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Navigating Admissibility Before the European Court of Human Rights for Lesbian and Gay Human Rights Defenders

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Abstract

In recent years the rise of populist right-wing governments across Europe has led to concerns about infringements to lesbian and gay rights. Brave individuals bring cases against their states to the European Court of Human Rights (ECtHR) to test state compliance with the European Convention on Human Rights. It is argued in this article that strict admissibility criteria before the ECtHR poses particular difficulties for lesbian and gay applicants. Specifically, the admissibility requirements of being (1) an individual victim, (2) to disallow anonymous applications and (3) to have suffered a 'significant disadvantage' are more challenging for lesbian and gay applicants to fulfil. It is concluded that enabling Representative Actions would provide greater possibilities for such individuals.

Keywords

European Court of Human Rights (ECtHR) – admissibility requirements – human rights defenders – significant disadvantage – lesbian and gay

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1 Introduction

The European Court of Human Rights (ECtHR) in Strasbourg has established itself worldwide as one of the leading international courts in the development of human rights protections for lesbian and gays.[1] Article 1 of the European Convention on Human Rights (European Convention) provides that all member states should 'secure to everyone within their jurisdiction the rights and freedoms' contained under the European Convention.[2] This is re-enforced by allowing individual applications to the ECtHR.[3] As the European Convention was drafted in the 1950s, the text itself does not explicitly prohibit sexual orientation discrimination. However leading judgments from the ECtHR determined that domestic laws which prohibited sex between consenting men violated the right to private life.[4] Other judgments interpreted the right to private life in conjunction with prohibition on discrimination (European Convention, Articles 8 and 14), to require the right to equality for lesbians and gay people in employment,[5] tenancy conditions,[6] adoption proceedings[7] and, more recently, equal access to civil partnerships.[8] In recent case law concerning gay rights protests, the ECtHR has upheld claims for breaches of freedom of

1 Council of Europe, 'The 40th Anniversary of a Key European Court of Human Rights Case that Led to the Decriminalisation of Homosexuality – a Turning Point for LGBTI Persons' 22 October 2021, Strasbourg, SOGI Newsroom,<https://www.coe.int/en/web/sogi/-/40th-anniversary-of-a-leading-european-court-of-human-rights-case-that-led-to-the-decriminalisation-of-homosexuality-a-turning-point-for-lgbti-persons> accessed 17 October 2024.

2 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ETS No. 5, 213 UNTS 222, Art 1.

3 Ibid, Art 34.

4 *Dudgeon v UK* App no 7525/76 (ECtHR, 22 October 1981), (1982) EHRR 149.

5 *Smith and Grady v UK* (1999) App nos 33985/96 and 33986/96 (ECtHR, 27 September 1999), (1999) 27 EHRR 493 and *Lustig-Prean and Beckett v UK* (2000) App nos 31417/96 and 32377/96 (ECtHR, 25 July 2000), (2001) 31 EHRR 23.

6 *Karner v Austria* (2001) App no 40016/98 (ECtHR, 11 September 2001), (2004) 38 EHRR 24.

7 *EB v France* (2008) App no 43546/ 02 (ECtHR, 22 January 2008), (2008) 47 EHRR 21.

8 In *Oliari v Italy* (2015) App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015), (2017) 65 EHRR 26 the ECtHR stated that contracting states must provide some level of civil partnership, providing that the circumstances on the ground were socially accepting of same sex couples. In *Orlandi v Italy* (2017) App no 26431/12 (ECtHR, 14 December 2017), the ECtHR held that a failure to recognise a same-sex marriage conducted abroad contravened the European Convention. Following *Fedetova and Others v Russia* (2021) App no 40792/10 (ECtHR, 22 November 2021), (2022) 74 EHRR 28 the ECtHR now requires contracting states to introduce civil partnerships, even where not socially accepting of same-sex couples on the ground. However there is no requirement to introduce same-sex marriage *Schalk and Kopf v Austria* (2010) App no 30141/04 (ECtHR, 24 June 2010), (2011) 53 EHRR 20.

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assembly contained in European Convention Article 11.[9] This is exemplified by the case of *Alekseyev v Russia*,[10] where the ECtHR even imposed positive obligations on states to ensure that such protests can go ahead peacefully and that protestors are kept safe.[11]

Whilst Europe is more gay and lesbian friendly than other jurisdictions (for example 66 countries worldwide criminalise same-sex sexual relations)[12] in areas of cultural and social sensitivity, the

ECtHR allows a large Margin of Appreciation (MoA) understood as a 'latitude of deference or error'.[13] The ECtHR does not mandate recognition of same-sex marriage,[14] or same-sex couples' child adoption rights,[15] and has allowed individual contracting states significant latitude where freedom of expression is concerned.[16] Due to the rise of populist right-wing governments across

9 European Convention, (n 2) Art 11 provides that 'Everyone has the right to freedom of peaceful assembly and to freedom of association.'

10 The case of *Alekseyev v Russia* App no 4916/07 (ECtHR, 21 October 2010), *(2011) Crim L R 480*; J De Kerf, 'Anti-Gay Propaganda Laws: Time for the European Court of Human Rights to Overcome Her Fear of Commitment' (2017) 4(1) *DiGeSt. Journal of Diversity and Gender Studies* 35.

11 ECtHR, 'Guide on the case-law of the European Convention on Human Rights of LGBTI Persons' ('ECtHR LGBTQI case guide') 2024, Strasbourg <https://ks.echr.coe.int/documents/d/echr-ks/guide_lgbti_rights_eng-pdf> accessed 17 October 2024.

12 International Lesbian and Gay Association (ILGA), 'Map of Sexual Orientation Laws' 2024, <https://ilga.org/ilga-world-maps/> accessed 17 October 2024.

13 P Butler, 'Margin of Appreciation – A Note Towards a Solution in the Pacific' *Victoria University* (2008–2009) 39 Legal Research Paper 687 referring to HC Yourow, *Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Brill 1996).

14 *Schalk v Kopf v Austria* (n 8). Out of 46 contracting states to the European Convention, twenty-one European states have now legalised same-sex marriage. This reflects global developments and makes a huge change from past purely heterosexual conception of marriage. Yet, certain Central and Eastern Europe states constitutionally define marriage as between a man and a woman only.

15 *Alekseyev v Russia*, (n 10) para 83. The ECtHR has reached favourable decisions in this area. If a contracting state allows same-sex couples or individuals to adopt they must do so without discrimination *EB v France* (n 7), *X and Others v Austria,* App no 19010/07 (ECtHR, 19 February 2013), 1 Fam CR 387. The ECtHR tries to avoid 'limping' situations where a parent-child relationship is recognised in one jurisdiction, but not another *Wagner v Luxembourg*, App no 76240/01 (ECtHR 28 June 2007); *Mennesson v France*, App no 65192/11 (ECtHR, 26 June 2014) including step-child adoption *D.B. v Switzerland* App nos 58252/15 and 58817/15 (ECtHR, 22 November 2022). However, the ECtHR does not impose an obligation on signatory states to allow same-sex couples to adopt when considering families who have not moved cross border and in *Alekseyev v Russia* (n 10) para 83 confirmed a wide margin of appreciation in respect of this.

16 *Handyside v UK* App no 5493/ 72, (ECtHR, 7 December 1976), (1979–1980) 1 EHRR 737 as discussed by P Johnson, 'Homosexual Propaganda' Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?' (2015) 3(2) *Russian Law Journal* 37.

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Europe in recent years there has been increasing resistance to the pro-lesbian and gay movement,[17] and the following are some of the issues of concern for pro lesbian and gay activists. In 2021, Prime Minister Viktor Orban of Hungary supported legislation to partially ban adoption by same-sex couples.[18] In 2022, both Bulgaria and Croatia were found in breach of non-discrimination provisions under Article 14 European Convention in conjunction with Article 2 European Convention right to life provisions, as they did not provide for homophobia as an aggravating factor when sentencing in criminal trials.[19] In Autumn 2023, Italy under right-wing Prime Minister Giorgia Meloni limited recognition of parental rights to the biological parent only in the case of same-sex couples.[20] In 2024, United Nations (UN) reports document that 79% of lesbians and gays in countries such as Bosnia, Serbia and Albania report some level of harassment.[21] In Russia, (a Council of Europe state until its expulsion in 2022 following the invasion of Ukraine), homophobia remains very much the norm. Prior to expulsion from the Council of Europe, Russia introduced several laws limiting the ability to discuss lesbian and gay rights, and the effect on the already marginalised community of lesbian and gay people in Russia has been extremely oppressive. Human Rights Watch (following similar statements from the UN and Council of Europe) has repeatedly condemned Russia's new laws, as 'an effective means of intimidation'.[22]

Of course, the ECtHR can only determine cases brought to its jurisdiction. Whilst inter-state actions are possible,[23] the European Convention remains

17 See for information Council of Europe Parliamentary Assembly, 'Provisional version Combating rising hate against LGBTI people in Europe' 2021 <https://assembly.coe.int/LifeRay/EGA/Pdf/TextesProvisoires/2021/20210921-RisingHateLGBTI-EN.pdf> accessed 17 October 2024.

18 Human Rights Watch, Graeme Reid, 'Hungary's Path Puts Everyone's Rights in Danger' 6 October 2021, <https://www.hrw.org/news/2021/10/06/hungarys-path-puts-everyones-rights-danger> accessed 17 October 2024.

19 *Stoyanova v Bulgaria* App no 56070/18 (ECtHR, 14 June 2022), (2022) 75 EHRR 27 and *Beus v Croatia and Sabalić v Croatia* App no 16943/17 (ECtHR, January 2021) paras 32 and 33.

20 Los Angelos Times, Colleen Barry, 'Italian Government Limits Parental Rights of Gay Couples' 14 March 2023 <https://www.latimes.com/world-nation/story/2023-03-14/italian-government-limits-parental-rights-of-gay-couples> accessed 17 October 2024.

21 United Nations Development Programme, 'Being LGBTI in Eastern Europe Progress, Drawbacks Recommendations' 2024, <https://www.undp.org/sites/g/files/zskgke326/files/migration/eurasia/undp-rbec-Factsheet-Being-LGBTI-in-Eastern-Europe.pdf> accessed 17 October 2024.

22 Human Rights Watch, 'No Support, Russia's "Gay Propaganda" Law Imperils LGBT Youth' 11 December 2018, <https://www.hrw.org/report/2018/12/12/no-support/russias-gay-propaganda-law-imperils-lgbt-youth> accessed 17 October 2024.

23 European Convention, (n 2) Art 33.

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closely connected with liberal individualism and most cases concern individuals bringing forward cases.[24] Fagan explains that the 'legitimate bearer of human rights is routinely said to be the individual'.[25] This remains the case even where the cultural attributes of 'minority' communities are concerned.[26] In the context of this article the relevant 'minority' group under consideration would be lesbians and gays. Whilst scholarly literature does discuss 'collective human rights'[27] and human rights instruments 'occasionally refer to the possibility that individuals may possess human-rights-based responsibilities towards other individuals' this remains theoretical only.[28] In human rights practice Fagan explains that the 'core relationship' consists of that between the 'state (as principal duty-bearer) and the separate, morally sovereign individuals to whom the state owes a human-rights-based duty of legal care and responsibility'.[29] Advances in human rights cases are therefore dependent upon brave individuals known as human rights defenders bringing forward their cases. Amnesty International defines:

> [h]uman rights defenders are people who champion and fight for human rights of other people. They challenge brutality, oppression and injustice in every part of the world … They are invaluable in creating a world in where all our human rights are respected -their effort benefits us all.[30]

24 An ECtHR Press Sheet explains that '[m]ost applications to the ECtHR are lodged by individuals, groups of people, companies or NGOs' and as at June 2024 only 30 cases had ever been lodged by states. See ECtHR 'Press Q A Inter-State Cases' June 2024 <https://www.echr.coe.int/documents/d/echr/Press_Q_A_Inter-State_cases_ENG> accessed 17 October 2024.

25 A Fagan, 'The Subject of Human Rights: From the Unencumbered Self to the Relational Self' (2024) 42(2) *Nordic Journal of Human Rights* 215.

26 Ibid at 217 referring to CCPR General Comment No. 23: Article 27 (Rights of Minorities), CCPR/C/21/Rev.1/Add.5.

27 Fagan (n 25) at 216 referencing M A. Jovanovic, *Collective Rights: A Legal Theory* (University of Belgrade Press 2012).

28 Fagan (n 25) referencing an attempt to formulate a set of human rights-based responsibilities from the Inter-Action Council, *A Universal Declaration of Human Responsibilities* 1 September 1997, <https://www.interactioncouncil.org/publications/universal-declaration-human-responsibilities> accessed 17 October 2024.

29 See Fagan (n 25) at 216 where he traces representations of the individual subject back centuries to theorists and philosophers such as John Locke, Gottfried Wilhelm Leibniz, Adam Smith, Immanuel Kant, John Stuart Mill, Ronald Dworkin, John Rawls, and Alan Gewirth.

30 Amnesty International, 'Human Rights Defenders – Some of the Bravest People in the World' 12 January 2018 <https://www.amnesty.org.uk/human-rights-defenders-what-are-hrds> accessed 17 October 2024.

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Van der Veta and Lyytikäine explain that human rights defenders (along with intergovernmental human rights institutions) are key actors who define how rights are practiced at the local level.[31] Human rights defenders play a broad role in documenting human rights abuses, reporting violations to relevant international human rights organisations and offering practical support and education.[32] To enable this work on the ground the UN and regional bodies in Europe such as the European Union have taken steps to protect human rights defenders.[33] This article concentrates on the ability of human rights defenders concerned with lesbian and gay issues to bring forward their cases to the ECtHR. Lilla Farkas explains that 'any human rights instrument is worth only as much as its enforcement mechanism'.[34]

Due to an influx of cases, the ECtHR has in recent years tightened admissibility criteria.[35] In broad overview in order to be admissible to the ECtHR applicants must have exhausted domestic remedies,[36] have filed their application within 4 months (reduced from 6 months) of the final domestic jurisdiction,[37] the applicant must be an individual victim,[38] cases cannot be made anonymously[39] and following a new criterion introduced by Protocol 14, the applicant must have suffered a significant disadvantage.[40] Tightening

31 F van der Veta and L Lyytikäine, 'Violence and human rights in Russia: how human rights defenders develop their tactics in the face of danger' (2015) 19(7) *The International Journal of Human Rights* 979.

32 Amnesty International (n 30).

33 See United Nations General Assembly Resolution 53/144 'Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' 9 December1998 <https://www/ohchr.org/en/civic-space/declaration-human-rights-defenders> accessed 17 October 2024 and at a regional level in Europe, European Union 'Guidelines on Human Rights Defenders' 2008 <https://www.eeas.europa.eu/sites/default/files/16332-re02_08_en.pdf> accessed 17 October 2024.

34 L Farkas, 'Limited Enforcement Possibilities Under European Anti-Discrimination Legislation: A Case Study of Procedural Novelties' (2001) 3(3) *Erasmus Law Journal* 181.

35 See ECtHR, 'The European Court of Human Rights, Practical Guide on Admissibility Criteria' ('ECtHR Practical Guide on Admissibility') 31 August 2023 <https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng> accessed 17 October 2024.

36 European Convention, (n 2) Art 35.

37 Ibid. This reform was introduced by Protocol 15.

38 European Convention, Art 34.

39 European Convention, (n 2) Art 35 (2)(a).

40 European Convention, Art 35(2)(b). The latter criterion was introduced by Protocol 14 European Convention which was enacted in 2004 but came into force in 2010 following ratification by the final contracting state Russia. Protocol 14 empowered the ECtHR to declare applications inadmissible where the applicant has not suffered a significant disadvantage and which do not raise serious questions affecting the application or the interpretation of the convention, or important questions concerning national law.

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admissibility criteria was intended as a compromise between ensuring the 'efficiency'[41] and 'long-term effectiveness'[42] of the ECtHR, whilst still protecting victim's rights. Yet the immediate impact was 'a [steep] decrease in the pending cases before the Court',[43] with the ECtHR itself documenting that over 90% of the cases submitted were declared inadmissible due to their failure to meet stringent admissibility criteria.[44] However well-intentioned the reforms, analysts have stated that 'the new criteria sit uncomfortably with the principle of access of individuals to international justice'[45] and have been criticised as being 'vague, subjective and liable to do the applicant a serious injustice'.[46] Particular concerns were expressed for vulnerable victims.[47] Critics argue that there is a possibility of meritorious cases being dismissed for reasons not proportionate to the risks at stake.[48] Whilst admissibility criteria in general have been the subject of extensive commentary[49] there has been no specific analysis of lesbian and gay specific challenges when addressing these criteria. This article therefore intends to fill the gap. In section 2 it is argued that the admissibility requirements set out under the European Convention to be an 'individual victim',[50] the ban on 'anonymous applications[51] and the requirement to have suffered a 'significant disadvantage',[52] pose difficulties for gay and lesbian applicants to meet. Section 3 analyses how admissibility criteria could be changed, for example to encourage Representative Actions, thereby providing greater protection for human rights defenders.

41 D Shelton, 'Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights' (2016) 16(2) *Human Rights Law Review* 30.

42 N Vogiatzis, 'The Admissibility Criterion Under Article 35(3)(b) ECHR: A "Significant Disadvantage" to Human Rights Protection?' (2016) 65(1) *International and Comparative Law Quarterly* 185; ECtHR Practical Guide on Admissibility, (n 35) para 12.

43 Vogiatzis (n 42) at 186 referring to ECtHR, 'Annual Report 2014'.

44 ECtHR, 'The Admissibility of an Application' 2015 at 1, <https://www.echr.coe.int/documents/d/echr/COURtalks_Inad_Talk_ENG> accessed 17 October 2024.

45 Vogiatzis (n 42), 187 and Shelton (n 41).

46 Committee on Legal Affairs and Human Rights, 'Draft Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Doc. 10147' 23 April 2004 <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10508&lang=EN> accessed 17 October 2024.

47 Ibid.

48 A Mowbray, *Cases, Materials, and the Commentary on the European Convention on Human Rights* (1st edn, OUP 2007) 18–22.

49 For example Shelton, (n 41) and Vogiatzis, (n 42).

50 European Convention, (n 2) Art 34.

51 Ibid, Art 35(2)(a).

52 Ibid, Art 35(3)(b)).

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2 Specific Challenges Faced by Gays and Lesbians When Addressing Admissibility Criteria

2.1 *Individual Victim*

One of the admissibility criteria set out under European Convention Article 34, is that the ECtHR can only receive applications 'from any persons, nongovernmental organisations or groups of individuals *claiming to be the victim of a violation*'.[53] The essence of the rule is that applicants must be directly affected in some way by the matter complained of, even if the effects are only temporary. Consequently, the ECtHR has repeatedly emphasised its unwillingness to accept cases that fall within the category of an 'actio popularis' (understood as actions brought by an individual on behalf of the public interest)[54] or class action lawsuits.[55] This was explicitly stated by the ECtHR in the case of *Aksu v Turkey*,[56] on the grounds that the European Convention functions on a first-hand victim basis and considers how individuals' rights are impacted in a case rather than rights in abstract. For this reason, the ECtHR will often reject applications submitted by Non-Governmental Organisations (NGOs) or representative bodies aiming to argue in favour of specific causes.[57] It is argued that the requirement to be an individual victim poses particular difficulties for claims connected with sexual orientation discrimination to comply with because: (i) lesbians and gays face specific challenges where the rule against actio popularis is concerned and (ii) the doctrine of transferable rights allowing indirect claims is less likely to apply to lesbians and gays.

2.1.1 Rule against 'actio popularis'

The ECtHR is careful to draw a distinction between those who are victims / potential victims and those who simply seek to challenge domestic laws. The latter kind of application will be declared inadmissible as an 'actio popularis'.[58]

53 European Convention, Ibid, Article 34.

54 See W J Aceves, 'Actio Popularis – The Class Action in International Law' 2003 1 *University of Chicago Legal Forum* 9 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1336&context=uclf> accessed 17 October 2024 and L Wildhaber, 'The European Convention on Human Rights and International Law' [2004] 56(2) *International and Comparative Law Quarterly* 217.

55 ECtHR Practical Court Guide on Admissibility (n 35) para 36.

56 *Aksu v Turkey* App nos 4149/04 and 41029/04 (ECtHR, 27 July 2010), (2013) 56 EHRR 4 at para 50.

57 See for example *Norris v Ireland* App no 10581/83 (ECtHR, 26 October 1988), (1991) 13 EHRR 186 and *Kosa v Hungary* App no 53461/15 (ECtHR, 21 November 2017).

58 See Aceves, (n 54) and Wildhaber, (n 54). An example of actio popularis being denied can be seen from the case of *Aksu v Turkey* (n 56).

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This ECtHR stated in *Tanase v Moldova* that 'the Convention does not envisage the bringing of an actio popularis [by individuals] … simply because they consider, without having been directly affected by it, that it may contravene the Convention'.[59] The ECtHR Practical Court Guide on Admissibility (2023), explains that;

> Article 34 guarantees the right of individual application, which gives individuals a genuine right to take legal action at international level. It is also one of the fundamental guarantees of the effectiveness of the Convention system – one of the "key components of the machinery" for the protection of human rights.[60]

The ECtHR functions on the basis of considering how individuals rights are specifically impacted, rather than considering rights in the abstract, which is also necessary to ensure 'effectiveness' and to prevent Strasbourg is already overwhelmed with thousands of cases each year.[61] This means that whilst applicants can have representatives, authorised as Advocates in their contracting state,[62] and NGOs can engage in supporting activities (for example funding, representation and background support), applicants must bring cases in their own names. The ECtHR will reject applications submitted by NGOs or representative bodies aiming to argue in favour of causes (rather than as an individual victim themselves).[63]

However, disallowing NGOs or public interest groups to bring forward cases on behalf of applicants, together with the starting point of not allowing anonymous cases (see section 2.2 below), has a clear impact on individual applicants. Individuals are required to put themselves forward into the blaze of publicity when bringing a case. This is demonstrated by two recent cases which successfully challenged Northern Ireland's then restrictive abortion laws which prevented abortions even where a fatal foetal abnormality had been diagnosed. The first case had originally been brought by the Northern Ireland's Human Rights Commission (NIHRC) on behalf of victims. However

59 *Tanase v Moldova* App no 7/08 (ECtHR, 27 April 2010), (2011) 53 EHRR 22 para 104.
60 ECtHR Practical Court Guide on Admissibility, (n 35) at para 12 citing *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) at pars 100 and 122.
61 ECtHR Practical Court Guide on Admissibility, (n 35) at para 12.
62 ECtHR, Rules of the Court, European Court of Human Rights ('ECtHR Court Rules'), 2023 <https://www.echr.coe.int/documents/d/echr/rules_court_eng> accessed 17 October 2024 at Rule 36(4)(a).
63 For example *Norris v Ireland,* (n 57); *Genderdoc-M and M.D. v the Republic of Moldova* (2013) App no 23914/15 (ECtHR, 14 December 2021).

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the case failed as NIHRC was not regarded as an individual victim, although the court did indicate that apart from this point, a violation of Article 8 would have been found.[64] Consequently, individual victim Sarah Ewart, who had personally suffered a fatal foetal abnormality and had been denied an abortion due to Northern Ireland's strict abortion laws at the time, had to bring forward her own individual case, before a breach of Article 8 was found.[65]

This issue is particularly challenging for lesbian and gay applicants. In the leading cases *Dudgeon v UK* and *Norris v Ireland*,[66] the ECtHR found breaches of Article 8 European Convention concerning then laws in place prohibiting consenting same-sex sexual relationships between men (in Northern Ireland and the Republic of Ireland respectively).[67] However, Norris had to bring the case in his own name. An earlier attempt by the National Gay Federation to bring a case on his behalf failed as the ECtHR did not regard the Federation as an individual victim. Instead an individual victim, namely Norris, was required to put himself forward and reveal his sexual orientation at a time when the political climate in the Republic of Ireland did not publicly favour lesbian and gay issues. It is argued that the rule against actio popularis which prevents NGO s bringing cases forward, together with the starting point of the additional admissibility requirement not to allow anonymous applications (see section 2.2) can be difficult or even dangerous in countries which are less tolerant of lesbians and gays. The issue remains particularly pertinent today given the rise of populist far-right parties in Europe.

2.1.2 Indirect Victims

In cases concerning absolute rights,[68] ECtHR case law has widened the individual victim criteria to allow cases to be brought by indirect victims, who are usually relatives. However lesbian and gay applicants face challenges using the mechanism of indirect victim because (i) they are less likely to be considered relatives and (ii) because lesbian and gay cases often do not concern absolute rights. Perhaps the need for the ECtHR allowing indirect victims is

64 *In the Matter of An Application by the Northern Ireland Human Rights Commission for Judicial Review* (*Northern Ireland*) [2018] UKSC 27.

65 *In the Matter of Sarah Jane Ewart* [2019] NIQB 88.

66 *Dudgeon v UK*, (n 4) and *Norris v Ireland* (n 57).

67 Ibid.

68 Absolute rights are rights which allow states no derogation in ordinary circumstances and are contained under Article 2 – 5 European Convention and include Article 2 (right to life), Article 3 (freedom from torture), Article 4 (prohibition of slavery) and Article 5 (right to liberty and security). Absolute rights are also common to other types of international law see Vogiatzis (n 42), 204 and T Meron, 'On a Hierarchy of International Human Rights' (1986) 80(1) *American Journal of International Law* 1.

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most obvious in cases concerning right to life (European Convention, Article 2), where victims have lost their own life and are therefore clearly incapable of bringing a case. Again it can be argued that this is a necessity for some victims under Article 3. However, in the case of *llhan v Turkey* (2000), the ECtHR critiqued the fact that indirect victims could bring forward cases, arguing that it was too similar to an actio popularis.[69] There are also examples of the ECtHR allowing indirect victims to bring forward cases concerning the right to liberty (European Convention, Article 5) as demonstrated by cases *Varnava and Others v Turkey* and *Khayrullina v Russia*.[70] Usually ECtHR case law has recognised indirect victims to include relatives. On occasion the rule has been extended to include indirect victims who are not family members.[71] In the case of *Becker v Denmark* the ECtHR allowed an individual to bring a case where the applicant children in question 'relied on the applicant'.[72] However, this does still circumvent the usual rule that only individual affected victims can bring cases to the ECtHR. It is going to be challenging for lesbian and gay applicants to rely on the indirect victim test as they are less likely to be recognised as family members due to the diversity of recognition of lesbian and gay rights across the Council of Europe and the wide margin of appreciation allowed by the ECtHR in this respect.[73]

The doctrine of indirect victims or transferable rights is typically only used in relation to absolute rights. The ECtHR Practical Court Guide on Admissibility 2023 states that 'in cases where the alleged violation of the Convention was not closely linked to the death or disappearance of the direct victim the Court's approach has been more restrictive'.[74] As cases concerning sexual orientation discrimination are typically brought under qualified rights,[75] in combination

69 *llhan v Turkey,* App no 22277/93 (ECtHR, 27 June 2000), (2002) 34 EHRR 36 discussed by Aceves, (n 54).

70 *Varnava and Others v Turkey* App nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009), (2010) 50 EHRR 21 and *Khayrullina v Russia* App no 29729/09, (ECtHR, 19 December 2017).

71 *Valentin Câmpeanu v Romania* App no 47848/08, (ECtHR, 17 July 2014), (2014) 37 BHRC 423; B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (7th edn, OUP 2017) 28 – 31.

72 Aceves, (n 54) at 377 discussing *Becker v Denmark* App no 7011/75 (ECtHR, 3 October 1975), 4 DR 215 (1975)

73 See introduction and notes 8, 14 and 15.

74 ECtHR Practical Court Guide on Admissibility (n 35) para 34.

75 Qualified rights are rights which states can legitimately interfere with in ordinary circumstances and are contained under Article 8 – 11 European Convention and include Article 8 (right of respect to private and family life), Article 9 (freedom of thought conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association).

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with the freedom from discrimination,[76] they are unlikely to be able to benefit from this doctrine. In many cases the ECtHR has repeatedly ruled out the Article 8 private life right as a transferable one, meaning that there is little scope for indirect victims to bring forwards cases[77] although it may be possible to bring a claim if the applicant can demonstrate for example a 'moral' or a 'pecuniary' interest.[78] The case of *Belli and Arquier-Martinez v Switzerland* (2018), whereby the ECtHR allowed the mother to bring forward a case as an 'indirect victim' regarding a case of discrimination against a disabled child who could not represent themselves, is a rare exception to this prohibition.[79]

Previous case law under Article 8 European Convention, which allowed individuals to bring forward claims on the basis that they fell within a class of potential victims, has now been considerably tightened. The use of the doctrine of potential victim is demonstrated by the *Dudgeon v UK* (1981) and *Norris v Ireland*[80] judgments as the mere existence of legislation criminalising same-sex relationships was deemed to directly effect the applicant's private life even if they respected the law and refrained from the prohibited behaviour (becoming actual victims if they engaged in the prohibited acts and become liable to criminal prosecution).[81] The potential victim case law was utilised in cases where the individual claimed they could be the subject of secret surveillance by postal or telecommunication services,[82] where they were potentially affected by succession legislation concerning children born out of wedlock[83] and for Irish women of child-bearing age who were prevented from accessing information about abortion facilities outside of jurisdiction by court injunction.[84] The previous case law was tightened and re-clarified in the case of *Roman Zakharov v Russia*.[85] The Grand Chamber of the ECtHR stated that, going forward, cases could only be brought where an applicant could claim to be affected because they belonged to a group or persons targeted by the contested legislation or because the legislation directly affected all users of

76 European Convention, (n 2) Art 14.
77 See for example *Dzhugashvili v Russia* App no 41123/10 (ECtHR, 9 December 2014) and *Janko Jakovljevic v Serbia* App no 5158/12 (ECtHR, 13 October 2020).
78 ECtHR Practical Guide on Admissibility (n 35), para 36.
79 *Belli and Arquier-Martinez v. Switzerland* App no 65550/13 (ECtHR, 11 December 2018).
80 *Dudgeon v UK* (n 4) and *Norris v Ireland* (n 57).
81 Ibid.
82 *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978), (1979–1980) 2 EHRR 214.
83 *Johnstone and Others v Ireland* App no 9697/82 (ECtHR, 18 December 1986) and *Marckx v Belgium* App no 6833/74 (ECtHR, 29 September 1975), (1979–1980) 2 EHRR 330.
84 *Open Door and Dublin Well Women v Ireland* Apps. nos. 14234/88 and 14235/88 (ECtHR, 29 October 1992), (1993) 15 EHRR 244.
85 *Roman Zakharov v Russia* App no 7143/06 (ECtHR, 4 December 2015), (2016) 63 EHRR 17.

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the communications services. The ECtHR takes into account the availability of remedies depending upon their effectiveness.

2.2 *Applications Cannot be Anonymous*

The European Convention Article 35 (2) (a) requires that applications cannot be anonymous.[86] The general stance of the ECtHR is that all of its documents are public and are published with the applicants' full name. The ECtHR Practical Court Guide on Admissibility states that as required by Rule 47(1)(a) of the Rules of Court Guide the starting point is that 'applicant must be duly identified in the application form'.[87] This is to avoid cases being lodged for improper purposes.[88] However, under Rule 47.4, the ECtHR does allow applicants to request anonymity by submitting a 'statement of the reasons justifying such a departure from the normal rule of public access to information in proceedings before the Court'.[89] Similarly public access to documents can be restricted 'in special circumstances which would prejudice the interests of justice'.[90] Whilst there are many examples of anonymity being granted, the starting point is to reject anonymity unless applicants apply to waive this criterion. Also ECtHR applicants must first exhaust domestic remedies,[91] and not all national systems allow for anonymity. Whilst any alleged victim of human rights abuse has to be courageous to bring forward a case, we argue that this particularly impacts on lesbians and gays as it requires them to reveal their sexual orientation, which may not otherwise have been noticeable. This is particularly relevant given the large diversity of legal, cultural and social treatment of lesbians and gay men across Europe. In some European countries, due to difficult on the ground circumstances, it may not be possible for applicants to reveal their sexual orientation in order to bring a case to the ECtHR.

Yet the ECtHR starting point of lack of anonymity and prohibition of actio popularis (meaning a lack of representative action for NGOs) means that gays and lesbians who bring forward cases often must reveal their sexual orientation. The lack of legal protections and / or social inclusion on the ground, means that in practice gays and lesbians who bring cases to the are being potentially exposed to danger in certain Council of Europe states. This places a practical restriction on lesbians and gays being able to bring forward a case to the ECtHR. This is illustrated by *Kozak v Poland* which concerned discriminatory

86 European Convention, Art 35(2)(a).
87 ECtHR Court Rules 2023, (n 62) at Rule 47(1)(a) referring to ECtHR Practical Court Guide on Admissibility 2023 (n 35), para 222.
88 Rainey, McCormick and Ovey (n 71) at 43.
89 ECtHR Court Rules 2023, (n 62) at Rule 47(4).
90 Ibid, Rule 33(2).
91 European Convention, (n 2) Art 35(1).

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provisions surrounding tenancy laws in Poland.[92] The applicant Piotr Kozak stated that he was hesitant to bring a case involving lesbian and gay rights, stating: 'it was not something one could just talk about in our country. People in Poland are still against different relationships'.[93] Such was his reluctance to reveal his sexual orientation, that he originally denied being in a same-sex relationship when bringing the case.[94] His point of view is understandable, given the high level of intolerance to lesbians and gays in certain parts of Poland, in common with other European states where there is a growing influence from the populist far right parties. Even prior to Russia's expulsion with new anti-lesbian and gay laws open discussion of such issues in Russia had become impossible. In an interview a Russian lesbian and gay activist Igor Iasine opined that Alekseyev, the proponent behind the ECtHR case of *Alekseyev v Russia,*[95] had achieved 'success' following the ECtHR judgment which found a breach of Article 11 European Convention freedom of assembly following the banning of Moscow Pride Marches.[96] However, Iasine stated that Alekseyev's movements have done little to impact attitudes in Russia as he had built everything about 'his person' and that he had not actively developed the lesbian and gay movement in Russia.[97] His activism also came at great personal cost as he had been arrested by Russian authorities on many occasions. Others who protest openly are also often arrested and abused as demonstrated by the case of Kirill Kalugin a Russian lesbian and gay activist who following many arrests in Russia applied for asylum in Germany.[98] Even whilst still a Council of Europe member, Russia was and continues to be notorious for setting up traps for gay men and subjecting them to appalling abuse. Discrimination towards members of the lesbian and gay community has increased, with Human Rights Watch reporting in 2014 a rise in violent attacks. The extent of the hatred is not in any ways limited by authorities in Russia, meaning that those who identify

92 *Kozak v Poland* App no 13102/02 (ECtHR 2 March 2010), (2010) 51 EHRR 16.
93 J Mizielińska and A Stasińska, 'Personal Strategies For Overcoming Legal Obstacles: "Families of Choice in Poland" (2013–2015)' (2024) in C Casonato and A Shuster (eds), *Rights on the Move Rainbow Families in Europe Conference Proceedings Trento, 16–17 October 2014*, E-published in Italy by Università degli Studi di Trento, Facoltà di Giurisprudenza <http://eprints.biblio.unitn.it/4448/1/Casonato-Schuster-ROTM_Proceedings-2014.pdf> accessed 17 October 2024 at 388.
94 Ibid.
95 *Alekseyev v Russia* (n 10).
96 K E Feyh, 'LGBTQ Oppression and Activism in Russia: An Interview with Igor Iasine" (2015) 2(1) *QED: A Journal in GLBTQ Worldmaking* 100.
97 Ibid.
98 L Verpoest, 'The End of Rhetorics: LGBT Policies in Russia and the European Union' (2017) 68(4) *Studia Diplomatica* 3.

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outwardly as part of the lesbian and gay community are either forced to hide their true selves or face potential violence.[99] The ECtHR's requirement for an individual victim (therefore disallowing action popularis and representative actions) and the starting point of anonymity does not consider the specific challenges facing lesbian and gay applicants. Consequently, these applicants are not given the greatest protection possible and often face stark choices in deciding which risks to bear when bringing important cases to the ECtHR.

2.3 *Significant Disadvantage*

Following the tightening of admissibility criteria through the introduction of Protocol 14, Article 35 now states that applications are only allowed if they are (a) not manifestly ill-founded and (b) where the applicant has suffered a significant disadvantage.[100] The purpose of the 'significant disadvantage' criterion, introduced by the Protocol 14 is to give power to the ECtHR to 'dismiss cases which raise no substantial issue under the Convention'[101] allowing expeditious disposal of 'issues not very important from a human rights perspective'.[102] Yet individual victims determined to pursue justice were intended to be protected as this provision was not supposed to be 'too-far reaching'.[103] A compromise solution, was to include a safeguard clause under Article 35(3)(b) where the ECtHR can refuse to strike out an application even if there is no significant disadvantage if 'respect for human rights […] requires an examination of the application on the merits'.[104] The President at the time of the reform, Luzius Wildhaber, did not see the reform as 'sufficient',[105] but in

99 Human Rights Watch, Report, 'License to Harm. Violence and Harassment against LGBT People and Activists in Russia' 15 December 2014 <https://www.hrw.org/report/2014/12/15/license-harm/violence-and-harassment-against-lgbt-people-and-activists-russia> accessed 17 October 2024.

100 European Convention, (n 2) Article 35(3)(b).

101 A Buyse, 'The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR' in BM Leyh, Y Haeck, C Herrera, and D C Garduno (eds) *The Realization of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak* (Intersentia 2013) at 3.

102 Ibid.

103 Ibid. referring to Council of Europe, 'Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention' (2004) <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=194> accessed 17 October 2024 at para 36 and X-B Ruedin, 'De minimis Non Curat the European Court of Human Rights: the Introduction of a New Admissibility Criterion (Article 12 of Protocol No.14)' (2008) 1 *European Human Rights Law Review* 80 at 82.

104 European Convention, (n 2) Art 35(3)(b).

105 Hioureas, 'Behind the Scenes of Protocol no 14: Politics in Reforming the European Court of Human Rights' (2006) 24 *Berkeley Journal of International Law* 718 at 75

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practice the introduction of the 'significant disadvantage' criterion has been hailed as a victory for constitutionalists as the ECtHR is now able to dismiss less serious cases.[106] This has led to manifold academic criticism from those favouring victim accessibility to the ECtHR. Some criticise the new criteria as an 'ideological shift'[107] with authors arguing that 'it … sends the wrong signal to states [with] lesser violations of human rights [escaping] scrutiny'.[108] We argue that lesbians and gays face specific challenges when attempting to meet this criterion.

The introduction of the criterion of 'significant disadvantage' into admissibility criteria, means that, judging the 'merits' of a claim becomes part and parcel of admissibility criteria as well. Indeed, the ECtHR's Admissibility Guide classifies the criterion of 'significant disadvantage' as inadmissibility review 'based on the merits'.[109] Yet Article 27 of the Convention states that '[a] single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34' and the Admissibility Guide confirms that the 'majority ' of cases will be determined by single judges, or a three-judge committee (with possibility for reference to the Chamber or Grand Chamber).[110] The authority given to single judges has led to criticism that although they are making merit-based judgments, these could be 'remarkably subjective'.[111] This also leads to the larger issue of interference with principles of fair hearings and transparency.[112] In section 2.3.1 we develop the argument that as claimants bringing cases based on issues connected with sexual orientation discrimination (most likely to be lesbians and gay persons) are typically relying on qualified rights[113] it is harder for those cases to meet the 'significant disadvantage' criterion, than those relying on absolute rights.[114] In section 2.3.2 we set out an additional barrier faced by those bringing cases based on sexual orientation discrimination in meeting the 'significant disadvantage' test, as

106 Buyse, (n 101) at 4.
107 Ibid. at 4 referring to F Vanneste, 'A New Inadmissibility Ground" in P Lemmens and W Vandenhole (eds) *Protocol No. 14 and the Reform of the European Court of Human Rights* (Intersentia 2005).
108 Buyse, (n 101) at 4 referring to Hioureas (n 105) at 751.
109 ECtHR Practical Court Guide on Admissibility (n 35), para 75–81 and Vogiatzis (n 42) at 201.
110 European Convention, (n 2) Art 27 and Ibid at para 350.
111 Buyse, (n 101) at 4 referring to F Hampson, 'The Future of the European Court of Human Rights' in G Gilbert, F Hampson and C Sandoval (eds), *Strategic Visions for Human Rights; Essays in Honour of Professor Kevin Boyle* (Routledge 2012) at 164–165.
112 Vogiatzis (n 42).
113 See n 75 for definition.
114 See n 68 for definition.

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they are subject to more relativity and diversity of social and cultural norms leading to a wider MoA.

2.3.1 Absolute versus Qualified and Conditional Rights

The 'significant disadvantage' criterion as set out in the text of the Convention applies to all rights.[115] Yet case law in practice reveals that certain types of rights are treated differently in relation to this admissibility criterion. In practice absolute rights, which allow of no derogation in ordinary circumstances will rarely fail this admissibility test. In contrast, qualified rights, which allow derogation by states for a wide variety of purposes, including for example for 'the protection of health or morals' (European Convention, Article 8) are subject to a more detailed standard of review.[116] Those alleging sexual orientation discrimination (most commonly lesbian and gay applicants) utilise qualified rights such as right to private life in combination with Article 14 non-discrimination provisions, a conditional right which can only be asserted if the applicant is claiming for breach of another right at the same time.[117] It is argued consequently that it is harder for these applicants to meet the 'significant disadvantage' criterion than those relying on absolute rights. The position of applicants claiming discrimination would be strengthened if this became a free-standing equality clause as provided by the EU Charter of Fundamental Rights (Article 21) or the International Covenant on Civil and Political Rights (Article 26).[118] Optional Protocol 12 European Convention which does contain a free-standing non-discrimination clause, but this has not yet been ratified by all contracting states.[119]

The difficulties with applicants seeking to satisfy the 'significant disadvantage' test whilst relying on qualified rights (as opposed to absolute rights) is corroborated by an analysis of the ECtHR's case law. Vogiatzis explains that in relation to absolute rights 'alleged violations of such rights *do* constitute a significant disadvantage'.[120] Absolute rights such as right to life (European Convention, Article 2) and freedom from torture (European Convention, Article

115 European Convention, Art 35(3)(b).

116 See case law analysis below in this section 2.3.1.

117 European Convention, Art 14 states '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'.

118 EU Charter of Fundamental Rights (2001) (2000/C 364/01), International Covenant on Civil and Political Rights (1966) (General Assembly Resolution 2299A (XXI).

119 European Convention Optional Protocol 12 has only been ratified by 20 out of 46 contracting states to the European Convention.

120 Vogiatzis (n 42) at 204.

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3) commonly meet the significant disadvantage criterion with little analysis.[121] Although the Court Guide explains that whilst the no significant disadvantage test 'applies to all applications pending before the Court',[122] the ECtHR stated in a case judgment that it has difficulty 'envisaging' where this criterion would not be satisfied in freedom from torture cases (European Convention, Article 3) where the minimum level of severity test has already been met.[123] In similar vein, the ECtHR rejected application of the test to an Article 2 cases, 'stressing that the right to life is one of the most fundamental provisions of the Convention'.[124] Similarly, the ECtHR has so far rejected the application of the 'significant disadvantage' admissibility criterion to Article 5 cases because of the significance which is attached to liberty in democratic countries.[125]

In contrast, case law reveals the careful scrutiny of the significant disadvantage criterion where Articles 8 – 11 are concerned (where claims for sexual orientation discrimination are typically framed).[126] In considering the test the ECtHR dismisses insignificant violations.[127] How the test applies in practice is varied and depends upon all the circumstances of the case. Points that could be taken into account are great in variety and include for instance in a freedom of assembly (European Convention, Article 11) context 'the importance of those freedoms' in a democratic society.[128] In freedom of expression cases (European Convention, Article 10) this could include consideration of contributions made to 'debates of general interest and whether the case involves the press or other news media'.[129] As explored further in section 2.3.2 below there is even more relativity in relation to claims concerning sexual orientation as these are more commonly subject to wider MoAs due to wider variations in cultural, social and religious treatment.[130] In

121 S C Greer, 'The New Admissibility Criterion" in S Besson (ed), *The European Court of Human Rights after Protocol 14: Preliminary Assessment and Perspectives* (Schultess 2013).
122 ECtHR Practical Court Guide on Admissibility 2023 (n 35), para 378.
123 *Y v Latvia* App no 61183/08 (ECtHR, 21 January 2015) at para 44.
124 *Makuchyan and Minasyan v Azerbaijan and Hungary* App no 17247/13 (ECtHR, 26 May 2020) paras 72–73.
125 *Zelčs v Latvia* App no 65367/16 (ECtHR, 20 Feb 2020) at para 44.
126 These are the qualified rights under n 75 and include right to private and family life (European Convention, Article 8), freedom for religion (European Convention, Article 9), freedom of expression (European Convention, Article 10) and freedom of assembly (European Convention, Article 11).
127 *Shefer v Russia* App no 45175/04 (ECtHR, 13 March 2012).
128 *Obote v Russia* App no 58954/09 (ECtHR, 19 November 2019).
129 ECtHR Practical Guide on Admissibility n 35, para 387; *Margulev v Russia* App no 15449/09 (ECtHR, 8 October 2019) and *Šeks v Croatia* App no 39325/20 (ECtHR, 3 February 2022).
130 See further analysis under section 2.3.2 below.

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addition when the ECtHR considers the legitimacy of derogations, qualified rights require consideration of necessity and proportionality. This means that at the admissibility stage the ECtHR considers whether a derogation is necessary 'in accordance with the law and … in a democratic society'[131] and whether the interference is no more than absolutely necessary.[132]

Vogiatzis concludes that the difference in practical application of the significant disadvantage criterion to absolute rights as opposed to qualified rights could 'possibly [and] indirectly [lead to] some type of classification of rights'.[133] We argue that it also is likely to disadvantage lesbian and gay applicants. Whilst the categories of absolute right are common amongst many international human rights conventions, an underlying debate remains as to what rights really are fundamental.[134] Specifically in relation to discrimination rights an argument could be made that they too should be considered of paramount important. Lilla Farkas argues that '… bearing in mind the sheer volume and nature of discrimination, – i.e. that is deep-rooted in human nature, recurring, institution and structural, the quality and efficacy of the mechanism enforcing the obligation of equal treatment is of paramount importance'.[135] In other case law the ECtHR has found that discrimination against lesbian and gay persons requires particularly strong justification.[136] Certainly the argument can be made that non-discrimination rights are a vital component of equal citizenship[137] and needed for 'full political standing'.[138]

2.3.2 Margin of Appreciation (MoA)

As the 'significant disadvantage' criterion brings an assessment of the merits into the admissibility stage, considerations such as MoA[139] therefore also become relevant at this early stage. The ECtHR has done much to advance rights for lesbians and gays, yet where lesbian and gay issues are concerned the

131 For discussion see De Kerf (n 10).
132 *Ilhan v Turkey* (n 69).
133 Vogiatzis (n 42) at 204.
134 Meron (n 68).
135 Farkas (n 34) at 181.
136 *Karner v Austria* (n 6).
137 A Harris, 'Loving Before and After the Law' (2007–2008) 76 *Fordham Law Review* 2821; B Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford University Press 2006); N Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press 2000) and Diane Richardson, 'Sexuality and Citizenship' (1998) 32 *Sociology* 83.
138 F Kornbluh, 'Queer Legal History: A Field Grows Up and Comes Out' (2011) 36(2) *Law and Social Inquiry* 537.
139 See definition of MoA set out in Introduction above by reference to Butler (n 14).

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ECtHR often leaves this subject to large MoAs.[140] This can be demonstrated by cases the early seminal case of *Handyside v United Kingdom*[141] and is replicated in other areas such as same-sex marriage,[142] same-sex adoption and case law concerning article 10 freedom of expression.[143] The ECtHR seeks to justify this by arguing that it is attempting to balance its goals to protect human rights, with the varying cultures and moral attitudes in member states.[144] Justine de Kerf, argues that the ECtHR does not wish to step on the toes of Member states, arguing that statuses such as marriage have 'deep-rooted social and cultural connotations' meaning that national authorities are 'best placed' to respond to the particular needs of their society.[145] It is argued that the introduction of the no significant disadvantage test into the admissibility criteria, now means that the significant MoAs applied in many lesbian and gay cases in the merits stage will now also affect the determination of whether there is a significant disadvantage on admissibility.

Many authors criticise the ECtHR merits case law for providing for a large MoAs in the area of lesbian and gay rights, arguing that this stance significantly affects the rule of law.[146] Large MoAs means that contracting states are free to determine their own domestic legislative provision, and could be relying on erroneous or discriminatory reasons in persisting with unequal treatment of gays, lesbians and same-sex relationships.[147] Whilst a balance needs to be struck between universal rights on the one hand and 'the competing values of self-governance, autonomy, and diversity'[148] on the other, it is argued that over reliance on regionalism leaves minority groups such as gays and lesbians unprotected.[149] This is despite the fact, as explored in the Introduction, that

140 See Introduction.
141 *Handyside v UK* (n 16).
142 *Schalk and Kopf* (n 8) and F Hamilton, 'Why the Margin of Appreciation Is Not the Answer to the Gay Marriage Debate' (2013) *European Human Rights Law Review* 47.
143 See the Introduction and Johnson (n 16).
144 De Kerf (n 10).
145 Ibid at 44.
146 J A Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights; Threat to the Rule of Law' (2004–2005) 15 *Emory International Law Review* 113 at 115.
147 Hamilton (n 142).
148 D L Donoho, 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights" (2001) 15 *Emory International Law Review* 391 at 398.
149 Ibid; J A Sweeney, 'Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54 *International and Comparative Law Quarterly* 459; E Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998–1999) 31 *New York University Journal of International Law and Policy* 843 and Brauch (n 146).

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many cases of discrimination against lesbian and gay persons continue to exist in the Council of Europe states. Another criticism is that in waiting for a consensus to develop (one of the central reasons given by the ECtHR in allowing a wide MoA), it is unclear when this will occur or how it will be quantified or measured.[150] Yet the introduction of 'significant disadvantage' criterion into the admissibility stage, brings considerations of MoA into play at this stage. We argue that these criticisms drawn from merits-based case law around wide MoAs in many areas connected with lesbian and gay discrimination, will now also apply to the ECtHR admissibility criterion of 'significant disadvantage'. This results in an additional barrier for lesbian and gay applicants in seeking to satisfy this criterion.

3 How Admissibility Criteria Could Be Changed

It is argued that strict admissibility criteria, which do not consider the specific challenges faced by certain groups, such as gays and lesbians, also impacts on the rule of law and the functioning of the ECtHR. Academics have argued that the ECtHR's unwillingness to accept public action cases stands directly in contrast to the purpose of the ECtHR. Toby Collis, and Robert Varenik critiqued the recent rejection by the ECtHR of an application brought forwards by an NGO to represent the Romani people in the *Kosa* case.[151] They conclude that the ECtHR's decision to reject this case on the basis that it constituted actio popularis 'effectively stultifies this practical and effective means of addressing discrimination, as organizations may choose not to utilize this mechanism if there is no realistic possibility to approach the European Court'.[152] Discrimination claims are essential to citizenship and need to be given a better chance of meeting admissibility criteria. The ECtHR has also expressed the opinion that although the

> primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the

150 F Hamilton, 'Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights' (2018) *European Human Rights Law Review* 1361 and de Kerf (n 10).

151 T Collis and R Varenik, 'In the European Court of Human Rights, Application No. 53461/15 – Kósa v. Hungary" Written Comments of the Open Society Justice Initiative (2016) <https://www.justiceinitiative.org/uploads/5f8ad954-8427-4f8d-813d-d1bd9838adac/litigation-kosa-hungary-thirdparty-20170201.pdf> accessed 17 October 2024, referring to *Kosa v Hungary* (n 57).

152 Ibid n 10.

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> common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States.[153]

Yet the present system relies on individuals to bring forward cases, meaning that claims are made ad hoc, making enforcement patchy and random.[154] Matters are also considered in a retrospective manner, leading to a defensive approach, rather than thinking about encouraging correction to prevent future breaches.[155] It could also be argued as set out by Lilla Farkas that discrimination claims are not well suited to individual applications as discrimination often does not arise at the individual level.[156] Sara Benedi Lahuerta further elaborates that '[d]iscrimination claims do not arise individually' and that therefore '[i]individual litigation may be ill-equipped to stop mass harm and systemic unlawful practices' with additional considerations around the fact that individuals may have 'little incentive to start an individual complaint if potential compensation awards are unlikely to cover litigation costs'.[157]

A common argument against reform of laws in relation to sexual orientation discrimination, is that the ECtHR should stay clear from national states' legislation in this respect and that cultural, social and religious diversity should be respected in areas of social moral and religious controversy such as lesbian and gay rights. The point is clearly demonstrated by the *Schalk and Kopf v Austria* judgment, where the ECtHR justified leaving a large Margin of Appreciation (MoA) due to respect for cultural and historical diversity in respect of same-sex marriage.[158] However, in recommending a change to the Admissibility criteria, whilst we aim to increase access to the ECtHR for vulnerable group such as lesbians and gays, we are not requiring wholesale change across Council of Europe states. There could be several different potential changes to Admissibility criteria, which could include allowing actio popularis (actions in the public interest which may be general potential challenges to law)[159] allowing 'class actions' as already seen in the US (defined as specific challenges where a class of applicants have similar cases) or our

153 *Konstantin Markin v Russia* App no 30078/06 (ECtHR, 22 March 2012) para 89.
154 Farkas, (n 34).
155 S Fredman, 'Making a Difference: The Promises and Perils of Positive Duties in the Equality Field' (2008) *European Anti-Discrimination Law Review* 6–7.
156 Farkas, (n 34).
157 S B Lahuerta, 'Enforcing EU Equality Law Through Collective Redress: Lagging Behind?' (2018) 5(3) *Common Market Law Review* 783 at 790.
158 *Schalk and Kopf* (n 8).
159 See Aceves (n 54) and Wildhaber (n 54).

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chosen recommended action of representative actions (a representative group or NGO, representing an individual). Any of these approaches could in part resolve the pressure on individual victims put in place by the current ECtHR admission criteria. However actio popularis or class actions are unlikely to ever be approved by the ECtHR. As set out in the introduction either of these reforms could be seen as undermining one of the strengths of the European Convention in that it allows individual applicants.[160] In case law the ECtHR has set out its refusal to ever countenance actio popularis. This was explicitly stated in the case of *Aksu v Turkey*,[161] on the grounds that the European Convention functions on a first-hand victim basis and considers how individuals' rights are impacted in a case rather than rights in abstract.[162] There are also concerns that allowing actio popularis or class actions would open the floodgates and lead to the ECtHR being unduly burdened.

However, we argue that allowing representative actions in the context of discrimination claims could be a useful method in seeking to improve the current position. In contrast to actio popularis or class action, representative actions are still brought forward by individual applicants, and thereby do not disturb the core basis behind the European Convention and its emphasis on protecting individuals. Representative actions, in allowing an action to be brought forward by an NGO on behalf of an individual, mean that individual victims are not required to reveal their sexual orientation. Representative actions also have other advantages given that NGOs are larger organisations and may have more resources, and funding that individual applicants simply do not have, and that they provide an important framework for victims to bring claims. This is exemplified by the *Kosa* case, where the ECtHR rejected the case on the basis that it was not brought forward by an individual victim.[163] The applicants in the case argued adamantly that NGO should be allowed to be applicants as the Romani people they sought to represent were unlikely to have the funding and education needed to bring such a case before the ECHR as individual applicants, and also described their lack of faith in the justice system, as well as a lack of awareness as to the tools and resources available to them. Third party intervener Open Society Justice Initiative argued that disallowing applications from NGOs in these circumstances 'render Convention rights theoretical and illusory'.[164] At present these arguments have proven fruitless as the ECtHR remains steadfastly against allowing such representative arguments

160 Wildhaber (n 54).
161 *Aksu v Turkey* (n 56).
162 ECtHR Practical Court Guide on Admissibility (n 35) para 36.
163 *Kosa v Hungary* (n 57).
164 Ibid, para 47.

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on the basis of concerns about actio popularis and opening the floodgates. A similar decision was also reached by the ECtHR in *Esélyt A Hátrányos Helyzetű Gyerekeknek Alapítvány v Hungary*.[165] Yet if representative actions are framed appropriately this would not necessarily lead to the opening of floodgates or other adverse impact on the ECtHR. Representative actions are firmly distinct from those claiming their rights in the abstract. As already demonstrated above in certain circumstances the ECtHR has allowed flexibility in practice around the application of admissibility criteria. This is demonstrated by the 'indirect victim' doctrine which is applied to absolute rights.[166] In the past as well the ECtHR did recognise the category of 'potential victim' although this has now been tightened.[167] There are also many cases that demonstrate the ECtHR's willingness to accept applications from groups of applicants. This is seen in the cases of *DH and Others v the Czech Republic* and *Oršuš and Others v Croatia*,[168] where the rights of Roma were considered in a wider context, with some even comparing these cases to 'class action' lawsuits.[169]

4 Conclusion

The foregoing analysis has demonstrated that the current admissibility criteria pose particular difficulties for lesbian and gay applicants to meet. Case law analysis demonstrates that the 'significant disadvantage' criterion is easier for cases concerning absolute rights to meet, as such cases are commonly held to meet the significant disadvantage criteria with little analysis.[170] In contrast those bringing cases under qualified rights (where claims for sexual orientation discrimination are framed), are subject to a more stringent analyses on admissibility in relation to the 'significant disadvantage' criterion, with less possibility of the doctrine of transferable rights being applied.[171] There are also broader MoAs applied to lesbian and gay cases in the merits stage and with the introduction of the significant disadvantage test to admissibility, these are now

165 *Esélyt A Hátrányos Helyzetű Gyerekeknek Alapítvány v Hungary* App no 41123/10 (25 March 2014).
166 See Section 2.1.2.
167 See Ibid and *Roman Zakharov* (n 85).
168 *DH and Others v. the Czech Republic* App no 57325/00 (ECtHR, November 2007 and *Oršuš and Others v Croatia* App no 15766/03 (ECtHR, 16 March 2010).
169 Organisation for Security and Co-Operation in Europe (OSCE), 'Use of Actio Popularis in Cases of Discrimination' (Helsinki Committee for Human Rights, 2016) <https://www.osce.org/files/f/documents/3/1/337191.pdf> accessed 17 October 2024.
170 See section 2.3, Greer (n 121), Buyse (n 101), and Vogiatzis (n 42).
171 See sections 2.3.1

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also likely to be applied at this early stage.[172] The analysis regarding the current individual victim criteria and the ban on anonymous applications reveals the severe pressure and burden that individuals can be placed under to reveal their sexual orientation when bringing a case, resulting in a practical barrier.[173] The risk of preventing NGOs from representing victims and the starting point of preventing anonymous applications is clear. While some applicants such as Norris may be willing to bring their cases individually, other victims may be entirely dissuaded from bringing their cases due to this condition.[174] It is argued that reform is needed both for the sake of the individual victims bringing cases, but also because of the wider public interest in enabling discrimination claims to be heard by the ECtHR. Representative actions mean that individual victims start from the point of being anonymous and therefore do not have to contend with revealing their sexuality in circumstances where it may be difficult or dangerous to do so. Additional advantages of representative actions means that there may be assistance from a cost perspective, as there is more chance of relevant funding. Representative actions mean that NGOs are more likely to be able to advise on complicated legal points and whilst the ECtHR 'significant advantage' criterion is in place this is clearly needed. This article is timely due to the rise of populist right-wing governments across Europe in recent years and the consequent challenge to the pro-lesbian and gay movement.[175] Human right defenders who bravely bring their cases to the ECtHR in order to test contracting state compliance with the European Convention therefore face increasing challenges, but their actions are needed perhaps more than ever. Allowing representative actions by NGOs would in our view increase the possibility of lesbian and gay human rights defenders being able to satisfy admissibility criteria and have their cases heard by the ECtHR.

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172 See section 2.3.2.
173 See section 2.2.
174 See section 2.1 and *Norris v Ireland* (n 57).
175 See Introduction.

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