II. PENALIZATION OF SEXUAL ACTIVITIES

A. Introductory remarks

In almost every state, criminal law is not only used to deter and prosecute sexual conduct understood to be violent or otherwise coercive, but is also applied to a wide range of consensual sexual conduct occurring between adults in private. In the second case, criminal law is used selectively to enforce certain moral, religious, or cultural standards. These standards are often arbitrary (i.e., not necessary or justifiable in a democratic society) and have negative impact on rights and on sexual health. Moreover, police practices regarding consensual adult sexual conduct in private – sometimes under cover of criminal law enforcement, but often without actual juridical basis in the law – can have grave effects on health and rights, especially of persons who are already socially marginalized. The criminalization of consensual sexual conduct between adults in private constitutes direct state interference with respect to private life; it also violates the right to equality and non-discrimination. Criminalization of consensual conduct between adults can proscribe sexual practices (‘sodomy’, ‘unnatural offenses’), sexual conduct between same-sex partners, sexual conduct between unmarried partners, and sexual conduct outside of marital relationships.

Criminalization of consensual, private sexual behaviour among adults has many consequences for sexual health. Persons whose sexual behaviour is deemed a criminal offense strive to hide their behaviour and relationships from agents of the state and others, not availing themselves of sexual health services on offer. Research has documented that those engaged in sexual behaviour deemed criminal evade or do not take full advantage of HIV and STI services for prevention and treatment of disease, fearing compromised medical privacy or doubting health providers’ respect for confidentiality. These consequences may be exacerbated by other characteristics of the person, which render them more vulnerable to abuse by authorities under the criminal law such as disfavoured sex, gender, race, ethnicity, or national status. Many legal systems fail to create remedies that both eliminate immediate barriers (i.e., the stigma that criminalization causes or exacerbates) and reach the underlying basis for abuse (race, national status, sex, or gender).

Similarly, seeking out sex education, contraceptive information and services, or abortion (even when it is legally permitted) is compromised by fear of identification, arrest, and prosecution for engaging in proscribed but consensual and desired forms of sexual behaviour. Furthermore, sexual practices conducted quickly and secretively to avoid detection do not foster safer sex practices or good communication between partners. Criminalization of consensual behaviour is a direct impediment and barrier to the ability to access appropriate care and services for sexual health, leading to no care, self-care, or care at the hands of non-professionals, with predictably poor results.

In addition to reduced ability to access existing information and services, persons who do reach services report being ill-treated by medical providers on the grounds of their illegitimate status, should it become known. Refusal to make clinic appointments, refusal to treat, or treatment with gross disrespect, private shaming, or public disparagement are among the abuses reported, along with hurried and inferior care. Name-calling, violation of medical privacy, and segregation to specific treatment areas removed from other patients are reported. These experiences reduce the likelihood that patients will return for future care.

Moreover, the criminalization of consensual sexual conduct has additional consequences beyond its direct effect on access to and quality of care for sexual health. Criminalization intensifies and reinforces stigma against persons engaging in, or imagined to engage in, sexual conduct which is against the law. Persons or groups of persons thus stigmatized are targets of violence (sexual and non-sexual), extortion, and other violations by state and non-state agents. Blackmail is frequently reported, with stigmatized persons afraid to report blackmail to the police or other authorities, for

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156 These introductory remarks have been drawn from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.
157 As numerous international rights cases and authorities have noted, the use of the criminal law to impose religious or moral beliefs on citizens in regard to sexual conduct is an arbitrary and discriminatory use of the power of the state which cannot be sustained under rights review. See Section on International human rights law.
158 Definitions of sodomy can include both same-sex and heterosexual anal or oral sex; definitions of unnatural sexual practices are often even broader, but generally capture a range of non-reproductive sexual practices.
159 Sexual health services include access to health care in regard to sexually transmitted infections, HIV, contraception, abortion, and sexual function and dysfunction, as well as access to comprehensive and accurate information about sexuality. Sexual health services must incorporate principles of non-discrimination, in regard to educational content as well as access.
fear of arrest (and because extortionists are not uncommonly police officers operating extra-murally). Those committing ‘consensual sexual crimes’ are thus targets for a range of abuses, which can be committed against them with impunity. Persons stigmatized through real or imagined violation of laws against consensual sex face reduced enjoyment of the full range of other rights, particularly rights to bodily integrity, education, expression and association, and employment. For example, impunity for police abuse (sometimes reaching the level of torture) has been associated with many criminal laws against same-sex conducts as well as regimes criminalizing prostitution.

A. Penalization of same-sex conduct and other non-conforming sexual practices

1. Introduction

The European region has taken a lead in decriminalizing same-sex conducts between consenting adults in private. The European human rights system was the first in the world to apply human rights parameters to penalization of same-sex behaviour, in Dudgeon v. United Kingdom, as early as 1981 (see below). The privacy argument, used by the Court, has since been employed both in international jurisprudence and by domestic courts. The leading case internationally to apply privacy and non-discrimination rights to issues of consensual same sex, Toonen v. Australia, was decided thirteen years after Dudgeon, in 1994.

On the other hand, there have been cases that illustrate a limit to the European Court of Human Rights’ willingness to recognize the rights under Article 8 for persons who either engage in non-conforming (but fully consensual) sexual practices or identify as homosexuals. As will be discussed below, these cases can be criticized from a sexual self-determination point of view, and raise questions about whether the Court is fully ready to embrace a view on sexual privacy as a value as fundamental as other aspects of human privacy and dignity.

On the domestic level, many European states have a long tradition of respecting privacy rights, flowing from the strong influence of Enlightenment theories and, from a legal viewpoint, Napoleonic laws. Decriminalization of same-sex conduct has followed as a consequence of these, and by the end of the nineteenth century France, Italy, Spain, Portugal, Belgium, and the Netherlands had all decriminalized same-sex sexual conducts among consenting adults. More recently, the rulings of the European Court of Human Rights have had great influence over domestic legislatures; almost without exception, countries that have been found to be in violation of privacy rights for criminalizing non-conforming sexual behaviour have reformed their laws accordingly. EU policies have also had strong influence, in particular over candidate member states.

A few countries in the region, all of them former Soviet republics, still penalize consensual same-sex behaviour.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

(i) Penalization of same-sex practices in private between two persons – In Dudgeon v. the United Kingdom the applicant was a homosexual man living in Northern Ireland. According to Northern Irish criminal law, ‘buggery’ (anal intercourse) and ‘gross indecency’ between males (e.g. mutual masturbation, oral-genital contact) were punishable with various degrees of imprisonment, regardless of whether they took place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants were consenting. The applicant, who had been subject to a police investigation as regards his same-sex activities, claimed that he had experienced fear, suffering, and psychological distress directly caused by the laws in question. He contended that the relevant provisions violated his right to respect for private life under Art 8 of the Convention.

The Court found that the existing legislation constituted a continuing interference with the applicant’s right to respect for his private life, which includes his sexual life, within the meaning of Article 8 (1). The risk of harm to vulnerable sections of society requiring protection, or effects on the public, provided insufficient justification to argue that there was a “pressing social need” to make homosexual acts criminal offences. Furthermore, moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards could

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160 See for example statements from the Special Rapporteur on Torture.


162 Application no. 7525/76, decided on 22 October 1981.
not warrant interfering with the applicant's private life to such an extent as to criminalize private homosexual relations. In conclusion, the restriction imposed on the applicant, by reason of its breadth and absolute character, was found to be disproportionate to the aims sought to be achieved. The Court concluded that the applicant's rights under Art 8 had been violated.\(^\text{163}\)

By contrast, here should be mentioned F. v. United Kingdom\(^\text{164}\) in which the Court declared inadmissible an application from an Iranian homosexual man who had been denied asylum in the United Kingdom. The Court argued that the applicant had not shown that he would be at real risk of extra-judicial execution or torture on the ground of his sexual orientation upon return. It was clear that Iran did not respect the right to private and family life for homosexuals, but, held the Court, this right is less fundamental than the right not to be subjected to ill-treatment. Thus, "it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention." The applicant's application was declared manifestly ill-founded. In conclusion, possible violations under Article 8 (of a self-identified homosexual man) are not sufficiently 'serious' to motivate asylum under the Convention. This outcome raises significant concerns from a sexual health perspective.

(ii) Penalization of group sex among men – In A.D.T. v. the United Kingdom\(^\text{165}\) the applicant was a gay man whose house had been searched by the police, finding videotapes that contained footage of the applicant and four other men engaging in oral sex and mutual masturbation in his home. He had been convicted of the offense of gross indecency. 'Gross indecency' was understood to mean mutual masturbation, intercrural contact, or oral-genital contact between men, when not committed in private. An act where more than two persons had taken part or had been present was not considered to have been committed 'in private.' The applicant complained that his right to respect for his private life under Article 8 had been violated.

The Court agreed. It stated that the fact that more than two persons were involved did not render the acts public. Likewise, nothing suggested that the videotapes would have been made available to the public. Therefore, the applicant was the victim of an interference with his right to respect for his private life, both in relation to the existing legislation, and with regard to the conviction for gross indecency. Since the activities were found to be private, the Court adopted the same narrow margin of appreciation afforded state authorities as in other cases involving intimate aspects of private life (e.g. Dudgeon, above) to determine whether the interference was justifiable for the protection of health and morals. It found no such justification. In conclusion, the Court held that there had therefore been a violation of Article 8.

(iii) Penalization of consensual sadomasochistic sex – The applicants in Laskey, Jaggard and Brown v. the United Kingdom\(^\text{166}\) were three men who had been arrested for being involved in gay sadomasochistic activities between adults, acting in private and with full consent. They had been found guilty of assault and wounding and convicted to imprisonment, and complained before the Court that their right to respect for private life under Article 8 had been violated.

The Court reaffirmed that the interference under the relevant law pursued a legitimate aim under the Convention of ‘protection of health and morals.’ It then discussed whether this interference could be deemed to be ‘necessary in a democratic society’ and whether the interference was proportionate to the aims sought. The Court accepted that one of the roles of the state is to regulate activities that involve the infliction of physical harm – whether in the course of sexual conduct or not. In commenting on the consent of the victim it argued that both public health considerations and the general deterrent effect of criminal law were at stake, as well as the personal autonomy of the individual. Furthermore, state authorities were entitled to have regard not only to actual harm but also to “the potential for harm inherent in the acts in question.” It found that the interference could be deemed necessary in a democratic society, and not disproportionate to the aims pursued. In conclusion, the Court found no violation of Article 8.

From the perspective of sexual health and sexual self-determination, the reasoning of the Court and the outcome of this case have significant problems. By contrast with its findings in Dudgeon and A.D.T, the Court here allowed the invasion of privacy in the name of protection of bodily integrity. It

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\(^{163}\) This case was used as an important precedent for Norris v. Ireland (application no. 10581/83, decided on 26 October 1988), and Modinos v. Cyprus (application no. 15070/89, decided on 22 April 1993): cases in which circumstances were very similar and the outcome the same.

\(^{164}\) Application no. 17341/03, Admissibility decision, decided on 22 June 2004.

\(^{165}\) Application no. 35765/97, decided on 31 July 2000.

is noteworthy however that the alleged crime had no victim – there was no physical damage to the parties, who all had fully consented to the practice. This case illustrates unwillingness on behalf of the Court to fully extend the rationale of the above-mentioned cases to all situations of non-conforming sexual practices, conducted in private and with full consent.  

3. European Union

No binding law from the European Union addresses penalization of sexual activities directly. However, a prohibition of same-sex activities among consensual adults in private runs contrary to EU non-discriminatory provisions where sex and sexual orientation are protected grounds. See Chapter 1.

4. Regional non-binding material

Both the Council of Europe and the EU have strongly condemned the penalization of consensual same-sex behaviour. Here will be highlighted only a few important documents. For example, the fact that the European region has been leading the call for decriminalization of same-sex conduct is illustrated by the Council of Europe Parliamentary Assembly Recommendation 924/1981 on discrimination against homosexuals. This early document, which inter alia recommended that all laws criminalizing homosexual acts between consenting adults be abolished, and that all special records on homosexuals be destroyed, was the first document of its kind in the world issued by an international organization.

A contemporary example of great weight is Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the the Council of Europe Committee of Ministers in March 2010. This recommendation covers a wide range of issues and uses human rights parameters to strongly recommend that all laws that penalize consensual same-sex behaviour between adults be repealed (para 18).

Other crucial documents are three resolutions by the European Parliament from the late 1990s, addressing Romanian sodomy laws in relation to Romania’s status as a candidate accession country to the EU. They condemn the Romanian criminalization of same-sex conduct, as well as the fact that Romania modified its sodomy law of the time (Article 200 of the Romanian Criminal Code) to introduce stiffer penalties for same-sex conduct. These European Parliament resolutions are an expression of the fact that respect for LGBT rights (as part of respect for human rights) is part of the Copenhagen criteria on admission of new member states. Article 200 of the Romanian Criminal Code, which prohibited sexual relations between persons of the same sex, “committed in public or producing a public scandal,” was repealed in 2001, on the ground that it both ran contrary to the respect for private life, as protected by the Romanian Constitution, and Romania’s 2000 anti-discrimination law. The repeal is widely believed to have taken place in response to European Parliament and Council of Europe pressure. For these reasons, the European Parliament documents probably represent the most

167 Here should be mentioned the case of K.A. and A.D. v. Belgium (applications 42758/98 and 45558/99, decided on 17 February 2005. So far in French only), in which the applicants had engaged in sadomasochistic sex and had been convicted of occasioning bodily harm. Like in Laskey et al, their conviction was not found by the Court to be in violation of Article 8. However, the big difference in this case was that here one of the participants, the wife of one of the applicants, clearly had withdrawn her consent to partake. The Court focused on the unwillingness on behalf of the applicants to stop the activity, which involved an increasing degree of violence towards the non-consenting party. From a sexual health and rights perspective, this decision goes well in line with principles of consent and the right not to be subjected to sexual violence.


169 Adopted on 1 October 1981.


171 A country seeking membership of EU must conform to the conditions set out by Article 49 and the principles laid down in Article 6(1) of the Treaty on European Union. The criteria were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. One of these is “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.” See http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm. Visited on 24 February 2010.

successful strategy that the EU has pursued in order to obtain the repeal of legislation criminalizing same-sex conduct in a candidate accession country.

5. **Domestic legislation**

As mentioned above, several European countries abolished criminal provisions outlawing same-sex activity as early as in the nineteenth century. In the twentieth century, Poland decriminalized same-sex activity in 1932, followed by Denmark in 1933, Iceland in 1940, Switzerland in 1942 and Sweden in 1944. More recent examples include Slovenia (legal since 1977), Russia (1993), Azerbaijan (2000), and Romania (discussed above). By now, consensual acts between same-sex adults are legal in most countries in the region. Exceptions include Uzbekistan and Turkmenistan; see below.

The above-mentioned cases from the European Court of Human Rights have had concrete effects in the relevant countries:

Following Dudgeon (1981), male homosexual sex was decriminalized in **Northern Ireland** in 1982, through the passing of the **Homosexual Offences (Northern Ireland) Order 1982**. Following A. D. T (2000), the **Sexual Offences Act 2003** was passed in the **United Kingdom**, which abolished the crime of gross indecency and decriminalized group sex in private.

The government of **Ireland** took legislative action after the European Court of Human Rights decision in Norris (1993). The new **Irish Criminal Law (Sexual Offences) Act 1993** entering into force on 7 July 1993, modified the Irish criminal legislation regarding homosexual acts. Since the entry into force of the new law, same-sex acts between consenting male adults of more than 17 years and capable of valid consent are no longer offenses. Female same-sex acts were never criminalized.

**Cyprus** did not immediately change its legislation on consensual same-sex activity after the European Court of Human Rights decision in Modinos (1993). In 2002, the criminal provisions that prohibited consensual sexual activity among adult males who are over the age of consent were repealed in the Southern, Greek, part of the island. However, a provision criminalizing sexual relations between consenting adult males is still in effect in the Northern, Turkish part of Cyprus though, according to reports, seldom enforced.

Prior to 1993 sexual intercourse between men was a criminal offense in **Russia**. There was no criminal liability for same-sex conduct between women. With the passing of a federal law in 1993, introducing changes to the Criminal Code, voluntary sexual intercourse between men ceased to be a crime. The term ‘ sodomy,’ previously used for both consensual and non-consensual same-sex activities, remained as part of Articles 132 (sexual assault), 133 (coercion to perform sexual acts), and 134 (sexual intercourse and other sexual acts with a person under the age of sixteen) in the new Russian Criminal Code, passed in 1996. According to a 2004 Directive from the Supreme Court, clarifying peculiarities of the application of Articles 131 and 132 of the Criminal Code, ‘ sodomy’ is to be understood as sex between men, but only forced or violent ‘ sodomy’ is criminalized. Similarly, the same articles mention ‘ lesbianism,’ which is also criminalized when expressed through violence or force.

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178 Information from Turkish LGBT information site, Turkeygay.net, at [http://www.turkeygay.net/cyprus.html], Last visited on 9 December 2009.
179 Information and translations in this section from researcher and Ukrainian lawyer Oksana Shevchenko.
181 Please note that the translation provided by OSCE ([http://legislationonline.org/](http://legislationonline.org/)), uses the term ‘ pederasty’ instead of ‘ sodomy.’ This translation is incorrect.
182 Translation by researcher and Ukrainian lawyer Oksana Shevchenko.
183 Directive no 11 of 15 June 2004, only available in Russian.
Similar to Russia, Kyrgyzstan decriminalized consensual same-sex activity between men in 1999.\footnote{Information gathered by researcher and Ukrainian lawyer Oksana Shevchenko.} Same-sex conduct between women was never penalized. However, similar to Russian criminal law, the Kyrgyz Criminal Code still singles out same-sex relationships as ‘sodomy’ and ‘lesbianism,’ making ‘forced’ sodomy or lesbianism subject to prosecution as essentially distinct from opposite-sex sexual violence.\footnote{Articles 130, 131, and 132, Kyrgyz Criminal Code. Information gathered by researcher and Ukrainian lawyer Oksana Shevchenko, confirmed by information in Labrys Shadow Report to CEDAW, 2008, available at http://www.iwraw-ap.org/resources/pdf/42_shadow_reports/Kyrgyzstan_SR_Labrys.pdf. Last visited on 25 February 2010.}


6. Concluding remarks

There is an almost total consensus in the region that consensual, adult same-sex activities should not be regulated by criminal law. This is shown by the strong laws on non-discrimination based on sexual orientation, as covered by other chapters of this report, but also by the fact that almost all countries have abolished criminal law provisions penalizing consensual same-sex conduct.

The case law of the European Court of Human Rights demonstrates that total bans on consensual same-sex activities in private violate Article 8 of the Convention. Similarly, bans on (homo)sexual activities between more than two persons, conducted in private and with full consent, also infringe upon the right to private life under Article 8 of the persons involved. The Court has so far not recognized that bans on consensual sado-masochistic sex may run contrary to privacy rights, as illustrated by its decision in Laskey et al. Here, the Court limited the notion of privacy even in the presence of consent of individuals to sexual practices that were clearly harmless, for the reason that sado-masochistic practices could result in some kind of ‘vulnus,’ or wound, to the physical body. This outcome is unfortunate from a sexual rights point of view. The Court’s statement about “the potential for harm inherent in the acts in question” indicates a failure to understand the nature of sadomasochistic practices. Similarly, the Court’s declaration about the limited reach of Article 8 in asylum procedures, in F. v. United Kingdom, raises concerns as it suggests a view on sexual identity as less crucial to individual dignity and personhood than other personal characteristics.

The former Soviet Republics are among the countries in the region that last decriminalized consensual same-sex behaviour, with a couple of notable exceptions where male homosexual sex is still a criminal offense. With some variations, penal codes of former Soviet Republics are based on the old Soviet or the more recent Russian criminal law. It is noteworthy that Russia and Kyrgyzstan, while having decriminalized consensual same-sex conduct for both men and women, still use special terms for sexual crimes where the perpetrator is of the same sex as the victim, instead of employing a gender-neutral language on rape and other sexual crimes. This is problematic. Separating sexual crime in these two groups – same-sex and opposite-sex – reinforces the idea that same-sex and opposite-sex sexual crimes are essentially different, and also involves the risk of further stigmatizing same-sex activities. A neutral system would criminalize sexual acts performed without consent without drawing any distinction based on the gender(s) of perpetrator and victim.

B. Criminalization of HIV transmission

1. Introduction\footnote{Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.}

Specific criminalization of HIV transmission (through sexual and other behaviour) has recently become a popular state response to HIV. However, a rights and health analysis suggests many problems with this approach and that the appropriate application of existing criminal law (on assault, for example) is more suitable and effective.\footnote{See Special Rapporteur on the Right to Health} Criminal statutes vary greatly in terms of what is prohibited: intentional sexual conduct (i.e., intending to cause transmission and infection) or sexual behaviour that is...
deemed reckless. To avoid criminal penalty, some laws require the infected person to announce his or her status to the potential partner prior to sexual relations, while others require taking protective steps (using a condom). Across such laws, the definition of prohibited sexual practices is often vague, violating the basic principle of criminal law that conduct must be described with sufficient clarity to give notice. Other laws explicitly (or de facto) are used to address only specific populations perceived to be particularly prone to ‘risky behaviour,’ for example, persons in sex work or men who have sex with men, such that the laws may be discriminatory in substance or application. Efforts to criminalize reckless or intentional transmission of HIV are often undertaken on the grounds of protecting vulnerable women (especially wives) against infection by male partners. Paradoxically, these laws are often turned against women. Women in many parts of the world face negative consequences upon disclosing their HIV status, on one hand, or refusing sex, on the other, which leaves them more vulnerable to acting in a way that can lead to their prosecution.\textsuperscript{189}

Although laws criminalizing intentional or careless HIV transmission might serve as strong statements of social disapproval about harmful or reckless sexual behaviour, the most significant effect on sexual health is that such laws discourage people from being tested and knowing their HIV status. Weighing the very small number of cases prosecuted under these laws against their impact suggests legislators turn to them as symbolic rather than functional interventions. Nonetheless, their negative rights and health consequences, in part through discriminatory policing and associated abuses, are felt by already stigmatized populations (for example, LGBT people, sex workers, and immigrants).

For these reasons, UNAIDS urges governments to limit criminalization to cases of intentional transmission, i.e. to the unusual cases where a person knows his or her HIV positive status, acts with the intent to transmit HIV, and does in fact transmit it. Furthermore UNAIDS recommends that if criminal law is used, the law should not be HIV specific but general criminal law should be applied; it should not be applied when the person did not know or did not understand that he or she was HIV positive; it should not be applied to acts that pose no substantial risk of transmission, or if the carrier of the virus took reasonable measures to reduce such risk; it should not be applied to cases where the partner was aware of the person’s positive status, and there was no deceit or coercion; and it should not be applied when the reason for concealment was the fear of violence or other serious consequences.\textsuperscript{190} UNAIDS and the UN Office for the High Commissioner for Human Rights also recommend states to ensure that any application of criminal law to HIV transmission should be in full consistency with their international human rights obligations, respecting in particular an individual’s right to privacy, highest attainable standard of health, freedom from discrimination, equality before the law, and liberty and security of the person.\textsuperscript{191}

For the purpose of sexual health and rights, the recommendations from UNAIDS provide useful guidance. Public health as well as general human rights concerns strongly suggest a restrictive approach to the application of criminal law in the combat of HIV/AIDS.

In the European region general criminal law tends to be used, applying provisions such as causing grievous bodily harm or assault, to prosecute cases of HIV transmission. Reckless transmission is generally punishable. However, several courts in the region have applied these provisions cautiously in cases of HIV, and, in their jurisprudence, have highlighted the many potential pitfalls of broad penalization of reckless transmission. Courts in the United Kingdom, Switzerland, and the Netherlands have addressed issues such as consent to the risk of contracting HIV on behalf of the sexual partner; real risk of transmission as opposed to a mere theoretical risk; and the need to establish reckless intent to cause harm on behalf of the defendant. In a commendable fashion, the courts have in these cases shed light on legal complexities involved in the application of criminal law on sexual, non-violent conduct where public health is at stake, and have carved out criteria for a narrower application of provisions criminalizing HIV transmission.

\textsuperscript{189} See, for example, Open Society Institute, “10 Reasons to Oppose the Criminalization of HIV Exposure or Transmission,” (2008). Available at http://www.soros.org/initiatives/health/focus/law/articles_publications/publications/10reasons_20080919/10reasons_20081201.pdf. Visited on 27 December 2009. Criminal statutes against intentional or reckless transmission may also have other perverse effects, when applied to pregnant women in childbirth, who may be viewed as infecting the newborn.

\textsuperscript{190} UNAIDS, “Policy Brief on Criminalization of HIV Transmission 2008,” available at http://data.unaids.org/pub/BaseDocument/2008/20080731_ic1513_policy_criminalization_en.pdf. Visited on 21 December 2009. See also OHCHR and UNAIDS, International Guidelines on HIV/AIDS and Human Rights (2006), UNAIDS Geneva Guideline 4: “Criminal and/or public health legislation should not include specific offences against the deliberate or intentional transmission of HIV, but rather should apply general criminal offences to these exceptional cases. Such applications should ensure the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.”

\textsuperscript{191} UNAIDS “Policy Brief on Criminalization of HIV Transmission 2008,” referring to Articles 3, 7 and 12 of the UDHR, and Article 12 of the ICESCR.
2. Council of Europe

Jurisprudence of the European Court of Human Rights

The European Court of Human Rights has not addressed the issue of criminalization of HIV transmission directly. However, one case merits attention in this context, which dealt with compulsory isolation of an HIV positive person. Criminal law had not been applied in his case (but administrative law), but state interference with his rights to liberty and freedom of movement in order to prevent HIV transmission from taking place suggests parallels with cases of prosecution and punishment for post-facto HIV transmission.

In the case, Enhorn v. Sweden, the applicant was a HIV positive man who based on his HIV status had been kept in confinement for long stretches of time by Swedish authorities. Swedish courts had determined that he was unable to comply with measures prescribed to him aimed at preventing him from spreading the HIV infection and had ordered confinement under the Swedish Infectious Diseases Act. In total, the order to deprive him of his liberty was in force for seven years, while the time he spent in isolation amounted to one year and a half. The applicant claimed that the decision to deprive him of his liberty went contrary to his right to liberty and security under Article 5 of the Convention.

The Court found that the deprivation of liberty as such had a basis in Swedish law, and that the HIV virus qualifies as a disease sufficiently dangerous to public health and safety as to justify restriction of rights. However, the Court argued that the Swedish government could have taken more lenient measures to prevent the applicant from spreading the virus. Moreover, the length of isolation was such that a fair balance had not been struck between the need to prevent the virus from being spread and the applicant's right to liberty. In sum, the Court found a violation of Article 5.

The case has obvious connections to health and rights. First, it concerns basic rights such as liberty and self-determination when the state takes restrictive measures against an individual whose mere liberty is judged to be a danger to public health. It also highlights how the applicant's sexuality as such was seen as dangerous by the Swedish state. The authorities had concluded that only detention could possibly prevent this man from engaging in reckless sexual behaviour and thereby spread the infection, even though very few facts about his past behaviour pointed in this direction. In relation to criminalization of HIV transmission, this case is relevant in that the Court emphasized that Swedish authorities had not complied with its international human rights obligations in its combat against the virus – as strongly urged by the UNAIDS (above). The use of criminal law or, here, administrative law with coercive elements, shall be used as a last resort in measures fighting HIV. Here, coercive measures had been taken that were not deemed to be the last resort available to the authorities. The Court's decision illustrates that states cannot exclude individuals from rights protection even though they carry the HIV virus; a holding of equal significance for issues of criminalization of HIV transmission.

3. European Union

This aspect of criminal law falls outside of the scope of binding EU law.

4. Domestic legislation and case law

Research shows that there is a tendency in the region increasingly to resort to criminal law in the combat against HIV. Prosecutions for HIV transmission have increased in Europe during recent years and several new laws have been introduced in the region with the effect of criminalizing transmission and/or exposure. Opposing trends also exist, however. The examples below have been selected to show that in several countries, although criminal law in fact is available for cases of unintentional transmission – contrary to recommendations by UNAIDS – there are significant legal safeguards to prevent criminal law from being employed in an arbitrary or abusive manner. In particular, jurisprudence has shed light upon many of the complexities brought to the fore in cases of unintentional transmission, and several courts have managed to narrow down the application of criminal law to very specific and exceptional cases.

In the United Kingdom, there is no specific criminal law provision on transmission of HIV. Instead,

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192 See, however, Z v. Finland (application No. 22009/93, decided on 25 February 1997), where the facts emanated from a prosecution for intentional HIV transmission, but the main issue regarded the right not to disclose one's HIV status, as part of the right to private life under Article 8; and also Klutin v. Russia (application No. 2790/10; see Chapter 1) where the Court ruled on refusal of residency based on HIV status.

193 Application no. 56529/00, decided on 25 January 2005.

transmission falls under Sections 18 and 20 of the Offences against the Person Act (OAPA) 1861, as amended. Section 18 is understood to regulate ‘intentional’ transmission. It provides that a person who “unlawfully and maliciously by any means whatsoever wound[s] or cause[s] any grievous bodily harm to any person… with intent” or who “do[es] some… grievous bodily harm to any person,” will be punished by life imprisonment. Attempt at intentional transmission is also punishable. According to the Terrence Higgins Trust, an international AIDS organization, no prosecution for HIV transmission has been successful under Section 18 of OAPA. This is because the burden of proof for conviction for this crime is very high, in comparison with the crime of ‘reckless’ transmission (below).\(^\text{195}\)

Reckless transmission is regulated in Section 20. The term ‘reckless’ does not appear in the actual legal text, but the concept is understood to be part of this provision (see, inter alia, in Regina v. Dica, below). Section 20 provides that “whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person,” will be liable for inflicting bodily injury and sentenced to prison. In legal terms ‘reckless’ means that the carrier of the virus was careless either before sex – not notifying his or her partner that he or she had HIV (or lying about it), or during sex – not taking measures to protect the partner. In such a case no intention has to be shown on part of the offender for his or her sexual partner to contract HIV – instead, the crime consists of not trying to stop transmission from happening. In this case only actual transmission will be punished. No HIV transmission means that no crime has been committed.\(^\text{196}\) In conclusion, to secure a guilty verdict for reckless transmission of HIV, the prosecution has to prove that actual transmission took place; that no means of protection were taken; that the carrier of HIV was aware of his or her HIV status; that the carrier of HIV was (or should have been) aware of the risk of transmission; and that the partner did not explicitly give informed consent to sex with an individual he or she knew had HIV.\(^\text{197}\)

**Case law: consent to risk of HIV transmission**

In the case of Regina v. Mohamed Dica,\(^\text{198}\) the appellant was an HIV positive man who had had unprotected consensual sex with two different women who both contracted HIV. The defendant claimed that the two women had known that he was HIV positive, which they denied. The prosecution had not alleged that the defendant intentionally had infected the women. In the lower court, he had been found guilty of reckless grievous bodily harm and sentenced to eight years in prison. The trial judge withdrew the issue of consent from the jury, holding that whether or not the complainants had known of the appellant’s condition, their consent, if any, was irrelevant and provided no defense. According to the trial judge, earlier case law deprived the complainants “of the legal capacity to consent to such serious harm.”

The Court of Appeal, in contrast, found that consent was at the core of the case, determining that the relevant issue was whether the complainants had been consenting to the risk of infection with HIV. Such consent would provide a defense under Section 20 of the OAPA.

The Court discussed various situations in which adults engaging in sexual activity subject themselves to risks:

> These, and similar risks, have always been taken by adults consenting to sexual intercourse. Different situations, no less potentially fraught, have to be addressed by them. Modern society has not thought to criminalise those who have willingly accepted the risks, and we know of no cases where one or other of the consenting adults has been prosecuted, let alone convicted, for the consequences of doing so.

> The problems of criminalising the consensual taking of risks like these include the sheer impracticability of enforcement and the haphazard nature of its impact. The process would undermine the general understanding of the community that sexual relationships are pre-eminently private and essentially personal to the individuals involved in them. And if adults were to be liable to prosecution for the consequences of taking known risks with their health, it would seem odd that this should be confined to risks taken in

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\(^\text{195}\) Information about UK criminal law provisions from Terrence Higgins Trust, available at [http://www.myhiv.org.uk/Telling-peoples/Law](http://www.myhiv.org.uk/Telling-peoples/Law), last visited on 21 December 2009. See also legal guidance of the Crown Prosecution Service on the application of Section 18, establishing that for a conviction of attempt under the provision, the prosecution must prove “that the defendant intended sexually to transmit an infection to a person but failed to do so” (4.6). Available at [http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/](http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/). Last visited on 26 February 2010.


the context of sexual intercourse, while they are nevertheless permitted to take the risks inherent in so many other aspects of everyday life, including […] the mother or father of a child suffering a serious contagious illness, who holds the child’s hand, and comforts or kisses him or her goodnight. (paras 50–51)

The Court also noted the possible negative public health consequences of criminalization of the transmission of sexually transmitted diseases:

We have taken note of the various points made by the interested organisations. These include the complexity of bedroom and sex negotiations, and the lack of realism if the law were to expect people to be paragons of sexual behaviour at such a time, or to set about informing each other in advance of the risks or to counsel the use of condoms. It is also suggested that there are significant negative consequences of disclosure of HIV, and that the imposition of criminal liability could have an adverse impact on public health because those who ought to take advice, might be discouraged from doing so. If the criminal law was to become involved at all, this should be confined to cases where the offender deliberately inflicted others with a serious disease. (para 54)

In conclusion, the Court established that only if the complainants did not consent to the risk of transmission could the defendant be held responsible for the crime. It held that the trial judge had erred when withdrawing the issue of consent from the jury, and ordered a retrial.\footnote{In the retrial, the jury at the London Central Criminal Court on 23 March, 2005, found Dica guilty of recklessly infecting one of the two women with HIV. According to news reports, the defendant had persuaded the woman to have unprotected sex with him, even though she wanted to use condoms. See, \textit{inter alia,} report about the case at \url{http://news.bbc.co.uk/2/hi/uk_news/england/london/4375793.stm}. Last visited on 27 December 2009.}

\textbf{Case law: informed consent and honest belief in informed consent}

In \textit{R v. Feston Konzani},\footnote{England and Wales Court of Appeal, [2005] EWCA706, decided on 17 March 2005.} the Court of Appeal examined the issue of consent more directly. The appellant was an HIV positive man who had been aware of his infection since 2000. He had had unprotected sexual intercourse with three women without notifying them of his HIV status. They had all contracted HIV. He had been sentenced to ten years of imprisonment for recklessly infecting grievous bodily harm on them with Section 20 of the OAPA.

The Court of Appeal reiterated the finding in \textit{Regina v. Dica}, that the issue of consent on behalf of the partner is key to establishing criminal liability. Here, the Court also stressed that the consent has to be \textit{informed} in order to provide the defendant with a defense. Furthermore, the Court noted that there may be situations where the defendant honestly believed in the consent of the partner, even if such consent had never been expressed. This could also provide him with a defense under Section 20:

\begin{quote}
[W]e accept that there may be circumstances in which it would be open to the jury to infer that, notwithstanding that the defendant was reckless and concealed his condition from the complainant, she may nevertheless have given an informed consent to the risk of contracting the HIV virus. By way of example, an individual with HIV may develop a sexual relationship with someone who knew him while he was in hospital, receiving treatment for the condition. If so, her informed consent, if it were indeed informed, would remain a defence, to be disproved by the prosecution, even if the defendant had not personally informed her of his condition. […]. (para 44)
\end{quote}

In the present case, the jury had found that the complainants had not given a willing or informed consent to the risk of contracting the HIV virus. The Court of Appeal did also find no evidence, direct or indirect, that the appellant honestly had believed that any of the complainants had consented to the specific risk of contracting the virus. The appeal was dismissed.

In the \textbf{Netherlands}, Article 82 (1) of the \textbf{Criminal Code}\footnote{As understood by the general rule attempt to the commission of crimes, Article 45.} provides that transmission of serious illnesses falls under the crime of ‘grievous bodily harm.’ Articles 300–304 detail different kinds of grievous bodily harm and their respective punishments. From this can be drawn that HIV transmission can result in criminal liability. Article 300 penalizes physical abuse – that may result in serious bodily harm or death – and equates intentional injuring of a person’s health with physical abuse. Intentional HIV transmission could further be penalized under Articles 302 and 303: aggravated physical abuse and premeditated aggravated physical abuse. Actual transmission does not need to occur for liability to arise.\footnote{3 March 1881, as amended. Unofficial translation of excerpts available in English.}
Case law: examining conditional intent/criteria for recklessness

Several prosecutions of cases of HIV exposure occurred in the Netherlands between 2001 and 2005. With a Supreme Court ruling in 2005, these effectively ended. In the ruling, \textit{2659/03 IV/SB}, the Dutch Supreme Court examined the appeal against a sentence for grievous bodily harm resulting in two years and three months imprisonment for an HIV positive man. In 1999 on one occasion he had unprotected oral and anal sex with a 16-year-old boy, without disclosing his HIV status.

The Supreme Court noted that the Appeals Court had decided that the acts had created a “substantial possibility of grievous bodily harm being inflicted on the victim.” The Supreme Court discussed the notion of ‘conditional intent’—required in Dutch law to secure a conviction for grievous bodily harm—and came to another conclusion:

\begin{quote}
That fact that a person infected with the HIV virus who has unprotected sexual contact poses a danger does not in itself mean that the sexual acts in question create the kind of possibility of infection with the HIV virus—and thus causing grievous bodily harm—that can be considered substantial in answering the question whether a conditional intent existed according to general empirical rules. \textit{\textit{(para 3.6)}}
\end{quote}

This conclusion—that the evidence did not prove that there was a substantial possibility for infection—was reached after the Court had cited medical expert evidence that the chance of HIV transmission in the actual case (anal sex in which the victim had penetrated the accused) was one in 500. The Court noted that “under unusual circumstances involving increased risk” the conclusion could be different, but that in the case under consideration no such exceptional circumstances had presented themselves. The Court emphasized that legislators, and not courts, should decide whether HIV positive people who engage in unprotected sex should be punished, without regard to actual risk in the individual case. In conclusion, the Court set aside the judgment of the Appeals Court and remitted it back to be re-adjudicated and resolved.

According to commentators, this case means that it is irrelevant whether actual transmission occurred or not. The case centers on the notion of conditional intent, compared to the concept of recklessness used in the United Kingdom. The notion of conditional intent is based on the assumption that a person’s intention is directed either indirectly or recklessly towards hurting another person physically. However, as noted by the Court, most cases of transmission of HIV are neither intentional nor recklessly intended.

This decision effectively rules out the possibility of a successful prosecution for grievous bodily harm for HIV transmission in the Netherlands. The Dutch legislature has chosen not to enact legislation that would punish unprotected sex by HIV positive people without regard to actual risk.

Case law: acquittal when significantly low risk of transmission

In Switzerland, HIV transmission can be penalized by Articles 122 (causing grievous bodily harm) and 231 (spreading of human disease) of the Swiss Penal Code. Attempt is penalized. In a February 2009 case, the Geneva Court of Justice examined an appeal from an HIV positive defendant who had been sentenced to 18 months of imprisonment. He had had unprotected sex without disclosing his HIV status to two female complainants, and had been found guilty by the Police Court of attempted spread of a human disease and attempted serious bodily harm, in November 2008. No transmission of the virus had occurred. The appellant had been aware of his HIV status since 1998 and had undergone treatment since then. Since 2008, his viremia had been undetectable. He did not have hepatitis B, syphilis, Chlamydia, or herpes. His doctors had assured him that there was no risk of transmission. He admitted to having engaged in unprotected sex.

According to expert testimony, the risk of contamination when the infected person is undergoing successful treatment, whose viremia is undetectable, and who does not have any other infections, is too low to be scientifically quantified. Based on these facts, and since the appellant fulfilled all these criteria, the Court found that Articles 231 and 122 of the Criminal Code did not apply. The appeal was granted and the appellant was acquitted of those counts. This was the first ruling of its kind in the world.

\begin{flushright}
\textit{AR1860, Supreme Court, Criminal Section no. 02659/03; Decided on 18 January 2005. Full case only available in Dutch; unofficial translation to English of excerpts available. The accuracy of the translation has been confirmed through the kind assistance by André den Exter at the Institute of Health Policy and Management at the Erasmus University, Rotterdam.}
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\textit{Mr. S v. Mr. S2 and Ms. R; Order of Geneva Court of Justice, 23 February 2009. Available in English translation.}
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By contrast to the above mentioned laws should be mentioned Tajikistan, which singles out transmission of venereal diseases as a separate crime. Article 126 of the Criminal Code expressly punishes infection with a venereal disease by an individual “who knows about […] his illness.”207 Thus, intention to infect does not appear to be part of the definition of the crime. The provision raises concerns as it creates the idea that sexually transmitted infections require special attention, compared to other transmissible diseases, with significant risk for stigmatization and/or harassment of persons with HIV or other sexually transmitted infections.

5. Concluding remarks

The European region shows conflicting trends with regard to the criminalization of transmission of HIV. There are tendencies showing an increasing use of criminal law, which raises concerns from both a public health and a human rights-perspective. Prosecutions for HIV transmission have increased in Europe during recent years, and several new laws have been introduced in the region with the effect of criminalizing transmission and/or exposure.208 Bodies of law other than criminal law are also used to restrict rights of HIV positive persons. For example, Swedish administrative law not only allows the isolation of HIV positive persons, as illustrated by Enborn v. Sweden, but can also impose an obligation on an HIV positive person to notify sexual partners about his or her HIV status (regardless of whether engaging in protected or unprotected sex), and can prohibit an HIV positive person from sharing needles with others.209

On the other hand, case law shows a tendency to restrict the scope of criminal law to cases of intentional or at least actual transmission. The British Appeals Court, as seen above, has grappled with the notion of consent and effectively limited criminal liability to cases where no consent to the risk of transmission, or no credible belief that such consent existed, can be established. The Swiss case emphasizes that there must be real, as opposed to only hypothetical, risks of transmission. The Dutch Supreme Court has established the most far-reaching rule, effectively barring convictions for grievous bodily harm in cases of non-intentional transmission, with its reasoning around substantial risk and the need to establish intent to cause harm.

The legal rules discussed above are all, with the exception for the Tajik provision, general criminal law rules and not STI/HIV or even disease-specific. Transmission can be punished through provisions on assault or the causing of grievous bodily harm. Where the crime can be committed through recklessness (in Hungary or the United Kingdom) or conditional intent (in the Netherlands), penalization will only happen when actual transmission has taken place – though the Dutch case law, as discussed, suggests that there is less concern with actual transmission and more with the level of risk involved. Convictions for intentional transmission, where attempt can also be punished, are in fact very unusual.

C. Age of consent

1. Introduction

The legal age of consent is the age over which young people are considered by law capable of consent to sexual conduct. The notion of age of consent is based on an assumption that children, being more vulnerable than adults, need special protection against sexual abuse, and that there is a certain age under which the consent of the child becomes merely fictional. Consequently, sex with a person under that age will be prosecuted as statutory rape.

The overall theme for this chapter is the agency and autonomy of the minor to use his or her body for sexual purposes. At what point has the underage subject been entrusted agency over his or her (sexual) body? By determining that age, has the state struck a reasonable balance between the legitimate state interest in protecting minors from sexual abuse and coercion, and the equally legitimate right of the young person to explore his or her sexuality? Differently put, are considerations of freedom from sexual harm framed in a way that also respects the evolving capacities of the child? Are rules on age of consent non-discriminatory, regardless of sex and sexual preferences, or is there a difference in treatment of boys and girls, on one hand, and of same-sex conduct and opposite-sex conduct, on the other?

207 Tajik Criminal Code, unofficial translation. Please note that the author has not been able to confirm the accuracy of the translation or what year it was made.


As for international human rights standards, the Committee of the Rights of the Child has emphasized that the age of consent should be the same for boys and girls, but has refrained from recommending a particular age. The Committee has recognized the minor's right to autonomy/agency in declaring that the age of consent should reflect their status as rights-holders, "in accordance with their evolving capacity, age and maturity."\(^{210}\)

The European Court of Human Right has addressed the topic of age of consent from a non-discriminatory angle, examining cases where one particular sexual constellation has been deemed more detrimental to youth than others. The tendency in several countries was previously to set a higher age of consent for male same-sex activities than for opposite-sex and female same-sex activities. The Court has effectively struck down such regulations as discriminatory and unlawful.

Domestically, the legal age of consent varies strongly in the region, from the age of 13 in Spain, to 18 in Malta and Turkey. Different concerns play a part. Protection of youth is one, moral considerations may be another. However, most countries have set their age of consent to be lower than 18, which tends to be the age of majority and the legal age to marry. An interesting dilemma arises when the state on one hand has set the age of consent below 18, and, on the other hand, has agreed to penalize child pornography involving all persons under 18, under all circumstances. As will be shown, both the European Union and the Council of Europe have attempted to tackle this possible discrepancy.

2. Council of Europe

Jurisprudence of the European Commission of Human Rights

In *Sutherland v. United Kingdom*,\(^{211}\) the applicant was a young homosexual British man who complained that he, after the age of 16 but before the age of 18, could have been subject to criminal proceedings when engaging in sexual activity, while the same had not been the case had he wanted to practice opposite-sex activities. According to the British Sexual Offences Act, women could consent to sexual activities – whether with men or with other women – from the age of 16, while for same-sex acts between men the age of consent was 18. The applicant claimed that this discrepancy was a violation of his right to private life under Article 8 of the Convention, and discriminatory under Article 14.

The Commission swiftly dismissed the government's argument for maintaining the different ages of consent and found instead that no objective and reasonable justification existed for the difference. Interestingly, for the purpose of sexual health, it discussed public health considerations in relation to the HIV/AIDS epidemic and the need to be able to reach young men with information and preventative measures:

> To reduce the age of consent to 16 might have positively beneficial effects on the sexual health of young homosexual men without any corresponding harmful consequences.

(para 60)

In conclusion, the Commission found a violation of Article 8 in conjunction with Article 14.

The case, when reaching the Court, was struck off the list, since the United Kingdom had at that time changed the law and made the legal age of consent 16 years for all.

Jurisprudence of the European Court of Human Rights

The substantive issue reached the Court a few years later, in a string of cases against Austria and the United Kingdom. In all cases, the Court found for the applicants on similar grounds as in *Sutherland*.\(^{212}\) Only one case will be commented on here. In *L. and V. v. Austria*,\(^{213}\) Austrian courts had convicted both applicants of homosexual acts with adolescents. According to the Austrian Criminal Code, sexual acts between an adult male and a male teenager between the ages of 14 and 19 were prohibited; offenders were subject to imprisonment up to four years. For female same-sex and opposite-sex acts, legal age of consent was 14 years.

The Court noted that there was a growing consensus in Europe to apply equal age of consent for same-sex and opposite-sex acts. It also took notice of the fact that the majority of experts before

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\(^{210}\) Committee on the Rights of the Child, General Comment 4 (Adolescent Health) at [9].

\(^{211}\) Application No. 25186/94, decided on 1 July 1997.

\(^{212}\) The cases being *L. and V. v. Austria* (application nos. 39392/98 and 39829/98, decided on 9 January 2003), *S.L v. Austria* (application no. 45390/99, decided on 9 January 2003), *R. B. v. United Kingdom* (application no. 53760/00, decided on 10 February 2004), *Woditschka and Wilfling v. Austria* (application nos. 69756/01 and 6306/02, decided on 21 October 2004), *Wollmeyer v. Austria* (application no. 5263/03, decided on 26 May 2005), and *R.H. v. Austria* (application no. 7336/03, decided on 19 January 2006).

\(^{213}\) Application nos. 39392/98 and 39829/98, decided on 9 January 2003.
the Austrian parliament had expressed themselves in favor of an equal age of consent in a debate on the issue in 1995 – a recommendation subsequently ignored by the Austrian parliament. The Court established that the issue at hand was whether there was an objective and reasonable justification for why teenage boys needed more protection against relationships with adult men than teenage girls (with either adult men or women). It found no such justification. Instead, the Court declared that the Criminal Code provision in question “embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority,” and that such biased views could not serve to justify a difference in treatment under the Convention. Such biases, stated the Court, could not be accepted any more than “similar negative attitudes towards those of a different race, origin or colour.” Hence, the Court found that the provision was discriminatory and thus violated Article 8 in conjunction with Article 14.

Austria changed its provisions and made the age of consent 14 for all, after the applicants had been convicted but before the Court decided on the case.214 Practically therefore, the Court’s decision did not impact Austrian legislation.

Conventions in the Council of Europe Treaty Series

Both the Council of Europe and the EU have taken into consideration the discrepancy between domestic rules on age of consent and blanket prohibitions of child pornography for all under-18-year-olds, mentioned above. Legal documents prohibiting child pornography from these regional bodies make an attempt to distinguish between exploitation of children, on one hand, and consensual sexual expressions of youth, on the other. This can be understood as a way to oppose and combat sexual exploitation of children while at the same time respecting the evolving agency of the minor to use his/her body for sexual purposes.

One example can be found in the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, which is not yet in force.215 According to its Article 20(3), each party to the Convention may reserve the right not to apply the provisions on criminalization of producing and possessing pornographic material when this

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\text{involv[es] children who have reached the age set in application of Article 18, paragraph 2 [that is, the legal age of consent], where these images are produced and possessed by them with their consent and solely for their own private use.}
\]

Furthermore, Article 18(3) sets forth that the provisions on criminalization of sexual activities with children “are not intended to govern consensual activities between minors.” Commenting on this provision, in the Explanatory Report to the Convention, the Committee of Ministers state that:

\[
\text{It is not the intention of this Convention to criminalise sexual activities of young adolescents who are discovering their sexuality and engaging in sexual experiences with each other in the framework of sexual development. Nor is it intended to cover sexual activities between persons of similar ages and maturity. (para 129)}
\]

3. European Union

Similarly, the EU Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography216 offers a caveat for young persons’ consensual experimentation with technology for sexual purposes. A child is defined as any person below the age of 18 years, and all conduct relating to pornography involving children shall be made punishable. However, in language identical to that of the proposed Council of Europe Convention (above), this Framework Decision holds that a member state can exclude from criminal liability conduct relating to child pornography, where “images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use” (Art. 3(2)).

This provision then acknowledges that the determination of consent may be difficult in certain situations of power imbalance when young people are involved, and sets forth that even where consent has been established, it will be considered invalid if “for example superior age, maturity, position, status, experience or the victim’s dependency on the perpetrator has been abused in achieving the consent” (Art. 3(2)).

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214 Section 206, Austrian Penal Code, read in conjunction with Section 74, establishing that the term ‘unmündig’ means under 14. An exception is established for cases where one partner is younger than 16 years and not sufficiently mature to understand the significance of the sexual act; in these cases the act can also be punishable, (Section 207b).

215 Council of Europe Treaty Series – No. 201. Open for signature on 25 October 2007. As of April 2010 it had been ratified by Albania, Denmark, Greece, Netherlands, and San Marino. It will enter into force on 1 July 2010.

The exception provided for by both the Council of Europe and the EU sends an important message as it recognizes some degree of sexual autonomy of the minor. At the same time, one can easily imagine difficulties in the operative applications of these norms. In this era, with technologies developing quickly and distinctions between private and public material on the internet blurring, one may wonder what the criteria for images produced and possessed solely for private use will be. How will they be applied if the young person produces images privately and then posts them on a site that can be publicly accessed? Or if he or she sends them voluntarily to an older person, whose possession of such images is not protected? These are only a couple of examples illustrating why this exceptional provision, while recognizing the legitimacy of sexual autonomy of youth, can encounter significant complications when applied in practice.

4. Domestic legislation and case law

Age of consent is generally regulated by criminal law provisions, establishing under what age engaging sexually with children will be considered a crime. Sexual activity with a child under that age is equated to rape, regardless of whether force, violence, or coercion was employed. Punishment for statutory rape may be lower than punishment ascribed for other kinds of rape, depending on the circumstances in the case. In addition to statutory rape provisions, several countries in the region also have provisions that penalize sexual activities with teenagers who have just reached the age of consent and who may be in a particularly vulnerable situation due to coercion, dependency or other circumstances that threaten the sexual self-determination of the young person.

Legal age of consent vary strongly in the region, from 13 years in Spain to 18 years in Turkey and Malta. Most European countries now have the same legal age of consent for same-sex and opposite-sex acts. Exceptions include Greece, where the general (and apparently gender-neutral) age of consent is 15, but where another article establishes that "[s]odomy committed by an adult through the seduction of a person under seventeen (17) years of age, or for financial gain, shall be punished with imprisonment of at least three (3) months." This implies that so-called sodomy, or sex between men, will be illegal if one party is under the age of 17. It is, however, not clear from the legal text whether ‘seduction’ merely implies sexual contact, or if an element of coercion or abuse of power has to be present in order for criminal liability to arise.

In Portugal, age of consent was equalized to be the same for same-sex and opposite-sex couples in 2007, after sexual orientation was included as a banned ground for discrimination in the Portuguese Constitution in 2004. The age of consent in Portugal is 14.

The Penal Code of Italy establishes different ages of consent, not depending on whether the parties are of same or of opposite sex, but related to power dynamics and age difference. Article 609 quarter of the Italian Penal Code establishes the general age of consent as 14 years. However, if the older party to the sexual relation is a parent, guardian, cohabiting adult, or any adult exercising custody or being responsible for the education or treatment with the youngster (inter alia a doctor, teacher, tutor, or temporary custodian), the age limit for sexual contact is 16 years. If, finally, the age difference between two minors is less than three years, there is a diminished age of consent – setting the age limit at 13.

From a sexual health perspective the Italian model has significant benefits, as it both recognizes situations of power imbalance where there may be a heightened risk for coercion and abuse, and acknowledges that the sexual autonomy of young people close in age should be respected.

Case law: same-sex relationship alternating between legal and illegal violating the principle of equality

In Austria, the Constitutional Court examined the different ages of consent between male same-sex

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217 See further Section 5B.2: Sexual violence and exploitation of children.

218 Article 181, Spanish Criminal Code. According to Article 183, sexual abuse by the use of deception with a minor between 13 and 16 will render punishment.

219 Articles 103 and 104 Turkish Penal Code; sexual contact without the use of force with a minor between 15 and 18 is illegal but renders lower sentence than with "sexual attempt against children who are under the age of fifteen."

220 Article 203, Maltese Criminal Code.


222 Article 347, Greek Criminal Code, ibid.


224 Italian Penal Code (1930), as amended. Only available in Italian.
couples and all other couples in 2002. As commented on above, Section 209 of the Austrian Criminal Code made same-sex contacts between young men punishable, if one party was over 19 and the other between 14 and 19, while the age of consent for opposite-sex couples and female same-sex couples was 14. The Court pointed out that Article 209 had the practical effect of making a same-sex relationship between young men alternately punishable and not punishable – depending on the age and age difference of the parties involved. If the two young men were 16 and 18, the relationship was legal, but as soon as the older party turned 19, he would be guilty of an offence. This shifting nature of the legality of one and the same relationship, according to the Constitutional Court, violated the principle of equality under the Austrian Constitution. The provision was struck down. As pointed out above, the Austrian parliament made 14 years the equal age of consent for all in July 2002.

The reason the European Court of Human Rights considered the Austrian cases, even though the Austrian Constitutional Court had struck down the provisions and the Austrian Parliament already had repealed the law, was that the legislative changes did not affect the situation of persons who already had been convicted according to Section 209.

5. Concluding remarks

As pointed out above, age of consent for sexual activity goes to the core of how the state assesses the autonomy of a minor to take decisions on the exercise of his or her sexuality. A healthy development of sexual life, respecting the evolving capacities of the child, may be negatively affected by state restrictions. Such restrictions may present themselves as age limits for all so high that the consensual sexual experimentation of sexually mature youth is severely infringed upon, or as age limits differentiated by sexual orientation. More permissive approaches to sexual activity of youth can also, as pointed out by the European Commission of Human Rights, have positive public health effects in that they make sexual information about sexually transmitted diseases and contraceptive methods more easily accessible. At the same time, states have a responsibility to protect the sexual development and sexual health of the minor vis-à-vis abuse or coercion. These two considerations imply a balancing act on behalf of the legislature.

As shown, in the European region there is no clear consensus on what that age limit for sexual autonomy should be; age of consent varies between 13 and 18 years. The countries that have set their age limit low tend to have protective clauses for the younger part of the sexually active population, recognizing that they may be particularly vulnerable to coercion or abuse. The Italian provision illustrates an especially interesting example in that regard.

The European Court of Human Rights jurisprudence on sexual consent is very clear in that it reaffirms the Court’s strong opposition to differentiated treatment based on sexual orientation without strong justification. Worth noticing is that the Court in L. and V. took the opportunity to reproach the Austrian government for its prejudiced views on male homosexual behaviour. The Austrian provision and the government’s way of defending it reflected an attitude toward male homosexuality as something undesirable and potentially dangerous in society against which young men should be protected. The Court declared that such view emanated from biases against the homosexual minority that could not be used to defend discriminatory laws. By now, almost all European countries apply an equal age of consent to same-sex and opposite-sex relations. The Greek exception raises concerns; regardless of whether ‘seduction’ in the Greek provision is interpreted narrowly or extensively, the separate article for male same-sex behaviour implies that homosexuality is less accepted than heterosexuality, and suggest that homosexuals are more likely to solicit sex with minors than others.

As for the Council of Europe and European Union provisions on possible exemptions from pornography laws for certain consensual youthful sexual activities, these illustrate a recognition of the complexity of the issue. Even if it may be difficult in practice to distinguish a case of exploitation from one of consensual activity, or a case of material produced for private purpose from one produced for public exposure, these provisions are interesting from a sexual health and rights perspective. They allow member states to nuance their laws against child pornography, thereby acknowledging that young people who have reached the legal age of consent but not yet the age of majority have been entrusted by their respective states to be sexually active. While maintaining a firm opposition to sexual exploitation of children, these exceptions also acknowledge that young people may consent to experimenting with expressions of their sexuality through the use of technology. Insofar as this behaviour is an expression of their sexual agency and autonomy, there should be possibilities to exempt it from criminal liability.

D. CONSENSUAL SEX IN PRISONS

1. Introduction

The criminalization of sexual conduct in prison (or other custodial facilities) is complex. In some cases it claims to seek to reduce or eliminate violent, non-consensual sexual relations between prisoners or between prisoners and guards. However, it also functions as a system of control, invasion of privacy, and erosion of sexual rights for persons in prison. The restriction of rights, a consequence of having been sentenced to imprisonment, will in many cases lead to a restriction of access to health services, on one hand, and to human relationships, on the other. This is problematic from a sexual health perspective. Thus, in addition to protecting detainees from coerced sex, prisons must also create an enabling environment for maintaining sexual health. This includes, at minimum, the provision of sexual health information, including information about HIV prevention and safer sex; condoms; and contraceptives (as appropriate). Some prison systems provide for conjugal visits as a way to maintain sexual health and well-being.

This chapter will address the issue of state approaches to consensual sexual activity in prison, in close connection with the problem of HIV and other sexually transmitted infections in prison. However, for access to sexual health services for inmates, see Chapter 6B: Access to HIV and STI services.

Most countries in Europe regulate their policies on sexual activities in prisons by local decree or prison-by-prison regulations. For that reason, it has proven difficult to find laws that govern this area.

2. Council of Europe

Non-binding Council of Europe documents

The Committee of Ministers has in several recommendations addressed the issue of health in correctional institutions, including questions related to sexual health and in particular HIV/STIs. Worth mentioning here are two documents in which the Committee has presented a permissive attitude to safe sexual relations in prisons. In Recommendation No. R (93) 6, the Committee pronounces itself in favor of condom distribution in prison:

In the interest of preventing HIV infection, prison and health authorities should make condoms available to prisoners during their period of detention and prior to their provisional or final release. Each State should be free to select the most appropriate channel for this purpose: medical service, sale in canteens or any other arrangements suited to current attitudes, the type of prison population concerned and the prison establishment's mode of operation. (para 7)

In Recommendation No. R (98) 7, the Committee also recommends the right to conjugal visits for inmates, without restricting this right to legal spouses or opposite-sex partners:

Consideration should be given to the possibility of allowing inmates to meet with their sexual partner without visual supervision during the visit. (para 68, appendix)

3. European Union

Issues related to consensual sexual relations in prison fall outside of the scope of binding EU law.

4. Domestic legislation, case law, and policy

In the Netherlands, a Ministry of Justice policy circular governs measures to be taken with regard to infectious diseases in prison in the Netherlands, including HIV. The circular, dated 2 August 2001, applies to all sectors under the mandate of the Dutch Department of Correctional Institutions. Its purpose is to prevent the spread of infectious diseases within correctional facilities and after release from prison. Principles that permeate the policy are the right to confidentiality for an inmate with an infectious disease, isolation only in situations where this is absolutely necessary from a medical point of view, and right to adequate health care. Emphasis is placed on information to inmates about infectious diseases, including HIV/AIDS, but the circular also recognizes that the state has a

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227 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.
228 Adopted on 18 October 1993.
229 Adopted on 8 April 1998.
230 Ministry of Justice Circular, 2 August 2001, replacing the AIDS Policy of January 24 1996, nr 532656/96/DJI. Unofficial translation provided by Marianne van der Sande, Head of Epidemiology and Surveillance, Centre for Infectious Disease Control, Bilthoven, Netherlands.
responsibility to ensure that sexual activities in prison can take place in a safe manner: as a protective measure, the circular establishes that condoms be made available to inmates, “(also) suitable for sexual anal activity.” 231

Similarly, in Moldova, the Law on Prevention and Control of HIV/AIDS (2007)232 mandates free of charge condom distribution in all prisons (Art 9 b)), as part of harm reduction programmes whose realization shall be ensured by the Ministry of Justice.

In Sweden, there is no express policy on condom distribution in prisons. However, according to Swedish Department of Corrections Information service, “condoms are provided by the Department of Corrections for conjugal visits and are available (free of charge) in visitation rooms and visitation departments.”233

Undisturbed same-sex conjugal visits for inmates are allowed in Belgium for inmates since 2000. According to a Circular Letter of the Minister, 5 July 2000, such will be possible after three months of imprisonment and only with a partner with whom the inmate has had a stable affective relationship for at least six months. The Act of January 2005 on the legal position of prisoners has adopted the same rule, but this part of the Act has as of December 2009 not yet entered into force.234 A Departmental circular (1715) of 5 July 2000 on the protection of affective relationships between inmates and their environment formulates several minimum rules applying to all penitentiaries. Rooms where so-called ‘undisturbed visits’ can take place must be equipped with sanitary facilities, adapted furniture, facilities for personal hygiene, such as face cloths, towels, soap, condoms, sanitary towels, etc.235

Furthermore, a Departmental circular (1785) of 18 July 2006 relating to the issue of drugs in prisons recognizes that in prisons diseases such as HIV, hepatitis B, and hepatitis C occur more often than elsewhere; for these reasons prison medical services must make sure that inmates can dispose of condoms.236

The Ukrainian penitentiary system is regulated by various orders and decrees such as the order On Approval of Regulations on Health Care of Persons Held in Remand and Institutions of the State Penitentiary Department of Ukraine for Execution of Punishment.237 Pursuant to this order, the administration of penitentiary institutions, regardless of the presence of HIV positive inmates, has an obligation to ensure conditions that are conducive to reducing the risk of HIV infection. These include the prevention of HIV transmission through medical means; accessibility of disinfection for the use of both detained and convicted; provision of safe shaving equipment; and availability of condoms for the use of both detained and convicted.238

As regards prison rape, European countries do not tend to have special laws addressing this crime, but apply provisions regulating rape in ordinary criminal laws. Within these laws, some countries address rape perpetrated on persons deprived of their liberty, or when a position of power is being abused, as particularly serious circumstances that render harsher punishments. Examples include Italy, where the Criminal Code establishes as an aggravating circumstance (under the general provisions of rape) sexual violence perpetrated on a person subjected to limitations of his or her personal liberty, punished with up to 12 years of prison (Art 609-ter, no. 4).239 Similarly, in Serbia, sexual violence committed by a person in an authority position is treated in the Criminal Code as an aggravating circumstance. This is defined as “abuse of position [by inducing] to sexual intercourse or an equal act a person who is in a subordinate or dependant position” (Art 181).240

In Germany, the Criminal Code241 addresses sexual violence on inmates as a crime of sexual self-
determination, treating sexual abuse of prisoners, patients and institutionalized persons not as an aggravating circumstance but as a separate crime. It states that

(1) Whosoever engages in sexual activity with a prisoner or a person detained by order of a public authority, who is entrusted to him for upbringing, education, supervision or care, by abusing his position, or allows them to engage in sexual activity with himself shall be liable to imprisonment from three months to five years. […] (Section 174a)

The following section addresses situations when a person is subjected to criminal proceedings and another person in some way is entrusted with authority to impose a custodial or other measure on him or her. If the latter person engages in sexual activity with the former, abusing the relationship of dependency, this will result in criminal liability (Section 174b).

5. Concluding remarks

Given the scarcity of legal material in this field, it is difficult to draw any clear conclusions on European region policies with regard to consensual sexual relations in prison. Nevertheless, a few remarks can be made. It is clear that the HIV/AIDS pandemic has highlighted the special vulnerability of the prison population to sexually transmitted infections, and across the region measures have been called for in order to counteract the spread of the virus in prisons. What is interesting, for the purpose of sexual health and rights, is when these measures recognize that sexual activity will take place in prison and that therefore condoms shall be available to inmates. The Council of Europe statements and the domestic policies mentioned above do not draw the conclusion that in order to stop the spreading of HIV sexual relations should be banned, but rather, that safer sexual behaviour should be encouraged. While this approach may stem from purely instrumental concerns – from a public health perspective, condom distribution has simply shown to be more effective than bans on sexual activity in prison – it also may have the effect of allowing sexual experiences for prisoners. As long as sexual encounters in prison occur with full consent and safeguards are in place to prevent and remedy prison rape and other kinds of sexual abuse, an open attitude towards sexual activity in prison may benefit the sexual health of inmates.

Similarly, regulations that allow conjugal visits for prisoners, such as the Belgian policies, can be beneficial for their sexual health. It is important to keep in mind that imprisonment legally limits a set number of rights – freedom of liberty and movement being the most obvious of them – but that generally, a prison sentence does not include restrictions of other aspects of human existence that are crucial for a person’s well-being.

In Europe, prison rape does not tend to be addressed as a separate crime, but is rather prosecuted under regular criminal provisions on rape, possibly with the deprivation of liberty or the dependent position of the victim established as aggravating circumstances. The rationale for these latter regulations is the same as in other provisions highlighting sexual crimes in situations of power imbalance, acknowledging that custodial situations can create unhealthy dependency dynamics and extreme vulnerability to sexual coercion or violence. Thus, these provisions target sexual crimes committed by officials on prisoners or detainees, and do not address rape between inmates.

E. Decriminalization of sex outside of marriage

Pre-marital sexual relations have not been criminalized in the European region for decades. However, concern has been raised over criminal laws that set the age of consent unusually high, thereby effectively making older teenagers who engage in sexual activity subject to prosecution. In Turkey the Penal Code sets the age of consent at 18 (Article 104), establishing that sexual intercourse absent any force with a person between 15 and 18 can render two years imprisonment. Similarly, according to Article 203 of the Criminal Code of Malta, whosoever “by lewd acts, defiles a minor of either sex” (that is, any person under 18) will be liable to prison up to three years.

In addition to the restrictive effects of these provisions on the sexual agency of minors, as discussed in Chapter 2C, they may also lead to discriminatory outcomes. The CEDAW Committee, in commenting on the Turkish provision, expresses concern that “the penalization of consensual sexual relations among young people between 15 and 18 years of age may have a more severe impact on young women, especially in the light of the persistence of patriarchal attitudes.”

242 However, the Maltese provision is subject to interpretation. It can be argued that if the young person is sexually mature and consents to the relation, he or she cannot be ‘defiled’ and, thus, no crime will be committed. See a comment by Maltese lawyer Dr. Aron Mifsud Bonnici, at http://www.ageofconsent.com/ageofconsent-malta.htm. Last visited on 2 March 2010.

F. **Virginity Testing**

1. **Introduction**

Virginity testing is a practice that violates a number of human rights principles. Testing a woman with the purpose of finding out whether she has engaged in sexual relations runs contrary to the principle of non-discrimination based on sex, the right to physical and psychological integrity, the right not to be subjected to cruel and degrading treatment, and the right to respect for one's private life. The CEDAW Committee, in discussing the Turkish practice of forced gynaecological examinations of women in the investigation of allegations of sexual assault in 1997, noted that "such coercive practices were degrading, discriminatory and unsafe and constituted a violation by state authorities of the bodily integrity, person and dignity of women."\(^{244}\)

In most parts of the European region, virginity testing has never been a widespread practice. The country where such tests have been commonly practiced, and where the issue has recently been widely discussed, is Turkey. This chapter will therefore focus on Turkey, while also recognizing that the lack of legislation and jurisprudence from most other countries in the region is merely a sign that virginity testing does not tend to occur or is largely socially unacceptable in those other countries. This, in turn, demonstrates a wide consensus in the region about the discriminatory and violent nature of the practice.

2. **Council of Europe**

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

In *Salmanoğlu and Polattas v. Turkey*,\(^{245}\) the issue before the Court was whether the treatment of two young women in police custody amounted to torture and inhuman and degrading treatment under Article 3 of the Convention. As part of their claim, the two women complained that they had been taken to a hospital by the police in order for their virginity status to be established and to determine whether they had had recent sexual relations. The authorities contended that these tests were carried out following complaints about sexual violence, although the applicants alleged that they had presented no such complaints at the time. The government claimed that the applicants had consented to the tests, but there was no evidence of any written consent presented to the Court.

The Court found that the ill-treatment the women had been subjected to in police custody amounted to violations of Article 3 in several ways. In relation to the virginity tests, it established that they had been carried out without any legal and medical necessity. While it was unclear whether consent had been given, the Court considered that even assuming that valid consent had been given,

> that there could be no medical or legal necessity justifying such an intrusive examination on that occasion as the applicants had yet not complained of sexual assault when the tests were conducted. The tests in themselves may therefore have constituted discriminatory and degrading treatment. (para 88)

The main part of the case related to allegations of actual abuse in custody. However, the statement quoted above illustrates that the Court took the opportunity also to condemn the virginity testing itself. While not stating that virginity tests could never be justified as part of an examination following complaints about sexual abuse, the Court suggested that under the circumstances, the tests themselves may have violated Article 3.

The issues of virginity testing and informed consent were at the core of the Court's examination in an important case decided in 2011. In the case, *Yazgül Yılmaz v. Turkey*,\(^{246}\) the applicant was a young woman who at the age of 16 had been taken into police custody, accused of lending support to the illegal group PKK. While in custody, the police requested a medical and gynecological examination, to establish whether there was evidence of sexual assault and whether the applicant’s hymen had been broken. The examination was carried out against the applicant's will. After the applicant's release a few days later, she suffered post-traumatic stress and depression. She complained, among other things, that the fact that she had been subjected to a gynecological examination without her consent violated her right not to suffer torture and degrading treatment under Article 3.

The Court stressed that gynecological examinations can be traumatizing, in particular for a minor, and that the obtaining of a minor's consent should be surrounded by minimum guarantees that are...
commensurate with the importance of the examination as such. It did not agree with the practice of automatic gynaecological examinations of female detainees in order to avoid false accusations of sexual assault against police officers. Such a practice, according to the Court, ignored the interests of detained women, and did not respond to any medical necessity. In the case, the applicant had not complained of rape during her detention – but of sexual harassment. Such complaints could not possibly have been disproven by an examination of her hymen. The examination had caused the applicant deep distress and anxiety, which had been virtually ignored by the authorities. In conclusion, the Court found that the examinations of the applicant amounted to degrading treatment, prohibited under Article 3.

This case is important because it emphasizes the importance of informed consent to gynaecological examinations and the special safeguards necessary when a minor is involved. Moreover, it clearly questions the practice of virginity testing as a response to accusations of sexual abuse. It rightly underlines that gynaecological tests should never be carried out contrary to the will of the involved person and that there are inherent risks for abuse and humiliation unless necessary safeguards are taken – not least when the subject of the investigation is a minor. Finally, it points to the inadequacy of assuming that virginity tests could provide protection in situations where sexual harassment or sexual abuse may occur. From a sexual health and human rights perspective, the clear link established between virginity tests and the protection afforded under Article 3 is of highest relevance.

3. European Union

The issue of virginity testing falls outside of the scope of binding EU law.

4. Domestic legislation

As indicated, in Turkey forced gynaecological exams and virginity testing were earlier widely practiced. The issue was raised in the CEDAW Concluding observations on Turkey in 1997, and then again in 2005. In the earlier version of the Statute of Awards and Discipline in the High School Education Institutions of the Ministry of Education, coming to effect in January 1995, ‘proof of unchastity’ was a valid reason for expulsion from the formal education system. The practice that tended to be employed to gather evidence for ‘unchastity’ was virginity testing. In March 2002, this wording was revised by the Ministry of Education, and references to ‘unchastity’ were removed. Instead, expulsion is now allowed of students whose behaviour “contradicts commonly accepted social values and influences the educational atmosphere in a negative way.”

In 1999, a statute was issued by the Ministry of Justice with the purpose of eliminating virginity testing, differentiating it from legally required vaginal or anal examinations. Circumstances in which such examinations could take place are alleged rape, sexual conduct with minors, and crimes related to prostitution. Vaginal or anal examinations without the consent of the woman can only be ordered by a judge, and only when there are no other means of proving the alleged crime. In the new Turkish Penal Code (2004), these principles have been codified in law. According to Article 287, entitled ‘Genital Examination,’ anyone who performs or takes a person for a genital examination without proper authorization from a judge or a prosecutor can be sentenced to imprisonment.

The 1999 statute and the new Penal Code provision mark that the Turkish state no longer tolerates widespread virginity testing. However, even if the possibility to perform such tests has been restricted, the law still allows for tests without the consent of the woman in some cases. The failure to explicitly ban non-voluntary virginity testing has been criticized by women’s groups. As pointed out by the CEDAW Committee 2005: “[…]In particular, the Committee is concerned that genital examinations of women, or virginity tests, may still be carried out under certain circumstances without the consent of women, or virginity tests, may still be carried out under certain circumstances without the consent of

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249 Ministry of Justice, Decree no 27/123, 1999.


252 Ibid, p. 60.
While gynaecological exams can be legitimately performed in order to establish rape, virginity testing as part of a rape investigation suggests that rape can only be committed against a woman who has not previously engaged in sexual relations – and/or that the non-virgin status of an unmarried woman must imply that she has been raped. Both these assumptions violate women’s rights to health and dignity in a number of ways. The Turkish law thus leaves room for forced examinations that violate women’s right to sexual health and sexual self-determination and contradict accepted human rights norms.

5. Concluding remarks

Virginity testing is not a common practice in the European region. It exists, or has existed, primarily in Turkey and in some of the Central Asian republics. Recent legislative changes in Turkey are positive signs, showing a change in how female sexuality is perceived and a deeper understanding of the practice’s discriminatory and violent nature. These reforms should be read in conjunction with other recent reforms in Turkish penal law, outlawing concepts such as crimes of ‘honour,’ ‘chastity,’ and ‘morality’ (as discussed in Chapters 5B: Sexual violence, and 5E: Honour crimes). However, Turkish provisions still fall short of completely prohibiting non-consensual virginity testing, which opens the possibility of abuse and raises concerns from a sexual health point of view.

Furthermore, the statement from the European Court of Human Rights in the Yilmaz case affirms that this practice constitutes degrading treatment, as prohibited under Article 3 of the Convention.