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### Publication Date

2004-12-01

HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS: RECENT JUDGMENTS AGAINST THE UNITED KINGDOM AND THEIR IMPACT ON OTHER SIGNATORIES TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

*Sameera Dalvi\**

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## I. INTRODUCTION

This Article examines judgments of the European Court of Human Rights against the United Kingdom in 1999, and how these have affected other signatory nations to the European Convention for the Protection of Human Rights.<sup>1</sup> Specifically, this Article focuses on signatory nations that

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1. In the wake of World War II the Council of Europe drafted the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). In the 1950s, the Convention established a Commission of Human Rights as a forum to hear complaints against a state for violating rights and freedoms protected by the Convention. After a case is heard, either the Commission or a state party may refer the case to the European Court of Human Rights. Once the nation-states accept the European Court's jurisdiction, its decisions are binding upon those states. Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725, 747 n.172 (1995) (citing MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 79-80 (1987)). The European Court of Human Rights is distinct from the International Court of Justice, which is part of the United Nations and sits in the Hague, the Netherlands. The European Court's jurisdiction is restricted to the states signatory to the Convention, and sits in Strasbourg, France, which is the home to most of the political bodies of the European Union. The European Court is sometimes

continue to exclude homosexuals from their militaries. In *Smith & Grady v. United Kingdom*<sup>2</sup> and *Lustig-Prean & Beckett v. United Kingdom*,<sup>3</sup> the European Court of Human Rights (European Court) ruled that discharging homosexuals from the armed forces violated Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).<sup>4</sup> Article 8 states that no public authority is permitted to violate a citizen's right to a "private and family life" unless absolutely necessary.<sup>5</sup>

This research addresses three closely related, yet conceptually distinct, questions about the Court's operation and position in the European polity. These questions are: first, whether a judgment against one member nation is binding on another member nation; second, the extent and nature of member nations' compliance with those decisions; and third, whether the Court's judgment in *Smith & Grady v. United Kingdom*<sup>6</sup> and *Lustig-Prean & Beckett v. United Kingdom*<sup>7</sup> will affect nations that continue to enforce the gay ban in their militaries. In light of these cases three outcomes are observed. First, the European Court's decision signals the development of a body of descriptive and explanatory work on how an influential supranational body can affect the development of a key issue in military personnel policy. Second, it reflects a significant advance in the understanding of the prevalence of supranational bodies and human rights policy in European nations, where homosexuals are still forbidden from serving in the armed forces. And finally, it highlights the application and the testing of ideas about culture in a novel political and institutional context.

Section II of this Article presents an overview of the origins and development of the European Court of Human Rights, and of the procedures by which it hears cases. These cases often involve allegations

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referred to as "The Strasbourg Court." For a general overview of the European Court and its composition, see the European Court of Human Rights web site, at <http://www.echr.coe.int/> (last visited Aug. 16, 2004).

2. *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999).

3. *Lustig-Prean & Beckett v. United Kingdom*, 29 Eur. H.R. Rep. 548 (1999).

4. *Smith & Grady*, 29 Eur. H.R. Rep. at 537; see Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter Convention], available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last visited Aug. 18, 2004); *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. at 587. In addition to Article 8, Articles 3, 10, and 14 were also considered in these cases. Further explanation is given in section IV of this Article.

5. Convention, *supra* note 4, art. 8.

6. *Smith & Grady*, 29 Eur. H.R. Rep. at 493.

7. *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. at 548.

of human rights violations in which the Court renders and enforces a judgment. To appreciate the significance of the Court's judgments on the issue of homosexuals in the military, it is essential to see the precise ways in which the European Court of Human Rights has been molded and to look behind its theoretical structure as laid down in the Articles of the Convention. Section III addresses an important aspect of the Court and its decisions, namely, the efficacy of judgments rendered against one member nation in other member nations. The status of the Convention at the national level, the doctrine of "margin of appreciation," reservations, and cultural variables are examined in this section as well. Section IV details the verdicts in *Smith & Grady v. United Kingdom* and *Lustig-Prean & Beckett v. United Kingdom*.<sup>8</sup>

Section V investigates the impact of these verdicts in countries that continue to prevent homosexuals from serving in their militaries. The discussion focuses on three countries: Turkey, a significant NATO member; Russia, a high-profile Mediterranean actor; and Poland, part of the European faction recently labeled by U.S. Secretary of Defense, Donald Rumsfeld, as the new Europe.<sup>9</sup> Additionally, detailed lists of the Convention signatories and their policies concerning homosexuals serving in their militaries are appended.

## II. THE GENESIS OF THE EUROPEAN COURT OF HUMAN RIGHTS

The beginnings of the European Court can be found in the political initiatives that followed World War II. These initiatives were designed to facilitate closer relationships between the sovereign nations of Europe.<sup>10</sup> For Europeans advocating a political union, human rights had become a key priority.<sup>11</sup> In May 1948, many organizations promoting European integration met in the Hague at the Conference of the International

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8. These are the most recent cases addressing homosexuality in the U.K. armed forces. No subsequent cases on this subject have been brought to the European Court.

9. Before the Iraq conflict, Donald Rumsfeld referred to the nations of Eastern Europe as the new Europe. His aim was to distinguish them from the nations against the conflict, namely France and Germany. *Outrage at "Old Europe" Remarks*, BBC NEWS, Jan. 23, 2003, available at <http://news.bbc.co.uk/2/hi/europe/2687403.stm> (last visited July 13, 2004).

10. ROBERT BLACKBURN, *The Institutions and Processes of the Convention*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950-2000*, at 3 (Robert Blackburn & Jorg Polakiewicz eds., 2000).

11. MARK W. JANIS ET AL., *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* 16 (2d ed. 2000).

Committee of the Movements for European Unity.<sup>12</sup> At the Conference, the representatives declared that they believed a Charter of Human Rights and a Court of Justice to implement the Charter were necessary.<sup>13</sup>

Alongside the private pro-integration movements, the European governments founded the Council of Europe, with its own Assembly and Committee of Ministers, as an official institutional move toward European unity.<sup>14</sup> It was agreed that one of the goals of the Council would be to negotiate and implement a human rights document for Europe.<sup>15</sup> From an initial group of eight states, membership of the Council has grown substantially.<sup>16</sup> In 1989, there were twenty-two member states; ten years later, this number had grown to forty-one.<sup>17</sup> This remarkable surge of growth was attributable to the end of the Cold War, and the new membership of states from Eastern Europe and a number of former Soviet republics.<sup>18</sup>

The atrocities committed prior to and during World War II made the Council members determined to formulate common norms of civilized behavior to which any sovereign nation must adhere.<sup>19</sup> Article 3 of the Statute of the Council stated: "Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."<sup>20</sup> It is clear that from the outset human rights was the focus of the Council's work. The result of this focus was the European Convention for Human Rights. The Convention, signed on November 4, 1950,<sup>21</sup> was the product of the intention of the Council of Europe to move beyond rhetoric toward binding the signatory nations to respect a coherent body of human rights.<sup>22</sup>

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12. *Id.*

13. COUNCIL OF EUROPE, COLLECTED EDITION OF THE TRAVAUX PRÉPARATOIRES xxii (1975), quoted in JANIS ET AL., *supra* note 11, at 16.

14. JANIS ET AL., *supra* note 11, at 16.

15. BLACKBURN, *supra* note 10, at 4-6.

16. JANIS ET AL., *supra* note 11, at 3.

17. *Id.* at 26. The 41 member states as of January 2000 were: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, the Former Yugoslav Republic of Macedonia, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. *Id.* at 3.

18. *Id.* at 26.

19. *Id.* at 16.

20. *Id.*

21. BLACKBURN, *supra* note 10, at 6.

22. JANIS ET AL., *supra* note 11, at 7.

Article 19 of the Convention established the European Court of Human Rights and the European Commission of Human Rights (Commission). It stated that in order to ensure that signatories to the Convention would comply with its requirements, a European Court of Human Rights would be established. Such a court would be established on a permanent basis.<sup>23</sup> The European Court is composed of one judge from each of the member states.<sup>24</sup> The judges are nominated by the Council of Europe and elected by a majority vote in the Parliamentary Assembly to renewable, rotating six-year terms.<sup>25</sup> The European Court also elects a president and two vice-presidents. The Commission used to exist alongside the European Court. Its mission was to prevent inadmissible cases from reaching the European Court. It amalgamated with the European Court in 1999.<sup>26</sup>

Private citizens, nongovernmental organizations, and groups of individuals may bring allegations of violations of the Convention by one or more member states to the Court, asking for redress.<sup>27</sup> The Court decides on the admissibility of claims.<sup>28</sup> Specifically, a subset chamber of the plenary court hears the case and makes a judgment,<sup>29</sup> by majority, on the admissibility of the case. Articles 34 and 35 outline the criteria for admissibility.<sup>30</sup>

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23. See Convention, *supra* note 4, art. 19.

24. JANIS ET AL., *supra* note 11, at 65.

25. *Id.*

26. *Id.* at 66.

27. See The European Convention on Human Rights of 1950, available at <http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm> (last visited July 13, 2004).

28. See JANIS ET AL., *supra* note 11, at 30-44.

29. *Id.* at 32.

30. Convention, *supra* note 4, arts. 34-35.

#### Article 34 — Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

#### Article 35 — Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

Once a case has been deemed admissible, the Court is required, under Article 38, to accept and examine the case, and if necessary undertake a fact-finding investigation.<sup>31</sup> While an investigation is being conducted, Article 38 also obliges the Court to attempt to facilitate a friendly settlement and resolution.<sup>32</sup> A friendly settlement will terminate a case.<sup>33</sup> Article 39 states that “[i]f a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.”<sup>34</sup>

However, if it is not possible to reach a friendly settlement, the Court will proceed to a public hearing.<sup>35</sup> If the Court finds that there has been a violation of the Convention or the protocols, pursuant to Article 41 the Court must “afford just satisfaction to the injured party.”<sup>36</sup> Judgments of the Court are final and binding on states who are parties to a case.<sup>37</sup> The final judgment is communicated to the Committee of Ministers responsible for its execution.<sup>38</sup>

Until October 1994, only the Commission and the states that were parties to the Convention had the authority to bring cases to the Court.<sup>39</sup> Although private citizens did not have the clout to bring cases to the Court, they were almost always the initiators of suits before the Commission.<sup>40</sup> Therefore, it became apparent that it was the individual and not the Commission that was the driving force behind the cases that reached the

3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

*Id.*

31. *Id.* art. 38, para. 1.a.

32. *Id.* art. 38, para. 1.b; *see also* JANIS ET AL., *supra* note 11, at 45-52.

33. Once a case has been deemed admissible, and as long as it has not been dismissed, Article 38 of the Convention obliges the Court to encourage the parties to reach a friendly settlement on the basis of human rights as defined in the Convention and the protocols. This attempt is made before the case actually reaches the Court. If a friendly settlement is reached, legal proceedings are terminated. However, a friendly settlement is not the same as a judgment, as there is no winner or loser. A friendly settlement is basically a compromise. JANIS ET AL., *supra* note 11, at 46.

34. Convention, *supra* note 4, art. 39.

35. JANIS ET AL., *supra* note 11, at 66.

36. Convention, *supra* note 4, art. 41.

37. JANIS ET AL., *supra* note 11, at 66.

38. *Id.*

39. *Id.*

40. *Id.*



Court. On October 1, 1994, the status of the individual improved dramatically as Protocol 9 to the Convention came into force.<sup>41</sup> This protocol amended Articles 44 and 48 of the old Convention to include persons, nongovernmental organizations, and groups of individuals among those who could directly refer a case to the Court.<sup>42</sup> Further reforms were initiated in 1994, when Protocol 11 allowed groups of individuals to bring cases to the Court against states party to the Convention.<sup>43</sup> Bearing in mind this brief overview of the origins and procedures of the European Court of Human Rights, the following section discusses the value of the Court's judgments. It also takes special note of those judgments relating to second and third party states.

### III. THE REACH OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Since 1959, the European Court has grown from a somewhat obscure organization, making only a handful of decisions each year, to a significant political force in the advancement and defense of human rights in Europe, and a model for similar institutions worldwide.<sup>44</sup> Central to the Court's continued importance is the extent to which member states comply with its decisions.

When the Court finds a violation of the Convention, the respondent state must immediately discontinue the wrongful practice.<sup>45</sup> According to Article 46, the judgment of the Court is binding on the respondent state.<sup>46</sup> However, the Court usually renders a decision as a measure of last resort.

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41. See Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms Nov. 6, 1990, Europ. T.S. No. 140 (entered into force Oct. 1, 1994), available at <http://conventions.coe.int/treaty/EN/Reports/Html/140.htm> (last visited July 13, 2004). A protocol secures rights and freedoms not included in the previous text of the Convention. By 1998, there were eleven protocols in effect. A twelfth protocol became open for signature and ratification on November 4, 2000. BLACKBURN, *supra* note 10, at 10 n.12. The full text of the first five protocols is available at <http://www.hri.org/docs/ECHR50.html> (last visited July 13, 2004).

42. JANIS ET AL., *supra* note 11, at 67-68.

43. See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Europ. T.S. No. 155 (entered into force Nov. 1, 1998), available at <http://conventions.coe.int/treaty/en/Treaties/Html/155.htm> (last visited July 13, 2004).

44. See BLACKBURN, *supra* note 10, at 6-8.

45. JORG POLAKIEWICZ, *The Execution of Judgments of the European Court of Human Rights*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950-2000, *supra* note 10, at 57-58.

46. Convention, *supra* note 4, art. 46, para. 1.

It decides a case only after an exhaustion of local remedies and a failure to reach a friendly settlement. Therefore it is rare that the violation is continuing when the Court delivers its judgment.<sup>47</sup>

It is important to bear in mind that the Court and the Convention were not established to replace governments or undermine their authority.<sup>48</sup> Rather they were set up to be an effective and uniform standard of protection for human rights in Europe.<sup>49</sup> Therefore, it is necessary for the Court to exercise a degree of restraint. This means that the Court's judgments are supposed "to have no direct effect on domestic law and national authorities *unless the domestic law itself requires or at least permits national authorities to apply or to execute them.*"<sup>50</sup>

The Court itself has repeatedly maintained that "it has no competence to annul, repeal, or modify statutory provisions or individual decisions taken by administrative, judicial or other national authorities."<sup>51</sup> The only exception is the respondent state, which is under an immediate obligation, as one of the contracting parties in the dispute, to discontinue any actions that violate the judgment of the Court.<sup>52</sup>

How do rulings impact member nations not involved in a particular case? In other words, is a ruling about Country *X* binding on Country *Y*? According to legal analysts, it is rare for a member state to alter its law or practice following a verdict against another member state.<sup>53</sup> However, instances do exist where judgments by the Court have initiated or stepped up administrative reforms in non-respondent states as well as the respondent states. For example, the Netherlands changed its law on illegitimate children because of the *Marck X* judgment against Belgium.<sup>54</sup> Also, Denmark changed its law on the closed shops in industrial relations

47. *Id.* at 58.

48. POLAKIEWICZ, *The Execution of Judgments of the European Court of Human Rights*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950-2000*, *supra* note 10, at 56.

49. *Id.*

50. *Id.* (italics added).

51. *Id.*

52. *Id.*

53. ROBERT BLACKBURN, *The United Kingdom*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950-2000*, *supra* note 10, at 1002.

54. POLAKIEWICZ, *The Execution of Judgments of the European Court of Human Rights*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950-2000*, *supra* note 10, at 62 n.42.

because of the *Young, James and Webster v. United Kingdom* judgment against the United Kingdom.<sup>55</sup>

However, in spite of the legal ambiguity in this area, it is possible to identify four factors which shed light on the circumstances under which Country *X* will adhere to a ruling binding on Country *Y*. These factors, discussed below, include: the status of the Convention in domestic law; the margin of appreciation; the system of reservations; and the nature of the “social system” of the countries under consideration.

#### A. *Status of the Convention in Domestic Law*

Member nations have repeatedly dealt with the question of how to incorporate international treaties and judgments into domestic law. Generally, member states are at liberty to select how best to ensure the broadest enjoyment of rights and freedoms outlined in the Convention, through incorporation or otherwise.<sup>56</sup> Therefore, the extent and the nature of member nations’ compliance with decisions rendered against other member states depends on the status of the Convention in their domestic law. According to Polakiewicz, this varies from nation to nation. For instance, in Austria, Bulgaria, the Czech Republic, Estonia, and France, constitutional provisions have been used to incorporate the Convention into domestic law. On the other hand, in Belgium, Italy, Germany, Lithuania, and Switzerland, case law has formed the basis of incorporation.<sup>57</sup>

Supreme and constitutional courts in member nations play a significant role in determining the status of the Convention in their respective countries. For instance, in 1985 a chamber of the German Federal Constitutional Court declared that pursuant to former Articles 52 and 53 (now Articles 44 and 46, section 1) of the Convention, all German Courts were obliged to provide redress for victims of ongoing infringement of the Convention.<sup>58</sup> Similar verdicts have been given by the supreme and constitutional courts in the Netherlands, Spain, and Switzerland.<sup>59</sup> Furthermore, various states have introduced special review procedures that

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55. *Id.*

56. JORG POLAKIEWICZ, *The Status of the Convention in National Law*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 33.

57. *Id.* at 36.

58. POLAKIEWICZ, *The Execution of Judgments of the European Court of Human Rights*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 66.

59. *Young, James & Webster v. Webster v. United Kingdom*, 4 Eur. H.R. Rep. 38 (1982).

allow criminal proceedings to be reopened in the wake of an adverse judgment of the European Court.<sup>60</sup> These states include Austria, Luxembourg, Germany, Poland, Hungary, France, Norway, and Switzerland.<sup>61</sup>

### B. *Margin of Appreciation*

The Court has regularly taken into account the special internal problems faced by local authorities in the member nations. In light of these unique circumstances the European Court has permitted some local discretion in determining what exactly is necessary when it comes to protecting morals and national security. The term used to describe this deference is the “doctrine of margin of appreciation.” It was fully explained in *Handyside v. United Kingdom*,<sup>62</sup> in which the Court indicated that the member state involved was “in a better position than the international judge” to assess the validity of the restrictions.<sup>63</sup> A broad margin of appreciation means that member states may adopt the Court judgment in a manner which suits their local circumstances.<sup>64</sup> In such circumstances there is a bit of elasticity in the Court’s judgment. Conversely, a narrow margin of appreciation means that a member state has to strictly adhere to the Court’s judgment, as there is no ambiguity in the wording.<sup>65</sup> When it comes to judgments about other member states, nations may choose not to adhere to the ruling if the Court has a granted broad margin of appreciation.

### C. *Reservations*

Member states have the option of making a reservation against or opting out of any of the Articles, subject to the stipulations outlined in Article 57 of the Convention.<sup>66</sup> The Council of Europe web site defines a

60. *Id.* at 67-68.

61. *Id.* at 67.

62. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (Ser. A) (1976).

63. JANIS ET AL., *supra* note 11, ¶ 48, at 144.

64. *See id.* at 146-48. For a discussion of the doctrine margin of appreciation and how it may threaten the development of a universally applied human rights jurisprudence, see generally Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT’L L. & POL. 843, available at <http://www.nyu.edu/pubs/jilp/main/issues/31/pdf/31v.pdf> (last visited July 13, 2004).

65. *See* JANIS ET AL., *supra* note 11, at 146-48.

66. Article 57 of the treaty states:

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the

“reservation” as a statement which, when made at the time of signing and ratifying the Convention, enables a State to modify the legal effect of certain articles.<sup>67</sup> The Court of Human Rights has jurisdiction to consider whether, in a specific case, a reservation has been made in accordance with the Convention, and litigants can contend that a reservation is invalid or ineffective.<sup>68</sup>

At least one interpretation of Article 57 suggests that it creates only temporary reservations that are intended to allow the signatory to bring its laws in-line with the requirements of the Convention.<sup>69</sup> This interpretation was stated in a concurrence in the case *Belilos v. Switzerland*.<sup>70</sup> In *Belilos*, Judge DeMeyer articulated that Article 57 allows for a narrow exception for a temporary measure at the time of signing the Convention. He stressed that it allows for a brief space in order to ensure that national laws are brought into conformity with the Convention.<sup>71</sup> Legal analysts have acknowledged that this is a difficult argument to put into practice as a large number of reservations to the Convention have not been of a temporary nature and have not attracted objections from other member states.<sup>72</sup>

A reservation may only be entered upon ratification or accession. Otherwise, the only option for the nation objecting to an Article is to denounce the entire Convention and then renegotiate membership with the specific reservation.<sup>73</sup> However, denouncement can be done only within the

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Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2. Any reservation made under this article shall contain a brief statement of the law concerned.

Convention, *supra* note 4, art. 57.

67. Council of Europe, Glossary of Treaties, at <http://conventions.coe.int/Treaty/EN/cadreglossaire.htm> (last visited July 13, 2004).

68. *See, e.g.*, *Belilos v. Switzerland*, 10 Eur. H.R. Rep. 466 (1988); *Temeltasch v. Switzerland*, 5 Eur. H.R. Rep. 417, 430-31 (1983) (commission report).

69. *See* Convention, *supra* note 4, art. 57.

70. *Belilos*, 10 Eur. H.R. Rep. 466, 493-94 (1988) (DeMeyer, J., concurring).

71. *See* David Pannick & Shaheed Fatima, *In The Matter of Denunciation of the European Convention On Human Rights — Joint Opinion 6*, available at <http://www.liberty-human-rights.org.uk/issues/pdfs/pannick-opinion-art-3.pdf> (last visited Mar. 16, 2004).

72. *Id.* at 6-7.

73. Peter Rowe, in his study of armed forces and the European Court of Human Rights, writes that for states who have not entered a reservation, it is too late for them to do so. The only option would be to denounce the Convention and then immediately accede to it anew with the desired reservations. PETER ROWE, CONTROL OVER ARMED FORCES EXERCISED BY THE EUROPEAN COURT OF HUMAN RIGHTS, 2-3, 10 (Geneva Centre for the Democratic Control of the Armed Forces, Working Paper No. 56, 2002).

time limits and notification requirement of Article 58.<sup>74</sup> The option of denunciation is highly controversial. Legal analysts have argued that the Convention does not permit a contracting state to use the power of denunciation as a device to secure a reservation that it could not otherwise validly make.<sup>75</sup> While denunciation is disfavored it is relevant for the present discussion as it might be employed as a method for Country *Y* to avoid complying with judgments against Country *X*. If the European Court interprets an Article in the Convention in a manner to which Country *Y*— not a party to the litigation — objects, then Country *Y* may seek to denounce the Convention and then enter a reservation against that Article upon renegotiation. Used in such a manner, denunciation and reservation could effectively undermine the Court’s judgments and substantially narrow the scope of the Convention. Member states may also bypass the Court’s judgments against other members if they have already entered reservations against the relevant Articles.

#### D. *The Social System*

The legal factors discussed so far only tell part of the story. In order to fully appreciate the circumstances under which a ruling against Country *X* is binding on Country *Y*, it is important to examine the social systems in which affected citizens operate. According to sociologist Malcolm Waters, the social system “is the arena in which an individual, seeking to gratify itself by the realization of wants, will confront and negotiate with other actors who are also seeking self-gratification.”<sup>76</sup> Within this context, the

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74. In pertinent part Article 58 states:

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months’ notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

Convention, *supra* note 4, art. 58.

75. Pannick & Fatima, *supra* note 71, at 4.

76. MALCOLM WATERS, *MODERN SOCIOLOGICAL THEORY* 147 (1994).

individual is oriented toward stability and continuity. The individual seeks to establish mutual understanding with others, thereby establishing mutuality of expectations.<sup>77</sup>

The social system can be conceptualized into four pillars: society, economy, polity, and culture.<sup>78</sup> Of these four pillars, Waters notes that culture is most important. Culture, for instance, affects the way in which politicians and society, in general, behave. Furthermore, the basic implicit assumptions about human existence (i.e., norms and values), which make up a culture, can affect how the economic pillar of a social system is managed.<sup>79</sup> In other words, culture can affect the way in which resources, investment, and commercial organizations are managed. Therefore, if we are to understand the circumstances under which member nations will comply with judgments concerning other member nations, it is crucial to examine the norms, values, and assumptions of the people in these nations. If one member nation will not comply with a ruling concerning homosexuals in the military of another nation, then the only way to change policy would be for the affected citizens in that country to take their own case to the Court. These affected citizens will have the confidence to bring cases dealing with sexuality only if there is discussion about sexuality at the national level. This discussion will only be possible if the social system is conducive to free and open exchange regarding sexual choices, thereby facilitating the elaboration and progressive political acceptance of sexual rights at the national, and then international, level.<sup>80</sup>

This section has focused on the effect of judgments of the European Court in third-party states (i.e., states not involved in the case under consideration). Judgments are only binding on states that are actually involved in the dispute. Other states may follow the judgments if there is a high regard for the Court and the Convention among its political elite, if there is a narrow margin of appreciation, if there is no reservation against the relevant articles, or if there is a social system to facilitate the change of policy in the area under consideration. The following section will highlight these issues in the context of the cases *Lustig-Prean & Beckett*<sup>81</sup> and *Smith & Grady*.<sup>82</sup>

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77. *Id.*

78. *Id.* at 151.

79. See FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN BUSINESS 22 (1997).

80. For a discussion of how the European Court has treated homosexuality and a proposal for a new treatment of universal sexual rights in the future, see Michele Grigolo, *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, 14 EUR. J. INT'L L. 1023 (2003).

81. *Lustig-Prean & Beckett v. United Kingdom*, 29 Eur. H.R. Rep. 548 (1999).

82. *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999).

#### IV. TWIN DECISIONS AGAINST THE UNITED KINGDOM BY THE EUROPEAN COURT OF HUMAN RIGHTS IN NOVEMBER 1999

The legal rights of homosexuals in the member nations of the Convention are in a period of transition.<sup>83</sup> The source of this transition is of a judicial and political nature. In the political sphere, gay and lesbian activists have enjoyed success in convincing national and regional legislatures to protect their rights.<sup>84</sup> In the legal arena, the judicial reluctance to rule against national administrative practices that adversely affect the lives of homosexuals, no longer exist.<sup>85</sup>

This section will scrutinize the main features of the cases *Smith & Grady v. United Kingdom*<sup>86</sup> and *Lustig-Prean & Beckett v. United Kingdom*.<sup>87</sup> It will attempt to explain the Court's reasoning in both cases, and then analyze the status of the Convention in the United Kingdom and the nature of British society in order to uncover the factors that motivated the parties in both cases to petition the Court.

Prior to the British Parliament's ratification in 1967 of the Sexual Offences Act,<sup>88</sup> homosexuality was regarded as a criminal offense in both civil society and the military. With the passing of the Sexual Offences Act, however, private and homosexual acts between consenting adults ages twenty-one years and over were decriminalized in civil society.<sup>89</sup> Homosexuality in the military, however, remained an offense under the 1955 Army and Air Force Acts<sup>90</sup> and the 1957 Naval Discipline Act.<sup>91</sup>

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83. For a general view about the rights of homosexuals in Europe, see LAURENCE R. HELFER, *Sexual Orientation and the European Court of Human Rights: New Activism or Cautious Incrementalism?*, 2001 INT'L C.L. REP. 11-17 (2002), available at [http://archive.aclu.org/library/iclr/2001/iclr2001\\_3.pdf](http://archive.aclu.org/library/iclr/2001/iclr2001_3.pdf) (last visited Sept. 2, 2004).

84. Examples of this success include the widening number of European countries which recognize lesbian and gay relationships through their marriage and partnerships statutes, and the November 2000 adoption by the fifteen-member European Union of a directive prohibiting discrimination on the basis of sexual orientation in public and private employment. See Euro-Letter, No. 110, Jan. 2004, available at [http://www.steff.suite.dk/eurolet/eur\\_110.pdf](http://www.steff.suite.dk/eurolet/eur_110.pdf) (last visited July 13, 2004).

85. For instance, in *Dudgeon v. United Kingdom*, the claimant argued that he had been prosecuted on the basis of his homosexuality and that this prosecution violated Article 8 of the Convention. The Court sided with the claimant. See *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 (1981).

86. 29 Eur. H.R. Rep. at 493.

87. *Id.* at 548.

88. *Smith & Grady*, 29 Eur. H.R. Rep. at 511-12.

89. *Id.*

90. *Id.*

91. *Id.*



Section 1(5) of the 1967 Sexual Offences Act<sup>92</sup> limited the scope of that law's application to the civil sector only. Although Section 1(5) was later repealed by the Criminal Justice and Public Order Act in 1994,<sup>93</sup> Section 146(4) of that Act provided that nothing in its provisions prevented the military from continuing to discharge members of the armed forces based on their sexual status.<sup>94</sup> The Ministry of Defence updated the Armed Forces' Policy and Guidelines on Homosexuality in December 1994. The amendment to the guidelines was significant because it provided that armed forces personnel could no longer be criminally prosecuted and court-martialed under military law for their homosexuality. They could, however, still be administratively discharged.<sup>95</sup>

British parliamentary law was complemented by precise armed forces regulations for dealing with homosexuals in the military.<sup>96</sup> These guidelines were redistributed to service personnel in 1994 after they were updated to take into account the Criminal Justice and Public Order Act.<sup>97</sup> The guidelines stressed that homosexuality was incompatible with service in the armed forces "because of the close physical conditions in which personnel often have to live and work, [and] also because homosexual behaviour can cause offence, polarise relationships, induce ill-discipline, and . . . damage morale and unit effectiveness."<sup>98</sup> If a service member was discovered to be or admitted to being a homosexual, he or she would be discharged. Potential recruits who declared they were homosexuals would be disqualified from the recruitment process.<sup>99</sup>

#### A. *The Cases*

This is not a policy based on overt sexual conduct nor is it a policy based on overt homosexuality. It is a policy based upon sexual orientation — private sexual orientation which has come to light in the Services either because an individual has "confessed" to it because he can no longer cope with the pressure of living the lie or, as is more often the case, it has come to the notice of the authorities because of the activities of the military police. It is not a policy

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92. *Id.*

93. *Smith & Grady*, 29 Eur. H.R. Rep. at 511-12.

94. *Id.*

95. *Lustig-Prean & Beckett v. United Kingdom*, 29 Eur. H.R. Rep. 548, 563-64 (1999).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

based upon “let sleeping dogs lie.” It is an active policy of “outing” individuals.<sup>100</sup>

The case of *Lustig-Prean & Beckett*<sup>101</sup> was decided by the European Court of Human Rights the same day as *Smith & Grady*.<sup>102</sup> All four applicants in the two cases were members of the armed forces of the United Kingdom. The applicants were the subjects of military police investigations into their sexual orientations.<sup>103</sup> In addition, each applicant admitted that he or she was homosexual and was administratively discharged between July 1993 and January 1995, in accordance with Ministry of Defence policy.<sup>104</sup> Duncan Lustig-Prean,<sup>105</sup> John Beckett, Jeanette Smith, and Graeme Grady complained in their applications that the investigations concerning their sexual orientation and their subsequent discharges constituted a violation of their right to private lives, guaranteed by Article 8 of the Convention on Human Rights.<sup>106</sup> Additionally, the

100. Duncan Lustig-Prean, *Fit to Fight? — People Are Discharged for One Private Aspect of Their Private Lives, Not for Any Misconduct*, 144 RUSI J. 90 (1999). Lusting-Prean made this statement regarding British policy prior to the verdict of the European Court of Human Rights. *See id.* at 90-92.

101. *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. at 548.

102. *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999).

103. *Id.* at 502, 504-05; *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. at 554, 556.

104. *Smith & Grady*, 29 Eur. H.R. Rep. at 501-06; *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. at 554-57.

105. Duncan Lustig-Prean was a successful naval officer until he was approached by a blackmailer who had discovered that he was gay. He reported the incident to the authorities and subsequently found himself subjected to interrogation. He was eventually discharged. Since then he has been a leader in the campaign to lift the ban on gays serving in the military. He has been chairman of the gay military support group, Rank Outsiders, and continues to advise them on issues concerning homosexuality in the armed forces. *See Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. at 554-57.

106. *Smith & Grady*, 29 Eur. H.R. Rep. at 522; *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. at 572. In pertinent part Article 8, the right to respect for private and family life, provides:

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 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.

applicants argued that they had been the subjects of discrimination, contrary to Article 14 of the Convention.<sup>107</sup>

The applicants in one case, Janette Smith and Graeme Grady, argued that in addition to a violation of Articles 8 and 14, there had also been an infringement of Articles 3 and 10.<sup>108</sup> They argued that there had been a violation of Article 3 because “their discriminatory treatment, based on crude stereotyping and prejudice, denied and caused affront to their individuality and dignity.”<sup>109</sup> Furthermore, they submitted that the caution given to them at the time of their interviews was standard caution given to criminal suspects and not being bound by a legal obligation to answer questions in no way made the process less degrading as they had to cooperate in order to ensure that the investigations were kept as discreet

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107. *Smith & Grady*, 29 Eur. H.R. Rep. at 537; *see Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. ¶ 106, at 587. Article 14, the prohibition of discrimination, provides:

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.

Convention, *supra* note 4, art. 14.

108.

Article 3 — Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
  
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

*Id.* arts. 3, 10.

109. *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 119, at 538.

as possible.<sup>110</sup> Regarding Article 10, they argued that a person's sexual identity encapsulates a belief system or a world view that is essential to his or her identity. As a result of the Ministry of Defence policy they were forced to lead a dual existence, thereby denying them the simple right to communicate their own sexual identity openly and freely.<sup>111</sup>

The core argument proffered by the U.K. government in both cases was that military service was a special context because the cohesion of a military unit had to withstand "close physical and shared living conditions together with external pressures such as grave danger and war."<sup>112</sup> In such circumstances, entrenched attitudes of hostility, suspicion, or discomfort could compromise the operational effectiveness and the fighting power of the armed forces.<sup>113</sup> The Court found that this argument originated in habitual feelings of disapproval and hostility toward individuals of homosexual orientation and to general expressions of discomfort about the presence of homosexual soldiers in military units. In response to the government's arguments, the Court observed:

To the extent that they 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 outlined above any more than similar negative attitudes towards those of a different race, origin or colour.<sup>114</sup>

Furthermore, the Court noted that a strict code of conduct, such as that already in place with respect to sexual and racial harassment, was an alternative to the policy of discharging homosexuals, with a much less severe impact on the private lives of gay and lesbian soldiers.<sup>115</sup>

The U.K. government argued for a wide margin of appreciation.<sup>116</sup> In both cases, the Court acknowledged that the State had the right to impose restrictions on an individual's right to respect for his private life if there

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110. *Id.*

111. *Id.* ¶ 126, at 539-40.

112. *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. ¶ 70, at 574-75; see *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 95, at 532.

113. *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 78, at 525; *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. ¶ 71, at 575.

114. *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 97, at 533.

115. *Id.* ¶ 102, at 534; *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. ¶ 95, at 584.

116. *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 77, at 524; *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. ¶ 70, at 575.

is a real threat to operational effectiveness of the armed forces.<sup>117</sup> The Court did accept that an army cannot properly function if service personnel are undermining it.<sup>118</sup> However, this “threat” must be substantiated by specific examples.<sup>119</sup> For instance, in *Smith & Grady*, the Court explicitly stated that the investigations were an intrusion into the private lives of the applicants and had little to do with operational effectiveness.<sup>120</sup> It stressed that the investigations were unnecessary once the applicants had admitted their homosexuality and that the Ministry of Defence was unable to offer specific examples that proved that homosexual service members were detrimental to the operational effectiveness of the British Armed Forces.<sup>121</sup> The Court criticized the Homosexuality Policy Assessment Team (HPAT) Report used by the Ministry of Defence in its attempts to substantiate its arguments by specific examples. It accepted the *Smith & Grady* applicants’ argument that the report was unsound,<sup>122</sup> and that the research was not carried out by independent consultants.<sup>123</sup>

In both cases, the Court ruled that there had indeed been a violation of Article 8. In *Smith & Grady*, for instance, the Court stated that “neither the investigations conducted into the applicants’ sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8(2) of the Convention.”<sup>124</sup> In both cases, however, a separate opinion was filed, wherein Judge Loucaides made it clear that he did not entirely agree with the majority’s ruling.<sup>125</sup> Although the partly concurring, partly dissenting opinion of Judge Loucaides did not have an impact on the final ruling of the majority, his comments illustrate that success for the plaintiffs in both cases did not come easily.<sup>126</sup> For instance, in *Lustig-Prean & Beckett*,

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117. *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 89, at 530; *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. ¶ 82, at 580.

118. *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 89, at 530; *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. ¶ 82, at 580.

119. *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 89, at 530; *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. ¶ 82, at 581.

120. *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 91, at 530-31.

121. *Id.* ¶ 99, at 536-37, ¶ 110, at 534.

122. The *Smith & Grady* applicants argued that the majority of the questions in the questionnaire were biased towards a negative response, that the response rate had generally been low, and those responding were not guaranteed anonymity. *Id.* ¶ 85, at 528.

123. *Id.* ¶ 95, at 532-33.

124. *Id.* ¶ 111, at 537.

125. *Smith & Grady*, 29 Eur. H.R. Rep. at 545 (Loucaides, J., partly dissenting opinion); *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. at 588 (Loucaides, J., partly dissenting opinion).

126. See *Smith & Grady*, 29 Eur. H.R. Rep. at 545 (Loucaides, J., partly dissenting opinion); *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. at 588 (Loucaides, J., partly dissenting opinion).

Judge Loucaides said that he agreed with the majority opinion, except as to whether there had been a violation of Article 8. He explained that he was convinced by the argument of the government that communal accommodation arrangements could prove to be a problem, and that this issue is no different from the one concerning the potential problems posed by male and female service members sharing communal accommodation.<sup>127</sup>

As for Article 14 of the Convention, the Court ruled in both cases that it did not add to the debate. The Court maintained that the applicants' discrimination complaints amounted in effect to the same complaint that the Court had already considered in relation to Article 8 of the Convention.<sup>128</sup>

In applying Article 3, the Court stated in *Smith & Grady* that ill-treatment must attain a minimum level of severity before it could be considered degrading.<sup>129</sup> The assessment of that minimum level depends on "the duration of the treatment and its physical or mental effects."<sup>130</sup> Therefore, a treatment may be considered degrading if it makes the victim feel fearful or inferior and is capable of breaking their physical or moral resistance.<sup>131</sup> However, in the case of *Smith & Grady* (where this point was raised), the Court found that while the investigation and discharge process of Smith and Grady was based on the biased opinions of a heterosexual majority against a homosexual minority, it did not reach the minimum level of severity which would bring it within the scope of Article 3.<sup>132</sup>

Turning its attention to Article 10, the Court concluded in *Smith & Grady* that the freedom of expression element was a secondary factor to the applicants' right to respect for their private lives. It did not overlook the fact that the silence imposed on the applicants with regard to their homosexuality, together with the constant obligation to be discreet when interacting with colleagues, friends and acquaintances, could amount to an interference in their freedom of expression.<sup>133</sup> However, the Court stated that the sole basis for the investigation and the discharge of the applicants was sexual orientation and not freedom of expression. The European Human Rights Court suggested that Article 8, which provides the right to

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127. *Lustig-Prean & Beckett*, 29 Eur. H.R. Rep. at 588 (Loucaides, J., partly dissenting opinion).

128. *Id.* ¶ 108, at 587; *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 115, at 537.

129. *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 120, at 538.

130. *Id.*

131. *Id.*

132. *Id.* ¶ 122, at 539.

133. *Id.* ¶ 127, at 540.

respect for an individual's private life, takes prominence over Article 10. Therefore, the Court ruled that it was necessary to focus the applicants' complaints under Article 8.<sup>134</sup>

As a result of these rulings, the Ministry of Defence announced a new policy on sexual conduct in the British Armed Forces.<sup>135</sup> It made clear that the government accepted the judgment of the European Court, and it would carefully study the implications of the decision.<sup>136</sup> Furthermore, it announced that those cases already in the system — that is, personnel in the process of being discharged on grounds of homosexuality — would be put on hold. A review of service chiefs, who had anticipated the ruling but were still firmly against relaxing the ban, was instigated. This review was completed in January 2000, when Defence Minister Geoffrey Hoon announced in his parliamentary speech “[t]he Chiefs of Staff accept the need to change the existing policy and have been fully involved in the process of developing a revised policy.”<sup>137</sup> Hoon reported that the Chiefs of Staff supported the outcome of the review. Furthermore, he added that his department looked at the experiences of other nations, such as Australia, as well as the findings of the latest British research on the issue, conducted in 1995. Finally he emphasized that his department considered the European Court of Human Rights rulings and acknowledged that the United Kingdom should formulate a policy that regards sexual orientation as a matter within the private sphere.<sup>138</sup>

### B. *Analysis*

In order to understand the judgments discussed in the previous section and the subsequent policy changes in the United Kingdom, an examination of the history of the Convention in the United Kingdom, its status in British national law, and the nature of British society should be undertaken.

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134. *Smith & Grady*, 29 Eur. H.R. Rep. ¶ 128, at 540.

135. See T.R. Reid, *Britain Ends Its Curbs on Gays in Military*, WASH. POST, Jan. 13, 2000, at A13.

136. The Secretary of State for Defence Mr. Geoffrey Hoon, Statement to Parliament (Jan. 12, 2000), available at [http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000112/debtext/00112-06.htm#00112-06\\_head0](http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000112/debtext/00112-06.htm#00112-06_head0) (last visited July 22, 2004).

137. *Id.*

138. *Id.*

## 1. The History of the Convention in the United Kingdom

Regarding the status of the Convention, the United Kingdom government has always been keen to comply with international obligations and has secured legislative reform whenever there was a breach or a potential breach of the Convention.<sup>139</sup> In fact, the United Kingdom was the first member state to ratify the Convention, only four months after it was officially signed.<sup>140</sup> The government at that time, headed by Prime Minister Clement Attlee, was clear that no domestic implementing legislation was necessary, and few believed it possible that the United Kingdom could be in breach of any part of the Convention.<sup>141</sup> The Convention as a whole attracted little attention within legal and political circles, apart from the Cabinet and the select group involved in negotiating its terms.<sup>142</sup>

On October 23, 1953, the United Kingdom formally notified the Secretary General of the Council of Europe, pursuant to Article 57 of the Convention, that it was explicitly extending the protections of the Convention to forty-two of its territories overseas.<sup>143</sup> A decade later, the United Kingdom formally acknowledged the right of individual petition and the jurisdiction of the Court. This significant step was completed upon ratification of Article 25 of the Convention on January 14, 1966.<sup>144</sup>

The election of the Labor Party in 1997 heralded a new era in human rights in the United Kingdom. The new administration promised to be more proactive in its approach and establish a new human rights culture in the United Kingdom.<sup>145</sup> It began fulfilling its promise in 1998 with the Human Rights Act (Act) which incorporated the Convention and its jurisprudence directly within the legal systems of the United Kingdom.<sup>146</sup> It also empowered individuals to bring domestic proceedings against public authorities for breach of their human rights as expressed in the

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139. For an overview, see BLACKBURN, *The United Kingdom*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000*, *supra* note 10, at 935.

140. *Id.* at 938.

141. *Id.*

142. *Id.*

143. *Id.* at 938-39.

144. BLACKBURN, *The United Kingdom*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000*, *supra* note 10, at 939.

145. *Id.* at 942.

146. *Id.* at 960-65.



Convention.<sup>147</sup> The Act came into force on October 2, 2000,<sup>148</sup> and it gave further effect to the rights and freedoms guaranteed in the Convention.<sup>149</sup>

## 2. The Status of the Convention in United Kingdom Domestic Affairs

The new Human Rights Act determines the legal status of the Convention in the United Kingdom national law. According to section 3 of the Act, the interpretation of primary legislation and subordinate legislation must not contradict the rights specified in the Convention, unless the legislation itself is so incompatible that it is clearly impossible to do so.<sup>150</sup> The government white paper accompanying publication of the draft legislation stated that the objective behind section 3 was to ensure that the domestic courts took into account the Convention when interpreting legislation. Prior to this Act, domestic courts were obliged to take into account the Convention only if there was an ambiguity in the legislative provision.<sup>151</sup>

Section 4 of the Human Rights Act introduces a legal procedure which requires domestic courts to make a declaration of incompatibility if legislation is incompatible with the Convention. This will place upon the government a moral (not necessarily legal) obligation to make the requisite changes to bring the legislation into conformity with the Convention.<sup>152</sup>

The judgments of the European Court have had great influence upon U.K. domestic law. By the end of 2000, the total number of violations by the United Kingdom had reached eighty-two.<sup>153</sup> Each adverse judgment, except for one, has been rectified in accordance with the terms of judgments from Strasbourg.<sup>154</sup> The issues dealt with in the U.K. cases before the European Court have been diverse. Apart from the issue of homosexuals in the armed forces, the Court has issued a judgment on the U.K.'s trade union practices, corporal punishment in British schools, homosexuality in Northern Ireland, and on matters relating to British prisoners and family life.<sup>155</sup>

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147. *Id.*

148. *Id.* at 960.

149. BLACKBURN, *The United Kingdom, in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 961.

150. *Id.* at 962.

151. *Id.*

152. *Id.* at 963.

153. *Id.* at 975.

154. BLACKBURN, *The United Kingdom, in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 975.

155. *Id.*

In cases where the United Kingdom has not been a respondent state, the picture is very different.<sup>156</sup> The government has largely chosen not to comply with judgments of the Court involving other member states.<sup>157</sup> Robert Blackburn sums up the situation when he says: “Positive action by the [U.K.] government has been confined to situations where the [United Kingdom] has itself been found to be in violation of one or more articles of the Convention. . . .”<sup>158</sup> This attitude is largely due to the fact that the U.K. government, like their European counterparts, have been only too eager to take advantage of the “margin of appreciation” concept.<sup>159</sup> Nevertheless, since the Human Rights Act<sup>160</sup> incorporated the Convention into domestic law in October 2002, U.K. governmental bodies will be expected to give serious consideration to the Court’s judgments against other member states as they arise.<sup>161</sup>

### 3. The Social System in the United Kingdom

The social system and culture in the United Kingdom with regard to gay and lesbian issues is a significant factor that illustrates how a change of discriminatory practices toward homosexuals can only occur if individuals hold positive attitudes toward homosexual issues. This Article now explores such positive assumptions in the cases *Pustig-Prean & Beckett* and *Smith & Grady*. The last decade has witnessed a change in the way homosexuals are perceived in U.K. public life. This change can be found in almost every sector of society, whether it be politics, economics, popular entertainment, art, or culture. In the political sphere, chief secretary John Bercow recently admitted that the Tories had been “justifiably denounced as shrill and homophobic,” and Labor Member of

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156. *Id.* at 1002-03.

157. *Id.* at 1002.

158. *Id.*

159. BLACKBURN, *The United Kingdom*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000*, *supra* note 10, at 1003.

160. According to Allan Ross, the Human Rights Act is the most significant change in the area of military rights. Prior to the introduction of the Act, service personnel in the United Kingdom had a limited forum within which they could lobby public and political opinion. While the Act does little for the rights civilian population (which already enjoy a high degree of protection in the United Kingdom), it will benefit British military personnel who until now have been denied the protection afforded to their civilian counterparts. For more details about Human Rights in the British Armed Forces, see Allan Ross, *You’re in the Army Now! Human Rights and the Armed Forces*, in *NEW PEOPLE STRATEGIES FOR THE BRITISH ARMED FORCES* 15, 19 (Alex Alexandrou et al. eds., 2001).

161. BLACKBURN, *The United Kingdom*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000*, *supra* note 10, at 1003.

Parliament Jane Griffiths attempted to introduce the Relationships (Civil Registration) Bill, to grant legal status to registered same-sex relationships for purposes of intestacy, among other things.<sup>162</sup> In 2002 a major victory was achieved when the House of Lords (the upper house of the British Parliament) voted 215 to 184 to give homosexual, as well as unmarried heterosexual couples, the right to adopt. This was made possible due to the efforts of the government and liberal Democrat camps in the House of Lords.<sup>163</sup> On the question of whether homosexuals should be allowed to serve in the armed forces, certain Labor ministers have personally supported reform.<sup>164</sup>

Openly homosexual Members of Parliament take their seats with a minimum of controversy.<sup>165</sup> Some are even appointed to ministerial positions.<sup>166</sup> The efforts of political figures who happen to be homosexual are not hindered by a “don’t ask, don’t tell” type of policy. In fact, the popular norm is to regard a person’s homosexuality as a non-issue. Evidence of this norm can also be found in the economic arena. Recently, analysts have been extolling the virtues of a “gay market.”<sup>167</sup> As a result, it has become acceptable for prominent industries to sponsor gay and lesbian television programs, festivals, and even support gay and lesbian charities.<sup>168</sup>

Even the religious sphere has been affected by gay rights. In July 2004, the gay cleric Dr. Jeffrey John was installed as the Dean of St. Albans, a district north of London. Senior progressive religious figures said that they hoped that his appointment would bring greater inclusivity to the church.<sup>169</sup>

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162. Jessica Berens, *Loud and Proud*, THE OBSERVER, Nov. 11, 2001, at 18.

163. Patrick Wintour, *Lords Back Gay Adoption Rights*, GUARDIAN, Nov. 6, 2002, at 11, available at 2002 WL 102334857.

164. BLACKBURN, *The United Kingdom*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950-2000, *supra* note 10, at 1004.

165. In 1997, four openly gay men won parliamentary seats at the General Election. C. Barillas, *Gay British Labour MPs Revel in New Freedom*, DATA LOUNGE, Oct. 3, 1997, at <http://www.datalounge.com/datalounge/news/record.html?record=2402> (last visited July 14, 2004).

166. For instance, Stephen Twigg and Ben Bradshaw are both members of the Labour Party. Stephen Twigg was Deputy Leader of the House of Commons until May 29, 2002, when he was promoted to become a Parliamentary Under-Secretary for the Department of Education and Skills, and Ben Bradshaw was named to take his place. See *The Knitting Circle: Parliamentarians*, at <http://myweb.lsbu.ac.uk/~stafflag/mps.html> (last visited July 14, 2004).

167. Simon Burrows & Daniel Dumoulin, *Mystery of the Pink Punter*, THE GUARDIAN, Feb. 24, 2000, at 21.

168. *Id.*

169. Stephen Bates, *Gay Cleric in Bishop Row Takes Up Role of Dean*, GUARDIAN, July 3, 2004, at 2, available at 2004 WL 75697464.

In the field of art and culture, the last decade has witnessed the rise and the acceptance of prominent gay entertainers in the United Kingdom.<sup>170</sup> This development is highly significant given the fact that twelve years ago, Michael Boothe, a gay actor, was kicked to death by seven men in a public lavatory.<sup>171</sup> In the words of one writer, “walls once formed to protect the inhabitants are now imprisoning them. The queens are being encouraged to escape, because for every glossy muscle-man there is a librarian, and for every disco toy boy there is a lawyer.”<sup>172</sup> The idea of institutionalizing gay arts and culture recently received a new impetus when prominent Londoners discussed the need for a homosexual museum. Such a museum would chronicle the achievements of early gay activists, gay authors, gay artists, and gay politicians. More significantly, a leading gay activist even proposed having a section in the museum that would celebrate the role of homosexual soldiers during the Second World War.<sup>173</sup>

Regarding values relating to homosexuals held by the general population, a recent poll showed widespread support for homosexuals to be able to work in the armed forces, the church, police, schools, and parliament, even though a majority still regarded sex between people of the same gender as wrong.<sup>174</sup> A more recent development has been the introduction of a picture book aimed at young children about same sex relationships. The publishers stated that the book could be used to show children that relationships between men are acceptable.<sup>175</sup> The rise in positive attitudes towards homosexuals can be viewed within the wider context of human rights interest among the youth in the United Kingdom. The desire to become better educated about human rights has led to the growth of human rights programs in universities across the United Kingdom. There are human rights centers at the London School of Economics and Political Science, Nottingham, Durham, Glasgow, Essex, and Strathclyde.<sup>176</sup> The significance of this development should not be underestimated. In the words of Mary Robinson: “The development of

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170. Berens, *supra* note 162.

171. *Id.*

172. *Id.*

173. Peter Tatchell, *Inside the Gay Museum*, GUARDIAN, June 8, 2004, at 14, available at 2004 WL 75683660.

174. *A Battle Belatedly Won: The Services Must Move with the Times*, THE GUARDIAN, Sept. 28, 1999, at 21.

175. Matt Wells, *Picture Book for Children Has a Gay Theme*, GUARDIAN, Jan. 20, 2003, at 5, available at 2003 WL 9518396.

176. Mary Robinson, *From Rhetoric to Reality: Making Human Rights Work*, 2003 EUR. HUM. RTS. L. REV. 1 (2003).

university human rights programmes is ultimately consumer led. The ever increasing interest from young people in undertaking professional training in human rights through graduate study is a way to measure the relevance of the ideal of universal human rights in our time.”<sup>177</sup>

However, institutional homophobia still persists in the British armed forces. For instance, a former NATO commander, General Sir Anthony Farrar-Hockley, attacked the Court’s judgment in the *Lustig-Prean & Beckett* and *Smith & Grady* cases as “ridiculous” and said that the Court should not interfere in the running of the British military.<sup>178</sup> Another example was the reaction to the policy change a year after the Court ruling when the Ministry of Defence, after negotiating with the Armed Forces Gay and Lesbian Association, agreed to recognize homosexual partners as fully-fledged spouses. A senior officer referred to this move as “madness” stating: “It’s a monstrosity. We are becoming an army of social workers not soldiers. There is all this focus on issues of gays and women and very little recognition of the fact that we have tens of thousands of soldiers doing a very professional job with increasingly limited funds.”<sup>179</sup>

This section has provided a detailed overview of cases which will have significant implications for gays in the military. It has shown that the Court is willing to move its jurisprudence forward, albeit at a carefully controlled pace of change. It has also illustrated that legal success for homosexual service members in Europe, will depend on how their government has incorporated the Convention into national law, and on cultural factors. In the British scenario, for instance, the social system in the United Kingdom and the special status given to the Convention in U.K. domestic affairs created a favorable political and legal climate for the protagonists in the cases discussed here to take their case to Strasbourg. A crucial factor which emerges from the analysis here is that, in the *Lustig-Prean & Beckett* and *Smith & Grady* cases, the U.K. government was willing to let the Court take responsibility for a decision for which the government, at least in theory, stands accountable to the electorate. This suggests an institutionalized homophobia operating within the British armed forces. As scholar Robert Blackburn observed, the U.K. government was willing to let the European Court of Human Rights decide the matter

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177. *Id.* at 2.

178. Richard Norton-Taylor & Clare Dyer, *Historic Ruling Ends Services Gay Ban*, THE GUARDIAN, Sept. 28, 1999, at 3.

179. Jason Burke, *Armed Forces Plan to Give Gay Partners Full Married Benefits*, THE OBSERVER, Aug. 12, 2001, at 2.

so the government could avoid being criticized by sections of the armed forces and the electorate.<sup>180</sup>

#### IV. THE IMPACT OF THE *SMITH* AND *LUSTIG-PREAN* JUDGMENTS ON THREE CONVENTION SIGNATORY COUNTRIES

In dealing with gay rights and the armed forces, it is vital to examine how the Court's judgments in the cases discussed will impact the non-respondent states. Analysts argue that since the Court's judgments are made public and the consequence for the offending state is to pay compensation to the defendant, states not involved in the case are encouraged to amend their own legislation in an attempt to prevent similar cases from being brought to the Court by their own citizens. States have a duty to provide effective remedies under domestic law to individuals whose rights, as defined by the Convention, have been violated.<sup>181</sup> This is a one-dimensional argument as it fails to take into account the margin of appreciation, the existence of reservations against military matters, the status of the Convention in national law and the nature of the social system. The aim here is not to underestimate the significance of the Court's judgment, but to highlight how the alteration of law and practices of non-respondent states depend on a set of complex factors, especially if the issue under consideration is as controversial as is the subject of this Article.

This section investigates how the *Lustig-Prean & Beckett* and *Smith & Grady* rulings have affected three high profile signatories of the Convention: Turkey, Poland, and Russia. For each country, it assesses the history of the Convention and its status in national law. The status of reservations under national law will also be examined. This Article also explores the nature of the social system in which homosexual citizens have to fight for their rights. It is crucial not to underestimate the significance of social variables. If an examination of the status of the Convention in national law were to reveal that the nation under consideration has a tendency of not complying with the European Court's verdicts concerning other member nations or that it has entered reservations, then the only way forward for homosexual service members in that nation would be to petition the Court themselves. This would only be possible if the social environment for homosexual citizens in that nation were not hostile.

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180. BLACKBURN, *The United Kingdom*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950-2000*, *supra* note 10, at 1004.

181. ROWE, *supra* note 73, at 2.

Therefore, in a scenario where Country *X* will not accept a ruling about Country *Y* as being binding on itself, it will be worthwhile to briefly examine the social factors to consider whether a *Lustig-Prean & Beckett* scenario in that country could ever be a reality.

#### A. Turkey

Homosexuality is regarded as immoral behavior in the Turkish armed forces, and under the military penal code, military personnel discovered to be homosexuals are discharged from duty on charges of indecency.<sup>182</sup> The individual does not face further prosecution once discharge from duty has occurred.<sup>183</sup> The moral code governing Turkish social life does not tolerate homosexuality, and this attitude is reflected in the Turkish armed forces.<sup>184</sup> The Turkish military establishment views homosexuality as indecent behavior that degrades the honor, dignity, and credibility of the military.<sup>185</sup> According to Haluk Buguner of Lambda Istanbul, a volunteer group for gay, lesbian, bisexual, and transgendered people in Turkey, the Justice Commission of the Turkish Parliament passed a bill in July 1996, stating that soldiers who engage in unnatural sexual activity would be expelled from the Army.<sup>186</sup> Buguner critiqued the bill by noting the vagueness of the law. The law did not specify the criteria for determining how the soldier conducts the unnatural sexual activity; whether it would be enough for the soldier to conduct the act only once or on a regular basis; or whether the activity should be conducted in public or in private. Therefore, according to Buguner the Court decisions enforcing this law would only be made on a case-by-case basis.<sup>187</sup> Additionally, these decisions would set examples for future cases. The bill was by no means limited to homosexuals. It also specified that military personnel who got into relationships with prostitutes and “morally decadent women” would also be discharged.<sup>188</sup> To examine how the *Lustig-Prean & Beckett* ruling will affect Turkey requires an examination of the history of the

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182. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE HONORABLE JOHN W. WARNER, U.S. SENATE, HOMOSEXUALS IN THE MILITARY: POLICIES AND PRACTICES OF FOREIGN COUNTRIES 25 (GAO/NSIAID-93-215, June 1993).

183. *Id.*

184. *Id.*

185. *Id.*

186. Employment Protection Law and Cases, at [http://www.ilga.info/Information/legal\\_survey/europe/turkey.htm](http://www.ilga.info/Information/legal_survey/europe/turkey.htm) (last visited July 26, 2004).

187. *Id.*

188. *Id.*

Convention in Turkey, its status in Turkish law, and the social system in which the homosexual community has to operate.

### 1. The History of the European Convention in Turkey

Turkey ratified the Convention in 1949 and Protocol Number 1 in 1954. The Convention did not attract much attention in Turkish politics in 1954 nor has it since.<sup>189</sup> In fact, the Convention had absolutely no impact on the political and legal life of Turkey in the 1960s.<sup>190</sup> It was believed that the Turkish Constitution of 1961 was more comprehensive than the Convention as it dealt with a wide list of social, economic, cultural, and political rights.<sup>191</sup> Additionally, Turkey did not recognize the right of individual application, nor did it accept the compulsory jurisdiction of the European Court. This prevented the Convention from having any status in Turkish domestic law.<sup>192</sup>

After the third military intervention of September 12, 1980, attitudes towards human rights in Turkey changed dramatically.<sup>193</sup> The new administration was significantly more oppressive than the administrations established by the military interventions of 1960 and 1971.<sup>194</sup> As a result, relations with European countries declined during the 1980s.<sup>195</sup> However, parallel to this, the Turkish human rights movement was growing, and a number of nongovernmental human rights institutions, founded by political prisoners and torture victims, their relatives and opposing intellectuals were making their mark by emphasizing to the government its international human rights responsibilities.<sup>196</sup>

By the late 1980s, in order to change the image of Turkey's human rights record, some human rights agreements were signed or ratified.<sup>197</sup> For instance, Turkey immediately ratified the European Convention on Torture in 1988. Furthermore, the Turkish government made declarations under Articles 25 and 46 during that time period.<sup>198</sup> In addition to these

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189. YASEMIN OZDEK & EMINE KARACAOGLU, *Turkey, in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 879.

190. *Id.* at 880.

191. *Id.*

192. *Id.*

193. *Id.*

194. OZDEK & KARACAOGLU, *Turkey, in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 880.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*



developments, the Turkish government also reversed the derogation it had made in 1992, concerning Article 5 of the Convention (the right to liberty and security) with respect to provinces under emergency rule.<sup>199</sup> In compliance with the case law of the Court, Turkey reduced the maximum detention period before an individual is brought before a judge to four days. According to Council of Europe Secretary General Walter Schwimmer, this measure, which encouraged the Turkish authorities to withdraw the derogation, was strongly welcomed because it signified progress in terms of human rights protection of people held in Turkey. Furthermore, Schwimmer added that this policy change reinforced the idea that respect for basic fundamental rights is not inconsistent with a vigilant attitude toward threats of terrorism.<sup>200</sup>

## 2. The Status of the Convention in Turkish Domestic Affairs

The 1924 Constitution, in effect at the time Turkey ratified the Convention, did not address the domestic status of international agreements.<sup>201</sup> This was rectified by the Constitutions of 1961 and 1982 which outlined some procedures for putting international agreements into effect.<sup>202</sup> The provisions of these constitutions have been interpreted to mean that in the Turkish legal system, international law is superior to domestic law.<sup>203</sup> However, this view is not shared by all legal analysts. Yasemin Ozdek and Emine Karacaoglu explain that there are two views on this matter.<sup>204</sup> Some analysts have claimed that international agreements have equal status with domestic law, while others consider them superior to domestic laws.<sup>205</sup> According to the first approach, international agreements have the “force of law.”<sup>206</sup> This means that a constitutional review of international agreements is not necessary and that they are on par with domestic laws.<sup>207</sup> The second view, on the other hand, stresses

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199. OZDEK & KARACAOGLU, *Turkey*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 881.

200. Human Rights Headlines, Turkey: Withdrawal of Derogation to Article 5 of European Convention, Feb. 1, 2002, at <http://www.hrea.org/lists/hr-headlines/markup/010202.php> (last visited July 14, 2004).

201. OZDEK & KARACAOGLU, *Turkey*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 881.

202. *Id.* at 882.

203. *Id.*

204. *Id.* at 882–83.

205. *Id.* at 883.

206. OZDEK & KARACAOGLU, *Turkey*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 883.

207. *Id.*

that the superiority of international agreements is reflected in the very fact that they are not subjected to constitutional reviews.<sup>208</sup> However, Turkish legal scholars subscribing to this school of thought are often split about the exact status of international agreements in the Turkish body of law.<sup>209</sup> While some have argued that the place of international agreements is between ordinary domestic laws and the Turkish Constitution, others have maintained that international agreements are constitutional or even supra-constitutional.<sup>210</sup> Therefore, if there is a conflict between a domestic law and an international agreement, the latter must be applied.<sup>211</sup>

However, it is important to bear in mind that human rights agreements are accorded a separate status from other international agreements in Turkey.<sup>212</sup> In other words, while Turkish legal scholars, at the very least, accept that while international agreements may have equal status with ordinary domestic laws, human rights agreements have a special character in the framework of the status of international law in the domestic affairs.<sup>213</sup>

What is notable about the Turkish situation is that the Convention has been used to justify restrictions as well as freedoms. The prime example is the right to form and join trade unions.<sup>214</sup> The Turkish Constitutional Court prohibited this activity on the grounds that Article 11 of the Convention provided a legal basis for such a restriction.<sup>215</sup> Another example is the right to dissolve political parties on the grounds that their ideology threatened the integrity of the Turkish state.<sup>216</sup> The Turkish authorities referred to Article 17 of the Convention in justifying this decision.<sup>217</sup>

Regarding the question of reservations, Turkey is part of the group of member states that have entered a reservation to prevent the Court having jurisdiction in matters of military discipline.<sup>218</sup> This means that the Turkish

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208. *Id.*

209. *Id.*

210. *Id.*

211. OZDEK & KARACAOGLU, *Turkey*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000*, *supra* note 10, at 883.

212. *Id.* at 884.

213. *Id.* at 883.

214. *Id.* at 893.

215. *Id.* This decision was overturned in 1995 when the Constitution was amended. *Id.* at 906.

216. OZDEK & KARACAOGLU, *Turkey*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000*, *supra* note 10, at 893.

217. *Id.* at 894.

218. ROWE, *supra* note 73, at 10.

government is not obliged to change its policies after the decisions in *Lustig-Prean & Beckett* and *Smith & Grady*.

Turkey's record before the Court has been poor. By 1997, the number of judgments involving Turkey had risen to 34.<sup>219</sup> Of these judgments, 28 have involved some kind of violation by the Turkish government, especially of Articles 2, 3, 5, 6, 8, 10, 11, 13, and 25 of the Convention.<sup>220</sup> These violations demonstrated that there were great structural barriers to democracy in Turkey.<sup>221</sup> Although the Turkish State has taken formal steps towards a more democratic political process, the current regime does possess authoritarian characteristics. For instance, kidnappings and executions have continued for years.<sup>222</sup> Furthermore, the Turkish army has also become politically active. On February 28, 1997, in a meeting of the National Security Council, the generals dictated their new program to the government, resulting in highly oppressive policies. Turkish political analysts have labeled this as a "covert military coup."<sup>223</sup> These developments clearly illustrate that there are some deeply entrenched barriers to the improvement of democracy in Turkey, and this has reduced the prospects for human rights agreements ratified by Turkey.<sup>224</sup> There seems to be a tension between the political requirements of the states and the international norms which the State has a responsibility to endorse.<sup>225</sup>

### 3. The Social System in Turkey

The previous section indicated that given the structural barriers to democracy, it is unlikely that Turkey will choose to abide by the Court's rulings in *Lustig-Prean & Beckett* and *Smith & Grady*. This is, however, only one part of the equation. It is equally important to look at social factors. The nature of the social system in Turkey has barred this issue from the political agenda. This section will attempt to illustrate that the nature of the social system in which Turkey's homosexuals and lesbians

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219. OZDEK & KARACAOGLU, *Turkey, in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 911. This low number was mainly due to the fact that Turkey only recognized the right of individual application in 1987. *Id.*

220. *Id.* at 912.

221. *Id.* at 913–14.

222. *Id.* at 913.

223. *Id.* at 914.

224. OZDEK & KARACAOGLU, *Turkey, in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 914.

225. *Id.*

live, work and operate, is a volatile one, and will make it impossible for gay and lesbian Turkish service members to take their case to the Court.

Change for homosexuals in Turkey has been gradual. Unlike its counterparts in the West, the Turkish Gay movement is still evolving. It is very much a fledgling movement. The turning point was in 1993, when a small number of gays and lesbians in Istanbul came together after the police banned Christopher Street Day celebrations.<sup>226</sup> They called the group Lambda Istanbul, and within this organization, various mini-groups were formed.<sup>227</sup> The goals of the groups were to assist homosexuals who wished to come out, to establish solidarity within the gay community, to combat prejudice of the media and society, to assist Turkish gays in their quest to develop an identity, and campaign for equality and liberation.<sup>228</sup> The groups had modest success in the 1990s, with the most notable success in the field of human rights.<sup>229</sup> In the 1980s, the Human Rights Association of Istanbul was unwilling to get involved in gay and lesbian issues. However, it changed its stance after working with Lambda's Human Rights Working Group.<sup>230</sup> In September 1998, the group participated in a major conference where it openly discussed homosexuality and as a result gained more members.<sup>231</sup>

However, it would be incorrect to assume that these successes heralded a "gay revolution" in Turkey.<sup>232</sup> Lambda's influence is not comparable to the clout of British gay and lesbian organizations, and Turkish homosexuals continue to face hostility from certain sections of society. From a legal perspective, Turkish homosexuals view themselves

226. "Christopher Street Day" is an annual celebration that commemorates police attacks on homosexuals in New York City's Greenwich Village in 1969. Deborah S. Morris, *Remembering Stonewall: Gay Pride March Steps Off Today*, *NEWSDAY* (New York), June 27, 2004, at A15. Observances take place annually around the world. *See Gays Celebrate, Vow to Fight On*, *THE MERCURY* (Australia), June 28, 2004, at 16. In 1993, International Gay Group Berlin, a gay rights organization in Berlin, Germany, attempted to start a Christopher Street Day celebration in Turkey, but the event was canceled by police. *See Queer Resources Directory, Homosexuality in Turkey, Gay Movement in 90s, Banned Activities in 1993* [hereinafter QRD Web Site], available at <http://qrd.tcp.com/qrd/www/world/europe/turkey/90s.htm> (last visited July 26, 2004).

227. *See supra* note 226; *see also* Lambda Istanbul Web Site, available at <http://www.lambdaistanbul.org/index.asp?ACTION=home&WHATDO=whois&LNG=ENG> (last visited July 26, 2004).

228. *See* QRD Web Site, *supra* note 226.

229. *See id.*

230. *See id.*

231. *See* Lambda Istanbul Web Site, *supra* note 227.

232. *See* Queer Resources Directory, Homosexuality in Turkey, Interview with OPOTH, available at <http://www.qrd.org/qrd/www/world/europe/turkey/iview.htm> (last visited July 26, 2004).

as vulnerable. While Turkish law does not mention homosexuality, there are other articles which give the police the power to interfere with anything that is against Turkish moral values. However, there are no guidelines to determine what is against Turkish moral code. This means that the police can arrest homosexuals if they conclude that homosexuality threatens Turkish moral values. This leaves Turkish gay and lesbian citizens in a precarious situation.<sup>233</sup>

As a Lambda spokesperson in an interview with a Greek magazine explained: “From the political view having no law about homosexuality is a little bit bad. Because we lack a target. If we had such a law we would work for removing that law and when it is achieved, it would make great effect on the society too.”<sup>234</sup> In the field of art and entertainment, the tendency has been to focus on gay stereotypes, rather than “regular gays who look like an ordinary heterosexual.”<sup>235</sup> According to Turkish gay activists, there seems to be an unwillingness on the part of the Turkish media to realistically portray the lives of Turkish homosexuals.<sup>236</sup>

In the political arena, the Freedom and Solidarity Party is the only Turkish political party to adopt an explicitly positive attitude towards Turkey’s homosexual population.<sup>237</sup> In its statutes there are direct references to sexual minorities. For instance a particular statute states, “We must resist every pressure on different sexual choices. We must fight the discrimination and contempt directed on the people because of their differences.”<sup>238</sup> These references cannot be found in any other party’s statutes, except the Radical Democratic Green Party, but the Freedom and Solidarity Party is still on the fringes of Turkish politics.<sup>239</sup> At the other end of the political spectrum, a high-profile member of the Prosperity Party, Erdogan, was alleged to have said at a secret meeting: “We will hang all homosexuals in Taksim Square.”<sup>240</sup> It is worth noting here that the Prosperity Party has an Islamic fundamentalist ideology at the basis of its manifesto. It recently shared power with another right wing party.

The analysis of the Turkish situation has demonstrated that a democratically deficient political and legal system prevents the decision makers from adhering to the spirit of the Convention. Politicians in a

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233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. Queer Resources Directory, *supra* note 232.

238. *Id.*

239. *Id.*

240. *Id.*

nation like Britain were able to introduce new policies to encourage British judges to take into account the Court's rulings relating to other member nations due to the democratically advanced political and legal system at their disposal. Turkish politicians and judges, on the other hand, still have to deal with challenges posed by the barriers to democracy and to apply the Convention in a manner that provides true freedom to all. It is therefore unlikely that they will take into consideration the Court's judgments which do not involve Turkey. Furthermore, Turkey's social system means that Turkish homosexuals still have to fight certain battles in order to be on par with their British (and Western) counterparts. It is only when they achieve this parity that organizations like Lambda will be able to focus on more specialized issues, such as homosexuals in the armed forces. In the United Kingdom, Stonewall, an organization which actively campaigns for homosexuals in a variety of areas, arranged legal representation for those involved in the *Lustig-Prean & Beckett* and *Grady & Smith* cases.<sup>241</sup> It will likely be some time before we see Lambda taking on something similar.

### B. Poland

Currently homosexual soldiers are directed to receive psychiatric treatment. They are then usually released to civilian life after being diagnosed as having "personality disorders." But this only in cases when their homosexuality is proven.<sup>242</sup>

According to a 1994 report on attitudes towards homosexuality in Poland,<sup>243</sup> gays are prevented from engaging in military service on the grounds that homosexuality is regarded as a "personality disorder." As a result, any homosexual soldier is directed to receive psychiatric treatment and must endure the humiliation of having his or her sexual orientation checked using unspecified means. The diagnosis of "personality disorder" is included in their records. The situation of gay soldiers in the Polish army

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241. See Stonewall's Web Site, Employment, at [http://www.stonewall.org.uk/stonewall/information\\_bank/employment/military.html](http://www.stonewall.org.uk/stonewall/information_bank/employment/military.html) (last visited July 26, 2004).

242. International Lesbian and Gay Association, Report on Discrimination on the Basis of Sexual Orientation in Poland in 1994 [hereinafter Discrimination Report] (citing an article in the *Nowa Trybuna Opolska*, June 4-5, 1994) (Comments of a Polish Army officer — a military doctor from Opole on the topic of the present situation of gay reserve soldiers in the Polish military), available at [http://www.ilga.info/Information/Legal\\_survey/europe/supporting%20files/report\\_on\\_discrimination\\_on\\_the\\_htm](http://www.ilga.info/Information/Legal_survey/europe/supporting%20files/report_on_discrimination_on_the_htm) (last visited July 26, 2004). These comments are from a Polish Army Officer, a military doctor from Opole, on the topic of the present situation of homosexual reserve soldiers in the Polish military.

243. *Id.*

is described by a former intelligence officer: “They were under constant surveillance. They carried the constant threat of being victims of blackmail, and could fall prey to foreign intelligence services.”<sup>244</sup> The report listed the following consequences for gay soldiers: being observed by intelligence officers, gross violation of the right to privacy of Polish Army Officers; fear that information pertaining to sexual orientation would be used in an inappropriate manner; fewer career opportunities; forced to do jobs below their expertise and knowledge level; and finally, dismissal from the forces.

An analysis of the Polish case study will reveal problems unique to the nations belonging to the former Eastern-bloc. It will attempt to illustrate that serious legal challenges prevent the Polish authorities from considering the Court’s judgments about other nations and that basic attitudes towards homosexuality must be changed before gay Polish soldiers can take their case to Strasbourg.

### 1. The History of the Convention in Poland

As in the other countries of the former Soviet bloc, the Convention was regarded as a mysterious document in Poland, known only to a few people. According to the official philosophy of the time, it was a symbol of Western hypocrisy, creating formal guarantees on paper, but too abstract to actually serve the people.<sup>245</sup>

The nations of the former Eastern bloc (or the *Realsozialismus* states) signed a variety of international agreements<sup>246</sup> on human rights, but it was believed that these states did not have serious intentions of fulfilling their obligations.<sup>247</sup> However, over a period of time, certain individuals in these states decided to take seriously the obligations undertaken by their states to adhere to basic human rights.<sup>248</sup> Members of the Polish Solidarity movement, the Czech Charter 77, along with numerous Helsinki Watch committees and other human rights organizations gradually empowered societies of those countries by making them aware of the real value and importance of international agreements on the protection of individual rights.<sup>249</sup>

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244. *Id.*

245. ANDREW DRZEMCZEWSKI & MAREK ANTONI NOWICKI, *Poland*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 657.

246. They signed, for instance, the U.N. Covenant of Civil and Political Rights. *Id.*

247. *Id.*

248. *Id.* at 658.

249. *Id.*

After 1989, when the prospect of post-Communist countries ratifying the Convention was no longer a pipe dream, the population in these countries realized that a great political and legal transformation was taking place — that their decision makers had committed their countries to specific and legally binding obligations, and that they would be able to demand compliance with these obligations from their decision makers both at home and on the world stage.<sup>250</sup>

Poland ratified and signed the Convention on November 26, 1991.<sup>251</sup> The Act ratifying the Convention was passed on October 2, 1992 and was published in the Official Gazette (*Dziennik Ustaw*) on November 24, 1992.<sup>252</sup> Section 2 of this Act focused solely on the Convention and stated that the Act would come into force a fortnight after its publication (i.e., December 8, 1992).<sup>253</sup> Lech Walesa, the President of Poland, signed this document on December 15, 1992.<sup>254</sup> The right of individual petition (Article 25) and the Strasbourg Court's authority were recognized beginning on May 1, 1993.<sup>255</sup>

## 2. The Status of the Convention in Polish Domestic Affairs

Until recently, the status of the Convention in the Polish legal order was ambiguous.<sup>256</sup> However, the new Polish Constitution of 1997 brought clarity to this issue.<sup>257</sup> Article 9 of the Constitution states that “the Republic of Poland abides by international law which is binding on it.”<sup>258</sup> In addition to this, Article 86 of the Polish Constitution stipulates that ratified international agreements constitute a significant part of the sources of

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250. DRZEMCZEWSKI & NOWICKI, *Poland*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000*, *supra* note 10, at 658.

251. *Id.*

252. *Id.* at 659.

253. *Id.*

254. *Id.*

255. DRZEMCZEWSKI & NOWICKI, *Poland*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000*, *supra* note 10, at 659.

256. *Id.*

257. *Id.* at 660.

258. POL. CONST. art. 9, *quoted in* DRZEMCZEWSKI & NOWICKI, *Poland*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000*, *supra* note 10, at 660.



generally binding law.<sup>259</sup> Article 90 of the Polish Constitution provides that once a ratified international treaty has been published in the Official Gazette, it immediately becomes part of the domestic legal order and is applicable directly, unless its application depends upon the passing of a separate Act of Parliament.<sup>260</sup> As a result of these articles, if there is a conflict between the Convention and a statute, the Convention is given priority.<sup>261</sup>

As to the Court's judgments that do not concern Poland, the Polish Constitution obliges the Polish Supreme Court and common courts to apply the Convention's case law in their decisions.<sup>262</sup> However, there are two serious legal obstacles that prevent the Supreme Court from making full use of the Court's judgments. The first problem is a lack of availability.<sup>263</sup> The judgments of the Court are usually presented in the official languages of the Council, French and English.<sup>264</sup> This can be a problem as Polish lawyers generally do not have a strong command of the English language.<sup>265</sup>

Second, Polish judges have yet to master the art of interpreting the Convention and the Court's judgments in the light of Poland's international legal obligations.<sup>266</sup> Polish legal analysts have argued that judges and public prosecutors need to become proficient in interpreting the articles of the Convention.<sup>267</sup>

Unlike Turkey, Poland has entered no reservation to the Convention as to prevent the Court from having jurisdiction in areas relating to military personnel. Therefore, in theory, it is free to follow the Strasbourg Court's rulings in *Lustig-Prean & Beckett* and *Grady & Smith*. However, as this section has demonstrated, there are some basic legal and linguistic barriers that prevent the Polish government from proceeding in this direction.

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259. DRZEMCZEWSKI & NOWICKI, *Poland*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 660.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 676.

264. DRZEMCZEWSKI & NOWICKI, *Poland*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 676.

265. *Id.* Effort has been made to make the European Court of Human Rights judgments available in Polish. For instance, Antoni Nowicki publishes in the *Rzeczpospolita* discussions of all judgments of the Court. *Id.*

266. *Id.* at 677.

267. *Id.*

Furthermore, the social challenges covered in the next section highlight the need to change cultural attitudes towards homosexuality before an attempt is made to change policy regarding homosexual service members.

### 3. The Social System in Poland

According to an opinion poll published by the Polish Press Agency in August 1994, seventy-nine percent of the respondents believed that homosexuals should be barred from the teaching profession, whereas only thirteen percent believed the opposite. In the same survey, eighty-eight percent were against homosexuals adopting children and twenty-five percent pejoratively labelled homosexuals as “fags.”<sup>268</sup>

The above report indicates that Polish society is far from friendly to homosexuals and that they are accepted at best marginally in the social and professional spheres. As a result, many Polish gays still keep their identity a secret for fear of being ostracized. This is not surprising, given the lack of tolerance reflected in the language used by Polish society. According to a recent International Gay Lesbian Association Report, thirty-four to forty-four percent of respondents use terms which are generally regarded as being offensive — “deviants,” “fags,” and so on.<sup>269</sup>

Polish politicians have also made this an extremely contentious issue. The Polish right wing has homosexuality on the agenda of presidential elections. The first post-Communist Polish leader, Lech Walesa, for instance, was quoted as saying that he believed homosexuals needed medical treatment.<sup>270</sup> Finally, the influence of the Catholic Church should not be underestimated. Marian Krzaklowski, candidate for the conservative Catholic group known as Solidarity Election Action, has come out strongly against homosexual marriages and adoption. She has argued that giving homosexuals such privileges “risks destroying the moral consensus and social peace.”<sup>271</sup>

This section has illustrated that legally there is nothing to prevent Poland from adhering to the *Lustig-Prean & Beckett* verdicts. After all, the 1997 Polish Constitution authorizes judges to take into consideration Court verdicts concerning other nations. Furthermore, the Polish authorities have not entered any reservations concerning military affairs. However, due to

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268. Discrimination Report, *supra* note 242.

269. *Id.*

270. *Polish Catholic Right Plays Homophobia Vote Card*, AGENCE FRANCE PRESSE, July 22, 2000, available at [http://www.ilga.info/Information/Legal\\_survey/europe/supporting%20files/polish\\_catholic\\_right\\_plays\\_homo.htm](http://www.ilga.info/Information/Legal_survey/europe/supporting%20files/polish_catholic_right_plays_homo.htm) (last visited June 9, 2004).

271. *Id.*

the linguistic and cultural barriers discussed, it is doubtful that there will be a policy change in the near future.

### C. Russia

In February 2003, the Russian government approved new eligibility criteria for military service. The new regulations classed homosexuality with drug addiction and emotional disorders and barred people dealing with these issues from the forces. According to the Chairman of the Russian Defense Ministry's Central Military Medical Commission, Major General Valery Kulikov:

This is not a medical matter. The classification of diseases by the World Health Organization does not include such a disease. The new rules are based on international norms. So we are not calling this a diagnosis. However, people "of untraditional sexual orientation" suffer some psychological changes, while people with personality disorders are not eligible according to medical examination rules for servicemen.<sup>272</sup>

The new rules were published in the official *Rossiyskaya Gazeta* and took effect on July 1, 2003. They stressed that people "who have problems with their identity and sexual preferences" can only be drafted during times of war.<sup>273</sup>

It is interesting to note that this change in policy came *after* the Court's rulings in 1999. Clearly, there was no attempt to bring policy in-line with these verdicts. There are legal challenges that explain why Russia felt that it was able to go against the liberal climate of the rest of Europe and introduce a personnel policy which excluded homosexuals from its military. For instance, it is simplistic to assume that all is well where human rights are concerned simply because Russia has declared itself to be a democratic state and has openly adopted the universal principles of human rights and freedoms.

According to Ferdinand Feldbrugge, "the heritage of many centuries of autocracy, dictatorship, and enforced orthodoxy and unity is a heavy

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272. *Drug Addicts, HIV Sufferers, Homosexuals to Be Barred from Russian Armed Forces*, NEWS AGENCY — ROSBALT, Mar. 16, 2003, available at <http://www.rosbaltnews.com/2003/03/16/61750.html> (last visited Mar. 17, 2004).

273. *Russia Bans Gays, Alcohol and Drug Users from the Army*, CDI RUSSIA WEEKLY, available at <http://www.cdi.org/russia/248-11-pr.cfm> (Last visited July 15, 2004).

burden which has a strong psychological impact on the Russian polity.”<sup>274</sup> Furthermore, Feldbrugge comments that Russian democracy itself is also hindered by the unwillingness or the inability of Russian policymakers to surrender the “winner takes all” mentality.<sup>275</sup> Given these political and cultural factors, positive change for minority groups such as homosexuals who wish to join the military will not come swiftly.<sup>276</sup> Furthermore, Russian societal attitudes towards homosexuals created an environment in the country that has made it difficult for Russian homosexual soldiers to be proactive in the fight for their rights within the forces. This section will examine these issues in greater detail.

### 1. The History of the Convention in Russia

On February 28, 1996, Russia became a member of the Council of Europe and ratified the Convention two years later.<sup>277</sup> After a relatively quick legislative process, the Duma (the directly elected First Chamber of the Russian Parliament), adopted the ratification law on February 20, 1998 and the Council of the Federation (representatives of the territorial administrative units) did the same a month later.<sup>278</sup> By May 5, 1998, “the instruments of the ratification” were officially deposited at the Council of Europe by Russia’s then Minister of Foreign Affairs, Mr. Primakov.<sup>279</sup>

Not surprisingly, Russian legal and political analysts found the Convention to be a highly controversial document. Maxim Ferschtman explained that while the basic principle of the Convention is to place a maximum importance on the individual, this goes against Russian legal culture, which has evolved to view the individual as a subject of a larger community or social group. In this context, the individual’s relationship to the state was in terms of reciprocity; in order to receive a service or a good, including basic human rights, the individual had to contribute something to the state.<sup>280</sup>

Ferdinand Feldbrugge in his essay *Human Rights in Russian Legal History* sheds further light on Russian legal culture.<sup>281</sup> He argues that

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274. Ferdinand Feldbrugge, *Human Rights in Russian Legal History*, in HUMAN RIGHTS IN RUSSIA AND EASTERN EUROPE, at 90 (Ferdinand J.M. Feldbrugge & William B. Simons eds., 2002).

275. *Id.*

276. *Id.*

277. MAXIM FERSCHTMAN, *Russia*, in FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 733.

278. *Id.* at 737.

279. *Id.* at 737-38.

280. *Id.* at 731-32.

281. Feldbrugge, *supra* note 274, at 89-90.

concepts such as separation of powers, which were gradually evolving in Western Europe, never gained momentum in Russia due to several factors. These factors included the secondary status of the Orthodox Church, the weakness of higher nobility, the nature of Russian feudalism, and the isolation from the ideals from Western Europe. However, this did not mean that those in charge had a free hand. For instance, while church leaders lacked the advantage of a legally defined position, they used their moral authority and spoke out against injustices. Subsequently, when the Communists came to power they introduced a package of human rights but ensured that these rights did not in any way hinder the regime's freedom of action.<sup>282</sup>

Due to this clash of two legal cultures, it was believed that Russia would be able to claim a broad margin of appreciation.<sup>283</sup> However, this argument was quickly dismissed.<sup>284</sup> The Convention is designed to take into account the unique legal and political features of each state, and respond to new norms, but the state itself is not permitted to introduce policies that go against the fundamental principles of the Convention.<sup>285</sup>

## 2. The Status of the Convention in Russian Domestic Affairs

A first glance at the Russian Constitution indicates that the Convention is directly applicable on Russian territory and that individuals can invoke its provisions directly in domestic courts.<sup>286</sup> However, this is not so straightforward when one considers the way in which the Convention is interpreted.<sup>287</sup> Some Russian legal analysts argue that international human rights treaties provide a minimum level of protection, and it is the state's choice to elevate the level of protection of the particular right.<sup>288</sup> They emphasize that the state will be fulfilling its international obligations as long as it does not fall below the "minimum" threshold.<sup>289</sup>

In its ratification document, Russia made a number of reservations, indicating that key aspects of Russian law are to be exempted from the

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282. FERSCHTMAN, *Russia, in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 731-32.

283. *Id.* at 732.

284. *Id.*

285. *Id.*

286. *Id.* at 736.

287. FERSCHTMAN, *Russia, in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES 1950–2000, *supra* note 10, at 736.

288. *Id.*

289. *Id.*

application of the Convention. One of the reservations, which concerns the discipline of the armed forces and the status of servicemen, declares that the Convention would not prevent the application of certain disciplinary regulations. Namely, the reservation provides for the

arrest and detention in the guard-house as a disciplinary measure imposed under extra-judicial procedure on servicemen — private soldiers, seamen, conscripted non-commissioned officers, non commissioned officers and officers.<sup>290</sup>

The European Court has stated, and many legal scholars agree, that the purpose of reservations is to serve as a temporary measure to remain in force until new legislation is adopted to replace the old provisions.<sup>291</sup> However, the above described reservation, pertaining to the Russian Armed Forces personnel, continues to remain in force. This ostensibly means that the European Court of Human Rights has no jurisdiction over Russia's military matters.

### 3. The Social System in Russia

In the early 1990s, Russia repealed the Soviet-era law that made homosexuality a criminal offense with a penalty of five years in prison. In May 1993, then-President Boris Yeltsin repealed Article 121 of the Criminal Code, which made sodomy a punishable offense. However, progress has been slow. It has been hard to change attitudes and challenge people's perceptions. For instance, in May 2002 a group of policymakers introduced an amendment to recriminalize sodomy, arguing that they were on a mission to restore traditional values and roles in Russia. This amendment, although regarded by most analysts as a publicity stunt, sparked protests by human rights groups and the homosexual community.<sup>292</sup>

According to the Russian gay community, homophobia is still deeply engrained in Russian society. "I don't feel there has been any progress in Russia in the past 10 years in terms of tolerance toward sexual minorities,"

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290. Council of Europe, List of Declarations Made with Respect to Treaty No. 005 Convention for the Protection of Human Rights and Fundamental Freedoms, *available at* <http://www.hri.ca/fortherecord2001/euro2001/documentation/conventions/echr.htm> (last visited July 15, 2004).

291. *See supra* text accompanying notes 69-72.

292. Claire Bigg, *Alternative-Sexuality Repts Stress Awareness*, ST. PETERBURG TIMES (Russia), June 14, 2002, *available at* [http://www.sptimesrussia.com/archive/times/777/news/n\\_6665.htm](http://www.sptimesrussia.com/archive/times/777/news/n_6665.htm) (last visited July 27, 2004).

said Ignat Fialkovsky, president of St. Petersburg's Association HS-Gay-Straight Alliance.<sup>293</sup>

The issue of homosexuality may be out of the closet and publicly debated in the Russian media, but homophobic attitudes from the Soviet era continue to dominate Russian society. Prominent Russian politicians view homosexuality as an alien Western concept. For instance, Vadim Bulavinov, a member of the Russian Parliament stated to CNN: "I think it's a perversion but unfortunately, recently in Russia, especially among young people and the media, they are promoting it, saying it's part of Western values."<sup>294</sup>

An analysis of legal and cultural variables in Russia has revealed that it is unlikely that the Russian government will change military recruitment policy to accord with the *Lustig-Prean & Beckett* and *Smith & Grady* verdicts. From a legal point of view, Russian policy-makers and legal scholars take the view that the Convention sets minimum standards and that as long as they fulfill these minimum obligations they will not be in breach of the Convention. Furthermore, the reservations which prevent external organizations from influencing the structure and culture of the Russian armed forces still stand. Finally, there seems to be a regression in the campaign to increase tolerance towards sexual minorities.

## V. CONCLUSION

This Article illustrates that the progress of homosexual servicemen and women in nations party to the Convention depends on a complex set of legal and cultural issues. Analysis of a few of the member nations reveals that the situation is by no means the same across the board. In the United Kingdom, liberal culture and legal developments, such as the Human Rights Act of 1998 have meant that minority groups such as gays and lesbians in the British Armed Forces have managed to reverse archaic policies. The Turkish scenario, on the other hand, has been influenced by democratic barriers and legal obstacles, such as reservations. Furthermore, the gay and lesbian scene in Turkey is still in its infancy and homosexuals must obtain basic social acceptance before they can turn their attention to more specialized issues. Issues such as the presence of sexual minorities in the armed forces. The situation can be compared to the women's

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293. *Russian Gays Say Homophobia Still Engrained in Society*, GAY.COMUK, Jan. 6, 2003, available at <http://www.uk.gay.com/headlines/3313> (last visited July 27, 2004).

294. Jill Dougherty, *Russian Gays Face Banning Law*, CNN.COM/WORLD, at <http://www.cnn.com/2002/WORLD/europe/08/03/russia.gay/index.html> (last visited July 27, 2004).

liberation movement in the 1970s and 1980s. Women's rights groups in the United Kingdom and the United States were concerned with such issues as sexual freedom and equality in the work place. Meanwhile, female activists in the East were more concerned with improving the basic living conditions of women in deprived regions. Given these legal and cultural difficulties, it is unlikely that in the near future the Turkish authorities will adhere to the *Lustig-Prean & Beckett* and *Smith & Grady* rulings.

The status of homosexuals in the Russian and Polish armed forces highlight features common to most former Communist countries. There are linguistic as well as legal and cultural barriers that at the present time make it impossible for the authorities in these countries to take notice of the *Lustig-Prean & Beckett* and *Smith & Grady* rulings.<sup>295</sup>

Will there be a policy reversal in the next decade in Convention member nations still enforcing the gay ban on their militaries? The answer depends on a complex set of political and legal factors. From a legal perspective, the new signatories to the Convention enforcing the gay ban, such as Poland and Russia, will have to adopt norms followed by Western European nations, namely that a party does not contest the judgment of an international court.<sup>296</sup>

Western nations find it especially unacceptable to contest the legitimacy of a court or a judgment when the judgment is unfavorable to one's own state. For actors seeking to cultivate a reputation as a legitimate and responsible player on the international scene, contesting unfavorable decisions is unwise. Most Western European governments to simply take into account the verdicts that have gone against them and take the measures necessary to comply.<sup>297</sup> Whether the new signatories will follow this norm remains to be seen. In the case of Turkey, there is a tendency to mix law and politics as demonstrated in the *Loizidou v. Turkey* case.<sup>298</sup> In this case a woman owned property in North Cyprus but could not use it due to the Turkish occupation of the area. The Court ruled that the woman should be paid damages, but Turkey declared that this case and others like it will only be settled after a political decision on the Cyprus issue has been reached.<sup>299</sup>

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295. Member nations are obliged to take notice of Strasbourg judgments, decisions, declarations, and opinions; however, they are not bound to follow them.

296. JANNE HAALAND MATLARY, *INTERVENTION FOR HUMAN RIGHTS IN EUROPE* 123 (2002).

297. *Id.*

298. *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513 (1996).

299. MATLARY, *supra* note 296, at 123.



From a political perspective, certain Convention signatories (especially the new members from Eastern Europe) have more basic military concerns, such as, transforming their forces from conscript to professional. As a result, at the moment, removing the gay military ban is an issue that they do not believe must be put on the agenda.<sup>300</sup> However, the situation could well change in the next decade as armed forces from Eastern Europe develop closer ties with NATO and in the process, absorb values that will influence their organizational culture.<sup>301</sup>

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300. Interviews with military representatives from the Hungarian and Ukrainian Embassies, in London, England (Dec. 15, 2003) (these individuals spoke with the author on the condition of anonymity).

301. *Id.*

Appendix One — Convention for the Protection of Human Rights and Fundamental Freedoms and the Nations That Have Lifted the Gay Ban on Their Armed Forces

States	Date of Signature	Military Reservations	Special Comments
Austria	12/13/1957		
Belgium	11/04/1950		
Bosnia & Herzegovina	04/24/2002		
Bulgaria	05/07/1992		
Czech Republic	02/21/1991		
Denmark	11/04/1950		
Estonia	05/14/1993		
Finland	05/05/1989		Has compulsory military service but men may be excused on the grounds of homosexuality
France	11/04/1950	Yes	
Germany	11/04/1950		Germany has no ban, but homosexuality can be a bar on promotion. Gay soldiers may not command or instruct troops. Open active-duty acts may be court-martialed.
Ireland	11/04/1950		.
Lithuania	05/14/1993	Yes	
Luxembourg	11/04/1950		
Netherlands	11/04/1950		

Norway	11/04/1950		Declaring homosexuality not sufficient to avoid service; must show behavior is or would be disruptive. No discrimination in posting or promotions. Very little "coming out."
Slovenia	05/14/1993		
Slovakia	02/21/1991	Yes	Source: Statement from the Slovak Military Attache in London.
Spain	11/24/1977	Yes	
Sweden	11/28/1950		There is no specific policy on gays in the military and it is not an issue in Sweden, which is generally liberal about homosexuality and gives legal recognition to gay partnership. To avoid service, must state that homosexuality is a problem to serving fully. There may be some discrimination in career opportunities or promotions.
Switzerland	12/21/1972		
United Kingdom	11/04/1950		

Appendix Two — Convention for the Protection of Human Rights and Fundamental Freedoms and the Nations with Militaries over 20,000 that Have NOT Lifted the Gay Ban on Their Armed Forces \*\*\*

States	Date of Signature	Military Reservations	Special Comments
Albania*	07/13/1995		
Armenia	01/25/2001		Officially gays can serve but they can use their sexual orientation to opt out of the military. However, for the people who opt out, they are let go on the grounds that homosexuality is regarded as a mental disorder. If an openly gay man does wish to serve, he has to be willing to be out to school, family, as the military might contact these people. Given the fact that homosexuality is perceived as a mental disorder and the pressure on a gay man to come out to those who know him if he wishes to serve, it would be appropriate to conclude that there is a <b>PARTIAL BAN.</b>
Azerbaijan*	01/25/2001		

Bulgaria	05/07/1992		According the Bulgarian military representatives in London , regulation number 10 (the section on sexual disorders), approved on 07/30/2003, prevents homosexuals from serving in the Bulgarian Armed Forces.
Croatia*	11/06/1996		
Cyprus	12/16/1961	Yes	
Greece	11/28/1950		Homosexuality is banned among officers in the Greek armed forces. If an officer is found to be homosexual he or she is forced to resign his or her commission. Conscripts may be exempted if they are gay, although they may insist on serving.

Hungary	11/06/1990	<p>According to a military representative from Hungarian embassy in London, there was a ban prior to 2000. He said that legislation 7/1996 banned gays from serving in the armed forces and that there was a change of policy in 2000, when new legislation was introduced. This legislation allowed gays to serve in the reserve forces and during mobilization. The change of policy was a result of pressure from a "trade union" that looks after the interests of Hungarian homosexuals. However, he stressed that in the case of the regular forces, a gay applicant would be expected to declare his sexuality before the selection board and he would then be told that he can serve either in reserve forces or will be called if there is a mobilization. His sexual orientation will be kept confidential (NB: the representative stressed that this happens very rarely). Therefore, it would be appropriate to conclude that there is a <b>PARTIAL BAN.</b></p>
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Italy	11/04/1950		There is no official policy on gays in the Italian military, but gay men are often allowed exemption from Italy's compulsory 10-month military service if they admit they are homosexual and say they fear discrimination.
Poland**	11/26/1991		
Portugal	09/22/1976	Yes	Following the revision of military service laws in 1989, there no longer exists any regulation that prohibits homosexuals from serving in the Portuguese armed services. As a result, homosexuals are theoretically permitted to serve without any career restrictions or discrimination. However, homosexuals who show signs of mental illness during the induction screen-ing process may be excluded, according to military officials.
Romania*	10/07/1993		

Russia	02/28/1996	Yes	<p>Traditionally, homosexuals in the Soviet Union, whether in the military or in civilian society, were punished as criminals if they happened to be discovered. No substantive changes have occurred in the post-Soviet Russian military regarding homosexual service, and the policy remains one reflecting indifference and lack of recognition; that is to say, there is no policy. Considering the monumental changes occurring in both the Russian military and in the society at large, it is not surprising that the issue of homosexuals in the military is not a significant area of policy debate. When and if Russian society overcomes its current social and economic crises, one may expect that homosexuals in the Russian military will slowly become recognized as a problem by military leadership.</p>
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Serbia and Montenegro	01/04/2003	Yes	According to a gay rights group, current policy does not allow gay men to openly serve. If a soldier claimed or was suspected to be gay, he would undergo psychological tests and, consequently discharged from the services. In practice, there are gay military personnel but they hide their sexual orientation.
Turkey	11/04/1950	Yes	Turkey is attempting to join the European Union. When they do join, they will be expected to change their policies in a number of areas, including the elimination of the death penalty and the acceptance of persons of all sexual orientations in the army.

Ukraine	11/09/1995	Yes	<p>This requires clarification. According to a representative from the Ukraine Embassy in London, while there is nothing in Ukraine military law and manuals that forbids homosexuals from serving in the their armed forces, defense policy-makers consider this to be a NON-ISSUE. He stressed that no attempt has been made to investigate if there are any homosexuals in the forces. Furthermore, he added that in his personal view, if a commander discovered that a member of his unit was a homosexual, the individual in question could be transferred or even discharged from the forces. Therefore, I have added Ukraine to this table.</p>
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- \* Attempts were made to contact these countries' embassies (military attaches in U.K. and U.S.) via phone, fax, and e-mail in November 2003, but there was no response. Additional attempts were made in January 2004, also with no reply.
- \*\* An attempt was made to contact the Polish military representatives in London in order to obtain extra information and clarify issues discussed in the Polish section of this Article, but there was no response.
- \*\*\* Many thanks to Dr. Geoffrey Bateman, Assistant Director of the Center for the Study of Sexual Minorities in the Military at the University of California, Santa Barbara, for his assistance with the research that yielded these tables.

#### Resources:

PETER ROWE, CONTROL OVER ARMED FORCES EXERCISED BY THE EUROPEAN COURT OF HUMAN RIGHTS (Geneva Centre For the Democratic Control of Armed Forces, Working Paper No. 56, 2002).

THE INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, THE MILITARY BALANCE 2003-2004 (2003). This source was used to determine which convention member nations have armed forces over 20,000. It is an annual publication that documents the manpower and equipment of all the major world militaries, *available at* <http://www.iiss.org/> (last visited Sept. 13, 2004).

David R. Segal et al., *Gender and Sexual Orientation Diversity in Modern Military Forces: Cross-National Patterns*, in IN BEYOND ZERO TOLERANCE: DISCRIMINATION IN MILITARY CULTURE 246-47 (Mary Fainsod Katzenstein & Judith Reppy Lanham eds., 1999).

Interviews with military representatives from the Hungarian and Ukrainian Embassies, in London, England (Dec. 15, 2003) (these individuals spoke with the author on the condition of anonymity).

