The Role of the European Court of Human Rights in Adjudicating LGBT Claims

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The primary purpose of this paper is to assess the role of the European Court of Human Rights (ECtHR or Court) in adjudicating claims of discrimination by members of the lesbian, gay, bisexual, and transgender (LGBT) community over the past several decades, principally in cases challenging restrictions on marriage and family life.[1] The analysis is divided into four parts: first, it explains the ECtHR's role as the judicial organ of the Council of Europe (CoE or Council) in interpreting the obligations of the signatory countries to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention), the primary international agreement guaranteeing rights of the citizens of Europe.[2] Second, it reviews recent efforts by the international community to combat discrimination against LGBT individuals. Third, it examines the current status of relationship recognition and marriage equality policies

[1] I use the conventional term "LGBT" to include lesbian, gay, bisexual, and transgender persons. However, it is more accurate in many instances to refer to gays and lesbians or, despite its negative connotations, homosexual, when discussing legal claims based on sexual orientation, rather than those based on bisexuality or transsexuality (Johnson 2013). Additionally, ECtHR rulings refer to gays and lesbians as homosexuals.

[2] The CoE grew out of a meeting in May 1948 in The Hague at the Conference of the International Committee of the Movements for European Unity. The group committed itself to enforcing human rights norms, with the ECHR as the foundation and the ECtHR as the enforcement mechanism. Membership in the CoE dramatically increased at the end of the Cold War, when Eastern European and Former Soviet Union states joined (Dalvi 2004). Today, the members of the CoE are a diverse group, ranging in level of development and size from Azerbaijan to the UK and Malta to Germany.

around the world. Last, it discusses the role of the ECtHR in ruling on claims of discrimination on the basis of sexual orientation and gender identity.

The Court and the ECHR

The forty-seven members of the CoE are required to be signatories to the Convention and to affirm their commitment to its guarantees of fundamental rights and freedoms of the people of Europe.[3] Borrowing from the principles of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on December 10, 1948, the ECHR was signed in Rome on November 4, 1950 by the then-twelve member states of the CoE; it came into force on September 3, 1953. Unlike the UN Declaration, which protects a wide array of rights, the ECHR more narrowly focuses on such civil and political rights as the right to vote; the right to a fair hearing; the right to freedom of speech, expression, thought, conscience, and religion; the right to freedom from torture or inhumane treatment; the right to life, the right to respect for private and family life; and the right to be free from discrimination in the enjoyment of the rights and freedoms guaranteed by the ECHR.

The preamble to the Convention states that the countries of Europe are "resolved, as the Governments of European Countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."

[3] The twenty-eight members of the European Union (EU) are signatories to the Convention, but the EU as an institution is not. Negotiations began in July 2010 over the accession of the EU to the Convention, which would make it the forty-eighth signatory and subject EU institutions to its provisions (see Spencer 2010; De Witte 2011). With the negotiations now complete, the final agreement is subject to approval by the EU and its individual member states. Accession will help protect members of the LGBT community from discrimination by the EU itself ("Accession of the European Union to the European Convention on Human Rights").

The contracting states of the CoE are bound to apply Convention law within their borders and, indeed, most countries equate its provisions with their own national legislation; some have even elevated it to constitutional or semi-constitutional status that supersedes national law and view the protections of the ECHR as a floor rather than a ceiling (Beeson 2011).

The ECtHR, sitting in Strasbourg, France, was created in 1959 as the judicial body of the Council.[4] There are forty-seven judges, each nominated by a member state of the CoE, but they do not sit as representatives of their states. Judges serve for nine-year non-renewable terms and typically adjudicate cases in panels of seven. In special circumstances where serious concerns about the interpretation of the ECHR are at issue, the Court sits as a Grand Chamber of seventeen judges to hear appeals from the lower chambers. In adjudicating cases, the ECtHR looks to principles of international law, including treaties and case law, as well as the Convention (Beeson 2011).

The Court may receive applications from individuals, groups, and non-governmental organizations as well as from contracting states; thus far, most applications

[4] Although their jurisdictions and powers differ, the counterpart to the ECtHR in European law is the European Court of Justice (ECJ). Sitting in Luxemburg, the ECJ was established in 1952 as the judicial body of the EU; it is authorized to assess the legality of EU measures and ensure the uniform interpretation and application of EU law. It is also empowered to decide whether member states and EU institutions are compliant with the provisions of the EU. Composed of twenty-eight judges (one from each EU member), ECJ rulings are based on the supremacy of EU law over domestic law. Cases or applications that come before the ECJ may arise from a national court, seeking clarification of a provision of EU law; these are known as preliminary rulings. Member states may also file complaints of violations of EU law by other states. ECJ rulings are binding on the EU member states, its institutions, and individuals in the EU and it may issue penalties to noncompliant states (Beeson 2011; Van De Heyning 2011). Much has been written on the relationship among national courts, the ECJ and the ECtHR (see, for example, De Witte 2011; Defies 2007). Both the ECJ and ECtHR rely on the ECHR as well as international agreements in determining standards for human rights protection; with the ECJ and the ECtHR both empowered to adjudicate cases involving EU states, conflicts occasionally arise between the two, yet more recently, they have tended to act in tandem (see Beeson 2011).

have come from individuals or groups. It first judges applications for admissibility, with inadmissible cases immediately dismissed; after determining admissibility, the Court then attempts to persuade the parties to come to an agreement.

Before proceeding to the Court, the complaining party must exhaust the remedies of the highest level of the national court, allowing it the first opportunity to interpret the Convention. The ECtHR does not sit as a court of appeal of rulings by national courts and has no authority to reverse their decisions; although its judgments are binding on the state party to the case, its rulings are not self-executing. States generally change their laws to conform to the Court's ruling, but the degree to which they do so varies according to the status of the Convention in their domestic laws (Dalvi 2004).

Combating Discrimination against the LGBT Community

In addition to judicial enforcement of the anti-discrimination principles of the ECHR and the more recent of Fundamental Human Rights of the European Union, a number of other efforts have been made to combat discrimination on the basis of sexual orientation and gender identity in Europe.

According to Paul Johnson (2013), in decriminalizing sexual activity and criminalizing hate speech as well as granting same-sex couples legal status, parts of the world -- especially Europe -- have become more hospitable to the LGBT community. However, nations in the world continue to ban same-sex relationships and sexual conduct, some even treating them as capital offenses.[5] Even in countries where members of the LGBT

[5] Homosexuality is criminalized in forty-one of the fifty-three countries of the Commonwealth of Nations (Johnson 2013, 1).

community are not subject to criminal penalties, there are numerous legal and social restrictions placed upon them.

Under the auspices of the United Nations, a group of human rights experts met in Yogyakarta, Indonesia in 2006 and drafted the *Yogyakarta Principles on Sexual Orientation, Gender Identity and Human Rights* (2006). The document was intended as a guideline for the United Nations as well as individual governments to expand human rights guarantees to all. Its preamble states, "All persons, regardless of sexual orientation or gender identity, are entitled to the full enjoyment of all human rights, [and] that the application of existing human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations and gender identities." Upon its release, Michael O'Flaherty of Ireland, a member of the UN Human Rights Committee, affirmed the group's goals, stating, "Ending violence and abuse against people because of their sexual orientation or gender identity must become a global priority for governments."

In Europe, the CoE has declared its opposition to discrimination against members of the LGBT community for over three decades. As early as 1981, the Parliamentary Assembly issued a recommendation against discrimination based on homosexuality. In March 2010, the CoE's Committee of Ministers adopted a statement against discrimination on the basis of sexual orientation and gender identity ("Discrimination on Grounds of Sexual Orientation and Gender Identity"). The Ministers recommended that member states "ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender

persons and to promote tolerance towards them" ("Recommendation CM/Rec (2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of orientation or gender identity"). One of the latest statements on eradicating discrimination in Europe was made by Thorbjorn Jagland, the Council's Secretary General and former Prime Minister of Norway as recently as May 2014. He declared himself "optimistic" that Europe was "going in the right direction on the issue of discrimination on the basis of sexual orientation." Acknowledging that "not every country is moving at the same speed," he said he believed "we are seeing generally a positive trend" ("Newsroom – Council of Europe").

Relationship Recognition and Marriage Equality

By 2014, a number of countries -- chiefly in northern Europe -- had taken seriously the enjoinder not to discriminate on the basis of sexual orientation and gender identity. Denmark was the first to legalize same-sex relationships by enacting the Registered Partnership Act of 1989. Norway accorded rights to same-sex couples in 1993, followed by Sweden in 1994, Iceland in 1996, and Finland in 2001

In 1998, the Netherlands had created a system of registered partnerships for both same-sex and different-sex couples. A year later, France followed suit with a Pacte Civil de Solidarite (PaCS) which also recognized permanent relationships between couples without regard to sexual orientation. Soon after, a Belgian partnership registration law took effect in 2000, followed by Germany's Life Partnership Act of 2001. Such laws extended legal protection to same-sex relationships, but stopped short of marriage (Lind 2008, 289).

Over the next several years, partnership recognition policies became more commonplace

in Europe. In 2003, Austria created a status called unregistered cohabitation that gave cohabiting same-sex couples the same rights as unmarried cohabiting different-sex partners; in 2010, it enacted the Registered Partnership Act to extend some of the aspects of civil marriage to same-sex couples. Also in 2003, Croatia began to permit same-sex couples who had been together for at least three years to be accorded equal treatment with different-sex cohabitating couples. A year later, the United Kingdom passed its Civil Partnerships Act and in 2005, Switzerland, Andorra, Luxembourg, and New Zealand all created partnership registration schemes, including civil unions. Slovenia and the Czech Republic allowed same-sex couples to enter into civil unions in 2006. As in France, Hungary began by assigning all unmarried couples a limited legal status in 1996, creating the status of civil partnership in 2007. The pattern continued as Ireland in 2010 and Lichtenstein in 2011 moved toward greater expansion of rights for same-sex couples, allowing them to enter into arrangements that mirrored some of the attributes of civil marriage (Lind 2008). By April 2014, when the Maltese Parliament enacted a law recognizing the legality of civil unions for same-sex couples, twenty-two CoE members recognized forms of same-sex relationships, but civil marriage has still remained beyond their grasp ("Malta recognizes same-sex civil partnerships").

Pointing to these advances, Craig Lind (2008, 285) argues that compared to the rest of the world, "Europe has [had] the longest formal history of same-sex partnership recognition, and has (arguably) made more thorough progress in that respect." In addition to recognizing various forms of same-sex relationships, the European states have also led the way in establishing full marriage equality. The Netherlands became the first country in the world to accord marital rights to same-sex couples in 2001 (Waaldijk 2001; 2000).

Two years later, Belgium followed the lead of its neighbor and legalized same-same marriage. Over the next decade, Spain and Canada granted marriage equality in 2005, with South Africa following in 2006. Norway and Sweden began to recognize same-sex marriages in 2009, and Portugal, Iceland, and Argentina followed suit in 2010.[6] Thus, by June 2011, seven CoE members had legalized same-sex marriage (Cooper 2011, 1747).

Marriage equality continued to gain acceptance in selected parts of the world. Denmark permitted same-sex civil marriage in 2012; France, Uruguay, New Zealand, England, and Wales legalized it in 2013. Brazil and Scotland adopted marriage equality in 2014 and, most recently, on June 18, 2014, the Luxembourg Parliament overwhelmingly voted in favor of permitting same-sex couples to marry beginning in 2015. Last, the Republic of Ireland is scheduled to hold a referendum on same-sex marriage in 2015.[7] In the United States and Mexico, the right to marry or recognize same-sex marriage varies by geographic region (*Freedom to Marry* 2014; "Timeline of Gay and Lesbian Marriage, Partnership or Unions Worldwide 2011").[8]

Today, seventeen countries permit same-sex marriage (*Freedom to Marry* 2014). However, despite this progress, over 90 percent of the nations in the world today (almost two hundred countries) still limit marriage to different-sex couples (Foster 2010). Some ban it entirely; others offer degrees of marital relationships, regulating them with a

[6] Following South Africa, Argentina was the second nation in the developing world to allow same-sex marriage (Encarnacion 2013-1014).

[7] In 2011, the Brazilian Supreme Court had required the government to grant legal status to same-sex partnerships.

[8] In 2009, Mexico City's Legislative Assembly passed a marriage equality bill that was limited to Mexico City; the Mexico Supreme Court subsequently ruled that states must recognize marriages performed in other regions in the country.

patchwork quilt of laws and policies. Germany, for example, offers relatively broad protection to same-sex relationships, while Austria offers more limited rights; Israel does not allow same-sex marriages to be performed, but recognizes valid same-sex marriages performed elsewhere.

Nations extending relationship recognition, including marriage, to same-sex couples did so primarily through parliamentary action.[9] As Lind (2008, 289) notes, "European legal changes – although influenced by human rights norms – have been waged more powerfully (and successfully) in political and not legal forums." That parliaments have played the predominant role in furthering partnership recognition policies is not surprising given the more constrained role of the judicial system in most of the countries of Europe, stemming from the tradition of the civil law method of decision-making.[10] He also suggests that countries with civil law traditions, which predominate in Europe, are more likely to compromise on divisive issues, such as marriage and relationship policies and thus European national legislatures are more likely to reach an accord over same-sex relationships and marriage equality.

[9] The Spanish and Portuguese legislatures sent the marriage equality laws to the courts for final approval.

[10] Although it is customary to categorize nations as having either a civil law or common law tradition, these distinctions are blurring. Nevertheless, social reform litigation is still more likely to occur in common law nations with stronger traditions of judicial review and judicial policymaking (see Friesen 1996; Hansen 2004). Australia and New Zealand are both anomalies. Both common law countries, neither have a tradition of judicial activism and their courts have not played a role in the marriage equality debate. In Australia, same-sex marriage activists have not turned to the courts in their quest for equality. Bernstein and Naples (2010) believe that the absence of constitutional rights guarantees in a Bill of Rights and a weak tradition of judicial policymaking require social movements to explore alternative approaches. Activists therefore operate within the European model of parliamentary system and thus far have not succeeded in persuading the ruling party to accept marriage equality. Because New Zealand does not have a federal constitution, civil rights are protected by the legislature in the 1990 Bill of Rights Act and the Human Rights Act of 1993 that prohibits discrimination on the basis of sexual orientation (Mazzochi 2011).

As the experiences of the European countries indicate, litigation has not been a very effective vehicle for obtaining marriage equality; most states allowing same-sex marriage have adopted it through traditional political means of electoral and legislative politics, rather than in the judicial arena.[11] However, because of the widespread refusal of most of the parliaments of the countries in the CoE to accept marriage equality, the LGBT community will likely be compelled to seek judicial intervention by the ECtHR when parliaments will not act.

Gender Identity and Sexual Orientation Claims in the ECtHR[12]

A survey of LGBT rulings in the ECtHR shows that it has issued forty-two final rulings in LGBT cases from 1981 to the present.[13] Sixteen arose from cases involving claims against the UK, followed by Austria with eleven, France with four, and Portugal with two; all others -- Cyprus, Finland, Germany, Greece, Ireland, Lithuania, Poland, Spain, Switzerland -- had one case each.[14]

Twenty-nine of the forty-two rulings (62 percent) revolved around claims of discrimination based on sexual orientation.[15] Of the twenty-nine rulings, the largest

[11] In Portugal and Spain, the legislature sent the marriage equality laws to the courts for final approval.

[12] I want to thank Timothy Hazen and Kimberly Loontjer for their efforts in collecting these data.

[13] There were a total of sixty rulings in LGBT cases during this time, but only forty-two involved final judgments.

[14] Applications to the ECtHR have steadily increased over time, as have its rulings; in 2011, it issued 1,511 judgments. It dismisses ninety percent of the applications that come before it (Johnson 2013, 14).

[15] Some applicants raised both types of claim; following Johnson's (2013) example, I distinguish between claims based on sexual orientation and claims based on gender identity. The applicants who raised both contended that the state's refusal to recognize their post-operative gender status prevented them from marrying because of the restriction on same-sex marriage. I coded such cases as gender identity claims because the applicants did not challenge the marriage restriction per se, but their inability to marry because the state rejected their claimed gender identity.

number (eight) addressed challenges to laws that created distinctions in the legal age of consent to engage in homosexual conduct. The next highest number (six) contested laws criminalizing private adult homosexual conduct; six rulings related to restrictions on adoption and child support; four involved claims about exclusion from the military; three complained of restrictive relationship recognition laws; one sought to legalize same-sex marriage; and one complained of a denial of benefits to same-sex couples. Of the remaining thirteen rulings dealing with applicants' claims of discrimination on the basis of gender identity, most (eight) arose from challenges to laws restricting the recognition of the individual's post-operative transgender status, two related to constraints on adoption and child custody, and two addressed denials of access to transsexual surgical procedures.[16]

The Court found in the applicant's favor in thirty-one of the forty-two rulings, for an overall success rate of 74 percent. Applicants raising claims based on sexual orientation discrimination prevailed in twenty-four of the twenty-nine sexual orientation discrimination rulings for an even higher success rate of 83 percent. The high success rate in these cases is explained by the Court's rulings in challenges to laws criminalizing homosexual conduct, discriminating in the age of consent to engage in homosexual acts, and excluding gays and lesbians from the military; it decided only two of these types of cases in the state's favor. The remaining cases in which the state prevailed were two adoption cases and one same-sex marriage case.

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[16] Most gender identity claims in the European Court of Justice arise "from those who have 'completed' gender reassignment . . . and ask to be treated in the same way as other persons sharing the gender to which he or she has transitioned" (Bell 2012, 135).

Applicants claiming gender identity discrimination prevailed in seven of the thirteen gender identity rulings, for a success rate of 54 percent. Four of these losses were in cases in which the Court refused to rule that states must recognize the post-operative status of a transsexual; the other two were in adoption and custody cases. The Court had adopted its new approach to transsexuality in *Goodwin v. UK* (2002) and, since then, has viewed transsexual persons by the gender identity they have adopted as a result of their psychological or physical transformation (Spencer 2010, 174).

In deciding sexual orientation and gender identity claims, the Court weighs the diversity among the signatory countries on issues of sexuality against its duty to enforce Convention rights (see Murray 2010). John Murray, Chief Justice of Ireland and member of the ECJ, maintains that despite the sweeping guarantees of fundamental rights in the Convention, the ECtHR has often been unwilling to override the social and legal norms of the contracting states (Murray 2010; see Van de Heyning 2011). David Oppenheimer, Alvaro Oliveira, and Aaron Blumenthal (2014, 211) describe the Court as "walking on a tight rope, balancing between the need to apply the European Convention on Human Rights' equal treatment provisions to homosexuals with the need to avoid the political third rail of full same-sex marriage legalization."

The Court's approach in such cases stems from its belief that the signatory states are entitled to "a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law" (*Frette v. France* 2002, 40). The basis for its judgment about the proper width of the margin arises in part from its view of "the existence or non-existence of common ground between the laws of the Contracting States" (*Frette v. France* 2002, 40). In deciding how much

latitude to give to the state, the Court weighs several factors: the nature of the right and its importance, the nature of the activities limited by the denial of the right, and the nature of the goal pursued by the limitation on the right at issue. In cases of conflicting moral principles, the Court commonly accords a wider margin of appreciation to the state, seeking to refrain from imposing its own values in determining the legality of the challenged law or policy (Murray 2010). However, by according a wider margin of appreciation to the state, the ECtHR "often dilutes the special protection granted to sex, race or religion" in its rulings (Beeson 2012, 171).

Critics, such as Paul Johnson (2013, 71), charge that the Court often simply invokes the margin of appreciation doctrine as a mechanism for obfuscating principles of law and failing to explain its reasoning in reaching its decision. According to him, the Court's reliance on the margin of appreciation doctrine has been especially problematic in cases involving rights of the LGBT community. He believes "the Commission granted contracting states a wide margin of error until the early 1980s because it regarded homosexuality as antithetical to social morality and public health (see Van de Heyning 2011).

The breakthrough for LGBT rights came in *Dudgeon v. UK* (1981), the first successful challenge to a law criminalizing homosexual conduct.[17] The Court explained that states retained the ability to regulate homosexuality, with the margin of error to which they were entitled depending on the specific sexual activity in question. In this

[17] Consensual sex between two men over 21 became legal in England and Wales in 1967. *Dudgeon* later extended that to all consensual homosexual sexual relations (Stiener 2011).

case, the Court refused to allow a wider margin of appreciation and found the state's interest in morality insufficient to justify the ban against private sexual relations between two consenting adults.

Today the Court generally accords a narrower margin of appreciation to states in claims based on discrimination by members of classes whose rights are guaranteed by the Convention, including sexual orientation. In some cases, however, it has found that the different treatment is justified, especially when balanced against other state interests such as protecting children and the family (Spencer 2010).[18]

Intended to provide greater flexibility to the Court in decision-making, the margin of appreciation doctrine has also been criticized because it allows too much malleability in decision-making (Murray 2010). Johnson (2013) comments on the Court's arbitrariness in applying the margin of appreciation principle in cases brought by members of the LGBT community, comparing the inconsistent results in *Frette v. France* (2002) and *E.B. v. France* (2008) -- both adoption cases -- in which the Court reached opposite conclusions. He charges that it also adopted contradictory views on the margin afforded the state in *Kozak v. Poland* (2010) and *Schalk and Kopf v. Austria* (2010), two relationship recognition cases, the latter specifically about same-sex marriage. In *Kozak*, the Court declared that Poland's "de facto marital cohabitation," which excluded same-sex couples, violated the Convention because it was unnecessary to protect the traditional

[18] This approach is similar to the common law courts of the United States, Canada, and South Africa, which apply a higher degree of scrutiny to laws affecting protected classes and a lower degree of scrutiny to laws affecting social or economic policies. Thus, plaintiffs challenging laws on the grounds of discrimination because of race, sex, or national origin are more likely to prevail than are other types of plaintiffs, in large part because of the Court's is more skeptical of the constitutionality of these types of laws.

family. In *Schalk*, however, the Court refused to require the state to extend civil marriage to same-sex couples (Cooper 2011).

Applicants advocating of LGBT rights, especially marriage equality, must also overcome the hurdle presented by the consensus doctrine, which, together with the margin of appreciation doctrine, determines the extent to which the Court defers to what it perceives as the prevailing views of the CoE member states.

Scholars have strongly criticized the Court for its arbitrary and capricious reliance on the consensus doctrine. Samantha Beeson (2011, 107) contends that "regrettably . . . the Court has never been very clear about the notion of 'consensus' and about the exact circumstances in which the margin of appreciation applies." She characterizes the Court as "extremely creative" about interpreting the Convention after deciding there is a consensus, treating it as a "living instrument"; however, it has also been "extremely inventive" in the absence of a consensus.

Murray (2010, 1412) also objects to the "elasticity and indeterminacy of the 'consensus' doctrine." In his view, it allows the Court to further its own policy agenda based on the policy preferences of the judges. He is most critical of the Court for failing to maintain a consistent posture toward consensus. On the one hand, in cases where it perceives an absence of consensus among the contracting parties, it affords the state a wide margin of appreciation; in other cases, however, in the absence of a consensus, the Court has narrowed the margin of appreciation and expanded the rights of individuals.

He believes that because of the influx of more divergent countries in the CoE, the consensus doctrine no longer acts as a restraint on the Court because it can justify its ruling by

simply pointing to changing values in the broader international community. He cites *Goodwin* as an example of this type of reasoning. In *Goodwin*, the Court held that by refusing to allow Christine Goodwin to marry a man, the state violated her rights, ignoring the absence of a consensus on transsexuality at that time among the contracting countries. Goodwin had transitioned from a male to female and presented herself as a female, but the government continued to recognize her as a male. She wished to change her birth certificate to female so that she could marry a man (the sex she had been before her gender reassignment).

The *Goodwin* Court cited Australian and New Zealand policies that accord legal recognition to a transsexual person's post-operative gender as well as the principles in the more recent European Charter, despite its validity only in EU member states (Murray 2010; see Defeis 2007).[19] Because of ECJ rulings and other international legal principles, the ECtHR held that the UK was not entitled to a "wide margin of appreciation" simply because of an absence of consensus among the CoE countries (Beeson 2011). Finally, Murray contends that in ruling in favor of *Goodwin*, the Court disregarded its earlier rulings upholding the state in *Rees v. UK* (1986) and *Cossey v. UK* (1990).

Johnson (2013, 77-78) also chides the Court for applying the doctrine inconsistently, noting that "a lack of consensus among member states will usually be the basis for maintaining a state's margin, whereas the existence of consensus may provide the foundation for a dynamic interpretation of the Convention in order to develop a

[19] Article 9 of the Charter of Fundamental Rights of the European Union, was announced at the Nice Summit in 2000 and entered into force on December 1, 2009. It provides "The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." Intended to underscore rights guaranteed in the ECHR, the Charter may have a political impact, but does not have the force of law. Unlike the ECHR, the Charter explicitly forbids discrimination on the basis of sexual orientation; however, it is not legally binding on EU members (Defeis 2007).

right." He argues that in LGBT cases, the Court often merely "legitimizes a particular moral understanding of homosexuality" (Graupner 2005).

In seeking to expand their rights, LGBT applicants have primarily relied on Article 8 (either alone or in conjunction with Article 14) and Article 12. They have been most successful when citing Article 8 and, not surprisingly, have relied on this article most often, especially since the 1990s (Johnson 2013, 93-94; see Cooper 2011; Stiener 2011; Graupner 2005).[20] The Court has broadly interpreted the phrase "private and family life" in Article 8 to include human relationships, bodily integrity, private information, and personal autonomy. However, although it has interpreted Article 8 to encompass LGBT rights in housing, employment, adoption, and sexual relationships, it has been unwilling to expand the definition of "family" to require the state to accord legal recognition to same-sex relationships. Ironically, the Court's understanding of Europe's increasing tolerance toward transsexuality played a major role in deciding in Goodwin's favor, but it has been unwilling to extend this reasoning to same-sex marriage (Graupner 2012).

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[20] Article 8 provides "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 12 provides "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

Article 14 provides "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Karner v. Austria (2003) and *Schalk* (2010) demonstrate the limits of the Court's willingness to expand the definition of family in Article 12 to include same-sex relationships.[21] In *Karner*, the applicant challenged Austrian law that restricted life companions to different-sex couples only, granting them a legal right to their jointly held property upon the death of one. The Court held that the state could not lawfully deny the survivor of a same-sex couple the benefits accorded to a different-sex life companion because, despite its legitimate interest in protecting the traditional family, it had not demonstrated the necessity of restricting life companionships to different-sex couples.

In *Schalk*, the applicants challenged the state's refusal to allow them to marry. The Court held that the definition of "family" within Article 8 encompassed both same-sex and different-sex co-habiting couples and acknowledged a growing consensus among European states toward recognizing same-sex relationships. However, because this view was not shared by a majority of the contracting states, the Court ruled that Article 12 did not compel Austria to permit w same-sex marriage. It declared that because the Convention is silent on the matter of marriage equality, it would base its ruling on the intention of its framers in 1950, the date it was adopted. Article 12, it noted, is the only article in the Convention to specify men and women, rather than the more common everyone or no one, and it believed that such wording must be viewed as deliberate. However, it cryptically added that Article 12 is not restricted to different-sex couples "in

[21] In *E.B. v. France* (2008), the ECtHR held that under Article 8, a member state could not deny a single woman the right to adopt a child because of her sexual orientation. Moreover, in *P.B. and J.S. v. Austria* (2010), the Court interpreted Article 8 to rule that states were not required to provide non-married couples the same access to social security benefits as married couples, but if it extended benefits to non-married couples, it could not exclude same-sex couples.

all circumstances." Because of its conflicting message about the family, Sarah Cooper (2011, 1748) refers to *Schalk* as "an oxymoronic decision" (see Hodson 2011).[22]

Oppenheimer, Oliveira, and Blumenthal (2014) suggest that the Court may have hesitated to rule in favor of the couple because it would have met resistance from CoE members such as Russia and Turkey that strongly oppose marriage equality or Lithuania, Latvia, and Poland that have placed constitutional limits on it. They speculate that a ruling that imposed marriage equality might have caused these countries to abandon the CoE.

In construing Article 8 (together with Article 14 at times) to require equal rights for single gays and lesbians as well as same-sex couples in some areas, the Court has declined to interpret Article 12 to require marriage equality or to oblige member states to recognize same-sex marriages performed elsewhere.[23] The applicants in *Schalk* had argued that the Court should base its ruling on the evidence of the societal changes and growing acceptance of same-sex marriage among the signatory nations. Acknowledging the truth behind their claim, the Court nevertheless refrained from extending marriage

[22] The European Charter omits references to men and women.

[23] The Convention is not alone in refusing to view marriage equality as a protected right. Although the family is almost universally revered around the globe and is protected by numerous international agreements, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, none of these conventions have been interpreted to require signatories to allow same-sex couples to marry (Wardle 2013). In the United States, the United States Supreme Court has declared that individuals have a fundamental right to marry, but it has not held that this right extends to same sex couples. A number of recent lower federal court decisions have departed from this position and found that gays and lesbians have a fundamental right to marry a person of the same sex.

equality to the countries of the CoE, citing the lack of a consensus on the legality of same-sex marriage among the European contracting nations.[24]

Article 14 subsumes the substantive freedoms and rights embodied in the Convention and has no independent force. In interpreting Article 14, the Court commonly requires the state to offer an "objective and reasonable justification" for differences in the law; however, it has also declared that if the differential treatment is based on sexual orientation or gender identity alone, the state must show that the different treatment is necessary (Stone 2003).

Conclusion

The study has shown that the ECtHR is committed to removing many of the vestiges of discrimination against members of the LGBT community, yet has been unwilling to go as far as declaring marriage equality a fundamental right under the ECHR. The Court has ruled in favor of same-sex applicants seeking recognition of quasi-marital arrangements, such as civil unions and life partnerships or companions, but has drawn the line at marriage. Because of the diversity among CoE members and the variance among their views on marriage equality, the Court has maintained an uneasy balance between guaranteeing human rights and deferring to states' views of the illegitimacy of same-sex marriage. Although it has upheld the applicants' claims of discrimination in a number of areas, it continues to defer to the views of the contracting states of the CoE that oppose same-sex marriage. This has resulted in a "chicken or egg"

[24] At the time of the *Schalk* ruling, only six of the forty-seven signatory states of the CoE permitted same-sex marriage (Bribosia**,** Rorive, and Van den Eynde 2014, 18).

problem, with the Court unwilling to impose marriage equality because it perceives an absence of a consensus in favor of it among the majority of CoE member states. However, by waiting for such a consensus to emerge, the Court is abdicating its duty to enforce the human rights guarantees of the Convention.

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