TRUISMS & TAUTOLOGIES: AMBIVALENT CONCLUSIONS REGARDING SAME-SEX MARRIAGE IN *CHAPIN V. FRANCE*

Donald E. Soles III[†]

INTRODUCTION

The European Court of Human Rights (the "Court") recently decided a French same-sex marriage controversy that was engendered in 2004.[1] In June of 2004, mayor Noël Mamère officiated a marriage between Bertrand Charpentier and Stéphane Chapin.[2] Mamère had intended his action to be a test of the compatibility of French law with same-sex marriage, and his ultimate intention was to pursue legal recourse as far as the European Court of Human Rights.[3] Through a refusal to grant an appeal on March 13, 2007, the French Cour de Cassation (the court of last resort for criminal and civil matters) upheld the proposition that marriage is exclusively between a man and a woman,[4] and Chapin and Charpentier filed their application for appeal with the Court on September 6, 2007.[5]

Perhaps one of the many reasons that same-sex marriage has garnered such eminent controversy in the modern era is due to the way in which proponents of a particular position predominately view counter opinions as being "based on animus."[6] Without the regard to final causes of this socio-political dissension, the controversy is ripe for legal analysis. The Court accepted the present case to determine the compatibility of France's ban of same-sex marriage with Articles 8, 12, and 14 of the European Convention of Human Rights (ECHR).[7] Since 1999, and at the time in which the controversy originated, French law recognized the

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† B.S. 2014, Regent University; J.D. 2017, Regent University School of Law.

1 *See* Chapin v. France, App. No. 40183/07, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/fre?i=001-163436 (translation on file with J. GLOBAL JUST. & PUB. POL'Y); Press Release, Eur. Ct. H.R., Prohibition in France of Marriage Between Same-Sex Couples Prior to the Law of 17 May 2013 Was Not Contrary to the Convention, ECHR 199 (2016), http://hudoc.echr.coe.int/eng-press?i=003-5407086-6765196 [hereinafter Press Release].

2 Daniel Borrillo, *Who Is Breaking with Tradition? The Legal Recognition of Same-Sex Partnership in France and the Question of Modernity,* 17 YALE J.L. & FEMINISM 89, 93 (2005).

3 *Id.*

4 *See* Emmanuelle Bribosia, Isabelle Rorive & Laura Van den Eynde, *Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience,* 32 BERKELEY J. INT'L L. 1, 6 (2014).

5 *Chapin*, App. No. 40183/07, Eur. Ct. H.R. ¶ 1; Press Release, *supra* note 1, at 2.

6 *See* LYNN D. WARDLE, MARK P. STRASSER & LYNNE MARIE KOHM, FAMILY LAW FROM MULTIPLE PERSPECTIVES 114–15 (2014).

7 *Chapin*, App. No. 40183/07, Eur. Ct. H.R. ¶¶ 3–14; Press Release, *supra* note 1, at 2.

following three types of legal unions: concubinage (similar to the American concept of common-law marriage), "the civil pact of solidarity" (also known as "Pacs;" a civil union other than marriage), and marriage.[8] Same-sex couples could previously avail themselves of concubinage and the civil pact of solidarity, but not legal marriage.[9] Something incredibly odd, however, happened in the time between the Court's initial acceptance of *Chapin* in 2007, and the final decision in 2016—France legalized same-sex marriage by statute on May 17, 2013.[10] Therefore, any remedy the Court could have offered in judgment would have been obviated *ipso facto*, yet the legal enquiry of "discrimination" remained under Articles 8, 12, and 14 of the ECHR.[11]

I. THE FACTS & PROCEDURAL HISTORY

In an attempted coup, Noël Mamère conducted a marriage between Bertrand Charpentier and Stéphane Chapin.[12] On May 27, 2004, the local Prosecutor filed an objection to the marriage with the civil registrar for the town of Bègles.[13] However, Mamère, who was acting in his capacity as registrar, celebrated the marriage on June 5 despite the objection from the prosecutor.[14] The Prosecutor appealed to the High Court of Bordeaux on June 22, and on July 27, this court found that the annulment and subsequent ban of same-sex marriage did not constitute discrimination under Articles 8, 12, and 14 of the ECHR.[15] On April 19, 2005, the Court of Appeals of Bordeaux upheld the lower court's judgment, reasoning that no discrimination existed under the ECHR because homosexuals were permitted to live as a family and adopt children.[16] Finally, the highest court in France rejected a petition for appeal, deferring to the lower court and specially noting that "marriage is the union [between] a man and a woman."[17]

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[8] *See* Benoît de Boysson et al., *France: Review of Family Law in 2010, in* THE INTERNATIONAL SURVEY OF FAMILY LAW 187, 190 (Bill Atkin & Fareda Banda eds., 2011).

[9] *Id.*

[10] Angélique Devaux, *The New French Marriage in an International and Comparative Law Perspective*, 23 TUL. J. INT'L & COMP. L. 73, 76 (2015).

[11] *Chapin*, App. No. 40183/07, Eur. Ct. H.R. ¶¶ 3, 7–8; *see also* Press Release, *supra* note 1, at 2.

[12] *See* Bribosia, Rorive, & Van den Eynde, *supra* note 4, at 6 (noting that the act of celebrating the marriage was civil disobedience).

[13] *Chapin*, App. No. 40183/07, Eur. Ct. H.R. ¶ 12.

[14] *Id.* ¶ 13.

[15] *Id.* ¶¶ 14–15.

[16] *Id.* ¶ 16; *see also* Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S 221 [hereinafter ECHR] (guaranteeing the right to private life and family).

[17] *Chapin*, App. No. 40183/07, Eur. Ct. H.R. ¶ 20.

II. THE HOLDING

Chapin and Charpentier invoked a combination of Article 12 and Article 14 from the ECHR.[18] Article 12 states, "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."[19] Concomitantly, Article 14 states, "[t]he enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex."[20] In response to the petitioner's assertion that they were discriminated against on the basis of sexual orientation, the Court relied heavily on precedent from a case decided six years earlier,[21] *Schalk v. Austria*, wherein the Court, finding no European consensus on the issue of same-sex marriage, held in favor of allowing individual member nations to determine their own position regarding the matter.[22] Without departing from the reasoning in *Schalk*, the Court found no violation of Articles 12 and 14, leaving the decision of legalizing same-sex marriage to respective European nations.[23]

The petitioners next invoked a combination of Articles 8 and 14.[24] Article 8 states:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
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> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[25]

Under this legal theory, the appellants argued that they were subject to discrimination because, although they had access to the legal protection offered through "Pacs," this form of protection was inferior to the legal protections found in marriage.[26] The Court responded that the legal protections afforded to homosexual couples living under the civil pact of

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18 *Id.* ¶ 28.

19 ECHR, *supra* note 16, art. 12.

20 *Id.* art. 14.

21 *Chapin*, App. No. 40183/07, Eur. Ct. H.R. ¶ 34.

22 *See* Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 438 (delegating the decision of whether to legalize same-sex marriage to the respective member-nations).

23 *Chapin*, App. No. 40183/07, Eur. Ct. H.R. ¶¶ 36, 39–40.

24 *Id.* ¶ 41.

25 ECHR, *supra* note 16, art. 8.

26 *Chapin*, App. No. 40183/07, Eur. Ct. H.R. ¶ 33.

solidarity were virtually the same in relation to material areas of legal protection.[27] The Court reached this conclusion by the use of two modalities of analogous reasoning. Firstly, the Court held that protections guaranteed under the pact of solidarity were virtually the same in relation to marriage in material areas such as taxation, right of rental, donations, labor law, and patrimony.[28] Secondly, the Court distinguished French law regarding same-sex marriage from Greek law, which had been the recent subject of the court's scrutiny and was ultimately found to be in violation of the ECHR.[29] For instance, in *Vallianatos v. Greece,* the nation of Greece had precluded homosexual couples from benefitting from the legal protections afforded by civil unions (which had themselves been created by statute in 2012), and this action was held to be a violation of Articles 8 and 14.[30] The *Chapin* Court concluded its analysis of case law by underscoring the overall consistency of French law with the composite trend of other European nations, noting no significant deviation from the norm.[31]

One of France's closing arguments included the assertion that same-sex marriage had become legal in France since the beginning of the controversy.[32] The degree to which this argument was instrumental in effecting the Court's decision is unknown because the Court did not enter into any discussion about France's legal provision for same-sex marriage.[33] Nonetheless, the Court found that the government of France, in denying the petitioner's ability to marry in 2004, did not violate the protections against discrimination afforded by the ECHR.[34]

III. WHAT IS DISCRIMINATION?

For the persistent discussion relating to discrimination, one may reasonably anticipate the question: what is discrimination? This agonizing question has led some to become pessimistic as to the ability of a court to adequately enumerate or proscribe discriminatory practice at all.[35] Indeed, Richard J. Arneson, a distinguished professor of philosophy

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[27] *Id.* ¶ 49.

[28] *Id.* ¶ 48–49.

[29] *Id.* ¶ 50.

[30] Vallianatos v. Greece, 2013-VI Eur. Ct. H.R. 125.

[31] *Chapin*, App. No. 40183/07, Eur. Ct. H.R. ¶ 51.

[32] *Id.* ¶ 34.

[33] *See id.* ¶¶ 24, 34, 36–39 (providing summary recognition of France's recent legalization of gay marriage without further analysis).

[34] *Id.* at ¶ 2–3.

[35] *See, e.g.,* Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2366 (2003) (bemoaning that reading over 800 pages on the subject of discrimination did not allow the author to grasp a clear meaning of "discrimination").

at the University of California, San Diego, has written, "[p]resently, we do not know what the appropriate norms of sexual regulation are." [36] Similarly, Wouter Vandenhole posits "there is no universally accepted definition of discrimination" and "the seven core UN human rights treaties [do not] offer a common definition of discrimination or equality."[37] Without a pellucid system for determining *in advance* which practices conform to a definition, one is relegated to anticipating an arbitrary enumeration of practices constituting discrimination.[38] Making matters even more turbid is the observation that certain forms of discrimination can even work to benefit a suspect class, as evidenced in the United States Supreme Court case of *Regents of the University of California v. Bakke*.[39] The search for an adequate definition of discrimination leads to a philosophical examination of the requirements of a definition itself.[40]

The purposes of definition include "the elimination of ambiguity" and the reduction of vagueness. [41] In general, there are five types of definition.[42] A *stipulative* definition is used to denote a new term, whereas a *lexical* definition reports a preexisting meaning of a term used in language.[43] *Precising* definitions reduce ambiguity when common locution is vague.[44] *Theoretical* definitions replace the lexical definition of a term as scientific theories undergo revision, and *persuasive* definitions are

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[36] Richard J. Arneson, *What Is Wrongful Discrimination?* 43 SAN DIEGO L. REV. 775, 800 (2006).

[37] WOUTER VANDENHOLE, NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES 33 (2005). Vandenhole also notes that there are four elements that the European Court of Human Rights considers in determining wrongful discrimination: (1) "whether there is differential treatment" (2) "of equal cases;" (3) "whether there is an objective and reasonable justification;" and (4) "whether there is proportionality between aim and means." *Id.* at 34.

[38] *See* Greg L. Bahnsen, *Revisionary Immunity,* COVENANT MEDIA FOUND. (1975), http://www.cmfnow.com/articles/PA018.htm. In criticism of the analytic/synthetic distinction, Bahnsen wrote, "[a]n acceptable proposal must allow us to *identify in advance* the analytic statements, not waiting for a complete enumeration of them by some philosophical pope." *Id.*

[39] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In this landmark case, the Medical School of the University of California Davis had created an admissions process that weighed a totality of factors which included race. *Id.* at 272–75. The Respondent, a white male, scored higher on the admissions test than many African-American applicants but was rejected. *Id.* at 276–77.

[40] *See generally* Andrew Altman, *Discrimination*, STAN. ENCYCLOPEDIA PHIL. (Aug. 30, 2015), http://plato.stanford.edu/entries/discrimination (suggesting "that simply providing non-exhaustive lists of the grounds on which discrimination is to be prohibited" is an inadequate substitution for a true definition).

[41] IRVING M. COPI, INTRODUCTION TO LOGIC 127–28 (5th ed. 1978).

[42] *Id.* at 135.

[43] *Id.* at 136–38.

[44] *Id.* at 139–40.

constructed to influence disposition.[45] In *Chapin*, the Court's definition of discrimination is precising in the sense that it attempts to clarify an ambiguity, theoretical in the sense that the legal theory underlying discrimination ultimately underwent revision, and persuasive if the Court intended to effect social response and change.

In a classification of civil rights, however, several precising categorizations may be noted. Sometimes in a discussion of civil rights, we speak of an individual's "liberty" or "freedom" to perform a certain action without government interference.[46] Other times when a civil right is mentioned, we speak of an individual's right to receive a benefit from others, and correspondingly, other citizen's duty to provide these services.[47] Lastly, we speak of civil rights in the context of an individual's right to exercise a liberty right free from discrimination.[48] As the epistemological philosopher Greg Bahnsen has deftly stated, "[t]o say that homosexuality is a nondiscrimination right clearly presupposes that homosexuality is also a freedom right, for it would be quite contradictory for the law to protect . . . what it does not allow as a freedom."[49]

Through this precising definition of discrimination, the factitious nature of the Court's analysis can be seen regarding same-sex marriage. Discrimination against same-sex marriage, without a clear stipulative definition in the UN documents,[50] would be impossible absent a liberty right legalizing same-sex marriage. Under this analysis, the Court's ultimate holding that France committed no discrimination would be tautological. If same-sex marriage was legalized, those pursuing same-sex marriage would consequently enjoy a non-discrimination right in enjoyment of the freedom to marry. If same-sex marriage was not legally recognized, there could be no discrimination against same-sex marriage. Thus the Court's conclusion is a truism and tells us nothing new or even useful about the nature of discrimination. The pith of the same-sex marriage controversy instead concerns whether same-sex marriage *ought*

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[45] *Id.* at 140–41.

[46] *See* GREG L. BAHNSEN, HOMOSEXUALITY: A BIBLICAL VIEW 101 (1978). An example of a liberty right is the right to "keep and bear arms," as stated in the Second Amendment of the United States Constitution. *See* McDonald v. Chicago, 561 U.S. 742, 778 (2010) ("The Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

[47] *Id.* Welfare and municipal services such as fire departments and road maintenance are examples of services falling under this category of "benefit" rights.

[48] *Id.*

[49] *Id.* at 102.

[50] *See supra* text accompanying note 37; s*ee also* COPI, *supra* note 41, at 136, 139 (discussing stipulative and precising definitions).

to be a liberty right.[51] In this pursuit, the Court assumes a role similar to that of the "fashion police," ensuring that various European nations garb themselves in the jurisprudential fads and trends of other European nations.[52]

IV. MORALITY

Richard J. Arneson writes, "[d]iscrimination that is intrinsically morally wrong occurs when an agent treats a person identified as being of a certain type differently than she otherwise would have done because of unwarranted animus or prejudice against persons of that type."[53] The concept of animus in discrimination is not a novel one.[54] This less-than-helpful statement, however, raises the question of what type of prejudice or animus is *warranted*.

CONCLUSION

Bahnsen perspicaciously writes, "[i]f the Christian has grounds for the conclusion that homosexuality should be treated as a crime by the state, then he likewise has *warrant* for rejecting homosexuality as a civil right."[55] Modern proponents either for or against same-sex marriage in contemporary debate largely attempt to replace influence on anti-discrimination law as an ersatz for the philosophical justification that may be given to buttress a moral obligation. It will come as no surprise that conservative Christians are not favorably inclined toward the creation of nondiscrimination rights for same-sex marriage because of the socio-political ethic implicit within Christianity.[56] Perhaps future debate over the topic of discrimination and same-sex marriage will surround the justification which may be given for an ethic, rather than a Court's factitious standard for something arrogated to be discrimination by *ipse dixit* justification. In the case of *Chapin v. France*, the Court's holding proves to be a mere truism at best and tautological at worst.

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[51] *See* BAHNSEN, *supra* note 46, at 102.

[52] *See* VANDENHOLE, *supra* note 37, at 34 (noting that one of the European Court of Human Right's tests of discrimination is the "comparability test"); *see also* Chapin v. France, App. No. 40183/07, Eur. Ct. H.R. ¶ 5 (2016), http://hudoc.echr.coe.int/fre?i=001-163436 (noting that France's treatment of same-sex couples was consistent with the trend of other European nations).

[53] Arneson, *supra* note 36, at 779.

[54] *See* WARDLE ET AL., *supra* note 6, at 114–15.

[55] *See* BAHNSEN, *supra* note 46, at 102 (emphasis added).

[56] *See, e.g.*, JOEL MCDURMON, THE BOUNDS OF LOVE: AN INTRODUCTION TO GOD'S LAW OF LIBERTY 94–95 (2016) (noting that there would be no civil right to same-sex marriage within a society legally regulated and informed by biblical law).