

Margin of Appreciation Gone Awry: The European Court of Human Rights' Implicit Use of the Precautionary Principle in *Fretté v. France* to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation

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I. INTRODUCTION

In *Fretté v. France*, the European Court of Human Rights (the Court) confronted the issue of whether France could discriminate on the basis of sexual orientation in its adoption procedures in conformity with the European Convention on Human Rights and Fundamental Freedoms (the Convention)¹. This Note argues that in determining that France was justified in its discrimination, the Court abused the margin of appreciation principle, by collapsing it into something akin to the precautionary principle, which the European Court of Justice uses to interpret the economic treaties of the European Union. This Note will further argue that even within the context of the precautionary principle as applied by the European Court of Justice, this form of discrimination is not justified, and that this principle is not appropriate in the human rights context. This Note concludes by warning that the European Court of Human Rights' failure to provide an adequate justification for their retreat from human rights principles—that they themselves have proclaimed—represents a dangerous politicization of the Court and a grave threat to the Convention itself.

II. THE FACTS AND PROCEDURE

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¹ European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

In 1991, Philippe Fretté, a single French man, sought to adopt a child.² In France, one must first apply for authorization before proceeding through the adoption procedure.³ It was in October of 1991 when Mr. Fretté made his application for authorization to Paris Social Services.⁴ During this process he admitted to the Social Services workers that he was homosexual.⁵

Article 343-1 of the French Civil Code provided that, “[a]doption may . . . be applied for by any person over twenty-eight years of age” (The age-limit was thirty at the time of the facts of the case.)⁶ Decree No. 85-938 of the 23rd of August 1985 established the procedure for the appraisal of applications for authorization to adopt a child in State care.⁷ Article 4 provided that, “[i]n assessing the application, the head of the children’s welfare services shall conduct all the investigations required to ascertain what kind of home the applicant is likely to offer the children from a psychological, child-rearing and family perspective”⁸ Article 9 provided that “[t]he applicant’s age or matrimonial status or the presence of children in his or her household may not constitute the sole reason for a denial.”⁹ Some ten percent of all applications are denied.¹⁰

The Paris Social Services Department initially denied Mr. Fretté authorization to adopt on the ground that he had “‘no stable maternal role model’ to offer” and had “‘difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child.’”¹¹ In denying Mr. Fretté authorization to adopt, the Social Services Department issued a report that concluded among other things that Mr. Fretté had a female friend who promised to act as a female role model for the child, that he had “‘undoubted personal qualities and an aptitude for bringing up children,” that a “‘child would probably be happy with him,” but that “‘he only realized when we visited his home how unsuited

² Fretté v. France, App. No. 36515/97, Eur. Ct. H.R., HUDOC Ref. No. REF00003291, at ¶9, available at <http://www.hudoc.echr.coe.int/eng>.

³ Fretté at ¶15.

⁴ *Id.* at ¶9.

⁵ *Id.*

⁶ *Id.* at ¶17.

⁷ *Id.* at ¶19.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at ¶20.

¹¹ *Id.* at ¶10.

his flat is for a child to live in.”¹² The report of March 2, 1993 concluded that the ultimate question was “whether his particular circumstances as a single homosexual man allow him to be entrusted with a child.”¹³

On the 21st of May 1993, Mr. Fretté asked the authority to reconsider its decision, but it refused.¹⁴ Mr. Fretté appealed the decision to the Paris Administrative Court, which set aside the decision of the Paris Social Services Department.¹⁵ The Administrative Court dismissed “the no stable maternal role model” and the inability “to envisage the consequences of the arrival of a child” grounds, which Social Services had relied upon, as insufficient standing alone and unsubstantiated, respectively.¹⁶ The Court found that the reason given by the Director of Social Services for the denial of Mr. Fretté’s application was Mr. Fretté’s “choice of lifestyle,” which the Court took to allude to Mr. Fretté’s homosexuality.¹⁷ The Court found, however, that this reason was insufficient to deny him authorization without finding “conduct that was prejudicial to the child’s upbringing.”¹⁸

Paris Social Services appealed the decision to the *Conseil d’Etat*.¹⁹ Mr. Fretté was not notified of the hearing before the *Conseil d’Etat* and did not appear to represent himself.²⁰ A lawyer did not represent Mr. Fretté and French law provided no rule stating that appellants must receive notice of the date on which their case is to be heard if they have not appointed a legal representative.²¹ All parties, including Mr. Fretté, are entitled to appoint a lawyer up until the date of the hearing, and all parties may apply for legal aid if necessary.²²

The Government Commissioner presented the question to the *Conseil d’Etat* as, “In spite of Mr. [Fretté’s] undoubted personal and intellectual qualities, did the authorities have good reason to consider that he did not provide sufficient guarantees to offer a child a home because of his choice of lifestyle?”²³ The *Conseil d’Etat*, in a judgment

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at ¶11.

¹⁵ *Id.* at ¶¶ 12-13.

¹⁶ *Id.* at ¶13.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at ¶14.

²⁰ *Id.* at ¶49.

²¹ *Id.* at ¶¶ 21-22, 46.

²² *Id.* at ¶46.

²³ *Id.* at ¶15.

of the 9th of October 1996, set aside the Paris Administrative Court's judgment and rejected Mr. Fretté's application for authorization to adopt.²⁴ The *Conseil d'Etat* found that Mr. Fretté "did not provide the requisite safeguards—from a child-rearing, psychological and family perspective—for adopting a child."²⁵

Mr. Fretté proceeded with an application against the French Republic to the European Commission of Human Rights ("the Commission") under Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").²⁶ Upon the entry into force of Article 5, Section 2 of Protocol No. 11 (abolishing the Commission), the case was transferred directly to the European Court of Human Rights.²⁷ Mr. Fretté alleged that the rejection of his application for authorization to adopt was "implicitly and exclusively based on his sexual orientation."²⁸ He argued that the decision was "tantamount to ruling out any possibility of adoption for a category of persons defined according to their sexual orientation, namely homosexuals and bisexuals, without taking any account of their individual personal qualities or aptitude for bringing up children."²⁹ He thus alleged that he had been a victim of discrimination on the ground of his sexual orientation in violation of Article 14³⁰ taken in conjunction with Article 8³¹ of the Convention.³² He also alleged a

²⁴ *Id.* at ¶16.

²⁵ *Id.*

²⁶ *Id.* at ¶¶ 1-2.

²⁷ *Id.* at ¶3.

²⁸ *Id.* at ¶26.

²⁹ *Id.*

³⁰ Article 14, with the heading, "Prohibition on discrimination" provides that, "The enjoyment of 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." European Convention on Human Rights, *supra* note 1, art. 14, 213 U.N.T.S. at 232.

³¹ Article 8 contains the heading, "Right to respect for private and family life" and provides in its first subpart that, "Everyone has the right to respect for his private and family life, his home and his correspondence." The second subpart reads, "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 well-being 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." European Convention on Human Rights, *supra* note 1, art. 8, 213 U.N.T.S. at 230.

³² *Fretté* at ¶26.

violation of his right to a fair trial guaranteed by Article 6 Section 1 of the Convention³³, because he had not been notified of the date of the hearing before the *Conseil d'Etat*.³⁴ The Article 6 violation was found by the Court and it awarded Mr. Fretté costs and expenses incurred before the Convention institutions in the amount of € 3,500, but this is not the focus of this Note.³⁵

III. THE MAJORITY ANALYSIS

The European Court of Human Rights (the Court) held 4-3³⁶ that there had been no violation of Article 14 taken in conjunction with Article 8. It began its analysis by enunciating the applicable legal rule. “[A] difference in treatment is discriminatory for the purposes of Article 14 if it “has no objective and reasonable justification,” that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realized.”³⁷

The Court recognized that sexual orientation is “undoubtedly covered by Article 14 of the Convention.”³⁸ It then found that Article 14 would be applicable if “the facts of the case . . . fall within the ambit of one or more of the provisions of the Convention.”³⁹ Although the Convention does not guarantee the right to adopt, the Court found that the French Civil Code does provide such a right in Article 343-1 and this falls within the ambit of Article 8.⁴⁰ The Court found that the decision to reject Fretté’s application was based decisively on his avowed

³³ European Convention on Human Rights, *supra* note 1, art. 6, 213 U.N.T.S. at 228.

³⁴ *Fretté* at ¶44.

³⁵ *Id.* at ¶¶ 2-3 of *holding*.

³⁶ The four judges joining in the opinion and their nationalities were: J-P. Costa (French); P. Kuris (Lithuanian); K. Jungwiert (Czech); and K. Traja (Albanian). The three dissenting judges and their nationalities were: W. Fuhrmann (Austrian); F. Tulkens (Belgian); and N. Bratza (British). Judges Jungwiert and Traja also filed partly concurring opinions.

³⁷ *Fretté* at ¶34.

³⁸ *Id.* at ¶32; *See also*, Salgueiro da Silva Mouta v. Portugal, 31 Eur. H.R. Rep. 1055, 1069 (1999) (Holding in a child custody case that sexual orientation is “undoubtedly covered” by Article 14 of the Convention).

³⁹ *Fretté* at ¶31.

⁴⁰ *Id.* at ¶32.

homosexuality.⁴¹ Accordingly, the Court held that Article 14 taken in conjunction with Article 8 was applicable.⁴²

The Court went on, however, to find that the decision pursued a legitimate aim, which was to protect the health and rights of children.⁴³ It then went on to formulate the question as whether there was a justification for the difference of treatment of homosexuals, and whether the means pursued were proportional.⁴⁴ The Court then declared that the Contracting States enjoyed “a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.”⁴⁵ It announced that one of the relevant factors in determining the proper scope of the margin of appreciation “may be the existence or non-existence of common ground between the laws of the Contracting States.”⁴⁶ The Court went on to say that it is “indisputable that there is no common ground on the question [of whether homosexuals may adopt].”⁴⁷ While most Contracting States did not prohibit homosexual adoption, “it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues,” the Court argued.⁴⁸ The Court went on to give an argument akin to the precautionary principle, writing, “the scientific community . . . is divided over the possible consequences of a child’s being adopted by one or more homosexual parents.”⁴⁹ The Court paid special attention to the “limited number of scientific studies conducted on the subject to date.”⁵⁰ Finding that denial of the application for authorization to adopt was proportional to the need to protect children, the Court concluded that no violation of Article 14 had occurred.⁵¹

IV. THE DISSENT OF SIR NICOLAS BRATZA AND JUDGES FUHRMANN AND TULKENS

⁴¹ *Id.* at ¶¶ 32, 37.

⁴² *Id.* at ¶33.

⁴³ *Id.* at ¶38.

⁴⁴ *Id.* at ¶¶ 38-42.

⁴⁵ *Id.* at ¶40.

⁴⁶ *Id.*

⁴⁷ *Id.* at ¶41.

⁴⁸ *Id.*

⁴⁹ *Id.* at ¶42.

⁵⁰ *Id.*

⁵¹ *Id.* at ¶43.

The dissent compared the case to the *Belgian Linguistic Case*.⁵² In the *Belgian Linguistic Case*, French-speaking parents challenged the Belgian school system that divided the country into regions for the purpose of determining the language of instruction.⁵³ The Court held that although Article 2 of Protocol No. 1⁵⁴ did not infer a right to obtain the creation of a particular kind of educational establishment from public authorities, “[a] State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14.”⁵⁵ This principle, the dissent argued, was later reinforced in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*.⁵⁶ Here the State was not bound under an Article 8 obligation to authorize foreign husbands residing in the country to be joined by their wives despite the fact that the latter did not have any independent right of entry to or residence in the territory.⁵⁷ However, since the United Kingdom did provide such a right, the difference in treatment with respect to husbands and wives had to be justified under Article 14.⁵⁸

The instant case was like those above, the dissent argued. Although Article 8 did not provide a right to adopt, adoption fell within the ambit of “respect for family and private life,” and France had indeed provided a right to adopt.⁵⁹ Since sexual orientation discrimination has been recognized by the Court to be forbidden under Article 14, any discrimination on this basis must be justified.⁶⁰ This leaves us asking relatively the same question as the majority; was the difference in treatment justified by a legitimate aim, and was the discrimination proportionate to that aim? The dissent then points out that the legitimate

⁵² Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, 1 Eur. H.R. Rep. 252 (1968); *Fretté* at ¶ 25.

⁵³ *Belgian Linguistic Case*, 1 Eur. H.R. Rep. at 252-53.

⁵⁴ Article 2 of Protocol 1 reads, “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” European Convention on Human Rights, *supra* note 1, Protocol 1, art. 2, 213 U.N.T.S. at 264.

⁵⁵ *Belgian Linguistic Case*, 1 Eur. H.R. Rep. at 283; *Fretté, dissenting opinion*.

⁵⁶ *Abdulaziz, Cabales & Balkandali v. United Kingdom*, App. Nos. 9214/80, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471 (1985); *Fretté, dissenting opinion*.

⁵⁷ *Fretté, dissenting opinion*.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id., dissenting opinion*.

aim is the protection of the child's rights and freedoms.⁶¹ The majority put it as, "to protect the health and rights of children."⁶² The dissent argued that the *Conseil d'Etat* itself found that there was no reference in the case-file "to any specific circumstance that might pose a threat to the child's interests."⁶³ The dissent claimed that the legitimate aim had not, therefore, been sufficiently established.⁶⁴ In failing to point out any scientific studies or other evidence of the danger of allowing homosexual adoption, and acknowledging the skills and abilities of Fretté, the *Conseil d'Etat* failed to carry out a detailed, substantive analysis of proportionality and took no account of the situation of persons concerned.⁶⁵ Under these circumstances, the dissent argued, an absolute bar to adoption on the grounds of homosexuality in order to protect children was not proportionate, and a violation of Article 14 in conjunction with Article 8 existed.⁶⁶

V. A DIFFERENT APPROACH TO PROPORTIONALITY (MARGIN OF APPRECIATION AND THE BURDEN OF PROOF)

The majority in this case has taken the margin of appreciation too far. It has used the margin of appreciation to completely override the principle of proportionality. In so doing, it turned the margin of appreciation into the abusive use of the precautionary principle. This resulted in the Court not adhering to its own standards of proportionality.

A. *From Particularity Convincing and Weighty Reasons to Zero Tolerance: The Burden of Proof in the Court of Human Rights Case Law on Sexual Orientation Discrimination*

The Court has already recognized sexual orientation as being among the categories protected from discrimination under Article 14.⁶⁷ In doing so they recognized that it is not generally a legitimate ground for discrimination, and that efforts to interfere in such an intimate part of

⁶¹ *Id.*

⁶² *Id.* at ¶38.

⁶³ *Id.*, *dissenting opinion*.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Fretté* at ¶32; *Salgueiro da Silva Mouta*, App. No. 33290/96, 31 Eur. H.R. Rep. 1055, 1069 (2001).

a person's life must be justified at a minimum by particularly convincing and weighty reasons.⁶⁸

The Court held that discrimination on the ground of sexual orientation had to be justified by "particularly convincing and weighty reasons" in *Smith and Grady v. the United Kingdom*.⁶⁹ In this case, the United Kingdom attempted to justify the necessity of the exclusion of homosexuals from the military.⁷⁰ In analyzing whether such exclusion was justified the Court examined a report submitted by the United Kingdom as evidence of the necessity of the exclusion of homosexuals.⁷¹ The Court, however, dismissed the study, announcing that

[t]o the extent that [the attitudes expressed in the study] represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights... any more than similar negative attitudes towards those of a different race, origin or colour.⁷²

The seminal case in which the Court balanced the health and rights of children with an applicant's rights of non-discrimination on the grounds of homosexuality was *Salgueiro da Silva Mouta v. Portugal*.⁷³ There, the Court confronted the question of whether a Lisbon Appeal Court's grant of custody to a mother on the grounds of the father's sexual orientation was an unjustified difference in treatment, and thus discriminatory under Article 14 taken in conjunction with Article 8.⁷⁴ The Court laid out the following test: "a difference in treatment is discriminatory within the meaning of Article 14 if it has no objective and

⁶⁸ *Smith & Grady v. United Kingdom*, App. Nos. 33985/96, 33986/96, 29 Eur. H.R. Rep. 493, 495 (1999); *See also*, *Lustig-Prean & Beckett v. United Kingdom*, App. Nos. 31417/96, 32377/96, 29 Eur. H.R. Rep. 548, 580 (1999).

⁶⁹ *See Smith and Grady*, 29 Eur. H.R. Rep. at 495.

⁷⁰ *See id.* at 524-525.

⁷¹ The court examined the report of the Homosexuality Policy Assessment Team, which concluded besides other "subsidiary issues" that, "the presence of known or strongly suspected homosexuals in the armed forces would produce certain behavioural and emotional responses and problems which would affect morale and, in turn, significantly and negatively affect the fighting power of the armed forces." *See Id.* at 516-17.

⁷² *Id.* at 533.

⁷³ *See Salgueiro da Silva Mouta*, 31 Eur. H.R. Rep. 1055.

⁷⁴ *Id.* at 1069.

reasonable justification, that is to say, if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means used and the aim envisaged.”⁷⁵ The Court first recognized that the aim pursued by the Lisbon Appeal Court, the protection of the health and rights of the child, was legitimate.⁷⁶ The Court then went on to analyze whether the difference in treatment was proportionate to the legitimate aim.⁷⁷ The Court moved to more of a “zero tolerance” attitude to discrimination on the grounds of sexual orientation, simply concluding that because a distinction on the basis of sexual orientation “cannot be tolerated under the Convention,” they could not “conclude that a reasonable relationship of proportionality existed between the means used and the aim envisaged,” and that, “there was therefore a breach of Article 8 in conjunction with Article 14.”⁷⁸

In *Fretté*, France presented no evidence such as the report submitted by the United Kingdom in *Smith and Grady*. In fact, no evidence at all was presented by the French government concerning the necessity of preclusion of homosexuals from adoption, other than an implicit allusion to the stigma the child of a homosexual is likely to face from prejudiced individuals in society.⁷⁹ Instead of relying on specific evidence the Court relied on the lack of common ground among the member states and the division of the scientific community in general, observing that, “the scientific community... is divided over the possible consequences of a child’s being adopted by one or more homosexual parents”⁸⁰ The “lack of common ground” argument, however, is questionable in the first place, and its use as a way of expanding the margin of appreciation to allow discrimination is inappropriate. By relying on the division of scientific opinion regarding the harms of homosexual adoption, the Court uses, without saying so, a form of the margin of appreciation akin to the precautionary principle, as the concurring opinion points out.⁸¹ This principle is used by the European Court of Justice, which interprets the largely economic-based treaties of the European Union. As will be explained later, not only is this standard

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 1070-71.

⁷⁸ *Id.* at 1071.

⁷⁹ See *Fretté* at ¶15 (“If there is any consensus it lies instead in the growing awareness that . . . the child’s interests cannot always be reconciled with current developments.”)

⁸⁰ *Id.* at ¶42.

⁸¹ See *id.* at *concurring opinion* (“In reality, most of the majority have based their decision, without saying so, on the precautionary principle.”).

itself not met, but it is not appropriate for a human rights context, and indeed does not appear to have been explicitly used by the European Court of Human Rights in the past.

B. Lack of Common Ground Among the Contracting States

The argument that there exists a lack of common ground as to the propriety of discrimination on the grounds of sexual orientation in adoption is inappropriate and cannot be supported. To the extent that this disagreement among the states on “these social issues” is with the morality of discriminating on the grounds of sexual orientation, the Court has already decided these issues, when it expressly found that sexual orientation was not a proper ground for discrimination under Article 14.⁸² To the extent the objection is based on a disagreement regarding the harm children may suffer as a result of being adopted by homosexuals, the Court relies on the division of the scientific community, which is an argument implicitly resting on the precautionary principle, and is addressed later in this Note.⁸³

Even were the morality of discrimination on the grounds of sexual orientation still open to question, the Court’s claim that “[a]lthough most of the Contracting States do not expressly prohibit homosexuals from adopting . . . it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues” is dubious.⁸⁴ As the dissent points out, on the contrary, there seems to be a European consensus developing regarding “these social issues.”⁸⁵ The European Union’s Charter of Fundamental Rights of the 7th of December 2000 expressly prohibits “any discrimination based on any ground such as . . . sexual orientation.”⁸⁶ The Netherlands has laws expressly providing a positive right for homosexuals to adopt children.⁸⁷ Bosnia and Herzegovina, the Czech Republic, Denmark, Finland, France, Hungary, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Romania, Slovenia, Spain and Sweden have laws protecting

⁸² See *Fretté* at ¶32; *Salgueiro da Silva Mouta*, 31 Eur. H.R. Rep. at 1069.

⁸³ See discussion *infra* Part V.

⁸⁴ See *Fretté* at ¶41.

⁸⁵ See *id.* at *dissenting opinion*.

⁸⁶ Charter of Fundamental Rights of the European Union, 18/12, 2000 O.J. (C 364) art. 21(1).

⁸⁷ See Stb. 2001, nr. 10 (Act of 11 Jan. 2001 amending Book 1 of the Civil Code) (English translation available at <http://athena.leidenuniv.nl/rechten/meijers/index.php3?c=86>).

people from discrimination on the ground of sexual orientation.⁸⁸ Other countries that are not listed, but are members of the European Union, such as Austria, Belgium, Germany, Greece, Italy, Portugal, and the United Kingdom are subject to the Council of the European Union's Directive 2000/78/EC, which prohibits discrimination in employment on the basis of sexual orientation.⁸⁹

In any case, the Court has made no attempt to specifically reference even one case or law of any country in Europe that has found discrimination on the grounds of sexual orientation justified, either with respect to adoption, or any other area.

⁸⁸ See generally, International Lesbian and Gay Association, *European Treaties and Legislation and National Constitutions and Legislation Expressly Prohibiting Discrimination Based On Sexual Orientation, World Legal Survey*, at http://www.ilga.org/Information/Legal_survey/list_of_international_treaties.htm (last modified Sept. 30, 2002) citing:

Bosnia and Herzegovina, Republika Srpska - Penal Code, article 141.

Czech Republic, Law 167/1999 of 13 July 1999 (amending Law 1/1991 on Employment), [30 July 1999] 57 Sbirka Zákonu (Law Gazette) 3151, and Law 155/2000 of 18 May 2000 (amending Labour Code, Law 65/1965, Art. 1(4), and Law on Soldiers, Law 221/1999, Art. 2(4)), [21 June 2000] 49 Sbirka Zákonu 2290, 2318.

Denmark, Law of 9 June 1971, nr. 289, as amended by Law of 3 June 1987, nr. 357 (forbidding discrimination in employment and extended to private employment by Law of 12 June 1996, nr. 459) (sexual orientation was added in 1987).

Finland, Penal Code (as amended by Law 21.4.1995/578), c. 11, ¶9, c. 47, ¶3.

France, C. PÉN. arts. 225-1, 225-2, 226-19, 432-7; C. TRAV. arts. L. 122-35, L. 122-45; Law No. 2001-1066 of Nov. 16, 2001, J.O. (adding sexual orientation to the various parts of the *Code pénal* and the *Code du travail*).

Hungary, Act on Public Health, Act No. 154 of 1997, art. 7.

Iceland, General Penal Code, No. 19/1940, §180, as amended by Act No. 135/1996.

Ireland, Employment Equality Act, No. 21, § 6(2)(d) (1998) (forbidding discrimination in employment on the grounds of sexual orientation) and the Equal Status Act, No. 8, §3(2)(d) (2000) (extending the Employment Equality Act to education, goods, services and housing).

The Netherlands, Stb. 1994, nr. 230 (General Equal Treatment Act), arts. 1, 5-7.

Norway, Penal Code, ¶349(a) as amended by Law of 8 May 1981, nr. 14; Law of 4 Feb. 1977, nr. 4, ¶55A, as amended by Law of 30 April 1998, nr. 24 (extending Law of 8 May 1981 to employment).

Romania, Law for the Adoption of Government Emergency Ordinance No.89/2001, published in Romania's *Official Gazette*, part I no. 65/30.01.2002.

Slovenia, see Penal Code (Law of 29 Sept. 1994, published in Uradni list, 13 Oct. 1994), art. 141.

Spain, see C.P. No. 10/1995, arts. 314, 511-12 (Organic Law of 23 Nov. 1995); See also 22(4), 510, 515(5). For Sweden see Penal Code (Brottsbalk), SFS 1962:700, c. 16, ¶9, as amended by Law of 4 June 1987, SFS 1987:610 (extended to employment by Law of 11 March 1999, SFS 1999:133).

⁸⁹ Council Directive 2000/78/EC, arts. 1, 2(1), 2000 O.J. (L 303/16).

C. *The Precautionary Principle Abused*

The other justification the Court used was based on a lack of scientific certainty, which is an argument implicitly based on the precautionary principle, as the Concurrence points out.⁹⁰ First a general definition of the precautionary principle is in order, so that the reader may be familiarized with the concept. In January of 1998 a group of scientists, government officials, lawyers, and labor and grass roots environmental activists met in Racine, Wisconsin at the Wingspread Conference to find such a definition. The Wingspread Conference issued a statement describing the precautionary principle as follows: “When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof.”⁹¹

The Commission of the European Union adopted a “Communication on the Precautionary Principle” (“the Communication”) in 2000.⁹² The Communication established that [a]lthough the precautionary principle is not explicitly mentioned in the Treaty except in the environmental field, its scope is far wider and covers those specific circumstances where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection.⁹³

The Communication set out guidelines for Member States to follow if they chose to rely on the principle. Where action is deemed necessary, measures based on the precautionary principle should be, *inter alia*: *proportional* to the chosen level of protection, *non-discriminatory* in their application, *consistent* with similar measures

⁹⁰ See Fretté, *concurring opinion* (“In reality, most of the majority have based their decision, without saying so, on the precautionary principle.”).

⁹¹ See Peter Montague, *The Precautionary Principle*, RACHEL’S ENV’T & HEALTH WKLY. #586, Feb. 19, 1998.

⁹² Commission of the European Communities, *Communication from the Commission on the Precautionary Principle*, COM (2000) 1 [hereinafter “Communication on the Precautionary Principle”].

⁹³ *Id.* at 10.

already taken, *based on an examination of the potential benefits and costs* of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis), *subject to review*, in the light of new scientific data, and *capable of assigning responsibility for producing the scientific evidence* necessary for a more comprehensive risk assessment.⁹⁴

The Communication went on to lay out in greater detail when and how Member States could rely on the precautionary principle.⁹⁵ With respect to proportionality it noted that [t]he measures envisaged must make it possible to achieve the appropriate level of protection. Measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists. However, in certain cases, an incomplete assessment of the risk may considerably limit the number of options available to the risk managers.⁹⁶

The Communication also noted with respect to the need for scientific investigation that “[t]he implementation of an approach based on the precautionary principle should start with a scientific evaluation, as complete as possible, and where possible, identifying at each stage the degree of scientific uncertainty.”⁹⁷

As has been said, it will be pointed out later that such a standard is not appropriate in the human rights context, but even were the Court justified in using a sort of precautionary principle to guide its interpretation of the fundamental human rights spelled out in the Convention, if it applied the principle at least as strictly as the European Union institutions do in determining whether a certain form of economic regulation is permissible, France’s prohibition of homosexual adoption in this case would not survive scrutiny. The European Union heavily tempers the precautionary principle with the principle of proportionality, rather than using the precautionary principle to justify the proportionality of the state action, as the Court in *Fretté* seemed to be doing. In addition, they require a Member State to produce at least *some* scientific evidence before relying on the principle, as will be laid out below.

The European Court of Justice (the ECJ) has recently explicitly noted that the precautionary principle applies to matters concerning not

⁹⁴ *Id.* at 4.

⁹⁵ *Id.* at 13-21.

⁹⁶ *Id.* at 18.

⁹⁷ *Id.* at 17.

only the environment, as spelled out in the Treaty,⁹⁸ but human health as well. The ECJ, in *National Farmers' Union v. Secretariat du Gouvernement*,⁹⁹ noted in dicta that the principle of proportionality was “inseparable from the precautionary principle.”¹⁰⁰

The European Court of Justice, in the *German Beer* case,¹⁰¹ analyzed a state defense based on the precautionary principle. Germany had a law (the Biersteuergesetz) that required beer to be manufactured using only malted barley, hops, yeast, and water.¹⁰² The law also required that any beverage labeled “Bier” (beer, in English) sold in Germany conform to the manufacturing requirement.¹⁰³ Importers of beer made of other additives protested the German law as being contrary to Article 28 of the Treaty Establishing the European Community (the EC Treaty), which forbade the use of import restrictions by Member States.¹⁰⁴ The German government relied on the precautionary principle and Article 30 of the EC Treaty, which allowed Member States to restrict or prohibit imports on the ground that the restrictions are necessary to protect the health or life of humans.¹⁰⁵ Without the law, Germany argued, other preservatives may be added to beer and there is scientific uncertainty as to the long-term health effects of these preservatives.¹⁰⁶ Because Germans consume far more beer than others, they need to be protected from potentially dangerous preservatives in beer, and the Biersteuergesetz does this by prohibiting all preservatives.¹⁰⁷ In response, the European Court of Justice reminded the German government of the proportionality principle. It found that prohibitions on marketing to be in accordance with the principle of proportionality “must be restricted to what is actually necessary to secure the protection of public health.”¹⁰⁸ It went on to say that the principle of

⁹⁸ Case C-491/01, *R. v. Sec'y. of State for Health ex parte British American Tobacco Ltd.*, 2003 E.C.R. 604.

⁹⁹ Case C-241/01, *National Farmers' Union v. Secretariat General du Gouvernement*, [2002] 3 C.M.L.R. 34 (2002).

¹⁰⁰ *Id.* at 977.

¹⁰¹ Case 178/84, *Re Purity Requirements For Beer: E. C. Commission v. Germany*, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780 (1987) (“German beer”).

¹⁰² *German Beer*, 1 C.M.L.R. at 801.

¹⁰³ *Id.*

¹⁰⁴ Treaty Establishing the European Community, art. 28, Nov. 10, 1997, 1997 O.J. (C 340), 173 [hereinafter EC TREATY].

¹⁰⁵ *Id.* at rt. 30.

¹⁰⁶ See *German Beer*, 1 C.M.L.R. at 808-09.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 809-10.

proportionality requires the government to take into account the specifics of each case.¹⁰⁹ “[B]y virtue of the principle of proportionality, traders must also be able to apply, under a procedure which is easily accessible to them and can be concluded within a reasonable time, for the use of specific additives”¹¹⁰

It seems that the European Court of Human Rights has it backwards in *Fretté*. Rather than using the fact of scientific uncertainty to justify the proportionality of the government’s action, the Court should be using the proportionality principle to temper the precautionary behavior of the government in the face of uncertain science. It may be argued though, that at least in recent cases, the ECJ has used the precautionary principle as part of its proportionality test. The Court of First Instance of the European Communities alluded to this in *Artegodan GmbH v. Commission*.¹¹¹ Here the court referenced the judgment of the European Court of Justice in *United Kingdom v. Commission (Mad Cow Disease)*¹¹², where the Court upheld a Commission ban on the export of live bovine animals.¹¹³ It is true that the precautionary principle was noted implicitly¹¹⁴ within the proportionality analysis in the *Mad Cow Disease* case,¹¹⁵ however, the Court still made its finding that the action was proportional only after reviewing extensive scientific data and facts submitted by both parties.¹¹⁶

One could argue that according to the precautionary standard articulated by the Wingspread Conference, the burden of proof should be on the proponent of an activity (Mr. Fretté, in the case at hand).¹¹⁷ However, the European Union, at least, requires a Member State to conduct a scientific evaluation before relying on the principle.¹¹⁸ The Commission of the European Communities Communication on the Precautionary Principle stated that, “[t]he implementation of an approach based on the precautionary principle should start with a scientific

¹⁰⁹ See *id.* at 810.

¹¹⁰ *Id.*

¹¹¹ Case T-74/00, *Artegodan GmbH v. Commission*, 2002 ECR II-4945 at ¶185 (2002).

¹¹² Case C-180/96, *United Kingdom v. Commission*, 1998 ECR I-2265 [hereinafter “*Mad Cow Disease*”].

¹¹³ *Id.* at ¶136.

¹¹⁴ See *Artegodan*, 2002 ECR II-4945 at ¶185; Communication on the Precautionary Principle, *supra* note 92, at 20 (citing the *Mad cow disease* case as an example of implicit application of the precautionary principle).

¹¹⁵ See *Mad Cow Disease*, 1998 ECR I-2265 at ¶¶76-111.

¹¹⁶ See *id.* at ¶¶78, 84, 86-89.

¹¹⁷ See Montague, *supra* note 9, and accompanying text.

¹¹⁸ See Communication on the Precautionary Principle, *supra* note 92, at 17.

evaluation, as complete as possible, and where possible, identifying at each stage the degree of scientific uncertainty.”¹¹⁹

Another possible response is that scientific data is not the appropriate measure in this context because homosexuality is largely a moral question, rather than one of scientific data. As discussed above, however, this attitude confuses the issues.¹²⁰ The European Court of Human Rights has already answered in the negative the moral question as to whether sexual orientation is a legitimate ground for discrimination. The Court has sought to justify France’s discrimination on these grounds in *Fretté* with a harm principle, not a moral one. With respect to harm, the court relies on a lack of agreement among the scientific community, an implicit use of the precautionary principle.

Applying the European Union’s precautionary standard to the facts of the case, the French government has failed to justify the necessity of its denial of authorization to adopt on the grounds of homosexuality. France presented no evidence at all concerning the necessity of preclusion of homosexuals from adoption, other than an offhand allusion to the stigma the child of a homosexual is likely to face from prejudiced individuals in society, which has already been found to be insufficient grounds for justification by the European Court of Human Rights in *Smith and Grady*.¹²¹ Additionally, France has refused to take account of the specifics of Mr. Fretté’s situation, even while acknowledging that a child would probably be happy with him. The precautionary principle tempered by the principle of proportionality demands such an accounting for specific situations, as illustrated in the *German Beer* case.¹²²

When the case at hand is measured up to the strict requirements of the precautionary principle enunciated by the European Court of Justice, the French government’s attempt at justification of the absolute ban on homosexual adoption utterly fails. Taken together, this presents a disturbing overall view of the judicial structure of European integration, with respect to its application of the precautionary principle. When it comes to breaking European economic standards, less deference is shown to individual Member States, but when it comes to European human rights standards, the Contracting States are given practically free reign.

¹¹⁹ *Id.*

¹²⁰ See discussion *supra* Part V.b.

¹²¹ See *Fretté* at ¶15; *Smith and Grady*, 29 Eur. H.R. Rep. at 532.

¹²² See *German Beer*, 1 C.M.L.R. at 810.

VI. USE OF THE PRECAUTIONARY PRINCIPLE INAPPROPRIATE IN A HUMAN RIGHTS CONTEXT

As the foregoing notes, the European Court of Human Rights has effectively used the precautionary principle (or something akin to it) as a basis for denying the rights of homosexuals to adopt children. Use of the precautionary principle in a human rights context is inappropriate, however, in the first place.

A more demanding standard than the existence of scientific uncertainty should be used when determining whether an interference with a human right is justified. Even when there is scientific agreement as to the harmful effects that the State seeks to protect against, for the sake of the progress of human rights, State interference with the rights may not be acceptable. The inappropriateness of this standard to justify derogation from a human rights treaty is made clear if we imagine France trying to discriminate on a different protected Article 14 basis, such as race, using a similar justification, that is, the interests of children who may grow up differently than others, or be put at a disadvantage because of the social stigma attached to the lifestyle of their parents, even if this evidence is supported by a majority of the scientific community. Both the European Court of Human Rights and the United States Supreme Court have faced similar issues in the past. The European Court of Human Rights found that the existence of “a predisposed bias on the part of a heterosexual majority against a homosexual minority” could not justify interferences with the applicant’s rights in the *Smith and Grady* case above.¹²³

In weighing the interests of children, the United States Supreme Court has similarly found in *Palmore v. Sidoti* that the racial bias a child may face by being raised in the interracial household of the child’s mother did not justify the award of custody to the father.¹²⁴ “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect,” the Court noted.¹²⁵ The comparison to the above cases makes it clear that an approach to human rights using the precautionary principle is inappropriate, especially if one views human rights as natural or fundamental.

¹²³ *Smith & Grady*, 29 Eur. H.R. Rep. at 533.

¹²⁴ *Palmore v. Sidoti*, 466 U.S. 429 (1984).

¹²⁵ *Id.* at 433.

VII. CONCLUSION: UNDUE PRECAUTION AND BACKTRACKING IN HUMAN RIGHTS

In *Fretté*, the Court has unjustifiably attempted to use the margin of appreciation as a sort of precautionary principle in order to backtrack on human rights standards that it had already announced in past case law regarding discrimination on the ground of sexual orientation. Not only has the European Court of Human Rights in *Fretté* managed to derogate from its own case law in applying a higher margin of appreciation to human rights abuses, but it has done so by implicitly and loosely applying a principle that is often applied by the ECJ in derogation of the economic treaties of the European Union; a principle that the ECJ itself has been more hesitant to apply. Why was a decision based on sexual orientation regarding the award of custody impermissible,¹²⁶ but the same basis for a decision in an adoption proceeding permissible? These results can only be explained by either a simple lapse in judgment or the political concern of not angering the Contracting States on controversial issues. If the latter is in fact true then the dissent's warning that the decision is "liable to take the protection of fundamental rights backwards"¹²⁷ rings true not only in the particular area of discrimination on the ground of sexual orientation, but also in all areas where controversy may arise.

¹²⁶ See *Salgueiro da Silva Mouta*, 31 Eur. H.R. Rep. 1055

¹²⁷ See *Fretté*, dissenting opinion.