



European  
University  
Institute

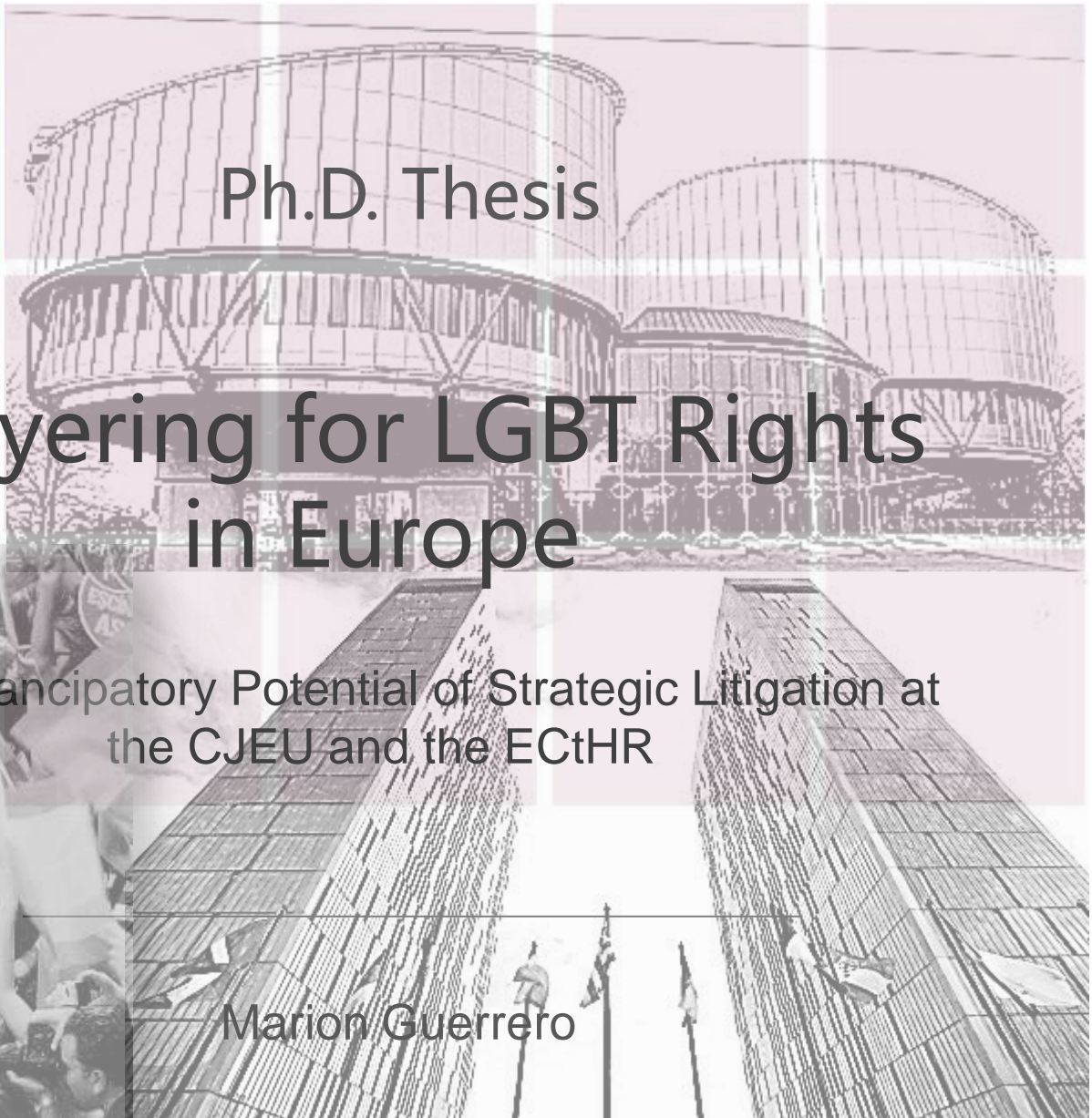
DEPARTMENT  
OF LAW

Ph.D. Thesis

# Lawyering for LGBT Rights in Europe

The Emancipatory Potential of Strategic Litigation at  
the CJEU and the ECtHR

Marion Guerrero





# Overview of Presentation

➔ field of research & methodology

background: “lawyering for social change”

➔ structure of thesis

US case study

➔ research question

subquestions

➔ conclusions

outlook on possible future research



Law Makers

Society

Law

Courts

## Ebenen des Kampfes um LGBTIQ Rechte





# Field of Research & Methodology

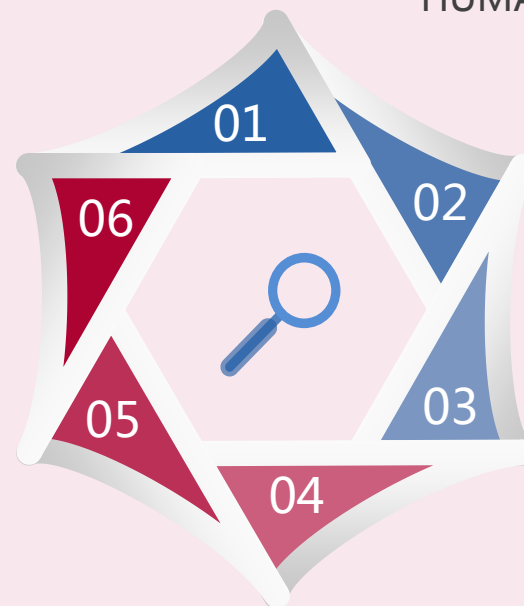
## INTERVIEWS

18 QUALITATIVE INTERVIEWS  
WITH LGBT RIGHTS ACTIVISTS

## SOCIOLOGICAL BACKGROUND RESEARCH

## LEGAL RESEARCH

INCLUDING RESEARCH OF  
PRIMARY AND SECONDARY  
SOURCES OF LAW



EU LAW & EUROPEAN  
HUMAN RIGHTS LAW

LEGAL QUEER &  
GENDER STUDIES

LEGAL THEORY &  
(LEGAL) PHILOSOPHY

INCLUDING HERMENEUTICS,  
LANGUAGE PHILOSOPHY,  
LAW AND SOCIOLOGY, AND  
OTHERS





# Lawyering for Social Change



*"directed at altering some aspect of the social, economic, and political status quo"*

Sarat/Scheingold



definition of *social change*



strategic litigation = one tool in the social change lawyering toolkit



definition of strategic litigation:



main purpose: effecting change that transcends the victory in a particular case



prioritization of a specific (legal/social/political) agenda over the particular interests of a client



# Research Question

separation-  
of-powers  
objection

law-  
sceptical  
objection

Is strategic litigation at the  
CJEU and the ECtHR an  
*emancipatory*  
and *feasible* approach for the  
advancement of LGBT rights in  
Europe?

*"The master's  
tools will never  
dismantle the  
master's house."*  
Audrey Lorde



## Can judges legitimately exercise quasi-legislative powers?

NO:

- violation of separation of powers
- lack of democratic accountability
- courts = elitist
- circumvention of (traditional) political discourses, etc.

YES:

- minority protection against majoritarian bias
- protection of fundamental, durable values, etc.





# Structure of the Thesis

0

INTRODUCTION

CHAPTER 0

1

THEORETICAL  
FOUNDATIONS

CHAPTER 1

2

PROCEDURAL  
CONSIDERATIONS

CHAPTER 2

3

STRATEGIC LITIGATION  
OPPORTUNITIES FRAMEWORK

CHAPTER 3

4

CJEU & SAME-SEX  
RIGHTS

CHAPTER 4

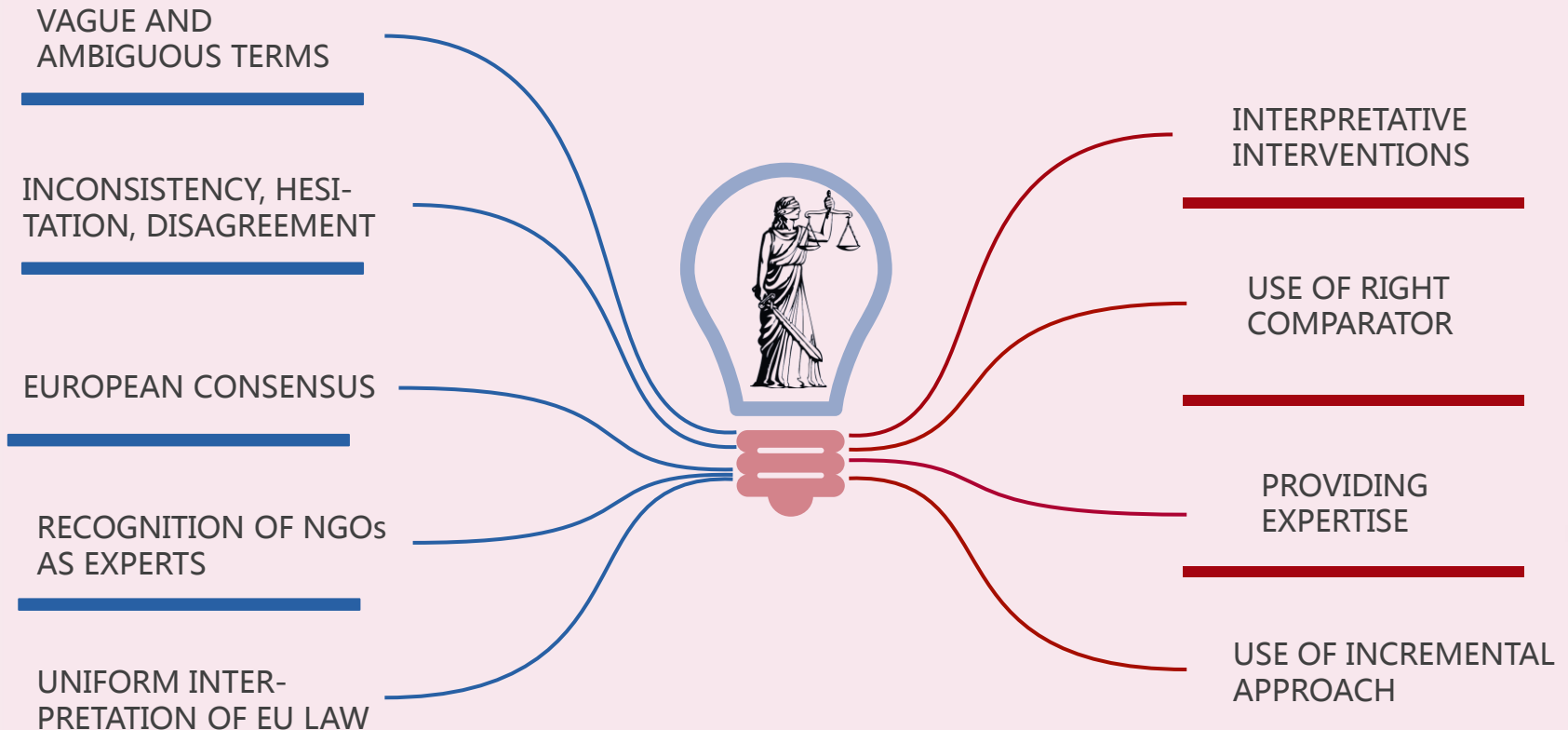
5

ECtHR & SAME-SEX  
RIGHTS

CHAPTER 5



# Strategic Litigation Opportunities Framework





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CHAPTER 5

6

CASE STUDY  
EXPERIENCE OF THE US LGBT  
RIGHTS MOVEMENT

CHAPTER 6

7

CONCLUSIONS

CHAPTER 7



# US Case Study

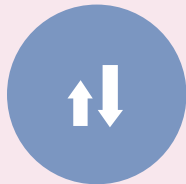
Same Sex Marriage: Affirming or  
Subverting Heteronormativity?

Litigation embedded in  
a larger strategy



Incremental Approach

Backlash Thesis



Legal Story Telling



# Research Question

Is strategic litigation at the CJEU and the ECtHR an *emancipatory* and *feasible* approach for the advancement of LGBT rights in Europe?



Is strategic litigation at the  
CJEU and the ECtHR an  
*emancipatory*  
and *feasible* approach for the  
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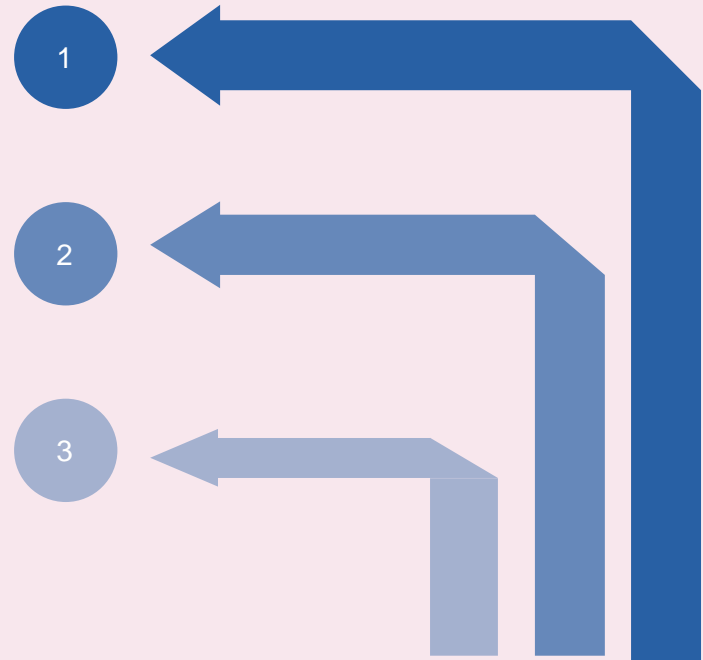
# Research Question

Is strategic litigation at the CJEU and the ECtHR an *emancipatory* and *feasible* approach for the advancement of LGBT rights in Europe?

Do the Courts exert sufficient influence to justify strategic LGBT rights litigation attempts?

Do European Courts provide procedural spaces for activist (LGBT rights) lawyers?

Can the case law of the European Courts be analysed and utilised in a progressive LGBT-rights enhancing way?







# Research Question

Do European Courts provide procedural spaces for activist (LGBT rights) lawyers?

2



Do the European Courts provide access to justice for activist (LGBT rights) litigants? (*precondition*)



Are the arguments of (LGBT rights) litigants adequately considered by the judges?



# Research Question

Can the case law of the European Courts be analysed and utilised in a progressive LGBT-rights enhancing way?

3

- 
- ➔ Do European Union law and European human rights law protect LGBT rights?  
(*precondition*)
  - ➔ Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?
  - ➔ How could an activist reading of the European Courts' LGBT rights case law look like? (strategic opportunities framework)

Is strategic litigation at the CJEU and the ECtHR an emancipatory and feasible approach for the advancement of LGBT rights in Europe?	
1) Do the Courts exert sufficient influence to justify strategic LGBT rights litigation attempts?	
2) Do European Courts provide procedural spaces for activist (LGBT rights) lawyers?	2.1) Do the European Courts provide access to justice for activist (LGBT rights) litigants? ( <i>precondition</i> )
	2.2) Are the arguments of (LGBT rights) litigants adequately considered by the judges?
3) Can the case law of the European Courts be analysed and utilised in a progressive LGBT-rights enhancing way?	3.1) Do European Union law and European human rights law protect LGBT rights? ( <i>precondition</i> )
	3.2) Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?
	3.3) How could an activist reading of the European Courts' LGBT rights case law look like? ( "strategic opportunities framework" )



# Conclusions

➔ litigation can be a tool for social change

Influence of CJEU & ECtHR can justify strategic litigation efforts

➔ view of adjudication as purely hierarchical = flawed

obscures agency and contributions of (activist) litigants

➔ actor-centred reading of case law establishes field of activist opportunities

➔ incremental approach



# Outlook – Areas for further Research

- ➔ examining de facto contributions of (LGBT) movement to legal development in Europe
- ➔ in-depth comparison of European and US LGBT rights provisions and case law
- ➔ social scientific research on activist / community organizing around legal approaches
- ➔ tracing national implementation of European LGBT rights cases





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Thank you.