CEU CENTRAL EUROPEAN UNIVERSITY

LGBT Rights and their Violation by Anti-LGBT Propaganda Laws : A Constitutional Analysis on the Right to a Queer Voice

by Cristiano Lucas Silva Goncalves

COMPARATIVE CONSTITUTIONAL LAW THESIS
PROGRAM: LL.M in Comparative Constitutional Law, Legal Department
PROFESSOR: Sejal Parmar
Central European University
1051 Budapest, Nador utca 9
Hungary

Executive Summary

The purpose of this research is to analyse the potential violations of human rights of sexual minorities by anti-LGBT propaganda laws. In order to achieve this goal, I will scrutinise the current standards of protection of LGBT rights and the jurisprudence of the European Court of Human Rights related to this group up to the present date, comparing this jurisprudence with that of the Supreme Court of Canada and United Nations Human Rights Committee. I argue that the anti-LGBT propaganda laws are in violation of international standards of human rights, and in order to underpin my claim I advance that, besides historical decisions from the aforementioned Courts denying certain rights to sexual minorities, the evolutive nature of the constitutional provisions these three Courts enforce has forced them, to different extents, to encompass further protection to sexual minorities than initially and explicitly mentioned on the documents they oversee. I analyse the approaches towards the evolution of interpretation and of limitation of rights of sexual minorities within the jurisprudences of the aforementioned Courts and refute the claims brought by states that the anti-LGBT propaganda laws are necessary to the protection of children and of morals.

Acknowledgements

I would like to thank, first of all, my parents, lifelong supporters and motivators, José Wilson and Beatriz.

To all my Russian friends for the warm welcome into a community that proved to me what true friendship means. Thank you for all the love and instigation to go further and fight against hate.

Edna, for being an example of competence and rectitude. Your smile will always live amongst us.

Thiago, for the lessons, motivation, friendship and timely reviews.

Table of Contents

List of abbreviations

BNA Act – British North America Act, 1867

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

HRC – United Nations Human Rights Committee

ICCPR – International Covenant on Civil and Political Rights

LGBT – Lesbians, Gays, Bisexuals and Transsexuals.

SCC – Supreme Court of Canada

Introduction

"*Wrong does not cease to be wrong because the majority share in it.*"[1]

Although part of the most innate nature of individuals and besides hard fought battles for acceptance, homosexuals still suffer with strong, widespread and baseless prejudice. The disapproval varies from homosexuality being considered a taboo or sin to a crime punished with death.[2] Despite a historical hostility towards homosexuality, a trend of recognising rights to sexual minorities has gained momentum lately. Brazil, Argentina and Uruguay in South America, several stated of the United Stated of America, followed by a historical decision from its Supreme Court, amongst many others jurisdictions, have recognised the right to marry to same-sex couples, either via legislative amendment or by judicial order.

Marriage rights are not the only battlefront fought by Lesbians, Gays, Bisexuals and Transgenders (henceforth LGBT[3]) for more recognition, equality and respect. Another front that is of special relevance is the fight against the approach of some countries in regard to civil rights of sexual minorities - certain polities that were once either neutral or protective towards LGBTs are making a U-turn and restricting rights of sexual minorities. Anti-gay laws and policies are currently being passed or discussed in different countries, notably in Eastern Europe and Africa.

[1] Tolstoy, *Confession*.

[2] At the moment of writing, homosexuality "remain[s] illegal in 76 countries around the world, and individuals can be executed on the basis of their sexual orientation in 7." "Traditional Values?," 7.

[3] For didactic purposes the terms *LGBT*, *homosexual, same-sex, gay* and its variations are used interchangeably as synonyms of *sexual minorities*. It acknowledges that for queer theory writers there are essential differences between the mentioned terms but this discussion is situated outside the scope of the present research.

A *gay divide* has taken the international sphere and the different position of different countries in regard to acceptance of LGBT rights is notably distinguishable within the United Nations (henceforth UN) Human Rights Council. While the Russian Federation has recently proposed a resolution to protect what they label as *traditional values*, aimed primarily at christening its Orthodox moral into the framework of human rights[4] and "that threatens to legitimise discrimination and subvert the universality of fundamental rights",[5] a number of Latin American took the opposite direction and sought to pass a resolution that "[w]elcom[ed] positive developments at the international, regional and national levels in the fight against violence and discrimination based on sexual orientation and gender identity."[6]

Before taking on the international stage, Russia had local parliaments passing a number of laws that intend to limit expression rights of homosexuals. Initially such laws were issued on local federative units with restricted territorial applicability. After gaining momentum, the Russian federal parliament passed a law restricting what was framed as *propaganda of non-traditional sexual relations* on the whole territory of Russia. It followed an internal trend that started in the oblast[7] of Ryazan in 2006 when the first law of this kind was introduced.[8] Similar bills were passed in the regions of Arkhangelsk, Saint Petersburg and Kostroma, amongst others.[9]

[4] Human Rights Council of the United Nations, Resolution 16/3 of 2011.
[5] "Traditional Values?," 19.
[6] "Human Rights, Sexual Orientation and Gender Identity : Resolution Adopted by the Human Rights Council."
[7] Oblasts are a type of administrative divisions of the Russian Federation, as established by Article 65 of the Russian Federal Constitution.
[8] The Ryazan Region Law on the Protection of Morality and Health of Minors, of April 3, 2006, Section 4, brings that "[p]ublic actions aimed at propaganda of homosexuality (sodomy or lesbianism) among minors shall not be allowed."
[9] On 30th September 2011 Arkhangelsk region passed its own law, and on 7th March 2012 was the turn of Saint Petersburg region, in where the second largest city of the country, named after the region, is.

Unsuccessful attempts to introduce similar laws were seen in the Parliaments of Hungary and Ukraine. A number of cities and regions in Moldova had bills of this nature, and a number of them passed into law.[10] The parliaments of Belarus, Latvia and Kazakhstan are currently discussing such bill,[11] and Lithuania already has its own.[12] Inherent to all these bills or laws is the belief that any sexual orientation or sexual identity that is not cis or heterosexual is a grave danger to children and to the morality and should stopped at the expense of rights of the LGBTs.

Based on arguments presented by different proponents and supporters of anti-LGBT propaganda laws[13] published on several fora[14], this research identify that the reasoning of such supporters rest on two main grounds: the necessity of protecting traditional moral values of society, and in the need of protecting rights of others, specifically of children.[15] In sum, in the view of the anti-LGBT propaganda laws advocates, morality and respect of children rights are valid grounds to trump rights of LGBTs,[16] arguments that echo on all the countries that passed or attempted to pass such laws. Based on the exposition of the overall and general framework of an anti-LGBT propaganda laws or bills exposed below, it is possible to find common denominators across them. These common denominators are part of the object of the present research, therefore this

[10] "On the Issue of the Prohibition of so-Called 'Propaganda of Homosexuality' in the Light of Recent Legislation in Some Member States of the Council of Europe."
[11] "Traditional Values?," 27.
[12] Law of the Republic of Lithuania on the Protection of Minors against the Detrimental Effect of Public Information, No IX-1067.
[13] *Anti-LGBT propaganda laws* and *propaganda laws* will be used interchangeably as meaning a typical law as described on subchapter 1.3 below.
[14] Arguments advanced by proponents of such laws were drawn from parliamentary debates, press releases, interviews of lawmakers and state agents, on arguments presented by and before courts, amongst other sources.
[15] Issaeva and Kiskachi, "Immoral Truth vs. Untruthful Morals?"
[16] As, for instance, argued by the Russian government in *Fedotova v. Russia.* Fedotova v. Russian Federation, Communication No. 1932/2010, 5.5 (United Nations Human Rights Committee 2012).

thesis addresses this general framework of limitation of LGBT rights as opposed to a discussion on a domestic law in particular.

The above-mentioned Russian federal law, amongst other legal provisions consists of article 6.21 of the Russian Code of Administrative Offences that makes punishable by a fine any propaganda of non-traditional sexual relations delivered from adults above 18 years of age to minors, via dissemination of information, establishing as a punishment a fine from four thousand to one million Russian Roubles (USD110 to USD30.000 as of March 2014) to individuals and companies that violate the provision.[17]

The compatibility between the homosexual propaganda ban and the current standards of protection of human rights is questionable, and thus the object of the present study. Eastern European countries are bound[18] by the European Convention on Human Rights (ECHR),[19] and by the International Covenant on Civil and Political Rights (ICCPR, and in combination with the ECHR, Treaties), therefore obliged to respect the rights established on these international instruments, the rights to freedom of expression, equality and privacy included. In order to question the validity of an anti-LGBT propaganda law, this thesis will discuss the case law of the United Nations (the UN) Human Rights Committee (HRC), the body that monitors the implementation of the International Covenant on Civil and Political Rights, and European Court of Human Rights (ECtHR), that implement the ECHR. The Canadian constitutional scheme, based on the British North America Act (BNA Act)[20] and its amendments, notably the Canadian Charter of Rights and Freedom (the Charter), enforced by the Supreme Court of Canada (SCC, and

[17] Federal Law of the Russian Federation dated December 30, 2011, No. 195-FZ.
[18] Belarus is an exception.
[19] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
[20] *Canadian Constitution Act, 1867*.

in combination with the HRC and the ECtHR, Courts) will be will also be an important part of the research for reasons presented below.

The objectives of this thesis are fourfold: First, it intends to portray how the jurisprudence of the ECtHR has been lenient in building concrete standards to protect rights of sexual minorities that are of public nature; second, it proposes to show how the underdeveloped and lenient case-law of the ECtHR can be used, although to a limited extent, to buttress claims in support of anti-LGBT propaganda laws; third, it argues that the ECtHR has developed standards that are very protective of children and to some extend neglected protecting their rights in matters related to homosexuality, and moreover, created a case law that substantiate claims on necessity of morality protection; finally, it argues that a major flaw in anti-LGBT propaganda laws is that they deny the evolutive nature of constitutional documents, rights' protective norms including. These objectives will be achieved while answering the following research question: are anti-LGBT propaganda laws at odds with international standards of human rights protection even though the precedent of the ECtHR has previously denied LGBTs rights they claim are being violated by such laws?

As far as methodology is concerned, in order to address the research question this thesis will analyse the jurisprudence of the HRC, the SCC and of ECtHR in order scrutinize the current standards of protection granted to children and to sexual minorities with a focus on the latter, and to identify how changes in interpretation take place within these jurisdictions. It will answer the research question by comparing two major international bill of rights' enforcement institutions, the ECtHR and HRC, in order to identify what are the current standards of protection applied at an international level, and concomitantly what are the flaws in the jurisdiction of the ECtHR. It will compare the jurisprudence of

these two international courts with that of the SCC, demonstrating that LGBT rights can also be equally well protected by domestic bill of rights.

In expliciting the flaws related to the protection of LGBTs in the case law of the ECtHR, this thesis intends to criticize the reluctance of the court in harboring LGBT rights from undue limitation. In order to understand a change in position of a court with regard to interpretation of a right, it will bring up the notable case law of the SCC and its *living tree doctrine* to buttress the claim that constitutions and their bill of rights are of evolutive nature, what is crucial to repeal morality-based claims used to support anti-LGBT propaganda laws.

The issue discussed in this research is framed as a conflict between anti-LGBT propaganda laws and the rights of children and of LGBTs as, alongside protection of children, protection of morals is the foremost antithesis to protection of LGBT rights, and morality-based arguments are founded on the necessity to protect morals from LGBT behaviour, be it orientation or sexual intimacy.

In other words, it proposes to go further than merely looking at the compatibility between a ban on LGBT propaganda to minors and the ECHR and ICCPR standards. It intends to analyse and criticise the current international standards of protection of sexual minority rights and identify shortfalls on their construction that strengthen the arguments of countries within the jurisdiction of the Court to underpin legislations that limit the right to freely express opinions on matters of homosexuality. This thesis intends further to analyse how tribunals changed their approach towards LGBT rights and the theories that underpin these changes. It proposes to illustrate how in negating the evolutive interpretation of rights provisions, States empty the intent of these provisions. In order to shed light on how changes on interpretation occurred over time on the chosen jurisdictions, the *living tree doctrine*, largely applied by the Supreme Court of Canada, is

analysed and brought forward to strengthen the claim that interpretation of rights documents should follow the development of society.

The relevance of the topic derives from the fact that anti-LGBT propaganda laws are spreading and sounder arguments should be made to counter this phenomenon. Furthermore, although the incompatibility of anti-LGBT propaganda laws and human rights has been widely researched, there is a lack of material that discusses this ban from a constitutionalist perspective.

Due to the broad range of issues that anti-LGBT propaganda legislation poses, a number of limitations to the present research have to be set up. This thesis focuses on addressing limitations such laws impose on expression, equality, and public and family rights of sexual minorities. For instance, the possible implication of this law on other aspect of rights of LGBT rights, such as adoption or marriage will not be addressed. The case law of the ECtHR on assembly rights will be address combined with expression rights, as the case law of the ECtHR on effects of bans on assembly rights are already developed.[21] The thesis will not address either, for the sake of not extending the research over topics that are more of political than legal nature, the whole UN apparatus and the debates or discussions taking place related to protection of children or LGBTs outside the HRC. It takes into account that the most comprehensive human rights document that touches upon children rights is the United Nations Convention on the Rights of the Child (UNCRC). Besides having a similar enforcement mechanism as the ICCPR, also instituted by an optional protocol, there is no jurisprudence available and the Committee responsible for receiving and analysing complaints from State Parties and from applicants have not considered any yet due to its recent entry into force that took place on mid-April

[21] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09 (European Court of Human Rights 2010).

2014, therefore the opinion of the judicial bodies of the UN on the effects of anti-LGBT propaganda laws will be addressed based on the case law of the HRC.

The thesis is divided as follow. The first chapter presents the theoretical framework of the research, addressing the friction points an anti-LGBT propaganda law create between the rights of the child and the rights of LGBT, and how, in theory, the three jurisdictions adjudicate such conflict. The following two chapters discuss how the ECHR, the ICCPR and the Charter protect children and LGBTs in different spheres, such as right to personal development, private live and right to freely and publicly express ideas and opinions. These two chapters test the validity of the anti-propaganda laws against children and LGBT rights, and highlight the shortfalls of ECtHR's case law. The fourth and last chapter presents how over the course of time a bill of rights such as the ECHR, the Charter and the ICCPR evolves over time, and how this evolution has a crucial effect on protecting and developing rights, notably on the case of LGBT rights that are of relatively recent recognition. This final chapter touches upon a number of cases discussed on previous chapters, but it does so from an essentially different aspect: it analyses these cases to identity in them how the Courts have relied on evolutive interpretation techniques to advance its case law.

I offer two main answers to the research question presented: the current standards of protection of LGBTs and children, besides still having gaps to be filled by subsequent case law, clash with the anti-propaganda laws at the expense of the latter; and that the evolutionary nature of rights' documents explains why their understandings evolved to encompass LGBT rights that were not explicitly included at first.

1. Chapter I.

Apparent Conflict Between the Rights of Children and of LGBTs

"[L]eave children alone, please,"[22] is the opinion of the Russian president on what critics of the ban on LGBT propaganda amongst minors in his country should do. It is a position that illustrates well the intent of proponents of such ban - embedded in their views is the opinion that homosexuality is a threat to vulnerable minors[23] and the State has the duty to protect its children from such risk.

Albeit no express mention to LGBT rights in the ECHR, in the Charter or in the ICCPR, other rights protects encompass, at least to a certain extent, aspects of LGBT lifestyle. The Charter and the ECHR neither mentions rights of the child. The jurisprudence of the Courts on charge enforcing the rights documents mentioned above have been closing gaps and slowly but steadily advancing rights to LGBTs, what should come at help to the LGTBs affected by anti-LGBT propaganda laws. They have, likewise, advanced rights to children as well. That said, what are the boundaries of such rights and how are they in conflict when an anti-LGBT propaganda law is passed?

It is necessary to define such boundaries of protection of LGBTs and children in order to understand how the anti-LGBT propaganda laws can be at odds with these protections. In order achieve that, it is first of all crucial to understand what an anti-LGBT propaganda law is, and if a call to have children left alone can be substantiated on children rights. This chapter will, therefore, present an essential look at the foundations and principles of an anti-LBGT propaganda legislation, to afterwards analyse both the rights of children and LGBTs, as this analysis is essential to the identification of the limits of these

[22] Walker, "Vladimir Putin."
[23] "Russian Ombudsman Calls for Damnation of Officials Supporting 'nontraditional' Families."

protections and friction points caused by a limitation of a determined type of propaganda to a certain audience.

In this chapter it is presented the theoretical framework of the principles of necessity to protect vulnerable minors and morals, and the conflicting rights of the LGBTs. It will be done by briefly presenting the principles, doctrines and legal documents that justify and protect both children and the morality, and conclude by highlighting the points of friction between these and the rights LGBTs enjoy. This chapter will, at first, justify the inclusion of international treaties in this research by arguing international human right treaties have an inherent constitutional nature, and also briefly present the principles of evolutionary nature of constitutions, their bill of rights included.

1.1. The constitutional nature of Human Rights protection international treaties

In the words of Sajo, "[c]onstitutionalism is the restriction of state power in the preservation of public peace."[24] Legal documents that are of constitutional nature are those that grant rights to constituents and define limitations on powers of a government.[25] Although *de jure* the ICCPR and the ECHR are international treaties, the strong connotation of limitation of governmental power assures their constitutional essence.

These two treaties were created with the intent to ascertain the behaviour of the state-parties and ensure their respect for the provisions they enacted, in a similar rationale behind constitutional documents. As taught by Meyer, "the ECHR and the ECtHR are not currently designated as an official constitution and constitutional court,"[26] but they nevertheless retain strong characteristics of the latter. Defining the boundaries of

[24] Sajó, *Limiting Government*, 10.
[25] Meyer, "The Constitutional Potential of the European Court of Human Rights," 207.
[26] Ibid., 210.

power of a government and what the latter owns to its citizens is the fundamental connection between the Conventions and a constitutional document.[27] The ECtHR and the HRC are of constitutional nature partially due to their identity as organs created with the intent to safeguard and recognize the rights entitled to citizens of parties to their treaties.[28]

For instance, Helfner taught that

> Most constitutions attempt to describe and limit the power of the government and the manner of its exercise by protecting individual rights against the potentially intrusive power of the State. Constitutions also guarantee security to their citizens by preventing the oppression of minority groups and those who lack power in the majoritarian political process.[29]

Professor Helfner further argues that identifying the ECtHR as a constitutional court has three meanings, meanings of which that, by analogy, apply equally to the HRC. First, it recognizes that the ECtHR has the power to test laws[30] of member-states against the rights of the Convention. Secondly, it means that the ECtHR can adjudicate on cases advancing its understanding of violations of the Convention. Finally, he argues the ECtHR acts didactically towards the domestic institutions of the member-states by shaping its case law in a manner that accommodates the values of the Convention on these institutions.[31]

Reinforcing the Treaties constitutional nature is that, similarly to most constitutional courts, both the HRC and the ECtHR accept direct complaints from alleged

[27] Ibid., 208.
[28] Ibid.
[29] Ibid.
[30] The powers of the ECtHR to analyse the respect for the ECHR by domestic rules are not only limited to the scrutiny of legal statues, as the Court has ruled that certain constitutional provisions were not in accordance with the treaty it enforces. In *Seijic and Finki v. Bosnia and Herzegovina* the Court not only protected the rights of individuals under its jurisdiction against excesses from the legislative, but also against their own domestic constitution. Sejdić and Finci v. Bosnia and Herzegovina, Applications nos. 27996/06 and 34836/06 (European Court of Human Rights 2009).
[31] Helfer, "Redesigning the European Court of Human Rights," 138.

victims of abuses by member-states.[32] For carrying the duties of both an international tribunal and of a constitutional court, the ECtHR is of *sui generis* nature, a definition that fits the HRC, as it advances and enforces the "obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms."[33] Notably about the ECtHR, the Court, in a 1995 decision, brought that "the Convention as a constitutional instrument of European public order."[34]

Setting aside doctrinarian differences, this thesis follows the doctrine that accepts the ECHR and ICCPR as constitutional in nature and, based on it justifies its inclusion in this constitutional law research.

1.2. The adjudication and evolution of rights

In order to understand how a conflict with human rights caused by an anti-LGBT propaganda law will be solved by judicial organs, it is essential do understand the legal theories used by courts in such circumstances. When adjudicating rights, the SCC, the HRC and the ECtHR apply proportionality analysis, considered by the doctrine the "overarching principle of constitutional adjudication".[35] This test "became the dominant framework for adjudicating constitutional challenges to government measures across most of the world."[36] Derived from German doctrine, the test is regularly used to settle "alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest".[37] A judicial claim of, for instance, the right to have a child protected from undue influence is in a direct conflict of the right to freedom of expression

[32] With regards to the HRC, the Committee only receive complaints concerned to State Parties that ratified the Optional Protocol to the ICCPR.
[33] *ICCPR*.
[34] Loizidou v. Turkey (preliminary objections), 75 (European Court of Human Rights 1995).
[35] Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism."
[36] Zion, "Effecting Balance: Oakes Analysis Restaged," 434.
[37] Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism."

gives, and such judicial dispute, within the ECtHR, SCC and HRC is resolved using proportionality analysis.

On its complete form, as summarized by Sweet and Mathews, this proportionality is composed of four different stages. It scrutinizes at first the *legitimacy* of a State measure, passing to the *suitability* or relation to the objective stated, moving on to the analysis of *necessity* of the means chosen, and finally scrutinizing *proportionality on a narrow sense*.[38] The Courts, when applying the proportionality analysis to assess a violation of a right by an anti-LGBT propaganda legislation, or conversely, complaining of a violation due to the failure of a State to protect children or morals from undue influence coming from LGBT propaganda, will scrutinize such measures. Therefore, in applying such test in the circumstances above, the underlying principles of anti-LGBT propaganda laws are questioned and this analysis can be of particular importance because the steps of these tests and the arguments they advance can be replicated on different rights assessments'. A comprehensive analysis of the legality, legitimacy, necessity and proportionality of a typical anti-LGBT propaganda law will be construed throughout this thesis, most notably on chapter III.

The ECtHR test for the qualified rights currently is composed of two phases, the first one being the assessment if complaint falls within the scope of the right, and secondly, it applies a three stage analysis of namely *legality*, *legitimacy* and *necessity*.[39] On its first stage, the ECtHR analyses if the measure questioned by the applicant is *prescribed by law*, i.e. it tests if the measure has fundament on a domestic law and is compatible with the rule of law.[40] Then the ECtHR analyses if the measure *pursues one of the legitimate aims*

[38] Ibid.
[39] Johnson, *Homosexuality and the European Court of Human Rights*.
[40] S. and Marper v. the United Kingdom, Applications nos. 30562/04 and 30566/04, 95 (European Court of Human Rights 2008).

set out for the right, as e.g. article 10(2) enumerates protection of morals as a legitimate aim. Finally, it tests the *necessity of the measure in a democratic society*, what means it analyses if the aim "answers a 'pressing social need' and, in particular, if it is *proportionate* to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are 'relevant and sufficient'".[41]

This overall test can take different forms and become more or less strict or complete whenever applied to qualified or limited rights. With regards to the level of scrutiny applied, the ECtHR calls the leeway given to its Contracting States when applying measures that limit rights *margin of appreciation*. This doctrine is inherently linked to the *necessity* test, having the ECtHR defined that

> [t]he margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. […] Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted.[42]

A lack of consensus across the Contracting States with regards to the best measure to protect a right or the importance of the interest at stake will widen the margin or appreciation.[43] That said, different categories of rights or classifications will trigger different margins. Sex or sexual orientation, for instance, is regarded as a field that calls for a narrow margin of appreciation.[44]

Proportionality analysis is performed by the Supreme Court of Canada as defined on *R. v. Oakes*,[45] a case decided in 1986. Underpinning the *Oakes* test is Section 1 of the Charter, that accept its rights and freedom can only be "subject […] to such reasonable

[41] Ibid., para. 101.
[42] Ibid., para. 102.
[43] Ibid.
[44] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 108 (European Court of Human Rights 2010).
[45] R. v. Oakes, [1986] 1 SCR 103 (Supreme Court of Canada 1986).

limits prescribed by law as can be demonstrably justified in a free and democratic society."[46] The Canadian government, under the *Oakes* test, has the burden to prove it *decided reasonably over competing claims* and that there is a *reason behind going against the Charter.* For the SCC, the test is composed of basically the following steps: at first, the government has to prove the measure chosen has a *pressing and substantial* objective. Secondly, this measure should have a *rational connection* with the objective sought. Thirdly, it is tested if the measure chosen uses the *minimally impairing means*. Finally, is measures if the *salutary effects outweigh the deleterious*.[47]

The proportionality analysis performed by the HRC is divided in three steps when considering an alleged violation of a qualified right, in a very similar fashion to the test applied by the ECtHR. The HRC accepts limitations on rights if the restriction is *provided by law*, "in pursuit of an *aim that is legitimate* under the Covenant",[48] and if it passes the strict tests of *necessity and proportionality*. It also only accepts restrictions applied "for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."[49]

1.3. The anti-LGBT propaganda laws

Yelena Mizulina, the proponent of one of the anti-LGBT propaganda laws that were passed in Russia, defends that her law

> [prohibits] the spreading of information aimed at forming non-traditional sexual attitudes among children, attractiveness of non-traditional sexual

[46] *Constitution Act, 1982*, sec. 1.
[47] Zion, "Effecting Balance: Oakes Analysis Restaged," 433. Dorsen does not agree with the division as described by Zion, claiming the *Oakes* test is better understood as seeking, first, a rational connection between the legislative means and objective, second, that the legislative means chosen should be the least restrictive possible, and finally that the benefits of restricting a right should outweigh gains. Dorsen et al., *Comparative Constitutionalism,* 236.
[48] Fedotova v. Russian Federation, Communication No. 1932/2010, 10.6 (United Nations Human Rights Committee 2012).
[49] "General Comment No. 34, Article 19, Freedoms of Opinion and Expression," para. 22.

> relations, or a distorted perception of social equality between traditional and non-traditional sexual relations. […] Secondly, [it prohibits] the imposition of information about non-traditional sexual relations that may cause interest in them among children.[50]

Echoing such understanding, other supporters of the anti-LGBT propaganda laws argue that "the statutory ban on propaganda of homosexuality among children is fully compliant with all the fundamental norms of international law"[51] as "[i]t is well documented in medical research that homosexual lifestyle is associated with increased risks to one's physical and mental health".[52] The Constitutional Court of the Russian Federation, illustrating this position in a 2014 case that questioned the constitutionality of the Russian Code of Administrative offense article that punished three individuals for homosexual propaganda, decided on

> the necessity of legal instruments […] to protect children from the influence of information capable to produce harmful effects on their health and development, in particular, from information related to aggressive imposition of the certain models of sexual behaviour, forming distorted ideas about socially recognized models of family relations.[53]

Protection of children and of morals are the aims behind the laws banning LGBT propaganda. Lithuania, for instance, has enacted a law of this kind, framing it as prohibition on the dissemination of information that has "detrimental effects on minors,"[54] enumerating in this roll information "which expresses contempt for family

[50] "Duma Passes Homosexuality Bill."
[51] "Family and Demography Foundation Defends Russian Ban on Homosexual Propaganda among Children before European Court of Human Rights."
[52] Ibid.
[53] Constitutional Court of the Russian Federation, Case N.A. Alekseeva, Y.N. Yevtushenko and D.A. Isakov of September 23, 2014 N 24-P Saint Petersburg, in a translation by the *Childs Right International Network*, available at https://www.crin.org/en/library/legal-database/constitutionality-part-1-article-621-code-administrative-offences-russian.
[54] Law of the Republic of Lithuania on the Protection of Minors against the Detrimental Effect of Public Information, No IX-1067, article 4 (1).

values, encourages the concept of entry into a marriage and creation of a family other than stipulated in the Constitution […] and the Civil Code[55] of the Republic of Lithuania."[56]

Ukraine, on its turn, attempted a number of times to pass bills that would prohibit "Propaganda of Homosexuality Aimed at Children,"[57] defining propaganda as "an activity that aims and/or manifests itself in the deliberate dissemination of any positive information about homosexuality which may impair physical and mental health of the child, his moral and spiritual development, including forming a misconception that the traditional and non-traditional marital relationships are socially equal."[58] These bills are aimed at promoting "healthy moral, spiritual and psychological development of children"[59] and endorsing "the idea that a family consists of a union between a man and a woman."[60]

In Moldova the anti-LGBT propaganda laws were often framed as municipal resolutions.[61] The city of Bălţi, for instance, issued a resolution that highlighted the role of Moldovan Orthodox Church, proclaiming the city a zone of especial support to the church. Based on this premise, the resolution goes on in prohibiting "aggressive propaganda of nontraditional sexual orientation" in Bălţi,"[62] what was later overturned by a decision from the local Court of Appeals on grounds of discrimination based on religious grounds.[63]

[55] Both the Constitution and the Civil Code of Lithuania define marriage as a union between a man and a woman.
[56] Law of the Republic of Lithuania on the Protection of Minors against the Detrimental Effect of Public Information, No IX-1067, article 4 (2) (16).
[57] Draft No. 10290 of the Ukrainian Parliament (Supreme Council).
[58] Draft no. 1155 of the Ukrainian Parliament (Supreme Council).
[59] Ibid.
[60] Ibid.
[61] "On the Issue of the Prohibition of so-Called 'Propaganda of Homosexuality' in the Light of Recent Legislation in Some Member States of the Council of Europe," 6.
[62] Ibid.
[63] Ibid.

The first law of this kind, passed in 2006 in Russia[64] in the oblast of Ryazan, placed the prohibition under the necessity to protect minors.[65] The Russian federal law changed other pieces of legislation in order to prohibit "promoting non-traditional sexual relationships"[66] and protect children "from information promoting non-traditional sexual relationships".[67] Proponents of such laws seem to assume that if exposed to information related to LGBT culture, education or even health, children could start engaging in homosexual practices and be deviated from the moral values that such supporters believe are the very own fabric of society.

It is not clear what the term *propaganda* in fact means. Some propaganda laws are not particularly precise in defining what amounts to propaganda, nor what they intent to prohibit: if LGBT lifestyle as a whole, or sexual intimacy between persons of the same sex. Is it prohibited, for instance, to educate LGBT children on prevention of sexuality transmitted diseases on homosexual sex? Or to tell an LGBT child that he or she is normal and healthy? Or that an LGBT parent or relative is a normal person? Does it prohibit the formation of LGBT families? This vagueness of a propaganda law raises a number of issues on the necessity of limitations imposed on rights protected by the ICCPR and ECHR to be precisely framed, issues that will be properly addressed below.

A typical anti-LGBT propaganda law has the potential to affect not only LGBT individuals. Combined with the lack of precision on what the law prohibits, it might, for example, affect legal persons that advertise content depicting same-sex couples, professors that defend LGBT pupils from bully by reprimanding on discrimination, non-governmental organizations that advocate for equality for LGBTs, health specialists that

[64] Ryazan Regional Law on The protection of children's health and morality, April 3, 2006, No. 41-OZ.
[65] Law on Administrative Offences of the Ryazan Region of December 4, 2008, No. 182-OZ.
[66] Federal Law of the Russian Federation of December 29, 2010 No. 436-FZ.
[67] Federal Law of the Russian Federation dated July 24, 1998, No. 124-FZ.

help LGBT children on self-acceptance, amongst a number of other possible victims of such laws.

In short, the declared aims of anti-LGBT propaganda laws are variations on protection of morals, traditional values, family and/or children.[68] "Most outline among their purposes the protection of either the rights of minors, the protection of public morality, or the expression of support for particular religious denominations or traditions."[69]

1.3.1. Protection of minors' claim

Acting on the *best interest of the child* is the overarching principle of children rights'. Given their vulnerability and the prospect of their development, a certain degree of protection not enjoyed for other groups is justifiable. For instance, they should not be exposed to explicit sexual content and should be insulated to the maximum extent possible from violence. In order to understand the level of protection granted to children within the ECtHR, first it is necessary to understand what are the principles of children rights that fundament such protection. It is widely accepted that 'it is one of the "principles of fundamental justice' that decisions about children must be made according to the "best interests" of the child."[70] This principle derives from arguments based on the vulnerability of children, on the fact that they have needs that are particular of a child, that they are experiencing temporary limitations, and that children are under development.

[68] This claim can be substantiated on the wording usually chosen and the sections of legislations in which the articles to prohibit LGBT propaganda are placed. Furthermore, particularly in the case of the Russian laws, governmental claims to support the laws presented on legal challenges to these laws are a rich source or the rationale behind the laws.
[69] "Traditional Values?," 7.
[70] Bala, "The Charter of Rights & Child Welfare Law."

With regard to the rights children enjoy related to propaganda laws, based on the jurisprudence of the ECtHR, these are mostly related on the right to development, as "[t]he child's vital interest in its personal development is […] widely recognised in the general scheme of the Convention."[71] Developmental protection help ensure children can enjoy a safe environment that will not hinder the minor's development into an full-capable adult, and proponents of propaganda-style laws tend to grasp on this right to argue that such laws are intrinsically necessary to ensure a proper development of children. Supporters of propaganda-style laws link the legitimacy of their law to the necessity to protect children, a claim that has strong resonance to the protection of development of children.

That said, a first question erupts: what are the boundaries of the protection children should enjoy? Different conceptions of the definition of, for instance, morality, will necessary lead to different scopes of protection of children. Some will argue sexual education on educational facilities is necessary in order to prevent transmission of sexual diseases and unwanted pregnancies, while others will argue children should be protected from this kind of information as it is the duty of the family to educate on the matter. At the very end of the spectrum, some will claim it is necessary to protect children even from influence that comes from the mere discussion of LGBT matters.

Legal measures aimed at isolating children from certain class of information based on a necessity of protection claim come at odds with rights enjoyed by other groups. A second question comes at mind: what is the group and which are the rights that conflict with a legal measure that protect children from information on the matters of non-traditional sexual preferences? The group is the LGBTs, a sexual minority seen by proponents of propaganda-style laws as a deviance and a harmful influence to children.

[71] Odièvre v. France, Application No. 42326/98, 44 (European Court of Human Rights 2003).

Also affected by propaganda laws are supporters of LGBTs, be them individuals, civil society organizations, corporations or the government itself.[72] The rights, the privacy, equality and expression.[73] Proponents of a ban on non-traditional sexual preferences propaganda seem to be oblivious that dehumanizing a group and attempting to silent it is merely a new cover to an age-old prejudice and legal attempts to harm LGBTs. An age-old prejudice that was manifested as sodomy and buggery laws, on the prohibition to enter civil union or marriages and on many other discriminatory measures that segregate and harm. The proponents seem to be oblivious, additionally, of the inherent evolutionary nature of rights documents, and on how rights evolve over time to keep pace with society's evolution.

1.3.2. Protection of morality as a denial of LGBT rights

The aims typically declared by proponents and supporters of anti-LGBT propaganda laws are, as briefly indicated above, protections of minors, traditional values, family values and morals, aims considered legitimate to different extents across the Courts. Protection of moral integrity is an argument that often denies a fundamental aspect of democracies: multiculturalism. Moral integrity should not be understood as a synonym of moral uniformity. Curiously, the necessity to protect morality emanating from proponents of such laws are intrinsically related to sex or sexual orientation, and ironically moral-based arguments are not often mentioned on corruption or immoral

[72] Laws prohibiting homosexual propaganda tend to prohibit both natural and legal persons from disseminating any information that advances conceptions that homosexuality is normal and acceptable. Therefore, an advertisement campaign that depicts an LGBT family in a positive manner, or a governmental campaign in schools to raise acceptance of homosexuality and tackle bulling might in fact be understood as in violation of the law.

[73] A throughout discussion of the rights violated by propaganda laws will take place on chapter III. At this moment it is important to notice that such laws violate assembly rights as well, but those are understood as *lex specialis* of expression rights, as defined by the ECtHR on *Ezelin v. France*.

practices such as bribery or embezzlement or public funds destined to cover health of educational costs.

These anti-LGBT propaganda laws have an inherent and declared element of attempting to prohibit the spreading of homosexuality. The supporters and proponents of anti-LGBT propaganda laws tend to argue that their cultural traditions should be respected and in that manner rights of sexual minorities should be limited in order to protect such traditions. It indirectly advances that homosexuality is acceptable if kept to the private sphere of LGBTs and its supporters, but not acceptable if discussed or presented publicly, not even if solely to seek understanding and respect.

Supporters of anti-LGBT propaganda laws seem to acknowledge that moral standards are not static and evolve over time. The majoritarian position on divorce, woman suffrage, and interracial marriage, e.g. were once at the opposite of what they currently are. What an anti-LGBT propaganda law does is to limit the spectre of discussion on LGBT matters in an attempt to bar the acceptance towards homosexuality on the youth, therefore stopping or slowing the shift on the majoritarian position regarding this topic.

The intent to protect morality from LGBT has its starting point from this claim – anti-LGBT propaganda laws are an attempt to protect the current standards or morality as already established, in a denial of the multiculturalism and pluralism that are an important part of a democratic society. It is important to highlight that protection of morality is used as a legal excuse to enforce homophobia – in other words, morality-protection claims supporting propaganda laws are a direct attack on LGBTs.

The Russian Federation has attempted to increase the legitimacy of protection of traditional values claims in the international sphere, and started a discussion in the United

Nation's Human Rights Council about such values.[74] From that discussion an ambiguous resolution was passed at this Council, a resolution that stresses the value that tradition, family and customs have and at the same time reinforces the universality of human rights.[75] The resolution mentions that traditional values "can be practically applied in the promotion and protection of human rights and upholding human dignity, in particular in the process of human rights education".[76]

The propaganda laws are based on cultural relativist argument that attempt the curtail recognized rights with claims founded on local traditions. This type of claims, on cases before the ECtHR and the HRC tend to be confined to the margin of appreciation or discretion granted to States members. States tend to ask for a wider margin of discretion in an attempt to have the particularities of its culture accepted when arguing protection of morality as a valid aim to limit rights.[77]

The position of the Courts with regards to the leeway given to States when limiting rights with the aim of protection morals has not been historically uniform. Past reluctance of the ECtHR and HRC in protecting sexual minorities, and the acceptance of claims that argued limitation of rights of such minority were valid grounds to protect morals have a harsh consequence: the arguments accepted in the past and the position taken by these courts are used in order to buttress the legitimacy of anti-LGBT legislations.

The records of the ECtHR in matters related to LGBT rights, besides being considered as "the most important site at which human rights discourse and policy

[74] "Since 2009, Russia has tabled three resolutions at the UN Human Rights Council (HRC) that claim to seek the promotion of human rights and fundamental freedoms through a "better understanding" of traditional values" (Article 19, 2013).
[75] "Report of the Human Rights Council on Its Twenty-First Session," 11.
[76] Ibid.
[77] The ECtHR, in *Handyside v. the United Kingdom* accepted the position that Contracting States are at a better position to decide on morality protection.

relating to sexual orientation is formulated",[78] are appalling. The ECtHR allowed, for example, the practice of the *policy of deterrence* in the Federal Republic of Germany, a policy that sought deterring young males from being "exposed to the risk of homosexual relations"[79] and that allowed a differentiation on age of consent in order to protect young men. In *W.B. v. Federal Republic of Germany* the Commission decided the application inadmissible and stated that "the Convention permits a High Contracting Party to legislate to make homosexuality a punishable offense".[80] The Commission based its decision under the argument that article 8 accepts the limitation of the right to private life. "[T]he law relating to private and family life may be subject of interference by the laws of the said Party dealing the protection of health and morals".[81] This case laid the foundation that "criminalization of homosexual sex fell within the ambit or Article 8".[82]

Protection of morals as a legitimate aim to restrict the rights of LGBT is a constant and was used, e.g. by Russia in *Alekseyev v. Russia*, decided by the ECtHR in 2010.[83] The core of the claim of the Russian government to limit assembly rights of LGBTs was based on "respect for and protection of their religious and moral beliefs and the right to bring up their children in accordance with them",[84] arguing further that it was necessary to protect the moral beliefs of those that had "a negative attitude towards homosexuality."[85]

Buttressing their claim on the case law of the ECtHR, notably on the cases *Müller and Others v. Switzerland*[86] and *Dudgeon v. the United Kingdom*,[87] Russian authorities

[78] Johnson, *Homosexuality and the European Court of Human Rights*, 13.
[79] Peck v. the United Kingdom, Application No. 44647/98 (European Court of Human Rights 2003).
[80] *W.B. v. Federal Republic of Germany*, no. 104/55, Commission decision, 17 December 1955.
[81] W.B. v. Federal Republic of Germany
[82] Johnson, *Homosexuality and the European Court of Human Rights*, 24.
[83] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 59 (European Court of Human Rights 2010).
[84] Ibid., para. 60.
[85] Ibid.
[86] Müller and others v. Switzerland, Application No. 10737/84 (European Court of Human Rights 1988).
[87] Dudgeon v. the United Kingdom, Application no. 7525/76 (European Court of Human Rights 1981).

claimed for a wider margin of appreciation in matters related to protection of morals and argued homosexual practices are analogous to bestiality and should "take place in private."[88] It is not argued here that a limitation of rights based on protection of morals from bestiality is not justifiable. Instead, it is argued that, in not protecting LGBT concretely and shielding it from morality-based arguments as "it has nevertheless remained consistently ambivalent about the moral value of homosexuality",[89] the ECtHR leaves room for morality-based arguments being advanced to trump rights of LGBTs.

Besides developments of its case law, the HRC has also decided the margin of discretion granted to national authorities authorized limitation on LGBT rights based on protection of morals. The HRC said, in a 1982 decision "that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities",[90] and based on that decided that a prohibition of discussion of LGBT matters on television was not in violation of the ICCPR.

In Canada, protection of morals plays a lesser role, notably as section 1 of the Charter does not explicitly allow limitation on rights on this ground as does, for instance, article 10.2 of the ECHR, and the multiculturalism of the Canadian society is explicitly highlighted on section 27 of the Charter.[91] A statute that violates a Charter right under a claim it is protecting morals will be scrutinized by the SCC to ascertain if such justification falls within section 1 of the Charter and it is, therefore, justifiable. The SCC test applied by

[88] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 61 (European Court of Human Rights 2010).
[89] Johnson Book, p. 57
[90] Leo Hertzberg et al. v. Finland, Communication No. 61/1979, 10.3 (United Nations Human Rights Committee 1982).
[91] "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." *Canadian Charter of Rights and Freedoms*, sec. 27.

the SCC to ascertain if a certain measure or statute violates morals is called "community standard of tolerance"[92] test. This test is "concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate other Canadians being exposed to,"[93] and has not been used to uphold limitations on rights of LGBTs.[94]

Chapter III will address each of the rights LGBTs conquered via case law, highlighting that protection of morals cannot be used to buttress the claim on the necessity of an anti-LGBT propaganda law. Chapter IV, departing from this point, will address the evolutionary nature of constitutions and of rights documents in order to strengthen the claim that the case law of the Courts evolved and, besides shortfalls, does not accept that anti-LGBT propaganda laws are in accordance with current standards of protection of LGBT rights.

1.4. LGBTs Rights and the apparent conflict with children rights.

The battle for protection of gay rights has a long lasting history, with notable positive developments beginning on early 20th century. A general framework of repulsion and discrimination, initially framed as sodomy laws, are still in place is some countries and concealed in western democracies as restrictions on marriage rights or other disguised forms of discrimination.

[92] R. v. Butler, [1992] 1 SCR 452 (Supreme Court of Canada 1992).
[93] Ibid.
[94] Cases before the SCC dealing with obscenity often use this test, and the case law of this court has upheld statutes that limit expression rights of homosexual content. The reasoning of the SCC, nevertheless, explicitly points that the test allows limitations on rights, but that it is related to prevention of harm, not limitation of particular taste, "and is restricted to conduct which society formally recognizes as incompatible with its proper functioning." Therefore, the test is not used to limit publication or sale of homosexual content. Conversely, it is used to prohibit the commercialization of sexual content that is harmful. Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 SCR 1120 (Supreme Court of Canada 2000).

Perhaps as a consequence of the times when they were framed or as an avoidance of conflict, ICCPR, ECHR and the Charter, differently from, e.g., the Human Rights Act of New Zealand,[95] fail to mention explicitly any protection to sexual minorities. Judicial decisions from the Courts advanced rights to this group when interpreting the contained on the rights documents and were based mostly on equality and privacy grounds. But what are the boundaries of this protection? To what extent do LGBT rights conflict with other rights affected to the anti-LGBT propaganda laws?

In Europe legal battles were fought to repeal discriminatory practices since the inception of the Council of Europe's framework of rights protection, without much success on its first decades. The shift on this trend and expansion of the boundaries of LGBT rights started with decisions of the ECtHR based on article 8[96] rights to respect for private and family life, and this article was interpreted and helped repeal sodomy laws, different age of consent for same and different sex couples, and possibility to homosexuals to serve in armed forces.[97]

Another powerhouse of rights granted to LGBTs is article 14' prohibition of discrimination.[98] Besides the reluctance of the ECtHR to analyse claims on this article, although dissenting opinions highlighted the necessity to do so, on early 1990's the ECtHR recognized that sexual orientation is to be understood as included on analogous grounds.

[95] *New Zealand Human Rights Act 1993*, sec. 21, 1, (m).
[96] Article 8 of the ECHR reads as follows: "Right to respect for private and family life. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
[97] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 83 (European Court of Human Rights 2010).
[98] Article 14 of the ECHR, *verbatim*: Prohibition of discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Johnson argues that the approach of the ECtHR has the resemblance of a closet as often it protects LGBTs only on private life matters, leaving their public aspects outside of the protection of the ECHR.

The attrition between the rights of the children and the rights of LGBTs is a result of the "particularly disturbing feature of these [propaganda] laws […] that they characterise LGBT people as a danger to children."[99] Such laws encroach on rights granted by the Courts to LGBTs, generating a number of friction points. It clashes with the particularly recognized right LGBTs have, for instance, of assembly. They also limited grated rights of entering family life as, by prohibiting dissemination of information that argues any other family formation that not composed of a man and a woman, such laws affect the possibility of an LGBT family of arguing their formation is salutary and normal.

LGBTs, as argued below, also have the right to equality protected by the ECtHR, SCC and HRC, and anti-LGBT laws impose a clear discrimination on grounds of sexual orientation, creating a critical friction point between the right to equality of LGBTs. Furthermore, children have the right to development and education, and by prohibiting them to be educated and informed on LGBT matters, such laws violate their rights and are a bar to their development – propaganda laws create a friction point between the right children (LGBT children inclusive) to be educated and not be discriminated on schools.

In short, by advancing protection of children rights as the rationale behind anti-LGBT propaganda laws, governments are creating an artificial conflict between the rights of the child and the rights of sexual minorities, a conflict that is addressed and solved in detail in the subsequent chapters.

[99] Coming Out, 2

2. Chapter II.

Settling anti-LGBT propaganda laws under protection on children claims

"All young people, regardless of sexual orientation or identity, deserve a safe and supportive environment in which to achieve their full potential."

Harvey Milk

This chapter will describe the development of the rights related to children, highlighting in the reasoning of the Courts what are the fundaments that repeal the claim that children rights can be used as grounds to trump LGBT rights. This chapter will present the case law of the ECtHR with regards to protection of children rights in order to identify what are the possible arguments that can be used to support a general anti-LGBT propaganda law. Differently from chapter I that presented the overall legal principles behind protection of children, this chapter will scrutinize the case law in order to separate and highlight arguments that can be of use to support the anti-LGBT propaganda law.

The bulk of protection of children rights within the ECtHR derived from the right to respect for private and family life (article 8 of the ECHR). Based on this article the ECtHR developed a comprehensive protection of different aspects of the rights enjoyed by minors. Differently from the ICCPR, that explicitly advances children rights and is supported by the more specific Convention on the Rights of the Child at the UN level, the ECtHR had to bring upon rights enjoyed by children even though the ECHR is silent on the

matter. The Charter, similarly to the ECHR, does not mention the rights of the child on its text, and this group, within Canada, is protected by a number of specific statutes.[100]

2.1. Positive obligation to protect privacy rights of children

The most notable aspect of ECHR's article 8 with regards to children rights is the positive obligation Contracting States have to protect their development, as "[t]he child's vital interest in its personal development is […] widely recognised in the general scheme of the Convention."[101] Developmental protection help ensure children can enjoy a safe environment that will not hinder the minor's development into an full-capable adult.

Under the jurisprudence of the ECtHR, "although the object of Article 8 is essentially to protect the individual against arbitrary interference by the public authorities,"[102] inasmuch it is inherently a negative right, right to private and family life also ensures "there may be positive obligations"[103] that a Contracting State has to enact to protect its citizens. "These obligations may invoke the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[104]

The positive obligation a Contracting State has to protect children might be connected to arguments advanced by proponents of propaganda laws. By claiming that the aim of a propaganda law is to protect children from what they believe undue influence homosexuality is, these proponents can attempt to use the case law of the ECtHR to

[100] There is a number of legislations specifically concerned on protection of children in the provinces of Canada, as for instance British Columbia's "Child, Family and Community Service Act" and Ontario's "Child and Family Services Act. Statues on Family Law also touch upon a number of provisions on protection of children and are within the powers of the provinces. Criminal law, a federal statute, also protects children specifically on certain provisions. Furthermore, Canada is a signatory of the UNCRC, but has not yet signed the protocol to allow individuals to submit complains to the CRC.
[101] Odièvre v. France, Application No. 42326/98, 44 (European Court of Human Rights 2003).
[102] K.U. v. Finland, Application no. 2872/02, 42 (European Court of Human Rights 2009).
[103] Ibid.
[104] Söderman v. Sweden, Application no. 5786/08, 78 (European Court of Human Rights 2013).

artificially increase the legitimacy of their propaganda laws. Notably on matters of right to freedom of expression, given the absence of a strong and consolidated position of the ECtHR on expression rights of LGBTs, claims on the necessity to protect the development of children might at first seem to bear weight, what does not mean such claim would pass the *necessity* analysis before the ECtHR. Nevertheless, it highlights the shortfalls in the jurisprudence of the ECtHR in public life aspects of homosexuality, as advanced in detail below.

Within the jurisdiction of the HRC privacy-related rights do not enjoy the same scope to protect children from anti-LGBT propaganda as it does within the ECtHR precedent. The approach of children rights of the ICCPR, by enumerating explicitly in the convention rights enjoyed by children, weakens the necessity to refer to other rights to protect this group. For instance, article 24 of the ICCPR brings that

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.[105]

This article, which is not the only in the ICCPR that protects children,[106] permit the HRC to advance a number of protection to children without the need to rely on privacy of family grounds. However, a similar claim on the necessity to protect children from influence emanating from LGBT propaganda could, theoretically, be grounded on article 24 of the ICCPR, as the article ensures the positive obligation a State has in ensure measures to protect a child. Nevertheless, the jurisprudence of the HRC is adamant on the violation of expression and discrimination rights by anti-LGBT propaganda laws,[107] what

[105] *ICCPR*, article 24.1.
[106] Articles 18 and 23 of the ICCPR also advance rights to children.
[107] Fedotova v. Russian Federation, Communication No. 1932/2010 (United Nations Human Rights Committee 2012).

highlights the weakness of the claim on the necessity of propaganda laws to ensure the proper development of a child.

ECHR's article 8 also protects the "physical and moral integrity of the person",[108] a concept that is related to "protection against acts of violence".[109] Physical and moral integrity protection forces the Contracting State to create steps that will effectively operates as "deterrence against such serious breaches of personal integrity".[110] That said, even though article 8 protects dimensions of sexual life,[111] the ECtHR has not, up to this moment, applied this concept to cover the necessity to protect individuals from strictly morally dangerous actions that are not necessarily violent. The supporters of anti-LGBT propaganda laws argue homosexuality is morally dangerous to children, but this claim will hardly fit under article 8 protection of physical and moral integrity for lacking a violence aspect.

In short, States party to the ICCPR and ECHR, as advanced by the case law of the courts that oversee these treaties, have positive obligations to ensure the development of children, and this right children enjoy is often used by proponents and supporters of anti-LGBT propaganda laws to artificially inflate the legitimacy and necessity of such laws.

2.2. Anti-LGBT propaganda laws: *legitimacy* and *necessity* tests on children rights' claims

There is little room to argue that protection of minors is not a legitimate aim to limit right qualified protected on the ECHR. The ECtHR often, on article 8 cases, accepts claims that the legitimate aim of a certain measure is protection of the rights and freedoms

[108] X. and Y. v. The Netherlands, Application no. 8978/80 (European Court of Human Rights 1985).
[109] Söderman v. Sweden, Application no. 5786/08, 80 (European Court of Human Rights 2013).
[110] Ibid.
[111] X. and Y. v. The Netherlands, Application no. 8978/80 (European Court of Human Rights 1985).

of children,[112] and so does the HRC,[113] what implies accepting the claim that, with regard to children rights, propaganda laws are to pass the *legitimacy*[114] test. The main issue of propaganda laws is, therefore, at the *necessity* part of the proportionality analysis.

First and foremost, with regards to children rights, LGBT propaganda does not amount to undue influence and there is no need to protect children from it. The decision on the case of *Salgueiro da Silva Mouta v. Portugal* offers a lesson on the position of the ECtHR in regard to the possibility of a homosexual household negatively influencing a child. In *Salgueiro, the* ECtHR decided that refusing parental rights to a father due to his homosexuality and to the fact he lived with another man amounts to a discrimination and a violation of his right to a family life,[115] indicating an acceptance that children can healthily live in a homosexual household without being negatively affected. The ECtHR refused the claim of the Portuguese court that "[t]he child should live in ... a traditional […] family and that '[…] homosexuality […] is an abnormality and children should not grow up in the shadow of abnormal situations.'"[116]

In *Alekseyev v. Russia*, an outstanding ground-breaking decision on public aspects of LGBT rights, the ECtHR stated that:

> [t]here is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or "vulnerable adults".[117]

[112] The ECtHR has repeatedly accepted such claims, as for instance in L. v. Finland, Application no. 25651/94, 108 (European Court of Human Rights 2000). After deciding on the legitimacy, as explained on 1.2 above, the ECtHR passes on to the analysis of the *necessity* of the measure.
[113] Fedotova v. Russian Federation, Communication No. 1932/2010, 10.6 (United Nations Human Rights Committee 2012).
[114] An analysis on the *legality* of a typical anti-LGBT propaganda law takes place on 3.2 below.
[115] Salgueiro da Silva Mouta v. Portugal, Application no. 33290/96, 36 (European Court of Human Rights 2000).
[116] Ibid., para. 34.
[117] Alekseyev v Russia, §86.

Combined with *Salgueiro. Alekseyev* is a strong indication that the ECtHR is not willing to accept claims that the limitation on LGBT rights is necessary to protect children. The *dictum* held in *Alekseyev* that there is no evidence that discussion on LGBT matters before children can negatively affect them is a solid hint that propaganda laws are to fail the *necessity* test before the ECtHR, as the reasons advanced by the supporters of such laws are not *relevant and sufficient* to justify their existence.

With regard to the HRC, it has already decided on *Fedotova v. Russia*, a freedom of expression and equality complaint in which the applicant questioned a Russian regional anti-LGBT propaganda law, that the application of penalties based on such law violated her protected rights.[118] The HRC specified that "the State party invokes the aim to protect the […] legitimate interests of minors,"[119], indicating that, as the ECtHR would, protection of legitimate interest of minors fulfils the requirements of *legitimacy*. The HRC, nevertheless, decided that the propaganda law of the oblast of Ryazan lacks a *reasonable and objective justification*, and therefore is at odds with equality provisions of the ICCPR.[120] Furthermore, the HRC was also on the opinion that the Russian government "failed to demonstrate why on the facts of the present communication it was necessary, for one of the legitimate purposes of article 19, paragraph 3, of the Covenant to restrict the author's right to freedom of expression,"[121] identifying a violation of freedom of expression rights of the applicant. The *Fedotova* case bears strong resemblance to *Bayev v. Russia*, a case pending before the ECtHR that questions the Russian federal anti-LGBT

[118] Fedotova v. Russian Federation, Communication No. 1932/2010, 10.7 (United Nations Human Rights Committee 2012).
[119] Ibid., para. 10.6.
[120] "[T]he Committee considers that the State party has not shown that a restriction on the right to freedom of expression in relation to "propaganda of homosexuality" – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria." Irina Fedotova v. Russian Federation, Communication No. 1932/2010 paragraph 10.6.
[121] Fedotova v. Russian Federation, Communication No. 1932/2010, 10.8 (United Nations Human Rights Committee 2012).

propaganda law, and a decision from the ECtHR similar to the one gave by the HRC would be welcome inasmuch it has the possibility to close the gap on freedom of expression rights of LGBTs.

Children rights can also repeal the supportive claims of anti-LGBT propaganda laws as the right children enjoy to a proper development protects also LGBT children, what refutes claims that such laws are *proportionate*. A blank denial of access of LGBT children to information on the matter amounts to a violation of their rights, as "elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. […] Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world."[122]

The ontological dimension of homosexuality, discussed below, encompasses the understanding that a child can also be a homosexual. In recognizing this fact, it becomes even clearer that there is no State obligation to protect children from non-traditional sexual relation's propaganda, as the scope over which a child can be influenced poses no threat to his or her sexuality. In other words, an individual is not taught, recruited or convinced to become a homosexual: in fact an individual is or is not gay, regardless of influence.[123] What the society in fact influences is the way an individual accepts him or herself as an LGBT, and discriminatory measures such as propaganda laws reinforce negative stereotypes causing a harm that can be easily preventable by fostering acceptance instead of discrimination.

[122] Peck v. the United Kingdom, Application No. 44647/98, 47 (European Court of Human Rights 2003).
[123] Ontological discourse on homosexuality is accepted by the ECtHR since its decision on *Dudgeon*.

The appalling consequences of discrimination on the lives of LGBT children have been denounced by a number of organs,[124] notably the UN Committee on the Rights of the Child (CRC). The CRC is of the opinion that discrimination, either of the children of their parents and regardless of the grounds, is a noteworthy factor that contributes to vulnerability of children, and that this discrimination should be addressed in order to minimize its implications.[125] Discrimination based on sexual orientation, according to the CRC, is a significant factor that increases vulnerability to HIV.[126] The CRC further recognizes the right children have to be informed of measures related to prevention of HIV infections, adequately adapted to their age, in order to be able to protect themselves when they start to manifest their sexuality.[127]

Complementing on the right to education children enjoy, the Committee of Ministers of the Council of Europe is of the belief that

> the right to education can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; this includes, in particular, safeguarding the right of children and youth to education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity.[128]

Within the jurisprudence of the SCC, this court has decided on the rights to children to have an educational environment freed from discrimination in a number of notable cases. In *Ross v. New Brunswick School District No. 15*,[129] the SCC found that the right to freedom of expression of a teacher was violated by a decision of a local Board of Inquiry

[124] The Parliamentary Assembly of the Council of Europe has highlighted the higher rate of suicide amongst young LGBT when compared with other youngsters. Parliamentary Assembly, "Child and Teenage Suicide in Europe: A Serious Public-Health Issue."
[125] "General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)," para. 8.
[126] Ibid.
[127] "General Comment No. 3 (2003): HIV/AIDS and the Rights of the Child," para. 16.
[128] "Recommendation of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity."
[129] Ross v. New Brunswick School District No. 15, [1996] 1 SCR 825 (Supreme Court of Canada 1996).

to remove him from his teaching role, but that such limitation was justified under Section 1 of the Charter.

The teacher in *Ross* made a number of public discriminatory and racist comments against Jewish people when off-duty. After a parent submitted a complaint to a local Human Rights Commission, a Board of Inquiry forced the School Board that hired the teacher to comply with a number of measures aimed at punishing the teacher. The SCC held that most of the measures were in accordance with Charter rights, and notably with regard to the right children enjoy to an educational environment that is not 'poisoned' by a lack of equality and tolerance.[130] In its decision, the SCC held that

> the educational context must be considered when balancing R's [the teacher] freedom to make discriminatory statements against the right of the children in the School Board to be educated in a school system that is free from bias, prejudice and intolerance; relevant to this particular context is the **vulnerability of young children to messages conveyed by their teachers**. [emphasis added]

Complementing this position of the SCC on the necessity to protect children from discrimination on the educational environment is well illustrated by the case *Trinity Western University v. British Columbia College of Teachers*. In *Trinity* the SCC had to dealt with an appeal that questioned the possibility of the British Columbia College of Teachers (BCCT) to deny the registration of a teaching program of the Trinity Western University (TWU) that offered bachelor degrees in education. TWU intended to have its Christian principles fully reflected on the program it wished to register, principles of which that guided its Community Standards to prohibit "sexual sin […] including homosexual behaviour."[131] The BCCT declined to register TWU's program on grounds that the prohibition of homosexual practices within TWU's staff, faculty and students amounted

[130] Ibid.
[131] Trinity Western University v. British Columbia College of Teachers, [2001] 1 SCR 772 (Supreme Court of Canada 2001).

to discrimination, and for following discriminatory practices, the TWU should not be allowed to form professors of public schools.

The SCC decided against the BCCT, holding that it acted unfairly as BCCT's "expertise does not qualify it to interpret the scope of human rights nor to reconcile competing rights,"[132] namely the freedom of religion of the TWU and the prohibition of discrimination on sexual orientation[133] that emanate both from the Charter. It held, in consideration of the latter, that "[p]ublic schools are meant to develop civic virtue and responsible citizenship and to educate in an environment free of bias, prejudice and intolerance,"[134] and payed special attention to the concerns the discriminatory practices of the TWU raised on equality matters of the students being taught by teachers graduated from the mentioned university.

Behind the reasoning of the SCC lies the understanding that, while the freedom of religion allows the TWU it to apply its Christian principles, teachers graduating from there must not nurture discriminatory practices at public schools. The SCC clarified that "[i]f a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT."[135] In *Trinity* the SCC held that the Charter does not tolerate discriminatory practices on sexual orientation grounds in public schools of Canada, illustrating that children should rather be protected from homophobia than from information on homosexuality.

Within the ECtHR, this position on the necessity to protect children from homophobia is found in *Vejdeland and others v. Sweden*,[136] a case in which a number of

[132] Ibid.
[133] SCC's case law on prohibition of discrimination will be explained below on 3.4.
[134] Trinity Western University v. British Columbia College of Teachers, [2001] 1 SCR 772 (Supreme Court of Canada 2001).
[135] SCC's case law on prohibition of discrimination will be explained below on 3.4.
[136] Vejdeland v. Sweden, Application no. 1813/07 (European Court of Human Rights 2012).

individuals were convicted on criminal offenses for leaving leaflets on children's school lockers, without authorization and after trespassing. The content of the leaflets were homophobic claims, arguing for example that "homosexuality was "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society.""[137] In *Vejdeland* the ECtHR held that the right of freedom of expression of individuals does not cover the right expose homophobic content to children, considering, notably, their vulnerability, the fact that homophobic remarks loaded with "serious and prejudicial allegations,"[138] that the convicted individuals had no authorization to enter the premises of the school nor could the children refuse to accept the leaflets.

Imposing a ban as anti-LGBT propaganda laws intend on dissemination of information related to homo and bisexuality is not by any means a *necessary* measure to protect children, as indicated by the case law discussed above. In aiming to protect the rights of children, such laws cause a number of *deleterious* effects that, both the SCC and the ECtHR, when applying their proportionality analysis, will deem as not proportionate.

That said, the claim that children should be insulated from information related to LGBT matters in order to be protected is a blatant inversion of cause and consequence. The Courts understand that children are harmed not when they have access to information aimed at tackling discrimination, but the opposite: by discriminating on sexual orientation grounds and isolating children from LGBT-related discussions, propaganda laws are negatively affecting children as a consequence of perpetuation of harmful prejudice.

Therefore, the claim that propaganda-style laws are necessary to protect children is not only a falsehood but also an empty attempt to increase the legitimacy of a botched

[137] Ibid., para. 54.
[138] Ibid.

law. The argument that anti-LGBT propaganda laws are necessary to protect children fails in many different grounds related to children rights.[139] Protection of children is indeed a state obligation, but this state obligation to protect has to be differentiated from a state duty to segregate certain groups or discriminate based on sexual preferences.

[139] Further analysis on LGBT rights grounds will take place on Chapter III.

3. Chapter III.
Settling anti-LGBT propaganda law under sexual minority rights

"Judicial review ultimately is about protecting the rights of citizens-all citizens - not just those belonging to the majority that is represented in the legislature"[140]

Within the Council of Europe's jurisprudence, in its role to protect Human Rights and civil liberties, the ECtHR advanced rights that grant a certain protection to LGBTs. Although, as already mentioned, there is no explicit right to be homosexual in the ECHR, the ECtHR identified through its case law, mostly within private life's protection of Article 8 that certain interventions on the private life of LGBT individuals can amount to a violation of the ECHR. This approach, besides its limited applicability, has been the backbone of LGBT protection under the ECtHR' jurisdiction and is one of the main objects of discussion in this chapter.

Besides privacy rights, equality rights were also widely used to, in conjunction with other rights as required by the ECHR,[141] used to support claims that asked for protection of different aspects of LGBT life. Within both the jurisdiction of the SCC and of the HRC, equality rights have also been a strong fortress against discrimination on grounds of sexual orientation.

With the notable exception of Canada, judicial decisions on mid to late-twentieth century were mostly on inadmissibility of complains related to abuses against LGBTs. Before the watershed decision of *Dudgeon*, a number of complaints from homosexual

[140] Zion, "Effecting Balance: Oakes Analysis Restaged," 452.
[141] Schalk and Kopf v. Austria, Application no. 30141/04, 89 (European Court of Human Rights 2010).

"men seeking redress from their treatment under national law that criminalized consensual and private homosexual sexual activities"[142] were deemed inadmissible by the European Commission of Human Rights. The Commission, that before protocol 11 to the ECHR came to force, played the role of deciding on admissibility of applications, rejected most of the cases by finding them 'manifestly ill-founded'.[143] This led to the dismissal of 710 out of 713 applications lodged between 5th July 1955 and 1st March 1960.[144] Johnson, on this matter, claims that

> the reasoning of the Commission [...] has strong resonances with contemporary political and legal arguments that favour restricting the human rights of homosexuals".[145]

The HRC first decision on LGBT matters had the HRC deciding on a Finish Penal Code provision that prohibited publication of content that "encourages indecent behaviour between persons of the same sex".[146] The HRC not only saw no violation of freedom of expression right but was also concerned on "harmful effects on minors"[147] that the broadcasting of such content could cause. It took another 12 years for the HRC to analyse another individual submission, this time to change its position and bring that sodomy laws in Tasmania were discriminatory against LGBT and violated their privacy rights.[148] The justifications presented by the government, according to the HRC, could not prove that criminalization of homosexuality amounted to "reasonable means or proportionate measure"[149] to protect health.

[142] Johnson Book, p. 19
[143] Decided under ex article 27(2) of the Convention.
[144] G.L. Weil, 'Decisions on Inadmissible Applications by the European Commission of Human Rights', *The American Journal of International Law* 54(4), 1960: 874-881.
[145] Johnson, *Homosexuality and the European Court of Human Rights*, 20.
[146] Leo Hertzberg et al. v. Finland, Communication No. 61/1979, 2.1 (United Nations Human Rights Committee 1982).
[147] Ibid., para. 10.4.
[148] Nicholas Toonen v. Australia, Communication No. 488/1992, 8.5 (United Nations Human Rights Committee 1994).
[149] Ibid.

Privacy-based arguments when used to protect LGBTs can be of great use to repeal legislations that prohibit sexual intimacy between homosexuals. Nevertheless , privacy-based arguments lack the strength to protect LGBTs from discrimination on public matters, what Johnson calls the "reproduction of closet"[150] as, for instance, expression rights related to LGBTs are still underdeveloped at the ECtHR. This chapter will develop on each of the claims most commonly used at the Courts to advance rights to LGBT, and will pinpoint on the case law what the shortfalls are and how they can be of use to support claims on the necessity to discriminate LGBTs.

3.1. Ontological and Natural

Essential to the comprehension of the debate that took place in the Courts across decades and that advanced rights to sexual minorities is the difference between a Constructivist and an Essentialist nature of homosexuality, and what are the consequences of adopting either doctrine. Constructivists are of the opinion that homosexuality is an acquired condition that can be taught and learned. In manifesting their opinion on the matter, constructivist judges of the Courts argued that e.g. homosexuality is "determined more by cultural influences than by instinctive needs"[151] and amount to "unnatural practices."[152] They are of the opinion that the mere discussion of homosexuality might cause "harmful effects on minors."[153]

[150] Johnson, *Homosexuality and the European Court of Human Rights*.
[151] Dudgeon v. the United Kingdom, Application no. 7525/76, Dissenting opinion of Judge Walsh, § 15. (European Court of Human Rights 1981).
[152] Ibid., pt. Dissenting opinion of Judge Zekia.
[153] Leo Hertzberg et al. v. Finland, Communication No. 61/1979, 10.4 (United Nations Human Rights Committee 1982).

By taking a Constructivists approach, judges tend to accept limitations on rights with the purpose to curb the negative influence that is homosexuality. Judge Walsh, dissenting on *Dudgeon*, a case before the ECtHR, argues that:

> Cultural trends and expectations can create drives mistakenly thought to be intrinsic instinctual urges. The legal arrangement and prescriptions set up to regulate sexual behaviour are very important formative factors in the shaping of cultural and social institutions.[154]

Essentialists, on the other hand, see homosexuality as an inherent condition, ontological to an individual, an approach that would "lend weight to the claim that sexual orientation is an embodied and authentic aspect of human nature."[155] By claiming their sexual orientation is innate, what is sought by LGBTs is a recognition of the humanness of what was, until then, seen as an unnatural deviance, and in seeking this recognition earn the protection they deserve as men and women.

Essentialist discourse had to be repeated extensively before becoming widely accepted. The shift from Constructivism proven to be of value for advancing rights to LGBTs. The ECtHR, for instance, in deciding that homosexuality is an "innate personal characteristic"[156] and "an essentially private manifestation of the human personality"[157] was the first international court to grant human rights to LGBTs as separate category.[158] By accepting the innateness of homosexuality, it became harder to argue that LGBTs should be discriminated and segregated by, for instance, sodomy laws. Johnson argues that "the [Essentialist] conceptions offer a vital mode of resistance and challenge to social and legal hostility."[159]

[154] Dudgeon v. the United Kingdom, Application no. 7525/76, Dissenting opinion of Judge Walsh, § 15. (European Court of Human Rights 1981).
[155] Johnson, *Homosexuality and the European Court of Human Rights*.
[156] Smith and Grady v. the United Kingdom, Applications nos. 33985/96 and 33986/96, 93 (n.d.).
[157] Dudgeon v. the United Kingdom, Application no. 7525/76, 60 (European Court of Human Rights 1981).
[158] Johnson, *Homosexuality and the European Court of Human Rights*.
[159] Ibid.

A similar Essentialist approach to the ECtHR is taken by the SCC. Sexual orientation, within their jurisdiction, is understood as "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs."[160]

Followed by the declassification of homosexuality from the list of diseases,[161] seeing homosexuality not as an acquired condition nor an illness but as ontological to an individual started a trend of comprehension from different groups that would give LGBTs a lot more respect and acceptance.

3.2. Privacy and family rights claims

Protected under article 8 of the ECHR,[162] privacy rights are what Johnson calls "the powerhouse for contesting and developing the scope of human rights available to gay men and lesbians under the Convention".[163] Combined with article 14' prohibition of discrimination as explained below, the right to privacy has up to this date granted more protection to LGBTs within the jurisdiction of the ECtHR than any other right. Privacy rights are also enshrined on article 17 of the ICCPR[164] and has, up to this date and to a limited extent, similarly helped protect LGBTs. Article 17 of the ICCPR underpinned the decision of the HRC on *Toonen* "that adult consensual sexual activity in private is covered by the concept of 'privacy.'"[165]

[160] Egan v. Canada, [1995] 2 SCR 513 (Supreme Court of Canada 1995).
[161] Homosexuality was declassified as a mental illness by the World Health Organization in 1990.
[162] Article 8 of the ECHR provides that: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
[163] Johnson, *Homosexuality and the European Court of Human Rights*.
[164] Article 17 of the ICCPR, *verbatim:* 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.
[165] Nicholas Toonen v. Australia, Communication No. 488/1992, 8.2 (United Nations Human Rights Committee 1994).

In Canada, after a SCC decision to convict a homosexual individual to preventive detention until "cured", Canadian society began a discussion on the necessity of sodomy laws that is well summarized by the historical statement of the Minister of Justice: "there's no place for the state in the bedrooms of the nation."[166] Privacy-related arguments were used to support the following legislation that repealed sodomy, buggery and gross indecency between consenting adults from its Criminal Code on 1969.[167] The Charter does not mention the right to private life explicitly, what has not hindered the SCC from advancing privacy rights using the enumerated rights. Nevertheless, privacy rights-related arguments have not to this point advanced rights to protect LGBTs in the case law of Canada.

Article 8 of the ECHR protects different dimensions of LGBT, notably as the terminology used is particularly broad and hard to define exhaustively. [168] Right to respect for private and family life has, up to this date, advanced rights on diverse elements such as sexual intimacy, access to serve in armed forced, parental rights of homosexuals, [169] and in conjunction with article 14 protection against discrimination, it has ensured equality in taxing, succession rights of a same-sex partner, and equal age of consent for LGBT and heterosexual couples.[170]

Besides settling the notion of LGBTs as subject to rights and of homosexuality as ontological to an individual, *Dudgeon's* claim of violation of his privacy rights by sodomy laws of the United Kingdom is a notable example of ECtHR's case law on article 8 protection of LGBTs. The applicant on *Dudgeon* claimed that United Kingdom's criminal

[166] Pierre-Elliot Trudeau, cited by Chaffey, "The Right to Privacy in Canada."
[167] Chaffey, "The Right to Privacy in Canada."
[168] Peck v. the United Kingdom, Application No. 44647/98, 57 (European Court of Human Rights 2003).
[169] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 83 (European Court of Human Rights 2010).
[170] Ibid.

law on male homosexual acts were in violation of his rights to privacy and equality.[171] Relying on article 8 and refusing to analyse article 14 claim, the ECtHR found that the laws in force in the United Kingdom were an interference on the privacy rights of the applicant. While applying the *necessity* test, the court found that the aim of protection of health and morals did not justify such interference, given the fact the "case concerns a most intimate aspect of private life"[172] and the ECtHR could not identify "particularly serious reasons"[173] to restrict the right of the applicant. Moreover, the ECtHR did not understand the United Kingdom's law as proportionate to the aims sought. It outweighed the negative effects the mere fact the law existed on homosexual individuals over the overall benefits of the law,[174] ruling the latter as incompatible with article 8 rights of the applicant.

Although considered a *powerhouse* for LGBT rights, as focusing extensively on the protection of "intimate aspects of private life,"[175] decisions funded on right to privacy have the downside of reproducing the what Johnson calls the "shaping presence of the closet."[176] Said differently, the jurisprudence of the ECtHR, by relying extensively on article 8 at the expense of other rights that could be invoked to protect LGBTs, is too lax when protecting sexual minorities outside the sphere of private life. The ECtHR has expressed such position in a number of cases, with particularly grave concern on *F. v. the United Kingdom*, in which it decided that a decision to deport an Iranian citizen from the United Kingdom did not amount to a violation of his privacy right to moral and physical integrity and deemed the application inadmissible.[177] Based on an early inadmissibility

[171] Dudgeon v. the United Kingdom, Application no. 7525/76, 34 (European Court of Human Rights 1981).
[172] Ibid., para. 52.
[173] Ibid.
[174] Ibid., para. 60.
[175] Ibid., para. 52.
[176] Johnson, *Homosexuality and the European Court of Human Rights*.
[177] Feldbrugge v. the Netherlands, Application no. 8562/79 (European Court of Human Rights 1986).

decision of the European Commission on Human Rights on *B v. the United Kingdom*, in *F.* the ECtHR relied on a report of Canada[178] that mentioned "generally tolerant attitude toward homosexual practice can partly be explained by the fact that it will usually take place discreetly.[179] Implying that behaving with discretion is an acceptable method to avoid prosecution on laws that criminalize homosexual behaviour, the ECtHR implies that if LGBTs are comfortable enough inside of the closet there is no need to protect them outside of it.

The ECtHR is, nevertheless, following a path of normalization of homosexuality[180] and has in 2010 taken a more incisive approach in protecting public aspects of homosexuality related to freedom of assembly, as it will be explained below, whereas freedom of expression rights "remains undeveloped."[181] Relying on the little protection the ECtHR granted to public life aspects of homosexuality, the Russian government has for instance expressed its opinion that "any form of celebration of homosexual behaviour should take place in private or in designated meeting places with restricted access."[182]

A complaint brought before the ECtHR alleging a violation of article 8 rights by a propaganda law will have the ECtHR first analysing the admissibility of the complaint by assessing if there has been an interference on this right. Propaganda laws affect extensively the public aspect of LGBT rights, that does not imply that such laws have no effect on privacy or family rights of LGBTs. These laws can, for instance, infringe article 8 rights of LGBT couples that have children. The Lithuanian anti-LGBT propaganda law prohibits dissemination of information detrimental to children that "expresses contempt

[178] The Canadian Immigration and Refugee Board report on the treatment of homosexuals in Iran.
[179] Feldbrugge v. the Netherlands, Application no. 8562/79 (European Court of Human Rights 1986).
[180] Engle, "Gay Rights in Russia?," 18.
[181] Johnson Book, p. 174.
[182] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 60 (European Court of Human Rights 2010).

for family values, encourages the concept of entry into a marriage and creation of a family other than"[183] a male-female couple. It is hardly arguable that a propaganda law will not affect an LGBT family with children when both parents are of the same sex, or when one of the parent is a LGBT. A propaganda law forces an LGBT individual to refrain from saying that his family formation is salubrious to his or her own children, what amounts at *prima facie* as a violation of what article 8 protects.

Accepting that there has been an interference with article 8, the ECtHR will then pass to the analysis of the legality of a propaganda law. The legality test applied by the ECtHR requires a legislation, if to fulfil this criteria, to be deemed "adequately accessible [and] formulated with sufficient precision to enable the citizen to regulate his conduct,"[184] as explained on subchapter 1.2 above. It is questionable that the term *propaganda* commonly used by anti-LGBT propaganda laws would be considered precise enough to pass the test before the ECtHR. Talking specifically of the Ryazan regional law in Russia, that used the terms *homosexual propaganda*, both terms are undoubtedly vague. What, the ECtHR would question, amounts to *propaganda*, and which aspect of *homosexual* life is prohibited? Sexual aspects of homosexuality, or aspects of homosexual sexual orientation? The subsequent federal law passed by the Russian Parliament seems to have taken notice of this flaw and prohibited "promoting non-traditional sexual relationships,"[185] what might not be considered sufficient to repeal the vagueness of the law, as the term n*on-traditional* can also be considered too unprecise. Therefore, in order to be considered "prescribed by law", an anti-LGBT propaganda law should be precise with regards of what is the conduct prohibited and which aspect of homosexuality or of

[183] Lithuania Law on The Protection of Minors Against the Detrimental Effect of Public Information, No XI-594.
[184] S. and Marper v. the United Kingdom, Applications nos. 30562/04 and 30566/04, 95 (European Court of Human Rights 2008).
[185] Federal Law of the Russian Federation of December 29, 2010 No. 436-FZ.

non-traditional sexual orientations is covered, avoiding the vagueness common across such type of law.

The case law of the ECtHR, as defined on *Markt Intern Verlag GMBH and Klaus Beerman v. Germany*, brings that "'frequently laws are framed in a manner that is not absolutely precise and that judicial interpretation of such laws can provide the required precision."[186] Considering the precedent in *Markt Intern* and the fact that courts have already interpreted some of the propaganda-type law, it is possible to argue that the ECtHR, when scrutinizing such laws might consider their inherent vagueness as not sufficient to deem them incompatible with the ECHR.

The second step from there would be analysing the legitimacy of a propaganda law. As argued above, the aims of such laws are often presented as protection of the rights of children[187] or of morals, both deemed legitimate by article 8.2. The main issue would be the further step, the *necessity* analysis. Besides claims that propaganda laws are a widely supported by the respective constituencies, this is not sufficient to say such laws are an answer to pressing social needs, given the fact majoritarian arguments do not suffice to trump rights of LGBTs when claiming the behaviour of the latter should be limited as it is an offense to the former.[188] Propaganda laws, with relation to article 8 rights, will call for a very narrow margin of appreciation,[189] what will eventually lead to a decision that, in being excessively broad and by failing to advance particularly weighty reasons when

[186] Johnson, "'Homosexual Propaganda' Laws in the Russian Federation," 48.
[187] The ECtHR accepts that protection of the rights of children is included in *protection of the rights and freedoms of others.* Dudgeon v. the United Kingdom, Application no. 7525/76 paragraph 47.
[188] Dudgeon v. the United Kingdom, Application no. 7525/76, 60 (European Court of Human Rights 1981).
[189] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 108 (European Court of Human Rights 2010).

limiting the rights of LGBTs, [190] these laws is not *proportionate* to the aim pursued,[191] therefore in violation of article 8 rights.

3.3. Freedom of expression claims

A ground-breaking decision of the ECtHR on article 10 protection of freedom of expression, fundamentally relevant to the present research, was issued by the ECtHR in *Handyside v. the United Kingdom*, a case on the rights to publish a children book that discussed homosexuality and abortion, amongst other topics. In this case the ECtHR decided that freedom of expression

> is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb [...]. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.[192]

This position on offensive, disturbing or shocking content was questioned on *Ötto-Preminger-Institut v. Austria*. In *Ötto*, a seizure of a movie detrimental to the Catholic faith, based on a provision of the Austrian Criminal Code that criminalized blasphemy was understood by the ECtHR as legitimate as it pursued the aim of protection "the right of citizens not to be insulted in their religious feelings."[193] The ECtHR also agreed with the Austrian government that the seizure was necessary in a democratic society,[194] given the

[190] Kozak v. Poland, Application no. 13102/02, 92 (European Court of Human Rights 2010).
[191] S. and Marper v. the United Kingdom, Applications nos. 30562/04 and 30566/04, 101 (European Court of Human Rights 2008).
[192] Handyside v. The United Kingdom, Application no. 5493/72, 49 (European Court of Human Rights 1976).
[193] Ötto-Preminger-Institut v. Austria, Application no. 13470/87, 48 (European Court of Human Rights 1994).
[194] Ibid., para. 56.

fact the screening of the movie was to take place on a region of Austria that had an overwhelmingly majority of Catholics could violate religious peace.[195]

This position of the ECtHR that majoritarian arguments could be used to decrease the scrutiny applied to measures that violate freedom of expression is highly questionable. The dissenting judges in *Ötto* noticed the perils involved in admitting prior restraint on forms of expression that challenged the opinions of a majoritarian powerful group, saying that "such prior restraint could be detrimental to that tolerance on which pluralist democracy depends."[196]

In its reasoning on *Ötto*, the ECtHR opens a critical gap on protection of freedom of expression. Combined with the lack of protection of expression rights of sexual minorities, which in itself is a major shortfall of ECtHR' the case law with regard to LGBT protection, *Ötto* has been opportunistically used by governments that are willing to limit rights under protection of morals. In *Alekseyev*, for instance, the Russian authorities "claimed that authorising gay parades would breach the rights of those people whose religious and moral beliefs included a negative attitude towards homosexuality."[197] Relying on *Ötto* and on *Dudgeon*, the Russian government claimed that the majoritarian views of Russian citizens in favour of religion and against a parade in favour of LGBT rights should be taken into account, and for that reason a margin of appreciation with matters related to protection of morals should be granted to the local authorities.[198]

Supporters of anti-LGBT propaganda laws could buttress a claim on the necessity to protect morals of the majority of their population that, in all European countries that

[195] Ibid.
[196] Ibid., sec. dissenting opinion of Judges Palm, Pekkanen and Makarczyk.
[197] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 60 (European Court of Human Rights 2010).
[198] Ibid.

proposed such laws, adherence to Christian faith and negative acceptance of homosexuality are predominant.[199] The applicability of *Ötto* to a claim supporting anti-LGBT propaganda laws is nevertheless questionable. The ECtHR stressed in *Ötto* that the content of the movie seized amounted to a form of expression that is "gratuitously offensive to others […] and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."[200]

In a number of other decisions, albeit given on grounds of other rights, the ECtHR has demonstrated it regards discussion on LGBT matters is most welcome and necessary, as it argued in *Alekseyev*. Therefore, it is unlikely the ECtHR would rely on *Ötto* and support a legislation that limits expression rights of LGBTs, as the ECtHR considers a public debate on LGBT matters as necessary and developmental regarding human affairs as opposed to a discussion gratuitously offensive.

Handyside, besides increasing the tolerance of the ECtHR to shocking, disturbing or offensive content, touched upon the margin of appreciation of Contraction States, and based on that the ECtHR understood that the measure chosen by the United Kingdom did not violate expression rights of the applicant.[201] Highlighting that "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals",[202] and mentioning a "rapid and far-reaching evolution of opinions on the subject",[203] the ECtHR regarded the authorities in the United Kingdom to be in a better position to decide on the extent of the measures chosen to protect morals in their jurisdiction. Since 1976, the year the ECtHR issued its judgement on *Handyside,* the

[199] For instance, so argued the Moldovan government in *Genderdoc v. Moldova* and the Russian government in *Alekseyev*.
[200] Ötto-Preminger-Institut v. Austria, Application no. 13470/87, 49 (European Court of Human Rights 1994).
[201] Handyside v. The United Kingdom, Application no. 5493/72, 50 (European Court of Human Rights 1976).
[202] Ibid., para. 48.
[203] Ibid.

concept of morality and the width of the margin of appreciation given to Contracting States have changed consistently, what does not impede Contracting States from using *Handyside* as grounds to increase their margin of appreciation on measures that limit rights with the aim of protecting morality.

Again in *Alekseyev*, relying partially on the *dictum* in *Dudgeon* that Contracting States are in a better position to ascertain measures to protect morality, the Russian government argued that the lack of consensus between Contracting States to the ECHR regarding acceptance of homosexuality allowed their domestic authorities to assess what can be considered as insulting to their communities. The Russian government emphasized that to their citizens gay parades should be regarded as bestiality and given the same level of tolerance granted by the ECtHR in *Ötto*, therefore legitimizing the necessity to limit assembly rights of the applicant.[204]

The margin of appreciation on morality-based measures that limit LGBT expression rights, up to this date and differently from the work the ECtHR has done with regard to privacy or discrimination rights, have not been sufficiently narrowed, what does not mean that the ECtHR have not been protective of LGBT expression rights altogether, as it will be explained below.

Lack of ambiguity on current standards, technically termed by the ECtHR as *European consensus*, under the jurisprudence of the ECtHR is understood to shift the balance towards the position on the rights that is more commonly adopted, what narrows the margin of appreciation given to governments on that matter. Sájo argues that "[b]y accepting a margin of appreciation, the Court recognizes that there are actual national differences in value systems, which function as grounds for speech restriction."[205] It

[204] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 61 (European Court of Human Rights 2010).
[205] Sajó, *Freedom of Expression*, 82.

amounts to say, in regard to anti-LGBT propaganda laws that are, at this moment on different forms adopted only on a limited number of countries, that there is a European consensus on expression rights of LGBTs. Therefore, the task to claim before the ECtHR that anti-LGBT propaganda laws are proportionate to the legitimate aim pursued and that such interference on LGBT expression rights is relevant and sufficient is significantly toughened.[206]

As argued above, the prohibition of *spreading of information* or *propaganda*, terms commonly used on proposed of passed anti-LGBT propaganda laws, is not precisely defined and leaves room to interpreting it as a blank restriction on publication of broadcasting of information on LGBT-related topics. Therefore and importantly, an anti-LGBT propaganda law can be seen as imposing a prior restraint, a type of restriction on expression rights that triggers the most careful scrutiny[207] from the ECtHR. It is understood, in light of the exposed above, that the margin of appreciation given to Contracting states that adopt measures aimed at limiting freedom of expression of sexual minorities via anti-LGBT propaganda is very narrow.

Protection of children's morals has been accepted by the ECtHR in the past as a legitimate aim to limit freedom of expression of LGBTs on a considerable number of cases.[208] In *Handyside*, besides it welcoming approach on shocking, disturbing and offensive content, the ECtHR held that the seizure of books by the government of the United Kingdom with the aim of protecting the morals of the young was not in violation of freedom of expression of the applicant,[209] agreeing with the government that "young people at a critical stage of their development could have interpreted [the book] as an

[206] Vejdeland v. Sweden, Application no. 1813/07, 52 (European Court of Human Rights 2012).
[207] Wingrove v. the United Kingdom, Application No. 17419/90, 58 (European Court of Human Rights 1996).
[208] Johnson, "'Homosexual Propaganda' Laws in the Russian Federation," 50.
[209] Handyside v. The United Kingdom, Application no. 5493/72, 52 (European Court of Human Rights 1976).

encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences."[210] A number of other complaints from LGBTs based on freedom of expression, were rejected by the ECtHR and by the European Commission on Human Rights on decisions that regarded "interference with Art. 10 rights was regarded to be necessary in a democratic society."[211] Important to notice that the *Handyside* decision was issued five years before *Dudgeon* and the adoption by the ECtHR of an Ontological discourse of the nature of homosexuality.

Even though propaganda laws are likely to be understood by the ECtHR as in *pursuit of a legitimate aim*, be it protection of health or morals or protection of the rights of others (children), such laws are not *necessary in a democratic society*. Morality-based claims call for a close scrutiny from the ECtHR when used to limit rights of LGBTs, as decided in *Karner v. Austria*. When inquiring on the necessity of an anti-LGBT propaganda law in a democratic society, the ECtHR will seek for a *pressing social need* in limiting the rights of individuals to achieve the declared aim. [212] It will also investigate if the measure chosen is *proportionate* to the pursued aim. Furthermore, the ECtHR will question if the reasons advanced to impose the limitation are *relevant and sufficient*. "[T]he crucial questions for the ECtHR will be whether the laws are a proportionate response to meeting these aims."[213]

For the *necessity* analysis of the ECtHR on propaganda laws, it is crucial to remember the court has stated freedom of expression is to be understood as general law to the special law on freedom of assembly,[214] and notably that in *Alekseyev* the ECtHR has decided on the incompatibility of a LGBT pride parade ban with assembly rights. *Alekseyev*

[210] Ibid.
[211] Johnson, "'Homosexual Propaganda' Laws in the Russian Federation," 50.
[212] Vejdeland v. Sweden, Application no. 1813/07, 53 (European Court of Human Rights 2012).
[213] Johnson, "'Homosexual Propaganda' Laws in the Russian Federation," 48.
[214] Feldbrugge v. the Netherlands, Application no. 8562/79, 35 (European Court of Human Rights 1986).

is central to understand the position of the ECtHR on limitation of expression rights as in this case it was addressed not only the reasoning of a government behind limiting public aspects of LGBTs, but also due to the fact the ECtHR touched upon a number of morality and children protection claims, repealing them in favour of pluralism and diversity.

The reasoning of the ECtHR in deeming the ban on pride parades not necessary in a democratic society as the aims pursued were not proportionate is a major advancement on the protection of the public sphere rights of LGBTs. Interestingly the ECtHR explicitly brought the claims of the mayor of Moscow and of the Russian government that discussion on homosexuality should be hidden from the public domain and kept in private.[215] The ECtHR refuted majoritarian claims[216] and lack of European consensus on the matter of LGBT rights,[217] arguing in subjecting assembly rights to acceptance of the majority would render the rights of LGBTs merely theoretical[218] and that all the other Contracting States recognize the "right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms."[219]

The shortfall on the case law of the ECtHR on protection of freedom of expression of LGBTs has slowly but steadily being closed. After *Alekseyev*, another case that has the potential of closing the gap on public dimension rights of LGBTs, as mentioned above, is *Bayev v. Russia*, a pending case that has the federal anti-LGBT propaganda law questioned under freedom of expression protection. Under the current standards of protection of the ECtHR it is hardily arguable that protection of minors or of morals answers a pressing social need that justifies such a blank limitation on expression rights of LGBTs. Identifying

[215] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 82 and 86 (European Court of Human Rights 2010).
[216] Ibid., para. 81.
[217] Ibid., para. 84.
[218] Ibid., para. 81.
[219] Ibid., para. 84.

this trend, Sájo teaches that "[r]estriction allegedly based on [public morals], however, come under increasingly strong scrutiny, because a broad restriction based on the need to uphold public morals does not give sufficient guidance to speakers.[220]

At the HRC, protection of expression rights against anti-LGBT propaganda laws is a matter already settled since *Fedotova*, decided in 2012 after a complaint on the first of the Russian regional laws banning homosexual propaganda. Relying on *Toonen v. Australia*, discussed below, and on General Comment no. 34 (henceforth General Comment), the HRC decided the Russian government violated the right to freedom of expression of the complainant.[221]

In regard to General Comment no. 34, it bears resemblance to the case law of the ECtHR on certain points, a notable example of cross-influence between international organizations. While in *Handyside* the ECtHR decided that content that is offensive, shocks or disturbs is protected by article 10 of the ECHR, paragraph 11 of the General Comment brings that content that is deeply offensive is also protected by the ICCPR, although liable to limitations. Paragraph 32 of the General Comment mentions that protection of morals should not be derived from a single tradition, the ECtHR has argued extensively on the necessity to protect pluralism.[222] General Comment no. 34 also offers lessons on the proportionally analysis applied by the HRC, highlighting for instance the obligation of a limitation on expression rights to be necessary to achieve a determined legitimate purpose, and furthermore such restriction must be proportional and the least intrusive possible.[223]

[220] Sajó, *Freedom of Expression*, 107.
[221] Fedotova v. Russian Federation, Communication No. 1932/2010, 10.8 (United Nations Human Rights Committee 2012).
[222] Smith and Grady v. the United Kingdom, Applications nos. 33985/96 and 33986/96, 83 (n.d.).
[223] "General Comment No. 34, Article 19, Freedoms of Opinion and Expression."

In applying the General Comment and the previous case law on prohibition of discrimination on sexual orientation grounds, the HRC refuted claims from the Russian government that there was no interference on the private life of the complainant and reached the conclusion that

> the State party has not shown that a restriction on the right to freedom of expression in relation to "propaganda of homosexuality" – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria. Moreover, no evidence which would point to the existence of factors justifying such a distinction has been advanced.[224]

Regardless of the backwardness of the ECtHR's case law on expression rights of sexual minorities, the position of both the HRC and of the ECtHR is that "there is little scope […] for restrictions on political speech or on debate on questions of public interest."[225] As argued by the ECtHR in *Alekseyev*, "[i]t is only through fair and public debate that society may address such complex issues as the one raised in the present case."[226] The failure of the ECtHR to cover extensively the public aspects of life of homosexuals does not mean this aspect is left unprotected.

The position on the SCC under freedom of expression rights on a propaganda law, given its case law, would be very similar to the decision of the HRC in *Fedotova*. Limitations on freedom of expression rights in Canada, protected by section 2 (b) of the Charter,[227] are only acceptable the limitation is justifiable under section 1.[228] An anti-LGBT propaganda law passed in Canada would, therefore, need to be justified on face of section 1 of the Charter.

[224] Fedotova v. Russian Federation, Communication No. 1932/2010, 10.6 (United Nations Human Rights Committee 2012).
[225] Öllinger v. Austria, Application no. 76900/01, 38 (European Court of Human Rights 2006).
[226] Alekseyev v Russia, §86.
[227] *Verbatim*: Everyone has the following fundamental freedoms: […] (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. *Constitution Act, 1982, sec. 2 (b).*
[228] Meyerson, "The Legitimate Extent of Freedom of Expression."

A relevant case before the SCC on freedom of expression is *Irwin Toy Ltd v. Quebec*, in which a company argued that its expression rights were violated by a Quebecoise law that limited its right to advertise its toys directly to children below the age of thirteen, and such limitation was unjustifiable under section 1 of the Charter. The SCC decided otherwise, upholding the legislation. It argued that, although there was a limitation on expression rights of the company, such limitation could be justified under protection of consumers' objectives, namely to "protect a group that is most vulnerable to commercial manipulation."[229] Said differently, the SCC accepted that it is in accordance with the Chapter "prohibit particular content of expression in the name of protecting children."[230] The SCC further argued that "[c]hildren are not as equipped as adults to evaluate the persuasive force of advertising."[231]

At first sight *Irwin* might be seen as a possible support to anti-LGBT propaganda laws, as it agrees with limitation of dissemination of information to children due to their vulnerability and incapacity to assess properly information targeted at them. Nevertheless, a closer analysis to the position of the SCC proves otherwise. The SCC decided that "non-commercial educational advertising aimed at children is permitted,"[232] and furthermore, the effects of the ban did not outweigh the "pressing and social objective"[233] of the government. A ban on dissemination of information on LGBT matters to children would not be deemed as in accordance with section 1 of the Charter as, besides the necessity to protect children and the *pressing and substantial* need to protect them, such ban would hardly be deemed as a *mean proportional to the ends*.

[229] Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927 (Supreme Court of Canada 1989).
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Ibid.

In checking if the means are *proportional and appropriate to the end*, the SCC tests if there is a *rational connection*, if the means are *minimally impairing*, and if the *deleterious effects* are outweighed by the beneficial. It is arguable if the SCC would find a rational connection between the prohibition on dissemination of LGBT-related information and the aim to protect children. In *Irwin* the SCC clearly stated that young children could not distinguish advertisements from reality, therefore defining adverts as detrimental to children. Dissemination of information to children that represent LGBT and same-sex families as equals, or that argues that LGBT families are normal, the kind of information that anti-LGBT propaganda laws prohibit, are not likely to be understood by the SCC (or by the ECtHR or HRC) as detrimental, what leads to the conclusion that limiting LGBT propaganda is not rationally connected to the aim of protecting children.

With regard to the *minimally impairing* part of the test, it is blatant that a typical anti-LGBT propaganda law does not impair as little as possible expression rights. In this part of the test the SCC is "required to balance the interests of society with those of individuals and groups."[234] The SCC would hardly agree that the interests of those willing to voice information that advocates acceptance towards sexual minorities, be them Non-Governmental Organization, individuals or the government itself, are being minimally impaired by the anti-LGBT propaganda law when aiming at protecting children.

Finally, in assessing if the *beneficial effects outweigh the deleterious*, the SCC will have a look on the effects that a ban on LGBT-related information to children might have on them and on the society as a whole, notably as such laws increase discrimination of sexual minorities. As presented above, a number of organizations have highlighted the harmful effects discrimination cause on LGBTs, notably on LGBT children, such as higher

[234] R. v. Oakes, [1986] 1 SCR 103, 70 (Supreme Court of Canada 1986).

suicide rates and HIV infection rates.[235] It is, therefore, hard to argue the SCC would uphold an anti-LGBT law. Besides freedom of expression issues, a propaganda law also raises friction with relation to equality rights, discussed below.

3.4. Equality claims

The principle of equality, as stated above, are often framed as prohibition of discrimination or right to equality. Both the ECHR, the Charter and the ICCPR protect equality rights, and the Courts seeking the implementation of their provisions have all decided on the inclusion of sexual orientation as grounds under which discrimination is prohibited, regardless of the lack of explicit mention of sexual orientation on the rights documents. The similarities on the approach to discrimination across the three jurisdictions provides a rich field for a comparative analysis.

The Charter, for instance, on section 15. (1) brings that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[236]

Sexual orientation, according to the SCC on *Egan v. Canada*, falls "within the ambit of s. 15 protection as being analogous to the enumerated grounds."[237] In *Egan* the Charter was interpreted to cover what other rights documents within Canada cover explicitly. For instance, the Quebecoise human rights legislation of 1976 enumerated explicitly sexual orientation on prohibited grounds of discrimination.

As for the ECHR, Article 14 says that

> [t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour,

[235] Parliamentary Assembly, "Child and Teenage Suicide in Europe: A Serious Public-Health Issue."
[236] *Constitution Act, 1982*, sec. 15 (1).
[237] Egan v. Canada, [1995] 2 SCR 513 (Supreme Court of Canada 1995).

> language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[238]

Claims brought before the ECtHR based on article 14 can only be advanced combined with another right. "The Court has repeatedly held that Article 14 is not autonomous but has effect only in relation to Convention rights."[239] Article 14 "has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions." [240] That said, the case law of the ECtHR with regards to discrimination of LGBTs is entirely linked to another right, more often right to respect for a private and family life, as explained on subchapters above. This interpretation of the ECtHR does not mean that another right has to be also violated in order for a claim based on article 14 be successful, but that a discrimination claim has to "fall within the ambit of one or more of the"[241] other rights of the ECHR. Protocol 12, an advancement to the anti-discriminatory provisions of the ECHR, extends the prohibition to discriminate on domestic legislation rights, in that fashion lengthening article 14's protection to discrimination on grounds of rights granted only domestically by a specific Contracting State.[242]

The ground-breaking decision of the ECtHR that broke the tradition of the European Committee of Human Rights to refuse to analyse complains on violations of rights of LGBTs was *Dudgeon v. the United Kingdom*. Nevertheless, as the ECtHR would do in most of its subsequent cases until 1999, in *Dudgeon* it "refused to consider Article 14 complaints brought in relation to homosexuality even when it found violations of rights

[238] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, vol. ETS 5, sec. Article 14.
[239] Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, 106 (European Court of Human Rights 2010).
[240] Ibid.
[241] Ibid.
[242] Protocol 12 to the European Convention on Human Rights.

under other articles of the Convention".[243] Two of the dissenting judges on *Dudgeon*, aware of this issue, attempted to highlight that to "interpret Article 14 in the restrictive manner […] deprives this fundamental provision in great part of its substance and function in the system of substantive rules established under the Convention."[244]

Salgueiro da Silva v. Portugal was the first case in which the ECtHR explicitly stated that "sexual orientation [is] a concept which is undoubtedly covered by Article 14 of the Convention."[245] Although early complaints attempted to include sexual orientation on the item *sex* of article 14,[246] the position of the ECtHR is that sexual orientation is an analogous ground to the enumerated and, therefore, not embedded on the this item.[247]

The position taken by the HRC regarding where to include sexual orientation within prohibition of discrimination would be closely linked with the claim of the applicant in *Dudgeon.* When deciding to include sexual orientation on article 26 prohibition of discrimination, the HRC, in *Toonen v. Australia*, stated that "'sex' in articles 2, paragraph 1, and 26 is to be understood as including sexual orientation",[248] a position that has been repeated on subsequent complaints. *Toonen* saw the HRC deciding on the incompatibility of sodomy laws with the equality and privacy provisions of the ICCPR.[249] Another noteworthy case from the HRC is *Young v. Australia*, a case in which the HRC saw a violation on equality provisions of the ICCPR by Australian regulations that did not

[243] Johnson, *Homosexuality and the European Court of Human Rights*.
[244] Dudgeon v. the United Kingdom, Application no. 7525/76, Dissenting opinion of Judges Evrigenis and Garcia De Enterria (European Court of Human Rights 1981).
[245] Salgueiro da Silva Mouta v. Portugal, Application no. 33290/96, 28 (European Court of Human Rights 2000).
[246] Dudgeon v. the United Kingdom, Application no. 7525/76, 34 (European Court of Human Rights 1981).
[247] Salgueiro da Silva Mouta v. Portugal, Application no. 33290/96, 28 (European Court of Human Rights 2000).
[248] Nicholas Toonen v. Australia, Communication No. 488/1992, 8.7 (United Nations Human Rights Committee 1994).
[249] Ibid., para. 8.6.

entitle same-sex partners from deceased veterans to a pension.[250] According to Lau, in *Young* the HRC "elevated sexual orientation from an issue of criminality to an issue of equal opportunity."[251]

In Canada the SCC, *Egan v. Canada* is the ground-breaking case that saw discrimination of LGBTs being included on the prohibition of discrimination provisions of the Charter. In *Egan* a homosexual couple complained of discrimination on grounds of sexual orientation of a legislation that denied same-sex couples a spousal allowance granted to elderly couples whose combined income was below a determined threshold. In a unanimous decision, the SCC decided that sexual orientation is included on the *enumerated grounds* of section 15 of the Charter.[252] The SCC, nevertheless, held that, although the discrimination violated equality rights of the couple, the limitation was justifiable and reasonable.

While the SCC voiced in *Egan* arguments highly criticisable, arguing the grant of spousal allowances only to different-sex couple was not discriminatory "since it was relevant to the state's "fundamental social objectives", namely the support of procreation and child-rearing",[253] part of the minority concluded that the discrimination of LGBTs and the denial in grating them spousal allowances "reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples."[254]

Using a logic similar to the ECtHR that governments should be given a wider margin of appreciation on matters related to discrimination regarding "general measures

[250] Edward Young v. Australia, Communication No. 941/2000, 10.4 (United Nations Human Rights Committee 2003).
[251] Lau, "Sexual Orientation."
[252] Ryder, "Egan v. Canada," 101.
[253] Ibid., 103.
[254] Egan v. Canada, [1995] 2 SCR 513 (Supreme Court of Canada 1995).

of economic or social strategy",[255] the judge that broke the majority, Sopinka J., voted that a discrimination was justifiable as "the government must be afforded leeway and flexibility in choosing amongst competing disadvantaged groups in social benefit schemes."[256] *Egan* is highly criticisable on a number of grounds, notably as "[t]he minority judges appear to equate fertility with heterosexuality, and heterosexuality with fertility,"[257] even though elderly different-sex couples are entitled to a spousal allowance even if they had no children, or had only cohabited for a year. On the other hand, individuals on same-sex couples were not entitled to the allowance even if they had fostered their own children.[258] Ryder notices that the SCC did not insist, as it did on previous cases, that the government had to "provide evidence that demonstrates the need to violate Charter rights in order to achieve other objectives."[259]

In short, *Egan's* immediate effect was, as argued by Ryder, "shift Charter claims by same-sex spouses from the section 15 frying pan to the section 1 fire,"[260] what amounts saying that instead of the individuals or couples in same-sex relationships that were discriminated on sexual orientation grounds having to argue on the protection of their equality by the Charter, the government instead has to prove its discriminatory practices are justifiable under section 1.[261]

Equality provisions of the ECHR, ICCPR and the Charter, when used to challenge anti-LGBT propaganda laws, are valid grounds to declare propaganda laws in violation of

[255] Schalk and Kopf v. Austria, Application no. 30141/04, 97 (European Court of Human Rights 2010).
[256] Ryder, "Egan v. Canada," 104.
[257] Ibid., 103.
[258] Ibid.
[259] Ibid.
[260] Ibid., 107.
[261] For instance, Justice Bastarache, in his concurring vote in *M. v. H.*, agued as follows: "section 1 analysis places a burden on the government to justify the legislative incursion on the Charter right, it is appropriate that governmental intention should, where possible, be considered and evaluated on its own terms to explain why the restriction on a Charter right is justifiable." M. v. H., [1999] 2 SCR 3 (Supreme Court of Canada 1999).

equality rights, as the case law of the Courts demonstrate. The proportionality test applied by the Courts on prohibition of discrimination claims, in all three jurisdictions, will question at minimum a. the legitimacy of the aim of the legislation, and b. the proportionality between the aims sought and the mean applied to achieve them.[262]

It is important to highlight that anti-LGBT propaganda laws create a distinction between LGBT and non-LGBT content. Such laws, therefore, discriminate LGBT from non-LGBT and trigger a difference in treatment depending on the nature of the content. With regard to difference in treatment based on sexual orientation, the ECHR "require[s] particularly serious reasons by way of justification"[263] if it is to "regard a difference in treatment based exclusively on [such] ground[s] […] as compatible with the Convention."[264] Within the ECtHR this approach narrows down the margin given to Contracting States with regard to the measures they can adopt that limit the right to equality. In other words, as advanced by the ECtHR on *Karner v. Austria*,

> the *margin of appreciation afforded to States is narrow*, as is the position where there is a difference in treatment based on sex or sexual orientation, *the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary* in order to achieve that aim to exclude certain categories of people […]. [*emphasis added*]

The arguments advanced by the Russian government in *Fedotova* offer an important example on what can be advanced by Contracting States when defending a propaganda law against violation of antidiscrimination claim.

Article 14's proportionality analysis applied by the ECtHR is composed of a test on the *objectiveness and reasonableness* of the justification advanced to discriminate, what in turn means an analysis on the *legitimacy of the aim*, and on the *reasonableness of*

[262] Karner v. Austria, Application no. 40016/98, 37 (European Court of Human Rights 2003).
[263] Ibid.
[264] Ibid.

proportionality between the means and the aim.[265] As repeatedly said, protection of morals and of rights of children are legitimate aims under the ECHR, the ICCPR and the Charter to limit protected rights. It is necessary, therefore, to analyse the *proportionality* of a propaganda law in achieving these aims.

The ECtHR has reiterated that "[s]exual orientation is a concept covered by Article 14,"[266] what forces the Contracting State to prove the measure chosen was "necessary in the circumstances."[267] Prohibiting the dissemination of any information that, for instance, advances the idea that LGBT families are normal or that LGBT lifestyle and sexual intimacy are not morally wrong are not *necessary* to protect the morals or rights of children, nor is such ban *proportionate* to aims advanced. In *Karner v. Austria*, for instance, the ECtHR decided that a ruling from the domestic Supreme Court to deny the right of homosexual individuals from succeeding tenancy agreements after the death of their same-sex partner, a right granted to different-sex couples,[268] was in violation of the ECHR.[269]

The reasons advanced by the Austrian government in *Karner* to quash equality rights of the applicant in order to achieve the aim– necessity to protect family in the traditional sense[270] – was understood by the ECtHR as not sufficient to justify a violation of such right.[271] A similar decision was reached by the ECtHR in *Kozak v. Poland*, in which an differentiation on the right to succeed tenancy agreements, based on the definition given by the Polish law on *marital cohabitation* as only to encompass different-sex couples,[272] was held as not proportionate to the aim of protecting family on the traditional

[265] Salgueiro da Silva Mouta v. Portugal, Application no. 33290/96, 29 (European Court of Human Rights 2000).
[266] Kozak v. Poland, Application no. 13102/02, 92 (European Court of Human Rights 2010).
[267] Ibid.
[268] Karner v. Austria, Application no. 40016/98, 15 (European Court of Human Rights 2003).
[269] Ibid., para. 43.
[270] Ibid., para. 35.
[271] Ibid., para. 41.
[272] Kozak v. Poland, Application no. 13102/02, 96 (European Court of Human Rights 2010).

sense.[273] Importantly, in *Kozak* the ECtHR reiterated that "if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention."[274]

Taking *Kozak* and *Karner* as examples, it is manifest that the case law of the ECHR on prohibition of discrimination is to cause the ECtHR deem anti-LGBT propaganda laws as in violation of equality rights for failing to pass the *proportionality* test. Although the ECtHR have not, up to this date, decided on a case that links article 14 with the protection of freedom of expression on a LGBT case, little room is left for arguing that anti-LGBT propaganda laws are not in violation of prohibition of discrimination.

As explained above, the HRC has decided on a number of cases that discrimination on grounds of sexual orientation amounts to a violation of ICCPR's prohibition of discrimination clause. The position of the HRC on anti-LGBT propaganda laws is adamant on the incompatibility of the latter with equality and freedom of speech provisions, as decided on *Fedotova*.[275]

In Canada, given the current standards of protection against discrimination on sexual orientation grounds, an anti-LGBT propaganda law is also bound to fail to pass the proportionality analysis. In order to identify a discrimination that violates Charter provisions, at first the SCC has, based on a test established in *Law v Canada (Minister of Employment and Immigration)*, to ascertain if there has been in fact a discrimination. In accordance with this test, the SCC inquires if the measure questioned creates a formal distinction that renders the claimant being treated substantially differently on base of personal characteristics. Secondly, it questions if there has been a difference in treatment

[273] Ibid., para. 99.
[274] Ibid., para. 92.
[275] Fedotova v. Russian Federation, Communication No. 1932/2010 (United Nations Human Rights Committee 2012).

on the basis of grounds of section 15 of the Charter. Finally, it inquires if the different in treatment "discriminate[s] in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage."[276]

With support on the decision of the SCC in *M. v. H.*[277], an anti-LGBT propaganda law is to be understood by the SCC as creating a distinction on LGBTs[278] if compared to heterosexuals, as such laws blatantly prohibit information on homo or bisexuality to be spread, but not on heterosexuality. From that, the SCC has to analyse if the distinction is on grounds of section 15 of the Charter, what the precedent in *Egan* clearly indicate it is, as the discrimination is on grounds of sexual orientation. Finally, this Court will assess if the propaganda law creates a creates a difference in treatment that is discriminatory.

Of particular importance on this matter is the position the SCC held in *M.* The SCC has decided in the latter that a difference in treatment of LGBTs discriminates if it "has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration."[279] It held that the denial of the possibility to use legal measures to individuals that were on same-sex relationships "contributes to the general vulnerability experienced by individuals in same-sex

[276] M. v. H., [1999] 2 SCR 3 (Supreme Court of Canada 1999).
[277] In *M*. a woman recently separated from her same-sex partner complained of discrimination by a statute that defined *spouses* as only different-sex couples that cohabited for a certain period of time, at the exclusion of same-sex couples. By not meeting the criteria of spouse under the mentioned statute, the woman could not get the reliefs the law provided to different-sex couples. The SCC decided that the statute discriminated on grounds of sexual orientation, a protected ground under the Charter section 15, and that such discrimination was not justifiable under section 1. Ibid.
[278] As argued above, the law might also affect heterosexual individuals or legal persons that argue LGBTs or LGBT families are as normal as a heterosexual persons or families.
[279] M. v. H., [1999] 2 SCR 3 (Supreme Court of Canada 1999).

relationships, […] promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection."[280]

M. leaves little room to argue an anti-LGBT propaganda law is not discriminatory, and indicates with precision what is the current opinion of the SCC on discriminatory practices on sexual orientation grounds. Interestingly, the SCC has taken a position that highlights the necessity of protection to LGBT individuals and their moral standing as individuals worth of concern, a position that the ECtHR has to this moment not yet advanced.[281] Notably, the SCC argued in *M.* that "*exclusion*[*s*] *perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence*."[282] [emphasis added]

After identifying a discrimination, the SCC will scrutinize if this violation of equality is justifiable under section 1 of the Charter. Again, *M.* is of help to precise the position of the SCC on the matter. The *Oakes* test applied at this stage led to the conclusion in *M.* that even if the objective pursued by the impugned statute was pressing and substantial,[283] the measures the statute adopted could not be rationally connected to its goal. [284] Protection of morals[285] and of children,[286] the aims often declared of anti-LGBT propaganda laws, are understood by the SCC as legitimate objectives of a legislation, therefore the analysis passes on to the *rational connection* between the goals and the measure chosen. As it did

[280] Ibid.
[281] Johson argues, on this matter, as follows: "Despite the implicit value that the Court has accorded to homosexuality since Dudgeon, through its recognition of the homosexual as a subject of rights, it has nevertheless remained consistently ambivalent about the moral value of homosexuality." Johnson, *Homosexuality and the European Court of Human Rights*.
[282] M. v. H., [1999] 2 SCR 3 (Supreme Court of Canada 1999).
[283] The SCC argued on a number of possible objectives, such as "equitable resolution of economic disputes […] between individuals" after a separation, protection of children, tackle systemic inequality between sexes and protect vulnerable woman. Ibid.
[284] Ibid.
[285] As explained on 1.3.2, the SCC sees protection of the morals of a community as a legal argument to limit Charter rights. Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 SCR 1120 and R. v. Butler, [1992] 1 SCR 452 (Supreme Court of Canada 1992).
[286] M. v. H., [1999] 2 SCR 3, 104 (Supreme Court of Canada 1999).

in *M.* the SCC tends to understand the limitation of dissemination of information on homosexuality as not rationally connected to the objective of protection of children or of morals. Children are not harmed by information on homo or bisexuality, as the SCC indicated in *Trinity*, nor is information on LGBT matters *per se* harmful to morals, as Canada is understood by the SCC as composed of a pluralistic society with different conceptions of morals.[287]

Nor is an anti-LGBT propaganda law, notably given the broadness of the prohibition on dissemination of information such laws impose, likely to be understood as the minimally impairing means possible to achieve the objective, be it protection of children or of morals. Prohibiting a whole vulnerable group of individuals from seeking understating and acceptance cannot by any means be understood as minimally impairing.

The final part of the *Oakes* test, the analysis if "deleterious effects of the measures are outweighed by the promotion of any laudable legislative goals, or by the salutary effects of those measures"[288] is also likely to lean towards the rejection of the anti-LGBT propaganda law by the SCC. In *M.* this court highlighted, as explained abobe, that "*exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence*"[289] and, if any benefit can be found as a resolute of a propaganda law, this harsh deleterious effect that goes against the principles of a multicultural Canadian society can hardly be outweighed by any benefit of such law.

3.5. Conclusion

[287] As presented on section 27 of the Charter and Reference re Same-Sex Marriage, [2004] 3 SCR 698, 2004 SCC 79 (CanLII) (Supreme Court of Canada 2004).
[288] M. v. H., [1999] 2 SCR 3 (Supreme Court of Canada 1999).
[289] Ibid.

Besides the historical position of the ECtHR in protecting homosexuals solely on their private sphere, notably after *Alekseyev*, there are strong indicators that the ECtHR is about to become more protective on LGBTs in manifestations on the public domain. As a consequence of the preference to analyse complains of violations of rights granted to LGBTs under privacy rights, there has not been, up to this date, a decision on the protection of expression rights of LGBT that would ensure the ECtHR recognizes the value of free speech of this group.

Nevertheless, besides this shortfall, the case law of the ECtHR has steadily been developed to become more protective of LGBTs. Given the current standards of protection of this sexual minority, there is little room to argue that anti-LGBT propaganda laws are in compliance with these standards. They, as explained above, fail to meet the criteria of *necessity* and of *proportionality* and are bound to be deemed as in violation of the ECHR.

4. Chapter IV.
Living Constitutions

"It ought to be remembered that there is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things."[290]

Underlining the reasoning of constituencies behind the proposal of anti-LGBT propaganda laws is their standing on the powers judicial bodies have to interpret and change the meaning of certain provisions of the rights' document they enforce.[291] While courts developed and applied doctrines that allowed the evolution of the constitutional documents they oversee, supporters of anti-LGBT propaganda laws tend to argue, although indirectly, that the interpretative powers of courts should be limited.[292] This claim is of special significance, notably on the case of the ECtHR, as the current case law, as argued above, it not particularly protective of expression rights of sexual minorities. Therefore, by claiming the interpretation of a constitutional document should be static as opposed to dynamic, the argument that propaganda-type laws are necessary gain strength, as rights of LGBTs are not expressly mentioned on the ECHR nor unmistakably protected by the case law of the ECtHR.

In order to support the claim that LGBT rights were recognized by the ECtHR and that such rights trump attempts to supress rights of LGBTs by propaganda laws, this chapter will provide an overall discussion on the prerogative courts have to advance

[290] Machiavelli, *The Prince*.
[291] For example, the Russian government in *Alekseyev* argued, with support on *Dudgeon* and *Müller* that they were on a better position to assess the appropriate measures to protect the sensitive morals of their constituents. The Russian government implicitly argued the ECtHR to rely on its precedent and do not expand the scope of assembly rights or prohibition of discrimination.
[292] Such was the approach of the Russian government on *Alekseyev*. By linking their claim of lack of consensus within the Contracting States of the ECHR on matters of homosexuality to the previous case law of the ECtHR, the government is implicitly arguing the interpretation of the ECHR should not evolve to be more protective of LGBT rights.

rights while interpreting constitutional provisions. It will do so by presenting the overarching principles and limits of the evolutive interpretation doctrine, by after demonstrating its applicability to the Charter, ECHR and ICCPR, notably in matters related to LGBT rights that, combined with the discussions from the previous chapter, support the claim that propaganda laws are in violation of rights of LGBTs. This discussion is of particular importance as the ECtHR will necessarily have to use evolutive interpretation, notably with respect to article 10, in order to change its current case law and protect expression rights of LGBTs against morality-based claims.

4.1. Evolutive interpretation doctrine

In overall, a change on a constitutional document[293] can occur either via amendment to its text of by transformation of its interpretation.[294] Constitutional amendments made by legislative act, when permitted by a certain constitution,[295] follow a procedure specified that often are of higher complexity than a mere a change on a statute. In Canada e.g. amendments to the Constitution must be approved by both the House of Commons and the Senate, and two-thirds of the legislative assemblies of the provinces.[296] Changes via judicial decision, on the other hand, occur whenever a decision of a court empowered to interpret the constitution and to create precedent decides on a

[293] Arato, offering a lesson on Kelsen's doctrine, presents the conceptual differentiation of a formal and a material constitution. "The material constitution, in his conception, is that set of norms that dictate the methods through which norms are created, interpreted, and applied at the highest levels of the legal system. The constitution may consist of a wide array of laws and customs, some perhaps enshrined in a document, and others developed through legislation, judgment, convention, or other practices of the constituted organs of government. As opposed to the formal document, the material constitution describes the fundamental normative architecture within which the constituted bodies function." Arato, "Constitutional Transformation in the ECtHR," p. 359.
[294] Arato, "Constitutional Transformation in the ECtHR," 360.
[295] The Brazilian Constitution of 1988 for instance entrenched as unamendable its fundamental and voting rights, the separation of powers and federative provisions.
[296] *Constitution Act, 1982*, sec. 38.

manner that alters the previous conception of a certain constitutional provision, applying *evolutive interpretation.*

Kavanagh defines interpretive evolution as a "development and change in constitutional law which occurs through the interpretations of the Constitution by the judges of the constitutional court"[297] either via a departure from the original meaning of the constitution, or via a change in case law that departs from previous decision and creates a new precedent.[298] Evolutive interpretation doctrine discourse advances that the meaning of a constitution should not be stuck in time, and that the evolution of moral and cultural values of society should be followed by an evolution of the interpretation given to constitutional documents.[299] It should further accept that the text of the constitution is not exhaustive, what allows courts to, in interpreting it, identify with support on the intention of the framers, other meanings that would concretize their intention. The evolutive interpretation doctrine is often linked to the metaphor of a *living tree* to illustrate the evolutive nature of a constitutional document. In the words of Kavanagh,

> the idea of a Constitution having 'life' refers to the growth, development and/or change in constitutional law which occurs through the decisions of the constitutional court. It thus concerns judicial development of constitutional law, rather than the constitutional change through the formal amendment process. [300]

The *living tree doctrine* was developed by the Privy Council of the United Kingdom on *Edwards v. AG Canada,*[301] commonly referred as *Persons* case, that referred to the British North America Act of 1867 (BNA Act)[302] as "a living tree capable of growth and

[297] Kavanagh, "The Idea of a Living Constitution," 56.
[298] Ibid., 67.
[299] Ibid., 68.
[300] Ibid., 55.
[301] Edwards v. Canada (Attorney General), [1930] A.C. 124, 1929 UKPC 86 (Judicial Committee of the Privy Council 1929).
[302] The BNA is a fundamental part of the Canadian constitutional framework and an important piece on separation of powers in Canada.

expansion within it natural limits."[303] In *Persons* a group of women successfully challenged before the Privy Council a provision of the BNA Act that was interpreted by the SCC as prohibiting woman from being appointed to the Canadian Senate. The Privy Council reverted a previous decision of the SCC and refused to accept originalist claims that were behind the SCC's decision.[304] Besides criticism on the intention of the Privy Council in arguing the BNA Act was a living tree[305] this terminology and doctrine "has been firmly established as a matter of Canadian constitutional bedrock"[306] specifying that "constitutional provisions are intended to provide 'a continuing framework for the legitimate exercise of governmental power.'"[307] The SCC has subsequently buttressed the necessity of interpreting the BNA progressively in order to maintain the relevance and legitimacy of the latter.[308]

Similarly to the position of the SCC, the ECtHR's position is that the ECHR "is a *living instrument* which must be interpreted in the light of *present-day conditions*[emphasis added],"[309] while the HRC believes that the ICCPR "should be interpreted as a *living instrument* and the rights protected under it should be applied in context and in the light of *present–day conditions*."[310] This position echoes on other international forum, as the Inter-American Court of Human Rights has highlighted:

> Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man […], and the European

[303] Edwards v. Canada (Attorney General), [1930] A.C. 124, 1929 UKPC 86 (Judicial Committee of the Privy Council 1929).
[304] Miller, "Origin Myth," 2.
[305] Miller argues the intention of the Privy Council was in fact to insulate the different legal systems within the Commonwealth. He supports his claim on the other arguments advanced by the Pricy Council, notably downplaying the influence of English precedent on Canada, and argues that what is a living tree is the Canadian constitutional system, not the BNA provisions in particular. Miller, "Origin Myth", p. 14.
[306] Miller, "Origin Myth," 2.
[307] R. v. Blais, [2003] 2 SCR 236, 40 (Supreme Court of Canada 2003).
[308] Reference re Same-Sex Marriage, [2004] 3 SCR 698, 2004 SCC 79 (CanLII), 23 (Supreme Court of Canada 2004).
[309] Mamatkulov and Askarov v. Turkey, Applications nos. 46827/99 and 46951/99, 121 (European Court of Human Rights 2005).
[310] Judge v. Canada, Communication No. 829/1998, 10.3 (United Nations Human Rights Committee 2003).

> Court of Human Rights, […] among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions."[311]

Evolutive interpretation doctrine has been applied by international courts even against decisions of domestic courts that applied originalist discourse. For instance, in *Karner* the ECtHR decided that the Supreme Court of Austria's ruling on interpreting a determined law in accordance with the meaning certain terms had at the time the law was enacted[312] was in violation of the ECHR.[313]

Within the HRC and ECtHR, interpretation of the international human rights treaties they oversee is heavily influenced by article 31 of the Vienna Convention on the Law of Treaties (VCLT),[314] that, as argued by Arato,[315] allows roughly two kinds of evolutive interpretation, the first based on the object and purpose of the treaty, the second being an evolution of a meaning of a term. While the former "determines a treaty or treaty provision to be evolutive on the basis of its object and purpose,"[316] the latter occurs "where a particular term or expression incorporated therein is considered inherently evolutive."[317]

---

311 "Inter-American Court of Human Rights Advisory Opinion OC-16/99," para. 114.
312 Karner v. Austria, Application no. 40016/98, 15 (European Court of Human Rights 2003).
313 Ibid., para. 43.
314 Article 31 of the VCLT, to the effect that a change in interpretation is acceptable according to international law rules, brings that "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose*. […] 3. There shall be taken into account, together with the context: (a) Any *subsequent agreement between the parties* regarding the interpretation of the treaty or the application of its provisions; (b) Any *subsequent practice in the application of the treaty* which establishes the agreement of the parties regarding its interpretation; (c) Any *relevant rules of international law* applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended." United Nations, *Vienna Convention on the Law of Treaties*, sec. 31(3)(c).
315 Arato, "Subsequent Practice and Evolutive Interpretation."
316 Arato, "Constitutional Transformation in the ECtHR," 473.
317 Citing *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, a report from the *International Law Commission*, Arato further argues that "a concept in a treaty may be considered to have an evolutive character where: (a) The concept is one which implies taking into account subsequent technical, economic or legal developments; (b) the concept sets up an obligation for further progressive development for the parties; or (c) the concept has a very general nature or is expressed in such general terms that it must take into account changing circumstances." Arato, "Constitutional Transformation in the ECtHR," 468.

The VCLT,[318] when deliberating on treaty interpretation offers a number of lessons on the possibility of evolutive interpretation of the ECHR and ICCPR.[319] As argued by Letsas, the VCLT "prioritizes the 'object and purpose' of treaties as a general rule of interpretation and assigns to preparatory works a supplementary role,"[320] what amounts to saying that achieving the object and purpose of the treaty is a more relevant interpretive technique than applying the plain intention of the framers. This position of the VCLT is crucial as it repeals originalist claims that call for a strict interpretation of the treaty as frozen in time, ignoring developments on the case law that sought realizing the object and purpose of the treaty. Claims on the ECtHR from governments requesting the ECtHR to apply a specific decision without regard to further developments are common,[321] and the VCLT's interpretive techniques are a strong rebuke to these claims.

Arato, writing specifically on the interpretive evolution of the ECHR,[322] argues that the ECtHR, when applying evolutive interpretation, considers three different tendencies. The first is with regard to "changes in the practice of an overwhelming majority of the Parties,"[323] linked to the analysis on *European Consensus*. Second, the ECtHR has applied evolutive interpretation whenever necessary to ensure the protection of a certain right remains practical and effective[324] in light of the current circumstances, a concept derived from the principle of effectiveness, "according to which a treaty may be interpreted

[318] United Nations, *Vienna Convention on the Law of Treaties*, sec. Article 31.
[319] That does not mean the VCLT is the only source of used by the doctrine. There are other significant sources of evolutive interpretation doctrine on international law, such as customary international law. Arato, "Subsequent Practice and Evolutive Interpretation." 465. For instance, the International Law Commission "makes clear […] that subsequent practice constitutes an element of interpretation equal in importance to plain-meaning, object and purpose, and context." Arato, "Subsequent Practice and Evolutive Interpretation," 458.
[320] Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 59.
[321] So did the Russian Government in *Alekseyev*, the United Kingdom government in *Dudgeon* and the Polish in *Kozak*.
[322] Arato, "Constitutional Transformation in the ECtHR."
[323] Ibid., 364.
[324] Scoppola v. Italy (no. 2), 104 (European Court of Human Rights 2009).

expansively in order to make sure all of its provisions have an independent, and according to some non-superfluous meaning."[325] Finally, relying on the VCLT,[326] the ECtHR considers developments on other regional and international normative frameworks with regard to rights protection. This analysis is what is called the *horizontal effect* of normative interpretation, explained in more details below.

Although often used to advance rights, Johnson recalls that evolutive interpretation can be used by the ECtHR both to endorse judicial conservatism when it grounds a decision on the consensus (or lack of) among Contracting States, or by judicial activism, when it is used as a tool to widen the scope of obligation Contacting States have in consequence of the ECHR. "In respect of complaints relating to homosexuality, the Court has used the living instrument doctrine in both ways."[327]

4.2. Originalists and the Limits of Evolutive Interpretation

The doctrinal opposite to evolutive interpretation discourse are originalist claims, advanced with limited degree of success before the SCC, ECtHR and HRC. In *Persons*, for instance, the Canadian government claimed[328] that the definition of 'persons' should be the same as of the time when the BNA Act was passed, a claim clearly underpinned in originalist discourse that, as argued by Letsas, "wish to tie interpretation back to the time when the law was enacted."[329]

Originalists fundamental claim is that the interpretation of a constitutional document must be constricted to the understanding it had at its inception.[330] They differ,

[325] Arato, "Subsequent Practice and Evolutive Interpretation," 473.
[326] United Nations, *Vienna Convention on the Law of Treaties*, sec. 31(3)(c).
[327] Johnson, *Homosexuality and the European Court of Human Rights*.
[328] As explained above, this position was rejected by the Privy Council.
[329] Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 60.
[330] Dorsen et al., *Comparative Constitutionalism*, 219.

nevertheless, on what should be the hallmark of this understanding: rather the intent of the framers or of the ratifiers, or the meaning contemporaries to those would have given to the constitutional text.[331] Originalists claim that courts are acting *ultra vires* when changing the interpretation given to a constitutional rule as courts lack the democratic backdrop and are not empowered by the constitution to apply evolutive interpretation. Said differently, they argue that "unless judges interpreting the Constitution adhere to its original meaning, they would inevitably distorted the nature and scope of constitutional rights, thus undermining both the Constitution and democracy."[332]

There are calls, even from within the ECtHR,[333] to halt the excessive use of evolutive interpretation. Nevertheless, such calls have little to no avail in repealing the advancements the HRC and the ECtHR have up to this date granted over LGBT rights. If a boundary is to be drawn over the powers courts have to interpret the treaties they oversee, by a number of reasons LGBT rights should not be put outside such boundary. This discussion on the limits of evolutive interpretation is of special significance in international law as the countries that signed treaties surrendered a part of their sovereignty, willing to abide to a specific treaty. It is of little surprise that claims from governments requesting the interpretation to be bound to previous precedent or interpretation are rife.

The Courts have demonstrated on their case law that they do not tend to accept originalist discourse, and as said above, that their constitutional documents are *alive*. A pure originalist doctrine might not be accepted, but that does not mean that the Courts are free to impose their position on any matter without constraints. There are inherent limits to evolutive interpretation doctrine and it is crucial to identify, in the case law of

[331] Ibid.
[332] Ibid.
[333] For example, the dissenting opinions in *Golder* and *Feltbrugge*.

the Courts, what these limits are. From a quantitative perspective, evolutive interpretation of an international human rights treaty raises a concern on the degree of commitment of a State party to the treaty. Judge Fitzmaurice, in a dissenting opinion in *Golder* highlighted this point in arguing that "extensive constructions might have the effect of imposing upon the contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming."[334] From this point, what should be questioned is not the expansion or not of a right protected by an international treaty, but rather if the expansion is within the authority an international court has.[335]

Roughly speaking, the boundaries for evolutive interpretation based on terminology lies on external meaning that judges can obtain for the term under question, and for evolution based on the object and purpose of the treaty, the boundary is the necessity of the evolution to maintain the effectiveness of the treaty's object and purpose.[336] For instance, the ECtHR precedent prohibits it from "insert[ing] a right into the text that was not there at the outset – particularly where this omission was deliberate."[337] It has said repeatedly that evolutive interpretation of the ECHR "may expand certain rights—even dramatically—but it cannot create new rights that were not already incorporated in the instrument." [338] The ECtHR, nevertheless, is often under criticism due to its tendency in expanding the scope of rights. It had, for instance, in *Young, James and Webster v. the United Kingdom* decided against the preparatory works that explicitly mentioned the ECHR would not include rules permitting individuals not to join

[334] Golder v. the United Kingdom, Application no. 4451/70, dissenting opinion of Judge Fitzmaurice, paragraph 39 (European Court of Human Rights 1975).
[335] Arato, "Constitutional Transformation in the ECtHR," 353.
[336] Arato, "Subsequent Practice and Evolutive Interpretation," 477.
[337] Ibid., 466.
[338] Arato, "Constitutional Transformation in the ECtHR," 364.

associations. This decision, followed by *Feldbrugge v. the Netherlands*, had strong dissenting opinions on the powers of the ECtHR to interpret rights expansively.[339]

In an attempt to conciliate the claims of the dissenters, it later decided in *Johnston v. Ireland*, a case questioning the denial of the right to re-marry[340] imposed by the Irish Constitution, that whenever a limitation on a right was intentionally included the ECtHR could not decide on expanding the right contradicting such limitation, even though social developments on the matter were different to those verified when the ECHR was drafted.[341] The ECtHR grounded its decision in *Johnston* on the fact that the ECHR did omit the right to dissolution of marriage, and that this omission was intentional.[342] Differently from the SCC that changed its interpretation on what amounts to marriage, as explained below, the ECtHR argued that the preparatory works[343] of the ECHR intentionally refused to include the right to dissolve a marriage,[344] and therefore it could not, "by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset."[345]

The SCC, taking a similar approach in identifying limits to evolutive doctrine discourse, in *R. v. Blais* decided against a claim that asked the *living tree doctrine* to be applied in a fashion that would extend the definition of 'Indians.'[346] The appellant on *Blais*

[339] Notably on *Feldbrugge*, the seven dissenting judges argued that although the ECHR allow and even require evolutive interpretation to be applied, "it does not allow entirely new concepts or spheres of application to be introduced into the Convention: that is a legislative function that belongs to the member States of the Council of Europe." Feldbrugge v. the Netherlands, Application no. 8562/79 (European Court of Human Rights 1986).
[340] The applicants intentionally argued their complaint was not on the right to divorce, but instead on the right to re-marry. Johnston and Others v. Ireland, Application no. 9697/82 paragraph 50.
[341] Johnston and Others v. Ireland, Application no. 9697/82, 53 (European Court of Human Rights 1986).
[342] Ibid.
[343] In a decision that goes against its reasoning in Johnston, in *Young, James and Webster* the ECtHR decided against the preparatory works that explicitly mentioned the ECHR would not include rules permitting individuals *not* to join associations, indicating its position regarding the weight given to the intention of the framers of not including a right might be downplayed. Interestingly this decision was prior to *Johnston*.
[344] Johnston and Others v. Ireland, Application no. 9697/82, 52 (European Court of Human Rights 1986).
[345] Ibid., para. 53.
[346] R. v. Blais, [2003] 2 SCR 236, 42 (Supreme Court of Canada 2003).

sought the SCC for relief in a conviction on hunting deer on Crown land out of season, claiming[347] an exception that allows Indians to hunt throughout the year should be applied to him, a Métis.[348] The SCC refused to accept the claim and withheld his conviction, on grounds that are understood as a clear example on the limitations of the living tree doctrine. It stated that the SCC "is not free to invent new obligations foreign to the original purpose of the provision at issue,"[349] therefore the doctrine could not be used to expand the historical purpose of constitutional provision. It further added that the Court should "anchor the analysis in the historical context of the provision,"[350] establishing a natural limit on the growth of the living tree.

Within the ECtHR, the precedent of limitation of evolutive interpretation it settled in *Johnston* has been weakened in subsequent decisions, notably in *López-Ostra v. Spain*[351] and *Öcalan v. Turkey*.[352] In the first case, the ECtHR controversially read into article 8 protection of home, private and family life a right to a healthy environment,[353] despite no indication on the ECHR of this protection,[354] whereas in *Öcalan* it understood the subsequent practice of Contracting States to enable a change in the text of the ECHR, despite the fact a Protocol[355] enacting this textual amendment was yet to be ratified by Turkey.[356]

[347] Ibid., para. 9.
[348] Métis is an ethnic group of persons with both Native Americans of Canada and European settlers' ancestry.
[349] R. v. Blais, [2003] 2 SCR 236, 40 (Supreme Court of Canada 2003).
[350] Ibid.
[351] López-Ostra v. Spain, Application no. 16798/90 (European Court of Human Rights 1994).
[352] Öcalan v. Turkey, Application no. 46221/99 (European Court of Human Rights 2005).
[353] López-Ostra v. Spain, Application no. 16798/90, 58 (European Court of Human Rights 1994).
[354] Arato, "Subsequent Practice and Evolutive Interpretation," 453.
[355] Protocol No. 6 to the ECHR, prohibiting death punishment in peacetime.
[356] Arato, on this matter, says that "[t]he Grand Chamber issued dicta in *Öcalan* that the overwhelming increase in member state practice abolishing the death penalty during peace-time de jure since *Soering* was now likely enough to find that the members intended by their subsequent practice to amend the ECHR, thus obliging even the three states that had not yet abolished the penalty to do so." Arato, "Subsequent Practice and Evolutive Interpretation," 463. The ECtHR in *Öcalan* advanced that the "practice within the Member States could give rise to an amendment of the Convention […] and hence remove a textual limit on the scope for evolutive interpretation." Öcalan v. Turkey, Application no. 46221/99.

Regardless of the opposition interpretive evolution doctrine faces in all three jurisdictions and the attempts to limit its applicability, evolutive interpretation is a valid method of interpretation that is extensively applied by all three Courts. In short, the ICCPR, ECHR and both the Charter and other constitutional provisions of Canada are understood to be *alive*, and their provisions, when interpreted, should be done in consideration of the *present-day conditions*, otherwise the efficacy of their provisions would have their efficiency curtailed.

4.3. Canadian Constitution Being Reinvented

A notable case to illustrate the application of the living tree doctrine by the SCC is found in *Reference re Same-Sex Marriage* (henceforth *Reference*), a reference question sent by the Government of Canada to the SCC enquiring about certain aspects of a proposed legislation to allow same-sex couples to enter civil marriages. In answering the questions of the Government, the SCC stressed the principles of the *living tree doctrine*, notably in regard to possible changes of interpretation of the meaning of *marriage* and the compatibility of such change with the Charter. The SCC held that the definition of *marriage* is to be understood in light of present day conditions, and that same-sex marriage is compatible with provisions of the Charter.[357]

The SCC decided that the Legislative Powers the BNA Act granted to the federal Parliament of Canada to legislate on matters of marriage encompasses the power to permit same-sex marriages. This position went against claims advanced by interveners that the meaning of the term *marriage* is a *frozen concept* on the BNA and consequently should be entrenched reflecting the meaning it would have had in 1867.[358] The answer of

[357] Reference re Same-Sex Marriage, [2004] 3 SCR 698, 2004 SCC 79 (CanLII) (Supreme Court of Canada 2004).
[358] Ibid., para. 27.

the SCC further repealed a precedent set up in *Hyde v. Hyde*, a case from 1866, that had marriage "defined as the voluntary union for life of one man and one woman, to the exclusion of all others."[359]

Claims against the evolutive interpretation of the BNA were based on the alleged historicity of the marriage as a pre-legal institution and on the impossibility of changing it by law, on the fact same-sex marriage falls outside of the natural *limits of the living tree doctrine*, and finally that the intention of the framers when defining the limits of Parliamentary powers should be final.[360] These claims seem to have been inspired by the decision of the SCC on *Blais*, besides no direct reference on the decision of the SCC. The reasoning of the SCC in *Reference*, when repealing claims based on *Blais* that it should "anchor the analysis in the historical context of the provision"[361] is elucidative on what influences changes in position of the SCC. Moreover, it also highlights the limits of the *living tree doctrine*.

When questioning the precedent from *Hyde*, the SCC emphasizes that when this case was decided, Canada had more homogenous social values,[362] what was not the case any longer. Writing that "Canada is a pluralistic society"[363] and supporting its position on *Persons,* the SCC advanced that

> [t]he "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.[364]

[359] Ibid.
[360] Ibid.
[361] Ibid.
[362] Ibid., para. 22.
[363] Ibid., para. 27.
[364] Ibid.

The conception of the *living tree*, according to the SCC, allows the BNA Act to be interpreted based on the current standards held by the Canadian society,[365] therefore permitting the interpretation of the term *marriage* to be expanded and cover also same-sex unions. In repealing the argument that the redefinition of marriage is outside legal scope, the SCC used the reasoning of *Persons* to decide that, although historically women were understood not to be fit for public service and that marriage was exclusively between a man and a woman, that was not the reality of the current times, and that such historical assertions could not be used to legally hold either *persons* or *marriage* as frozen concepts, highlighting that the following passage in *Persons:*

> Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.
> The appeal to history therefore in this particular matter is not conclusive.[366]

As mentioned above, the living tree envisioned in *Persons* is "capable of growth and expansion within its natural limits."[367] With support on this passage, in *Reference* interveners argued that redefining *marriage* would be outside the natural limits of the capable growth of the living tree, and that in accepting the term to cover same-sex marriages would amount to amending the BNA. Refuting this claim, the SCC found that this argument failed as it did not indicate that the "objective core of meaning which defines what is "natural" in relation to marriage"[368] would suffice the define marriage only as a voluntary union between two people of different sex.[369]

[365] The SCC recognizes the limitations of evolutive interpretation, as argued in 4.2 above.
[366] Edwards v. Canada (Attorney General), [1930] A.C. 124, 1929 UKPC 86, 134 (Judicial Committee of the Privy Council 1929).
[367] Ibid., 136.
[368] Reference re Same-Sex Marriage, [2004] 3 SCR 698, 2004 SCC 79 (CanLII), 27 (Supreme Court of Canada 2004).
[369] Ibid.

The SCC was also questioned in *Reference* about the consistency of the proposed legislation to allow same-sex marriages with the Charter. It found that "the proposed legislation is consistent with the Charter,"[370] identifying no curtailment of Charters rights. The SCC further argued that

> [t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of Charter rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the Charter was meant to foster.[371]

As expressed above, evolutive interpretation technique, understood as a shift in interpretation, led to advancements of rights to LGBT by the SCC on many different grounds, notably on the protection of LGBT couples and prohibition of discrimination. The position of the SCC on evolutive nature of its constitutional provisions and the necessity to protect LGBTs from discrimination are strongholds Canadians can rely on to ensure sexual minorities are not to be harms by statutes intolerant as propaganda laws.

4.4. Evolutive Interpretation at the ECtHR & HRC

The reasoning applied by the HRC and ECtHR with regard to evolutive interpretation is intrinsically similar, although its position is not as developed on the former as it is on the latter. This similarity is a notable example of the horizontal effects of a decision verified within international courts grounded on VCLT article 31(3)(c). It is in *Judge v. Canada*[372] that the HCR stated that it "considers that the Covenant should be

[370] Reference re Same-Sex Marriage, [2004] 3 SCR 698, 2004 SCC 79 (CanLII) (Supreme Court of Canada 2004).
[371] Ibid., para. 45.
[372] In *Judge* the HRC addressed a complaint that questioned the compatibility of the ICCPR with a decision from Canada, a country that has abolished death penalty, to extradite an individual to another country that allowed such punishment, without previously assuring that the individual would not face such punishment. The HRC found a violation of the right to life of the complainant. Judge v. Canada, Communication No. 829/1998 (United Nations Human Rights Committee 2003).

interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present–day conditions."[373]

With regard to LGBT rights, the HRC's case law, in reasoning over evolutive interpretation, led to an increase in acceptance such rights and, conversely, a limitation to accept morality-based limitation on ICCPR's rights. Since *Hertzberg v. Finland*, when it understood that limiting expression rights with the aim of protecting morals was within the margin of discretion granted to national authorities,[374] the HRC has changed its position on LGBT rights on several different matters, as already discussed above. For example, since *Toonen v. Australia*[375] it is understood by the HRC that a criminal law discrimination on grounds of sexual orientation amounts to a violation of article 26 protection of equality.[376] A similar reasoning was applied on *Fedotova v. Russia*, in which the HRC saw the Ryazan's anti-LGBT propaganda law as in violation of the applicant's equality and expression rights.[377] Evolutive interpretation discourse was the main tool behind the shift in position from accepting morality-based arguments as valid grounds to trump expression rights and to deem anti-LGBT propaganda laws as a violation on not only expression rights but also equality provisions.

Within the ECtHR, evolutive interpretation has also caused a major shift on the court's position of LGBT rights. Since *Golder v. the United Kingdom*, when the ECtHR downplayed originalist claims and read into article 6 of the ECHR the right to access to courts, regardless of the omission on the text,[378] there has been a stable path on

[373] Ibid., para. 10.3.
[374] Leo Hertzberg et al. v. Finland, Communication No. 61/1979, 10.3 (United Nations Human Rights Committee 1982).
[375] Nicholas Toonen v. Australia, Communication No. 488/1992 (United Nations Human Rights Committee 1994).
[376] Ibid., para. 8.7.
[377] Fedotova v. Russian Federation, Communication No. 1932/2010, 10.8 (United Nations Human Rights Committee 2012).
[378] Golder v. the United Kingdom, Application no. 4451/70 (European Court of Human Rights 1975).

recognition of rights to LGBT subjects related to their sexual orientation and gender identity by virtue of evolutive interpretation.

The underlying question in *Golder* and in a number of cases that raised the standards of protection of LGBT rights was a discussion similar to the one that takes place in American constitutional law debates on *unenumerated rights*. The ECtHR in its decision on *Golder* read the right to access to court within article 6 despite it was not explicitly mentioned, as if this right was not enumerated but implicit on the ECHR. The ECtHR claimed that it was not forcing new obligations on Contracting States, but merely based its decision on the terms of article 6 "read in its context and having regard to the object and purpose of the Convention."[379] This technique led the ECtHR to read into provisions of the ECHR, as already explained above, a number of other rights to LGBTs not explicitly mentioned on the convention.

Article 8 cases provide an additional insight on the position of the ECtHR on unenumerated rights. It has, for instance and as discussed on previous chapters, read into this article the right to a clean environment, the right of a child to development, and the right to sexual intimacy between same-sex couples. The ECtHR, since *Golder*, has further developed its case law and advanced other core doctrines related to evolutive interpretation, notably the *living instrument*, *autonomous concepts*, and *practical and effective*,[380] briefly explained below.

In repealing arguments that corporal punishments were not in violation of article 3 protection against unhuman or degrading punishments, the ECtHR in *Tyrer v. the United Kingdom* stressed "that the Convention is a living instrument which […] must be interpreted in the light of present-day conditions,"[381] accepting the influence exerted by

[379] Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 63.
[380] Letsas, *A Theory of Interpretation of the European Convention on Human Rights*.
[381] Tyrer v. the United Kingdom, Application no. 5856/72, 31 (European Court of Human Rights 1978).

the great majority of Contracting States that had did not use such modality of punishment. In *Tyrer* the ECtHR declared its authority to engage in interpretation on a manner that takes into account changes on the values of the European societies before issuing a decision.[382]

The court developed the autonomous interpretation doctrine in *Engel v. the Netherlands* when it decided that, regardless of the terminology used by a Contracting States, a determined action, if to be deemed as a criminal or administrative offense, "must be examined in the light of the common denominator of the respective legislation of the various Contracting States." [383] The ECtHR reached this decision by measuring the degree of fair trial rights to be granted to an individual while being indicted – administrative charges do not confer ECHR's article 6 and 7 protection, whereas a criminal charge does. Therefore, penalties of "deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental"[384] should be assigned to the criminal sphere.

The practical and effective doctrine was developed by the ECtHR in *Airey v. Ireland*, a case that had the applicant claiming the prohibitive judicial costs and intricate procedures for obtaining a judicial separation in Ireland amounted to a violation of right to access to court. The ECtHR decided that in not putting in place measures that would either simplify the procedures or provide legal aid rendered the right to access to court "theoretical or illusory,"[385] extending the scope of article 6-1 to include positive rights.

After applying the above-mentioned techniques, the ECtHR often used the *European consensus* analysis to identify a change of opinion on a certain matter on the

[382] Johnson, *Homosexuality and the European Court of Human Rights*.
[383] Engel and others v. the Netherlands, Applications No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 82 (European Court of Human Rights 1976).
[384] Ibid.
[385] Airey v. Ireland, Application No. 6289/73, 24 (European Court of Human Rights 1979).

majority of the Contracting States, what might lead to a different margin of appreciation granted by the ECtHR to the Contracting State on this matter. Depending on how strong the majority adopting a certain position is and how stablished is such practice, it "could be taken as establishing the agreement of the Contracting States […] to remove a textual limit on the scope for evolutive interpretation."[386] The ECtHR, when analysing the 'present day conditions' scrutinizes what are the current standards not only within the jurisdiction of the Council of Europe, but also on other notable international and domestic courts. For instance, Johnson argues that "the Court [ECtHR] often suggests that it merely amplifies the collective morality of member states – interpreting the convention 'in the light of present-day conditions'".[387]

In that matter, the VCLT, on article 31(3), advances that the *subsequent practice* or *agreement* between the parties to a treaty regarding the application or interpretation is a criterion to be considered by courts when interpreting a treaty. Both the HRC and the ECtHR have referred to this article when interpreting the treaties they oversee.[388]

4.5. LGBT rights birth and blossom at the ECtHR

As argued above, a refusal of the evolution of the interpretation given to the ICCPR and ECHR is inherent to the proposition of anti-LGBT propaganda laws. Such laws are in denial of the spectrum of rights granted to sexual minorities notably over the last decades, and besides being party to both the ICCPR to its first optional protocol and to the ECHR, European countries[389] proposing propaganda laws are rhetorically attempting to stop the

[386] Soering v. the United Kingdom, Application no. 14038/88, 103 (European Court of Human Rights 1989).
[387] Johnson, *Homosexuality and the European Court of Human Rights*, 13.
[388] For example, the HRC in *Young v. Canada* and the ECtHR in *Loizidou v. Turkey (Preliminary objections)*.
[389] Belarus has also proposed an anti-LGBT propaganda law and it is not a party to the ECHR.

evolutive interpretation of the ECHR and ICCPR in a point in time that would benefit their claims on the necessity and proportionality of such laws.[390]

From the applications complaining of sodomy laws in Europe the European Commission of Human Rights rejected, to *Handyside* and the acceptance that offensive, shocking or disturbing content is also covered by expression rights, to *Dudgeon* and the protection of the private sphere, sexual intimacy and acceptance of the ontological nature of homosexuality, passing to *Salgueiro* and the prohibition of discrimination on grounds of sexual orientation, to finally *Alekseyev* and the beginning of the recognition of public aspect rights of LGBT, the ECtHR has slowly but steadily writing a history of acceptance and normalization of homosexuality. It might not yet "found in favour of a gay or lesbian applicant who has lodged an Article 10 complaint,"[391] but it has strongly indicated that it will decide in this direction on its subsequent cases.

In adjudicating different rights in cases related to LGBTs, it is beyond doubt that the SCC, the HRC and the ECtHR, each using their own techniques, have advanced rights to LGBTs on many different aspects. What it is also beyond doubt is that the attempts of former soviet countries to limit rights of LGBTs via propaganda laws run counter to the plethora of rights advanced to LGBTs, be them on privacy, family, expression, or equality grounds, violating the protections LGBTs fought hardly to enjoy.

[390] As extensively argued above, the Russian government in *Alekseyev* and *Fedotova* attempted to use the previous case law of the HRC and ECtHR to buttress their claim that a ban on LGBT parades and on LGBT propaganda was in accordance with the case law of these two international courts and that the measures were within the margin of appreciation (or discretion) their government enjoyed to protect the morals and rights of its constituents.

[391] Johnson, *Homosexuality and the European Court of Human Rights*.

Conclusion

The underlying question of this research was if the anti-LGBT propaganda laws, passed or discussed in Eastern Europe, were in accordance with the current standards of protection of human rights established by the ECtHR, the HRC of the United Nations, and by the SCC, considering the case law of these tribunals, in particular considering the Canadian *living tree doctrine* and the evolutive interpretation of constitutions this doctrine defends.

The research answered the question by stating the anti-LGBT propaganda laws are not in accordance with the rights protected by the Courts, notably on privacy, equality and freedom of expression rights. The evolutive nature of constitutional documents, their bill of rights included, allow the adaptation of the interpretation of such provisions in light of the current moral and legal standards, what has forced the ECtHR, HRC and SCC to change their case law and absorb into their precedents the overall acceptance of homo and bisexuality of the constituents under their jurisdiction.

Regardless of, e.g., previous decisions that supported sodomy laws and that regarded protection of children as grounds sufficient to trump expression rights of LGBTs, the case law of the Courts evolved to a degree that anti-LGBT propaganda laws, regardless of the aims they allegedly attempt to achieve, are not *proportionate* nor *necessary* in a democratic society, therefore in violation of rights enshrined on the Charter, ICCPR and ECHT. In other words, this thesis presented that children rights and protection of morality are, generally speaking, considered as legitimate aims of measures that limit expression rights. The inherent problem of the proposed and passed anti-LGBT propaganda laws is that they are not, by any means, proportionate to the aim they pursue.

Such homophobic legislations deny the development of LGBT rights in the two most important fora of international human rights, the HRC and the ECtHR, and attempt

to fundament claim on the necessity of this kind of laws on arguments that have been extensively repealed in both fora. Nevertheless, notably in the case of the ECtHR, the impossibility of arguing successfully before this court that anti-LGBT propaganda laws are in accordance of the ECHR standards of protection of LGBT rights does not mean that that its case law is comprehensively protective of LGBTs.

It presented the shortfalls of the case law of ECtHR on protection of sexual minorities, most notably its reluctance to protect public life aspects of homosexuality, besides developments over the last five years. It mentioned *Bayev v. Russia*, pending before the ECtHR, that has the potential of closing such gap and helping ensure a wholesome protection of LGBTs within the Council of Europe's jurisdiction, more specifically on freedom of expression matters. Drawing lessons from the SCC case law, the research argued that the meaning given to certain terms on a constitutional document should not be stuck in time, at the expense of turning such constitutional document irrelevant and illegitimate.

It would be most welcoming to the protection of LGBT rights within the jurisprudence of the ECtHR if instead of simply relying in *Alekseyev* and arguing propaganda laws are in violation of the ECHR, it could increase the moral weight it gives to rights of homosexuals, and also further develop the protection of homosexuality on public sphere. The ECtHR should as well present that it does not accept developments that curtail rights already recognized and that even if this trend is verified amongst more than one member, it should not be seen as a change in consensus.

Bibliography

Primary Sources

Canadian Charter of Rights and Freedoms, *Constitution Act, 1982*.

Canadian Constitution Act, 1867.

Council of Europe. *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Vol. ETS 5, 1950.

Draft No. 10290. Ukrainian Parliament (Supreme Council).

Draft no. 1155 of the Ukrainian Parliament (Supreme Council).

Federal Law No. 436-FZ. Russian Federation Duma.

Federal Law No. 124-FZ. Russian Federal Duma.

International Covenant on Civil and Political Rights (ICCPR). *United Nations, Treaty Series, Vol. 999, P. 171*, 1966.

Law on Administrative Offences. Ryazan Parliament, *No. 182-OZ*.

Law on The protection of children's health and morality. Ryazan Parliament, *No. 41-OZ*.

Law on the Protection of Minors against the Detrimental Effect of Public Information. Parliament of the Republic of Lithuania, No IX-1067.

New Zealand Human Rights Act 1993, 1993.

United Nations. *Vienna Convention on the Law of Treaties*. *United Nations, Treaty Series, Vol. 1155, P. 331*, 1969.

Judgements

Airey v. Ireland, Application No. 6289/73, (European Court of Human Rights 1979).

Alekseyev v. Russia, Applications nos. 4916/07, 25924/08 and 14599/09, (European Court of Human Rights 2010).

Dudgeon v. the United Kingdom, Application no. 7525/76, (European Court of Human Rights 1981).

Edward Young v. Australia, Communication No. 941/2000, (United Nations Human Rights Committee 2003).

Edwards v. Canada (Attorney General), [1930] A.C. 124, 1929 UKPC 86, (Judicial Committee of the Privy Council 1929).

Egan v. Canada, [1995] 2 SCR 513, (Supreme Court of Canada 1995).

Engel and others v. the Netherlands, Applications No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, (European Court of Human Rights 1976).

Fedotova v. Russian Federation, Communication No. 1932/2010, (United Nations Human Rights Committee 2012).

Feldbrugge v. the Netherlands, Application no. 8562/79, (European Court of Human Rights 1986).

Golder v. the United Kingdom, Application no. 4451/70, (European Court of Human Rights 1975).

Handyside v. The United Kingdom, Application no. 5493/72, (European Court of Human Rights 1976).

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927, (Supreme Court of Canada 1989).

Johnston and Others v. Ireland, Application no. 9697/82, (European Court of Human Rights 1986).

Judge v. Canada, Communication No. 829/1998, (United Nations Human Rights Committee 2003).

Karner v. Austria, Application no. 40016/98, (European Court of Human Rights 2003).

Kozak v. Poland, Application no. 13102/02, (European Court of Human Rights 2010).

K.U. v. Finland, Application no. 2872/02, (European Court of Human Rights 2009).

L. v. Finland, Application no. 25651/94, (European Court of Human Rights 2000).

Leo Hertzberg et al. v. Finland, Communication No. 61/1979 (United Nations Human Rights Committee 1982).

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 SCR 1120, (Supreme Court of Canada 2000).

Loizidou v. Turkey (preliminary objections), (European Court of Human Rights 1995).

López-Ostra v. Spain, Application no. 16798/90, (European Court of Human Rights 1994).

Mamatkulov and Askarov v. Turkey, Applications nos. 46827/99 and 46951/99, (European Court of Human Rights 2005).

M. v. H., [1999] 2 SCR 3, (Supreme Court of Canada 1999).

Müller and others v. Switzerland, Application No. 10737/84, (European Court of Human Rights 1988).

Nicholas Toonen v. Australia, Communication No. 488/1992 (United Nations Human Rights Committee 1994).

Öcalan v. Turkey, Application no. 46221/99, (European Court of Human Rights 2005).

Odièvre v. France, Application No. 42326/98, (European Court of Human Rights 2003).

Öllinger v. Austria, Application no. 76900/01, (European Court of Human Rights 2006).

Ötto-Preminger-Institut v. Austria, Application no. 13470/87, (European Court of Human Rights 1994).

Peck v. the United Kingdom, Application No. 44647/98, (European Court of Human Rights 2003).

R. v. Blais, [2003] 2 SCR 236, (Supreme Court of Canada 2003).

R. v. Butler, [1992] 1 SCR 452, (Supreme Court of Canada 1992).

R. v. Oakes, [1986] 1 SCR 103, (Supreme Court of Canada 1986).

Reference re Same-Sex Marriage, [2004] 3 SCR 698, 2004 SCC 79 (CanLII), (Supreme Court of Canada 2004).

Ross v. New Brunswick School District No. 15, [1996] 1 SCR 825, (Supreme Court of Canada 1996).

S. and Marper v. the United Kingdom, Applications nos. 30562/04 and 30566/04, (European Court of Human Rights 2008).

Salgueiro da Silva Mouta v. Portugal, Application no. 33290/96, (European Court of Human Rights 2000).

Schalk and Kopf v. Austria, Application no. 30141/04, (European Court of Human Rights 2010).

Scoppola v. Italy (no. 2), (European Court of Human Rights 2009).

Sejdić and Finci v. Bosnia and Herzegovina, Applications nos. 27996/06 and 34836/06, (European Court of Human Rights 2009).

Smith and Grady v. the United Kingdom, Applications nos. 33985/96 and 33986/96, (n.d.).

Söderman v. Sweden, Application no. 5786/08, (European Court of Human Rights 2013).

Soering v. the United Kingdom, Application no. 14038/88, (European Court of Human Rights 1989).

Trinity Western University v. British Columbia College of Teachers, [2001] 1 SCR 772, (Supreme Court of Canada 2001).

Tyrer v. the United Kingdom, Application no. 5856/72, (European Court of Human Rights 1978).

Vejdeland v. Sweden, Application no. 1813/07, (European Court of Human Rights 2012).

Secondary Sources

Arato, Julian. "Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, October 30, 2011. http://papers.ssrn.com/abstract=1951547.

———. "Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences." *The Law & Practice of International Courts and Tribunals* 9, no. 3 (January 1, 2010): 443–94. doi:10.1163/157180310X539511.

Article 19. "Traditional Values? Attempts to Censor Sexuality. Homosexual Propaganda Bans, Freedom of Expression and Equality." Article 19, March 7, 2013. http://www.refworld.org/docid/513da4692.html.

Bala, Nicholas. "The Charter of Rights & Child Welfare Law." The National Judicial Institute, Ottawa, Canada, 2002.

Chaffey, Douglas Camp. "The Right to Privacy in Canada." *Political Science Quarterly* 108, no. 1 (1993): 117–32. doi:10.2307/2152488.

Dorsen, Norman, Michel Rosenfeld, András Sajó, and Susanne Baer, eds. *Comparative Constitutionalism: Cases and Materials*. 2nd ed. American Casebook Series. St. Paul, MN: Thomson/West, 2010.

"Duma Passes Homosexuality Bill." *RadioFreeEurope/RadioLiberty*. Accessed January 8, 2016. http://www.rferl.org/a/russia-homosexuality-law-duma-protest/25013537.html.

Engle, Eric. "Gay Rights in Russia? Russia's Ban on Gay Pride Parades and the General Principle of Proportionality in International Law." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, July 22, 2013. http://papers.ssrn.com/abstract=2296803.

"Family and Demography Foundation Defends Russian Ban on Homosexual Propaganda among Children before European Court of Human Rights." Accessed June 28, 2016. http://en.familypolicy.ru/read/323.

"General Comment No. 3 (2003): HIV/AIDS and the Rights of the Child." UN Committee on the Rights of the Child (CRC), March 17, 2003. CRC/GC/2003/3.

"General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)." UN Committee on the Rights of the Child (CRC), April 17, 2013. CRC/C/GC/15.

"General Comment No. 34, Article 19, Freedoms of Opinion and Expression." UN Human Rights Committee (HRC), September 12, 2011. CCPR/C/GC/34.

Helfer, Laurence R. "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, October 18, 2007. http://papers.ssrn.com/abstract=1021798.

"Human Rights, Sexual Orientation and Gender Identity : Resolution Adopted by the Human Rights Council." UN Human Rights Council, October 2, 2014. A/HRC/RES/27/32.

"Inter-American Court of Human Rights Advisory Opinion OC-16/99: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law." *UNHCR*. Accessed September 30, 2014. http://www.unhcr.org/4bfb8da09.html.

Issaeva, Maria, and Maria Kiskachi. "Immoral Truth vs. Untruthful Morals? Attempts to Render Rights and Freedoms Conditional upon Sexual Orientation in Light of Russia's International Obligations." *Russian Law Journal* II, no. I (n.d.): 82–105.

Johnson, Paul. "'Homosexual Propaganda' Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?" SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, July 8, 2013. http://papers.ssrn.com/abstract=2251005.

Johnson, Paul R. *Homosexuality and the European Court of Human Rights*. Abingdon, Oxon ; New York: Routledge, 2012.

Kavanagh, Aileen. "The Idea of a Living Constitution." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, October 2, 2003. http://papers.ssrn.com/abstract=418749.

Lau, Holning. "Sexual Orientation: Testing the Universality of International Human Rights Law." *The University of Chicago Law Review* 71, no. 4 (2004): 1689–1720.

Letsas, George. *A Theory of Interpretation of the European Convention on Human Rights*. Oxford University Press, 2007.

Machiavelli, Niccolò. *The Prince*. Grant Richards, 1903.

Meyer, Scott James. "The Constitutional Potential of the European Court of Human Rights." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, October 31, 2012. http://papers.ssrn.com/abstract=2169166.

Meyerson, Denise. "The Legitimate Extent of Freedom of Expression." *The University of Toronto Law Journal* 5, no. 3 (Summer 2002): 331–48.

Miller, Bradley W. "Origin Myth: The Persons Case, the Living Tree, and the New Originalism." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, September 28, 2011. https://papers.ssrn.com/abstract=1935018.

"On the Issue of the Prohibition of so-Called 'Propaganda of Homosexuality' in the Light of Recent Legislation in Some Member States of the Council of Europe." Opinion. European Commission for Democracy Through Law, June 14, 2013.

Parliamentary Assembly. "Child and Teenage Suicide in Europe: A Serious Public-Health Issue." Council of Europe, April 16, 2008.

"Recommendation of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity." Council of Europe: Committee of Ministers, March 31, 2010. https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)5&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true.

"Report of the Human Rights Council on Its Twenty-First Session." Human Rights Council of the United Nations, August 26, 2013.

"Russian Ombudsman Calls for Damnation of Officials Supporting 'nontraditional' Families." *Queer Russia: Live LGBTQ News & Views Feed*. Accessed June 29, 2016. http://queerussia.info/2013/11/19/2569/.

Ryder, Bruce. "Egan v. Canada: Equality Deferred, Again." *Canadian Labour & Employment Law Journal* 4 (1996): 101.

Sajó, András. *Freedom of Expression*. Warszawa: Instytut Spraw Publicznych, 2004.

———. *Limiting Government: An Introduction to Constitutionalism*. Budapest: CEU Press, 1999.

Sweet, Alec Stone, and Jud Mathews. "Proportionality Balancing and Global Constitutionalism." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 2008. http://papers.ssrn.com/abstract=1569344.

Tolstoy, Leo. *Confession*. W. W. Norton, Incorporated, 1996.

Walker, Shaun. "Vladimir Putin: Gay People at Winter Olympics Must 'Leave Children Alone.'" *The Guardian*, January 17, 2014, sec. World news. http://www.theguardian.com/world/2014/jan/17/vladimir-putin-gay-winter-olympics-children.

Zion, Mark. "Effecting Balance: Oakes Analysis Restaged." *Ottawa Law Review* 43 (January 1, 2012): 431.