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

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

I. Introduction

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

II. The Facts and Procedure

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

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

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\(^3\) Fretté at ¶15.
\(^4\) Id. at ¶9.
\(^5\) Id.
\(^6\) Id. at ¶17.
\(^7\) Id. at ¶19.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id. at ¶20.
The Paris Social Services Department initially denied Mr. Fretté authorization to adopt on the ground that he had “‘no stable maternal role model’ to offer” and had “‘difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child.’” In denying Mr. Fretté authorization to adopt, the Social Services Department issued a report that concluded among other things that Mr. Fretté had a female friend who promised to act as a female role model for the child, that he had “undoubted personal qualities and an aptitude for bringing up children,” that a “child would probably be happy with him,” but that “he only realized when we visited his home how unsuited his flat is for a child to live in.” The report of March 2, 1993 concluded that the ultimate question was, “whether his particular circumstances as a single homosexual man allow him to be entrusted with a child.”

On the 21st of May 1993, Mr. Fretté asked the authority to reconsider its decision, but it refused. Mr. Fretté appealed the decision to the Paris Administrative Court, which set aside the decision of the Paris Social Services Department. The Administrative Court dismissed “the no stable maternal role model” and the inability “to envisage the consequences of the arrival of a child” grounds, which Social Services had relied upon, as insufficient standing alone and unsubstantiated, respectively. The Court found that the reason given by the Director of Social Services for the denial of Mr. Fretté’s application was Mr. Fretté’s “choice of lifestyle,” which the Court took to allude

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11 Id. at ¶10.
12 Id.
13 Id.
14 Id. at ¶11.
15 Id. at ¶¶ 12-13.
16 Id. at ¶13.
to Mr. Fretté’s homosexuality. The Court found, however, that this reason was insufficient to deny him authorization without finding “conduct that was prejudicial to the child’s upbringing.”

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

The Government Commissioner presented the question to the Conseil d’Etat as, “In spite of Mr. [Fretté’s] undoubted personal and intellectual qualities, did the authorities have good reason to consider that he did not provide sufficient guarantees to offer a child a home because of his choice of lifestyle?” The Conseil d’Etat, in a judgment of the 9th of October 1996, set aside the Paris Administrative Court’s judgment and rejected Mr. Fretté’s application for authorization to adopt. The Conseil d’Etat found that Mr. Fretté “did not provide the requisite safeguards – from a child-rearing, psychological and family perspective – for adopting a child.”

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17 Id.
18 Id.
19 Id. at ¶14.
20 Id. at ¶49.
21 Id. at ¶21-22, 46.
22 Id. at ¶46.
23 Id. at ¶15.
24 Id. at ¶16.
25 Id.
Mr. Fretté proceeded with an application against the French Republic to the European Commission of Human Rights (“the Commission”) under Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). Upon the entry into force of Article 5, §2 of Protocol No. 11 (abolishing the Commission), the case was transferred directly to the European Court of Human Rights. Mr. Fretté alleged that the rejection of his application for authorization to adopt was “implicitly and exclusively based on his sexual orientation”. He argued that the decision was “tantamount to ruling out any possibility of adoption for a category of persons defined according to their sexual orientation, namely homosexuals and bisexuals, without taking any account of their individual personal qualities or aptitude for bringing up children.” He thus alleged that he had been a victim of discrimination on the ground of his sexual orientation in violation of Article 14 taken in conjunction with Article 8 of the Convention. He also alleged a violation of his right to a fair trial guaranteed by Article 6 §1 of the Convention, because he had not been notified of the

26 Id. at ¶1-2.
27 Id. at ¶3.
28 Id. at ¶26.
29 Id.
30 Article 14, with the heading, “Prohibition on discrimination” provides that, “The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” European Convention on Human Rights, supra note 1, art. 14, 213 U.N.T.S. at 232.
31 Article 8 contains the heading, “Right to respect for private and family life” and provides in its first subpart that, “Everyone has the right to respect for his private and family life, his home and his correspondence.” The second subpart reads, “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” European Convention on Human Rights, supra note 1, art. 8, 213 U.N.T.S. at 230.
32 Fretté at ¶26.
33 European Convention on Human Rights, supra note 1, art. 6, 213 U.N.T.S. at 228.
date of the hearing before the *Conseil d’Etat*. The Article 6 violation was found by the Court and it awarded Mr. Fretté costs and expenses incurred before the Convention institutions in the amount of € 3,500, but this is not the focus of this Note.

III. *The Majority Analysis*

The European Court of Human Rights (the Court) held 4-3 that there had been no violation of Article 14 taken in conjunction with Article 8. It began its analysis by enunciating the applicable legal rule. “[A] difference in treatment is discriminatory for the purposes of Article 14 if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realized.”

The Court recognized that sexual orientation is “undoubtedly covered by Article 14 of the Convention.” It then found that Article 14 would be applicable if “the facts of the case … fall within the ambit of one or more of the provisions of the Convention.” Although the Convention does not guarantee the right to adopt, the Court found that the French Civil Code does provide such a right in Article 343-1 and this falls within the ambit of Article 8. The Court found that the decision to reject Fretté’s application was

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34 *Fretté* at ¶44.  
35 *Id.* at ¶ 2-3 of *holding*.  
36 The four judges joining in the opinion and their nationalities were: J-P. Costa (French); P. Kuris (Lithuanian); K. Jungwiert (Czech); and K. Traja (Albanian). The three dissenting judges and their nationalities were: W. Fuhrmann (Austrian); F. Tulkens (Belgian); and N. Bratza (British). Judges Jungwiert and Traja also filed Partly Concurring opinions.  
37 *Fretté* at ¶34.  
39 *Fretté* at ¶31.  
40 *Id.* at ¶32.
based decisively on his avowed homosexuality. Accordingly, the Court held that
Article 14 taken in conjunction with Article 8 was applicable.

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

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41 Id. at ¶ 32, 37.
42 Id. at ¶33.
43 Id. at ¶38.
44 Id. at ¶ 38-42.
45 Id. at ¶40.
46 Id.
47 Id. at ¶41.
48 Id.
49 Id. at ¶42.
of scientific studies conducted on the subject to date.”

Finding that denial of the application for authorization to adopt was proportional to the need to protect children, the Court concluded that no violation of Article 14 had occurred.

IV. The Dissent of Sir Nicolas Bratza and Judges Fuhrmann and Tulkens

The dissent compared the case to the Belgian Linguistic Case. In the Belgium Linguistic Case, French-speaking parents challenged the Belgian school system that divided the country into regions for the purpose of determining the language of instruction. The Court held that although Article 2 of Protocol No. 1 did not infer a right to obtain the creation of a particular kind of educational establishment from public authorities, “[a] State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14.” This principle, the dissent argued, was later reinforced in the case of Abdulaziz, Cabales and Balkandali v. the United Kingdom. Here the State was not bound under an Article 8 obligation to authorize foreign husbands residing in the country to be joined by their wives despite the fact that the latter did not have any independent right of entry to or residence in the territory. However, since the United Kingdom did provide such a right,

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50 Id.
51 Id. at ¶43.
52 Belgian Linguistic Case, 1 Eur. H.R. Rep. 252 (1968); Fretté at *25.
54 Article 2 of Protocol 1 reads, “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” European Convention on Human Rights, supra note 1, Protocol 1, art. 2, 213 U.N.T.S. at 264.
55 Belgian Linguistic Case, 1 Eur. H.R. Rep. at 283; Fretté, dissenting opinion.
57 Fretté, dissenting opinion.
the difference in treatment with respect to husbands and wives had to be justified under Article 14.\textsuperscript{58}

The instant case was like those above, the dissent argued. Although Article 8 did not provide a right to adopt, adoption fell within the ambit of “respect for family and private life”, and France had indeed provided a right to adopt.\textsuperscript{59} Since sexual orientation discrimination has been recognized by the Court to be forbidden under Article 14, any discrimination on this basis must be justified.\textsuperscript{60} This leaves us asking relatively the same question as the majority; was the difference in treatment justified by a legitimate aim, and was the discrimination was proportionate to that aim? The dissent then points out that the legitimate aim is the protection of the child’s rights and freedoms.\textsuperscript{61} The majority put it as, “to protect the health and rights of children”.\textsuperscript{62} The dissent argued that the Conseil d’Etat itself found that there was no reference in the case-file “to any specific circumstance that might pose a threat to the child’s interests”.\textsuperscript{63} The dissent claimed that the legitimate aim had not, therefore, been sufficiently established.\textsuperscript{64} In failing to point out any scientific studies or other evidence of the danger of allowing homosexual adoption, and acknowledging the skills and abilities of Fretté, the Conseil d’Etat failed to carry out a detailed, substantive analysis of proportionality and took no account of the situation of persons concerned.\textsuperscript{65} Under these circumstances, the dissent argued, an

\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id., dissenting opinion.}
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id. at ¶38.}
\textsuperscript{63} \textit{Id., dissenting opinion.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
absolute bar to adoption on the grounds of homosexuality in order to protect children was not proportionate, and a violation of Article 14 in conjunction with Article 8 existed. 66

V. A Different Approach to Proportionality (Margin of Appreciation and the Burden of Proof).

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

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

The Court has already recognized sexual orientation as being among the categories protected from discrimination under Article 14. 67 In doing so they recognized that it is not generally a legitimate grounds for discrimination, and that efforts to interfere in such an intimate part of a person’s life must be justified at a minimum by particularly convincing and weighty reasons. 68

The Court held that discrimination on the ground of sexual orientation had to be justified by “particularly convincing and weighty reasons” in Smith and Grady v. the United Kingdom. 69 In this case, the United Kingdom attempted to justify the necessity of

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66 Id.


the exclusion of homosexuals from the military.\textsuperscript{70} In analyzing whether such exclusion was justified the Court examined a report submitted by the United Kingdom as evidence of the necessity of the exclusion of homosexuals.\textsuperscript{71} The Court, however, dismissed the study, announcing that

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

The seminal case in which the Court balanced the health and rights of children with an applicant’s rights of non-discrimination on the grounds of homosexuality was \textit{Salgueiro da Silva Mouta v. Portugal}.\textsuperscript{73} There, the Court confronted the question of whether a Lisbon Appeal Court’s grant of custody to a mother on the grounds of the father’s sexual orientation was an unjustified difference in treatment, and thus discriminatory under Article 14 taken in conjunction with Article 8.\textsuperscript{74} The Court laid out the following test: “a difference in treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification, that is to say, if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality

\textsuperscript{70} See Id. at 524-525.
\textsuperscript{71} The court examined the report of the Homosexuality Policy Assessment Team, which concluded besides other “subsidiary issues” that, “the presence of known or strongly suspected homosexuals in the armed forces would produce certain behavioural and emotional responses and problems which would affect morale and, in turn, significantly and negatively affect the fighting power of the armed forces.” See Id. at 516-17.
\textsuperscript{72} Id. at 533.
\textsuperscript{74} Id. at 1069.
between the means used and the aim envisaged.” 75 The Court first recognized that the aim pursued by the Lisbon Appeal Court, the protection of the health and rights of the child, was legitimate. 76 The Court then went on to analyze whether the difference in treatment was proportionate to the legitimate aim. 77 The Court moved to more of a “zero tolerance” attitude to discrimination on the grounds of sexual orientation, simply concluding that because a distinction on the basis of sexual orientation “cannot be tolerated under the Convention,” they could not “conclude that a reasonable relationship of proportionality existed between the means used and the aim envisaged…,” and that, “there was therefore a breach of Article 8 in conjunction with Article 14.” 78

In Fretté, France presented no evidence such as the report submitted by the United Kingdom in Smith and Grady. In fact, no evidence at all was presented by the French government concerning the necessity of preclusion of homosexuals from adoption, other than an implicit allusion to the stigma the child of a homosexual is likely to face from prejudiced individuals in society. 79 Instead of relying on specific evidence the Court relied on the lack of common ground among the member states and the division of the scientific community in general, observing that, “the scientific community… is divided over the possible consequences of a child’s being adopted by one or more homosexual parents…” 80 The “lack of common ground” argument, however, is questionable in the first place, and its use as a way of expanding the margin of appreciation to allow

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75 Id.
76 Id.
77 Id. at 1070 – 71.
78 Id. at 1071.
79 See Fretté at ¶15 (“If there is any consensus it lies instead in the growing awareness that… the child’s interests cannot always be reconciled with current developments.”)
80 Id. at ¶42.
discrimination is inappropriate. By relying on the division of scientific opinion regarding
the harms of homosexual adoption, the Court uses, without saying so, a form of the
margin of appreciation akin to the precautionary principle, as the Concurring Opinion
points out. This principle is used by the European Court of Justice, which interprets the
largely economic based treaties of the European Union. As will be explained later, not
only is this standard itself not met, but it is not appropriate for a human rights context,
and indeed does not appear to have been explicitly used by the European Court of Human
Rights in the past.

B. Lack of Common Ground Among the Contracting States

The argument that there exists a lack of common ground as to the propriety of
discrimination on the grounds of sexual orientation in adoption is inappropriate and
cannot be supported. To the extent that this disagreement among the states on “these
social issues” is with the morality of discriminating on the grounds of sexual orientation,
the Court has already decided these issues, when it expressly found that sexual orientation
was not a proper ground for discrimination under Article 14. To the extent the
objection is based on a disagreement regarding the harm children may suffer as a result of
being adopted by homosexuals, the Court relies on the division of the scientific
community, which is an argument implicitly resting on the precautionary principle, and is
addressed later in this Note.

Even were the morality of discrimination on the grounds of sexual orientation still
open to question, the Court’s claim that “[a]lthough most of the Contracting States do not

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81 See id. at concurring opinion (“In reality, most of the majority have based their decision, without saying
so, on the precautionary principle.”).
expressly prohibit homosexuals from adopting… it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues…” is dubious. 84 As the dissent points out, on the contrary, there seems to be a European consensus developing regarding “these social issues”. 85 The European Union's Charter of Fundamental Rights of the 7th of December 2000 expressly prohibits “any discrimination based on any ground such as… sexual orientation”. 86 The Netherlands has laws expressly providing a positive right for homosexuals to adopt children. 87 Bosnia and Herzegovina, the Czech Republic, Denmark, Finland, France, Hungary, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Romania, Slovenia, Spain and Sweden have laws protecting people from discrimination on the ground of sexual orientation. 88 Other countries that are

83 See discussion infra Part V.
84 See Fretté at ¶41.
85 See id. at dissenting opinion.
86 Charter of Fundamental Rights of the European Union, 18/12, 2000 O.J. (C 364) art. 21(1).
Bosnia and Herzegovina, Republika Srpska - Penal Code, article 141.
Finland, Penal Code (as amended by Law 21.4.1995/578), c. 11, ¶9, c. 47, ¶3.
The Netherlands, Stb. 1994, nr. 230 (General Equal Treatment Act), arts. 1, 5-7.
not listed, but are members of the European Union, such as Austria, Belgium, Germany, Greece, Italy, Portugal, and the United Kingdom are subject to the Council of the European Union’s Directive 2000/78/EC, which prohibits discrimination in employment on the basis of sexual orientation.\footnote{Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303/16), arts. 1, 2(1).}

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

C. \textit{The Precautionary Principle Abused}

The other justification the Court used was based on a lack of scientific certainty, which is an argument implicitly based on the precautionary principle, as the Concurrence points out.\footnote{See Fretté, concurring opinion (“In reality, most of the majority have based their decision, without saying so, on the precautionary principle.”).} First a general definition of the precautionary principle is in order, so that the reader may be familiarized with the concept. In January of 1998 a group of scientists, government officials, lawyers, and labor and grass roots environmental activists met in Racine, Wisconsin at the Wingspread Conference to find such a definition. The Wingspread Conference issued a statement describing the precautionary principle as follows: “When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are
not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof."

The Commission of the European Union adopted a “Communication on the Precautionary Principle” ("the Communication") in 2000. The Communication established that

Although the precautionary principle is not explicitly mentioned in the Treaty except in the environmental field, its scope is far wider and covers those specific circumstances where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection.

The Communication set out guidelines for Member States to follow if they chose to rely on the principle.

Where action is deemed necessary, measures based on the precautionary principle should be, \textit{inter alia}:
- proportional to the chosen level of protection,
- non-discriminatory in their application,
- consistent with similar measures already taken,
- based on an examination of the potential benefits and costs of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis),
- subject to review, in the light of new scientific data, and
- capable of assigning responsibility for producing the scientific evidence necessary for a more comprehensive risk assessment.

The Communication went on to lay out in greater detail when and how Member States could rely on the precautionary principle. With respect to proportionality it noted that

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93 \textit{Id.} at 10.
The measures envisaged must make it possible to achieve the appropriate level of protection. Measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists. However, in certain cases, an incomplete assessment of the risk may considerably limit the number of options available to the risk managers.96

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

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

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

94 Id. at 4.  
95 Id. at 13-21.  
96 Id. at 18.  
97 Id. at 17.
out in the Treaty, but human health as well. The ECJ, in *National Farmers’ Union v. Secretariat du Gouvernement*, noted in dicta that the principle of proportionality was “inseparable from the precautionary principle.”

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

100 *Id.* at 977.
102 *German Beer*, 1 C.M.L.R. at 801.
103 *Id.*
105 EC TREATY art. 30.
preservatives.\textsuperscript{107} In response, the European Court of Justice reminded the German
government of the proportionality principle. It found that prohibitions on marketing to be
in accordance with the principle of proportionality “must be restricted to what is actually
necessary to secure the protection of public health.”\textsuperscript{108} It went on to say that the principle
of proportionality requires the government to take into account the specifics of each
case.\textsuperscript{109} “[B]y virtue of the principle of proportionality, traders must also be able to
apply, under a procedure which is easily accessible to them and can be concluded within a
reasonable time, for the use of specific additives…”\textsuperscript{110}

It seems that the European Court of Human Rights has it backwards in \textit{Fretté}.
Rather than using the fact of scientific uncertainty to justify the proportionality of the
government’s action, the Court should be using the proportionality principle to temper the
precautionary behavior of the government in the face of uncertain science. It may be
argued though, that at least in recent cases, the ECJ has used the precautionary principle
as part of its proportionality test. The Court of First Instance of the European
Communities alluded to this in \textit{Artegodan GmbH v. Commission}.\textsuperscript{111} Here the court
referenced the judgment of the European Court of Justice in \textit{United Kingdom v.
Commission (Mad Cow Disease)}\textsuperscript{112}, where the Court upheld a Commission ban on the
export of live bovine animals.\textsuperscript{113} It is true that the precautionary principle was noted

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\textsuperscript{106} \textit{See German Beer}, 1 C.M.L.R. at 808-09. \\
\textsuperscript{107} \textit{Id.} \\
\textsuperscript{108} \textit{Id.} at 809-10. \\
\textsuperscript{109} \textit{See id.} at 810. \\
\textsuperscript{110} \textit{Id.} \\
\textsuperscript{111} Case T-74/00, Artegodan GmbH v. Commission, 2002 ECR II-4945 at ¶185 (2002). \\
\textsuperscript{112} Case C-180/96, United Kingdom v. Commission, 1998 ECR I-2265 [hereinafter “\textit{Mad Cow Disease}”]. \\
\textsuperscript{113} \textit{Id.} at ¶136.}

implicitly\textsuperscript{114} within the proportionality analysis in the \textit{Mad cow disease} case,\textsuperscript{115} however, the Court still made its finding that the action was proportional only after reviewing extensive scientific data and facts submitted by both parties.\textsuperscript{116}

One could argue that according to the precautionary standard articulated by the Wingspread Conference, the burden of proof should be on the proponent of an activity (Mr. Fretté, in the case at hand).\textsuperscript{117} However, the European Union, at least, requires a Member State to conduct a scientific evaluation before relying on the principle.\textsuperscript{118} The Commission of the European Communities Communication on the Precautionary Principle stated that, “[t]he implementation of an approach based on the precautionary principle should start with a scientific evaluation, as complete as possible, and where possible, identifying at each stage the degree of scientific uncertainty.”\textsuperscript{119}

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

\textsuperscript{114} See Artegodan, 2002 ECR II-4945 at ¶185; Communication on the Precautionary Principle, \textit{supra} note 91, 20 (citing the \textit{Mad cow disease} case as an example of implicit application of the precautionary principle).
\textsuperscript{115} See \textit{Mad Cow Disease}, 1998 ECR I-2265 at ¶¶76-111.
\textsuperscript{116} See \textit{id.} at ¶¶78, 84, 86-89.
\textsuperscript{117} See Montague, \textit{supra} note 91 and accompanying text.
\textsuperscript{118} See Communication on the Precautionary Principle, \textit{supra} note 92, at 17.
\textsuperscript{119} \textit{Id.}
Applying the European Union’s precautionary standard to the facts of the case, the French government has failed to justify the necessity of its denial of authorization to adopt on the grounds of homosexuality. France presented no evidence at all concerning the necessity of preclusion of homosexuals from adoption, other than an offhand allusion to the stigma the child of a homosexual is likely to face from prejudiced individuals in society, which has already been found to be insufficient grounds for justification by the European Court of Human Rights in *Smith and Grady*.\(^{121}\) Additionally, France has refused to take account of the specifics of Mr. Fretté’s situation, even while acknowledging that a child would probably be happy with him. The precautionary principle tempered by the principle of proportionality demands such an accounting for specific situations, as illustrated in the *German Beer* case.\(^{122}\)

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

VI. *Use of the Precautionary Principle Inappropriate in a Human Rights Context.*

\(^{120}\) See discussion supra Part V.b.

\(^{121}\) See Fretté at ¶15; *Smith and Grady*, 29 Eur. H.R. Rep. at 532.

\(^{122}\) See *German Beer*, 1 C.M.L.R. at 810.
As the foregoing notes, the European Court of Human Rights has effectively used the precautionary principle (or something akin to it) as a basis for denying the rights of homosexuals to adopt children. Use of the precautionary principle in a human rights context is inappropriate, however, in the first place.

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

In weighing the interests of children, the United States Supreme Court has similarly found in Palmore v. Sidoti that the racial bias a child may face by being raised in the interracial household of the child’s mother did not justify the award of custody to

the father.\textsuperscript{124} “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect,” the Court noted.\textsuperscript{125} The comparison to above cases makes it clear that an approach to human rights using the precautionary principle is inappropriate, especially if one views human rights as natural or fundamental.

VII. Conclusion: \textit{Undue Precaution and Backtracking in Human Rights}

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

\begin{enumerate}
\item[125] \textit{Id.} at 433.
\item[127] See \textit{Fretté}, dissenting opinion.
\end{enumerate}

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true not only in the particular area of discrimination on the ground of sexual orientation,
but also in all areas where controversy may arise.

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