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EU Sexual Citizenship:
Sex Beyond the Internal Market

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Department of Law

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SEX BEYOND THE INTERNAL MARKET**

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Abstract

This paper is forthcoming as a chapter in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2015). The central idea builds on the popular sociological concept of sexual citizenship, assuming its link to the cluster of specific sexual rights. Such sexual rights address multiple identities based on gender, sexual orientation and other broader aspects of sexuality (including, inter alia, consumption of pornography and sex work). The author applies this broad paradigm of sexual citizenship towards federalizing evolution of EU citizenship. The result of such a critical investigation demonstrates that EU citizenship offers not only a novel transnational vision of peoplehood. It equally entails governance of sexual rights as a part and parcel of mobile European project through vertical channels of EU sexual citizenship.

Keywords

EU citizenship, sexual citizenship, gender equality, sex trade, LGBT rights

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Introduction

[...] Some of us are tantric about it, quick about it, shy about it, private about it, and public about it, but still – it's all sex. Everything in the world is about sex except sex.

Sex is about power.

Oscar Wilde

One of the greatest paradoxes of citizenship rests on its Janus-like power to both include and exclude.¹ Ancient citizenship notoriously excluded slaves and women,² while modern citizenship keeps on delimiting borders between nationals and 'licit' residents from 'non-citizens' and 'illicit' residents. Likewise, two principal dimensions have characterised the discussion about EU citizenship.³ The first dimension of citizenship rhetoric in the Union covered the agenda of claiming rights beyond the ever-extended free movement of persons: voting rights, diplomatic protection outside the EU, the gradually equalising catalogues of social and economic rights between nationals and non-nationals of Member States, and so on. The second dimension of citizenship embraced the hegemonic rhetoric of borders delimiting the rights and resources of EU citizens *vis-à-vis* excluded groups of non-EU-citizens (migrants, asylum-seekers, and so forth). While gender and sexual identity – unlike nationality – have not been articulated as central facets of EU citizenship, this paper will show how *mere* sexual rights have been underpinning the transnational phenomenon of the Union citizenship. To this end, it will employ a popular sociological concept of *sexual citizenship*,⁴ tracing a series of exclusions and inclusions in the evolution of the European project.

The figure of – *the other* – illicit subject (migrant, woman, transgender, gay, prostitute etc) provides us with a useful analogue to trace the evolution of the inclusivity of citizenship. Such an ever-inclusive version of transnational citizenship goes against outdated ideals of republican citizenship, assuming a certain opposition to the rhetoric of the common good and civic obedience. EU sexual citizenship instead offers a paradigm of rights centred on group claims which position sexual identity as an individual virtue in itself, an aspect of a citizens' dignity that requires protection against the *polis* and its hegemonic aspirations of the common *boni mores*. Furthermore, EU sexual citizenship offers a vocabulary of specific sexual rights which have been effectively challenging paternalistic republican discourse of *othering* on gender and sexuality. Finally, mobile and flexible, EU sexual citizenship

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¹ For a discussion about social power of citizenship, see D. Taylor, 'Citizenship and Judicial Power' (1989) 9(26) *Critical Social Policy* 19.

² S. R. Joshel and S. Murnaghan, *Women and Slaves in Greco-Roman Culture* (London: Routledge, 1998).

³ For a thorough overview of the history of this legal concept and its theoretical foundations, see D. Kochenov, 'The Essence of European Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 *International & Comparative Law Quarterly* 97.

⁴ The leading proponents include D. T. Evans, *Sexual Citizenship: The Material Construction of Sexualities* (London: Routledge, 1993); D. Richardson, 'Constructing Sexual Citizenship: Theorizing Sexual Rights' (2000) 20 *Critical Social Policy* 105; C. Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford: Hart Publishing, 2003); B. Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford, CA: Stanford University Press, 2007). With rare exceptions (such as lawyers Carl Stychin and Brenda Cossman), most scholars engaged into the studies of sexual citizenship up to date are social or political scientists.

conveys a supple postmodern framework for unstable sexual identities and family constructions, minimising the zone of exclusion.⁵ The mere demands for sexual emancipation have been continuously framed as a matter of European discourse, turning EU citizenship into a viable tool of European federalism and the empowerment of individuals which spreads much further than narrow concerns about the internal market.⁶

To explain the mechanics of that specific mobility and flexibility pertinent to EU citizenship, this paper will first outline a theoretical background of sexual citizenship and related sexual rights (2). It will then proceed with an evolution of sexual rights in the Union through the analysis of three foundational dimensions: (3.1.) emancipation of sexuality through a mobile, flexible and commercially-oriented internal market; (3.2.) Europeanisation of sex emancipation claims via expansive readings of gender equality in the Union; and finally, (3.3.) the introduction of sexuality into the EU anti-discrimination project in the late 1990s. The last – conclusive – part will summarise the effects of sexual rights to the rise of EU sexual citizenship with its embedded federal prospects and limits.

Sexual Citizenship: Normative Investigation

Concept of Sexual Citizenship

Scholars of citizenship commonly distinguish between passive and active forms of citizenship depending on whether citizenship status prescribes obedience to the state regime or whether citizens are able to contest their status in the face of injustice and inequalities.⁷ Activist citizenship is sustained by the ideology of human rights, with its focus on individual claims, and contrasts with the traditional social reproduction of ‘ideal’ passive citizens within the state-centred framework of modernist national states which emphasise a foundational common good. In liberal democracies, a function of endorsing citizenship discourses is shared between state and other institutions, such as Non-Governmental Organisations (NGOs), the media, the free market and so on. Both passive and active discourses on citizenship trigger a series of inclusions and exclusions and reproduce a number of subjects including the citizen-national, the citizen-worker, the citizen-soldier and the citizen-parent.⁸ Thus, citizenship substantially informs us about the status roles of individuals. A formal status passively assigns us to a certain jurisdiction. A practical status lays the foundations of the activist dimension of citizenship. Finally, citizenship plays a disciplining procedural function in reproducing various social taxonomies: citizens, migrant residents, non-citizen family members, asylum-seekers and other non-citizens. The

⁵ *Mobility* of EU citizenship captures why many EU rights are focused on mobile EU citizens, i.e. those who have exercised rights of free movement and reside in a Member State other than the one of which they are nationals, such as migrant workers, students or retired persons. Mobile EU citizenship supplants the notion of belonging to one specific place with pertaining to a multiple and fluid community. *Flexible citizenship* describes an ideology of citizenship that puts economic reasons as primary for the choice of citizenship in contrast to a strong identification with a community based on shared political rights. The flexible facet of EU citizenship is evident, for example, in the popularity of “selling citizenship”, when a rich businessman from the US is willing to buy, for example, a Maltese citizenship not necessarily for the sake of Maltese nationality but for the benefits of visa-free entry and residence rights in 28 EU Member States.

⁶ For convincing approach to EU citizenship through the looking glass of individual, see L. Azoulay, ‘The (Mis)Construction of the European Individual: Two Essays on EU Citizenship Law’ (2014) *EUI Working Paper* 14.

⁷ E. F. Isin, ‘Theorizing Acts of Citizenship’, in E. F. Isin and G. M. Nielsen (eds.), *Acts of Citizenship* (London: Zed Books, 2008), p. 15; B. S. Turner, ‘Outline of a Theory of Citizenship’ (1990) 24 *Sociology* 189. Other scholars draw on even wider paradigm of passive, active and activist citizens, where activist citizens do not only exercise the rights and fulfil duties confined to them within citizenship (voting, army service, etc.) but also critically challenge the polity and destabilise the regime. See e.g., account of citizenship and obedience in D. Kochenov, ‘EU Citizenship without Duties’ (2014) 20 *European Law Journal* 482.

⁸ B. S. Turner, ‘The Erosion of Citizenship’ (2001) 52 *British Journal of Sociology* 189.

scholars of gender and sexuality have convincingly showed that various citizenship regimes have consistently reproduced women and sexual minorities as secondary subjects of civil relations via patriarchal and heteronormative schemes prescribed to the common ethical goals of citizenship.⁹

The capability of citizenship, on the one hand, to offer an activist matrix for contesting rights and challenging inequalities, and on the other hand, to sustain the reproduction of hetero-sexist exclusions is captured neatly by a number of social and political scientists under the heading of *sexual citizenship*. Various definitions of sexual citizenship link gender and sexuality to inclusive concerns about citizenship and the specific sexual rights space. Accordingly, studies of sexual citizenship emphasise sex-based structural inequality and the exclusion from equal membership.¹⁰ Such studies scrutinise gender and sexuality (in various proportions, with many scholars focusing exclusively on sexual orientation) and draw attention to the political aspects of erotica and the sexual component of politics, articulating free sexual expression, bodily autonomy, and institutional inclusion.¹¹

Since this paper explores the emancipating ‘sexual’ potential of EU citizenship and its federalising effect on Member States, it adopts a broad understanding of sexual citizenship as a looking glass for EU law on gender, lesbian, gay, bisexual and transgender (LGBT) rights and wider aspects of sexual identity within and beyond the EU internal market (discussing EU engagement with pornography and prostitution). Although this insight into the internal market has little to do with any neo-Marxist perspective on the commercialisation of sex,¹² it somewhat echoes the concept’s original proponent, David T Evans’s initial concern about the market’s role. He argued that all varieties of sexuality under capitalism are materially constructed out of the complex interrelationship between the market and the state.¹³

This market core is specific to the rise of EU sexual citizenship, since a substantial part of the initial rights discourse in the Union (from the 1957 Treaty establishing the European Economic Community (EEC) or Rome Treaty)¹⁴ was based on a strictly economic rationale, sustaining competitive equality of the Member States and facilitating the commercial exchange of goods and labour, thus covering the terrain of sexual governance within the internal market. With activist developments from the Court of Justice on gender and transgender equality and the subsequent introduction of a separate anti-discrimination paradigm in the Amsterdam Treaty,¹⁵ sexual governance spreads substantially beyond the formal boundaries of the internal market and develops as an independent asset of Union law. The

⁹ C. Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988). J. Butler, ‘Sexual Politics, Torture, and Secular Time’ (2008) 59 *British Journal of Sociology* 1; J. Gerhards, ‘Non-Discrimination Towards Homosexuality: The European Union’s Policy and Citizens’ Attitudes towards Homosexuality in 27 European Countries’ (2010) 25 *International Sociology* 5.

¹⁰ See literature in note 4 above.

¹¹ ‘Sexual Citizenship’, in *Encyclopaedia of Gay, Lesbian, Bisexual, Transgender & Queer Cultures*, available at <http://www.glbtc.com/social-sciences/sexual_citizenship.html>; See also J. Weeks, ‘The Sexual Citizen’ (1998) 15(3) *Theory, Culture and Society* 35.

¹² Scrutiny of sexuality has equally emerged from streams quite opposite to leftist critical scholarship, such as Richard A. Posner examining through law and economics, legal issues in erotic art, pornography and nudity, sexual abuse, separation of reproduction from sex, etc. See R. A. Posner, *Sex and Reason* (Cambridge, MA: Harvard University Press, 1992).

¹³ D. T. Evans, *Sexual Citizenship: The Material Construction of Sexualities* (London: Routledge, 1993).

¹⁴ Treaty establishing the European Economic Community, Rome, 25 March 1957, entered into force 1 January 1958, 298 UNTS 11 (EEC).

¹⁵ This paradigm was embedded in Art. 13 of the Consolidated version of the Treaty Establishing the European Community, OJ 2006 No. C326/37 (EC) [now Art. 19 of the Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 No. C326/47 (TFEU)], allowing the Union to tackle discrimination on the grounds of race and ethnicity, religion, sexual orientation, age and disability.

direct effect of EU law coupled with the establishment of EU citizenship in primary law opens up a remarkable space for conceptualising EU sexual citizenship.¹⁶

EU citizenship is thus not only a unique space for ‘overcoming’ nationality (often imagined in terms of the dominant ethnicity of Member States), a room which it co-occupies. EU citizenship equally offers an activist area for challenging sexual identities and inequalities embedded in those national citizenships, transnationalising discourse on rights and emancipation as a matter of EU law. *European*, in this context, becomes a language of rights and entitlements. On the one hand, transnational forms of citizenship facilitate the very dialogue on sexual rights among Member States and problematise the construction of fixed identities. On the other hand, EU citizenship is equally a realm of disciplining humiliation of Member States.¹⁷ The rhetoric of ‘socially unfruitful’ homosexuality and the prescription of women’s reproductive role has been particularly visible in nationalist projects with ethno-centric views on the group boundaries and longevity.¹⁸ The Union offers value models for anti-discrimination developments beyond the ‘population’ narrative of – largely patriarchal and heteronormative – national citizenships. Although not always legally enforceable due to the limited possibilities for harmonisation and Union action, transnational and national social movements can capitalise on value models as a matter of EU federalism for lobbying just causes.

Yet some scholars of sexual citizenship warn against a narrative of progress towards supposedly emancipated and tolerant Western societies, while depicting the EU as a liberating force which comes to rescue local lesbians and gays from the jaws of ‘heteronationalism’.¹⁹ They associate it with *homonationalism*, understood as a process of nationalisation of the LGBT discourse in many Western countries and positioned as an emblem of civilization.²⁰ They see this ‘embarrassment’ approach as reminiscent of colonial practices, the artificial East/West divisions in Europe and inspiring extremist propaganda to capitalise further on the discourse of ‘being humiliated’ by the West. However, even such sceptical scholars acknowledge that EU accession opened a space for political mobilisation not only to sexual rights activists, but to centre-left and right-wing proponents alike, who draw on the different normative assumptions about sexuality and relations with national identity. Sexual citizenship can inform how European citizenship is itself imagined.

Sexual Rights in the EU: Federal Governance of Gender & Sexuality

As has been established, sexual citizenship is a concept defined through the rights’ discourse. The nomenclature of ‘sexual rights’, however, is far from conventional under contemporary legal doctrine. However, it is an often disregarded device with powerful implications for legal mobilisation. In

¹⁶ Although EU citizenship was first formally laid down in primary law by the Treaty on European Union (Maastricht, 7 February 1992, entered into force 1 November 1993, OJ 1992 No. C191/1), the phenomenon of transnational European citizenship draws on the expansive interpretation of the *acquis communautaire* from the early 1970s, as was masterfully exposed by A. Wiener, *European Citizenship Practice: Building Institutions of a Non-State* (Boulder, CO: Westview Press, 1998).

¹⁷ G. Davies, ‘The Humiliation of the State as a Constitutional Tactic’, in F. Amtenbrink and P. A. J. van den Bergh (eds.), *The Constitutional Integrity of the European Union* (The Hague: T. M. C. Asser Press, 2010).

¹⁸ N. Yuval-Davis, *Gender and Nations* (London: Sage Publications, 1997).

¹⁹ J. Haritaworn, T. Tauqir and E. Erdem, ‘Gay Imperialism: Gender and Sexuality Discourse in the “War on Terror”’, in A. Kunstman and E. Miyake (eds.), *Out of Place: Interrogating Silences in Queerness/Raciality* (York: Raw Nerve Books, 2008), p. 71; K. Kahlina, ‘Contested Terrain of Sexual Citizenship: EU Accession and the Changing Position of Sexual Minorities in the Post-Yugoslav Context’ (2013) *University of Edinburgh Working Paper* No. 2013/33. Exploring the post-Yugoslav case studies, the author shows how in the process of accession sexual citizenship became a contested terrain where struggles over EU accession, liberal pluralism, and national identity and tradition take place.

²⁰ J. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, NC: Duke University Press, 2007); D. Richardson, ‘Sexuality and Citizenship’ (1998) 32 *Sociology* 83; F. R. Ammaturo, ‘The ‘Pink Agenda’: Questioning and Challenging European Homonationalist Sexual Citizenship’ (2015) *Sociology* (forthcoming).

general terms, sexual rights constitute an evolving set of entitlements related to sexuality, which contribute to the freedom, equality, and dignity of individuals, comprising an important component of human rights. The list of sexual rights (scattered across various areas of law) implies the protection of gender equality, the right to the free exercise of identity and gender choice (including gay, lesbian, bisexual, transsexual etc.), the uncoerced choice of sexual partner, the prohibition of sexual violence, the right to sexual autonomy and integrity, freedom from sexual stereotyping and sexist and homophobic hate speech, the artistic expression of sexuality, the freedom of sexual association (marriage, partnership, responsible associations etc.), the protection of the sexuality of minors, the right to free and responsible²¹ reproductive choices, sexual privacy, reproductive health, sexual education and healthcare, and so on.

European Union law (along with national and, to a lesser extent, international law) has been co-governing the sexual rights of almost half a billion EU citizens, and has been arguably projecting that governance onto some ‘third countries’. The geographic space of this specific quasi-federal legal regime coincides, on the one hand, with the cradle of Western sexuality in ancient Greece, Rome, the Renaissance, and the Enlightenment, along with, on the other hand, the birthplace of Roman Catholicism, Byzantine Orthodoxy, protestant ethics (with their peculiar regimes of sexual repression), and the nineteenth-century urge to talk about sex,²² resulting in a legal mythology of *l’ordre publique*, *bonnes mœurs*, public morality, the criminalisation of pornography, prostitution, abortion and ‘deviant’ sexualities (often exported via colonial systems to the rest of the world).

Since the initial Treaty of Rome, the legal constructs of sex have experienced an impressive proliferation, despite the fact that the initial integration process was essentially driven by pure commercial rationales. A tiny and fairly toothless provision in Article 119 EEC (now Article 157 of the Treaty on the Functioning of the European Union (TFEU))²³ introduced the seminal wording of gender equality between men and women, the equal pay principle. Few scholars could have imagined in the 1950s that this brief provision would pave the way to the far-reaching and evolving set of sexual rights in EU law. All the principal EU institutions (the European Court of Justice (ECJ), the Council, the Commission and the Parliament) have been involved at various times and to varying degrees in the issues of gender mainstreaming, women’s labour and social rights, pregnancy and positive discrimination, gay liberation and sexual identity, prostitution, pornography and the fight against paedophilia and sexual trafficking. The study of sexual citizenship in the EU should rely therefore on cases from a variety of doctrinal areas and primary and secondary sources, examining the forms of consensual sexual expression which are legally prohibited and tracing why the law deems certain acts as illicit.

Today, EU law offers one of the most advanced frameworks for sexual and gender protection in the world despite the fact that it seemingly rests on very conventional notions of the family and non-discrimination. It is clearing moving ahead of the US, for example, where sexuality was until recently largely a matter of moralistic taboo and where legal institutions have often reproduced

²¹ This paper clearly adopts the vision of EU citizenship as a concept centered on rights with a problematic deduction of any explicit duties of EU citizens in practice. Therefore, the standard wording of “responsible” reproductive choices should not be conflated with duties as it rather refers to the informed choices for reproduction or non-reproduction. In line with this choice-focused regulation in 2015, the European Commission has authorised an advanced emergency contraceptive, ellaOne® (‘morning pill’), to be accessible from pharmacies without the need for a doctor’s prescription. Together with EU involvement with regulation of sexual health and other sexual risks, including sexual harassment and trafficking, this decision regarding contraceptive products signals the emergence of EU sexual risk regulation, drawing analogies with earlier examples of obesity, tobacco and alcohol regulation. A common usage of “responsible reproductive choices” refers to increasing knowledge in the area of genetics and its influence on appropriate reproductive choices by citizens. See J.R. Spencer, A. du Bois-Pedain (eds.), *Freedom and Responsibility in Reproductive Choices* (Hart, 2006).

²² M. Foucault, *Histoire de la sexualité: La volonté de savoir* (Paris: Éditions Gallimard, 1976).

²³ Consolidated version of the *Treaty on the Functioning of the European Union*, OJ 2012 No. C326/47 (TFEU).

obscurantist visions of sex.²⁴ While several EU Member States had already legalised same-sex partnerships, homosexual intercourse was completely decriminalised by the US Supreme Court in 2003.²⁵ Despite the country being the world's largest producer of pornographic material, obscenity remains outlawed in several states in the US. Until recently, a number of American states banned the sale of vibrators through laws regulating 'obscene devices'. Currently, a ban remains in force only in Alabama.²⁶ Paradoxically, this conservative position of the mainstream institutions inspired the original emancipating vision of law and sexuality among US scholars. That vision then spread to Canadian, Australian and UK scholars.²⁷

Meanwhile, EU law scholars conducted their research in narrow and scattered clusters including non-discrimination (chiefly on gender equality often understood exclusively as the protection of women), internal market (on pornography, prostitution etc.), and social law and family rights (on the benefits of same-sex partnerships). Instead of positioning the sexual as a separate and indispensable feature of human dignity, they often theorise in the outdated and heuristically empty legal framework of morality (prescribed as an excuse for discrimination in EU primary law), family values (as part of the obsolete heteronormative vocabulary) and the artificial divide between the private and public spheres. By manipulating the division between private and public spheres, an employer is perfectly able to foster discrimination on the grounds of sexuality via simple silencing of sexual expression. The 'closet' (that is, the concealment of sexuality) serves as asylum for many LGBT citizens and is a stigma preventing the serious discussion of the rights of sexual workers at the EU level. In this respect, the Anglo-American concept of sexual citizenship offers a suitable methodological lens for challenging the private/public division in the EU rights discourse. While EU law clearly articulated (sexual) citizens' rights (protection from discrimination in employment, maternity and pregnancy etc.), the duties of EU citizens are absent in the narrative of primary and secondary law.²⁸ Such a duty-less concept of EU citizenship releases the tension inherent to the civic republicanism of national citizenship regimes. Unlike in Member States, to be a valuable part of transnational society, EU citizens are not 'obliged' to self-reproduce for the sake of a sustainable population, to display pure and vestal morals, monogamy, family-orientation and strict heterosexuality, nor even to conform to the expected habits of their biological sex. EU law, thus, offers a new subject in the form of the sexual citizen,²⁹ capable of accommodating mobile identities: for example, various forms of transgenderism,³⁰ potentially extending protection to even less conventional forms of sexual diversity, such as sexual fetishism and clothing, sex labour, consensual masochistic practices and public nudity.³¹

24 M. Murray, 'Strange Bedfellows: Criminal Law, Family Law and the Legal Construction of Intimate Life' (2009) 94 *Iowa Law Review* 1253.

25 *Lawrence v. Texas*, 539 US 558 (2003). Obviously, in most other states, it was decriminalised de facto and de jure much earlier due to the prominent post-Stonewall gay activism back in the 1960s.

26 D. J. Lindemann, 'Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States' (2006) 15 *Columbia Journal of Gender and Law* 326.

27 See e.g., deconstruction of pornography and family law: A. M. Adler, 'Post-Modern Art and the Death of Obscenity Law' (1990) 99 *Yale Law Journal* 1359; A. Ristoph and M. Murray, 'Disestablishing the Family' (2010) 119 *Yale Law Journal* 1236.

28 Kochenov, 'EU Citizenship without Duties', note 7 above.

29 Carl F. Stychin, 'Sexual Citizenship in the European Union' (2001) 5 *Citizenship Studies* 285. On the 'sexual subject' in the framework of the Council of Europe, see M. Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 *European Journal of International Law* 1023; For a general account of 'sexual subject(s)', see N. Lacey, *Unspeakable Subjects. Feminist Essays on Legal and Social Theory* (Oxford: Hart Publishing, 1998).

30 S. Monro and L. Warren, 'Transgendering Citizenship' (2004) 7 *Sexualities* 345.

31 M. Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Cambridge, MA: Harvard University Press, 1999); M. A. Case, 'Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence' (1995) 105 *Yale Law Journal* 1.

EU citizenship provides vertical opportunities for claiming sexual rights, in addition to horizontal developments occurring in certain Member States.³² The current multilevel system of fundamental rights protection in Europe (EU, Council of Europe, national states and a relatively vast number of actors such as the media and NGOs) boosts political opportunities for advocacy groups to mobilise around the social issues of gender and sexual equality. As studies by political scientists demonstrate, such groups continuously frame their demands as a matter of ‘European’ discourse by making issues of equality and acceptance one of human rights and domestic responsibilities of the EU community.³³ The ultimate question is whether we are observing a nascent ‘right to love’ distributed through the EU citizenship discourse into the less-fortunate states via the federalising impact of EU law.³⁴ While the presence of an exit option is indisputably inherent to the nature of virtually any federal system, the legal specificity of the supranational community in Europe, with its goal-oriented reading of competences and the growing awareness of the possible implications of its actions for human rights protection potentially opens a way also to an ‘entry option’ that would oblige Member States to recognise less restrictive or simply different moral choices made by other states. Outside the ideologically charged areas of sexuality, gender identity and family law, such an ‘entry option’ is already a day-to-day reality in the EU.³⁵

EU Sexual Rights: Three Bricks at the Foundation of Sex in the Union

The first part of this paper, thus, mapped a theoretical account of sexual citizenship and sexual rights. The subsequent second part will illustrate three central axes underpinning EU sexual rights and their federalising distribution in Member States, on the way to EU sexual citizenship. These three axes address, respectively: (A) developments stemming from the rise of the internal market and economic mobility in the Union; (B) the explosive expansion of the initial gender equality in primary EU law; and, finally, (C) the introduction of sexuality as self-standing grounds of discrimination by Amsterdam Treaty in the late 1990s.

Internal Market and Economic Mobility of Nationality

The idea of duties (which stems from civic republicanism) commonly attributes a disciplining impetus to citizenship. The sexual is trivialised as a lower-order space of individual instincts based on the body and pleasure, in contrast to the much-praised common good of citizens. Hence, the role of citizenship is akin to overcoming the body and the individual, subordinating them to the social and the common. This common (or community-based) good of citizenship has been projected in constitutional and civil vocabularies as *boni mores*, initially a contractual term in Roman law further expanded in the era of European codifications to public – in particular – criminal and administrative law: public morality,

32 K. Alter and J. Vargas, ‘Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy’ (2000) 33 *Comparative Political Studies* 452. In citizenship studies ‘vertical’ is sometimes understood as relationship between citizen and state, while ‘horizontal’ absorbs relationship among citizens developing a community with shared loyalties and character. For the purposes of this paper, ‘vertical opportunities’ refer to EU claims while ‘horizontal opportunities’ describe cause lawyering based on national legal system(s).

33 R. A. Cichowski, ‘Legal Mobilization, Transnational Activism and Gender Equality in the EU’ (2013) 28 *Canadian Journal of Law & Society* 209; P. M. Ayoub, ‘Cooperative Transnationalism in Contemporary Europe: Europeanization and Political Opportunities for LGBT Mobilization in the European Union’ (2013) 5 *European Political Science Review* 279; K. Zippel, ‘Transnational Advocacy Networks and Policy Cycles in the European Union: The Case of Sexual Harassment’ (2004) 11 *Social Politics* 57.

34 The right to love is a catchy metaphor. There is brilliant literature on the freedom of intimate association, see K. L. Karst, ‘The Freedom of Intimate Association’ (1980) 89 *Yale Law Journal* 624.

35 D. Kochenov, ‘On Options of Citizens and Moral Choices of States: Gays and European Federalism’ (2009) 33 *Fordham International Law Journal* 156.

bonnes mœurs, gute Sitten, buon costume, openbare zeden, and so on.³⁶ *Good morals* have thus been acting as a foundation myth of the social morality, which has been inbuilt into an underpinning requirement of citizenship and civic obedience.³⁷ The disciplining rhetoric of citizenship in nation states explains the nineteenth century legal obsession with the family, its reproductive purpose and the emphasis on population instead of individuals.³⁸

The genesis of EU citizenship is rooted in the internal market which offered a radically different environment for the sexual than Member States did. On the one hand, primary EU law had to replicate the substantially empty ideological legal clichés of public morality as ‘legitimate/justifiable’ exceptions to the internal market. Among the grounds which do not preclude prohibitions or restrictions on imports, exports or goods in transit (such as public policy, public security, protection of health, animals or plants, national treasures, industrial and commercial property), Article 36 TFEU puts ‘public morality’ first. On the other hand, European integration fostered a space for a flexible, mobile and essentially commerce-oriented internal market. Such a profit-oriented legal environment was destined to deliver a liberalising – commodifying – effect for goods and the workforce, where the nature of goods and jobs function as neutral categories as long as they facilitate free movement and flow indiscriminately among Member States.

Furthermore, the foundations of that flexible and morally neutral market were extended by the ever-expanding judicialisation of that European project.³⁹ From the landmark *Van Gend & Loos*⁴⁰ and *Costa v. ENEL*⁴¹ judgments, the history of the internal market has been substantially driven by the Court of Justice. All the underpinning dimensions of the internal market (free movement of goods, services and persons) inevitably involve aspects of human sexuality. Accordingly, an essentially commercial tribunal, the ECJ has had to deal with issues of pornography, prostitution and family reunification. The explicit involvement of the Court with ‘Euro-sex’ began following the inevitable clash of civic republicanism (and its moralistic prescriptions for citizenship) with the rationale of the common market. The first line of these decisions addresses the controversies around sex workers. The ECJ refers to national law that positions prostitution into the domain of labour and confirms that Member States should adopt a consistent attitude towards both citizens and migrants. Therefore, the refusal to permit French *filles de joie* to remain in Belgium constituted arbitrary discrimination.⁴²

³⁶ For the original legal semantics of the *boni mores* in Roman law, see T. Mayer-Maly, ‘Die guten Sitten als Massstab des Rechts’ [1988] *Juristische Schulung* 596; G. Hannard, *Droit romain. Notions de base. Concept de droit, sujets et droit* (Brussels: Publications des Facultés universitaires Saint-Louis, 1997), pp. 98–99; E. Geraud-Llorca, ‘L’introduction des bonnes mœurs dans le code civil’, in J. Chevallier (ed.), *Les bonnes mœurs* (Paris: Presses Universitaires de France, 1994); G. Battista Ferri, *Ordine pubblico, buon costume e la teoria del contratto* (Milan: Giuffrè, 1967). For a recent attempt to reconstruct the Roman ‘*contra bonas mores*’ principle through an economic analysis of legal history, see P. Cserne and G. Deli, ‘Law and Morality in the Regulation of Contracts: Lessons from Ancient Rome’ (2009) *TILEC Discussion Paper* No. 2009/37.

³⁷ For reconstruction, see U. Belavusau, ‘Art, Pornography and Foucauldian Reconstruction of Comparative Law’ (2010) 17 *Maastricht Journal of European & Comparative Law* 252.

³⁸ In this sense, contemporary ‘conservatives’ appeal to what Foucault described as a *population* vision of the society. The 18th and 19th centuries, apart from giving a legal sense to pornography, produced an important category in ‘the population’, one of the greatest instruments of social power. The attributes and variables of the population (birth and death rate, life expectancy, fertility, state of health, etc.) brought sex into the heart of ‘*scientia sexualis*’. A moralistic discourse is centered on those variables, discussing the frequency of sexual relations, ways of becoming fertile and sterile, the effects of unmarried life or the prohibition of certain sexual practices.

³⁹ A. Stone Sweet, ‘The European Court of Justice and the Judicialization of EU Governance’ (2010) 5(2) *Living Reviews in European Governance* at 5–39.

⁴⁰ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, EU:C:1963:1, [1963] ECR (Special English Edition) 1.

⁴¹ Case 6/64, *Costa v. ENEL*, EU:C:1964:66, [1964] ECR (Special English Edition) 585.

⁴² Joined cases 115/81 and 116/81, *Rezguia Adoui v. Belgian State and City of Liège and Dominique Cornuaille v. Belgian State*, EU:C:1982:183, [1982] ECR 1665.

The Court has confirmed this approach in a later case of *Danielle Roux*, another French sex worker who declared her occupation as a waitress in her application for a Belgian residence permit.⁴³ However, the local authorities uncovered the sexual nature of her commercial services and refused to issue her permit in line with Belgian ‘social legislation’. Ms Roux brought a claim against the Belgian state before the Court of First Instance in Liège, which referred this issue for preliminary ruling to the Court of Justice. The Court again acknowledged sex work as an economic activity subject to the common market non-discrimination rules.

The second line addresses trade in sexual objects and services. From the outset, the ECJ could have applied the *boni mores* provision from Article 36 TFEU (by then Article 30 EC, stipulating morality as grounds for legitimate discrimination) for a conservative shift in jurisprudence in line with the civic republicanism of national citizenship regimes. However, the Court took a somewhat more pragmatic position. In the case *Henn and Darby* (1979),⁴⁴ the appellants were convicted in a British court of a variety of offences connected with the trade in pornographic materials. In that instance, the Court held that Article 30 of the Treaty establishing the European Community (EC)⁴⁵ means that a Member State may, in principle, lawfully impose prohibitions on the importation of articles that are of an indecent or obscene nature as understood in its domestic law. The Court left Member States with the discretion to determine obscenity in accordance with their own values.⁴⁶ The fact that there are certain differences between the laws enforced in the different constituent parts of a Member State does not prevent that state from applying a unitary concept with regard to prohibitions on imports imposed on grounds of public morality on trade with other Member States.⁴⁷ In a subsequent case seven years later, *Conegate Ltd.* (1986),⁴⁸ which again came up as a preliminary ruling from the UK, the Court essentially clarified its position. A number of life-size blow-up dolls and vacuum flasks were seized and confiscated upon being imported into the UK from Germany. The British authorities relied on *Henn and Darby* and argued that this restriction on the free movement of goods fell within the scope of the ‘public morality’ clause in Article 30 EC, and, therefore, Article 28 EC did not apply. Nevertheless, the ECJ held that as a limitation on a vital principle of EC law, Article 30 EC had to be interpreted restrictively. Thus, a Member State would have to prove that the national measure is aimed exclusively at the protection of public morality and, therefore, that it applies equally to national producers and service providers.⁴⁹ However, similar products were already lawfully sold in the UK. Consequently, the restriction on importation could not be justified under Article 30 EC. In 2010 the Court had another opportunity to decide on pornography, this time concerning the taxation of ‘obscene’ movies.⁵⁰ Although it did not support extending a special taxation regime provided by national legislation to artistic films at cinemas to pornographic films shown on the premises of sex shops, the ECJ framed its judgement in morally neutral language. Furthermore, the national – in that case Belgian – court itself formulated its question for preliminary ruling to Luxembourg in sex-neutral language.⁵¹ The non-restriction of tax levies was justified on the basis of the mode of presentation instead of its content.⁵²

⁴³ Case C-363/89, *Danielle Roux v. Belgian State*, EU:C:1991:41, [1991] ECR I-273.

⁴⁴ Case 34/79, *R. v. Maurice Donal Henn and John Frederick Ernest Darby*, EU:C:1979:295, [1979] ECR 3795.

⁴⁵ Consolidated version of the Treaty establishing the European Community, OJ 2006 No. C326/37 (EC).

⁴⁶ Case 34/79, *Henn and Darby*, EU:C:1979:295, [1979] ECR 3795, para. 15.

⁴⁷ See J. H. H. Weiler, ‘Europornography – First Reference of the House of Lords to the European Court of Justice’ (1981) 44 *Modern Law Review* 91.

⁴⁸ Case 121/85, *Conegate Ltd. v. H. M. Customs & Excise*, EU:C:1986:114, [1986] ECR 1007.

⁴⁹ Case 121/85, *Conegate Ltd.*, EU:C:1986:114, [1986] ECR 1007, para. 20.

⁵⁰ Case C-3/09, *Erotic Center BVBA v. Belgian State*, EU:C:2010:149, [2010] ECR I-2361.

⁵¹ The court in Ghent worded its question in a completely content-neutral manner. To appreciate this puritan ‘neutrality’, we can recall a judgment by the EFTA Court about a Swedish–Norwegian dispute on pornographic broadcasting, during which one of the questions was referred to as follows: ‘In the event that Art. 22, first sentence of Council Directive

These cases have shown sex and sexuality to be indispensable subjects of the EU legal narrative. Other EU institutions, firstly the European Parliament, did not remain neutral to sex in the Union. Heather MacRae reconstructs the passionate debates in the European Parliament in the 1990s when it considered the clauses on pornography in the EU instrument on broadcasting (Television without Frontiers Directive).⁵³ Transmission of pornographic content is subject to restrictive regulation by Article 22 Television without Frontiers Directive.⁵⁴ Most recently, in March 2013, the European Parliament had sufficient wisdom to decline a peculiar blanket ban on pornography on the Internet. The ban concerns the prescription on the inadmissibility of pornographic materials in the Report on Eliminating Gender Stereotypes in the EU.⁵⁵ Point 19 of this amusing document, called on ‘the Member States to establish independent regulation bodies with the aim of controlling the media and advertising industry and a mandate to impose effective sanctions on companies and individuals promoting the sexualization of girls’. Furthermore, the initial document also contained Point 17, calling ‘on the EU and its Member States to take concrete action on its resolution of 16 September 1997 on discrimination against women in advertising which called for a ban on all forms of pornography in the media and on the advertising of sex tourism’. The rationale of the drafters evidently echoes the tradition of radical feminism, hostile to pornographic expression as a mythical space of patriarchal subordination and exploitation of women.⁵⁶

The opponents of the legal liberalisation of sexual industry blamed the Court for regarding such services as ‘a legitimate dimension of a legitimate industry, the sex industry’.⁵⁷ In contrast, the ECJ has fostered an entirely moral-neutral legal position on several central sex-related issues. It has advanced a flexible internal market with free movement of sexual services and disregarded the miserable moralistic clichés of republican citizenship.

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89/552/EEC establishes a common standard for the European Economic Area: is the Swedish norm which accepts scenes shot in close-ups with masturbation, licking and sucking of sexual organs, intercourse, dwelling on ejaculation in the mouths of women and group sex an expression of the common norm in Art. 22 which is to apply for the European Economic Area? (*TV 1000 Sverige AB v. The Norwegian Government represented by the Royal Ministry of Cultural Affairs* [1998] EFTA Ct Rep. 68).

⁵² Case C-3/09, *Erotic Center BVBA*, EU:C:2010:149, [2010] ECR I-2361, paras. 18–19. For a detailed commentary, see U. Belavusau, ‘Sex in the Union: EU Law, Taxation and the Adult Industry’ (2010) 4 *European Law Reporter* 165.

⁵³ Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities (Television without Frontiers Directive), OJ 1989 No. L298/23. See H. MacRae, ‘Morality, Censorship, and Discrimination: Reframing the Pornography Debate in Germany and Europe’ (2003) 10 *Social Politics* 314.

⁵⁴ In the *Red Hot Dutch* case, the Court was asked to clarify the word ‘retransmission’. It concerned the satellite broadcasting of pornographic movies to the UK, which at the time expressed a stronger commitment to ‘child protection’ in accordance with Art. 22 Broadcasting Directive, applying basically criminal measures. The case was not pursued (Case C-327/93, *Continental Television*, removed from the register on 29 March 1996). As a result, the sale of equipment for the reception of the satellite signal from *Red Hot Dutch* stopped and the broadcaster was bankrupted. About history of the case, see C. Itzin, ‘Pornography, Harm and Human Rights: The UK in European Context’, in R. Amy Elman (ed.), *Sexual Politics and the European Union: the New Feminist Challenge* (New York, NY: Berghahn, 1996) p. 74.

⁵⁵ European Parliament, ‘Report on Eliminating Gender Stereotypes in the EU’, 2012/2116(INI) (Committee on Women’s Rights and Gender Equality, Rapporteur: Kartika Tamara Liotard, 6 December 2012).

⁵⁶ By now ‘iconic’ representatives of radical feminism with regard to pornography and prostitution are C. A. MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993) and A. Dworkin, *Pornography – Men Possessing Women* (New York, NY: Plume, 1991).

⁵⁷ For an unconvincing and – hopefully – outdated critique of the Court from radical feminist positions, see S. Edwards, ‘The Legal Regulation of Prostitution: A Human Issue’, in A. Scambler and G. Scambler (eds.), *Rethinking Prostitution: Purchasing Sex in the 1990s* (London: Routledge, 1997), p. 57, esp. at p. 82.

Gender Equality – Foundational Myth

Born in the cradle of European civilization – Ancient Greece – citizenship has notoriously excluded or undermined women. Voluminous literature has been written describing this exclusion of women, in particular, from voting rights. Yet voting is not the sole and perhaps not even the most troublesome exclusion in terms of gender equality. Modernist citizenship, with its emphasis on community goals, family and reproduction of the population (citizens of national states) has constructed womanhood as a ‘delicate’ subject, secondary and even subordinate to manhood. In this respect, the nineteenth century judgment of the US Supreme Court in *Bradwell v. Illinois* perfectly illuminated the cultural bias prescribed to women in modern national projects.⁵⁸ In that case, the Supreme Court allowed Illinois to prohibit Ms Myra Brandwell from practicing law. In his concurring opinion (that supports the Court’s decision), Justice Bradley maintained the ‘natural and proper timidity and delicacy’ of women which precludes them from exercising the law.⁵⁹ The male subject has historically commuted between home affairs and civil society, while women have been condemned as selfish whenever they aspired to transfer to the public realm. The discourse of republican citizenship has established family as a patriarchal space, that is, reaffirmation of power balance between genders (a husband and a wife). In the context of nationalism, this ethos of womanhood has emphasised common descent as foundational to the boundaries of a community and female reproductive capacities, as safeguarding national unity and the sustainability of that community.⁶⁰ The imagined consensus about (‘timid and delicate’) women and female sexuality, thus established an order of such strangeness that it remains enigmatic unless endorsed by the law.

Initially, EU law offered only a single tiny clause on equality along the lines of ‘men and women should enjoy equal pay for equal work’ (now Article 119 EEC). The clause was lobbied by France, which had raised concerns that its own ‘generous’ protection of women risked turning into a potential barrier to fair and equal competition among Member States.⁶¹ However, few could have imagined that paid employment would further pave the way towards EU sexual citizenship and the contemporary federal horizons of EU gender equality.

Similarly to the judicialisation of the internal market (described in the previous sub-part), non-discrimination has become an area of effective preliminary rulings at the Court of Justice. The Court has fostered an ever-emancipating space for EU gender equality. That legal space has been successfully mobilised in the advocacy of feminist cause litigators and social movements. One of the earliest examples is Elaine Vogel-Polsky, the lawyer who litigated landmark the *Defrenne* cases

⁵⁸ *Myra Bradwell v. State of Illinois*, 83 US 130 (15 April 1873).

⁵⁹ Although the majority opinion avoids references to Bradwell’s sex and does not decide the case on the basis of her being a woman (despite it being the underlying reason for the challenged prohibition in Illinois), Justice Bradely and two other colleagues found her sex critical. His concurring opinion maintains that ‘[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life’ (*Myra Bradwell v. State of Illinois*, 83 US 130 (15 April 1873) at 142). It is quite ironic in the context of citizenship, that in his dissent in the *Slaughterhouse Cases*, Bradeley had argued (with respect to men) that ‘the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of his most valuable rights, and one which the legislature of a State cannot invade, whether restrained by its own constitution or not’ (*The Butchers’ Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company and Others*, 83 US 36 (14 April 1873) at 114).

⁶⁰ N. Yuval-Davis and F. Anthias, *Woman – Nation – State* (Basingstoke: Palgrave Macmillan, 1989); and Yuval-Davis, *Gender and Nations*, note 18 above.

⁶¹ See C. Kilpatrick, ‘Effective Utilisation of Equality Rights: Equal Pay for Work of Equal Value in France and the UK’, in F. Gardiner (ed.), *Sex Equality Policy in Western Europe* (London: Routledge, 1997). 25-45; S. Roth (ed.), *Gender Politics in the Expanding European Union. Mobilization, Inclusion, Exclusion* (New York, NY: Berghahn, 2008); D. Schiek, ‘Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multi-Dimensional Conception of Equality Law’ (2005) 12 *Maastricht Journal of European and Comparative Law* 427.

(1971, 1976 and 1978).⁶² She famously managed to ensure that the Court established that Article 119 EEC⁶³ had a direct and binding effect, from which the Court has since developed its doctrine of sex equality as a general principle of EU law.⁶⁴

Over the last thirty years, the EU has passed nine directives on gender equality which closely reflect the ECJ's own judgments on the topic.⁶⁵ The activist Luxembourg tribunal has extended the tiny aforementioned primary law provision to interpret the gender aspects of equal pay, pension and social guarantees for men and women, as well as pregnancy and child-raising, and the advancement of positive discrimination laws and the rights of transsexuals.⁶⁶ Furthermore, following these abundant developments from Luxembourg, the post-Lisbon formulation of the gender equality clause (Article 157 TFEU) has exploded to several paragraphs. The progressive stance of the ECJ on gender equality seems to echo a corresponding liberalisation before the European Court of Human Rights, thus fostering European law as an important arena for the elaboration of gender citizenship.⁶⁷

⁶² Case 80/70, *Gabrielle Defrenne v. Belgian State*, EU:C:1971:55, [1971] ECR 445; Case 43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, EU:C:1976:56, [1976] ECR 455; Case 149/77, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, EU:C:1978:130, [1978] ECR 1365. The first equality case appeared in Luxembourg in the 1970s, in Case 43/75, *Defrenne v. Sabena*, EU:C:1976:56, [1976] ECR 544, while the primary law did not offer any non-discrimination provisions apart from a tiny clause of Art. 141 EEC that maintained, that men and women should enjoy equal pay for equal work. A prominent cause lawyer, Eliane Vogel-Polsky who used *Defrenne* saga to mainstream gender non-discrimination in EU law, supported Ms Defrenne, the plaintiff employed as flight attendant. She was essentially the first to question whether Art. 119 EEC (nowadays Art. 157 TFEU) had direct effect. See E. Vogel-Polsky, 'L'article 119 du traité de Rome peut-il être considéré comme self-executing?' [1967] *Journal des tribunaux* 233. About Vogel-Polsky, see a book by E. Gubin and C. Jacques, *Eliane Vogel-Polsky: A Woman of Conviction* (Brussels: Institute for the Equality of Women and Men, 2007).

⁶³ Now Art. 157 TFEU.

⁶⁴ The *Defrenne* saga stands alongside other seminal ECJ cases brought by pan-European cause lawyers and which safeguard the substantial judicialisation of EU law: L. F. D. ter Kuile in Case 26/62, *van Gend & Loos*, EU:C:1963:1, [1963] ECR (Special English Edition) 1, Gert Meier in Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein [Cassis de Dijon]*, EU:C:1979:42, [1979] ECR 649, etc. A. Vauchez, 'Euro-lawyering, Transnational Social Fields and European Policy-Building', in A. Vauchez and B. de Witte (eds.), *Lawyering Europe: European Law as A Transnational Social Field* (Oxford: Hart Publishing, 2013).

⁶⁵ The majority of EU anti-discrimination judgments are on gender equality. It is therefore virtually impossible to list them all in a footnote and more efficient to cite the subsequent harmonisation in secondary EU law. See e.g., Council Directive No. 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ 1975 No. L45/19; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 No. L6/24; Council Directive No. 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services, OJ 2004 No. L373/37.

⁶⁶ Relevant parts of current secondary legislation include (on employment law) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ 2006 No. L204/23; and Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC, OJ 1992 No. L348/1; (on aid for sexual/reproductive issues) Regulation (EC) No. 1567/2003 of the European Parliament and of the Council of 15 July 2003 on aid for policies and actions on reproductive and sexual health and rights in developing countries, OJ 2003 No. L224/1; (on the sexual exploitation of children) Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ 2004 No. L13/44; and the 'Brussels Regulation': Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ 2003 No. L338/1. For a discussion of EU expansion in gender equality – in particular, in the matters of maternity and paternity leave – see U. Belavusau, 'From Lëtzebuerg to Luxembourg: EU Law, Non-Discrimination and Pregnancy' [2010] *European Law Reporter* 45.

⁶⁷ R. Rubio-Marín, 'The Achievement of Female Suffrage in Europe: On Women's Citizenship' (2014) 12 *International Journal of Constitutional Law* 4; S. Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain

Perhaps the culmination of sexual rights (drawn out of the tiny gender-equality clause) was the ECJ's rulings on transsexuals. In its 1996 judgement in *P. v. S.*,⁶⁸ the Court interpreted the provision on the equality of men and women to apply to cases of gender reassignment.⁶⁹ The EU citizenship project has, therefore, broken with the idea of exclusively biologically-born women being the timid and delicate subjects of patriarchal familial relations, whose main purpose is the procreation of community and, ultimately, of the mythical nation. The EU argument achieved more than just fostering labour equality. It helped to gradually overcome cultural patriarchal views mistaken in Member States for natural facts, offering a comparative and supra-national realm for the achievement of progressive emancipation. The whole mechanics of EU harmonisation and the transposition of EU law in Member States has exposed national legal systems to an assessment of the cultural contingency entrenched in sex categories unsuitable for supranational projects such as the Union itself.

Article 19 TFEU: Adding Sexuality

While early national citizenship systematically shut women out, it was also excluding gays unless they kept their identity hidden.⁷⁰ As nationalist rhetoric on citizenship used to position women as subjects of procreation, non-heterosexual individuals were conceived as 'pathological', 'immoral' and 'foreign' to imagined domestic communities.⁷¹ Quite characteristically, the homophobic narrative in the new Member States of the Union, for example, is often framed as an 'imposition of hostile Western values' on blissfully prudish and moral 'national citizens'.⁷² The parallel discourse on the imagined pathology of homosexuality (a concept largely shaped by psychiatrists and criminologists)⁷³ gained sustenance from the HIV/AIDS epidemic. In this respect, there is a gap between the current Union Member States who found themselves behind opposite sides of the Berlin Wall. Western countries had brought homosexuality into the vocabulary of active citizenship earlier, during sexual revolution of the 1960s and the AIDS breakout in the 1980s. Dennis Altman predicted that economic growth and development would facilitate the integration of homosexuals into modern society.⁷⁴ Homosexuals do not map to any

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Meet?' (2008) 8 *Human Rights Law Review* 647; D. Martin, 'Strasbourg, Luxembourg et la discrimination: influences croisées ou jurisprudences sous influence?' (2007) 69 *Revue Trimestrielle des Droits de l'Homme* 132.

⁶⁸ Case C-13/94, *P. v. S. and Cornwall County Council*, EU:C:1996:170, [1996] ECR I-2143. Another pertinent case in this context is Case C-117/01, *K. B. v. National Health Service Pensions Agency and Secretary of State for Health*, EU:C:2004:7, [2004] ECR I-541.

⁶⁹ Discrimination of transsexuals since then has been treated as an aspect of gender equality, as incorporated into Directive 2006/54/EC on equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ 2006 No. L204/23, Rec. 3 of the Preamble: 'The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person'. In June 2010, the European Parliament adopted a resolution (the 'Figueiredo report') calling for an inclusive EU gender equality strategy, specifically addressing issues linked to gender identity: European Parliament, 'Report on the assessment of the results of the 2006–2010 Roadmap for Equality between women and men, and forward-looking recommendations', 2009/2242(INI) (Committee on Women's Rights and Gender Equality, Rapporteur: Ilda Figueiredo, 12 May 2010).

⁷⁰ Obviously, this statement is subject to a disclaimer about the liquidity of the concept of homosexuality, as introduced not earlier than the 19th century. Ancient Greek citizenship, in contrast, fostered an alternative view on sexuality and the role of man-to-man relations which could hardly be regarded as discriminatory in contemporary terms. See D. Cohen, *Law, Sexuality, and Society: The Enforcement of Morals in Classical Athens* (Cambridge: Cambridge University Press, 2004).

⁷¹ J. Nagel, *Race, Ethnicity, and Sexuality: Intimate Intersections, Forbidden Frontiers* (Oxford: Oxford University Press, 2003).

⁷² See e.g., K. Kahlina, 'Contested Terrain of Sexual Citizenship: EU Accession and the Changing Position of Sexual Minorities in the Post-Yugoslav Context' (2013) *University of Edinburgh Working Paper No. 2013/33*.

⁷³ See the classic works of Foucault, *Histoire de la sexualité*, note 22 above. See also D. F. Greenberg, *The Construction of Homosexuality* (Chicago, IL: Chicago University Press, 1990).

⁷⁴ D. Altman, *The Homosexualization of America: the Americanization of the Homosexual* (New York, NY: St Martin's Press, 1982).

particular economic class and are therefore not easily reducible to an economically disadvantaged group. Nonetheless, economic development and globalisation are incompatible with exclusion based on sexual orientation.⁷⁵ Likewise, the EU project based on the internal market rationale is hardly compatible with discrimination on the basis of sexuality, as it could exclude large sections of the population from providing and receiving services, consuming goods and fostering economic growth on an inter-state basis.

As has been shown above, the ECJ has stretched the tiny sex equality clause to cover cases on gender reassignment and to protect the rights of transsexuals. However, it was the absolute maximum the activist Court was able to achieve to foster emancipation causes for LGBT individuals in the 1990s.⁷⁶ Similar cases for gay and lesbian couples based on Article 157 TFEU have all failed.⁷⁷ The heteronormativity of the EU legal order is additionally sustained by the *de jure* exclusion – often wrongly relied upon – of family matters from the scope of EU regulation, although it would have been perhaps more correct to state that currently, national and EU law co-regulate family matters to a certain degree.⁷⁸ The 1996 case on transsexuals was already a huge achievement, considering that back in the 1950s (when the EEC was established), national judges (including for example, judges of the European Court of Human Rights) employed the language of crime, pathology and deviation when describing homosexuality.⁷⁹ Furthermore, it remained criminalised in many Member States until the 1970s, with Romania becoming the last EU Member State to decriminalise homosexuality in the 2000s (before its accession to the EU).⁸⁰

The limitations on EU action written into primary law prompted the inclusion of a provision on anti-discrimination which would be self-standing and extend the emancipation potential beyond the ever-expanded yet finite gender equality clause. Such a provision was negotiated into the Treaty of Amsterdam, which introduced Article 13 into the EC Treaty (today Article 19 TFEU). The new clause stands apart from the gender clause (the latter has acquired a richer harmonisation scope) and lists sexual orientation among the additional grounds of prohibited discrimination (along with race and ethnicity, age, disability and religion). The clause does not straightforwardly impose, for example, the

⁷⁵ R. A. Posner, *Sex and Reason* (Cambridge, MA: Harvard University Press, 1992).

⁷⁶ K. Waaldijk and M. Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive* (The Hague: T. M. C. Asser Press, 2006); G. N. von Toggenburg, “‘LGBT’ Go Luxembourg: On the Stance of Lesbian Gay Bisexual and Transgender Rights Before the European Court of Justice” [2008] *European Law Reporter* 174.

⁷⁷ Case 249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd.*, EU:C:1998:63, [1998] ECR I-621; Case 122/99, *D. and Kingdom of Sweden v. Council of the European Union*, EU:C:2001, [2001] ECR I-4319; Case 117/01, *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, EU:C:2004, [2004] ECR I-541. About the defeat of the earlier cases, see N. J. Beger, ‘Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)potence of Rights Politics at the European Court of Justice’ (2000) 9 *Social & Legal Studies* 249.

⁷⁸ As will be demonstrated below in the context of the ‘Citizenship Directive’ and the case law of the ECJ, it is quite wrong to keep assuming that EU law does not regulate family matters. For a convincing rebuttal of this erroneous claim, see H. Stalford, ‘For Better, For Worse: The Relationship between the EU Citizenship and the Development of Cross-Border Family Law’, in M. Dougan, N. Nic Shuibhne and E. Spaventa (eds.), *Empowerment and Disempowerment of European Citizens* (Oxford: Hart Publishing, 2012), p. 223. The idea that family matters are completely excluded from EU regulation is often drawn from Rec. 22 of the Preamble to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 No. L303/16, as well as from the ECJ cases, like the recent Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, EU:C:2011:286, [2011] ECR I-3591, para. 38: ‘As a preliminary point, it should be observed that, as EU law stands at present, legislation on the marital status of persons falls within the competence of the Member States’.

⁷⁹ M. Grigolo, ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’ (2003) 14 *European Journal of International Law* 1023.

⁸⁰ For multiple (including Romanian) examples, see D. Kochenov, ‘Democracy and Human Rights – Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities’ (2007) 13 *Texas Wesleyan Law Review* 459.

legality of same-sex marriages, but it enables EU harmonisation powers to challenge discrimination based on sexual orientation.

Although not without caveats, Article 19 TFEU has already contributed to the rise of EU secondary law protecting LGBT rights in the employment context,⁸¹ with several important judgments in this field.⁸² Furthermore, Article 19 TFEU was inserted into the second paper of the TFEU, entitled ‘Non-Discrimination and Citizenship of the Union’ (Articles 20–24 TFEU), thus consolidating the project of EU citizenship with the anti-discrimination ethos.

Like most of the cases brought on the basis of Article 157 TFEU, the recent line of case law based on Article 19 TFEU primarily involves preliminary rulings at the Court of Justice. The biggest achievement so far is recognising equal pay rights in various labour contexts (earlier acknowledged for women and transsexuals) for lesbian and gay couples, as soon as a state acknowledges a minimum legal status for the homosexual union (be it a partnership or a marriage).⁸³ One recent case from Luxembourg which stands out from the rest as particularly promising in litigation terms is the judgment in *Asociația ACCEPT*.⁸⁴ This case, which put homophobia under the spotlight of EU law, illustrates the value of pragmatic cause litigation (similar to the *Defrenne* saga in the 1970s) for the benefit of a disempowered minority and the rise of an active form of citizenship mobilising EU sexual rights. A Romanian football club was found to be performing direct discrimination by not distancing itself from the words of its patron. The patron announced that he would never hire a gay player. A non-discrimination organisation managed to bring this case in the absence of a single plaintiff. The *locus standi* for organisations is undoubtedly a huge achievement of EU non-discrimination law in that it encourages the litigious potential of active citizenship.⁸⁵ This tactic, based on civil litigants and social movements, gives a true boost to otherwise ‘desperate’ cases, which lack individual plaintiffs. The latter factor is particularly emblematic for the LGBT community, especially in Member States with more socially prevalent homophobia and religious obscurantism. In such societies, where coming out is still uncommon, revealing alternative sexuality often leads to social ostracism and numerous employment difficulties. As convincingly demonstrated by Foucault, heteronormativity is not exclusively a matter of repression.⁸⁶ Instead, it is often sustained by keeping the sexual as a most cherished secret of Western society. The ‘closet’ (that is, the concealment of sexuality) serves as an asylum for many gays and lesbians. Hence, a deafening and embarrassing silence remain the stigma of the queer citizens.

In addition to Article 19 TFEU and a brief non-discrimination provision in the Charter of Fundamental Rights,⁸⁷ the next substantial EU basis for claiming gay rights is based on the so-called Citizenship

⁸¹ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 No. L303/16.

⁸² Case C-267/06, *Tadao Maruko v. Versorgunganstalt der deutschen Bühnen*, EU:C:2008:179, [2008] ECR I-1757.

⁸³ See Kochenov, ‘On Options of Citizens’, note 35 above; M. Möschel, ‘Life Partnerships in Germany: Separate and Unequal?’ (2009) 16 *Columbia Journal of European Law* 37; D. Borillo, ‘Pluralisme conjugal ou hiérarchie des sexualités. La reconnaissance juridique des couples homosexuelles dans l’Union européenne’ (2011) 46 *McGill Law Review* 875.

⁸⁴ Case C-81/12, *Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, EU:C:2013:275. For an extensive comment on the case, see U. Belavusau, ‘A Penalty Card for Homophobia from EU Non-Discrimination Law’ (2015) *Columbia Journal of European Law* (forthcoming).

⁸⁵ Art. 9(2) Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 No. L303/16.

⁸⁶ See P. Rabinow (ed.), *The Foucault Reader* (New York, NY: Pantheon Books, 1984), p. 294.

⁸⁷ Art. 21 of the CFR stipulates a general prohibition of discrimination, based on sexual orientation. Its Arts. 7 (respect for private and family life) and 9 (right to marry and right to found a family) both employ gender-neutral language for ‘family’, unlike some outdated national constitutions specifying that family is a union of a man and a woman, e.g. the current interpretation of Art. 6 in the German *Grundgesetz*. For discussion, see A. Sanders, ‘Marriage, Same-Sex Partnership, and the German Constitution’ (2012) 13 *German Law Journal* 911.

Directive.⁸⁸ This instrument of secondary EU law employs a gender-neutral language for family unions and partners.⁸⁹ The Directive establishes several regimes for married, registered and unregistered partners. If a same-sex couple is married in a home state then EU law unquestionably requires the host state to recognise the marriage, as the wording of the Directive is crystal-clear.⁹⁰ In practice, host states not recognising same-sex marriages often obstruct the practical enjoyment of the right of a spouse to join their partner – an issue which no doubt needs to be clarified in the case law of the ECJ. Two situations are possible in the case of a registered partnership. Should the host Member State treat registered partnerships as equivalent to marriage, an individual then has the right to join their partner as if they were spouses. If the host state does not treat registered partnerships as equal to marriage, then the couple falls into the category of unregistered partners in a ‘durable relationship’. However, EU law creates no obligation to recognise registered partnerships. Unregistered partners do not enjoy the same right as a spouse to join their partner. Instead, the Directive obliges Member States to ‘facilitate entry and residence’ to unregistered partners who are in a ‘durable relationship’. This unclear rule applies equally to same-sex couples and to couples of the opposite sex.⁹¹ Such situations cover same-sex couples where one is a EU citizen. In addition, the Family Reunification Directive allows spouses who are third-country nationals to be united with third-country nationals residing lawfully in the territory of a Member State. However, Member States are not explicitly obliged to extend this right to same-sex registered (or unregistered) partnerships.⁹² The evident limitation is that an albeit ever-decreasing number of EU countries continue not to recognise any form of same-sex unions. Furthermore, Poland and the UK negotiated a specific Protocol to the Charter which has been presented as opt-out of these countries from substantial parts of the Charter.⁹³ In addition, Poland has adopted a specific declaration on morality and family law.⁹⁴ In practice, this acclaimed opt-out from the Charter is meaningless: technically non-discrimination matters can always be handled by reference to Article 19 TFEU, the general principle of equality and fundamental rights.⁹⁵

The federal elements embedded in the ever-evolving EU law, on the one hand, created mobilising opportunities for transnational LGBT litigation and, on the other hand, have steadily Europeanised

⁸⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 No. L158/77.

⁸⁹ Art. 2(2) Directive 2004/38 on the right of citizens of the Union, OJ 2004 No. L158/77 states: “‘family member’ means the spouse”. Rec. 3 of the Preamble to the Directive is even more explicit: ‘Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as [...] sexual orientation.’

⁹⁰ Kochenov, ‘On Options of Citizens’, note 35 above.

⁹¹ For a broad discussion of the Directive with regard to same-sex couples, see M. Bell, *EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process* (ILGA-Europe Report, 2005). For a summary, see *Same-Sex Couples, Free Movement of EU Citizens, Migration and Asylum* (European Agency for Fundamental Rights, 2009). For a recent academic study, see A. Tryfonidou, ‘Free Movement Law and the Cross-Border Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition’, paper presented at the 44th UACES Conference (Cork, 1–3 September 2014).

⁹² Wider aspects of residence are regulated in Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 No. L251/12.

⁹³ Protocol 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom 2007, OJ 2012 No. C326/313.

⁹⁴ Declaration No. 61 by the Republic of Poland on the Charter of Fundamental Rights of the European Union, OJ 2012 No. C326/360: ‘The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity’.

⁹⁵ C. Barnard, ‘The “Opt-Out” for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reading’, in S. Griller and J. Ziller (eds.), *Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Vienna: Springer, 2008).

the discourse on gay rights as part-and-parcel of Union values. EU citizenship, non-discrimination and fundamental rights' developments have all contributed to the minimum 'European' standards of sexual rights. The ultimate question is whether we face the nascent 'right to love' translated into conservative states through the vertical distribution of EU law. With this overwhelming EU federalisation, the discourse on LGBT rights can no longer be silenced in the moralistic socio-political narratives of the Union's homophobic Member States. As has been demonstrated in recent studies, the 'Europeanization of LGBT rights begins primarily as a vertical process in which the EU imposes formal rules on Member States and builds the capacities of civil society [...] to lobby domestic institutions. This engenders new domestic discourses and generates media attention around the LGBT issue, which domestic groups then use to draw attention from outside'.⁹⁶ Yet the borders of the homo-space (an indispensable aspect of EU sexual citizenship) are continuously being negotiated with the 'public universal' hetero-counterpart. In this respect, fairly progressive EU sexual rights also shape new categories of *homo* and *hetero* that are themselves based on an act of copy-paste from the heterosexual family relations. However, the current scope of protection incorporated into the primary law and the neutral language of family 'partners' in the Citizenship Directive both leave the Union with an open project for sexual rights, which could further accommodate less typical (beyond heteronormative and patriarchal) forms of intimacy – including networks of friends, lovers and partners – as spaces for socialisation.⁹⁷ A relationship is no longer a procreative prerequisite of the 'good citizenship' but an end in itself, developing into *the right to love*.

Conclusions: Mobile Citizenship and Sex Mobilization via EU Law

This paper demonstrated that activist EU citizenship accommodates a dynamic body of sexual rights and signals the emergence of EU sexual citizenship. Its rise is a result of complex developments in the governance of sex, gender and sexuality in EU law. EU sexual citizenship is quasi-federal in nature in the sense that it offers an alternative model of peoplehood, whose consensual sexual pursuits (be it sexual labour, pornography, gender assignment, forms of intimacy and relationships etc.) are a matter of personal choice, in contrast to the procreative and moralistic duties of national communities and their imagined 'common goods'. Sexual citizenship is a mobile category whose flexibility is capable of adopting more engaging and ever evolving schemes of sexuality that fall out of the static national citizenship regimes with their 'population-based' fictions of family law and community values. Likewise, a mobile and flexible internal market has proved to be a more profitable space for the economic pursuit of sexual pleasure and gender equality than the 'virtue'-oriented national market. The mobility of EU sexual citizenship is also reinforced as it goes hand-in-hand with other prescribed non-discrimination grounds, such as age, ethnicity and disability. In addition, it offers a reasonable fluidity of protected consensual forms of intimacy. Ultimately, we observe the shift from local sexual subjects (for example, homosexual, trans-person, woman or prostitute) towards a somewhat universal sexual legal subject which enhances the inclusivity of EU citizenship. This sexual subject of EU law has its own virtue and requires protection against the imagined *boni mores* and communitarian myths of Member States.

At the vertical level, EU sexual citizenship distributes sexual rights to Member States through several channels. Before accession, future Member States are obliged to adopt governance of sexual rights through the Copenhagen criteria on the rule of law and fundamental rights (that is, for example, to decriminalise adult same-sex relations). After accession, EU institutions contribute to the minimum level of emancipation of sexual standards across Member States (for example, non-discrimination in

⁹⁶ P. M. Ayoub, 'Cooperative Transnationalism in Contemporary Europe: Europeanization and Political Opportunities for LGBT Mobilization in the European Union' (2013) 5 *European Political Science Review* 280.

⁹⁷ The concept of alternative forms of intimacy (especially among gays and lesbians) which is often missing in the heteronormative vision of equality was advanced by A. Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Cambridge: Polity Press, 1992).

employment and asylum). Furthermore, the EU offers a litigation space for active citizens and social movements to advance their sexual causes at the Court of Justice. The ECJ has bolstered the proliferation of gender equality and took a moral-neutral position to adjudications on sexual services. Finally, sexual rights find their way vertically to Member States through the federal discourse of EU citizenship. The rhetoric of gender and sexual emancipation is strongly associated with idealistic perceptions of European politics and law. EU federalisation fosters the social imagination of EU citizens and social movements who, in turn, rely on EU sexual standards as a strategy for humiliating Member States. *European* becomes the language of rights and entitlements. EU sexual citizenship, thus, turns into a realm for disciplining embarrassment in the Union. Dictating gender roles, sexual choices and lifestyles is not yet fully precluded. Yet thanks to the EU, it is finally a cause for shame and yields less cash.

