

Popularism, Sexual Orientation Discrimination, and the European Convention on Human Rights

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1.

Thank you Ciaran, Conor, and Steven, thank you Lawyers with Pride, for organizing this event, and for the great honour of inviting me. Thank you to Susan Burton for organising my visit. Thank you all for coming today.

2.

What I'm going to talk about today is the on-going development of human rights relating to sexual orientation under the European Convention on Human Rights² and, specifically, the role of the European Court of Human Rights in developing those rights.

I'm going to talk about this in the general context of an intensification of attacks on the legitimacy of the Court, and of the Convention, in the UK and elsewhere in recent years.

Such attacks in the UK, which are made by people of all political persuasions, usually use the most unpopular judgments of the Court – such as those on the rights of prisoners – as a platform to appeal to people who hold the (sadly now popular) view that limitations should be placed on the powers of the Court, or that the UK should withdraw from the Convention.

I'm going to argue that such popularism is detrimental to the Court's 'mission', which is to 'provide individual relief' to those suffering a violation of human rights and to raise 'the general standards of protection of human rights' in Europe.³

If the Court is to fulfil this mission, and operate effectively as the 'Conscience of Europe',⁴ then this will involve it, at times, issuing deeply unpopular judgments and, crucially, us accepting them.

I'm going to argue this because, as I'll go on to demonstrate, it has often been the unpopularity of 'gay rights' in Europe, and the unwillingness of the majority of people to accept gay rights, that has led the Court to shy away from interpreting the Convention in ways that would have developed important human rights protections for gay people.

In my view, a concern with what will receive enough popular support, either by European governments or by people in Europe, has far too often determined the Court's approach to issues relating to sexual orientation discrimination and resulted in the Court failing in its mission to do the best by gay people.

So, in essence, I'll argue that it is only by European governments fully accepting the Court's mission, supporting it to reach judgments that best realize human rights – however unpopular these may be – and, crucially, holding it to account when it does not do this, that gay rights will be fully developed under the Convention.

3.

I feel, given that this is the Annual Law Lecture, that I ought to begin with the confession that I am not a lawyer and, indeed, that I have no legal qualifications.

So I do feel something of an imposter or trespasser here, and, on that basis I thought that I would say a few words about who I am and what I do.

I am, by training and profession, a sociologist. Sociology is one of those academic disciplines that has never had a single organizing principle or goal but, in essence, is a discipline orientated towards understanding both how human societies function and, crucially, how they might function better.

Auguste Comte, who was one of the first people to use the term 'sociology' in the 19th century, believed that the task of the sociologist was to discover the underlying laws of society and, once discovered, harness these laws to direct society and achieve social progress. The initial name for this endeavour was 'social physics' – in other words, the physics of society.⁵

As sociology has developed, a wide range of branches of the discipline have grown up, each with their own focus on discovering the underlying patterns and rules that govern aspects of society and social behaviour.

For me, the study of law should be at the forefront of the sociological attempt to both understand and improve society.

That is because law – in all its forms – is central to the organization of our society and penetrates every aspect of our lives.

Law governs everything we do, and it would be difficult to identify a single aspect of our behaviour, whether when we are alone or in interaction with others, that is not touched upon, and to some degree shaped, by law.

Patrick Devlin, Lord Devlin, speaking about the criminal law, once said that 'law is not a statement of how people ought to behave; it is a statement of what will happen to them if they do not behave'.⁶

I think that is wrong. Law clearly does tell us how we ought to behave. Law is a key mechanism in our society for conferring value on certain behaviours and devaluing other behaviours.

Law crystallises and mandates aspects of social morality, setting the moral parameters in which we live our everyday lives.

Whilst we all ultimately retain agency and make choices, our choices are shaped, to a very large degree, by our interaction with law, and our acceptance of or disregard for it.

I think gay people know this more than most, because we know that law has been, and in some places still is, a source of oppression and victimization.

But we also know that law can offer us protection, and provide us with a shield from discrimination.

Law can allow us, in some cases, to articulate our desire for equality, our wish to live our lives free from discrimination, and, ultimately, make our claim for personal and intimate autonomy.

Law is not the answer to everything. As Macklemore and Ryan Lewis put it in their song *Same Love*: 'No law's gonna change us, We have to change us'.

But law can be a driver, a powerful driver, of social change, and, in the case of using law to change society and achieve equality based on sexual orientation, one of the key sources of law has been the European Convention on Human Rights, which I'll now turn to talk about.

4.

The European Convention on Human Rights has been, is, and I hope will remain, central to developing sexual orientation equality in Europe.

Since it came into force in 1953, the Convention has enshrined certain human rights and fundamental freedoms and, crucially, provided machinery for their 'collective enforcement'.⁷

The most important part of this machinery is the European Court of Human Rights in Strasbourg which supervises⁸ the compliance of 47 European states in respect of the obligation they have undertaken to 'secure to everyone within their jurisdiction the rights and freedoms'⁹ contained in the Convention.

The most powerful aspect of the Convention system is that it allows every individual who feels that they are a victim of a violation of their Convention rights to, providing they satisfy certain admissibility criteria, make an application to the Court.

When the Court agrees with an individual that there has been a violation of the Convention the state must abide by the Court's judgment and, in doing so, may need to take measures to address the violation and prevent it happening again.

This gives the Court a tremendous amount of power. And it's a power that the UK has always been wary of.

Sir Gerald Fitzmaurice, former UK judge at the Court, expressed in 1975 a common British attitude when he said that, because the Convention made 'heavy inroads on some of the most cherished preserves of governments' and allowed 'private persons ... to (in effect) sue their own governments', that this should 'not only [...] justify, but positively [...] demand, a cautious and conservative interpretation' of the Convention by the Court.¹⁰

For all of its life, however, the Strasbourg Court has attracted the criticism that it frequently does not adopt a cautious and conservative interpretation of the Convention but, on the contrary, is far too active in its approach.

Although the Convention opens with a commitment to not just the 'maintenance' of human rights, but also their 'further realisation'¹¹ – which means that the Court must think of the Convention as 'a living instrument' and interpret it 'in the light of present-day conditions'¹² – the Court is often accused of exceeding its jurisdiction and trampling over matters that should be left to states.

5.

This criticism has, in recent years, become amplified through arguments by politicians that focus on the unpopularity of certain judgments by the Court.

For example, former Prime Minister, David Cameron, seized on the unpopularity of the Court's judgment on prisoner voting¹³ to attack the Court in 2012 for having 'distorted' and 'discredited' the concept of human rights.¹⁴

Similarly, Chris Grayling MP used the unpopularity of the Court's judgment on the issue of the irreducibility of 'whole life orders' imposed on prisoners¹⁵ to, in 2013, argue that the Court's judgment would have the founders of the Convention 'turning in their graves'.¹⁶

Within this context, the UK used its chairmanship of the Committee of Ministers of the Council of Europe in 2012 to 'reform' the Court, through a new Protocol to the Convention,¹⁷ with the aim of 're-balancing' the relationship between states and the Court.¹⁸

Soon after, in 2014, the Conservative Party proposed to make the Court's judgments 'advisory' rather than 'binding' on the UK and, if this was not agreed to in Strasbourg, to withdraw the UK from the Convention.¹⁹

Our new Prime Minister, Boris Johnson, is reportedly more favorably disposed to the Convention, but also holds the view that the Court's judgments do not have to be applied either by the UK courts or by the UK Parliament.²⁰

Politicians make arguments like these about the Court knowing that they find popular support with people in the UK, where 41 per cent of adults, according to a YouGov survey, favour the withdrawal of the UK from the Convention.²¹

Contemporary political condemnations of the Court can therefore, in my view, be described as populist, insofar as they attempt to tap into and play to negative sentiments about the Court, rather than offer an informed and balanced assessment of the Court's activities.

Although this populist political discourse ebbs and flows and, to some extent, has been suppressed in the last couple of years because of the focus on Brexit, it never entirely goes away.

At times, this discourse also takes on a specifically populist hue, with the Court depicted as a tyrannical, elitist institution populated by 'them over there' who are hell-bent on taking away rights and freedoms from 'us over here'.

For example, Lord Jonathan Sumption, in his recent Reith Lecture *Human Rights and Human Wrongs* advanced the claim that the Convention reclassifies 'intensely political questions' about societies and the individuals in them as 'questions of law' and, in so doing, reduces democratic decision-making by allowing judges in the Court, rather than politicians in parliament, to

make decisions.²²

Lord Sumption argues that the Strasbourg Court has something in common with the 'post-war dictatorships of Eastern Europe' insofar as it, through a 'priestly caste of judges', imposes a system of values which citizens have no democratic control over.²³

6.

These views of the Strasbourg Court do appear to remain quite seductive, given the level of attention they get and the consent they seem to manufacture.

The problem with these views is that, in respect of the development of rights and freedoms related to sexual orientation, they fly in the face of evidence and fact.

Strasbourg has certainly, over time, issued a number of decisions and judgments that have propelled fundamental changes to law in the UK and elsewhere.²⁴

But Strasbourg has also frequently adopted a conservative interpretation of the rights and freedoms contained in the Convention and, much to the disappointment of gay men and lesbians, rejected applications concerning sexual orientation discrimination.

In my view, it is 'restraint' rather than 'activism' that is the hallmark of the Strasbourg approach to gay rights.

If you believed people like Lord Sumption, you might think that every time a gay person in Europe took him or herself off to Strasbourg to complain about mistreatment by a state they found a warm welcome there and, moreover, were sent home with a note saying 'government: change your ways and treat this person better'.

This is, in fact, the exact opposite of what has usually happened over the last six decades that gay people have been going to Strasbourg with complaints about sexual orientation discrimination.

The fact is, gay people have been saying since the 1950s that gay rights are human rights, and human rights are gay rights – long before Hillary Clinton popularized that idea in 2011²⁵ – but Strasbourg has often been unwilling to accept this.

To put it simply, when gay men and lesbians have knocked at Strasbourg's door and asked for help, they have very often had the door slammed in their faces.

One reason for this, I would argue, is that Strasbourg has itself often pandered to popularism when it comes to 'gay issues' and, in doing so, decided not to side with gay people in ways that would be unpopular with European governments or the majority of people.

7.

A case in point is the ongoing response of the Court to same-sex couples who assert that they have a right to marry under Article 12 of the Convention, which guarantees the right to marry.

Strasbourg has been rejecting complaints about sexual orientation discrimination brought under Article 12 since 1989²⁶ and, since 2010, has repeatedly refused to recognize that same-sex couples have a right to marry under this provision.²⁷

The Court has stated that its decision-making on same-sex marriage is informed, to some degree, by a lack of 'European consensus' on same-sex marriage.²⁸

Among the 47 member states of the Council of Europe, only 16 states currently permit same-sex marriage and, on this basis, the Court justifies granting states discretion (a margin of appreciation) in determining whether or not to permit same-sex couples to marry.

In other words, the lack of consensus in Europe is a way the Court justifies, as it does on a wide number of issues that come before it, the stagnation of its jurisprudence on same-sex marriage.

Assessing whether there is 'consensus' in Europe is not, of course, exactly the same thing as assessing what is 'popular'; but waiting to evolve jurisprudence until there is 'consensus' is, I would argue, a way of avoiding a certain level of 'unpopularity'.

I'll come back to the issue of same-sex marriage later, but the point I'm making here is that Strasbourg often fails to recognize discrimination against gay people as a violation of the Convention because, to do so, would generate too high a degree of unpopularity.

The occasions on which Strasbourg has done this are not incidental or minor

occurrences in an otherwise more positive jurisprudential history.

Rather, rejecting complaints by gay people about discrimination has been a routine feature of the operation of the Convention organs since they came into existence.

8.

To demonstrate this, I want to go back to 1955, and to the first ever application concerning sexual orientation discrimination that was dealt with by Strasbourg.²⁹

The application was submitted by an adult man, whose name we don't know, who was serving a fifteen-month term of imprisonment in Germany for 'two cases of homosexuality' contrary to provisions in the criminal law that were in force in the form enacted by the National Socialist German Workers' (Nazi) Party.³⁰

The applicant complained that his conviction infringed his 'right to privacy' and, to the extent that the criminal law applied only to sexual acts between men, that this infringed 'the principle of sexual non-discrimination'.³¹

Strasbourg rejected the application, stating that 'the Convention permits a High Contracting Party to legislate to make homosexuality a punishable offence'.³²

Less than a year after this decision, the Council of Europe's Directorate of Human Rights cited it as positive evidence that Strasbourg was 'equipped to ensure observance of the fundamental rights and freedoms essential to the satisfactory operation of European democratic regimes, without thereby opening the door to abuses prejudicial to the [...] legitimate interests of governments'.³³

It was clear from the outset that Strasbourg's view was that to uphold a complaint about sexual orientation discrimination would be to facilitate an 'abuse' of the Convention that went against the legitimate interests of a government to regulate homosexuality as it saw fit.

Throughout the 1950s and 1960s, Strasbourg repeatedly reached the same conclusion in respect of a series of similar applications against Germany, and against Austria, concerning the prohibition of same-sex sexual acts.³⁴

These decisions, in my view, were based on Strasbourg's uncritical acceptance of socially persuasive and popular views on the undesirability of

homosexuality and same-sex relationships.

For example, by the mid 1970s, Strasbourg was still persuaded that the 'social reprobation' of homosexuality and the 'specific social danger in the case of masculine homosexuality' justified special provision in the criminal law to regulate male same-sex sexual acts.³⁵

It took 26 years, from the first application in 1955, to the judgment in *Dudgeon v the United Kingdom* in 1981, for the Court to establish that the blanket prohibition of male same-sex sexual acts amounted to a violation of Article 8 of the Convention.³⁶

The judgment in *Dudgeon* was reached, in large part, because of what the Court called the development of 'a better understanding, and in consequence an increased tolerance, of homosexual behaviour' in Europe.³⁷

In other words, although gay people may not have commanded popular support in 1981, the total criminalization of same-sex relationships had become unpopular enough for Strasbourg to act.

9.

I know I'm in the one place today where I don't have to elaborate on the significance of Jeff Dudgeon's victory in Strasbourg. The ramifications of that judgment are still being felt around the world, as it continues to be cited in case after case concerning repugnant laws that criminalize same-sex sexual acts.

But what is often forgotten about Jeff's case in Strasbourg is that Jeff argued a wide number of points about discrimination, and the Court rejected these.

For example, Jeff argued that he had been subject to a difference in treatment 'on sexual grounds' (because only male same-sex sexual acts were completely criminalized) which amounted to discrimination in violation of Article 14 taken in conjunction with Article 8 of the Convention.³⁸

The Court rejected this argument on the grounds that, as it put it, 'a clear inequality of treatment' was not 'a fundamental aspect of the case'.³⁹

This absurd reasoning, I would argue, reflected the Court's unwillingness to establish the principle – which would not have been popular with governments at the time – that inequalities based on sexual orientation amount to discrimination in violation of the Convention.

It took the Court a further 18 years until, in 1999, it definitively established that sexual orientation is 'a concept which is undoubtedly covered by Article 14' of the Convention.⁴⁰

In *Dudgeon*, the Court also reiterated its then established view that states were able to determine, as it put it, the age 'under which young people should have the protection of the criminal law' and, therefore, that states were free to maintain a higher minimum age for same-sex sexual acts.⁴¹

It took Strasbourg a further 16 years to decide, in 1997, that an unequal age of consent for same-sex sexual acts amounted to a violation of the Convention.⁴²

10.

This is part of a pattern that can be found across Strasbourg jurisprudence.

The pattern is that, in respect of most issues concerning sexual orientation discrimination, Strasbourg will reject a series of applications across a long period of time before, in respect of some issues, finally recognizing that the discrimination being complained of is a violation of the Convention.

If we look at the length of time between Strasbourg rejecting an initial application about sexual orientation discrimination and the point that it eventually recognizes such discrimination as a violation of the Convention we see, for example, that:

it took 16 years for Strasbourg to say that being discharged from the armed forces for being gay is a violation of human rights;⁴³

it took 17 years for Strasbourg to say that evicting a person from the home they had shared with a same-sex partner who died is a violation of human rights;⁴⁴

it took 21 years for Strasbourg to say that preventing the same-sex partner of a child's parent from becoming the child's 'step' parent is a violation of human rights;⁴⁵

it took 27 years for Strasbourg to say that the relationship of a same-sex couple falls within the scope of the right to respect for family life;⁴⁶

it took 50 years for Strasbourg to say that the ill-treatment of a person in prison because they are gay is a violation of human rights.⁴⁷

Now, of course, Strasbourg got there in the end and extended the protection of the Convention to people suffering these differences in treatment on the grounds of their sexual orientation and, obviously, that is extremely important.

But what's also important is the length of time it usually takes for Strasbourg to recognize the human rights of gay people and, whilst it's waiting, the discrimination gay people have to keep enduring.

For me, then, it's crucial that we recognize one of the key reasons that this happens, which is that Strasbourg usually waits until it feels its judgments will be acceptable among member states and to the people in them.

Let me give you two contemporary examples of this tendency in Strasbourg that relate to asylum, and marriage.

11.

Since 1998, Strasbourg has repeatedly rejected applications from gay asylum seekers who, having fled to Europe to escape persecution, find themselves subject to deportation by European governments to countries of origin where, they claim, there is a real risk of them being subjected to ill-treatment because of sexual orientation.⁴⁸

To date, the Court has never accepted the claim of any gay man or lesbian that being deported to a country of origin outside of Europe would put them at risk of death or serious ill-treatment.

Instead, the Court has repeatedly ratcheted up the threshold at which gay people are deemed to be at real risk, making it almost impossible for gay asylum seekers to produce evidence of such risk.

This has resulted, in my opinion, in some shameful decisions by the Court.

It has resulted in, for example, the Court telling a Libyan male asylum seeker in Sweden, married to a Swedish man but denied asylum by the Swedish authorities, that it was appropriate for Sweden to send him back to Libya to apply from there for reunification with his husband.⁴⁹

The Court would not accept the Libyan man's claim that his expulsion to Libya would expose him to a real risk of ill-treatment in violation of the Convention, because in Libya all same-sex sexual acts are punishable by a term of imprisonment of five years.

What the Court told the man is that, although during his stay in Libya he would

have to be 'discreet about his private life', this would not require him 'to conceal or suppress an important part of his identity' in a way that amounted to a violation of the Convention.⁵⁰

Ann Power-Forde, the former judge for Ireland in the Court, lodged a trenchant dissenting opinion in this case, stating that asking someone to hide a core aspect of personal identity was an 'affront to human dignity', an 'assault upon personal authenticity', and 'corrosive of personal integrity and human dignity' in ways that violated the Convention.⁵¹

I agree with Ann Power-Forde and, I suspect, many other Strasbourg judges also privately agree with her. But, to date, shamefully, Strasbourg has not developed jurisprudence that protects gay asylum seekers from being deported to countries where they would be at risk of homophobic persecution.

The reason for this is, in part, because the Court is unwilling to interfere with the almost sacred right of states to control the entry, residence and expulsion of all aliens.

But the Court's unwillingness also has something to do with specific concerns about sexual orientation, because it has been prepared to develop jurisprudence to prevent asylum seekers being deported to countries where they would be at risk of ill-treatment on the grounds of religious belief⁵² or because of gender.⁵³

The reluctance of the Court to develop the same jurisprudence in respect of sexual orientation may be the outcome of claims that circulate in member states about the dangers of European countries being 'flooded' by migrants bogusly claiming to be gay in order to be granted asylum.

If those claims are the reason the Court is unwilling to evolve its approach to gay asylum seekers then it is, in my view, failing in its mission.

12.

The same can be said for the Court's approach to same-sex marriage.

Since 2010, the Court has offered a number of reasons why it cannot interpret Article 12 of the Convention to include the right of same-sex couples to marry.⁵⁴

It has argued that the wording of Article 12, which guarantees the right to marry to 'men and women', rather than to 'everyone', must 'be regarded as deliberate' and reflective of the time that the Convention was conceived, when

‘marriage was clearly understood in the traditional sense of being a union between partners of different sex’.⁵⁵

This is pure bunkum, because there is clear evidence that the wording of Article 12 was deliberately chosen to address gender discrimination in respect of marriage, rather than to ensure that marriage be limited to different-sex couples.⁵⁶

The Court has also said that marriage has ‘deep-rooted social and cultural connotations’ and that it ‘must not rush to substitute’ the legal provisions of national authorities ‘who are best placed to assess and respond to the needs of society’.⁵⁷

In other words, in the majority of states there is, to some degree, a deep attachment to discriminating against same-sex couples in respect of marriage and the Court should not interfere with this.

Here, in Northern Ireland, the Court’s position on same-sex marriage and Article 12 has been critical. When Mr Justice O’Hara, in the High Court in 2017, considered the challenge of two same-sex couples to the prohibition of same-sex marriage in Northern Ireland, he was ‘driven to conclude that the Convention rights of the applicants have not been violated’ because ‘the Strasbourg Court does not recognise a “right” to same sex marriage’ and, therefore, that right does ‘not exist in any legal sense’.⁵⁸

Had Strasbourg decided to recognize the right of same-sex couples to marry under Article 12 the judgment in the High Court may have been different and, as a consequence, led to same-sex marriage in Northern Ireland.

Yet the Strasbourg Court shows no sign of changing its mind that the Convention does not impose an obligation on states to make marriage, or the rights and benefits attached to it, available to same-sex couples.

How Strasbourg judges privately square this with the Court’s established principle that ‘respect for human dignity forms part of the very essence of the Convention’,⁵⁹ I don’t know.

Do Strasbourg judges really think that being excluded from marriage solely on the basis of sexual orientation doesn’t strike at the heart of human dignity, amounting to a form of degrading treatment that the Convention is supposed to protect against?⁶⁰

Do Strasbourg judges really think it is morally right to wait until same-sex marriage is more popular across Europe – which it may never be – before

recognizing that same-sex couples have a human right to marry?

If they do, I say those views are contrary to the Court's mission.

13.

I want to conclude by saying that I don't think we should be negative about the Strasbourg Court, but that we should be realistic.

We should recognize the important role that Strasbourg has played in the development of gay rights, and the ways the Court has evolved its interpretation of the Convention to protect gay people.

We should take great pride in the Court having developed strong principles that protect gay people from discrimination, such as the principle that if a difference in treatment is based solely on a person's sexual orientation then this will amount to discrimination under the Convention.⁶¹

However, we should acknowledge, as I've tried to show, that the Court frequently doesn't recognize that differences in treatment based solely on sexual orientation amount to a violation of the Convention.

There are a number of reasons for this, many of which I haven't touched upon today.

However, one of the key reasons that the Court often refuses to recognize gay rights under the Convention is, as I've argued, because it operates in a context in which unpopular judgments are so often used to threaten its legitimacy.

Popularist responses to unpopular judgments serve, in my view, to encourage a climate in which the Court is asked to be cautious in its interpretation of the Convention and issue judgments that states and their publics can stomach.

This is the exact opposite of what the Court's supervisory function should be.

Politicians should foster and promote a climate in which the Court feels empowered to take decisions that best protect human rights regardless of when these decisions are unpopular, or claimed to be unpopular, with the majority of people in Europe and their governments.

In such a climate, the Court will be more inclined to reach the best moral decisions and, as a consequence, fully recognize the rights of gay people under the Convention, including the right of same-sex couples to marry.

If the Court continues to fail to recognize aspects of sexual orientation discrimination as a violation of the Convention, we can then call it out for its moral failures, rather than for its reluctance to reach decisions that it feels would be too unpopular in some European societies.

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² Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS No 005. Hereinafter referenced as 'ECHR'.

³ *Karner v Austria* ECHR 2003-IX § 26.

⁴ John Coleman (ed.) *The Conscience of Europe* (Council of Europe 1999).

⁵ Auguste Comte, *Social physics: from the Positive philosophy of Auguste Comte* (C. Blanchard 1856).

⁶ Patrick Devlin, *The Enforcement of Morals* (Oxford University Press 1959) p. 20.

⁷ ECHR, preamble.

⁸ *Handyside v the United Kingdom* (1976) Series A no 24.

⁹ ECHR, Article 1.

¹⁰ *Golder v the United Kingdom* (1975) Series A no 18, separate opinion of Judge Sir Gerald Fitzmaurice §§ 38-9.

¹¹ ECHR, preamble.

¹² *Tyrer v the United Kingdom* (1978) Series A no 26 § 31

¹³ *Hirst v the United Kingdom (no 2)* [GC] ECHR 2005-IX.

¹⁴ David Cameron MP, quoted in BBC News, 'Concept of human rights being distorted, warns Cameron' (25 January 2012) <www.bbc.co.uk/news/uk-politics-16708845>.

¹⁵ *Vinter and Others v the United Kingdom* [GC] nos. 66069/09, 130/10 and 3896/10, 9 July 2013.

¹⁶ Chris Grayling MP, quoted in Nicholas Watt and Alan Travis, 'Tory ministers condemn ECHR ruling on whole-life prison sentences', *The Guardian* (9 July 2013) <www.theguardian.com/law/2013/jul/09/whole-life-sentences-david-cameron-human-rights>.

¹⁷ Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (24 June 2013) CETS 213 (not yet in force). For claims by the UK government that the 'Brighton Declaration' and Protocol No. 15 will significantly change and limit the scope and function of the Court, see Ministry of Justice, 'UK delivers European court reform' (20 April 2012) <www.gov.uk/government/news/uk-delivers-european-court-reform>. For a contrary view, see European Court of Human Rights, 'Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights' (6 February 2013) <www.echr.coe.int/Documents/2013_Protocol_15_Court_Opinion_ENG.pdf>.

¹⁸ David Cameron MP, 'Speech on the European Court of Human Rights' (25 January 2012) <<https://www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights>>.

¹⁹ Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' (2014).

²⁰ Ben Glaze and Dan Bloom, 'Passionate Boris Johnson defends European Convention on Human Rights – but says we should still quit EU', *The Mirror* (23 May 2016) <www.mirror.co.uk/news/uk-news/boris-johnson-defends-european-convention-8033527>.

²¹ YouGov, 'Scepticism about human rights as well as the ECHR' (20 July 2014) <www.yougov.co.uk/topics/politics/articles-reports/2014/07/20/scepticism-about-human-rights-well-echr>.

²² Jonathan Sumption, 'Human Rights and Wrongs', *The Reith Lectures 2019: Law and the Decline Of Politics* <http://downloads.bbc.co.uk/radio4/reith2019/Reith_2019_Sumption_lecture_3.pdf>.

²³ *Ibid.*

²⁴ For convenience, I refer to 'Strasbourg' when discussing decisions and opinions of the former European Commission of Human Rights, which ceased to function in 1999, as well as decisions and judgments of the European Court of Human Rights.

²⁵ Hillary R. Clinton, 'Remarks in Recognition of International Human Rights Day' (Geneva, 6 December 2011) <<https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/12/178368.htm>>.

²⁶ *C. and L.M. v the United Kingdom*, no. 14753/89, Commission decision, 9 October 1989.

²⁷ *Schalk and Kopf v Austria* ECHR 2010-IV.

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- ²⁸ Ibid § 58.
- ²⁹ *W.B. v Federal Republic of Germany* (1955) Documents and Decisions 1955–1956–1957, 228.
- ³⁰ For a discussion of the case see Paul Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford University Press 2016) pp. 11-12.
- ³¹ *W.B. v Federal Republic of Germany* (1955) Documents and Decisions 1955–1956–1957, 229.
- ³² Ibid.
- ³³ Council of Europe, ‘Memorandum by the Directorate of Human Rights on the experience gained and the results achieved by the European Commission of Human Rights in the matter of individual applications’, 24 October 1956, H(56)2, 25, reference omitted from quotation.
- ³⁴ For a discussion of these cases see Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013).
- ³⁵ *X. v Federal Republic of Germany* (1975) 3 DR 46.
- ³⁶ *Dudgeon v the United Kingdom* (1981) Series A no 45.
- ³⁷ Ibid § 60.
- ³⁸ *Dudgeon v the United Kingdom* (1978) 11 DR 128-9.
- ³⁹ *Dudgeon v the United Kingdom* (1981) Series A no 45 § 69.
- ⁴⁰ *Salgueiro da Silva Mouta v Portugal* ECHR 1999-IX § 28.
- ⁴¹ *Dudgeon v the United Kingdom* (1981) Series A no 45 § 62.
- ⁴² *Sutherland v the United Kingdom*, no. 25186/94, Commission report, 1 July 1997.
- ⁴³ From the first decision on a complaint in 1983 (*B. v the United Kingdom* (1983) 34 DR 68) to 1999 (*Smith and Grady v the United Kingdom* ECHR 1999-VI).
- ⁴⁴ From the first decision on a complaint in 1986 (*Simpson v the United Kingdom*, no. 11716/85, Commission decision, 14 May 1986) to 2003 (*Karner v Austria* ECHR 2003-IX).
- ⁴⁵ From the first decision on a complaint in 1992 (*Kerkhoven, Hinke and Hinke v the Netherlands*, no. 15666/89, Commission decision, 19 May 1992) to 2013 (*X. and Others v Austria* [GC] ECHR 2013-II).
- ⁴⁶ From the first decision on a complaint in 1983 (*X. and Y. v the United Kingdom* (1983) 32 DR 220) to 2010 (*Schalk and Kopf v Austria* ECHR 2010-IV).
- ⁴⁷ From the first decision on a complaint in 1962 (*X. v Federal Republic of Germany*, no. 986/61, Commission decision, 7 May 1962) to 2012 (*X. v Turkey*, no. 24626/09, 9 October 2012).
- ⁴⁸ For a discussion see Silvia Falcetta and Paul Johnson, ‘Migration, Sexual Orientation, and the European Convention on Human Rights’, *Journal of Immigration, Asylum and Nationality Law* (2018) 32, 210.
- ⁴⁹ *M.E. v Sweden*, no. 71398/12, 26 June 2014. See also *M.E. v Sweden* (striking out) [GC] no. 71398/12, 8 April 2015.
- ⁵⁰ *M.E. v Sweden*, no. 71398/12, 26 June 2014 § 88.
- ⁵¹ Ibid, Dissenting Opinion of Judge Power-Forde.
- ⁵² *F.G. v Sweden* [GC] no. 43611/11, 23 March 2016.
- ⁵³ *N. v Sweden*, no. 23505/09, 20 July 2010
- ⁵⁴ For a discussion see Paul Johnson and Silvia Falcetta, ‘Same-sex marriage and Article 12 of the European Convention on Human Rights’, *Research Handbook on Gender, Sexuality and Law* (Edward Elgar in press) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3136642>.
- ⁵⁵ *Schalk and Kopf v Austria* ECHR 2010-IV § 55.
- ⁵⁶ For a discussion see Paul Johnson, “‘The choice of wording must be regarded as deliberate’”: Same-sex marriage and Article 12 of the European Convention on Human Rights’, *European Law Review* (2015) 40, 207.
- ⁵⁷ *Schalk and Kopf v Austria* ECHR 2010-IV § 62.
- ⁵⁸ *In the Matter of an application by Close (Grainne), Sickles (Shannon), Flanagan Kane (Christopher) and Flanagan Kane (Henry)* [2017] NIQB 79 § 16.
- ⁵⁹ *Bouyid v Belgium* [GC] ECHR 2015 § 89.
- ⁶⁰ For a further discussion see Paul Johnson and Silvia Falcetta, ‘Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities’, *European Law Review* (2018) 43(2) 167-85.
- ⁶¹ *Kozak v Poland*, no. 13102/02, 2 March 2010.