


ORIGINAL ARTICLE

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# BinaryTech in motion: The sexgender in the European Court of Human Rights jurisprudence

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## Abstract

Sexgender has become politicized by neo-conservative and populist movements in Europe and elsewhere. This article explores how the sexgender binary is foundational to the social and material construction of the non-heterosexual legal subject and unveils binary hierarchies embedded therein. Furthermore, it develops a new materialist methodology called BinaryTech, which exposes the binary formulas of inequality and difference in the Court's jurisprudence. This new materialist approach, based on Karen Barad's agential realism, is used to critically examine how differences are produced as stable features of subjects and objects. The human of the Convention being heterosexual is thereby the result, constructed on material-discursive differentiation of non-heterosexuals. The article concludes by describing how new materialist interventions and Nordic feminist perspectives on law can offer valuable insights within the emerging material turn.

**Keywords:** BinaryTech; ECtHR; feminism; LGBTI; new materialism; posthumanism

## 1. Introduction

The European Union Agency for Fundamental Rights (FRA) report paints a picture of varying degrees of discrimination faced by non-heterosexual people across Europe and shows an increase in the proportion of the LGBTI population experiencing discrimination from 37 per cent in 2012 to 43 per cent in 2019.<sup>1</sup> For example, non-heterosexuals have been scapegoated by politicians across Europe; in Norway two people were killed and 20 wounded in an attack outside an Oslo LGBTI bar in 2022;<sup>2</sup> and in the United Kingdom, a 16-year-old trans girl was sadistically killed by teenagers in 2023.<sup>3</sup> Not to mention the vicious large-scale anti-gay purges of 2017 and the 2019

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<sup>1</sup>European Union Agency for Fundamental Rights (FRA), *A Long Way to Go for LGBTI Equality* (2020), 10.

<sup>2</sup>ILGA-Europe, *2023 Annual Report of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia* (2023).

<sup>3</sup>H. Pidd, 'Teenagers guilty of "senseless" murder of transgender Girl Brianna Grey', *Guardian*, 20 December 2023.

crackdown during which gay men were tortured by the police<sup>4</sup> in Chechnya, Russia, at that time a member of the Council of Europe.<sup>5</sup> This hostility towards LGBTI people is advocated by the same actors who are targeting women's reproductive rights as part of the global so-called anti-gender movements.<sup>6</sup> The legally- and socially constructed gendered difference<sup>7</sup> of LGBTI<sup>8</sup> and non-binary<sup>9</sup> people has become politicized by neo-conservative and populist movements<sup>10</sup> in Europe and in Nordic countries despite the region's high rankings in gender equality.<sup>11</sup>

The European Court of Human Rights (ECtHR, the Court) has been an important site for gradual inclusion of non-heterosexual people under the protective scope of the European Convention on Human Rights (ECHR, the Convention).<sup>12</sup> Despite the improvement of non-heterosexual peoples' rights, even today non-heterosexual people do not enjoy equal access to all the rights enumerated in the Convention, for instance access to marriage.<sup>13</sup>

The aims of this article are threefold: First, this article unearths how the *sexgender*<sup>14</sup> male/female binary is foundational for the heterosexuality/non-heterosexuality binary, and how those binaries are also hierarchies of power<sup>15</sup> embedded in the Court's jurisprudence. I use the concepts of female non-heterosexuality and male non-heterosexuality respectively.<sup>16</sup> Power relations between non-heterosexuals appear in differing hierarchies in the Court's case law. The Court forms and defines its subjects by granting or denying protection under the Convention. The second aim is to further Judith Butler's influential theory of gender performativity by exploring how not only discourses, but also material factors (matter in its physicality) are important in the process of materialization, as noted by Karen Barad.<sup>17</sup> To achieve the second aim, I rely on critical discourse analysis.<sup>18</sup> Through new materialism, I also explore how the legal subject is more than a

<sup>4</sup>Human Rights Watch, 'Russia: New Anti-Gay Crackdown in Chechnya', 8 May 2019, available at [www.hrw.org/news/2019/05/08/russia-new-anti-gay-crackdown-chechnya](http://www.hrw.org/news/2019/05/08/russia-new-anti-gay-crackdown-chechnya).

<sup>5</sup>COE Press Release, 16 March 2022.

<sup>6</sup>R. Kuhar and D. Paternotte, *Anti-Gender Campaigns in Europe: Mobilizing against Equality* (2017).

<sup>7</sup>J. Niemi-Kiesiläinen et al., 'Legal Texts as Discourses', in E.-M. Svensson et al. (eds.), *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (2007), 69.

<sup>8</sup>Lesbian, gay, bi, trans, and intersex.

<sup>9</sup>Non-binary people may identify as an intermediate or separate third gender, identify with more than one gender, no gender, or have a fluctuating gender identity.

<sup>10</sup>H. McEwen and L. Narayanaswamy, *The International Anti-Gender Movement Understanding the Rise of Anti-Gender Discourses in the Context of Development, Human Rights and Social Protection* (2023); K. Giritli-Nygren et al., 'Gender Equality and Beyond: At the Crossroads of Neoliberalism, Anti-Gender Movements, "European" Values, and Normative Reiterations in the Nordic Model', (2018) 6 *Social Inclusion* 1.

<sup>11</sup>A. Hellum et al. (eds.), *Nordic Equality and Anti-Discrimination Laws in the Throes of Change* (2023).

<sup>12</sup>P. Johnson, *Homosexuality and the European Court of Human Rights* (2013).

<sup>13</sup>D. A. Gonzalez-Salzburg, *Sexuality and Transsexuality under the European Convention on Human Rights* (2019).

<sup>14</sup>Posthuman feminism renders the sex/gender distinction obsolete because gender is a grid that captures and codes sexuate matter. See J. Scott, 'Gender: A Useful Category for Historical Analysis', (1986) 91 *American Historical Review* 1053. I am using the term *sexgender* inspired by Donna Haraway's *naturecultures*. The sex/gender dichotomy is a central nature/culture dichotomy, but where does one's sex end and gender begin? 'New materialism shows how the mind is always already material (the mind is an idea of the body), how matter is necessarily something of the mind (the mind has the body as its object), and how nature and culture are always already "naturecultures" (Donna Haraway's term).' I. Van der Tuin and R. Dolphijn, *New Materialism: Interviews & Cartographies* (2012), 48; M. Davies, *Law Unlimited* (2017), 38.

<sup>15</sup>Jacques Derrida reasoned that language prefers hierarchies that are based on false dichotomies that we take for granted as 'truths' as the basis of his deconstructive method. See J. Derrida, *Limited Inc* (1988).

<sup>16</sup>I am using the term non-heterosexual, which also includes people who do not identify themselves only as other than heterosexual, but also as other than LGBTI+, for instance, men who have sex with men, women who have sex with women, questioning and bi-curious. Also using the term, it highlights the normalized and hegemonic position of heterosexuality as the taken-for-granted knowledge for social organization.

<sup>17</sup>On how to take account of the material constraints, the material dimensions of agency, and the material dimensions of regulatory practices see K. Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (2007), at 191–4; K. Barad, 'Posthumanist Performativity: Toward an Understanding of How Matter Comes to Matter', (2003) 28 *Signs: Journal of Women in Culture and Society* 801.

<sup>18</sup>See Niemi-Kiesiläinen et al., *supra* note 7.

linguistic construct in the Court's jurisprudence and address the significance of physical matter (bodies, spaces) in the process. The third aim is logically derived from the first two and further develops an experimental new materialist methodology called BinaryTech, which is a formula for exposing sexgendered power structures in the ECtHR jurisprudence. Methodologically, BinaryTech allows us to delve into how the human is a material-discursive phenomenon and enables a systematic analysis of how bodies are valued in the Court's jurisprudence. Thus, it brings the materiality of sexgender hierarchies to the fore.

The research questions are: How does the binary understanding of male/female and hetero/non-hetero manifest itself through the selected case law? What kind of material-discursive human can be derived from the set of case law concerning non-heterosexuals? And thus, how do these binaries affect the subject's ontology? The development of BinaryTech opens new paths to understanding and accounting for how the law matters in and through bodies<sup>19</sup> in the selected case law.

The article is organized in four sections. I will briefly map the current state of the art of Nordic feminist perspectives on law and the material turn in Section 2.1, the theoretical foundations of BinaryTech methodology in Section 2.2, and the methodology's functioning in Section 2.3. Section 3 is dedicated to reading of the ECtHR case law through BinaryTech. Section 4 sums up the results and offers conclusions.

## 2. From the linguistic turn towards the material turn via Nordic feminist perspectives on law

During the past 30 years the core feminist and queer theoretical innovations have emerged from often radical and always interdisciplinary practices that called themselves 'studies'.<sup>20</sup> These studies owe a great deal to postmodernism and the linguistic turn of the 1960s.<sup>21</sup> The discourses emerging from 'the studies' created a set of radical epistemologies that have brought the situated knowledge of the structural 'others' into the scope of scientific discussion<sup>22</sup> by questioning the paradigmatic conception of the human.<sup>23</sup> Judith Butler, coming from 'the [gender] studies', influenced by Michel Foucault, recognizes the performativity of law as a form of discursive subject-production that leads to the creation of a subject that is represented by the very same systems of judicial power that produced it.<sup>24</sup> Butler recognizes that discourses materialize in making a human intelligible as a sexualized subject through performativity. The performativity takes place within the heterosexual matrix<sup>25</sup> which in turn is based on the sexgender binary. The heterosexual matrix is the source of structural 'otherness'. The structurally 'othered' non-heterosexual subjectivities

<sup>19</sup>J. Käll, 'The Potential for New Materialist Justice via Nordic Feminist Perspectives of Law', (2020) 3 *Nordic Journal on Law and Society* 1; J. Aalto, 'Nordic Feminist Perspectives on Law, New Materialist Insights, and the Renewal of the Finnish Personal Identification Code', (2021) 44 *Retfærd* 23.

<sup>20</sup>R. Braidotti, *Posthuman Knowledge* (2019), 'Women's, Gay and Lesbian, Gender, Feminist and Queer Studies; Race, Postcolonial and Subaltern Studies, alongside Cultural Studies'. Braidotti uses this as an example of innovation happening outside the discursive limitations of well-established disciplines. Eva-Maria Svensson identified early that the intra-legal disciplinary boundary must be methodologically overcome for providing meaningful analysis about substantive equality in terms of gender relation (genusrelation). See E.-M. Svensson, *Genus Och Rätt - En Problematisering Av Föreställningen Om Rätten* (1997), at 22.

<sup>21</sup>Coole and Frost argue that 'foregrounding material factors and reconfiguring our very understanding of matter are prerequisites for any plausible account of coexistence and its conditions in the twenty-first century'. D. Coole and S. Frost (eds.), *Introducing the New Materialisms* (2010), at 2; S. Alaimo and S. Hekman, 'Introduction: Emerging Models of Materiality in Feminist Theory', in S. Alaimo and S. Hekman, *Material Feminisms* (2008), 1.

<sup>22</sup>For postcolonial subaltern studies in law see, e.g., B. Rajagopal, *International Law from Below* (2003).

<sup>23</sup>See Braidotti, *supra* note at 20, at 104–5; Ratna Kapur argues that the future of human rights rests in transformative engagement with non-liberal registers outside the liberal fishbowl. Critique of liberalism is outside the scope of this article. R. Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (2018).

<sup>24</sup>J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1995), at 2.

<sup>25</sup>*Ibid.*, at 47–105.

have been addressed from ‘the studies’ – perspectives<sup>26</sup> such as feminism and queer.<sup>27</sup> In legal scholarship, more precisely in the ECtHR context,<sup>28</sup> the Court has been identified as a site where, *inter alia*, discourses about sexuality become part of the normalizing law as normative ‘truths’. Previous research demonstrates how the Court discursively defines the presumed legal subjects.<sup>29</sup> The existing critical scholarship on discursive subject formation at the ECtHR has relied *inter alia* on discourse analysis,<sup>30</sup> social construction, and deconstruction.<sup>31</sup>

The linguistic turn<sup>32</sup> scholars have argued that subjectivities are constituted through language and discursive practices such as law and its adjudication. The paradigmatic human has never been a neutral description of humanity; instead, it is a normative convention that is based on exclusions of sexgendered, sexualized, racialized, and naturalized ‘others’ and is opposed to technology. The paradigmatic human is a human norm describing normality, normalcy, and normativity.<sup>33</sup> What

<sup>26</sup>See Braidotti, *supra* note 20, at 107–14.

<sup>27</sup>M. Grodin et al. (eds.), *Sexual Orientation, Gender Identity and International Human Rights Law: Common Law Perspectives* (2020); J. Repo, *The Biopolitics of Gender* (2015); A. V. Sanmartin, *Trapped in Gender. Understanding the Concept of Gender and Its Use in Law* (2020); D. Otto, ‘Queering Gender [Identity] in International Law’, (2015) 33 *Nordic Journal of Human Rights* 299; D. Otto, *Queering International Law: Possibilities, Alliances, Complicities, Risks* (2018); D. Otto, ‘Disconcerting “Masculinities”: Reinventing the Gendered Subject(s) of International Human Rights Law’, in D. Buss and A. Manji (eds.), *International Law: Modern Feminist Approaches* (2005), 105; E-M. Svensson et al., *Nordic Equality at a Crossroads: Feminist Legal Studies Coping with Difference* (2004); A. Pylkkänen, *Trapped in Equality: Women as Legal Persons in the Modernisation of Finnish Law* (2009).

<sup>28</sup>I offer only some examples of linguistic turn scholarship, as it is not in the scope of this article to provide an anthology of the critical perspectives from which the Court has been studied. L. Hodson, ‘Sexual Orientation and the European Convention on Human Rights: What of the “L” in LGBT?’, (2019) 23 *Journal of Lesbian Studies* 383; P. Johnson, ‘Heteronormativity and the European Court of Human Rights’, (2012) 23 *Law and Critique* 43; K. A. Doty, ‘From Fretté to EB.: The European Court of Human Rights on Gay and Lesbian Adoption’, (2009) 18 *Law & Sexuality: A Review of Lesbian, Gay, Bisexual & Transgender Legal Issues* 121; M. Grigolo, ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’, (2003) 14 *European Journal of International Law* 1023. Paul Johnson has demonstrated how the ‘ontology of the homosexual’ as a danger to both society’s morals and the nation state was constructed between 1950–1980 in Strasbourg. See Johnson, *supra* note 12. These ontological constructions have enabled, *inter alia*, the treatment of homosexuals as criminals in order to establish culpability for homosexual acts in the criminal process by neglecting the immutable character of sexual orientation. Still today there are ambivalent moralist perceptions about the non-heterosexual subject’s ontology.

<sup>29</sup>P. Johnson, ‘“An Essentially Private Manifestation of Human Personality”: Constructions of Homosexuality in the European Court of Human Rights’, (2010) 10 *Human Rights Law Review* 67, at 72. For more general discussion see D. M. Patterson, *Law and Truth* (1996).

<sup>30</sup>L. Peroni, ‘Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising’, (2014) 10 *International Journal of Law in Context* 195. Lourdes Peroni’s study, inspired by discourse analysis, found that the Court’s discourses on identities ‘revealed a widespread use of collectivisations of the applicants and objectifications of their traits’. In other words, the Court has produced subjectivity by objectifying the applicants’ traits, from “transsexualism”, “pregnancy”, “homosexuality” to the “Gypsy way of life” and collectivising “transsexuals”, “women”, “sexual minorities” in some instances’.

<sup>31</sup>D. A. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights* (2019), at 3–4. Gonzalez-Salzberg performed – methodologically speaking – a deconstructive, theoretically-grounded reading based on queer and feminist theories. His aim was to find out how the Court has constructed the gendered and sexualized subject of human rights in its jurisprudence.

<sup>32</sup>Linguistic turn is a major reconception of the nature of Western philosophy, that emphasized the role of language over mind and experience. Alaimo and Hekman argue that the offspring (postmodernism and poststructuralism) of linguistic turn ‘has allowed feminists to understand how gender has been articulated with other volatile markings, such as class, race, and sexuality, within cultural systems of difference that function like a language (à la Ferdinand de Saussure). The rigorous deconstructions of Jacques Derrida and Luce Irigaray . . . have exposed the pernicious logic that casts woman as subordinated, inferior, a mirror of the same, or all but invisible. At the forefront of this turn to the linguistic is the influence of postmodern thought in feminist theory. The strength of postmodern feminism is to reveal that since its inception, Western thought has been structured by a series of gendered dichotomies. Postmodern feminists have argued that the male/female dichotomy informs all the dichotomies that ground Western thought: culture/nature, mind/body, subject/object, rational/emotional, and countless others’. See Alaimo and Hekman, *supra* note 21, at 1.

<sup>33</sup>This has been empirically and qualitatively shown true in terms of gender equality at least since 1997. See Svensson, *supra* note 20, at 37. Braidotti, *supra* note 20, at 26.

needs to be addressed is not only the oppositional, often binary, exclusionary linguistic categorizations, but also the fact that binaries are hierarchies that occupy agency alongside material things (body and space). They produce materially unequally equipped<sup>34</sup> human bodies.

In this regard, Nordic legal feminist scholarship has historically been open to incorporating and furthering theories that emerged from ‘the studies’ and to providing empirical knowledge about linguistic subject construction in the welfare state context.<sup>35</sup> Nordic legal scholarship has integrated discursive/linguistic analysis with an analysis of power structures that are reproduced by language and social practices. Notably, Eva Maria-Svensson’s work<sup>36</sup> on the significance of *gender relation* as a linguistic and symbolic power hierarchy<sup>37</sup> has addressed the issue of inequality between sexes.

Building on Butler’s and Barad’s work, and also on the insights provided by Nordic legal feminists since the 1990s, I integrate posthumanism and new materialism<sup>38</sup> within the critical discourse analysis.<sup>39</sup> Matter’s agency is vital in subject construction. The focus of the analysis is the Court’s subject production that is not only discursive, but also an entanglement of matter and discourse. The binary discourses of sexgender and sexual orientation are recognized as being entangled with matter’s agency. I embed the feminist and queer linguistic turn scholarship on inequalities and difference in a formula called BinaryTech. Here inequality is addressed, enabling a systematic analysis of how bodies are valued and hierarchically structured both discursively and materially.

### 2.1 The foundation of BinaryTech: Barad’s agential realism and material-discursive reality

In order to integrate posthumanism and new materialism within critical discourse analysis, the focus has to be set on the material-discursive practices that produce the perceived ‘subjects’ and

<sup>34</sup>Philippopoulos-Mihalopoulos notes that there are stronger bodies in the assemblage of the posthuman lawscape, ‘such as corporations, a billionaire, religion, or tsunami . . .’, in other words, some bodies have more influence. A. Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (2015), at 62.

<sup>35</sup>Authors such as Catharine MacKinnon, Ngaire Naffine, Carol Smart, and Judith Butler have been further theorized within Nordic feminist perspectives on law. See, for instance, P. K. Koskinen, *Naisoikeutta: naisnäkökulma työoikeuteen* (1983); T. Stang Dahl, *Women’s Law: An Introduction to Feminist Jurisprudence* (1988); K. Nousiainen, ‘Oikeuden systeemi ja naisen arki’, in R. Turunen (ed.), *Naisnäkökulmia oikeuteen* (1992); H. Petersen, ‘On Women and Legal Concepts: Informal Law and the Norm of Consideration’, (1992) 1 *Social & Legal Studies* 493; Svensson, *supra* note 20; Niemi-Kiesiläinen et al., *supra* note 7. The postmodern social constructionist view of law as both regulating and forming/producing its subjects, together with other social norms and discourses, has been a central theme especially in Sweden and Finland. See Å. Gunnarsson et al., *Genusrättsvetenskap, Tidigare utgåva av Åsa Gunnarsson, Eva-Maria Svensson 2009* (2018). For new materialist insights to Nordic feminist perspectives on law see Käll, *supra* note 19.

<sup>36</sup>Svensson argues that the presumption of neutral law has obscured the relevance of gender relation (*genusrelation*). Her focus was on language and linguistic practices where power is embedded. She identified the role of language as both enabling but also limiting expression for understanding life. Her approach covered verbal and non-verbal, symbols and perspectives, and physical reality was not addressed in analysis. See Svensson, *supra* note 20.

<sup>37</sup>*Ibid.*, at 38–52.

<sup>38</sup>For new materialism and posthumanism in legal research see, for instance, M. Arvidsson and E. Jones (eds.), *International Law and Posthuman Theory* (2024); M. Tedeschi and M. Viljanen, ‘Lost in Transduction: From Law and Code’s Intra-Actions to the Right to Explanation in the European Data Protection Regulations’, (2023) *Law and Critique*; J. Hohmann, ‘Diffuse Subjects and Dispersed Power: New Materialist Insights and Cautionary Lessons for International Law’, (2021) 34 *Leiden Journal of International Law* 585; M. Davies, ‘Can Property Be Justified in an Entangled World?’, (2020) 17 *Globalizations* 1104; M. Arvidsson, ‘Targeting, Gender, and International Posthumanitarian Law and Practice: Framing the Question of the Human in International Humanitarian Law’, (2018) 44 *Australian Feminist Law Journal* 9; J. Käll, ‘A Posthuman Data Subject? The Right to Be Forgotten and Beyond’, (2017) 18 *German Law Journal* 1145; A. Grear, ‘Human Rights and New Horizons? Thoughts toward a New Juridical Ontology’, (2018) 43 *Science Technology and Human Values* 129; M. Davies, ‘Re-Forming Property to Address Eco-Social Fragmentation and Rift’, in A. Grear et al. (eds.), *Posthuman Legalities: New Materialism and Law beyond the Human* (2021), 13; Davies, *supra* note 14; E. Jones, *Feminist Theory and International Law: Posthuman Perspectives* (2023).

<sup>39</sup>The idea of BinaryTech was introduced in Aalto, *supra* note 19.



'objects'.<sup>40</sup> Accordingly, humans are considered to be phenomena that are produced by material-discursive boundary-making practices. This means that humans emerge from intra-action<sup>41</sup> of both discourse and matter, rather than merely from linguistic practices. The main difference between critical discourse analysis and the proposed integration of new materialisms is the placement of the hierarchical binary sexgender system as part of the ontology of the material-discursive human phenomenon. This difference is central for understanding the relational ontology of the human as a momentary material-discursive phenomenon that is enacted.

Barad's agential realism helps to understand this move by explaining how the universe is comprised of *phenomena*, rather than ontologically independent objects with inherent boundaries or properties.<sup>42</sup> Phenomena are not representations of pre-existing things, but entities in their becoming, and are therefore 'open ended'.<sup>43</sup> This 'becoming' means that the entities are continually reconstituted through the material-discursive intra-actions, where neither the material nor the discursive takes precedence. Reality is now the entanglement of matter and discourse that produces phenomena in their intra-action, rather than a composition of stable subjects and/or objects that can be presented through language, leading to language/reality dualisms.

Humans are temporal and spatial phenomena that arise through specific intra-actions. The human phenomena are the result of sets of agential cuts. An *agential cut* is a moment of differentiation resulting in temporal stabilization of agencies<sup>44</sup> that produce phenomena. These moments of differentiation, enacted as agential cuts, are foundational for BinaryTech. Therefore, critical discourse analysis is used through the new materialist lenses, adding a material layer to the discursive which can be accounted for in how the human phenomenon is comprised. These layers together highlight the entanglement of matter and discourse, displaying the law, the body, physical matter, space, and binary sexgender/sexuality discourses as agential cuts.

BinaryTech enables the analysis of intra-actions by focusing on binary sexgender's agency within those specific intra-actions. This makes it possible to underline how the human referent of this article emerges through intra-action and is ontologically in the process of becoming, instead of being a stable entity.<sup>45</sup> This material-discursive human phenomenon is referred to as The Strasbourg Human.

## 2.2. BinaryTech

BinaryTech is a formula that underlines the binary sexgender power structure often implicit in linguistic practices. To this extent BinaryTech can be used as a method for critical discourse analysis for effectively revealing and analysing binary differences and power structures embedded therein. The focus is on the dichotomy of heterosexual/non-heterosexual (*h/nh*), founded upon

<sup>40</sup>This is a crucial difference to the linguistic turn understanding of materialization which presupposes that linguistic practices produce subjects giving preference to language over matter. An example is how judicial systems of power produce subjects or objects they govern. Instead, matter and discourse are the agential cuts leading to emergence of the subject as a phenomenon.

<sup>41</sup>Intra-action differs from the familiar inter-action by calling into question the assumed pre-existing separate ontological units (subjects and/or objects) capable of inter-action. See Barad (2003), *supra* note 17.

<sup>42</sup>See Barad (2007), *supra* note 17, at 139.

<sup>43</sup>Cirkovic argues for international law that is not just a mirror of permanently split human subjectivity but that could recognize the indeterminate nature of the world beyond it. E. Cirkovic, 'The Next Generation of International Law: Space, Ice, and the Cosmological Proposal', (2021) 22 *German Law Journal* 147, at 167.

<sup>44</sup>*Nota bene*, to Barad agency is a matter of intra-acting; it is an enactment, not something that someone or something has. See Barad (2007), *supra* note 17, at 178.

<sup>45</sup>*Ibid.* 'The primary ontological units are not "things" but phenomena—dynamic topological reconfigurings/entanglements/relationalities/(re)articulations. And the primary semantic units are not "words" but material-discursive practices through which boundaries are constituted. This dynamism is agency. Agency is not an attribute but the ongoing reconfigurings of the world.'

the male/female ( $m/f$ )<sup>46</sup> sexgender binary. This binary acts as a material-discursive hierarchy where masculinity is considered to be superior to femininity ( $m>f$ ).<sup>47</sup> The formula depicts heterosexuality trumping non-heterosexuality<sup>48</sup> ( $h>nh$ ), and female non-heterosexuality/male non-heterosexuality ( $f^{nh}/m^{nh}$ ) where the power relations are based on the binary of  $m/f$  where  $m>f$  or vice versa. BinaryTech complements Janet Halley's formula, which represents sex and gender hierarchies,<sup>49</sup> with sexuality. As an example of BinaryTech formula:  $m/f \wedge h/nh = m>f \wedge h>nh$  reads: if male/female and heterosexuality/non-heterosexuality binaries exist, the result is that the male is hierarchically positioned over female and heterosexuality over non-heterosexuality.

The BinaryTech formula integrates insights from new materialism and posthumanism to analyse agential realist intra-actions in which the binary sexgender system constrains and enables possibilities for the emergence of the human as a *material-discursive* phenomenon. BinaryTech enables a systematic analysis of how bodies are both valued discursively and organized hierarchically as a matter. BinaryTech intervenes in intra-actions of the physical body and space, the law and discourses based on binary sexgender and sexuality. The analysis of intra-actions focuses on the Court's jurisprudence. The Court is more than a site where discourses become part of the normalizing law or legal discourse that affects the subject. BinaryTech examines how the Court's functioning through adjudication and jurisprudence is a material-discursive practice. Differences are enacted between human phenomena having material effects. The human phenomenon that emerges is constrained not only by discourses but also by material factors resulting in hierarchical structuring of matter. As the case law will illustrate, the non-heterosexual bodies have been incarcerated, disconnected from soil, murdered for being in a park known to be a cruising spot, and discharged from the military. These material aspects of discourse and law need to be addressed for understanding how inequality is a material-discursive practice of difference making.

The ongoing nature of intra-activity is revealed with the phrase 'BinaryTech in motion'. BinaryTech is activated within the intra-actioning of the enacted agential cuts in each case analysed, revealing the hierarchical material-discursive differences made. The analysis of each case, BinaryTech shows that differences are unstable and only momentarily stabilized by the Court in the enactment of the Strasbourg human.

### 3. Case analysis through BinaryTech

I have grouped<sup>50</sup> the nine selected cases according to the shifts in the Court's ontological understanding of non-heterosexual people<sup>51</sup> as follows: (i) Male non-heterosexuals as deviants

<sup>46</sup>J. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (2008). Halley distinguishes between power feminism, sex-positive feminism, cultural feminism, liberal feminism, socialist feminism, and governance feminism for demonstrating the multiplicity of feminist theorizations through the system of revealing how sex and gender are power structures. I repurpose Halley's system of abbreviations developed for distinguishing feminist approaches to be used for analysis of legal decisions.

<sup>47</sup>'Sexuality, then, is a form of power. Gender, as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. . . . If this is true, sexuality is the linchpin of gender inequality.' *Ibid.*, at 42–4; cited in C. A. Mackinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory', (1982) 7 *Signs* 515, 533.

<sup>48</sup>See for homo/hetero binary and how societies classify homosexuality as 'second rate' and the risks involved in constructionist approaches, P. Johnson, 'Haunting Heterosexuality: The Homo/Het Binary and Intimate Love', (2004) 7 *Sexualities* 183.

<sup>49</sup>Halley's formula is used to categorize feminisms. See Halley, *supra* note 46.

<sup>50</sup>I have used Paul Johnson's periodization of the cases as a starting point and supplemented it with more recent ones. See Johnson, *supra* note 12.

<sup>51</sup>Johnson has mapped how the Court understood homosexuals as ontologically dangerous until the 1980s (*Dudgeon* 1981) in order to justify derogations from Art. 8 right to private life. After *Dudgeon*, the ontology became moral disapproval of difference in treatment justified by immoral threats posed by the innately homosexual subject, e.g., recruitment of minors, or threat of transmitting HIV/AIDS in group sex acts. These ontological claims were entertained until 1996–1999 (*Sutherland*:

(Section 3.1); (ii) Keep it private! – material exclusionary practices (Section 3.2); and (iii) Non-heterosexuals assimilated – materially the same but with a different set of rights (Section 3.3). I have chosen nine cases from 1951 to 2022. The wide time span is chosen for probing what kind of formulas BinaryTech reveals in the case law, considering how significantly both social and legal discourses about sexuality have changed throughout those years. The Convention should be interpreted as a living instrument,<sup>52</sup> which means that social context has implications for the application of the Convention and its relation to the materialization of abstract rights mattering in a particular time and space. The choice of cases is prompted by the ability of BinaryTech to account for material and discursive factors that have been changing how the human phenomena have been produced in these time-specific events (intra-actions).

Both *W.B.*<sup>53</sup> and *X*,<sup>54</sup> analysed in Section 3.1, were declared inadmissible, as were all 11 cases referred to the Court that concerned homosexuality between 1955 and 1972.<sup>55</sup> The Commission confirmed in *W.B.*'s very first petition that sexuality falls under the ambit of Article 8 – the right to private life.<sup>56</sup> The Commission was able to 'filter' petitions transferrable to the Court, it being an inherently political organ, because Section III of the 1950 Convention did not stipulate any qualifications of legal education for its members.<sup>57</sup> The Commission ceased to exist and direct petition to the Court became possible by the entry into force of Protocol 11 on 1 November 1998.<sup>58</sup> Section 3.2 covers three cases where homosexuality no longer qualified as a legitimate target of criminal law *ultima ratio*, but remained permissible for other aims. All of the cases were brought under Article 8: *Dudgeon*,<sup>59</sup> *X. and Y.*,<sup>60</sup> and *Laskey, Jaggard and Brown*.<sup>61</sup> The last grouping in Section 3.3 covers cases where the ontology of the homosexual had become recognized but difference in treatment persisted. The set is composed of four cases: *Sutherland*,<sup>62</sup> *Smith and Grady*,<sup>63</sup> *Schalk and Kopf*,<sup>64</sup> and *Stoyanova*.<sup>65</sup>

### 3.1 Male non-heterosexuals as discursively 'deviants'

#### 3.1.1 *W.B. v. Federal Republic of Germany 1955*

*W.B. v. Federal Republic of Germany* concerned paragraph 175 of the German Criminal Code of 1871, which criminalized 'unnatural fornication' and its attempt. It was amended by the Nazi regime in 1935<sup>66</sup> to cover all 'lewd acts' between men, both in private and in public. The applicant

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different ages of consent in breach of Art 8 and A.D.T.: criminalization of group sex in breach of Art. 8). The current ontological claims hinge on difference in treatment in various contexts, with moral ambivalence shown by the Court. See Johnson, *supra* note 12, at 42–61.

<sup>52</sup>*Tyrer v. The United Kingdom*, Judgment of 25 April 1978, [1978] ECHR.

<sup>53</sup>*W.B. v. Germany*, Commission Decision of 17 December 1955, [1955] ECHR.

<sup>54</sup>*X. v. Germany*, Commission Decision of 30 September 1975, [1975] ECHR.

<sup>55</sup>See Johnson, *supra* note 12, Appendix 2.

<sup>56</sup>See *W.B. v. Germany*, *supra* note 53, at 2.

<sup>57</sup>1950 Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol, available at [www.echr.coe.int/Documents/Archives\\_1950\\_Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Archives_1950_Convention_ENG.pdf).

<sup>58</sup>Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, 11 May 1994, Strasbourg.

<sup>59</sup>*Dudgeon v. The United Kingdom*, Judgment of 22 October 1981, [1981] ECHR.

<sup>60</sup>*X. and Y. v. The United Kingdom*, Commission Decision of 3 May 1983, [1983] ECHR.

<sup>61</sup>*Laskey, Jaggard and Brown v. The United Kingdom*, Judgment of 19 February 1997, [1997] ECHR.

<sup>62</sup>*Sutherland v. The United Kingdom*, Judgment of 27 March 2001, [2001] ECHR.

<sup>63</sup>*Smith and Grady v. The United Kingdom*, Judgment of 27 September 1999, [1999] ECHR.

<sup>64</sup>*Schalk and Kopf v. Austria*, Judgment of 24 June 2010, [2010] ECHR.

<sup>65</sup>*Stoyanova v. Bulgaria*, Judgment of 14 June 2022, [2022] ECHR.

<sup>66</sup>Between 1933 and 1945, an estimated 100,000 men were arrested in Nazi Germany as 'homosexuals', of whom 50,000 were sentenced, and between 5,000 and 15,000 sent to concentration camps. Lesbians, bisexual women, and trans people, whose experiences remain under-researched, were also targeted. It is unclear how many LGBT people perished in these camps. Stonewall, 'Remembering the Holocaust', 27 January 2020, available at [stonewall.org.uk/node/127916](https://stonewall.org.uk/node/127916).



complained under Articles 2, 8, 17, and 18 that the German Penal Code not only violated the Convention in principle, but also in person by its reach to limit the applicant's right to private life, rendering his conviction for lewd acts between men and aggravated attempt of homosexuality in breach of the Convention. The applicant complained about the scope of the criminal code, which limited criminalization to men only and as so was in breach of Article 8 taken in conjunction with Article 14, namely the principle of non-discrimination on account of sex.

The Commission understood the homosexual as a criminal by establishing that homosexuality fell within the scope of Article 8, simultaneously permitting states to treat homosexuality through criminal law, declaring that difference in treatment under Article 14 on account of sex does not preclude the ability of the state to make a distinction between sexes while taking measures in regard to homosexuality for the protection of health and morals.<sup>67</sup>

BinaryTech was in motion in the Commission decision to consider criminalization and punishment of homosexual acts and their attempts permissible under the Convention. The formula behind the decision is  $m/f \wedge h/nh = h > nh \wedge f^{nh} > m^{nh}$  as the Court refused to consider why neither lewd acts nor their attempt were criminalized between females,  $f^{nh}$  was invisible, while  $m^{nh}$  was seen as a threat to society, and the criminal subject was seen as being rationally capable of refraining from lewd acts, without considering the traditional *ultima ratio* doctrine of criminal law.<sup>68</sup>

The Strasbourg human emerged through this specific intra-action of the Convention law, the Commission, societal discourses of homosexuality as criminal, public space, and the applicant. BinaryTech was in motion enabling and constraining the possibilities of 'the human' to emerge as a sexed and sexually binary phenomenon. Discourses on heterosexuality, the separation of male non-heterosexuals' material bodies from each other and from public space, the permissibility of incarcerating some  $m^{nh}$ , the law, and binary thinking were the material and discursive stabilized agencies (agential cuts) that produced the Strasbourg human as heterosexual. Non-heterosexuality was seen as a choice of the abnormal, thus illegal and illegitimate, and as such foundational for continued justification for criminalization of  $m^{nh}$  bodies and removing  $m^{nh}$  from public space. Alternatively, if the discourse of non-heterosexuality being a choice had become part of the Strasbourg human phenomenon, it would have rendered it impossible to prove *mens rea* in cases considering homosexual acts criminal. The incarceration of non-heterosexual male bodies was found permissible in order to protect societies and public spaces. The discourses of non-criminal heterosexuality and female non-heterosexuality became part of the Strasbourg human, while finding it permissible to keep  $m^{nh}$  bodies sexually apart and away from public spaces. The differential boundary between  $h/nh$  was drawn as the Strasbourg human mattered as a heterosexual male whose body was allowed in public spaces.

### 3.1.2 *X v. The Federal Republic of Germany*

In *X v. The Federal Republic of Germany*<sup>69</sup> the applicant contested his criminal conviction on the basis that the laws in force were by virtue contrary to the Convention. He submitted that the German Criminal Code 175/1 amended in 1969 only targeted men committing 'an indecent assault (Unzucht) on a man under the age of 21'; other types of consensual homosexual relations were not criminalized. Furthermore, the applicant complained under Article 14, stating discrimination on account of sex because only male homosexuality constituted a crime under certain circumstances.

<sup>67</sup>See *W.B. v. Germany*, *supra* note 53.

<sup>68</sup>S. Melander, 'Ultima Ratio in European Criminal Law', (2013) 3 *European Criminal Law Review* 45.

<sup>69</sup>See *X. v. Germany*, *supra* note 54.

The parties were asked to respond to the following question:

On the assumption that the legislation punishing masculine homosexuality is compatible with the provisions of Art. 8 (2) as a measure necessary in a democratic society for the protection of the rights of others, is it not nevertheless contrary to Art. 14 read in conjunction with Art. 8?

The government observed that the punishment of homosexual relationships with adolescents contained a difference of treatment based on sex, but it was found permissible because similar deterrence was not deemed necessary to provide special protection for girls.

The applicant maintained that the aforementioned distinction was based on inadequate scientific knowledge of the two forms of homosexuality. Even if it was accepted that male homosexuality was more widespread and less stable, it did not constitute a sufficient reason for difference in treatment. The Commission reasoned that the German legislature's aim was 'to prevent homosexual acts with adults having an unfortunate influence on the development of heterosexual tendencies in minors'. Although the effects of homosexuality, according to the Commission, are being widely studied in Europe, the fact remains that the aim of the German legislature, 'was clearly inspired by the need to protect the rights of children and adolescents and enable them to achieve true autonomy in sexual matters'. Because of the difference in treatment, the Commission opined as follows:

[The studies conducted in Germany] lead to convincing conclusions as to the specific danger in the case of masculine homosexuality. This danger results from the fact that masculine homosexuals often constitute a distinct socio-cultural group with a clear tendency to proselytise adolescents and that the social isolation in which it involves the latter is particularly marked.<sup>70</sup>

The Commission declared the application inadmissible as manifestly ill-founded.

BinaryTech is in motion in how the Commission relied on the formula  $m/f \wedge h/nh \wedge m^{nh}/f^{nh} = h > nh \wedge f^{nh} > m^{nh}$ .<sup>71</sup> Besides scientific discourse, the previous Strasbourg human, the Convention, the Commission and the  $m^{nh}/f^{nh}$  differentiation are enacted as an agential cut within this specific intra-action. The understanding of the higher prevalence or visibility of  $m^{nh}$  in society was reflected in the criminal law targeting only  $m^{nh}$ .  $F^{nh}$  was not criminal. Furthermore, the Strasbourg human continued to reinforce the  $h > nh$  hierarchy.  $M^{nh}$  were given meaning as a 'distinct socio-cultural group'<sup>72</sup> to which belonging would leave the adolescent 'particularly marked'.<sup>73</sup> Furthermore, the  $m^{nh}$  was able to proselytize adolescents by sexual engagement. Only male homosexual bodies were seen to have an unfortunate influence on development of heterosexual tendencies in youth – a basis for legitimizing difference in treatment of homosexual men in criminal law. In other words, keeping homosexual bodies out of sight 'in a democratic society', for the protection of the heterosexual ideal of the Strasbourg human, was deemed legitimate. The Strasbourg human emerged as a male heterosexual whose heterosexuality needed the protection of criminal law. BinaryTech was reconfigured as follows:  $m > f \wedge f^{nh} > m^{nh}$  distinguished  $f^{nh}$  from  $m^{nh}$  because  $m > m^{nh}$ . and further rendered  $f^{nh}$  invisible. These hierarchical discourses and the permissibility of the removal of male homosexual behaviour from the public sphere became an

<sup>70</sup>Ibid.

<sup>71</sup>Ibid., at 56. Although *obiter dicta*, the case file includes a comparison between  $m^{nh}$  and  $f^{nh}$  in terms of the amount  $m^{nh} > f^{nh}$ , preferred age of partners where  $m^{nh}$  prefer young and  $f^{nh}$  same aged, promiscuity  $m^{nh} > f^{nh}$ , exposition of youth  $m > f$  to  $m^{nh} > f^{nh}$ , and visibility  $m^{nh} > f^{nh}$ .

<sup>72</sup>Ibid.

<sup>73</sup>Ibid.

ontological part of the Strasbourg human phenomenon, and as such a stabilizing difference. The normalizing discourse of heterosexuality started to matter on the ground.

### 3.2 Keep it private! – Material exclusionary practices

#### 3.2.1 *Dudgeon v. The United Kingdom*

In *Dudgeon v. The United Kingdom*<sup>74</sup> the applicant contested laws prohibiting buggery between males, between males/females and animals, and ‘gross indecency’ between male persons.<sup>75</sup> He alleged that he had been suffering under an unjustified interference with his right to respect for his private life protected under Article 8 taken alone and in conjunction with Article 14.<sup>76</sup> He claimed the very existence of the laws in force was the direct cause of the fear, suffering, and psychological distress he had been experiencing.<sup>77</sup> Even though homosexuality was not criminal as such, the laws prohibited any sexual practices between consenting males, even in private. The Court acknowledged the vulnerability of a socially unpopular group the rights of which could easily be trampled by the democratic majority and found a violation of Article 8.<sup>78</sup> However, the Court refused to consider the case under Article 14 in conjunction with Article 8, in terms of discrimination on account of sex (*m/f*), in legislation which set lower ages of consent for female non-heterosexuality (*f<sup>nh</sup>*) and heterosexuality (*h*) in relation to male non-heterosexuality (*m<sup>nh</sup>*).<sup>79</sup> The Court did not find a legal purpose for determining this.<sup>80</sup>

The Court accepted Mr. Dudgeon’s homosexuality as a fact<sup>81</sup> and was of the opinion that his complaint arose from the fact that even consensual homosexual acts, which he might commit in private, were criminal offences in Northern Ireland.<sup>82</sup> Male heterosexuality was considered as having a public character, while male non-heterosexuality was left to the private sphere. Judge Walsh, in his dissent, was concerned over the possibility of permissive language producing homosexuality: ‘Sexual behaviour is determined more by cultural influences than by instinctive needs . . . The legal arrangements and prescriptions set up to regulate sexual behaviour are very important formative factors in the shaping of social and cultural institutions.’<sup>83</sup> Furthermore, ‘It is known that many male persons who are heterosexual or pansexual indulge in these activities [*m<sup>nh</sup>*] not because of any incurable tendency but for sexual excitement’, as Judge Walsh reasoned.<sup>84</sup> Judge Walsh’s reasoning prompts an assumption that heterosexual persons have sex because of an incurable tendency rather than sexual excitement. Walsh’s dissent seems to have accepted the basic tenets of Butler’s performativity of gender. A more accepting discourse on homosexuality does not produce homosexual bodies; instead, it renders homosexual lives liveable and a possible choice for bodies which, in other circumstances, would have felt compelled to adapt to the normative discourse of heterosexuality. The desiring body is there from the start.

BinaryTech was in motion revealing the formula:  $m/f \wedge h/nh = m>f \wedge h>nh \wedge f^{nh}>m^{nh}$ <sup>85</sup> because only certain sexual acts between men were criminal. The blanket ban on sex between

<sup>74</sup>See *Dudgeon v. The United Kingdom*, *supra* note 59.

<sup>75</sup>The relevant provisions currently in force in Northern Ireland are contained in the Offences against the Person Act 1861 (‘the 1861 Act’), and the Criminal Law Amendment Act 1885 (‘the 1885 Act’).

<sup>76</sup>See *Dudgeon v. The United Kingdom*, *supra* note 59, para. 14.

<sup>77</sup>*Ibid.*

<sup>78</sup>*Ibid.*, paras. 63, 64.

<sup>79</sup>*Ibid.*, para. 69. Age of consent for homosexual acts was set at 21 and for lesbian and heterosexual acts at 17.

<sup>80</sup>*Ibid.*

<sup>81</sup>*Ibid.*, para. 13 in Judge Walsh’s Dissent. The factual statement of Dudgeon’s homosexuality marks a shift in thinking towards immutability of homosexuality.

<sup>82</sup>*Ibid.*, para. 39.

<sup>83</sup>*Ibid.*, para. 15 in Judge Walsh’s dissent.

<sup>84</sup>*Ibid.*, para. 13.

<sup>85</sup>In *B. v. The United Kingdom*, Commission Decision of 12 October 1983, [1983] ECHR. BinaryTech motioned through  $m/f \wedge h/nh \wedge m/m^{nh} = m>f \wedge h>nh \wedge m>m^{nh}$ : (i) by closing sexgender into the barracks by material and spatial

18–21-year-old men inverts the sex/gender hierarchy to be  $f > m$ , but only in terms of non-heterosexuality as  $f^{nh} > m^{nh}$ . The Strasbourg human emerges through intra-action where the law, human bodies, and heteronormative discourses are enacted as agential cuts, both enabled and constrained by the formula. The Strasbourg human emerged as a heterosexual man or woman, or as a female-non-heterosexual without specific material or discursive constraints on the choice of partners. The space for male non-heterosexuality was confined to privacy; BinaryTech motioned for preserving and re-enforcing the hierarchies of  $m/f > m^{nh}$ , and  $f^{nh} > m^{nh}$ . Furthermore, the Court laid foundations for the future by protecting homosexuality under Article 8 as ‘an essentially private manifestation of the human personality’.<sup>86</sup>

### 3.2.2 *X. and Y. v. The United Kingdom*

The admissibility decision of *X. and Y.*<sup>87</sup> concerned a Malaysian national, X, and a British national, Y. X. was deported from the UK for overstaying a visa. The applicants contested the deportation as an infringement of their right to family life, relying on Article 8. The Commission opined that despite the modern evolution of attitudes towards homosexuality, the applicants’ relationship did not fall within the scope of Article 8. The reasoning was based on the finding in *Dudgeon* that ‘certain restraints on homosexual relationships could create an interference with an individual’s right to respect for his private life’.<sup>88</sup> The Commission drew parallels to other immigration cases, where it had been held that ‘there is no right to enter or remain in a particular country, guaranteed as such by the Convention’.<sup>89</sup> The Commission recognized that an issue may arise under Article 8 when ‘a close member of a family is excluded from the country where his family resides . . .’<sup>90</sup> and noted that both applicants were professionally mobile and that ‘it was not shown that the applicants could not live together elsewhere than the United Kingdom, or that the United Kingdom is an essential element of the relationship’.<sup>91</sup> According to the facts of the case the applicants had been in a stable relationship and they had been granted a permanent residence permit in Sweden.<sup>92</sup>

BinaryTech is in motion revealing the following formula:  $m/f \wedge h/nh = h > nh$ . In this intra-action, the law, the applicants’ bodies, the soil, the state, and heteronormative discourse of family life and kinship are enacted as agential cuts. The Strasbourg human was enabled and constrained to emerge as a heterosexual who, by default, has an essential connection to a contracting state and the capability of forming a family based on close membership thereto. Legal obligations arising from the Convention text became entangled with the British soil and the heterosexual body. While the soil and state were constituted as elements of the viable, that is, heterosexual relationship, the soil was not able to act as a stage for state supported non-heterosexual family life. The citizenship of a specific country did not create an essential element of a relationship that was merely a private matter, because  $m^{nh}$  couples fell outside the scope of family life that was often generously

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segregation based on binary, and (ii) by excluding a certain category of males from the barracks:  $m/m^{nh}$  where  $m > m^{nh}$ . In *Johnson v. The United Kingdom*, Commission Decision of 17 July 1986, [1986] ECHR. BinaryTech motioned through  $m/f \wedge h/nh \wedge mnh/fnh = h > nh \wedge fnh > mnh$ . The Strasbourg human emerged as female non-heterosexual and as heterosexual, able to enjoy their private life in terms of having sexual relations with people above the age of 16, and when more than two persons are taking part. Male humans on the other hand were to be kept from enjoying the same sexual privacy rights if other males were involved.

<sup>86</sup>The Court recreated the social relations of ‘the closet’, since the protection granted to homosexuality appeared to be subject to its private character, leading to assimilation of privacy with secrecy. See *Johnson*, *supra* note 29.

<sup>87</sup>See *X. and Y. v. The United Kingdom*, *supra* note 60.

<sup>88</sup>*Ibid.*, para. 221.

<sup>89</sup>*Ibid.*

<sup>90</sup>*Ibid.*, para. 222.

<sup>91</sup>*Ibid.*

<sup>92</sup>*Ibid.*

sponsored by nation-states in its hetero form.<sup>93</sup> Heterosexual family life started to matter as public and entangled with the soil and the state. The *m<sup>nh</sup>* couple was spatially detached from British soil and public life, which were reserved for heterosexual family life based on the binary *h>nh*.

### 3.2.3 *Laskey, Jaggard and Brown v. The United Kingdom*

The case of *Laskey, Jaggard and Brown*<sup>94</sup> originated from three different applications of persons who had taken part in a sadomasochistic party at one applicant's house. In 1987 the police found video films of sadomasochistic encounters involving the applicants and up to 44 other homosexual men in the course of routine investigations of other matters.<sup>95</sup> The acts consisted of, *inter alia*, maltreatment of genitalia, ritualistic spanking with whips, and the use of nettles. All the acts were consensual and done for sexual gratification, and a code word was in use for stopping play. Furthermore, the acts did not lead to any permanent injury or need for medical assistance. It was not shown that the video tapes were circulating outside the closed group, nor was it suggested that the tapes had been sold or seen by outsiders.<sup>96</sup> However, the prosecution was largely based on the video content.<sup>97</sup> The applicants were charged with a range of offences, covering acts of assault and wounding. One of the charges involved a defendant who had not reached the age of 21 at that time.<sup>98</sup> The applicants complained under Article 8 alone and in conjunction with Article 14.

The Court observed 'there can be no doubt that sexual orientation and activity concern an intimate aspect of private life',<sup>99</sup> however, 'not all consensual sexual activities for the purpose of sexual gratification behind closed doors fall under the scope of Article 8'<sup>100</sup> and could thus invoke Article 8(2) limitations. The Court concluded that the applicants' respective prosecutions and convictions amounted to a breach of their private life, and assumed the task of finding whether the measures taken by the state were 'necessary in a democratic society'.<sup>101</sup> The Court found Lord Jauncey of Tullichettle's reasoning persuasive on the potential harm, *inter alia*, of Laskey being responsible 'in part for the corruption of a youth "K" who is now, it seems, settled into a normal heterosexual relationship'.<sup>102</sup>

To demonstrate a difference in treatment of homosexuals vis-à-vis heterosexuals and bisexuals, the applicants introduced a domestic case, where a husband consensually branded his initials with a hot knife on his wife's buttocks.<sup>103</sup> The Court of Appeals stated in *dicta* that '[an act] between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, a proper matter for criminal investigation, let alone criminal prosecution'.<sup>104</sup>

While replying to the applicants' claim that they were singled out partly because of the authorities' bias against homosexuals, the Court reaffirmed the trial judge's remark in the applicants' judgment that 'unlawful conduct now before the court would be dealt with equally in the prosecution of heterosexuals or bisexuals if carried out by them'.<sup>105</sup> The Court unanimously held that the interference in the applicants' private life was indeed necessary in a democratic society for the protection of health. No breach of Article 8 was found.

<sup>93</sup>See, for instance, D. Otto, *Queering International Law: Possibilities, Alliances, Complicities, Risk* (2018); Y. Hirdman, 'State Policy and Gender Contracts: The Swedish Experience', (1998) *Women, Work and Family in Europe* 36.

<sup>94</sup>See *Laskey, Jaggard and Brown v. The United Kingdom*, *supra* note 61.

<sup>95</sup>*Ibid.*, para. 8.

<sup>96</sup>*Ibid.*, para. 9.

<sup>97</sup>*Ibid.*

<sup>98</sup>*Ibid.*, para. 8.

<sup>99</sup>*Ibid.*, para. 36.

<sup>100</sup>*Ibid.*

<sup>101</sup>*Ibid.*

<sup>102</sup>*Ibid.*, paras. 21, 46.

<sup>103</sup>*Ibid.*, para. 30.

<sup>104</sup>*Ibid.*

<sup>105</sup>*Ibid.*, paras. 11, 47.



BinaryTech was in motion revealing the following formula:  $m/f \wedge h/nh \ m>f = m>f \wedge h>nh$ . Public/private binary discourses and matrimony are enacted as agential cuts within this particular intra-action, reinforcing  $m>f$  within those institutional settings. Peculiarly, bisexuals were mentioned but differentiation of  $f^{nh}/m^{nh}$  was left undistinguished. Heterosexuality was referred to as the norm, thus reinforcing  $h/nh$  and  $h>nh$ . The Strasbourg human emerged as heterosexual and able to inflict permanent injuries within the privacy of the matrimonial home, and develop normal heterosexual relationships if not corrupted by homosexuals between the ages of 16 and 21. The Court relied on the anticipated harmfulness of sadomasochistic encounters, leaving aside the fact that the films were accidentally found by the police in the course of investigations of other matters, while contending that the applicants were not victims of the authorities' bias against homosexuals. Consequently, if non-heterosexual acts were part of an individual's private life, it was permissible to further limit the private aspects of solely  $m^{nh}$  for the protection of heterosexuality, perhaps because  $f^{nh}$  was not seen as a threat to  $m/f$  where  $m>f$ . In other words, female homosexuality was not threatening the  $m>f$  power structure within the Strasbourg human.

### 3.3 Non-heterosexuals assimilated – materially same but with a different set of rights

#### 3.3.1 *Sutherland v. The United Kingdom*

*Sutherland v. the UK* solved the issue of discrimination on account of sex in terms of different ages of consent. The case was admissible independent of whether sexual orientation difference was based on sex or on other status. The Commission reasoned: 'it is a difference in respect of which the Commission is entitled to seek justification'.<sup>106</sup> In its examination of the merits of the case, the Commission found that there was a difference in treatment in pursuit of the legitimate aim of protection of morals. However, a reasonable and objective justification for that was not found.<sup>107</sup> The protection of 16–18-year-olds who had not settled their sexual orientation was not accepted. Neither did the Commission accept that the prohibiting laws would protect this vulnerable group from considerable social pressure and isolation, nor that criminal sanctions would deter young men from homosexuality. The Government asserted the entitlement of society 'to indicate its disapproval of homosexual conduct and its preference that children [should] follow a heterosexual way of life'.<sup>108</sup>

The Commission had to ponder whether sexual orientation as a category might qualify for Article 14 difference in treatment, either on account of sex or other grounds. The question was addressed with silence. In the present case, difference itself is enacted as an agential cut within this specific intra-action. BinaryTech is in motion revealing the formula  $m/f \wedge f^{nh}/m^{nh} = f^{nh}>m^{nh}$ , rendering certain levels of control of  $m^{nh}$  permissible.

The aforementioned binary differences were accepted as a justification for difference in treatment if that treatment served a legitimate aim. Evidently, even if the Commission refused to decide whether sexual orientation fell under the Article 14 ban, it was implicitly established through the  $m/f$  binary. This configuration based on enacting difference as an agential cut between  $m^{nh}$  and  $f^{nh}$  led to  $f^{nh}>m^{nh}$ . The Strasbourg human started emerging as a more human phenomenon, or at least not constrained by discursive limitations in terms of finding sexual partners.

#### 3.3.2 *Smith and Grady v. The United Kingdom*

*Smith and Grady v. the UK*<sup>109</sup> joined two applications from Ms. Smith and Mr. Grady. They appealed their respective discharges from the British Air Force due to a blanket ban on

<sup>106</sup>*Sutherland v. The United Kingdom*, Commission Decision of 1 July 1997, [1997] ECHR, para. 50.

<sup>107</sup>*Ibid.*, para. 64.

<sup>108</sup>*Ibid.*, para. 63.

<sup>109</sup>See *Smith and Grady v. The United Kingdom*, *supra* note 63.

homosexuality under Article 8 alone and in conjunction with Article 14. Both applicants' homosexuality became known to their employer by disclosures from third persons.<sup>110</sup> As part of the investigations Ms. Smith was questioned as to whether 'she was into girlie games' and was careful about not transmitting HIV; she had to respond to inquiries into whether her relationship to her foster child was of a sexual nature. She was discharged with a letter of recommendation describing her general proficiency as very good and her overall conduct as exemplary.<sup>111</sup> Mr. Grady was referred to in the investigations as 'queen', 'out' and 'bender'. He was questioned about his marital (heterosexual) sex life, when he had discovered his homosexuality, and whether he was HIV positive.<sup>112</sup> Grady was subsequently discharged, although he was described as a loyal serviceman, a conscientious hard worker who could be relied upon to achieve the highest standards, and a person with sound personal qualities, integrity, and respect from other staff.<sup>113</sup>

The armed forces had an equal opportunities policy in operation against sexual and racial harassment and bullying, emphasizing that ' [bullying] undermines morale and creates fear and stress both in the individual and the group being bullied in the organisation'. The Court stated that the restrictions on homosexuality concerned the most intimate part of an individual's private life, and only 'particularly serious reasons' could justify these interferences. The Court accepted national security and the operational effectiveness of the armed forces, as well as the competence of each state to regulate the system of military discipline, as legitimate aims with a limited margin of appreciation. Furthermore, the Court underlined that the alleged threats to operational effectiveness must be substantially specified. The threats were, *inter alia*, that the stressful and confined military living conditions were deemed a risk and that a permissive approach towards homosexuality would have a negative effect on the morale of the troops, and ultimately on fighting power and operational effectiveness.<sup>114</sup>

The Court considered the alleged breach to be especially grave as both applicants had kept their sexual orientation private prior to the disclosure to their employer by third persons. Furthermore, the blanket ban on homosexuality was considered decisive because the establishment of a person's homosexuality would lead to immediate discharge based solely on personal characteristics rather than on service records.<sup>115</sup> The Court found a violation of Article 8; however, no separate issue was seen to arise under Article 8 in conjunction with Article 14.<sup>116</sup>

BinaryTech is in motion revealing the formula  $m/f \wedge h/nh = h > nh$ . The discharges demonstrated that the *sui generis* nature of the armed forces could not be enacted as an agential cut for creating a difference, subsequently to be used as a justification for difference in treatment. Effective fighting power could be provided by non-heterosexual people. The Strasbourg human emerged as formally equal within the armed forces; on the other hand, the acts were considered particularly intrusive because the applicants chose to keep their sexuality private both discursively and materially. This construction continued and re-enforced the binary  $h/nh$  where  $h > nh$  in the public space.

### 3.3.3 *Schalk and Kopf v. Austria*

In *Schalk and Kopf*<sup>117</sup> the applicants were two homosexual men who contested Austrian legislation which did not offer any legal recognition of same-sex partnerships at the time of filing the complaint. They complained under Articles 12 and 8 alone and Article 8 in conjunction with

<sup>110</sup>*Ibid.*, paras. 13, 22.

<sup>111</sup>*Ibid.*, para. 16.

<sup>112</sup>*Ibid.*, para. 27.

<sup>113</sup>*Ibid.*, para. 37.

<sup>114</sup>*Ibid.*, paras. 76–79.

<sup>115</sup>*Ibid.*, para. 93.

<sup>116</sup>*Ibid.*, paras. 112, 116.

<sup>117</sup>See *Schalk and Kopf v. Austria*, *supra* note 64, para. 54.

Article 14, relying on the Court's analysis found in *Christine Goodwin v. the UK*.<sup>118</sup> Six years later we find the same materiality of discourse in *Hämäläinen v. Finland*. In *Hämäläinen* a religious couple had to dissolve their marriage, after the 'husband's' gender reassignment was deemed permissible under the Convention.<sup>119</sup> There the Court stated that even if marriage had undergone major social changes since the 1950s, European consensus on same-sex marriage could not be found. The Court rejected the applicants' submission of the Convention being a living instrument to be interpreted in present day conditions, which should lead to the granting of legal recognition to same-sex couples. It approached the issue through Article 12 black-letter-law, where it was evident that men and women actually meant a man and a woman according to the French version 'l'homme et la femme ont le droit de se marier'.<sup>120</sup> The Court stated that 'in contrast, [to Article 12] all other substantive Articles . . . grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment'. The Court declared that '[i]n the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex', rendering the wording of Article 12 deliberate.<sup>121</sup> The Court distinguished the present case from *Christine Goodwin*, where the opposite-sex composition of marriage was preserved if transsexuals marry in their assigned gender.<sup>122</sup> The Court also noted that according to its jurisprudence on married couples, where one of the partners wants to correct their biological sex and have it legally fully recognized, they must end their marriage in cases where same-sex marriage is not provided for in national law.<sup>123</sup> No violation of Article 12 was found.<sup>124</sup>

The Court analysed the case under Article 8 in conjunction with Article 14 and shifted the focus to family life. The applicants invited the Court to consider its *dicta* in *Karner*:<sup>125</sup> 'the protection of family in the traditional sense is, in principle, a weighty and a legitimate reason which might justify a difference in treatment'.<sup>126</sup> The Court affirmed that in cases where difference in treatment is based on sexual orientation the margin of appreciation afforded to states is particularly narrow. Consequently, it would have had to be shown that the measure is suited for realizing the aim pursued, and that 'it was necessary in order to achieve that aim to exclude certain categories of people'.<sup>127</sup> Even if the margin of appreciation was especially narrow in cases concerning family life, the Court went on to state that 'same-sex couples are just as capable as different sex couples of entering into stable and committed relationships. Consequently, they are in a . . . need for legal recognition and protection of their relationship'.<sup>128</sup> However, the state did not have to fulfil the test of, first, showing what the legitimate aim being pursued was and, second, showing whether the contested law was proportionate to the non-existent aim sought. Instead, the Court stated that there is 'an emerging European consensus towards legal recognition of same-sex couples'.<sup>129</sup> As there was no consensus on the matter, same-sex couples' legal recognition must be seen as an 'evolving right', which gives a wide margin of appreciation to States 'in the timing of the introduction of legislative changes . . .'.<sup>130</sup>

In this case the law, difference, and matrimony are enacted as agential cuts. BinaryTech is in motion and reveals the formula  $m/f \wedge h/nh = h > nh$ . Interestingly, the Strasbourg human could

<sup>118</sup>*Christine Goodwin v. The United Kingdom*, Judgment of 11 July 2002, [2002] ECHR.

<sup>119</sup>*Ibid.*

<sup>120</sup>See *Schalk and Kopf v. Austria*, *supra* note 64, para. 54.

<sup>121</sup>*Ibid.*

<sup>122</sup>*Ibid.*, para. 59.

<sup>123</sup>*Ibid.*, para. 53.

<sup>124</sup>*Ibid.*, para. 64.

<sup>125</sup>*Karner v. Austria*, Judgment of 24 July 2003, [2003] ECHR.

<sup>126</sup>*Ibid.*, para. 40.

<sup>127</sup>*Ibid.*, para. 41.

<sup>128</sup>See *Schalk and Kopf v. Austria*, *supra* note 64, para. 99.

<sup>129</sup>*Ibid.*, para. 105.

<sup>130</sup>*Ibid.*

emerge through this intra-action with a capability of entering into stable and committed relationships, but marriage was limited to heterosexual people, who enjoyed a materially favourable position in terms of inheritance and other benefits connected thereto. Here we find reproduction of homosexuality as an incurable tendency within heterosexuality vis-à-vis homosexuality as a mere choice. Non-heterosexuals did not have the choice of either fitting or not fitting into the ‘marriage norm’, as heterosexuals did. Non-heterosexual relationships were not to enjoy the level of protection of ‘traditional’ marriage, thus the Court continued to reinforce the binary *m/f* making evident the *h>nh* preference as an ontological part of the Strasbourg human through the separation of same-sex bodies.

### 3.3.4 *Stoyanova v. Bulgaria*

The case of *Stoyanova v. Bulgaria*<sup>131</sup> concerned the applicant’s 26-year-old son, who was assaulted and choked to death in a park in Sofia by three men because ‘they thought that he looked like a homosexual’.<sup>132</sup> The three men were part of a group of six secondary school students who often gathered in the park in question. In the course of their gatherings, they singled out homosexuals known to frequent the park and assaulted them, calling these acts ‘kicking’ or ‘clean-up’.<sup>133</sup> The mother of the 26-year-old victim complained under Article 14 read in conjunction with Article 2 right to life. The applicant submitted that the Bulgarian legislature was in breach of the Convention on three accounts: (i) the failure of the legislature to view homophobic motives as a statutory aggravating factor; (ii) the refusal of the Bulgarian courts to deem those motives to constitute hooligan ones; and (iii) the failure of those courts to treat those homophobic motives as an aggravating factor when fixing the attackers’ sentences.<sup>134</sup>

In the present case the Court draws attention to the striking fact that the Bulgarian Supreme Court of Cassation completely disregarded the homophobic motives behind the attack, even though they were plainly a key feature of the case. They concentrated on other matters while analysing the interplay of individual mitigating and aggravating factors.<sup>135</sup> Far from focusing on the homophobic motive, the Supreme Court instead ‘considered that the attackers deserved special leniency, and chose to fix their sentences well below the statutory minimum’.<sup>136</sup> The Court did not establish the victim’s homosexuality as an ontological ‘fact’.<sup>137</sup> Instead, the *perceived* homosexuality of the applicant’s son was decisive in the Court’s reasoning when determining why there had been a procedural shortcoming in the Bulgarian criminal process. The ECtHR found a violation of Article 14 taken together with Article 2, on the grounds that the Bulgarian courts clearly established the attackers’ motivation as being hostility towards people whom they perceived to be homosexuals without attaching any tangible legal consequences to that finding.<sup>138</sup>

BinaryTech reveals the formula  $m/f \wedge h/nh \wedge m^{nh}/f^{nh} = h>nh \wedge m > m^{nh} \wedge f^{nh} > m^{nh}$ . In the present case, the law, Bulgarian legal discourse, the attackers, the dead perceived homosexual body, the park, and social discourses on intelligible homosexuality are enacted as agential cuts.

<sup>131</sup>See *Stoyanova v. Bulgaria*, *supra* note 65.

<sup>132</sup>*Ibid.*, para. 5.

<sup>133</sup>*Ibid.*, para. 6.

<sup>134</sup>*Ibid.*, para. 53.

<sup>135</sup>*Ibid.*, para. 67.

<sup>136</sup>See Johnson, *supra* note 12, at 41–61.

<sup>137</sup>Butler argues that ‘for heterosexuality to remain intact as a distinct social form, it requires an intelligible concept of homosexuality and also requires the prohibition of that conception in rendering it culturally unintelligible’ (emphasis in original). See Butler, *supra* note 24, at 98. ‘In this way, “heterosexuality” depends on “homosexuality” in order to sustain its own identity – or rather the fiction of its own identity. While heterosexuality denies its reliance on homosexuality by seeking to repress or erase the latter’s existence, it is nevertheless subject to the same kinds of discursive complications and contradictions.’ R. Carroll, *Introduction: Feminism, Queer Theory and Heterosexuality Book Title: Rereading Heterosexuality Book Subtitle: Feminism, Queer Theory and Contemporary Fiction* (2012), vol. 1, 6.

<sup>138</sup>See *Stoyanova v. Bulgaria*, *supra* note 65, para. 73.

The park known to be visited by  $m^{nh}$  was chosen as the material venue for the planned attack which re-iterated  $m > m^{nh}$  and  $f^{nh}/m^{nh}$ . Furthermore, social discourses based on  $h/nh$ ,  $m^{nh}/f^{nh}$ ,  $m/m^{nh}$ , and  $h > nh$  enabled the attackers to perceive the victim as a homosexual. The attackers' description of their actions as 'clean up' were based on dualist discourses on public/private, where they felt justified in purging a public space of homosexuality. The Bulgarian legal discourse was unable to identify the homophobic undertones of the killing and instead showed leniency towards the attackers, in so doing reinstating  $h > nh$  and  $m > m^{nh}$ . The victim's body was removed from the intra-action producing his material-discursive human phenomenon as well as from the ongoing intra-activity of the world's becoming.<sup>139</sup> The Court did not give significance to whether the victim was a homosexual by establishing it as a fact, intuitively shifting towards an understanding of the Strasbourg human through relational ontology where matter and discourse are entangled, and discourses of difference have material effects.

#### 4. Conclusions

The sexgender male/female binary is foundational for the heterosexuality/non-heterosexuality dualism as revealed by BinaryTech throughout 71 years of ECtHR decisions and judgments. BinaryTech demonstrates how binary thinking inevitably leads not only to linguistic hierarchies but also to hierarchical organizations of matter, mainly through material exclusions, when material factors are considered in the analysis. Power relations between non-heterosexuals constructed upon the male/female binary appeared in differing hierarchies in the Court's case law and the heterosexual male > female hierarchy was inverted as non-heterosexual female > non-heterosexual male. The Court not only linguistically constructs legal subjectivity; instead, this article has demonstrated how material factors can be accounted for alongside discourses to provide understanding of the human subject as a material-discursive phenomenon in a materialist vein.

The paradigmatic human subject is not only a discursive, normative convention, but also a material-discursive phenomenon. This human emerges through the intra-action of both material and discursive agencies entangling within the production of bodies, the law, and physical spaces, which are all enabled and constrained by binary thinking. The 1990s Nordic adaptation of the linguistic turn, critical discourse, and power analytics revealed the gender relation itself as a linguistic regulatory practice. The blind spot remedied by BinaryTech has been the materiality of those practices. Reading the insights of the Nordic linguistic turn, feminist legal scholarship, through the material turn lenses, allowed a more nuanced understanding of how bodies are not mere discursive formations, but the discourse and body matter can be treated as a non-pre-existing entanglement.

The sexgender binary is still taken for granted in Strasbourg, leading to hierarchical organization of legal subjects both discursively and materially. BinaryTech is well suited for revealing how binary thinking permeates the Court's jurisprudence. Furthermore, BinaryTech can be used as a new materialist methodology for analysing the material-discursive formation of the subject in the Court's jurisprudence. The methodology explored how physical matter can be taken into account in analysing a reality composed of material-discursive phenomena in their ongoing intra-activity.

The Strasbourg human as derived from the Court's case law is founded on binary thinking of sexgender difference. It does not appear as a momentarily stabilized agency within intra-action. The binary discourse becomes part of the subject's ontology through the prolonged effect of the differentiation maintained by both legal discourse and hierarchically structured matter (bodies).

<sup>139</sup> A literal decimation of non-heterosexual baby boomer men born between 1951–1970 during the AIDS crisis of the 1980s. In the US alone 1,600, 000 men died. D. Rosenfeld, 'The AIDS Epidemic's Lasting Impact on Gay Men', 19 February 2018, available at [www.thebritishacademy.ac.uk/blog/aids-epidemic-lasting-impact-gay-men/](http://www.thebritishacademy.ac.uk/blog/aids-epidemic-lasting-impact-gay-men/).



The Strasbourg human emerges material-discursively and becomes the transposed, preferred standard for the human who is differentiated from the non-heterosexual as a normative convention. As the BinaryTech reading of *Stoyanova* suggests, there is a need for a more dynamic understanding of subjectivity and legal innovation in how human rights can be further guaranteed without insistence on stable subjectivity.