I. NON-DISCRIMINATION AS RELEVANT TO SEXUAL HEALTH

A. NON-DISCRIMINATION ON ACCOUNT OF SEX, SEXUAL ORIENTATION, GENDER IDENTITY, MARITAL STATUS, AND HIV STATUS

1. Introduction

The right to non-discrimination is a fundamental principle in all human rights, as it is the obligation of the state both to ensure equal protection of the law and to take steps to eliminate discrimination by others to achieve equality. Although many of the topics dealt with in this report overlap with discrimination, this opening sub-chapter focuses primarily on general anti-discrimination protections in law, as well as court decisions where discriminatory laws and practices have been struck down by European and domestic courts. Later sub-chapters under this heading examine specific expressions of discrimination, such as sexual harassment and mandatory HIV testing. Asylum laws on European and domestic levels are also included in this chapter, since most asylum claims related to sexuality are strongly connected with discriminatory practices in the asylum seeker’s country of origin. Other chapters address more indirect (but no less obvious) forms of discrimination, such as laws that prohibit persons of the same sex to marry or to access adoption procedures, or laws failing to respond to marital rape.

The principle of non-discrimination has multiple associations with sexual health. Inequality among and between persons and groups is a strong predictor of the burdens of ill health, including sexual health. Inequalities are manifest through differential access to services and resources and in individuals’ ability to participate in the policies and laws that govern their lives, as well as to seek remedies for abuses committed against them. Discrimination operates through processes of inequality that are rarely linked solely to one characteristic of a person, but are often fuelled by multiple factors including sex, age, class, race, sexual orientation, marital status, national status, disability as well as health status, which includes HIV status.

In the European region, the principle of non-discrimination is strongly rooted at both the regional and domestic level. Non-discrimination with regard to nationality became a cornerstone of the early economic cooperation within the European Communities, in order to facilitate the free flow of goods and services across borders. Thus, the rationale for the principle of non-discrimination was pragmatic and primarily economic and market-based. However, the principle has since spilled over into other fields, prohibiting discrimination on the basis of sex and sexual orientation, among other grounds, within an array of fields covered by EU law. Consequently, these provisions have taken root on domestic level in the EU member states and also outside of the Union to varying degrees. Many states in the region have both strong constitutional protection for the principle of equality, and detailed non-discrimination laws that specifically mention sex and sexual orientation as prohibited grounds for discrimination. Gender identity is still only recognized as protected ground in a few states.

Contrasting with the strong emphasis on non-discrimination within the EU, and in light of other international human rights treaties, the European Convention on Human Rights has a comparatively weak non-discrimination provision – one that is not freestanding but which can only be applied in conjunction with any of the substantive rights under the Convention. The European Court of Human Rights has declared that sexual orientation is a protected ground under the Convention, but in general the jurisprudence of the Court shows a reluctance to extensively apply Article 14 (non-discrimination) to cases of sexual orientation and gender identity. In many cases where sexual activities or sexual identity have caused negative treatment by the state, the Court has found a violation of the right to private life under Article 8, and has not found a reason to separately examine the issue under Article 14.

2. Council of Europe

European Convention on Human Rights

Article 14 of the ECHR includes sex as one of the prohibited grounds of discrimination in the enjoyment of the rights under the Convention. It reads:

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.

6 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.

7 WHO, 25 Questions on Health and Human Rights. As noted in international legal standards, international human rights, humanitarian, criminal and labour law all are premised on principles of equality and non-discrimination.
It is important to note that Article 14 only prohibits discrimination with regard to the rights protected by the Convention; thus a violation of Article 14 can only be found in conjunction with one of the Convention's substantive rights. In this sense, Article 14 is different and substantially weaker than the non-discrimination clause in the International Convention on Civil and Political Rights, Article 26. The fact that Article 14 must be taken together with another Convention right does not mean that there must also be a violation of the substantive right, however.\(^8\)

Protocol No. 12 to the Convention establishes a freestanding prohibition of discrimination (regarding “any right set forth by law”), where sex again is one of the listed grounds:

> The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, relation, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As of 3 August 2011, 18 countries have ratified Protocol No. 12. As of 31 December 2009 there is no case law from the Court under Protocol 12 relevant for the present report.

The Convention and its Protocol do not explicitly mention sexual orientation or gender identity as prohibited grounds for discrimination, but the list in both provisions is non-exhaustive and has been interpreted by the Court to at least include sexual orientation (see below).

**Jurisprudence of the European Court of Human Rights**

The Court has specified the obligations of member states to ensure the right to non-discrimination on the basis of sex in various cases. Only two important examples will be mentioned here.

**(i) Discrimination on the basis of sex: unjustified difference in treatment of men and women** – The applicants in Abdulaziz, Cabales and Balkandali v. United Kingdom\(^9\) were three women of immigrant background who resided lawfully in the United Kingdom, and whose husbands had been refused to join or remain with them. The United Kingdom applied stricter rules for the granting of permission for husbands to join their wives than vice versa, justified with reference to the protection of the domestic labour market and the maintenance of “public tranquillity.” The applicants challenged these decisions, claiming discrimination on the basis of sex, race, and, in one case, birth, under Article 14 taken together with Article 3 (prohibition of torture) and Article 8 (respect for family life).

The Court determined that the applicants had suffered discrimination on the basis of sex under Article 14 in conjunction with Article 8, given that it was easier for a man settled in the United Kingdom to be granted permission for his spouse to join him than for a woman in a similar situation. Even though the aim to protect the domestic labour market was legitimate under the Convention, this did not legitimize the difference in treatment of male and female immigrants.

The Government objected that given that it acted more generously than required under the Convention – admitting non-national wives and fiancées of men settled in the United Kingdom – it could not be in violation of Article 14. The Court firmly rejected this argument:

> The notion of discrimination within the meaning of Article 14 […] includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention. (para 82)

The Court acknowledged that States enjoy a certain margin of appreciation in assessing whether otherwise similar situations may justify difference in treatment, but stressed that “the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention” (para 78).

**(ii) Discrimination on the basis of sex: challenging gender stereotyping** – In Schuler-Zgraggen v. Switzerland\(^10\) the applicant was a woman who had lost her job because of illness and had received full disability pension. After having had a child, she was disallowed her pension because her health was getting better and she was able to assume large parts of her household and childcare responsibilities. Upon appeal, the Federal Insurance Court granted her a partial pension, examining how the applicant was limited in her capacity as a housewife, but not whether she was fit to work in her

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8. See *Abdulaziz, Cabales and Balkandali v. United Kingdom*, below.
previous employment. It assumed that when the applicant became a mother she would have given up her job regardless of her illness. The applicant contended that in the exercise of her right to a fair trial under Article 6, she had been discriminated against on the ground of her sex (Article 14).

The Court reiterated from its decision in Abduraziz et al that very weighty reasons would have to justify differential treatment on the basis of sex under the Convention. The reasoning of the Federal Insurance Court introduced a difference of treatment based on the ground of sex only, which had no justification under the Convention. In conclusion, the Court found a violation of Article 14 taken together with Article 6.11

(iii) Discrimination based on sexual orientation linked to parenthood, child maintenance, insurance, spousal benefits, and military service – In several cases, the Court has found that state interference with same-sex couple’s sexual (or other) activities constitutes a violation of Art 8 separately (violation of right to private and family life), without declaring discrimination under Art 14 (non-discrimination). In these cases, the Court has generally not established that discrimination has not occurred; rather, it has found it unnecessary to examine the case under Article 14 once it has established that one of the substantive articles has been violated.12

That said, the Court has indeed on a few occasions ruled that discrimination on the basis of sexual orientation is prohibited under Article 14, even though sexual orientation is not explicitly included in the list of banned grounds of discrimination. Here will be mentioned cases where violation of Article 14 has been found (Salgueiro, Karner, J.M., P.B. & J.S.), and cases where the violation – though described as an interference with Article 8 – expressed itself as a clearly discriminatory employment practice (Lustig-Prean and Beckett). For cases on penalization of same-sex behaviour, see Chapter 2.

The first case where sexual orientation was found to be one of the protected grounds under Article 14 was Salgueiro da Silva Mouta v. Portugal.13 The applicant, who was divorced and had an under-aged daughter, now lived in a relationship with another man. His former wife had been awarded parental responsibility by the Lisbon Court of Appeal, with the right to contact for the applicant. The Court of Appeal argued that custody of young children should as a rule be awarded to the mother, that the father’s homosexual lifestyle was an abnormality, and that children should not grow up in the shadow of abnormal situations. The father turned to the European Court of Human Rights when the mother refused to let him see his children. He argued that the decision of the Court of Appeal had been based on his sexual orientation, which both violated his right to respect for family life and constituted unlawful discrimination under the Convention.

The Court found that there had been a difference in treatment of the father and the mother, which was based on the applicant’s sexual orientation. It established that ‘sexual orientation’ is “a concept which is undoubtedly covered by Article 14 of the Convention” (para 28). The father’s homosexuality had been a decisive factor in the decision of the Portuguese court. While the decision pursued a legitimate aim – the protection of the rights and health of the child – the differentiated treatment lacked objective or reasonable justification. The Court accordingly found that there had been a violation of Article 8 taken together with Article 14.14

In J.M. v. the United Kingdom,15 the applicant was a woman who, after the divorce from her husband, was required to contribute financially to the upbringing of their children who resided with the father. After the applicant entered into a relationship with a woman, her child maintenance remained the same as previously, whereas the amount would have been reduced if she had started a relationship with a man. She claimed that she had been discriminated against on the basis of her sexual orientation, relying on her right to property, Article 1 of Protocol No. 1, in conjunction with Article 14. The Court agreed. It noted the purpose of the domestic regulation, which was to avoid that the absent parent

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11 Another case in which the Court has challenged gender stereotypes is Burghartz v. Switzerland (Application no. 16213/90, decided on 22 February 1994), in which a husband was refused to adopt his wife’s surname when they got married. The Court found that this differential treatment lacked an objective and reasonable justification and amounted to discrimination, Article 14 taken together with Article 8.

12 The phrases commonly used are that “it is not necessary also to examine the case under Article 14” or that “no separate issue arises under Article 14.” See, for instance, Dudgeon v. United Kingdom, 1981, Lustig-Prean and Becket v. United Kingdom, 1999, and A.D.T. v. United Kingdom, 2000.

13 Application no. 33290/96, decided on 21 December 1999. See also L and V v. Austria and S. and L v. Austria, 2003 (where a difference in age of consent for opposite-sex and same-sex activities was found discriminatory under Article 14 in conjunction with Article 8, discussed in Chapter 2C: Age of consent).

14 Worth noting is that the Court did not discuss or explore whether sexual orientation actually constitutes a ground for discrimination as prohibited by Article 14 but simply stated that this is the case. Due to the fact that this was the first time that the Court made clear that sexual orientation is covered by the protection under Article 14, the case is referred to as an important precedent in this regard.

15 Application no. 37060/06, decided on 28 September 2010.

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suffer an excessive financial burden when entering into new life circumstances. The Court could see no reason to assess this potential excessive financial burden differently because a person entered into a same-sex, rather than opposite-sex relationship. The Court concluded that there had been a violation of Article 1, Protocol 1, taken together with Article 14.

Worth noting is that this difference in treatment had already been eliminated in the United Kingdom by the time of the Court’s decision, through the reforms introduced by the Civil Partnership Act in 2004. The Court therefore called for no legislative changes.

In *PB. and J.S. v. Austria*, the applicants were a same-sex couple that complained that the medical insurance linked to the employment one of them held as a civil servant did not cover the partner, on the sole basis that they were of the same sex. Austrian law provided that only close relatives or partners of the opposite sex qualified as dependants. The applicants contended that they were discriminated against on the basis of their sexual orientation, in violation of Article 8 in conjunction with Article 14. The Court reiterated that states are granted only a narrow margin of appreciation in regard to different treatment based on sexual orientation, and noted that the Austrian government had given no justification to the difference of treatment in this case. It found that the applicants had been discriminated against with regard to their family life under Article 8. Importantly, the Court stated in this case for the first time that a same-sex couple not only has a right to “private life” under Article 8, but also to “family life,” which can be seen as an important step towards recognizing same-sex family constellations on equal terms with opposite-sex families in a myriad of ways:

> [T]he Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would. (para 30)

Austrian law changed in 2007, when the insurance act was amended and formulated in a neutral way that made no distinction between same-sex and opposite-sex cohabitees. Thus, as in the previous case, requested changes already taken place at the time of the Court’s judgment.

In *Karner v. Austria*, the applicant had survived his partner, Mr. W, who died in 1994. The couple had lived together in a flat which was rented in W’s name, and upon W’s death the landlord brought proceedings against the applicant for termination of the tenancy. The applicant contested the claim, arguing that he had the right to succeed to the tenancy in accordance with Austrian law which provided for this right to unmarried life companions. The Austrian Supreme Court found that the notion ‘life companion’ did not include same-sex partners and that the landlord therefore could terminate the lease. The applicant claimed to have been the victim of discrimination on the basis of his sexual orientation and that Austria therefore had violated Article 14 in conjunction with Article 8. The Court agreed. It found that even though protection of the traditional family as such may justify different treatment, the measure has to be proportional to the aim sought. The Court stated in this regard:

> In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of [the relevant rule]. (para 41)

The Court did not find that Austria had presented legitimate reasons to exclude the group same-sex partners from the right to succeed to tenancy and therefore, Article 14 taken together with Article 8 had been violated.

In 2010, the Court came to the same conclusion in a case with similar circumstances. In *Kozak v. Poland*, the applicant had been denied succession to the tenancy after his deceased same-sex partner on grounds specifically related to his sexual orientation. Poland was found by the Court to have violated Article 8 in conjunction with Article 14.

16 Application no. 18984/02, decided on 22 July 2010.
17 According to the facts presented in the case before the Court.
19 Application no. 13102/02, decided on 2 March 2010.
In Lustig-Prean and Beckett v. the United Kingdom20 the applicants were two homosexual men who separately had been discharged from the British naval force when their homosexuality had been discovered. According to UK law, homosexual conduct could be a ground for administrative discharge from the armed forces, and according to Government policy on homosexual personnel in the armed forces homosexuality was incompatible with service. The applicants complained that these laws and regulations violated their rights to respect for private life under Article 8.

The Court found that the investigations by the military police into the applicants' homosexuality, the preparation of a final report, and the administrative discharge on the sole ground of their sexual orientation, constituted a direct interference with the applicants' right to respect for their private lives. While the interferences could be said to pursue legitimate aims ('interests of national security' and 'the prevention of disorder'), they did not qualify as necessary in a democratic society. The Government's arguments were also based on statements and alleged evidence questioned by the Court on the basis of their non-scientific character and sweeping generalizations. In conclusion, neither the investigations about the applicants' sexual preferences, nor their discharge on grounds of their homosexuality in pursuance of the Government policy, could be justified under the Convention. The applicants' rights under Article 8 had been violated.21

As a consequence of Lustig-Prean and Beckett and related cases, the United Kingdom lifted its ban on homosexuals in the army in 2000, replacing it with a code of conduct named Armed Forces Code of Conduct,22 which "applies to all members of the Armed Forces regardless of their gender, sexual orientation, rank or status."

(iv) Gender identity discrimination – The Court has strongly pronounced itself on the right to respect for private and family life for transgender persons, in B. v. France (1992), Goodwin v. United Kingdom (2002), and Grant v. United Kingdom (2006). In none of these cases has it found a separate issue under Article 14. See for a discussion of these cases Chapter 4: Gender identity, gender expression, and intersex.

(v) Marital status discrimination – The question of discrimination based on marital status has prevalently (if not exclusively) been considered by the Court in cases related to the rights of children who, under the law of the country, were considered ‘illegitimate’ when born out of wedlock. Although this approach does not directly reflect a sexual rights issue, the Court has pointed to a relevant principle when stating that marital status should not affect basic rights – not of non-married adults, nor of children living outside of the traditional family unit.

In Marckx v. Belgium23 the applicant was an unmarried woman with a young daughter. The applicant complained of the manner the Belgian law required unmarried mothers to register and officially adopt their own children. The birth itself did not establish a legal bond between mother and child. This had, among other things, effects on the possibilities of the mother to give or bequeath her property to her child. The applicant claimed that these provisions negatively affected both her and her daughter's rights under Article 8 of the Convention. She also claimed that the provisions were discriminatory in relation to the rights of 'legitimate' families.

The Court held that the Belgian law violated Article 8 both taken alone and in conjunction with Article 14. It established that unmarried mothers and children born outside of marriage enjoy rights to respect for their family life under the Convention, and with regard to maternal affiliation, family relationships, and certain patrimonial rights, unmarried mothers and their children have the same rights as married mothers and ‘legitimate’ children. The state, when regulating family ties, has to act in a way that avoids “any discrimination grounded on birth.”24

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20 Applications nos. 31417/96 and 32377/96, decided on 27 September 1999.
21 The applications of the above case were joined by the applications in the similar case of Smith and Grady v. the United Kingdom (applications nos. 33985/96 and 33986/96, decided on 27 September 1999). The Court's reasoning is identical in the two cases, though there were minor differences in circumstances (e.g., Smith was a woman). In the cases of Beck, Copp and Bazeley v. the United Kingdom (applications nos. 48535/99, 48536/99 and 48537/99, decided on 22 October 2002), and Perkins and R v. the United Kingdom (applications nos. 43208/00 and 44875/98, decided on 22 October 2002) the outcome was the same since no material differences from the above cases were found. Violations of Article 8 (in both cases) and of Article 13 (in Beck, Copp and Bazeley) were established.
23 Application no. 6833/74, decided on 13 June 1979.
24 The issue of different treatment of children born out of wedlock came up again in Johnston v. Ireland (Application no. 9697/82, decided on 18 December 1986), where the Court also addressed whether there is a right to divorce under the Convention (see Chapter 3B: Termination of marriage). See also Vermeire v. Belgium (Application no. 12849/87, decided on 29 November 1991), where the issue was inheritance rights of illegitimate children. This case addresses family and property rights of the child rather than sexual health-related aspects of the parents, however, it is important to note that the Court again strongly condemned discrimination based of birth status.

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Following the Marxx judgment, in March 1987 the Belgian Civil Code was revised, ending discrimination of unmarried mothers and children born out of wedlock and thereby bringing Belgian law in line with the Convention.\(^{25}\)

**(vi) Discrimination based on HIV status** — In *Kiyutin v. Russia*,\(^ {26}\) the Court for the first time stated that discrimination on the basis of HIV status is prohibited under the Convention. The applicant was an Uzbek national who resided in Russia and had married a Russian. He was in 2004 denied a residence permit in Russia after having tested positive for HIV. When he reapplied for a permit in 2009 it was determined that he was in the country as an unlawful resident, and by reference to the Russian Foreign Nationals Act — restricting the issue of residence permits to foreign nationals who could not show their negative HIV status — he received a deportation order. He claimed to have been discriminated against on the basis of his HIV status, relying on Articles 8 and 14 of the Convention.

The Court noted that the right for an alien to enter and settle in a particular country is not guaranteed under the Convention, and reiterated that Article 14 only applies in conjunction with one of the substantial rights. Nevertheless, the state must organize its immigration policies so that it is compatible with its human rights obligations, in particular the right to respect for a foreign national's family life and the right not to be subject to discrimination. Referencing the UN Commission on Human Rights, it noted that “other status” in non-discrimination clauses in international legal instruments can be interpreted to cover health status, which includes HIV infection. It concludes that a distinction made on account of a person's health status should be covered — “either as a form of disability or alongside with it” — by the term “other status” in the text of Article 14.

The Court noted that the applicant enjoyed a right to family life with his Russian wife and their child under Article 8. It reiterated that a State's margin of appreciation for a legitimate restriction of rights under Article 8 is narrower when these rights apply to a particularly vulnerable group and found, interestingly, that HIV positive persons constitute such a group. It explained:

> HIV infection has been traced back to behaviours — such as same-sex intercourse, drug injection, prostitution or promiscuity — that were already stigmatized in many societies, creating a false nexus between the infection and personal irresponsibility and reinforcing other forms of stigma and discrimination, such as racism, homophobia or misogyny. In recent times, despite considerable progress in HIV prevention and better access to HIV treatment, stigma and related discrimination against people living with HIV/AIDS has remained a subject of great concern for all international organizations active in the field of HIV/AIDS. [...] The Court therefore considers that people living with HIV are a vulnerable group with a history of prejudice and stigmatization and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status. (para 64)

The Court noted that a very large majority of European states do not impose any restrictions on the entry, stay or residence of people living with HIV, that experts have concluded that travel restrictions on people living with HIV cannot be justified by reference to public health, and that public health can even be harmed by a policy that lends itself to viewing HIV as something “foreign” and thus to the false view that HIV can be kept out. It concluded that the exclusion of the applicant, who belonged to a particularly vulnerable group, had not been shown to have a reasonable and objective justification and that the Russian government therefore had overstepped the narrow margin of appreciation afforded to them. It found that the applicant had suffered discrimination on account of his health status under Article 14 in conjunction with Article 8.

See Chapter 2B, Criminalization of HIV transmission, and Chapter 6B, Access to health service for HIV and other sexually transmitted infections for additional cases related to negative treatment due to HIV-positive status.

**European Social Charter and the European Committee of Social Rights**

The *European Social Charter* (revised version, 1996) contains a general non-discrimination clause:

> The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status. (Article E)

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\(^{26}\) Application no. 2700/10, decided on 10 March 2011.
It also establishes the right of women and men to equal treatment and equal opportunities in occupation and employment (Article 20), and the prohibition of discrimination on the basis of family responsibilities (Article 27). According to the appendix to Article 20, provisions concerning the protection of women shall not be deemed discrimination. However, the revised Charter (1996) shall be interpreted ensuring that such protections “must be justified objectively by needs that apply exclusively to women.”³⁷ This means that they should be restricted to the ‘biological’ protection of women during pregnancy, childbirth and the post-natal period.³⁸ For example, women may not be prohibited from night work. According to the European Committee of Social Rights, “exceptions to the equality principle on behalf of women must be objectively justified by their particular needs. The underlying principle is that if night work is harmful, it is just as detrimental to men as to women.”³⁹

Part 1 of the Charter enlists a number of rights and principles, the effective realization of which the parties must strive to achieve. This part of the 1961 version of the Charter included a prohibition of discrimination on the basis of marital status:

*Moters and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection. (Part 1, para 17)*

Interestingly, the wording on “marital status and family relations” has disappeared in the 1996 revised version of the Charter, possibly as discrimination on the basis of marital status no longer is seen as a major problem in the region. Regardless, states that have ratified the 1961 version are still bound by the provision. The Charter does not explicitly prohibit discrimination based on sexual orientation, sexual practices, gender identity, or inter-sex.

The European Committee of Social Rights has in numerous cases found that women have been discriminated against under the Charter, *inter alia* in cases related to pregnancy and childbirth. Finland was found not to be in conformity with the Charter because the legislation did not require the reinstatement of women dismissed unlawfully for reasons linked to pregnancy or maternity leave, and because a ceiling was placed on the compensation payable in the event of unlawful dismissal.³⁰ A similar situation in Belgium was also found to go against the Charter.³¹ In Cyprus the situation was found inconsistent with the Charter since the courts could only order reinstatement of an unlawfully dismissed employee if the enterprise concerned had more than twenty employees.³²

### 3. European Union

**European Union binding law**

Equality and non-discrimination are fundamental principles of EU law. This is illustrated *inter alia* by the prohibition of discrimination on grounds of nationality (Article 12, EC Treaty) and in the principle of equal pay for equal work (Article 141, EC Treaty). Discrimination based on sex and nationality were mentioned explicitly in the originary EC Treaty, for the reason that, even at a time in which human rights and non-discrimination did not constitute core pillars of the EU (then EEC), addressing discrimination on grounds of sex and nationality was considered key in ensuring the free flow of goods and services. The principle of non-discrimination on ground of sex, in other words, was considered a fundamental element for a functional market. Since then, the principle of non-discrimination has gained wider recognition within EU law, and grounds other than sex and nationality have been added. Thus, while the principle was justified primarily by economic reasons, it has since gained the status as a social and human right central to EU law.³³

The principle of equality between men and women is recognized as one of the EU’s goals described

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³⁸ Ibid.

³⁹ Conclusions XVII-2, Netherlands (Aruba), Article 1 of the Protocol.

³⁰ Conclusions XVII-2, Finland, Article 8§2.

³¹ Conclusions XVII-2, Belgium, Article 8§2.

³² Conclusions 2005, Cyprus, Article 8§2.

in Articles 2 and 3 of the EC Treaty. On December 1, 2009, the Treaty of Lisbon entered into force, introducing the EU Charter of Fundamental Rights into European Primary law. The Charter reinforces the fundamental nature of the prohibition of discrimination within the Union. It lists several prohibited grounds for discrimination including sexual orientation. This is the first internationally binding document making a ban on such discrimination explicit:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. (Art 21.1)

Equality between women and men is established in a separate article in the Charter:

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex. (Article 23)

The Charter has also adopted gender neutral language, for example that “everyone has the right to respect for his or her private and family life, home and communications” (Article 7, emphasis added).

The Treaty of Lisbon, in addition to incorporating the Charter of Fundamental Rights, provides that the Union shall “combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child” (para 3).

Article 13 of the EC Treaty, introduced by the Amsterdam Treaty in 1998, constitutes the legal basis for the adoption of secondary law prohibiting discrimination, on different grounds and within different areas of EU law. It establishes that the Council can “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” Both before and after Article 13 was introduced, the Council has adopted several directives addressing the issue of non-discrimination on the basis of sex and sexual orientation. As all directives, these must be implemented in all member states within a certain time period; if not satisfactorily implemented, they can be applied directly under the EU doctrine of direct effect. Gender discrimination at work and in services constitutes one of the areas addressed most frequently by Council directives. In Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, the relationship between equal treatment and the prohibition of sex discrimination was defined in the following manner:

[The principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status. (Art 2(1))]

Many directives have been adopted that concretize this principle. In 2006, a directive was adopted to group in the same legal text all previous directives relating to sex discrimination at work: Directive

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34 Article 2 reads: “The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.” (emphasis added). Article 3 specifies the activities the Community will undertake for the purposes of Article 2, and concludes with stating: “In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.” (Art 3(2)).

35 The text of the Treaty of Lisbon does not include the Charter. However, Article 1(8) of the Treaty of Lisbon provides that Article 6(1) of the Treaty on European Union is to be replaced by the following: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

36 For an explanation of this term, see Appendix 1.


Chapter 1: Non-Discrimination as Relevant to Sexual Health

2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the so-called Recast Directive). Recital 3 of its preamble underlines that the Court of Justice has found the principle of equal treatment between men and women also to apply to discrimination arising from gender reassignment (in Richards v. Secretary of State for Work and Pensions, see below). Although preambles of EU Directives are not directly legally binding, they are a source of interpretation of the text. By including Recital 3 the EU lawmaker has formally included the prohibition of discrimination on grounds of gender reassignment into the notion of sex discrimination. Whether the notion of gender reassignment only includes individuals who have undergone or are planning to undergo major genital surgery, or whether it applies to any transgender individual under any kind of treatment, is not fully clear. However, the lack of definition of gender reassignment, that might imply, inter alia, hormone treatment, suggests a wider understanding than one that recognizes only surgical procedures.

In 2000, the Council adopted a directive concretizing, among other grounds, the prohibition of sexual orientation discrimination in employment-related areas. EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation flows from the possibility laid out by Article 13 of the EC Treaty, mentioned above, for the Council to take concrete action to combat discrimination. It covers discrimination on the grounds of religion or belief, disability, age, and sexual orientation. It complements earlier directives calling for the implementation of the principle of equal treatment between men and women (above), and between persons irrespective of racial or ethnic origin (2000).

The Directive covers both direct and indirect discrimination, and private as well as public sectors, with regard to employment, self-employment, occupation, access to vocational guidance and vocational training, employment and working conditions, dismissal and pay, and labour union involvement (Art 3). Harassment is deemed a form of discrimination (Art 2.3), and the burden of proof shifts to the respondent once facts suggest that discrimination has occurred (Art 10.1). This latter rule does not apply in criminal proceedings. The Directive does not prohibit positive action for disadvantages linked to the protected grounds (Art 7). It requires that effective judicial or administrative remedies be available, and it provides for legal standing for organizations having a legitimate interest in the application of the norms, among others (Art 9).

On 2 July 2008, the Commission adopted a proposal for a new directive which would provide for the protection against discrimination on the same grounds (age, disability, sexual orientation, and religion) beyond the workplace. It would ensure equal treatment in the areas of social protection, including social security and health care, education, and housing. As of 31 December 2009, the proposal has still not been adopted by the European Council.

European Court of Justice judgments

The European Court of Justice has a rich jurisprudence in which it applies the principle of non-discrimination on the basis of sex. The cases are numerous: as early as 1976 the Court established that the principle of non-discrimination on the basis of sex in relation to equal pay for equal work could be applied directly to member states without the requirement of domestic legislation. Two years later, in Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, the Court recognized that the equality between men and women was a general principle and a fundamental right of EU law:

The court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.

In regard to discrimination on the basis of sexual orientation, the European Court of Justice ruled

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43 Case 149/77 [1978].
44 Ibid, at paras 26–27.
on a topic similar to that of Karner v. Austria in Maruko v. Versorgungsanstalt der deutschen Bühnen. Here, the court examined whether the above-mentioned Directive 2000/78 applied to a German occupational pension scheme. The applicant had been in a so-called life partnership (civil union for same-sex couples according to German law) with another man. When the partner died, the applicant applied to the pension institution for a widower’s pension, but was denied the pension on the ground that the scheme did not cover surviving life partners. He claimed that he was thereby discriminated against on the basis of his sexual orientation.

The Court found that the pension scheme was to be regarded as ‘pay’ in the terminology of the relevant Directive, hence the Directive was applicable. The preamble of the Directive states that it is without prejudice to national laws on marital status and benefits that derive from marital status, but, the Court reiterated, this does not exempt member states from having to respect the principle of non-discrimination under EU law. The Court noted that same-sex partners could not marry under German law. Instead, life partnership had been established as a way for the state to recognize same-sex relationships, with significant similarities to the institution of marriage. The Court ruled that when member states have established a model for same-sex partnership, such that the situation of life partners is comparable to that of spouses with regard to survivor’s benefits, less favourable treatment of life partners than of spouses constitutes direct discrimination under the Directive. It was for the national court to determine whether the situation of the applicant was comparable to that of a legal spouse.

In 2011 a similar case was brought before the Court. In the case, Jürgen Römer v. Freie und Hansestadt Hamburg,46 the issue was whether a pensioner who had entered into a registered life partnership and had received a supplementary retirement pension lower than that granted a married pensioner had suffered unlawful discrimination under Directive 2000/78. The European Court of Justice, in the affirmative. It concluded that when marriage is reserved to persons of different gender, when registered life partnership exists for persons of the same gender, and when the life partner is in a legal and factual situation comparable to that of a married person, then there is direct discrimination on the ground of sexual orientation if the pension granted is lower for the registered partner than for the married person. In short, the Court reiterated its stance in Maruko, that when the situation of same-sex life partners is comparable to that of spouses, they should have access to the same employment benefits.

In the EU employment case W v. Commission,47 the issues of discrimination on the basis of marital status and sexual orientation coincide. The case was decided by the Civil Service Tribunal, which is a specialized tribunal within the Court of Justice adjudicating disputes between the EU and its civil servants. The applicant was a Commission contract staff member who had been refused household allowance for his same-sex partner, based on the fact that they were not married. Household allowances could be granted to same-sex as well as to opposite-sex couples, but only where “the couple has no access to legal marriage in a Member State.” The applicant lived in Belgium but had dual Belgian and Moroccan citizenship. Same-sex marriage is legal in Belgium, but the couple wished not to marry, arguing that entering into a same-sex marriage would put the applicant at risk in Morocco, where homosexual acts are illegal and homosexuals are routinely persecuted. Thus, the issue was whether the applicant could access the relevant benefit while staying unmarried, since same-sex marriage would imply real risks to him in one of his home countries.

The Tribunal noted that the extension of entitlement to the household allowance to officials registered as stable, non-marital partners, including those of the same sex, reflected the non-discrimination principle as enshrined in fundamental EU instruments, where sexual orientation has been included as a banned ground for discrimination. It further stressed that access to legal marriage, the absence of which was a condition for granting of the benefit to non-married couples, should not be “construed in a purely formal sense” but should take into account whether access to marriage for the couple in question was “practical and effective.” For the applicant, the Tribunal observed, risks involved with entering into a same-sex marriage were real and serious in any contacts with one of his two home countries. In conclusion, and relying on jurisprudence from the European Court of Human Rights, the Tribunal stated forcefully that the applicant’s access to marriage in Belgium could not be “regarded as practical and effective.” Thus, the decision by which he was denied household allowance was annulled.

In several cases, the Court has examined the right not to be discriminated against on the basis of gender identity – though this has been more narrowly framed as discrimination in relation to gender reassignment. The important principle here is that the Court has determined that gender identity/gender reassignment discrimination is included in the notion of sex discrimination.

45 Case C-267/06, decided on 1 April 2008.
46 Case C-147/08, decided on 10 May 2011.
47 Case F-86/09, decided on 14 October 2010.
In *P. v. S. and Cornwall County Council*, the central issue was whether dismissal because of gender reassignment could be considered discrimination based on sex under Directive 76/207/EEC. The applicant had decided to undergo gender reassignment and, upon informing her employer of the decision, was dismissed from her work. She claimed that this dismissal violated the Directive, whose article 5(1) prohibits discrimination on grounds of sex with regard to working conditions, which includes dismissal.

The Court found that discrimination against a person for reasons related to gender reassignment is covered by the Directive in question; dismissal of a transsexual for such reason therefore violates the Directive. The most significant finding is that ‘sex,’ as read by the relevant Directive, includes not only the traditional understanding of the two sexes but also situations arising from gender reassignment. Unfavourable treatment linked to gender reassignment thereby effectively became a new ground for discrimination, as a subcategory of discrimination on the basis of sex. The Court also made references to the principle of equality as a fundamental principle of Community law and stated that the relevant Directive is but an expression of said principle.

It is important to bear in mind that this decision only relates to issues linked to gender reassignment (without specifying whether this includes non-surgical treatment or not), and not to gender identity issues more broadly. The Court uses consistently the term ‘transsexual,’ suggesting that the scope of its findings is limited to a group of persons who have undergone, or are in the process of undergoing, genital corrective surgery.

In 1999, the British parliament enacted the Sexual Discrimination (Gender Re-assignment) Regulations Act, in response to the *P. v. S. and Cornwall County Council* case. The law prohibits less favorable treatment of individuals in employment linked with gender reassignment procedures (see below).

In *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, the claimant was a woman employee of the British National Health Service. Her partner, R., had undergone female-to-male gender reassignment. The two would have liked to marry but were unable to do so since R. could not have his sex changed on his birth certificate and, accordingly, was still considered female by British law. Marriage in the UK requires two people of opposite sex. R. could not be the assigned beneficiary of a widower’s pension under the NHS pension scheme in the event of the death of K.B., since they were not married. K.B. claimed that this constituted sex discrimination, contrary to the principles on equal pay for men and women of Article 141 of the EC Treaty and Directive 75/117/EEC.

The Court found that what was at stake in the case was not whether it was correct to make marriage a precondition for pension rights, but rather the capacity itself to marry. Thereafter, the reasoning of the Court is confusing and seems to reflect that the judges were divided among themselves. On one hand, it stated that it was for national courts to decide whether cases like this should be seen as sex discrimination under the EC Treaty or not. On the other hand, it held that legislation that bars a couple such as K.B. and R. from marrying in principle is incompatible with the principle of equal pay for men and women in Article 141 (which also covers benefits such as pensions), since marriage is a requirement for one of them to be able to access the widower’s pension. The Court referred to the European Court of Human Rights cases *Goodwin v. United Kingdom* and *I. v. United Kingdom* (see Chapter 4, below), where the Court had found a breach of the right to marry under Article 12 of the European Convention on Human Rights.

In conclusion, the holding appears to be that member states should revise legislation which bars transsexuals from marrying a person of the opposite sex after gender reassignment. Strictly speaking, the issue of marriage must be considered beyond the jurisdiction of the Court, as family law is within the competence of member states. Therefore, this decision – while confusing in its reasoning – is both surprising and, in its references to the European Court of Human Rights, unusually progressive in its reach.

In *Richards v. Secretary of State for Work and Pensions*, Ms. Richards had undergone male-to-female gender re-assignment surgery, and had been denied a retirement pension from the day she turned 60 on the ground that she was born male. The retirement age for men was 65 in the UK. She claimed that this violated the prohibition of discrimination on the basis of sex in matters of social

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48 Case C-139/94, decided on 30 April 1996.
50 Case C-117/01, decided on 7 January 2004.
52 Case C-423/04, decided on 27 April 2006.
The Court agreed. Citing its previous case law, it concluded that the Directive cannot be confined simply to discrimination based on the fact that a person is of one or the other sex, but also to discrimination arising from gender reassignment. The applicant would have been entitled to the pension from age 60 had she been registered as a woman in national law, and therefore there was a clear case of discrimination. The Court reiterated that discrimination on account of acquired gender identity shall be seen as a subset of discrimination on account of sex. While this finding was not surprising, given the Court’s previous jurisprudence, it is important to note that the Court here applied this rule also in matters of social security – hence widening the scope of the principle.

4. Regional non-binding material

Political bodies of the Council of Europe as well as of and the European Parliament (EU) have issued numerous recommendations and resolutions on issues related to discrimination on the grounds of sex, sexual orientation, and gender identity. Worth mentioning here is the Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted in March 2010. The recommendation has a clear human rights focus, stressing that human rights equality standards should be applied to sexual orientation and gender identity, and characterizing violations of the rights of LGBT persons as violations of widely recognized rights. These include the right to life, security and protection from violence (with regard to hate crimes and hate speech), freedom of association, expression, and peaceful assembly, right to respect for private and family life, right to seek asylum, and right to non-discrimination in employment, education, health, housing, and sports. The Recommendation highlights the need for comprehensive legislation, policies, and strategies to combat sexual orientation and gender identity discrimination in these areas, calls for effective legal remedies and appropriate sanctions when discrimination occurs, and gives a clear mandate to national human rights mechanisms to address such discrimination.

5. Domestic legislation and case law

(i) Prohibition of discrimination on the basis of sex in national constitutions – Most European constitutions have a clause prohibiting sex discrimination. These vary widely in structure and level of detail. Approaches to this issue include the prohibition of sex discrimination before the law and/or in enjoyment of rights; promotion of gender equality in different spheres of society; gender neutral language; and special protection for women.

In Croatia, rights and freedoms shall be enjoyed regardless of gender, and inequality with regard to gender is prohibited in states of emergency where rights otherwise may be restricted. Poland specifies that men and women shall have equal rights for example in education, employment, and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations. In Ukraine, the Constitution prescribes how gender equality will be obtained in practice, by, inter alia, providing women with opportunities in education and in public, political, and cultural activities, and also by establishing special measures for the protection of work and health of women and conditions that allow women to combine work and motherhood. The constitution of Malta has detailed instructions as to how discrimination on the basis of sex shall be counteracted, prohibits any legal provision that is discriminatory “either of itself and in its effect,” gives a detailed description of how discrimination is to be understood, and specifies that affirmative action for the enhancement of gender equality will not be considered unlawful discrimination.

55 Adopted on 31 March 2010.
56 Article 14 and 17, respectively, Croatian Constitution. Translation of the Croatian Constitution provided by the Croatian Constitutional Court.
59 Article 45, Maltese constitution. Official version (English is one of Malta’s official languages).
Several constitutions, most notably in Eastern Europe, have special protective clauses of mothers, women, and children. While these provisions may guarantee women the right to maternity leave and reproductive health care, they also often include paternalistic components, calling for special protections for women in the workplace and banning women from certain ‘dangerous’ work situations. These aspects of the provisions build on stereotypes of women as more fragile and more worthy of protection than men, and present child-rearing as a task of women exclusively. Examples include Hungary, where mothers shall receive support and protection before and after childbirth and where separate regulations also shall ensure the protection of women and youth in the workplace, and Turkey, where minors, women, and persons with physical and mental disabilities shall enjoy special protection with regard to working conditions. The Irish constitution merits special attention in this regard. It celebrates the role of the woman as home-maker, and for the so-called protection of the family, the Irish state shall ensure that mothers “shall not be obliged by economic necessity to engage in labour” so that they can fulfil their “duties in the home.”

Many constitutions call for equality between spouses. Examples include Georgia and Belarus.

(ii) Prohibition of discrimination on the basis of sexual orientation in national constitutions – Several European constitutions now prohibit discrimination based on sexual orientation. In Sweden, where this ground was introduced through an amendment of the constitution in 2003, public institutions shall combat discrimination on grounds of, inter alia, sexual orientation “or other circumstances affecting the private person.” Portugal added sexual orientation to the list of protected grounds in the constitution in 2004, specifying that “no one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty” on the basis of, among many other grounds, sexual orientation. In Switzerland, the new constitution (1999) does not mention sexual orientation or sexual practices explicitly, but prohibits discrimination on the basis of ‘way of life.’ This, according to commentators, is aimed to include sexual orientation.

(iii) Domestic anti-discrimination laws – As mentioned above, all EU member states have an obligation to implement all anti-discrimination directives, including Directive 2000/78/EC, prohibiting discrimination on the basis of sexual orientation in employment-related contexts. Most member states now have established comprehensive anti-discrimination regimes, where legal provisions are accompanied by monitoring bodies and procedural safeguards. Accession countries, mostly in the Balkans, must also comply with these requirements in order to be considered for membership, and several have already adopted interesting anti-discrimination laws.

Bosnia and Herzegovina passed a wide-ranging law against gender discrimination in 2003, the Law on Gender Equality in Bosnia Herzegovina. It sets forth the right to gender equality and non-discrimination in all sectors of society, including education, economy, employment, social welfare, health care, public life, and the media, regardless of marital or family status (Art 2). The law covers direct and indirect discrimination; spells out obligations on behalf of the authorities to enforce the law; and orders the establishment of a special agency whose role it is to monitor the implementation of the law. For the purposes of this report it is noteworthy that it specifically addresses sexual harassment in education and employment (Arts 6 and 8) as well as prohibits “[a]ll forms of violence in private and public life on the grounds of gender” (Art 17). In regard to access to health care, it establishes, inter alia, an equal right to family planning services regardless of gender (Art 13).

60 Article 66, Hungarian Constitution. Unofficial translation.
61 Article 50, Turkish Constitution. Official translation, published by the Office of the Prime Minister.
62 Article 41, Irish Constitution.
63 “Marriage shall be based upon equality of rights and free will of spouses.” (Article 36.1). Official translation.
64 “Marriage, the family, motherhood, fatherhood, and childhood shall be under the protection of the State. On reaching the age of consent women and men shall have the right to enter into marriage on a voluntary basis and start a family. A husband and wife shall be equal in family relationships.” (Article 32) – note that both fatherhood and motherhood shall be protected. Official translation.
65 Chapter 1, Article 2, Swedish Instrument of Government. Official translation.
66 Article 13, Portuguese Constitution. Official translation provided by Portugal’s Constitutional Court.
67 Article 8, Swiss Constitution. Official but unauthoritative translation.
69 Passed on 21 May 2003. English translation provided by the UNDP.
Interestingly, the law deliberately uses the term ‘gender,’ defined as the “socially established role of women and men in public and private life as distinct from the expression bestowed by biological attributes” (Art 4 a), and consistently prohibits discrimination on this ground, as opposed to on the ground ‘sex.’ This approach may suggest that discrimination on the ground of gender identity also could be covered under the law, although this has not been made explicit in the law.

In **Belgium**, the federal anti-discrimination law is named Act of 10 May 2007 aimed at combating certain forms of discrimination.** It addresses discrimination in a holistic manner, covers a wide array of protected grounds, and introduces various provisions to make redress for discrimination available in practice. Protected categories are sexual orientation, age, marital status, birth, language, fortune, religion or belief, political conviction, current and future state of health, disability, physical or genetic characteristics, and social origin (Art. 4(4)). Sex discrimination and racial discrimination are covered by other laws.**

Worth noting is the inclusion of “current and future state of health” as a protected ground, as it provides protection against discrimination based on HIV or AIDS-status. According to a report commissioned by the European Union Agency for Fundamental Rights in 2008, “in practice the Belgian equality body […] regularly finds discrimination of homosexuals to be intricately bound up with fears and prejudices regarding [HIV/AIDS and other] sexually transmitted diseases.”

The anti-discrimination Act was introduced as part of the implementation of Directive 2000/78/EC, but has a wider scope than the directive in that it does not only cover employment-related fields, but also provision of goods and services, social security and benefits, membership in labour organizations, official documents or records, and participation in a wide range of public activities (Art. 5). It is worth noting, however, that since the Act is federal, it does not include discrimination in matters under regional or local legal authority.

Considering that discrimination is often hard to prove and penalize, it is relevant that the Act introduces special measures to make it enforceable. These include making discriminatory agreements or contracts invalid (Art 15), shifting burden of proof to the alleged discriminator in court cases (Art 28), allowing interest groups to bring legal action under the Act (Art 30), and making criminal sanctions available. When discrimination has been legally established, lump sums will be payable to the victim, which makes it unnecessary for victims to prove the actual amount of damages they have suffered (Art 18). The law gives the government equality body, the Centre for Equal Opportunities and Opposition to Racism, wide-ranging powers to bring claims under all disputes that arise under the Act (Art 29).

The three criminal provisions included in the Act are incitement to hatred, discrimination, or violence (Art 22), prohibition of discriminatory conduct by civil and public servants (Art 23), and the introduction of aggravating circumstances for certain hate crimes (Art 33).

One potentially problematic point is to be found in Article 11, which allows for direct or indirect ‘distinctions,’ when these are regulated by other legislation. This provision has been criticized for allowing the law-maker to opt out from the obligations under the anti-discrimination Act, just by creating another law that goes against it.

**Bulgaria** adopted a comprehensive anti-discrimination law in 2003, which integrates all EU equality directives, including Directive 2000/78/EC. It is commendable in its wide scope and its mention of international obligations, including human rights obligations. The law bans direct or indirect discrimination on many grounds, including sex and sexual orientation, but it also places the right to non-discrimination in an international context, by specifically expanding its list of protected grounds.

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71 Ibid, p. 12.

72 Ibid.

73 Articles referred to and explained in Lemmens, Heylen, Vandeven, and Vrielink (2008), and by the author’s own comparison of the provisions described there with the text in Dutch and French.


to “other grounds, established by the law, or by international treaties to which the Republic of Bulgaria is a party” (Art 4). The prohibition of discrimination applies to any legal right at all, as established by the Bulgarian Constitution and the laws of Bulgaria (art. 6). It does not distinguish between public and private employment, education, or services. Multiple discrimination is mentioned specifically, as discrimination on more than one of the grounds (additional provisions, § 1.11).

The law established a body (Commission for protection against discrimination) responsible for providing protection under all grounds covered by the law, including sexual orientation (arts. 40–49). It has wide-ranging powers related to investigative, legal, preventative, and remedial work.

A fact that raises concern for the purpose of sexual health is that sexual orientation is mentioned as one of the protected grounds, but does not appear as a ground for which special measures should be taken in order to achieve better integration and representation. Sex, ethnicity, language and, in some cases, disabilities, are mentioned repeatedly as grounds that call for special positive measures, or as areas where special caution must be taken so that discrimination will not occur. Sexual orientation is not. For example, Article 27 specifically mentions that the law applies to discrimination on the grounds of sex in the military service and armed forces, and Article 35(1) calls on education-providers to combat gender stereotyping and discriminatory depictions of racial and religious groups and persons with disabilities. In neither case are sexual orientation or sexual minorities mentioned. On the other hand, several of these provisions relate to quotas – encouraging a balanced participation between men and women and representative participation of persons belonging to ethnic, religious, or language minorities. Quotas may indeed be a less desirable and less effective tool to combat sexual orientation discrimination.

In Serbia, a new anti-discrimination law entered into force in April 2009. Serbia is not a member of the EU. This law therefore shows that the trend toward more comprehensive and inclusive anti-discrimination regimes goes beyond what is imposed on EU member states. The Serbian law stands out as one of the few anti-discrimination laws in the region, and the only in Eastern Europe, that bans discrimination on the basis of gender identity. Its list of protected grounds is long, including gender, gender identity, sexual orientation, health, and marital and family status (Art 2(1)). Article 21, Discrimination on the grounds of sexual orientation, includes both the right to keep one’s sexual orientation private, and to openly declare it, which is worth noting as an interesting manner to frame the issue:

Sexual orientation shall be a private matter, and no one may be called to publicly declare his/her sexual orientation. Everyone shall have the right to declare his/her sexual orientation, and discriminatory treatment on account of such a declaration shall be forbidden. (Art 21)

Gender identity discrimination is explored in the context of ‘Discrimination on the grounds of gender’ (Art 20), establishing first the fundamental principle of equality of genders, and then laying out the prohibition of discrimination based on gender as well as gender change:

Discrimination shall be considered to occur in the case of conduct contrary to the principle of the equality of the genders; that is, the principle of observing the equal rights and freedoms of women and men in the political, economic, cultural and other aspects of public, professional, private and family life.

It is forbidden to deny rights or to grant privileges, be it publicly or covertly, pertaining to gender or gender change. It is forbidden to practise physical violence, exploitation, express hatred, disparagement, blackmail and harassment pertaining to gender, as well as to publicly advocate, support and practise conduct in keeping with prejudices, customs and other social models of behaviour based on the idea of gender inferiority or superiority; that is, the stereotyped roles of the genders. [Emphasis added]

Making gender identity discrimination part of a general prohibition of gender discrimination underlines the recognition that gender identity is something all humans have and not only a feature of transgendered persons. This way of framing the issue is in line with the approach taken by the European Court of Justice. The latter part of the provision, however, may raise concerns as the prohibition of public advocacy of certain conduct may run contrary to the protection of freedom of speech.

The Serbian law also prescribes the establishment of an anti-discrimination body, the Commissioner for the Protection of Equality (Arts 28–34) that will, inter alia, receive complaints, file charges, and generally monitor compliance with the law.

76 The Law on the Prohibition of Discrimination, unofficial translation by Labris Serbia, solicited by UNDP Serbia.
Discrimination based on gender identity has also been addressed in the United Kingdom and in Sweden. In the United Kingdom, gender identity discrimination has been framed as a problem closely linked with the treatment a transgendered individual is undergoing. The British Sex Discrimination Act 1975,\textsuperscript{77} as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999,\textsuperscript{78} now includes discrimination on the basis of gender reassignment, defined as negative treatment resulting from the ground that a person intends to undergo, is undergoing, or has undergone gender reassignment (Section 2A(1)). Gender reassignment is defined broadly, referring not only to surgery but to “a process which is undertaken under medical supervision” to change physiological or other characteristics of sex (Section 82(1)). This includes hormonal treatment. Even so, the provision is clearly narrower than its Serbian and Swedish (below) counterparts, as it does not include transgendered individuals who cannot or do not wish to undergo any kind of medical treatment. The section of the British law was included as a consequence of the ECJ judgment P v. S and Cornwall County Council, and covered originally only discrimination in employment and vocational training. In 2008, the law was amended to include prohibition of discrimination on gender reassignment grounds to the areas of provision of goods, facilities or services, disposal or management of premises, and consent for assignment or sub-letting.\textsuperscript{79}

The law provides for four so-called “Special Genuine Occupational Qualifications” that apply exclusively to the gender reassignment ground, and are clauses that identify circumstances in which it may be legal to discriminate against a transgendered person otherwise protected by the law (Section 7B(2)). These provisions specify that the discrimination protection does not apply under certain conditions when the person may perform intimate physical searches as part of his or her job, when the person holds a job in which he or she may be called on to live in someone's private home, when the job includes co-living with colleagues, such as in the military, and when the holder of the job provides vulnerable individuals with personal service.\textsuperscript{80}

From a human rights point of view, it raises concern that these exceptions apply exclusively to transgendered people, thus singling them out. It seems that these restrictions are to a large extent built on prejudices and presumptions about reactions transitioning between genders may stir. Furthermore, the law does not specify when the process of gender reassignment is to be considered complete, nor does it define what populations are to be considered ‘vulnerable.’ On the other hand, following the entry of the EU Recast Directive, 2006/54, as mentioned above, which includes gender identity discrimination under the notion of sex discrimination, these provisions may be challenged if they violate any of the principles under the Directive.

In Sweden, the Discrimination Act\textsuperscript{81} prohibits discrimination broadly, and includes as one of its protected categories “transgender identity or expression.” This latter ground is defined as somebody “not identify[ing] herself or himself as a woman or a man or express[ing] by their manner of dressing or in some other way that they belong to another sex” (Section 5(2)). Contrasting with the British category, this definition has the advantage of including transgendered individuals who are not undergoing or intending to undergo any kind of medical treatment.

(iv) Domestic case law

(1) Shifting of burden of proof

Sweden provides an interesting Supreme Court case, which examined the prohibition of discrimination based on sexual orientation. The Supreme Court found that two lesbian women who had been showing affection publicly in a restaurant, and who had been aggressively approached by the restaurant owner and asked to leave, had been unlawfully discriminated against for reasons of their sexual orientation.\textsuperscript{82} The Court applied the then-valid Swedish anti-discrimination law,\textsuperscript{83} Article 9 of which banned discrimination related to sexual orientation in the provision of goods and services. The Court also relied on Article 21, according to which it is for the respondent to show that discrimination had not occurred, if the plaintiff has shown that there were circumstances suggesting discriminatory treatment.

\textsuperscript{77} Passed on 12 November 1975.


\textsuperscript{80} The latter two exceptions apply only when a person intends to undergo gender reassignment or is in the process of doing so.


\textsuperscript{82} Swedish Supreme Court, NJA s. 170, only available in Swedish.

The Court found that the facts – that the two women had been kissing and hugging gently and that opposite-sex couples showing the same level of affection were left undisturbed – were established, and the respondent did not succeed in showing that its treatment had not been discriminatory.

(2) Employer-imposed protective measures

In case 178 1 (2006) before Austria’s Federal Equal Treatment Commission, the Commission discussed ‘protective measures’ taken by an employer to shield a person from discrimination, against the will of the person. The applicant was a policeman. After announcing his (homo)sexual orientation in his workplace and suffering negative treatment he had been transferred against his wishes from a special unit to another post, while the other colleagues involved in the incident had not faced consequences. The Equal Treatment Commission concluded that he suffered unlawful discrimination on the basis of his homosexuality. Although the employer argued that it had transferred the applicant to protect him against possible harassment, the court ruled that such measures must not be taken against a person’s will.

(3) When non-discrimination and religion conflict

In the 2008 British case London Borough of Islington v. Miss L. Ladele before the Employment Appeal Tribunal, the claimant (here, respondent) was a state-employed Registrar who, among other things, registered marriages. When the Civil Partnerships Act 2004 came into force, she refused to register partnerships between same-sex couples because she claimed doing so was inconsistent with her Christian faith. The council where she worked insisted that she perform at least some of such duties, disciplined her, and threatened her with dismissal when she refused. The claimant contended that she had been subject to direct and indirect discrimination as well as harassment because of her beliefs, and the Employment Tribunal agreed that she had suffered direct discrimination.

The Employment Appeal Tribunal ruled that there was no proper legal basis to conclude that discrimination had been established. It held that the applicant had not been directly discriminated against or subjected to harassment on the basis of her religious beliefs but rather disciplined on the basis that she had failed to perform work duties. She had also not been indirectly discriminated against, as the requirement for all registrars to perform civil partnerships, while adversely affecting persons who shared the applicant’s religious beliefs, could be objectively justified as a proportionate measure designed to give effect to the principle of equality of treatment that public authorities were expected to respect. As such, the court concluded that disciplining a local authority official for refusing to register same-sex civil partnerships does not constitute religious discrimination.

(4) Gender identity discrimination

In another United Kingdom case, Sheffield v. Air Foyle Charter Airlines, the applicant was a pilot who had undergone male-to-female gender reassignment. She had successfully worked as a pilot for many years. When applying for a job with Air Foyle Ltd. she was called to attend a seminar organized by the employer but was then not called for an interview. She asserted that the sole reason she had not been called for an interview was that she was a transsexual and that this fact had become known to the company.

The Industrial Tribunal dismissed the employer’s defense that the applicant was unable to work in a team, was hazardous to safety, that she flaunted her femininity, and that pilots were unwilling to fly with her. The applicant had the necessary experience, qualifications, and a stellar record for the position. The Tribunal unanimously held that the reason or the principal reason for the company’s decision not to call her for an interview was because of the knowledge that she was a transsexual. This finding was evidenced by the fact that she had originally been short listed for an interview but later removed from the list.

The Tribunal found that the applicant had been unlawfully discriminated against under the Sex Discrimination Act 1975. The Act did still not prohibit discrimination based on gender assignment, but the Tribunal reached its conclusion applying its provisions on sex discrimination.

6. Concluding remarks

Non-discrimination as a principle is strongly recognized in the region, primarily within the European Union and consequently on the domestic level in EU member states and in accession countries. Unlike the EU bodies, the European Court of Human Rights has not treated non-discrimination as a...
core principle of its jurisprudence. The European Court of Human Rights has, nevertheless, issued important decisions clarifying and expanding what the principle entails under the Convention. Here it should be noted that the principle is so strong in the region and legislation so wide and varied that it is close to impossible to make an exhaustive analysis. Merely a few concluding remarks will be made.

**Marital status discrimination**, after the issue was settled by the European Court of Human Rights in *Marxx v. Belgium* in 1979, no longer appears to be a contentious issue in the region. Such discrimination is virtually outlawed in law and in practice – at least with regard to non-married heterosexual couples and their children.

The prohibition of discrimination on the basis of **sexual orientation**, while still not as generally accepted as anti-discrimination based on sex, is reaching increasing acceptance. This ground has recently been included in several constitutions and modern anti-discrimination laws in the region tend to include sexual orientation in their lists of banned grounds. The new Serbian anti-discrimination law serves as a good example. The entry into force of the Treaty of Lisbon on 1 December 2009, giving the Charter of Fundamental Rights and its prohibition of discrimination on the basis of sexual orientation primary law status within the EU, is another landmark in this regard. The consistent term used in these constitutions and laws is ‘sexual orientation’ (except for in the Swiss constitution) which implies an identity-based view on sexuality rather than a behaviour-based view. This suggests that a person has to self-identify as a lesbian, gay, or bisexual person in order to be covered by the protection under the laws, which may constitute a potential limitation to the reach of these provisions.

The European Court of Human Rights *Karner* case is of great importance in the context of sexual orientation discrimination. It points to the importance for same-sex couples to be included in the concept of family and of the right for same-sex partners to be included in social benefits traditionally only awarded to legal spouses. It also makes clear that the margin of appreciation afforded to states is narrow where there is a difference in treatment based on sexual orientation, which is why states have to present exceptional reasons for legally being able to grant same-sex couples less beneficial measures than opposite-sex couples. This principle is applicable and obligatory in many other areas than in the one under examination in the case, as shown by the judgments in *J.M. v. the United Kingdom* and *P.B. and J.S. v. Austria*. The latter case is especially important for the explicit statement that same-sex couples have a right to “family life” under Article 8, an important step towards recognising same-sex family units on equal terms with opposite sex families.

As regards **gender identity discrimination**, the right for a transgendered person not to suffer discrimination has not been as universally recognized – at least not spelled out as such. So far, only three countries in the region have an explicit prohibition of gender identity discrimination. In one of those, the United Kingdom, the prohibition only applies to discrimination related to gender reassignment, which appears to exclude persons not undergoing treatment. The UK law also has several troubling exceptions that illustrate that prejudices against the transgender community still prevail. However, the fact that the European Court of Justice in *P v. S* and *Cornwall County Council* declared that gender identity discrimination is a subcategory of sex discrimination under EU law is significant and has had consequences on the domestic level. Following the European Court of Justice decision, the EU Council decided to include in the preamble of the Recast Directive 2006/54 gender reassignment in the notion of sex. Even if the preamble is not legally binding, this establishes an important principle. Precisely because the protection from gender identity discrimination has been included in the concept of equal treatment between men and women, this protection may be stronger in practice than the protection granted on the ground of sexual orientation.

Finally, **discrimination based on health status**, including HIV status has now been tackled by the European Court of Human Rights in *Kiyutin v. Russia*, and also is recognized and prohibited in some countries’ anti-discrimination laws. Two such examples are Belgium and Serbia. In Belgium, as discussed, HIV discrimination is often intertwined with discrimination based on sexual orientation, which shows the importance of taking a broad view on discrimination and not treating the grounds as mutually exclusive.

**B. Sexual Harassment**

1. **Introduction**

At national and international levels, one of the critical developments in anti-discrimination law is the recognition that sexual harassment (unwanted sexuality-based verbal or physical activities in workplace or educational settings which create a hostile environment) functions as a barrier to equality, and as

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87 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.
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such counts as a form of discrimination. Sexual harassment can have health effects in two ways. First, the harassment itself can be coercive or abusive enough to have direct mental or physical health effects. Second, in driving the harassed workers out of their employment, it may remove them from a key source of health benefits. Women are disproportionately the targets of this form of harassment, although men may also face this abuse. Freedom from sexual harassment enhances other kinds of freedoms, such as the freedom to speak one's mind, to prosper professionally, and to develop healthy relationships with colleagues and partners. Sexual harassment can also be understood as an unwanted intrusion in the intimacy and sexual life of the individual, violating the right for the individual to define his or her own sexuality, sexual activities, and sexual limits. Sexual harassment can express itself based on sex, sexual orientation, or gender identity: all these grounds are equally serious and should be counteracted as such.

The prohibition of sexual harassment in the work context has gained considerable recognition within the European Union over the last ten years. The EU has established that sexual harassment falls under the notion of unlawful discrimination on grounds of sex and thus violates the principle of equal treatment – sexual harassment being defined in part by violating the right to dignity of the person being subjected to it. Its express prohibition comes up primarily, but not exclusively, in relation to equal relations between men and women in the workplace. The European Social Charter couches sexual harassment as a violation of the right to dignity at work, while the Council of Europe Convention on preventing and combating violence against women and domestic violence, although yet to enter into force, defines and criminalizes sexual harassment as a form of violence. Both the right to equality and the right to dignity also underpin domestic provisions on sexual harassment in the region. In the United Kingdom and Croatia, for example, sexual harassment is framed as an expression of sex discrimination but its definition includes violation of the right to dignity. Other jurisdictions, such as Israel, focus on the degrading and humiliating character of sexual harassment, thus framing it first and foremost as a breach of the right to dignity. However, as will be discussed, the Israeli law also (albeit secondarily) understands sexual harassment as a breach of the right to equality; a sophisticated understanding of the complex nature of sexual harassment that Israeli courts, comments suggest, have failed fully to embrace.

2. Council of Europe

Conventions in the Council of Europe Treaty Series

The Council of Europe Convention on preventing and combating violence against women and domestic violence opened for signature on May 11, 2011, and has thus not yet entered into force. The Convention (discussed in more detail in Chapter 5A: Domestic & Intimate Partner Violence) defines and criminalizes sexual harassment as a form of violence rather than discrimination.

Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction. (Article 40)

European Social Charter

In the revised version of the European Social Charter (1996), freedom from sexual harassment is recognized as part of the right to dignity at work:

**Article 26 – The right to dignity at work**

*With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers’ and workers’ organisations:*

1. to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct;

2. to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.

According to the Explanatory Report, sexual harassment is to be understood as “unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of workers, including the conduct...
of superiors and colleagues.” The second paragraph of the article aims at forms of victimizing conduct affecting the right to dignity at work other than sexual harassment.

3. European Union

The prohibition of sexual harassment was made part of mandatory community law for the first time in 2002 and has since gained considerable recognition as a key part of labour regulations that are binding on all member states. The directives described below must be implemented by all member states within a certain time period; if not implemented, they can be applied directly under the doctrine of direct effect. The EU Council Directive 2000/78/EC clarifies that harassment is a form of discrimination but does not explicitly mention sexual harassment. The express prohibition of sexual harassment was introduced in the so-called Sexual Harassment Directive in 2002. This specifically categorizes such harassment as a form of discrimination, in violation of equal protection.

In 2006, a new directive incorporated all previous directives related to equal treatment of men and women, as well as certain developments arising from the case law of the European Court of Justice, in one legal text. The Sexual Harassment Directive was repealed accordingly, but the content relating to sexual harassment remains the same. The new, so-called Recast Directive, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (see also above under 1A), defines harassment as:

\[
\text{where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment (Art 2)}
\]

and sexual harassment as:

\[
\text{where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (Art 2)}
\]

Harassment and sexual harassment are included in the concept of discrimination (Art 2(2)(a)), and prohibited as such (Arts 4–14). Thus, sexual harassment is framed as an expression of discrimination, however its definition includes a violation of the right to dignity. The prohibition includes both so-called ‘quid pro quo’ harassment (benefits or other conditions of employment made contingent on the provision of sexual favors, or the rejection thereof resulting in negative treatment or loss of benefit) and ‘hostile work environment’ harassment. It is noteworthy that the definition of sexual harassment includes conduct with the effect of violating a person’s dignity. This means that it is not necessary to show that the alleged harasser intended to violate the victim’s dignity; it is sufficient to show that this was the outcome of the conduct.

The Directive sets guidelines for sanctions, legal action, and compensation for victims of sexual harassment. It specifically states that no prior upper limit may be fixed for compensation (Art 18). Member states must establish government agencies for the promotion of equality (Art 20), and anti-discrimination laws must be enforced (Art 17). The Directive obliges member states to encourage employers and those responsible for vocational training to take measures to prevent all forms of sex discrimination, in particular harassment and sexual harassment (Art 26). Furthermore, the Directive eases the burden of proof on the part of the person claiming to have been discriminated against, which includes persons claiming to have been harassed. Once facts exist from which it may be presumed that harassment has occurred, the victim of sexual harassment will not have to prove,
against a more powerful counterpart (the employer), that the alleged conduct took place (Art 19).

In 2004, the prohibition of sexual harassment was reiterated in Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, employing the same definitions as those described above. Here, the prohibition applies to persons providing goods and services available to the public and transactions carried out in the public context.

As of December 2009, the European Court of Justice has not provided guidance for the interpretation of the notion of sexual harassment in the meaning of Directives 2006/54/EC and 2004/113/EC.

4. Domestic legislation and case law


(a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect –

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,

(b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect –

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or

(c) on the ground of her rejection of or submission to unwanted conduct of a kind mentioned in paragraph (a) or (b), he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.

According to Section 4A (5) and (6), harassment and sexual harassment of women as defined above is to be read as applying equally to the harassment of men. Importantly, it also covers harassment based on a person’s gender identity, however only in cases where the person intends to undergo, or has undergone gender reassignment (Section 4A(3)). The employer is liable for both direct harassment and for harassment occurring among co-workers, under the employer’s obligation to take reasonable steps to prevent harassment at the workplace (Section 41).

Further amendments to the Sex Discrimination Act (1975) were introduced in 2008 in order to bring UK regulations in line with EU Directives. The SDA Amendment Regulations SI 2008/656 came into effect on 6 April 2008. The definition of gender harassment is expanded to protect against harassment when “[a person] engages in unwanted conduct that is related to [the victim’s] sex or that of another person” (Section 3). This change enables claims to be made by somebody who is not personally subjected to the unwanted conduct, but the effect of which nonetheless violates his or her dignity or creates an intimidating environment. Moreover, the 2008 amendment includes a specific provision to make an employer liable for sexual harassment of employees by third parties. The employer will become liable if he or she fails to take reasonably practicable (proactive and reactive) steps to protect the employees, where sexual harassment is known to have happened on at least two occasions (Section 4, amending Section 6 of SDA).

Furthermore, the United Kingdom has a specific statute establishing criminal liability in the case of

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94 This was regulated in Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (OJ L 14, 20.1.1998, p. 6) until the passage of Directive 2006/54/EC, which now incorporates these principles.


96 In force on October 1, 2005.

97 Section 4A (1) of the Employment Equality Regulations, amending the Sex Discrimination Act.

98 See for a discussion of this limitation above under Chapter 1.

99 SDA Amendment Regulations SI 2008/656.
harassment, sexual or otherwise, including the crime of putting people in fear of violence and allowing for the court to issue restraining orders when a person's conduct will amount to harassment.\footnote{Protection from Harassment Act 1997, passed on 21 March, 1997.}

Finally, the \textit{Employment Equality (Sexual Orientation) Regulations 2003}\footnote{Statutory Instrument 2003/1661, in force on 1 December 2003.} includes a provision specifically covering harassment on grounds of sexual orientation:

\begin{quote}
For the purposes of these Regulations, a person ("A") subjects another person ("B") to harassment where, on grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of - (a) violating B's dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect. (Section 5)
\end{quote}

In \textit{Croatia} (a candidate country but not yet a member state of the EU), the \textit{Gender Equality Law 116/2003}\footnote{Published in the Official Gazette no. 116 on 22 July 2003, in effect on July 30th 2003. Official translation.} determines the general basis for the protection and promotion of gender equality and protection against gender discrimination. Harassment and sexual harassment are covered by this law, and are considered forms of gender discrimination, linking the unwanted conduct to a violation of the personal dignity, creating an "unpleasant, unfriendly, humiliating or insulting atmosphere" (Art 8). Similarly in 2003, harassment and sexual harassment were introduced and banned in Croatian labour law with the amendment of the \textit{Labour Act}.\footnote{Consolidated text, published in the Official Gazette no. 137/2004. Unofficial translation.} Both these laws made sexual orientation a prohibited ground for discrimination, with the consequence that sexual harassment based on sexual orientation is covered under the harassment provisions.

Article 30 of the Labour Act is named “The protection of workers’ dignity,” and contains a long list of obligations conferred on the employer for the protection of the employees from harassment or sexual harassment. When harassment takes place, this is understood to violate “employment obligations”. Interestingly, when this occurs, under certain conditions the victim has the right to cease working until he or she is offered protection, with guaranteed full compensation. This provision merits close attention, with the caveat that it remains unclear what actions the employer should take in order to prevent harassment and sexual harassment in order to fulfill its obligations under the article. According to commentaries, codes of conduct and provisions of collective agreements probably need to be enacted on this issue to specify the duties of the employer.\footnote{Mario Vincovic, “Gender Equality and the process of harmonisation of the Croatian Labour Law,” Croatian Yearbook of European Law and Policy, Vol. 1. No. 1. May 2005.}

\textit{Israel} has a comprehensive sexual harassment law that differs slightly in perspective from other such laws in the region. The \textit{Prevention of Sexual Harassment Law},\footnote{Prevention of Sexual Harassment Law, 5758 – 1998, SH 166, approved on 10 March 1998. Translation to English appears to be official.} enacted by the Knesset in 1998, declares as its purpose “to prohibit sexual harassment in order to protect the right to respect, human dignity, liberty and privacy and to promote equality between the sexes” (Art 1). In other words, here the issue of sexual harassment is framed \textit{primarily} as an injury to the right to human dignity and respect, \textit{in combination} with an infringement of the right to equality.

Article 3 of the law defines sexual harassment. The concept includes, \textit{inter alia}, sexual blackmail or threats; indecent acts; repeated propositions of a sexual character or references with sexual connotations against the wishes of the person receiving them; and intimidating or humiliating remarks concerning a person's sex/gender, sexuality, or sexual tendencies. If committed against persons of a dependent or subordinate status (minor-parent/tutor, patient-doctor, and employee-employer), remarks and propositions of a sexual nature will be deemed sexual harassment even if the victim has not made known that he/she is not interested. Furthermore, ‘prejudicial treatment’ is prohibited, defined as any harmful act which originates in sexual harassment or complaints related to sexual harassment. This is to be understood as intimidation or retaliation, which can occur simultaneously to the harassment and before unwelcome sexual advances have been rejected.\footnote{Orit Kamir, “Israel's 1998 Sexual Harassment Law: Prohibiting Sexual Harassment, Sexual Stalking, and Degradation Based on Sexual Orientation in the Workplace and in all Social Settings” (2006), 7 International Journal of Discrimination and the Law, 315–336. Page numbers here from a separate pdf version of the article, available at \url{http://sitemaker.umich.edu/Orit_Kamir/files/sxharas2.pdf}. Last visited on 15 April 2010.}
The law prohibits sexual harassment everywhere; it does not distinguish sexual harassment in the workplace from sexual harassment in other – public or private – places (Art 4). It defines sexual harassment both as a tort and as a criminal offense (Arts 5-6). The harasser has personal liability – as opposed to employer liability, for example, when committed between colleagues in a workplace – and can, thus, both be subjected to criminal law punishment (Art 5), and civil law liability (Art 6). That said, the employer also has extensive duties to prevent sexual harassment in the workplace and to deal with cases of sexual harassment and adverse treatment when they have occurred (Arts 7-9 and 11).

Interestingly, and without precedent in Israeli law, the law provides for punitive damages without damage having to be proved (Art 6(b)). What must be shown is only conduct that the law has defined as harassment.107 According to the explanatory note accompanying the law, the damage “is often inflicted on the harassed person’s dignity, self-confidence, and his right to respect and to a reasonable quality of life […]. Since these injuries are inherent in the nature of the harassing behavior, the proof of conduct embodies the proof of damage.”108 This, according to a commentary, is a way to protect ‘strong’ harassed persons – even those who do not have emotional breakdowns following harassment – by insisting that all harassed persons suffer injury to their dignity and self-worth and deserve the protection of the law.109

As seen, the objective behind the law was to combine the dignity paradigm with the equality paradigm, and not to see those two approaches as mutually exclusive in sexual harassment law. However, as one commentator has pointed out, Israeli courts have favored the ‘dignity’ aspect over the ‘equality’ aspect, in the sense that the discriminatory features of sexual harassment have to a large extent been excluded from legal analysis.110 This approach, framing the harm of sexual harassment in gender-neutral terms, has had a tendency to disguise the gendered significance of most cases of sexual harassment.111 The jurisprudence applying the law has also been criticized for understanding harm to dignity as a moral harm, or harm to the honour of women. Such approach implies that women are vulnerable, sexually pure, and in need of special protection, and may uphold rather than undermine gender inequalities.112

(ii) Case law: sexual harassment as sex discrimination – In the Scottish Court of Session case Strathclyde Regional Council v. Porcelli (1986)113 the respondent, Mrs. Porcelli, was a science laboratory technician employed by the appellants. She had complained to an Industrial Tribunal that her employers had discriminated against her in violation of the Sex Discrimination Act (1975).114 Her complaint included allegations that two of her fellow employees, both male, had subjected her to a course of vindictive and unpleasant treatment which compelled her to transfer to another workplace. The Employment Appeal Tribunal found that the campaign against the claimant included sexual harassment, directed towards her because she was a woman, and the Scottish Court of Session agreed:

[T]his particular part of the campaign was plainly adopted against Mrs Porcelli because she was a woman. It was a particular kind of weapon, based upon the sex of the victim, which […] would not have been used against an equally disliked man. (para 9)

The possibility that the two colleagues might have treated an equally disliked man as unfavourably as they treated Mrs. Porcelli was beside the point. It was the choice of actions taken that was to be examined. The campaign had expressed itself in sexual harassment, a “particularly degrading and unacceptable form of treatment which it must be taken to have been the intention of Parliament to restrain [in the context of the Sex Discrimination Act].” In conclusion, the Court found that the claimant had been discriminated against based on her sex.

108 Quote from Kamir, p. 13.
111 An example of this tendency, according to Rimalt, can be found in the Supreme Court decision Israel v. Ben-Asher, CSA 6713/96 [1998] IsrSC 52(1) 650 – technically decided before the law was enacted but applying the principles of the draft law.
112 Rimalt mentions as an example of this paternalistic approach the Supreme Court decision Galili, HCJ 1284/99 Jane Doe v. IDF Commander [1999] IsrSC 53(2) 62.
114 This was before the introduction of the amendments of Sex Discrimination Act (1975) in 2005 (above). The case shows that UK Courts before the amendment of the Act had already established that sexual harassment is an unlawful form of sex discrimination, falling under the general prohibition of sex discrimination.
(iii) Employer responsibility for harassment subjected by third party — In the 1995 British Employment Appeal Tribunal case Go Kidz Go Ltd v. Bourdouane the applicant was an employee of a company hosting children’s parties who was sexually harassed by a male parent while working at such a party. She was dismissed by her employer upon complaining about the matter. The Tribunal stated that it is sufficient for a complainant to show that behaviour is sexually offensive to a woman in order to establish discrimination under the Sex Discrimination Act. According to the Act an employer has a duty to take all reasonable steps to prevent such discrimination from taking place whenever it is within the power of the employer to prevent it, even if the harassment is imposed by non-employees. The Tribunal held that the employer had failed to take steps to stop the harassment. As a consequence, the employer was found guilty of sex discrimination.

(iv) Conflict between sexual harassment and freedom of expression — In the German case BVerwG 2 WD 9.06 the issue was sexual harassment in the workplace on the ground of sexual orientation. A superior soldier had greeted his subordinate on his birthday with the words “Good luck, my gay friend” in the presence of a third party. The subordinate soldier had not given his consent for his sexual orientation to be revealed.

According to the Federal Administrative Court, the constitutionally protected freedom of expression has its limits, when the equally protected rights to of personal dignity and the protection of privacy are at stake (Articles 1 (1) and 2 (1) of the German Constitution). These rights empower each person to determine his or her attitude toward his or her sexuality, including whether and in what form he or she would like to reveal his sexual orientation or provide it as a topic of discussion. The Court found that the behaviour of the superior solider constituted sexual harassment in the workplace as well as a violation of duty and comradeship.

5. Concluding remarks

As seen, the prohibition of sexual harassment has gained strong recognition in European Union law. Once sexual harassment was acknowledged as a form of sex discrimination, its prohibition has followed from the strong stance against discrimination in general within the EU legal framework. The EU position on sexual harassment, focusing in particular on harassment in the workplace, has taken root in domestic legislation in Europe, including in countries that are not yet members of the Union, such as Croatia. Worth pointing out is that both in the United Kingdom and in Croatia the prohibition includes sexual harassment based on sexual orientation.

Sexual harassment includes both behaviour that is ‘objectively’ offensive and harmful, such as sexual blackmailing by way of threats or sexual intimidation or humiliation, and behaviour that per se is neutral but becomes offensive if undesired by the recipient. In this latter category fall sexual propositions and references to a person’s sexuality. Such conduct can be desirable, when performed with mutual consent, which is important to recognize. For this reason, the UK provisions stress that relevant conduct must be ‘unwanted’ and the Israeli law prohibits behaviour “where the person has shown to the harasser that he is not interested.” Demonstrating objection, however, may be difficult in situations of power imbalance, such as in a workplace when the perpetrator is a person in a position of power in relation to the victim. In fact, power dynamics are often present in situations where sexual harassment occurs. The Israeli lawmaker has tackled this problem by specifically mentioning situations of dependence or hierarchy, exempting the victim in those situations from having to show her or his discomfort. In the EU and in several domestic laws, recognizing this power imbalance that may make it difficult for the victim of sexual harassment to make a claim against a more powerful counterpart, a shifting of the burden of proof to the alleged perpetrator has been provided, once basic facts are established.

The Israeli law also does not require that personal injury be shown in order to create liability for sexual harassment. This is based on the notion that conduct that typically constitutes sexual harassment per se injures the dignity of the person, such that the reaction of the individual subjected to it is of less relevance. This strong focus on dignity makes the Israeli law differ slightly from other regulations examined here, although the violation of dignity is at the core of the definition of sexual harassment in all of them. The Israeli approach, by not placing sexual harassment primarily in the realm of sex inequality and structural oppression of women, makes the prohibition easier to apply in situations of same-sex harassment, or harassment of men. However, this approach may also obscure the fact that most expressions of sexual harassment in fact take place within the framework of male dominance.


116 Federal Administrative Court, decided on 24 April 2007. Only in German.
over women and are linked to structural inequalities between the sexes. Furthermore, if the concept of dignity is interpreted as (female) ‘honour’ or a ‘moral’ good, the law might lead to the reinforcement of gender stereotyping, which would appear to be contrary to the intentions behind the Israeli law.

C. **Mandatory HIV Testing**

1. **Introduction**

Research demonstrates that mandatory HIV testing, particularly when separated from therapeutic intervention, is unjustified on public health grounds, as it has not been proven to result in greater access to or sustained use of treatment, nor in more effective sharing of information with sexual partners. Moreover, such testing violates the rights to privacy and security of the person. It is also often discriminatory, both in application and effect. Laws and policies mandating or allowing non-consensual HIV testing tend to selectively target marginalized groups believed to be at higher risk of HIV infection, such as sex workers or prisoners. Because the testing is done in ways that violate privacy (such as when police officials receive results for registered prostitutes) and which do not result in either treatment of the affected persons or in good preventative practices more generally, it can be criticised as discriminatory. Mandatory testing also has a tendency to increase discrimination against persons living with HIV, disempowering them and exposing them to society's scorn.

Voluntary and consensual HIV testing has for these reasons obvious bearing on sexual health and human rights. From a public health perspective, voluntary testing has proven to be more effective in the fight against HIV. From a rights perspective, the voluntary nature of such testing is imperative in order to respect the individual's rights and to combat discrimination and social exclusion.

In Europe, mandatory HIV testing has largely been abolished. Widespread mandatory testing was previously practiced in Eastern Europe and the former Soviet Union in the wake of the emergence of the HIV crisis, but several countries in the former Eastern Bloc have now included provisions in their HIV/AIDS regulations explicitly stating that testing must be conducted on a voluntary basis. This distinguishes these states from most other European countries, where mandatory testing was never practiced on a large scale and where the voluntary nature of testing therefore is not explicitly emphasized in legal text. One area where mandatory testing has arisen in Europe is with regard to HIV testing following criminal activity, in particular of sex offenders after rape who do not consent to testing. While in Scotland a general proposal to allow for compulsory testing of assailants was rejected on human rights grounds, in the Netherlands such testing following rape has been allowed with reference to the victim's right to eliminate the uncertainty raised by the risk of transmission.

2. **Council of Europe**

Neither the European Court of Human Rights nor the European Committee for Social Rights has addressed the issue of mandatory HIV testing.

3. **European Union**

   **European Court of Justice**

The case *X v. Commission* mainly concerns issues of disclosure of HIV status, but is worth mentioning in the context of mandatory HIV testing. It relates to the principles underlying the opposition to mandatory testing in that the Court makes clear that a person's refusal to undergo an HIV test has to be respected in its entirety and cannot be circumvented by giving the test another name.

The appellant in the case had applied for employment as a typist with the Commission, and had been asked to undergo a medical examination, including various biological tests. One of these was a lymphocyte count of which he had been unaware. He had declined the suggestion that he would also be tested for HIV. The medical officer reported him unfit for recruitment. The appellant argued that the lymphocyte count to which he had been subjected equated a dissimulated HIV antibody screening test, to which he had withheld his consent. Carrying out this test without his informed consent, he contended, constituted an interference with his physical integrity and therefore violated Article 8 of the European Convention on Human Rights.

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117 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.


119 Case C-404/92 P. decided on 5 October 1994, appeal against a judgment of the Court of First Instance.
The European Court of Justice stated that medical tests in order to establish fitness for recruitment are lawful, and that a person has to be found physically fit for the performance of duties concerned before hire. However, in the case the appellant had expressly refused to undergo the HIV screening test. The Court held that any test that was likely to point to or establish the existence of HIV/AIDS was therefore also precluded. The lymphocyte count in question apparently had provided the medical officer with sufficient information to draw the conclusion that the appellant may be a carrier of HIV. Therefore, the decision that the appellant had been found unfit for the position concerned should be annulled.

4. Regional non-binding material

There is an abundance of non-binding material from both the Council of Europe and the European Union on HIV related issues. In these documents, the importance of HIV testing being voluntary is clear, although the issue generally is mentioned in passing. The documents stress the use of "voluntary counseling and testing," sometimes with the addition "with full protection of confidentiality and informed consent." These documents generally operate within a public health framework, stressing that voluntary testing is the more effective means by which an end to the pandemic can be achieved. There are also occasional statements where a rights-approach to the problem of mandatory testing can be detected, such as in the 1989 Council of Europe Committee of Ministers Recommendation No. R (89) 14 on the ethical issues of HIV infection in the health care and social settings. It establishes that compulsory screening, in the absence of curative treatment, is "unethical, ineffective, unnecessarily intrusive, discriminatory and counterproductive." The same document further highlights the discriminatory nature of mandatory screening, recommending that public health authorities make sure that such compulsory screening is not imposed on any group of the population, but in particular not on especially vulnerable populations, such as prisoners, immigrants, and military recruits.

5. Domestic legislation and case law

As mentioned, mandatory HIV is no longer a widespread practice in Europe. Rather than impose testing, some countries have opted to mandate that health providers offer HIV screening. For instance, in France, Finland, Poland, and Sweden, health care providers must offer HIV tests to pregnant women, who are free to refuse. In France, physicians have been required to offer HIV testing to pregnant women since 1993. Under the French Public Health Code, "[a]t the first prenatal visit, following information on risks of infection, an HIV test is offered to the pregnant woman" (Art L2122-1). This provides legal support for HIV testing while still preserving the patient's rights.

From 1987 in the Soviet Union (and continuing in the Russian Federation), sanitary-epidemiological policies were passed and implemented. These policies were based on mandatory HIV testing for as much of the population as possible, especially for those considered "risk groups." Health officials believed that a policy of medical isolation and criminalization was necessary to contain the spread of HIV, and severe criminal sanctions were used to punish and isolate HIV positive individuals. In response to the development of knowledge about the pandemic and under international influence, these practices have to a large extent been abandoned in the former Soviet republics. Mandatory HIV testing has been severely restricted.

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121 Adopted by the Committee of Ministers on 24 October 1989.

122 For a history of compulsory HIV testing and other public health measures in response to the arrival of HIV in Europe, see James Baldwin, Disease and Democracy, Berkeley, 2005, pp. 51–85.


124 Law 93-121 on various social measures, Art. 48, establishing Article L2122-1 of the Public Health Code. Unofficial translation of this article from French Conseil National du Sida.


126 Medvedev. [HIV positive foreigners were deported and HIV positive Soviets were isolated].
For example, the 1995 Russian federal law On Prevention of the Spread in the Russian Federation of Illness Caused by Human Immunodeficiency Virus (HIV)\(^{127}\) generally reflects international principles to effectively fight HIV/AIDS. The law bans discrimination and guarantees to protect the interests of persons living with HIV. It also sets forth the right to voluntary HIV testing. According to its Article 8, medical examination in state, municipal, or private health institutions is to be carried out voluntarily at the person's request or with his/her consent. Moreover, at the person's request the voluntary medical examination may be anonymous. Pursuant to Article 9, mandatory HIV testing is required only for donors of blood, body fluids, organs, and tissues and for employees of particular professions, listed in a 1995 Government resolution.\(^{128}\) These professions include, inter alia, medical staff working at centers for HIV prevention and treatment and laboratory staff and others conducting scientific research on HIV related issues or on immunobiological drugs.

Even though the above list can be described as somewhat puzzling and discriminatory towards persons who work in professions related to HIV treatment and research, the list is limited in scope. It is noteworthy that traditionally marginalized groups, such as injecting drug users, sex workers, and prisoners, cannot be tested without their consent. Testing secretly or by force is totally prohibited.

The above-mentioned federal law on prevention and spread of HIV poses HIV related conditions on entry for foreign citizens. According to its Article 10 ("Conditions of entry to the Russian Federation of foreign citizens and stateless persons"), non-nationals who will come to Russia for more than three months will only get a visa subject to the production of a certificate proving that they are not carriers of HIV. This provision does not apply to members of diplomatic missions and consular institutions of foreign states and to employees of international intergovernmental organizations and their families. Additionally, the 2002 Federal Law on the Legal Status of Foreign Citizens in the Russian Federation\(^{129}\) states that a foreign citizen will not be issued a residence permit or, if previously issued, such permit will be terminated, if the alien cannot show a certificate that he or she has "no disease caused by human immunodeficiency virus (HIV) or suffer from one of the infectious diseases that pose a danger to others."\(^{130}\) The list of such diseases is approved by a federal executive body, authorized by the Russian Government.

In 2008, following a US decision to ease HIV/AIDS-related travel restrictions, news sources report that Russian government officials declared that the Russian entry bans for HIV infected foreigners would be modified or rescinded.\(^{131}\) As of December 2009, the law is still in place. As described in Chapter 1, the European Court of Human Rights recently found that the actions of the Russian State in denying a residency permit to a foreign national on the ground of his HIV status was discriminatory and violated his right to a family life with his Russian wife and their children.\(^{132}\)

In Ukraine, like in Russia, mandatory HIV testing is banned. Article 57 of the 1992 Basic Laws of Ukraine on Health\(^{133}\), as amended, establishes that public health institutions are obliged to implement special measures of prevention and treatment of so-called ‘dangerous social diseases,’ of which AIDS is listed as one. According to the law On Prevention of the Disease AIDS and Social Protection of Population\(^{134}\), citizens of Ukraine have the following rights:

\begin{quote}
The State guarantees the availability, quality, efficiency of HIV testing, including anonymous [testing], with preliminary and subsequent advice, as well as the provision of security for the subject of the medical examination and the staff. (Art 4)

Medical examination of Ukrainian citizens, foreigners and stateless persons who permanently reside in the territory of Ukraine, or who are granted refugee status, is free. The medical examination is voluntary. (Art 7)
\end{quote}

\(^{127}\) Dated 30 March 1995, only available in Russian. All translations in this section are unofficial, made by Ukrainian lawyer and researcher for the project Oksana Shevchenko.

\(^{128}\) On Approval of List of Employees for Individual Occupations, Industries, Enterprises, Institutions and Organizations that Pass a Compulsory Medical Examination to Detect HIV Infection During the Mandatory Pre-Admission for Employment and Periodic Medical Examinations, Russian Federation Government Resolution No 877, dated 4 September 1995. Only available in Russian.

\(^{129}\) Dated 21 June 2002, only available in Russian.

\(^{130}\) Article 9 ("Grounds for refusal or revocation of residence permit"), part 13.


\(^{132}\) Knyazhi v. Russia, Application no. 2700/10, decided on 10 March 2011.


\(^{134}\) Dated 12 December 1991. Translation by Ukrainian lawyer and researcher Oksana Shevchenko.
Additionally, the procedure for voluntary HIV testing and counselling in Ukraine is regulated by a Ministry of Health Order from 2005, *About Improvement of Voluntary Counseling and Testing HIV Infection*. This order reiterates that HIV testing may be performed only with the informed and voluntary consent of the patient. Informed and voluntary consent is defined as follows: that the patient has been given sufficient information in a language accessible format; that he/she has realized all positive and negative consequences of revealing his or her HIV status, and that he/she has given written consent to the test before it takes place. Pressure or coercion to undergo testing is not permitted.

In some western European countries, compulsory testing has been discussed following criminal activity, based on the notion that victims of crime or law enforcement personnel have a right to know whether they have been subjected to risk of transmission. In *Scotland*, the Scottish Police Force proposed in 2002 that the parliament should pass legislation that would make it compulsory for "assailants and others who have caused police officers to be exposed or potentially exposed to such risk to submit to a blood test." The Scottish executive went even further, proposing that the right to insist on a blood test would be made available not just to police officers but also to others "caught up in comparable circumstances." A working group established to consider these proposals acknowledged that compulsory testing may interfere with UK obligations under the European Convention on Human Rights, and also that the proposals were not likely to reduce the risk of actual transmission of HIV. For these reasons, the proposals did not lead to legislation.

A related issue is that of mandatory testing of sex offenders who have committed rape and who do not voluntarily agree to be tested. In the *Netherlands* this issue came up in 1991, when a woman who had been raped demanded that the rapist undergo an HIV test, and the offender refused to do so with reference to his right to bodily integrity under the Dutch Constitution. The Dutch Supreme Court found for the woman, ruling that a blood test was necessary. The Court argued that it was the right of the woman that the consequence of the rape be mitigated, and that the uncertainty concerning HIV transmission was one of those consequences. Thus, she had a substantial interest in eliminating this uncertainty, which justified a blood test against the will of the rapist. However, the Court also emphasized that the rapist’s request not to be informed about the result of the test had to be respected.

6. Concluding remarks

In the European region, mandatory HIV testing is no longer practiced except for under very exceptional circumstances. No binding regional documents outlaw the practice; nevertheless, the examination of non-binding statements from both the Council of Europe and the European Union demonstrate that the issue is treated with an obviousness that suggests a consensus around the belief that mandatory testing is outdated, discriminatory, and contrary to human rights standards.

While mandatory testing was prevalent when HIV/AIDS first became known in the Soviet Union and, after its dissolution, in the former Soviet Republics, these countries have to a large extent abandoned the practice. An increasing awareness of HIV/AIDS as a human rights issue, the right to non-discrimination of persons living with HIV, and state obligations to provide for respectful and consensual testing and health care can be discerned. The Ukrainian policies provide a good example in this regard.

Some problematic points remain. The list of professions for whom mandatory testing is required in Russia seems arbitrary and nonsensical, and has a strong discriminatory element. The Russian travel and entry ban on HIV positive foreigners is another troubling aspect, but should probably be seen as an isolated remainder of a policy which since has largely been abolished. Reports suggest that this ban is about to be abandoned, which again points to the trend to embrace a more rights-based approach to HIV/AIDS.

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139 Ibid.
In other European countries, calls for mandatory HIV testing, in particular of immigrants and refugees, appear occasionally on the political scene.\textsuperscript{140} So far, these have been dismissed, both on public health and human rights grounds. Similarly, the proposal that the police in Scotland would have a right to demand testing of assailants following criminal activity was rejected, primarily with reference to rights under the European Convention. The Netherlands, in allowing for non-consensual testing of a sex offender following rape, weighed the rights of the victim of the crime against the right to bodily integrity of the offender, and concluded that the victim's right to mitigate the consequences of the crime took precedence. This case must be seen as an exception to the general practice in Europe that only consensual testing should be allowed, and can be explained by the presence of conflicting rights in the case and the overriding interest in limiting the harm for the victim of sexual crime.

D. \textbf{Asylum on the Basis of LGBT-related or Gender-based Persecution or HIV Status}

1. \textbf{Introduction}

Asylum granted as a consequence of well-founded fear of persecution based on LGBT-related or gender-based persecution or on the grounds of HIV status is a response to situations where serious violations of sexual rights or the right to health are at risk of occurring. In this sense, asylum is to be understood as a \textit{remedy} to a dangerous situation, which can serve as best practice as a last resort when an individual's sexual health is seriously threatened. Since discrimination – on the basis of sex, on the basis of real or perceived sexual orientation or gender identity, or on the basis of HIV status – underlies most persecution relevant for this report, the legal framework of asylum will be covered in this chapter. Individual cases where asylum has been granted will be addressed in the chapters examining the particular violations that have given rise to the asylum claim.\textsuperscript{141}

2. \textbf{Council of Europe}

\textit{Jurisprudence of the European Court of Human Rights}

The European Convention on Human Rights does not establish a right to seek or to be granted asylum. However, the Court has repeatedly addressed the issue of asylum under the Convention's substantive articles, establishing that the (European) host country may be in violation of the Convention when expelling a person to a country where he or she is at risk of persecution or violence. In this sense, it has found that the Convention has extraterritorial application.\textsuperscript{142} For the purpose of this report, it is relevant to point out cases where the Court has examined the right to asylum for HIV positive persons who cannot access treatment in their country of origin, as addressed in Chapter 6B: Access to STI/HIV treatment. In one case the refusal to grant an Iranian man asylum in the United Kingdom, when claiming persecution based on his homosexual orientation, was upheld by the Court in 2004. This case is mentioned briefly in Chapter 2. Additionally, in \textit{N. v. Sweden}, the Court ruled that Sweden would violate its obligations under Article 3 were it to deport an Afghan woman who had separated from her husband and initiated a relationship with a Swedish man. This case is discussed in Chapter 3D: Adultery.

\textit{Conventions in the Council of Europe Treaty Series}

The Council of Europe Convention on preventing and combating violence against women and \textit{domestic violence},\textsuperscript{143} opened for signature on May 11, 2011, and thus not yet in force, provides that states shall ensure that gender-based violence against women may be recognized as a form of persecution for the purpose of asylum (Art. 60). The Convention is discussed more fully in Chapter 5A: Domestic & Intimate Partner Violence.

\textsuperscript{140} See reports on such proposals; Swedish Parliamentarian Jan Emanuel Johansson proposing a compulsory HIV test of all asylum seekers in 2005, news report in Swedish at \url{http://www.expressen.se/sv/1.76616} (18 February 2005), and UK Government 2004 response to proposals to introduce mandatory testing for immigrants, at \url{http://www.aidsmap.com/en/NEWS/35E0C868-4403-4DAB-9652-8FB051EC16BE.asp} (27 July 2004). Both sites last visited on 7 April 2010. See for for earlier examples of compulsory testing of immigrants in the wake of the HIV crisis Baldwin, pp. 77–85.

\textsuperscript{141} See, \textit{inter alia}, Chapter 3C, asylum granted based on the threat of being subjected to forced marriage, and Chapter 6B, asylum granted based on HIV status and lack of treatment in country of origin.


\textsuperscript{143} Council of Europe Treaty Series No. 210, May 11, 2011.
3. European Union

European Union regulations on immigration, border control, protection of refugees, and granting of asylum are too numerous and complex to list here. Worth mentioning for the purpose of this report is, nevertheless, a recent directive that establishes both that a ‘particular social group’ (within the meaning of the Geneva Convention) might include a group based on a common characteristic of sexual orientation, and that sexual violence as well as acts of gender-specific or child-specific nature can qualify as acts of persecution.

This so-called Qualifications Directive (2004)144 establishes common criteria for the identification of persons in need of international protection under European asylum law and sets out minimum standards for benefits that should be available to such persons in all member states. The Directive should have been implemented by all member states by 10 October 2006. Given that the Directive contains minimum standards, states are allowed to introduce or maintain more favorable provisions.

The Directive adopts the Geneva Convention definition of a ‘refugee’ as a person who has a well-founded fear of being persecuted in his or her home country on one of a number of grounds, among them the membership of a particular social group (Art 2 (c)). The fact that the applicant has suffered past persecution, serious harm, or direct threats is an indication that he or she has a well-founded fear of persecution (art 4.4). Nevertheless, international protection needs can also arise sur place; that is, the application can be based on events that have taken place since the applicant left his or her country or origin, or on activities in which the applicant has engaged after leaving his or her home country (Art 5). Agents of persecution can include the state (Art 6(a)), parties or organizations controlling the state or a substantial part of its territory (Art 6 (b)), or non-state actors, if it can be demonstrated that the state is unable or unwilling to provide protection (Art 6 (c)). The latter category is particularly relevant for persecution linked to sexual health since persecution on sexual grounds or gender-based violence commonly, but by no means always, occurs in the private sphere.

The Directive qualifies acts of persecution as treatment “sufficiently serious by [its] nature or repetition as to constitute a severe violation of basic human rights” (Art 9.1). Examples of acts of persecution provided by the Directive, are acts of physical or mental violence, including acts of sexual violence (Art 9.2 (a)); legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner (Art 9.2 (b)); prosecution or punishment, which is disproportionate or discriminatory (Art 9.2(c)); or acts of a gender-specific or child-specific nature (Art 9.2 (f)).

Article 10 addresses reasons for persecution. With regard to the concept of persecution based on membership of a social group, it establishes that a group shall be considered a ‘particular certain group’ when:

– members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
– that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. (Art 10.1(f))

The same Article then continues:

[D]epending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article (Art 10.1(f)).

Finally, the Article clarifies that in the assessment of whether there is a well-founded fear of persecution, it is irrelevant whether the applicant actually possesses the characteristics that attract the persecution (Art 10.2). This is a clarification crucial for persecution based on real or perceived homosexuality and non-conforming gender identity.

The Directive also addresses subsidiary protection in situations where an applicant faces “serious harm” (death penalty or execution, torture or degrading or inhuman treatment or punishment, or serious threat to a civilian’s life or person by reason of indiscriminate violence in situations of armed conflict) upon return to his or her country of origin (Art 15).

Minimum standard of benefits for a person who has been declared a refugee and granted asylum are worded in general terms. The “content of international protection” listed in the Directive includes protection from refoulement (Art 21), access to relevant information (Art 22), maintaining family unity (Art 23), residence permit and travel documents (Arts 24 and 25), access to employment (Art 26), access to education (Art 27), access to welfare (Art 28), access to health care (Art 29), access to accommodation (Art 31), freedom of movement within the Member State (Art 32), and access to integration facilities (Art 33).

4. Regional non-binding material

Worth mentioning here is the 2000 Council of Europe Parliamentary Assembly Recommendation 1470 (2000) on the Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe. This recommendation urges member states to examine the question of recognition of homosexuals as members of particular social groups in the meaning of the Geneva Convention, which would ensure that persecution on grounds of homosexuality would be recognized as a ground for asylum.

5. Domestic legislation

According to standing policy and case law in the Netherlands, the definition of being persecuted for reasons of membership of a particular social group in the sense of the Geneva Convention includes being persecuted for reasons of sexual orientation or gender identity. This is laid out in the Aliens Circular, a policy document specifying various criteria related to immigration and asylum issues, in interpretation of the Aliens Act (2000). An LGBT asylum seeker, in order to qualify for refugee status, must have a well-founded fear of persecution due to his/her sexual orientation or gender identity. The existence of a penalty clause in the country of origin that concerns LGBT people exclusively is to be considered an act of persecution. However, the criminal sanction must reach a certain gravity in order to justify the recognition as a refugee; sole criminalization does not automatically lead to the conclusion that an LGBT person from that country is a refugee.

An LGBT asylum seeker can also be granted residence in the Netherlands if he or she can show substantial grounds for believing that he/she faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment upon return, in the meaning of Article 3 of the ECHR, Article 7 of the ICCPR, or (with regard to torture) Article 3 of the CAT. The situation of LGBT people in the country of origin can also be a reason for so-called protection for humanitarian reasons. This is protection for persons for whom the Minister considers that for pressing humanitarian reasons it cannot be required that they return to their country of origin, even though they do not qualify for refugee status. This protection for humanitarian reasons has in recent times been applied to Iranian LGBT persons.

With regard to gender-based persecution, the Aliens Act does not specifically mention such persecution as a basis for asylum. However, the Aliens Circular advocates a “gender-inclusive approach to asylum.”

In Spain, a new asylum law was passed in 2009. In this law, Law 12/2009, of 30 October, regulating the right to asylum and to subsidiary protection, persecution both on the basis of gender and on the basis of sexual orientation have been included as grounds for asylum. These grounds have been defined as separate grounds, not included in the term ‘social group.’ Instead, refuge will be granted to

145 Adopted on 30 June 2000.


149 Pursuant to Article 29(1b) of the Aliens Act.

150 Article 29(1c) of the Aliens Act.


153 No. 17242, promulgated on 30 October 2009. Only available in Spanish; translation is author’s own.
a person who "because of a well-founded fear of persecution on account of race, religion, nationality, political opinions, membership in a particular social group, gender or sexual orientation" (emphasis added) is outside of his or her country of origin and cannot return (Art. 3). According to Article 6, acts that constitute persecution must reach a certain level of gravity. Among such acts are "acts of physical or psychological violence, including acts of sexual violence" (Art 6 (2) (a)), "procedures or punishments that seem disproportionate or discriminatory (Art 6 (2) (c)), and "acts of sexual character that affect adults or children" (Art 6 (2) (f)).

From the text of the law, it appears that persons of a particular sexual orientation or gender can also constitute a 'social group' in the meaning of the law. Article 7(1)(e), defining ‘particular social group’ as a ground for protection states that with account taken to the prevailing circumstances in the country of origin, the concept of a particular social group can include a "group based on a common characteristic of sexual orientation, sexual identity, and/or age," as well as persons who flee their countries of origin in response to a well-founded fear of persecution on account of gender and/or age. Agents of persecution may be agents of the state, agents of organizations or groups controlling the state, or non-state actors, when the state or other relevant entities are unable or unwilling to provide protection (Art 13).

According to one commentary, the reference to “prevailing circumstances in the country” in Article 7 (defining membership in a particular social group) may limit the scope of protection for women or persons persecuted on the basis of sexual orientation. This caveat, according to the commentary, could imply that persecution that is wide-spread and normalized, in particular when committed within families or communities, would not be perceived as sufficiently serious.154

6. Concluding remarks

Asylum law is included in this report only to demonstrate that severe persecution on grounds related to sexual health has in recent years been acknowledged as a ground that can lead to asylum. In the wake of the Second World War, refugee status was granted exclusively for individual persecution primarily on account of ethnicity/race, religion, and political opinion: violations of ‘traditional’ civil and political rights, committed by state agents.155 While the legal framework has remained virtually the same – based on the definitions and limitations of the Geneva Convention – the understanding of what groups may deserve protection has expanded. There is a growing acceptance in the European region that, for the purpose of asylum law, persecution can take other forms than the ‘traditional’ without being less serious. This includes the acknowledgement that the source of persecution can be non-state actors or entities, such as perpetrators of domestic violence or mob violence against gays and lesbians, when there is no effective system to bring the perpetrators to justice and to protect the victims. It also includes the recognition that sexual orientation, gender identity, and gender are characteristics that are as innate to a person as her ethnicity or religion, and that it would be unreasonable to expect her to change or hide these characteristics in order to live free from persecution. This means that persons who share these characteristics deserve protection from persecution as members of a particular social group in the meaning of the Geneva Convention or, in the Spanish law, as individuals persecuted on account of their sexuality or gender.

Asylum laws on EU and domestic levels are part of a broader body of law related to immigration in general and immigration control in particular. Both the legal provisions and their application merit critical examination from a human rights perspective. It is not the intention of this report to engage in this debate, but merely to draw attention to how asylum can be a remedy of last resort when the sexual health of a person is seriously threatened.

For individual cases, see relevant chapters discussing the violation that motivated the asylum claim.


155 The two by far most important international documents granting a right to asylum being the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol.