

Drawing the Line: Same-sex adoption and the jurisprudence of the ECtHR on the application of the “European consensus” standard under Article 14

X and Others v Australia, App. No. 19010/07, Judgment of the European Court of Human Rights (Grand Chamber) of 19 February 2013

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Keywords

ECtHR, Article 14, margin of appreciation, consensus standard, same-sex adoption

Abstract

One of the main criteria that the European Court of Human Rights uses in determining the parameters of the margin of appreciation has been to find a consensus among the state parties to the Convention as to the definition or interpretation of a specific right. The way the Court has implemented the methodology of finding a “European consensus” of the discriminatory practice of states under Article 14 has been problematic. Firstly, it is unclear when the Court takes into consideration the practice of member states of the European Council. Secondly, it is unclear how it defines the comparative group and the threshold necessary in defining a consensus.

This note looks at the application of the Court of this standard in cases concerning same-sex adoption in light of its most recent decision in *X. and Others v. Austria* (2013). It is argued that the application of the standard in practice has yielded variable jurisprudence, is inconsistently applied, and risks further fragmenting Contracting States’ obligations under the Convention. In using the consensus standard as an interpretive comparative tool, the Court should allow a narrow margin of appreciation only where there is substantial consensus on an issue. It is the author’s position that its negative iteration, or the notion that a lack of consensus should yield a wide margin, should not be maintained, as this approach risks further deteriorating the protection of fundamental rights.

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Merkourios 2013 – Volume 29/Issue 77, Article, pp. 66-75.

URN:NBN:NL:UI:10-1-112874

ISSN: 0927-460X

URL: www.merkourios.org

Publisher: Igitur Publishing

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I. Introduction

The margin of appreciation is an important tool that the European Court of Human Rights (“ECtHR” or “Court”) uses in considering whether a member state has breached the European Convention of Human Rights (“ECHR” or “Convention”). The doctrine has been defined as a methodology by which the ECtHR “decides upon the scope of its own supervisory powers and, consequently, upon the scope of discretion that will remain vested in the national authorities” for the definition, interpretation, and application of the fundamental human rights guarantees contained in the Convention.¹ The rationale for having the margin of appreciation doctrine is in large part grounded in the principle of subsidiarity. In close cases, the Court is reluctant to substitute its point of view for that of the national authorities, who are considered better-situated than international judges sitting in Strasbourg to assess the requirements of morality or other legitimate aims pursued in their society.² The existence of the doctrine therefore arises in consideration of the divergent legal and cultural traditions of the contracting parties.³

The doctrine does not appear anywhere in the ECHR or its *travaux préparatoires*.⁴ Instead, the varying scope of the margin’s applicability under different Convention rights has been developed by the Court over the years. One of the main criteria that the Court has used in determining the parameters of the margin of appreciation has been to find a consensus among the state parties to the Convention as to the definition or interpretation of a specific right.⁵ The “European consensus” approach looks at whether there is a degree of uniformity in the practice of state parties. In cases where there is consensus among the member states, the Court in theory applies a narrow margin of appreciation. Conversely, where there is no consensus, the margin is wider.

The doctrine is not without its discontents and its application remains controversial. On one extreme, it has been criticised on substantive grounds as stifling the development of universal human rights standards, at times amounting to a denial of justice.⁶ Other scholars, while accepting judicial deference as a necessary component of the principle of subsidiarity, have attacked the inconsistent use of the doctrine and the absence of clear criteria.⁷ This note adopts the latter view. It is argued that the ad hoc application of a finding of “consensus” in defining the margin of appreciation, as applied in the jurisprudence of the Court concerning same-sex adoption, renders the standard an undesirable and unviable legal concept. The Court should instead limit the standard to cases where there is a clear consensus that serves to narrow the margin of appreciation, and not simply afford a wide margin where there is no uniformity in the discriminatory practice of states on the basis of sexual orientation, as this approach has detrimental effects for the protection of fundamental human rights.

This case note will provide an overview of the application of the consensus standard in the context of adoption by homosexual couples and individuals in light of the 2013 decision in *X. and Others v. Austria*.⁸ In Section II, the note describes the general principles and standards regulating the margin of appreciation under the provision for non-discrimination under Article 14, focusing in particular on the development and methodological application of the standard of consensus. It will then discuss the application of the standard by the Court in cases of same-sex adoption in *X. and Others v. Austria* and its predecessors in Section III. The final section further analyses how the inconsistent application of the standard affects the protection of the human rights of homosexual persons by the ECtHR, and proposes a different approach that the Court should undertake.

1 Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, (OUP 2009) 29.

2 Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR* (Intersentia 2002) 69.

3 See Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers 1996) 4-5.

4 Yourow (n 3) 14.

5 Jeoren Schokkenbroek, ‘The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights’ (1998) 19 *Human Rights L J* 30, 34.

6 See eg Lord Lester quoted in Paul Mahoney, ‘Marvellous richness of diversity or invidious cultural relativism?’ (1998) 19 *Human Rights L J* 1; Cora S. Feingold, ‘The Doctrine of Margin of Appreciation and the European Convention on Human Rights’ (1977) 53 *Notre Dame Lawyer* 90, 95, 106; E Benvenisti, ‘Margin of Appreciation, Consensus and Universal Standards’ (1998-1999) 31 *NYU J of Int’l L & Politics*, 843; G Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 4 *Oxford J of Legal Studies*, 705; Paolo G Carozza, ‘Uses and Misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights’ (1998) 73 *Notre Dame L Rev* 1217; Ivana Radačić, ‘The Margin of Appreciation, Consensus, Morality and the Rights of the Vulnerable Groups’ (1991) 31 *Zb Prav Fak Rij*.

7 See eg Rosalyn Higgins, ‘Derogations under Human Rights Treaties’ (1978) 48 *Brit Y B Int’l L* 281, 296-315, 315; Mahoney (n 6), 6; Yourow (n 3); Thomas A O’Donnell, ‘The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights’ (1982) 4 *Human Rights Quarterly* 474, 475, 479-490; Schokkenbroek (n 5) 31. Laurence R Helfer, ‘Consensus, Coherence, and the European Convention on Human Rights’ (1993) 25 *Cornell Int’l L J* 133, 135 (arguing for a more rigorous approach to the methodology of consensus). As scholar Thomas O’Donnell observes, however, there is a presupposition in the first position that the Court will always defer to the decisions of the responding government in its application of the margin of appreciation, which is not the case. O’Donnell (n 7), 476.

8 (GC) App no 19010/07 (ECHR, 19 February 2013).

II. General principles and standards regulating the margin of appreciation under Article 14

Cases concerning same-sex adoption before the Court involve individuals alleging that they had been subject to discriminatory treatment based on their sexual orientation in violation of their right to respect for their private and family life. Since a breach of the prohibition of discrimination under Article 14 may only be pleaded with respect to other rights in the Convention, the cases have been asserted under Article 14 in conjunction with the right to privacy and family life under Article 8.⁹ The Court has repeatedly found that the emotional and sexual relationship of a same-sex couple constitutes a private or family life within the meaning of Article 8,¹⁰ although it reaffirmed in those cases that the article does not guarantee either the right to create a family or to adopt.¹¹ Hence, much of the jurisprudence has focused on the margin of appreciation developed under Article 14, discussed in the sub-sections that follow.

A. *Factors affecting the margin of appreciation under Article 14*

On its face, Article 14 suggests that discrimination is an objective matter; however, the Court has noted that Article 14 “does not forbid every difference in treatment in the exercise of the rights and freedoms recognized”¹² and makes a distinction between a difference in treatment and discrimination. A difference in treatment is not necessarily discriminatory, provided a reasonable and objective basis can be found.¹³ Where certain conditions are met, contracting states enjoy a wide margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.¹⁴

The margin of appreciation permitted under Article 14 relies on a three-tiered factors test. First, there must be a difference in the treatment of relevant, similarly-situated persons.¹⁵ Second, the State must show that there is an “objective and reasonable justification”¹⁶ for the unequal treatment. The respondent government is required to show the legitimate aim as a matter of fact supported by evidence and by making reference to the specific policy goals which it is said to facilitate.¹⁷ Third, there must be a reasonable relationship of proportionality between the means employed and the policy ends sought.¹⁸ In this regard, the Strasbourg Court seeks to strike a fair balance between the protection of interests of the community and the respect for fundamental rights.¹⁹

The inquiry into the general principles or practice of states finds relevance in all three stages of the test under Article 14: a finding of consensus helps define the size of the comparative group under the first prong, helps provide a measure of objectivity and legitimisation under the second prong, and supplies a standard of reasonableness for the restriction under the doctrine of proportionality of the third prong. The standard is discussed below.

B. *“European consensus”*

In drawing the line between difference and discrimination, the Court also takes into consideration whether the practice in question is regarded as non-discriminatory in other democratic states. The interpretive doctrine has been recognised as being of “major relevance” in determining the scope of the margin.²⁰ The consensus standard is grounded in part in the evolutive framework of the Court in its assessment of fundamental rights under the Convention, wherein the Convention is to be

9 Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights* (Council of Europe Publishing 2000).

10 *Gas and Dubois v France* App no 25951/07 (ECHR, 15 March 2012), para 37; see also *Schalk and Kopf v Austria* App no 30141/04 (ECHR, 24 June 2010), para 92. The Court has explicitly found that the notion of family life is not confined to marriage-based relationships and may encompass other forms of de facto family ties, such as where the parties are cohabiting out of wedlock. See *Elsholz v Germany* (GC) App no 25735/94 (ECHR, 13 July 2000), para 43; *Keegan v Ireland* App no 16969/90 (ECHR, 26 May 1994), para 44; *Johnston and Others v Ireland* App no 9697/82 (ECHR, 18 December 1986), para 56.

11 *Gas and Dubois* (n 10), para 37; *EB v France* (GC) App no 43546/02 (ECHR 22 January 2008), para 41.

12 *Case Relating to certain aspects of the laws on the use of languages in education in Belgium* App nos 1474/62; 1677/62; 1769/62; 1994/63; 2126/64, (ECHR, 23 July 1968) (hereinafter “Belgian Linguistics Case”), para 10.

13 *ibid.*

14 *See Burden v UK* (GC) App no 13378/05 (ECHR, 12 December 2006), para 60. The difference includes a different treatment in law. *See Marckx v Belgium* App no 6833/74 (ECHR, 13 June 1979), para 38.

15 *Gas and Dubois* (n 10), para 58.

16 *Belgian Linguistics Case* (n 12), para 10.

17 *Greer* (n 9) 11.

18 E Brems, ‘The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights’ (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 248; see also *Gas and Dubois* (n 10), para 58.

19 *Belgian Linguistics Case* (n 12), para 7.

20 *Greer* (n 9) 11. See also *Schokkenbroek* (n 5) 34.

interpreted in light of present-day conditions.²¹ The Court has noted the importance of consensus in cases dealing with gender discrimination, for example, to justify a progressive approach in the recognition of rights.²²

There are two principle methods by which the Court finds public consensus on an issue. In one application, the Court makes a comparative survey of the practice of states, and allows a narrow margin of appreciation where there is substantial consensus on an issue. This approach was clearly articulated in the *Sunday Times*²³ case:

The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area.... Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.²⁴

This position best reflects an evolutive reading of the Convention,²⁵ as it makes a direct reference to the existence of state practice. This approach was instrumental in invalidating Northern Ireland's sodomy law in the case of *Dudgeon*.²⁶

At other times, the Court looks at the absence of consensus in an area to draw a different, negated proposition: where there doesn't appear to be common ground in the practice of states, the Court gives wide deference to the states.²⁷ This is particularly the case where the legitimate aim advanced under the second prong concerns morality, wherein the Court has given states a wide degree of deference. This stance was articulated in *Handyside*, where the ECtHR found that there was no consensus on morals in the domestic law of the various member states, and consequently the state was afforded a wide margin of discretion to decide on issues concerning the publication of obscene materials.²⁸

Despite the fact that issues of sexuality are intrinsically linked to issues of morality and religion in Western societies, the Court has not categorically relegated those issues under a wide margin. Instead, the Court has repeatedly held that differences based on sexual orientation require particularly serious reasons by way of justification.²⁹ Nonetheless, tensions remain with the wider margin afforded for such issues; states have been afforded a wider margin on issues ranging from the age of consent for sexual intercourse,³⁰ the recognition of same-sex marriage,³¹ and sexual activities in the armed forces.³² The differences illustrate the hesitation of the Court to decide on issues concerning morality for which there are conflicting practices in the European community.

Finally, the Court at times looks to international treaties embodying a particular principle to find a general consensus, even where the respondent State is not a party to the treaties. That was the approach taken in *Marckx*, where the ECtHR found that the mere existence of international treaties denoted a "clear measure of common ground in [the treatment of illegitimate children] amongst modern societies."³³

Although the Court has developed various methods of analysing the practice of nations, their application has not been

21 See eg *Johnston and Others* (n 10), para 53; see also *Marckx* (n 14), para 41 (stating: "[T]he Court cannot but be struck by the fact that the domestic law of the great majority of the member states of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of "mater semper certa est.").

22 See *Abdulaziz, Cabales and Balkandali v UK* App nos 9214/80, 9473/81, 9474/81, (ECHR, 28 May 1985), para 78 (noting that "the advancement of the equality of sexes is today a major goal".)

23 *Case of the Sunday Times v UK* App no 6538/74 (ECHR, 26 April 1979).

24 *ibid*, para 49.

25 See eg *MC v Bulgaria* App no 39272/98 (ECHR, 4 December 2003) (finding that the evolution of social attitudes towards the equality of sexes requires that every form of non-consensual sex is criminalised as rape, including cases where the victim does not physically resist, although not many member states have taken this approach).

26 The Court, in relevant part stated:

"[T]here is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member states of the Council of Europe, it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member states."

Dudgeon v UK App no 7525/76 (ECHR, 22 October 1981), para 60.

27 See eg *Case of the Sunday Times* (n 23), para 59; *Rasmussen v Denmark* App no 8777/70 (ECHR, 28 November 1984) (inconsistent practice in legislation dealing with paternity proceedings); *Engel and others v The Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECHR, 8 June 1976) (similar discrimination in the practice of states concerning distinctions in disciplinary treatment between officers and ordinary servicemen).

28 *Handyside v UK* App no 5493/72 (ECHR, 7 December 1976), para 48.

29 See eg *Karner v Austria* App no 40016/98 (ECHR, 24 July 2003), para 37; *L and V v Austria*, App nos 39392/98, 39829/98 (ECHR, 9 January 2003), para 45; *Smith and Grady v UK* App nos 33985/96, 33986/96 (ECHR, 27 September 1999), para 90; and *Schalk and Kopf* (n 10), paras 96-97.

30 *X v Germany* App no 5935/72 (ECHR, 30 September 1975); *Johnson v UK* App no 10389/83 (ECHR, 17 July 1986), para 47.

31 *Schalk and Kopf* (n 10).

32 *B v UK* App no 9237/81 (ECHR 12 October 1983), cited in *Arai-Takahashi* (n 2) 69.

33 *Marckx* (n 14), para 41.

consistent and has yielded variable jurisprudence. The ECtHR has afforded states a wide margin of appreciation even where there exists a directly relevant international instrument on the issue and where there is divergence in the practice of states.³⁴ Moreover, where the legitimate aim of the government has been the protection of morals, the Court at times foregoes an analysis of the practice of states or relevant international instruments altogether.³⁵ The inconsistent application of the principle in practice will be illustrated in the cases concerning same-sex adoption, discussed in the next section.

III. Jurisprudence of the ECtHR regarding adoption by same-sex couples

The Court has addressed two types of situations in the context of adoption by homosexual persons. These are: (1) individual adoption, whereby an individual opts to adopt on his or her own; and (2) second-parent adoption, whereby one partner seeks to adopt the other partner's child with the aim of achieving legal recognition for their parental status.³⁶ The ECtHR has dealt with two cases relating to individual adoption and two cases of second-parent adoption by same-sex couples. The cases are discussed below, with particular attention paid to the Court's findings of consensus in aiding its assessment.

A. Individual adoption cases: *Fretté* and *E.B. v. Franc*

The issue of adoption by a homosexual individual was first addressed in the 2002 case *Fretté v. France*.³⁷ In *Fretté*, the Court considered the request for prior authorisation to adopt a child by a single homosexual man. The highest administrative court in France, the Conseil d'État, denied Fretté's request on the basis that his "lifestyle" could pose "substantial risks to the child's development."³⁸ The domestic law otherwise permitted single or unmarried males to adopt, and it was clear to the Court that the domestic authorities had rejected the application on the basis of Fretté's sexual orientation.³⁹ The Court examined the case under Article 14 taken in conjunction with Article 8.

In analysing whether the government had an objective and reasonable justification for the difference in treatment, the Court found that the domestic authorities had pursued a legitimate aim—namely, the protection of the health and rights of children.⁴⁰ The Court then remarked on the absence of common ground between member states of the Council of Europe concerning adoption by unmarried, homosexual persons, and concluded that there was a lack of consensus regarding the advisability or permissibility of such adoptions. It also notably took into account the lack of consensus in the scientific community, noting the paucity in the availability of studies concerning the consequences of child adoption by one or more homosexual parents.⁴¹ Based on these facts, the Court took the same approach as in *Handyside* to conclude that a wide margin of appreciation must therefore be afforded to the government in determining the best interests of the child.⁴² Consequently, the Court found no violation of Articles 14 and 8 of the Convention.⁴³

Four years after *Fretté*, another French case concerning *l'homoparentalité* made its way to the Grand Chamber. *E.B. v. France*⁴⁴ marked a turning point in the issue of same-sex adoption as it involved a reversal of the Court's previous position. *E.B.* concerned a request made by a single woman for prior authorisation to adopt her partner's child. The applicant had been in a long-term, stable relationship with her partner. As in *Fretté*, the Court found that the applicant's homosexuality had been a determining factor in refusing her request.⁴⁵ Unlike in *Fretté* however, the Grand Chamber this time found a violation of

34 See eg *Chapman v UK* (GC) App no 27238/95 (ECHR, 18 January 2001); *Coster v UK* (GC) App no 24876/94 (ECHR, 18 January 2001); *Jane Smith v UK* (GC) App no 25154/94 (ECHR, 18 January 2001); *Lee v UK* (GC) App no 25289/94 (ECHR, 18 January 2001); *Beard v UK* (GC) App no 24882/94 (ECHR, 18 January 2001).

35 See generally *Radačić* (n 6) 606.

36 A third category, joint adoption by a same-sex couple, has yet to be addressed by the Court. See *Gas and Dubois* (n 10), para 54; *X and others v France* (GC) App no 19010/07 (ECHR, 19 February 2013), para 55.

37 *Fretté v France* App no 3651/97 (ECHR, 26 February 2002).

38 *ibid*, paras 11, 13, 16, 32.

39 *ibid*, para 32.

40 *ibid*, para 35. The Court rejected other arguments advanced by the government seeking to justify the difference in treatment, such as the child's short-term stigmatisation ensuing from the adoption. *ibid*.

41 *ibid*, para 42. The analysis of the Court has been criticised by the concurring opinion as a misuse and abuse of the "precautionary principle". *ibid*, Partly concurring opinion of judge Costa joined by judges Jungwiert and Traja. See also Thomas Willoughby Stone 'Margin of Appreciation Gone Awry: The European Court of Human Rights' Implicit Use of the Precautionary Principle in *Fretté v. France* to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation' (2003) 3 *Conn Pub Int'l L J* 270 (note).

42 *ibid*, paras 41-43.

43 *Fretté* (n 37), para 43. The Court found that the refusal to grant prior authorisation for adoption did not infringe the principle of proportionality and that the difference in treatment was not discriminatory within the meaning of Article 14 of the Convention. *ibid*, paras 37-43.

44 *EB* (n 11).

Article 14 of the Convention taken in conjunction with Article 8.⁴⁶ It specifically found that the refusal to grant the applicant authorisation to adopt on the basis of her sexual orientation amounted to a disparity in treatment by the domestic authorities vis-à-vis heterosexual individuals amounting to discrimination under the Convention.⁴⁷ What changed in the practice of nations over the course of four years?

The answer is: not much, or apparently not enough for the Court to remark on the development amongst the member states of the Council of Europe. Even though the parties (and third parties) made submissions on that point, the Court was silent as to the role of the practice of states in the case. The submissions pointed to a lack of common ground on the practice of nations regarding same-sex adoption, with the trend shifting in favour of extending the right to same-sex couples.⁴⁸ Instead of applying a wide margin of appreciation as it had in *Fretté* where the practice of states diverged, the Court limited its analysis to the requirement of an “objective and reasonable justification” under Article 14. In scrutinising the State’s submission that the rejection of the application was made in the best interest of the child, that Court found that concern about the applicant’s sexual orientation had “contaminated” the authorities’ decision to reject her application, even where the reference to her homosexuality was not made explicitly, but implicitly.⁴⁹

The *E.B.* case stands for the important proposition that the refusal to grant an adoption may not be made solely on the basis of a prospective parent’s sexual orientation⁵⁰ and further narrowed states’ margin of appreciation on the issue of same-sex adoption without having to resort to a finding of consensus in the practice of nations. While monumental, the holding of the case has been narrowly restricted to cases involving individual adoption by unmarried, single persons, as seen in the cases that follow.

B. Second-parent adoption cases: *Gas and Dubois v. France and X. and Others v. Austria*

The applicants in *Gas and Dubois*⁵¹ involved two cohabiting, homosexual women who had entered into a civil partnership under French law (*pacte civil de solidarité*).⁵² The first applicant sought to adopt the second applicant’s biological child, in a process generically described as “second-parent adoption.” The application was refused on the ground that only married couples were allowed to share parental rights in the case of simple adoption orders. Despite the watershed ruling of *E.B. v. France* four years earlier, the Court found no violation of Articles 14 and 8.⁵³

One of the key points in the Court’s differing treatment of second-parent adoption concerns the legal status of the applicants’ relationship and their relationship to the child. For an issue to arise under Article 14, the difference in treatment must concern persons in relevantly similar situations.⁵⁴ The Court thus looked at the rights afforded under civil partnerships related to second-parent adoption as a basis of comparison. The Court accordingly found no difference in treatment based on the applicants’ sexual orientation, because heterosexual couples who had entered into civil partnerships were also prohibited from obtaining a simple adoption order.⁵⁵ In response to the claim that heterosexual couples could circumvent such prohibitions by changing their legal status through marriage while homosexual couples could not, the Court reiterated its ruling in *Schalk and Kopf v. Austria*,⁵⁶ which held that contracting states were not obligated to grant access to marriage to homosexual couples.

The Court further stated that the contracting States enjoy a wide margin of appreciation in considering whether and to what

45 *ibid*, paras 72-89. The rationales provided for the refusal included the “place [the applicant’s] partner would occupy in the child’s life” and “the lack of paternal referent” in the household. *ibid*, para 15.

46 *ibid*, paras 94-98.

47 *ibid*, para 93.

48 The applicant submitted that there had been a “steady development in the law” favouring adoption by same-sex couples since *Fretté*. However, the government noted that only nine out of forty-six member states of the Council of Europe were moving towards adoption by same-sex couples, and some countries did not even make adoption available to unmarried persons. *ibid*, paras 61, 65.

49 *ibid*, paras. 80, 88-93.

50 See EB (n 11), paras 91 (“Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8...”), 93 (“In the Court’s opinion, if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant’s sexual orientation this would amount to discrimination under the Convention...”), and 96 (“...the Court cannot but observe that, in rejecting the applicant’s application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention.”).

51 *Gas and Dubois* (n 10).

52 French Civil Code, Art 515-1.

53 *Gas and Dubois* (n 10) para 73.

54 *ibid*, para 58.

55 *ibid*, para 68.

56 App no 30141/04 (ECHR, 24 June 2010).

extent different treatment may be justified where the issue concerned “general measures of economic or social strategy”.⁵⁷ This is a marked departure from the approach taken earlier in *E.B.*, which closely scrutinised the decision by the national authorities to provide an objective and reasonable justification for the discrimination. As in *E.B.*, however, the Court chose not to address the practice of states concerning second-parent adoption, even though the concurrent opinion found that the case “fundamentally” concerned “issues on which no consensus exists in Europe,” where second-parent adoption was only permitted in ten of the forty-seven state parties to the Convention.⁵⁸ The reluctance of the Court to discuss consensus of the practice may be attributed to the novelty of the issues before it and the lack of a clear trend among member-states to recognise second-parent adoption for same-sex couples. The Court had just ruled that states are free to restrict access to marriage to heterosexual couples and enjoy a wide margin of appreciation as to the status conferred by alternative means of recognition.⁵⁹

In 2013, however, the Court revisited the issue of second-parent adoption in a different domestic context. *X. and Others v. Austria* involved a cohabiting lesbian couple in a stable relationship, wherein the biological mother’s partner wanted to adopt her partner’s child. The applicants claimed that they had been discriminated against in comparison to heterosexual couples, married or unmarried, because second-parent adoption was foreclosed to homosexual couples in Austria. The Austrian law in question made same-sex adoption legally impossible because a child could not have parentage divided between more than two parents: a father and a mother.⁶⁰ Hence, a same-sex partner seeking to adopt cannot take the place of the biological parent of the same sex, and any such adoption would break the relationship of the child with his or her biological mother.

The Court found that there was a difference in treatment between the applicants and similarly-situated unmarried heterosexual couples, since second-parent adoption by the latter does not affect the legal relationship of the parent with the child.⁶¹ The difference in treatment was therefore based solely on the applicants’ sexual orientation, and the government had not provided any convincing reasons showing that difference in treatment was necessary for the interests of the child. This case is distinguished from *Gas and Dubois* because in that case, French law did not open the possibility of second-parent adoption to unmarried persons of different sexes, as it was permitted under Austrian law. The Court therefore found a violation of Articles 14 and 8, taken in conjunction.⁶²

This time, the Court engaged extensively in a comparative analysis. The Court made reference to a study by the Council of Europe Commissioner for Human Rights,⁶³ which presented various findings on the practice of the member states in the Council of Europe concerning adoption by same-sex couples. Specifically, the study found that ten member states allowed second-parent adoption by same-sex couples,⁶⁴ while 35 member states barred its extension to same-sex couples.⁶⁵ 24 states reserved second-parent adoption to married couples only,⁶⁶ while ten states also allowed extended it to unmarried couples. Of the latter, six states allow second-parent adoption by unmarried heterosexual and homosexual couples alike, while four limit it to unmarried heterosexual couples only. Austria falls in the last category.⁶⁷

The fact that a vast majority of states do not allow same-sex couples to have a second-parent adoption should indicate that there is a clear divergence in the practice of states. The group that the Court looked at to derive a consensus, however, concerned the much smaller group of second-parent adoption extended to unmarried couples. Because that group only contained ten states, the Court considered that no conclusions as to the existence of a possible consensus could be drawn from such a narrow sample.

57 *Gas and Dubois* (n 10) paras 58, 60. The Court also applied this principle in its decision concerning the viability of same-sex marriage. *Schalk and Kopf* (n 10), para 97.

58 *Gas and Dubois* (n 10), Concurring opinion of Judge Spielmann joined by Judge Berro-Lefèvre.

59 *Schalk and Kopf* (n 10), para 98.

60 Allgemeines bürgerliches Gesetzbuch [ABGB] [Civil Code] Justizgesetzsammlung [JGS] No. 946/1816, as amended § 841 (Austria), Art 182, para 2.

61 *X and Others* (n 36), para 12.

62 No such violation was found where the applicants’ situation was compared with that of married persons.

63 Thomas Hammarberg, *Discrimination on grounds of sexual orientation and gender identity in Europe* (Council of Europe Publishing, 2d. ed., June 2011), available at: http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf.

64 *ibid.* cited in *X and Others* (n 36) paras 55-56. These include: Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Spain, Sweden, and the United Kingdom as well as Slovenia in its recent case-law. *ibid.*

65 They include: Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Poland, Portugal, Romania, the Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Switzerland, the former Yugoslav Republic of Macedonia, Turkey and Ukraine. *ibid.*

66 *X and Others* (n 36), para 57.

67 *ibid.*

IV. Commentary: towards a new standard of European consensus under Article 14

The Court's consensus approach raises more questions than it answers: how is the comparative group defined? What number is sufficient to constitute a consensus? When does a disparity in the practice of states lead to a wider margin? In light of the absence of clear and consistent criteria to be applied, the Court adds uncertainty to its deliberations and a margin that is already nebulous in its application. Also unclear is when the Court decides to inquire into the existence of a consensus among member states of the European Council. In all the cases of same-sex adoption since *Fretté*, the parties made submissions on the point of European consensus, at times pointing to the lack of a uniform practice while also recognising a trend in the growing recognition of same-sex adoption more generally.

X. and Others attempts to establish a new criterion in the methodology but provides no rationale for its introduction. While it is not unreasonable to suggest that a sample of ten states does not suffice in finding a consensus within an already narrowly-defined group, the smallness of the sample equally suggests that there is no consensus in Europe concerning the viability of second-parent adoption by homosexual persons. Where only six states had extended second-parent adoption to unmarried couples regardless of their sexual orientation, and a large majority—35 member states—did not allow second-parent adoption by same-sex couples, the inevitable conclusion that may be drawn is that while there may be an emergence in the recognition of the right, there is also still a strong practice against it.

The Court thus avoided the discussion on the broader context by making its analysis and comparative sample very narrow. The issue articulated by the Court is: whether the difference in treatment between unmarried heterosexual and same-sex couples with respect to the specific type of adoption alleged amount to discrimination. By focusing on a sample that only took into account the states that afforded unmarried persons the right to adopt, another important consideration got lost in the analysis: the inadequacy of the “similarly situated group” compared where one group, couples in same-sex relationships, are segregated in their status under the law. This point will be returned to later on.

The scope of the issue also dictated the size of the sample from which to draw a comparative analysis. The decision further fails to explain when the Court will find a lack of consensus based on a small sample, and when it will simply discard the sample as being too small. The methodology of the Court drew due criticism in the partial dissent of seven judges. They accused the majority of avoiding the issue and artificially taking refuge behind the “narrowness of the sample”.⁶⁸ The sample chosen by the Court was further described as being “unduly technical” and “reductive”, as it ignored the clear trend that the majority of member states currently do not authorise second-parent adoption for unmarried couples in general, and even less so for unmarried same-sex couples.⁶⁹ The dissent's accusation of arbitrariness by the Court is fair in light of the lack of rationale provided. In the commentary that followed in academic forums, the methodology of the Court was similarly criticised as being applied in an ad-hoc or teleological manner.⁷⁰

Given the inadequacy of the method of consensus to support the principle in practice, it is proposed that the negative iteration of the principle should be discarded altogether, as it yields variable jurisprudence, is inconsistently applied, and risks further fragmenting States' obligations under the Convention. In this sense, the rationale for the proposed approach echoes the dissenting opinion in *Fretté*, which remarked:

[R]eference... to the lack of “common ground” in the contracting States or “uniform principles” on adoption by homosexuals... which paves the way for States to be given total discretion, seems to us to be irrelevant, at variance with the Court's case-law relating to Article 14 of the Convention and, when couched in such general terms, liable to take the protection of fundamental rights backwards.⁷¹

On the other hand, a clear consensus on an issue remains an important marker for the Court in determining objective standards consistent with its evolutive interpretation of the Convention. The finding of consensus should therefore be restricted to where there exists a large consensus and pool to draw from, and accordingly lead to a narrow margin in cases of

68 *X and Others* (n 36), Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, de Gaetano and Sicilianos, para 14.

69 *ibid*, para 13.

70 See eg Grégor Puppincq, ‘Si la femme avait été un homme... Commentaire de l'arrêt X et autres c. Autriche sur l'adoption homosexuelle’ (European Centre for Law and Justice, 20 February 2013) <<http://eclj.org/pdf/si-la-femme-avait-%C3%A9t%C3%A9-un-homme.pdf>> accessed 17 July 2013; Paul Johnson, ‘X v Austria Judgment’ (ECHR Blog, 21 February 2013) <<http://echrblog.blogspot.co.uk/2013/02/x-v-austria-judgment.html>> accessed 17 July 2013; Stijn Smet, ‘X. and Others v. Austria (Part II): A Narrow Ruling on a Narrow Issue’ (Strasbourg Observers, 6 March 2013), <<http://strasbourgobservers.com/2013/03/06/x-and-others-v-austria-part-ii-a-narrow-ruling-on-a-narrow-issue/>> accessed 17 July 2013.

71 *Fretté* (n 37), Joint partly dissenting opinion of judge Sir Nicolas Bratza and Judges Fuhrmann and Tulkens, para 2.

discrimination. The absence of a uniform practice of states does not logically lead to the conclusion that the margin should therefore be widened; instead, the Court ought to reaffirm that issues of sexual orientation are subject to strict scrutiny,⁷² and focus its analysis on the three-tiered test for the margin of appreciation under Article 14. To reiterate, they involve: finding a difference in the treatment of relevant, similarly-situated persons; an “objective and reasonable justification” for the unequal treatment on the part of the State; and a reasonable relationship of proportionality between the means employed and the policy ends sought.

As regards the first prong, the Court should re-examine what constitutes a “similarly-situated group” as it influences the size of the comparative group and gets to the heart of the discrimination issue. The Court’s failure to distinguish the situations of individuals who *cannot* marry and individuals who *choose* not to marry in their comparative assessment is a lamentable refrain; it appears throughout the Court’s analysis of cases regarding discrimination on the basis of sexual orientation, with the effect that it prejudices homosexual relationships. Instead of furthering the promotion and protection of human rights, the principle that the differential treatment of unmarried same-sex couples as compared to married, heterosexual couples will not amount to discrimination under the Convention leaves contracting states free to maintain separate, and thus inherently unequal, statuses to relationships that otherwise have been recognised as constituting a private or family life. This stance also risks creating absurd results and skewed incentives: in *Gas and Dubois*, it suggests that the homosexual couple may be better off unmarried rather than in a civil partnership, since the pool to draw from in a comparative analysis may be even more narrow for civil partnerships.⁷³ Moreover, it suggests that states may simply restrict second-parent adoption to married persons to stay in compliance with their obligations under the Convention and keep homosexual couples from adopting. *X. and Others* thus furthers the discrimination that results from the exclusion of homosexual persons from the category of marriage and the associated rights that emerge from that label, which include adoption rights.

The second prong scrutinises the legitimacy of the interfering State’s aim, which must have an “objective and reasonable justification”. Relatedly, the principle of proportionality under the third prong looks at the severity of the interference and the difference in treatment as weighed against the legitimate aim put forth by the respondent State. The Court in *E.B.* focused its analysis on those factors in holding that states may not discriminate solely on the basis of sexual orientation. Moreover, it arrived at that conclusion without resorting to a comparative analysis. This approach better focuses the analysis on whether discrimination on account of sexual orientation has taken place, instead of conducting a majoritarian survey on the permissibility of such discrimination. It is the more human rights-centric approach in the sense that it places the burden of proof squarely on the interfering State to justify its difference in treatment. Relevantly, the Court’s references to a scientific consensus as concerns the viability of same-sex adoption has also evolved since *Fretté*. The onus is now on the government to show that the exclusion of same-sex couples from second-parent adoption is necessary to protect the interests of the child.⁷⁴

In this regard, the move away from invoking the protection of “traditional family values” as a legitimate aim is to be welcomed in light of the Court’s jurisprudence.⁷⁵ In *X. and Others*, the Court also found that such an aim was “rather abstract,” and that “a broad variety of concrete measures may be used” to implement it instead.⁷⁶ The conversation has therefore shifted to considerations on the best interest of the child, such as the child’s interest in having his parents have joint legal custody or the importance of maintaining the mother’s legal tie to her child where the latter may be broken if the rights associated with parental responsibility are transferred to the adoptive parent.⁷⁷ These are relevant considerations, and resort may be had to international instruments and scientific reports to guide the Court’s assessment.

X. and Others illustrates the tensions between the margin of appreciation and a universalist vision for the protection of fundamental human rights advanced by the supranational, regional Court. The Court has used the practice of European nations as a demarcation line for the margin. On the one hand, a strong consensus on an issue may be indicative of its universal appeal. On the other hand, a fragmented, diverse approach among member states may signal that the issue is better left to the states, consistent with the principle of subsidiarity. However, giving states too much discretion in areas concerning the “morals” of a society where there is little agreement, especially in issues concerning sexual orientation, risks mirroring the Court into a quagmire of cultural relativism and may create skewed incentives for states to continue their differential

72 See (n 29).

73 Thirteen states in the Council of Europe recognise the partnerships of homosexual couples. Hammarberg (n 64) 9.

74 *X and Others* (n 36), para 67.

75 See eg *Kozak v Poland* App no 13102/02 (ECHR, 2 March 2010), para 98.

76 See *X and Others* (n 36) para 139.

77 *Gas and Dubois* (n 10), para 62. But see *X and Others* (n 36), Dissenting opinion of Judge Villiger (suggesting that it is in the best interests of the child for the parents to obtain joint parental custody).

treatment of homosexual persons. It is therefore important to have a cautious, coherent, and consistent methodology in the use of the European consensus standard to aid in the Court's difficult assessments. In this note, a less ambitious approach is proposed than the guidelines the Court has developed in the area of same-sex adoption. It looks only to the existence of consensus to narrow the margin of appreciation, and not to widen it where the practice of nations is in flux. This approach avoids many of the problems that the Court has had in defining the existence and limits of consensus, and draws the line where the consensus is clear. ■