

# SEXUAL ORIENTATION EQUALITY IN CENTRAL AND EASTERN EUROPE: THE ROLE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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## Abstract

For six decades the European Convention on Human Rights has been a beacon of hope for people in Europe suffering discrimination on the grounds of sexual orientation. Since the early 1990s, following the expansion of the Council of Europe to include 22 former communist states, the Convention has become an important means by which to promote sexual orientation equality in Central and Eastern Europe. In this article we provide a systematic examination of how the Convention is being used, in the European Court of Human Rights, to challenge sexual orientation discrimination in Central and Eastern European states. We discuss those issues that have been raised before the Court relating to sexual orientation discrimination in these states and, in turn, assess how the Court has developed Convention jurisprudence to address them. We situate this analysis in the broader context of the contribution of Central and Eastern European states to shaping the approach of the Council of Europe's statutory organs to sexual orientation equality, which influences the work of the Court. Our overall conclusion is that, notwithstanding certain limitations and problems, there is significant scope for sexual minorities in Central and Eastern European states to use the Convention more systematically to challenge aspects of sexual orientation discrimination.

## Introduction

This article considers the role of the European Convention on Human Rights (hereinafter, 'the Convention')<sup>1</sup> in shaping equality on the grounds of sexual orientation in Central and Eastern European states (hereinafter, 'CEE states'). The Convention plays an important role in developing sexual orientation equality in CEE states at both the domestic level – through, for example, its interpretation and implementation by national courts and legislatures – and at the international level – through the work of the bodies and organs of the Council of Europe (hereinafter, 'the Council'). The European Court of Human Rights (hereinafter, 'the Court'), which ultimately determines the minimum standard of protections available to sexual minorities under the Convention, has become a crucial resource for those seeking to challenge and eradicate sexual orientation discrimination in many CEE states. This article provides an examination of how the Court has responded to and addressed complaints brought by individuals under the Convention about sexual orientation discrimination in CEE states. In

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<sup>1</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 005.

doing so, the article considers the extent to which the Court has developed Convention jurisprudence to enhance the protection of sexual minorities in CEE states.

The article focuses on those 22 post-communist states that joined the Council from the early 1990s onwards. These states include those that were part of the Soviet Union, those that were independent of but aligned to the Soviet Union, and those that were independent of and not aligned to the Soviet Union.<sup>2</sup> Because of the Council's 'open door approach'<sup>3</sup> to CEE states, a majority of them (14) had joined the Council by the end of 1995, with the remaining states (8) joining between 1996 and 2007. In becoming a member of the Council, each CEE state placed itself under the obligation to 'accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'<sup>4</sup> which, in practical terms, meant becoming a party to the Convention.<sup>5</sup> As a consequence, all CEE states have signed and ratified the Convention, thereby making the commitment to secure to everyone within their jurisdictions the rights and freedoms contained in the Convention<sup>6</sup> and, importantly, recognised the jurisdiction of the Court to receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of those rights and freedoms.<sup>7</sup>

We begin the article by providing an overview of sexual orientation equality in CEE states. We then go on to examine the role of CEE states in shaping the approach of the Council's statutory organs to sexual orientation equality which, as we explain, is important because it influences how the Court interprets and applies the Convention. We then provide an analysis of the development and growth of applications relating to sexual orientation discrimination lodged with the Court against CEE states. We examine the issues that have been raised before the Court by sexual minorities in CEE states and how the Court has responded to these. We go on to analyze the ways in which the Court has evolved its jurisprudence to develop general principles designed to provide protection from sexual orientation discrimination in CEE states. We conclude by arguing that sexual minorities could use the Convention more systematically in the future to challenge aspects of sexual orientation discrimination in CEE states, but that the lack of compliance by some CEE states with the Court's judgments remains a significant problem.

### **Sexual orientation equality in CEE states: an overview of legislation and policy**

In this section we provide an overview of legislation and social policy in CEE states in respect of sexual orientation equality. Such legislation and policy relating to the promotion of equality and the curtailment of discrimination on the grounds of sexual orientation is extremely varied across CEE states. These states, according to the latest annual benchmarking exercise carried out by ILGA-Europe – which ranks 49 countries in Europe in respect of their LGBTI equality laws and policies – all fall considerably behind the majority of Western European states in terms

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<sup>2</sup> Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Montenegro, Poland, Republic of Moldova, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, the Former Yugoslav Republic of Macedonia, and Ukraine.

<sup>3</sup> D. Spielmann, "Foreword", in I. Motoc and I. Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (Cambridge: Cambridge University Press, 2016), p.xxv.

<sup>4</sup> Council of Europe, Statute of the Council of Europe, 5 May 1949, ETS No. 001, Chapter II, art.3.

<sup>5</sup> In 1994, the Parliamentary Assembly of the Council of Europe resolved that 'accession to the Council of Europe must go together with becoming a party to the European Convention on Human Rights'. See Council of Europe, Parliamentary Assembly, Resolution 1031 (1994) at [9].

<sup>6</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art.1.

<sup>7</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art.34.

of the protections they afford individuals from sexual orientation discrimination.<sup>8</sup> In this respect, there is considerable disparity across CEE states, with some being far more developed in their approach to sexual orientation equality than others. For example, Croatia, Hungary, and Slovenia (the highest ranked CEE states) are considered to offer a similar level of protection to LGBTI people as Greece, Iceland, Ireland, and Luxembourg. However, a significant proportion of those European states considered to offer the lowest levels of protection to LGBTI people are CEE states.

One common feature of CEE states is that they have no criminal laws that discriminate on the grounds of sexual orientation in respect of sexual acts committed between consenting adults. In this respect, CEE states have repealed criminal laws specifically relating to homosexual sexual acts and operate a common ‘age of consent’ for sexual acts regardless of sex/gender. A condition of entry to the Council for CEE states was the removal of any criminal provision enforcing a total prohibition of same-sex sexual acts. As the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly made clear in 2000, ‘[u]nder the accession procedure for applicant countries’ it had ‘been verifying that any former classification of homosexuality as an offence is no longer current’ and ‘had occasion to call for amendment of national legislation to divest it of provisions penalising homosexuality’.<sup>9</sup> Romania’s membership of the Council, for example, was approved by the Parliamentary Assembly in 1993 with the expectation that a law which placed an outright ban on same-sex sexual acts between men would be changed.<sup>10</sup>

Another area of commonality between CEE states in respect of sexual orientation equality is their legislative and policy approaches to same-sex partnerships. No CEE state permits same-sex marriage,<sup>11</sup> and only 3 CEE states (Croatia, Hungary, and Slovenia) offer same-sex couples the opportunity to enter into registered partnerships that afford similar rights to marriage.<sup>12</sup> No CEE state permits same-sex couples to jointly adopt a child, and only 1 CEE state (Slovenia) permits full second (step) parent adoption of a child by the same-sex partner of the child’s

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<sup>8</sup> ILGA-Europe, “Rainbow Europe Map 2018”, [https://www.ilga-europe.org/sites/default/files/Attachments/rainbow\\_europe\\_map\\_2018\\_small.pdf](https://www.ilga-europe.org/sites/default/files/Attachments/rainbow_europe_map_2018_small.pdf) [Accessed 14 February 2019]. The ranking system is based on scores which ILGA-Europe attribute to each country based on an assessment of the legal and public policy situation. Scores are not limited to sexual orientation issues but include transgender and intersex issues. Whilst ILGA-Europe’s benchmarking tool has some limitations for assessing sexual orientation equality – insofar as it provides a ‘snapshot’ of national laws and policies rather than an understanding of their implementation or enforcement – it is useful to demonstrate the considerable variation of legal and policy development across CEE states.

<sup>9</sup> Council of Europe, Parliamentary Assembly, *Report on the situation of lesbians and gays in Council of Europe member states*, (Doc. 8755, 2000). See also Council of Europe, Parliamentary Assembly, Recommendation 1474 (2000) at [4], which states: ‘Under the accession procedure for new member states, the Assembly ensures that, as a prerequisite for membership, homosexual acts between consenting adults are no longer classified as a criminal offence’.

<sup>10</sup> Council of Europe, Parliamentary Assembly, *Opinion on the application by Romania for membership of the Council of Europe* (Opi. 176, 1993). For a general discussion, see: V. Nachescu, “Hierarchies of Difference: National Identity, Gay and Lesbian Rights, and the Church in Postcommunist Romania”, in A. Štulhofer and T. Sandfort (eds.), *Sexuality and Gender in Postcommunist Eastern Europe and Russia* (New York: The Haworth Press, 2005), pp. 57-79.

<sup>11</sup> Estonia allows same-sex couples to register domestically a same-sex marriage validly contracted abroad. See *Orlandi and Others v Italy* (App. Nos.26431/12 and 3 others), judgment of 14 December 2017 at [113].

<sup>12</sup> Czech Republic and Estonia offer same-sex couples the opportunity to enter into registered partnerships with limited rights. See ILGA-Europe, “Rainbow Europe Index 2018”, [https://www.ilga-europe.org/sites/default/files/Attachments/index\\_2018\\_small.pdf](https://www.ilga-europe.org/sites/default/files/Attachments/index_2018_small.pdf) [Accessed 14 February 2019].

parent.<sup>13</sup> This is illustrative of the lack of development across CEE states in respect of a number of ‘family life’ matters relating to same-sex couples and their children. Whilst certain Western European states can be said to lack the same development – for example, Italy – most Western European states have undertaken considerable development of family law and policy to eliminate discrimination based on sexual orientation. Therefore, in respect of many areas of family life, there is a significant contrast between Western European and CEE states.

A distinction can be drawn between those CEE states that are progressively developing law and policy to promote sexual orientation equality and those that are actively resisting such development. In respect of the latter, some CEE states can, because of their implementation of legislative and policy agendas aimed at curtailing or stifling the rights of sexual minorities, be described as actively promoting a ‘backlash’ against sexual orientation equality. For example, in recent years a number of CEE states have proposed or introduced legislation designed to limit public expressions of and debate about homosexuality.<sup>14</sup> Additionally, a number of CEE states have introduced legislative ‘bans’ on same-sex marriage by, for example, creating a heteronormative constitutional definition of marriage.<sup>15</sup> In some cases – as demonstrated by the serious ill treatment of LGBT people in the Chechen Republic of the Russian Federation since 2017<sup>16</sup> – some CEE states actively promote or collude in systematic discrimination against gay people.

### **The role of CEE states in shaping the Council’s approach to sexual orientation equality**

In this section we consider the contribution of CEE states to shaping the approach of the Council’s statutory organs – the Committee of Ministers and the Parliamentary Assembly – to sexual orientation equality. The approach taken by the statutory organs is important because it influences the ways in which the Court interprets and applies the Convention when it considers applications relating to sexual orientation discrimination. The Court often cites the instruments adopted by the statutory organs – principally, recommendations and resolutions – as relevant to its interpretation and application of the Convention. Such instruments are products of the statutory organs pursuing the Council’s aim ‘to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress’<sup>17</sup> which is achieved, in part, through ‘discussion of questions of common concern and by agreements and common action in [...] the maintenance and further realisation of human rights and fundamental freedoms’.<sup>18</sup> The diverse membership of the Council has meant that its approaches to the human rights of sexual minorities has been shaped by debates about the extent to which there is ‘common heritage’ and ‘common concern’ in this area and, moreover, what ‘common action’ can be agreed upon. CEE states, as we outline below, have made a significant contribution to shaping these debates.

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<sup>13</sup> ILGA-Europe, “Rainbow Europe Index 2018”, [https://www.ilga-europe.org/sites/default/files/Attachments/index\\_2018\\_small.pdf](https://www.ilga-europe.org/sites/default/files/Attachments/index_2018_small.pdf) [Accessed 14 February 2019].

<sup>14</sup> For a discussion, see P. Johnson, “‘Homosexual Propaganda’ Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?” (2015) 3(2) *Russian Law Journal* 37.

<sup>15</sup> For example, Croatia, Georgia, Hungary, and Latvia have introduced legislative amendments to define marriage as the union between a man and a woman only. For a discussion, see: K. Waaldijk, “Same-Sex Partnership, International Protection”, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012).

<sup>16</sup> See, Council of Europe, Parliamentary Assembly, *Report on the persecution of LGBTI people in the Chechen Republic (Russian Federation)* (Doc. 14572, 2018).

<sup>17</sup> Statute of the Council of Europe, art. 1a.

<sup>18</sup> Statute of the Council of Europe, art. 1b.

## *The Parliamentary Assembly*

Prior to the expansion of the Council through the membership of CEE states, the Parliamentary Assembly had adopted very few instruments relating to sexual orientation equality. Although a Recommendation and Resolution adopted in 1981 on discrimination against homosexuals marked a significant development in the Assembly's approach to sexual orientation equality,<sup>19</sup> it was not until 2000 that the Assembly began to more systematically develop its approach in this area. Since 2000, the Assembly has adopted a number of Recommendations and Resolutions relating to sexual orientation equality that has involved the participation of CEE states. Each of the CEE states has varying influence in the Assembly, by virtue of the different numbers of representatives that they are permitted to send.<sup>20</sup> For instance, several CEE states (Estonia, Latvia, the former Yugoslav Republic of Macedonia, Montenegro, and Slovenia) are permitted three representatives, whereas two CEE states (Poland and Ukraine) are each permitted 12 representatives. The Russian Federation is permitted 18 representatives in the Assembly – which is the largest number of any CEE state – but its participation has been limited since 2014.<sup>21</sup> Of the total number of 324 representatives of the Assembly from the 47 member states, 137 representatives are from CEE states.<sup>22</sup> This makes the representatives from CEE states approximately 42 per cent of the total membership of the Assembly. Collectively, therefore, the CEE states have considerable capacity to influence the Assembly's approach to sexual orientation equality.

When, in 2000, the Assembly began to more robustly develop its position on sexual orientation equality, through the adoption of two Recommendations,<sup>23</sup> 17 CEE states had become members of the Council. The more extensive of these two Recommendations recommended that the Committee of Ministers call upon member states to make wide provision to address discrimination on the grounds of sexual orientation in member states by, for instance, adopting legislation providing for registered partnerships.<sup>24</sup> This Recommendation also, reiterating an earlier Opinion,<sup>25</sup> contained the recommendation that the Committee of Ministers add sexual orientation to the grounds on which the Convention prohibits discrimination.<sup>26</sup> When the draft text of the Recommendation was presented in the Assembly, by a representative of Hungary,<sup>27</sup>

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<sup>19</sup> Council of Europe, Parliamentary Assembly, Recommendation 924 (1981); Council of Europe, Parliamentary Assembly, Resolution 756 (1981). For a discussion, see P. Johnson, "The Council of Europe and the European Court of Human Rights", in A. R. Ziegler (ed.), *International LGBTI Law: Sexual Orientation and Gender Identity Law from an International-Comparative Perspective* (forthcoming), pre-print copy available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2927098](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2927098) [Accessed 14 February 2019].

<sup>20</sup> The number of Parliamentary Assembly representatives for each member state is set by Statute of the Council of Europe, art.26.

<sup>21</sup> Following the annexation of Crimea by the Russian Federation, the Parliamentary Assembly adopted the Resolution 1990 (2014) which, inter alia, suspended the voting rights of the Russian Federation delegation until the end of the 2014 session (a suspension which was subsequently renewed in 2015). The Russian Delegation rejoined the Assembly in July 2019.

<sup>22</sup> This number includes the 18 representatives from the Russian Federation that did not vote in the Assembly between 2014 and 2019 (see footnote above).

<sup>23</sup> Recommendation 1474 (2000).

<sup>24</sup> Recommendation 1474 (2000) at [11.3.i].

<sup>25</sup> Council of Europe, Parliamentary Assembly, *Opinion on the draft Protocol No. 12 to the European Convention on Human Rights* (Opi. 216, 2000).

<sup>26</sup> Recommendation 1474 (2000) at [11.1].

<sup>27</sup> Mr Tabajdi, see Council of Europe, Parliamentary Assembly, Third part of the 2000 Ordinary Session of the Parliamentary Assembly, 24<sup>th</sup> Sitting (30 June 2000), <http://assembly.coe.int/Documents/Records/2000/e/0003301000e.htm#5> [Accessed 14 February 2019].

it was acknowledged that it had ‘stimulated heated reaction and fevered debate’<sup>28</sup> among members of the Committee on Legal Affairs and Human Rights and that there had been ‘resistance’ to addressing issues relating to the adoption of children and assisted procreation which, as a result, had not been included in the draft.<sup>29</sup>

When the Assembly debated this draft Recommendation in 2000,<sup>30</sup> hostility to it came principally from representatives of Council states who held faith-based beliefs about certain issues relating to homosexuality and children. In light of this, it was proposed that, in order ‘to command the broadest possible consensus’,<sup>31</sup> the draft text be amended to omit a reference to the right of same-sex couples to adopt children.<sup>32</sup> This proposal was designed to address the fact that, as a representative of Moldova stated, several members of the Assembly felt the draft text ‘goes too far’.<sup>33</sup> The aim of removing the reference to adoption in the draft text was therefore to ‘persuade many members of the Christian Democrat Group’ to vote for the Recommendation as a whole.<sup>34</sup> This illustrates that differences in opinion among representatives of the Assembly on the development of the approach to sexual orientation equality is not necessarily organized according to the state-affiliation of representatives but, rather, by the faith-based and other beliefs of representatives about homosexuality.

However, what is discernable from an examination of Assembly debates since 2000 is that, among CEE states, more representatives tend to vote against rather than for proposed Recommendations or Resolutions relating to sexual orientation equality and, in doing, usually constitute the majority of the overall votes against such measures. For example, in 2010 when the Assembly debated a Resolution concerning discrimination on the basis of sexual orientation and gender identity<sup>35</sup> – which was adopted with 51 votes for, 25 against and 5 abstentions – representatives from 7 CEE states voted against and representatives from 5 CEE states voted for. Of the 25 votes against the Resolution, 17 were cast by representatives of CEE states<sup>36</sup> (68 per cent), whereas of the 51 votes for the Resolution, only 9 were cast by representatives of CEE states (18 per cent).<sup>37</sup> Therefore, of the total votes cast by representatives of CEE states, 65 per cent were against the adoption of the Resolution. This pattern of voting has been similar

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<sup>28</sup> Mr Tabajdi, <http://assembly.coe.int/Documents/Records/2000/e/0003301000e.htm#5> [Accessed 14 February 2019].

<sup>29</sup> Mr Tabajdi, <http://assembly.coe.int/Documents/Records/2000/e/0003301000e.htm#5> [Accessed 14 February 2019].

<sup>30</sup> The draft Recommendation was debated simultaneously with another draft Recommendation addressing the situation of gays and lesbians and their partners in respect of asylum and immigration in Council member states. See Council of Europe, Parliamentary Assembly, Recommendation 1470 (2000).

<sup>31</sup> Mr Solonari, see Council of Europe, Parliamentary Assembly, Fourth part of the 2000 Ordinary Session of the Parliamentary Assembly, 27<sup>th</sup> Sitting (26 September 2000), <http://assembly.coe.int/Documents/Records/2000/e/0004261500e.htm#4.%20Situation%20of%20lesbians%20and%20gays%20in%20Council%20of%20Europe%20member%20states> [Accessed 14 February 2019].

<sup>32</sup> The draft text in question stated at [9] that the ‘Assembly is pleased to note [...] that some countries have [...] passed laws recognising homosexual partnerships and even the right to adopt children’. See *Report on the situation of lesbians and gays in Council of Europe member states* (Doc. 8755, 2000).

<sup>33</sup> Mr Solonari, see Council of Europe, Fourth part of the 2000 Ordinary Session of the Parliamentary Assembly, 27<sup>th</sup> Sitting (26 September 2000).

<sup>34</sup> Mr Eörsi, see Council of Europe, Fourth part of the 2000 Ordinary Session of the Parliamentary Assembly, 27<sup>th</sup> Sitting (26 September 2000).

<sup>35</sup> Council of Europe, Parliamentary Assembly, Resolution 1728 (2010).

<sup>36</sup> The 17 votes were cast by Armenia (x2), Czech Republic, Lithuania, Former Yugoslav Republic of Macedonia, Moldova (x2), Poland (x4), and the Russian Federation (x6).

<sup>37</sup> The 9 votes were cast by Czech Republic (x2), Estonia (x2), Poland, the Russian Federation, and Serbia (x3). Similar voting patterns apply in respect of the Recommendation 1915 (2010) which was debated and adopted during the same session.

in respect of other subsequent Recommendations and Resolutions concerning sexual orientation equality,<sup>38</sup> although the recent absence of representatives of the Russian Federation – who have previously consistently voted against such measures – has changed the number of votes from CEE states in the Assembly.<sup>39</sup>

Votes cast against sexual orientation equality measures in the Assembly by representatives of CEE states do not prevent instruments from ultimately being adopted. However, during Assembly debates, these representatives do play a decisive role in determining the shape of such instruments. For example, in respect of the 2010 Resolution discussed above, votes by representatives of CEE states comprised 56 per cent of the votes in favour of an amendment – which was adopted by a close vote<sup>40</sup> – that deleted from the Resolution a provision calling for equality on the grounds of sexual orientation in respect of the adoption of unrelated children by single persons.<sup>41</sup> By contrast, only 18 per cent of the votes against the amendment were by representatives of CEE states.<sup>42</sup> This demonstrates that CEE states often play a significant role in diluting or narrowing the scope of the instruments relating to sexual orientation equality that are adopted by the Assembly.

### *The Committee of Ministers*

The Council's most important instrument relating to sexual orientation is a Recommendation, adopted by the Committee of Ministers in 2010, designed to combat discrimination against LGBT people.<sup>43</sup> This instrument, the first of its kind, contains recommendations to member states in respect of a wide range of issues, including: the right to life, security and protection from violence; freedom of association, expression and peaceful assembly; and protection from discrimination in employment, education, health, housing, and sports. The Recommendation grew out of a Message, adopted in 2008, in which the Committee of Ministers stated that it was 'strongly attached to the principle of equal rights and dignity of all human beings, including lesbian, gay, bisexual and transgender persons' and that 'instances of discrimination on grounds of sexual orientation or gender identity as well as homophobia and intolerance towards transgender persons are regrettably still widespread in Europe'.<sup>44</sup> In the Message, the Committee of Ministers made specific reference to its previous pronouncements on sexual orientation discrimination in several CEE states.<sup>45</sup> On this basis, the Committee of Ministers

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<sup>38</sup> See, for example, Council of Europe, Parliamentary Assembly, Recommendation 2021 (2013); Council of Europe, Parliamentary Assembly, Resolution 1948 (2013).

<sup>39</sup> For example, see voting in respect of Council of Europe, Parliamentary Assembly, Resolution 2239 (2018).

<sup>40</sup> Amendment 11 was approved with 41 votes in favour, 38 votes against, and 3 abstentions. See Council of Europe, Parliamentary Assembly, Second Part of the 2010 Ordinary Session, 17<sup>th</sup> Sitting on (29 April 2010) AS (2010) CR 17.

<sup>41</sup> Paragraph 15.11 of draft Resolution. See: *Report Discrimination on the basis of sexual orientation and gender identity* (Doc. 12185, 2010). Of the 41 votes in favour of the amendment, 23 votes were cast by representatives of CEE states (Bulgaria (x2), Czech Republic, Estonia, Georgia, Hungary, Lithuania, Former Yugoslav Republic of Macedonia, Moldova (x2), Poland (x4), the Russian Federation (x8), and Ukraine).

<sup>42</sup> Of the 38 votes against the amendment, 7 were cast by representatives of CEE states (Czech Republic (x2), Estonia (x2), Poland, and Serbia (x2)).

<sup>43</sup> Council of Europe, Committee of Ministers, Recommendation CM/Rec(2010)5.

<sup>44</sup> Council of Europe, Committee of Ministers, *Message from the Committee of Ministers to steering committees and other committees involved in intergovernmental co-operation at the Council of Europe on equal rights and dignity of lesbian, gay, bisexual and transgender persons* (adopted by the Committee of Ministers on 2 July 2008 at the 1031<sup>st</sup> meeting of the Ministers' Deputies). For a background on the development of this Message, see Council of Europe, Committee of Ministers, GR-H (2008)19.

<sup>45</sup> See: Council of Europe, Committee of Ministers, *Reply to Written Question No. 524 by Mrs Acketofti: "Ban on a Chişinau demonstration by homosexuals"* (Doc. 11283, 2007); Council of Europe, Committee of Ministers, *reply to Written Question No. 527 by Mr Huss: "Ban on a Moscow demonstration by lesbian, gay, bisexual and*

issued the Steering Committee for Human Rights with Terms of Reference that instructed it to draft a Recommendation on measures to combat discrimination based on sexual orientation or gender identity, to ensure respect for the human rights of LGBT persons and to promote tolerance towards them.<sup>46</sup> This drafting was subsequently carried out by the Committee of Experts on discrimination on grounds of sexual orientation and gender identity, under Terms of Reference agreed by the Committee of Ministers,<sup>47</sup> which decided that the Recommendation ‘should set out the principles deriving from existing European and other international instruments, with particular emphasis on the European Convention on Human Rights, in the light of European Court of Human Rights case-law’.<sup>48</sup>

Because the text of the Recommendation was shaped by the case law of the Court, the Recommendation can be seen to reproduce some of the limitations that existed in the case law at that time. For instance, the Recommendation does not recommend that member states provide same-sex couples with access to partnership recognition equivalent to different-sex couples by, for instance, granting them access to marriage. However, the Recommendation can be seen to take a significant lead on addressing a number of issues relating to discrimination on the grounds of sexual orientation and gender identity – such as hate crime and hate speech – which, as we discuss below, are significant problems in many CEE states. One aspect of the Recommendation that is particularly important in respect of CEE states is the recommendation that member states should take appropriate action to ensure that ‘the right to education can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity’<sup>49</sup> and ‘promote mutual tolerance and respect in schools, regardless of sexual orientation or gender identity’.<sup>50</sup> The Recommendation states that this should include:

providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials, and providing pupils and students with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity.<sup>51</sup>

This aspect of the Recommendation has far-reaching implications in light of some CEE states, most notably the Russian Federation, having made legislative provision to limit the dissemination of so-called ‘propaganda’ to minors in respect of ‘non-traditional’ aspects of gender and sexuality.<sup>52</sup>

It is not possible to know the extent to which any member state, including any CEE state, influenced the process by which the Recommendation was adopted. No formal vote was taken on the Recommendation by the Committee of Ministers when it was adopted by consensus in line with the ‘gentleman’s agreement’, which provides that no delegation should request that a

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*transgender persons in 2007*” (CM/AS(2007)Quest527); Council of Europe, Committee of Ministers, *reply to Written Question No. 540 by Mr Huss: “Denial of freedom of assembly and expression to lesbian, gay, bisexual and transgender persons in Lithuania”* (Doc. 11486, 2008).

<sup>46</sup> Council of Europe, Committee of Ministers, CM/Del/Dec(2008)1031/4.3abE.

<sup>47</sup> Council of Europe, Committee of Ministers, CM/Del/Dec(2009)1048/4.4cE.

<sup>48</sup> Council of Europe, Committee of Ministers, Steering Committee for Human Rights, CM(2010)4-add3final, part 1.

<sup>49</sup> Council of Europe, Recommendation CM/Rec(2010)5 at [31].

<sup>50</sup> Council of Europe, Recommendation CM/Rec(2010)5 at [32].

<sup>51</sup> Council of Europe, Recommendation CM/Rec(2010)5 at [32].

<sup>52</sup> See P. Johnson, “‘Homosexual Propaganda’ Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?” (2015) 3(2) *Russian Law Journal* 37.



unanimous vote be required<sup>53</sup> to block the adoption of recommendations if a majority has been attained.<sup>54</sup> On this basis, some, if not all, CEE states must have supported the adoption of the Recommendation. We are aware that a ‘few countries’ did make interpretative statements that are included in the Records of the meeting at which the Recommendation was adopted but, unfortunately, these are classified until May 2020.<sup>55</sup> Once declassified, these documents may shed light on the extent to which certain CEE states sought to shape or even resist the adoption of the Recommendation. The Recommendation has now been cited by the Court in respect of a number of cases (which we discuss below) concerning sexual orientation discrimination in CEE states that include complaints relating to freedom of expression and peaceful assembly,<sup>56</sup> homophobic violence,<sup>57</sup> and family reunification.<sup>58</sup>

## **Applications to the Court against CEE states concerning sexual orientation discrimination**

In this section, we provide an overview of the applications brought under the Convention against CEE states concerning sexual orientation discrimination since the time that individuals in CEE states first became able, in 1992, to submit such applications.<sup>59</sup> To date, as of July 2019, 50 cases (which, in some instances, comprise conjoined individual applications) concerning sexual orientation discrimination in CEE states have either been judicially disposed of (by way of a publicly available decision or judgment)<sup>60</sup> or have been communicated by the Court.<sup>61</sup>

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<sup>53</sup> As specified by Statute of the Council of Europe, art.20.a.

<sup>54</sup> The Statute of the Council of Europe requires a two-thirds majority of the Representatives casting a vote and a majority of the Representatives entitled to sit on the Committee of Ministers. See: Statute of the Council of Europe, art.20.d.

<sup>55</sup> Personal correspondence of the authors with the Secretariat of the Committee of Ministers.

<sup>56</sup> *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010; *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10.

<sup>57</sup> *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17; *M.C. and A.C. v Romania* (App. No.12060/12), judgment of 12 April 2016.

<sup>58</sup> *Pajić v Croatia* (2018) 67 E.H.R.R. 12.

<sup>59</sup> Bulgaria and Hungary were the first CEE countries where the Convention came into force in 1992 and, as a consequence of those states making declarations under ex-art.25 and ex-art.46 of the Convention, the right of individual petition and the jurisdiction of the Court was recognised. Since 1994, when Protocol 11 of the Convention entered into force, individuals have an automatic right to individual petition in states where the Convention is in force.

<sup>60</sup> *Szywala v Poland* (App. No.61782/00), decision of 20 June 2006; *Bączkowski and Others v Poland* (2009) 48 E.H.R.R. 19; *Kozak v Poland* (2010) 51 E.H.R.R. 16; *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010; *Lokpo and Touré v Hungary* (App. No.10816/10), judgment of 20 September 2011; *Genderdoc-M v Moldova* (App. No. 9106/06), judgment of 12 June 2012; *Georgescu v Romania* (App. No.4867/03), decision of 22 October 2013; *Mladina D.D. Ljubljana v Slovenia* (App. No.20981/10), judgment of 17 April 2014; *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17; *Pajić v Croatia* (2018) 67 E.H.R.R. 12; *M.C. and A.C. v Romania* (App. No.12060/12), judgment of 12 April 2016; *O.M. v Hungary* (App. No.9912/15), judgment of 5 July 2016; *Dorđević and Others v Serbia* (App. Nos.5591/10 and 3 others), decision of 17 January 2017; *Lashmankin and Others v Russia* (2019) 68 E.H.R.R. 1; *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10; *D.K. v Croatia* (App. No.28416/14), decision of 26 June 2018; *Nurmatov (Ali Feruz) v Russia* (App. No.56368/17), decision of 2 October 2018; *Alekseyev and Others v Russia* (App. Nos.14988/09 and 50 others), judgment of 27 November 2018; *Zhdanov and Others v Russia* (App. Nos.12200/08 and 2 others), judgment of 16 July 2019. We have no access to any data on applications that may have been submitted to the Court that have been disposed of in ways that do not result in documentation being made publicly available by the Court.

<sup>61</sup> *Aghdgomelashvili and Japaridze v Georgia* (App. No.7224/11), communicated 3 December 2013; *Sabalić v Croatia* (App. No.50231/13), communicated 7 January 2014; *Women’s Initiatives Supporting Group and Others v Georgia* (App. No.73204/13), communicated 24 August 2015; *Alekseyev and Others v Russia* (App. No.31782/15), communicated 15 January 2016; *Fedotova and Shipitko v Russia* (App. Nos.40792/10 and 2 others), communicated 2 May 2016; *Sozayev and Others v Russia and Samburov v Russia* (App. Nos.67685/14 and 35199/15), communicated 29 September 2016; *Ecodefence and Others v Russia* (App. Nos.9988/13 and 48 others),

Figure 1 – Cases (which in some instances comprise conjoined applications) brought by individuals against CEE states concerning sexual orientation discrimination that have been judicially disposed of, by way of a publicly available decision or judgment, or have been communicated by the Court

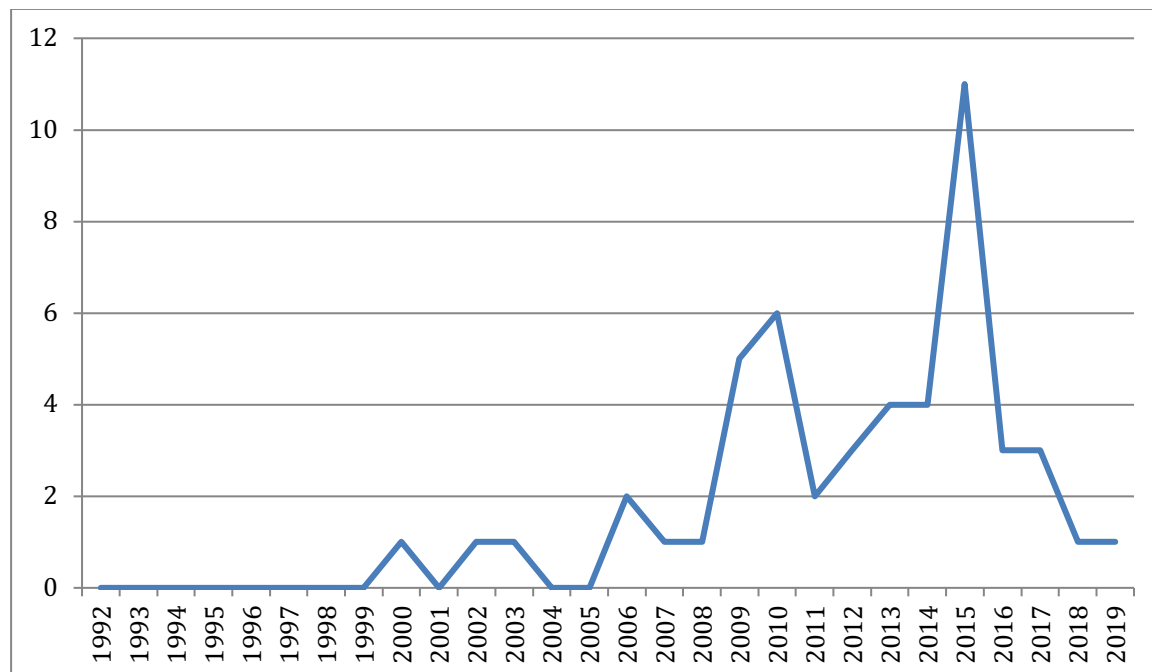


Figure 1 illustrates the temporal evolution of the 50 cases relating to sexual orientation discrimination against CEE states. It shows that between 1992 and 1999, no application was submitted to the former European Commission of Human Rights – which was the body responsible for receiving applications until its abolition in 1999 – concerning a complaint of sexual orientation discrimination in a CEE state. The absence of such applications during this period can be explained, in part, by the fact that the process of ratifying the Convention was incomplete in many CEE states. In addition, although by 1999 the Convention had entered into force in 17 CEE states, the ‘immense’ challenge of dealing with a ‘sophisticated body of norms

communicated 22 March 2017; *Beus v Croatia* (App. No.16943/17), communicated 5 April 2017; *Beizaras and Levickas v Lithuania* (App. No.41288/15), communicated 16 June 2017; *Chechetkin v Russia* (App. No.42395/15), communicated 6 July 2017; *Klimova v Russia* (App. No.33421/16), communicated 26 October 2017; *Krupnova v Russia* (App. No.49014/16), communicated 26 October 2017; *Romanov v Russia* (App. Nos.58358/14 and 2 others), communicated 2 November 2017; *Alekseyev and Others v Russia and 1 other application* (App. Nos.39954/09 and 3465/17), communicated 13 November 2017; *V.P. v Russia* (App. No.33140/15), communicated 12 December 2017; *Iachimovschi v the Republic of Moldova* (App. Nos.21029/13 and 5 others), communicated 24 January 2018; *Association Accept and Others v Romania* (App. No. 19237/16), communicated 7 February 2019; *Minasyan and Others v Armenia* (App. No.59180/15), communicated 21 February 2018; *A.S. v Poland* (App. No.58012/10), communicated 26 February 2019; *Komarova v Russia* (App. No.44570/11), communicated 16 April 2018; *Zahtila and Koletić v Croatia* (App. No.63344/17), communicated 12 July 2018; *Berkman v Russia* (App. No.46712/15), communicated 12 November 2018; *Ilupin and Others v Russia* (App. No.76797/13), communicated 12 November 2018; *A. v Azerbaijan and 24 other applications* (App. No.17184/18), communicated 26 February 2019; *A.D.-K. and Others v Poland* (App. No.30806/15), communicated 26 February 2019; *Schlittner-Hay v Poland and 1 other application* (App. Nos.56846/15 and 56849/15), communicated 26 February 2019; *X. v Poland* (App. No.20741/10), communicated 26 February 2019; *Oganezova v Armenia and 1 other application*, (App. Nos.71367/12 and 72961/12), communicated 17 May 2019; *Ivanov v Russia* (App. No.72144/14), communicated 28 May 2019; *Duță v Romania* (App. No.8783/15), communicated 24 June 2019); *Nino Bolkvadze and Others v Georgia* (App. No. 17354/19), communicated 5 July 2019. In compiling this list of communicated cases we have included those cases that explicitly concern sexual orientation discrimination in CEE states and are publicly available on HUDOC.

and standards<sup>62</sup> in societies where ‘public interest litigation’ had previously been virtually unknown,<sup>63</sup> and where LGBT organizations were not sufficiently equipped to undertake it, can be seen to have contributed to suppressing applications concerning sexual orientation discrimination during this period. The absence of applications between 1992 and 1999 conforms to the more general trend that, during this period, the overall number of applications that were lodged against CEE states was low.<sup>64</sup>

The first application concerning sexual orientation discrimination in a CEE state was lodged in 2000<sup>65</sup> and, until 2005, the ‘take-up’ of the Convention as a strategic instrument to challenge sexual orientation discrimination remained limited in CEE states. Only three applications concerning sexual orientation discrimination in CEE states were lodged by individuals, against Poland and Romania, between 2000 and 2005.<sup>66</sup> From 2006 onwards, however, gay men and lesbians have turned to the Convention with greater frequency and have lodged applications comprising 47 cases against CEE states concerning sexual orientation discrimination. This increase in applications since 2006 is consistent with the general increase in applications being lodged against CEE states, which now account for a significant proportion of the Court’s workload.<sup>67</sup> The increase also reflects the growing involvement of disadvantaged or marginalised minority groups in CEE states in ‘strategic litigation’ in the Court.<sup>68</sup>

To date, as Table 1 shows, cases have been brought under the Convention about sexual orientation discrimination in 12 CEE states. Significantly, nearly half of these cases are against one state, the Russian Federation. As we discuss below, several of the cases against the Russian Federation raise similar claims and challenge the existence of legislative provisions designed to restrict the ‘promotion of homosexuality in general’<sup>69</sup> and in ‘public places’.<sup>70</sup>

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<sup>62</sup> D. Spielmann, “Foreword”, in I. Motoc and I. Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, p.xxv.

<sup>63</sup> J. A. Goldston, “Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges” (2006) 28(2) *Human Rights Quarterly* 492, 492.

<sup>64</sup> In this respect, former President of the Court, Luzius Wildhaber, points out that between 1992 and 1998 the Court issued a total of only nine judgments against four CEE states. See L. Wildhaber, “Comments on the early years and conclusions”, in I. Motoc and I. Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (Cambridge: Cambridge University Press, 2016), p.10.

<sup>65</sup> *Szywala v Poland* (App. No.61782/00), decision of 20 June 2006.

<sup>66</sup> *Szywala v Poland* (App. No.61782/00), decision of 20 June 2006; *Kozak v Poland* (2010) 51 E.H.R.R. 16; *Georgescu v Romania* (App. No.4867/03), decision of 22 October 2013.

<sup>67</sup> For example, out of 798,610 applications considered by the Court and former Commission in the period 1959-2017, 509,597 applications were lodged against CEE states. See European Court of Human Rights, “Overview 1959-2017 ECHR”, [https://www.echr.coe.int/Documents/Overview\\_19592017\\_ENG.pdf](https://www.echr.coe.int/Documents/Overview_19592017_ENG.pdf) [Accessed 14 February 2019]. For an overview on the impact of ‘new’ Council states on the Court see E. Bates, *The Evolution of the European Convention on Human Rights* (Oxford: Oxford University Press, 2010); S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2005).

<sup>68</sup> For instance, NGOs and individuals consistently challenge forms of discrimination against Roma minorities in CEE states by pursuing litigation before the Court. According to the latest information available, 81 applications concerning Roma rights in CEE states have been either judicially disposed of or have been communicated by the Court between 2001 and 2018. See European Court of Human Rights, “Factsheet – Roma and Travellers”, [https://www.echr.coe.int/Documents/FS\\_Roma\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Roma_ENG.pdf) [Accessed 14 February 2019]. For an overview of the measures adopted by the Council to protect Roma minorities, see Council of Europe, *The Council of Europe: Protecting the Rights of Roma* (Council of Europe, 2013).

<sup>69</sup> *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10 at [45].

<sup>70</sup> *Alekseyev and Others v Russia* (App. Nos.14988/09 and 50 others), judgment of 27 November 2018 at [17].

Table 1 – Cases by state (which in some instances comprise conjoined applications) brought by individuals against CEE states concerning sexual orientation discrimination that have been judicially disposed of, by way of a publicly available decision or judgment, or have been communicated by the Court

State	Number of cases	Number of judgments/decisions	Number of violations
Russian Federation	20	6	5
Poland	7	3	2
Croatia	5	2	1
Romania	4	2	1
Georgia	4	1	1
Hungary	2	2	2
Moldova	2	1	1
Armenia	2	0	0
Slovenia	1	1	1
Serbia	1	1	0
Azerbaijan	1	0	0
Lithuania	1	0	0

As we indicated above, the factors determining whether individuals decide to bring complaints to the Court about sexual orientation discrimination in CEE states are complex and multifaceted and include, at least, the extent to which an individual is prepared to put their ‘neck on the block’,<sup>71</sup> the level of support such an individual receives in making their complaint, and the access an individual has to legal professionals who can and are willing to take forward litigation concerning sexual orientation discrimination. These factors, and other personal issues,<sup>72</sup> account for the low level of applications against some CEE states, and for the total absence of applications against 10 CEE states. It is significant that, whilst litigation in the Court and former Commission concerning sexual orientation discrimination in Western Europe has historically been undertaken predominantly by male applicants,<sup>73</sup> such litigation against CEE states has been undertaken by an almost equal number of male and female applicants,<sup>74</sup> reflecting the diversity of the communities that engage in such litigation.

Since 2006, the Court has adjudicated 19 cases concerning sexual orientation discrimination in CEE states. Of these, the Court has found a violation of the Convention in respect of 14 cases

<sup>71</sup> P. Johnson, *Going to Strasbourg. An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford: Oxford University Press, 2016), p.137.

<sup>72</sup> For an analysis of the personal issues connected to taking a sexual orientation discrimination case to the Court in the British context, see P. Johnson, *Going to Strasbourg* (Oxford: Oxford University Press, 2016). For an analysis of such personal issues in the Russian context, see L. McIntosh Sundstrom, V. Sperling, M. Sayoglu, *Courting Gender Justice: Russia, Turkey, and the European Court of Human Rights* (Oxford University Press, 2019).

<sup>73</sup> The first complaints concerning female applicants were lodged in 1985 - *Morrissens v Belgium* (App. No.11389/85), decision of 03 May 1988; *S v United Kingdom* (App. No.11716/85), decision of 14 May 1986 - 30 years after the first complaint about sexual orientation discrimination was lodged by a male applicant. For an overview, see: P. Johnson, *Homosexuality and the European Court of Human Rights* (Abingdon: Routledge, 2013).

<sup>74</sup> The applicants involved in the 50 cases concerning sexual orientation discrimination in the Court have been almost half male and half female. In calculating this number we have excluded those applications where no individual is involved or where the applicant is anonymous.

(74 per cent)<sup>75</sup> and declared five cases inadmissible or struck them out.<sup>76</sup> There is, therefore, a high rate of success for applications about sexual orientation discrimination in CEE states. Significantly, the rate of success of cases against the Russian Federation is higher, with the Court having found a violation of the Convention in five of the six cases that it has adjudicated. Since 14 of the 31 cases that are currently pending before the Court about sexual orientation discrimination in CEE states are against the Russian Federation, and Russian authorities arguably continue to implement and enforce regressive legal measures against sexual minorities, it is to be expected that a significant number of new violations will be found against the Russian Federation in the near future.

Applicants involved in most sexual orientation discrimination cases in the Court have been represented by different legal professionals and, therefore, there is no common set of lawyers or legal organization underpinning the litigation. The exception to this is in respect of the Russian Federation, where applicants in eight cases have been represented by a lawyer<sup>77</sup> who has also taken part in public campaigns designed to illustrate the impact of ‘homosexual propaganda’ legislation.<sup>78</sup> There are also common lawyers in cases concerning sexual orientation discrimination in Romania,<sup>79</sup> Georgia<sup>80</sup> and Croatia,<sup>81</sup> but they do not appear to be affiliated to any organisation concerning sexual orientation equality. This would suggest the existence, in a small number of CEE states, of legal professionals committed to actively pursuing sexual orientation discrimination litigation in the Court – something that has long been

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<sup>75</sup> *Bączkowski and Others v Poland* (2009) 48 E.H.R.R. 19; *Kozak v Poland* (2010) 51 E.H.R.R. 16; *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010; *Lokpo and Touré v Hungary* (App. No.10816/10), judgment of 20 September 2011; *Genderdoc-M v Moldova* (App. No. 9106/06), judgment of 12 June 2012; *Mladina D.D. Ljubljana v Slovenia* (App. No.20981/10), judgment of 17 April 2014; *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17; *Pajić v Croatia* (2018) 67 E.H.R.R. 12; *M.C. and A.C. v Romania* (App. No.12060/12), judgment of 12 April 2016; *O.M. v Hungary* (App. No.9912/15), judgment of 5 July 2016; *Lashmankin and Others v Russia* (2019) 68 E.H.R.R. 1; *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10; *Alekseyev and Others v Russia* (App. Nos.14988/09 and 50 others), judgment of 27 November 2018; *Zhdanov and Others v Russia* (App. Nos.12200/08 and 2 others), judgment of 16 July 2019.

<sup>76</sup> *Szywala v Poland* (App. No.61782/00), decision of 20 June 2006; *Georgescu v Romania* (App. No.4867/03), decision of 22 October 2013; *Dorđević and Others v Serbia* (App. Nos.5591/10 and 3 others), decision of 17 January 2017; *D.K. v Croatia* (App. No.28416/14), decision of 26 June 2018; *Nurmatov (Ali Feruz) v Russia* (App. No.56368/17), decision of 2 October 2018.

<sup>77</sup> Mr. D. G. Bartenev has been involved as the only legal representative or as part of the legal team assisting the applicants in the following cases: *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010; *Alekseyev and Movement for Marriage Equality v Russia* (conjoined in *Zhdanov and Others v Russia*); *Fedotova and Shipitko v Russia* (App. Nos.40792/10 and 2 others), communicated 2 May 2016; *Lashmankin and Others v Russia* (2019) 68 E.H.R.R. 1; *Romanov v Russia* (App. Nos.58358/14 and 2 others), communicated 2 November 2017; *Ecodefence and Others v Russia* (App. Nos.9988/13 and 48 others), communicated 22 March 2017; *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10; *Komarova v Russia* (App. No.44570/11), communicated 16 April 2018. See also *Zhdanov and Rainbow House v Russia* (conjoined in *Zhdanov and Others v Russia*) in which the legal representative is affiliated to ‘Agora’, an organisation which pursues human rights litigation across the Russian Federation.

<sup>78</sup> For instance, see: D. Bartenev, “LGBT Rights in Russia and European Human Rights Standards”, in L. Mälksoo and W. Benedek (eds.), *Russia and the European Court of Human Rights* (Cambridge: Cambridge University Press, 2017), p.326; Equal Rights Trust, *Justice or Complicity* (London: Equal Rights Trust, 2016)

<sup>79</sup> The same lawyer has represented the applicants in *M.C. and A.C. v Romania* (App. No.12060/12), judgment of 12 April 2016, and *Association Accept and Others v Romania* (App. No. 19237/16), communicated 7 February 2019.

<sup>80</sup> The same lawyers have represented the applicants in *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 and in *Women’s Initiatives Supporting Group and Others v Georgia* (App. No.73204/13), communicated 24 August 2015.

<sup>81</sup> The same lawyer has represented the applicant in *Pajić v Croatia* (2018) 67 E.H.R.R. 12, *Sabalić v Croatia* (App. No.50231/13), communicated 7 January 2014, and in *Zahtila and Koletić v Croatia* (App. No.63344/17), communicated 12 July 2018.

a common feature of such litigation in Western Europe.<sup>82</sup> Moreover, as we discuss below, litigation concerning sexual orientation discrimination in CEE states has a high level of involvement of non-governmental organizations (NGOs). NGOs are the applicants in nine cases against CEE states concerning sexual orientation discrimination.<sup>83</sup> Moreover, applicants in at least 18 cases are affiliated to organisations dedicated to promoting sexual orientation equality<sup>84</sup> and, in one of these cases, a human rights NGO is providing legal aid to the applicants along with an international organisation.<sup>85</sup> Therefore, the majority of cases against CEE states concerning sexual orientation discrimination can, to varying degrees, be characterised as examples of strategic litigation or ‘activism in litigation’.<sup>86</sup>

## **The jurisprudence of the Court in respect of sexual orientation discrimination in CEE states**

In this section we explore the substance of the complaints relating to sexual orientation discrimination that have been brought under the Convention against CEE states. We begin by examining the issues that have been raised by sexual minorities in CEE states, and then go on to consider the response of the Court. Specifically, we examine the ways in which the Court has been required to evolve its jurisprudence in order to address particular aspects of sexual orientation discrimination in CEE states.

### ***Issues raised by applicants before the Court***

Gay men and lesbians in CEE states have attempted to utilize the Convention to challenge a number of aspects of sexual orientation discrimination. Although the 50 cases submitted to the Court about sexual orientation discrimination in CEE states are all unique, in the sense that they concern issues that are specific to each applicant’s life, it is nevertheless possible to discern

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<sup>82</sup> For a discussion of the role of legal professionals in sustaining litigation about sexual orientation discrimination in the British context see P. Johnson, *Going to Strasbourg* (Oxford: Oxford University Press, 2016), chapter 5.

<sup>83</sup> *Bączkowski and Others v Poland* (2009) 48 E.H.R.R. 19; *Zhdanov and Others v Russia* (App. Nos.12200/08 and 2 others), judgment of 16 July 2019; *Genderdoc-M v Moldova* (App. No. 9106/06), judgment of 12 June 2012; *Women’s Initiatives Supporting Group and Others v Georgia* (App. No.73204/13), communicated 24 August 2015; *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17; *Đorđević and Others v Serbia* (App. Nos.5591/10 and 3 others), decision of 17 January 2017; *Ecodefence and Others v Russia* (App. Nos.9988/13 and 48 others), communicated 22 March 2017; *Iachimovschi v the Republic of Moldova* (App. Nos.21029/13 and 5 others), communicated 24 January 2018; *Association Accept and Others v Romania* (App. No. 19237/16), communicated 7 February 2019.

<sup>84</sup> *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010; *Aghdgomelashvili and Japaridze v Georgia* (App. No.7224/11), communicated 3 December 2013; *Georgescu v Romania* (App. No.4867/03), decision of 22 October 2013; *Alekseyev and Others v Russia* (App. No.31782/15), communicated 15 January 2016; *M.C. and A.C. v Romania* (App. No.12060/12), judgment of 12 April 2016; *Lashmankin and Others v Russia* (2019) 68 E.H.R.R. 1; *Beus v Croatia* (App. No.16943/17), communicated 5 April 2017; *Beizaras and Levickas v Lithuania* (App. No.41288/15), communicated 16 June 2017; *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10; *Chechetkin v Russia* (App. No.42395/15), communicated 6 July 2017; *Klimova v Russia* (App. No.33421/16), communicated 26 October 2017; *Romanov v Russia* (App. Nos.58358/14 and 2 others), communicated 2 November 2017; *Alekseyev and Others v Russia* (App. Nos.39954/09 and 3465/17), communicated 13 November 2017; *Minasyan and Others v Armenia* (App. No.59180/15), communicated 21 February 2018; *Komarova v Russia* (App. No.44570/11), communicated 16 April 2018; *Alekseyev and Others v Russia* (App. Nos.14988/09 and 50 others), judgment of 27 November 2018; *Oganezova v Armenia*, (App. Nos.71367/12 and 72961/12), communicated 17 May 2019; *Ivanov v Russia* (App. No.72144/14), communicated 28 May 2019.

<sup>85</sup> *Aghdgomelashvili and Japaridze v Georgia* (App. No.7224/11), communicated 3 December 2013.

<sup>86</sup> L. Hodson, “Activists and Lawyers in the ECtHR: The Struggle for Gay Rights”, in D. Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System (Onati International Series in Law and Society)* (Oxford: Hart Publishing, 2014), p.181.

common features among them. Moreover, these common features distinguish, to a certain extent, cases against CEE states from those applications brought against other Council states about sexual orientation discrimination. For example, as we noted above, no CEE state has retained criminal laws that discriminate on the grounds of sexual orientation in respect of sexual acts committed between consenting adults and, as such, applications before the Court have not – unlike in earlier applications brought against Western European states – involved issues concerning the right to respect for sexual privacy. Moreover, despite the fact that no CEE state permits same-sex marriage and the majority of CEE states do not extend legal recognition to same-sex relationships, very few applicants from CEE states – unlike in Western Europe – have brought complaints to the Court about discrimination in respect of ‘love rights’.<sup>87</sup>

What dominates applications concerning sexual orientation discrimination in CEE states – and is raised in 30 cases – are complaints about the discrimination and ill-treatment that sexual minorities encounter as a result of exercising, or attempting to exercise, the right to freedom of expression and freedom of assembly and association. The curtailment of sexual minorities’ assembly, association, and expression is a significant problem in many CEE states which, unlike in Western Europe, experience high levels of intolerance of and hostility towards public discussions of homosexuality. In some cases, such intolerance and hostility escalates into outbreaks of ‘hatred’ against sexual minorities, resulting in applicants complaining of the lack of ‘adequate legislative and other measures’<sup>88</sup> to deal with homophobic motivated crimes and the refusal of domestic authorities ‘to combat anti-LGBT violence’.<sup>89</sup> The applications brought against CEE states in relation to interferences with assembly, association, and expression – which invoke various aspects of the Convention – concern four key sets of issues.

First, applicants have complained about various forms of limitations imposed on a range of public events aimed at promoting sexual orientation equality, such as parades, marches and sit-ins. In this respect, applicants have complained that national authorities have limited such events by repeatedly refusing to authorise them on the grounds that, for example, they do not comply with national laws regulating public assemblies.<sup>90</sup> Russian applicants have also argued that national authorities have hindered them participating in public events by enacting bespoke ‘homosexual propaganda’ laws that prevent public assemblies concerning sexual orientation equality,<sup>91</sup> deny the registration of associations promoting sexual orientation equality,<sup>92</sup> and allow gay men and lesbians who express ideas about homosexuality in public spaces to be prosecuted. For example, three gay men complained that, after holding banners against

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<sup>87</sup> With the term ‘love rights’ Wintemute refers to the ‘rights or benefits or recognition to any factually or legally same-sex partner an LGBT individual may have, including employment, housing and parental rights the partner derives through his or her relationship with the individual’. See R. Wintemute, “From Sex Rights to Love Rights: Partnership Rights as Human Rights”, in N. Bamforth (ed.), *Sex Rights* (Oxford: Oxford University Press, 2005), p.189.

<sup>88</sup> *M.C. and A.C. v Romania* (App. No.12060/12), judgment of 12 April 2016 at [47].

<sup>89</sup> *Chechetkin v Russia* (App. No.42395/15), communicated 6 July 2017.

<sup>90</sup> *Bączkowski and Others v Poland* (2009) 48 E.H.R.R. 19. See also: *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010 *Genderdoc-M v Moldova* (App. No. 9106/06), judgment of 12 June 2012; *Lashmankin and Others v Russia* (2019) 68 E.H.R.R. 1; *Dorđević and Others v Serbia* (App. Nos.5591/10 and 3 others), decision of 17 January 2017; *Alekseyev and Others v Russia* (App. Nos.14988/09 and 50 others), judgment of 27 November 2018.

<sup>91</sup> See also *Alekseyev and Others v Russia* (App. Nos.14988/09 and 50 others), judgment of 27 November 2018.

<sup>92</sup> *Zhdanov and Others v Russia* (App. Nos.12200/08 and 2 others), judgment of 16 July 2019. Similarly, in *Ecodefence and Others v Russia* (App. Nos.9988/13 and 48 others), communicated 22 March 2017, domestic authorities resorted to national legislation restricting rights for associations with foreign funders to deny registration to associations advocating for sexual orientation equality.

homophobic bullying near a secondary school and a children's library, they were found guilty of 'public activities aimed at the promotion of homosexuality among minors'.<sup>93</sup>

Second, applicants in several cases have raised complaints about the failure of domestic authorities to protect them from violent attacks perpetrated against them because of their participation in public assemblies aimed at promoting sexual orientation equality. For example, several applicants argued that, while attending a march to mark the International Day against Homophobia in Tbilisi, they were met 'by a hundred or more counter-demonstrators'<sup>94</sup> who resorted to 'physical attack'<sup>95</sup> and verbal abuse against them. These applicants argued that police officers present at the scene distanced themselves<sup>96</sup> and, when police officers did intervene, four of the applicants were arrested.<sup>97</sup> Similarly, two applicants complained that national authorities had failed to conduct effective investigations into aggression perpetrated by individuals following the annual gay march in Bucharest.<sup>98</sup>

Third, several applicants have complained that national authorities have directly interfered with their Convention rights, or failed to protect their Convention rights, when they have assembled in private spaces. For examples, two applicants have complained about an unlawful police search of the office of the 'Inclusive Foundation', a Georgian NGO, which, it is alleged, involved police officers, upon realising they had entered the premises of an LGBT organisation, becoming 'extremely aggressive', threatening the applicants, and subjecting them to inhuman and degrading treatment.<sup>99</sup> Similarly, a Russian applicant has complained that he was forced to close a 'gay nightclub' after the police 'stormed into the club' and 'dragged the club visitors into a police bus', as a result of which 'the lease for the premises of the nightclub was suddenly terminated without any explanation'.<sup>100</sup> Another Russian applicant has complained about the lack of adequate investigation into a violent attack perpetrated by two men during a social event organised at an HIV centre, as a result of which he suffered the loss of sight from one eye.<sup>101</sup>

Finally, applicants have complained about adverse consequences arising from using the Internet to foster debate about sexual orientation equality. For example, an applicant has complained about the decision of Russian authorities to block her website 'Children-404', an online support project for non-heterosexual teenagers, and convict her of the administrative offence of promoting homosexuality among minors.<sup>102</sup> Several applicants have complained that, after responding on social media to some homophobic remarks expressed in the course of a public event, they became the target of a series of newspaper articles which contained 'insults and pursued the sole purpose of tarnishing their honour and dignity' which the national authorities

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<sup>93</sup> *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10 at [7]. See also: *Sozayev and Others v Russia* (App. Nos.67685/14 and 35199/15), communicated 29 September 2016.

<sup>94</sup> *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 at [13].

<sup>95</sup> *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 at [15].

<sup>96</sup> *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 at [13].

<sup>97</sup> *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 at [16]-[17]; see also at [90]. See also: *Women's Initiatives Supporting Group and Others v Georgia* (App. No.73204/13), communicated 24 August 2015; *Alekseyev and Others v Russia* (App. No.31782/15), communicated 15 January 2016; *Romanov v Russia* (App. Nos.58358/14 and 2 others), communicated 2 November 2017; ; *Iachimovschi v the Republic of Moldova* (App. Nos.21029/13 and 5 others), communicated 24 January 2018; *Ilupin and Others v Russia* (App. No.76797/13), communicated 12 November 2018.

<sup>98</sup> *M.C. and A.C. v Romania* (App. No.12060/12), judgment of 12 April 2016 at [127].

<sup>99</sup> *Aghdgomelashvili and Japaridze v Georgia* (App. No.7224/11), communicated 3 December 2013 at [6].

<sup>100</sup> *Zhdanov and Others v Russia* (App. Nos.12200/08 and 2 others), judgment of 16 July 2019 at [8].

<sup>101</sup> *Chechetkin v Russia* (App. No.42395/15), communicated 6 July 2017.

<sup>102</sup> *Klimova v Russia* (App. No.33421/16), communicated 26 October 2017.



failed to protect them from.<sup>103</sup> Similarly, two applicants have complained that after they made public a picture of them kissing on Facebook, with the intent to ‘announce the beginning of [their] relationship’, they received hundreds of online negative comments, many of which directly threatened the applicants, and national authorities refused to investigate such direct instances of hate speech.<sup>104</sup>

In addition to the above issues relating to assembly, association, and expression, applicants have also complained to the Court about other aspects of sexual orientation discrimination in CEE states. Several applicants have complained about the failure of domestic authorities to adequately investigate homophobic violence perpetrated against them by other individuals in the course of their everyday lives.<sup>105</sup> Several applicants have complained about forms of ill-treatment by officials whilst being held in detention<sup>106</sup> and two applicants have complained about the lack of adequate mechanisms of judicial review to assess the lawfulness of their detention.<sup>107</sup> A small number of applications have been made that concern discrimination against same-sex couples in the area of private and family life. These applications concern, for example, discrimination created by domestic laws in CEE states in respect of housing and residency rights.<sup>108</sup> Such applications illustrate the various ways in which same-sex couples experience restrictions in the ‘possibilities of private life and private choice’ that are open to different-sex couples.<sup>109</sup>

### *Key developments in the Court’s jurisprudence*

The Court has, to date, issued 14 judgments concerning sexual orientation discrimination in eight CEE states, in which it has found violations of the Convention. Some of these judgments concern forms of sexual orientation discrimination that the Court had previously dealt with in the context of Western European states. For example, when the Court considered a complaint about the exclusion of same-sex couples in Poland from legislative provisions relating to succession in housing tenure, it had previously considered a similar complaint brought against Austria.<sup>110</sup> Similarly, when the Court considered a complaint against Croatia concerning the decision of national authorities to refuse the applicant a residence permit for family reunification with her same-sex partner, it drew on its established jurisprudence concerning cohabiting same-sex couples living in *de-facto* partnerships.<sup>111</sup> Therefore, in upholding the applicants’ complaints in these cases the Court was not required to innovate in its approach to

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<sup>103</sup> *Minasyan and Others v Armenia* (App. No.59180/15), communicated 21 February 2018.

<sup>104</sup> *Beizaras and Levickas v Lithuania* (App. No.41288/15), communicated 16 June 2017.

<sup>105</sup> *Sabalić v Croatia* (App. No.50231/13), communicated 7 January 2014; *Beus v Croatia* (App. No.16943/17), communicated 5 April 2017; *Zahtila and Koletić v Croatia* (App. No.63344/17), communicated 12 July 2018.

<sup>106</sup> *Szywala v Poland* (App. No.61782/00), decision of 20 June 2006; *Georgescu v Romania* (App. No.4867/03), decision of 22 October 2013; *V.P. v Russia* (App. No.33140/15), communicated 12 December 2017; *D.K. v Croatia* (App. No.28416/14), decision of 26 June 2018.

<sup>107</sup> *Lokpo and Touré v Hungary* (App. No.10816/10), judgment of 20 September 2011; *O.M. v Hungary* (App. No.9912/15), judgment of 5 July 2016.

<sup>108</sup> See *Kozak v Poland* (2010) 51 E.H.R.R. 16 and *Pajić v Croatia* (2018) 67 E.H.R.R. 12. See also: *Fedotova and Shipitko v Russia* (App. Nos.40792/10 and 2 others), communicated 2 May 2016; *Krupnova v Russia* (App. No.49014/16), communicated 26 October 2017.

<sup>109</sup> J. Weeks, “The Sexual Citizen” (1998) 15(3-4) *Theory, Culture and Society* 35, 37.

<sup>110</sup> *Kozak v Poland* (2010) 51 E.H.R.R. 16; see also *Karner v Austria* (2004) 38 E.H.R.R. 24.

<sup>111</sup> *Pajić v Croatia* (2018) 67 E.H.R.R. 12. See also *Karner v Austria* (2004) 38 E.H.R.R. 24; *Kozak v Poland* (2010) 51 E.H.R.R. 16; *Schalk and Kopf v Austria* (2011) 53 E.H.R.R. 20; *P.B. and J.S v Austria* (2012) 55 E.H.R.R. 31; *X and Others v Austria*, [GC] (App No.19010/07), judgment of 19 February 2013; *Vallianatos and Others v Greece* (2014) 59 E.H.R.R. 12; *Oliari and Others v Italy* (2017) 65 E.H.R.R. 26. For a discussion, see P. Johnson, “Marriage, Heteronormativity, and the European Court of Human Rights: A Reappraisal” (2015) 29(1) *International Journal of Law, Policy and the Family* 56.

dealing with sexual orientation discrimination under the Convention. By contrast, in respect of some cases brought against CEE states by gay men and lesbians, the Court has been required to consider aspects of sexual orientation discrimination that it has hitherto not considered and, as a result, evolve its jurisprudence to address such discrimination under the Convention. Overall, as Table 2 shows, the Court has established a significant body of jurisprudence in the judgments that it has issued to date concerning sexual orientation discrimination in CEE states.

As Table 2 shows, one area in which the Court has significantly evolved its jurisprudence in response to sexual orientation discrimination in CEE states is in relation to art.11 of the Convention (freedom of assembly and association). Before issuing its judgments in respect of applications concerning restrictions on the public assembly of sexual minorities in Poland and in the Russian Federation, the Court had never issued a judgment in respect of a complaint concerning sexual orientation discrimination under art.11.<sup>112</sup> Therefore, in order to address complaints about restrictions imposed upon the freedom of assembly of gay men and lesbians, the Court evolved its art.11 jurisprudence in three key ways. First, the Court has established that ‘the authorities’ disapproval<sup>113</sup> or the protection of ‘the rights of those people whose religious and moral beliefs included a negative attitude towards homosexuality’<sup>114</sup> do not amount to sufficient reasons to restrict the freedom of assembly of sexual minorities and, moreover, art.11 secures the right of peaceful assembly in public ‘to promote respect for human rights and freedoms and to call for tolerance towards sexual minorities’.<sup>115</sup> Secondly, the Court has established that concerns about public order<sup>116</sup> or about possible clashes with hostile counter-demonstrators<sup>117</sup> do not justify national authorities issuing blanket refusals to requests by individuals and organizations to hold public events focused on sexual orientation equality. Thirdly, and relatedly, the Court has established that national authorities are obliged ‘to use any means possible’<sup>118</sup> to protect gay men and lesbians from ‘homophobic and violent counter-demonstrators’<sup>119</sup> and that ‘[i]t is [...] the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully’.<sup>120</sup>

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<sup>112</sup> In a rare consideration of art.11 in respect of sexual orientation discrimination, the former European Commission of Human Rights held that legal provisions relating to the criminalization of male homosexual sex did not violate the applicant’s rights guaranteed by art.11. See *Dudgeon v United Kingdom* (1978) 11 DR 117, 131. For a discussion, see P. Johnson, *Going to Strasbourg* (Oxford: Oxford University Press, 2016), pp.21-28.

<sup>113</sup> *Genderdoc-M v Moldova* (App. No. 9106/06), judgment of 12 June 2012 at [54]; see also *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010 at [109].

<sup>114</sup> *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010 at [60].

<sup>115</sup> *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010 at [82].

<sup>116</sup> *Bączkowski and Others v Poland* (2009) 48 E.H.R.R. 19.

<sup>117</sup> *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010. See also *Zhdanov and Others v Russia* (App. Nos.12200/08 and 2 others), judgment of 16 July 2019 in respect of the positive obligation placed on states to take reasonable and appropriate measures to enable LGBT organisations to carry out their activities without fear that opponents will subject them to physical violence.

<sup>118</sup> *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 at [99].

<sup>119</sup> *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 at [100].

<sup>120</sup> *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010 at [73].

*Table 2 – Chronological list of judgments concerning sexual orientation discrimination in CEE states that resulted in a violation of the Convention*

<b>Date</b>	<b>Name</b>	<b>Key Issue</b>	<b>Significance</b>
3/5/2007	Bączkowski and Others v Poland	Freedom of assembly	First successful Article 11 complaint about sexual orientation discrimination in a Council state; first successful Article 11 complaint about the limitations imposed on LGBT public events in a CEE state
2/3/2010	Kozak v Poland	Discrimination in succession to tenancy	First successful complaint concerning rights of same-sex partners in a CEE state
21/10/2010	Alekseyev v Russia	Freedom of assembly	First successful Article 11 complaint about the limitations imposed by Russian authorities on LGBT public events
20/9/2011	Lokpo and Touré v Hungary	Detention of asylum seekers	First successful complaint by homosexual asylum seekers in a Council state (although the case does not explicitly address sexual orientation discrimination)
12/6/2012	Genderdoc-M v Moldova	Freedom of assembly	Successful Article 11 complaint about the limitations imposed by Moldovan authorities on LGBT public events
17/4/2014	Mladina D.D. Ljubljana v Slovenia	Freedom of expression	Successful Article 10 complaint of a publisher against sanctions resulting from publication of an article critical of homophobia
12/5/2015	Identoba and Others v Georgia	Protection against violence motivated by hatred	First successful Article 3+Article 14 complaint about Georgian national authorities' failure to protect demonstrators from homophobic violence
23/2/2016	Pajić v Croatia	Discrimination in residency rights	First successful complaint concerning residency rights of bi-national same-sex couples in a CEE state
12/4/2016	M.C. and A.C. v Romania	Protection against violence motivated by hatred	Successful Article 3+Article 14 complaint relating to Romanian national authorities' failure to protect demonstrators from homophobic violence
5/7/2016	O.M. v Hungary	Detention of asylum seeker	First successful complaint about treatment of asylum seekers held in detention in respect of their sexual orientation in a Council state
7/2/2017	Lashmankin and Others v Russia	Freedom of expression and freedom of assembly	Successful Article 11 complaint about the limitations imposed by Russian authorities on LGBT public events
20/6/2017	Bayev and Others v Russia	Freedom of expression	First successful Article 14+Article 10 complaint concerning sexual orientation discrimination in a Council state; first successful Article 10 complaint against Russian 'homosexual propaganda' laws
27/11/2018	Alekseyev and Others v Russia	Freedom of assembly	First successful Article 11 complaint against Russian 'homosexual propaganda' laws
16/7/2019	Zhdanov and Others v Russia	Freedom of association	First successful Article 11 (and Article 14+Article 11) complaints about the refusal to register associations set up to promote and protect the rights of LGBT people

The Court has also significantly evolved its jurisprudence in respect of art.10 of the Convention (freedom of expression) and sexual orientation discrimination.<sup>121</sup> In response to a complaint against the Russian Federation, the Court addressed the issue of whether domestic authorities are permitted to restrict ‘public debate on LGBT issues’<sup>122</sup> and to control ‘open manifestation of homosexuality’<sup>123</sup> by means of legal regulation. In upholding the applicants’ complaints about such restrictions, the Court reiterated its established principle that policies and decisions which embody a ‘predisposed bias on the part of a heterosexual majority against a homosexual minority’<sup>124</sup> cannot be considered compatible with the Convention and, in doing so, recognised that art.10 secures the right of sexual minorities to campaign for rights and to openly manifest their sexual orientation. In the context of the Court’s previous limited jurisprudence on art.10 and sexual orientation discrimination, this can be seen as significantly enhancing the rights of sexual minorities under this aspect of the Convention. This is not least because the Court has established that states that legislate to restrict gay men and lesbians’ right to freedom of expression ‘reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society’.<sup>125</sup>

The Court has also evolved its jurisprudence on the interplay between art.3 (prohibition of torture) and art.14 (prohibition of discrimination) of the Convention in order to address complaints about the ill-treatment of sexual minorities in CEE states.<sup>126</sup> In response to a complaint against Georgia, the Court held, for the first time, that episodes of ill-treatment perpetrated by private individuals against gay men and lesbians taking part in public assemblies – in the form of ‘violence, which consisted mostly of hate speech and serious threats, but also some sporadic physical abuse’ – created ‘fear, anxiety and insecurity’ severe enough to reach the relevant threshold under art.3 taken in conjunction with art.14 of the Convention.<sup>127</sup> The Court also held that the failure of national authorities to conduct effective investigations into these episodes, with a view to unmasking ‘the bias motive’ and identifying ‘those responsible for committing the homophobic violence’,<sup>128</sup> meant that they fell short of their procedural obligation under art.3 taken in conjunction with art.14. The significance of this is that the Court has established that the Convention obliges national authorities to explicitly investigate bias-motivated crimes committed on grounds of sexual orientation, because not to do so would mean that ‘prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes’.<sup>129</sup>

## Conclusions

The aim of this article has been to illustrate the role of the Convention in shaping equality on the grounds of sexual orientation in CEE states. The role of the Convention is important

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<sup>121</sup> For an overview of the Court’s approach to art.10 in complaints concerning sexual orientation discrimination, see P. Johnson, *Homosexuality and the European Court of Human Rights* (Abingdon: Routledge, 2013), chapter 7.

<sup>122</sup> *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10 at [71].

<sup>123</sup> *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10 at [65].

<sup>124</sup> *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10 at [68].

<sup>125</sup> *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10 at [83].

<sup>126</sup> For a general discussion of the Court’s jurisprudence on sexual orientation discrimination under art.3 and art.14, see P. Johnson and S. Falcetta, “Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities” (2018) 43(2) *European Law Review* 167.

<sup>127</sup> *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 at [79].

<sup>128</sup> *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 at [80].

<sup>129</sup> *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 at [77].

because, although levels of sexual orientation equality vary across CEE states, these states generally ‘fall behind’ the majority of Western European states in terms of the legal and policy frameworks that they have in place to enhance equality and reduce discrimination on the grounds of sexual orientation. For sexual minorities in many CEE states, therefore, the Convention is, as it was originally conceived to be, a ‘beacon’ that provides ‘hope’ of ‘freedom’.<sup>130</sup> It is on this basis that the Court now provides one of the mechanisms by which sexual minorities in CEE states attempt to challenge and eradicate the various forms of discrimination they experience. For this reason, a key aim of the article has been to provide an in-depth analysis of the ways in which the Court has responded to complaints brought by sexual minorities against CEE states and the jurisprudence it has developed to address sexual orientation discrimination.

The Court’s interpretation of the Convention does not take place in a vacuum, but is influenced by the position of the Council on sexual orientation equality. For this reason, we have analyzed the ways in which CEE states influence the instruments that the statutory organs have adopted in respect of sexual orientation equality. As we have shown, there is no unified hostility among CEE states to the development of such instruments. However, in the Parliamentary Assembly of the Council, representatives of CEE states tend to vote against rather than for instruments relating to sexual orientation equality and, moreover, representatives of CEE states usually constitute the majority of Council representatives who vote against such instruments. Our analysis shows that although resistance from CEE states does not prevent instruments relating to some aspects of sexual orientation equality being adopted by the Parliamentary Assembly, it does significantly shape and, in some cases, limit the scope and reach of such instruments. This, in turn, can have an impact on the Court, which often draws upon Council instruments when interpreting and applying the Convention.

As we have shown, the use of the Convention to challenge sexual orientation discrimination in CEE states has changed significantly during the time that the Convention has been in force in these states. In the early years of the first CEE states’ membership of the Council the ‘take up’ of the Convention to address sexual orientation discrimination in the Court remained very limited. Since 2006, however, gay men and lesbians in CEE states have increasingly turned to the Court to complain about discrimination against them. To date, the Court has communicated or judicially disposed of cases concerning sexual orientation discrimination in just over half of the CEE states. Notably, as we have shown, cases against the Russian Federation account for nearly half of all cases concerning sexual orientation discrimination in CEE states and, consequently, cases against other CEE states remain at a low level. Considered in light of the fact that no applications have been lodged against nearly half of the CEE states, it is reasonable to conclude that a socio-legal culture of ‘going to Strasbourg’ to address sexual orientation discrimination is, unlike in most Western European states,<sup>131</sup> either non-existent or still in its infancy in CEE states. This is explained by, as we have argued, multiple social, legal and personal factors that influence whether individuals take complaints to the Court. However, given that when applications are considered on their merits by the Court they have a high rate of success – which conveys a positive message about the Convention’s utility in addressing sexual orientation discrimination – it is reasonable to conclude that cases against CEE states will increase in the future.

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<sup>130</sup> From a speech given at the signing of the Convention by Sir David Maxwell Fyfe, who was instrumental in drafting it. Quoted in Human Rights Information Bulletin, “The European Convention on Human Rights at 50” (Council of Europe, 2000) 47.

<sup>131</sup> For a discussion of the socio-legal culture of petitioning the Court to address sexual orientation discrimination in the British context see P. Johnson, *Going to Strasbourg* (Oxford: Oxford University Press, 2016).

A key issue that we have drawn attention to is that cases against CEE states are dominated by complaints about freedom of expression and freedom of assembly and association. Such complaints concern limitations imposed on public events promoting sexual orientation equality, the failure of domestic authorities to protect gay men and lesbians from attacks during public assemblies, the interference of national authorities with sexual minorities when they have peacefully assembled in public, and adverse consequences arising from using the Internet to foster awareness of sexual orientation discrimination. Such complaints are almost entirely absent from cases against Western European states concerning sexual orientation discrimination. By contrast, whereas cases against Western European states about sexual orientation discrimination are now dominated by complaints about discrimination in the area of family life, very few cases against CEE states address discrimination of this kind. Given that sexual minorities in CEE states face significant discrimination in the area of family life, this suggests that there is significant scope to develop applications against CEE states in the future in order to address this and other aspects of sexual orientation discrimination.

In this respect, we suggest that gay men and lesbians in CEE states could fruitfully use the Convention in a number of ways. For example, because no CEE state permits same-sex marriage and very few offer registered partnerships to same-sex couples, the Convention could provide a powerful mechanism to those in CEE states who wish to challenge the impossibility of having a same-sex relationship legally recognised. In this respect, gay men and lesbians in CEE states can draw on the Court's established principle that same-sex stable and committed relationships fall within the scope of 'family life' and that national authorities may be under a Convention obligation to put in place 'a specific legal framework providing for the recognition and protection of [...] same-sex unions'.<sup>132</sup> Moreover, gay men and lesbians in CEE states could draw upon the Court's established jurisprudence to challenge prohibitions placed on the adoption of a child by the same-sex partner of the child's biological parent. These and other aspects of sexual orientation discrimination in CEE states could be robustly challenged using the Court's strongly established principle that 'if the reasons advanced for a difference in treatment [are] based solely on the [individual's] sexual orientation, this would amount to discrimination under the Convention'.<sup>133</sup>

The Court has already shown, in response to the cases against CEE states that it has judicially disposed of, that it is prepared to significantly evolve its jurisprudence to offer protection to sexual minorities. Although, as we have shown, the Court's large body of existing jurisprudence has been crucial to address certain aspects of sexual orientation discrimination complained about in CEE states, the Court has also been required to develop new jurisprudence to address other aspects of discrimination. For example, the Court took the significant step of establishing that the Convention secures the right of sexual minorities to peacefully assemble in public to promote equality on the grounds of sexual orientation. Moreover, the Court has recognised that sexual minorities have the Convention right to openly manifest their sexual orientation in public and to promote public debate about sexual orientation equality. The Court has also developed a strong framework under the Convention by which sexual minorities can hold national authorities accountable for failing to adequately investigate bias-motivated crimes committed

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<sup>132</sup> *Oliari and Others v Italy* (2017) 65 E.H.R.R. 26 at [185]; see also *Orlandi and Others v Italy* (App. Nos.26431/12 and 3 others), judgment of 14 December 2017 at [199]. The Court's jurisprudence on whether states are obliged to provide same-sex couples with access to an 'alternative' to marriage, such as civil union, is currently ambiguous. For a discussion, see: P. Johnson, "The Council of Europe and the European Court of Human Rights", in A. R. Ziegler (ed.), *International LGBTI Law: Sexual Orientation and Gender Identity Law from an International-Comparative Perspective* (forthcoming).

<sup>133</sup> *Kozak v Poland* (2010) 51 E.H.R.R. 16 at [92].

against them. By evolving its jurisprudence in these and other ways the Court has put in place important new protections for sexual minorities in CEE and other states of the Council.

The effectiveness of the protections developed by the Court for sexual minorities in CEE states has to be understood within the broader context of the compliance of those states with the Convention and the Court. Such compliance varies considerably across CEE states. Some judgments of the Court concerning sexual orientation discrimination require little compliance because national authorities will have already made changes to domestic laws and, therefore, addressed the issues complained about at the time the judgment is issued.<sup>134</sup> In other cases, however, the Court's judgments require states to implement significant measures to address discrimination. For example, the Court has invited Romanian authorities to develop measures aimed at improving the effectiveness of investigations into hate crime against sexual minorities,<sup>135</sup> and urged Russian authorities to remove the blanket ban on the promotion of non-traditional sexual relations among minors.<sup>136</sup> National authorities in CEE states react to the measures required by the Court in different ways, both in terms of their willingness to meaningfully engage with the Committee of Ministers during the process by which a judgment is executed and the extent to which they will modify domestic law or policy to address the matter complained of. In some cases, CEE states can engage in protracted debates with the Committee of Ministers, often lasting for years, and this limits the immediacy and extent of the impact of a judgment by the Court. For example, the response of the Russian national authorities to a judgment concerning restrictions placed on public assemblies organized by sexual minorities has meant that, nine years after the judgment was promulgated, it remains unexecuted.<sup>137</sup> Lack of compliance by the Russian authorities with the Court's judgments, coupled with the strained relationship between the Russian Federation and the Council generally,<sup>138</sup> is a significant concern given that nearly half of cases that are currently pending before the Court concerning sexual orientation discrimination in CEE states are against the Russian Federation. This, and problems of compliance by states more generally, should not deter those in CEE states from submitting applications to the Court concerning sexual orientation discrimination but it should be recognised that success in the Court does not guarantee immediate relief from discrimination.

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<sup>134</sup> For example, in *Bączkowski and Others v Poland* (2009) 48 E.H.R.R. 19 and *Kozak v Poland* (2010) 51 E.H.R.R. 16 the Court can be seen to confirm changes already endorsed by national authorities.

<sup>135</sup> *M.C. and A.C. v Romania* (App. No.12060/12), judgment of 12 April 2016.

<sup>136</sup> *Bayev and Others v Russia* (2018) 66 E.H.R.R. 10.

<sup>137</sup> *Alekseyev v Russia* (App. Nos.4916/07 and 2 others), judgment of 21 October 2010.

<sup>138</sup> For an overview of the problematic relation between the Russian Federation and the Council see: L. Mälksoo and W. Benedek (eds.), *Russia and the European Court of Human Rights* (Cambridge: Cambridge University Press, 2017).