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Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: *Alekseyev v Russia*

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1. Introduction

On 11 April 2011 the Grand Chamber of the European Court of Human Rights ('the Court') rejected a referral request by the government of the Russian Federation in respect of *Alekseyev v Russia*.[1] As a result, the judgment of the First Section of the Court that the Russian government had violated Mr Alekseyev's rights under Articles 11, 13 and 14 of the European Convention on Human Rights ('the Convention')[2] became final.[3] The judgment in *Alekseyev* is important for lesbian and gay rights in a number of respects, not least because it shows a clear and positive evolution of the Court's jurisprudence in relation to the freedom of assembly guaranteed by Article 11. As I will outline below, the judgment demonstrates a willingness by the Court to strongly condemn public authorities that interfere with peaceful public assemblies of lesbian and gay individuals and organisations. In designating such interference a violation of both Articles 11 and 14, the Court has taken a

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1 *Alekseyev v Russia* Application Nos 4916/07, 25924/08 and 14599/09, Merits, 21 October 2010.
2 1950, ETS 5.
3 In accordance with Article 44(2)(c) of the Convention.

welcome step in further expanding the provision of Convention rights to non-heterosexuals. However, the judgment is also evidence of continued inconsistencies in the Court's jurisprudence in respect of the rights of lesbians and gay men. Set in the context of recent judgments extending Convention rights to homosexual individuals seeking to adopt a child,[4] but denying protection to homosexual couples who wish to marry,[5] the Court's jurisprudence continues to develop a piecemeal (rather than universal) application of the Convention in respect of sexual orientation issues. As I argue below, the attempt in *Alekseyev* to justify these inconsistencies is not only unconvincing, but also potentially damages the integrity of the Court's judicial methodology and, ultimately, its interpretation of the Convention.

2. Background to *Alekseyev v Russia*

Mr Nikolay Aleksandrovich Alekseyev, recognised by the Court as a 'gay rights activist',[6] made three individual applications to the Court. The first application, like the two subsequent ones, related to the applicant's attempt to organise a 'Pride March' in Moscow in May 2006. After announcing his intentions in early 2006 to organise the march, Interfax (an 'information service' that provides 'news and other information products that are essential for decision-makers in politics and business') published statements from the office of the mayor of Moscow that indicated hostility towards the holding of any such march in Moscow. The mayor confirmed this opposition on 24 March 2006 when he instructed his first deputy, five other officials of his office and all prefects of Moscow 'to take effective measures for the prevention and deterrence of any gay-oriented public or mass actions in the capital city'.[7] On 18 May 2006 the Department for Liaison with Security Authorities of the Moscow Government informed the applicant of the mayor's decision to refuse permission to hold the march on the grounds of public order, for the prevention of riots, and the protection of health, morals and the rights and freedoms of others. The applicant and the other organisers of the march responded to this by submitting a notice to hold a picket on the same date and time as the march for which permission had been refused. On 23 May 2006 the deputy prefect of the Moscow Central Administrative Circuit refused permission to hold the picket on the same grounds as those given by the Department for Liaison with Security Authorities of the Moscow Government. Over the

4 *E.B. v France* Application No 43546/02, Merits, 22 January 2008.
5 *Schalk and Kopf v Austria* Application No 30141/04, Merits, 24 June 2010.
6 Supra n 1 at para 5. On a point of nomenclature, this is the first time that the Court has directly referred to an individual as 'gay' in a published judgment, having previously consistently used the term 'homosexual'.
7 Ibid. at para 10.

following two years, applications to hold a pride march and a picket event were refused by the same authorities on the same grounds.

The applicant made several challenges to these decisions in the domestic courts. The first judgment in respect of these was issued on 26 May 2006 by the Tverskoy District Court of Moscow, which dismissed the applicant's challenge to the decision of the mayor, referring to section 12 of the Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing ('the Assemblies Act') that, it stated, entitled public authorities to ban a public event on safety grounds. The applicant lodged an appeal in which he argued that section 12 of the Assemblies Act imposed an obligation on the authorities to make a reasoned proposal to change the venue or the time of the event in respect of any safety concerns. He also challenged the finding that a ban was justified on safety grounds, arguing that concerns for safety could have been addressed by providing protection to those taking part in the event. The Moscow City Court subsequently rejected the applicant's appeal and upheld the judgment of the Tverskoy District Court of Moscow as lawful and justified. The applicant went on to challenge the prefect's refusal to allow peaceful picketing as an alternative to the march. On 22 August 2006 the Taganskiy District Court of Moscow dismissed the applicant's complaint, finding that the ban had been justified on safety grounds. The Moscow City Court dismissed an appeal against this judgment and upheld it on the grounds advanced by the Taganskiy District Court of Moscow. In 2007 and 2008, the applicant repeated these complaints against decisions to refuse permission to march or picket and made unsuccessful appeals in the same domestic courts.

3. The Judgment of the Court

Taking Mr Alekseyev's three applications together, the Court considered the alleged violation of his rights under Articles 11, 13 and 14 of the Convention.

In respect of Article 11, the applicant complained that the repeated ban on the public events he had organised in 2006, 2007 and 2008 was a violation of his right to peaceful assembly. He claimed that the bans imposed on holding Pride Marches and picketing had not been in accordance with the law, had not pursued any legitimate aim and had not been necessary in a democratic society. The Russian government contested that argument and submitted that the public authorities had acted lawfully and within their margin of appreciation when deciding to prohibit the events. The government stated that the ban pursued three legitimate aims: the protection of public safety and the prevention of disorder; the protection of morals and the protection of the rights and freedoms of others. These aims were legitimate, the government argued, in light of statements made by several religious groups, which suggested that the proposed assemblies would cause moral offence and raise

significant safety issues. They referred to a number of statements made by: 'The Union of Orthodox Citizens' who advised the mayor of their intention to conduct a mass protest in response to any Pride march in Moscow; the Orthodox Church who objected to a gay parade on the grounds that it was propaganda promoting sin; the Supreme Mufti for Russia who promised that Muslims and other 'normal people' in Russia would demonstrate against any Pride march; and the head of the Muslim authority of Nizhniy Novgorod who argued that 'as a matter of necessity, homosexuals must be stoned to death'. As I explore below, the Court did not feel it necessary to rule on the 'legitimate aims' point, since it concluded that 'the ban on the events organised by the applicant did not correspond to a pressing social need and was thus not necessary in a democratic society'.[8] Therefore, the Court unanimously found in favour of the applicant and judged that he had suffered a violation of his rights under Article 11.

In respect of Article 13, the applicant complained of a violation of his right to an effective remedy for the violation of his freedom of assembly. He argued that the administrative processes of the domestic courts through which he challenged the repeated bans on his planned events did not offer an effective remedy because the time-scales on which the courts operated did not allow him to obtain a final decision on each event before the date that it was due to take place. The Russian government argued that the applicant had not always expedited his complaints as quickly as he could have done and that he was responsible for slowing down the procedural process of the courts. The Court found in favour of the applicant for two reasons: first, because the timing of public events is crucial for organisers and participants, the right of an effective remedy to a ban an event necessitates the possibility of obtaining a decision on an appeal prior to the time at which it is intended to take place; second, whilst Russian law provides for time-limits for the organisers of events to give notice, it does not place public authorities under any legally binding time-frame to give their final decisions before the planned date of an event. The Court unanimously concluded that it was not persuaded that 'the judicial remedy available to the applicant in the present case, which was of a *post-hoc* character, could have provided adequate redress in respect of the alleged violations of the Convention'.[9]

In respect of Article 14, the applicant complained that, despite the absence of any explicit reference by public authorities to sexual orientation as the grounds for the ban, the main reason for their refusal to grant permission was an official moral disapproval of homosexuality. The grounds for the mayor's decision, Mr Alekseyev contended, was the disapproval of religious

8 Ibid. at para 87.
9 Ibid. at para 99.

and other groups (who had stated that displays of homosexuality in public caused moral offence to religious believers) and the mayor's own disapproval which he demonstrated in a number of public statements about homosexuals (Interfax had quoted statements from the mayor in which he claimed that homosexuality was unnatural and that most Moscow residents supported the ban). In light of the antagonistic social relations between homosexuals and religious groups, the government argued that it was not discriminatory, but necessary, for public authorities to place restrictions on the exercise of Article 11 rights. The Court concluded that 'the ban imposed on the events organised by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality' and that, as such, 'the applicant suffered discrimination on the grounds of his sexual orientation and that of other participants in the proposed events'.[10] Therefore, the Court found in favour of the applicant and judged unanimously that he had suffered a violation of his rights under Article 14.

The Court awarded the applicant €12,000 in respect of non-pecuniary damage, plus €17,510 in costs.

4. Analysis of the Judgment

A. Clear and Decisive Recognition of the Right to Freedom of Assembly for Homosexuals under Article 11

The most obvious, and significant, aspect of *Alekseyev* is the clear message that it sends to contracting states regarding the importance of respecting the freedom of assembly of homosexuals. The Court had taken a step towards this in its previous judgment in *Bączkowski and Others v Poland*, which concerned a complaint by the organisation 'Foundation for Equality' against the Mayor of Warsaw who had refused permission, using provisions in the Road Traffic Act 1997, for an assembly aimed at alerting the public on the issue of discrimination against minorities.[11] In *Bączkowski*, the Court followed its established methodology to consider whether the alleged interference with the rights guaranteed by Article 11(1) was prescribed by law, pursued one or more legitimate aim and was necessary in a democratic society as required by Article 11(2). The Court gave significant consideration to the lawfulness of the ban and to the findings of the Polish Constitutional Court who had also reviewed the legality of it. The Constitutional Court had judged that the use of the Road Traffic Act 1997 by public authorities to ban an assembly organised by

10 Ibid. at para 109.
11 *Bączkowski and others v Poland* Application No 1543/06, Merits, 3 May 2007.

homosexuals contravened rights guaranteed by the Polish Constitution and the Assemblies Act 1990 and, therefore:

> The legislator made an error by failing to account for the constitutional nature of freedom of assembly as a fundamental political freedom. Therefore, freedom of assembly may not be subject to the same regulation as the Road Traffic Act 1997 envisages for the organisation of athletic competitions, rallies, races and similar events, which are by nature politically neutral.[12]

In *Bączkowski* the Court reiterated the Constitutional Court's view of the unlawfulness of the ban and reached the conclusion that the applicants had suffered a violation of their rights under Article 11.[13] Because the Court accepted that the ban was unlawful, it did not feel it necessary to apply the legitimacy and necessity tests in its review. However, the Court stated that whilst it had often referred to the essential role of political parties in ensuring the proper functioning of pluralism and democracy, it was also important to recognise the contribution of 'associations formed for other purposes' because

> pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.[14]

As I have argued elsewhere,[15] this recognition of the importance of freedom of assembly on the grounds of 'cultural identity', and its centrality for achieving the 'harmonious interaction of persons', was a significant first step in expanding the Court's Article 11 jurisprudence in respect of homosexuality.

The approach taken by the Court in *Alekseyev* can be seen as evidence of a further and significant evolution in its jurisprudence because, unlike in *Bączkowski*, the Court did not focus on the issue of lawfulness. From the outset of its review, the Court dispensed with the parties' claims regarding the legality and legitimacy of the ban. The Court stated that it could 'dispense with ruling on these points because, irrespective of the aim and the domestic lawfulness of the ban, it fell short of being necessary in a democratic society'.[16] The elevation of the necessity test in this way is extremely significant because it decisively articulates the view that the existence of domestic law designed

12 Constitutional Court of the Republic of Poland, Judgment, 18 January 2006 (K21/05) at para 9 ('Requirement to obtain permission for an assembly on a public road').
13 *Bączkowski and others v Poland*, supra n 11 at para 71.
14 *Alekseyev*, supra n 1 at para 70, citing *Bączkowski*, supra n 11 at para 62.
15 Johnson, "'An Essentially Private Manifestation of Human Personality": Constructions of Homosexuality in the European Court of Human Rights' (2010) 10 *Human Rights Law Review* 67.
16 *Alekseyev*, supra n 1 at para 69.

to curtail the public assembly of homosexuals does not in itself provide a justification for interference with the Articles 10 and 11 rights of homosexuals. This will have far-reaching implications in those states that continue to enact legislation with the intention of restricting the freedom of expression and assembly of homosexuals—for example, in Lithuania where there is an on-going attempt to criminalise the 'promotion' of homosexuality[17]—because, while such restriction will be in accordance with the law, it will now be less likely to meet the necessity test of the Court. Nor will states now be able to assume that the legitimate aims specified by Article 11(2) provide a solid basis for justifying the restriction of the peaceful assembly of homosexuals. Whilst the Russian government argued that the interference of public authorities was justified because it pursued the legitimate aims of 'public safety' and 'the protection of health or morals or for the protection of the rights and freedoms of others' the Court stated that, although it would not consider the question of legitimacy, 'in any event the ban was disproportionate to either of the two alleged aims'.[18]

B. Clear Rejection of 'Public Safety' as a Justification for Automatically Prohibiting the Public Assembly of Homosexuals and Support for the Criminalisation of Those Who Make Threats of Violence Against Them

The Russian government argued that preventing the applicant's proposed march and picket was decided on the grounds of the risk it posed to public safety. The government argued that, in light of the statements made by religious groups, it had not been possible for the public authorities to guarantee the safety of those taking part in the planned events. The government further stated that it was impossible to avoid an outright ban because no measures were available to public authorities that would have adequately addressed the security risks posed by the events. The Court rejected the government's argument on a number of grounds. First, the Court stated that it could not accept the argument that 'the threat was so great as to require such a drastic measure as banning the event altogether, let alone doing so repeatedly over a period of three years'.[19] Whilst discretion is left to contracting states to

17 On July 14 2009 the Lithuanian Parliament amended the Law on the Protection of Minors against the Detrimental Effect of Public Information to prohibit any public information 'whereby homosexual, bisexual or polygamous relations are promoted' (Article 4.14) and 'family relations are distorted, its values are scorned' (Article 4.15). The law was vetoed by the President and subject to further amendment before its commencement. The most recent version of the law prohibits any public information 'which expresses contempt for family values, encourages the concept of entry into a marriage and creation of a family other than stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania' (Article 4.16). The Civil Code of the Republic of Lithuania defines marriage as 'a voluntary agreement between a man and a woman' (Article 3.7).

18 *Alekseyev*, supra n 1 at para 79.

19 Ibid. at para 77.

regulate public assemblies that pose a clear threat of violence, the Court stated that the authorities had not made an 'adequate assessment' of the perceived threat.[20]

Second, the Court reiterated that it is the duty of contracting states to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully and that the public authorities had failed to do this by not undertaking an adequate assessment of the risks posed. In line with its case law, the Court stated:

> [T]he mere existence of a risk is insufficient for banning the event: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat of violent clashes.[21]

This is significant, because it places an important emphasis on the responsibility of public authorities to 'neutralize' the threat of violence towards homosexuals rather than to curtail their right to assembly in light of it. The Court stated very clearly that public authorities have a duty 'to address potential counter-protesters – whether by making a public statement or by replying to their petitions individually – in order to remind them to remain within the boundaries of the law when carrying out any protest actions'.[22] This is in sympathy with the recommendation of the Council of Europe that:

> Member states should ensure that law enforcement authorities take appropriate measures to protect participants in peaceful demonstrations in favour of the human rights of lesbian, gay, bisexual and transgender persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to freedom of expression and peaceful assembly.[23]

The Court gave considerable weight to this recommendation and made a strong and significant comment about the importance of repudiating threats of violence against homosexuals with an appropriate legal response:

> As regards any statements calling for violence and inciting offences against the participants in a public event, such as those by a Muslim cleric from Nizhniy Novgorod, who reportedly said that homosexuals must be stoned to death . . . as well as any isolated incidents of threats of violence being put into practice, they could have adequately been dealt with through the prosecution of those responsible. However, it does not

20 Ibid.
21 Ibid. at para 75.
22 Ibid.
23 Committee of Ministers of the Council of Europe Recommendation CM/Rec(2010)5, 31 March 2010.

> appear that the authorities in the present case reacted to the cleric's call for violence in any other way than banning the event he condemned. By relying on such blatantly unlawful calls as grounds for the ban, the authorities effectively endorsed the intentions of persons and organisations that clearly and deliberately intended to disrupt a peaceful demonstration in breach of the law and public order.[24]

The Court's view, that public authorities effectively endorse threats of anti-gay violence if they do not adequately respond to them, is in keeping with arguments in favour of the development and implementation of legislation designed to protect homosexuals from the effects of 'hate speech'. The Court can be seen to validate measures—such as the recent introduction of legislation criminalising incitement to hatred on the grounds of sexual orientation in the United Kingdom[25]—that enhance the regulation of those that seek to incite hatred of, and violence towards, gay men and lesbians.

A third way in which the Court rejected concerns regarding public safety as a justification for curtailing the Article 11 rights of homosexuals was in its refusal to accept the government's argument as genuine. The Court argued that the public statements made by the Mayor of Moscow, as well as observations by the government, demonstrated that security risks were a secondary concern to a primary moral objection to homosexuality. The Court stated that the Moscow authorities had originally relied on moral objections to homosexuality but that, having found that public morality was not a ground proscribed by domestic law for banning this type of event, the government had substituted the original aim with the aim of ensuring public safety. By making this stratagem transparent, the Court made clear that it will not accept moral condemnations of homosexuality that masquerade as other legitimate aims.

C. Clear Rejection of the Protection of 'Public Morality' as a Justification for Limiting Discussions of Homosexuality to the Private Sphere

A consistent theme of the Court's approach to matters of sexual orientation equality, since its landmark judgment in *Dudgeon v United Kingdom*, has been its conceptualisation of homosexuality as 'an essentially private manifestation of human personality'.[26] By distinguishing the right to manifest homosexuality in private from a range of other 'public rights', the Court has reproduced the long-standing legal preoccupation of many contracting states with enclosing homosexuality within the domestic sphere in order to 'protect' the social

24 *Alekseyev*, supra n 1 at para 76.
25 Section 74 and Schedule 16 of the Criminal Justice and Immigration Act 2008 (UK).
26 A 45 (1981); 4 EHRR 149 at para 60.

morality it is said to offend. As I have argued elsewhere, a foundation of the Court's evolution of the Convention (most notably of Article 8) has been its view that homosexuality is protectable when it is genuinely private.[27] A criticism of this approach is that the 'cost' of the protection that the Court has afforded to sexual minorities has been the institutional reproduction of a moral discourse through which homosexuality has been imagined as antithetical to the common and public good. Whilst there are historical and legal reasons for the Court's approach (not least, that its jurisprudence developed in response to applications received from gay men who complained that the criminalisation of male homosexual sex in private violated their Article 8 rights) the public/private distinction that it has relied upon remains problematic. This is because contracting states continue to use this distinction to justify mechanisms of social control designed to suppress displays or discussions of homosexuality in the public sphere.

For this reason, it is highly significant that in *Alekseyev* the Court clearly recognises the importance of assemblies in the public sphere that aim to further the rights of homosexuals. Rejecting various claims by the Russian government that public discussion of homosexuality would adversely affect morals (particularly those of children and 'vulnerable adults'), the Court gave its strong endorsement to assemblies designed 'to promote respect for human rights and freedoms and to call for tolerance towards sexual minorities'.[28] Whilst the Russian government argued that any discussion of homosexuality should take place in private or in designated meeting places with restricted access, the Court stated that there was no justification for such exclusion from the public sphere. On the contrary, the Court argued that it was the responsibility of public authorities to promote 'fair and public debate', which 'would benefit social cohesion by ensuring that representatives of all views are heard'.[29] The Court stated that this 'was exactly the kind of debate that the applicant in the present case attempted to launch, and it could not be replaced by the officials spontaneously expressing uninformed views which they considered popular'.[30] The Court relied (as it often does) on 'scientific' claims to reject the view that public discussion of homosexuality adversely affects public morality: 'There is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or "vulnerable adults"'.[31] In stating this, the Court can be seen to have made its strongest statement to date that the rights of homosexuals extend beyond the domestic sphere and that violation of the Article 11 (and,

27 Johnson, supra n 15.
28 *Alekseyev*, supra n 1 at paras 82–6.
29 Ibid. at para 86.
30 Ibid.
31 Ibid.

by implication, Article 10[32]) rights of homosexuals cannot be justified on the grounds of protecting public morality.

D. Clear Rejection of the Claim That Protecting the Rights and Freedoms of Religious Believers Provides a Justification for Limiting the Article 11 Rights of Homosexuals

A central feature of the justification offered by the Moscow authorities and the Russian government for the ban was that events such as those proposed by the applicant should be restricted in principle because, as a form of propaganda that promotes homosexuality, they are incompatible with the established 'religious doctrines' subscribed to by the majority of Russian society. This argument reflects a widespread reliance across contracting states on faith-based arguments to justify means of curtailing the Convention rights of homosexuals[33] (arguments which, of course, fail to recognise that homosexuals are also often people of faith[34]). Whilst Article 9 of the Convention guarantees the right to freedom of religion, the Russian authorities did not rely on it explicitly. Rather, the authorities argued that restricting the Article 11 rights of homosexuals was justified because it pursued the legitimate aim of protecting the rights and freedoms of others.[35] The authorities argued that the 'ideas of the event organisers were not neutral to the rest of society, but had actually encroached on the rights [and] lawful interests' of religious believers because 'the gay parades would be perceived by believers as an intentional insult to their religious feelings and a "terrible debasement of their human dignity"'.[36]

It is significant that the Court gave no weight to these arguments. Whilst anti-gay individuals and organisations often seek to privilege their views on the basis that they are rooted in religious faith, the Court accorded religion no special status in the 'balance' of interests that characterise a democratic society (the hallmarks of which are, as the Court has repeatedly stressed, pluralism, tolerance and broadmindedness). Quoting from its judgment in

32 Whilst it does not explicitly refer to it, the judgment can be seen to implicitly reiterate the view established in *Christian Democratic People's Party v Moldova* 2006-II; 45 EHRR 392 at para 62, that Article 11 is fundamentally related to freedom of expression guaranteed by Article 10: 'The Court reiterates that, notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11.'

33 For further discussion see Vanderbeck and Johnson, 'Religion, Homophobia, and Hate Speech: An Analysis of UK Parliamentary Debates Over Incitement to Hatred on the Grounds of Sexual Orientation', 8 July 2011, *Parliamentary Affairs*, available at: http://pa.oxfordjournals.org/content/early/2011/07/07/pa.gsr022.abstract [last accessed 18 July 2011].

34 See Vanderbeck et al., 'Sexuality, activism, and witness in the Anglican Communion: the 2008 Lambeth Conference of Anglican Bishops' (2011) 101 *Annals of the Association of American Geographers* 670.

35 *Alekseyev*, supra n 1 at para 59.

36 Ibid. at para 60.

Bączkowski, the Court stated that 'democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.[37] The implication of this is that, no matter how dominant a religion is in a society, faith should not assume any special status in balancing the protection of the Article 11 rights of homosexuals with the rights and freedoms of others.

E. Emerging Inconsistencies in the Court's Jurisprudence and Methodology in Respect of the Convention Rights of Homosexuals

Whilst those who support lesbian and gay rights will welcome *Alekseyev* for the reasons I have outlined above, the judgment does raise some serious concerns about the development of the Convention rights of homosexuals and the justification offered for this by the Court. Recent developments in the Court's case law show the continuation of a partial, rather than universal, interpretation of the Convention in respect of homosexuality. This piecemeal approach has largely been determined by the Court's application of its margin of appreciation doctrine. This doctrine is rooted in the principles of subsidiarity and 'fair balance', long established in Strasbourg jurisprudence, which are foundational to the Court's adjudication of disputes between individuals claiming fundamental rights guaranteed by the Convention and states seeking to limit those rights in the perceived interests of their general population. As Mowbray argues, the Court uses the principle of fair balance as a 'multi-functional tool' in order to 'take account of a myriad of competing individual and community interests asserted by applicants and respondent States'.[38] Letsas distinguishes this use of the margin of appreciation doctrine from the way the Court utilises it to address the 'limits or intensity' of its review and to make decisions to 'defer to the judgment of national authorities'.[39]

Since the early 1980s, the Court's jurisprudence has shown a progressive narrowing of the margin of appreciation afforded to states in respect of sexual orientation issues. Nevertheless, the application of the doctrine remains somewhat inconsistent in respect of complaints brought to the Court by homosexual applicants. A key source of this inconsistency is variability in the importance that the Court attaches to the existence of a European consensus of opinion when determining the relevant margin of appreciation available to a state. The Court's recent judgment in respect of same-sex marriage

37 Ibid. at para 70.

38 Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 *Human Rights Law Review* 315 at 315–316.

39 Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 706.

demonstrated a strong reliance upon the absence of a European consensus as grounds for affording contracting states a wide margin of appreciation to exclude homosexual couples from civil marriage.[40] However, in another recent judgment the Court ignored the question of consensus altogether (and the margin of appreciation doctrine) to uphold the complaint of a homosexual woman who had been refused permission by domestic authorities to adopt a child.[41] These judgments suggest an inconsistent use of the principle of European consensus in adjudicating claims since there is arguably no greater consensus across contracting states in respect of the adoption of children by homosexuals than of same-sex marriage.[42]

40 *E.B. v France*, supra n 4.

41 Ibid. The *Alekseyev* judgment incorrectly records that the Court confirmed the state's margin of appreciation in *E.B. v France.*

42 An alternative view of the difference of approaches taken by the Court in *E.B. v France* (supra n 4) and *Schalk and Kopf v Austria* (supra n 5) is that *E.B.*, unlike *Schalk*, did not necessitate a consideration of the margin of appreciation, or an assessment of European consensus, because it concerned discrimination in respect of an existing domestic legal provision available to all individuals. The majority in *E.B.* argued that since French law allows single individuals to adopt a child (Article 343 of the Civil Code) this opens the possibility of adoption by single homosexual individuals and any discrimination on the grounds of sexual orientation in the application of this law breaches Article 14 taken in conjunction with Article 8 of the Convention (*E.B. v France*, supra n 4 at paras 94–8). Whilst I welcome the Court's judgment, I find its failure to address the competing claims offered by the applicant and the respondent state regarding the margin of appreciation and European consensus to be inconsistent with its established approach. The French government claimed that it should be afforded a margin of appreciation to differentiate between applicants on the grounds of their sexual orientation in light of a lack of consensus across contracting states in respect of adoption by homosexual parents; in contrast, the applicant argued that there was an emerging consensus across contracting states in respect of allowing adoption of children by single homosexuals (paras 60–5). Whilst I disagree with the substance of Judge Loucaides' dissenting opinion in *E.B.*—that refusal to grant an application to a homosexual adoptive parent should be well within a state's margin of appreciation—I agree with the sentiment that the Court should have considered the issue. By omitting the question of margin of appreciation, *E.B.* contrasts sharply with *Fretté v France* 2002-I; 38 EHRR 21, in which the Court confirmed the margin of appreciation of the French state to refuse an application to a homosexual man to adopt a child on the grounds that this pursued a legitimate aim (the health and rights of the child) and, in light of the absence of any European consensus on adoption of children by homosexual parents, constituted a justified difference in treatment. Whilst I disagree with the judgment in *Fretté*, the approach taken by the Court was consistent with its established process of review: it does not follow that because French law proscribes that all single individuals have a right to *apply* to adopt a child that this removes the state's margin of appreciation to differentiate between potential parents on a number of grounds (including sexual orientation). Given that states have a wide margin of appreciation to determine the suitability of adoptive parents in ensuring the best interests of a child, the Court should have directly approached in *E.B.* (as it did in *Fretté*) the question of whether the sexual orientation of the applicant fell within that margin of appreciation and what relevance European consensus plays in determining it. Had it done this, the judgment in *E.B.* would not only have achieved more jurisprudential consistency but it would also have offered a more authoritative rejection of a 'homophobic consensus'. By explicitly engaging with the issue of consensus, rather than 'side-stepping' it, the Court would have demonstrated a rejection of majority opinion in favour of upholding the fundamental value of human rights for homosexuals (see Hodson, 'A Marriage by Any Other Name? *Schalk and Kopf v Austria*' (2011) 11 *Human Rights Law Review* 170).

Alekseyev further problematises this by providing a confusing account of the role that convergence of opinion plays in the application of the margin of appreciation doctrine. On the one hand, the Court strongly rebutted the Russian government's claim that, because of a lack of consensus among contracting states about the acceptability of homosexuality, domestic authorities were better informed about what action to take to promote their own community interests. The Court stated that a wide margin of appreciation was not available to the Russian government in light of the Court's 'ample case-law reflecting a long-standing European consensus' on most matters relating to homosexuality.[43] In this sense, the Court reiterated its long-standing view that any margin of appreciation afforded to contracting states reflects its ongoing assessment of European consensus—a claim that is in keeping with the Court's established principle that its jurisprudence is the outcome of interpreting the Convention 'in light of present day conditions'.[44] To emphasise the centrality of consensus to its judgment in *Alekseyev*, the Court advanced the extremely contestable empirical claim that there

> is no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly.[45]

Leaving aside the validity of this view, it suggests that the existence of a European consensus was decisive to the Court's judgment.

On the other hand, however, the Court advanced a contrary view elsewhere in its judgment regarding the relationship between the rights of minority groups and majority opinion. The Court clearly stated that the Convention rights of individuals can never depend upon the agreement of a majority:

> The Court further reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.[46]

The Court's reasoning that Convention rights cannot rely on the existence of majority opinion is of particular importance to homosexuals who, across contracting states, continue to be denied access to the full range of Convention

43 *Alekseyev*, supra n 1 at para 83.
44 This is the approach to the Convention as a 'living instrument' that was established in *Tyrer v United Kingdom* A 26 (1978); 2 EHRR 1 at para 31.
45 Supra n 1 at para 84.
46 Ibid. at para 81.

rights by a heterosexual majority. Expanding access to particular rights within contracting states has often been done despite, rather than because, of majority opinion. Whilst the Court may distinguish domestic opinion from European opinion, it has often forced legal reform contrary to both—for instance, in *E.B. v France*, where the Court gave no weight to the question of majority opinion at the domestic or European levels.[47]

In *Alekseyev*, the Court sought to clarify its use of European consensus, as the basis for determining the margin of appreciation available to contracting states in relation to sexual orientation issues, by stating that its relevance differed in respect of particular Convention rights. In relation to Article 11, the Court stated that the question of consensus was of no relevance 'because conferring substantive rights on homosexual persons is fundamentally different from recognising their right to campaign for such rights'.[48] This distinction can be seen as problematic for homosexuals who seek universal access to Convention rights because it establishes a hierarchy in which some rights (in this case, Article 11 rights) may be granted 'in principle' while other rights demand the support of a European consensus.[49] A consequence of this is that, in respect of the other substantive rights of the Convention, a lack of European consensus can be a ground for granting a state a margin of appreciation to restrict the rights of homosexuals. The idea that a lack of European consensus can be a ground for affording a wide margin of appreciation to states to withhold access to Convention rights for homosexuals is contrary to the Court's longstanding view that difference of treatment based on sexual orientation constitutes discrimination under Article 14:

> When the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow . . . Indeed, *if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention.*[50]

Yet, in diametric opposition to this view, the sole reason accepted by the Court in *Schalk and Kopf v Austria* for granting a wide margin of appreciation

47 *E.B. v France*, supra n 4.
48 *Alekseyev*, supra n 1 at para 84.
49 The Court acknowledged its recognition of a hierarchy in human rights in *Streletz, Kessler and Krenz v Germany* 2001-II; 33 EHRR 751 at para 94, when it stated that 'the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights.'
50 Supra n 1 at para 108 (emphasis added).

to continue a difference in treatment of same-sex and opposite-sex couples in respect of civil marriage was sexual orientation.[51] And a key aspect of that judgment was the lack of a European consensus on same-sex marriage.[52]

5. Conclusion

There is no question that *Alekseyev* represents a significant advance for lesbian and gay rights. It is evidence of the Court's willingness to expand Article 11 rights to homosexuals and is a strong endorsement of their right to freedom of assembly as a basis for campaigning for recognition of their human rights. However, as I have argued above, the judgment also raises some important questions about the Court's evolution of its interpretation of the Convention in respect of homosexuality. The most optimistic view of the judgment is that the manner in which the Court addressed the issue of European consensus in respect of the margin of appreciation doctrine was a means of justifying and endorsing the widest possible expansion of Article 11 rights for homosexuals within the current social, cultural and legal context of contemporary Europe. A less optimistic view is that the Court's judgment is an attempt to stabilise and justify its inconsistent use of the margin of appreciation doctrine in order that the lack of majority support for homosexual rights can be grounds for withholding them in the future. There is no doubt that the key area of dispute in the near future will be complaints from same-sex couples who want access to the right to marry under Article 12. A central response to these complaints by contracting states will be the argument that there is no consensus within or across contracting states for recognising same-sex marriage as a human right under the Convention. If the Court continues to rely on the margin of appreciation doctrine to sanction the deprivation of rights from gay men and lesbians on the basis of a lack of consensus then it makes an 'announcement of deference, and not coherent jurisprudential principle'[53] that calls into question both the legitimacy of its methodology and the universality of the Convention that it interprets.[54]

51 *Schalk and Kopf*, supra n 5.

52 For a discussion of *Schalk and Kopf v Austria*, see Hodson, supra n 42. See also Johnson, 'Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority' (2011) 20 *Social and Legal Studies* (forthcoming).

53 Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 *International and Comparative Law Quarterly* 638 at 649.

54 Mahoney, 'Marvelous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 *Human Rights Law Journal* 1.