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Unravelling the knot of equality and privacy in the ECtHR and the SCOTUS: From *Isonomia* to *Isotimia*

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ABSTRACT

This article aims to suggest a framework for understanding the interaction between the right to equality and the right to privacy. It does so with specific reference to the case-law of the European Court of Human Rights (ECtHR) and the Supreme Court of the United States (SCOTUS). First, the different origins of equality and privacy, as well as the link between these two concepts, are traced in theory. Second, examples are drawn from the case-law of the ECtHR and SCOTUS, with a view to illustrating the exact parameters of the interaction between equality and privacy in practice. This doctrinal analysis focuses mainly on the issue of legal treatment of same-sex relationships. Third, the ancient Greek notion of isotimia is put forward as a way to unravel the knot created by equality and privacy; that is, as a way to understand properly their relationship.

KEYWORDS: equality and non-discrimination, privacy, sexual orientation, European Court of Human Rights, Supreme Court of the United States

1. INTRODUCTION

Mapping the conceptual labyrinths generated by the notions of equality and privacy is certainly not an easy task.[1] But hard as it might be –if at all desirable- to agree on the exact parameters of either concept, a strong link between them has emerged time and again both in theory and in the practice of human rights adjudication. This paper aims to map that link under the light of the approach adopted by the European Court of Human Rights (ECtHR) and the Supreme Court of the United States (SCOTUS) in relation to the legal treatment of same-sex relationships. At the outset, a conceptual inquiry is undertaken to demonstrate the link between equality and privacy in theory. This is followed by a doctrinal analysis, drawing examples from the case-law of the ECtHR and the SCOTUS, with a view to exploring how equality and privacy interact in practice. The final section engages in a normative analysis, suggesting that the right to privacy has been instrumental in enhancing our understanding of the right to equality; but also that the time has come to unravel the knot created by the two rights, to discern their distinctiveness in clearer terms. The ancient Greek notion of *isotimia* as a specific manifestation of the right to equality is put forward as the key to doing so.

2. EQUALITY AND PRIVACY: A CONCEPTUAL PERSPECTIVE

A. Different origins and a common trait

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[1] For an overview of some of the complex debates that have surrounded the two concepts, see Louis P. Pojman and Robert Westmoreland (eds), *Equality: Selected Readings* (1997) and Ferdinand D. Schoeman, *Philosophical Dimensions of Privacy: An Anthology* (1984).

There is a certain paradox which lies at the very core of our understanding of equality and privacy. Albeit both notions are widely recognised as enshrining a fundamental right, they have both been attacked on the grounds that they constitute abstractions which attach to other values in order to acquire substance. For instance, a well-known critique of the right to equality is that equal treatment draws its appeal from external values, thus being an 'empty idea'.[2] This is so because treating like cases alike is logically impossible unless we rely on external factors with reference to which such treatment is to take place. Similarly, the right to privacy has been analysed as 'derivative' in the sense that it encapsulates a cluster of rights that overlaps with those attaching to one's ownership of their person and their property.[3] These criticisms stem from the fact that there does not appear to be a single understanding of the core meaning of either equality or privacy, although the two rights continue to play an important role in human rights discourse. In examining why this is the case, perhaps it is best to start by looking into the foundations upon which our modern perception of equality and privacy has evolved.

On the one hand, the need for equality has been linked traditionally to the idea that a just distribution of tangible or intangible benefits requires like cases to be treated alike.[4] The characteristics which are relevant for the purpose of assessing likeness or unlikeness may be determined with reference to the benefit or the burden that is being distributed. So, to use a millennia-old example, the best flutes should be given to the best flute players and not to the most handsome ones; and the ability to move fast may be used as a criterion in declaring the winners of gymnastics competitions, but not in allocating offices of State.[5] That is so because the grounds for any distinction must be rational and impartial; and in the absence of such rationality and impartiality, the distinction will be arbitrary.[6] To allow such arbitrary treatment in the public sphere would be to jeopardise equality before the law in particular and the administration of justice in general by fostering unpredictability and a sense of favouritism within the legal order.

On the other hand, the need for privacy may be said to emanate from the idea that '[t]he distinction between what an individual exposes to public view and what he conceals or exposes only to intimates is essential to permit creatures as complex as ourselves to interact without social breakdown'.[7] Indeed, it is fair to argue that all of us are entitled to keep some aspects of our life –tangible or intangible- away from the public eye and share them only with those we choose and in the way we choose. It is that classic exposition of the right 'to be let alone' that has informed the evolution of our understanding of privacy since the very early days of the debate.[8] Just as everyone is entitled to protect their property from external

[2] See Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537.

[3] See Judith Jarvis Thomson, 'The Right to Privacy' (1975) 4 *Philosophy & Public Affairs* 295 at 306 and 312-314; cf. Thomas Scanlon, 'Thomson on Privacy' (1975) 4 *Philosophy & Public Affairs* 315 at 319.

[4] See Aristotle, *The Nicomachean Ethics*, translated by Sir David Ross, revised with an introduction and notes by Lesley Brown (2009); the great philosopher observed in Chapters II and III of Book V that 'in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution … this is the origin of quarrels and complaints – when either equals have and are awarded unequal shares, or unequals equal shares' (at 84-85).

[5] See Aristotle, *Politics*, translated by Ernest Barker, revised with an introduction and notes by R.F. Stalley (1998), Chapter XII, Book III at 113-114.

[6] To use the words of Bernard Williams, 'for every difference in the way men are treated, some general reason or principle of differentiation must be given': see Bernard Williams, *Problems of the Self: Philosophical Papers 1956-1972* (1973) at 231.

[7] Thomas Nagel, *Concealment and Exposure and other Essays* (2002) at 28.

[8] See Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193 at 195.

interference, they should be equally capable to safeguard their private affairs, that is, their 'inviolate personality', from being intruded against their will.[9] This formulation of the right to privacy, stemming from a wide notion of the right to property, allows for the creation of a protective sphere that might extend to 'personal appearance, sayings, acts, and to personal relation[s], domestic or otherwise'.[10] It also has the added benefit of being applicable against the whole world, as opposed to related concepts such as breach of contract, trust or confidence which presuppose a more personal connection between the perpetrator and the victim.[11]

It is easy to realise from the above brief exposition of the right 'to equal treatment' and the right 'to be let alone' that the right to equality and the right to privacy share no common ground in terms of their origin; and the same applies, prima facie, with regard to their actual content. A requirement to respect rationality in the distribution of benefits or burdens is undeniably an important principle in any modern democracy –especially as it relates to the equal application of the laws- but it does not seem to interact in any direct way with the entitlement of individuals to seclude their personality. And yet, as already suggested, the right to equality and the right to privacy seem to share a common trait: they are both 'incomplete' in the sense that their objective remains partly obscure. In other words, just as the right to equal treatment does not readily inform us what values are to be distributed equally, the right to be let alone does not offer any clear guidance as to what are those matters in relation to which one should be let alone.[12]

B. Freedom of choice

Efforts to explain the 'what' of equality and privacy have generated many different conceptions of the two notions. Thus, equality has been approached as enshrining a claim to (i) the equal protection of the laws (i.e. a responsibility to avoid arbitrary distinctions), (ii) redistribution (i.e. an obligation to address disadvantages commonly associated with specific statuses), (iii) recognition (i.e. a duty to create a sense of equal worth among various groups in the face of stigma, prejudice and other hostile attitudes), (iv) transformation (i.e. an expectation to change social structures so as to be make them more open to difference), and, (v) participation (i.e. a demand to increase the involvement of underrepresented groups in the political and social life).[13] By the same token, we might refer to privacy as aiming to guarantee the individual exclusive control over his or her (i) personal information (e.g. right to secrecy of private conversations), (ii) private property (e.g. right to enjoy one's home), (iii) physical space (e.g. right not to be subjected to stalking or arbitrary stop-and-search) and, (iv) freedom to make choices of a personal nature (e.g. what religion to follow).[14]

These formulations are not exhaustive, nor do they necessarily constitute a definitive statement of the content of either the right to equality or privacy. Nevertheless, they are indicative of the breadth of meanings that the two rights have been assigned. This serves to highlight an additional common element of equality and privacy; their multifaceted identity. Indeed, despite the fact that alternative suggestions as to the exact content of either right

[9] Ibid. at 205.
[10] Ibid. at 211-213.
[11] Ibid.
[12] On the latter point, see Daniel J. Solove, *Understanding Privacy* (2008) at 17-18.
[13] See Sandra Fredman, *Discrimination Law*, 2nd edn (2011) at 8-33.
[14] See Jon L. Mills, *Privacy: The Lost Right* (2008) at 13-20.

have been put forward, it is properly acknowledged that there exists a 'diversity of equalities'[15] and various 'types of privacy problems'.[16] This is an important caveat to be taken into account in any analysis, as we need to be aware of the fact that we are actually dealing with a multiplicity of rights brought together under the 'umbrella' of equality or privacy; these rights remain distinct and need to be approached as such. Distinctiveness, however, does not necessarily preclude overlap. In fact, there is significant common ground within the different conceptions of equality and the same applies with regard to the various meanings of privacy.

For example -drawing from the formulations set out above- the effort to enhance equal participation in social life has much to gain from the transformation of adverse social structures; and the protection of private information might be jeopardised where an individual's physical space is invaded. This overlap is not only internal within the multiple meanings of equality and privacy, but also extends to encompass other rights. For instance, the right to work could be affected where there is unequal pay for women and men; and the right to peaceful enjoyment of one's possessions may be engaged where the privacy of one's private property is not respected. But there is also an additional dimension of overlap, one that concerns the very relationship between equality and privacy. In fact, it is fair to argue that, both in theory and in practice, freedom to make a choice is a shared element of the two fundamental rights. Let us illustrate this point with reference to the most common formulation of the right to equality; that is, the prohibition of discrimination.

When we assert that A must not discriminate against B on the grounds of sex, we may see ourselves as claiming that sex must not be taken into account in the context of distributing a particular benefit or burden, unless rationality dictates otherwise.[17] However, we may also take a more substantive view according to which sex is a personal characteristic that should not affect the freedom of B to enjoy valuable options within the various spheres of public interaction and development, e.g. employment or education.[18] For example, sex must not be used as grounds for limiting the options available to B in pursuing a specific job or a university degree. This focus on defending freedom of choice derives naturally from the notion of autonomous life which is also 'bound up with the availability of valuable options'.[19] Thus approached, equality aims to promote individual autonomy by

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[15] See Christopher McCrudden, 'Thinking about the Discrimination Directives' (2005) *European Anti-Discrimination Law Review*, Issue No 1, 17 at 19. According to McCrudden, '[t]here are, essentially, four different (although overlapping) meanings currently attaching to the concept of equality as a policy goal: equality as individual justice, equality as group justice, equality as protecting and enhancing identity, and equality as participation' (at 18).

[16] See Daniel J. Solove, supra n 12 at 172. Solove identifies (at 101-170) four groups of privacy problems and sixteen subgroups: 'Information collection' (which includes 'surveillance' and 'interrogation'), 'Information processing' (which includes 'aggregation', 'identification', 'insecurity', 'secondary use' and 'exclusion'), 'Information dissemination' (which includes 'breach of confidence', 'disclosure', 'exposure', 'increased accessibility', 'blackmail', 'appropriation' and 'distortion') and 'Invasion' (which includes 'intrusion' and 'decisional interference').

[17] For example, it is perfectly rational –albeit not necessary- that a director might choose to audition only women for the role of Alice in a production of Alice in Wonderland.

[18] For one of the most elaborate expositions of the freedom to make choices as the foundation of equality see Amartya Sen, *Inequality Reexamined* (1992).

[19] See Joseph Raz, *The Morality of Freedom* (1986) at 395. Despite the connection drawn here between equality and autonomy, it is worth noting that Raz himself is one of the most prominent supporters of the view that equality is derivative in the sense that '[p]rinciples of equality always depend on other principles determining the value of the benefits which the egalitarian principles regulate' (at 240).

guaranteeing that valuable options will remain open to all irrespective of immutable traits (e.g. sex and race) or fundamental choices (e.g. religion).[20] It seems fair to argue then that '[p]rohibitions on disparate treatment … insulate our deliberations from the cost of these traits: we can decide where to work or where to live without having to think about the low opinion others may have of our race or our gender'.[21] Once we acknowledge this substantive dimension of equality, we start moving beyond notions of rationality in treatment, focusing instead on the broader aim of enabling the individual to function free from adverse social norms such as prejudice, stereotyping and lack of reasonable accommodation.[22]

It is not hard to imagine how this idea of insulating our deliberations from external interference also relates to the most basic manifestation of the right to privacy; that is, the right to control the dissemination of our personal information. Notions of seclusion, solitude and self-determination clearly play an important role in that context as well.[23] And the point may reasonably be made that one of the key functions of informational privacy is to guarantee the autonomy to develop our 'individuality and consciousness of individual choice', to formulate our perceptions of the world without 'fear of ridicule and penalty'.[24] In that sense, the suggestion that we should be free to share information relating to our personal life as we decide is logically correlated to the assertion that we must also be able to shape our personal life as we see fit. For if external pressures determine important choices over our personal life, thereby shaping it, little autonomy over such a life is secured by the mere entitlement to keep its aspects secret. The right to make important choices over our personal lives free from external coercion arises then as an additional interest that needs to be safeguarded. The resulting decisional dimension of privacy overlaps conceptually with the substantive dimension of equality described above; that is, in so far as the limitation imposed upon individual freedom stems from prejudice, stereotyping or lack of reasonable accommodation of difference.

Ideals of recognition, participation and freedom of choice intertwine on this point of conceptual convergence between the right to equality and the right to privacy. We no longer talk only about equal treatment and freedom from arbitrariness, nor do we refer simply to the idea of being let alone and the proprietary interest over one's personal affairs. Instead, the ability to lead an autonomous life, according to one's own desires, is pushed forward. Each individual is to stand as an equal in making free (albeit not necessarily good) decisions affecting the course of his or her personal life, without having to face social oppression in the form of prejudice, stereotyping and lack reasonable accommodation. This link between decisional privacy and substantive equality is also acknowledged in the assertion that 'the reasons why competent adults are entitled to privacy for their sexual and domestic affairs is not that choice is necessary to success in these –if, indeed, it is- but that it is necessary for us to see and treat each other as equals, rather than as masters and serfs, or as tools lacking ends of their own'.[25]

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[20] For a similar argument, see John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 *Oxford Journal of Legal Studies* 167 at 170-171.

[21] See Sophia Moreau, 'What is Discrimination?' (2010) 38 *Philosophy & Public Affairs* at 143 at 155.

[22] See Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts* (2015) at 14-28.

[23] See David H. Holtzman, *Privacy lost: How Technology is Endangering Your Privacy* (2006) at 4.

[24] See Alan F. Westin, *Privacy and Freedom* (1967) at 34.

[25] See Annabelle Lever, *On Privacy* (2012) at 63.

At a more practical level, this relationship between equality and privacy on the basis of freedom of choice is evidenced by looking into the usual non-discrimination grounds which –as already noted above- may fairly be categorised as consisting of either immutable traits (e.g. sex or race) or fundamental choices (e.g. religion). In determining whether or not a choice is of fundamental character, it is only logical that we should take into account its impact. That impact may be assessed with reference to the significance of the choice in the protection of a fundamental right but also, more generally, with regard to the effect of the choice on one's private life, understood broadly as the sphere within which the individual should enjoy absolute freedom from unwarranted external interferences.[26] This is but one example of how privacy may not interact with equality only conceptually; instead, the decisional dimension of the former right might actually come to inform the application of the substantive dimension of the latter.[27]

With a view to demonstrating the relevance of the above mentioned observations at a more practical level, the next part of this essay will examine how the interaction between decisional privacy and substantive equality has been evidenced in the jurisprudence of the European Court of Human Rights (ECtHR) and the Supreme Court of the United States (SCOTUS). The two Courts are being chosen due to their special prominence as actors for the development of human rights norms at the federal (United States of America) and international (European) levels but also as providing, within their jurisprudence, good examples of how the link between equality and privacy becomes relevant in practice. The focus will be primarily –albeit not exclusively- on the issue of legal treatment of same sex relationships, intimate association being considered an area where choice as to how individuals will lead their personal lives becomes highly prominent. Having gone through the doctrinal side of the argument, the final section will assess the normative implications of the interaction between equality and privacy in the case-law of the two courts.

3. EQUALITY AND PRIVACY IN ADJUDICATION

A. Introducing the two Courts

The ECtHR is an international institution which has been described –not indisputably- as exercising a semi-constitutional function in the sense that it sets standards for sovereign States in Europe to follow by interpreting, mainly in the context of cases brought before it, the European Convention on Human Rights (ECHR).[28] The SCOTUS is a domestic institution empowered to pass judgment on issues arising under the Constitution of the United States of America and under the laws of the Federal Structure, its leading role in constitutional adjudication having been the subject of heated debate since the early days of its existence.[29]

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[26] For an argument along the same lines see Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention and the Canadian Charter* (1995) at 16.

[27] The formal dimension of equality is not engaged here because it is taken to concern any ground, not necessarily one that refers to immutable traits or fundamental choices, given that –as previously explained- the goal is simply to prevent arbitrary distinctions stemming from reliance on irrelevant factors.

[28] See Articles 19 and 32 of the European Convention on Human Rights. For a good discussion of the controversy surrounding the 'constitutional' character of the ECtHR see Robert Harmsen, 'The European Court of Human Rights as a ''Constitutional Court'': Definitional Debates and the Dynamics of Reform' in John Morison, Kieran McEvoy, and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (2007) at 33-53.

[29] See Article III of the Constitution of the United States of America. For a classic instance of the debate surrounding the role of the SCOTUS in the US Constitutional order, see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd edn (1986).

The judgments of both courts are capable of affecting public policy across States that share many differences despite being part of the same international or federal order.[30] But the manner through which this may occur is hardly similar. The SCOTUS can bring about systemic change within the various States of the United States of America by striking down State and federal laws that conflict with the US Constitution while the ECtHR can only put pressure on sovereign States to change their laws through the finding of a violation of the European Convention.[31]

The dissimilarities between the two courts range beyond their respective international and domestic character, the enforceability and effect of their judgments, or even the fact that the ECtHR is a specialised human rights court while the SCOTUS exercises jurisdiction upon a wider range of constitutional and federal issues.[32] And yet the criticism has been advanced that in pursuing its aspirations to set uniform human rights standards throughout the Member States, the ECtHR 'considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe'.[33] This assertion is useful in demonstrating that both courts have come to be seen as yielding a power which resembles that of the law maker as much as that of the judge.[34] This is perhaps not surprising if we consider that they are called upon to interpret human rights with primary reference to a document which does not contain detailed guidance as to the content of such rights, is not easily amendable and has been drafted at a time distant to the modern experience.[35] The line demarcating the limits of judicial discretion may become particularly blurry in this

[30] The judgments of SCOTUS are considered authoritative even beyond the context of the litigation that led to them, although the politicisation of constitutional adjudication may often place that authoritativeness in question: see Michel Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts', (2004) 2 *International Journal of Constitutional Law* 633. The judgments of the ECtHR are only binding between the parties to the dispute, technically, but practically they are addressed to the whole regional legal order insofar as they set the expectations for human rights protection within it: see Laurence R. Helfer and Eric Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68 *International Organization* 77.

[31] The SCOTUS asserted that power itself, in the seminal case of *Marbury v Madison* 5 U.S. 137 (1803). Repealing a piece of domestic legislation as a consequence of an ECtHR judgment is, quite expectedly, a lot more challenging even as concerns the State party against which the violation has been established; not to mention the other Member States. This much is hinted by the terms of Article 46 ECHR and illustrated by lines of cases such as the one of *Hirst v United Kingdom (No 2)* Application No 74025/01, Merits and Just Satisfaction, 6 October 2005; *Greens and M.T. v United Kingdom* Applications Nos 60041/08 and 60054/08, Merits and Just Satisfaction, 23 November 2010; *Firth and Others v United Kingdom* Applications Nos 47784/09 *et al.*, Merits and Just Satisfaction, 12 August 2014; *McHugh and Others v United Kingdom* Applications Nos 51987/08 *et al.*, Merits and Just Satisfaction, 10 February 2015 and *Millbank and Others v United Kingdom* Applications Nos 44473/14 *et al.*, Merits and Just Satisfaction, 30 June 2016.

[32] For example, an inquiry into the processes of appointment of their members, the drafting of their judgments, the preferred methods of interpretation and even the annual workload of each court can also be quite informative in making sense of their respective roles, powers and limitations. But that would be outside the scope of this paper.

[33] See Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009, p. 14, available at: https://www.judiciary.gov.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf [Last accessed 19 September 2018].

[34] To use the words of one of the most vocal critics of such a mentality prevailing within the SCOTUS, 'it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view …, can impose its own favored social and economic dispositions nationwide' (Dissenting opinion of Justice Scalia in *United States v Virginia* 518 U. S. 515 (1996) at 601).

[35] The US Constitution was signed in 1787 and the Bill of Rights (the first ten amendments to the Constitution) was adopted four years later. The European Convention was signed in 1950.

context, the two courts having to tackle hard questions with reference to a static document but within a platform of varying political, social and even moral dynamics.[36]

The mere act of reviewing the relationship between equality and privacy within their jurisprudence amounts to an indirect acknowledgment of the two courts' active role in developing –not only interpreting- human rights standards. A simple look into the text of the European Convention and the US constitution reveals why this is the case. The European Convention only prohibits discrimination in relation to the enjoyment of the rights enshrined therein, the prohibition contained in Article 14 ECHR having been described as 'parasitic' and 'subordinate' to the other Convention rights as a result.[37] And the US Constitution makes no express reference to privacy or respect for private life as a distinct right. On the face of it then, any meaningful interaction between the right to equality and the right to privacy seems difficult when we peruse the European Convention and practically impossible when we study the US Constitution. And yet, such a relationship is anything but illusionary if we shift our attention to the jurisprudence of the SCOTUS and the ECtHR.

B. Privacy, private life and equality

In the case of *Griswold v Connecticut*,[38] Justice Douglas, delivering the opinion of the SCOTUS, famously claimed that the 'penumbra' of various guarantees in the Bill of rights created 'zones of privacy'.[39] For example, he referred to the case of *NAACP v Alabama*,[40] where the Court emphasised that 'privacy in one's association' was 'indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs'.[41] Thus, the 'penumbra' of the First Amendment established a zone of privacy, freedom of association being a 'peripheral First Amendment right'.[42] By the same token, the guarantees put forward in the Fourth[43] and Fifth[44] Amendments created zones of privacy, being concerned with 'the sanctity of a man's home and the privacies of life'.[45] The same was true of the Third Amendment[46] which also generated a zone of privacy.[47] Accordingly, even though the right to (marital, in the case of *Griswold*) privacy was nowhere to be found in the text of the Bill of Rights, the 'penumbras' theory, also supported by the Ninth Amendment,[48] enabled the SCOTUS to bring it into being.[49] In turn, the Fourteenth

[36] See, for example, Paul Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57; also see Archibald Cox, 'The New Dimensions of Constitutional Adjudication' (1975-1976) 51 *Washington Law Review* 791.

[37] See, for example, Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 *Human Rights Law Review* 99 at 100.

[38] 381 U.S. 479 (1965).

[39] Ibid. at 484.

[40] 357 U.S. 449 (1958).

[41] Ibid. at 462 (per Justice Harlan); also see *Griswold*, supra n 38 at 483.

[42] See *Griswold*, supra n 38 at 483-484.

[43] 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …'.

[44] 'No Person … shall be compelled in any criminal case to be a witness against himself …'.

[45] See *Boyd v United States* 116 U.S. 616 (1886) at 630; referred to by Justice Douglas in *Griswold*, supra n 38 at 484.

[46] 'No Soldier shall in time of peace be quartered in any house without the consent of the Owner …'.

[47] See *Griswold*, supra n 38 at 484.

[48] 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'. The significance of the Ninth Amendments was mentioned by Justice Douglas and was further elaborated upon by Justice Goldberg in his concurring opinion, joined by Chief Justice Warren and Justice Brennan: see *Griswold*, supra n 38 at 484 and 486-499.

Amendment allowed protection of the said right to be extended to state law.[50] The result of *Griswold* was that married couples should be allowed to choose whether or not to use means of contraception and, as a result, States should not punish those who made use of them or those who facilitated access to them. Seven years later, during the course of delivering the opinion of the SCOTUS in *Eisenstadt v Baird*,[51] Justice Brennan described privacy as entailing 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child'.[52]

Only one year after *Eisenstadt* and eight years after *Griswold*, in the seminal case of *Roe v Wade*,[53] this right to privacy was further extended by the SCOTUS to guarantee a woman's right to decide freely whether or not to have an abortion. But this time privacy was not approached as emanating from the 'penumbra' of other constitutional rights and simply given effect –against the actions of a state- through the due process clause of the Fourteenth Amendment; instead, it was seen as being part of the 'concept of personal liberty'[54] contained therein. That concept of personal liberty had been relied upon even before *Griswold* in the course of securing individuals the right to be free from government intrusion in exercising choice about important aspects of private life, such as the mode of education of their children.[55] It

> denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[56]

It seems to be the case then that privacy was never understood by the SCOTUS only as pursuing an entitlement to spatial or informational seclusion. Instead, it has always had a decisional dimension as well, one that stems from the right to individual autonomy.[57]

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[49] It is worth mentioning that the 'penumbras' approach has been heavily criticised -as has been the invocation of the right to privacy- even by scholars who agree with the end result of the case: see, for example, Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation & Constitutional Law* (2010) at 68-77.

[50] '… No State shall … deprive any person of life, liberty, or property, without due process of law …'.

[51] 405 U.S. 438 (1972).

[52] Ibid. at 453.

[53] 410 U.S. 113 (1973).

[54] Ibid. at 153. It is worth noting that this approach echoes the concurring opinions of Justice White and Justice Harlan in *Griswold*, supra 38.

[55] Thus, for example, in *Meyer v Nebraska* 262 U.S. 390 (1923) the SCOTUS declared unconstitutional a State law which dictated that children are not to be taught any modern language other than English before completing the eighth grade, as this interfered in an arbitrary manner with the liberty of the parents to have their children instructed as they see fit and the liberty of the foreign language instructors to teach (at 400 and 403). By the same token, in *Pierce v Society of Sisters* 268 U.S. 510 (1925) the SCOTUS found that a law which obliged children to attend exclusively public schools between the ages of eight and sixteen amounted to an undue interference with the liberty of the parents to direct their children's education (at 534-535).

[56] See *Meyer*, ibid. at 399.

[57] For a discussion of this dimension of the right to privacy in the United States, see Jeffrey M. Shaman, *Equality and Liberty in the Golden Age of State Constitutional Law* (2008) at 121-162.

The right to privacy, as construed by the SCOTUS, has been as much concerned with keeping personal matters away from the public eye, as it has been with 'the interest in independence in making certain kinds of important decisions'.[58] This extrovert conception of privacy is not particularly hard to align with the definition given to 'private life' by the ECtHR in interpreting Article 8 ECHR.[59] In the early days of the European Convention, the European Commission on Human Rights construed the notion of 'private life' as being wider than the notion of 'privacy'. According to the Commission, the former notion also referred to the ability of the individual to form relations with others and to develop and fulfil their personality, while the latter notion was limited to guaranteeing protection from unwarranted publicity.[60] Such a distinction appears no longer valid (if it ever was), at least not if we refer to the jurisprudence of the SCOTUS. In fact, quite the opposite seems to be the case. The notions of privacy and private life, as explicated by the SCOTUS and the ECtHR respectively, can be characterised as largely equivalent in terms of their wider meaning.

According to the ECtHR, the notion of private life, which is not open to an exhaustive definition, refers to 'an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle'.[61] But this is far from the end of the matter. The need to respect private life 'also comprise[s] to a certain degree the right to establish and develop relationships with other human beings'.[62] Private life 'includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity'.[63] The right to respect for private life also incorporates 'a right to identity and personal development'[64] and aspects 'such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8'.[65] The ECtHR has also established that 'the notion of personal autonomy is an important principle underlying the interpretation [of Article 8]'.[66] It emerges that respect for private life, as interpreted by the ECtHR, is not confined to guaranteeing spatial or informational security either, but it also has a decisional dimension, entitling individuals to live a life of their own choosing within their personal sphere.[67]

Just as this autonomy based, decisional, aspect of the right to respect for private life in the European Convention may be seen as aiming to secure 'freedom of action and life-

[58] See *Whalen v Roe* 429 U.S. 589 (1977) at 599-600. For an elaborate study of the distinction between 'proprietary' and 'decisional' privacy in the US, see Mary McThomas, *The Dual System of Privacy Rights in the United States* (2014).

[59] Article 8(1) ECHR stipulates that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'.

[60] See *X v Iceland* Application No 6825/74, Commission Decision, 18 May 1976.

[61] See *Niemietz v Germany* Application No 13710/88, Merits and Just Satisfaction, 16 December 1992 at para 29.

[62] Ibid.

[63] See *Mikulić v Croatia* Application No 53176/99, Merits and Just Satisfaction, 7 February 2002 at para 53.

[64] See *Peck v United Kingdom* Application No 44647/98, Merits and Just Satisfaction, 28 January 2003 at para 57.

[65] Ibid.

[66] See *Pretty v United Kingdom* Application No 2346/02, Merits, 29 April 2002 at para 61.

[67] For an interesting exposition of the different private life interests involved in the interpretation of Article 8 by the ECtHR, including the one of personal autonomy, see N.A. Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination' (2008) *European Human Rights Law Review,* Issue No 1, 44; for a broader discussion of how a right to personal autonomy might be said to emerge from Article 8, see Jill Marshall, 'A Right to Personal Autonomy at the European Court of Human Rights' (2008) *European Human Rights Law Review*, Issue No 3, 337.

style',[68] the decisional facet of the right to privacy in the US Constitution has been eloquently described as being based on the need to secure 'an area, free from public scrutiny, in which an individual can develop her own views and enact her chosen lifestyle'.[69] Defining the limits of that area, that is, identifying the point where the interests of the individual will need to give way to the interests of society as a whole, is to define the limits of the decisional dimension of the right to privacy.[70] This is where the substantive dimension of equality becomes most relevant in the case-law of the two courts, reminding us that attitudes stemming from social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation of difference, should never be perceived as a societal interest strong enough to trump the right of the individual to choose how to lead his or her life. And this is the point where equality and privacy interact so strongly that they appear to become essentially the same right. The way the two courts have dealt with the issue of decriminalising same-sex relationships provides an excellent illustration of this observation.

C. Tracing the link between substantive equality and decisional privacy

In *Dudgeon v United Kingdom*[71] the ECtHR was faced with the criminalisation of certain forms of sexual contact between consenting male adults in Northern Ireland. The matter at hand was approached in the judgment as affecting 'a most intimate aspect of private life'.[72] This view played a pivotal role in limiting the margin of appreciation granted to the national authorities, thereby enabling the European Court to conclude that

> there [was] now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it [was] no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.[73]

The European Court further noticed that even '[i]n Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent'.[74] The defending government claimed that the interference at hand was justified mainly because of the adverse 'moral climate in Northern Ireland' towards homosexuality and the need 'to preserve prevailing moral standards'.[75] This aim was deemed to be legitimate, but criminalisation of certain forms of sexual contact between consenting male adults could not be considered a proportionate way to pursue it.[76] Accordingly, there was a violation of the right to respect for the applicant's private life, enshrined in Article 8 ECHR.

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[68] See David Feldman, 'The developing scope of Article 8 of the European Convention on Human Rights' (1997) *European Human Rights Law Review*, Issue No 3, 265 at 267.
[69] See Mary McThomas, supra n 58 at 25.
[70] Ibid.
[71] Application No 7525/76, Merits, 22 October 1981.
[72] Ibid. at para 52.
[73] Ibid. at para 60.
[74] Ibid.
[75] Ibid. at para 57.
[76] Ibid. at paras 57 and 60.

That landmark decision of the ECtHR was expressly taken into account by the SCOTUS when it overruled its previous case-law in 2003. Indeed, the majority of the US Court had established back in 1986, in the case of *Bowers v Hardwick*,[77] that there was nothing in the US Constitution to prevent the criminalization of consensual sodomy. According to the SCOTUS, the right to engage privately in homosexual sodomy was neither 'implicit in the concept of ordered liberty' nor 'deeply rooted in th[e] Nation's history and tradition' and, as a result, it did not fall within the substantive due process guaranteed by the Fourteenth Amendment to the US Constitution.[78] In fact, Chief Justice Burger observed in his concurring opinion that to recognise such a fundamental right under the due process clause 'would be to cast aside millennia of moral teaching'.[79] It was not until 17 years later, in *Lawrence v Texas*,[80] that the majority of the SCOTUS recognised an 'emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex'.[81] In reaching this conclusion, the US Court relied, inter alia, on the judgment of the European Court in *Dudgeon*, finding the decision to be 'at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization'.[82] Like the ECtHR, the SCOTUS embarked on an examination of State practice, noting that of the 25 States that had been referenced in its earlier jurisprudence as having sodomy laws in place, only 13 retained them when *Lawrence* came to be decided, only four of these actually enforcing them.[83]

An interesting element in both *Dudgeon* and *Lawrence* is the emphasis placed on the personal liberty of the people potentially affected by the impugned pieces of legislation.[84] This becomes even more apparent in the latter judgment. In contrast to *Lawrence* where the petitioners had actually been arrested and convicted of deviate sexual intercourse, the applicant in *Dudgeon* was never charged with an offence; he actually complained of the 'fear, suffering and psychological distress directly caused by the very existence of the laws in

[77] 478 U.S. 186 (1986).

[78] Ibid., at 192-193. The former quote is drawn from the judgment of the SCOTUS in *Palko v Connecticut* 302 U.S. 319 (1937) at 325-326 and the latter from the judgment of the same Court in *Moore v East Cleveland* 431 U.S. 494 (1977) at 503.

[79] See *Bowers v Hardwick*, supra n 77 at 198.

[80] 539 U.S. 558 (2003).

[81] Ibid. at 572. The importance of *Lawrence* radiates beyond same-sex relations, especially when placed within the broader discussion concerning the interaction between gender and privacy: see, for example, Jeannie Suk, 'Is Privacy a Woman?' (2009) 97 *The Georgetown Law Journal* 485 at 509-513.

[82] *Lawrence*, supra n 80 at 573. The judgments of the ECtHR in *Modinos v Cyprus* Application No 15070/89, Merits and Just Satisfaction, 22 April 1993 and *Norris v Ireland*, Application No 10581/83, Merits and Just Satisfaction, 26 October 1988, which effectively confirmed the finding in *Dudgeon*, were also expressly relied upon by the US Court (ibid. at 576). Reliance on decisions of foreign legal materials in interpreting the US Constitution is not without its critics; see, for example, the dissenting opinion of Justice Scalia in *Lawrence*, supra at 598; also see Antonin Scalia, 'Foreign Legal Authority in the Federal Courts' (2004) 98 *Proceedings of the Annual Meeting (American Society of International Law)* 305 and Robert J. Delahunty and John Yoo, 'Against Foreign Law' (2005) 29 *Harvard Journal of Law & Public Policy* 291.

[83] See *Lawrence*, supra n 80 at 572-573.

[84] From a doctrinal point of view, such an emphasis may well be seen as the corollary of the restrictiveness of the non-discrimination clause contained in Article 14 ECHR and the equal protection clause of the Fourteenth Amendment; and the need of the courts to stray away from these provisions in affording more effective protection. For a brief discussion of the limitations of Article 14 ECHR, see Charilaos Nikolaidis, supra n 22 at 53-57; for a similar discussion with reference to the equal protection guarantee contained in the Fourteenth Amendment, see Kenji Yoshino, 'The New Equal Protection' (2011) 124 *Harvard Law Review* 747 at 755-776.

question - including fear of harassment and blackmail'.[85] This was enough, according to the ECtHR, to constitute an interference with -and eventually a breach of- Mr Dudgeon's right to respect for his private life.[86] Such a right to personal autonomy was understood as entailing respect for a person's 'most private human conduct'[87] and 'private life'.[88] The element of choice as a manifestation of an individual's liberty in his or her private sphere was the key to tackling the issue before both Courts. Indeed, the criminalisation of homosexual intimacy obliged Mr Dudgeon to 'refrai[n] from engaging – even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies'.[89] By the same token, it hampered Mr Lawrence's liberty 'to choose without being punished'[90] by failing 'to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons'.[91]

Both *Dudgeon* and *Lawrence* could have easily been decided under the non-discrimination clause contained in Article 14 ECHR or the equal protection clause of the Fourteenth Amendment respectively.[92] In fact, as Justice Blackmun eloquently noticed in his dissenting opinion in *Bowers*, 'a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices'.[93] Following this line of thought, respecting difference may often be seen as lying at the heart of the liberty we address when are dealing with the protection of privacy or private life. Both Mr Dudgeon and Mr Lawrence where effectively subjected to penalties and stigmatisation for expressing their sexuality in circumstances where heterosexual individuals would be free to do as they please. It was exclusively because of their sexual orientation that their liberty to make a choice as regards their intimate associations was impinged upon. In fact, the resulting impact on their private life could be

[85] See *Dudgeon*, supra n 71 at para 37.

[86] It is worth noting that Judges Matscher, Pinheiro Farinha and Walsh disagreed and claimed in their dissenting opinions that the applicant was not actually a 'victim' (see Article 34 ECHR) of a violation.

[87] See *Lawrence*, supra n 80 at 567

[88] See *Dudgeon*, supra n 71 at para 41.

[89] Ibid. at para 41.

[90] See *Lawrence*, supra n 80 at 567.

[91] Ibid.

[92] A steadily evolving understanding of equality and liberty as values that are actually confluent and synergetic has not gone unnoticed, especially as regards the interpretation of the equal protection clause and the due process clause of the Fourteenth Amendment by the SCOTUS; and a huge debate has emerged around the normative implications of this development, with notes of joy as well as caution: see, for example, Laurence H. Tribe, 'Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name' (2014) 117 Harvard Law 1893 at 1898; Kenji Yoshino, supra n 84; Rebecca L. Brown, 'Liberty, The New Equality' (2002) 77 *New York University Law Review* 1491; Pamela S. Karlan, 'Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment' (2001-2002) 33 *McGeorge Law Review* 473; Richard A. Epstein, 'Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights' (2002) 2002 *University of Chicago Legal Forum* 73; Cass R. Sunstein, 'Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection' (1988) 55 *University of Chicago Law Review* 1161; and Ira C. Lupu, 'Untangling the Strands of the Fourteenth Amendment' (1979) 77 *Michigan Law Review* 981.

[93] See *Bowers*, supra n 77 at 205-206 (Dissenting opinion of Justice Blackmun, joined by Justice Brennan, Justice Marshall and Justice Stevens).

seen as an aggravating factor towards establishing the invidiousness of the distinction at hand.[94]

To illustrate this point, it is useful to draw a parallel with other seminal cases and test whether or not the same link between privacy and equality can be traced even beyond the issue of same sex relationships. An interesting example would be the previously mentioned case of *Roe*, where the SCOTUS decided that the due process clause of the Fourteenth Amendment secured a right to have an abortion, subject to certain conditions. That case could have also been decided under the rubric of equality on the simple biological fact that pregnancies take place within a woman's body as opposed to a man's and, as a result, prohibiting their termination necessarily affected the former more than the latter. Still, this would not be the end of the equality analysis. As in *Lawrence*, the issue would have to be addressed whether or not that distinction was justifiable. It would be at this point where the equality analysis could merge with the one based on privacy. For the interest protected by the right to substantive equality, that is, freedom from social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation, seems to coincide with the interest protected by what Justice Blackmun described in his dissenting opinion in *Bowers* as the decisional aspect of the right to privacy, that is, the recognition that there are 'certain decisions that are properly for the individual to make'.[95]

The rationale behind this coincidence is that the adverse social dynamics which violate the right to equality will very often impinge on the ability of the individual to make important choices about his or her life. Conversely, interferences with private choice may leave people exposed to adverse social dynamics or they might even help perpetuate such dynamics. For example, a homosexual couple that is not allowed to engage in certain sexual acts is denied enjoyment of a most intimate aspect of their private life but, at the same time, is marginalised as immoral or perverted in the eyes of society, thus confirming and reinforcing any prejudice and stereotyping that underpinned the initial prohibition. By the same token, allowing a choice as to whether or not to have an abortion might help recognise and accommodate the specific situation women might find themselves in by offering a shield against the possible consequences of an unwanted pregnancy, both at a personal and a social level (e.g. prejudice and stereotyping against single mothers). Thus construed, the notion of equal liberty in shaping one's destiny by exercising freedom of choice is the link between the right to (substantive) equality and the right to (decisional) privacy.

This intersection can be eloquently articulated in terms of what has been described as the pursuit of 'equal citizenship', that is, the need to secure to every individual 'the dignity of full membership in the society' as a matter of law and fact.[96] Taking away the right to free choice about important aspects of one's private life by virtue of a personal characteristic opens the gates for stigmatisation and marginalisation which deny equal participation and the 'right to be treated as a person, one of equal worth among citizens'.[97] This much becomes evident from the further example of the case of Mr Duncan Lustig-Prean and Mr

[94] For a similar argument and for a wider discussion of how Justice Blackmun's legacy reinforced an integrated understanding of privacy, liberty and equality, see Pamela S. Karlan, 'Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun' (1998-1999) 26 *Hastings Constitutional Law Quarterly* 59.

[95] See *Bowers*, supra n 77 at 204.

[96] See Kenneth L. Karst, 'Foreword: Equal Citizenship Under the Fourteenth Amendment' (1977) 91 *Harvard Law Review* 1 at 5.

[97] Ibid. at 32.

John Beckett, brought before the ECtHR.[98] The two applicants were subjected to an investigation as to their sexual orientation and were subsequently discharged from the Royal Navy because the British Ministry of Defence had a policy of excluding homosexuals from the armed forces. The ECtHR accepted that the policy related to national security and 'the operational effectiveness of the armed forces', an area where a margin of appreciation is normally accorded to the States;[99] but it also noticed that the investigation into their sexual orientation and the subsequent discharge impinged upon 'a most intimate aspect of an individual's private life'.[100] Eventually, it found a violation of Article 8 ECHR, considering it unnecessary to look into the Article 14 ECHR claim.

The core argument of the defending government was that homosexuality posed a threat to the effectiveness of the armed forces due to 'the negative attitudes of heterosexual personnel towards those of homosexual orientation'.[101] The ECtHR replied that

> [t]o the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered … to amount to sufficient justification for the interferences with the applicants' rights … .[102]

It is quite remarkable how the dialectics of prejudice and stereotyping directed against a certain group of people imbued an analysis which centred around the right to respect for the applicants' private life, not their right to equality and non-discrimination. From a normative standpoint, this conflation can be explained if we accept that the decisional dimension of the privacy claim at hand was actually conflated with the equality dimension of the case. The freedom of Mr Lustig-Prean and Mr Beckett to develop themselves and their lives as they saw fit, free from external oppression in the form of social bias, had already been dealt with in the course of analysing Article 8 ECHR.

In fact, as in *Dudgeon*, the ECtHR itself conceded that the claim under Article 8 taken in conjunction with Article 14 ECHR was practically 'the same complaint, albeit seen from a different angle [and did] not give rise to any separate issue'.[103] But even though this conflation of the privacy and equality claims was recognised as a conclusion, the actual way in which it occurred was not mapped out, just as it was not explained in *Dudgeon*. By emphasising the 'exceptionally intrusive character'[104] of the investigation that took place, the ECtHR seemed to highlight the informational, introvert dimension of the applicants' right to privacy; that is, their entitlement to keep their sexual orientation to themselves, away from the public eye.[105] At the same time, however, the European Court also declared

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[98] See *Lustig-Prean and Beckett v United Kingdom* Applications Nos 31417/96 and 32377/96, Merits, 27 September 1999; also see *Smith and Grady v United Kingdom* Applications Nos 33985/96 and 33986/96, Merits, 27 September 1999.

[99] Ibid. at para 82.

[100] Ibid. at para 83.

[101] Ibid. at paras 88-89.

[102] Ibid. at para 90.

[103] Ibid. at paras 108-109; also see *Dudgeon*, supra n 71 at para 69.

[104] *Lustig-Prean and Beckett*, supra n 98 at para 84.

[105] For a wider critique of how the ECtHR has defended homosexuality as protectable primarily in the private as opposed to the public sphere, see Paul Johnson, 'An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights', *Human Rights Law Review*, Vol. 10, Issue 1, 2010, pp. 67-97.

that social bias should never be allowed to act as basis for excluding homosexuals from the army and that the discharge of the applicants had 'a profound effect on their careers and prospects'.[106] In doing so, the ECtHR emphasised the decisional, extrovert dimension of privacy, which demands equal respect for all to participate in society and to make important choices about their personal development without fear of being marginalised.[107]

Even though this latter conception of privacy is in line with the right to equality, it remains the case that, as previously mentioned, there seems to be no conceptual clarity as to the way in which the said interaction takes place. Having identified a link between privacy and equality in theory and in the case law of the two courts, the logical next step must be to articulate that link in a clear manner. The assertion that we have two rights protecting the exact same interest -that is, the interest in making important choices about one's personal development free from social oppression- might reasonably be seen as conceptually confusing; and yet, as it will be argued in the next section, there is a good explanation as to why this happened and a single notion that can help us unravel the knot created by equality and privacy in an orderly fashion.

4. EQUALITY, PRIVACY AND THE LOST TERM THAT BRINGS THEM TOGETHER

A. A right in search of a name

In *Christine Goodwin v United Kingdom*,[108] the ECtHR was faced with the failure of the defending State to provide legal recognition of the change of sex of the applicant, who was registered male at birth but had undergone gender reassignment surgery. In establishing a violation of the right to respect for private life, the ECtHR emphasised the particularly important role that the notion of personal autonomy plays in the interpretation of Article 8 and noted that protecting an individual's private sphere includes the right to establish details of one's identity.[109] It then moved on to find that the placement of people like the applicant in an 'intermediate zone as not quite one gender or the other' impinged upon 'the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society'.[110] The ECtHR also observed the failure of the United Kingdom to tackle this problem 'despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted'.[111] Once again, the ECtHR concluded that 'no separate issue' arose under Article 14 ECHR, the 'discriminatory experiences and prejudices' the applicant claimed to have experienced due to the lack of recognition having already been addressed in the course of finding a violation of Article 8 ECHR. The reasoning of the ECtHR in that case constitutes a further excellent illustration of the link between privacy and equality. The key

[106] See *Lustig-Prean and Beckett*, supra n 98 at para 85.

[107] For an interesting discussion on how the case could have been decided to bring forward the different dimensions of privacy as well as the equality issue at hand, see Michael Kavey, 'The Public Faces of Privacy: Rewriting Lustig-Prean and Beckett v. United Kingdom' in Eva Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (2013) 293.

[108] Application No 28957/95, Merits and Just Satisfaction, Judgment of 11 July 2002.

[109] Ibid. at para 90.

[110] Ibid.

[111] Ibid. at para 92. The ECtHR referred to similar cases brought before it in the past, where it had refused to find a violation but it had urged the United Kingdom to keep its policy under review, having regard to scientific and social developments in that area: see, for example, *Sheffield and Horsham v United Kingdom* Applications Nos 22985/93 and 23390/94, Merits, 30 July 1998 at para 60.

through which such a link was achieved in that particular case was the abovementioned requirement to safeguard the *moral security* of the individual on an equal footing with others.

In fact, the notion of moral security seems to encapsulate most eloquently the need for recognition in the eyes of the State and in the eyes of society alike; for to guarantee moral security is to make sure that 'our moral standing and basic needs are recognised by others as limiting what may legitimately be done to us, and that our interests and welfare will be regarded as morally important by social, political, and legal institutions'.[112] Discriminatory attitudes directed against certain groups are bound to negate such recognition of the equal moral value of every individual's interests and welfare.[113] Mrs Goodwin, the applicant who had undergone gender reassignment, was denied recognition of her sex essentially due to lack of reasonable accommodation stemming from the failure of the United Kingdom to make an exception to the historical nature of the birth register system.[114] As a consequence, her freedom to proceed with her life as she wished was impinged upon, the applicant being left exposed to 'stress', 'alienation', 'embarrassment', 'vulnerability', 'humiliation', 'anxiety' or other practical difficulties (e.g. different pension rights).[115] Thus, jeopardizing her right to be free from social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation (substantive equality), directly compromised her right to make important choices about her personal development in an autonomous manner (decisional privacy).

The notion of moral security, then, is yet another way to describe the interrelationship between privacy and equality, as is 'equal citizenship' and other notions such as 'personal liberty', 'recognition' or 'personal development'. But in order to fully grasp the human interest at hand and to develop the basic tenets of the correlative right it gives rise to, it is important to find a single name for it; a name that includes all of the above terms and is appropriate not only conceptually, but also historically, if this is indeed a fundamental right that goes back in time and is not simply a modern invention. At this point, we need to take a step back from the wider philosophical enquiry and focus, instead, once again, on the actual origins of the terms we are dealing with. In doing so, we will find that the (relatively modern) right to privacy has actually been used by the ECtHR and the SCOTUS to unearth a long lost dimension of the (classical) right to equality.

B. From *Isonomia* to *Isotimia*

Equality derives from the old French word *equalité* (nowadays, *égalité*).[116] The word *equalité*, in turn, comes from the Latin word *aequalitas* with means 'equality, similarity, uniformity'.[117] This short etymological analysis reveals the core ideal that has been perceived traditionally as the basis of equality: the need to treat those who are in a similar position in a uniform manner. Such a conception of equality is indeed a valuable way of guaranteeing impartially and freedom from arbitrariness by maintaining consistent treatment as a matter of form. But this formal understanding of equality does remain

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[112] See Jessica Wolfendale, 'Moral Security', (2017) 25 *The Journal of Political Philosophy* 238 at 244.

[113] See ibid. at 251-255 for an argument along the same lines.

[114] See *Christine Goodwin*, supra n 108 at paras 86-88.

[115] Ibid. at paras 76-79 and 89.

[116] See Online Etymology Dictionary: https://www.etymonline.com/word/equality [Last accessed 17 September 2018].

[117] See Charlton T. Lewis and Charles Short, *A Latin Dictionary* (1879) available online at http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0059 [Last accessed 17 September 2018].

incomplete unless we agree on what is the standard in relation to which such treatment is to happen. The answer, therefore, as to the actual meaning of equality must be found somewhere beyond the term itself. In this regard, it is quite helpful to travel further back in time to find the Greek ancestor of *aequalitas*; that is, *isotis* (*ἰσότης*). If we engage with any dictionary of the ancient Greek language, we are immediately struck by the simple realisation that *isotis* is a root word leading to many derivative terms, when combined with other words denoting specific interests.[118] Of these derivative terms, the most prevalent one has been *isonomia* (*ἰσονομία*) which means 'equality of political rights'.[119] *Isonomia* derives from the word *isos* (equal) and *nomos* (law) and has also found its way into the dictionaries of the English language as *isonomy*, i.e. equality before the law.[120]

The significance of the notion of *isonomia* radiates, of course, far beyond the pages of dictionaries of ancient Greek or modern English. Article 14 ECHR provides that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination …'; in other words, it guarantees equality before the law of the European Convention. By the same token, the equal protection clause of the Fourteenth Amendment to the US Constitution stipulates that '[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws'. The way the right to equality is set out in these prominent documents of western civil rights culture demonstrates quite clearly that the notion of equality before the law has been the dominant understanding of equality. The law itself must not make arbitrary distinctions based on personal characteristics, nor should the law be applied differently to similarly situated people. The law must be impartial and consistent in the distribution of rights and burdens. Such assertions echo quite strongly the morality of modern democratic societies. But this does not mean that they exhaust the meaning of equality.

Another important term, derived from the same root, has been the one of *isotimia* (*ἰσοτιμία*), composed of the words *isos* (equal) and *timi* (honour, esteem).[121] The person enjoying *isotimia* is called *isotimos* and is defined as one who is 'held in equal honour' and maintains 'equality of privilege'.[122] This state of affairs alludes to a kind of equality that is not based on form, but on substance, focusing on equal standing rather than on consistency in treatment. *Isotimia* is concerned with the intrinsic status of being seen as an equal, while *isonomia* refers to the extrinsic attribute of being treated equally in the distribution of rights. To further illustrate this point, it is worth delving a bit deeper into the word *nomos* (law) which derives from the verb *nemo* (*νέμω*), meaning to deal out, dispense, distribute.[123] In fact, an alternative meaning for the word *isonomia* is 'equal distribution'.[124] Hence, for example, in a conversation one is treated with *isonomia* when he is allowed to speak as much the other, but one is treated with *isotimia* when he can 'converse with him as his equal'.[125] The former term is mostly quantitative, implying equal portion in the distribution

[118] See Henry George Liddell and Robert Scott, *Greek-English Lexicon*, Oxford, Clarendon Press, 1940, available online at http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3atext%3a1999.04.0057 [Last accessed 17 September 2018].
[119] Ibid.
[120] See ibid. and The Free Dictionary: https://www.thefreedictionary.com/isonomy [Last accessed 17 September 2018].
[121] See Henry George Liddell and Robert Scot, supra n 118.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Ibid.

of something, while the latter is mostly qualitative, denoting equal esteem in dealing with somebody.

The fact that *isonomia* found its way into modern English while *isotimia* was lost in translation is not really surprising. First of all, as already mentioned, the equal application of the laws is an indisputably important element of maintaining impartiality and freedom from arbitrary treatment in a democratic society. Second, equal treatment in the sense of applying rights and duties in a consistent manner, without unjustified distinctions, is more specific and easier to grasp than the need to guarantee equal honour and to pursue recognition of everyone as an equal. Third, again in terms of complexity, while equality before the law is inherently 'vertical' in its application, equality of honour does possess a strong 'horizontal' dimension in that recognition –or negation- of honour takes place not only in the eyes of the law, but also in the attitudes of other individuals. These practical difficulties in the definition and implementation of *isotimia* seem to provide a reasonable explanation of why the ancient *isotis* turned out to be equated in modern times only with *isonomia* and equal treatment. Nevertheless, even though words might be lost in time, their meaning persists. This much is shown from the interaction between equality and privacy in human rights adjudication, as described so far.

The right to choose as an element of the right to privacy has been strongly correlated, as already discussed, with notions such as the ones of 'moral security' or 'equal citizenship'. This state of affairs is naturally perplexing as it forces us to stand between equality and privacy without a clear explanation as to what it is we are dealing with. The point to be advanced here is that what we are facing when we engage with the decisional dimension of the right to privacy is often our claim to *isotimia*, our desire to be recognised in law and in fact as being our own masters in making important decisions regarding our own life, our demand to stand on an equal footing with others in society when reaching such decisions and not to suffer social oppression as a result of doing so. When Mr Dudgeon or Mr Lawrence protested their freedom to engage in the sexual conduct they wished without fear of prosecution, in reality, they stood for their right not to be treated as lesser individuals because of adverse social norms such as prejudice and stereotyping. Under this light, the decisional dimension of privacy is in reality the normative laboratory through which the ECtHR and the SCOTUS brought into existence a dimension of equality that was not reflected in the equality provisions of the respective documents they interpret; that is, *isotimia*. The final subsection will further illustrate the validity of this assertion with reference to the issue of legal recognition of same-sex relationships.

C. From privacy to equality through *isotimia*

In June 2015, in the case of *Obergefell v Hodges*,[126] the SCOTUS famously held that same-sex marriage is to be allowed and recognised by all States on an equal footing with different-sex marriage, by virtue of the liberty protected by the due process clause as well as the equal protection clause of the Fourteenth Amendment to the US Constitution. In doing so, the opinion of the court emphasised that marriage is 'a key stone' of the social order and 'a building block' of the national community, a 'constellation of benefits' having been linked to it by the States.[127] The harm suffered by same-sex couples as a result of their exclusion from

[126] (2015) 41 BHRC 160.
[127] Ibid. at 171-172.

such an institution consisted of 'more than just material burdens'.[128] The SCOTUS pointed out that '[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society'.[129] In the course of the judgment, the SCOTUS also emphasised the 'profound'[130] connection between the equal protection clause and the due process clause of the Fourteenth Amendment, tracing it through a series of cases, culminating in *Lawrence*. The SCOTUS also drew a parallel with *Lawrence* noting that, in being denied the right to marry, same-sex couples were once again faced with 'a long history of disapproval' which inflicted 'a grave and continuing harm', imposing a 'disability on gays and lesbians [that] serve[d] to disrespect and subordinate them'.[131] Lack of equal respect and the resulting infliction of moral harm and social oppression seem to have created the intersection between the equal protection clause and the due process clause, i.e. between equality and liberty.

In essence, the SCOTUS in *Obergefell* carried on from *Lawrence* in continuing 'a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix'.[132] Justice Kennedy - who delivered the opinion of the court both in *Lawrence* and in *Obergefell*- described that legal double helix in his closing statement for the latter case as a claim 'for equal dignity in the eyes of the law'.[133] Hard as it might be to provide an exhaustive definition of the notion of 'equal dignity', it might reasonably be said that it refers to the equal measure in which all individuals are entitled to autonomy in developing their identity and their role in society, without undue interferences by the State.[134] This is far from being simply a right to be left alone or a right to be treated similarly to those in a similar position. Furthermore, marriage is a social institution and the act of getting married is anything but private in terms of its effects on the social and the legal status of the couple. By the same token, same-sex couples are anything but similar to different-sex couples in terms of their sexual orientation, nor is marriage traditionally understood as being an institution that is open to heterosexual and homosexual couples alike. Still, all are equal in their need to be treated as respected members of a society, possessing equal standing to participate in its institutions.

Nevertheless, it does remain conceptually perplexing to argue -as the majority did in *Obergefell*- that 'equal dignity' can stand to describe a specific right, to the necessary exclusion of other rights.[135] Besides, freedom to choose how to proceed with one's personal development is no less attached to the concept of dignity than is freedom from torture, freedom from slavery, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and so on. Instead, it is far more practical to recognise that the right to equality itself can accommodate what is being described as equal dignity, the word 'equal'

[128] Ibid. at 172.
[129] Ibid.
[130] Ibid. at 173.
[131] Ibid. at 175.
[132] See Laurence H. Tribe, supra n 92 at 1898.
[133] *Obergefell*, supra n 126 at 178.
[134] See Laurence H. Tribe, 'Equal Dignity: Speaking its Name' (2015) 129 *Harvard Law Review Forum* 16 at 22. For a wider discussion of the complexities involved in employing the concept of dignity in legal discourse, see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *The European Journal of International Law* at 655; also see David Feldman, 'Human Dignity as a Legal Value: Part 1' (1999) *Public Law* at 682.
[135] The same applies to employing other notions, such as the one of 'anti-subordination liberty' in describing the approach that prevailed in *Obergefell* and *Lawrence*: see Kenji Yoshino, 'A New Birth of Freedom?: Obergefell v. Hodges', (2015) 129 *Harvard Law Review* 147 at 174.

being added next to the notion of dignity simply with a view to reasserting its own normative identity through it; that is, to extend beyond *isonomia*. Same-sex couples should have the right to marry because this is in line with the requirement of making sure that everyone is treated with equal honour as a member of society and that, as long as there is no disproportionate interference with the rights of others or the State as a whole, everyone should be equally capable to fall in love, engage in sexual relationships and, if he or she so wishes, get married. Past or current attitudes stemming from prejudice, stereotyping or lack of accommodation should never be considered valid reasons for qualifying that fundamental right to *isotimia*. The ECtHR is further away than the SCOTUS from clearly acknowledging this dimension of equality as something separate from the right to private life.

Only a month after *Obergefell*, the ECtHR found in the case of *Oliari and Others v Italy*[136] that Article 8 ECHR alone entailed a positive obligation for member States to provide a specific legal framework for the recognition of same-sex unions, considering it, once again, unnecessary to examine the claim brought under Article 14 in conjunction with Article 8. It is true that Article 8 ECHR played an important role in the emergence of a substantive understanding of equality within the case law of the ECtHR.[137] Nevertheless, to insist on Article 8 and on the notions of respect for private and family life alone as a terrain for debating the issue of recognition of same sex marriage is to conflate the means through which such a substantive conception of equality came about with the conception itself. Besides, it is fair to argue that, not only did an equality analysis played a role in not examining the Article 14 claim, but, in fact, the decision of the ECtHR to rely solely on Article 8 ECHR was strongly influenced by *isonomia*, the dimension of equality as impartiality which requires sameness in the treatment of similarly situated individuals. To understand why this is so, we will have to delve a bit deeper into the possible reasons why the ECtHR preferred not to review the claim under Article 14 in conjunction with Article 8 ECHR.

First, it is interesting to note that if the defending State did have a system of civil partnerships in place that was made available only to different-sex couples, but not to same-sex couples, the ECtHR would not hesitate to find a violation of Article 14 in conjunction with Article 8 ECHR, as it has done in the past.[138] Second, we need to remember that in *Oliari*, the defending State had not established an effective system of civil partnerships at all. Thus, as the only form of legal recognition available to heterosexual couples in this case was marriage, the ECtHR in *Oliari* would have to consider extending the right to marry to homosexual couples. But that would be practically impossible as the ECtHR still interprets the right to marry as referring only to heterosexual couples.[139] This would lead to a paradox whereby the ECtHR would be incapable of extending the same benefit (right to marry) to homosexual couples despite having already established 'that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships [and, accordingly, that] they are in a relevantly similar situation to a different-

[136] Applications Nos 18766/11 and 36030/11, Merits and Just Satisfaction, 21 July 2015.

[137] See Charilaos Nikolaidis, supra n 22 at 57-59.

[138] See *Vallianatos and Others v Greece* Applications Nos 29381/09 and 32684/09, Merits and Just Satisfaction, 7 November 2013.

[139] The wording of Article 12 ECHR ('Men and women of marriageable age have the right to marry …') has been construed by the ECtHR as referring exclusively to different-sex marriage; and, given that the Convention is to be read as a whole, this implies that there can be no right to marry for homosexual couples under Articles 14 and 8 ECHR either, at least not for the time being, regard being had to the state of European consensus on the issue as well: see *Schalk and Kopf v Austria* Application No 30141/04, Merits and Just Satisfaction, 24 June 2010 at paras 54-64 and 101.

sex couple as regards their need for legal recognition and protection of their relationship'.[140] It appears then that, by opting to examine the claim under Article 8 ECHR alone, the ECtHR managed to evade the issue of equal distribution by focusing entirely on the issue of equal recognition; in other words, it bypassed the formal requirements of *isonomia* to achieve *isotimia*.

A similar point can be made as regards the decision of the SCOTUS in *Lawrence*. The majority were concerned that if they invalidated the statute under the equal protection clause 'some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants'.[141] With a view to avoiding this possible levelling down, the opinion of the court emphasised the synergy between 'the due process right to demand respect for conduct protected by the substantive guarantee of liberty' and the equal protection clause;[142] but it only relied on the former to strike down the statute at hand. Thus, by letting go of the dialectics of equal treatment, the SCOTUS avoided the issue of levelling down and it also enabled itself to examine directly the substantive inequality at hand, that is, the 'stigma' imposed by the impugned criminal statute.[143] Once again, then, privacy was used to sidestep the formal limitations of *isonomia* in order to secure *isotimia*.

The ECtHR noted in *Oliari* that there was 'a conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition on the territory'.[144] Moreover, it reaffirmed, in the same way the SCOTUS did in *Obergefell*, that this state of affairs also led to immaterial harm which should be addressed. Accordingly, imposing a positive obligation to set in place an effective system of legal recognition would help cultivate 'a sense of legitimacy to same-sex couple' which has 'an intrinsic value for persons in the applicants' position, irrespective of the legal effects, however narrow or extensive, that they would produce …'.[145] This is a deeply relational and extrovert conception of privacy which spells the equality interest at hand quite clearly. It highlights the need for everybody to be treated as an equally honourable member of society, even if they are not to receive the exact same treatment. It also contributes in bringing about social change, thereby helping to disprove the critique that privacy can in fact perpetuate inequalities by requiring non-interference with existing structures of power within the private sphere.[146] Privacy in this context is just another name for equality and, more specifically, for *isotimia*.

The SCOTUS and the ECtHR have been on a parallel (albeit not identical) path in promoting the legal recognition of same-sex relations.[147] The existence of an informal

[140] Ibid. at para 99. For a wider analysis of how the ECtHR should proceed in properly acknowledging the right of same-sex couples to marry, based on its own methodology in interpreting Article 14 ECHR, see Emmanuelle Bribosia, Isabelle Rorive and Laura Van den Eynde, 'Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the US Experience', (2014) 32 *Berkeley Journal of International Law* 1.

[141] See *Lawrence*, supra n 80 at 575.

[142] Ibid.

[143] Ibid.

[144] See *Oliari*, supra n 136 at para 173.

[145] Ibid. at para 174.

[146] For a notable exposition of such a critique, see Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) at 93-102.

[147] For an overview and a comparison, see Massimo Fichera, 'Same-sex Marriage and the Role of Transnational Law: Changes in the European Landscape', (2016) 17 *German Law Journal* 383; also see Veronica Valenti, 'Principle of Non-discrimination on the Grounds of Sexual Orientation and Same-Sex Marriage. A Comparison

dialogue is hard to deny if we consider, for instance, that the judgment of the ECtHR in *Dudgeon* was expressly mentioned by the SCOTUS in *Lawrence*; and *Lawrence*, in turn, was relied upon in *Obergefell*, which, again, was taken into account by the ECtHR in *Oliari*.[148] But it is also important to recognise that from *Dudgeon* and *Lawrence* to *Obergefell* and *Oliari*, the two courts have in reality developed a similar philosophy in dealing with the interaction between the right to equality and the right to privacy. That philosophy has received many names, as previously pointed out, but in reality a simple term suffices to describe it and to reveal it as a distinct, neglected dimension of the right to equality that was simply rediscovered through the right to privacy. *Isotimia* helps us understand better the true nature of the relationship between the right to equality and the right to privacy. Even as an element of the right to privacy -as is currently often perceived- it can help us draw a distinction as to how we approach cases of decisional privacy where we take social oppression to be a central consideration (*isotimia*) and those where we consider other factors to be pivotal in restricting our freedom of choice.[149]

Most importantly, *isotimia* provides a solid conceptual platform upon which we can continue to develop our understanding of how inequalities are best approached and tackled in human rights adjudication. Acknowledging that the wider notion of equality is in fact indicative of more than one equalities and applying this finding to the adjudication of equality claims increases order and coherence in identifying the protected interest at hand and, by necessary implication, in dealing with conflicting interests. Other essential issues may also be resolved. For instance, the argument can be put forward that distinguishing between 'formal' and 'substantive' equality is a rather awkward way of addressing the two concepts in that it runs the danger of downplaying the significance of the former against the latter. In distinguishing between *isonomia* as indicative of the formal dimension and *isotimia* as indicative of (at least part of) the substantive dimension, we can achieve an 'equality of terms', by removing the implication that one of them lacks 'substance'. Besides, to pursue equality by securing rationality and impartiality in treatment is no less important than to seek equality by guaranteeing equal honour and autonomy. Such an increase in precision and clarity is particularly important in the context of adjudication of human rights claims.

5. CONCLUSION

Equality and privacy are conceptual labyrinths within which one might get easily lost. But if we look carefully we will notice there is a pathway leading to each other. This can be summarised as the right to choose how to lead one's life without undue interferences stemming from social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation. This is a requirement that is part of both the right to equality and of the right to privacy, at least at a conceptual level. Various instances of the case-law of the ECtHR and the SCOTUS on the legal treatment of same-sex relationships emphasise this synergy between equality and privacy at a more practical level as well. Indeed, the reality seems to be that both courts have used the right to privacy in order to promote equality interests, even though they have not always clearly acknowledged this to be the case. The

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Between United States and European Case Law' in Laura Pineschi (ed), *General Principles of Law – The Role of the Judiciary* (2015) 215.

[148] See *Lawrence*, supra n 80 at 573, *Obergefell*, supra n 126 at 171 and 175 and *Oliari*, supra n 136 at para 65.

[149] Cases concerning the permissibility of assisted suicide provide a good illustration of the latter category, where the courts might feel less eager to intervene: see, e.g., the judgment of the ECtHR in *Pretty*, supra n 66 and the judgment of the SCOTUS in *Washington v Glucksberg* 521 U.S. 702 (1997).

resulting reliance on relatively unclear terms such as 'personal liberty', 'personal development', 'moral security' or 'equal dignity' does not serve to maintain conceptual clarity. Moreover, focusing on privacy alone might serve to undermine the role of equality in human rights adjudication by downplaying its importance and by preventing it from stretching beyond its formal facet.

By distinguishing between *isonomia* and *isotimia* as two of the most basic manifestations of equality, and by acknowledging the prominent role that the former has played traditionally in human rights adjudication as opposed to the latter, we can acquire a better understanding of the reasons why privacy was used over equality in tackling issues related to the legal protection of same-sex couples. This is so because the said distinction allows us to observe that privacy has been employed as a conceptual laboratory within which the separation of *isonomia* from *isotimia* was achieved, or to be more accurate, rediscovered. Accordingly, it may fairly be argued that what we have been dealing with in many of the cases discussed above has been equality as *isotimia*, but masked as privacy. The notion of *isotimia* is particularly useful not only in eloquently capturing the claims brought forward when a person is rendered less capable of making a valuable choice by virtue of social oppression; it also serves to denote that such claims are in fact based on an understanding of equality as equal honour that is no less 'classical', in terms of its origin, than the one that is based on consistency in treatment, also known as *isonomia*.

Freedom from torture is not the same as freedom of expression, even though they are both freedoms. By the same token, equality in treatment (*isonomia*) is not the same as equality in honour (*isotimia*), even though they are both equalities. While the former notion has been the dominant paradigm in the theory and practice of equality, this paper has aimed to suggest that the latter notion is at least as important and has been acknowledged as such, albeit not properly. The conflation of *isotimia* with the decisional dimension of the right to privacy has delivered a great service in helping the ECtHR and the SCOTUS highlight the importance of this alternate dimension of equality. Safeguarding the private sphere within which same-sex relationships can flourish without fear of suffering the effects of social oppression proved to be an ideal terrain for that process. But the time has come to unravel the knot created by equality and privacy in more express terms.