (1948).

[92] Parekh (n 85) 25.

[93] Ayten Gundogdu, 'Statelessness and the Right to Have Rights' in Patrick Hayden (ed.), *Hannah Arendt Key Concepts* (Acumen Publishing 2014).

[94] Hannah Arendt, Imperialism, Part II of The Origins of Totalitarianism (Harvest, 1968); Hannah Arendt, The Origins of Totalitarianism (Allen and Unwin, 1967).

[95] Ibid.

movement towards the system which is known today as human rights.[96] As mentioned previously, both national and international human rights systems continue to develop through the recognition of new rights and claims that manage to be accommodated successfully within this matrix, either autopoietically or by means of legal transplantation.

If concepts of recognition and granting rights are deconstructed, the human rights system could be reduced to actions of exclusion and inclusion.[97] Ibhawoh reads this conflict between exclusion and inclusion as the story of human rights:

> … continuous tension, especially between the progressive impulse to gradually expand human rights protection to more people across the world and the counter impulse to restrict the scope of human rights and limit its enforcement.[98]

However, Agamben critically reads this as 'a constant need to redefine the threshold in life that distinguishes and separates what is inside from what is outside'.[99] As has been discussed, in spite of the common understanding that rights are innate to human beings, and that these rights are an instrument to protect humans, human rights are in reality a mechanism that governs the methods of state protection and functions as a distinguishing process through which those who are entitled to that protection is formulated.[100] The function of

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[96] Upendra Baxi, *The Future of Human Rights* (3rd edn., Oxford India Paperbacks 2009) 43.

[97] Ibid, 42.

[98] Bonny Ibhawoh, Human Rights for Some: Universal Human Rights, Sexual Minorities, and the Exclusionary Impulse (2014) 69(4) International Journal 612–622.

[99] Giorgio Agamben, *Homo Sacer, Sovereign Power and Bare Life* (Stanford University Pres, 1998) 13.

[100] Parekh (n 85) 11.

exclusion is central to the understanding of the human rights system.[101] Exclusion takes place through the process of framing what is human, who is intelligible and who is not. Sovereign states have the sole authority to decide on what type of humans qualify for their national and international protection.[102] Whoever formulates/authors international/universal human rights within these sovereign states adds another layer to this already asymmetrical power to create the human via rights.[103] In this sense, it is worthwhile to refer to Makau W. Mutua's argument that addresses the historical pattern that associates law/right-making with the West, as well as assigning it a perpetual role in civilising the non-West through distributing Western laws/rights.[104] This analysis sheds light on the imperialistic function of legal transplantation within international human rights-making and human rights-taking between the West and the non-West.[105]

Douzinas analyses human rights-making as follows: '[h]uman rights do not belong to humans and do not follow the dictates of humanity; they construct humans. A human being is someone who can successfully claim human rights.'[106] If Douzinas's prescription is read with Makau's insight in mind, which reveals Western domination within human rights-making, we can conclude that the thresholds of the human and the mechanisms that produce human rights

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[101] Ibid.

[102] Douzinas (n 83).

[103] Mutua (n 77).

[104] Ibid.

[105] Ibid.

[106] Parekh (n 85).

are all Western constructs. Hence inclusion in human rights protection necessitates the re-establishment of Western structures. In other words, legal development or inclusion within human rights can be reidentified as creating a legally recognisable subject by means of imitating the pre-existing Western legal structures, legal texts and legal philosophy in both autopoietic and legal transplantation models. Thus, the subject is humanised performatively.

Judith Butler's performativity theory seems to touch upon a critical overlap between the gendered subject and the humanised subject. Gender performativity goes beyond exposing the ways in which the human is genderised. It can also be expanded to display how a human is constructed and how rights are made. The performativity theory advanced by Judith Butler provides an insight regarding the role of imitation and repetition processes within the formation of a subject. Butler's initial argument is that gender is performative.[107] According to her theory, gender is performative in the sense that it is a binary frame within which we are obliged to imitate one or the other gender in order to be intelligible to others.[108] This intelligibility facilitates recognition, which happens through repeating historically delimited manifestations of what gender is.[109] One of the main theoretical arguments of this thesis is that a subject is gendered and humanised in a similar process

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[107] Judith Butler, *Gender Trouble* (Routledge, first published 1990, 2007).

[108] Judith Butler, 'Performativity, Precarity and Sexual Politics' (2009) 4(3) AIBR, Revista de Antropología Iberoamericana i–xiii <http://www.aibr.org/antropologia/04v03/criticos/040301b.pdf> accessed 16 May 2016.

[109] Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (December 1988) 40(4) Theatre Journal 519–531.

performatively. The previous discussions in this chapter indicate that the LGB rights concept is a matter of legal recognition by which the legally intelligible subject of lesbian, gay and bisexual is constructed through historically delimited manifestation of what human rights are; in a similar way, gender emerges through imitating the delimited manifestations of what gender is.

5.2.2.2 Butler's performativity theory

Butler's theory of performativity is influenced by Austin's speech act theory, Derrida's concept of iterability and, more significantly, Foucault's concept of discursive power.[110] Butler explains the development of performativity theory:

> This is the moment in which discourse becomes productive in a fairly specific way. So what I'm trying to do is think about the performativity as that aspect of discourse that has the capacity to produce what it names. Then I take a further step, through the Derridean rewriting of Austin, and suggest that this production actually always happens through a certain kind of repetition and recitation. So if you want the ontology of this, I guess performativity is the vehicle through which ontological effects are established. Performativity is the discursive mode by which ontological effects are installed. Something like that.[111]

This means that performativity is key to understanding the process that creates the assumption of formation. In line with the preceding performativity theories,

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[110] Judith Butler, *Bodies That Matter* (Routledge 1993) 170–173; Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Polity Press 2013) 129; Moya Lloyd, *Judith Butler From Norms to Politics* (Polity Press 2007) 61; Judith Butler, 'Performative Agency' (2010) 3(2) Journal of Cultural Economy 147–161; Stephen Moebius, 'Imitation, Repetition and Iterability' (2004) 5(2) Distinktion: Scandinavian Journal of Social Theory 55–69; Sara Ahmed, *The Judith Butler Reader* (Blackwell Publishing 2004) 91.

[111] Judith Butler, 'Interview by Peter Osborne and Lynne Segal, London' (1993) 67 Radical Philosophy <http://www.theory.org.uk/but-int1.htm> accessed 4 May 2016.

Butler's version also postulates that subjects are formed owing to an endless circle of repetition.[112]

Butler provides a number of descriptions of performativity. A very well known, and perhaps the oldest, definition indicates that gender is performative owing to the formation of the subject 'through a stylized repetition of acts'.[113] In another early description she explains that gender is performative in that '[t]here is no gender identity behind the expressions of gender; that identity is performatively constituted by the very "expressions" that are said to be its results'.[114] This means that gender does not precede the performative repetition. There is no gender without repetition. She strongly argues that references to pre-existing gender imperatives through imitation have been interpreted as evidence that there is a gender preceding the repetition. However, repetition of the gender norms produces gender and creates the effect that gender is a natural and inherent truth.[115] Butler maintains that 'gender is always a doing' in the sense that gender performativity is not only about utterance but also embodiment.[116] Therefore, Butler's understanding of the performative goes beyond the reiterative power of discourse and text by acknowledging the corporeal

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[112] Butler, *Gender Trouble* (n 107); Butler, *Bodies That Matter* (n 110).

[113] Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40(4) Theatre Journal 519–531.

[114] Butler, *Gender Trouble* (n 107) 25.

[115] Judith Butler, *Notes Toward a Performative Theory of Assembly* (Harvard University Press 2015) 63.

[116] Butler, *Gender Trouble* (107) 25, Loizidou, *Judith Butler: Ethics, Law, Politics* (n 1) 20.

dimension.[117] At the time when Butler first articulated that gender is performative, one understanding was that gender was a voluntarily embodied performance; it could be chosen intentionally among the available gender conventions.[118] The fact that Butler uses terms such as 'doing gender' and 'undoing gender' adds to this understanding that performing gender is a choice, a deliberate performance.[119] However, she clarifies that gender performativity is not a voluntary reproduction.[120] What happens instead is a compulsory repetition of pre-existing conventions, and there is no single author in performativity.[121] She further debunks the voluntary/deliberate understanding of the performative act by arguing that:

> Gender performativity does not just characterise what we do, but how discourse and institutional power affect us, constraining and moving us in relation to what we come to call our 'own' action.[122]

In harmony with her analysis that portrays performativity as an illusion of an innate, original, 'real' gender, she argues that performativity also creates an illusion of deliberate actions. According to her theory, this illusion leads us to conclude that we are the sovereign agents of our actions. However, we fail to acknowledge that norms act on us and we are always in the process of being made.[123] Thus, the performative is never a voluntary act; on the contrary, it

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[117] Butler, *Notes Toward a Performative Theory of Assembly* (n 115) 64.

[118] Butler, *Bodies That Matter* (n 110) 177; Butler, *Notes Toward a Performative Theory of Assembly* (115) 63.

[119] Butler, *Bodies That Matter* (n 110) 177.

[120] Ibid.

[121] Butler, *Undoing Gender* (Routledge 2004) 1.

[122] Butler, *Bodies That Matter* (n 110) 64.

[123] Butler, 'Performativity, Precarity and Sexual Politics' (n 108) i–xiii.

involves obligatory norms that precede the 'I'.[124] Butler calls this 'compulsory citationality' or 'forcible citation' of a norm, which is a mechanism that cannot be detached from the process of performativity.[125] This compulsion occurs because there are limited ways to be intelligible for a subject who seeks to be recognisable. This brings about the forcible citation of conventional and regulatory norms in an aim to make our appearance and existence recognisable. Therefore, intelligible appearance of the subject, which can also be called recognition, happens owing to the endless cycle of repetition of those historically delimited regulatory norms. The compulsion emanates from the fact that our understanding is already historically delimited and structured. In Butler's words:

> performativity seeks to counter a certain kind of positivism according to which we might begin with already delimited understanding of what gender, the state, and the economy are.[126]

Following the logic of this quote, we can conclude that we also have a historically delimited, binary-framed understanding of what rights and laws are. This delimits the way through which a subject becomes legally recognisable. Recognition is one of the pivotal concepts for performativity. Butler acknowledges that the desire for recognition could never be accomplished. However, subjects' desire for recognition leads them to constitute themselves in a recognisable form through repetition that would be intelligible by the norms that govern recognition. She sometimes calls this 'speaking the language of

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[124] Butler, *Notes Toward a Performative Theory of Assembly* (n 115) 32.

[125] Butler, *Gender Trouble* (n 107) 177.

[126] Butler, *Bodies That Matter* (n 110).

norms'.[127] In terms of legal recognition, repetition can be interpreted as a right-making method in the service of recognition. Thus, subjects that desire to be legally recognisable have to present themselves in accordance with the pre-existing legal structures. This compels them to speak the language of rights/laws to ensure their legal intelligibility. This line of analysis presents imitation as a necessary act for recognition as there are no other ways for an intelligible gender/human to appear other than through the expressions of already-existing concepts.[128] Forcible citation of a norm emerges since intelligibility is regulated by certain norms. In terms of legal recognition, it is mostly governed by human rights conventions. Thus, who qualifies as human is always a question of who speaks the language of rights. It can therefore be concluded that anyone who desires to qualify as a human is compelled to cite/repeat the pre-existing human rights structures.

Another consequence of having delimited ways of being intelligible is that it leads to an assumption that there is an innate, natural, 'real' subject who predates the moment of repetition. For Butler, gender is 'real only to the extent that it is performed'.[129] Thus, not only does this endless series of repetition constitute the intelligible gendered subject but also our understanding of 'what reality is' is governed by these historically delimited constructions of gender.[130] As a result, other than endless imitations, there is no preceding, natural or

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[127] Butler, *Undoing Gender* (n 121).

[128] Butler refers to Hegel when explaining that desire is always a desire for recognition: Butler, *Undoing Gender* (n 121) 2.

[129] Butler, *Gender Trouble* (n 107) 278.

[130] Butler, *Undoing Gender* (n 121).

innate gender but only limited options for a subject to constitute itself through repeating the already-established notions of what gender is.

The fact that Butler emphasises that we have a historically delimited understanding of gender, as well as any other concepts those performatively constructed do, actually derives from the post-structuralist theories that presume that discourse has a history.[131] She understands this historicity as a means in which imitation 'echoes the prior actions, and accumulates the force of authority through the repetition or citation of a prior, authoritative set of practises'.[132] The history of discourse is indeed the history of repetition. The previous chains of repetitions[133] creates our knowledge of gender, law, rights and the human, through which a subject is comprehended and recognised. Accumulating from the previous repetitions, performativity constitutes 'who can become produced as a recognisable subject, a subject who is living, whose life

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[131] In terms of historicity of citation, Butler refers to two post-structuralist philosophers, namely Nietzsche and Derrida, in *Bodies that Matter*, page 172. Regarding Derrida, she mentions provisional success of performative, which is explained by Derrida as follows: 'Could a performative utterance succeed if its formulation did not repeat a "coded" or iterable utterance, or in other words, if the formula I pronounce in order to open a meeting, launch a ship or a marriage were not identifiable as conforming with an iterable model if it were not then identifiable is some way as a "citation"?' Jacques Derrida, *Limited Inc* (Northwestern University Press 1977) 18. Nietzsche is mentioned with regards to sign-chain, which he explains as follows: 'a continuous sign-chain of ever new interpretations and adaptions whose causes do not even have to be related to one another but, on the contrary, in some cases succeed and alternate with one another in a purely chance fashion'. Frederick Nietzsche, *On Genealogy of Morality, Second Essay* (first published 1887) <http://www.inp.uw.edu.pl/mdsie/Political_Thought/Nie-GenologyofMorals.pdf> accessed 10 September 2016).

[132] Butler, *Bodies That Matter* (n 110) 172.

[133] Butler refers to sign-chain in Nietzsche (explained in footnote 131) and reads this through Foucault's discursive power. Judith Butler, *Bodies That Matter* (n 110) 170.

is worth sheltering and whose life, when lost, would be worthy of mourning'.[134] Therefore, it can be deduced that performativity theory manifests a set of repetitions that produce ontological effects. More recently, Butler has provided another description that posits that 'performativity is a way of naming a power language has to bring about a new situation or to set into motion a set of effects'.[135] As mentioned, Butler's conceptualising of performativity goes beyond language and discourse; it is rather an amalgam of speech and bodily performances that produce an effect of gender through repetition.

In sum, Butler's performativity theory entails the following: firstly, it goes beyond being solely a speech act to become a combination of acts that are capable of reproduction and embodiment of subjects and norms by repetition. Secondly, this repetition involves compulsion; there is no free will or a single author in this self/subject/concept constitution process. Thirdly, the subject can only imitate historically delimited options, which means that it is already closed to future possibilities. Fourthly, the subject imitates the intelligible manifestations of the pre-existing, delimited options in order to be recognisable, and this is always followed by a negotiation with power and history for recognition.[136] Finally, performativity has a normative force, which also simulates as ontology.[137] These insights provide the research with a lens to scrutinise legal transplantation through the imitations it consists of.

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[134] Butler, 'Performativity, Precarity and Sexual Politics' (n 108) i–xiii.

[135] Butler, *Notes Toward a Performative Theory of Assembly* (n 115) 28.

[136] Butler, 'Performativity, Precarity and Sexual Politics' (n 108) i–xiii.

[137] Ibid.

5.3 Analysing legal transplantation through the lens of performativity theory

One way of evaluating legal transplantation is to discover the role of imitation within the law/right-making processes. As discussed in the previous section, legal transplantation operates, basically, through repetition or imitation. In other words, given the definition of legal transplantation as the moving of a piece of legislation from one jurisdiction to another, imitation is necessarily embedded within this process as this move means reiteration of this piece of legislation by the recipient jurisdiction. Following this definition, there are two parties involved in this imitation process: a law-maker, who actively produces a piece of legislation, and a law-taker, who imitates the original text constructed by the law-maker. This is how the legal transplantation theory conceptualises imitation and reproduction.[138] If we deconstruct the legal transplantation process through the lens of performative theory, we can arrive at three important conclusions. Firstly, there is not just one law-maker within the process of legal transplantation. Secondly, there is no original, natural law that precedes the moment of repetition but instead there are historically delimited concepts. Consequently, and thirdly, the law-taker appears to function as a law-maker as imitation of the pre-existing structures is also a making, according to performativity theory. I will expand on these three points and argue that right/law-making is essentially and theoretically performative in nature.[139]

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[138] This act of imitation can also be defined as reiteration, repetition and citation.

[139] These scholars also argued the performativity of law: gender performativity as a legal method: Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (n 1) 26; Law is performative: Riccardo Baldissone, 'The Juridicial Production of Reality: Towards a Theory of Legal Performativity' (paper presented at the Critical Legal Conference, University of Kent, 3 September 2016).

As mentioned before, both law-making and law-taking processes operate through delimited repetitions that produce ontological effects. In other words, rights/laws are formed through various repetitions of historically established legal structures within the law-maker's jurisdiction: for example, what is termed LGB rights is not a new category of law; it is the inclusion of the LGB subject in the protective statuses within the human rights system. Therefore, it is the formation of a legally recognisable LGB subject though the repetition of delimited and historically established rights. This kind of repetition develops through self-referencing and, as mentioned previously, is termed autopoietic law by Luhmann.[140] In this phase of legal performativity, rights/laws are created with reference to preceding legal frames. Thus, what we perceive as a new right/law is indeed the same structure repeating itself. In other words, it is the reproduction of already-existing rights concepts. On the one hand, the process of law-making entails a circle of repetition which brings about the formation of a subject in a legally recognisable form.[141] On the other hand, as law-making involves the repetition of pre-existing structures, the law-maker is actually law-imitating as well. Therefore, imitation within the legal transplantation process is not limited to the law-taking jurisdiction; what we perceive as the law-maker is also the law-imitator. Consequently, it can be argued that what is called law-making is performative in the sense that it also reproduces the new through the imitation of pre-existing structures.

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[140] Teubner, 'Introduction to Autopoietic Law' (n 77); Luhmann, *A Sociological Theory of Law* (n 77); Luhmann, 'Law as a Social System' (n 77).

[141] Butler, *Bodies That Matter* (n 110) 171.

This line of analysis similarly casts doubt on the term 'law-taker' as well. Given that each and every imitative or repetitive action is also a constitution, according to the glossary of performativity theory, law-taking by means of repetition/imitation becomes a law-making process. The conventional understanding of law-maker posits that laws and rights are fabricated by the jurisdiction from which they depart. However, according to performative theory, repetition itself creates and fabricates these norms.[142] The fact that both law-making and law-taking phases proceed through repetition means that they are both law-making. It was discussed in the previous section that legal transplantation requires a law-maker and law-taker regardless of how this process is theorised, that is, either as the optimal method for legal development or the bitter consequence of globalism and imperialism. Thus, it is believed that there is a binary relationship between the lexicons of the law-maker and the recipient, the law-taker. However, as the lens of performativity theory reveals, this binary formation of law-maker and law-taker does not exist. Both jurisdictions overlap through the fact that they reproduce new laws/rights through imitation. In the concept of legal transplantation, while the law-taker imitates the foreign texts, the law-maker imitates their own pre-existing structures in an autopoietic fashion. This leads to a situation where the law-maker's autopoietically created laws pre-exist at the time when the law-taker imitates them. In other words, the law-maker's laws become the 'real' law that the law-taker is compelled to imitate. The law-maker and the law-taker are imitating within different 'scenes of constraint'. The scene of constraint for the

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[142] Alecia Youngblood Jackson, 'Performativity Identified' (2004) 10(5) Qualitative Inquiry 673–690.

law-maker (the West) is its own pre-existing legal structures and its history, while the scene of constraint for the non-West relates to the norms produced by the West. The scene of constraint for the non-West is narrower than the West; it has to reiterate the latest version of Western law/rights. This creates a vicious cycle of 'development' through which the West always maintains its place as the developed, with the non-West always trying to catch the new threshold of the West. Another consequence of this vicious cycle of legal development is that the history of the non-West becomes insignificant in this process.

I will try to explain this though a critique that is relevant to this discussion. As mentioned previously, Neville Hoad problematises the portrayal of non-Western arguments that were the previous Western position on a topic as evidence of the underdevelopment of the non-West. This suggests that there is a linear evolution progress, with the West becoming developed ahead of the non-West. In this cycle, the non-Western jurisdiction imitates an outdated Western standard and reformulates it as a cultural stance against installing the latest version of the Western laws. This process makes the non/less-Western legal history insignificant because the resistance under the name of culture does not rely on the culture of the non-West but on the history of the West. Regarding the non-West's insistence on previous Western positions, as noted in Chapter 4, this might be used to deconstruct the culture argument of the non-Western. Briefly stated, I question whether, if the non-Western position is a previous implant from the West, how could it be a cultural stance?

Another aspect of this chain of imitations from various productions of the Western legal history is that Western power is conditional on this cycle. If we break this process to its elements, the law-maker makes different laws in a

period of time and the law-taker imitates them. The imperialist nature of this trade in legislation is actually maintained by this interplay. As mentioned before, the West must produce the new by imitating its pre-existing categories and this changes the thresholds of a rights category such that the West maintains its forward-thinking, developed position. Thus, it is the West, not the non-West, that is dependent on performative norm creation in order to sustain its power on the non-West.[143] In other words, there is a constant need to alter the thresholds of what it means to be developed or civilised in order to empower the sovereignty of the West in relation to law-making.[144]

This leads to the question of whether these autopoietically created Western laws could be called original, natural laws in that they are imitated by non-Western areas. There are two different ways to approach this question. The first line of argument can be drawn from Butler's gender performativity theory.[145] One of the reasons that gender performative is useful to address original versus copy crisis is that it deconstructs the assumption that there is a natural sex/gender. Repetition gives the impression that there is a natural, innate gender. There is no original gender beyond the repetition. If we transfer this line of argument to law-making, then we can conclude that there is no law/right beyond the repetition. In other words, does imitation create the effect of rights/laws, or could it be deduced that there is no original law beyond the repetition? If we apply this to legal transplantation, the originality of the laws

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[143] Agamben (n 99) 131.

[144] Ibid.

[145] Butler, *Gender Trouble* (n 107).

made by the law-maker becomes doubtful. It is presumed that the law-taker imitates the original law that is produced by the law-maker jurisdiction. If, for Butler, gender is original to the extent it is repeated, what we regard as the original law that the law-taker imitates is not the original but the illusion of original/natural law that is created through these endless repetitions of legal norms.[146] Consequently, this approach leads us to the assumption that there is no law/right that precedes the moment of the repetition. Instead, there is a chain of repetition that produces the effect of rights. This then reveals that the law-maker is dependent on the law-taker's repetition in order to maintain its claim of originality. Without repetition the effect of originality cannot be achieved.

Another possible trajectory which answers the same question would be to examine the role of compulsion in norm-making. Butler refers to forcible citation of a norm while explaining performativity. In Butler's works, this compulsion refers to the historically delimited manifestations of the subjects/concepts that are available for imitation. Thereby, in order to be intelligible, a subject is compelled to cite these limited manifestations of being. In a broader explanation, Butler acknowledges that subjects are compelled to repeat these manifestations while forming themselves in order to be intelligible, and thus recognisable. She enumerates law and rights as one of the categories that for recognition to occur stipulates imitation of the already-existing structures.[147] Thus, law-making is a process within the delimited forms of law and rights, or, in a different expression, the pre-existing structures of laws and rights. With this in

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[146] Jackson (n 142).

[147] Butler, *Notes Toward a Performative Theory of Assembly* (n 115) 28.

mind, if we revisit the law-maker and law-taker concepts, this time centring our analyses on the compulsory nature of these processes, we can see that there are two dimensions to this delimitation. The first takes place within the lexicon of the law-maker. This dimension restricts the law/right-making to that within the pre-existing structures. The second dimension happens within the law-taker's realm, as that which is compelled to repeat/imitate or in a more legal way adopt the rights that are performatively constructed in a different jurisdiction. What is often overlooked is that the law-making is also already delimited within the pre-existing structures. Thus, in a similar way to law-taking, law-making involves compulsion. As such, we again arrive at the same conclusion: there are no original, natural law/rights, but repetition creates the effect of natural rights.

A law-taker is a law-maker in that it reproduces the delimited rights/laws through repetition. Although the literature defines legal transplantation as the transplantation of laws from one jurisdiction to another, and considers that this takes place only between a law-maker and a law-taker, analysis through the lens of performativity theory proves that both jurisdictions can be called law-makers. Therefore, we can conclude that there are multiple law-makers, and law-making is a performative act. Putting imitation at the heart of the analyses brings these aspects of law/right-making into light. If the law-maker is also a law-imitator and if both the law-maker (West) and the law-taker (non-West) are imitating within a scene of constraint, then what can be said about the agency of law/right-maker?[148] Who decides to imitate or can we talk about a decision at all?

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[148] Butler, *Undoing Gender* (n 121) 1.

Butler's analysis in *Gender Trouble* portrayed power as an absolute that does not enable agency to appear.[149] In her later works she provided more insight about the agency of the subject. Butler asserts that '[t]here need be no subject who initiates or enunciates the performative process, only a reiteration of a set of social relations within which theory emerges with limited performative agency'.[150] Accordingly, agency is a performative agency, which can be described as forming the subject through various imitations it is compelled to imitate. Given that for Butler the main desire is that of recognition then a subject imitates because it wants to be intelligible. The subject 'does' gender and 'does' rights/law through various imitations, not in a voluntary way, but it is the performative agent who improvises or resignifies within the realm of limited intelligibility.[151] In this sense, performative agency is a doing within limited possibilities. As mentioned before, there is a double understanding of subject creation in Butler. A set of imitations can constitute the subject performatively at the same time each and every repetition, and an occasion occurs for subversion. This occasion for subversion is also an occasion for the agency. Similar to the double use of law in Butler, there is a double, perhaps paradoxical, understanding of agency as well. In Butler's words: 'Agency is that double movement of being constituted in and by a signifier where "to be

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[149] Vicki Bell, 'On Speech, Race and Melancholia: An Interview with Judith Butler' (1999) 16(2) Theory, Culture, & Society 170.

[150] Butler, 'Performative Agency' (n 110).

[151] Butler, *Undoing Gender* (n 121) 1.

constituted" means "to be compelled to cite or repeat or mime" the signifier itself'.[152]

With this perspective on agency in mind, if we revisit the critiques which were mentioned in Chapter 2 about attributing the whole agency of law/right-making to the West and holding the non-Western as a passive recipient, we can conclude that both the West and the non-West are imitating and thus being or doing within delimited possibilities.[153] The occasion for subversion that is embedded within the chain of imitation allows the passive recipient agent to emerge and subvert these limits.[154] Butler asserts that 'the agency begins when sovereignty wanes'.[155] Can we infer from this quote that, when the occasion appears for subversion, limitation wanes, and as a result agency emerges as a possibility from this occasion?[156] In Chapter 6, I will return to the discussion of agency when evaluating the realm of the possible.

This section focused on the technical aspects of right/law-making and deconstructed these processes through the lens of performativity theory. The following section will focus upon human rights-making, specifically the construction of the LGB rights concept theoretically. It will proceed by

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[152] Butler, *Bodies That Matter* (n 110) 220.

[153] Neville Hoad, 'Arrested Development or the Queerness of Savages: Resisting Evolutionary Narratives of Difference' (2000) 3 Postcolonial Studies 133–148.

[154] Butler, *Undoing Gender* (n 123) 1.

[155] Judith Butler, Excitable Speech, A politics of the Performative (Routledge 1997) 16.

[156] Butler, *Bodies That Matter* (n 110) 12; David Kyuman Kim, *Melancholic Freedom: Agency and the Spirit of Politics* (Oxford Scholarship Online 2007).

discussing the inclusion and exclusion of LGB subjects in human rights protection, again through the lens of Butler's performativity theory.

5.4 The role of performativity within the normative production of a human, and the legally recognisable LGB subject

Norm/right-making or granting happens when an excluded category asks to be included; this is also called legal recognition. Butler's description of precariousness can be extended to the unprotected, unrecognised and excluded in general. As she explains, '[p]recarious life characterizes such lives who do not qualify as recognizable, readable, or grievable'. The moment a precarious life asks to be recognised as a life that is worthy of protection in the eyes of the law, the precarious has to present this in an intelligible format. In other words, those excluded from legal recognition, the precarious lives, manifest their will to be included within the system by presenting themselves as capable of forming a recognisable category. This recognisability is not granted to all manifestations of desires to be recognised; it has to be submitted in a design that complies with the historical, pre-existing human rights structures. This brings about the reproduction of such precarious lives through repetition of the pre-existing human rights structures. Thus, performativity stands as the only way of accessing legal recognition for the precarious lives that are willing to qualify for protection. In other words, performative norm production has the power to upgrade a precarious life to a life that matters, a life that is worthy of protection. In this sense, performativity has the potential to transform the excluded and unrecognised into recognisable, intelligible subjects within the human rights system. Accordingly, performativity stands as a bridge between

the precarious and the recognised, the dehumanised and the humanised. It forms the subject in an intelligible way.

This description of performativity correlates with the humanisation function of human rights.[157] Douzinas theorises this process as follows: '[h]uman rights do not belong to humans and do not follow the dictates of humanity; they construct humans. A human being is someone who can successfully claim human rights.'[158] Therefore, the human is constructed through rights. Similar to the construction of the subject by performative acts, human rights instruments, as documents, have the authority to create and expand the threshold of the human subject. These human rights documents constitute the subject of the human through inclusion of new categories upon which their demand for recognition relies. In this sense, they hold sovereign performative powers to declare a group of person as human.

Human rights are 'certain norms [that] have been operative in establishing who is human and so entitled to human rights and who is not'.[159] As such, the function of the LGB rights concept is to humanise LGB people and entitle them to human rights protection. This humanisation happens through a set of imitations that forms a legally intelligible LGB. In other words, recalling previous discussions, performative norm-making constructs the intelligible LGB human. Consequently, the LGB human protected by human rights is performatively

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[157] Agamben (n 99).

[158] Costas Douzinas, 'The End(s) of Human Rights' (2002) 26(2) Melbourne University Law Review 445.

[159] Judith Butler, *Frames of War* (Verso 2010, first published 2009) 75; Butler, *Undoing Gender* (n 121) 37.

formed. In this respect, performativity as a force of citationality[160] parallels the function of human rights in that the granting of rights produces a human who is eligible for protection and legal recognition.[161] By doing this, it also determines those who are considered non-human/dehuman and whose lives are thus not worthy of protection.

It should be borne in mind that inclusion in the human rights system does not mean that rights and principles will be fully exercised by the included, nor will absolute protection from the circumstances that produce precarity be provided. Some categories that have gained legal recognition, for example women, are still precarious and vulnerable despite the institutional protection granted to them. Butler's suggestion of a coalition between women, queers, transgender people, the poor and the stateless substantiates this argument by implying that women, recognised as 'human' by the human rights mechanisms, still belong to the cluster of precarious lives.[162] Butler acknowledges that social and political institutions are designed to minimise the conditions of precarity.[163] Thus, full realisation of protection should not be expected from legal recognition, as it will always be incomplete.[164] Her analyses regarding the result of legal recognition, that is, admission to the human rights system, will be discussed in the cultural translation section, Chapters 6 and 7. In this section, I would rather focus on her theory regarding the process of repetition, which provides a possibility for a

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[160] Butler, *Bodies That Matter* (n 110) 220.

[161] Butler, *Undoing Gender* (n 121) 3.

[162] Butler, 'Performativity, Precarity and Sexual Politics' (n 108) i–xiii.

[163] Butler, *Undoing Gender* (n 121) 32.

[164] Butler, 'Performativity, Precarity and Sexual Politics' (n 108) i–xiii.

social transformation to flourish each and every time the human is redefined and resignified.[165] Butler draws our attention to the fact that, every time the ontology of the human is rearticulated by international human rights, the possibility for diverse and multiple rearticulations of knowing, being and becoming human also emerge.[166] At this point it would be worthwhile to revisit the overlap between Butler and scholars such as Legrand, who argue that a travelling law would be conceptualised differently by the recipient legal culture (or/and by other subsystems as discussed by Teubner as aforementioned). Thus, it will always be a new law in the sense that the laws will be made again each time they are repeated. However, unlike Butler, Legrand's and Teubner's analyses presume that there is a law-maker and a law-taker who generally overlap with the universal versus culture dichotomy in a binary framework. Butler, on the other hand, maintains that there are competing universalities rather than a binary universal versus culture relationship, which will be examined in detail in the forthcoming chapters. Furthermore, according to Butler every repetition brings about a possibility, which differs from interpretation. Possibility is not a structure, it is not a new that is defined or articulated by the law-taker within the limits of its culture. In this aspect, repetition in Butler diverts from Legrand and Teubner as what they refer as interpretation is another conceptualisation of the original, which prevents some other possibilities to emerge. In this sense, interpretation has its limitations and thus is different from 'possibility' in Butler.

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[165] Butler, *Undoing Gender* (n 121) 32.

[166] Ibid.

Another scholar who needs to be mentioned is Douzinas in terms of the concept of 'possibility'. Despite sharing with Butler similar critiques in terms of the ontological role of human rights mechanisms, Douzinas does not describe this possibility in optimistic terms.[167] According to him, human rights are 'a present lie, which may be partially verified in the future'.[168] The inhuman, less human or precarious thereby maintain their commitment to the human rights system through this illusion of a future possibility. In other words, this illusion underpins the desire for legal recognition for the dehumanised by providing them with a gateway to a false hope of a future humanisation that might happen. The school of thought Douzinas follows is the Lacanian tradition, which understands desire for recognition interweaved with 'lack'.[169] He explains the role of lack of legal recognition as follows:

> …this demand for wholeness and unqualified recognition cannot be met by the big Other (language, law, the state) or the other person. The big Other is the cause and symbol of lack. The other person cannot offer what the subject lacks because he is also lacking. In our appeal to the other, we confront lack, a lack that can neither be filled nor fully symbolized.
>
> But their success is limited. No right can earn me the full recognition and love of the other. No bill of rights can complete the struggle for a just society. Indeed the more rights we introduce, the greater the pressure is to legislate for more, to enforce them better, to turn the person into an infinite collector of rights, and to turn humanity into an endlessly proliferating mosaic of laws… The law keeps colonizing life and the social world, while the endless spiral of more rights, acquisitions, and possessions fuels the subject's imagination and dominates the symbolic world. Rights become the reward for psychological lack and political impotence. Fully positivized

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[167] Douzinas, *The End of Human Rights* (n 83) 97.

[168] Ibid.

[169] Douzinas, 'The End(s) of Human Rights' (n 158).

> rights and legalized desire extinguish the self-creating potential of human rights.'[170]

According to Douzinas, repetition brings about an endless spiral of more rights, through which the potential of human rights is demolished. He refers to potential as a non-positivist self-creation in which the subject does not need legal recognition. Thus, creating more rights through repetition empowers the positivist system that, in his words, 'colonises life and the social world'.[171] In Butler's analyses, empowerment of structures through a repetitive circle is articulated as maintaining sustainability by virtue of obedience to historically delimited possibilities.[172] However, unlike Douzinas, Butler sees a possibility of subversion in every repetition.[173] In sum, Douzinas interprets the repetitive circle as a mechanism through which the structures are heightened as rights and an illusion of future possibility is reinforced. However, for Butler, every single repetition embodies the potential to subvert those very structures.[174] Therefore, what distinguishes Butler from Douzinas is that her emphasis is on possibility rather than impossibility.[175] Hence, unlike Douzinas, Butler evaluates the venue of international human rights in a more positive tone, where possibility of social transformation emerges due to the repetitive resignification

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[170] Costas Douzinas, 'Seven Theses on Human Rights' <http://criticallegalthinking.com/2013/06/03/seven-theses-on-human-rights-6-desire> accessed 26 May 2016.

[171] Ibid.

[172] Butler, *Gender Trouble* (n 107) 190.

[173] Ibid.

[174] Ibid. 185.

[175] Butler, *Bodies That Matter* (n 110) 61; Mark Antaki, 'The World(lessness) of Human Rights' [2003] McGill Law Journal.

of human.[176] Subversive resignification is an important concept generated by Butler to destabilise the subject and concept formation. In *Gender Trouble*, Butler delineates strategies for subversive repetition as 'participating in precisely those practises of repetition that constitute identity and, therefore, present the immanent possibility of contesting them'.[177] This underpins Butler's inclination to speak the language of rights, which is in the service of international human rights that are always in the process of rearticulating the ontology of human.[178] While Douzinas analyses this repetitiveness in a negative tone through which the positivist human rights structures strengthen themselves, Butler is instead interested in the discursive occasion that arises in every single repetition, as that which rearticulates the human by breaking the historical continuity of citation and/or the imitation chain of being human.[179] This intervention is also referred to as 'radical resignification', 'queer resignification' or 'subversive rearticulation'.[180] The question is how the precarious could intervene within the rearticulations of the human without consolidating the pre-existed structures of human rights. The answer, to my mind, can be found in another of Butler's theories: that of cultural translation, which has the potential to bring about social and ethical, as well as legal, transformation.[181]

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[176] Butler, *Undoing Gender* (n 121) 32.

[177] Butler, *Gender Trouble* (n 107) 200.

[178] Butler, *Undoing Gender* (n 121) 32, 33.

[179] Butler, *Bodies That Matter* (n 110) xxiv; Angela McRobbie, 'Feminism and the Socialist Tradition … Undone?' (2004) 18(4) Cultural Studies 503–522.

[180] Butler, *Bodies That Matter* (n 110) xxiv, 72, 73.

[181] Butler, *Undoing Gender* (n 121) 38.

5.5 Conclusion

In the previous section, I mentioned that Butler discusses performativity with reference to Derrida, Austin and Foucault. Loizidou argues that what distinguishes Butler's performativity theory from Derrida's critique of Austin's is twofold.[182] Firstly, for Butler, performativity is not limited to structural deconstruction.[183] Secondly, Butler displays a significant interest in analysing how the unspeakable, that is, those who 'are not authorised [to] speak the conventional norms',[184] gain recognition.[185] Butler's focus lends itself to one particular theory, namely cultural translation, which, briefly stated, proposes a less imperialistic process in which subject/norm formation/intelligibility is not governed by the authorised, and through which new concepts emerge without citing the pre-existing and hence historically limited conventions.[186] I will attempt to deploy cultural translation as the third aspect of law in Butler's works in Chapters 6 and 7.

Legal recognition happens through inclusion in the current human rights regime. It therefore requires a set of imitations that reproduce the subject by following the structures of previously included categories in a manner similar to the way the subject is performatively gendered as per Butler's theory. There is a noted

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[182] Elena Louzidou, *Judith Butler: Ethics, Law, Politics* (n 1) 19.

[183] Ibid.; Butler, Excitable Speech, A Politics of the Performative (n 155) 45.

[184] Louzidou, *Judith Butler: Ethics, Law, Politics* (n 1) 19.

[185] Butler, *Excitable Speech, A Politics of the Performative* (n 155) 143; Butler, *Undoing Gender* (n 121) 39.

[186] Judith Butler, *Undoing Gender* (n 121) 39.

parallel between how humans are gendered and humanised and how the non-West is ‘civilised’.

Series of imitations make the right, take the right, create the human through this right. Given this picture, imitation proved to be a common denominator in every phase of human rights-making, fabrication of the LGB rights concept and this concept’s diffusion to the non-West. Thus, imitation sat in the heart of my analyses. I chose to scrutinise all these processes through Butler’s theories. This brings about the conclusion that every imitation unfolding in this process is performative. Butler asserts the fact that imitation is functional in forming a subject in an intelligible way. Then imitating is a type of forming a performative way of subject formation.

Following this line of analysis, firstly, I found that Turkey is not voluntarily transplanting Western legal texts. The compulsion does not always arise from colonial or mandate relations. The fact that human rights idea and texts are governed by the West and there are no other options other than the Western human rights categories itself creates a compulsion. There is only one language to speak the language of rights; through imitating this, humanisation occurs. This led me to conclude that humanisation occurs through imitating the historically delimited manifestations of what human rights are.

Secondly, I found that law-taking is also a law-making. The conventional understanding of law-maker posits that laws and rights are fabricated by the jurisdiction from which they depart. However, according to performative theory,

repetition itself creates and fabricates the norms.[187] The fact that both law-making and law-taking phases proceed through repetition means that they are both law-making. The law-taker appears to function as a law-maker as imitation of the pre-existing structures is also a making, forming according to performativity theory. Imitating the pre-existing conventions, structures makes us exist, come into being, because they make us intelligible and recognisable. This leads to another finding that there is not just one law-maker within the process of legal transplantation. When this applied to the LGB rights concept, the common explanation is that LGB subject follows the formal sexual orientation's footsteps, thus becomes intelligible. A romantic and sexual relationship could only be intelligible by following the pre-existing structures of heterosexuality. This brings about delimitation and forcible citation of heterosexuality and equality politics. In this sense, equality politics delimit subject formation. A homosexual subject can only form itself legally through imitating the historically delimited manifestations of what sexual intimacy laws/rights are. If we apply this to the diffusion of the LGB rights concept, we can conclude that the legally recognisable LGB subject in the non-West can only happen by imitating the historically delimited manifestation of what LGB rights are in the West. This pattern of compulsion unravels more about the problems occurring in application of the LGB rights concept and human rights in general. The problem cannot be reduced to an implementation and a culture versus universal crisis. As this chapter discussed, imitation constructs the subject imperialistically while the same imitation providing an occasion for a subversion, a resistance to this process. Then how could this occasion be used

[187] Jackson (n 142).

in the service of a less imperialistic law-making method, given that the root cause is that rights are made in the West through numerous imitations within a scene of constraint? The following chapter addresses the theoretical bedrock for unlocking this scene of constraint by discussing cultural translation as a law-making method alternative to legal transplants.

Chapter 6 Cultural translation as a law-making method

6.1 Introduction

Analysing legal transplantation through Butler's understanding of imitation provides us with the possibility of subverting current law-making process. As evaluated in the previous chapter an occasion for radical subversion emerges from each and every act of imitation in the current law-making method. The question for this chapter is how can this occasion be used in the service of a less-imperialistic law-making via the process of cultural translation? How will the excluded intervene in current law-making and what kind of a law-making will flourish from this intervention? How will legal recognition happen without consolidating the pre-existing human rights structures? For this aim, I start by testing the potential of cultural translation as a less-imperialistic law-making within the realm of human rights. This chapter, then, establishes the theoretical foundations of cultural translation as law-making. It starts with a brief history of the concept of cultural translation in Homi Bhabha's works and then evaluates its significance through the writings of Butler. Building upon their insights, I develop the theoretical bedrock of law-making via cultural translation through a detailed discussion of its various components, such as 'subversive resignification', 'performative contradiction', 'reclaiming of the universal' and 'competing universals'. I then compare these elements with the existing principles of human rights.

6.2. The concept of cultural translation

The issue of cultural translation has long been a topic within translation studies, and especially anthropology. Talal Asad's article, which examines British social

anthropology's imperialist tendencies when translating between cultures, has made a significant contribution to the development of the concept of cultural translation.[1] Asad asserts that the cultural translation between what he calls the unequal languages employed by Western scholars brings about 'push[ing] the meanings of Third World society in a single direction'.[2]

In 1994, the concept of cultural translation re-emerged in Homi K. Bhabha's works, which were inspired by Walter Benjamin's essay 'The Task of the Translator'.[3] Bhabha used translation as a metaphor that includes but goes beyond linguistic translation.[4] According to his insights, cultural translation is a performative act that stages the difference.[5] In his words, 'translation is the performative nature of cultural communication.… And the sign of translation continually tells or 'tolls' the different times and spaces between cultural authority and its performative practices'.[6]

Bhabha's analysis was interpreted as a deconstruction of the binarism embedded within the universal versus culture dichotomy as that between the

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[1] Talal Asad, 'The Concept of Cultural Translation in British Social Anthropology' in James Clifford and George E. Marcus (eds), *Writing Culture, The Poetics and Politics of Ethnography, Reading Other Cultures* (University of California Press 1986).

[2] Ibid.

[3] Homi K. Bhabha, 'How Newness Enters the World: Postmodern Space, Postcolonial Time and the Trials of Cultural Translation' in *The Location of Culture* (Psychology Press 1994); Paresh Chandra Marxism, 'Homi Bhabha and the Omissions of Postcolonial Theory' (2012) 40(2) Critique 199–214.

[4] Bhabha, 'How Newness Enters the World: Postmodern Space, Postcolonial Time and the Trials of Cultural Translation' (n 3).

[5] Ibid.

[6] Ibid.

coloniser and the colonised.[7] The conventional understanding that gives the sole agency to the coloniser is challenged in Bhabha's works by placing emphasis on the transformative power of the colonised in this communication.[8] Bhabha examines how minority, new and foreign discourses enter into communication with the universal in a global environment.[9] Cultural translation appears as a method that can eliminate the assumptions of cultural supremacy in this communication among universal and culture, coloniser and the colonised, the West and the non-West.

Bhabha argues that 'a newness that is not part of the progressivist division between past and present, or archaic and the modern … or mimesis of original and copy'[10] is discovered in the middle of a cultural translation.[11] The cultural translation takes place within the third space, the space of hybridity. In this way, what is called new is a product of neither the West nor the non-West; it is always hybrid. The hybrid appears when an untranslatable/foreign is encountered within the process of cultural translation. The current communication among cultures happens in an imperialistic fashion, which relies

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[7] Michal Frenkel and Yehouda Shenhav, 'From Binarism back to Hybridity: A Postcolonial Reading of Management and Organization' (2006) 27(6) Organization Studies ; Rachit Anand, 'A Critical Analysis of Homi Bhabha's "How Newness Enters the World"' (2013) <https://www.scribd.com/doc/216445609/How-Newness-Enters-the-World> accessed 8 August 2016; Boris Buden, Stefan Nowotny, Sherry Simon, Ashok Bery and Michael Cronin,'Cultural Translation: An Introduction to the Problem, and Responses' (2009) 2(2) Translation Studies 196–219.

[8] Homi K. Bhabha, 'How Newness Enters the World: Postmodern Space, Postcolonial Time and the Trials of Cultural Translation' (n 3).

[9] Ibid.

[10] Ibid. 327.

[11] Ibid.

on hierarchy. In this communication, what is unintelligible to the powerful/imperial party loses its significance and is redefined within the limits of imperial language. In this current imperialistic method of communication, the unintelligible/untranslatable is replaced by a meaning from the imperial language that does not reflect the meaning that the less powerful attached to it prior to its encounter to the imperial episteme. For example, as discussed in Chapter 3, the decriminalisation of homosexuality refers solely to *private* consensual intercourse in the West. As the other cultural articulations of decriminalisation of homosexuality were unintelligible to the West, the other definitions of decriminalisation were replaced with the Western understanding of it. As a result of this imperialistic communication, there is only one understanding of the decriminalisation of homosexuality, which is deemed universally valid. This leads to the disappearance of historic terms that do not correspond with Western history and episteme. Thus, when a new term enters into this world, it appears under the condition of being intelligible by the West.

In the light of this analysis, we can conclude that when the West encounters an unintelligible within the episteme of the non-West, its intelligibility is restricted to Western history and episteme. This is what Asad defines as pushing the non-Western meanings in a singular Western direction. This indicates that non-Western meanings are replaced by the Western understandings of them. Therefore, meanings and their intelligibility are governed by a site of power: the West. As noted repeatedly before, what is universal is governed and singularised by the West. Bhabha suggests a different method of communication among the cultures, namely ‘cultural translation’, which takes

place within the realm of what he calls the 'hybrid' or the 'third space'.[12] The notion of hybridity is a form of resistance to the settled meanings.[13] The hybrid is not a result of mixing different sites of knowledges, identities or structures; for example, it is not combination of West and non-West. Its owner is ambivalent; it belongs neither to West nor to non-West.[14] Hybrid is the third space where 'differences are entertained without an assumed or imposed hierarchy'.[15] Thus, in this realm, possibilities can emerge beyond the limitations of fixed identity categories and historical structures of West and non-West.[16] This hybrid third space opens up to a possibility where a subject can be formed without being dependent on either West or non-West in order to become intelligible. In this way, Bhabha's third space hybridity challenges the binary subject formation in which subject formation is trapped between universal and culture crisis.

If we apply these analyses to the theme of this thesis, Bhabha seems to provide a way for the LGB subject to become legally intelligible without having to consolidate the historically delimited Western human rights structures. In

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[12] Ibid.; Robert C.J Young, 'Cultural Translation as Hybridisation' (2012) 5(1) Trans-Humanities Journal 155–175.

[13] Ibid.

[14] Bhabha 'How Newness Enters the World: Postmodern Space, Postcolonial Time and the Trials of Cultural Translation' (n 3); Young (n 12); John Hutnyk, 'Hybridity' (2005) 28(1) Ethnic and Racial Studies 79–102.

[15] Antony Easthope, 'Bhabha, Hybridity and Identity' (1998) 12(2) Textual Practice 341–348.

[16] Bhabha 'How Newness Enters the World: Postmodern Space, Postcolonial Time and the Trials of Cultural Translation' (n 3); Young (n 12); Hutnyk (n14); Paul Meredith, 'Hybridity in the Third Space: Rethinking Bi-cultural Politics in Aotearoa/New Zealand' (Te Oru Rangahau Maori Research and Development Conference, 7–9 July 1998).

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Butler's works, intelligibility is closely linked to recognition. Cultural translation's potential to liberate the intelligibility of a subject from being dependent on the universal (West) enhances its capability of being a non/less imperialistic legal recognition method.[17] Similarities between Bhabha's and Butler's analyses are not limited to this. Paresh Chandra has argued that Bhabha theorises cultural performativity in a manner that can be associated with Butler's gender performativity.[18] While Bhabha elaborates on how minorities and newness are formed performatively, Butler focuses on gender. Bhabha's interpretation of the performative subject creation corresponds to Butler's assertion of gender performativity. Both refer to imitation as an act that creates the subject within the limits of historical and pre-existing schemes. If gender is performative, subject formation is limited to binary gender regime, whereas in Bhabha the colonised is delimited to the episteme of the coloniser.

For both Bhabha and Butler, performative subject creation is twofold. Firstly, imitation reproduces the original and the copy in an imperialistic interplay; and, secondly, at the same time imitation provides a space for resistance. According to Butler, this resistance is embedded within the incomplete and exclusionary feature of the subject formation,[19] which I explained in Chapter 5. This incompleteness serves as an occasion for subversive resignification each time

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[17] Bhabha 'How Newness Enters the World: Postmodern Space, Postcolonial Time and the Trials of Cultural Translation' (n 3); Young (n 12).

[18] Paresh Chandra, 'Marxism, Homi Bhabha and the Omissions of Postcolonial Theory' (2012) 40(2) Critique 199–214.

[19] Judith Butler, *Gender Trouble* (Routledge, first published 1990, 2007) 190.

an imitation occurs.[20] In Bhabha, hybridity is a transformative category as it stages difference constantly.[21] What is called 'the different' in Bhabha's work corresponds to 'the excluded' in Butler's. Bhabha, quoting Etienne Balibar, asserts that failures of minoritarian rights and protection are depicted as exterior to the subject. However, their failures are 'present in the hollow of its discursive, legislative, organisational, and repressive practices'[22] This analysis is coherent with Butler's: 'participating in precisely those practises of repetition that constitute identity and, therefore, present the immanent possibility of contesting them'.[23] They both argue that resistance is implicit within imitation. According to Bhabha, the different, the hybrid, are the transformative categories, whereas in Butler the excluded plays this role. In both cases, their agency is embedded within 'the discriminatory, exclusionary, disempowering hollows'[24] within the process of performative subject creation via imitation.[25]

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[20] Bhabha 'How Newness Enters the World: Postmodern Space, Postcolonial Time and the Trials of Cultural Translation' (n 3); Judith Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' in Judith Butler, Ernesto Laclau and Slavoj Zizek (eds), *Contingency, Hegemony, Universality* (Verso 2000); Butler, *Gender Trouble* (n 19) 190, 200.

[21] Bhabha 'How Newness Enters the World: Postmodern Space, Postcolonial Time and the Trials of Cultural Translation' (n 3).

[22] Etienne Balibar, *Masses, Classes, Ideas* (Routledge 1994).

[23] Butler, *Gender Trouble* (n 19) 200.

[24] Homi Bhabha, 'Foreword' in Pnina Werbner and Tariq Modood (eds), *Debating Cultural Hybridity* (Zen Books 1997).

[25] Ibid.

The emergence of the concept of cultural translation in Judith Butler's work started in the 1990s with her focus on universality.[26] Butler revisits the critical scholars' insights about the inseparability of the idea of universality from imperialism.[27] She also describes what qualifies as universal, the West, as being contested through non-Western cultures, revealing the parochial and exclusionary nature of the universal. Accordingly, what is claimed to be universal can only be *partially* universal.[28] Drawing upon these analyses, she proffers a different interpretation of partiality: if the universal is only partially valid then it can also mean that it is not fully articulated and thus remains temporary, unrealised and incomplete.[29] Butler thereby offers a new perspective on universality, which can be reclaimed by the very subjects who are excluded from it. Butler builds on Bhabha's concept of cultural translation as a process that enables newness to enter the world in a non-imperialistic way, when the excluded challenges the universal for inclusion in the form of the new.[30]

Contrary to some critics,[31] cultural translation is not separate from Butler's well-known performativity theory. In fact, they are complementary to each other. In

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[26] Judith Butler, 'Universality in Culture' in Joshua Cohen (ed.), *For Love of Country* (Beacon Press 1996); Judith Butler, *Excitable Speech* (Routledge 1997) 91.

[27] Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' (n 20).

[28] Butler, 'Universality in Culture' (n 26).

[29] Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' (n 20).

[30] Bhabha 'How Newness Enters the World: Postmodern Space, Postcolonial Time and the Trials of Cultural Translation' (n 3).

[31] Marie-Hélène Bourcier, 'Cultural Translation, Politics of Disempowerment and the Reinvention of Queer Power and Politics' (2012) 15 Sexualities 93–109;

particular, the critiques raised by Marie-Hélène Bourcier portray cultural translation as a departure from Butler's radical theories in *Gender Trouble*.[32] Cultural translation is, indeed, connected to the performativity theory from which it basically originates. As mentioned above, Butler's performativity theory exposes incompletion and failure in every single subject formation and Butler sees this as an occasion for the precarious/excluded to intervene in the realms where 'basic categories of ontology of being human, of being gendered, of being recognizably sexual'[33] are governed and deemed to be universally valid. The question that remains unaddressed is: what are the ways in which these interventions will take place? At this point, Butler refers to the cultural translation concept as a process of social and ethical transformation through which 'multiple ways of knowing, being, and becoming'[34] are in an endless conversation, without knowing what is 'right' in advance.[35] In this endless process of cultural translation, Butler asserts that the way through which the precarious/excluded can join this translation is called a performative contradiction, which 'takes place when one with no authorization to speak within and as the universal nevertheless lays claims to the terms'.[36] The failure of the

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George Shulman, 'On Vulnerability as Judith Butler's Language of Politics: From Excitable Speech to Precarious Life' (Spring/Summer 2011) 39(1–2) WSQ: Women's Studies Quarterly 227–235.

[32] Bourcier, 'Cultural Translation, Politics of Disempowerment and the Reinvention of Queer Power and Politics' (n 31).

[33] Judith Butler, *Undoing Gender* (Routledge 2004) 38.

[34] Laura A. Foster, 'Critical Cultural Translation: A Socio-Legal Framework for Regulatory Orders' (Winter 2014) 21(1) Indiana Journal of Global Legal Studies.

[35] Butler, *Undoing Gender* (n 33) 39.

[36] Butler, *The Excitable Speech* (n 26) 91.

universal is revealed in this way through the performative contradiction enacted by the excluded. This is one of the reasons why cultural translation advanced by Butler is also called the 'return of the excluded'.[37]

Because performative contradiction entails 'extension of universality through the act of translation', the concept of cultural translation has also been rearticulated as reclaiming the universal.[38] The main reason that cultural translation is referred to as the reclamation of the universal is that Butler, following Bhabha, challenges the universal versus culture binarism, and argues that there are multiple and competing universalities in conversation with each other, which I will expand upon in the following paragraphs.[39]

The above discussion touches upon extremely critical issues, namely the universality and exclusion embedded within the current law-making processes (i.e. legal transplantation), which have long been blamed for their complicity with imperialism.[40] Given that Butler stresses that international human rights is a

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[37] Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' (n 20).

[38] Butler, 'Universality in Culture'(n 26).

[39] Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' (n 20); Judith Butler, 'Competing Universalities' in Judith Butler, Ernesto Laclau and Slavoj Zizek (eds), *Contingency, Hegemony, Universality* (Verso 2000).

[40] Nicholas Bamforth, 'An "Imperial" Strategy?' in Robert Leckey and Kim Brooks (eds), *Queer Theory Law, Culture, Empire* (Routledge 2011); Leticia Sabsay, 'Queering the Politics of Global Sexual Rights?' (2013) 13(1) Studies in Ethnicity and Nationalism 80–90; Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) EJIL 1023–1044; Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2014) 233–234; Francesca Romana Ammaturo, 'The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe' (2014) 23(2) Social & Legal Studies 175–194; D.Ø. Endsjø, 'Lesbian, Gay, Bisexual, and Transgender Rights and the Religious Relativism of Human Rights' (2005) 6(2) Human Rights Review 102–110; Radhika Coomaraswamy,

convenient venue for the cultural translation process, this thesis will use the concept of cultural translation as a new mechanism that has the potential to minimalise exclusionary and universalist human rights-making, including LGB rights-making.[41] The value of cultural translation for the purpose of this thesis becomes pivotal, given that it deals with important questions, such as: how does the excluded population speak the language of human rights? Are we compelled to the current human rights-making/taking, in order to be recognised? What are the ways in which the excluded speak the language of rights without consolidating the pre-existing structures of human rights? Can we use cultural translation as a law-making method? Finally, and most importantly, how can we make/produce rights in a less/non-imperialistic way with the help of the cultural translation process?[42]

Firstly, though, I would like to address the critics who conceive of cultural translation as a neo-liberal concept.[43] The fact that the emergence of cultural

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'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' [2002–2003] Geo Wash Int'l L Rev 483; Momin Rahman, 'Queer Rights and the Triangulation of Western Exceptionalism' (2014) 13(3) Journal of Human Rights 247–289; Cai Wilkinson, 'Putting "Traditional Values" into Practice: The Rise and Contestation of Anti-Homopropaganda Laws in Russia' (2014) 13(3) Journal of Human Rights 363–379; UNHRC, Res 16/3 'Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind' (8 April 2011) UN Doc A/HRC/RES/16/3.

[41] Judith Butler, *Undoing Gender* (n 33) 39.

[42] Judith Butler, 'Performativity, Precarity and Sexual Politics' (2009) 4(3) AIBR, Revista de Antropología Iberoamericana i–xiii <http://www.aibr.org/antropologia/04v03/criticos/040301b.pdf> accessed 16 May 2016.

[43] Bourcier, 'Cultural Translation, Politics of Disempowerment and the Reinvention of Queer Power and Politics' (n 31); Angela McRobbie, 'Feminism and the Socialist Tradition … Undone?' (2004) 18(4) Cultural Studies 503–522;

translation in Butler's works coincided with her interest in international human rights as a convenient domain for social transformation has been interpreted as her endorsement of the neo-liberal human rights concept.[44] Cultural translation has been understood as prescribing inclusion of the excluded into the neo-liberal human rights system, and thus as being no different from those neo-liberal inclusion theories.[45] Some scholars, such as Bourcier, McRobbie and Feola, have, therefore, interpreted cultural translation as a departure from Butler's radical stance within queer politics and a move towards neo-liberal human rights rhetoric.[46] These criticisms are crucial to understanding what cultural translation theory actually entails. Thus, in the section to follow, I will outline and attempt to address these criticisms. I will evaluate cultural translation by maintaining my focus on the possibility it offers for a less/non-imperialistic human rights-making, particularly in relation to the LGB rights concept.

6.3. Cultural translation in Judith Butler

Butler outlines what cultural translation entails a number of times in her work. One of the definitions she provides is as follows:

> [W]e can only rearticulate or resignify the basic categories of ontology, of being human, of being gendered, of being recognizably sexual, to the extent that we submit ourselves to a process of cultural translation. The

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Micheal Feola, 'Norms, Vision and Violence: Judith Butler on the Politics of Legibility' (2014) 13(2) Contemporary Political Theory 130–148.

[44] Judith Butler, *Undoing Gender* (n 33) 32, 33.

[45] Inclusion to human rights protection is examined in Chapter 2.

[46] Bourcier, 'Cultural Translation, Politics of Disempowerment and the Reinvention of Queer Power and Politics' (n 31); McRobbie (n 43); Feola (n 43).

> point is not to assimilate foreign or unfamiliar notions of gender or humanness into our own as if it is simply a matter of incorporation alienness into an established lexicon. Cultural translation is also a process of yielding our most fundamental categories, that is, seeing how and why they break up, require resignification when they encounter the limits of an available episteme: what is unknown or not yet known. It is crucial to recognize that the notion of the human will only be built over time in and by the process of cultural translation, where it is not a translation between two languages that stay enclosed, distinct, unified. But rather, translation will compel each language to change in order to apprehend the other, and this apprehension, at the limit of what is familiar, parochial, and already known, will be the occasion for both an ethical and social transformation. It will constitute a loss, a disorientation, but one in which the human stands a chance of coming into being anew.[47]

Following this description, cultural translation can be described as a process of subject formation, which is based on plurality: it seeks open-ended coalition among different articulations and different languages. Cultural translation can be expanded to make laws where their content is contested among different languages, cultures, concepts, understandings etc. Karen Zivi describes Butler's approach relating to rights as 'hopeful politics' that acknowledge the limits of recognition.[48] Following her insight, cultural translation appears to be a politics of hope for non-imperialistic law-making.

Before delving into how cultural translation works, it is worthwhile evaluating the reasons why Butler applies it to international human rights. When Butler explains the conditions that urge her to study international human rights, she mentions two important concepts: precarity and recognition.[49] As discussed in the previous sections, the problem Butler identifies regarding recognition is that

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[47] Judith Butler, *Undoing Gender* (n 33) 38, 39.

[48] Karen Zivi, 'Rights and the Politics of Performativity' in Terrell Carver and Samuel A. Chambers (eds), *Judith Butler's Precarious Politics:* Critical Encounters (Routledge 2008).

[49] Butler, *Undoing Gender* (n 33) 33; Butler, *Excitable Speech* (n 26) 90–91; Feola (n 43).

existing conventions of universality exclude other understandings of being, becoming and knowing.[50] Thus, recognition becomes limited to the framework of universality, which is governed by the West.

Butler defines precariousness as living socially, that is, the fact that one's life is always in some sense 'in the hands of the other'.[51] Her description of precarity situates us outside of ourselves.[52] She further differentiates between two understandings of precarity: firstly, the precarity that is deemed to be experienced equally among all humans because of being exposed to society and, secondly, the precarity that stems from inequalities within that society, which Butler calls 'precariousness'.[53] If precarity starts with being exposed to others, society then is indissociable from recognition. Recognition from others functions as a precondition of existence in a society, and simultaneously makes one precarious. In this sense, precarity and recognition are interlinked concepts.

For Butler, precariousness happens when we are exposed to others but recognised unequally; some beings are viewed as more valuable than others, who are, in a way, deemed disposable.[54] The fact that the current recognition regime operates through exclusion and inclusion mechanisms, which justify unequal treatment between the excluded and the included, means that not all

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[50] Butler, *Excitable Speech* (n 26) 90.

[51] Judith Butler, *Frames of War. When is Life Grievable?* (Verso 2010) 14.

[52] Judith Butler, *Undoing Gender* (n 33) 33.

[53] Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Polity Press 2013) 20.

[54] Ibid. 21.

precarious beings are granted protection. Thus, the current regime of recognition, through which the precarious gain protection, turns precarity into precariousness. Regarding law and rights, legal recognition is deemed to be a remedy for the precarious to gain protection from the others to whom they are exposed. This leads to another layer of connection between recognition and precarity, which is the legal recognition that stipulates a set of thresholds to qualify as a human, that is, persons whose rights are worth protecting. In my opinion, two basic questions reveal the imperialistic nature of these thresholds: (1) who is protected; and (2) what is the structure of the protection? In this part, my emphasis is on who is protected, and in the following section on subversive resignification I will focus on the structure of protection.

6.4 How do the precarious present themselves in a legally recognisable format?

To answer such requires a closer examination of ECtHR jurisprudence, particularly that relating to the new and emerging concept of a 'vulnerable group', which will help broaden our legal understanding of precarity and the ways in which the precarious are legally recognised.[55]

The main approach of the international/regional human rights courts is to limit the protected statuses of the groups that successfully prove either their immutability or/and stability.[56] In a very basic explanation, stability requires a

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[55] Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 Int'l J Const L 1056.

[56] Kristin Henrard, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?' (2016) 34(3) Nordic Journal of Human Rights 157–177.

fixed definition of a group as that which will not change in the future. Immutability involves a trait that a person is unable to choose or change. This approach to protected status compels identity-based politics for the excluded.[57] Those who demand to be included must demonstrate that their situation is unchangeable and constant and they have not chosen it and are thus worthy of protection. The immutability criterion has been implicit within the application of international human rights law, especially in the ECtHR. This approach had been a hurdle for LGB-related cases being successful in the ECtHR.[58]

The new emerging concept of 'vulnerable group' is thought to have broadened the understanding of immutability.[59] This concept determines the groups that fall under the protection of the convention, especially in terms of discrimination. The first explicitly[60] identified 'vulnerable group' was the Roma minority in the case of *D.H and Others v The Czech Republic* (2007). The rationale behind this identification was stated as follows:

> … the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle…the Court also observed that there could be said to be an

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[57] *Horie v The United Kingdom* App No 31845/10 (ECtHR, 2011) paras 28–29.

[58] For a detailed discussion of fundamental choice, immutable status and discrimination arguments regarding homosexuality: Robert Wintemute, Sexual Orientation and Human Rights: The United States Constitution, the European Convention and the Canadian Charter (Clarendon Press 1995).

[59] *D.H. and Others v The Czech Republic*, App No 57325/00 (ECtHR, 11 November 2007) paras 181 and 182.

[60] In *Kiyutin v Russia* App No: 2700/10 (ECtHR, 10 March 2011) para 48 the court listed homosexuality as one of the particular vulnerable groups, however when homosexuality-related applications started to become successful, the rationale has been the limits of state interference within the private lives of homosexuals. The court further identified homosexuality as a particular vulnerable group as obiter dictum in *Kiyutin v Russia*.

> emerging international consensus among the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.[61]

In the two decisions of *Chapman v The UK* and *D.H and Others v The Czech Republic*, there are no implications of an immutability criterion regarding the Roma minorities. However, the court's ruling in *Horie v The UK* (2011) reveals that the immutability criterion is fundamental for the particular vulnerable group assessment:

> … the Court observes that the applicant in the present case is a New Traveller and not a gypsy. Unlike Romani gypsies, who are widely recognised as an ethnic group, and Irish Travellers, who are a traditionally nomadic people with their own culture and language, New Travellers live a nomadic lifestyle through personal choice and not on account of being born into any ethnic or cultural group.
>
> The court's previous decisions concerning the rights of travellers have all concerned applicants who are gypsies by birth. Consequently, it has not had cause to consider whether or not New Travellers should be afforded the same protection as gypsies.[62]

After *Horie v The UK*, it has been acknowledged that the particular vulnerable group category is based upon immutability. The ECtHR identified a number of particular vulnerable groups in its judgments: those who are HIV+, Roma minorities, persons with mental disabilities, homosexuals and asylum seekers.[63]

As noted, the reason behind particular vulnerable group designation is that they share particular traits that their members have not chosen. Thus, the inclination of international law is not to expand protection to the vulnerable groups that

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[61] *Chapman v The United Kingdom* App No 27238/95 (ECHR, 18 January 2001) para. 96.

[62] *Horie v The United Kingdom* (n 57) paras 28–29.

[63] *Kiyutin v Russia* (n 60); See also *M.S.S. v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011) para 251.

have the ability to choose what/who they are.[64] The hierarchy among the precarious groups relies on this immutability: those who cannot present themselves as an immutable identity are unlikely to gain recognition as vulnerable and consequently be deprived of protection. From this perspective, identifying gender as a fluid condition contrary to the binary gender regime or in a polyamorous relation would fall outside the ambit of the protection. Kenji Yoshino criticises this immutability criterion, stressing that the courts should depart from essentialist understanding of the body, which limits it to a corporal being.[65] In the current legal understanding of immutability, the agency of the subject is not acknowledged. If the discrimination stems from a chosen lifestyle, the person is not worthy of protection. This approach clearly obscures the agency of the subject/human.

How will cultural translation overcome this hurdle of immutability entrenched within the human rights regime? Butler suggests a different trajectory in which legal recognition does not require defining the common features of the victims and immutable fabrication of identity categories. Instead, emphasis shifts to descriptions of oppression to which the precarious are subjected.[66] In this way, legal recognition would not require an immutable or stable definition for that precarious group. Thus cultural translation avoids the need to form identity categories in order to participate in the international human rights schema. The

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[64] *Horie v The United Kingdom* (n 57) paras 28–29.

[65] Yoshino, Kenji, 'Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of 'Don't Ask, Don't Tell,' (1998–1999) 108 Yale L J 485, 570.

[66] Butler and Athanasiou, *Dispossession: The Performative in the Political* (n 53) 87.

focus, in other words, is on the oppression, not the oppressed, as Butler explains:

> There is a difference between calling for recognition of oppression in order to overcome oppression and calling for recognition of identity that now becomes defined by its injury… The transition from an emphasis on injury to an emphasis on oppression is one that lets the category of identity become historical; it focuses politics less on the proclamation and exhibition of identity than on the struggle to overcome broader social and economic conditions of oppression.[67]

According to Butler, when the emphasis is on oppression, legal recognition is no longer limited to a static and immutable status; on the contrary, it becomes a transformative category.[68] The oppressed/victims are no longer asked to present themselves as a stable group. In this current human rights regime, the emphasis is on the traits of this group that demand protection, as those which determine whether they qualify for protection. However, if the emphasis is shifted to describing the oppression instead of the oppressed, legal recognition would be offered to anyone who needs protection. As such, protection is provided regardless of one's (in)ability to choose one's status. For example, instead of the LGB rights concept, the right to be protected from homophobia would be recognised. In this version the identity category is no longer a significant factor in terms of obtaining protection.

Another trajectory to follow regarding precarity in Butler's work is her emphasis on coalition politics. Mari Ruti asserts that, despite being unevenly distributed, precarity is shared among all humans.[69] Precarity, according to Ruti, thus

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[67] Ibid. 87.

[68] Ibid. 87; Butler, *Undoing Gender* (n 33) 32, 20.

[69] Judith Butler, *Precarious Lives* (first published 2004, Verso 2006) 47.

becomes a convenient ground for a coalition among the excluded and precarious. Butler's analyses in *Beside Oneself: On the Limits of Sexual Autonomy* supports Ruti's interpretation of precarity as a ground for consensus.[70] Cultural translation has also been suggested as a method for a coalition politics, which would allow minorities to discover competing and overlapping demands, desires and needs for their groups.[71]

To sum up, Butler maintains that precariousness makes us find ourselves in vulnerable circumstances, exposed to society and exposed to the potential of violence at the hands of others.[72] Butler's acknowledgement of the violence that the precarious are subjected to leads her to think about the necessity for institutional protection.[73] She finds international human rights to be the most convenient venue because the protection it offers to the precarious can at least ensure their biological form of lives, which only means being alive as a living organism.[74] International human rights provides minimal institutional protection, as well as keeping the meaning of 'the human' negotiable and resignifiable for legal recognition.[75] Unfortunately, recognition by the current human rights system occurs through formation of a subject according to historically established, pre-existing frameworks, which are deemed universally valid. This brings about a situation where protection of the lives of the precarious, or their

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[70] Butler, *Undoing Gender* (n 33) 33.

[71] Butler, *Precarious Lives* (n 69) 47.

[72] Butler, *Undoing Gender* (n 33) 33.

[73] Ibid.

[74] Butler, *Undoing Gender* (n 33) 33.

[75] Ibid.

inclusion within the universal, is inseparable from the formation of the precarious in a legally intelligible form. Problems then arise because legal recognition occurs only through historically limited forms, and requires stable identity categories that constrain who and what we are. This means that inequality is implicit in this system of recognition, where it is entirely legitimate to grant rights to those who comply with the structures and exclude others who do not. In this sense, the current regime of legal recognition, namely human rights, brings about a process where precarity is transformed into precariousness.[76] Cultural translation offers a new form of recognition, which could be a transformative category through perverse reiteration and subversive resignification.

6.5 Resignification as a subversive practice

Resignification appears to be an essential tool that ensures the instability and openness of subjects and concepts within the process of cultural translation. By doing this, resignification broadens intelligibility and, thus, the recognition of the subject, by installing various meanings in a subject/concept. Resignification is a subversive practice where stable, settled knowledge encounters the perspective of what it has excluded. It disturbs the unified/universal nature of law/right-making. In fact, the aim of endless resignifications is to destabilise law/rights structures and bring about dissonancy. In this sense, resignification is a resistance according to Butler's account.[77]

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[76] Butler, *Frames of War. When is Life Grievable?* (n 51) 14.

[77] Catherine Mills, 'Contesting the Political: Butler and Foucault on Power and Resistance' (2003) 11(3) The Journal of Political Philosophy 253–272.

When the precarious carry out performative contradiction pertaining to human rights, they resignify human rights. One example is when LGB people claim that their rights are *human* rights. In this initial stage of cultural translation, the precarious/excluded start to speak the language of rights, despite the fact that they are prevented from exercising human rights. The task for the excluded is to intervene in these processes, exposing the limits and keeping the concepts open to rearticulations, all the while making sure that concepts maintain their incompleteness. In this way, international human rights becomes 'the realm of the possible'.[78]

The endorsement of cultural translation as a law-making method transforms the international human rights regime into the realm of the possible. Entering into the processes of international human rights unlocks possibility by providing an occasion for the precarious to intervene, subvert and resignify 'the very meaning of personhood'.[79] Butler draws attention to the fact that reference to rights as definitions of what we are emanate from the assumption that personhood/humanity is always already constituted.[80] Drawing from her analyses, which view universality as an incomplete concept, human rights, as that which are deemed universal, can also be understood as incomplete, as not yet constituted.[81] This 'not yet' concept coincides with Butler's understanding of subject formation, which necessarily embodies a failure and, thus, is always

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[78] Butler, *Undoing Gender* (n 33) 32.

[79] Butler, *Undoing Gender* (n 33) 32; Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' (n 20).

[80] Judith Butler, *Undoing Gender* (n 33) 32; McRobbie (n 43); Feola (n 43).

[81] Ibid.

incomplete. Proceeding from this incompleteness, Butler asserts that legal recognition requires meeting the thresholds of the human, which is structured by international human rights and, as such, is always incomplete. This incompleteness provides a convenient occasion for the excluded to (re)signify and (re)articulate the concepts of rights as a subversive practice. Building upon Butler's assertion that international human rights is a venue where what it means to be human is open to resignification provides a gateway for the excluded to intervene in the processes of rearticulation in relation to a rights-bearing human.

Principles of international treaty interpretation may be seen to have already adopted resignifications and interventions as an evolutionary method – especially the ECtHR, which has developed various interpretation methods, such as the 'living instrument' principle, which allows the treaty to evolve and adjust to present-day conditions.[82] This resonates strongly with Butler's concept of the not-yet-constituted. The question then becomes: what is the difference between the ECtHR-pioneered 'living instrument' principle and incompleteness in Butler's analyses? Or, if human rights treaties are open to rearticulation and resignification, then why there is a need for cultural translation?

My answer to this question is twofold. Firstly, cultural translation is needed to historically examine the process of rearticulation, or, in legal terms, the evolution of case law within the jurisprudence of the ECtHR. In this regard, the development of LGB rights within the ECtHR is a very good example of the

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[82] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2009) 11.

limits of resignification. Secondly, an examination of the listed rights categories in the ECHR evidences their openness to rearticulation. As noted before, there are two basic thresholds of legal recognition: who is legally recognisable and in which structure they can be recognised. I evaluated the former in the previous section. Examination of evolution of LGB rights within the ECtHR will provide an analysis of the structural threshold of legal recognition.

The first international achievement for LGB rights happened by virtue of ECtHR case law, namely with the *Dudgeon v The UK* judgment (1981).[83] Before this case, the European Commission of Human Rights (hereafter Commission)[84] was disinclined to accept LGB-related applications.[85] The Commission's attitude towards these issues pre-*Dudgeon* was that homosexuality can be criminalised and/or states can intervene within the private life of the homosexuals on moral and health grounds.[86] In the case of *W.B. v Germany* (1955) the Commission ruled that the criminalisation of homosexuality was necessary in a democratic society 'for the protection of health and morals'.[87] It is worth highlighting that,

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[83] *Dudgeon v The UK* App No 7525/76 (ECHR, 22 October 1981).

[84] On the entry into force of Protocol 11 of European Convention on Human Rights on 1 November 1998, the European Commission of Human Rights was replaced by European Court of Human Rights.

[85] Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2014) 40.

[86] *W.B. v Germany* App. No. 104/55 (ECHR, 17 December 1955); *X. v The Federal Republic of Germany* App No 2566/65 (ECHR, 6 February 1962); *X v The Federal Republic of Germany* App No 4119/69 (ECHR, 21 July 1970); *X v The Federal Republic of Germany* App No 5935/72 (ECHR, 30 September 1975); Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2014) 40; Grigolo (n 40); Laurence R. Helfer and Erik Voeten, 'International Courts as Agents of Legal Chance: Evidence from LGBT Rights in Europe' [2014] International Organization 77–110.

[87] *W.B. v Germany* (n 86).

from 1955 to 1981, the ECtHR shared the same standpoint as today's opponents of LGB rights. How then did the Commission and the court resignify and rearticulate their approach towards homosexuality? The key rearticulation happened with the *Dudgeon* case, in which interference with private, consensual same-sex intercourse was found to violate Article 8 of the convention, that is, the right for respect of one's private and family life. This approach led to case law within the ambit of Article 8 and later Article 14 (prohibition of discrimination) with the equalisation of the age of consent in *Sutherland v UK*.[88] Any rearticulation that places homosexuality outside either of these legal structures has not taken place within ECHR jurisprudence.[89]

As noted in Chapter 2, one attempt to address same-sex attraction outside of Articles 8 and 14 happened in 1975 in *X v The UK*.[90] The applicant, X, was already convicted of homosexuality and serving his conviction in a prison. He argued that his freedom of expression, guaranteed under Article 10 (freedom of expression), had been violated, as he was prohibited from expressing his love for men. The Commission ruled that there was no violation because freedom of expression could only protect ideas and not expression of love.[91] Daniel J. Kane argued in 1988 that relying on Article 8 (right to private and family life) implicitly

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[88] *Sutherland v The United Kingdom* App No 25186/94 (ECtHR Grand Chamber 27 March 2001).

[89] ECHR, Article 14—Anti-Prohibition of Discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[90] *X v The United Kingdom* App No 7215/55 (ECHR, 7 July 1977).

[91] Ibid.

confirms that homosexuality is immoral, precisely because it dictates that same-sex intimacy has to be kept discreet within the boundaries of private life.[92] Moreover, Article 8 only delimits the extent of state interference to the private sphere, and therefore provides a narrow freedom.[93] He instead argues that sexual orientation claims should build their arguments on sexual self-determination as a fundamental freedom.[94]

The second limit to resignification is that the machinery of law-making does not allow for rearticulations of the historically framed articles. The articles laid down by the convention set the limits to rearticulation. There is no possibility to come up with a new rights category and claim it unless it presents itself in a way that complies with the already-existing articles and their subcategories. If interpretation is always a derivation of the original text, dependency occurs as to the meaning ascribed to already-formed articles. In other words, resignification of the articles is limited to the structure of the legal frameworks. Thus, intervention in the interpretation of articles is not without limitations: rearticulations are allowed only if they comply with the pre-existing structures of the articles. For example, if one decides to claim a right to display public affection, these demands could either be dealt with under Article 8 (right to private and family life) or Article 10 (freedom of expression). There is no way for

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[92] Daniel J. Kane, 'Homosexuality and the European Convention on Human Rights: What Rights?' (1988) 11 Hastings Comparative and International L R 447–486.

[93] Ibid.

[94] Ibid.

an individual to create a new rights category. Rights are thus always dependent on pre-existing categories fabricated by states and thus limited.

One might argue that in her discussions of cultural translation Butler only mentions the rearticulation of the human, and she does not extend her analysis to human rights provisions. In Butler's work, resignification entails resistance, which is a transformative act; and Butler portrays transformation as a disruption of 'what has become settled knowledge and knowable reality'.[95] In this sense, whatever becomes settled and stable could be, and perhaps *should* be, resignified, and this includes rights categories and ECHR articles.

Another question would be whether extension of the rights-bearing human to accommodate different articulations of the human via resignification constitutes a resistant and/or transformative act? The evolution of international human rights law in the practice of the ECtHR might seem to comply with transformation. However, in Butler's evaluation of the process, this disruption should lead rights/articles to 'become rattled, display their instability and become open to resignification'.[96] When a new rights category, a new 'human', enters into the protection of the ECtHR, the opposite happens: the historically formed rights categories persistently show their stability and new grounds are included only if they could be framed in a stable form that confirm the pre-existing structures. Thus, evolution of rights and expansion of the definition of the human happen via a repetition of the pre-existing structures within delimitations which are in compliance with the performative subject creation,

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[95] Butler, *Undoing Gender* (n 33) 27.

[96] Ibid. 28.

thereby maintaining the interplay between the original and the imitation under the name of resignification. The human rights system evolves via resignification. Nevertheless, this resignification presumes and reconfirms the priority of its structures. A resignification is possible within an original–imitation binary regime. Consequently, what is often referred to as resignification is never an open-ended process; it is instead limited to the structural scheme of pre-existing rights. Despite the fact that rearticulation of the concepts is possible within the scene of human rights, it is a practice of resignification within a realm of constraint.[97]

In the light of these analyses, it would be a mistake to conclude that resignification within the current human rights regime and the resignification mentioned in cultural translation process advanced by Butler are the same. Nor can it be deduced that Butler prescribes admittance to the already-established human rights regime. Butler's works are not solely about the resignification of who qualifies as human once the excluded enter into the realm of international human rights.[98] Her emphasis on international human rights appears to emanate from the concept of *possibility*, from an interest in finding ways to make international human rights the 'realm of the possible' where the only norm/right that exists is 'possibility itself'.[99]

Resignifications that have taken place within the realm of human rights cannot be defined as subversive resignifications. The latter do not aim to form a subject

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[97] Ibid. 1.

[98] Ibid. 38, 39.

[99] Ibid. 38, 39.

that would successfully fit into historically established human rights structures. On the contrary: subversive resignification challenges the universality and inclusivity of rights categories and reveal their historical and structural limitations.[100] The difference between the resignifications unfolding within the sphere of international human rights and what cultural translation suggests is that the former rearticulates within a realm of limitations, whereas the latter rearticulates to expose those very limitations. In other words, while the human rights regime constructs the human via resignification, cultural translation deconstructs it via subversive resignification.

At this point, it is important to address the arguments that legal recognition requires formation of identity categories, and therefore that international human rights could do no more than to facilitate the assimilation of the LGB individuals into heteronormative structures.[101] In other words, international human rights can only enhance, and never subvert, the current human rights regime because every resignification simply reconstructs and strengthens its historical structures. This is why, following Butler, we need human rights beyond inclusion, that is, rights and subjects that are kept open-ended through indefinite resignifications, which prevent them from stabilising. Only then will human rights enter the realm of the possible.

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[100] Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' (n 20).

[101] Bourcier, 'Cultural Translation, Politics of Disempowerment and the Reinvention of Queer Power and Politics' (n 31); McRobbie (n 43); Ammaturo (n 40).

Consequent to these analyses, cultural translation is proposed as an endless dialogue not only among and between different articulations of being human but also as multiple articulations of what rights are.[102] It does not seek admittance to neo-liberal human rights while reclaiming human rights in a non-imperialistic way. Cultural translation instead encourages the rearticulation of the human, including rights, in multiple different ways. It proposes ways through which universality and exclusionism can be tackled. Therefore, it is argued that Butler reclaims international human rights through the concept of cultural translation for non/less imperialistic norm-making.

6.6 Performative contradiction and perverse reiteration

After determining the realm of the intervention, which is international human rights, Butler reveals another task for the precarious/excluded, which is that of 'performative contradiction': 'one with no authorization to speak within and as the universal nevertheless lays claim to the term'.[103] In order to turn human rights into the realm of the possible via the cultural translation process, performative contradiction is one of the essential steps. Butler asserts that the role of the excluded must be to expose the limits of norms, and deconstruct their historical and current failures.[104] This action of bringing the limits and exclusionary character of an established lexicon to light is an act of 'performative contradiction',[105] whereby the precarious, the inhuman and those

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[102] Laura A. Foster, 'Critical Cultural Translation: A Socio-Legal Framework for Regulatory Orders' (Winter 2014) 21(1) Indiana Journal of Global Legal Studies.

[103] Butler, *Excitable Speech* (n 26) 91.

[104] Butler, 'Competing Universalities' (n 39).

[105] Butler, *Universality in Culture* (n 26).

excluded from the rubric of the universal human rights speak the language of rights and consider themselves as humans, all the while being excluded from the schema of rights that govern who qualifies as human.[106] Performative contradictions happen when the excluded, without authorisation, speak the language of human rights despite being sceptical/critical about their inclusion in the prevailing legal schemes. Through this act, deconstruction, revision, rearticulation and subversion become viable and possible.[107] The practice of performative contradiction enables the excluded to challenge the established conventions of the universal by means of cultural translation, which makes performative contradiction one of the instruments of this concept.[108] Occasions for a radical resignification also emerge once the excluded expand the limits of universality as a result of performative contradiction. In this way, the excluded plays an important role in this non/less imperialistic understanding of universality by keeping the concepts open-ended and safeguarding their uncontrollability.[109] The universal's current status of being unrealised and partially valid derives from the ones it excludes. The universal denies the existence of the excluded.[110] Exclusion is an important instrument that establishes these norms of reality. It is operational in establishing the universal

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[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] Ibid; Judith Butler, 'The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess' in Drucilla Cornell (ed.), *Feminism and Pornography* (Oxford University Press 2000).

[110] Judith Butler, Ernesto Laclau and Slavoj Zizek, *Contingency, Hegemony, Universality* (Verso 2000); Butler, 'Competing Universalities' (n 39); Butler, 'Universality in Culture' (n 26).

versus culture dichotomy by laying down in advance thresholds between the speakable and the unspeakable, human and non-human, and protected and unprotected within the domain of the universal.[111] When the unspeakable, the excluded, speaks the language of the universal, they at the same time challenge those historically established thresholds of reality and a:

> [F]utural anticipation of a universality that has not arrived yet, one for which we have no ready concept, one whose articulations will only follow, if they do, from a contestation of universality as its already imagined borders.[112]

Butler identifies this as the extension of universality via translation:

> [T]he extension of universality through the act of translation takes place when one who is excluded from the universal, and yet belongs to it nevertheless, speaks from a split situation of being at once authorized and deauthorized.[113]

The performative contradiction of the excluded must not be regarded as assimilation or inclusion. As mentioned above in relation to previous ECtHR LGB cases, the prevailing human rights protection operates through inclusion. In cultural translation, there is no norm other than possibility itself, and therefore none of the norms is known in advance. In this case, there is not any pre-existing norm that the new category must assimilate itself to.

One might argue that, despite being subjected to subversive resignification, a resignification of a rights category or a legal subject still embodies imitation and reiteration. There must be a signified in order to resignify that which it resembles. In this way, resignification includes reiteration. Then what is the

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[111] Butler, 'Universality in Culture' (n 26).

[112] Ibid.

[113] Ibid.

difference between resignification and reiteration? Butler asserts that subversive resignification must contain perverse reiterations through which unconventional formulations of different universalities can arise.[114] The task of the perverse reiteration is to repeat a structure in order to shatter its boundaries and expose its failures. In this way, subversive resignification and perverse reiteration are almost identical processes. They both deconstruct the subject/structure in the service of cultural translation and trigger new demands and performative contradictions, which in turn lead to novel universalities.[115]

6.7 Reclaiming the universal through cultural translation: competing universalities

How might we continue to insist upon more expansive reformulations of universality if we commit ourselves to honouring only the provisional and parochial versions of universality encoded in international law? Clearly, such precedents are enormously useful for political arguments in an international context. However, it would be a mistake to think that such conventional formulations exhaust the possibilities of what might be meant by 'the universal'.[116]

In the preceding section, I have elaborated on the role of endless subversive resignifications within the cultural translation process. As a result, there will be numerous different subversive and non-subversive resignifications of a rights

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[114] Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' (n 20).

[115] Ibid.

[116] Butler, *Excitable Speech* (n 26) 89.

category or subject. The question to be addressed in this section is what will happen to these multiple rearticulations? The brief answer: they will start a conversation through translation.

These different rearticulations and resignifications have been categorised under the purview of culture by the current human rights regime, mainly because they do not conform with formal universality. Butler argues that 'the very claim of universality is bound to various syntactic stagings within culture which make it impossible to separate the formal from the cultural features of any universality claim'.[117] Accordingly, what is called culture in the current human rights regime is actually a different understanding of what universality should entail. In other words, for Butler, there are multiple universalities rather than a simply 'culture versus universal' binary.

Translation among competing and overlapping universalities is a transformative act in cultural translation.[118] It can be used to challenge the boundaries of human rights structures. At the same time, coalition politics among minorities can emerge by discovering their overlapping demands for recognition through translation.[119] This translation, on the one hand, allows the excluded to expose the failures and limits of the current notion of the universal. In the formal human rights system, inclusion of the excluded is articulated as a new rights category. In fact, what is called new in the current human rights regime is not new to the

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[117] Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' (n 20).

[118] Bhabha, 'How Newness Enters the World: Postmodern Space, Postcolonial Time and the Trials of Cultural Translation' (n 3).

[119] Butler, 'Competing Universalities' (n 39).

realm of possibilities, but as they are excluded from the norms that govern recognition, their intervention in this human rights scheme is new.[120] On the other hand, when the new intervenes into the scheme of the formal universal, its duty is to turn its set of norms into transformative categories, via endless subversive resignifications and perverse reiterations. These will put human rights' claim of universality under scrutiny by the constant confrontation of what it excludes, thus ensuring that the universal acknowledges that it is not universal but only partially universal.

Given that deciding what is right for all and determining the domain of the speakable/grievable, which is worthy of protection in advance, is a basic formulation of the current imperialistic universality, then the task for social transformation movements is to initiate a conversation among diverse assertions of 'what is right for all'. The aim of this conversation is to compel all sides to change, rearticulate, resignify and alter their limits and comprehension of others.[121] This conversation of competing universalities is the cultural translation process, which will keep all the notions of the universal in an endless translation.

Butler's emphasis on the failure or incompleteness of norms becomes operational in her analyses regarding universality. She utilises this incompleteness as providing the possibility for the excluded to intervene in the realms where subjects are formed, however incomplete, and thus are open to

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[120] Butler, *Undoing Gender* (n 33) 26.

[121] Ibid. 37.

rearticulations.[122] As argued above, the current resignification process is limited in that it has not been liberated from the boundaries of human rights structures. The universality claim of the human rights regime is in fact challenged by the excluded. As unintelligible and unrecognised, the excluded do not exist within the world prescribed and governed by the universal.

Butler's mention of the 'unreal' and fantasy is in reference to those who have been excluded by the norms that govern existence/reality. The paradox is that these excluded are key to constitute the 'real' because a real cannot be constituted without unreal, a system cannot be understood through what it includes, excluded are also constitutive, the constitutive outside:

> Presume a mimetic relation between the real, fantasy and representation that presumes the priority of the real, we can understand the 'real' as a variable construction which is always and only determined in relation to its constitutive outside: fantasy, the unthinkable, the unreal.[123]

The unreal is the constitutive other of the real and unintelligible is the constitutive outside of the intelligible. If we apply this to human rights, it is the only existing regime that governs legal intelligibility. The excluded are useful for exposing the parochialist, exclusionist understanding of universality embedded within the current human rights-making. Those who are not equipped with human rights are constitutive outside of the universal human rights system. The excluded constantly remind the system that it is not universal precisely because it excludes them and therefore it is only partially valid and cannot be not universally valid. Butler argues that the current universality of rights discourse is

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[122] Butler, *Excitable Speech* (n 39) 90.

[123] Butler, 'The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess' (n 109).

parochialist because '[t]he meaning of 'the universal' proves to be culturally variable, and the specific cultural articulations of the universal work against its claim to a transcultural status'.[124] This contradiction embedded within universality claims has previously been called into question by Giddens, Douzinas and Cornell, among others,[125] who emphasise that the universal could only ever be partially valid.[126] Butler agrees that the current universal is historically parochial, but invites us to reconsider this from a different perspective, examining *which* partiality equates to incompleteness.[127] She asserts that 'it may be that the universal is not partially articulated, and that we do not yet know what forms it may take'.[128] Possibility itself becomes a norm.[129]

As already mentioned, cultural translation is often referred to as 'reclaiming the universal'.[130] By revisiting or reclaiming the universal, Butler is in fact revisiting the concept of possibility as a norm. She underscores that accepting the notion

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[124] Butler, *Undoing Gender* (n 33) 190; Butler, 'Universality in Culture' (n 26).

[125] Anthony Giddens, *The Consequences of Modernity* (Polity Press in association with Basil Blackwell 1990); Serena Parekh, *Hannah Arendt and the Challenge of Modernity* (Routledge 2008) 25; Bonny Ibhawoh, 'Human Rights for Some: Universal Human Rights, Sexual Minorities, and the Exclusionary Impulse' (2014) 69(4) International Journal 612–622; Drucilla Cornell, *The Philosophy of the Limit* (Routledge 1992) 1; Walter D. Mignolo, From '"Human Rights" to "Life Rights"' in Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights* (Cambridge University Press 2014) 164; Costas Douzinas, *The End of Human Rights* (Hart Publishing 2000) 185; Grigolo (n 40).

[126] Ibid.

[127] Butler, 'Universality in Culture' (n 26).

[128] Ibid.

[129] Ibid.

[130] Ibid.; Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' (n 20); Butler, 'Competing Universalities' (n 39).

of the 'not yet'[131] opens up a domain where established conventions are deemed to be provisional and incomplete. This interpretation allows the excluded to become a future possibility and it facilitates an occasion for the excluded to intervene, through which the possibility of an 'open-ended ideal that has not been adequately encoded by any given set of legal conventions would arise'.[132]

Her interpretation of the universal offers an alternative account for the famous universal versus culture dichotomy, which is often at the heart of discussions pertaining to human rights. In addition to Butler's philosophical insights regarding the universality of human rights, this relates to the LGB rights concept on two specific levels. On the one hand, LGB individuals' desire to qualify as humans who are entitled to universal human rights has long been denied, and their conformability to the universal has been contested.[133] In this way, LGB individuals were connoted with culture, whereas heterosexuality claimed to be universal.[134] When LGB individuals' admittance to human rights started to develop, diffusion of the LGB rights concept triggered another crisis pertaining to universality, this time associating LGB individuals with the universal, as the LGB rights concept has been strongly upheld by Western countries, which has resulted in association of the LGB rights concept with the West and homophobia with the East.[135] Thus, diffusion of LGB-friendly laws tends to

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[131] Butler, 'Universality in Culture' (n 26).

[132] Ibid.

[133] Ibid.

[134] Ibid.

[135] Ibid.

happen from West to East, validating the historical patterns of imperialism.[136] Legal borrowings from Western countries have long been discussed in reference to the universal versus culture dualism.[137] Universalism has been criticised for its complicity with imperialism and its denial of cultural differences.[138] However, the LGB rights concept disturbs that stable polarisation.

One school of thought has started to argue that cultural relativism plays an imperialist role in the context of LGB rights by providing a justification for discrimination against LGB persons.[139] Given that some countries have not agreed that universal human rights should include LGB persons, in this context, cultural values have taken the place of universality. This evidences the complex nature of universality and the cultural dialectic and their juxtaposition regarding the LGB rights concept. It can be seen from this portrayal that each could perform the other's function in different circumstances. Butler analyses this interplay by recognising the presence of universality within a culture.[140] Thus, instead of a universal versus culture binary crisis, according to Butler, there are

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[136] Ibid.

[137] Pierre Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 Maastricht J Eur & Comp L 111; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61(1) The Modern Law Review 11–32; Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The Transplant Effect' (2003) 51(1) The American Journal of Comparative Law 163–203; Peter Grajzl and Valentina Dimitrova-Grazjl, 'The Choice in the Lawmaking Process: Legal Transplants vs. Indigenous Law' (2009) 5(1) Review of Law and Economics 615–660.

[138] Butler, 'Restaging the Universal: Hegemony and the Limits of Formalism' (n 20).

[139] Bamforth (n 40).

[140] Butler, 'Universality in Culture' (n 26).

at least two different competing universalities.[141] Butler identifies parochialism, exclusionism and foreclosure as the three historical devices of contemporary universality.[142] These strategies sustain its imperialistic nature. According to Judith Butler's account, without the cultural translation process the diffusion of concepts/rights will remain colonialist and imperialist.[143] Thus, in order to have less/non-imperialistic human rights-making, the cultural translation concept appears to be a promising tool to solve the current perils that are linked to the universal versus culture crisis, especially in relation to the LGB rights concept.

One might object to these analyses by arguing that the United Nations (UN)'s right-making tradition is based on different cultures and states' interactions. Yet the UN's law-making mechanism regards culture as non-Western states' discourse.[144] When cultural differences are at stake, this generally means opposition against Western positions. In this system, all cultures' different rearticulations of a rights category are minimised to a particular state narrative. This provides a nation state-based right-making procedure which compels other voices and minorities within a state to be reduced to a formal state vote or ratification of covenants. This system forces individuals to be limited to and represented by their state's understanding of what rights are. In this sense, the UN system is not open to all possibilities.[145] Moreover, the space provided for

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[141] Butler, 'Universality in Culture' (n 26); Butler, 'Competing Universalities' (n 39).

[142] Butler, 'Universality in Culture' (n 26).

[143] Butler, *Undoing Gender* (n 33) 37.

[144] Butler, *Undoing Gender* (n 33) 189, 190, 191.

[145] Ibid.

NGOs does not go beyond listing their state's violations of the existing human rights schemes, or invoking international mechanisms to encourage their states to adhere to the new categories included in the rights categories. Thus, the law-making process takes place between the states; it is again a practice of law/right-making within a scene of constraint. This process prioritises the dominant, ruling legal understanding that has the legitimacy to govern other legal cultures existing under its sovereignty.

Another problem this way of law-making poses is the dominance of Western legal culture within these institutions. As I have discussed this in detail in the previous chapters, I will continue evaluating its consequences. This dominance leads to universalisation of the Western approach to human rights, while defining all other non-Western understandings as 'cultural' or culturally relative and therefore less legitimate. In a way, this universalises non-Western cultures and is problematic, as Watson notes earlier in relation to mirror theory, because society is not a single community. Law can never reflect societal values as a whole.[146] This fact will bring about a legal system that mirrors the benefits for some, most likely the elites, but not all. Therefore, Watson concludes that mirror theory will inevitably fail to administer societal values into law.[147] Following Watson's insights, the practice of the UN and other international law-making institutions is to downgrade all non-Western ideas to non-Western state discourse. In this way, opposition to the Western human rights structures is

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[146] Alan Watson, *Roman and Comparative* (University of Georgia Press 1991) 97–98; Alan Watson, *The Evolution of Law* (Johns Hopkins University Press 1985) 119.

[147] Ibid.

limited to a non-Western state's attitude. When culture is equalised with the state, despite not being an internally homogenous concept, diverse approaches within the jurisdiction of that non-Western state become insignificant and not reflected within the law/right-making processes.

The only option remaining for these other cultures within non-Western states is the domestic law-making processes, which are limited to implementation of the human rights scheme produced by states on the international level abiding by performative subject formation. The international law-making domain, therefore, works to impoverish those cultures that have no authorisation to speak in a state-based system. This brings about the universalisation of state culture, which does not reflect all cultures under its governance. It is instead state-centric law-making.[148] This system paves the way for non-Western state discourse to supersede different articulations of rights by those cultures that are opposed to the state's approach. The unrepresented cultures living under the jurisdiction of that state can only team up with the Western legal approach to convince their states to implement a Westernised rights system. This coupling provides the grounding for pinkwashing and homocolonialism discussed in the previous chapters. For example, LGBTI+ movements in non-Western countries work with Western funds and Western state institutions, which paves the way for an imperialistic interference by the West in the non-West. These unrecognised cultures within non-Western state are, therefore, compelled to cite Western-made laws, as the law-making processes do not allow the production of alternatives but constrain all unauthorised groups to a binary choice between

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[148] Butler, *Undoing Gender* (n 33) 37.

the universal rights scheme or their state's attitude against it. In this binary law-making regime, the universal rights scheme is preferred as it offers a limited way of being possible, whereas, within the non-Western understanding, there is generally the preclusion of the possible. Butler identifies this compulsion as the 'forcible citation' of a norm.[149] In the light of this discussion, the UN mechanism does not comply with the cultural translation concept, precisely because only states are represented at this platform.

The task of law-making follows performative subject formation and its focal aim is to maintain the stability and controllability of concepts/society. The ECtHR and UN law-making is predicated on immutable, stable, controllable subjects and structures. This again brings about over-generalisation and the defining of subjects via sameness. When an excluded category demands recognition from this scheme of rights, this method frames such recognition in one recognisable form. This new category must be capable of presenting itself as a stable category. Stability brings about predictability of this concept. In this way, the human rights domain builds thresholds to this excluded group and locates it somewhere in between the pre-existing structures. As a result of this process, the newly recognised group acknowledges the limits of the protection provided and the extent to which duties are imposed on it in return for this protection. This creates a predictable interrelation. Given this, what should we understand from Butler's assertion of safeguarding the unpredictability and uncontrollability of concepts/subjects within cultural translation? This principle of cultural translation safeguards the discovery of norms in the midst of the cultural

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[149] Judith Butler, *Bodies That Matter* (Routledge 1993) 177.

translation process. It ensures that norms are not known in advance of the moment of cultural translation. As mentioned above, in this way there would be no original/imitation binary relationship, which turns the domain of rights into a site of power as it brings about imperialistic subject creation. Unpredictability and uncontrollability also relate to the concept of possibility itself being the only norm. The stable, predictable, controllable subjects and concepts inevitably constrain possibilities as they are framed in one intelligible scheme. Their function is to clearly define the limits of possibility. If we turn to the inclusion of LGB individuals within human rights protection, we can observe that the frontier of this recognition is the normative framework of the human rights structures.

Another question that needs to be addressed is whether the excluded is a unified subject within this process. For example, LGB individuals will have to present themselves in a stable form for intelligibility/recognition. This can also be defined as representation: some LGB individuals will claim that they represent the LGB rights cause. However, there are diverse demands pertaining to LGB rights. Thus this claim may lead to exclusion of some understandings and concerns within the LGB rights concept. In the process of stabilisation, LGB rights and individuals also practise exclusion. The LGB rights concept goes through performative subject formation, in which the LGB is envisaged as a stable, immutable category. This precludes the subject from opening to resignifications without being limited to historical structures.

From one perspective, controllability, stability and norm structures might be the optimal way to secure coherency, which will, as a result, guarantee equal treatment to all other protected categories as well as maintain the rule of law. The definition of what rule of law entails is a highly contested one among

scholars, but Joseph Raz's description seems to reflect the basic and common understanding:

> The 'rule of law' means literally what it says: the rule of the law.
>
> Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it.[150]

It is thought that stable laws/rights would ensure equal treatment within a society. No one is considered immune from obeying the law, including the ruling class. In this sense, laws/rights that are known in advance govern everyone equally. The opposite of the rule of law is often considered the arbitrary use of power. The notion of unpredictability in Butler's cultural translation could easily be confused with arbitrariness. At this point, what needs to be addressed is the difference in Butler between arbitrariness and unpredictability, especially when examining the law-making culture of Turkey, which is commonly critiqued for its arbitrariness and disregard for the rule of law.[151]

Arbitrariness is the application of norms that change inconsistently according to the discretion of a person, class or group. This makes the reactions of the state in question unpredictable as it does not deploy a schema but rather acts irregularly. In contrast, Butler's positing of the uncontrollability of concepts appears in both identity politics critiques and her evaluation of radical

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[150] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 212.

[151] European Commission, Turkey 2016 Report (SWD(2016) 366 final) pages 7, 25, 28, 29, 71, 73; European Commission, Turkey 2015 Report (SWD (2015) 216 final) pages 22, 24, 25, 52, 67.

democracy.[152] According to Butler, subversion, resignification and rearticulation of subjects should be endless and open to possibilities. One way of keeping all subjects open to infinite resignifications is safeguarding the uncontrollability of the signified.[153] This brings about dissonance among the endless articulations of a subject, which democracy is dependent upon, according to Butler.[154] She maintains that the process should be open to possibilities without any limitation and this leads to unpredictability as to what will come out of this process of cultural translation: unknown and discovered in the midst of the process. Thus unpredictability in Butler functions as a principle that enables as many rearticulations as possible to join the cultural translation. This type of unpredictability is not governed by one single authority or a group. It is rather a tool to keep the subject open to subversion. As there is no control over the subject, the different ways it will be rearticulated is unpredictable and unknown. In this way, the subject will be liberated from historically delimited ways of being intelligible. It will not be limited, but unpredictably will stay open to all understandings. Consequently, for Butler, unpredictability, uncontrollability and instability ensures the demolition of limitations and opens the subject up to unlimited ways of being, knowing and doing. Whereas arbitrariness, especially in Turkey, relates to non-democratic tendencies, there are significant differences between the two concepts. Unpredictability that originates from arbitrariness limits the intelligibility of the subject to the discretion of a group or a

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[152] Butler, 'The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess in Feminism and Pornography' (n 109).

[153] Ibid.

[154] Judith Butler, *Undoing Gender* (n 33) 39.

person. This group or person's desires replaces, governs and constrains reality. It feeds undemocratic limitations and keeps the subject foreclosed to possibilities. On the other hand, unpredictability in cultural translation assures the removal of limitations, opening up the subject up to endless possibilities of being.

It is evident that phases and tasks within the cultural translation process do not follow a stable order. However, we can pinpoint the fact that possibility plays a key role in Butler's understanding of cultural translation. There are two types of references to possibility within this concept: (1) interventions in the realm of the possible, where rearticulations of norms can take place; and (2) the acceptance that possibility itself is the only norm. Norm-making through cultural translation is actually a process of discovery: none of the parties know what this norm will be in advance. It is discovered in the midst of the cultural translation.[155] This prevents the imperialistic norm-making process, which imposes the idea that some can govern what is right for everyone. The law-maker/law-taker dichotomy is inherently imperialistic, since the law-maker is given the authority to exclude some, include others and decide what is law/right in advance for the entire body of law-takers. Therefore, in order to maintain a less/non-imperialistic norm-making, for only known law to be developed it should be accepted that possibility itself is the only norm. Through this method of law-making, all universalities (law-makers and law-takers) must undergo a process of cultural translation 'without certainty about what will come'.[156] This would allow different

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[155] Judith Butler, *Undoing Gender* (n 33) 39.

[156] Ibid.

understandings of knowing, being and becoming to flourish and enter into an endless translation process, encountering their limits and compelling each other 'to change in order to apprehend the other … this will be the occasion for both an ethical and social transformation'.[157] This will lead us to the possibility of non/less imperialistic human rights-making via cultural translation.

In sum, we can briefly summarise the apparatus for the cultural translation process and list seven non-exhaustive phases. The first one involves, as mentioned above, performative contradiction. In this phase, the excluded returns and reclaims what it was precluded from. In the second phase, the incompleteness of a subject constructed by virtue of performative formation is acknowledged and this leads to an occasion where intervention/subversion is possible owing to incompleteness. Thirdly, during all the endless process of cultural translation, subjects must be kept open to endless subversive resignifications/rearticulations. In the fourth phase, the uncontrollability and instability of subjects is safeguarded. Fifthly, possibility itself is acknowledged and accepted as the *only* norm. The sixth phase recognises that norms and subjects are not known in advance and they must be discovered in the midst of the cultural translation process. And, finally, the seventh phase reclaims the universal by acknowledging its cultural relativism. The cultural translation method can be utilised as a subversive practice of law/right-making, endorsing radical resignification.

Marie-Hélène Bourcier argues that Butler's politics dramatically changed after *Undoing Gender*, with more emphasis being given to the cultural translation

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[157] Ibid. 38.

concept, which she calls the 'second Butler'.[158] Bourcier discusses the idea that Butler's analyses are disempowering, especially for trans people, as there is no clear political subject in Butler's arguments. Moreover, Bourcier asserts that reclaiming the universal concept has been engendered by overlooking the biopolitical power behind the universal. I disagree. First of all, it should be stressed that the concept of cultural translation is not a departure; it is, on the contrary, a continuation of queer theory and radical subversion. Cultural translation had always been noticeable within the prior concepts and theories Butler had engendered. The cultural translation concept started to appear within Butler's work in the 1990s with her focus on universality. Besides writing directly about cultural translation, it has always been embedded within the ways in which Butler drew her work from different philosophical strands.[159] She has always used this method to translate different philosophical stances to each other. A very typical example of this would be the way she develops a conversation among Foucault, Derrida, Austin, Hegel, Lacan, Arendt, Irigaray and De Beauvoir in her works. Her theories have been generated and enriched through the cultural translation process between these philosophers. Being associated with all, her theories are not, therefore, limited to any single one philosophical strand. Butler instead uses translation as a form of deconstruction to discover the limits of different approaches, and does not stabilise her concepts within one of the theories. The concepts she has generated are fluid and unstable in the sense that they are also open to endless, unlimited

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[158] Marie-Hélène Bourcier, 'F***' the Politics of Disempowerment in the Second Butler' (2012) 35(2) Paragraph 233–253.

[159] Bourcier, 'Cultural Translation, Politics of Disempowerment and the Reinvention of Queer Power and Politics' (n 31).

resignifications. Therefore, it can be concluded that this instability and being open to future articulations is also a process that Butler's previous works are and have been going through. In this sense, cultural translation is a result of these rearticulations, specifically the rearticulation of gender performativity, which places the politics of precarity and universality at the heart of the analyses. In other words, cultural translation is the method by which Butler has been rearticulating her concepts whether or not this concept was named at the time of the rearticulation. Therefore, queer subversion, performativity, precarity and reclaiming universality are neither unrelated nor contradictory to the concept of cultural translation, but develop through it as they are all intertwined with each other. As a result, cultural translation cannot be regarded as a brand new concept depicting Butler's tendency towards neo-liberal human rights discourse. In fact, it appears to be that it has always been embedded within the style Butler argues and develops her theories through. Therefore, cultural translation is not a mechanism that directs the politics of the excluded towards the neo-liberal human rights system, and not a departure from queer theory. Instead, it reclaims human rights-making.

When it is said that LGB rights are human rights, the main claim is about private and family life because the right to respect for private and family life is the locus of the LGB rights concept. This rights category was initially designed on the foundation that discriminates against LGB individuals. Only non-LGB persons were entitled to enjoy their right to respect for private and family life. The performative contradiction happened when LGB individuals claimed that they were also entitled to the right to respect for private and family life despite the fact that the prevailing regime of human rights did not authorise respect for the

private lives of LGB individuals. As discussed before, the ECtHR epitomises this process of inclusion. The performative contradiction exercised by LGB individuals could not expose the respect for private and family life clause limits as a whole. The constraints of the human rights law-making delimited the performative contradiction to discovering Article 8's limits regarding equality. In this way, the principle of equality circumscribes the law-making process as equal to heterosexual individuals. Thus the equality principle functions as a delimitation of possibilities. The LGB subject is dependent on the heterosexual subject. Therefore, the performative contradiction performed regarding the respect for private life by LGB individuals has been controlled by the historically delimited structure. LGB individuals could only enjoy a limited agency of resignification. In this sense, possibilities are limited to the framework for respect for the private and family lives of heterosexual individuals. Consequently, this resignification of respect for private and family life takes place within the realm of limited ways of being possible. However, law-making via cultural translation must be a subversive practice, not a practice of inclusionary resignification within a scene of constraint.[160]

6.8 Conclusion

This chapter focused on the philosophical roots of the cultural translation concept and its advancement by Butler. Following the identified imperialistic features of current law-making, it then discussed how could cultural translation overcome these impediments. It also elaborated on crucial concepts in cultural translation by comparing arbitrariness versus unpredictability, the rule of law

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[160] Judith Butler, *Undoing Gender* (n 33) 1.

versus norms unknown in advance, to manifest the application of cultural translation in reference to legal concepts. Doing so allowed me to lay a theoretical foundation that will steadily develop into demonstrating practicalities of cultural translation. In the next chapter, I expand upon the proposed law-making method in more detail. I will aim to concretise law-making via cultural translation on the LGB rights concept through subjecting some rights categories to cultural translation.

Chapter 7 Cultural translation in application: Fantastical non-imperialistic law-making

> The critical promise of fantasy, when and where it exists, is to challenge the contingent limits of what will and will not be called reality. Fantasy is what allows us to imagine ourselves and others otherwise; it establishes the possible in excess of the real; it points elsewhere, and when it is embodied, it brings the elsewhere home.[1]

7.1 Introduction

Drawing upon the theoretical groundwork from the previous chapter, this chapter aims to demonstrate an application of cultural translation. The main focus of this chapter is how cultural translation can be utilised as a law-making method in practice. To this aim, I will 'fantasise', as per Butler, a law-making process that is inspired by the cultural translation concept. Taking both the reader and author alike into the realm of the possible, where exercising the right to be possible is a possibility, I will trespass the boundaries between the norms that govern what is real and unreal and dare to imagine how it could be if laws/rights were made differently.

I will illustrate a practice of cultural translation using the three main pillars of the LGB rights concept: (1) the decriminalisation of homosexuality; (2) the right to life (including prevention from homophobic violence); and (3) the right to marry and respect for private life.

The concept of 'livable life' in Butler will be deployed to demonstrate the emergence of permanent and temporary right categories in cultural translation and it will also be used to subject the right to life concept in the current human

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[1] Judith Butler, *Undoing Gender* (Routledge 2004) 29.

rights regime into subversive resignification. In this law-making via cultural translation, the permanent right is the right to be possible and the temporary rights category is the temporary discoveries for the normative conditions for a livable life for LGB people. I continue by evaluating the decriminalisation of homosexuality within the Ottoman Empire through the lens of cultural translation, and subject the right to respect for private/ family life to subversive resignification. In this practice of cultural translation, a collective, less-imperialistic law-making method is discovered. This law-making method does not distinguish redistribution politics from identity politics. It instead safeguards uncontrollability of rights categories, thereby guaranteeing the right to be possible as a permanent possibility that turns the field of human rights into the realm of the possible.

Before I commence, I would like to acknowledge the impediments involved in my endeavour. This understanding of cultural translation is limited to my interpretation, which is shaped by the structures I have been exposed to. I am limited to epistemes that I voluntarily and involuntarily engage with. In this sense, this fantasy of a new law-making regime is limited to my insight and that of various other authors who have shaped my intellectual and ethical stance. Cultural translation as law-making could occur in various different forms than are imagined in this chapter. In this sense, below only reflects one version of cultural translation, among many other possibilities.

Before delving into how cultural translation could be applied to law-making, I draw some theoretical comparisons between the current law-making method and cultural translation. Also, there are several critical questions to be

addressed to provide the foundation for the practice of cultural translation as law-making.

7.2 From translating foreign laws to law-making as translation

In *Parting Ways: Jewishness and the Critique of Zionism*[2] Butler demonstrates an application of translation as a method in her critique of Zionism. This could be used as guidance:

> The turn to translation risks two different kinds of problems. On the one hand, one might assume that translation is an assimilation of religious meanings into established secular frames. On the other hand, one might assume that translation is an effort to find a common language that transcends particular discourses. But if and when translation is a scene in which the limits of a given episteme are exposed, and forced to become rearticulated in ways that do not recontain alterity, then we have opened onto a terrain that neither presumes the superiority of secular discourses nor affirms the self-sufficiency of particular religious discourses.[3]

This could provide an example for this chapter on how to practise translation incorporating the LGB rights concept. Butler first exposes the limits of Zionism and compels it to become resignified in an uncontrollable way. In this way, Zionism cannot be controlled by either secular or religious discourses. After subjecting the history of Palestine, Zionism, Judaism and the state of Israel to scrutiny, in the last chapter she arrives at the notion of binationalism as a possibility of undoing nationalism. Given that I have already critically evaluated law-making within the West and the non-West pertaining to the LGB rights concept in the previous chapters, I will apply cultural translation, whereby

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[2] Judith Butler, *Parting Ways: Jewishness and the Critique of Zionism* (Columbia University Press 2012) 15.

[3] Ibid.

providing possibilities for undoing law though this very process of law-making in a way that neither universal nor culture governs this process.

In the previous chapters, I used Butler's gender performativity to deconstruct the first and last legal implants in Turkey pertaining to the LGB rights concept. Simultaneously, I probed the possibility of cultural translation as an alternative law-making method. In this way, Butler's work enabled me to deconstruct the current law-making process and discover a way to convert this mechanism into a new law-making method at the same time. This paradoxical application of law combines 'doing' law with 'undoing' law and 'making' law with its 'unmaking'. It is the tension between doing and undoing, making and unmaking, which opens law up to the 'realm of the possible'.[4]

According to Butler, the potential of law emerges from the crisis between legal recognition to gain institutional protection and having a critical approach to the ways in which this legally recognisable subject is fabricated.[5] This crisis produces an occasion for possibility. Doing/undoing law is, according to Butler, a commitment to the unknown, unpredictable process of cultural translation. The laws' stability is broken through the many translations and subversive resignifications such that their author can no longer be identified within the dissonancy of cultural translation.

Law-making includes various imitations. Every act of imitating/reiteration provides an occasion for those who are excluded from these structures to

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[4] Erin Gray, 'Review: Undoing Gender' (Upping the Anti, 26 March 2005) <http://uppingtheanti.org/journal/article/01-undoing-gender> accessed 13 April 2016.

[5] Butler, *Undoing Gender* (n 1).

intervene in the law-making process. This starts with laws being made in the West imitating the pre-existing Western structures and continues with non-West imitating this Western-made law. Each imitation in these processes contains a potential for cultural translation. Intervention of the excluded to the processes of current law-making happens via perverse reiteration, which includes subversive resignification. In this way these laws encounter their limits. In addition, the boundaries of these laws as structures are challenged through various resignifications. All these different resignifications enter into communication by means of translation, and discover how much they overlap and compete with each other. These different resignifications stem from different universalities; among them they construct coalitions, rights, laws and subjects, while simultaneously deconstructing such via translation without aiming to be unified.

Turkey's law-making tradition has since the late Ottoman times been legal transplantation.[6] Foreign legal texts, in other words, are transplanted into the Turkish corpus. Simultaneously, this method of law-making necessarily involves imitation and reiteration. Turkey's precarious population is very diverse. There are competing legal quests for recognition among LGBs, Kurds, Alevis, Armenians and other ethnic, gender and religious minorities. Given this situation, Turkey provides a telling example of how cultural translation can be performed as a law-making method. I should note that, unlike the current law-making method, cultural translation does not impose duties on non-Western countries, in this case Turkey. Therefore, challenging imperialism in law-making requires changing this process as a whole from legal transplanting to cultural

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[6] Esin Örücü, 'A Legal System Based on Translation: The Turkish Experience' (2013) 6 J Civ L Stud.

translation. Then the question is how can law-making proceed from legal transplantation to cultural translation. In other words, '[c]an law perhaps take up the task of the translator?'[7]

If legal transplanting is translating Western laws to non-West lexicon, cultural translation is law in translation. In an interview, Butler was asked what the title 'Gender in Translation' evoked for her.[8] Her response provides very helpful insight that can be transferred to law/rights in translation:

> It figures 'gender' as a term that is in transit. It is not defined by its context once and for all. It seems to be fleeing its context, morphing into something new and, like other strangers who speak another language, remains uncertain of its welcome.[9]

Building on this response law-making via translation would postulate that law in translation entails a constant mood of transformation. It is not defined by a context; it is temporary. It emancipates and subverts its context, transforming into something new, something uncertain.

The act of translation embodies a tension. There are at least two languages, two different frameworks of meanings, which clash and overlap. This is how competing and overlapping universalities are described in cultural translation. The act of cultural translation is dedicated to discovering more than hermeneutics of a language by acknowledging that it requires the translation of history, politics, economics and all the other conditions that a concept emerges

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[7] Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (Routledge 2007) 126.

[8] Judith Butler, 'Gender in Translation' (10 December 2015) <https://genderintranslation.com/2015/11/15/judith-butler-on-gender-in-translation> accessed 1 August 2017.

[9] Ibid.

from and is born into. Thus, law-making via cultural translation unfolds through multiple tensions. These tensions exceed the binary crisis as between original and copy. The question then becomes: in what ways do the tensions within the process of cultural translation differ from the tension between original and copy? If we follow the process of cultural translation, it starts with perverse reiteration and subversive resignification. To have a rights category subjected to perverse reiteration, do we need a structure at first place? Will this still be called the original?

Butler intervenes in the incomplete structures, suggesting that there must be a structure constructed by the West initially in order to perform cultural translation. This poses two important questions: (1) if the starting point is a structure then how will we assure that norms are not known in advance; and (2) how will the binary relationship between the original and the copy be prevented as between the structure and the subversive resignifications/perverse reiterations? Regarding the second question, Bhabha's insight might assist:

> Developing that notion, translation is also a way of imitating, but in a mischievous displacing sense – imitating an original in such a way that the priority of the original is not reinforced but by the very fact that it can be simulated, copied, transferred, transformed, made into a simulacrum and so on: the 'original' is never finished or complete in itself. The 'originary' is always open to translation so that it can never be said to have a totalised prior moment of being or meaning – an essence. What this really means is that cultures are only constituted in relation to that otherness internal to their own symbol-forming activity which makes them decentred structures – through that displacement or liminality opens up the possibility of articulating different, even incommensurable cultural practices and priorities.[10]

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[10] Jonathan Rutherford, *Identity: Community, Culture, Difference* (Lawrence and Wishart 1990) 207–221.

Following Bhabha, Butler's inspiration for the concept of cultural translation, the task appears to be ensuring that the original loses its control over the copy through subversive resignifications. Thus, the interplay between original and copy is dismantled through resignifiying the original structures and mobilising it outside of its boundaries by challenging its limits. As noted in the previous chapters, Butler's emphasis on human rights derives from the fact that who is human is open to rearticulation.[11] When a non-Western country's understanding of humanity is different from Western understandings, the non-West's views are downplayed as cultural articulations. The formal endeavour has been to translate the Western understanding to the cultural, non-Western episteme. This one-way translation generally requires the non-West to implement Western meanings. This automatically creates a hierarchy between the West and the non-West. In this translation, the non-West is supposed to understand the West. If there are any untranslatable concepts, the non-West must replace it with the closest Western term. These features reinforce the imperialistic nature of contemporary law-making. Cultural translation as a multidirectional praxis compels the West to encounter the insufficiency, and thus the limits, of its lexicon. These limits appear to draw the line for the West's universality, where the West is untranslatable to the non-West. The universality claim of the West comes to an end where the unintelligibility of it starts against the non-West.

Cultural translation as law-making is not only a translation between two legal languages, two legal systems; it also reveals the limits of their translatability. In this way, when one of the multiple understandings of a legal concept stages its

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[11] Butler, *Undoing Gender* (n 1) 38.

untranslatability, all actors within the conversation will have to adapt in order to comprehend each other. Thus, translation is a transformative act in cultural translation. Translation is no longer a delivery from West to non-West. It does not force the non-West to change according to the West. It does not translate the universal to various cultures. In this sense, cultural translation promises a less/non-imperialistic law-making, where there are competing universals in conversation with one another. Each reacting to this untranslatability, the conversation can pervert the direction of the translation and transform it multidirectionally, where all universals are in translation. If translation is 'a language between languages'[12] then cultural translation as law-making could be a law between laws: the law of possibility that enables other articulations of law to become possible just by entering into the process of cultural translation.

Translation is an act that makes one language intelligible to another language. As mentioned in the previous chapters, intelligibility is closely linked to recognition in Butler. Accordingly, cultural translation not only transforms the unidirectional nature of translation to a multidirectional one but also turns recognition into a multidimensional category. As a result, rearticulations of humanity within the non/less-West will not be compelled to present themselves in an intelligible form to the West. The West, as the original, will simultaneously have to alter itself through the translation it receives from the non/less-West. In this way, the precondition for intelligibility/recognition will not be governed by the West. The Western monopoly on the subject creation will be disrupted.

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[12] Judith Butler, 'Competing Universalities' in Judith Butler, Ernesto Laclau and Slavoj Zizek (eds), *Contingency, Hegemony, Universality* (Verso 2000) 179.

Translation does not just occur between foreign languages/cultures/meanings. Interestingly, translation is also necessary for those who speak the same language within defined national boundaries but who are unintelligible to one other.[13] Translation is thereby an attempt to make a concept intelligible to the other, the different.

When applied to law-making via cultural translation, more than one understanding or language of law enters into the process of cultural translation. A schema of law is exposed to other laws on local and international levels. Similar to subject creation, laws/rights desire recognition from other schemas of laws/rights or international law. Laws socialise and communicate with each other explicitly on the global scale. They are not self-sufficient concepts produced by states, which must maintain relations with other states. In contemporary law-making, this interaction has been an imperialist one. The aim of this one-way translation is the reaching of a unity within the global jurisdictions, where the singular legal language is under the governance of the West. As noted before when discussing the forcible citation of a norm, it was underscored that non-Western legal understandings have been compelled to translate Western laws/rights to their lexicons. In this way, non-Western laws and legal concepts have been deemed insignificant within the law-making process and are often replaced with Western counterparts through the process of legal transplantation/translation. Accordingly, in the current process of law-making non-Western laws and concepts are found to be disposable; they do not have any value as against their Western version.

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[13] Judith Butler, 'Precarious Life, Vulnerability, and the Ethics of Cohabitation' (2012) 26(2) The Journal of Speculative Philosophy 134–151.

This parallels Butler's description of precarity. If we follow Butler here, we can see that laws can also become precarious when they are exposed to other legal schemas. This happened when the decriminalisation of same-sex relations was translated to the Ottoman legal language. The Ottoman penal history became precarious when exposed to the dominant Western legal system and became disposable in the course of translating French law into Turkish.

7.3 Law-making via cultural translation

> For now, I want only to suggest in a fairly elementary way that if I am only bound to those who are close to me, already familiar, then my ethics are invariably parochial, communitarian, and exclusionary. If I am only bound to those who are 'human' in the abstract, then I avert every effort to translate culturally between my own situation and that of others.[14]

As noted before, law-making via cultural translation enables different universalities to discover norms in the midst of the translation. These discoveries are subjected to a series of other cultural translation processes where they constantly encounter their limits. This circle of cultural translation produces temporary laws/rights. This temporality brings about unstable laws that are open to possibilities. The temporary nature of law also prevents one universal from completely governing the norms of legal intelligibility. This does not mean that universalities will be in a rota to govern the norms of legal intelligibility. In cultural translation, the fact that there are competing and overlapping notions of universalities governs the norms of legal intelligibility. Law-making via cultural translation stages coalitions and conflicts about norms of legal intelligibility. In other words, legal recognition transforms into a multidirectional category that cannot be controlled by any of the universals

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[14] Ibid.

involved in the process. The law-making is ruled through coalitions and contradictions of universals.

In order to ensure that none of the universals dominates and governs law-making, there are several principles that participants in cultural translation ought to comply with. As this is a discovery of rights, there are no rights known in advance of the cultural translation process. The discovery of a right happens in the middle of the translation among the competing and overlapping universalities. Thus, what could be discovered as a right is unpredictable for all parties. It is a matter of committing to the unstable, temporary and mutable nature of rights. This should be accompanied by a permanent dedication to keep these rights discovered within the cultural translation process outside of the realm of delimited ways of being possible. The only permanent norm within this law-making process is possibility. If the only norm is always possibility, how would this be materialised in practice?

In the following section, in an attempt to demonstrate law-making in application, I will discuss human rights categories in relation to cultural translation. I will refer to Butler's 'livable life' concept in conjunction with 'possibility as the only norm', both of which provide a very useful basis to speculate and imagine how cultural translation could work, especially within the field of LGB rights.

7.3.1 The LGB rights concept versus the normative conditions for a livable life for LGB people

The concept of livability appears in Butler's works in the context of international human rights, in which she enquires into the 'certain normative conditions that

must be fulfilled for life to become life'.[15] Butler anticipates diverse answers from different universalities. Law-making via cultural translation proceeds within the chaos of these dissonant answers.

If we first direct this question to international human rights, the answer can be discovered in the concept of the 'right to life'. The legal structure of this right is regulated under almost all international and regional human rights instruments. It is protected under the UDHR, Article 3;[16] the ICCPR, Article 6;[17] the ECHR, Article 2;[18] the African Charter on Human and Peoples' Rights, Article 4;[19] and the American Convention on Human Rights, Article 4.[20] I will focus my analyses on the UDHR, the ECHR, the ICCPR and the ICESCR (International Covenant on Economic, Social and Cultural Rights), to which Turkey is signatory. Before delving into the consequences of this separation regarding the normative conditions for a livable life for LGB individuals, I will first demonstrate the legal ambit of right to life within these three instruments.

The ECHR regulates the right to life as follows:

> Article 2.
>
> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of

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[15] Judith Butler, *Undoing Gender* (n 1) 39.

[16] Universal Declaration of Human Rights (1948).

[17] International Covenant on Civil and Political Rights (1966).

[18] European Convention on Human Rights (1950).

[19] The African Charter on Human and Peoples' Rights (1981).

[20] The American Convention on Human Rights (1969).

> court following his conviction of a crime for which this penalty is provided by law.[21]

The right to life is not absolute, which means that states can violate this right under certain and limited circumstances prescribes by law.[22] Section 2 of Article 2 lists the exceptions:

> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.[23]

Article 6 of the ICCPR formulates the right to life as follows:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.[24]

A state can interfere with an individual's right to life in the listed limited circumstances. Thus, the right to life is, as in the ECHR, not an absolute right.

As well as negative obligations, these conventions also ascribe some positive

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[21] European Convention on Human Rights (1950), Section 1, Article 2.

[22] Universal Declaration of Human Rights (1848), Article 3; International Covenant on Civil and Political Rights (1966), Article 6; European Convention on Human Rights (1950), Article 2.

[23] European Convention on Human Rights (1950), Section 2, Article 2.

[24] International Covenant on Civil and Political Rights (1966), Sections 1, 2, Article 6.

obligations to states to protect the lives of the individuals, which include the effective investigation of loss of life[25] and the prevention of extra-judicial execution.[26]

Complementary to the right to life as a civil and political right, Articles 11 and 15 of the ICESCR specify different forms of normative conditions for life:

> Article 11.
>
> 1.The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[27]
>
> Article 15.
>
> 1. The States Parties to the present Covenant recognize the right of everyone:
>
> (a) To take part in cultural life[28]

Considering that economic, social and cultural (ESC) rights include the right to an adequate income, the right to education and the right to the enjoyment of the highest attainable standard of physical and mental health, it indicates a different perspective on minimum normative conditions for a livable life. The civil and political category of the right to life guarantees basically the *biological* form of

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[25] *Sandru and Others v Romania* App No. 22465/03 (ECtHR, 8 December 2009).

[26] Ibid.

[27] International Covenant on Economic, Social and Cultural Rights (1966).

[28] International Covenant on Economic, Social and Cultural Rights (1966).

life.[29] The right to life basically entails a right not to be killed by states and non-state actors.[30] In that sense, it remedies a certain precariousness when a human body is exposed to society, which means that human life could be subjected to fatal violence at the hands of the others and state. On the other hand, ESC rights prescribe conditions to support this biological form of life with its basic needs to live adequately well and turn this biological life into a social, political and cultural life. These covenants propose different forms of lives. The ICCPR protects against the violent interventions that could endanger the biological life of humans, while the ICESCR provides this biological life with basic needs and turns this life to an economic, social and cultural life.

Although these two covenants, the ICCPR and the ICESCR, are considered twin covenants, there is a long and prominent debate about the superiority of civil and political rights.[31] This assumption stems from the wording of the ICESCR, which requires state parties to realise these rights not fully but only to the extent that they can in relation to their available resources.[32] On the other hand, under Article 2 of the ICCPR, states are obliged to ensure the immediate

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[29] For a discussion about the historical evolution of right to life see: Elizabeth Wicks, *Right to Life and Conflicting Interests* (Oxford Scholarship Online 2010, print publication 2010).

[30] J.O. Famakinwa, 'Interpreting the Right to Life' (2011) 29 Diametros (September 2011) 22.

[31] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 1.

[32] Article 1—Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

application of civil and political rights.[33] This means that the fulfilment of ESC rights varies according to the economic capacity of a state, while CPR are expected to be fulfilled by all states regardless of their economic or other capacities. Thus, CPR are presumed to be universally valid whereas ESCR are not.[34]

In the light of the above, the right to life in the context of civil and political rights is limited to the protection of biological life. In this sense, states are under an obligation to immediately apply negative duties – i.e. not to arbitrarily deprive the lives of humans – and positive duties such as taking measures to protect the lives those living under its jurisdiction and investigate the loss of lives properly. States are under full and equal obligation to safeguard biological life against state and non-state violence. The other categories of civil and political rights prohibit torture and ill-treatment and provide the right to a fair trial and the right to respect for private and family life. ICCPR constrains states from interfering in individuals' lives. Accordingly, this convention's answer for the normative conditions for a livable life would be: protection of everyone from state (and non-state) violence and guaranteeing individuals' biological form of living. Looking specifically at LGB individuals, the question becomes: what are the normative conditions for the LGB individuals to live a livable life? The ICCPR's answer would be protecting their biological mode of existence, not

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[33] Article 2 1—Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

[34] Saul, Kinley and Mowbray (n 31) 1, 133.

interfering in their private life and ensuring that LGB individuals have at their disposal 'a specific legal framework providing for the recognition and protection of their same-sex unions'.[35]

On the other hand, the ICESC rights articulation of life includes living with a sufficient income, education, cultural engagement and security. Minimal normative conditions for a livable life under this convention would thus include providing everyone – including LGB individuals – with the right to work, with a fair and equal wage between men and women; safe and healthy working conditions; trade union protection; and the ability to exercise their right to strike. It would include a life that everyone can maintain an adequate standard of living, explicitly including adequate food, clothing and housing for all individuals and their families. Moreover, also necessary would be the right to education and the highest attainable standard of physical and mental health. As such, it calls for a life that goes beyond the minimum biological form of being. However, as noted already, states are not obliged to provide this level of rights protection or this kind of livable life.

This distinction is the bedrock of the neo-liberal ideology, where the state stands only for protection from violence and providing minimal civil and political freedoms for individuals; their other needs are sold by private entities to those who can afford them. For example, states are not under an immediate

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[35] *Oliari and Others v Italy* App No 18766/11 36030/11 (ECHR, 21 July 2015) 185.

obligation to provide health care, water, food or shelter for individuals.[36] This understanding of livability is articulated by Butler as follows:

> [T]hose who cannot afford to pay for health care constitute but one version of a population deemed disposable … they also understand themselves to have lost several forms of security and promise, they also understand themselves as abandoned by a government and a political economy that clearly augments wealth for the very few at the expense of the general population.[37]

Butler's question as to what normative conditions are necessary for a life to be livable embodies a critique of the neo-liberal framework of life. Defining a livable life within the terms of the human rights system reduces life to its biological form and justifies social and economic forms of inequalities. For example, according to the classification of rights, inequalities regarding access to health care and wealth do not have the same weight as civil and political rights.

The LGB rights concept is associated with civil and political rights, which is concurrent with neo-liberalism. This brings about a limitation on the equality of LGB individuals, in particular as it relates to the right to respect for private and family life. In these circumstances, the LGB rights concept's answer for certain normative conditions for a livable life is securing the biological form of life where state interference to life is at its minimum.[38] Minimising the role of the state has certain advantages, such as diminishing the authority of a state in relation to individual freedom and choice. However, on the other hand, when state

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[36] Judith Butler, *Notes Toward a Performative Theory of Assembly* (Harvard University Press 2011) 25.

[37] Ibid.

[38] This was a contentious issue between Western states and the Soviet Bloc during the Cold War. The Western states tended to downgrade social, economic and cultural rights and empower civil rights instead.

interference is minimised, according to neo-liberal understanding, with it comes 'accelerat[ed] inequality'.[39] This is because the neo-liberal regime prioritises the needs of the market over the individual. State obligations become a private matter[40] and their role is degraded by means of privatisation and a reduction of civil and political rights.[41] Inequality among individuals in terms of accessing social and economic rights is justified under international law by assigning a lower obligation to states when compared to civil and political rights. It is the individual's responsibility to earn enough income to afford social and economic rights. Even the right to water, food and housing belongs to the individual; states' responsibilities are undermined by international law.[42]

Butler draws attention to the increasing legitimacy of individuals' responsibility solely for themselves and not for others. In other words, every individual is responsible for their economic self-sufficiency, which is the consequence of neo-liberal approach to human rights that creates the hierarchy between civil and political rights and ESC rights. Building law-making on this neo-liberal schema of rights narrows LGB individuals' horizon of livability in relation to civil and political rights. In this way the LGB rights concept is delimited to the private life and protection from violence and discrimination is curtailed.

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[39] Butler, *Notes Toward a Performative Theory of Assembly* (n 36) 25.

[40] Diego Giannone, 'Measuring and Monitoring Social Rights in a Neoliberal Age: Between the United Nations' Rhetoric and States' Practice' (2015) 27(2) Global Change, Peace & Security 173–189.

[41] Henry A. Giroux, Neo-liberalism and the Machinery of Disposability (15 April 2014) <https://philosophersforchange.org/2014/04/15/neoliberalism-and-the-machinery-of-disposability> accessed 10 September 2017.

[42] UNHRC, Twenty-seventh session 'Report by Catarina de Albuquerque, the Special Rapporteur on the Human Right to safe Drinking Water and Sanitation' (June 2014) UN Doc A/HRC/27/55.

Karen Zivi's argument postulates that rights-claiming as a persuasive act is complementary to Butler. She manifests that rights-claiming is a performative utterance recognising the performativity embedded within right claiming.[43] She further analyses this performance of rights-claiming as a persuasive act.[44] In this way, rights-claiming becomes individuals' personal responsibility to persuade others that they have rights. This correlates with the neo-liberal understanding of self-responsibility.[45]

Butler's description of a livable life goes beyond these neo-liberal distinctions within human rights. According to Butler's insight, the possibility of normative conditions for a livable life can be reached through persistence and the assembly of the precarious in the service of cultural translation.[46] In this sense, law-making releases itself from state-centric recognition mechanisms and transforms into an alliance among precarious. Instead of dividing the rights categories according to their value to the neo-liberal system, the quest for a livable life attaches importance to the differential distribution of precariousness among the populations.[47] In doing so, the precarious can be those who starve, who lack protection against violence, who are displaced, who are discriminated against, who are deprived of health care, etc. These precarious populations experience unlivability in different forms. They are disposable in different ways

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[43] Karen Zivi, *From Rights to Right Claiming* (Oxford University Press 2012) 16 26.

[44] Ibid. 44.

[45] Ibid. 16, 26.

[46] Butler, *Notes Toward a Performative Theory of Assembly* (n 36).

[47] Ibid. 27.

according to the categorisation of the current system. The concept of the livable life departs from individual responsibility, which is dictated by neo-liberal ideology. On the contrary, it subverts this responsibility to a collective form of responsibility. In this type, livable life entails responsibility for all forms of precariousness, and unlivable lives in general.[48] It becomes an endeavour to understand and alter one's description of normative conditions for a livable life according to others' articulation of it through translation. Then law-making by means of cultural translation imposes conversation among various modes of precariousness and unlivable lives, which allows law-making process to discover an alliance among different understandings of a livable life though competing and overlapping universalities.

In the neo-liberal system of human rights there are also mechanisms in place to address the disparity among different understandings of legal concepts. For example, the ECtHR generated a doctrine called the 'margin of appreciation', which has been designed to address cultural differences among state parties. There are diverse approaches to the beginning and end of biological life, which causes dissonance among signatory states, especially in terms of abortion and euthanasia.[49] The court preserves the right to give broad discretion to the sovereign state while determining culturally significant issues on which member states have not displayed consensus in their applications. This is how the ECtHR tackles different rearticulations of rights and legal concepts within member states. One might argue that the doctrine of margin of appreciation

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[48] Ibid. 14, 25.

[49] Douwe Korff, *A Guide to the Implementation of Article 2 of the European Convention on Human Rights* (Council of Europe 2006).

bears similarities to cultural translation. Firstly, it operates through consensus and contradiction, just like the notion of competing and overlapping universalities in cultural translation. Secondly, it allows states to resignify the law differently within their sovereign jurisdiction.

Returning to Butler:

> These limits on what is knowable are established precisely by regimes of power, so if we are disposed to respond to a claim that is not immediately assimilable into an already authorized framework, then our ethical disposition to the demand engages in a critical relation to power. In this sense, as Spivak claims, 'translation is a field of power'. Or, as Talal Asad remarks about the practice of cultural translation, it 'is inevitably enmeshed in conditions of power'.[50]

In the ECtHR, this translation operates in the field of sovereign states. The power, consensus and contradictions are all limited to the formal discourse of these sovereign powers. The precarious can only participate, as individuals, as victims, when their recognised rights are infringed by the very state which recognised them in the first place. In this way, the margin of appreciation is part of a consensus mechanism governed by the states who distribute precariousness and rights unequally, thereby becoming the source of inequality.

Legal recognition through cultural translation could be collective, unlike the current identity-based recognition politics in which the precarious are encouraged to an identity-based legal policy in the formal human rights system. Identity politics is also group-based: identity is built through the qualities that members of a group share. The formation of identity disregards differences within the group and emphasis is placed on the similarities, which are deemed permanent. The group is defined by sameness in order to be recognised.

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[50] Butler, 'Parting Ways: Jewishness and the Critique of Zionism' (n 2) 18.

However, each person falling within the scope of a protected identity group must claim their rights on an *individual* basis.

Butler's call for a collective responsibility stems from her elaboration of precarity. As discussed before, the politics of precarity in Butler's work is a coalition politics among the precarious. Collective recognition does not progress through identity categories. Instead, all demands for recognition are in translation with one other. In this process of translation, they discover competing and overlapping features. In this way, the process of recognition is no longer solely governed by states. It starts with a performative contradiction against the state that authored the human rights concepts. In doing so, the precarious speak the language of rights, even though they are deprived of such in the formal realm of human rights. When they speak this language and lay their claims to normative conditions for a livable life, the process of cultural translation ensures that whatever emerges as a norm out of this process is a temporary one. Translation composes a temporary rights/law category, which is open to another translation. Instead of identity categories, coalition politics of precariousness produces temporary normative conditions for a livable life. In this way, this process becomes collective law-making, which is open to unlimited possibilities.

Collective responsibility is best understood in relation to the concept of precarity. Conventional legal recognition is based upon individual accession to the human rights system. Legal responsibility is thus limited to the rights-holders' responsibility towards the state that grants rights. The precarious have responsibilities towards the state and in return the state has duties to protect the precarious categories it recognises. The precarious identities are not in any

meaningful interaction with each other during the recognition process. If precarity is caused by being exposed to one another, the conditions that would eliminate precarity are implicit in the ways it is created. In other words, being exposed to one another has the potential to create collectivity. Thus, the root cause of precarity could be subjected to subversion. Being exposed to society and living with the other could be rearticulated as a collective[51] responsibility to one another.[52] Butler explains this process as follows:

> [I]t does matter when one starts to realize that one's own suffering is like that of the other's. That can lead to a structural understanding of exploitation or differential precarity. Some forms of identification or substitutability can begin forms of alliance that call into question the more entrenched versions of individualism. The idea that I am obligated to others follows, I think, from the more fundamental insight that one life is not living without the other and that this way of being bound up together is at once ontological and ethical.[53]

Accordingly, the baseline for certain, albeit temporary, normative conditions for a livable life is found in the acknowledgement that life is not living without the other. In this sense, collective responsibility is the ethics of this law-making.

Could collective responsibility extend recognition to cover humanity in general, or all of the precarious?[54] According to Butler, recognition cannot be inclusive of all of humanity since what it means to be 'human' is contentious[55] and its

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[51] Within the current human rights regime, collective rights generally refer to indigenous community rights <http://www.unric.org/en/indigenous-people/27309-individual-vs-collective-rights>.

[52] Stephanie Berbec, 'Interview with Judith Butler, Wordless without One Another' (2017) <https://theotherjournal.com/2017/06/26/worldless-without-one-another-interview-judith-butler> accessed 26 June 2017.

[53] Ibid.

[54] Judith Butler, *Notes Toward a Performative Theory of Assembly* (n 36) 4.

[55] Ibid. 5.

meaning changes over time and place. There will always be an unrecognisable population[56] and recognition and inclusion thereby always produce inequality. Butler maintains that if recognition and inclusion are regarded as temporary mechanisms then collective responsibility to each other becomes an endless discovery of what constitutes a livable life.[57] Her remedy is to dismantle the inclusion and exclusion praxis of recognition and for it to provide the conditions for a livable life. Butler explains as follows:

> If I am to lead a good life without those others; I will not lose this I that I am; whoever I am will be transformed by my connections with others, since my dependency on another, and my dependability, are necessary in order to live and to live well. Our shared exposure to precarity is but one ground of our potential equality and our reciprocal obligations to produce together conditions of livable life.[58]

Following Butler, it can be deduced that law-making via cultural translation is a collective production of normative conditions for a livable life through an endless conversation among the precarious. Collective responsibility arises from one's dependency on others. Thus, such law-making is a collective, perhaps chaotic, conversation among competing and overlapping universals, which is the foundation of a less imperialistic law-making.

Clearly, the collective responsibility suggested by Butler is different from individual responsibility within the neo-liberal human rights regime. Butler instead deconstructs the neo-liberal responsibility: 'The question of responsibility in the era of socially enforced individualism must be "How are we

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[56] Ibid.

[57] Ibid. 6.

[58] Ibid. 218.

formed within social life, and at what cost?"'[59] Neo-liberal responsibility can thus be subverted by calling formation processes into question. It is an acknowledgement of those excluded when I am included, of those who I turn into the other when forming myself in a recognisable form. Thus, the imitation of pre-existing structures in order to make myself intelligible limits my self-formation.

Butler invites us to reconsider the ways in which ethical responsibility is constructed within the neo-liberal system:

> To make this view plain, I want to suggest as a point of departure that images and accounts of war suffering are a particular form of ethical solicitation, one that compels us to negotiate questions of proximity and distance. They implicitly formulate ethical quandaries: Is what is happening so far from me that I can bear no responsibility for it? Is what is happening so close to me that I cannot bear having to take responsibility for it? If I myself did not make this suffering, am I still in some other sense responsible to it?[60]

Within the scope of neo-liberalism, responsibility for the other emerges in three ways. Firstly, human rights conventions function as a global *contract* determining states' responsibility to prevent and remedy certain types of precarity. A second form is through one's role or responsibility in causing the precariousness, which is generally defined by national laws. Finally, when determining the ethics of collective and individual responsibility to a precarious situation, distance and proximity are operative thresholds. People tend to feel

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[59] Judith Butler, *Giving Account of Oneself* (Fordham University Press 2005) 136.

[60] Butler, 'Precarious Life, Vulnerability, and the Ethics of Cohabitation' (n 13).

responsibility for some precarious but not others.[61] This became evident through the unequal public and state-level reactions against the Paris and Ankara attacks in 2015.[62] The Paris attack was condemned more strongly than that in Ankara. In order to transcend the delimitations stemming from national and cultural distances, cultural translation appears to be the only process that can subvert the limits of intelligibility and thereby broaden the sense of responsibility.

Whose lives are worth grieving for is, for Butler, very relevant to the current law-making method, through which some are granted rights, but not others. The latter's lives are not deemed worthy of grief or protection. Cultural translation process as law-making pursues a livable life in which inclusion and exclusion methods are replaced with collective responsibility and coalition politics. In this way of law-making, recognition and intelligibility are no longer a matter of inclusion but *translation*. Recognition is accordingly a translation, however not a unidirectional one, but one that is mutually constituted through ongoing conversations between the West and the non-West. Recognition then emerges as a transformative act in which one changes in order to understand the other and vice versa.

What then is the role of the state in law-making via cultural translation? In the current law-making regime, states are held to be the only possible authors of law/rights. However, states are limited by pre-existing structures. This casts a

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[61] Ibid.

[62] Chris D'Angelo, 'We Prayed for Paris, What about Ankara?' (14 March 2016) <https://www.huffingtonpost.com/entry/pray-for-ankara_us_56e722c5e4b065e2e3d6f8b2> accessed 20 September 2017.

doubt on the autonomy of their authorship. States' agency over making laws/rights is always dependent on the laws/rights that existed before them and which will undoubtedly exceed them. Law-making is accordingly an act of improvisation[63] within the limits of national and international law and pre-existing historical structures. Similarly, legal recognition improvises within the limits of law, which is always constrained by the available set of structures and concepts. This casts a doubt on the agency of states as the only legitimate authors of law/rights. Legal sovereignties, states, are regarded as autonomous within their jurisdiction as long as their enforcement of autonomy complies with their obligations deriving from international law. In contemporary law-making the autonomy of the individual operates parallel to the sovereignty of states. States are sovereign within a realm of constraint; likewise individuals, as Butler explains:

> [N]ot only does one need the social world to be a certain way in order to lay claim to what is one's own, but it turns out that what is one's own is always from the start dependent upon what is not one's own, the social conditions by which autonomy is, strangely, dispossessed and undone.[64]

The above description of the relationship between social conditions and agency also shapes Butler's analyses regarding precarity. The fact that the individual is dependent on others brings about precarity, but at the same time this means that an individual's agency is always limited owing to this dependency on others. State sovereignty is similarly limited in light of its dependency on other states and international validation. In this sense, a state does not exercise full

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[63] Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Routledge 2013).

[64] Butler, *Undoing Gender* (n 1) 100.

agency in law-making. There is an element of forcible citation of a norm, as explained before, and imperialistic pressure on states. With this in mind, agency belongs to the process of cultural translation. Agency is ability of translation through which recognition emerges as a mutual and transformative process in which one changes in order to understand the other and vice versa.

Lisa Duggan's critique of neo-liberalism is enlightening while analysing neo-liberal equality politics acquired by the LGB rights movement. She highlights the essential role that privatisation and self-responsibility play within the neo-liberal narrative. These terms both apply to social, cultural, legal and economic field. The main mission is privatisation which means expansion of private realm and 'the transfer of wealth and decision-making from public… to individual or corporate, unaccountable hands.'[65] This has important reflections on the LGB rights concept as Duggan argues that identity politics has been utilised to obscure redistribution policies. Differently from liberalism, neo-liberalism does not distinguish politics of identity and class.[66] In this way, neo-liberal policies narrowed the scope of equality. Equality politics disassociated itself from redistribution politics, with its sole focus on recognition and identity politics. The respect for private life clause, which is the bedrock of the LGB rights concept, is in ideological harmony with privatisation and personal responsibility within neo-liberalism. There is an overlap between neo-liberalism's emphasis on personal responsibility and privatisation and the LGB rights concept's focus on private life. Private life represents a state-free realm where state interference should be

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[65] Lisa Duggan, *The Twilight of Equality?* (Beacon Press 2003) 12.

[66] Ibid. 15.

at its minimal. This corresponds with the free market ideology where state should not interfere with the market. The LGB rights concept and neo-liberal economy are complementary to each other on an ideological level.

> The new neoliberal sexual politics of the Independent Gay Forum might be termed the new homonormativity-it is a politics that does not contest dominant heteronormative assumptions and institutions, but upholds and sustains them, while promising the possibility of a demobilised gay constituency and a privatised, depoliticised gay culture anchored in domesticity and consumption… primarily through a rhetorical remapping of public/private boundaries designed to shrink gay public spheres, and redefines gay equality against the 'civil rights agenda' and 'liberationism,' as access to the institutions of domestic privacy, the 'free' market, and patriotism.[67]

Following Duggan, it is not a coincidence that the LGB rights concept emerges within the respect for private life clause simultaneously with the rise of neo-liberal policies. In this way, neo-liberalism redefines freedom in reference to the private sphere such as LGB rights. Neo-liberal cultural propaganda for the remapping of the private and public spheres is therefore intertwined with the LGB rights concept. One of the popular reasons to glorify the private sphere is its gateway function for LGBs to access human rights instruments.

It is proven that, in countries where capitalism, liberalism and neo-liberalism have not been institutionalised 'properly' or where the founding concepts of these economic-political models are differently articulated from the West, the LGB rights concept encounters tradition and culture arguments. The LGB rights concept arises from the private- and public-sphere and individual freedom concepts that underlie the substructures of capitalism, liberalism and neo-liberalism. In countries where these substructures are not functioning 'properly',

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[67] Ibid. 50–51.

the LGB rights concept is disharmonious. In this way, the right to respect for private life does not perform as a gateway. Therefore, the culture argument is also a result of imperialistic law-making legal transplantation. Although it portrays itself as a reaction to West – and partially it is – at the same time the culture argument emerges within the turmoil of remapping private and public spheres according to neo-liberal understanding.

If we return to discussing the livable life in light of these discussions, pursuing normative conditions for a livable life goes beyond the concept of the right to life. It develops into a process that includes and exceeds all human rights conventions. Precarious, unlivable lives in different ways translate their understanding of livability and the normative conditions for such to each other. This endless translation opens the concept to possibilities in a way that guarantees one of the main elements of cultural translation: possibility as the only norm. Searching for normative conditions for a livable life transforms the structured and delimited formula of the right to life into an open concept in which different resignifications and future articulations of a livable life become possible. Cultural translation thus encourages diverse and endless rearticulations of normative conditions for livability to flourish within the realm of possibility. In this process, discoveries about what a livable life entails will not be permanent. They will not be known in advance. If they were, they would inevitably only be partially valid as there will always be different articulations in the past, present and future that cannot be covered by a permanently stable and static concept. Concepts formed within the process of cultural translation are thus born to be challenged, to be continuously altered and translated.

The desire for permanency forecloses the concept to different and future articulations. It implies that, from the moment of its formation, there will be no alterations. This unchangeability locks out possibility within the framework of the allegedly permanent concept. As long as the schema does not control the concepts, they remain open to possibility. Accordingly, the emerging normative conditions for a livable life should always be temporary in order to accommodate possibility.

In light of the above, law-making via cultural translation produces two types of norms. The first type involves *temporary* norms, which flourish when subverted by the many resignifications in the act of translation. These are temporary discoveries of normative conditions for a livable life. The second type is the *permanent* normative condition for a livable life, which maintains the openness of this law-making process. *Possibility* is the only norm that is permanent within this process. All other normative conditions that arise within multiple cultural translations are temporary.

In the endless process of cultural translation as law-making, translation will release numerous and temporary normative conditions for a livable life, reassuring the possibility of future and unknown articulations. This process requires different universals to embrace discoveries in the middle of the cultural translation. This means that universals in the act of translation do not know in advance what will bloom from this process. In this way, law-making via cultural translation provides space for possibility. It is the realm where those seeking to become possible can appear in plural or singular forms:

> [W]hen bodies assemble on the street, in the square, or in other forms of public space (including the virtual ones) they are exercising a plural and performative right to appear, one that asserts and instates the body in the

> midst of the political field, and which, in its expressive and signifying function, delivers a bodily demand for a more livable set of economic, social and political conditions no longer afflicted by induced forms of precarity.[68]

Rights are thereby discovered in manifold discursive, bodily, textual and vocal conversations among participants. These conversations are multidirectional translations and there is no one language of rights. The language of law-making is that of translation and demands are expressed via various forms on any public platform. When diverse understandings of conditions for a livable life are in (cultural) translation, their limits are challenged. A temporary condition for a livable life appears from this cultural translation process.

In this way, law-making via cultural translation promises a less/anti-imperialistic law as it brings about collective production of temporary normative conditions for a livable life as opposed to the neo-liberal law-making, which indicates that people are responsible for their welfare and thereby responsible for shifting their unlivable conditions.[69] The neo-liberal understanding of law-making is basically deemed to be a contract between each individual and the state, where there are mutual obligations and responsibilities. In law-making via cultural translation, this responsibility is a collective and multilateral one. Claiming one's rights requires a coalition; it cannot be reduced to an individual engagement with the authoritative law-maker state. Conventions are replaced with conversations where discoveries of temporary normative conditions for a livable life appear as a result of translation through collective responsibility.

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[68] Butler, *Notes Toward a Performative Theory of Assembly* (n 36) 11.

[69] Ibid. 16.

With these theoretical directions in mind, there will be two types of norms that arise from cultural translation as law-making regarding LGBs' legal status. The first is the *right to be possible*, or the right to possibility as the only norm, which is the only permanent rights category in cultural translation. The second type of rights consists of the temporary conditions for a livable life. The LGB rights concept then turns into conditions for a livable life for LGB people.

7.4 Right types in cultural translation as law-making

7.4.1 The Permanent Right Type - Right to be Possible

As mentioned above, the right to be possible is a permanent type of norm which is constantly open to possibility. In other words, the permanent condition for a livable life is the right to be possible. Butler describes possibility 'as crucial as bread'.[70] The right to be possible can also be identified as the right to appear. Butler's recent discussion of the right to appear focuses on public assembly.[71] However, my understanding of this right is expanded to cover the right to be possible, and goes beyond public gatherings. The right to be possible or right to appear are both modes of subject formation, which do not require any pre-existing structures to be validated. The only framework required is an openness to past, present and future possibilities.

The right to be possible relates to recognition, not that which is controlled by a universal but recognition that is in constant flight. The desire of the subject

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[70] Judith Butler, *Undoing Gender* (n 1) 29.

[71] Butler, *Notes Toward a Performative Theory of Assembly* (n 36) 24–65.

remains for recognition, but it occurs through challenging the limits of intelligibility, through 'fantasy', as Butler explains:

> [F]antasy is part of the articulation of the possible; it moves us beyond what is merely actual and present into a realm of possibility, the not yet actualized or the not actualizable. The struggle to survive is not really separable from the cultural life of fantasy, and the foreclosure of fantasy—through censorship, degradation, or other means—is one strategy for providing for the social death of persons. Fantasy is not the opposite of reality; it is what reality forecloses, and, as a result, it defines the limits of reality, constituting it as its constitutive outside. The critical promise of fantasy, when and where it exists, is to challenge the contingent limits of what will and will not be called reality. Fantasy is what allows us to imagine ourselves and others otherwise; it establishes the possible in excess of the real; it points elsewhere, and when it is embodied, it brings the elsewhere home.[72]

Norms that are not possible according to the current system of human rights are actually speaking the language of fantasy, breaking the chain of imitation to the detriment of power. They do not follow the rules of intelligibility but, instead, their unintelligibility prove that no power is absolute. However, we might be mistaken if we deduce that the realm of the possible is a power-free sphere. The right to be possible does not take place where there is no power or in a realm that is liberated from power. On the contrary: the right to be possible is a different interaction with power. It is a constant endeavour to challenge the limits of the power which governs reality, and thereby intelligibility and recognition. Butler's insight regarding gender performativity is instructive here:

> And it is true that I cannot change these terms radically, and even if I decide to resist the category of woman, I will have to battle with this category throughout my whole life. In this way, whenever we question our gender we run the risk of losing our intelligibility, of being labelled 'monsters'. My struggle with gender would be precisely that, a struggle,

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[72] Judith Butler, *Undoing Gender* (n 1) 28–29.

> and that has something to do with the patient labour that forms the impatience for freedom.[73]

Questioning the current recognition, in the next section my endeavour is to manifest a legal recognition that appears in my fantasy of law-making via cultural translation. Legal recognition emerges as a pursuit for the normative conditions for a livable for LGB people. I will start by the rights categories relevant to LGB rights concept that are fabricated through the current human rights system. As mentioned above, the LGB rights concept has three important keystones within the current human rights regime: (1) the decriminalisation of homosexuality; (2) the right to life (prevention from homophobic violence, limited to maintaining a biological form of life) as explained in the previous section under the right to life versus normative conditions for a livable life discussion; and (3) the right to marry and respect for private life. In my formulation of cultural translation, these rights categories fall within the scope of temporary discoveries for the normative conditions of a livable life for LGB people.

7.4.2 Temporary discoveries for the normative conditions for a livable life for LGB people

Law-making via cultural translation embodies at least two types of norms produced simultaneously, and conditional to each other. As noted above, the first one is the permanent act of the right to be possible and the right to appear. While the permanent norm is keeping the subject open to possibilities through deconstructing it via various translations, the temporary norms appear from

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[73] Fina Brules, 'Interview with Judith Butler, Gender is Extramoral' (Summer 2008) <https://genius.com/Judith-butler-gender-is-extramoral-annotated> accessed 10 September 2017.

these translations where different understandings compete and overlap with each other. The temporary norms can emerge from at least two occasions. The first occasion arises from every act of imitation. As discussed in the previous chapters, imitation provides an occasion for subversion. Subjects and rights categories – those are fabricated via various imitations within the delimited ways of being intelligible – are subjected to subversive resignification by the unauthorised precarious through performative contradiction. A rights category is subverted and a collective coalition is reached via translation; a temporary rights category emerges. The second, yet non-exhaustive occasion for a temporary rights category appears through the realm of the possible. This is facilitated by the permanent norm category: the right to be possible. This type of temporary right does not need a pre-formulated rights category to perform subversive resignification on it. These temporary rights are discovered during various translations. This type of norm requires a non-imperialistic environment to function. In this sense, it is less productive than the other type. However, it is still a possibility.

In this thesis, I focus on the temporary rights categories that arise through subversive resignifications in relation to LGB rights. These temporary rights categories are based on those created by the current law-making method. A rights category is formed through various imitations of historically delimited structures. However, subversion of these structures is also embedded within every single imitation performed during this fabrication. Resistance to these structures can occur through performative contradiction, where the unauthorised intervenes and claims that from which they have been denied, and through subversive resignification of the concepts that were designed not to

accommodate the excluded. These two performances are indeed interventions into the process of contemporary law-making through the imitations it embodies. Claiming rights is then no longer an effort to fit into the structures imposed by the West but a challenge to the boundaries of these structures, exposing them to their limits. As such, rights-claiming becomes a process of discovery in relation to the temporary conditions for a livable life.

7.5 The return of the excluded: Reclaiming universal

7.5.1 Subjecting decriminalisation of homosexuality to subversive resignification and return of the excluded: The Ottoman experience

The decriminalisation of homosexuality in the Ottoman era was subjected to scrutiny in Chapter 3. The decriminalisation of homosexuality was defined by Western legal thought as consensual private same-sex intercourse. This articulation constrains the concept of decriminalisation. The possibility of a different penal history has been excluded from the norms that govern decriminalisation. In this way, this interpretation took place within the realm of limited ways of being possible. Thus, decriminalisation as a concept was reduced to the legalisation of private same-sex activities. This stabilisation, at the same time, prevented other possibilities and resignifications of decriminalisation from emerging. Consequently, there has been only one single formula to cite. This has brought about the forcible citation of a norm that forecloses the concept to any other present and future articulations of

decriminalisation.[74] This approach also disregards the history of the excluded. This way of law-making not only controls decriminalisation but also controls and dominates the concept of criminalisation. The only intelligible conceptualisations are those belonging to Western legal history. This also brings about the disappearance/insignificance of any penal history that is different from the dominant universal's penal history.

The Ottoman experience of the criminalisation and decriminalisation of homosexuality were excluded from the conceptualisation of such in the West. When the excluded, the Ottoman, formulated (de)criminalisation and claimed that it could happen differently from how the settled knowledge stipulates, this functions as a performative contradiction. Butler's insight regarding performative contradiction goes beyond an excluded group's claim to be covered by universality. It also includes 'the continuing revision and elaboration of historical standards of universality'.[75] Following this definition, if the formula of (de)criminalisation is reduced to a single universal standard, thereby revealing the limits of the universal, this constitutes performative contradiction as well. In this way, the universalised standard of (de)criminalisation of homosexuality encounters its inclusivity and translatability.[76]

When this universalised understanding of (de)criminalisation is challenged through resignification and rearticulation, the universal is exposed to the fact

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[74] Judith Butler, 'The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess' in Drucilla Cornell (ed.), *Feminism and Pornography* (Oxford University Press 2000).

[75] Ibid.

[76] Butler, *Undoing Gender* (n 1) 38.

that it is incomplete, and thus not globally valid. The aim of the resignification process is not only to expose the universal term to its limit but also to maintain its openness so that other rearticulations are possible; (de)criminalisation, in other words, is liberated from its stable formation. Once it becomes unstable and uncontrollable, future rearticulations and revisions are possible. The act of translation within the cultural translation process leaves the future of the term unknown and unpredictable. Accordingly, when assessing a culture's attitude towards (de)criminalisation of homosexuality, there will be no benchmarks that would universalise the reality in a single direction. Instead, possibility as the only norm will be the only reference.

If we examine what happened in the Ottoman/Turkish example through the lens of cultural translation as advanced by Butler, we can observe that an imperialistic version of resignification has occurred. Since the implementation of the French Penal Code in 1858, treatment of homosexuality has been replaced and rearticulated within the Western approach to same-sex desire. From that moment on, the legal regime of the Ottoman Empire was resignified in a way that could be intelligible to the universal West. Similar to the resignification argument made pertaining to UN and ECtHR law-making, this Ottoman resignification marks a domain of constraint where there are limited ways to legalise or criminalise homosexuality. It has transformed the historical legal culture in an imperialistic fashion, compelling a forcible citation of a norm.

If these analyses are extended to evaluate the culture/tradition argument against which the LGB rights concept during the time that the republic emerged, the consequences of the Ottoman resignification on their legal regime becomes more evident. The 1858 Ottoman Penal Code not only transplanted the French

Penal Code; it also resignified and revised its approach to same-sex desire. Given the very basic definition of tradition and culture that '[t]raditional cultural practices reflect the values and beliefs held by members of a community for periods often spanning generations',[77] this resignification has disturbed the continuity between the legal tradition before the adoption of the 1858 Penal Code and the tradition/culture discourse engendered after this legal transplantation. The culture/tradition objection to the universal LGB rights concept postulates that in my history same-sex desire has never been tolerated, or has never existed. In other words, the culture/tradition objection declares its unfamiliarity with same-sex desire, and defines it as a foreign vice. This new cultural discourse has revised history and removed all legal practices that are contrary to the Western approach from its legal memory. This coincides with the legal transplantation of foreign laws by the Ottomans. When the Ottoman and Western legal languages collided, they could not turn this encounter into a cultural translation process. If this had happened, then the Western and Ottoman understandings of (de)criminalisation would have discovered the limits and translatability of their epistemes and turned this legal conversation into a transformative act. Different universalities could have competed in an endless cultural translation process during which disparate understandings of what (de)criminalisation of homosexuality entails would not be stabilised to the Western definition, that is, legalising consensual, private sex for adults above a certain age. Instead, they interacted in a binary format in which the West was the universal and the Ottoman was the culture. This brought about dominance

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[77] MJ Malueke, 'Culture, Tradition, Custom, Law And Gender Equality' (2012) 15 Potchefstroom Elec L J 1.

of one and inferiority of the other. The non-intelligibility of the Ottoman legal attitude towards same-sex desire by the Western legal episteme led the Ottomans to fabricate a new culture/tradition that had not existed in their history. This imagination of a different history occurred after their admittance to the modern Western legal lexicon. Thus, when Turkish authorities mention culture and tradition as an argument against any attempt to ameliorate the lives of LGB individuals, they are not referring to their many centuries of history or legal traits but to the attitude they generated after the implementation of a Western sexual regime within their corpus in the 19th century. A culture/tradition argument was then produced by imitating the Western legal culture performatively. This performative formation of culture, ironically, has been presented as a feature of Turkey, distinguishing from the West. However, it was indeed implanted from the West. This cultural discourse emerged as a result of transplanting Western laws.[78] This situation resonates with the cultural argument against LGB-positive laws, or even decriminalisation in India and some African countries stemming from the British colonial criminal codes that criminalised homosexuality, which were forcibly introduced into their corpus.[79] Ironically, the culture which these former colonial countries refer to now was implanted by their coloniser state, Britain, more than a century ago. As a result, Western-made, same-sex criminalisation embraced by the non-West and the Western-constructed LGB rights concept clash with each other. This substantiates my argument that

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[78] Human Rights Watch, 'Alien Legacy Origins of Sodomy Laws in British Colonialism' (17 December 2008) <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism> accessed 27 June 2017.

[79] Ibid.

resignification itself does not suffice to liberate legal evolution and law-making from their imperialistic features.

Cultural translation as advanced by Butler does not prescribe resignification in a way that reproduces binary-power relations. On the contrary, resignification emerges as a form of *resistance*. Occasions for resistance emerge whenever a subject is performatively constructed through exclusion. Those who are excluded challenge the subject through performative contradiction. At this point, subversive resignification maintains that this subject is open to endless rearticulations and to being destabilised. Subversive resignification does not allow the subject to stabilise itself. It challenges the formation through the ones it excludes. Inevitably, different, contesting rearticulations and resignifications of that subject occur. In this case, all resignifications enter into a conversation, namely the cultural translation process through which translation functions as law-making. This law-making is based on translation. In this process, none of the resignifications is known in advance. What will come out of this translation is a discovery. Law and rights are not made but are instead discovered. Among these legal languages and resignifications, the only norm known in advance is that possibility itself is the only norm; other norms are temporary discoveries for normative conditions for a livable life.[80]

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[80] Butler, *Undoing Gender* (n 1) 39.

7.5.2 Subjecting right to respect for private and family life to subversive resignification: Right to relate

The right to respect for private life embodies various imitations that can be subjected to subversive resignification. As noted in Chapter 2, one of the first repetitions embedded within the LGB rights concept is the imitation of the heterosexual family structure for a legally valid and recognised claim to same-sex intimacy. The equality principle adds to this imitative, thus performative, legal subject creation. The legal framework for heterosexual intimacy is found in the right to respect for private life and family life clause. LGB demands did not extend the limits of heterosexual legal framework. The very idea of the LGB rights concept is that LGB rights are human rights and thus are determined by the current human rights schemes. In this phase of the imitation, the Western LGB subject imitates the legal status of Western heterosexual subjects in order to appear intelligible to pre-existing human rights structures.

In the second phase, non-Western LGB individuals imitate this legally recognised Western LGB subject. In this cycle of imitations, every imitation embodies an occasion for subversion, as discussed previously. As such, Western LGB individuals could subject the right to privacy and family life to subversive resignification. Drawing upon the previous theoretical analyses, the first step involves the construction of a rights category regarding the protection of family life and marriage. This right only covers opposite-sex intimacy. The second stage involves performative contradiction, in which LGB individuals claim that this right must cover same-sex intimacy as well. On this level, the legal framework for heterosexual relations is exposed to its limits. The performative contradiction reveals the parochial nature of a scheme that

excludes LGBs. The excluded returns to destabilise the legal framework of intimacy and kinship. Until this point, the development of contemporary law-making and cultural translation might seem to overlap. The difference is dramatic. In the current law-making system, the excluded, LGBs, have to qualify the pre-existing standards of human. In the cultural translation process, however, instead of imitating the structure to comply with the pre-existing standards, the LGB subject rearticulates the conditions for legal recognition. The pre-existing standards are subjected to subversive resignification. In this way, the LGB subject demands the normative conditions for a livable life and reclaims the legal framework of intimacy.

As noted, I offer that the LGB rights concept could be replaced with the normative conditions for a livable life for such individuals. Waldijk argues that the right to respect for private and family life, and the right to marry, should be rearticulated in the sense that marriage and kinship could embrace same-sex couples. He points out that private life clause protection hinders LGB individuals from coming together or displaying affection to each other in *public* spaces. He reveals the limits of the right to respect for private and family life and right to marry schemes. His argument reflects the culture versus universal crisis within the Western jurisdiction, where homosexuals represent culture and heterosexuals are deemed to be the universal. Waldijk discusses how the 'right to relate' can be a good example of this rearticulation.[81] It is of note that his argument does not seek to be subversive. He argues that the common ground

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[81] Kees Waaldijk, 'The Right to Relate: Lecture on The Importance of "Orientation" in Comparative Sexual Orientation Law' (2013–2014), 24 Duke J Comp & Int'l L 16.

for all the human rights categories that are inclusive of LGB people, which thus form the LGB rights concept, is right to establish and develop relationship. He proposes the right to relate as a concept that could combine the decriminalisation of homosexuality, the prohibition of discrimination based on homosexuality, the right to respect for private life, the right to marry, the right to adopt and all other rights categories that are relevant to the LGB population. He resignifies the LGB rights concept as the right to relate.[82] My discussion of the right to relate aims to bring the subversive potential it embodies into light.

When a rights category is transplanted into or forced upon the non-West another layer of imitation unfolds. It brings about another occasion for subversion. This time binaries such as heterosexual/homosexual, Western/non-Western, developed/developing, poor/wealthy, Christian/Muslim and civilised/savage all combine in one pot to create a complex mixture of opposition to this rights category. Therefore, culture versus the LGB rights concept dichotomy accommodates various dichotomies. It is not simply being against LGB rights or defending culture. There are historical and political layers of this argument. Then, subjecting culture/tradition argument to subversive resignification requires subversion of all these historical and political layers of this opposition, such as heterosexual/homosexual, Western/non-Western, developed/developing, poor/wealthy, Christian/Muslim and civilised/savage.

Butler's critique of Nancy Fraser's portrayal of LGBTI politics as a cultural matter provides very useful insight to a better understanding of how reducing some issues as cultural within the current law-making regime functions. In that

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[82] Ibid.

discussion, Fraser argues that LGBTI politics is not relevant to political economy as there is no class exploitation. She asserts that homosexuality is a cultural issue.[83] According to her, homophobia is not relevant to redistribution politics and it is only a matter of recognition. Butler refuses to formulate economy and culture in a binary opposition in the way that degrades whatever falls within the sphere of culture, in this discussion LGBTI politics. Butler acknowledges the leftist efforts to separate sexual orientation politics from economic and class issues as neo-conservatism.[84] In her article 'Merely Cultural', which was published in 1997, Butler refuses to distinguish redistribution from the politics of recognition. She returns to the Marxist critique of family and links the naturalisation of heterosexuality with the capitalist understanding of family, in this way she makes it clear that heterosexuality as the formal sexual orientation of capitalism has a crucial role within economy/redistribution as well:

> The compulsory model of sexual exchange reproduces not only a sexuality constrained by reproduction, but a naturalized notion of 'sex' for which the role in reproduction is central.
>
> To the extent that naturalized sexes function to secure the heterosexual dyad as the holy structure of sexuality, they continue to underwrite kinship, legal and economic entitlement, and those practices that delimit what will be a socially recognizable person. To insist that the social forms of sexuality cannot only exceed but confound heterosexual kinship arrangements as well as reproduction is also to argue that what qualifies as a person and a sex will be radically altered—an argument that is not merely cultural, but which confirms the place of sexual regulation as a mode of producing the subject.

Fraser's argument associates with neo-liberal LGB rights politics, which is endorsed by the current human rights regime. Neo-liberal LGBTI politics

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[83] Nancy Fraser, *Justice Interrupts* (Psychology Press 1997) 18, 183.

[84] Judith Butler, 'Merely Cultural' (1998) I New Left Review 227.

focuses on legal recognition. Lisa Duggan critiques neo-liberal identity politics for separating identity and class, recognition and redistribution.[85] Moreover, Duggan asserts that recognition politics, such as the LGBTI rights concept, obscures redistribution politics.[86] She further maintains that identity politics which 'do not offer political economic critique are substituted for the radical critiques informing feminist, queer anti-racist creativity'.[87] However, Butler's understanding of recognition via cultural translation expands to redistribution. In this way, the unity suggested between recognition and redistribution politics or cultural and economics in Butler's 1997 article seems to emerge with the cultural translation process. Thus, despite the name, cultural translation is merely cultural as well. If we return to Duggan's insight, her analysis regarding the function of culture within the neo-liberal politics is very useful. She maintains that

> [t]he newly more visible conflict among elites is accompanied by an overlapping conflict over cultural politics. On one side is the residual strategy of cultural traditionalism deployed during the late twentieth century 'culture wars'—energetic attacks against 'multiculturalism'.… On the other side is a newly emergent 'equality' politics that supports 'diversity' and 'tolerance' but defines these in the narrowest terms, and entirely within the framework of globalist neoliberalism.[88]

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[85] Duggan (n 65) 15.

[86] Ibid.

[87] Ibid. 83.

[88] Ibid. 21.

This exchange between Fraser and Butler confirms that the universal versus culture/tradition argument is not merely cultural but entangled with ideology of neo-liberalism, which contaminates equality politics.[89]

If we return to the subversive rearticulation of the right to relate or the right to respect for private and family life (and marriage), in Turkey the subversive resignification should address the complex combination of issues that this rights concept triggers. Rights-claiming appears as a coalition politics that is driven by collective responsibility towards translating normative conditions for a livable life pertaining to LGB people. The notion of the human in human rights provides a productive basis for this praxis. Law/rights emerge through an accumulation of textual, discursive and bodily communications where diverse rearticulations submit themselves to be undone, which is a chance that becomes possible. The right to be possible and right to appear then becomes:

> I am open to a world that acts on me in ways that cannot be fully predicted or controlled in advance, and something about my openness is not, strictly speaking, under my control. That opening toward the world is not something that I can exactly will away. This social character of our persistence and our possible flourishing means that we have to take collective responsibility for overcoming conditions of induced precarity.[90]

When recognition within the limits of power compels the subject to cite its norms of intelligibility, the right to be possible, on the contrary, is a constant act taking the risk of becoming unintelligible in an aim to be intelligible. A constant act of bodily, discursive, textual, vocal performances that challenge the norms that limit possibility and claiming their right to be possible. In this way, those who are excluded from being possible, being real, being recognised – in Butler's

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[89] Butler, 'Merely Cultural' (n 84).

[90] Berbec (n 52).

articulation, 'the monster' – are translated to the language of intelligibility. In this translation the norms that govern the reality is exposed to its limits and changes in order to comprehend the unintelligible.[91] This process is challenging the limits of the possible and reconstituting possibility in the service of anew, which has not been constituted, or even fantasied about yet. She writes:

> Cultural translation is also a process of yielding our most fundamental categories, that is, seeing how and why they break up, require resignification when they encounter the limits of an available episteme: what is unknown or not yet known. It is crucial to recognize that the notion of the human will only be built over time in and by the process of cultural translation, where it is not a translation between two languages that stay enclosed, distinct, unified. But rather, translation will compel each language to change in order to apprehend the other, and this apprehension, at the limit of what is familiar, parochial, and already known, will be the occasion for both an ethical and social transformation. It will constitute a loss, a disorientation, but one in which the human stands a chance of coming into being anew.[92]

The permanent condition for a livable life goes beyond the concept of the right to life in the current human rights regime. The permanent type of law is always the right to be possible, in the sense that the right to be possible or the right to appear does not equal institutional protection and maintaining a form of biological life. It refers to bodily, textual, discursive and vocal performances that form the subject as an appearance but at the same time deconstruct the subject via the same performances in the service of possibility. Then, borrowing from Bhabha, it is a less imperialistic model for a new to enter into the world of delimited ways of being possible. Although it is newly introduced to the reality, it is indeed not new but had been excluded from being real. It is the fact that their

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[91] Butler, *Undoing Gender* (n 1) 37.

[92] Ibid. 37, 38.

reality had been disregarded, not recognised by the laws that distinguish what is possible/real from unreal/impossible.

The right to be possible is an open-ended act that enables the past, present and future possibilities to appear. As noted, Butler delineates the components of this subject constitution as bodily, discursive, textual, vocal, visual, acoustics and all the various performative acts.[93] This acknowledges the various authors that constitute the subject beyond and outside the subject. The right to appear corresponds to the right to be possible, in the sense that the right to appear safeguards the possibility of various being, doing and making.

The right to appear at the same time constitutes the subject without compelling it to cite pre-existing, historical forms of appearances. The right to appear does not constitute the subject as in the current human rights regime but safeguards their possibility and ensures that no historically entrenched norms that govern their recognition or appearance. It constitutes the subject as a possibility, especially in the public sphere. The public sphere then turns into the sphere of appearance, the realm of the possible.[94] The subject acknowledges that its possibility is not subjected to preconditions to appear.

7.6 Conclusion

Potential of transformation in translation flourishes when used in the service of cultural translation that unlocks possibilities continuously. Then the right to possible is a constant construction of possibility in the act of translation. To

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[93] Butler, *Notes Toward a Performative Theory of Assembly* (n 36) 20.

[94] Ibid. 36.

maintain the realm of the possible, the subject is exposed to various translations, various subversions in the pursuit of a less/non-imperialistic law-making.

Cultural translation as law-making consists of endless translations that aim to preserve the permanent rights category, the right to be possible, and the second category, discovering temporary conditions for a livable life. This is the foundation of law-making via cultural translation. In this way, cultural translation promises a non-imperialistic law-making.

Chapter 8 Conclusion

8.1 Introduction

This thesis analysed the current law/right-making method and proposed an alternative. It has been inspired by my personal and professional experiences as a lawyer and an activist within Turkey's LGBTI+ scene. My academic journey started with a desire to advance my knowledge about human rights mechanisms in order to ameliorate LGBTI+ lives in Turkey. However, I discovered that the problem was intrinsic to the human rights system itself. The idea that if human rights are recognised we would live in a better world collapses when the imperialistic features of it are unravelled. This causes us to lose hope regarding the possibility of pursuing a livable life. I wanted to restore my hope through unlocking possibilities for non-imperialistic law/right-making. While much literature concentrates on either deconstruction or implementation of human rights, in this research I manifest a fantasy – a very necessary fantasy – for those who still want to become possible in a non-imperialistic way but are left with delimited ways of being human within the human rights scheme.

The question of whether cultural translation could be an alternative law-making method to legal transplants proved to be no idle one. My research evaluated this question by putting the LGB rights concept and Turkey at the heart of its analyses. Although the case study is limited to LGB rights, the research applies to any rights category, including their fabrication and diffusion. Even though the case study country is Turkey, again this research method and findings apply to all countries as they either make or take rights.

8.2 Discoveries

At this final stage of the research, my findings proved that tackling the law-making method has been the right route to follow. The literature is dominated by questions like: why cannot the non-West implement LGB rights? In which ways does the non-West violate the rights of the LGB population? These types of question lead research to terrain where the emphasis is on determining the shortcomings of the non-West as against Western standards. In other words, it highlights, and thus consolidates, the undeveloped status of the non-West. Research trapped in this mindset is not capable of unravelling the imperialistic features embedded within the law-making processes. Thus, research that does not engage critically with these processes reinforces imperialistic patterns, where the West is the law-maker and the non-West is the law-taker (similar to the West being the coloniser and the non-West being the colonised). My methodology emancipated my research from these impediments.

Building the research on law/right-making method enabled me to discuss the imperialistic historical pattern embedded within both the emergence and diffusion of each rights concept. Without subjecting right-making and‐taking processes to scrutiny it would not be possible for problems entangled within the LGB rights concept to come to light. The literature is dominated by works that are either critical or receptive of the LGB rights concept. In my opinion, the LGB rights concept is a consequence of the current right-making method. My contribution falls on the critical side of the literature but my main critique is about the law/right-making method, not its production, namely the LGB rights concept, because being critical or receptive of this concept without tackling the fabrication process limits research to a binary culture versus universal crisis.

This famous culture versus universal debate creates a dead end that misleads research towards supporting one of the positions.

In every denominator which the West uses to distinguish the civilised from the savage, this historical pattern of imperialism is recreated. In previous centuries, the denominator of civilisation was harsh punishments assigned for homosexuality. In this century, the denominator of civilisation is recognition of the LGB rights concept. The denominator changes but the fact that the West governs the denominators and forces them upon the non-West has not changed. This research attempted to address this pattern embedded within the law/right-making processes. When considering the relationship between the West and the non-West regarding rights, the root cause of the problem is that the West introduces and reintroduces the legal benchmarks that distinguish the developed from the undeveloped. The current law-making method reinforces this governance of the West. The first part of my research, which I call the realm of delimited ways of being possible, is dedicated to deconstructing this current law-making method by following the process of imitation that it embodies. My choice of method and the questions I asked did not take my research towards imperialistic analyses. As such, I do not associate problems arising from the LGB rights concept with the non-West or its glorification with the West. Instead, the problem becomes how the LGB rights concept is fabricated, including its diffusion through the default law-making method, legal transplantation.

In addition to the questions I pursued, my deployment of imitation to deconstruct both processes of law-making and law-taking has produced very fruitful results. Discovering the common act within law-making and law-taking as imitation helped me to divide these processes into various acts of imitations.

This enabled me to analyse these processes through the denominator they have in common: imitation. Analysing these processes as a series of imitations emancipates the research from implementation of Western rights versus no rights dichotomy. Laws/rights in the West are fabricated through imitating structures of pre-existing laws/rights. Luhmann calls this method of legal production autopoietic.[1] To make new law/rights, autopoietic laws imitate structures from its realm and makes these laws/rights self-referential. Western law/right-making tradition follows the autopoietic fashion of imitation. It operates like a closed circuit, which produces and reproduces new rights in accordance with the pre-existing Western legal structures. Accordingly, law-making in the West involves imitation of its own legal structures. The opposite applies to the non-West. Although non-Western law-making also involves imitation, it is different from the West in that the non-West imitates foreign legal structures while Western-made laws refer to laws that repeat the previous Western legal structures.

The LGB rights concept has emerged within the West, imitating the pre-existing legal structures of the Western legal corpus. This LGB rights concept is now regarded as the only way to speak the rights of homosexuals. The right to respect for private and family life clause has been functional in deriving a new rights-bearer group. This group is created via various imitations. Another function of the LGB rights concept is the formation of a legally acceptable LGB subject. The international human rights system is equipped with the power to

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[1] See Niklas Luhmann, *Rechtssoziologie* (2nd ed. 1983) (English translation, *A Sociological Theory of Law*, E. King & M. Albrow trans. 2nd ed. 1985); Niklas Luhmann, 'Law as a Social System' (1988–1989) 83 Nw U L Rev 136.

create humans by granting rights. Then, the fabrication of the LGB rights concept also means humanisation of LGB individuals. However, this subject and law formation happens within the realm of delimited ways of being intelligible.

Following Butler, I explored every delimitation that comes with each imitation that occurred within the law-making process of the LGB rights concept. In Chapter 2, I started by examining the fabrication of the concept by means of imitating previous human rights structures within the legal realm of the West. Chasing the diffusion of the LGB rights concept, I analysed recent reactions to it in Turkey. As discussed in the second chapter, decriminalisation is often regarded as one of the first and founding stage of the LGB rights concept in a country. In Chapter 3, revisiting the history, I analysed the first legal imitation regarding the LGB rights concept within Ottoman/Turkish legal history. The vast majority of the literature regards that the Ottomans decriminalised homosexuality by implanting the French Penal Code in 1858. I investigated this claim of decriminalisation through Butler's lens. This allowed me to approach this legal implant as series of imitations. I broke down this law-making process into imitations it embodies and subject each imitation to scrutiny. The first imitation was the 1810 French Penal Code, which is believed to have decriminalised homosexuality. I compared the previous French Penal Code with the 1810 one to identify the penalty applied to same-sex intimacy. This comparison proved that penalties for same-sex intimacy had been relaxed, from the death penalty to no mention of any penalties for intimacy in the private sphere, and three months to one year of imprisonment for public intimacy. I used the same comparison method to the 1858 Ottoman Penal Code. The last

penal code prescribing penalty for same-sex intimacy had been the 15th-century penal code of Suleiman the Magnificent. In Suleiman's code, the penalty assigned for same-sex intimacy was monetary punishment. When compared to the 1858 Penal Code, which adopted the 1810 French Penal Code, private same-sex intimacy was not mentioned and public intimacy was penalised from three months to one year of imprisonment. According to this comparison, public same-sex intimacy was penalised heavier in the 1858 Ottoman Penal Code, which allegedly decriminalised homosexuality. In addition to this, the Ottomans were very lenient towards same-sex intimacy compared to France and other Western legislations. The penalty for same-sex intimacy had been monetary punishment from the 15th century to the 19th century in the Ottoman Empire, whereas it had been the death penalty in the West. However, credit for decriminalising of homosexuality in the private sphere was given to the 1810 French Penal Code. The Ottomans are deemed to have decriminalised homosexuality only because they imitated the 1810 French Penal Code. These standards were unintelligible to the Ottomans, because in their history same-sex intimacy had never been a major criminal act.

The decriminalisation of homosexuality must bring about better conditions for those who are attracted to people of their gender compared to times when same-sex intimacy had been criminalised. However, in the Ottoman example the opposite happened: homosexuality disappeared from the arts, social life and literature as well as legal texts. Therefore, the fact that the Ottomans transplanted the French Penal Code, which relaxed penalties for homosexuality, does not mean that the same results would be gained in the Ottoman realm. This imperialistic assessment criterion has not been capable of

determining a different penal history than the Western one. The Ottoman penal experience of same-sex intimacy was not intelligible to Western standards because the Ottoman/Turkish penal approach to homosexuality was assessed through an imperialistic lens. When we change the benchmark of this analysis and reanalyse these laws through a generic definition of decriminalisation instead of examining them through the Western concept of decriminalisation of homosexuality, the conclusion cannot be that the Ottomans decriminalised homosexuality in 1858. Decriminalisation of same-sex intimacy cannot be reduced to one single formula. Homosexuality disappeared from the Ottoman social, legal and artistic realm when the alleged decriminalisation happened. If the universalisation of the Western penal history was abandoned, if the decriminalisation of homosexuality assessment criteria was decolonised from its imperialistic formulations, then it could have been possible to see that homosexuality had been silenced in 1858.

This research has debunked a very common assessment that posits the Ottomans decriminalised homosexuality in 1858. Moreover, it also proved that the decriminalisation of homosexuality cannot be fixed and reduced to an absence of mentioning penalties for same-sex intimacy in the private sphere. Through this way, the decriminalisation of homosexuality criteria and assessments can be liberated from imperialistic features. Given that decriminalisation is the bedrock of the rights concept, the method I propose contributes to the decolonisation of the human rights of LGB individuals.

In Chapter 4, I explored the legal implants that took place in the Turkish Republic, which maintained its legal silence with regards to same-sex intimacy until 2011, a silence that had been broken by Suleiman the Magnificent's codes

in the 16th century. Until the late 19th century, same-sex intimacy had been bluntly mentioned in the legal texts. Only in 1986 did the Turkish parliament and Constitutional Court openly and briefly discuss de/criminalisation of homosexuality, two centuries after it was concluded that the decriminalisation happened according to Western standards.[2]

Again, after two centuries, a term defining same-sex intimacy, 'sexual orientation', entered the legal corpus of Turkey. The Turkish Republic ratified the Istanbul Convention, which includes sexual orientation in its text, in 2011. In this way, sexual orientation became part of the Turkish legal corpus. Ironically, sexual orientation was implanted to the lexicon simultaneously with a formal anti-LGB rights discourse. Turkish authorities and high-profile politicians including ministers and the prime minister, Recep Tayyip Erdoğan (who has been president since 2014), formed their sexual orientation policies upon the culture and tradition counterargument, essentially that homosexuality did not exist in their history and is deemed immoral. According to this argument, homosexuality is a foreign vice and against Turkish moral and family values. Pursuing the origins of the culture/tradition argument in Turkey takes us to the early years of the Turkish Republic, the 1920s, when the newly established parliament was discussing the republic's prospective legal system. Culture and tradition arguments were very widely articulated by MPs and intellectuals. The

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[2] Turkish Parliament Session: 111 Date: 11 June 1986 <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d17/c018/tbmm17018111.pdf> accessed 25 December 2016; Constitutional Court of Turkey, Date: 26 November 1986, Case No: 1985/8, Decision No:1986/27 <http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/a941ca57–4abb-4226–9308–42fe0a147c8e?excludeGerekce=False&wordsOnly=False> accessed 2 January 2017.

initial proponents of the culture/tradition argument at that time were against the implantation of Western legislation. At that time, the culture/tradition argument asserted that the Turkish Republic should maintain combining religious rules with Western legislation, following the late Ottomans. On the other side, secular voices were opposing this idea by arguing that the failure of the Ottomans happened due to the combining of Western and Islamic rules. These incompatible codes in one legal text impaired the holistic nature of each code, therefore the legal system collapsed. According to this secular strand, culture was represented in the national revolution. People had overthrown the Ottomans to establish a secular republic based on the Turkish nation. Therefore, Western laws should be implanted as a whole, without ruining their spirit by blending them with religious laws.

There is a rise in studies which unravel that many countries with a history of colonisation that criminalise homosexuality today have had a period in their culture when same-sex intimacy had not been condemned.[3] This period coincides with the time when Western standards were forced upon them. This research contributes to this line of discussion with its discussion of the Ottoman legal history. Although what happened in the former British colonies is the opposite of what happened in the Ottoman Empire – the former criminalised homosexuality and the latter allegedly decriminalised homosexuality via legal transplantation – the intersection is the interference of the West with law-making and its conclusions on the creation of culture/tradition argument with regards to

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[3] For further reading about the colonial anti-sodomy laws: Rahul Rao, 'A Tale of Two Atonements' in Dianne Otto (ed.), *Queering International Law* (Routledge 2017).

same-sex intimacy. The Ottoman legal history proved that same-sex intimacy was part of their culture/tradition. However, the culture/tradition argument ignores this period of history. Then what is really meant by culture/tradition becomes obscure owing to a long chain of legal transplantation. On the one hand, the culture/tradition argument is critical of imperialist tendencies of the West that governs, and thus updates, the denominators of civilisation. On the other hand, it consolidates the imperialistic approach, which overlooks the non-West's legal history by removing some period of their history from their formal culture discourse. Then, Turkey's culture/tradition argument is constructed in the present upon an imaginary past, which also confirms my argument that legal transplantation not only changes the present laws but also retroactively manipulates legal history. This process makes non-Western legal history disappear and turn the right-making into a conversation among different phases of Western history. This explains the fact that the non-West builds its culture argument on previous Western arguments on same-sex intimacy. The non-West does not exist in this process despite strongly producing culture/tradition arguments. The reason is legal transplantation. This further approved my pursuit for an alternative law-making method.

Using imitation as a key concept not only allowed me to deconstruct the law-making process of legal transplantation; it also provided an alternative method to this law-making method. Following Loizidou's insight into the dual deployment of law in Butler's works, set out in the first part of this thesis, the realm of delimited ways of being possible, I analysed the imperialistic power

intrinsic in law-making.[4] In the second part, the realm of the possible, I discussed a new law-making method that paradoxically arises from the same imitation act embedded within the process of legal transplantation. In the realm of the possible, I applied cultural translation as an alternative to legal transplantation. If legal transplantation creates law and subjects imperialistically, cultural translation is a method for the excluded to enter into our world without the limits imposed by imperialistic subject creation. My discussion in Chapter 6 is mainly theoretical, where I posed questions which critically assesses the applicability of cultural translation as law-making. In that chapter I provided a contextual bedrock that would allow us to imagine a less imperialistic law-making method. Because the main impediment is that legal transplantation is taken for granted, a new law-making is not even fantasised. For this reason, in Chapter 7 doctrinal analyses are accompanied with discussions on the praxis of cultural translation. Cultural translation is a relentless performance that stages, instead of assimilating, the difference. In fact, cultural translation creates a possibility, a space for resistance, thus not allowing concepts to obey the pre-existing structures at the expense of recognition. Drawing upon my readings of Butler, I identified a number of principles that are prerequisites for law-making via cultural translation to happen. First of all, norms are discovered; they are not known in advance. This not only challenges the original versus copy dichotomy but also guarantees the unpredictability and instability of the right concepts.

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[4] Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (Routledge 2007) 126; Elena Loizidou, 'Butler and Life: law, sovereignty, power' in Terrel Carver and Samuel A. Chambers (eds), *Precarious Politics: Critical Encounters* (Routledge 2008).

Instability and unpredictability ensure that concepts are not governed by the West or by any other power.

Performative contradiction, perverse reiteration and subversive resignification are the instruments of this discovery of rights process: cultural translation. Translation is the law among different articulations and rearticulations of rights. There are two types of rights produced via cultural translation. The first is a permanent rights category: possibility as the norm. This guarantees the right to be possible by constantly breaking the scene of constraints. The desire for recognition is in a way a desire to becoming a possibility. Then possibility as the norm is an imperative for a recognition that does not compel speaking a certain, single language of human rights in order to be intelligible. Instead, the multidimensional translation act takes up this role and subverts the one-way translation that the current law-making method solicits.

The second type of rights categories is temporary rights. These emerge through imitation. In this way, the imitated rights category is subjected to subversive resignification to discover temporary normative conditions for a livable life. In cultural translation, the LGB rights concept becomes the temporary normative conditions for a livable life for LGB people. In this research I demonstrated how we could apply cultural translation on the right to marry through subjecting it to subversive resignification as the right to relate. The thesis continued with the right to appear, the right to a livable life and the right to be possible. These rights categories have been discovered in my experience of cultural translation, therefore they can be articulated in many different ways by other practitioners of cultural translation. My endeavour was to translate my fantasy of a less imperialistic right-making to all stakeholders.

Cultural translation as law-making can operate in any part of the world. Despite the expectation I might have created in the previous chapters, I did not focus on Turkey and list what it should do to incorporate cultural translation as a law-making method. This was done deliberately to emancipate the research from imperialistic tendencies, which postulate that the non-West is always expected to implement Western laws, structures and methods. The common attitude is telling non-West what to do. Instead I used Turkey to expose the limits of Western law-making regarding the LGB rights concept. Turkey's experience with the LGB rights concept played the role of the 'return of the excluded' in cultural translation, as discussed in Chapter 5.

8.3 Possibilities left unexplored

Fantasising a different way of law-making has been a struggle. Despite all the limitations, I have an affirmative answer to the main question I pursued throughout the thesis. Yes, cultural translation can be an alternative to legal transplantation as a law-making method. Cultural translation is capable of producing less imperialistic laws. Improving cultural translation as a law-making method will be one of my future research avenues. This has been the start of my research on cultural translation as law-making. Taking this research as a foundation, I will develop this law-making method in the future. This thesis proved that another law-making method is possible. Building upon the findings of this thesis, I will endeavour to manifest cultural translation as law-making through different examples and research topics. This thesis only laid the foundation for these future studies, especially research that places transgender and intersex rights at the heart of the analyses. In the future, I plan to expand

the LGB rights concept to that of the LGBTI+ one and further elaborate on the praxis of cultural translation.

There are also various imitations left to pursue and analyse. For example, the penal history of the Ottoman Empire with regards to SOGI issues has been a long-neglected area in academia. I would like to continue researching SOGI legal history. One of the core findings of this research is that same-sex intimacy and its legal regulation did not start within the West. There has been a vivid and open discussion in terms of legal status of same-sex intimacy in the Ottoman era.

If space had permitted, I would have liked to explore more on the relationship between privatisation and the private sphere. Doing so would allow me to discover the foundations of the LGB rights concept and its cohesion with neo-liberalism. The decriminalisation of homosexuality is a taken-for-granted concept, albeit built upon the division of public/private sphere as a result of liberal thought. However, the link between liberal/neo-liberal privatisation policies and protection of private sphere has not been examined sufficiently in a way that could shed a light on how privatisation, the private sphere and the decriminalisation of homosexuality are interlinked concepts.

I would also like to expand my research to the role of the current law-making method and the LGB rights concept within ethnic conflicts. In the Israel–Palestine conflict Israel portrays a pro-LGBTI attitude and in the Turkey/Syria–Rojava conflict some components of the Rojava revolution manifested themselves as a queer liberation brigade. Using cultural translation as a guide I would like to examine possibilities arising within the Middle East focusing on

these two conflicts and its reflections on SOGI-related issues and law/right-making.

8.4 Conclusion

To conclude, this research was inspired by my experience as a lawyer and activist within the LGBTI+ movement in the Third World, namely Turkey. It developed into a pursuit for a new right-making method. My research findings do not only target Turkey's law-making method, legal transplantation. My conclusion is that law-making in the West and in the non-West can be replaced with cultural translation for a less imperialistic law-making, which is actually beyond making, discovering rights.

Using imitation advanced by Butler as a key concept to deconstruct LGB right-making in the West and non-West proved to be a very fruitful method. Following every single imitation relevant to the LGB rights concept from history to the present day directed the research towards a space for resistance, which again arises from this very act of imitation. Therefore, imitation proved to be the component of both imperialistic law-making – legal transplantation – and its less imperialistic alternative, cultural translation. Without discussing an alternative, critiques surrounding the LGB rights concept causes despair among the LGBTI+ community. At least this had been my experience and observation. For this reason, my main inspiration in writing up this thesis has been a pledge for hope. When the neo-liberal human rights system appears to be in the service of homocapitalism, then how can we decolonise the rights and reclaim them through a different right-making method? My hope for the future of right-making regarding LGB people has been restored during this research.

Ostensibly, my research challenges sexual orientation and human rights studies. My research findings question the assessment criteria used in the de/criminalisation of same-sex intimacy. My extrapolation on the culture/tradition arguments reveals that LGB rights have been a core element within the state-level politics for longer than they are portrayed to have been. Regardless of the terminology used in different time periods, same-sex intimacy has had a role within the field of international politics – sometimes in the service of colonialism, sometimes capitalism and neo-liberalism. These ideologies should not be allowed to contaminate LGB politics and efforts for a better world for all. Decolonising the LGB human rights struggle is a necessity and a possibility, if we create the realm of the possible via cultural translation. For those who are trapped within the dichotomy of culture versus universal, human rights versus no rights, civilised versus savage, law-making via cultural translation rebuilds a politics of hope, not only for those in the non-West but for the West as well.

Glossary

i. Lesbian, gay and bisexual versus queer

Engagement of the lesbian–gay liberation movement with identity politics is understandable through the trends in the political environment at the time of its emergence.[1] Identity politics made it possible to construct an identity from same-sex desire, which has not been allowed to the public realm in spite of constituting an innate, congenital and fixed category. The core argument of the lesbian–gay movement was claiming naturality, thereby equalising same-sex and opposite-sex attractions. Marjorie Garber profoundly challenges the argument that builds itself on the naturality of same-sex attraction by asking that 'If science can prove that homosexuality isn't a choice, what is to prevent its being repathologized and either cured or therapeutically aborted after prenatal testing discloses the presence of the gay gene?'[2] Garber's point was materialised when the so-called AIDS crisis hit the lesbian–gay movement. HIV was presented as a gay virus, and in this way disease and gay terms were again re-established.[3] The AIDS crisis and equalling LGBs, gay men especially, with HIV compelled the movement to review the negative outcomes of its emphasis on biology and triggered the divergence from identity politics.[4]

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[1] Fred Fejes, *Gay Rights and Moral Panic* (Palgrave Macmillan 2008) 5–11.

[2] Marjorie Garber, 'The Return to Biology' in Iain Morland and Annabelle Willox (eds), *Readers in Cultural Criticism – Queer Theor*y (Palgrave Macmillan, 2005).

[3] Mary Bernstein, 'Identities and Politics, Toward a Historical Understanding of the Lesbian and Gay Movement' (2002) 26(3) Social Science History 531–581.

[4] Ibid.

On the other hand, there were some other scholars who were critical of the creation of fixed identities of LGBTI and arguments around naturality.[5] Thus, queer theory emerged as opposed to the modern manifestation of same-sex attraction.[6] Judith Butler, one of the leading queer scholars, precisely pointed out that the LGBTI movement that is operating through the guidance of identity politics, which could only strengthen the naturalisation of heterosexuality. Her approach to what is natural or original can be grasped through her words: 'gender is a kind of imitation for which there is no original'.[7] According to her perspective, illustrating variations of sexual orientations through binarism, like heterosexual and homosexual or gay and straight, serves the phantasmatic ideal of heterosexuality.[8] It seems to be that, as long as the binary structures are affirmed, there will be the institutionally armed heterosexual against the homosexual who experienced criminalisation and being diagnosed throughout history who is demanding the same status. Within this battle, without questioning the gender regime that has strengthened heterosexuality with those privileges that served maintaining the central position of heterosexuality, it is doubtful that imitating the heterosexual model under the name of liberation would go beyond strengthening the gender regime based on heterosexuality. That is why, instead of LGBTI, homosexual or homophile, they tend to use

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[5] Suzanna Danuta Walters, 'From Here to Queer: Radical Feminism, Post-modernism, and the Lesbian Menace' in Iain Morland and Annabelle Willox (eds), *Readers in Cultural Criticism – Queer Theory* (Palgrave Macmillan 2005).

[6] Ibid.

[7] Judith Butler, 'Imitation and Gender Insubordination' in Henry Abelove (ed.), *The Lesbian and Gay Studies Reader* (Routledge 1993) 307–320.

[8] Ibid.

queer, which refers to non-normative sexual and gender performances and also has no affiliation with binary oppositions. It is indispensable to note that there is an analogy between the belief that liberty is possible via transplanting laws from Western countries and the idea that assumes that the liberation of LGBTIs is equivalent to imitating laws that regulate and protect heterosexuality. These corresponding notions will be tackled throughout the whole thesis.

If we go back and have a brief review of the terms used for same-sex attraction, it will be observed that gay and lesbian terms emerged from the movement. Homophile was the first term deployed by the movement. Homosexual has never been embraced. Those who were called homosexual by science, law and society have chosen after Stonewall to be called lesbian and gay.[9] Stonewall was a milestone for LGBTI movement; it represents a shift in the same-sex movement. However, Halberstam disagrees with that notion by arguing that Stonewall can only be representative for male gays; it is widely considered a LGBTI riot.[10] Thus, gay and lesbian terms emanated as a political stance against criminalisation, the medicalisation of the same-sex phenomenon and the homophile movement's emphasis on assimilation policies.[11]

Examining this process yields significant facts about same-sex terminology. The terms gay and lesbian were developed within the same-sex community. However, homosexual was coined by outsiders. Yet, queer constitutes a different case: in spite of being a pejorative for homosexuals, its denotation was

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[9] Annamarie Jagose, *Queer Theory* (Melbourne University Press 1996) 32.

[10] Ibid.

[11] Ibid. 30.

reversed and embraced by LGBTs. Some argued that queer pre-existed before the terms homosexual and gay/lesbian: queer used to refer to non-feminine homosexuals and gay to feminine ones.[12] Recalling the binary oppositions, traces of masculine/feminine dichotomy on LGBTI terminology can be detected in that reference. However, queer's meaning was reclaimed from a negative denotation to a self-proud concept. This process is called linguistic reclamation.[13] One might argue that gay as a word also first initiated with a meaning that was different from homosexual. However, gay's original meaning – joyful and happy – did not connote a negative meaning, as queer did.[14]

The reclamation of the pejorative word queer has occurred in two ways. Firstly, self-identification: those who acknowledge queer theory and prefer to be called queer as a political stance. In that sense, queer refers to being against heterosexism and heteronormativity.[15] It should be emphasised that the gay liberation movement had also begun with a political stance, though it turned into a movement that is willing to fit in the heterosexual structures under the name of equality. Besides, despite being started as a mixed movement, it was superseded by male gays, which led lesbians to identify themselves through the

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[12] Robin Brontsema, 'A Queer Revolution: Reconceptualizing the Debate over Linguistic Reclamation' (2004) 17(1) Colorado Research in Linguistics.

[13] Ibid.

[14] Kevin Cedrick R. Castro, 'Gay: To Say or Not to Say' (2 February 2012) <https://www.academia.edu/1475457/_Gay_To_Say_or_not_to_Say> accessed 26 August 2014.

[15] Queer Problems, 'The Positive Reclamation of Queer' <http://www.queerproblems.com/post/75828183433/the-positive-reclamation-of-queer> accessed 20 August 2014.

feminist movement.[16] In an interview with Cherry Smith, she draws attention to queer's potential to merge lesbian feminism and gay liberation.[17]

Secondly, queer has been used as a synonym of gay without any affiliation to queer theory.[18] In particular, popular culture such as mainstream dramas like *Queer as Folk* played a role in the diffusion of the term as a substitute for gay.[19] However, as with the male emphasis on the term gay, the popular usage of queer also evokes male homosexuality. Consequently, queer, in that mainstream sense, does not offer any shift and consequently is not a useful term to be preferred by research.

As a theory, queer offers a way out for the movement from the narrow dilemmas like natural or preference, normal or deviance, heterosexual or homosexual and straight or gay. It is more a postmodern ideology for gender issues rather than a definition for a sexual orientation. On the one hand, it saves sexual orientations to be reduced to a long list of letters like LGBTI and functions as an umbrella term by claiming to cover all varieties of oppressed non-bilateral sexual expressions. On the other hand, it requires an objection to the modern way of identifying sexualities.

There are also alternative terminologies like pomosexual (postmodern sexual who are not grasping sexuality via identity politics) or pansexual (who are

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[16] Cherry Smyth and Amy Hamilton, 'Interview: Queer Notions' (1992) 22(9) Off Our Backs 12–15.

[17] Ibid.

[18] Brontsema (n 12).

[19] Ibid.

attracted to all gender and sexual orientations), which lately appeared to supplant queer. As precisely articulated by Elizabeth Autumn, 'In the most basic sense, pansexuality can be an identity claimed by individuals in LGBTQ communities, whereas, more often than not, pomosexuality is an umbrella term used to describe political resistance that encompasses identities and concepts that are unknown, unnamed, or otherwise completely transgressive'.[20] Or, from a different perspective, 'pomosexuality' is '[t]he queer erotic reality beyond the boundaries of gender, separatism, and essentialist notions of sexual orientation'.[21] It seems to be that reconceptualising the same-sex phenomenon and any other resistant sexual existence will not end, even though queer theory seems to encapsulate all most all of the marginalised sexual expressions.

Gay/lesbian terms emerged from identity politics, which was on the rise in the modern era. Afterwards, queer theory was developed as a reaction to identity politics. The term queer emerged as a substitute for LGBTI in contemporary times.[22] However, queer theory's aim is to subvert the concept of identities including LGBTI, which are, according to queer standpoint, unified and generalised categories deriving from modern thought.[23] The terminology debate is still ongoing and some LGBTI individuals tend not to use queer instead of

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[20] Elizabeth Autumn, 'Challenging the Binary: Sexual Identity That Is Not Duality' (2013) 13 Journal of Bisexuality 329.

[21] Carol Queen and Lawrence Schimel, *Pomosexuals: Challenging Assumptions About Gender and Sexuality* (Cleis Press 1997).

[22] Jagose (n 9) 108.

[23] Steven Seidman, *Difference Troubles: Queering Social Theory and Sexual Politics* (Cambridge University Press 1997).

gay/lesbian, arguing that this would lead LGBTIs losing their achievements: those are attached to gay/lesbian terms and gained through identity politics.

The controversial issue within the recent discussions of terminology of same-sex relations has been whether to pursue an identity and equality struggle and consequently stick to gay/lesbian identity categories or to disaffirm all identity politics. This thesis uses lesbian, gay and bisexual predominantly, although some scholars prefer to use 'sexual orientation' or SOGI while analysing same-sex attraction and gender identity. Although heterosexuality also falls under the term 'sexual orientation', Kees Waaldijk argues that the term 'sexual orientation' refers to same-sex relationships within the legal glossary. As Butler uses lesbian and gay while discussing the human rights concept, I follow her in this sense, for the sake of consistency, and I also think that the term LGB rights reflects the performatively fabricated nature of this concept successfully. I also use sexual orientation and gender identity (SOGI), homosexual, same-sex intimacy, same-sex desire, same-sex relationships throughout the thesis.

As a final note, I must add that this terminology discussion occurs within the Western episteme. None of the terms that have been used to define same-sex intimacy by non-West is mentioned within the terminology discussions. This reflects the hegemony of the West within the human rights of LGB people.

ii. Why LGB not LGBTI rights?

As explained in the first footnote of this thesis, the reason I do not expand my analysis to LGBTI rights, but rather narrow it down to the LGB rights concept, is solely academic. I initially used the LGBTI rights concept. Despite my eagerness to maintain the research on the LGBTI rights concept, I came to an

understanding that I must narrow down my focus owing to the different legal paths that sexual orientation and gender identity follow. The limits of the PhD thesis compelled me to choose between body politics and same-sex attraction. This is how I ended up focusing on the LGB rights concept.

iii. What are LGB rights? And what do I mean by the LGB rights concept?

The reason I prefer LGB rights rather than queer rights is that the LGB rights concept profoundly sits in the heart of the human rights concept, which is what this thesis problematises. Robert Wintemute classifies human rights as basic rights, individual rights and couple/love rights. According to his taxonomy, basic rights apply to everyone regardless of their sexual orientation, whereas individual and couple rights can be identified as LGB rights because adherence to these categories happens owing to the sexual orientation of a person.

What I understand from the LGB rights concept is that formation of new right holders from the pre-existing human rights categories. It is constructing a legally recognisable LGB subject that concurrently humanises the LGB subject via granting rights. In this sense it is performative and thus has discursive, material, bodily ontological effects on the subject humanises them. Accordingly, the LGB rights concept mirrors this thesis's trajectory of analysing the issue. It refers to a new set of rights in the sense that Butler profoundly describes what new entails:

> The genders I have in mind have been in existence for a long time, but they have not been admitted into the terms that govern reality, so it is a question of developing within law, psychiatry, social, and literary theory a new legitimating lexicon for the gender complexity that we have been living with for a long time. Because the norms governing reality have not admitted these forms to be real, we will, of necessity, call them 'new'.[24]

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[24] Judith Butler, *Undoing Gender* (Routledge 2004) 219.

In this thesis the LGB rights concept refers to the inclusion of the LGB subject to the already-existing legal conventions and rights categories. It expands to states' acknowledgement of the fact that LGB individuals fall within the scope of everyone and thus are not limited to individual rights. The LGB rights concept emerges by establishing a legal subject who is worthy of state protection. As such, the LGB rights concept starts with the recognition of everyone, including lesbian and gays, in other words the moment when the emphasis on everyone within the fundamental rights is no longer ambivalent and when the LGB individual is openly and explicitly visible within the everyone phrase. Throughout this research this moment will be addressed as the humanisation of the LGB individual through granting rights performatively. To sum up, the LGB rights concept starts when the LGB individuals are legally admitted to human rights protection. I am using the LGB rights concept instead of LGB rights to highlight the fact that there could be various versions of LGB rights: however, owing to their being compelled to the current single rights regime, we are limited to the current LGB rights structure. My aim is to underline this fact and remind us that this version of the LGB rights concept arrives from a long history of imperialistic right-making processes.

iv. Neo-liberalism

Neo-liberalism is the dominant ideology that is believed to govern today's world. The most commonly referred definition is provided by David Harvey:

> Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an

> institutional framework characterized by strong private property rights, free markets and free trade.[25]

I consider that the current regime of human rights also operates through neo-liberal values. In this sense, the diffusion of law/rights is not dissimilar from the free trade motto. John Nuyet Erni describes this rights trade as rights assets:

> [I] suggest that global neo-liberal governance allows not only capital assets to operate across borders, but also a second kind of thing: what I call 'rights assets' to be produced and distributed across borders. Global neo-liberal governance opens economic markets as well as what can be crudely called 'humanitarian markets.' A 'rights asset' is something a state or a group of networked states can invest in, such as setting up inter-state environmental protection agreements, cooperative HIV prevention schemes, or coordinated programs to accept and accommodate refugees.[26]

Therefore, rights/laws travelling from one jurisdiction to another follows the economic matrix of neo-liberalism. Then legal transplantation is a core concept within the neo-liberal economy, through which rights are becoming assets that are made in the West and exported to the non-West following the other goods in the market and developing countries are disabled from the production of goods and laws.

v. Imperialism

My use of imperialism in this thesis postulates the extension of Western power to the non-West. This means that the non-West is governed by the West. This can happen under the name of colonialism or capitalism or under any other legally valid instruments.

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[25] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005) 2.

[26] John Nguyet Erni, 'Human Rights in The Neo-Liberal Imagination' (2009) 23(3) Cultural Studies 417–436.

I also acknowledge that West is not a singular unit of power. I first highlighted this fact in the thesis by using non/less-West. However, mentioning ‘non/less’ every time I used West became eye-straining. For readers’ information, I noted in Chapter 1 that every non-West means non/less-West.

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