Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities

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Abstract

In 2012, the European Court of Human Rights held, for the first time, that the discriminatory treatment of an individual on the grounds of his sexual orientation amounted to a violation of Article 3, alone and in conjunction with Article 14, of the European Convention on Human Rights. This judgment is highly significant given that individuals in Europe have been arguing since 1959 that forms of ill-treatment based on sexual orientation amount to a violation of Article 3 of the Convention. In this article we provide a critical analysis of the evolution of the Court's Article 3 jurisprudence in order to assess the ways in which this has developed the protection of sexual minorities in Europe. We identify major gaps in this protection, most notably in respect of asylum, and argue that the Court's Article 3 jurisprudence should be further evolved to address these. Using the example of same-sex marriage, we conclude with a consideration of how sexual minorities might better and more creatively use Article 3 in the future to address discrimination against them.

Keywords: Asylum, European Convention on Human Rights, Inhuman and degrading treatment, LGBT, Same-sex marriage, Sexual orientation discrimination

Introduction

This article considers the jurisprudence of the European Court of Human Rights (hereinafter "the Court") in respect of cases relating to sexual orientation discrimination that have involved Article 3 of the European Convention on Human Rights (hereinafter "the Convention").[1] Article 3 of the Convention, which was designed by its drafters to stand for "decency and humanity and for civilisation",[2] provides the absolute guarantee that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". Given the scope of this guarantee, it would be reasonable to assume that Article 3 would have hitherto been a key provision for addressing the wide spectrum of ill-treatment to which individuals have been subjected because of their sexual orientation. However, it is striking that, since the Convention entered into force in 1953, Article 3 has rarely been utilized to address sexual orientation discrimination. Moreover, it was not until 2012 that a complaint brought under Article 3 about sexual orientation discrimination succeeded in the Court.

The principal aims of this article are to provide a critical analysis of the evolution of the Court's Article 3 jurisprudence in order to assess the ways in which this has developed the protection of sexual minorities in Europe and, moreover, to explore the ways in which Article 3 might be better utilized in the future to further enhance such protection. We consider that a more systematic and creative use of Article 3, by both applicants and

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS No 005.

[2] Mr Cocks, Council of Europe, First Session of the Consultative Assembly, Eighteenth Sitting (8 September 1949), in *Reports, Part IV, Sittings 16 to 18*, 1296.

the Court, to address sexual orientation discrimination would be desirable for the following three reasons.

First, Article 3 can address both the existence of homophobic relations in contemporary societies and their impact upon individuals in a way that is distinctly different to the other substantive provisions of the Convention. This is because Article 3 does not specify types of treatment that are prohibited or contain exceptions allowing ill-treatment under particular circumstances. Rather, the open-ended wording of Article 3 establishes that, regardless of the nature of the actions perpetrated against individuals and the circumstances under which they take place, any treatment or punishment that is "inhuman" or "degrading" may amount to a violation of the Convention. This means that Article 3 provides a method to condemn, in absolute and unqualified terms, a wide range of discriminatory social practices directed at sexual minorities.

Secondly, the applicability and scope of Article 3 is not circumscribed in respect of particular areas of social life. Article 3 does not require any treatment complained of by an individual to fall within a particular ambit such as, as is the case with Article 8 of the Convention, "private and family life". Article 3, therefore, has the capacity to capture a wide range of physical and psychological suffering experienced by sexual minorities in European societies that might not otherwise fall within the scope of the other substantive provisions of the Convention. Consequently, Article 3 provides a means to expand Convention jurisprudence to more effectively address discrimination against sexual minorities.

Thirdly, and in this vein, Article 3 provides the means to develop Convention jurisprudence in ways that more holistically and comprehensively address sexual orientation discrimination in contemporary societies. The scope of Article 3 provides a framework to enable a more sociological understanding of and response to the variety of ways in which discrimination against sexual minorities is socially organized and experienced. Article 3 can, for example, be used as a framework for conceptualizing how certain forms of discrimination on the grounds of sexual orientation diminishes the social status of sexual minorities, as both individuals and as a group, in ways that might incubate forms of ill-treatment against them.

We begin the article by considering why Article 3 has not previously been more consistently invoked in complaints to the Court about sexual orientation discrimination. To assess the scope for making such complaints, we go on to examine the Court's general approach to interpreting Article 3 and, in particular, its notion that any ill-treatment must attain a minimum level of severity to fall within this aspect of the Convention. We then provide a critical account of the Court's extant jurisprudence on Article 3 and sexual orientation discrimination and consider the evolution of this jurisprudence up to the point that the Court held for the first time, in 2012, that a form of ill-treatment on the grounds of sexual orientation amounted to a violation of Article 3, alone and in conjunction with Article 14 of the Convention.[3] We go on to analyse recent developments in the Court's jurisprudence since 2012 which have, on the one hand, increased the positive obligations on national authorities to protect sexual

[3] *X v Turkey* App no 24626/09 (ECtHR, 9 October 2012).

minorities from discrimination in European states[4] but, on the other hand, have maintained an absence of protection for sexual minority asylum seekers attempting to resist deportation to states outside the Council of Europe (hereinafter "the CoE") that criminalize same-sex sexual acts. Finally, using discrimination in respect of marriage as an example, we demonstrate how Article 3 might be better and more creatively used in the future to expand the protection of sexual minorities in European societies.

Article 3 and sexual orientation discrimination: a historical perspective

In the six decades that gay men and lesbians have been making complaints about sexual orientation discrimination to the Court and the former European Commission of Human Rights (hereinafter "the Commission") Article 3 has been invoked in only 55 cases (which includes, as we explain below, a large number of repetitive cases brought under uncommon circumstances). From a socio-legal perspective, the relative scarcity of Article 3 complaints relating to sexual orientation discrimination raises a number of questions about the dynamics which underpin its use by both applicants and the Court. To understand why Article 3 has not figured more prominently in complaints about sexual orientation discrimination it is useful to consider the evolution of its use over time.

[4] *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015).

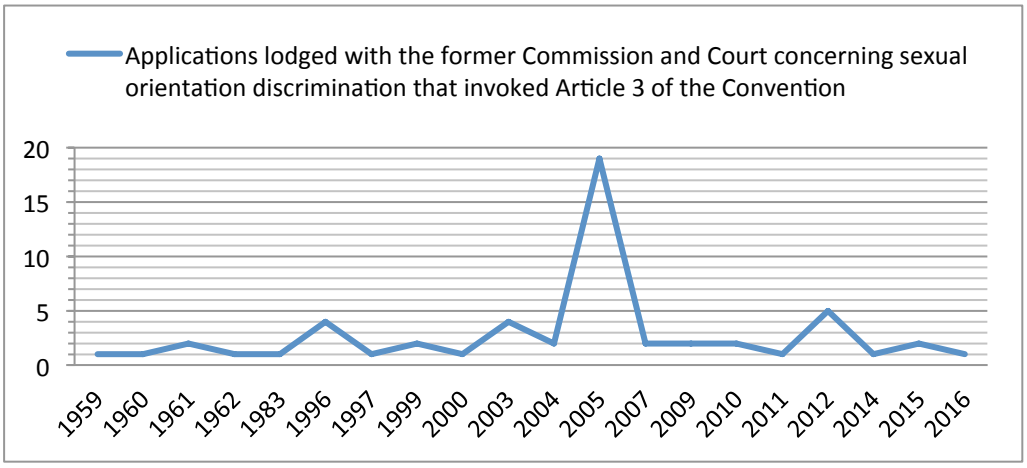

Figure 1

Figure 1 illustrates the temporal evolution of the use of Article 3 in complaints relating to sexual orientation discrimination since 1959. These data reveal a distinct trend: in the earliest years that the Convention was in force, Article 3 was invoked in five cases between 1959 and 1962 (more than one per year) and then fell out of use completely for nearly two decades between 1963 and 1982. Moreover, between 1983 and 1995 only one applicant claimed to have been exposed to ill-treatment on the grounds of sexual orientation that was in violation of Article 3. From 1996 onwards, Article 3 has been invoked in complaints about sexual orientation discrimination with greater frequency and, in 2005 and 2012, reached the peak of being invoked in 19 and five complaints respectively.

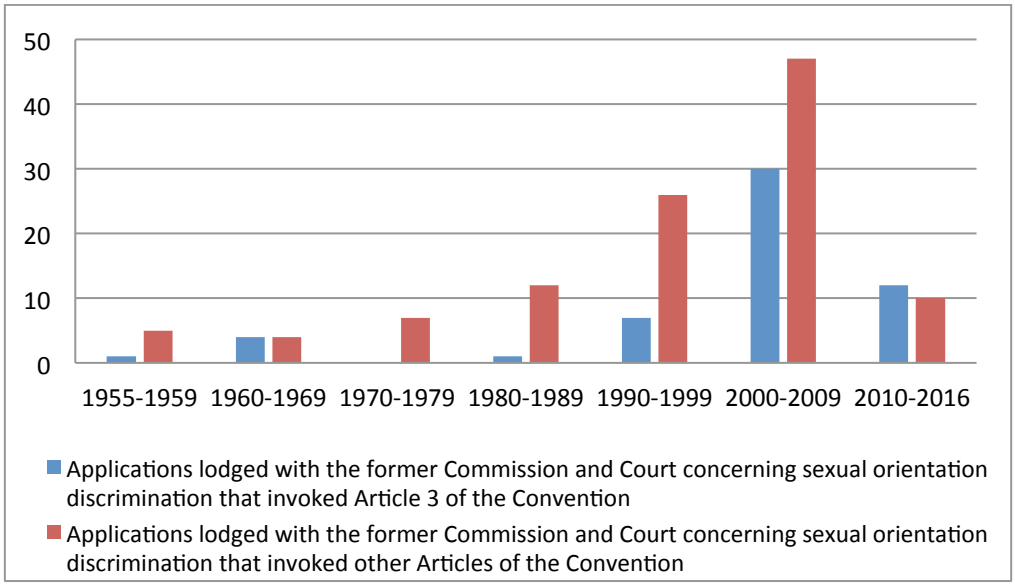

Figure 2

As shown in Figure 2, the limited use of Article 3 in sexual orientation discrimination complaints is in marked contrast to the general expansion of complaints about such discrimination using other substantive provisions of the Convention. In the two decades, between 1980 and 2000, when the private life limb of Article 8 of the Convention became the "powerhouse" for attempting to address a wide range of issues relating to sexual orientation discrimination[5] very few applicants sought to frame their experience of discrimination as a form of ill-treatment within the meaning of Article 3.

The lack of "take-up" of Article 3 in applications concerning sexual orientation discrimination might be the result of decisions taken by the former Commission in respect of the earliest applications of this type that invoked Article 3. The five applications, shown in Figure 1, that were lodged with the Commission between 1959 and 1962, which invoked Article 3 in complaints against Austria or Germany about the

[5] For a discussion, see: Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013) 93-120.

criminalization of male homosexual acts, were all declared inadmissible.[6] It is reasonable to assume that a combination of the outright failure of the use of Article 3 in these cases, as well as the subsequent gradual recognition that issues relating to sexual orientation belonged to the sphere of "private life" covered by Article 8,[7] led applicants and their legal professionals to cease regarding Article 3 as a viable option for addressing discrimination based on sexual orientation. For example, although the applicant in *Dudgeon v the United Kingdom* had been subjected to insulting[8] and humiliating[9] remarks about his sexual orientation when questioned by the police, which had resulted in "psychological injury and harm",[10] Article 3 was not invoked in the application. Similarly, although the applicant in *Alekseyev v Russia*[11] had been subjected to various forms of verbal abuse by public authorities (including the mayor of Moscow, who reportedly referred to homosexuality as "satanic") and arrest,[12] no use was made of Article 3.

As Figures 1 and 2 show, there has been an upward trend in the use of Article 3 in sexual orientation discrimination complaints since the middle of the 1990s. However,

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[6] See: *A.S. v the Federal Republic of Germany* App no 530/59 (Commission decision, 04 January 1960); *H.S. v the Federal Republic of Germany* App no 704/60 (Commission decision, 04 August 1960); *X v the Federal Republic of Germany* App no 986/61 (Commission decision, 07 May 1962); *G.W. v the Federal Republic of Germany* App no 1307/61 (Commission decision, 04 October 1962); *X v Austria* App no 1593/62 (Commission decision, 04 July 1964).

[7] See, for example, *X. v the Federal Republic of Germany* (no. 5935/72, Commission decision, 30 September 1975, section "The Law") in which the former Commission held that a "person's sexual life is undoubtedly part of his private life of which it constitutes an important aspect". For a discussion, see: Leslie J. Moran, *The Homosexual(ity) of Law*, (Routledge 1996); Paul Johnson, "'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights" [2010] 10(1) Human Rights Law Review 67.

[8] *Dudgeon v the United Kingdom* App no 7525/76 (Commission report, 13 March 1980) para 44.

[9] *Dudgeon v the United Kingdom* (1978) 11 DR 117, 124.

[10] ibid, 120.

[11] *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010).

[12] BBC News, "Moscow Bans "Satanic" Gay Parade", 29 January 2007, <http://news.bbc.co.uk/1/hi/world/europe/6310883.stm > accessed 13 June 2017.

the peak reached in 2005 is the outcome of uncommon circumstances and can be considered as an outlier that has not significantly affected the use of Article 3 in complaints related to sexual orientation discrimination. This peak is the result of the Court's acknowledgment, in *Smith and Grady v the United Kingdom*,[13] that the investigation and discharge of gay and lesbian personnel from the armed forces on the grounds of their sexual orientation amounted to a violation of Article 8 of the Convention. As a consequence of this, a significant number of British gay men and lesbians discharged from the armed forces lodged applications with the Court and, in 20 of the 25 applications lodged between 2003 and 2005, the applicants unsuccessfully invoked Article 3 in ways similar to that in *Smith and Grady*.[14] If these applications are discounted, the upward trend is due, in large part, to an increase in applications lodged by asylum seekers in CoE states who complain that, if returned to their country of origin (outside of the CoE), they would be subjected to ill-treatment in violation of Article 3 because of their sexual orientation. Between 1996 and 2016, 14 of the 29 applications concerning sexual orientation discrimination that invoked Article 3 (which is the total number, discounting those applications lodged between 2003 and 2005 concerning the British armed forces) were lodged by asylum seekers. Moreover, the use of Article 3 in applications addressing sexual orientation discrimination that were lodged with the Court in both 2015 and 2016 was limited exclusively to issues raised by foreign nationals. Therefore, it remains the case that Article 3 has rarely been used in complaints by nationals of CoE states complaining about "domestic" treatment that they regard to be discrimination on the grounds of sexual orientation.

[13] *Smith and Grady v the United Kingdom* ECHR 1999-VI.

[14] For a discussion of these cases, see: Paul Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford University Press 2016) 58-64.

The limited use of Article 3 in sexual orientation discrimination complaints shows that there has been very little interest among applicants in attempting to utilize this provision in innovative ways to evolve Convention jurisprudence. This is in marked contrast to the use of other provisions of the Convention where there is an on-going attempt by applicants to redefine and reshape the meaning and scope of protection. For example, Article 8, in conjunction with Article 14, remains the central focus of sexual orientation discrimination complaints and the concept of "private life" is used as a malleable apparatus to deal with a wide range of issues touching upon the lives of sexual minorities. Similarly, although to a lesser extent, there have been attempts to use Article 12 in creative ways to address forms of discrimination against same-sex couples. However, no such creative use has been made of Article 3 by applicants or by the Court's judges during the adjudication of complaints about sexual orientation discrimination. The reason for this is either that the majority of applicants who have experienced sexual orientation discrimination are convinced that such discrimination is neither inhuman or degrading or, as seems more likely to be the case, applicants continue to tend to frame their complaints within the parameters set by Convention jurisprudence in order to maximise their chances of success under other Articles.

The Court's approach to Article 3

Before we go on to explore the Court's Article 3 jurisprudence in respect of sexual orientation discrimination it is worth examining the Court's general approach to considering complaints brought under this aspect of the Convention. The Court has determined that Article 3 secures the absolute and unqualified right not to be subjected

to torture or to inhuman or degrading treatment or punishment "irrespective of the victim's conduct"[15] and that there can be no derogation from its provisions even in "the event of a public emergency threatening the life of the nation".[16] In one of the earliest attempts to define and delimit the textual meaning of the terms "torture" and "inhuman or degrading treatment" contained in Article 3, the Commission stated,

> [i]t is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.[17]

Torture, therefore, must generally be deliberate[18] and purposive[19] and, even if not planned in detail, "the element of *purpose* suggests that the minimum degree of fault required for torture should lie somewhere between recklessness and premeditation".[20] Treatment may be considered inhuman if it, inter alia, is "premeditated", "applied for

[15] *Ireland v the United Kingdom* (1978) Series A, no 25, para 163.
[16] ibid.
[17] *The Greek case* (1969) 12 YECHR, 186.
[18] *Ireland v the United Kingdom* (1978) Series A, no 25, para 167.
[19] *Mahmut Kaya v Turkey* ECHR 2000- III, para 117.
[20] Yutaka Arai-Yokoi, "Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR" [2003] 21(3) Netherlands Quarterly of Human Rights 385, 389.

hours at a stretch" and causes "either actual bodily injury or intense physical or mental suffering".[21] Whilst inhuman treatment is always degrading, a form of treatment may be regarded as degrading but not as inhuman. The borderline between inhuman and degrading treatment may prove difficult to determine but, throughout its jurisprudence, the Court has set out a number of parameters that distinguish degrading forms of treatment. The Court has held treatment to be degrading,

> if it causes in its victim feelings of fear, anguish and inferiority […], if it humiliates or debases an individual (humiliation in the victim's own eyes […], and/or in other people's eyes […]), whether or not that was the aim […], if it breaks the person's physical or moral resistance or drives him or her to act against his or her will or conscience […], or if it shows a lack of respect for, or diminishes, human dignity.[22]

However, as has been pointed out on several occasions,[23] Article 3 has not lent itself to precise definition or application by the Court.

Given the wide spectrum of actions potentially covered by Article 3, which range from the infliction of bodily harm to the humiliation of individuals, it would be reasonable to assume that a significant number of "homophobic" actions would be deemed to fall within its scope. However, a key reason why the Court and the former Commission have repeatedly rejected complaints by gay men and lesbians brought under Article 3 is

[21] *Kudla v Poland* ECHR 2000-XI, para 92.
[22] *M.C. and A.C. v Romania* App no 12060/12 (ECtHR, 12 April 2016), para 108.
[23] Antonio Cassese, "Prohibition of Torture and Inhuman or Degrading Treatment or Punishment" in Ronald J. MacDonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993); Michael K. Addo and Nicholas Grief, "Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?" [1998] 9 European Journal of International Law 510.

because of the stringent application of the principle that any treatment complained of "must attain a minimum level of severity" if it is to fall within the scope of this aspect of the Convention.[24] In this respect, the Court has generally attempted to maintain a high threshold for this minimum in order not to trivialize the substance of Article 3 or encourage "rights inflation" under it. However, the Court has recognized that determining the threshold is relative and depends on the assessment of "all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim".[25] Moreover, having regard to the fact that the Convention is a living instrument that must be interpreted in the light of present-day conditions, the Court has also recognized that the minimum level of severity for each aspect of Article 3 changes over time:

> the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[26]

Because the threshold of Article 3 is relative, it has been possible to utilize this aspect of the Convention to address the subjective effects of discrimination based on, for example, "race". For instance, in *Moldovan and Others v Romania (no 2)*, which concerned the living conditions of and discrimination against a group of Roma villagers,

[24] *Bouyid v Belgium* [GC] ECHR 2015, para 86.
[25] *Ireland v the United Kingdom* (1978) Series A no 25, para 162.
[26] *Selmouni v France* ECHR 1999-V, para 101.

the Court paid particular attention to the "general attitude of the authorities", which caused the applicants "considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement".[27] Specifically, the Court held that,

> remarks concerning the applicants' honesty and way of life made by some authorities dealing with the applicants' grievances […] appear to be, in the absence of any substantiation on behalf of those authorities, purely discriminatory [and] discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 of the Convention.[28]

The Court's acknowledgement that forms of discrimination based on race can attain the minimum level of severity to be classified as degrading treatment contrary to Article 3 has, as we explore below, provided a foundation on which to make similar claims in respect of sexual orientation.

Article 3 and sexual orientation discrimination: the road to *X v Turkey*

Between the point of the first Article 3 complaint relating to sexual orientation discrimination in 1959[29] and the point that the Court first upheld such a complaint in 2012,[30] both the Court and former Commission had shown a remarkable unwillingness to recognize that homophobic treatment amounted to a violation of any aspect of Article

[27] *Moldovan and Others v Romania (no 2)* ECHR 2005-VII (extracts), para 110.
[28] ibid, para 111.
[29] *A.S. v the Federal Republic of Germany* App no 530/59 (Commission decision, 04 January 1960).
[30] *X v Turkey* App no 24626/09 (ECtHR 9 October 2012).

3. For this reason, this aspect of Convention jurisprudence could be said to have evolved very little over 53 years. However, an examination of the Commission's decisions and Court's judgments reveals certain dynamic shifts in Convention jurisprudence during that period which, we would argue, ultimately led to the Court's judgment in *X v Turkey* in 2012.[31]

The foundations of Article 3 jurisprudence in respect of sexual orientation discrimination are the Commission's early decisions in respect of complaints made by applicants alleging that they had suffered inhuman and degrading treatment or punishment as a result of the criminalization of same-sex sexual acts. In these early cases the Commission tended to largely ignore the applicants' complaints, treating them as "absurd or frivolous applications"[32] that should not be transmitted to governments. For example, in applications against Germany which contained Article 3 complaints relating to the existence and enforcement of criminal law that prohibited all sexual acts between men, the Commission tended to simply state that the existence of such law and punishments resulting from it were "in no way in contradiction with the provisions of the Convention".[33] Similarly, the Commission rejected the Article 3 complaint of an Austrian citizen, convicted under criminal laws prohibiting homosexual sexual acts, regarding disciplinary penalties imposed on him whilst in prison for voicing his disapproval of the laws under which he was convicted.[34] These decisions reflected the

[31] ibid.
[32] Denys P. Myers, "The European Commission of Human Rights" [1956] 50(4) American Journal of International Law 949, 950.
[33] *A.S. v the Federal Republic of Germany* App no 530/59 (Commission decision, 4 January 1960), section "The Law". See also: *H.S. v the Federal Republic of Germany*, no. 704/60 (Commission decision, 4 August 1960), section "The Law"; *G.W. v the Federal Republic of Germany*, no. 1307/61 (Commission decision, 4 October 1962), section "The Law".
[34] *X v Austria* App no 1593/62 (Commission decision, 4 July 1964).

Commission's more general approach of, until the mid 1970s, declaring inadmissible any complaint made under any provision of the Convention about the criminalization and punishment of same-sex sexual acts. The Commission's early approach was lauded at the outset by the CoE's Directorate on Human Rights who regarded it as evidence that the Commission was equipped to "ensure observance of the fundamental rights and freedoms […] without thereby opening the door to abuses prejudicial to the effectiveness of its work and to the legitimate interests of governments".[35]

Following the milestone judgment in *Dudgeon v the United Kingdom,*[36] in which the Court acknowledged that Article 8 of the Convention secures the human right to engage in private and consensual same-sex sexual acts without the risk of prosecution, the Commission continued to ignore applications brought under Article 3 regarding sexual orientation discrimination. For example, the Commission paid no attention to the substance of an Article 3 complaint lodged in 1983 in which the applicant, following his arrest and conviction for homosexual offences (and passport forgery) in Morocco, complained that the German diplomatic services did not intervene to protect him while he was in prison and thereby exposed him to the risk of torture and inhuman conditions.[37] However, by the late 1990s, the Court's approach to sexual orientation discrimination complaints under Article 3 began to show limited signs of evolution. In *Smith and Grady v the United Kingdom*,[38] the Court rejected the applicants' complaint under Article 3 but conceded that it "would not exclude that treatment which is

[35] CoE, "Memorandum by the Directorate of Human Rights on the experience gained and the results achieved by the European Commission of Human Rights in the matter of individual applications", 24 October 1956, H(56)2, 25. The Directorate was commenting, inter alia, on the decision in *W.B. v the Federal Republic of Germany* App no 104/55 (Commission decision, 17 December 1955).
[36] *Dudgeon v the United Kingdom* (1981) Series A, no 45, para 63.
[37] *S v the Federal Republic of Germany,* App no 10686/83 (Commission decision, 5 October 1984).
[38] *Smith and Grady v the United Kingdom* ECHR 1999-VI (see also discussion above, n. 15).

grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority […] could, in principle, fall within the scope of Article 3".[39] Whilst the Court accepted that the policy of prohibiting gay men and lesbians from serving in the armed forces, combined with the investigation and discharge of the applicants, was "undoubtedly distressing and humiliating", it did not consider that the treatment reached the minimum level of severity to bring it within the scope of Article 3.[40]

Smith and Grady can be seen as a "transitional" judgment in which the Court acknowledged that certain forms of "bias" against individuals on the grounds of sexual orientation could, in principle, amount to a violation of Article 3. In the subsequent case of *Stasi v France*, which concerned the ill-treatment of a gay man in prison by other inmates, the Court took the further step of acknowledging that the ill-treatment complained of, which had resulted from a predisposed bias based on sexual orientation, did reach the threshold required by Article 3.[41] However, the Court held that there had been no violation of Article 3 in this case because the prison authorities had taken reasonable measures in respect of every allegation made by the applicant and that they could not be considered responsible for incidents that the applicant had failed to report.[42]

[39] ibid, para 121.
[40] ibid, para 122.
[41] *Stasi v France* App no 25001/07 (ECtHR, 20 October 2011).
[42] For a discussion, particularly of the strongly worded dissenting opinion of Judges Spielmann and Nussberger, see: Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013) 202-212.

The year after the judgment in *Stasi* the Court issued two judgments that finally evolved its jurisprudence to provide sexual minorities with protection under Article 3. In the first of these judgments, in the case of *Zontul v Greece,* the Court held that the rape by means of a truncheon[43] of a gay man by a public official whilst he was detained as an illegal immigrant was torture within the terms of Article 3 and that the inadequate redress afforded to him by national authorities amounted to a procedural violation of the same provision.[44] In reaching this conclusion, the Court did not pay significant attention to the applicant's sexual orientation and, consequently, its reasoning was not especially innovative in respect of the relationship between forms of ill-treatment and sexual orientation discrimination. However, 10 months later, when the Court issued its judgment in the case of *X v Turkey*, it did pay particular attention to the link between the ill-treatment complained of by the applicant and his sexual orientation. The applicant, a gay man serving a prison sentence for forgery,[45] complained that, on account of his sexual orientation, he had been placed in an individual "very dirty and rat-infested"[46] cell for more than thirteen months which had had an irreparable and irreversible effect on his mental and physical health.[47] He stated that his conditions of detention were similar to those generally intended for disciplinary measures against inmates accused of paedophilia or rape[48] and the Court observed that they were "stricter than the Turkish prison regime for prisoners serving whole-life imprisonment".[49] Significantly, not only did the Court consider that the condition of the applicant's detention amounted to

[43] *Zontul v Greece* App no 12294/07 (ECtHR, 17 January 2012), paras 85-86.
[44] ibid, para 114.
[45] *X v Turkey* App no 24626/09 (ECtHR, 9 October 2012), para 5.
[46] ibid, para 10.
[47] ibid, para 29. The Court determined that the applicant was, in total, in solitary confinement for eight months and eighteen days.
[48] ibid, para 10.
[49] ibid, para 37.

inhuman and degrading treatment in violation of Article 3, but it also held that the applicant had "suffered discrimination on grounds of his sexual orientation" in violation of Article 14 taken in conjunction with Article 3.[50] The Court reached this judgment on the basis that it regarded the applicant's sexual orientation as "the main reason" for placing him in conditions considered to be inhuman and degrading.[51]

X v Turkey can be seen as establishing a new, strong framework for holding national authorities to account for sexual orientation discrimination in respect of their positive obligations under Article 3 in conjunction with Article 14 of the Convention. The judgment establishes that the conduct of national authorities can amount to sexual orientation discrimination even when such discrimination is not intentional.[52] If national authorities fail "to take all possible measures to determine whether or not a discriminatory attitude had played a role in adopting [a particular] measure" then this can amount to a violation of Article 14 taken in conjunction with Article 3.[53] Moreover, such a violation can be deemed to have occurred without having to determine whether the person who is the subject of any ill-treatment is being treated less favourably, without an objective or reasonable justification, than persons in a relevantly similar situation (which is a requirement that the Court often imposes when assessing complaints about a difference in treatment under Article 14).[54] The judgment also reiterates in the strongest terms that "[i]f the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to

[50] ibid, para 57.
[51] ibid.
[52] ibid.
[53] ibid, para 55.
[54] See, for example, *Boacă and Others v Romania* App no 40355/11 (ECtHR, 12 January 2016) para 97, in which the Court held that for the purposes of Article 14 "discrimination means treating differently, without an objective and reasonable justification, people in relevantly similar situations".

discrimination under the Convention"[55] and reminds national authorities that they cannot justify any ill-treatment of an individual on the grounds of their sexual orientation on the basis that it was "for his own protection"[56] without undertaking "an adequate assessment of the risk posed to the [individual's] safety".[57] The net result of the judgment in *X v Turkey* is the effective broadening of the range of ill-treatment deemed to fall within the ambit of Article 3 and the narrowing of the margin of appreciation available to contracting states under Article 14 to justify such ill-treatment. The judgment therefore represents a watershed in the Court's jurisprudence on sexual orientation discrimination which, as we explore below, has been subject to further evolution during the last five years.

Beyond *X v Turkey*: addressing "hatred"

Since the judgment in *X v Turkey*, the Court has significantly and rapidly developed the interplay between Article 3 and Article 14 of the Convention in its jurisprudence concerning forms of ill-treatment against sexual minorities that are based on "hatred". In *Alekseyev v Russia*, the Court had previously established, under Article 11 (alone and in conjunction with Article 14), the right to assemble peacefully in public "to promote respect for human rights and freedoms and to call for tolerance towards sexual

[55] *X v Turkey* App no 24626/09 (ECtHR, 9 October 2012), para 50. This formulation derives from *E.B. v France* [GC] App no 43546/02 (ECtHR, 22 January 2008) para 93, and *Kozak v* Poland App no 13102/02 (ECtHR, 2 March 2010) para 92. The Court does not always use such strong wording. For instance, in *Karner v Austria* ECHR 2003-IX, para 37, and *Schalk and Kopf v Austria* ECHR 2010, para 97, the Court held more generally that "differences based on sexual orientation require particularly serious reasons by way of justification".
[56] *X v Turkey* App no 24626/09 (ECtHR, 9 October 2012), para 47.
[57] ibid, para 56.

minorities".[58] In *Identoba and Others v Georgia* and *M.C. and A.C. v Romania*, the Court addressed the hostile response that sexual minorities often face when they assemble in public for these purposes. Significantly, in these cases, the Court dealt with hostility directed towards sexual minorities in public under Article 3 in conjunction with Article 14. In doing so, the Court examined the threshold at which homophobic hatred triggers Article 3[59] and clarified the substantive and procedural obligations pending on national authorities. The Court also examined the extent to which, in the event of inhuman or degrading treatment against sexual minorities, the failure of national authorities to comply with all of the obligations placed on them can amount to discrimination within the meaning of Article 14.

In *Identoba and Others v Georgia*, the applicants (a non-governmental organization and fourteen individuals) complained that, while attending a march to mark the International Day against Homophobia in Tbilisi, "they were met […] by a hundred or more counter-demonstrators" and "were subjected to threats of physical assault and to insults".[60] Pursuant to Georgian law, the applicant organization had previously informed national authorities about the day, the timing and the planned route of the march, and had been assured that police forces would be deployed to ensure that the procession took place peacefully.[61] However, at the point that the applicants were attacked, they received no immediate assistance from the police and, when the police eventually intervened after

[58] *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010), para 82. See also: *Bączkowski and Others v Poland* App. no 1543/06 (ECtHR, 03 May 2007).
[59] *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), paras 68-71; *M.C. and A.C. v Romania* App no 12060/12 (ECtHR, 12 April 2016), paras 116-119.
[60] *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 13.
[61] ibid, para 9.

approximately twenty or thirty minutes,[62] they arrested four of the applicants with the alleged aim of protecting them from the counter-demonstrators.[63] Subsequently, the applicants filed several criminal complaints requesting that investigations be conducted into the attacks against them and into the failure of the police to adequately protect them from the attacks, but these met with such responses as, since "there were no signs of illegality in the actions of the police during the demonstration, there was no need to launch an investigation against them for abuse of power" and that two of the attackers has been deemed to have committed a "minor breach of public order".[64]

In *M.C. and A.C. v Romania*, the applicants complained about the response of national authorities to an attack upon them on a metro train after they had attended the annual gay march in Bucharest. The applicants were attacked by a group of seven people who subjected them to physical violence and verbal homophobic abuse.[65] The applicants argued that the response of the authorities was unsatisfactory because, when they complained to the police about the attack, the police tried "to dissuade them from pursuing their complaint"[66] and when they filed a criminal complaint the police terminated the investigation before any criminal suspect was prosecuted.

In both *Identoba and Others* and *M.C. and A.C.,* the Court made an effort to clarify the general principles underlying its approach to the interplay between Article 3 and Article 14 in respect of sexual orientation discrimination. In *Identoba and Others*, reiterating

[62] ibid, para 15.
[63] ibid, para 16-17.
[64] *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 22.
[65] *M.C. and A.C. v Romania* App no 12060/12 (ECtHR, 12 April 2016), para 9.
[66] ibid, para 17.

that Article 3 covers acts of physical ill-treatment as well as the infliction of psychological suffering, the Court recalled that,

> discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity. More specifically, treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3.[67]

Moreover, national authorities, when investigating allegations of ill-treatment under Article 3, "have the duty to take all reasonable steps to unmask possible discriminatory motives"[68] because "[t]reating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights" and this "may constitute unjustified treatment irreconcilable with Article 14 of the Convention".[69] In *M.C. and A.C.,* the Court reiterated that the absence of direct responsibility for acts of violence of such severity to engage Article 3 did not absolve the state from all obligations under this provision, noting that "Article 3 requires that the authorities conduct an effective […] investigation into the alleged ill-treatment, even if such treatment has been inflicted by private individuals".[70]

[67] *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 65.
[68] ibid, para 67.
[69] ibid.
[70] *M.C. and A.C. v Romania* App no 12060/12 (ECtHR, 12 April 2016), para 110.

The Court applied these general principles in *Identoba and Others* and *M.C. and A.C* and, in doing so, expanded the jurisprudence on sexual orientation discrimination established in *X v Turkey.* The Court redefined the threshold of Article 3 to take into account the combined effect of "hate speech and aggressive behaviour" which created a situation of "intense fear and anxiety" for the applicants.[71] The Court stated that the "feelings of fear, anguish and insecurity" experienced by the applicants, which was the result of treatment directed at them because of their "identity", was incompatible with respect for their human dignity and reached the threshold of severity to fall within the ambit of Article 3 taken in conjunction with Article 14.[72] In *Identoba and Others*, the Court considered that the failure of national authorities to meet the positive obligations placed upon them to provide the applicants with heightened protection from attacks by private individuals, and the fact that "the belated police intervention shifted onto the arrest and evacuation of some of the applicants, the very victims whom they had been called to protect",[73] amounted to a violation of Article 3 taken in conjunction with Article 14. Finally, in both *Identoba and Others* and *M.C. and A.C.*, the Court held that national authorities had fallen short of their procedural obligation to carry out an investigation of the incidents complained of "with particular emphasis on unmasking the bias motive and identifying those responsible for committing the homophobic violence".[74] This failure, the Court concluded, amounted to a violation of Article 3 taken in conjunction with Article 14.

[71] *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 70. See also: *M.C. and A.C. v Romania* App no 12060/12 (ECtHR, 12 April 2016), para 117.
[72] *M.C. and A.C. v Romania* App no 12060/12 (ECtHR, 12 April 2016), para 119. See also: *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 71.
[73] *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 73.
[74] ibid, para 80. See also: *M.C. and A.C. v Romania* App no 12060/12 (ECtHR, 12 April 2016), para 124.

The judgments in *Identoba and Others* and *M.C. and A.C.* represent a further watershed in the Court's jurisprudence on sexual orientation discrimination. The Court has made clear that, if authorities do not take a "rigorous approach" to investigating "prejudice-motivated crimes" then this amounts to "indifference" which is "tantamount to official acquiescence to, or even connivance with, hate crimes".[75] From a sociological point of view, this can be seen to send a highly significant message to gay men and lesbians living in societies that are hostile to them, and to national authorities who are either indifferent towards or complicit with violence against sexual minorities. The message is that not only are national authorities obliged to refrain from directly and indirectly discriminating against sexual minorities in ways that might amount to ill-treatment in violation of Article 3, but that they are also obliged to intervene in and address manifestations of hate-based ill-treatment against gay men and lesbians.

A major gap in Article 3 jurisprudence: the failure to protect gay asylum seekers

In contrast to the evolving Article 3 jurisprudence on hatred towards sexual minorities in European societies, the approach of the Court to addressing problems experienced by gay men and lesbians seeking to escape from hatred directed towards them in countries outside of the CoE has remained static. Significantly, the Court has never upheld a complaint by a gay or lesbian "asylum seeker" alleging that, if deported to a country outside of the CoE, they would face a risk of ill-treatment on the grounds of their sexual orientation that would amount to a violation of Article 3. As we explained above, a significant number of the applications now received by the Court from gay men and

[75] *M.C. and A.C. v Romania* App no 12060/12 (ECtHR, 12 April 2016), para 124. See also: *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 77.

lesbians that invoke Article 3 are from asylum seekers who claim that, if returned to their country of origin outside the CoE, they would be exposed to ill-treatment on the grounds of their sexual orientation. Such applications are unsurprising given the widespread ill-treatment and punishment which sexual minorities are subjected to in states outside the CoE, and the difficulties they face during the examination and assessment of their applications for asylum in CoE states.[76] However, the Court has not engaged in any dynamic interpretation of the Convention in respect of these issues and, as we explain below, has consistently refused to evolve its jurisprudence in this area, thus leaving a major gap in the protection offered to sexual minorities by the Convention system.

The Court can be seen to have relied on at least three "strategies" to allow it to reject complaints by gay and lesbian asylum seekers brought under Article 3 about the risk of ill-treatment in their country of origin. The first strategy has been to ensure that the threshold of what constitutes "risk" under Article 3 is difficult for asylum seekers to reach. Although the Court has established that Article 3 places an obligation on a contracting state not to expel individuals to countries "where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country",[77] it has also, in respect of complaints about sexual orientation discrimination, set a high threshold when assessing the existence of "real risk". This has made it impossible for gay asylum seekers to successfully argue a case under Article 3. For example, in

[76] See: United Nations High Commissioner for Refugees, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR"s Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015.
[77] *Jabari v Turkey* ECHR 2000-VIII, para 38.

response to complaints regarding the refoulement of gay asylum seekers, the Court has established that it is not sufficient to show that criminal laws exist in a country of origin that prohibit same-sex sexual acts, or that an applicant has been the subject of the enforcement of such law.[78] Rather, it must be shown that there is "a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships"[79] and that there are "substantial grounds" for believing that if deported the applicant would be exposed to a real risk of being subjected to treatment contrary to Article 3.[80]

In *F v the United Kingdom*, for instance, the Court emphasized that, although Iranian law criminalizes all same-sex acts and makes particular acts punishable by death, in Iranian society there is a certain toleration for same-sex sexual activities and that Islamic law is not concerned with sexual acts committed "in the privacy of the home".[81] As a consequence, the Court dismissed the applicant's claim – that, whilst there was under-reporting of executions and floggings for homosexual offences, there had been a series of documented cases where men had received sentences of capital and corporal punishment for engaging in same-sex sexual acts – as a "tenuous and hypothetical basis on which to assess the likelihood of Article 3 treatment occurring".[82] The Court adopted a similar approach in *M.E. v Sweden*, which concerned a Libyan citizen who had claimed asylum in Sweden on the grounds that, inter alia, he had married a Swedish man.[83] Although Libyan criminal law makes all same-sex sexual acts punishable by a

[78] *I.I.N. v the Netherlands* (dec) App no 2035/04 (ECtHR, 9 December 2004).
[79] *F. v United Kingdom* (dec) App no 17341/03 (ECtHR, 22 June 2004).
[80] *M.E. v Sweden* App no 71398/12 (ECtHR, 26 June 2014), para 73.
[81] *F. v United Kingdom* (dec) App no 17341/03 (ECtHR, 22 June 2004).
[82] ibid.
[83] *M.E. v Sweden* App no 71398/12 (ECtHR, 26 June 2014).

term of imprisonment of up to five years[84] and despite several independent sources confirming violence perpetrated against sexual minorities,[85] the Court reiterated that "the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3"[86] and concluded that a temporary relocation of the applicant to Libya did not infringe the applicant's rights under Article 3.[87]

In its most recent jurisprudence the Court appears to have further raised the threshold for what constitutes real risk under Article 3.[88] For example, in *A.N. v France*, which concerned a Senegalese citizen seeking asylum in France on the basis of having been subjected to blackmail, harassment and violence in Senegal because of his sexual orientation,[89] the Court examined credible reports that provisions in the Senegal Penal Code making same-sex acts a criminal offence were enforced and that there had been a resurgence of homophobia[90] in the name of traditional values and Islam.[91] However, the Court decided that the applicant had not produced sufficient evidence capable of demonstrating that he would be exposed to a risk of treatment contrary to Article 3 if

[84] ibid, para 43.
[85] ibid, para 44-45.
[86] ibid, para 74.
[87] ibid, para 90. The case was referred to the Grand Chamber upon request of the applicant, who, inter alia, urged the Court to consider the "serious issues of fundamental importance relating to homosexuals" rights and how to assess those rights in asylum cases all over Europe" (*M.E. v Sweden* [GC] App no 71398/12, ECtHR, 08 April 2015, para 30). However, the Court denied the existence of "special circumstances regarding respect for human rights" and decided to strike the case out on the ground that subsequently to the Chamber judgment national authorities had granted the applicant a permanent residence permit (ibid, paras 37-38).
[88] For the most recent cases, see: *A.N v France* (dec) App no 12956/15 (ECtHR, 19 April 2016); *H.A and H.A. v Norway* (dec) App no 56167/16 (ECtHR, 03 January 2017).
[89] *A.N. v France* (dec) App no 12956/15 (ECtHR, 19 April 2016).
[90] ibid, para 20.
[91] ibid, para 17-18.

returned to Senegal.[92] Such a finding raises the question of whether it is possible for a gay asylum seeker in these circumstances to produce any evidence that the Court would find acceptable.

The second strategy of the Court to reject complaints by gay and lesbian asylum seekers brought under Article 3 has involved it deploying the idea that sexual minorities can take measures to conceal their sexual orientation in order to avoid ill-treatment. In *M.E. v Sweden*, for example, when considering the risks created by temporarily returning the applicant to Libya, the Court stated that even if he "would have to be discreet about his private life during this time, it would not require him to conceal or supress an important part of his identity permanently or for any longer period of time".[93] It is clear, therefore, that a gay man or lesbian who is forced to conform to a heteronormative model of sexuality, in order to avoid ill-treatment resulting from the bias of a majority of society, will not be deemed to be experiencing a form of suffering that reaches the threshold of Article 3. In other words, the Court will not accept the claim that returning a gay man or lesbian to a country in which they would live under the threat of imprisonment for engaging in a consensual, private and adult sexual relationship amounts to degrading treatment within the meaning of Article 3 because it would cause "feelings of fear, anguish and inferiority" and would result in breaking "the person's physical or moral resistance" or driving "him or her to act against his or her will or conscience".[94]

[92] ibid, para 44.
[93] *M.E. v Sweden* App no 71398/12 (ECtHR, 26 June 2014), para 88. See also *A.N. v France* (dec) App no 12956/15 (ECtHR, 19 April 2016) para 28 and 43.
[94] *M.C. and A.C. v Romania* App no 12060/12 (ECtHR, 12 April 2016), para 108.

The third strategy of the Court to reject complaints by gay and lesbian asylum seekers brought under Article 3 has been to strike out applications when domestic authorities either grant an applicant a residence permit or undertake to re-examine their application for asylum.[95] For example, in *M.B. v Spain* the Court considered a complaint by a citizen of Cameroon who had claimed asylum in Spain on the grounds that, inter alia, she had been threatened because of her sexual orientation.[96] The applicant's attempt to gain asylum failed and, in the face of being removed to Cameroon by national authorities, she successfully applied to the Court for interim measures to be imposed that prevented her from being deported for the duration of all domestic legal proceedings. Following this, the Audiencia Nacional upheld an appeal by the applicant and ordered her application for asylum to be examined by the administrative authorities. The Court's response was to partially strike the application out on the grounds that the applicant's application for asylum was being re-examined by the domestic authorities and she could not be deported during that period of examination, and to partially declare the application inadmissible on the grounds that the applicant had not exhausted domestic remedies.[97] This decision can be regarded as problematic because, as the applicant pointed out, had the Court not applied the interim measures then she would have been deported whilst her domestic legal appeal was still pending. Although the domestic authorities had ultimately removed the immediate threat of deportation, the Court could have continued the examination of the case (as it is entitled to do under Article 37 of the Convention) in order to consider whether there was a "structural

[95] *A.E. v Finland* (dec) App no 30953/11 (ECtHR, 22 September 2015); *M.B. v Spain* (dec) App no 15109/15 (ECtHR, 13 December 2016).
[96] *M.B. v Spain* (dec) App no 15109/15 (ECtHR, 13 December 2016), para 6.
[97] ibid, paras 18-28.

problem" in Spain regarding asylum appeals[98] which put the applicant, at the point that she was threatened with deportation, under real risk of ill-treatment contrary to Article 3. However, the Court decided that the actions of the domestic authorities amounted to the matter being resolved and, therefore, that the case should be struck out. This approach, which the Court has adopted in other similar cases,[99] can be seen as a way to avoid ruling on the merits of such complaints.

It could be argued that the Court's overall approach is motivated by a desire to protect the national sovereignty of CoE states to determine their immigration policies and, moreover, to protect itself from an enormous amount of complaints from gay asylum seekers. If the Court upheld a complaint about the refoulement of a gay asylum seeker, it would establish the principle that CoE states must safeguard gay foreign nationals from ill-treatment in their country of origin and, consequently, this would curtail the capacity of states to control immigration. In such circumstances, CoE states may fear being "flooded" with applications for asylum on the grounds of sexual orientation discrimination, including applications from those who cannot claim asylum on other grounds and so bogusly claim to be gay.[100] The Court may fear that a large amount of these applications would end up coming to Strasbourg. If the Court's motivation for

[98] ibid, para 19.

[99] See: *M.E. v Sweden* (striking out) [GC] App no 71398/12 (ECtHR, 08 April 2015); *A.E. v Finland* (dec) App no 30953/11 (ECtHR, 22 September 2015); *A.T. v Sweden* (dec) App no 78701/14 (ECtHR, 25 April 2017).

[100] Some newspapers have already raised the concern that the Court's jurisprudence weakens national control of immigration to the benefit of bogus homosexual asylum seekers. See, for example: Daily Mail Online, "How the British Public are now Banned from Knowing the Identity of Asylum Seekers – even when their Stories are Patently Bogus", 28 January 2017 <http://www.dailymail.co.uk/news/article-4166050/Public-banned-knowing-identity-asylum-seekers.html> accessed 13 June 2017; Breitbart London, "Asylum Seekers Pretending to Be Gay To Cheat UK System", 24 October 2014 <http://www.breitbart.com/london/2014/10/24/a-third-of-gay-asylum-seekers-failed-on-earlier-applications> accessed 13 June 2017.

avoiding establishing jurisprudence that protects these sexual minorities is a way of accommodating such fears then it is not effectively carrying out its function to supervise the obligation placed on states to secure to *everyone* within their jurisdiction the rights and freedoms defined in the Convention (Article 1). In simple terms, the Court's current approach is arguably "more a question of politics than law".[101]

Same-sex marriage and Article 3

In this final section we explore how the Court's Article 3 jurisprudence could be developed to address sexual orientation discrimination in respect of marriage. To date, Article 3 has never been invoked in a complaint about the lack of access to or legal recognition of same-sex marriage. This is perhaps unsurprising because the Court has interpreted the substantive provision on marriage enshrined in Article 12 of the Convention to be founded on the concept of a "union between partners of different sex"[102] and has consistently held that it "does not impose an obligation on [a] Government to grant a same-sex couple […] access to marriage".[103] Consequently, there have been very few attempts to develop the Court's jurisprudence on marriage to address discrimination against same-sex couples.[104] Moreover, the Court's refusal to compare unmarried same-sex couples and married different-sex couples for the purposes of considering complaints about discrimination based on sexual orientation

[101] Mikael Rask Madsen, "The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence", in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights Between Law and Politics* (Oxford University Press 2011) 48.
[102] *Schalk and Kopf v Austria* ECHR 2010-IV, para 55.
[103] *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015), para 192.
[104] Following *Schalk and Kopf v Austria*, see: *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015); *Chapin and Charpentier v France* App no 40183/07 (ECtHR, 9 June 2016).

under Article 14 of the Convention[105] has produced a "two track" approach: on the one hand, the Court continues to develop its jurisprudence on numerous aspects of sexual orientation discrimination in respect of private and family life (under Article 8) whilst, on the other hand, it maintains the inflexible view that same-sex couples have no recourse to being excluded from the rights and benefits attached to marriage (under Article 12).[106] A key question for those who seek to evolve the human right to marry for same-sex couples, therefore, concerns how it might be possible to break down the "firewall" that the Court has built around marriage.

Article 3 provides a powerful mechanism by which to challenge the Court's heteronormative interpretation of marriage and the "separate but equal" human rights regime that it has produced. Currently, same-sex couples can assert a right to have access to a "specific legal framework providing for the recognition and protection of their same-sex unions" providing that this legal framework is not marriage.[107] Article 3, in our opinion, offers the opportunity to address and eradicate this legal distinction from the standpoint of "human dignity". The close connection between the right to marry and respect for human dignity has been thoroughly explored by courts as well as by scholars.[108] For example, writing about the United States of America, Martha Nussbaum argues that marriage operates as "an agent of recognition or the granting of dignity"[109] and that "[t]o be told, 'You cannot get married' is […] to be excluded from one of the

[105] See, for example: *X and Others v Austria* [GC] ECHR 2013-II, paras 105-110.
[106] See: Paul Johnson, "Marriage, Heteronormativity, and the European Court of Human Rights: A Reappraisal" [2015] 29(1) International Journal of Law, Policy and the Family 56.
[107] *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July, 2015), para 185.
[108] See, for example: William N. Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (Free Press 1996); Robert Wintemute, "From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights", in N. Bamforth (ed), *Sex Rights: The Oxford Amnesty Lectures 2002* (Oxford University Press 2005) 186.
[109] Martha C. Nussbaum, "A Right to Marry" [2010] 98(3) California Law Review 667, 669.

defining rituals of the American life cycle".[110] The Constitutional Court of South Africa adopted a similar view when it held that excluding same-sex couples from the "status, entitlements and responsibilities" of marriage represented a "violation of their right to dignity" and "manifestly affects their dignity as members of society".[111] Similarly, the Supreme Court of the United States of America recognized that "the transcendent importance of marriage" is the "nobility and dignity" it offers to couples and that same-sex couples seeking access to marriage are asking "for equal dignity in the eyes of the law".[112] The consequences of denying same-sex couples access to the dignity that marriage bestows is, as Nussbaum argues, "stigmatizing and degrading".[113] Or, as the Supreme Court of the United States of America put it, "laws excluding same-sex couples from the marriage right impose stigma and injury".[114]

Although, as we noted above, no same-sex couple has made a complaint to the Court under Article 3 regarding their exclusion from marriage, several applicants have highlighted that being denied access to a form of legal recognition for their same-sex relationships (either in form of marriage or civil partnership) has aroused in them feelings that could be argued to fall within the scope of Article 3. For example, the individual applicants in *Vallianatos and Others v Greece*, four same-sex couples, expressed their "feeling of exclusion and social marginalisation" created by a law that denied them the ability to enter into a civil partnership.[115] In *Oliari and Others v Italy*, which concerned the inability of same-sex couples to gain any form of legal recognition

[110] ibid, 668.
[111] *Minister of Home Affairs and Another v Fourie and another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (2005), ZACC 19, para 114.
[112] *Obergefell v Hodges*, 576 U.S._ (2015) 3 and 28.
[113] Martha C. Nussbaum, "A Right to Marry" [2010] 98(3) California Law Review 667, 671.
[114] *Obergefell v Hodges*, 576 U.S._ (2015) 18.
[115] *Vallianatos and Others v Greece,* ECHR 2013 (extracts), para 43.

of their relationships, the applicants stated that "the recognition in law of one's family life and status [is] crucial for the existence and well-being of an individual and for his or her dignity"[116] and that "[t]o persist on denying certain rights to same-sex couples only continued to marginalise and stigmatise a minority group in favour of a majority with discriminatory tendencies".[117] Clearly, what these applicants sought to stress to the Court is that the exclusion of same-sex couples from marriage or an equivalent form of legal recognition creates forms of subjective distress for same-sex couples that diminishes their human dignity. As such, same-sex couples could assert that the injurious effects of being excluded from marriage amount to degrading treatment within the meaning of Article 3 of the Convention.

The Court's recent jurisprudence provides a basis for it to consider the exclusion of same-sex couples from marriage as a form of degrading treatment within the meaning of Article 3, and a form of discrimination within the meaning of Article 14 taken in conjunction with Article 3. The Court has acknowledged that "same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships" and that "same-sex couples are in need of legal recognition and protection of their relationship".[118] Furthermore, the Court has recognized the "momentous interests" of same-sex couples who seek "recognition" and "legitimacy" in law.[119] It is on these foundations that the Court could go on to determine that the exclusion of same-sex couples from marriage amounts to a form of degrading and discriminatory treatment contrary to Article 3 taken in conjunction with Article 14. The Court could substantiate

[116] *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015), para 107.
[117] ibid, para 190.
[118] ibid, para 165.
[119] ibid, paras 174 and 185

that finding by recalling its established principle that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority can fall within the scope of Article 3[120] and draw upon its finding that treatment which creates "fear, anxiety and insecurity" in gay men and lesbians amounts to a violation of Article 3 taken in conjunction with Article 14.[121]

If the Court reached this conclusion it would signal an acceptance of the view that being denied access to marriage causes forms of personal suffering and humiliation that strike at the very essence of human dignity. For instance, when, due to an exclusion from the rights and benefits of marriage, a person has no legal right to visit their same-sex partner in hospital, or to decide or be informed about that partner's medical treatment, that person could claim to experience "fear, anxiety and insecurity".[122] Or when a person is denied the opportunity to form a legally binding parental bond with a child, such as through second-parent adoption, because such an opportunity is reserved for married, different-sex couples, that person could claim to experience suffering that breaks their moral resistance.[123] There are an extensive number of ways in which, as a result of being excluded from marriage, same-sex couples suffer humiliation and debasement in their own eyes and the eyes of others, are driven to act against their will or conscience, are treated with a lack of respect, and are diminished in the societies in which they live.[124]

[120] See: *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 65.
[121] ibid, para 79.
[122] ibid.
[123] *M.C. and A.C. v Romania* App no 12060/12 (ECtHR, 12 April 2016), para 108.
[124] ibid. See also: *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 65.

Some may argue that the claim that being denied access to marry amounts to degrading and discriminatory treatment contrary to Article 3 in conjunction with Article 14 is not feasible. They may argue that it is not feasible because the Court has interpreted Article 12 as the "*lex specialis* for the right to marry"[125] and has held that the right to marry cannot be derived from an interpretation of other provisions of the Convention that have a more general purpose and scope[126]. However, in our view, the fact that the Court has determined that same-sex couples have no right to marry under the Convention does not prevent it from determining that denying same-sex couples the opportunity to marry amounts to a violation of Article 3. The fact that the Convention does not recognise the right to wear spectacles did not prevent the Court, in *Slyusarev v Russia*, declaring that depriving a prisoner of his reading glasses amounted to degrading treatment contrary to Article 3.[127] Likewise, the fact that the Convention does not recognise the right of access to food or the right to sleep did not prevent the Court, in *Strelets v Russia*, declaring that depriving a prisoner "of food on days he was transported to the court-house, as well as […] of adequate sleep between court hearings"[128] amounted to inhuman and degrading treatment. These findings neither infringe the principle that the Convention must be read "as a whole" and "its Articles should therefore be construed in harmony with one another",[129] nor violate the principle that the Court must not introduce a right that was not intended when the Convention was drafted.[130] Therefore,

[125] *Hämäläinen v Finland* [GC] ECHR 2014, para 96.
[126] On Article 14 read in conjunction with Article 8, see: *Schalk and Kopf v Austria* ECHR 2010-IV, para 101. On Article 14 read in conjunction with Article 12, see: *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015), para 193; *Chapin and Charpentier v France* App no 40183/07 (ECtHR, 9 June 2016), para 38.
[127] *Slyusarev v Russia* App no 60333/00 (ECtHR, 20 April 2010), paras 43-44.
[128] *Strelets v Russia* App no 28018/05 (ECtHR, 06 November 2012), para 47.
[129] *Schalk and Kopf v Austria* ECHR 2010-IV, para 101. See also: *Johnston and Others v Ireland* (1986) Series A no 112, para 57.
[130] See: *Johnston and Others v Ireland* (1986) Series A no 112, para 53.

we argue that the Court could determine that depriving same-sex couples of access to marriage amounts to a form of ill-treatment contrary to Article 3 without recognising a right for same-sex couples to marry under Article 12.

When the Court considers an application concerning the exclusion of same-sex couples from marriage, it is able to consider the substance of the complaint under Article 3 regardless of whether this aspect of the Convention is invoked by the applicants. The Court's jurisdiction, according to Article 32 of the Convention, extends "to all matters concerning the interpretation and application of the Convention" and, moreover, the Court is "master of the characterisation to be given in law to the facts of the case" and is not "bound by the characterisation given by an applicant".[131] The Court could, therefore, take the initiative and consider the issue of excluding same-sex couples from marriage under Article 3 in order to analyse whether, as we have argued above, such exclusion amounts to a form of human degradation in violation of the Convention. This would provide it with the opportunity to consider the issue of same-sex marriage outside of the confines of Article 12 and, in doing so, avoid historical questions concerning whether the wording of the right to marry refers only to unions between men and women.[132]

[131] *Guerra and Others v Italy* ECHR 1998-I, para 44.

[132] For a discussion of drafting of Article 12, see: Paul Johnson, '"The Choice of Wording Must be Regarded as Deliberate": Same-sex Marriage and Article 12 of the European Convention on Human Rights' [2015] 40(2) European Law Review 207.

Conclusions

In this article, we have examined the Court's jurisprudence in respect of cases relating to sexual orientation discrimination that have involved Article 3 of the Convention. In doing so, we have critically addressed the historical reluctance, by both applicants and the Court, to frame sexual orientation discrimination as "inhuman or degrading treatment". We have examined the evolution of the Court's interpretation of Article 3 in respect of sexual orientation discrimination and discussed the legal turning points that led to the Court finding in 2012 – 53 years after the introduction of the first Article 3 complaint relating to sexual orientation discrimination – that a form of ill-treatment based on sexual orientation amounted to a violation of Article 3, alone and in conjunction with Article 14. We have also shown that, since that time, the Court has further evolved the interplay between Article 3 and Article 14 to address forms of "hate crime" against sexual minorities in Europe that constitute an affront to human dignity.

Our principal aim has been to advocate for a more systematic and "creative" use of Article 3 to address sexual orientation discrimination. It is our view that Article 3 should become more central to addressing the social exclusion, and the physical and psychological suffering, experienced by sexual minorities in CoE states. As such, we have critically examined the high threshold set by the Court when assessing under Article 3 the existence of real risk of refoulement to gay and lesbian asylum seekers and explored how the Court could develop its jurisprudence in this area. Moreover, we have considered how the prohibition of degrading treatment in Article 3 may provide the

Court with the scope to consider and address the adverse effects of excluding same-sex couples from marriage.

It is our view that Article 3 provides the means to develop a holistic reading of the Convention – "in such a way as to promote internal consistency and harmony between its various provisions" – that significantly enhances the protection of sexual minorities.[133] Article 3 provides such a means because it can be used to address numerous issues relating to human dignity, respect for which is the "very essence of the Convention"[134] and "one of the most fundamental values of democratic society".[135] The drafters of the Convention held the defence of human dignity in high regard – seeing the protection of human rights as the means to uphold "the conviction shared by us all that every man is worthy of respect, that every man has the right to live in safety and dignity"[136] – and viewed it as a hallmark of European civilisation.[137] Precisely for this reason and in order to keep the interpretation of the Convention in line with the "increasingly high standard […] required in the area of […] human rights",[138] the Court has adopted a flexible approach when assessing the minimum level of severity of ill-treatment under Article 3. Such flexibility, in our view, provides the Court with the opportunity to further develop its interpretation of sexual orientation discrimination

[133] *Saadi v the United Kingdom* ECHR 2008, para 62.
[134] *Bouyid v Belgium* [GC] ECHR 2015, para 89. See also: *C.R. v the United Kingdom* (1995) Series A no 335-C, para 42.
[135] *Z. and Others v the United Kingdom* [GC] ECHR 2001-V, para 73.
[136] Mr de la Vallée-Poussin, Council of Europe, First Session of the Consultative Assembly, Eighth Sitting (19 August 1949), in *Reports, Part II, Sittings 7 to 11*, 438. See also: Mr Spaak, Council of Europe, First Session of the Consultative Assembly, Eighteenth Sitting (8 September 1949), in *Reports, Part IV, Sittings 16 to 18*, 1328.
[137] Mr Spaak, Council of Europe, First Session of the Consultative Assembly, Eighteenth Sitting (8 September 1949), in *Reports, Part IV, Sittings 16 to 18*, 1328. See also: Mr Teitgen, Council of Europe, First Session of the Consultative Assembly, Seventeenth Sitting (7 September 1949), in *Reports, Part IV, Sittings 16 to 18*, 1144-1146.
[138] *Selmouni v France* [GC] ECHR 1999-V, para 101.

under Article 3 in order to expand the protection afforded to sexual minorities against a wide range of degrading treatment. If the Court pursued this developmental agenda its jurisprudence may more significantly contribute to securing the human dignity of gay men and lesbians in a way that is consistent with the demanding legacy of Article 3 and the universalistic aims of the Convention.