DISSERTATION SUBMITTED FOR THE DEGREE OF TAUGHT MASTERS IN LAW

How gay is the European Court of Human Rights?

Lesbian, Gay, Bisexual and Transgender rights as human rights in the Strasbourg institutions

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Submitted by Gary James McLachlan, student number 550010920, to the University of Exeter as a dissertation towards the degree of Master of Laws by advanced study in LLM in International Human Rights, July 2009.

I certify that all material in this dissertation which is not my own work has been identified with appropriate acknowledgement and referencing and I also certify that no material is included for which a degree has previously been conferred upon me.

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Abstract

With the recent increases in membership of the Council of Europe a contemporary study of sexual orientation in the context of Convention law is an essential tool in incorporating new legal systems and jurisprudence into the regional human rights law as decided by the Strasbourg institutions.

In order to evaluate present conditions and future areas of concern, a full historic evaluation of the case law of the European Commission and Court of Human Rights as it relates to lesbian, gay, bisexual and transgender persons is used, following the use of limitations allowed under Articles 8 through 11, and how the jurisprudence of the Strasbourg institutions has evolved from the 1950s through to the present.

Focussing on the case law, and using existing doctrine this study examines rights under Articles 8 through 12, finding that in the main equal rights for homosexuals were achieved by the Court in 1999, although some rights may not be as certain – the guarantees of Article 10 cannot be ascertained beyond doubt, and it is in that area that the former communist States of eastern Europe will cause cases to be brought to the Court; for example in the recent passage by the Lithuanian Seimas of the '*Law on the Protection of Minors against the Detrimental Effect of Public Information*' despite it having being vetoed once by the President due to human rights concerns. The study focuses on the use of morality as a limitation, and includes an analysis of Russian human rights to evaluate the partial success and future threats arising from the eastward expansion of the Council of Europe.

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Abbreviations

CoE..... Council of Europe.
ECHR..... European Convention on Human Rights.
ECoHR..... European Commission of Human Rights.
ECtHR..... European Court of Human Rights.
HRCee..... Human Rights Committee, UN ICCPR.
ICCPR..... International Covenant on Civil and Political Rights.
LGBT..... Lesbian, Gay, Bisexual and Transgender.
UK..... United Kingdom of Great Britain and Northern Ireland.
UN..... United Nations.
UNHCR..... United Nations High Commissioner for Refugees.
UDHR..... Universal Declaration of Human Rights.
WR..... Wolfenden Report.

Definitions

The 'age of consent' cases consist of the ECtHR cases of:

Sutherland v UK, 2001 (Application no. 25186/94);

L. and V. v Austria, 2003 (Application nos. 39392/98 and 39829/98);

S.L. v Austria, 2003 (Application no. 45330/99);

H.G. and G.B. v Austria, 2005 (Application nos. 11084/02 and 15306/02);

R.H. v Austria, 2006 (Application no. 7336/03).

The 'decriminalisation' cases consist of the ECtHR cases of:

Dudgeon v UK, 1981 (Application no. 7525/76);

Norris v Ireland, 1991 (Application no. 10581/83);

Modinos v Cyprus, 1993 (Application no. 15070/89).

The 'living instrument' doctrine, according to which the ECHR must be interpreted in light of 'present-day conditions' is a creative tool of the ECtHR, first set out in *Tyrer v the United Kingdom*, 1978 (Application no. 5856/72), at paragraph 31.

The 'military service' cases consist of the ECtHR cases of:

Lustig-Prean and Beckett v UK, 1999 (Application nos. 31417/96 and 32377/96);

Smith and Grady v UK, 1999 (Application no. 33985/96 and 33986/96);

Beck, Copp and Bazeley v UK, 2002 (Application nos. 48535/99, 48536/99, 48537/99);

Perkins and R. v UK, 2002 (Application nos. 43208/98 and 44875/98).

The 'practical and effective' doctrine was elaborated as a creative tool by the ECtHR, in *Airey v Ireland*, 1979 (Application no. 6289/73), at paragraph 24.

The 'victim approach' to human rights was elaborated as a creative tool by the ECtHR in *Dudgeon v UK*, 1981 (Application no. 7525/76), at paragraphs 40-41.

Chapter One: Methodology and Introduction

Defining terms and scope

In this work, LGBT is the common acronym for lesbian, gay, bisexual and transgender persons as a group of people, who campaign for equality on similar grounds; a challenge to traditional sexual mores and to static perceptions of gender. The clearest statement of this category is given in the Introduction to the Yogyakarta Principles[1]

> "1) Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.
>
> 2) Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body [...] and other expressions of gender, including dress, speech and mannerisms."

These principles, binding in theory through international law under the UN Charter and international treaties such as the ICCPR *were* considered not to be subject to any individual 'right of address' other than UN bodies; being a collected set of principles which "*affirm the primary obligation of States to implement human rights*."[2] They have now been incorporated into Recommendations to CoE States[3].

The reason 'why' homosexuality or gender-misalignment arises is not the topic of study – the Victorian English legal system and early Twentieth Century jurisprudence

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[1] The Yogyakarta Principles. *Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007 <www.yogyakartaprinciples.org> accessed on 8 April 2009 ; About the Yogyakarta Principles <http://www.yogyakartaprinciples.org/principles_en.htm> accessed on 27 July 2009.

[2] '*Q. How can these rights be implemented*': About the Yogyakarta Principles <http://www.yogyakartaprinciples.org/principles_en.htm> accessed on 27 July 2009.

[3] Commissioner for Human Rights. *Issue Paper: Human rights and gender identity*. July 2009, CommDH/Issue Paper(2009)2, page 45 (Section 5), recommendation 1.

was littered with largely irrelevant questions of etymology. Put quite simply in terms of human rights, the '*why*' of LGBT does not matter; if being LGBT is a choice[4] then it is a question of freedom to make that choice. If being LGBT is an immutable fact[5] and part of being a human being then likewise, the cause does not matter, since in these terms the immutable part of human identity is what human rights law is protecting. Either reason 'why' lends itself to a human rights interpretation of the rights of the LGBT individuals who are affected. Although questions of 'why' may naturally occur in the jurisprudence under investigation, the answer to that question lies within a causal science, be that sociology, psychology or biology.

In terms of homosexual activities, the different signatories to the ECHR have differing legal histories in relation to the legality of homosexual sexual acts, lesbian sexual acts, transgender identity questions, ages of consent, etcetera. Although some of these issues will be identified and investigated, it is not the focus of the individual State laws which are under question – it is how the ECoHR and ECtHR have together handled these questions in relation to human rights that is the focus of this study.

The question "*How gay is the ECtHR*?" uses the term gay in both modern senses; as the G part of LGBT, and also in a schoolyard sense of 'bad'; the question asks both how LGBT-friendly the Strasbourg institutions are, and also by contrast, how these institutions have failed to recognise and promote LGBT equality both historically and in the present-day.

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[4] Wintemute, R. *Sexual Orientation and Human Rights*, at page 97; '*Fundamental Choice Arguments*'.
[5] Wintemute, R. *Sexual Orientation and Human Rights*, at page 119; '*Immutable Status*'.

Historic elements and reasoning

The history of LGBT rights in modern Europe is considered in context of the CoE. After the second world war there was a recognition in Western Europe that the region as a whole needed a system of human rights protection to help prevent such events reoccurring[6].

During the Holocaust, homosexual men were identified to the authorities in concentration camps by being forced to wear the pink triangle[7]. There is some argument over whether lesbian women were so identified[8], or merely classified as political prisoners, and transgender people at this time did not exist in the same way that they do now, since the medical surgeries enabling a gender-change were not available until the 1950s or later; it is likely that any cross-dressing man was classified as homosexual, and any cross-dressing woman as either a political agitator or mentally unbalanced as being 'un-German' (asocial[9]) given the private-sphere expectations of women in Nazi Germany[10].

This paper will not discuss whether the Nazi persecution of homosexuals in the concentration camps amounted to genocide, although the Genocide Convention[11] does include "*killing members of the group*"[12], "*causing bodily or mental harm to*

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[6] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at pages 1-2.
[7] Yoshino, Kenji. *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*. Columbia Law, (1996) 96(7):1753-1834, at page 1753.
[8] Jenson, Erik N. *The Pink Triangle and Political Consciousness: Gays, Lesbians, and the Memory of Nazi Persecution*. Journal of the History of Sexuality (2002) 11(*1/2 Special Issue: Sexuality and German Fascism*):319-349, at page 333-334.
[9] Gellately, Robert. *Backing Hitler: Consent and Coercion in Nazi Germany*, at pages 95-100.
[10] *i.e. 'natural occupations'*: Noakes, J and Pridham, G. *Nazism 1919-1945; Volume 2, State, Economy and Society 1933-1939*, at chapter 20.
[11] Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UNTS 277.
[12] Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UNTS 277, Article II (a).

members of the group"[13], and "*deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*"[14]. The Article II list of groups includes national, ethnical, racial and religious groups; which would include the members of the Jewish faith and Roma who also suffered great losses during the 'final solution', but does not include protections for political prisoners, homosexuals, or the disabled, all of whom also suffered during the Holocaust.

These omissions were corrected in part by the UDHR[15] in which Article 2 contains a list including "*political or other opinion*" and "*birth, or other status*" which would cover the other groups persecuted by the Nazi authorities, but not, on first reading, the group of homosexuals, unless they appeared under "*other status*" or "*sex*".

A reading of the appropriate decisions from UN bodies shows that the HRCee under the ICCPR[16] recognised "*sex*" as including sexual orientation in 1994[17], and the UNHCR recognised that the "*particular social group*" category in the 1951 Convention[18] would also include groups based on their sexual orientation[19]. Strasbourg was breaking new ground when it decided *Dudgeon*[20], the first of the 'decriminalisation' cases; becoming the first international body to rule positively on *homosexual* human rights.

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[13] Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UNTS 277, Article II (b).
[14] Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UNTS 277, Article II (c).
[15] United Nations General Assembly Resolution 217A (III), 10 December 1948. *The Universal Declaration of Human Rights*.
[16] International Covenant on Civil and Political Rights (1966), 999 UNTS 171.
[17] *Nicholas Toonen v Australia*, 50th Sess., Communication No. 488/1992, CCPR/C/50/D/488/1992, April 4, 1994, paragraph 8.7 ; confirmed in *Young v Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000, September 18, 2003; *X v Columbia*, Communication No. 1361/2005, CCPR/C/89/D/1361/2005, May 14, 2007.
[18] Convention Relating to the Status of Refugees (1951) 189 UNTS 137.
[19] UN High Commissioner for Refugees, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004. Online. UNHCR Refworld <http://www.unhcr.org/refworld/docid/4551c0d04.html> accessed 8 April 2009.
[20] Case of *Dudgeon v the United Kingdom* (Application no. 7525/76), 1981.

Despite the historic segregation of gay men, and the persecution of this specific group on the grounds of their sexual orientation within Europe, the drafters of the ECHR[21] did not include sexual orientation in the Convention as a protected ground, nor mention it as a legitimate grounds of complaint in terms of discrimination.

Indeed, the early ECoHR cases brought forward during the 1950s show that the Commission was willing to accept the common stereotypes of the day, phrases such as "*it is known that...*" in relation to homosexuals being acceptable in legal pleadings by signatory States in a way that *should* be unthinkable in a modern court of law.

The German government did not officially recognise homosexual sufferers of the Holocaust until 1985[22], and in the 1950s many signatory States still criminalised homosexual sexual acts in terms of public morality[23]. This work will examine issues around morality and homosexuality, since this is *still* the greatest apparent barrier to total legal equality for LGBT persons.

That these perceptions had largely been disproved by the Wolfenden Committee[24] in their Report in 1956 did not appear to reach the cognisance of the ECoHR or ECtHR until *Dudgeon*; 1979 at the Commission, 1981 at the Court, more than two decades after the Report had been presented. Chapter two of this work examines the WR, its

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[21] Convention for the Protection of Human Rights and Fundamental Freedoms (1950), ETS No. 5 (Protocol 11, ETS No. 155).

[22] Jenson, Erik N. *The Pink Triangle and Political Consciousness: Gays, Lesbians, and the Memory of Nazi Persecution*. Journal of the History of Sexuality (2002) 11(*1/2 Special Issue: Sexuality and German Fascism*):319-349, at page 336 ; Official Apology, 2005: <http://political-apologies.wlu.ca/details.php?table=doc_press&id=581> accessed on 8 April 2009.

[23] COURT_n2543304_v1_Norris_10581_83_Memorial_of_the_Government.pdf, at paragraphs 9, 10, 14 ; COURT_n2543320_v1_Modinos_15070_89_Memorial_of_the_Government.pdf, at paragraph 13, and *prayer for relief* paragraph 1.

[24] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008. *Hereinafter* WR.

relationship to tolerance and the use of it by the Court in further cases establishing a minimum Convention status for homosexuals.

Right to a private life

Article 8 of the ECHR, the right to respect for one's private life, has been core to the progress made in LGBT rights under the Convention – although the signatory States have very different perceptions of what a right to privacy entails, the greatest progress towards equality and the greater balance of the Strasbourg jurisprudence historically comes from Article 8.

Chapter three therefore will concentrate exclusively on the core case-law around LGBT cases and chart the progression from minimal rights to full equality. This will include some element of 'morality' since the first such case, *Dudgeon*, contained moral defences based around the Protestant faith protests against the limited decriminalisation of homosexual activity from the territorial extension of SOA[25].

The 1990s 'military service' cases contain discussions of necessity and public policy. At this stage the jurisprudence of the ECoHR and ECtHR (latterly the Court only) avoided use of Article 14 in conjunction with Article 8[26], and also did not refer to the 'living instrument'[27] concept at all – until minimum standards were met in equality, the laws of the signatory States were sufficient to create violations of Article 8.

The 'age of consent' cases that run from the 1990s until 2006 saw the enlargement of the principles involved in Article 8 and decisions based under Article 14 arguments,

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[25] The Sexual Offences Act 1967, c.60.
[26] Wintemute, R. *Sexual Orientation and Human Rights*, at page 121; '*Application of Article 14 to Sexual Orientation Discrimination*'.
[27] Case of *Tyrer v the United Kingdom*, 1978 (Application no. 5856/72), at paragraph 31.

and these will also be examined in Chapter three, following those cases where discrimination in conjunction with the right to privacy became a deciding factor in removing barriers to full equality.

The decisions which finally recognised the rights of transgender persons took place in 2002[28], and at this point the 'living instrument' *explicitly* entered the positively-decided jurisprudence of LGBT rights cases.

The future of the Convention

This paper will attempt to determine a point in time where we can recognise equality for LGBT persons; although problems persist – as Commissioner for Human Rights[29], Thomas Hammarberg[30] outlined the problems still facing LGBT persons in signatory States; notably the new entrants from Eastern Europe, Russia, and also Turkey[31]. Chapter four examines the legal issues and challenges facing the established western members of the CoE in tackling discrimination in those member States, many of whom can justly claim to have different traditions to the Preamble statement contained in the ECHR[32]. Indeed, despite the work of the ECoHR and ECtHR since 1950 even some of the western States have different ideals in certain areas, and this chapter will also examine the concepts of 'morality' and 'necessary' in the context of regional and

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[28] Case of *Christine Goodwin v the United Kingdom*, 2002 (Application no. 28957/95) ; Case of *I. v the United Kingdom*, 2002 (Application no. 25680/94).
[29] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 16; *on the role of the Commissioner*.
[30] CommDH/Speech (2008) 16, Strasbourg 3 November 2008. "*Thinking Globally, Acting Locally*" ILGA European conference, statement by Thomas Hammarberg, Council of Europe Commissioner for Human Rights Vienna, 31 October 2008.
[31] Ratification by Turkey: 18 May 1954. <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=4/11/2009&CL=EN> accessed on 11 April 2009.
[32] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 48; *citing* Dremczewski *on common legal tradition*.

national variations, closely examining certain cases under Article 10 where conflicts *seem* to have arisen in the case-law, creating a less legally certain position than "*collective enforcement of certain of the rights*" would seem to guarantee.

Inequality and State Inequality

The final chapter will examine the issues raised in chapter four, comparing the purpose of the ECHR and the CoE to the political reality of a 47-State Council containing 800,000 Europeans by focussing on Russia in particular to illustrate a series of problems that could allow the jurisprudence of the ECtHR to deteriorate or reverse the steps towards equality for LGBT persons that have been achieved.

Chapter Two: Wolfenden and other History

This chapter will examine the WR in the context of LGBT rights, and look at the papers and ECoHR cases which had arisen prior to the hearing of *Dudgeon* since these are the background to progress for LGBT rights.

In order to place *Dudgeon* and the successive cases in their place this paper will first examine the modern legal history of sexual offences legislation and legal thinking in Anglo-Saxon jurisdictions, focussing particular attention on the UK as well as examining academic papers that would have been available to lawyers taking cases to Strasbourg during the period from 1955 to 1978, prior to the ECoHR proceedings for *Dudgeon*.

Early Commission hearings[33]

The first ECoHR case to be considered is application 104/55[34], a case which takes three paragraphs in the Yearbook; at this stage the ECoHR held it to be established that the ECHR allowed member states to enact laws criminalising homosexual sex on the grounds of health or morals under Article 8(2), and that Article 14 on discrimination allowed a member state to apply different standards of behaviour to the two sexes; effectively approving the criminalisation of male homosexuality whilst ignoring or allowing lesbian sexual activities[35].

The case was declared inadmissible as manifestly ill-founded for those reasons. Given the paucity of information still in existence about this case it is impractical to speculate

[33] Wintemute, R. *Sexual Orientation and Human Rights*, at page 92 footnote 3.
[34] *X v Federal Republic of Germany*, Application no. 104/55, Yearbook of the European Commission of Human Rights [1955-57] 228.
[35] *On early decisions*, Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 270.

as to the submissions from either party; and the later application of 3595/72 therefore remains the most complete early case prior to *Dudgeon*. It is *likely* that the reasons advanced by the German authorities in the 1970s were similar to those used by them in the 1950s but this cannot be stated here as a fact.

The Wolfenden Report

Homosexual offences

The WR itself notes[36] that, when addressing criminal acts, the definition of what constitutes a crime can be a circular argument; since by defining it as "*an act which is punished by the State*" the question of what acts ought to be punished by the State is unanswered, and in this definition from the perspective of this paper, leaves out entirely the role of human rights within the criminal law. Function as seen by the authors of the Report[37] was to "*preserve public order and **decency**, to protect the citizen from what is **offensive** or injurious, and to provide sufficient safeguards against exploitation and **corruption** of others.*"

In a human rights context, we see the reflection of those aims in the limitations of rights as given by paragraph 2 of Articles 8 through 11 of the ECHR; that any criminal act should be clearly defined ("*in accordance with the law*") so as to not be arbitrary, and must be "*necessary in a democratic society*" for the protection of health, morals, or the rights and freedoms of others. National security is also mentioned as a limiting ground, as is public safety but although these categories may have had influence on

[36] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008.
[37] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at pages 9-10, paragraph 13, emphasis added.

other issues surrounding LGBT rights they do not directly affect the WR at this stage; which had in its purposes the state of the criminal law only as regards to homosexual sexual offences. Although it is possible to look backwards from a human rights perspective, too close a parallel between the work of the Strasbourg institutions and the WR should be avoided: The WR does not allude to human rights at all in part two on homosexual offences, and the ECHR was not in the authors minds at all during the considerations.

This points to the first major objection to either side in any case at Strasbourg using the WR; since it does not refer to human rights at any stage and is concerned only with the limitations under paragraph 2 of Articles 8-11 of the ECHR in a peripheral sense it is at best a manipulation of the results to use the report in a human rights context.

The second objection is the use of public opinion by the authors; the Report states that "*opinions will differ as to what is offensive, injurious or inimical to the common good*"[38] and admits that "*[w]e have been guided by our estimate of the standards of the community in general*"[39]. In terms of providing authoritative information then, the WR concedes that public opinion is largely immeasurable, unquantifiable and that they have guessed the prevailing opinion of the day. The 'informed estimation' of the Committee may well be an accurate assessment of public opinion at that time; however the fact remains that public opinion is fickle at best, and can change rapidly in terms of advancing or reducing a tolerant attitude[40].

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[38] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 10, paragraph 15.
[39] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 10, paragraph 15.
[40] *Infra*; Russian Courts and Judiciary at page 72.

The problem with 'public opinion' in the context of the ECHR is that unless the value of public opinion to the rule of law is 'read in' to the preamble as part of the "*common heritage*" then there is no mention of public opinion in the ECHR. Public opinion thus becomes a problem until a tool is created to guide interpretation; such a tool was created by the Court in *Tyrer* with the 'living instrument' which must be interpreted in the 'light of present-day conditions'. The WR predates that judgement by 20 years and did not seek to determine present-day conditions in a fixed sense[41].

Medical Opinions

The original fixing of the age of consent for homosexual men in the WR at 21 was not intended to reflect the maturity or otherwise of men above or below that age; at the time it was advised, that was the age of contractual responsibility (majority) in law[42]. The reason the lower age of eighteen was not proposed by the majority was to protect younger men from "*pressures of an undesirable kind*"[43] to experiment sexually. This attitude came from a basic misunderstanding of the nature of sexuality in humans, which was to stand before the law until the 'age of consent' cases, and will be examined further at that point[44].

In his further reservation, Dr Whitby[45] states that he finds it "*hard to believe that a young man needs to be protected from would-be seducers more carefully than a girl*"[46],

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[41] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 10, paragraph 16.
[42] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 21, paragraph 71.
[43] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 21, paragraph 71.
[44] *Infra,* The Austrian cases for the protection of minors at page 41; *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 26, paragraph 68.
[45] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, page 125.

after consideration of the unanimous expert testimony from medical witnesses that "*the effects of homosexual seduction in youth have been greatly exaggerated*"[47]. Whilst these opinions were unlikely at this point in time to result in a total removal of the barriers to equality, that this evidence was available in the 1950s is significant when considered in the context of the ECoHR case of 5935/72, which is considered below[48].

Moral arguments

The authors of the Report expected "*that the law would continue to make provision for the preservation of public order and decency*"[49], leaving it "*for the courts to decide [...] whether or not public decency has been outraged*"[50]. Whilst the subsidiarity of the Strasbourg institutions to domestic courts in principle allowed (and still allows, within the 'margin of appreciation'[51]) domestic courts to take decisions of this nature based on local circumstances there is another clear danger to the universal nature of the ECHR guarantees in tolerating national or regional variations in moral standards outside of clearly defined limits[52].

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[46] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 125 paragraph 3(a) ; at page 26, paragraph 67.
[47] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 125 paragraph 3(b).
[48] *Infra*, The human rights of ephebophiles at page 24.
[49] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 28, paragraph 76.
[50] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 25, paragraph 64.
[51] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 53, *citing the views of Sir Gerald Fitzmaurice*.
[52] *Infra,* The limitations of morality at page 64; *Infra,* Russia and morality – the LGBT perspective at page 76.

The definition of "*in private*"[53] was never intended to be a legal definition, it relied entirely on the judgment of the court as outlined above on what outraged public decency. The difference to the private life element of Article 8 cannot be underestimated here; when later English court rulings found that a hotel room in which two men had otherwise fully lawful homosexual sex was not "*in private*"[54] (there being a possibility of a third-party presence) they were allowing public outrage to intrude into private spaces and intimate areas of private life, something that English judges such as Sir Patrick Devlin[55] took as allowing the public inspection of private acts even when no public awareness of the act was present.

Continuum of behaviour

The results of surveys into human behaviour such as the Kinsey Report were well publicised in the 1940s and 50s, and the WR recognised the existence of a continuum of behaviour between total, exclusive and permanent homosexuality and total, exclusive and permanent heterosexuality[56], and while they acknowledge that this means that homosexuals cannot be regarded as "*quite separate from the rest of mankind*"[57] they continue to separate the state of being homosexual from the sexual acts defined as homosexual acts; which allows those homosexual acts to continue to be regarded as aberrant, if not abhorrent. The fundamental dichotomy of the criminal law is never fully recognised, in that the assumption of 'normal' as excluding

[53] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 25, paragraph 64.
[54] Sexual Offences Act 1967, s1(2)(a) ; Moran, Leslie J. *The Homosexual(ity) of Law*. Routledge, 1996, at page 57.
[55] Fletcher, Joseph. *Sex Offences: An Ethical* View. Law and Contemporary Problems (1960) 25(2):244-257, cited at footnote 70 as Patrick Devlin, The Enforcement of Morals 15 (1959).
[56] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 12, paragraph 22.
[57] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 12, paragraph 22.

homosexual acts is made a tradition because those acts were unlawful; had those acts never been criminalised it is likely that the question of 'normal' would never have arisen in the same way[58]. The WR does recognise that homosexuality cannot be legitimately regarded as a psychiatric disease[59], and tellingly, that even where 'seduction' has been observed the subject can still "*become entirely heterosexual in their disposition*."[60] What it does not recognise is the circular logic; where homosexuality is stated as the cause of marriage break-down, or as having a damaging effect on family life[61] the WR recognises that "*the mere existence of homosexuality in one of the partners can result in an unsatisfactory marriage*"[62] without drawing the proper conclusion – that the criminalisation of homosexual acts and the public opprobrium which *caused* homosexuals to marry in order to hide or deny their homosexuality was in fact the *direct* cause of this damage to family life.

"It is known that" arguments

In that same way, most of the moral arguments proposed to retain criminal legislation against homosexuals[63], or to prevent legal reform for equality focus around the supposed damaging effects of homosexuality, often arguing that the secondary effects resulting from the criminalisation of homosexuality are in fact a primary cause, and due to homosexuality itself (or homosexuals themselves). One such area was

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[58] *Expanded in* McLachlan, Gary LLB. 'Liberating invisibility: The love that *shall* not speak its name…' <http://garymclachlan.wordpress.com/invisibility/> accessed on 11 May 2009.
[59] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 14, paragraphs 26-27.
[60] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 15, paragraph 29.
[61] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 22, paragraph 55.
[62] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 22, paragraph 55.
[63] *And other measures*; i.e. s.28 in Cumper, Peter and Bell, Mark. *Reforming section 28: lessons for Westminster from Holyrood*. European Human Rights Law Review [2003] 4:400-409, at pages 401-403.

investigated by the WR, when they considered whether de-criminalisation might lead to greater amounts of homosexual activity; the authorities in Sweden were able to produce no statistical information at all, but the conclusion of the WR is that this meant there had been no "*appreciable increase in homosexual behaviour*"[64], thus disparaging if not disproving the 'flood-gates' arguments of opponents of liberalisation.

Post-Wolfenden: legal change and historic tradition

An ethical view of sex offences

In his introduction, Fletcher posits that the main reason for lack of reform of the 'moral code' laws against all kinds of sexual immorality is not a determination to uphold moral standards, but merely a "*fear of appearing indifferent to morality*"[65] a view which has also been noted in the general sphere of the mainstream media where legal reform has stalled in parliaments across Europe.

Fletcher points to the WR and the testimony of the Anglican Council[66] that law does not build character, and stunts moral obligation, as well as tendering a third and perhaps better argument than both of these points; that compelled behaviour is *not* righteous behaviour[67].

His conclusion is that where examining the relationship between ethics and law and relating this to sexual offenses there are three classes of offence; those acts with

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[64] *Report of the Committee on Homosexual Offences and Prostitution*. 1956-57 Cmnd. 247 Parliamentary Papers: <http://parlipapers.chadwyck.co.uk/> visited 18 March 2008, at page 24, paragraph 59.
[65] Fletcher, Joseph. *Sex Offences: An Ethical View*. Law and Contemporary Problems (1960) 25(2):244-257, at page 244.
[66] Fletcher, Joseph. *Sex Offences: An Ethical View*. Law and Contemporary Problems (1960) 25(2):244-257, at page 252.
[67] Cram, Ian. *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies*, at pages 5-6; '*how to inculcate virtue*'.

persons under the legal age of consent, those acts which are genuine public nuisances or infringe public decency, and those acts which have an element of force, duress or fraud[68].

An examination of those three classes of offence in a human rights context allows us to fit those proposals very neatly within the limitation paragraphs of Articles 8-11, indeed if one considers the right of privacy to cover the co-existent right of not being involved in other people's private lives then morality or 'public decency' are not elements of the limitations here at all; the three classes of offence would all protect the rights of others. Children have the right to develop their own private lives, free from adult interference; and any element of force, duress, coercion, or fraud is a violation of another person's rights and freedoms.

In this respect Fletcher's arguments from the 1960 paper fit neatly into human rights law and support decriminalisation arguments, age of consent arguments and also the military service arguments without having to argue value judgments (moral obligations) in this sphere.

The human rights of ephebophiles

The problem of morals and morality cross into the ECHR since it was drafted with the morality clauses in limitation articles, so that something that could be argued as having no value in human rights law was given immediate value in the interpretation of the ECHR by the Strasbourg institutions. This historically proved to be a problem for

[68] Fletcher, Joseph. *Sex Offences: An Ethical View*. Law and Contemporary Problems (1960) 25(2):244-257, at page 257.

homosexual decriminalisation because of the intrinsic flaws in several cases, most notably in 5935/72[69].

That the German government was able to forward as support for limited decriminalisation and a variance in the age of consent the arguments that "*male homosexuals prefer young partners*"[70] leading to the assumption that "*young men are much more exposed to the risk of homosexual relations with adults than girls*"[71] was due in no small part to the claimant in this case. In modern terms he would be classed as an Ephebophile, although by definition in the 1970s he would have been classed as a paedophile. Whilst some of the elements of his case surrounded the fairness of certain trial proceedings against him, these were dismissed as unfounded early in the hearings leaving only article 8 and 14 issues to be examined. The intrinsic flaw in this case should be manifest to any observer; there exists no human right in any reputable document which would allow the infringement of the rights of a child or the breach of an established criminal age of consent (both limitable reasons within Article 8(2)) to allow that part of the claim to stand as anything other than manifestly ill-founded. The problem with the case in general is that no arguments were raised against the "*it is generally admitted that*"[72], and "*experience shows that*"[73] arguments given by the German authorities because the claimant in this case was everything that the German authorities said that homosexuals were; he was in *specific* everything they claimed in

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[69] *X v Federal Republic of Germany* (1975) European Commission of Human Rights Decisions and Reports 3:46.
[70] *X v Federal Republic of Germany* (1975) European Commission of Human Rights Decisions and Reports 3:46, at page 53, second alphabetical list (b).
[71] *X v Federal Republic of Germany* (1975) European Commission of Human Rights Decisions and Reports 3:46, at page 53, second alphabetical list (d).
[72] *X v Federal Republic of Germany* (1975) European Commission of Human Rights Decisions and Reports 3:46, at page 53, first alphabetical list at (a) and (c).
[73] *X v Federal Republic of Germany* (1975) European Commission of Human Rights Decisions and Reports 3:46, at page 53, first alphabetical list at (b).

general, and as such, an appalling person to bring a key case in the early history of human rights decisions. This paper would not suggest that paedophiles or ephebophiles should not be protected in the strongest terms against abuses of their human rights in the fairness of proceedings, being regarded as innocent before the law before absolute proof of their guilt is presented in a full trial, and the other fundamental guarantees which apply to all human beings, but the consequence at that time, and until *Dudgeon* for decriminalisation was that assumptions without any valid basis were allowed in evidence as reasons to limit under Article 8(2) and it is likely that this ruling caused (in part) the longer wait on the age of consent issue.

Abortion and a sexual life

Regarding sexual life, the abortion case of Brüggemann[74] was to have better long-term affect for LGBT rights than the earlier homosexual cases, since the ECoHR found in this case that sexual life formed a part of private life, and that legislation which concerned abortion could form an interference with private life as a consequence of that. Given this finding, homosexual sex as a part of private life is *implicit* in the decision, and any limitation of homosexual sex would thereafter have to be justifiably limited using Article 8(2). The earlier Commission cases had alluded to homosexual sexual acts being a facet of private life, but it is likely that this particular ruling meant the ability of States to pass a limitation test based purely on speculative grounds such as those in 5935/72 was severely curtailed.

[74] *Rosemarie Brüggemann and Adelhaid Scheuten v Federal Republic of Germany*, 1976 (Application no. 6959/75).

Morals in law: The Handyside case

True facts

The applicant in this case gathered expert witnesses who testified to the fact that the material in the '*Little Red Schoolbook*[75]' was not contrary to the Obscene Publications Act 1959, but at the London Quarter Sessions the judge held that

> "an almost infinite variation in the relevant background of children who would in one way or another be affected by the book, so that it was difficult to speak of 'true facts'"[76].

This is the underlying problem with any measure of morals or morality; it is always difficult to point to true facts when assessing moral values or the impact on morals of a particular publication (for Article 10) or a particular way of life (for Article 8).

In terms of LGBT issues and morality the London Quarter Sessions and the Public Hearings of June 1976 cover the same issue; namely the passage of the '*LRS*'[77] where stable homosexual relationships are mentioned, and both the court of first instance in England and the government saw this passage as particularly resonant with morality in measuring the corrupting influence of the book when taken as a whole. Although not pivotal to the case, this point that homosexuality itself was at this time considered to be as immoral as taking illegal drugs, or a possible corrupting influence on youth by the UK government and the English courts is an important one; it seems to contradict the findings of the WR in finding a malign influence from homosexuals or homosexuality itself. As an aside at this point, it is worth bearing in mind that since the UK government did not put forward the bill which became the Sexual Offences Act 1967,

[75] hereinafter '*LRS*'.
[76] Case of *Handyside v UK*, 1976 (Application no. 5493/72), at paragraph 29.
[77] Cited in Eur. Court H.R., Series B no. 22, *Handyside case,* at page 135.

and did not seek to utilise the WR findings in information to the courts or judges within the UK. The UK government itself never had any respect for or interest in the positive findings of the WR – this Report would never have been introduced to the ECoHR or ECtHR were it not used by *Dudgeon* to counter the arguments of the government.

A contrary State

In the ECoHR records the dissenting opinions of MM. Kellberg, Nørgaard and Trechsel[78] that the evidence of the court case itself was merely one of the "*indications of the moral climate prevailing in Great Britain at the material time*", and on that basis the '*LRS*' itself was not contrary to the prevailing morality of the UK at that time.

This dissenting opinion is enough to show the dangers of attempting to ascertain a moral viewpoint on any issue, within a given member state, or even as a whole across the entire population of the CoE. Any moral view that may be reached is likely to be based purely on a majoritarian sense, and the ECtHR found the same;

> "[i]n particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals."[79]

The ECtHR went on to say that 'necessary' was not synonymous with 'indispensible', but not as flexible as 'useful' or 'desirable' in the context of the limitations, adding that it is for national authorities[80] to make the initial assessment of the pressing social need implied in Article 10(2) and that this was 'the margin of appreciation' in the sphere of morality.

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[78] Cited in Eur. Court H.R., Series B no. 22, *Handyside case,* at page 61.
[79] Case of *Handyside v UK*, 1976 (Application no. 5493/72), at paragraph 48.
[80] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 33-34, on "local requirements"; citing *Tyrer v the United Kingdom* at paragraph 38.

The scope of the 'margin of appreciation' given to States, as set out by the ECtHR "*will vary according to the circumstances, the subject-matter and its background*"[81] and differs when the *purpose* of a limitation is considered[82] under the different Articles 8-11[83]. For these purposes when considering Article 10 *against* Article 8 as competing rights, it appears that privacy of the individual is capable of 'trumping' freedom of speech. In the demands of pluralism, tolerance and broadmindedness without which there is no democratic society any restriction made for moral reasons must be proportionate to the legitimate aim pursued.[84] Although *Handyside* was decided in the UK government's favour, ruling that there had been no violation of Article 10, the versions of the '*LRS*' differed from State-to-State making a universal and single statement of fact on the varying morality across the CoE at that time a difficult job at best; it becomes clear that in this case at least, the UK was allowed to vary on morality from the prevailing 'more relaxed' attitude in continental European members of the CoE at that time. Although the margin of appreciation on Article 10 has been restricted since, the single-State variance in 'morality' based on the 'local' consideration of what morality means to the domestic legislation of the State and how it stands against the ECHR itself is a precedent which still appears in case law at Strasbourg. This issue will be considered further throughout this work[85].

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[81] Lavender, Nicholas. *The problem of the Margin of Appreciation* European Human Rights law Review [1997] 4:380-390*,* p.384 citing *Rasmussen,* Series A, No.87, p.15, s.40 (1984) 7EHRR 371.

[82] Arai, Yutaka. *The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights*. Netherlands Quarterly of Human Rights, 1998 16(1):41-63, at page 50, section C *Homosexuals and Transsexuals*.

[83] Macdonald, R St J. *The Margin of Appreciation*. Chapter 6 of *R St J Macdonald et al (eds.), The European System for the Protection of Human Rights*, 83-124, 1993 Kluwer Academic Publications, Netherlands, at p.86, Section III Article 10 ; Millar, Gavin. *Whither the spirit of Lingens?* European Human Rights Law Review [2009] 3:277-288.

[84] Case of *Handyside v UK*, 1976 (Application no. 5493/72), at paragraph 49.

[85] *Infra,* The limitations of morality at page 64; *Infra,* Russia and morality – the LGBT perspective at page 76.

Unenforced, unenforceable and the failure of aim

Handyside tried to argue that the 'pressing social need' element of the case from a ECHR point of view was missing, using in evidence the lack of prosecution in Scotland and the fact that the book was in circulation in other parts of the UK. This approach failed[86], which has two aspects; one, that the English judgment could still be seen as a response to a real necessity, and two, that at this time the ECtHR did not see a dichotomy in allowing the UK to devolve areas of law in varying degrees to the 'provincial' countries within the UK (such as Scotland, or Northern Ireland) based on local need.

This decision would seem to run counter to the finding in the *Belgian Linguistics case*[87], in so far as it would tie the moral attitudes of certain people 'to the soil'[88] and allow for a variance in moral attitude across the different countries within the Union, to be guaranteed within the setting of the ECHR. Although there are anomalous cases that post-date *Handyside*, for Article 8 at least, *Dudgeon* changed this particular localised variation on morality in *criminal* law[89].

Judge Mosler in his separate opinion felt that the obscenity laws in this instance were not 'necessary' because they failed of their aim, since some 90% of the copies of the '*LRS*' did not suffer confiscation, remaining in circulation despite the ruling of the English court. This is in certain ways a restatement of the arguments made by the applicant at the ECoHR, and even clearly stated in this way, failed to convince the

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[86] Case of *Handyside v UK*, 1976 (Application no. 5493/72), at paragraph 54.
[87] Case *"Relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium (MERITS)*, 1968 (Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64).
[88] Case *"Relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium (MERITS)*, 1968 (Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), at page 35.
[89] *Infra*, *Dudgeon* – morality in private lives at page 34.

majority of the ECtHR. It can be argued that it is not the purpose of any law to reach 100% effectiveness; indeed arguing from a historical perspective on the ECHR itself, post-*Dudgeon* it could be argued that since the Strasbourg institutions failed to uphold LGBT rights as human rights at all until *Dudgeon* the ECHR was ineffective and had failed of its aim[90]. This would be a gross distortion of the accomplishments of the ECHR and Strasbourg institutions throughout the period[91].

Bentham uncovered

The publication in 1978 of a previously unpublished Bentham polemic 'Offences Against One's Self'[92] shows the views of one of the earliest utilitarian philosophers to such 'offences' as those covered under LGBT identities, and makes a strong utilitarian case against most of the recurrent arguments against decriminalisation and acceptance of homosexuality; many of the same arguments were still used in legal or moral arguments at the time of the WR and beyond, having already been argued against by the very person who taught Mill and probably influenced greatly Mill's 'harm' principal[93], by which it can be argued that morality has no place in the bedroom at all. If any philosophical principle exists in the ECHR it can be seen in the reaffirmation of "*profound belief in those fundamental freedoms which are the foundation of justice and peace in the world*"[94] which is a very utilitarian statement of the place of liberty within human rights.

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[90] *Application of the* Airey *principle*; Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at pages 47-48.
[91] Greer, Stephen. *The European Convention on Human Rights: Achievements, Problems and Prospects*, at pages 55-59 (conclusion).
[92] Bentham, Jeremy. *Offences Against One's Self*. Unpublished, c. 1785. Stonewall and Beyond: Lesbian and Gay Culture <http://www.colubia.edu/cu/lweb/eresources/exhibitions/sw25/bentham/index.html> accessed 18 March 2008.
[93] Mill, John Stuart. *On Liberty*, 1859 <http://www.utilitarianism.com/ol> accessed 10 October 2008
[94] European Convention on Human Rights, preamble.

In regards to more modern and legal-based arguments on matters of morality and the law, we return to Fletcher, who states as the major fear of reform of supposedly 'moral' laws such as sexual offences legislation is that of the legislator appearing to be 'indifferent to morality'[95], something that certainly describes the position of the various UK governments before *Dudgeon* was heard, relating to the extension of the 1967 Act to Northern Ireland; and has been alluded to in this chapter already, in that the government of the UK never made any official use of the WR which it had commissioned; and indeed was about to have the WR very effectively used against it in *Dudgeon*...

[95] Fletcher, Joseph. *Sex Offences: An Ethical View*. Law and Contemporary Problems (1960) 25(2):244-257, at page 244.

Chapter three: The Legal Minimum

This chapter looks closely at the most important *positively-found* LGBT cases to be heard at Strasbourg from 1979 through to 2009. There are several purposes; to find, if possible, a date at which we can state that LGBT human rights were held to be equal, both in respect of each other, and with 'heterosexual' human rights; and where protections are missing, to identify them. The development of creative interpretation through these cases under Articles 8, 12 and 14 will also be examined.

The decriminalisation cases

Dudgeon – the victim approach

The first and most important part of *Dudgeon* from the perspective of the creativity of the Strasbourg institutions was that Dudgeon was considered to be a victim within the meaning of Article 25 of the ECHR. The fact that no legal proceedings had been brought against him under criminal law did not prevent the existence of those laws and the permanent threat of use making him a direct victim of a violation[96]. This follows *Marckx*[97] and develops the 'victim approach' taken by the ECoHR and ECtHR in developing a creative approach to victim status under Article 25[98]. This approach is tied to both the 'living instrument' and 'practical and effective' doctrines; the expansion from *direct* victims of specific actions to those affected '*by the scope and extent of a law*' in order to evolve the enforcement mechanisms and *guarantee* the

[96] *On the maintenance in force of legislation*, Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at pages 270-271.
[97] Case of *Marckx v Belgium*, 1979 (Application no. 6833/74), at paragraph 27.
[98] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at pages 482-484

protection of the ECHR. In this case, criminal proceedings and investigations were carried out against Dudgeon although eventually all charges were dropped and no prosecution resulted; but both the ECoHR and ECtHR considered that the actions of the authorities in Northern Ireland and the continuing existence of the legislation itself[99] amounted to creating victim status.

Dudgeon – morality in private lives

The government position on morality was that the broad consent of the people of Northern Ireland was required for a change in the criminal law to decriminalise homosexuality[100] and that their margin of appreciation on morality, based on *Handyside* was wide in this area. The government position does not of course, include mention of the position from *Tyrer* where it was held[101] that while '*necessary in a democratic society*' might include local public opinion and beliefs, these were not enough on their own; "*positive and conclusive proof of a requirement*"[102] was required, and in considering both the *Sunday Times*[103] judgment and *Handyside* the ECtHR in *Dudgeon*[104] went on to add that in addition to the aim of a restriction the nature of the activities involved and indeed, the Article under which a claim is based also have a direct effect on the margin of appreciation. In *Dudgeon* the ECtHR said that the limitation of private life under Article 8 demands higher justification than the limitation of freedom of expression under Article 10. The ECtHR said plainly that "*the Court cannot overlook the marked changes which have occurred in this regard in the*

[99] Case of *Dudgeon v UK*, 1981 (Application no. 7525/76), at paragraph 41.
[100] *X v the United Kingdom*, 1978 (Application no. 7525/76), Decision on admissibility, page 128 Reports (from HUDOC).
[101] Case of *Tyrer v UK*, 1978 (Application no. 5856/72), at paragraphs 37 to 38.
[102] Case of *Tyrer v the United Kingdom,* 1978 (Application no. 5856/72), at paragraph 38.
[103] Case of *the Sunday Times v the United Kingdom*, 1979 (Application no. 6538/74).
[104] Case of *Dudgeon v the United Kingdom,* 1981 (Application no. 7525/76), at paragraph 52.

domestic law of member States"[105] citing, by analogy[106] the living instrument principle in both *Tyrer*[107] and *Marckx*[108]. Although not explicit in the use of the living instrument the implicit use by analogy showed the creative method of updating the ECHR to "*increasingly high standards*", including those Articles governing procedure and enforcement machinery, especially in those areas where no additional Protocol had been adopted to vary the Convention[109].

Both the changes in circumstances and law in other member States, and the general restraint shown even in Northern Ireland on the use of the criminal law to its fullest extent against homosexual men over 21 was enough to deny the "*pressing social need*" claimed to justify the legislation.

The majority of the Court decided that the legislation was disproportionate by "*reason of its breadth and absolute character*", implying also that *the severit*y of possible penalties was an issue that, had the legislation been *less* absolute or broad, would have been a different ground to find a violation[110].

A further ground of complaint in *Dudgeon* was the restriction of the age of consent to 21 and over, however this part of the claim was struck out as manifestly ill-founded by the ECoHR, and the ECtHR determined that "*some degree of control*" over the age of consent was legitimate. Although the WR had done enough in convincing the

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[105] Case of *Dudgeon v the United Kingdom,* 1981 (Application no. 7525/76), at paragraph 60.
[106] *mutatis mutandis*: 'with those things having been changed which need to be changed'.
[107] Case of *Tyrer v the United Kingdom,* 1978 (Application no. 5856/72), at paragraph 31.
[108] Case of *Marckx v Belgium*, 1979 (Application no. 6833/74), at paragraph 41.
[109] Mowbray, Alastair. *The Creativity of the European Court of Human Rights;* enforcement Articles – p.62-63 [*Loizidou*] ; evolving international law – p.63 [*Matthews*] ; evolving standards in domestic legislations – p.65 [*Stafford*] ; existence of a protocol – p.67 [*Soering*] ; "*increasingly high standards*" – p.71 [*Selmouni*].
[110] Case of *Dudgeon v the United Kingdom,* 1981 (Application no. 7525/76), at paragraph 61.

Strasbourg institutions that *limited* decriminalisation was necessary, and a part of human rights, there still remained barriers to full equality.

Norris – confirmation of status and intent

The situation in *Norris* was not too dissimilar to that in *Dudgeon*; Norris was a homosexual in the Republic of Ireland, who like Dudgeon, was an activist for homosexual rights. Unlike Dudgeon he had not been investigated, but as a homosexual, lived in the same situational fear of prosecution. Both the ECoHR and ECtHR were able to draw the 'victim approach' a step further than in *Dudgeon* and hold that Norris was a victim under Article 25[111]. Although the Irish authorities argued that in this case without even preparatory work for a prosecution the action should be held as a popular action[112] neither the ECoHR nor ECtHR agreed, stating that Norris was directly affected by the law even "*in the absence of an individual measure of implementation*"[113].

In common with *Dudgeon* the ECtHR found that the "*maintenance in force of the impugned legislation*"[114] was enough to bring a violation of Article 8, and the ECoHR found that the factors which in *Dudgeon* had lead to the conclusion that the law was not 'necessary in a democratic society' led to the same conclusion in *Norris*[115]. The Irish government tried to argue that the margin of appreciation on morality should be much wider; arguing that a limitation in the area of morality to a 'pressing social need' and 'proportionality' in the law would strip the "*'moral exception' of meaning*"[116]. The

[111] Case of *Norris v Ireland*, 1988 (Application no. 10581/83), at paragraph 28.
[112] *Actio popularis*: deriving from Roman Law; a request of the Courts to protect a public interest.
[113] Case of *Norris v Ireland*, 1988 (Application no. 10581/83), at paragraph 31.
[114] Case of *Norris v Ireland*, 1988 (Application no. 10581/83), at paragraph 38.
[115] Case of *Norris v Ireland*, 1988 (Application no. 10581/83), at paragraph 42.
[116] Case of *Norris v Ireland*, 1988 (Application no. 10581/83), at paragraph 43.

ECtHR disagreed, citing *Handyside, Dudgeon* and *Müller*[117] as setting out that in cases involving morality, the tests for proportionality and 'pressing social need' were the tests to be passed when considering any legal measure on a domestic level. The effect of accepting Ireland's argument would, the ECtHR reasoned, preclude the ECtHR from ruling on issues of domestic morality; counter to Article 19.

The reason that the Irish authorities argued the moral case so strongly was not simply that they particularly believed in morality above and beyond the UK position in *Dudgeon*, but that at this stage, given that the law in question was exactly the same law as in effect in Northern Ireland[118], the entirety of the WR was *as appropriate* in this case as it had been in *Dudgeon* and this was the only argument against repeal that Ireland had left to it. The dissent in *Norris* turned entirely on the victim point; the six signatories to the dissenting opinion emphasised that they were not questioning the merits of *Dudgeon*, but merely objected to the extension of the 'victim approach'. While a certain sympathy can be held with the views of the six judges in dissent that no individual measure had been bought against Norris to which he could attach his application, it was made clear in both this and *Dudgeon* that the stigmatisation and victimisation felt by homosexual men *by the very existence* of a law criminalising any private expression of their nature was *in and of itself* a very real breach of their human rights.

Modinos – dissenting opinions and dissenting States

Modinos showed a very clear danger to the authority of the Strasbourg institutions; in this case the Supreme Court of Cyprus refused to follow the majority decision in

[117] Case of *Norris v Ireland*, 1988 (Application no. 10581/83), at paragraph 44.
[118] Offences Against the Person Act (1861), and Criminal Law Amendment Act (1885).

Dudgeon and adopted the dissenting view of Judge Zekia[119] as being authoritative; claiming that this represented their acceptance of the ECHR "*in the light of the present social and moral standards*"[120] on a domestic level.

The level of chaos that would ensue from every member State of the CoE picking and choosing their own parts of judgments based on this theory cannot be overstated; the Cypriot view of morality as impossible to ascertain on a European level would have, if accepted by Strasbourg institutions, removed the margin of appreciation at a stroke; again counter to Article 19.

In this case the ECtHR almost summarily dealt with the issues; stating that there was no guarantee that what Cyprus claimed was 'dead-letter' law in a Constitutional sense[121], would not preclude a prosecution ever being bought against a homosexual[122], citing both *Dudgeon* and *Norris* to find Cyprus in violation of Article 8.

The Cypriot argument that the decision was taken before cognisance of *Norris*, and that the use of Judge Zekia's opinion was *obiter* and therefore not conclusive seemed to matter more to Judge Pikis in dissent than it did to the ECtHR in finding the violation. Whilst the position of Cyprus that the law in question was unconstitutional and was therefore impliedly repealed holds some merit on a domestic level, the necessity under the ECHR itself to *actively* repeal the legislation whatever its domestic status was a key issue; and a rights-based jurisprudence on the European level as enunciated by the Strasbourg institutions demands clarity from legislatures. It is not enough, in convention terms, to say that an Act no longer stands; the Act must be

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[119] The Cypriot judicial representative.
[120] Case of *Modinos v Cyprus*, 1993 (Application no. 15070/89), at paragraph 11.
[121] Case of *Modinos v Cyprus*, 1993 (Application no. 15070/89), dissenting opinion of Judge Pikis.
[122] Case of *Modinos v Cyprus*, 1993 (Application no. 15070/89), at paragraph 23.

repealed in order to prove that it cannot ever be used, since as clarified in *Dudgeon* the very fact of the existence of such legislation was a violation in and of itself.

Equality as a goal; were lesbians and gay men equal?

Whilst McLoughlin is probably right in stating that the finding in *Dudgeon* represents a point "*beyond which European gay and lesbian rights may not erode*"[123] he is, in this paper's view, wrong when he states that the rulings represented equality for gay men and lesbians; the age of consent issue still remained unresolved at a European level, and while most States considered lesbian activities in the same light as other homosexual activities they did not, as a general rule, have a separate age of consent for lesbians when compared to the heterosexual age of consent. As it stood even after *Modinos*; Ireland, the UK, Austria and West Germany were notable for keeping the age of consent for gay men higher than the heterosexual and lesbian age of consent. Romania at this time had been told that membership was conditional on decriminalising homosexual activities, which it had failed to do at the point of *Modinos*.[124]

McLoughlin does point towards "*comparatively mild*" negative attitudes on the part of the ECtHR towards LGBT issues at the time of his article[125] and his theme throughout is

[123] McLoughlin, Micheal T. *Crystal or Glass?: A Review of Dudgeon v. United Kingdom on the Fifteenth Anniversary of the Decision*. Murdoch University Electronic Journal of Law (1996) 3(4): <http://www.murdoch.edu.au/elaw/issues/v3n4/mclough.html> accessed on 25 April 2009, at paragraph 3.
[124] McLoughlin, Micheal T. Crystal or Glass?: A Review of Dudgeon v. United Kingdom on the Fifteenth Anniversary of the Decision. Murdoch University Electronic Journal of Law (1996) 3(4), at paragraph 91.
[125] McLoughlin, Micheal T. *Crystal or Glass?: A Review of Dudgeon v. United Kingdom on the Fifteenth Anniversary of the Decision*. Murdoch University Electronic Journal of Law (1996) 3(4), at paragraph 96.

that it is often hard to counter these negative attitudes, since they are based on non-logical grounds rather than illogical ones.[126]

The age of consent cases

Sutherland and the margin of appreciation

From the history of the ECoHR[127] and also the effect of the ruling in *Dudgeon* that the age of consent issue was not a part of the case against the UK government at that time, cases brought by older men seeking to remove the disparity in the age of consent would almost inevitably run into the prejudicial 'it is known that' idea that gay men predated on younger men. In this case, the fact that Euan Sutherland was willing to take the case to Strasbourg[128] as a direct victim being a gay man under the age of consent as it stood, removed that perceptual bar to a successful hearing. *Sutherland* was in the end, struck out since a friendly settlement was reached, in that the UK government undertook not to contest the application until after Parliament had considered the age of consent. The ECoHR report in 1997 stated that the amended age of consent in the UK[129] was still a violation of Article 8 in conjunction with Article 14. Although parliamentary approval of the equalisation of the age of consent took until 2000[130], the matter was settled in UK law when the hearing took place[131]. The principle remained as settled in terms of the ECHR however, since at this point the ECoHR had decided that Article 8 in conjunction with Article 14 was violated by a difference in the

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[126] McLoughlin, Micheal T. *Crystal or Glass?: A Review of Dudgeon v. United Kingdom on the Fifteenth Anniversary of the Decision*. Murdoch University Electronic Journal of Law (1996) 3(4), at paragraph 100.
[127] *Supra*, The human rights of ephebophiles at page 24.
[128] Case of *Sutherland v UK*, 2001 (Application no. 25186/94).
[129] 18.
[130] Sexual Offences (Amendment) Act 2000, c.44 ; entry into force by The Sexual Offences (Amendment) Act 2000 (Commencement No. 1) Order 2000 (No. 3303 (c.106)), 8th January 2001.
[131] 27 March 2001.

age of consent when applied to homosexuals. The ECtHR found "*no reason of* ordre public"[132] to continue the case in the face of both parties accepting the friendly solution. This would seem, on the face of it, to be an implicit recognition by the ECtHR of the position of the ECoHR in finding a violation; had the ECtHR any doubts on this issue they could have proceeded regardless of the settlement, in order to disagree with the findings of the ECoHR.

In this case the older 'margin of appreciation' finding that States were entitled to restrict homosexual conduct on the grounds of morality as it related to the age of consent was narrowed by the ECoHR findings, and the ECtHR chose not to disturb this finding in subsequent cases.

The Austrian cases for the protection of minors

The cases of *L and V*[133], and *S.L.*[134] were heard on the same day by the First Section of the ECtHR. *S.L.* was similar to *Sutherland* in that the applicant was aged under the age of consent, and stated in his application that he was aware of his sexual orientation by the age of twelve[135], and also that he was sexually attracted to older men. Austria tried to distinguish their law from the UK position because, whilst the UK criminally penalised both partners (including the younger party) Austria prosecuted only the older party, thus giving a 'more rational' law for the protection of minors. The Parliamentary debate in Austria[136] pointed to the Recommendation[137] on the age of

[132] Case of *Sutherland v UK*, 2001 (Application no. 25186/94), at paragraph 20.
[133] Case of *L. and V. v Austria*, 2003 (Application nos. 39392/98 and 39829/98).
[134] Case of *S.L. v Austria*, 2003 (Application no. 45330/99).
[135] *On the development of human personality*: Marshall, Jill. *A right to personal autonomy at the European Court of Human Rights*. European Human Rights Law Review (2008) 3:337-356, at pages 353-356.
[136] Case of *S.L. v Austria*, 2003 (Application no. 45330/99), at paragraphs 22 to 26.
[137] CoE Parliamentary Assembly Recommendation 924/1981.

consent, and found that the majority of scientific opinion at this time[138] held that human sexuality was established prior to puberty and that 'recruitment' arguments had been disproved. Austria finally removed the difference in 2002[139].

The ECtHR accepted that the age of consent issue was "*within the ambit of Article 8*"[140] but chose to examine the case under Article 14 in conjunction with Article 8, something that the ECoHR had refused to do in all cases up to and including *Dudgeon*. Since these cases were decided after the 'military services' cases the standard in sexual orientation cases was different to the earlier case law; *Smith and Grady*[141] had held that "*particularly convincing and weighty*" reasons were required in order to limit the ECHR guarantees in sexual orientation cases. The ECtHR also reiterated that sexual orientation was a concept covered by Article 14[142] and although the ECtHR had accepted that rights could be limited to protect the rights of others[143] it determined that this still required justification of any difference in treatment, at the level of *Smith and Grady*.

In this case the ECtHR found that the distinction given by Austria was not decisive, and that Article 209 of the Austrian Criminal Code "*embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority*"[144] which was unacceptable, and insufficient reason to limit ECHR guarantees.

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[138] 1995.
[139] Case of *S.L. v Austria*, 2003 (Application no. 45330/99), at paragraph 26.
[140] Case of *S.L. v Austria*, 2003 (Application no. 45330/99), at paragraph 29.
[141] Case of *Smith and Grady v UK*, 1999 (Application no. 33985/96 and 33986/96), at paragraph 94.
[142] Case of *Salgueiro da Silva Mouta v Portugal*, 1999 (Application no. 33290/66), at paragraph 28.
[143] Case of *S.L. v Austria*, 2003 (Application no. 45330/99), at paragraph 38.
[144] Case of *S.L. v Austria*, 2003 (Application no. 45330/99), at paragraph 44.

The other Austrian 'age of consent' cases[145] were brought by applicants over the age of consent alleging violations of their Article 8 and Article 14 in conjunction with Article 8 rights, following convictions under Article 209. The ECtHR followed both *Sutherland* and *S.L.* in these cases, examining the violations entirely under Article 14 in conjunction with Article 8. Since the scientific evidence and 'European consensus'[146] was taken as the same for all age of consent cases post-*Sutherland*, the finding of violations in these cases followed those rulings, rather than the earlier ECoHR position. Apart from issues surrounding the non-pecuniary damages in the cases decided after *L. and V* the decision on merits was at this stage unanimous. This paper can thus point to 2003 as the year in which pre-existing ideals[147] or 'mild negative attitudes' either no longer affected judges at the ECtHR (they had no prejudice), or no longer affected their decision-making (they did not allow their prejudice to affect their decisions). For the purposes of clarity in this paper, this shall be referred to as the 'equality point'.

BB v UK and compensating for change

The applicant in this case was prosecuted after the ECoHR had heard *Sutherland* and ruled the age of consent issue to be in violation of Article 14[148]. In this particular case the UK authorities made no move to prosecute the minor party to the offence as it stood under the 1967 Act, and although the proceedings against the applicant were

[145] Case of *L. and V. v Austria*, 2003 (Application nos. 39392/98 and 39829/98) ; Case of *H.G. and G.B. v Austria*, 2005 (Application nos. 11084/02 and 15306/02) ; Case of *R.H. v Austria*, 2006 (Application no. 7336/03).
[146] *i.e.* Case of *L. and V. v Austria*, 2003 (Application nos. 39392/98 and 39829/98), at paragraph 39.
[147] *Supra,* Equality as a goal; were lesbians and gay men equal? at page 39.
[148] Case of *BB v UK*, 2004 (Application no. 53760/00), at paragraph 12.

eventually discontinued this was due to the complainant declining to testify, not a matter of human rights policy[149].

In this case the ECtHR was able to unanimously agree that the non-pecuniary sum of 7,000 Euros should be awarded to cover 'anxiety and distress', this sum being significantly lower than the awards in the Austrian cases following *L and V*. In *R.H.* for example, in compensation for the 'general distress and humiliation' and criminal proceedings resulting in a conviction the award was 35,000 Euros; but the vote was only four to three in favour of this level of compensation, and the dissenting opinion of *H.G and G.B.* was cited in the dissenting opinion here[150]. Despite there being no element of "*aggravated or punitive damages*"[151] the two Austrian age of consent cases post-2003 are anomalous in the award of non-pecuniary damages at a high level, perhaps explainable in terms of actual convictions having been made in law; perhaps a subconscious desire on the part of some judges to 'punish' Austria for not dropping the criminal cases before they resulted in convictions.

The value of family life in Article 8

Although *Dudgeon* and successive cases determined that sexual orientation fell into the guarantees of Article 8 for 'private life' considerations, these cases did not involve relationships analogous to 'family life'. In this respect it appears that 'family life' offers a level of protection higher than that of 'private life', since it operates to grant couples

[149] Case of *BB v UK*, 2004 (Application no. 53760/00), at paragraph 21.
[150] Case of *H.G. and G.B v Austria*, 2005 (Application nos. 11084/02 and 15306/02), dissenting opinion of Judges Botoucharova and Hajiyev.
[151] Case of *BB v UK*, 2004 (Application no. 53760/00), at paragraph 36.

a sphere of privacy between themselves into which a State cannot intrude[152]; including the ability to have their relationship recognised in law without the use of Article 12[153] (marriage), and also in asylum law where a CoE State national is in a relationship with an asylum seeker[154].

S v UK

In the ECoHR case *S*[155], the surviving partner of a lesbian co-habiting couple was ruled under UK law as not having the same rights as cohabiting heterosexual couples in survival on leases. *Simpson* complained that respect for both her private and family life had been denied under Article 8 and alleged a property violation under Protocol 1(1).

The Commission recalled that in its own case law, a stable homosexual relationship *did not* fall within the scope of Article 8 family life[156] but *could* fall within private life[157]. In this case, since the applicant's partner had died, her individual private life was adjudged not to have been interfered with. The property right of the landlord in contract law was judged as the more important right in law for Protocol 1(1); the contract in question having been with Simpsons' dead partner, and the case accordingly fell on all claims.

As regards Article 14 discrimination the ECoHR did *note* the difference in treatment, but considered at this time that the legitimate aim of '*protecting the family*' could

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[152] Mowbray, A.R. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*. Oxford – Portland, Oregon, 2004, at page 169-175.
[153] *On the wording of Article 12,* Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 252.
[154] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition,* at pages 262-263.
[155] *Mary Cunningham Simpson v the United Kingdom*, 1986 (Application no. 11716/85).
[156] No. 9369/81, Dec 3.5.83, D.R. 32 p. 220 ; Wintemute, R. *Sexual Orientation and Human Rights*, at page 123 (*Kerkhoven v the Netherlands*) and footnote 28.
[157] *On a hierarchy of family life*, Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition,* at page 249.

justify differences in treatment between heterosexual cohabiters and homosexual ones. Because the difference in treatment was allowable in terms of traditional 'family life', the proportionality test was sidestepped; as the measure could not be assessed against this claim. It may just be the rather clumsy phrasing of this case where the ECoHR said that it

> "consider[ed] that the family (to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated) [...]"[158]

without saying *why* heterosexual unmarried couples should be included, but not homosexual unmarried couples. In terms of Article 12 there would be no argument; the principle of Strasbourg subsidiarity allows the nation State to define marriage on its own terms in law under the ECHR, but in terms of equality under Article 8 in conjunction with Article 14 this paper cannot agree with the successive decisions of the ECoHR that homosexual relationships are *not* family life, falling only into the private sphere; either *all* monogamous relationships formed between two cohabiting adult human beings without any pre-existing blood ties are family life, or none of them are, and fall entirely into private life unless children are involved[159]. Since Article 12 on marriage is a separate article, the authors of the ECHR (and the ECoHR) may have assumed that Articles 8 and 12 were linked in some way, but qualification for marriage under Article 12 cannot be said to form the basis of family life under Article 8[160] since no-where within the ECHR itself is this distinction made, even reading the ECHR 'as a whole'.

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[158] *S v the United Kingdom*, 1986 (Application no. 11716/85).
[159] *Cohabitation is not required for 'family life' in cases involving children*: Case of *Berrehab v the Netherlands*, 1988 (Application no. 10730/84), at paragraph 21.
[160] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition,* at pages 250-253.

Salgueiro da Silva Mouta and fatherhood

In *Salgueiro*[161] the claimant alleged a violation of Article 8 alone and in conjunction with Article 14 on the grounds that his ex-wife had been granted custody of their daughter exclusively on the grounds of his sexual orientation.

The claimant stressed that he understood that the interests of his daughter were paramount in any custody case, but argued that the exclusive award of custody to his ex-wife was an unjustifiable interference with his family life.[162]

The pivotal point of the ECtHR decision comes when looking at the appeal case in Portugal, where the introduction by the Court of Appeal of the new factor; the applicant's homosexuality, allowed the ECtHR to conclude[163] that the difference in treatment of the two parents was based on sexual orientation. The ECtHR found that the Portuguese Court of Appeal passages that the government referred to as 'clumsy' were in fact decisive[164] and proved that the decision was based on a distinction regarding the claimant's sexual orientation. In common with *Hoffmann*[165] this distinction was not acceptable to the ECtHR, eliminating the

> "reasonable relationship of proportionality [...] between the means employed and the aim pursued"[166]

creating a violation of Article 8 in conjunction with Article 14. This decision was again unanimous, allowing us to move the 'equality point' backwards in time to 1999.

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[161] Case of *Salgueiro da Silva Mouta v Portugal*, 1999 (Application no. 33290/96).
[162] Case of *Salgueiro da Silva Mouta v Portugal*, 1999 (Application no. 33290/96), at paragraph 22.
[163] Case of *Salgueiro da Silva Mouta v Portugal*, 1999 (Application no. 33290/96), at paragraph 28.
[164] Case of *Salgueiro da Silva Mouta v Portugal*, 1999 (Application no. 33290/96), at paragraph 35.
[165] Case of *Hoffmann v Austria*, 1993 (Application no. 12875/87), at paragraph 36.
[166] Case of *Salgueiro da Silva Mouta v Portugal*, 1999 (Application no. 33290/96), at paragraph 36.

Between LGBT parents and their *natural* off-spring therefore, family life can be said to exist under the ECHR and to have done so at least since 1999.

Adoption and homosexuals

In *Fretté*[167] the claimant alleged a violation of Article 8 in that his homosexuality had been used as a reason to prevent him adopting. This paper has no issue with the fact as found by the ECtHR that adoption is not a human rights issue within the ECHR, nor does the family life element of Article 8 cover the *desire* to found a family; there is no aspirational part to Article 8[168]. However, since the French law allowed single persons to apply for adoption then an Article 14 violation would have occurred if the claimant had been treated differently from other single persons based only upon his sexual orientation[169].

The main problem that this paper has with the decision in terms of the submissions of the parties is the use by the French authorities of the (translated) term "*choice of lifestyle*"[170] which is itself a clumsy phrase, implying that homosexuality is a lifestyle *choice*. As previously stated[171] for the purposes of human rights and equality the difference between a choice and a permanence of condition does not matter to law, but to see the entry once more in a modern context of a term that implies a choice[172] is, it is submitted, steering the cognitive thinking of the court in the direction of thinking of homosexuality as a choice; which could lead to decisions being based upon thinking of homosexuality as a choice, which *might* allow greater limitations to be

[167] Case of *Fretté v France*, 2002 (Application no. 36515/97).
[168] *Authorities cited at*; Case of *Fretté v France*, 2002 (Application no. 36515/97), paragraph 32.
[169] Case of *Fretté v France*, 2002 (Application no. 36515/97), paragraph 32.
[170] Case of *Fretté v France*, 2002 (Application no. 36515/97), paragraph 36.
[171] *Supra*, Defining terms and scope at page 8.
[172] Wintemute, R. *Sexual Orientation and Human Rights*, at page 99 and footnote 44.

placed upon limitable rights than would be the case if the assumption of permanence without choice was the preferred position. To expand upon the introduction at this point; if an answer to 'why' is required then by definition human rights law must demand that the highest possible reason be chosen. The position that allows for the least limitation as being proportional in law; if no answer to 'why' is being sought then clumsy and emotive phrases such as "*choice of lifestyle*" must be corrected by the ECtHR as being inappropriate methods of communicating legal issues – having not accepted the 'clumsy' wording in *Salgueiro* the ECtHR allowed it to stand here unchallenged.

The ECtHR in this case failed to find 'common ground' among the CoE States on adoption, seeing a wide margin of appreciation, limited by decisions being made by the State in a non-arbitrary way[173]. The decision of the French authorities was held to appear objective and reasonable, so that no violation of Article 8 or Article 14 could be found[174].

The partly concurring opinion of Judge Costa[175] points to the apparent paradox that it would have been easier for the ECtHR in this case "*to justify the rejection of the complaint on the legal basis of the inapplicability of Article 14 than to declare Article 14 applicable and then find no breach of it*"[176] and this paper concurs with that opinion, accepting that the rights of children to have a family life does not grant a concurrent right upon *all* adults to adopt.

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[173] Case of *Fretté v France*, 2002 (Application no. 36515/97), paragraph 41.
[174] Case of *Fretté v France*, 2002 (Application no. 36515/97), paragraph 42.
[175] Case of *Fretté v France*, 2002 (Application no. 36515/97) partly concurring opinion of Judge Costa joined by Judges Jungwiert and Traja.
[176] Case of *Fretté v France*, 2002 (Application no. 36515/97), HUDOC document, at page 30.

The different circumstances in *E.B*[177] and the 'living instrument' doctrine led the ECtHR to take the position that it was not asked to rule whether adoption "*should or should not fall within the ambit of Article 8*"[178], but that Article 14 also applied to any additional rights which fell within the scope of any Convention article by means of voluntary State action in applying rights at a higher level than the ECHR guarantees[179]. Since the ECtHR had, in *Fretté* found that Article 14 applied, it was also held to apply here; and this may have been the reason for the convoluted method used in *Fretté*, so that future examinations of this question would not automatically fall to be declared inadmissible. Here the ECtHR used inverted commas around "lifestyle"[180] and held it established that this led to an "*inescapable conclusion*" that her sexual orientation had created a difference in treatment[181]. This, held the ECtHR, could not be justified reasonably and objectively in this case, finding a violation of Article 14 in conjunction with Article 8. In dissenting, Judge Costa followed his earlier partly concurring opinion with an agreement that while

> "a person can no more be refused authorisation to adopt on grounds of their homosexuality than have their parental responsibility withdrawn on those grounds"[182]

his dissent was based purely on the individual case and he did not feel that this was a case decided *only* on the grounds of sexual orientation.

The problem with both of these adoption cases is that neither was uncontaminated by elements outside of the claimant's sexuality; *E.B* was not in fact single and her partner was at best ambivalent about adopting, and *Fretté* clearly had an insufficient view of

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[177] Case of *E.B. v France*, 2008 (Application no. 43546/02).
[178] Case of *E.B. v France*, 2008 (Application no. 43546/02), at paragraph 46.
[179] *Authorities cited at*; Case of *E.B. v France*, 2008 (Application no. 43546/02), at paragraph 48.
[180] *i.e.* Case of *E.B. v France*, 2008 (Application no. 43546/02), at paragraph 88.
[181] Case of *E.B. v France*, 2008 (Application no. 43546/02), at paragraphs 88 to 89.
[182] Case of *E.B. v France*, 2008 (Application no. 43546/02), dissenting opinion of Judge Costa joined by Judges Türmen, Ugrekhelidze and Jočienė.

what adoption would mean; on the impact a child residing with him would have to his life. That however, is a fact of life; and as remarked upon before, sometimes the cases that make it to the ECtHR are not the ones that might have been chosen to forward LGBT equality within human rights.

P.B. and J.S. and *Karner*

In *Karner*[183] the ECtHR revisited the grounds of *Simpson* in a landmark ruling for two reasons; the first, that private life was deemed in this case to cover the surviving partner of a dead lease-holder by reason of Article 14 in conjunction with Article 8, thus overruling *Simpson* although not going so far as to rule under family life. The second reason this case was remarkable was that the applicant had died, and no surviving relation wished to succeed to the lease; the ECtHR ruled that the issue was important enough to refuse the government request to strike the case out[184], Article 37(1)(c) of the ECHR justifying the continued examination of the position of homosexuals under Austrian tenancy law. The ECtHR held[185] that if it had not been for Mr. Karner's sex[ual orientation] he would have been accepted under Austrian law to succeed to the lease as a 'life companion', thus engaging Article 14 of the ECHR. Austria admitted this, and attempted to justify the provision as '*protecting the traditional family*'[186] the ECtHR used its jurisprudence in the field of sexual orientation to remind Austria that the margin of appreciation afforded to States was narrow[187], ruling that Article 14 in conjunction with Article 8 had been breached in this case.

[183] Case of *Karner v Austria*, 2003 (Application no. 40016/98).
[184] Case of *Karner v Austria*, 2003 (Application no. 40016/98), at paragraph 28.
[185] Case of *Karner v Austria*, 2003 (Application no. 40016/98), at paragraph 33.
[186] Case of *Karner v Austria*, 2003 (Application no. 40016/98), at paragraph 35.
[187] Case of *Karner v Austria*, 2003 (Application no. 40016/98), at paragraph 41.

The dissenting opinion of Judge Grabenwarter in this case did not disagree on the principle of equality, but on the continuation of proceedings under Article 37(1)(c), pointing out that earlier case law on 'important' issues had failed to continue a case under Article 3; an absolute right. Whilst the points made by Judge Grabenwarter are convincing, this paper disagrees in that *on the consequences* this case was important; there were other cases proceeding against Turkey on Article 3 when *Sevgi Erdoğan* was struck out, but no other tenancy case had come before the ECtHR since the 'equality point' in 1999 and certain domestic courts[188] had been following the earlier position of *Simpson* in denying homosexual succession in law. This needed, from a ECHR point of view to be clarified under the 'equality point' of Strasbourg jurisprudence to prevent a succession of further cases, since the better purpose of the ECHR is not to find violations, but to prevent them[189].

P.B. and J.S[190] is similar in that an insurance right granted to heterosexual cohabitees is denied to same-sex couples in Austrian law. The ECtHR declared the application admissible, without prejudgment on the merits. A date for the full hearing has still to be set, but the case is set out in both family life and private life terms again; whilst the private life aspect would seem to be certain of finding a violation given the current jurisprudence of the ECtHR on the equality principle, this paper expresses the hope that the case can be found to exist within the more protected realm of 'family life', recognising at last that stable homosexual couples can have 'family life' and not just two intertwined sets of 'private life'. This would also prevent such difficulties as in *E.B*;

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[188] *i.e. Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 *cf. Ghaidan v Godin-Mendoza* [2004] UKHL 30, citing *Karner* at paragraph 16.
[189] *i.e. National Measures*: Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition,* at p.523.
[190] *P.B. and J.S. v Austria*, 2008 (Application no. 18984/02), hearing on admissibility.

if homosexual 'family life' existed then the French authorities would have been absolutely right to limit E.B's adoption rights, since her partner was not committed to the application. This family/private life missing protection for homosexuals created a loophole which enabled E.B to claim single status despite the factual situation being the reverse. The recognition of homosexual 'family life' is a recognition of equality[191] with all that brings; both positive and negative in effect. Until this remaining Article 8 category is extended fully to homosexual couples the law will have to convolute itself as it did in *E.B*, unable to process facts purely on their own merits.

The Military Service cases

As an example of the common law restricting rights the 'military service' cases are a good example of rational human rights set against non-logical 'traditional' thinking; although not a 'moral' ground these cases illustrated that no majority has the right to exclude a minority just because they want to.

Can you give me an example?

Smith and Grady[192], respectively a lesbian and gay man discharged from the RAF on the grounds of their homosexuality and *Lustig-Prean and Beckett*[193], both gay men discharged from the RN on the grounds of their homosexuality were both heard by the ECtHR third section on the same day, being the first of the collective positively decided[194] 'military service' cases. Later cases on homosexuality and Article 14 most

[191] Human rights files No. 14. *Equality between the sexes and the European Convention on Human Rights*, at pages 7-8 and footnote 1; *Abdulaziz v UK*.
[192] Case of *Smith and Grady v UK*, 1999 (Application nos. 33985/96 and 33986/96).
[193] Case of *Lustig-Prean and Beckett v UK*, 1999 (Application nos. 31417/96 and 32377/96).
[194] *Cf. Bruce v* UK, in Wintemute, R. *Sexual Orientation and Human Rights*, at page 123 and footnote 29.

often cite *Smith and Grady*[195] in stating that "*particularly serious reasons by way of justification were required*"[196] for any interference with a right. This phrase also appears in *Lustig-Prean*[197], continuing to be used by the ECtHR from the original ruling in *Dudgeon.*[198]

In both cases the ECtHR emphasised that assertions as to operational effectiveness (the grounds the UK government used to justify the ban on homosexuals serving in the armed forces[199]) must be "*substantiated by specific examples*"[200] although the example given in *Gubi* related to Article 10 rights, it has already been pointed out[201] that Article 8 seems to demand higher standards of justification in the limitation of private life than the limitation of freedom of expression, so following *Gubi* as a case involving restrictions necessary for operational effectiveness is an obvious step for the ECtHR to take. On these grounds, and on the grounds that the negative attitudes of other military personnel towards homosexuals could not be held as sufficient reason for the ban to continue[202] the ECtHR ruled at this point that the UK's continuing ban of homosexuals serving in the armed forces was in violation of Article 8[203]; not requiring separate consideration of a violation of Article 14 in conjunction with Article 8.

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[195] Case of *Smith and Grady v UK*, 1999 (Application nos. 33985/96 and 33986/96), at paragraph 90.
[196] *Also; Abdulaziz v* UK, in Wintemute, R. *Sexual Orientation and Human Rights*, at page 126 and footnote 44.
[197] Case of *Lustig-Prean and Beckett v UK*, 1999 (Application nos. 31417/96 and 32377/96), at paragraph 83.
[198] Case of *Dudgeon v the United Kingdom,* 1981 (Application no. 7525/76), at paragraph 52.
[199] *On the findings of the UK Homosexuality Assessment Policy Team*, Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at pages 271-272.
[200] Case of *Vereiningung Demokratischer Soldaten Österreichs and Gubi v Austria*, 1994 (Application no. 15153/89), at paragraphs 36 and 38.
[201] Supra, *Dudgeon* – morality in private lives at page 34.
[202] Case of *Lustig-Prean and Beckett v UK*, 1999 (Application nos. 31417/96 and 32377/96), at paragraph 90.
[203] Case of *Lustig-Prean and Beckett v UK*, 1999 (Application nos. 31417/96 and 32377/96), at paragraph 105 ; Case of *Smith and Grady v UK*, 1999 (Application nos. 33985/96 and 33986/96), at paragraph 112.

As previously noted[204], this accords with 1999 as the 'equality point' in other cases for homosexuals, with this ruling appearing to remove all barriers to full equality for LGB persons without specific, provable and serious reasons which were fully proportional when assessing the means used as against the ends to be achieved as '*necessary in a democratic society*'. The only missing element for full equality is the recognition of homosexual 'family life', but it would be expected from 1999 onwards that any reasoned complaint brought to the ECtHR would result in a finding of violation under most circumstances[205]. Given the number of CoE States now with domestic partnership legislation[206], it is highly likely that this 'missing element' will be decided soon under the 'living instrument' doctrine.

Trans-sexual Rights

The cases on transsexual rights raise different issues than those relating to homosexuality, since once a transsexual has completed the medical transition of biological sex they appear to belong to their new gender. LGBT rights are thought of as a group in modern terms however; since all homosexual activity is deemed to transgress gender 'norms', and we would expect many of the same prejudices and assumption to appear in both sets of cases.

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[204] *Supra*, *Salgueiro da Silva Mouta* and fatherhood at page 47.
[205] Wintemute, R. *Sexual Orientation and Human Rights*, at page 129 and footnote 63.
[206] *ILGA Europe lists 31 countries within the CoE which recognise cohabitation (13), register partnerships (13) or permit same-sex marriage (5) – ILGA-Europe prints maps on legal situation for LGB people in Europe* <http://www.ilga-europe.org/europe/news/ilga_europe_prints_maps_on_legal_situation_for_lgb_people_in_europe> accessed on 27 July 2009.

Rees and present-day conditions

Although the ECoHR and ECtHR agreed in principle that the sex-change of *Rees*[207] from female to male fell within Article 8, this was another area of law in which the ECtHR could not find common ground[208], meaning that a wider margin of appreciation existed in this area of law[209]. While the ECoHR found an incompatibility with Article 8[210] the ECtHR failed to be persuaded that the 'medical recognition' led to legal recognition[211] being necessary, pointing out that the catalogue of changes required to change a birth certificate was beyond the range of positive obligations upon a State at this time[212].

The ECtHR did however, feel it necessary in this case to point out that the 'living instrument' reference in *Dudgeon*[213] meant that *"[t]he need for appropriate legal measures"*[214] should be kept under review; the *Dudgeon* criteria being 'marked legal change' within CoE States as a whole. In the face of no violation being found under Article 8 the ruling that Article 12 had not been violated either was not a surprising decision in this case.

The minority dissenting opinion[215] that a change in circumstances would not be as problematic as implied by the majority carried the corollary view that Article 12 would still not have been breached; in forwarding the case of transsexual rights a limited reflection only of the 'new' sexual identity is not equality, and this case still stands

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[207] Case of *Rees v UK*, 1986 (Application no. 9532/81), at paragraph 34.
[208] Case of *Rees v UK*, 1986 (Application no. 9532/81), at paragraph 37.
[209] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at pages 274-5.
[210] Case of *Rees v UK*, 1986 (Application no. 9532/81), at paragraph 41.
[211] Case of *Rees v UK*, 1986 (Application no. 9532/81), at paragraphs 41 and 42.
[212] Case of *Rees v UK*, 1986 (Application no. 9532/81), at paragraphs 43 and 44.
[213] Case of *Dudgeon v the United Kingdom,* 1981 (Application no. 7525/76), at paragraph 60.
[214] Case of *Rees v UK*, 1986 (Application no. 9532/81), at paragraph 47.
[215] Case of *Rees v UK*, 1986 (Application no. 9532/81), dissenting opinion of Judges Bindschedler-Robert, Russo and Gersing.

even though finding no breach, as at least giving a future change indication. The finding of no violation here carried a warning for CoE States; you may not have to change right now, but one day you will.

Cossey[216] was a male to female transsexual, who at the ECoHR was given a ruling of a violation of Article 12, but not Article 8[217] on similar facts to those in *Rees*. At the ECtHR it was decided that the facts of the case were not materially distinguishable from those of *Rees*[218] and found no violation of Article 8 again; but emphasised once more the "*light of current circumstances*"[219] and the need for constant review of legal measures. The ECtHR also reversed the decision of the ECoHR that there had been a violation of Article 12; it is interesting to note that the decision on Article 8 was close (ten votes to eight) while the Article 12 decision was far wider (fourteen votes to four). This reflects in part the position of this paper that Articles 8 and 12 are *not* limited by the same factors, and that the margin of appreciation on the 'National law' element of Article 12 is far wider than that granted under the limitation paragraph of Article 8(2).

The dissenting opinions in this case pointed to the same dissent as *Rees*[220] and also considered that not only had 'certain developments' occurred since *Rees*[221] but in fact 'clear developments' had been made, narrowing the margin of appreciation from *Rees* to *Cossey*.

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[216] Case of *Cossey v UK*, 1990 (Application no. 10843/84).
[217] Case of *Cossey v UK*, 1990 (Application no. 10843/84), at paragraph 28.
[218] Case of *Cossey v UK*, 1990 (Application no. 10843/84), at paragraph 34.
[219] Case of *Cossey v UK*, 1990 (Application no. 10843/84), at paragraph 42.
[220] Case of *Cossey v UK*, 1990 (Application no. 10843/84), Partly dissenting joint opinion of Judges Bindschedler-Robert and Russo.
[221] Case of *Cossey v UK*, 1990 (Application no. 10843/84), joint partly dissenting opinion of Judges MacDonald and Spielmann.

Judge Martens went further in dissent in *Cossey*, including in effect, a full academic essay on transsexual human rights in his opinion[222], pointing out the fundamental dichotomy of the decision under Article 12; that since biological sex at birth was considered determinative of the 'opposite sex' requirement to marry underlying the ECtHR decision in both *Rees* and *Cossey* the only way a transsexual could marry post-operative sex change would be to marry a member of the same biological sex as themself; who would have been the opposite birth sex. The consequences of both denying biological homosexuals the right to marry and demanding that transsexuals only marry in same-sex relationships did not cross the cognisance of the ECoHR or ECtHR until Judge Martens explained it in those terms; and in *Cossey* at least it appears to have made little difference to the outcome. Judge Martens also points out that if marriage is purely for procreation it should be denied to the elderly, or those who are unable to procreate[223]. Judge Martens opinion in this case is also important for the way in which the 'present-day circumstances' are outlined[224]. On this basis it becomes clear that when the ECtHR is considering present-day conditions it looks to see *how many States have already changed their law*; using an LGBT perspective, the ECtHR is not being very creative when using the 'living instrument', it is, in effect, merely compelling a State which is isolated or in a very small minority to 'catch up' with the rest of contemporary CoE opinion. It appears on the face of it that if no member State

[222] Case of *Cossey v UK*, 1990 (Application no. 10843/84), dissenting opinion of Judge Martens.
[223] Case of *Cossey v UK*, 1990 (Application no. 10843/84), dissenting opinion of Judge Martens at 4.5.2.
[224] Case of *Cossey v UK*, 1990 (Application no. 10843/84), dissenting opinion of Judge Martens at notes no. 49.

had ever considered the rights of LGBT persons to have advanced, then neither would the ECtHR have ever considered those rights to have advanced[225].

B and the start of change

In *B v France*[226] two years after *Cossey*, the slightly different circumstances of a case under French law was considered by the ECtHR. In this case a violation of Article 8 was found, since the French courts had refused to allow any recognition of the changed status of a post-operative transsexual, either in the use of such titles as Mme or Mlle[227] or by using a 'feminine' name[228] rather than a 'neutral' one[229]. The distinction from *Rees* and *Cossey* thus created was enough to enable a clear majority decision in favour of a finding of violation. Judge Marten in his separate opinion referred to his opinion in *Cossey*, and noted that several of his colleagues were appearing to favour the changes he thought were necessary.

In terms of the 'equality point' in case law of 1999[230], we can see in 1992 a marked change in the thinking of the ECtHR in decisions relating to 'traditional' positions in legal thinking; whatever followed came from this point onwards, that issues of gender and sexual orientation would never be looked at again in the 'traditional' non-logical sense, and that within a few years that last barriers to true equality would probably be gone.

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[225] *On the cognisance of higher contemporary standards*: Mowbray, Alastair. *The Creativity of the European Court of Human Rights*. Human Rights Law Review (2005) 5(1):57-80, at pages 63-64 ; *on* Stafford v UK *and legal developments*: *Ibid*, at page 65.
[226] Case of *B. v France*, 1992 (Application no. 13343/87).
[227] Case of *B. v France*, 1992 (Application no. 13343/87), at paragraphs 27 and 61.
[228] Mowbray, A.R. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, at pages 138-142.
[229] Case of *B. v France*, 1992 (Application no. 13343/87), at paragraph 57.
[230] Ovey & White, Jacobs & White The European Convention on Human Rights 4th Edition, at page 275; citing *Sheffield and Horsham v the United Kingdom,* decided in 1998.

Christine Goodwin and *Van Kück* – the living instrument doctrine

In *Christine Goodwin*[231] and *I*[232], Liberty's survey[233] adduced in evidence showed that the legal position of the CoE member States had changed since *Cossey*, and that France, having being found in violation of Article 8 after *B*, had gone further than required and granted full legal recognition to transsexuals; including the right to marry.

Keeping in mind the 'equality point' and the 'living instrument' if the decision of the ECtHR were unknown to an impartial observer then the decision would appear to be that a violation of Article 8 would be found, and Article 12 could well also be violated (although the Article 12 violation is less clear only on the logic, given the wider margin of appreciation).

Indeed, in both these cases the Article 8 right to a private life was adjudged to have been violated, as was the Article 12 right to marry. Article 14 considerations were judged as not being required. Not only was the violation found in both Articles, but the decision was unanimous; our 'equality point' of 1999 for homosexual rights therefore also stands this test, and we can state that the entirety of LGBT persons rights as human rights guaranteed under Article 8 of the ECHR can be held as fully established *after* 1999, bar only the element of 'family life'.

In *Van Kück*[234] an additional element of protection was guaranteed, in that where a health insurance company had denied the costs of sex realignment surgery this was deemed to be in violation of the Article 8 rights of a transsexual. Further in this case, the German authorities were judged to have violated the Article 6(1) guarantees of a

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[231] Case of *Christine Goodwin v the United Kingdom,* 2002 (Application no. 28957/95).
[232] Case of *I. v the United Kingdom*, 2002 (Application no. 25680/94).
[233] Case of *Christine Goodwin v UK*, 2002 (Application no. 28957/95).
[234] Case of *Van Kück v Germany,* 2003 (Application no. 35968/97).

fair hearing when the proceedings for recovery were considered as a whole[235], especially given that the court of appeal undertook an unscientific (non-logical) approach to the cause of transsexualism, deemed 'inappropriate' by the ECtHR[236].

This paper submits however a warning note, given the dissenting opinion[237]; in that the opinion of one doctor seems to have been held in higher esteem than that of the applicant. Had a panel of independent medical doctors confirmed this opinion as being medically valid then this warning would not be necessary, however the dissenting opinion makes no mention of any such clinical panel. The opinion of one medical doctor is not scientific medical proof; a medical doctor is as much a human being as any other, and as such is as capable of non-logic and prejudice as any other human being; therefore a single opinion cannot stand before a court of law as valid. For this reason the dissenting opinion could be seen as being based on non-logic and prejudice, even if that was not in the minds of the judges making it.

Equality as a goal; group sex good, BDSM bad

ADT v UK; the re-writing of the definition of privacy

In *ADT*[238] the ECtHR considered the final 'missing element' in UK law; the privacy element that since 1967 had meant that for homosexuals at least, any sexual activity could only be considered private where no third party could *possibly* be present.

When examining whether the interference was justified the ECtHR held that although an interference may be justified for the protection of health or morals, group sex in

[235] Case of *Van Kück v Germany,* 2003 (Application no. 35968/97), at paragraph 64.
[236] Case of *Van Kück v Germany,* 2003 (Application no. 35968/97), at paragraph 63.
[237] Case of *Van Kück v Germany,* 2003 (Application no. 35968/97), dissenting opinion of Judges Cabral Barreto, Hedigan and Greve.
[238] Case of *A.D.T. v the United Kingdom*, 2000 (Application no. 35765/97).

this case fell under the same narrow margin of appreciation[239] as *Dudgeon*[240]. Accordingly there had been a violation of Article 8 of the ECHR; and, as in *Dudgeon* the ECtHR found it unnecessary to rule separately on Article 14 in conjunction with 8. As to be expected with a post-1999 case, the decision was unanimous.

Laskey, Jaggard and Brown – why it isn't a gay rights case

Laskey[241] is an anomalous case when considered from an LGBT perspective, although it helps in seeing where an interference is justified for the protection of health, it still stands alone since no heterosexual BDSM case has made it to Europe; although post-1999 it is likely that the ECtHR would find the same way regardless of the sexuality of the participants in BDSM sex[242].

The issue here is not that which appears on the face of it; the *sexuality* of the participants is not a cause of concern in this case[243], nor that the limitation of Article 8 gave the reason as 'necessary for the protection of health'. The problem is that this case was discussed under Article 8 at all; however the application was brought, when the issue of consent is irrelevant to the actual acts that occurred. Whether for sexual gratification, or as 'necessity' in a ticking-bomb scenario[244], there is absolutely never a reason to allow a violation of Article 3[245], and BDSM sex is a violation both of Article 3

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[239] Case of *A.D.T. v the United Kingdom*, 2000 (Application no. 35765/97), at paragraph 37.
[240] *Cf. Johnson v UK*, 1986; Wintemute, R. *Sexual Orientation and Human Rights*, at page 102-103 and footnote 73.
[241] Case of *Laskey, Jaggard and Brown v the United Kingdom*, 1997 (Application nos. 21627/93, 21826/93 and 21974/93).
[242] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 273, citing paragraph 47 of *Laskey*.
[243] *Contrary to* Ovey & White*, Jacobs & White The European Convention on Human Rights 4th Edition*, at page 272, categorising *Laskey* under homosexuality.
[244] Case of *Gäfgen v Germany*, 2008 (Application no. 22978/05).
[245] Mowbray, A.R. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*. Oxford – Portland, Oregon, 2004, at page 44.

in the physical acts[246], and Article 4[247] in the subjugation elements[248] of such role-play. This paper would not suggest that it is imperative that State agents enter bedrooms to guarantee that no BDSM is taking place[249]; but where evidence of BDSM activities is found[250], then prosecution is not only in the public interest, it is *imperative* under the positive obligations of Article 3[251]. For these reasons this case should have been found to be manifestly ill-founded and struck out at the stage of the ECoHR[252].

The original limitations on Article 8 as seen in LGBT rights were instances of the State intruding into the bedroom[253]; the converse question at the present time is how much an awareness of the bedroom is 'allowed' to enter the public sphere.

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[246] *i.e. injuries*: Case of *Selmouni v France*, 1999 (Application no. 25803/94) ; *i.e. restraint*: Case of *Hénaf v France*, 2003 (Application no. 65436/01).
[247] *i.e. on consent*: Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 112 (*Siliadin*) ; and pages 120-121.
[248] *i.e. voluntary behaviour and slavery*: Case of *Siliadin v France*, 2005 (Application no. 73316/01) ; Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at pages 120-121.
[249] *on positive obligations*: Mowbray, Alastair. *The Creativity of the European Court of Human Rights*. Human Rights Law Review (2005) 5(1):57-80, at page 75, citing *X and Y v the Netherlands*.
[250] *i.e. video evidence*, Ovey & White, Jacobs & White The European Convention on Human Rights 4th Edition, at page 273.
[251] Mowbray, A.R. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*. Oxford – Portland, Oregon, 2004, at page 44.
[252] *Contrary to* Ovey & White*, Jacobs & White The European Convention on Human Rights 4th Edition*, at page 273, citing Leslie Moran.
[253] *On sexual identity and personal autonomy*: Marshall, Jill. *A right to personal autonomy at the European Court of Human Rights*. European Human Rights Law Review (2008) 3:337-356, at pages 347-348.

Chapter Four: The Future of the Convention

With the Article 8 equality of LGBT persons now guaranteed by the Convention the question becomes whether the guarantee of equality in all other Articles has been reached; de-criminalisation of homosexual activities is now a pre-condition of entry to the CoE[254] imposed by the Parliamentary Assembly prior to membership; unfortunately this has been interpreted almost entirely on the Article 8 basis, so the argument has moved in the former communist bloc to Articles 10 and 11, where the case law is less clear...

The limitations of morality

The problem with morality, says Nowlin[255] is that 'traditional moral values'[256] were the deciding factor in *Handyside*, while an adequate assessment of the consequences of deciding cases on these terms was not explored in *Handyside,* nor in *Müller*[257]. Nowlin[258] points out, and Greer agrees, that the protection of moral rights, rather than a limitation based upon upholding moral obligations would better fit the purposes of human rights under the ECHR[259].

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[254] *See for example*: Opinion No. 261 (2007), *the cumulative effects of* paragraphs 19.3.3, 19.2.1.4, 19.2.12, 19.4.2, 19.5.1 ; Immigration and Refugee Board of Canada, *Armenia: The situation of homosexuals and lesbians; public perception of gays and lesbians; availability of state protection and whether there exist state programs to promote the respect of their human rights (January 2003 - December 2005)* , 19 January 2006, ARM100689.E <http://www.unhcr.org/refworld/docid/45f147e128.html> accessed 27 July 2009 at paragraph 1.

[255] Nowlin, Christopher. *The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms*. Human Rights Quarterly (2002) 24:264-286.

[256] Nowlin, Christopher. *The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms*. Human Rights Quarterly (2002) 24:264-286, at page 280.

[257] Case of *Müller and Others v Switzerland*, 1988 (Application no. 10737/84).

[258] Nowlin, Christopher. *The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms*. Human Rights Quarterly (2002) 24:264-286, at page 285.

[259] Greer, Stephen. *The European Convention on Human Rights: Achievements, Problems and Prospects*, at page 258 and footnote 96.

In *Open Door*[260] the 'legitimate aim' of the limitation under Article 10(2) was the protection of morals; this finding removed the need for the ECtHR to decide whether the unborn were 'others' under 10(2) whose rights should be protected. The ECtHR did not return to *Brüggemann*[261] as to whether there is a right to abortion in the ECHR; since they were examining the question under Article 10, not Article 8. The ECtHR refused to accept the logic of Ireland's claim that their view on morality was not open to review, following by analogy[262], *Norris*[263]. Stating once more that the margin of appreciation was not unlimited, the ECtHR asserted that it had the supervisory power to determine whether *any* restriction was compatible with the ECHR. The ECtHR unfortunately side-stepped the moral issue by determining that the restrictions were "*over broad and disproportionate*"[264], which following the logic of *Dudgeon* would automatically be a violation of the ECHR. In this case the ECtHR found by fifteen votes to eight that there had been a violation of Article 10.

Judge Cremona in dissent[265] describes the referendum result in Ireland as a counter-balancing factor in determining that Article 10 had not been violated; however it is submitted that this proposition is in direct violation of the findings of both *Tyrer* and *Smith and Grady*; that a majority opinion *cannot* give legitimacy to a law which would otherwise be in violation of the ECHR.

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[260] Case of *Open Door and Dublin Well Woman v Ireland*, 1992 (Application nos. 14234/88 and 14235/88), at paragraph 63.
[261] *Rosemarie Brüggemann and Adelhaid Scheuten v Federal Republic of Germany*, 1976 (Application no. 6959/75).
[262] *mutatis mutandis.*
[263] Case of *Open Door and Dublin Well Woman v Ireland*, 1992 (Application nos. 14234/88 and 14235/88), at paragraph 68.
[264] Case of *Open Door and Dublin Well Woman v Ireland*, 1992 (Application nos. 14234/88 and 14235/88), at paragraph 74.
[265] Case of *Open Door and Dublin Well Woman v Ireland*, 1992 (Application nos. 14234/88 and 14235/88), dissenting opinion of Judge Cremona.

In *Otto-Preminger*[266] the showing of a 'blasphemous'[267] film brought about a similar situation to that of *Müller* (with works of art) whereby the seizure of the film was claimed to be in violation of Article 10[268]. The ECtHR said again that the respect for religious feelings[269] includes the same elements of pluralism and tolerance necessary in a democratic society as all other parts of the ECHR; which should be "*read as a whole*"[270] in a harmonious and logical way. Given that the majority of Tyroleans[271] were Catholic, the ECtHR found the seizure to be within the margin of appreciation under Article 10[272]. Once again, this paper cannot agree with this judgement; it is the imposition by a majority of a moral position; and, as stated by Judges Palm, Pekkanen and Makarczyk[273] "*tolerance works both ways*" and in this case, the distinction to *Müller* was that the film was advertised, limited to those above 17 and a door charge was to be made; 'unwitting' confrontation with the material was unlikely, as it was also in *Scherer*.

There appears to be a certain problem with the principles of *Smith and Grady*[274] when examined in the light of Article 10 cases; while the freedom of the press[275] has been widely upheld in the public interest in the jurisprudence of the Strasbourg

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[266] Case of *Otto-Preminger-Institut v Austria*, 1994 (Application no. 13470/87).
[267] *See also* Wintemute, R. *Sexual Orientation and Human Rights*, at page 95, footnote 28; the Case of *Gay News Ltd. v UK*, 1982 (Application no. 8710/79).
[268] *Cf. Scherer v Switzerland*; Wintemute, R. *Sexual Orientation and Human Rights*, at page 115 and footnote 142.
[269] Case of *Otto-Preminger-Institut v Austria*, 1994 (Application no. 13470/87), at paragraph 47.
[270] Case of *Otto-Preminger-Institut v Austria*, 1994 (Application no. 13470/87), at paragraph 47.
[271] Stated at 87%.
[272] Mowbray, A.R. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, at page 190.
[273] Case of *Otto-Preminger-Institut v Austria*, 1994 (Application no. 13470/87), joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk, at paragraph 6.
[274] *Supra*, The Austrian cases for the protection of minors at page 41.
[275] Mowbray, A.R. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, at page 195.

institutions[276], the same rights have *not* been granted to individuals, whether artists[277], film distributors[278], or LGBT publications[279].[280]

Cram refers to the perverse "*immunity upon religious beliefs and institutions that is denied to political beliefs and institutions*"[281], and it is this 'immunity' which creates for LGBT rights a massive conflict in Article 10; despite the 1999 'equality point' in Article 8 terms, the question remains – are moral or religious reasons[282] sufficient to justify limitations on LGBT rights when considered under Article 10, despite the ECHR 'being read as a whole'; as was the case in *Gay News*?

Freedom of expression and association

In *Baczkowski*[283] the applicants complained of a violation of Article 11 after a 'gay pride' parade was denied permission[284], even though six counter-demonstrations on the same day were allowed[285]. The ECtHR in this case[286] gave one of the most concise and descriptive summaries of both democracy[287] and pluralism as they relate to the ECHR, stating that "*the participation of citizens in the democratic process is to a large*

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[276] *i.e.* Case of *the Sunday Times v the United Kingdom (No. 2)*, 1990 (Application no. 13166/87).
[277] Case of *Muller and Others v Switzerland*, 1988 (Application no. 10737/84).
[278] Case of *Otto-Preminger-Institut v Austria*, 1994 (Application no. 13470/87).
[279] *Gay News Ltd and Lemon v UK*, 1982 (Application 8710/79).
[280] *See also* Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 320 *on the level of protection under freedom of expression*.
[281] Cram, Ian. *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies*, at page 108.
[282] *i.e. 'the protection of minors'* in The Lithuanian Seimas legislation; Amnesty International. *Amnesty International condemns adoption of homophobic law in Lithuania*. <http://www.amnesty.org.uk/news_details.asp?NewsID=18325> accessed on 14 July 2009.
[283] Case of *Baczkowski and Others v Poland*, 2007 (Application no. 1543/06).
[284] *On positive obligations*: Mowbray, Alastair. *The Creativity of the European Court of Human Rights*. Human Rights Law Review (2005) 5(1):57-80, at pages 75-76, citing *Platform 'Ärzte für das Leben' v Austria*.
[285] Case of *Baczkowski and Others v Poland*, 2007 (Application no. 1543/06), at paragraphs 13 and 14.
[286] Case of *Baczkowski and Others v Poland*, 2007 (Application no. 1543/06), at paragraphs 61 and 62.
[287] *Following Gorzelik and others v Poland*; cited in *Ovey & White, Jacobs & White The European Convention on Human Rights 4th Edition*, at page 49.

extent achieved through belonging to associations". Citing *Young*[288] the ECtHR stated that "*a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.*"[289] In this case the ECtHR found violations of Article 11 alone, Article 14 in conjunction with Article 11, and Article 13 in that there was no domestic remedy for the violations.

Again, this paper submits that these findings *do not* stand alongside the Article 10 rulings already described herein; the Article 8 and 11 rights of LGBT persons have a measure of special protection either by the '*convincing and weighty reasons*' under *Smith and Grady*, or by the '*abuse of a dominant position*' held in *Baczkowski*. Article 10 appears not, despite what the ECtHR said in *Otto-Preminger*, to be read as a whole in a harmonious and logical way with the other Articles of the ECHR[290].

In *Klein*[291] it was held that an interference with another persons' right to freedom of religion had not in fact occurred on the facts of the case, leading to a finding of a violation of Article 10. The main problem with this case in context is that these decisions on a case-by-case basis have produced no single test or theory by which a set of facts can be measured, except for '*pressing social need*'; the law of the ECHR is itself unclear, a situation which would probably lead to a finding of a violation of Article 6 if brought against a CoE State[292].

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[288] Case of *Young, James and Webster v the United Kingdom*, 1981 (Application nos. 7601/76 and 7806/77); Case of *Baczkowski and Others v Poland*, 2007 (Application no. 1543/06), at paragraph 63.
[289] Case of *Baczkowski and Others v Poland*, 2007 (Application no. 1543/06), at paragraph 63.
[290] Mowbray, A.R. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, at page 197 ; Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 320 on the '*immediate and powerful effect*' of visual media.
[291] Case of *Klein v Slovakia*, 2006 (Application 72208/01).
[292] *On practical and effective resolution*: Brems, Eva. *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention of Human Rights and Fundamental Freedoms*. Human Rights Quarterly (2005) 27:296-326, at page 298.

The judges at Strasbourg urgently need to remedy this situation, since different chamber compositions clearly lead to different findings depending on which particular faith or moral position[293] has been used 'in fair balance' as a limitation by a State defending an Article 10 case[294].

Maintaining the authority and impartiality of the judiciary

In *Kobenter*[295], where an Austrian judge who included 'inappropriate' material on same-sex relationships in his judgement[296] of a defamation case was criticised in a publication, the ECtHR found a violation of Article 10 in the subsequent prosecution of that publication for defamation. The freedom (duties)[297] of the press under Article 10, linked to the failure to uphold the "*heavy responsibilities*"[298] that come with judicial office had lead the Austrian authorities to overstep the margin of appreciation. The relevance of this case to LGBT equality is in the original Austrian case, where a religious group had defamed LGBT persons; the Austrian court found that those persons who were identified by photographs had been defamed, but that in general the article had not defamed LGBT persons as a group unless personally identified[299]. The ECtHR did not rule on that case, of course, which is both correct in law, and frustrating in fact; the ECtHR may have been hinting at the result of the primary case being incorrect in the

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[293] *Cross-over arguments with common ground on blasphemy*, Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 332.
[294] Greer, Stephen. *The European Convention on Human Rights: Achievements, Problems and Prospects*, at page 264 and footnotes 107-108.
[295] Case of *Kobenter and Standard Verlags GMBH* v Austria, 2006 (Application No. 60899/00).
[296] Addo, Michael. *Are Judges Beyond Criticism under Article 10 of the European Convention on Human Rights?* The International and Comparative Law Quarterly (1998) 47:425-438, *Impartiality of Tribunal*, pages 431-432.
[297] Case of *Kobenter and Standard Verlags GMBH* v Austria, 2006 (Application No. 60899/00), at paragraph 31.
[298] Case of *Kobenter and Standard Verlags GMBH* v Austria, 2006 (Application No. 60899/00), at paragraph 31.
[299] *Cf.* Cram, Ian. *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies*, at 109 -110 "the definition of the *community [...]*".

failures of the judgment, but this cannot be implied by any part of the judgment in Strasbourg. We are left in the same position after *Kobenter* as before; we do not know whether the original religious-based attack on LGBT persons is upheld by Articles 9 and 10 in combination, or whether the Article 8 rights of those LGBT persons would be high enough to justify an Article 10(2) limitation on the freedom of expression of religious groups to criticise and condemn LGBT persons *as a minority group*[300]. What *Kobenter* states is that the press have a *duty* to report on judges and judgments where it can be objectively proven that the high standards required from judicial office have been breached[301].

In *Kudeshkina*[302] a Russian judge alleged that "*commercial, political or personal*"[303] interests had been used to terminate her judicial appointment when she stood for election and publicly denounced what she had personally witnessed in breaches of due process against the rule of law. The ECtHR summarised the elements which comprise "*necessary in a democratic society*"[304] and also examined the issues surrounding the functioning of the justice system[305] stating that it is "*incumbent on public officials serving in the judiciary that they should show restraint*" when expressing opinions. Given the risk of a "*chilling effect*"[306] and the severity of the loss of judicial post, the ECtHR held that in this case there was a violation of Article 10, however it was only by

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[300] Cram, Ian. *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies*, at page 123, and footnote 134 ; Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 320 on hate speech, citing *Gündüz v Turkey*.

[301] Addo, Michael. *Are Judges Beyond Criticism under Article 10 of the European Convention on Human Rights?* The International and Comparative Law Quarterly (1998) 47:425-438, *Conclusion*, pages 437-438 ; Ovey, Clare & White, Robin C.A. *Jacobs and White: The European Convention on Human Rights* Fourth Edition, at page 325.

[302] Case of *Kudeshkina v Russia*, 2009 (Application no. 29492/05).

[303] Case of *Kudeshkina v Russia*, 2009 (Application no. 29492/05), at paragraph 19.

[304] Case of *Kudeshkina v Russia*, 2009 (Application no. 29492/05), at paragraph 82, i-iii.

[305] Case of *Kudeshkina v Russia*, 2009 (Application no. 29492/05), at paragraph 86.

[306] Case of *Kudeshkina v Russia*, 2009 (Application no. 29492/05), at paragraphs 99 and 100.

four votes to three. Judge Kovler[307] in dissent stated that Kudeshkina had already "*excluded herself from the community of judges*" and expressed a belief that the ruling seemed to go beyond 'legitimate aim' in being more than 'permissive' and not having due regard for the *bona fides* of Kudeshkina; given the *political* arena in which she chose to release sensitive information. This is another case where the motives or behaviour of the applicant is not above reproach, although given the importance of the rule of law to the ECHR[308] the nature of the revelations was of paramount importance. The specific trust and belief in the courts, legal system and judiciary is emphasised throughout this case[309]; the rule of law as a factual underpinning of all courts demands that shortcomings are exposed where they occur, especially given the nature of public responses to the findings in certain cases, as will be explored in chapter five.

[307] Case of *Kudeshkina v Russia*, 2009 (Application no. 29492/05), dissenting opinion of Judge Kovler joined by Judge Steiner.
[308] Convention for the Protection of Human Rights and Fundamental Freedoms, at the final paragraph of the preamble.
[309] *The function of the author and the subject*, Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 325, citing *Skalka v Poland*.

Chapter Five: Equality and State Inequality

This chapter examines the future of LGBT rights as guaranteed under the ECHR, given the context of Russia's entry into the ECHR and the new political reality of an expanded CoE containing in population terms a *majority* significantly different to the founding membership. Russia has been chosen as the focus, rather than any other new entrant based on its high volume of applications to the ECtHR; the fact that it is the largest single State in the CoE in terms of both population and geographical area; that it is a super-power and therefore arguably the most powerful single entity within the CoE; and that there are substantial numbers of published works available in English. It is also the largest CoE State that is not a member of the EU, which means there is no other source of external equality legislation than ordinary public international law.

Russian Courts and Judiciary

The Russian Constitution, passed in 1993, states clearly that human rights[310] are of supreme value, that the Constitution has supremacy[311], that there is a separation of powers[312] and that political[313] and secular plurality[314] is guaranteed. The standard of human rights guaranteed within the Constitution is stated as being "*the commonly recognised principles and norms of the international law*"[315], which have direct effect, secured by the judiciary[316].

[310] The Constitution of the Russian Federation, Article 2 Protection of Human Rights.
[311] The Constitution of the Russian Federation, Article 4 (2) Sovereignty.
[312] The Constitution of the Russian Federation, Article 10 Separation of Powers.
[313] The Constitution of the Russian Federation, Article 13 Political Plurality.
[314] The Constitution of the Russian Federation, Article 14 Secularity of the State.
[315] The Constitution of the Russian Federation, Article 17 Basic Rights and Liberties.
[316] The Constitution of the Russian Federation, Article 18 Direct Effect.

Baburkin[317] sets out the terms of human rights within the context of security, which states the basic objects of security as including individual rights and liberties, society and its material and *spiritual* values, and the State with its constitutional order, sovereignty and territorial integrity. Security is a mutual responsibility between individual, society and security[318].

This set of circumstances is, whilst not illiberal; different to the ECHR interpretations on human rights – the ECHR describes the fundamental freedoms, there is no element within them of any mutual responsibility between individual and State for the security of the State. The CoE took a risk when admitting Russia in 1996 – "*integration is better than isolation; cooperation is better than confrontation*"[319]; this paper submits that the CoE might have over-reached itself thereby.

An extensive study[320] into the Russian court system and its effect upon public opinion found that it is far easier for a court ruling to reinforce a negative public opinion than it is for a ruling to change a negative public opinion to a positive one. Although the rulings focussed upon in this study were in the sphere of religion, the moral and cultural issues surrounding LGBT rights cross over to a great deal with the non '*mainstream*' religious groups studied[321]. Homosexuality was decriminalised in 1993, the Jehovah's Witnesses were officially recognised in 1991; so the timing is similar for

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[317] Baburkin, Sergei. *National Security, Civil Society and Human Rights in Russia: Conceptual and Legal Framework.* Demokratizatsiya (2000) 8(3):376-384.
[318] Baburkin, Sergei. *National Security, Civil Society and Human Rights in Russia: Conceptual and Legal Framework*. Demokratizatsiya (2000) 8(3):376-384, at page 381.
[319] Jordan, Pamela A. *Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms*. Demokratizatsiya (2003) 11(2):281-296, at page 285, citing Rapporteur Muelemann (endnote 10).
[320] Baird, Vanessa A and Javeline, Debra. *The Persuasive Power of Russian Courts.* Political Research Quarterly (2007) 60(3):429-442.
[321] Baird, Vanessa A and Javeline, Debra. *The Persuasive Power of Russian Courts.* Political Research Quarterly (2007) 60(3):429-442, i.e. at page 431 "*Granting Rights to Jehovah's Witnesses*".

both groups. The statistics within the survey show how difficult it is to change an entrenched majority bias against a minority group, whether there are positive court rulings or negative findings[322].

Russian Constitution and religion

The 1997 law[323] reversed the growing freedom of religion for Jehovah's Witnesses, resulting in court decisions that gave rise to cases at the ECtHR. The study of three recent cases in the ECtHR shows the trend in Russian jurisprudence to 'clamp down' on minority views for reasons attached to the 'moral majority'.

In *Kuznetsov*[324] the refusal of State organs to register Jehovah's Witnesses as a religion under the 1997 law and various consequences of that, including the closure of a meeting were examined. Although the applicants complained under Articles 8 through 11, the ECtHR chose to examine the complaint under Article 9; since "*[t]he pluralism indissociable from a democratic society*"[325] depends on freedom of conscience. The case was found in violation of Article 9.

In *Ismailova*[326] while the ECtHR found by majority four to three that no violation of Article 8 had occurred, the dissent[327] on the grounds of the "*tone and phrasing of the considerations*"[328] went against the majority in concluding that the difference in

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[322] Baird, Vanessa A and Javeline, Debra. *The Persuasive Power of Russian Courts.* Political Research Quarterly (2007) 60(3):429-442, at page 436 table 3.
[323] On Freedom of Conscience and Religious Associations (OFCRA); cited in Baird, Vanessa A and Javeline, Debra. *The Persuasive Power of Russian Courts.* Political Research Quarterly (2007) 60(3):429-442, at page 432.
[324] Case of *Kuznetsov and Others v Russia*, 2007 (Application no. 184/02).
[325] Case of *Kuznetsov and Others v Russia*, 2007 (Application no. 184/02), at paragraph 56.
[326] Case of *Ismailova v Russia*, 2007 (Application no. 37614/02).
[327] Case of *Ismailova v Russia*, 2007 (Application no. 37614/02), dissenting opinion of Judge Hajiyev, joined by Judges Vajić and Steiner.
[328] Case of *Ismailova v Russia*, 2007 (Application no. 37614/02), dissenting opinion of Judge Hajiyev, joined by Judges Vajić and Steiner, at paragraph 3.

treatment was entirely down to the mothers religion, and therefore not justified, in violation of Article 8.

In *Nolan*[329] the partly dissenting opinion[330] agreed with the majority that Articles 8, 9 and 5 had been violated, but stated that the violations found of Article 38 and Protocol no.7 Article 1 were "*rather strange*" and "*a new, rather radical interpretation*". The ECtHR once again stressed the importance under Article 9 of the "*pluralism indissociable from a democratic society, which has been dearly won over the centuries*"[331], the importance of which attaches to all religious *and non-religious* thought.

Trochev[332] posits that far from entrenching democracy in Russia, the establishment of many constitutional regional courts was in fact to entrench political power in governors as an action intended to create a stronger Executive; indeed he points to the "*elimination of contradictory judicial decisions*"[333] as being a goal of judicial reforms. He concludes that the rise of the rule of law cannot be measured without a study of the effect of judgements; in those terms we have the study of the effect of judicial rulings on public opinion[334], leading to the submission that the Executive, by attempting to entrench its own position within the court structure *is* attempting to subvert public opinion by means of the use of 'moral majority' opinions; to the detriment of certain human rights.

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[329] Case of *Nolan and K. v Russia*, 2009 (Application no. 2512/04).
[330] Case of *Nolan and K. v Russia*, 2009 (Application no. 2512/04), partly dissenting opinion of Judge Kovler.
[331] Case of *Nolan and K. v Russia*, 2009 (Application no. 2512/04), at paragraph 61.
[332] Trochev, Alexei. *Less Democracy, More Courts: A Puzzle of Judicial Review in Russia*. Law & Society Review (2004) 38(3):513-548.
[333] Trochev, Alexei. *Less Democracy, More Courts: A Puzzle of Judicial Review in Russia*. Law & Society Review (2004) 38(3):513-548, at page 537.
[334] Baird, Vanessa A and Javeline, Debra. *The Persuasive Power of Russian Courts.* Political Research Quarterly (2007) 60(3):429-442.

Russia and morality – the LGBT perspective

The danger to LGBT rights as human rights is illustrated by Patriarch Alexy II at the 2007 Ordinary Session[335];

> "[…] In Moscow, there had been a call for a homosexual parade. The church had taken the view that this was *propaganda for sin*. It was an illness and a distortion of the human personality […] An exception for homosexuality could not be justified, *particularly given its influence on the young*."

We can see the position of the Orthodox church; homosexuality is a sin and an illness, homosexuals should not be allowed to engage in propaganda for this sin[336].

Moscow's Mayor, Yury Luzhkov has stated publically on a number of occasions that homosexuality is perverted and 'satanic'[337], continuing to ban LGBT pride marches from 2007 despite the ruling of the ECtHR in *Baczkowski*. Indeed, Slavic Pride 2009, timed to coincide with the staging of the Eurovision contest in Moscow was actively suppressed[338], as had the other pride marches organised in previous years. It is hard to reconcile these public statements with the requirement in law that there be a "*slim basis in fact*" on value judgments[339].

Here is evidence that Russia, despite its secular Constitution, is prepared to legislate as to which religions qualify as religions, and the Executive and religious leaders are prone to public statements denying human rights to both religious groups, and

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[335] 2007 Ordinary Session, Tuesday 2 October 2007 at 10 a.m. Report. *Italics added*.
[336] *Cf.* Ovey, Clare & White, Robin C.A. *Jacobs and White: The European Convention on Human Rights* Fourth Edition at page 326 '*Value judgments and statements of fact'.*
[337] *Luzhkov Sued for 'Queer' Comments*, *The Moscow Times*, 4 June 2009 <http://www.themoscowtimes.com/article/1010/42/377738.htm> accessed on 16 June 2009.
[338] *Thank you Mayor Luzhkov*, The Guardian, 19 May 2009 <http://www.guardian.co.uk/commentisfree/2009/may/19/russia-gay-pride-luzhkov> accessed on 16 June 2009.
[339] *Dichand and Others v Austria*, in Ovey & White*, Jacobs & White The European Convention on Human Rights 4th Edition*, at page 326 and footnote 55.

minorities such as LGBT persons. These statements and decisions are not only counter to the ECHR, they also transgress several CoE Recommendations[340] in their use of language[341] and the methods of suppression[342]. Russia is not alone in this; Turkey has also been officially criticised[343] for similar actions; the problem from the perspective of this paper is that these 'new' issues against LGBT persons did not occur in Western Europe prior to the accession of the former-communist States (with the sole exception of Clause 28)[344], so the ECtHR has yet to rule decisively, although this paper submits that since 1999 it is highly unlikely that the position of the ECtHR would regress beyond the levels of protection given by *Smith and Grady* and *Baczkowski*. The problem here is not that the ECHR does not ensure these rights, it is that a State is deliberately ignoring the accumulated jurisprudence of the Strasbourg institutions[345]. Russia seems determined to return again and again to the ECtHR on the same issues and settle each case individually, rather than applying the law *erga omnes* at domestic level[346]. The Constitutional guarantees[347] on human rights protection are not being judicially interpreted as the standards of ECHR jurisprudence[348].

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[340] Recommendation 211 (2007) on freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons ; Recommendation 1474 (2000) Situation of lesbians and gays in Council of Europe member states ; Recommendation 924 (1981) on discrimination against homosexuals ; Recommendation No. R (97) 20 of the Committee of Ministers to member States on "hate speech".

[341] Cram, Ian. *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies*, at page 100.

[342] *On prohibiting the abuse of rights*: Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition,* at pages 432-436.

[343] Parliamentary Assembly Document 11796, 26 January 2009. *End Violence and discrimination on the basis of sexual orientation and gender identity in Turkey*.

[344] Local Government Act, 1988, Section 28 (commonly referred to as Clause 28) – *never tested in a case in England or at the ECtHR*.

[345] Greer, Stephen. *The European Convention on Human Rights: Achievements, Problems and Prospects*, at page 279; footnote 3 *cf.* footnote 4.

[346] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 23; on the fundamental rights of individuals, citing *Austria v Italy*.

[347] The Constitution of the Russian Federation, Article 17 Basic Rights and Liberties.

[348] *On limitation on the use of restrictions*: Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition,* at page 436.

Conclusions

On cultural relativity

That Russia will continue to do this seems fairly obvious; no radical upheaval of the Russian legal system has occurred[349], and entrenched positions have remained relatively static[350]. Russia can cite precedent on this; it is possible through the actions of France in the continuation in law of the same rules that gave rise to a prosecution of *Lehideux and Isorni*[351] for Russia to appropriate France's perfectly justifiable historic and cultural reasons for the suppression of positive statements about the Vichy regime[352] and twist it to upholding the suppression of LGBT persons on cultural and moral grounds[353].

Although the ECtHR found a violation in *Lehideux*, it was entirely possible for them to have agreed with France that Article 17 was sufficient in this case, or that the limitation by reason of 10(2) under French law was a proportionate means to the end sought. By instead provoking France to deliberately ignore a judgment of the ECtHR the Strasbourg institutions allowed (if not forced) a CoE State to act in permanent violation of Article 46(1), though *not* in violation of the ICCPR.

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[349] *Cf.* Asoyan, Ella, The Moscow Times: *Human Rights Runaround.*
[350] *On the role of the Committee of Ministers and Russia*, Ovey & White, Jacobs & White The European Convention on Human Rights 4th Edition, at page 502; citing *Burdov v Russia*.
[351] Case of *Lehideux and Isorni v France*, 1998 (Application no. 24662/94).
[352] Cram, Ian. *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies*, at page 99, footnote 15 ; Ovey & White *Jacobs and White The European Convention on Human Rights 4th Edition*. at page 323 and footnote 35.
[353] *Another eastern European example*: The Lithuanian Seimas legislation; Amnesty International. *Amnesty International condemns adoption of homophobic law in Lithuania***.** <http://www.amnesty.org.uk/news_details.asp?NewsID=18325> accessed on 14 July 2009.

On moral rights, not moral obligations.

This underscores the importance of a valid doctrine for the limitation clauses on morality; that the limitation should only be allowed for the protection of the moral rights of *individuals*, not for the protection of the moral concepts of a majority which creates a *moral obligation* on the minority. This paper does not question the legal right of Orthodox Christians to regard homosexuality as a sin; it does question the proselytising of that 'sin' as 'universal' morality regardless of the pluralism of society as a *compulsory* morality, enforced by the public opinions and actions of both members of the clergy and Executive within the Russian system. The implication that those who do not share a 'universal' morality must perforce be immoral is a direct attack on pluralism and democracy itself; it is a return to the values of National Socialism[354] and an anathema to human rights[355].

On bias

Until now no successful legal challenge has been mounted within the Russian system on the banning of pride parades, and it remains to be seen whether the judges in the Russian system challenge the Mayor in banning such parades by ruling it unlawful; if they do so then the doubt remains whether the Mayor would simply ignore such a ruling, forcing a case to be brought before the ECtHR, or conversely whether the courts themselves would endorse his position as they have previously[356], equally forcing cases to be brought before the ECtHR. Given the latter position there would be sufficient

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[354] Greer, Stephen. *The European Convention on Human Rights: Achievements, Problems and Prospects*, at pages 316-317 (*drift towards authoritarianism*).
[355] *i.e. Ritual and Social Conformity:* Noakes, J and Pridham, G. *Nazism 1919-1945; Volume 2, State, Economy and Society 1933-1939*, at page 216.
[356] *Moscow Gay Pride Ban goes to European Court*, Pink News, 19 September 2006 <http://www.pinknews.co.uk/news/articles/2005-2520.html> accessed on 16 June 2009.

evidence that the Russian courts were themselves guilty of a pre-disposed bias[357], which brings into question not only Russian compliance with the ECHR[358] but the very place of a Russian judge within the Strasbourg institutions under Article 21(3).

On democracy

Since "*[d]emocracy is the only political model contemplated in the Convention and the only one compatible with it*"[359], then true democratic States with all the hallmarks of democracy, including separation of powers, should be welcome within the CoE as signatory to the ECHR. The problem with Russia is defining democracy in terms that do not distort the meaning of the word in order to fit it to a system that in Constitutional terms *appears* entirely democratic, yet *functionally* displays elements more akin to the communist structures of the past; especially in the methods used to achieve security and in the actions of the Executive. As it stands at present Executive support for diversity, in the existence of strong LGBT groups is utterly missing; and the stance of the Executive and some courts to LGBT rights is totally negative.

On a chilling effect

The "chilling effect" of majoritarian rule not only appears in civil society through the suppression of LGBT public activities; the statements of the Executive serve in effect to cast a moral judgment on LGBT persons, denying them legal parity and forcing social exclusion. This disassociation from society narrows the view of the majority further; in much the same way that negative court rulings enforce negative opinions, so negative

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[357] Case of *Smith and Grady v the United Kingdom*, 1999 (Application no. 33985/96 and 33986/96), at paragraph 97.
[358] Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition*, at page 38 ; citing *Golder v the United Kingdom*.
[359] Case of *Gorzelik and Others v Poland*, 2004 (Application no. 44158/98), at paragraph 89 ; Case of *Baczkowski and Others v Poland*, 2007 (Application no. 1543/06), at paragraph 61.

stereotypes enforce negative reactions[360], destroying individual human rights and human lives.

On majorities

The problem with 'present day conditions' previous to expansion of the CoE into Eastern Europe was the slow pace of development. The problem now is that when you add the countries within that bloc or the population of those former communist States to that of Western Europe then the Russian, Turkish and Eastern European population is the 'majority' in Europe, and their individual judges are the majority at Strasbourg. Given that most of these States were not involved in the first 40 years of human rights jurisprudence the still unanswered question is; where does the majority lie? Will the new majority be measured in the progress that had already been made, or has the CoE actually set itself back 40 years.

Will the new 'political reality' of the CoE be another 40 years of stalemate, waiting for the new entrants to reach this same point for themselves before any progress can be made again?

How 'friendly' is the ECtHR?

In the 30 years since the ECoHR decided *Dudgeon*, before the ECtHR heard the case in full, the progress of LGBT rights as human rights at the Strasbourg institutions has been remarkable; with the exception of a final ruling on Transsexual marriages[361] and the 'family life' element of Article 8 it would appear that *almost* full equality in

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[360] *The converse, on positive impact*; Lewis, Gregory B. *The Friends and Family Plan: Assessing the Impact of Knowing Someone Gay on Support for Gay Rights*. Georgia State University Department of Public Administration & Urban Studies. Andrew Young School of Policy Studies Research Paper Series No. 08-19. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1260400> accessed on 14 July 2009.

[361] Commissioner for Human Rights. *Issue Paper: Human rights and gender identity*. July 2009, CommDH/Issue Paper(2009)2, page 46 (Section 5), recommendation 6.

fundamental human rights was achieved a decade ago, and with the sole exception of one dissenting view on morality in *Dudgeon* and dissent on the expansion of the 'victim principle' the judges at the ECtHR are usually able to achieve a unanimous decision on cases that do reach the ECtHR. The legal protection of individual LGBT rights under the ECHR has not only grown beyond the vision of the creators of the ECHR, it has grown beyond the expectations of many gay rights protesters of the early 1970s.

How 'bad' is the ECtHR?

Until now the development of LGBT rights as human rights through the jurisprudence of the Strasbourg institutions has been slow; historically perhaps slower than it otherwise would have been by the unfortunate cases which came before the ECoHR before *Dudgeon* finally decided that certain homosexual rights were human rights. Although there is more work to be done in extending the doctrine of 'family life' to LGB couples, the extension of case law has been relatively smooth and without any major cases being decided against the trend towards full legal parity. The problems with the post-communist States and Turkey remain however, and at some point the CoE will have to commit itself one way or the other; either inclusion means inclusion for all, and member States must comply with full legal equality for all human beings covered under the ECHR, or the paper-thin promises of certain members States without *pacta sunt servanda*[362] must lead to their suspension or exclusion from the CoE.

[362] Vienna Convention on the Law of Treaties, 1969, Article 26.

Given that it is Russia that is now generating more cases for Strasbourg than any other State[363], (which could be seen as a sign of a healthy democracy, unless contrasted with the opinion stated in the *Moscow Times*[364]) can Russia be allowed to force the ECtHR to limp along without Protocol 14 being passed; since it is only Russia that has not acceded to this protocol, should the passage of Protocol 14 be forced upon Russia as a condition for their continued active membership of the CoE?[365] It is submitted that the answer should be yes – anything else looks like intentional sabotage of the ECHR, which must be resisted by all other CoE States[366].

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[363] "Annual Report 2008 of the European Court of Human Rights (provisional edition), Council of Europe" <http://www.echr.coe.int/NR/rdonlyres/B680E717-1A81-4408-BFBC-4F480BDD0628/0/Annual_Report_2008_Provisional_Edition.pdf> Accessed on 26 March 2009, at page 126 (pending cases).

[364] Asoyan, Ella, The Moscow Times: *Human Rights Runaround.* <http://www.themoscowtimes.com/article/1016/42/379833.htm> accessed on 27 July 2009.

[365] *On sanctions and expulsion*, Ovey & White*, Jacobs & White The European Convention on Human Rights 4th Edition*, at page 504.

[366] *On continuing effectiveness*, Ovey & White, *Jacobs & White The European Convention on Human Rights 4th Edition,* at page 525.

Bibliography

Case-law

Case of *A.D.T. v the United Kingdom*, 2000 (Application no. 35765/97).

Case of *Airey v Ireland*, 1979 (Application no. 6289/73).

Austin (FC) (Appellant) v Commissioner of Police of the Metropolis (Respondent) [2009] UKHL 5.

Case of *B.B. v the United Kingdom*, 2004 (Application no. 53760/00).

Case of *Baczkowski and Others v Poland*, 2007 (Application no. 1543/06).

Case of *Beck, Copp and Bazeley v the United Kingdom*, 2002 (Application nos. 48535/99, 48536/99 and 48537/99).

Case of *Berrehab v the Netherlands*, 1988 (Application no. 10730/84).

Rosemarie Brüggemann and Adelhaid Scheuten v Federal Republic of Germany, 1976 (Application no. 6959/75).

Case of *Bulgakova v Russia*, 2007 (2008) (Application no. 69524/01).

Case of *Ceylan v Turkey*, 1999 (Application no. 23556/94).

Chief Constable of Hertfordshire Police (Original Appellant and Cross-Appellant) v Van Colle (administrator of the estate of GC (deceased)) and another (Original Respondents and Cross-appellants) Smith (FC) (Respondent) v Chief Constable of Sussex Police (Appellant) [2008] UKHL 50.

Case of *Andrew Courten against the United Kingdom (Final Decision as to the Admissibility of)*, 2008 (Application no. 4479/06).

Case of *Dudgeon v the United Kingdom,* 1981 (Application no. 7525/76).

Case of *E.B. v France*, 2008 (Application no. 43546/02).

Case of *Enhorn v Sweden*, 2005 (Application no. 56529/00).

Case of *Fretté v France*, 2002 (Application no. 36515/97).

Case of *Christine Goodwin v the United Kingdom,* 2002 (Application no. 28957/95).

Case of *I. v the United Kingdom*, 2002 (Application no. 25680/94).

Case of *Isayeva, Yusupova and Bazayeva v Russia*, 2005 (Application nos. 57947/00, 57948/00 and 57949/00).

Case of *Golder v the United Kingdom*, 1975 (Application no. 4451/70).

Case of *Gorzelik and Others v Poland*, 2004 (Application no. 44158/98).

Case of *H.G. and G.B. v Austria*, 2005 (Application nos. 11084/02 and 15306/02).

Case of *Handyside v the United Kingdom*, 1976 (Application no. 5493/72). Series B: Pleadings, Oral Arguments and Documents, Volume 22 (1979).

Case of *Janowski v Poland*, 1999 (Application no. 25716/94).

Case of *Laskey, Jaggard and Brown v the United Kingdom*, 1997 (Application nos. 21627/93, 21826/93 and 21974/93).

Case of *Kalaç v Turkey*, 1997 (Application no. 20704/92).

Case of *Karner v Austria,* 2003 (Application no. 40016/98).

Case of *Klein v Slovakia*, 2006 (Application 72208/01).

Case of *Kobenter and Standard Verlags GMBH* v Austria, 2006 (Application No. 60899/00).

Case of *Kudeshkina v Russia*, 2009 (Application no. 29492/05).

Case of *Sergey Kuznetsov v Russia*, 2008 (Application no. 10877/04).

Case of *L. and V. v Austria*, 2003 (Application nos. 39392/98 and 39829/98).

Case of *S.L. v Austria*, 2003 (Application no. 45330/99).

Case of *Lehideux and Isorni v France*, 1998 (Application no. 24662/94).

Case of *Loizidou v Turkey (Preliminary Objections)*, 1995 (Application no. 15318/89).

Case of *Lustig-Prean and Beckett v the United Kingdom,* 1999 (Application nos. 31417/96 and 32377/96).

Case of *Mamatkulov and Askarov v Turkey*, 2005 (Application nos. 46827/99 and 46951/99).

Case of *Marckx v Belgium*, 1979 (Application no. 6833/74).

Case of *Modinos v Cyprus,* 1993 (Application no. 15070/89).

Case of *Muller and Others v Switzerland*, 1988 (Application no. 10737/84).

Case of *Norris v Ireland,* 1991 (Application no. 10581/83).

Case of *Oberschlick v Austria (No. 2)*, 1995 (Application no. 20834/92).

Case of *Open Door and Dublin Well Woman v Ireland*, 1992 (Application nos. 14234/88 and 14235/88).

Case of *Otto-Preminger-Institut v Austria*, 1994 (Application no. 13470/87).

Case of *Perkins and R v the United Kingdom*, 2002 (Application nos. 43208/98 and 44875/98).

Case of *R.H. v Austria*, 2006 (Application no. 7336/03).

Case of *Rees v the United Kingdom*, 1986 (Application no. 9532/81).

Case of *Refah Partisi (The Welfare Party) and Others v Turkey*, 2003 (Application nos. 41340/98, 41342/98, 41343/98 and 41344/98).

Case of *Salgueiro Da Silva Mouta v Portugal*, 1999 (Application no. 33290/96).

Segi and Gestoras Pro-Amnistia v Germany and Others, 2002 (Application nos. 6422/02 and 9916/02).

Case of *Smith and Grady v the United Kingdom*, 1999 (Application no. 33985/96 and 33986/96).

Case of *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, 2001 (Application nos. 29221/95 and 29225/95).

Case of *the Sunday Times v the United Kingdom*, 1979 (Application no. 6538/74).

Case of *the Sunday Times v the United Kingdom (Article 50)*, 1980 (Application no. 6538/74).

Case of *the Sunday Times v the United Kingdom (No. 2)*, 1990 (Application no. 13166/87).

Case of *Sutherland v the United Kingdom*, 2001 (Application No. 25186/94).

Case of *Tauira and 18 Others v France*, 1995 (Application no. 28204/95).

Case of *Tyrer v the United Kingdom*, 1978 (Application no. 5856/72).

Case of *Van Kück v Germany,* 2003 (Application no. 35968/97).

Case of *Vereiningung Demokratischer Soldaten Österreichs and Gubi v Austria*, 1994 (Application no. 15153/89).

Wilkinson v Kitzinger [2006] HRLR 36.

X c. Republique Federale d'Allemagne, 1975 (Application no. 5936/72).

X v/the United Kingdom, 1978 (Application no. 7525/76).

*X Ltd and Y v/the United Kingd*om, (Application no. 8710/79); *Gay News Ltd and Lemon v UK*.

Case of *X v the United Kingdom*, 1981 (Application no. 7215/75).

Case of *X, Y and Z v the United Kingdom*, 1993 (Application no. 21830/93).

Case of *Young, James and Webster v the United Kingdom*, 1981 (Application nos. 7601/76 and 7806/77).

Case of *Yumak and Sadak v Turkey*, 2008 (GC) (Application no. 10226/03).

Council of Europe Documentation

2007 Ordinary Session, Tuesday 2 October 2007 at 10 a.m. Report.

"Annual Report 2008 of the European Court of Human Rights (provisional edition), Council of Europe" < http://www.echr.coe.int/NR/rdonlyres/B680E717-1A81-4408-BFBC-4F480BDD0628/0/Annual_Report_2008_Provisional_Edition.pdf> accessed on 26 March 2009.

Commissioner for Human Rights. *Issue Paper: Human rights and gender identity*. July 2009, CommDH/Issue Paper(2009)2.

Conseil de l'Europe – dossier thématique – homophobie. <http://www.coe.int/t/dc/files/themes/homophobie/default_EN.asp> accessed on 8 January 2009.

Convention for the Protection of Human Rights and Fundamental Freedoms (1950), ETS No. 5 (Protocol 11, ETS No. 155).

Document 10620, 5 July 2005. Legal recognition of same-sex partnerships in Europe.

Document 10832, 1 February 2006. Freedom of assembly and expression for lesbian, gay, bisexual and transgendered persons in member states.

Document 11175 revised, 12 February 2007. Ban on a Moscow demonstration by homosexuals: Written question No. 497 to the Chairman of the Committee of Ministers. <http://assembly.coe.int/Documents/WorkingDocs/Doc07/EDOC11175.pdf> accessed on 27 July 2009.

Document 11423, 8 October 2007. Discrimination on the basis of sexual orientation and gender identity.

Document 11796, 26 January 2009. End violence and discrimination on the basis of sexual orientation and gender identity in Turkey.

Document 11808, 27 January 2009. Equal rights for homosexual partnerships.

Human rights files No. 14. *Equality between the sexes and the European Convention on Human Rights*. Council of Europe Press 1989. ISBN 92-871-2671-2.

Introductory Speech by Maud de Boar-Buquicchio, Deputy Secretary General of the Council of Europe, 16 May 2008. International Day against Homophobia. <http://www.coe.int/t/dc/press/news/20080516_disc_sga_lgbt_en.asp> accessed 5 December 2008.

Opinion No. 261 (2007) Accession of the Republic of Montenegro to the Council of Europe: *Assembly debate* on 17 April 2007 (12th Sitting) (see Doc. 11204, report of the Political Affairs Committee, rapporteur: Mr Gardetto; Doc. 11205, opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Jurgens; and Doc. 11207, opinion of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), rapporteur: Mr Holovaty). *Text adopted by the Assembly* on 17 April 2007 (12th Sitting). <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EOPI261.htm> accessed on 27 July 2009.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.2000. ETS 177.

Recommendation 924 (1981) on discrimination against homosexuals.

Recommendation 1474 (2000) Situation of lesbians and gays in Council of Europe member states.

Recommendation 1635 (2003) Lesbians and gays in sports.

Recommendation 211 (2007) on freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons.

Statement by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, Vienna 31 October 2008. CommDH/Speech(2008)16. “Thinking Globally, Acting Locally” ILGA Europe conference.

Viewpoint: “Homophobic policies are slow to disappear” 16/05/2007. <http://www.coe.int/t/commissioner/vbiewpoints/070516_en.asp> accessed on 5 December 2008.

Viewpoint: “Time to recognise that human rights principles apply also to sexual orientation and gender identity” 14/05/08.

<http://www.coe.int/t/commissioner/viewpoints/080514_en.asp> accessed on 5 December 2008.

Viewpoint: "Hate crimes – the ugly face of racism, anti-Semitism, anti-Gypsyism, Islamophobia and homophobia" 20/07/08.
<http://www.coe.int/t/commissioner/viewpoints/080721_en.asp> accessed 29 January 2009.

Case Analysis

Case Comment: Article 8, privacy and the rights of homosexuals. European Law Review (1989) 14(2):112-114.

Case Comment: Conviction of anal intercourse with a woman – consent. European Human Rights Law Review [1998] 2:232-235.

Case Comment: Criminal law: sado-masochism – consent to assault. European Human Rights Law Review [1996] 2:194-197.

Case Comment: Employment and discrimination – determination of legality of United Kingdom Armed Forces' ban on homosexuality. European Human Rights Law Review [2000] 1:79-82.

Case Comment: Privacy/discrimination. European Human Rights Law Review [1996] 5:554-556.

Case Comment: Privacy/discrimination: criminalisation of homosexual relations between the ages of 16 and 18. European Human Rights Law Review [1998] 1:117-119.

Case Comment: Registration of child to father who was described as a woman at birth – private and family life. European Human Rights Law Review [1996] 1:97-99.

Crime and sentencing: consensual group sex between homosexuals – proceedings for gross indecency. European Human Rights Law Review [2001] 1:86-89.

Family and Children: refusal to permit homosexual man to adopt children. European Human Rights Law Review [2002] 5:679-683.

Freedom from Discrimination on the grounds of sexual orientation. Journal of Civil Liberties (1998) 34(3):117.

Fretté v France. Human Rights Case Digest (2001) 12:451.

Fitzpatrick v Sterling Housing Association. Journal of Criminal Law (2000) 5:90.

G.L. and A.V. v. Austria. Human Rights Case Digest (2001) 12:1093.

R v. Secretary of State for Defence ex parte Lustig-Prean and others. Journal of Criminal Law (1996) 1:89.

R v. Secretary of State for Defence, ex parte Perkins. Journal of Criminal Law (1999) 4:111.

S.L. v. Austria. Human Rights Case Digest (2001) 12:1095.

Journal Articles and Books

Addo, Michael. *Are Judges Beyond Criticism under Article 10 of the European Convention on Human Rights?* The International and Comparative Law Quarterly (1998) 47:425-438.

Anderson, Richard D (Jnr). *Metaphors of Dictatorship and Democracy: Change in the Russian Political Lexicon and the Transformation of Russian Politics*. Slavic Review (2001) 60(2):312-335.

Anonymous. *Post-Kinsey: Voluntary Sex Relations as Criminal Offences*. The University of Chicago Law Review (1949) 17(1):162-182.

Arai, Yutaka. *The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights*. Netherlands Quarterly of Human Rights, 1998 16(1):41-63.

Arriola, Elvia R. *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*. International Journal of Gender Race and Justice [1998] 1:429.

Baburkin, Sergei. *National Security, Civil Society and Human Rights in Russia: Conceptual and Legal Framework.* Demokratizatsiya (2000) 8(3):376-384 <http://www.demokratizatsiya.org/Dem%20Archives/DEM%2008-3%20Baburkin.PDF> accessed on 14 June 2009.

Baird, Vanessa A and Javeline, Debra. *The Persuasive Power of Russian Courts.* Political Research Quarterly (2007) 60(3):429-442.

Baker, Aaron. *Proportional, Not Strict, Scrutiny: Against a U.S. "Suspect Classifications" Model under Article 14 ECHR in the UK*. American Journal of Comparative Law (2008) 56(4):847-894.

Beck, Gunnar. *Human Rights adjudication under the ECHR between value pluralism and essential contestability*. European Human Rights Law Review [2008] 2:412-244.

Bentham, Jeremy. *Offences Against One's Self*. Unpublished, c. 1785. Stonewall and Beyond: Lesbian and Gay Culture <http://www.colubia.edu/cu/lweb/eresources/exhibitions/sw25/bentham/index.html> accessed 18 March 2008.

Brems, Eva. *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention of Human Rights and Fundamental Freedoms*. Human Rights Quarterly (2005) 27:296-326.

Brzezinski, Mark F. *Toward "Constitutionalism" in Russia: The Russian Constitutional Court*. The International and Comparative Law Quarterly (1993) 42(3):673-690.

Carothers, Thomas. *The Rule of Law Revival*. Foreign Affairs (1998) 77(2):95-106.

Cram, Ian. *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies*. MPG Books Ltd, Bodmin, Cornwall, 2006. ISBN 0-7546-2365-3.

Dupré, Catherine. *After reforms: human rights protection in post-communist states*. European Human Rights Law Review (2008) 5:621-632.

Cumper, Peter and Bell, Mark. *Reforming section 28: lessons for Westminster from Holyrood*. European Human Rights Law Review [2003] 4:400-409.

Duffy, Peter. *A case for equality*. European Human Rights Law Review [1998] 2:134-152.

Epstein, Lee, Knight, Jack and Shvetsova, Olga. *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*. Law & Society Review (2001) 35(1):117-164.

Evans, Malcolm D. *Blackstone's Statutes: International Law Documents, Eighth Edition*. Oxford University Press, UK, 2007. ISBN 978-0-19-921184-5.

Fletcher, Joseph. *Sex Offences: An Ethical View*. Law and Contemporary Problems (1960) 25(2):244-257.

Gellately, Robert. *Backing Hitler: Consent and Coercion in Nazi Germany*. Oxford University Press, 2001. ISBN 0-19-280291-7.

Greer, Stephen. *The European Convention on Human Rights: Achievements, Problems and Prospects*. Cambridge University Press, 2006. ISBN 978-0-521-84617-2.

Grigolo, Michele. *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*. European Journal of International Law (2003) 14(5):1023-1044.

Hale of Richmond, Baroness. *Law Lords at the Margin: Who defines Convention Rights?* The JUSTICE Tom Sargant memorial annual lecture 2008. Copy on file.

Healey, Dan. *Homosexual desire in Revolutionary Russia*, University of Chicago Press, 2001. ISBN 0226322343, 9780226322346. Exeter Library 301.41570947 HEA.

Heinze, Eric. *Sexual Orientation: A Human Right – An Essay on International Human Rights Law*. Martinus Nijhoff Publishers, 1995 ISBN 0-7923-3370-5.

Hindley, Clifford J. *The age of consent for male homosexuals*. Criminal Law Review [1986] 595-603.

Jaconelli, Joseph. *Defences to speech crimes*. European Human Rights Law Review [2007] 1:27-46.

Janis, Mark. *Russia and the 'Legality' of Strasbourg Law*. European Journal of International Law (1997) 8:93.

Jenson, Erik N. *The Pink Triangle and Political Consciousness: Gays, Lesbians, and the Memory of Nazi Persecution*. Journal of the History of Sexuality (2002) 11(*1/2 Special Issue: Sexuality and German Fascism*):319-349.

Jordan, Pamela A. *Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms*. Human Rights Quarterly (2003) 25:660-688.

Jordan, Pamela A. *Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms.* Demokratizatsiya (2003) 11(2):281-296 <http://www.demokratizatsiya.org/Dem%20Archives/DEM%2011-2%20Jordan.PDF> accessed on 14 June 2009.

Yoshino, Kenji. *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*. Columbia Law, (1996) 96(7):1753-1834.

Lavender, Nicholas. *The Problem of the Margin of Appreciation*. European Human Rights law Review [1997] 4:380-390.

Lewis, Gregory B. *The Friends and Family Plan: Assessing the Impact of Knowing Someone Gay on Support for Gay Rights*. Georgia State University Department of Public Administration &

Urban Studies. Andrew Young School of Policy Studies Research Paper Series No. 08-19. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1260400> accessed on 14 July 2009.

Karsten, Ian. *Atypical families and the Human Rights Act: the rights of unmarried fathers, same sex couples and transsexuals*. European Human Rights Law Review [1999] 2:195-207.

Liddy, Jane. *The concept of family life under the ECHR*. European Human Rights Law Review [1998] 1:15-25.

Macdonald, R St J. *The Margin of Appreciation*. Chapter 6 of *R St J Macdonald et al (eds.), The European System for the Protection of Human Rights,* 83-124, 1993 Kluwer Academic Publications, Netherlands.

Marks, Susan. *Reservations unhinged: the Belilos case before the European Court of Human Rights*. International Comparative Law Quarterly (1990) 39(2):300-327.

Marshall, Jill. *A right to personal autonomy at the European Court of Human Rights*. European Human Rights Law Review [2008] 3:337-356.

Massaro, Toni M. *Gay Rights, Thick and Thin*. Stanford Law Review (1996) 49(1):45-110.

McColgan, Aileen. *Cracking the comparator problem: discrimination, "equal" treatment and the role of comparisons*. European Human Rights Law Review [2006] 6:650-677.

McColgan, Aileen. *Do privacy rights disappear in the workplace?* European Human Rights Law Review [2003] Supplement:120-140.

McCrudden, Christopher. *Human dignity and judicial interpretation of human rights*. European Journal of International Law (2008) 19(4):655-724.

McHarg, Aileen. *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*. The Modern Law Review (1999) 62(5):671-696.

McLoughlin, Micheal T. *Crystal or Glass?: A Review of Dudgeon v. United Kingdom on the Fifteenth Anniversary of the Decision*. Murdoch University Electronic Journal of Law (1996) 3(4): <http://www.murdoch.edu.au/elaw/issues/v3n4/mclough.html> accessed on 25 April 2009.

Mead, David. *Swallowing the camel, straining at the gnat: the implications of Mendoza v Ghaidan*. European Human Rights Law Review [2003] 5:501-514.

Mill, John Stuart. *On Liberty*, 1859 <http://www.utilitarianism.com/ol> accessed 10 October 2008.

Millar, Gavin. *Whither the spirit of Lingens?* European Human Rights Law Review [2009] 3:277-288.

Minter, Shannon. *Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion in the Gay Rights Movement*. New York Law School Journal of Human Rights (2000-01) 17:589-621.

Moon, Gay and Allen, Robin. *Dignity discourse in discrimination law: a better route to equality?* European Human Rights Law Review [2006] 6:610-649.

Moran, Leslie J. *The Homosexual(ity) of Law*. Routledge, 1996. ISBN 0-415-07953-5.

Mowbray, A.R. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*. Oxford – Portland, Oregon, 2004. ISBN 1-84113-261-6.

Mowbray, Alastair. *The Creativity of the European Court of Human Rights*. Human Rights Law Review (2005) 5(1):57-80.

Noakes, J and Pridham, G. *Nazism 1919-1945; Volume 2, State, Economy and Society 1933-1939*. University of Exeter Press, Great Britain, 2000. ISBN 0-85989-599-8.

Nowlin, Christopher. *The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms*. Human Rights Quarterly (2002) 24:264-286.

Ovey, Clare & White, Robin C.A. *Jacobs and White: The European Convention on Human Rights* Fourth Edition. Oxford University Press, 2006. ISBN 978-0-19-928810-6.

Polikoff, Nancy D. *Recognizing Partners but not Parents / Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*. New York Law School Journal of Human Rights (2000-01) 17:711-751.

Rekers, George and Kilgus, Mark. *Studies of Homosexual Parenting: A Critical Review*. Regent University Law Review (2001-02) 14:343.

Report of the Committee on Homosexual Offences and Prostitution. 1956-57 Cmnd. 247 Parliamentary Papers: < http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:hcpp&rft_dat=xri:hcpp:rec:1956-046673 > accessed 27 April 2009.

Ress, G. *The Effect of Judgments and Decisions in Domestic Law*. Ch. 36 The European System for the Protection of Human Rights. (ed.) R St J McDonald et al, 1993 Kluwer Academic Publishers.

Rose, Richard and Shin, Doh Chull. *Democratization Backwards: The Problem of Third-Wave Democracies.* British Journal of Political Science (2001) 31(2):331-354.

Saari, S. M, 2006-03-22 "*European Multilateral Human Rights Cooperation and Russia: Socialising Russia into Europe?*" Paper presented at the annual meeting of the International Studies Association, Town & Country Resort and Convention Center, San Diego, California, USA Online <PDF>. 2009-05-25 <http://www.allacademic.com/meta/p99088_index.html> accessed on 28 July 2009.

Singh, Rabinder. *Equality: the neglected virtue.* European Human Rights Law Review [2004] 2:141-157.

Singh, Rabinder. *Is there a role for the "margin of appreciation" in national law after the Human Rights Act?* European Human Rights Law Review [1999] 1:15-22.

Thorp, Arabella. *Age of Consent for Male Homosexual Acts*. [1998] House of Commons Research Paper 98/68.

Trochev, Alexei. *Less Democracy, More Courts: A Puzzle of Judicial Review in Russia*. Law & Society Review (2004) 38(3):513-548.

Urban, Michael. *Remythologising the Russian State*. Europe-Asia Studies (1998) 50(6):969-992.

Waaldijk, Kees. *Standard Sequences in the Legal Recognition of Homosexuality - Europe's Past, Present and Future*. Australasian Gay and Lesbian Law Journal (1994) 50:4-74.

Wintemute, R. *Sexual Orientation and Human Rights*. Clarendon Press – Oxford, 1995. ISBN 0-19-825972-7.

Yoshino, Kenji. *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*. Columbia Law Review (1996) 96(7):1753-1834.

Dudgeon Case Materials

Dudgeon, Jeff. Strasbourg case article from BICO magazine (1984). Materials supplied by Jeff Dudgeon. Copy on file.

McVeigh, A.M. *Public Record Office of Northern Ireland. D/3762, The Northern Ireland Gay Rights Association (NIGRA) archive, 1974-1986*. Sept. 1999. Materials supplied by Jeff Dudgeon. Copy on file.

Queens University Belfast, talk by Jeff Dudgeon 9 April 2008. *Talk by Jeff Dudgeon (successful plaintiff in 1981 against the UK government on the laws in Northern Ireland criminalising male homosexual acts) at 4pm on 9 April 2008 at QUB Human Rights School.* Materials supplied by Jeff Dudgeon. Copy on file.

Strasbourg Press Statement (1981). Materials supplied by Jeff Dudgeon. Copy on file.

ECtHR Case Materials

COURT_n2543226_v1_Norris_10581_83_memorial_of_the_applicant.pdf – Materials supplied by the ECtHR. Copy on file.

*COURT_n2543304_v1_Norris_10581_83_Memorial_of_the_Government.*pdf – Materials supplied by the ECtHR. Copy on file.

COURT_n2543241_v1_Modinos_15070_89_memorial_of_the_applicant.pdf – Materials supplied by the ECtHR. Copy on file.

COURT_n2543320_v1_Modinos_15070_89_Memorial_of_the_Government.pdf – Materials supplied by the ECtHR. Copy on file.

Otto-Preminger-Institut; Article 19 Submission. <http://www.article19.org/pdfs/cases/austria-case-of-otto-preminger-v.-austria.pdf> accessed 25 April 2009. Copy on file.

United Nations Materials

Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UNTS 277.

Convention Relating to the Status of Refugees (1951) 189 UNTS 137.

International Covenant on Civil and Political Rights (1966), 999 UNTS 171.

Nicholas Toonen v Australia, 50th Sess., Communication No. 488/1992, CCPR/C/50/D/488/1992, April 4, 1994, paragraph 8.7 ; confirmed in *Young v Australia*,

Communication No. 941/2000, CCPR/C/78/D/941/2000, September 18, 2003; *X v Columbia*, Communication No. 1361/2005, CCPR/C/89/D/1361/2005, May 14, 2007.

United Nations General Assembly Resolution 217A (III), 10 December 1948. *The Universal Declaration of Human Rights*.

UN High Commissioner for Refugees, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004. Online. UNHCR Refworld <http://www.unhcr.org/refworld/docid/4551c0d04.html> accessed 8 April 2009.

Web-based Resources

Amnesty International. *Amnesty International condemns adoption of homophobic law in Lithuania* <http://www.amnesty.org.uk/news_details.asp?NewsID=18325> accessed on 14 July 2009.

Human Rights Watch. *Council of Europe Failing on Russia*. <http://www.hrw.org/en/news/2008/04/14/council-europe-failing-russia> accessed on 4 December 2008.

Human Rights Watch. *We Need a Law for Liberation*. <http://www.hrw.org/en/node/62197/section/12> accessed 7 January 2009.

Human Rights Watch. *We Need a Law for Liberation: Gender, Sexuality and Human Rights in a Changing Turkey*. May 2008 ISBN 1-56432-316-1. Copy on file.

Immigration and Refugee Board of Canada, *Armenia: The situation of homosexuals and lesbians; public perception of gays and lesbians; availability of state protection and whether there exist state programs to promote the respect of their human rights (January 2003 - December 2005)* , 19 January 2006, ARM100689.E <http://www.unhcr.org/refworld/docid/45f147e128.html> accessed 27 July 2009.

ILGA – International Lesbian and Gay Association. <http://www.ilga.org> accessed on 5 November 2008.

ILGA . *We welcome the strong statements by the European Union and by 10 Mercosur and Associated countries in favour of ending discrimination and violence based on sexual orientation and gender identity*. <http://www.ilga.org/print.asp?LanguageID=1&FileID=1160&FileCategory=1&ZoneID=7&> accessed on 25 April 2009.

ILGA. *ILGA-Europe prints maps on legal situation for LGB people in Europe* <http://www.ilga-europe.org/europe/news/ilga_europe_prints_maps_on_legal_situation_for_lgb_people_in_europe> accessed on 27 July 2009.

List of Ratifications <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=4/11/2009&CL=EN> accessed on 11 April 2009.

McLachlan, Gary LLB. 'Liberating invisibility: The love that *shall* not speak its name…' <http://garymclachlan.wordpress.com/invisibility/> accessed on 11 May 2009.

Moscow Times, The. Asoyan, Ella, *Human Rights Runaround.* <http://www.themoscowtimes.com/article/1016/42/379833.htm> accessed on 27 July 2009.

Neddermeyer, Dorothy M. *Sex Offenders – Pedophilia or Ephebophilia – The Truth*. <http://ezinearticles.com/?Sex-Offenders-Pedophilia-or-Ephebophilia-The-Truth&id=25340> accessed on 11 May 2009.

Official Apology, 2005: <http://political-apologies.wlu.ca/details.php?table=doc_press&id=581> accessed on 8 April 2009.

Times Online; Law. *Judge Margaret Short sacked for being rude to solicitors*. <http://business.timesonline.co.uk/tol/business/law/article6156728.ece> accessed 25 April 2009.

Times Online; William Rees-Mogg. *We can't allow Strasbourg to lay down the law*. <http://www.timesonline.co.uk/tol/comment/columnists/william_rees_mogg/article6040951.ece> accessed on 25 April 2009.

Yogyakarta Principles. *Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007 <www.yogyakartaprinciples.org> accessed on 8 April 2009.