III. STATE REGULATION OF MARRIAGE AND FAMILY AND ITS RELEVANCE FOR SEXUAL HEALTH

Introductory remarks

International human rights standards note the fundamental right to ‘marry and found a family’ and emphasize the centrality of the family as a core unit of society. Marriage is an important institution in many societies, although in practice its structure is diverse. While marriage can be the basis of family, it is increasingly recognized that marriage is not the only basis of family; moreover, families can take many forms. And while both marriage and family are important institutions, persons wishing not to marry or found a family must be acknowledged as full participants in society and entitled to full rights, including sexual rights.

While marriage and family are often treated as linked institutions in both law and in many social and religious systems, they also need to be considered separately to assess fully their impacts on the sexual health and rights of all affected persons, including parent(s), children, and guardians. Marriage and family law play a major role in promoting or restricting the health and rights, including sexual health, of many people, both married and unmarried, and their children and other dependents. In addition, marriage regulations may promote or be detrimental to physical, emotional, or social well-being of spouses.

In contemporary rights terms, marriage can generally be understood as a voluntary union which creates specific bonds of legal rights and responsibilities and which, as a consensual union, can also be dissolved by decision of either partner with due process and respect for the rights of the partners. Importantly, under rights principles, the legal bonds of marriage are created through contracts made by persons endowed by law with equal powers of ‘free and full consent’ to enter marriage.

The human rights-based focus on equal, free, and full consent for all persons, female and male, to decide if, when, and with whom to enter into or dissolve marriage has important consequences for sexual health. Marriage partners have equal rights to determine their voluntary sexual conduct in marriage, and should have the means to act on their decisions, including through access to medical services and with the support of the law. Equality of rights in marriage is an especially important aspect of rights for the sexual health of women and it is important to note that establishing equality between men and women in marriage may require affirmative actions by the state. The equal right of women and men to control their fertility, therefore, underscores the importance of laws that promote access to sexual and reproductive health information and services; women’s and men’s right to access and use family planning; and rights to legal and other remedies for any abuses that may occur within marriage and on its dissolution.

Moreover, health and rights analyses increasingly highlight the need for recognition of alternative forms of family, as these varied forms of family provide important economic resources and social support to many people. States must ensure that access to appropriate services, as well as conditions of equality, security, and freedom necessary for the health of all members of the family, are available to all kinds of families. Families formed outside of marital or other intimate partner relationships, such as when a grandparent or other kin cares for children of their extended family, need recognition and support, including appropriate authority to make decisions in the child’s best interest, as well as access to the means to ensure the child’s sexual health and freedom from abuse.

This chapter addresses aspects of state regulation of marriage and family which have implications for sexual health. These include state recognition of different kinds of relationships, whether same-sex marriage, registered partnership, or cohabitation; access to adoption and artificial reproduction technologies; termination of marriage; forced marriage; adultery; polygamy; testing and conditions placed on marriage; and incest.

254 These introductory remarks have been drawn from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.

255 UDHR article 16; ICESCR article 10, ICCPR article 23, CRC Preamble, CRPD article 23.

256 CEDAW, for example, notes the importance of temporary special measures to ensure substantive equality between men and women, noting that equality does not mean identical treatment in many areas of public and private life, See, General Recommendation 25, UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures), 2004, available at: http://www.unhcr.org/refworld/docid/453882a7e0.html. Last visited 29 March 2010.
A. **SAME-SEX MARRIAGE, PARTNERSHIP, COHABITATION, ACCESS TO ADOPTION, AND ARTIFICIAL REPRODUCTION TECHNOLOGIES**

1. **Introduction**

This sub-chapter should be read primarily from a non-discriminatory perspective; it is closely linked with the more general discussions on the relevance of non-discrimination for sexual health as addressed in Chapter 1. Who is allowed to marry? What benefits are available to same-sex partners? Who can adopt children and have access to artificial reproduction technologies? What is the rationale behind definitions and regulations of marriage and family with regard to who has been included and who left out? The same arguments that speak strongly for non-discrimination in general apply to this chapter. A non-discriminatory approach will benefit health in general and sexual health in particular, given the harmful effects of discrimination based on sex or sexual orientation on the individual and his or her interaction with her surroundings. Among the rights and duties flowing from the recognition of couples, there are health-related aspects (among others, decision-making related to an incapacitated partner, bereavement leaves, healthcare benefits, etc). Furthermore, state recognition of different living arrangements will facilitate the right to the free development of personality of the individual.

From a non-discriminatory health and rights perspective, it is important not only to focus on same-sex couples’ opportunity to marry, but also to look at what rights and guarantees are available to couples that cannot, or choose not to, marry – regardless of whether they are same-sex or opposite-sex. Do states make it possible to choose the form of co-living that works best for the relevant couple, without infringing upon that couple’s basic rights to legal and economic security, health-care, and to have children? Examples below suggest that the more legal recognition available to couples, regardless of the label of the relationship, the greater the chance that health will prosper.

Contentious issues with regard to regulated co-living for same-sex couples surround the issue of children/family-building. Even when countries allow for registered partnership, many prevent same-sex couples from jointly adopting children, enjoying joint custody of children, or undergoing fertility treatment.

With regard to adoption, both state and regional legislation and jurisprudence make very clear that the best interest of the child takes precedence over all other considerations. Thus, there is no such thing as a ‘right’ to adopt a child. However, as shown by the European Court of Human Rights, adoption procedures must be fair and non-discriminatory, so prejudice cannot determine who gets authorization to apply for adoption. Even though the Court still has not ruled that same-sex couples seeking to adopt should be treated equally to opposite-sex couples, its most recent precedent on single persons clearly applies to discrimination against homosexuals. Jurisprudence in the region also illustrates that the notion of ‘best interest of the child’ is evolving. While earlier laws relied on blanket statements about the adoptive child’s need for a mother and a father, there is now a tendency to look more pragmatically at the particular family under examination, focusing on the child’s need for a loving environment, regardless of the potential parents’ sexual orientation. This shift in perspective is also visible in regard to artificial reproduction technologies (ART), which are increasingly expanding the reproductive choices of same-sex couples, unmarried people, and single women. It is also important to keep in mind that ART bring to the fore questions surrounding access to (reproductive) health care more generally. This makes them relevant from a sexual health perspective in a broader sense.

2. **Council of Europe**

*Jurisprudence of the European Court of Human Rights*

In *Karner v. Austria*\(^ {257}\) the Court established that norms that treat unmarried same-sex couples differently than unmarried opposite-sex couples are discriminatory. The applicant was a man who was found to have been discriminated against when an Austrian court denied him to take over the lease of his deceased, same-sex, partner. See details in Chapter 1.

The issue in *Schalk and Kopf v. Austria*\(^ {258}\) was, for the first time for the Court, whether there is a right under the Convention for same-sex couples to marry. The applicants were a same-sex couple claiming that their inability to marry constituted a violation of Article 12, the right to marry, as well as a violation of their right to respect for their private and family life and the principle of non-discrimination. The Court first held, importantly, that the relationship of the applicants fell within the notion of ‘family life,’ just as that of opposite-sex couples in the same situation would. Previously same-sex couples have been found to have the right to respect for their ‘private life’ but not family life, which makes this statement of

\(^{257}\) Application no. 40016/03, decided on 24 July 2003.

\(^{258}\) Application no. 30141/04, decided on 24 June 2010.
great importance. However, the Court refrained from obliging a state to establish the right to marry for same-sex couples. It noted that there is no European consensus regarding same-sex marriage. Thus, and given that “marriage has deep-rooted social and cultural connotations which may differ largely from one society to another,” it found that Article 12 does not impose an obligation on member states to grant same-sex couples the right to marry. As regards the claim under Article 8 in conjunction with Article 14, the Court rejected the notion that the right for same-sex couples to marry could be derived from these articles, when this right had been found not to flow from Article 12. The Convention, stated the Court, must be read as a whole and its articles should be construed in harmony with one another. In conclusion, no violation of Article 8 read together with Article 14 was found either.

The European Court of Human Rights has not directly addressed the issue of adoption for same-sex couples, but relevant trends can be extrapolated from the two cases discussed below.\(^{259}\) In these cases, the Court examined the right of single people, who identify as homosexuals, to be authorized for adoption. It reached different conclusions in the two cases.

In Fretté v. France,\(^{260}\) the applicant was a single, homosexual man who had been denied authorization to adopt a child although French law allows for single persons to adopt, and despite the fact that he had shown good qualities for child-rearing. The European Court made reference to the division in the scientific community over possible consequences of a child being adopted by one or more homosexual parents and held that states must be granted a broad margin of discretion in this area. It found that the principle of proportionality had not been infringed upon and, hence, that there had been no breach of the Convention.

Six years later the court reversed itself, in F. B. v. France.\(^{261}\) A woman who lived in a stable relationship with another woman sought a single-parent adoption (French law does not allow same-sex couples jointly to adopt children). French courts had denied her the authorization to adopt based, \textit{inter alia}, on the fact that she failed to provide a 'paternal referent' for the child. The applicant submitted that the domestic authorities had based decision on her ‘lifestyle’ – that is, her homosexuality – and that this was discriminatory treatment prohibited by Article 8 taken together with Article 14 of the Convention.

The Court made clear that there is no right to adopt a child under Article 8 of the Convention, nor under other international law or French provisions. The issue was whether the \textit{procedure to obtain authorization} was respectful of the guarantees under the Convention. The Court found that the treatment of the applicant in the relevant case had several flaws. Primarily, the Court pointed out that the reference to a 'parental referent' for the child was odd, given that the relevant provision allowed for adoption by single persons; referring to such ground could “render ineffective the right of single persons to apply for authorisation.” In the relevant case, it seemed like the reference to the parental referent had been used as a pretext for rejecting the application, when the real reason was the applicant’s sexual orientation. In fact, even though the domestic authorities denied that their decision had anything to do with the applicant’s homosexuality, the Court noted that the sexual preferences of the applicant featured extensively in the reasoning of the different domestic bodies. These made references, \textit{inter alia}, to her ‘lifestyle,’ and claimed that she had an “unusual attitude […] to men in that men are rejected.” In conclusion, it was found that the sexual orientation of the applicant had “consistently [been] at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings.” The Court held that the authorities thereby had distinguished the applicant, as a single, homosexual person, from single, heterosexual, persons who indeed were authorized to adopt. This distinction amounted to discrimination and was as such unacceptable under the Convention; thus, there had been a breach of Article 8 in conjunction with Article 14.

The case is relevant for a number of reasons. As pointed out, it does not establish a right to adopt for single or for homosexual people.\(^{262}\) Its focus is the prohibition of discrimination. French law authorizes single people, men or women, to adopt children. In applying this law, the Court now holds that a person cannot be discriminated against on account of his or her sexual preferences. It is important to notice that the Court does not \textit{per se} dismiss the notion that a child may need both male and

\(^{259}\) See also X Y and Z v. United Kingdom, 1997, in which the Court examined the right to legal recognition of a post-operative female-to-male transsexual as the father of the child born by his female partner. This case is discussed in Chapter 4A: Gender identity, gender expression, and intersex.

\(^{260}\) Application no. 36515/97, decided on 26 February 2002.

\(^{261}\) Application no. 43546/02, decided on 22 January 2008.

\(^{262}\) The Court has previously, in cases involving complaints about the absence of opportunities for single persons to adopt, made clear that Article 8 does not oblige the state to grant to a person the status of adoptive parent; thus emphasizing that there is no right to adopt under the Convention. See for example Lazzaro v. Italy (application no. 31924/96, inadmissibility decision on 10 July 1997) and Pini and others v. Romania (application nos. 78028/01 and 78030/01, decided on 22 June 2004).
female role models, nor does it engage in the debate on the issue. Instead, it states that it is already perfectly in line with French law for an adopted child to grow up without parents of both sexes—since single people can adopt. Therefore, for French authorities to deny authorization to adopt to a person who identifies as homosexual, arguing that the child will lack a paternal reference, is discriminatory and irrational. The Court sheds light very clearly on the lack of logic in the French argument. For a comment on the different outcomes in Fretté and E.B: see Concluding remarks.

As of June 2011, a case is pending before the Court addressing second-parent adoption for same-sex couples. The case, Gas and Dubois v. France, was declared admissible in August 2010. The applicants are two women in a lesbian couple, one of whom had a child by donor insemination. The partner of the woman who had the child was denied the right to adopt the child, because second-parent adoption is restricted to spouses in France. Same-sex couples cannot marry in France. The applicants claim that their right to respect for their family and private life under Article 8, in conjunction with the prohibition of discrimination under Article 14, has been violated.

The Court has in three cases addressed issues related to artificial reproduction technologies. Two are relevant here. In Dickson v. United Kingdom, the Court examined when the state legitimately can and cannot restrict access to artificial insemination. The applicants were a man who was imprisoned for life after having committed murder, and his wife, a former prisoner, who wished to have a child. Conjugal visits were denied them, and the woman would be at least 51 years old when the man was released from prison, making natural conception unlikely. The issue was whether they had the right to artificial insemination, which had been denied to them by British authorities, under Article 8 of the Convention.

The Grand Chamber of the Court stated that room for manoeuvre, or margin of appreciation, accorded to a state under the Convention is restricted when “a particularly important facet of an individual’s existence or identity is at stake (such as the choice to become a genetic parent).” It found that the policy applied by the British government, while not a blanket ban, set a threshold so high against the applicants that it did not produce a balanced assessment of the competing individual and public interests. The absence of this assessment, in an issue of such significant importance for the applicants, was found to fall outside of any acceptable margin of appreciation. Accordingly, the Court ruled that there had been a breach of Article 8.

This case does not on its face provide for a right to artificial insemination facilities for prisoners. The Court restricted itself to stating that a policy as harsh and restrictive as the British one fails to respect the importance of the matter for the individuals involved. The Court called for a more generous policy and procedure in assessing applications of this nature. The decision is interesting however in that it acknowledges that the choice to try to become a genetic parent is a “particularly important facet of an individual’s existence or identity.” There is little room for state restrictions of such important aspects of the right to respect for family and private life, even in relation to persons whose circumstances allow for legitimate restriction of other rights. In relation to sexual health, this case opens the door towards a generous understanding of what artificial insemination may mean for individuals, and implies that access to such reproductive health measures must be broad. It suggests that the state cannot put a blanket ban— or a near blanket ban— on reproduction for any part of the population. Even more interestingly, it also shows that under some circumstances the state may be obliged to provide for the services involved, as a positive obligation under Article 8.

In S.H. and Others v. Austria, the applicants were two opposite-sex couples who could not conceive children and wished to access artificial reproduction techniques. In one couple, the woman suffered from infertility but her husband could produce sperm fit for procreation. In the other couple the woman could not conceive naturally and her husband was infertile. The Austrian Artificial Procreation Act permitted only so-called ‘homologous methods,’ that is, using ova and sperm from the spouses or the cohabiting couple itself, as well as in exceptional cases insemination using sperm from donors. Sperm from donors for in vitro fertilization as well as ova donation in general were always prohibited. The couples, who thereby effectively had been barred from having access to artificial procreation, complained that this provision was discriminatory and

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263 Application no. 25961/07, declared admissible on 31 August 2010. The hearing in the case took place on 12 April 2011. Statement of facts available only in French.
264 The other case, Evans v. United Kingdom, (application no. 63397/05, decided on 10 April 2004) concerned the right for a man to withdraw his consent to the storage and use of embryos jointly created by a couple. The Court found that he had such a right under the Convention and that the United Kingdom thus had not violated the rights under Article 8 of his former wife. The case has no major bearing on sexual health.
265 Application no. 44362/04, decided on 4 December 2007.
266 For a discussion on the right to conjugal visits in prison, see Section 2D: State regulation of sex in prisons.
267 Application no. 57813/00, decided on 3 November 2011 (Grand Chamber).
violated their right to private and family life; Article 8 taken together with Article 14 of the Convention.

The Chamber stated that once the decision has been taken to allow artificial procreation in some circumstances, states must regulate the issue in accordance with the obligations that derive from the Convention – such as the obligation not to discriminate. It concluded that both couples had been discriminated against in their right to respect for their private and family life.

The Grand Chamber, however, upon appeal, found differently. In regard to the couple that wished to access ovum donation, it noted that there was a clear trend in the legislation of European states towards allowing gamete donation for the purpose of in vitro fertilization, but, it stated, this trend is not “based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law.” Thus states should be afforded a wide margin of appreciation when legislating on this issue. The Grand Chamber also raised caution about “splitting of motherhood between a genetic mother and the one carrying the child.” As for the couple that wished to access in vitro fertilization with donated sperm, the Grand Chamber agreed with the Chamber that this type of artificial procreation combined two techniques which, taken alone, were allowed under Austrian legislation. However, the Grand Chamber stated, this process “was a controversial issue in Austrian society, raising complex ethical question on which there was not yet a consensus.” Further, the Grand Chamber noted that there was no prohibition under Austrian law on going abroad to seek treatment for infertility. In conclusion, the Grand Chamber found that Austria had not exceeded its margin of appreciation in regard to either couple, and, thus, there was no violation.

While this case on its face may seem far removed from issues of sexual health, it is relevant to include it here because of the view it reflects on the definition of family. The Chamber judgment stressed the non-discrimination argument and rejected the Austrian government's arguments that family relationships necessarily should be built on biological ties. The Chamber judgment could thus have bearing on the right not to be discriminated against on the basis of sexual orientation or gender identity. The Grand Chamber, however, took a completely different path. Its deference to “complex ethical questions” and its granting of a wide margin of appreciation despite the recognition that there was a clear trend in Europe towards allowing this treatment are troubling. This reasoning suggests a more conservative view on family relationships and on the definition of a family as such than in other cases here referred to. Finally, the reference to the possibility for couples to travel abroad to access treatment raises serious concerns, as it suggests that states under certain circumstances can choose to deny individuals rights, as long as other states nearby may be willing to grant them.

*Conventions in the Council of Europe Treaty Series*

A significant change on the European level for the recognition of adoption of children in non-conventional families came with the adoption of the revised version of the European Convention on the Adoption of Children in 2008. The earlier 1967 version of the convention stated that “[t]he law shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person” (Art. 6.1). This conflicted with Sweden's decision to authorize adoption by same-sex couples in 2002 and the United Kingdom's decision to do the same in 2005. The Convention was therefore revised to read:

> States are free to extend the scope of this Convention to same sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship. (Art. 7)

This new provision not only allows state parties to extend authorization of adoption to married or registered same-sex couples, but also acknowledges that couples that are neither married nor registered partners may have an interest in joint adoption. In other words, while not mandating a broader family concept, the Convention acknowledges that it is in the interest of many states to promote such family concept. The provision shows that the Convention will not stand in the way of this development, which is framed in basically positive terms.

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270 The revised Convention retained the statement that “[t]he law shall permit a child to be adopted […] by one person” (Art. 7.1).
3. European Union

European Union binding law

Family law is not covered by EU jurisdiction. Thus, with regard to the extension of spousal rights and benefits to same-sex or unmarried couples, and access to adoption and ART, the EU gives wide discretion to domestic family law. However, in the context of the increasing importance awarded non-discrimination in the Union, EU bodies have started to address certain limited aspects of family law issues. When cohabitation or registered partnership have been equated to marriage by domestic law in a member state, EU law now requires that those couples should have the same rights as married couples, both in that member state and, under certain conditions, in other member states.

In 2004, the EU adopted a new directive on freedom of movement (one of the fundamental rights recognized by the EU for citizens of member countries) within the Union. The Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,271 replaces a great number of earlier directives on free movement within the Union. For the purposes of this report, the main relevance of this directive concerns the right of non-conventional family members who are not EU citizens to freely move and to reside within the Union. Here, there is both an attempt to include registered partners in the definition of ‘family member,’ and also to extend a certain level of freedom of movement to unmarried/unregistered partners.

First, the Directive recognizes as a ‘family member,’ in addition to spouse and direct descendants and dependants,

the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State. (Art. 2 (2) (b))

In other words, there is no separate, binding, EU provision that registered partners be recognized as family members for freedom of movement purposes. Instead, the right to movement depends both on the previous recognition of the relevant couple under domestic family laws in one member state, and on the treatment of such couples as equivalent to married couples by the law in the host member state (that is, the state to which the couple moves). This limited notion of couples’ rights is in keeping with the Union’s deference to domestic family law and follows the European Court of Justice judgment Maruko v. Versorgungsanstalt der deutschen Bühnen.272 According to that case, the applicant should have been included in the pension scheme of his deceased (same-sex) partner precisely because Germany had established the ‘life partnership’ model for same-sex couples, which under German law was equated with marriage.

With regard to unmarried and unregistered partners, whether same-sex or opposite-sex, the Directive declares that the host member state shall, “in accordance with its national legislation, facilitate entry and residence” for, among others, “the partner with whom the Union citizen has a durable relationship, duly attested” (Art. 3 (2) (b)). The Directive does not specify the requirements for a duly attested durable relationship. As seen, unmarried and unregistered partners are not included in the definition of ‘family member’ and thus have no absolute right to freedom of movement under the Directive, but some of the rights of the Directive are extended to them. Entry and residence must be facilitated – in other words, the host member state cannot simply refuse entry and residence on the basis that the couple is not married, without further justification.

The Directive’s preamble, which as such is not binding but which provides guidance in the interpretation of the Directive, prohibits discrimination based on sexual orientation (Recital 31). On that basis one can argue that a state cannot agree to admit unmarried opposite-sex partners, while refusing entry or residence to same-sex partners. The same reasoning applies to married same-sex couples under the laws of EU member states that now recognize same-sex marriages (Belgium, the Netherlands, Spain, Sweden, and Portugal).273 These should now be included in the definition of ‘spouse’ under the Directive,


272 Case C-267/06, decided on April 1, 2008. See also Jürgen Römer v. Freie und Hansestadt Hamburg (Case C-147/08). Both cases are addressed in Chapter 1.

273 Norway and Iceland are the other countries in the region, although not EU members, that currently recognize same-sex marriage.
though thus far this has not been made explicit in the Directive nor addressed in Court’s jurisprudence. Worth noting is that member states must treat registered same-sex partners, when the above-mentioned requirements have been fulfilled, like any other family members, while in relation to unmarried partners (same-sex or opposite-sex), they are not obliged to do so, as long as they justify any decisions to deny entry or residence. This points to the relevance awarded to unions accredited by the state, whether through marriage or registered partnership, and that couples who cannot or choose not to have their relationship sanctioned by the state will still find themselves in a less privileged position.

European Court of Justice judgments

In the early case Netherlands v. Ann Florence Reed (1986), the petitioner, a migrant worker from the United Kingdom, was requesting that her unmarried cohabiting partner obtain a residence permit in the Netherlands, as would have been granted a spouse. The Court argued that where the host country recognizes the rights of unmarried partners among its own citizens, it cannot refuse the same rights to another EU citizen without violating the principle of non-discrimination on grounds of nationality under the EC Treaty (then Articles 7 and 48) This decision falls well in line with the European Court of Justice approach generally, paying due respect to domestic law but stressing the principle of non-discrimination.

With regard to whether same-sex partners have the same right to benefits as different-sex partners, the Maruko and Bömer cases (mentioned above, discussed in Chapter 1) establish good practice. In two earlier cases, the Court was more restrictive. These are Grant v. South-West Trains (1998) (community law did not require equal treatment of unmarried opposite-sex and same-sex couples with regard to employment benefits) and D and Sweden v. Council (2001) (a Council staff member could be denied a household allowance in relation to his same-sex partner, because they were not married). As for Grant, it is important to keep in mind that this case was decided before the passing of Directive 2000/78/EC, discussed in Chapter 1. As employment benefits are considered pay under EU law and that directive, the outcome in Grant would now be a case of direct discrimination on grounds of sexual orientation. Thus, Grant no longer constitutes a precedent under EU law.

4. Domestic legislation and case law

The below overview gives but a few examples of how issues of same-sex or opposite-sex common law marriage, spousal benefits to same-sex partners, cohabitation, same-sex marriage, same-sex adoption, and fertility treatment for lesbian or single women have been framed in the region. There are many more examples; the European region provides an array of models for how these issues can be regulated. It will be argued here that the below examples, while not lacking problematic aspects, embrace a non-discriminatory approach to partnership and family-building which, in turn, is strongly beneficial to sexual health.

As of May 2011, seven European countries permit same-sex marriage. These are the Netherlands, Belgium, Sweden, Norway, Spain, Portugal and Iceland. The speed by which countries have followed suit in this regard – the first such law, in the Netherlands, was passed only in 2001 – suggest that there is a real trend towards recognizing marriage rights for same-sex couples in the region. However, in rare cases laws have recently been amended to explicitly prohibit same-sex marriage, such as in the 2005 amendment to the Constitution of Latvia.

Hungary: common-law marriage and registered partnership

In Hungary, domestic partnership was regulated as early as 1959 and is generally referred to as common-law marriage. According to Article 685/A of the Hungarian Civil Code, domestic partnership will exist if the parties live together, share the same household, and are in emotional and financial community. If domestic partnership can be established, this entitles the couple to most of the rights and obligations of civil marriage, including social security and pension rights, inheritance, testimonial immunity, and mutual support duties. In other words, legal rights and obligations stem from a condition that arises from a factual demonstration of a shared life together, with repercussions in many different legal spheres. The existence of common-law marriage is established retroactively in each individual case. No registration is required. Interestingly, case law has clarified that there is no

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274 Case C-59/85, decided on 17 April 1986.
275 Case C-249/96, decided on 17 February 1998.
277 Article 110, Constitution of Latvia, as amended on 15 December 2005, reads: “The State shall protect and support marriage – a union between a man and a woman, the family, the rights of parents and rights of the child. [...]” Official translation.
The provision that made the institution of common-law marriage open only to opposite-sex couples was challenged in 1995 and the Hungarian Constitutional Court passed its decision No. 14/1995 (III. 13.) on 13 March 1995. The petitioner argued both that common-law marriage as it stood and civil marriage were discriminatory on the ground of sex and therefore unconstitutional, since both excluded same-sex couples.

The Court ruled that the Constitution protected formal marriage, defined as a union between a man and a woman, and was thus unwilling to open up civil marriage to same-sex couples even though it acknowledged “growing acceptance of homosexuality [and] changes in the traditional definition of a family” (Section II para 3). However, it found that it was indeed unconstitutionally discriminatory for regulations granting benefits to couples living in common-law marriages to exclude same-sex couples. According to the Court,

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[\text{it is arbitrary and contrary to human dignity […] that the law [on common-law marriage; meaning all regulations considering common-law marriage as an economic and emotional union] withholds recognition from couples living in an economic and emotional union simply because they are same-sex.}]^{261} (\text{Section III para 3})
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The Court established that denying same-sex couples benefits awarded to opposite-sex couples in common law marriages runs contrary to Section 70/A of the Hungarian Constitution, which prohibits discrimination (but does not list sexual orientation explicitly as a protected ground). If third parties are affected, however, exclusion of rights for same-sex couples may not be discriminatory in violation of the Constitution.\(^{282}\)

The ruling was codified in 1996 in the Common Law Marriage Act, which added same-sex couples to the institution.\(^{283}\) Same-sex common-law marriage still differs from opposite-sex common-law marriage in that it does not confer any parental rights on same-sex couples. Both adoption and assisted procreation are \textit{de facto} unavailable to same-sex couples as well as to single persons in Hungary.\(^{284}\)

In case 154/2008,\(^{285}\) the Hungarian Constitutional Court ruled against the Act on Registered Partnership (184/2007), which recognized both same-sex and opposite-sex couples’ relationships and gave them rights similar to those of married couples. The Court held that the law was introducing a new institution parallel to marriage and therefore was contrary to the constitutional protection of marriage. However, the Court accepted the right of same-sex couples to have legally recognized, ‘marriage-like’ partnerships based on Article 54 (1) of the Constitution on human dignity. The Court concluded that an act on registered partnership only recognizing rights and duties of same-sex couples would not be against the Constitution. Thus, the question of unconstitutionality had to do with the introduction of a model that could undermine marriage – in effect, giving opposite-sex couples another option than to marry – and not with recognition of the rights of same-sex couples.

Since July 2009, the Hungarian Act XXIX of 2009 on Registered Partnership and Related Legislation and on the Amendment of Other Statutes to Facilitate the Proof of Cohabitation\(^{286}\) provides legal recognition for the permanent relationships of same-sex couples only. In 2010, the Constitutional Court declared this law in line with constitutional requirements.\(^{287}\)

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282 For example, if the regulation concerns the common child of the partners or the existing marriage with a third party.

283 Statute 42/1996 amending Section 578/G (now 685/A) of the Civil Code.

284 Ibid, p. 132.


286 Only available in Hungarian.

Israel and Slovenia: case law, denial of benefits to same-sex partner violating equality

In the Israeli Supreme Court case *El Al Israel Airlines Ltd. v. The Respondents: Yonatan Danilowitz & The National Labor Court*, the claimant (here: the respondent) was a male flight attendant of an airline company who had been denied a benefit (discounted air fare) for his same-sex domestic partner. According to the valid collective bargaining agreement, such benefits were granted a ‘spouse’ or a ‘common-law husband/wife’ of an employee. The National Labor Court had ruled in favor of the claimant, finding that the denial of the benefit to the same-sex partner constituted unlawful discrimination on the basis of sexual orientation. The airline company appealed to the Supreme Court.

The Court reiterated that equality is a fundamental principle of the Israeli legal system. It went on to investigate the rationale of the benefit in question and stated that

> “[t]he grant of the benefit to the employee for his spouse or common law spouse is based on the notion that a benefit – in the form of a flight ticket – should be given to the employee for the one with whom he shares his life, with whom he maintains a common household, with whom he parts when leaving for flights and to whom he returns when the work has ended. This is the common characteristic of the spouse and the common law spouse. The purpose of the benefit is not to strengthen the marriage institution.” (para 15)

In that context, and given that same-sex partners share the same kind of social unity as opposite-sex partners, denial of the benefit to a same-sex partner was found to constitute discrimination and inequality. The different treatment was not justified by any relevant difference between the two kinds of couples and, thus, violated the constitutional principle of equality. In addition, according to §2 of the Employment (Equal Opportunities) Law of 1988 as amended (on 2 January 1992), an employer shall not discriminate between his employees concerning work conditions “on the basis of their sex, sexual orientation, personal status or their being parents.” The regulation clearly violated this statute. The appropriate remedy was found to be the granting of the benefit also to those who share their life with a member of the same sex.

In July 2009, the Slovenian Constitutional Court came to a similar conclusion, in relation to inheritance rights for same-sex partners. The Slovenian Registration of a Same-Sex Civil Partnership Act denied inheritance rights for the same-sex partner of the deceased person. The Court found the relevant article of the law contrary to the principle of non-discrimination of Article 14 of the Slovenian Constitution, insofar as same-sex couples under the new law are fully comparable to spouses. The Court came to this conclusion by acknowledging how sexual orientation is a fundamental aspect of personhood, and by making explicit reference to the non-discrimination provision of the European Convention on Human Rights:

> “[I]t is evident that the differences in the regulation of inheritance are not based on any objective, non-personal circumstance, but on sexual orientation. Sexual orientation is, although not explicitly mentioned therein, undoubtedly one of the personal circumstances provided for in the first paragraph of Article 14 of the Constitution. It is namely a human characteristic that importantly defines an individual, influences his or her life, and follows him or her through his or her entire life, just as circumstances such as race, sex, and birth do. Sexual orientation, as a circumstance which may not be a basis for differentiation, is also regarded as such by the ECtHR, although it is not among the explicitly enumerated circumstances in Article 14 of the ECHR.” (para 13)

France: registered partnership

Several European countries recognize registered partnership, either for same-sex couples only or for all couples. While the rights that flow from this institution are similar to those attached to marriage, these countries have opted for this ‘middle ground’ solution (less symbolically charged than marriage) instead of opening marriage to same-sex couples. In France, registered partnership is available to both same-sex and opposite-sex couples, according to *Law 99-944 of 15 November 1999 relating to*
a civil solidarity pact\textsuperscript{291} (PaCS in abbreviation, introducing changes to the Civil Code). A civil solidarity pact is a contract that can be signed by two adults in cohabitation, in order for them to organize their common life. Cohabitation is defined as a “de facto stable and continuous relationship between two persons of different sexes or the same sex living together as a couple” (Art 3, changing Art 515-8 of the Civil Code). The law does not allow for adoption, parental authority, or medically assisted procreation, but grants registered partners of the same sex or of opposite sex considerable tax benefits, rights to transfer ownership of a lease, social protection, insurance benefits, etc. The union can be dissolved by means of a simple administrative procedure, and conflicts after dissolutions are handled by the court dealing with contracts, as opposed to a family court. In this sense, the PaCS have been described as a combination of a contract and a regular marriage.\textsuperscript{292}

\textit{Netherlands: recognizing same-sex marriage, unmarried cohabitation, and adoption and ART for same-sex couples}

The Netherlands became the first country in the world to recognize \textit{marriage for same-sex couples} in 2001.\textsuperscript{293} For both same-sex and opposite-sex couples who choose not to marry, there is also the option of \textit{informal cohabitation}. This model is not regulated in one law in the Netherlands, but has been recognized gradually, beginning in the 1970s. Most laws that recognize informal cohabitation use the term ‘lasting joint household’ as a way of describing couples that qualify. Some legal provisions in the Civil Code instead use the term ‘life companion.’\textsuperscript{294} By 2004, almost all legal consequences of marriage were also available to cohabiting couples.\textsuperscript{295} Exceptions include automatic recognition of parenthood, inheritance in case of no testament, right to alimony, and right to shared surname.

As for adoption, the rules are found in Book 1 of the Civil Code (Art 227) complemented by, for international adoption, the \textit{Act on reception of foreign children for adoption}.\textsuperscript{296} In 2001 both married and unmarried same-sex couples were granted the right to apply for adoption of children born in the Netherlands.\textsuperscript{297} Since 2009, same-sex couples can also adopt foreign children, although they must be married.\textsuperscript{298} Individuals can adopt both Dutch and foreign children.

The amended version of the Civil Code also regulates second parent adoption (Art 228). If the spouse, registered partner, or other life partner of the parent of the child is adopting, the adopter and the parent must have been caring for the child for at least one year, unless the child was born in a relationship between the mother and her female life partner.

\textit{Medically assisted insemination and in-vitro fertilization} in the Netherlands are available to women in both different-sex and in same-sex relationships, as well as to single women. These principles follow from the general anti-discrimination law, according to which discrimination on the basis of sexual orientation is prohibited.\textsuperscript{299} As a consequence, this also gives a right to infertile partnered lesbians as well as to infertile single women to undergo IVF.

The female partner of a woman becoming pregnant through artificial reproduction technologies does not automatically become the co-parent of the child. Instead, the female partner of a woman giving birth gets so-called ‘joint parental responsibility’ for the child, and the couple can choose to start an adoption procedure to make the partner a full legal parent. A 2007 Government Commission has


\textsuperscript{292} Godard, p. 315.

\textsuperscript{293} Article 30(1) of Book 1 of the Dutch Civil Code, amendment in force since 1 April 2001, according to Kees Waaldijk, in “Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in the Netherlands,” 2004, available at \url{http://www-same-sex.ined.fr/pdf/DocTrav125/05Doc125TheNetherlands.pdf}. Last visited on 17 February 2010.

\textsuperscript{294} Ibid.

\textsuperscript{295} Ibid.

\textsuperscript{296} 8 December 1988, published in the Official Journal of the Kingdom of the Netherlands 1988 nr 566; in force 15 July 1989; amended later on several occasions.

\textsuperscript{297} Art 227, Book 1, Dutch Civil Code, as amended by \textit{Act of 21 December 2000 amending Book 1 of the Civil Code (adoption by persons of the same sex)}, published in the Official Journal of the Kingdom of the Netherlands 2001 nr 10; in force 1 April 2001. Unofficial translation by Dr Kees Waaldijk (May 2001) available.

\textsuperscript{298} \textit{Act on reception of foreign children for adoption of 8 December 1988}, as amended as of 1 January 2009 by the amending \textit{Act of 24 October 2008} (published in Official Journal of the Kingdom of the Netherlands 2008 nr. 425).

\textsuperscript{299} 2 March 1994. See in particular Articles 1 and 7 (1)(c).
recommended that the female partner of a woman giving birth can acknowledge the child as her own, equal to the possibility now open only for men. Such acknowledgment can be done before or after the birth of the child. As of December 2009, legislative proposals in line with these recommendations were being prepared by the Dutch government.  

Sweden: cohabitation, same-sex marriage, ART

The Swedish marriage legislation was amended in 2009 to include the right of same-sex couples to marry. The relevant change in the country’s Marriage Code entered into force on 1 May 2009, through the Act (2009:253) amending the Marriage Code, at which time the Act on Registered Partnership was abolished. Article 1 of the Marriage Code now states: “This Code contains provisions about marriage relations. Those two who marry each other will be spouses.” Hence, the legislature chose not to mention same-sex couples specifically, but rather to make its language gender neutral.

Registered same-sex partners have been able to adopt children since 2003, either jointly or in the form of second-parent adoption, and also to jointly exercise custody over children. Most other rights of married spouses were also enjoyed by registered partners before the reform. Thus, allowing for same-sex marriage is important symbolically but does not imply significant practical changes compared to the previously recognized registered partnership.

Same-sex or opposite-sex couples also have the option of cohabitation, which is regulated by law. The Swedish Cohabitation Act defines cohabitants as “two people who live together on a permanent basis as a couple and who have a joint household.” No distinction is made between same-sex and opposite-sex couples, and there is no set time period to prove the permanent nature of the relationship. The act applies only to romantic relationships (“on a permanent basis as a couple”) and, hence, excludes siblings or friends who live together. The law mainly covers issues of the joint home and household goods and gives limited rights to cohabitants. However, as in the Dutch case, other legislation has also equated cohabitants with spouses, making the total body of rights for cohabitants rather wide-reaching. For instance, cohabitation is equated with marriage with regard to survivor’s pension, inheritance tax, residence permit and citizenship for foreign partner, and next-of-kin privileges for medical purposes.

Cohabitants (same-sex or opposite-sex) cannot jointly adopt children. Individual adoption is allowed, but may be difficult in practice if the individual lives in a relationship but has opted not to marry. Authorities may question why the partners have not married and see this as a sign that the relationship is unstable, which could be considered negative for the child.

**Assisted fertilization with donated sperm and in-vitro fertilization** are regulated in the Genetic Integrity Act. Assisted insemination for cohabiting opposite-sex couples has been allowed since 1984. In 2005, the law was changed so that cohabiting lesbian couples also can undergo insemination within the Swedish national health care system. The procedure is still not open to single women. With regard to IVF, a fertilized egg may be introduced into the body of a woman only if she is married, cohabiting partner, or registered partner, and her spouse or partner has consented to the procedure. There must be a biological link to at least one of the parties using ART; either the egg or the sperm must come from one of the two partners/spouses. There are thus no possibilities for infertile lesbians to receive treatment. The child who has been conceived by artificial insemination or fertilization outside of the body has, when having reached “sufficient maturity,” the right to access the information available about the sperm- or (in the case of IVF in an opposite-sex couple) egg-donor.

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300 Information from Kees Waaldijk, University of Leiden, at [http://www.law.leiden.edu/organisatie/meijers/research-projects/samesexlaw.html](http://www.law.leiden.edu/organisatie/meijers/research-projects/samesexlaw.html) (last visited on 8 December 2009), and via email correspondence.

301 2 April 2009, only in Swedish.

302 Repealed through Act (2009:260) repealing the act on registered partnership, 2 April 2009.

303 This translation is author’s own.

304 The Children and Parents Code (1949:381), as amended, Chapter 4 and § 3:1 Act (1994:1117) on registered partnership (providing that what is said about ‘spouses’ in other legal texts will also include registered partners. This law has now been repealed, see above).


308 The Genetic Integrity Act, Chapter 6.

309 The Genetic Integrity Act, Chapter 7 § 2.

310 Ibid, Chapter 6 § 5 and Chapter 7 § 7, respectively.
The Swedish Children and Parent Code\textsuperscript{311} establishes that in case of artificial insemination or assisted fertilization, the partner or spouse of the woman undergoing the treatment will be considered co-parent to the child, if the partner/spouse has agreed to the treatment and it is likely that the child was conceived through it.\textsuperscript{312}

In Sweden, according to local ordinances (but consistent in the whole country) only one party of a lesbian couple is entitled to ART treatment. This is motivated in part by an attempt to equate same-sex couples to opposite-sex couples, where only one party – the woman – can undergo assisted insemination, and also by an effort to limit the impact on public finances.\textsuperscript{313}

**Case law: best interest of the child overruling requirement for known donor**

In the two Swedish 1997 appeals cases ÖÄ 3324-06\textsuperscript{314} and ÖÄ 3323-06,\textsuperscript{315} the applicants were two women who had applied to be granted second parent adoption of each others’ biological children. The two children had been born to the two women, respectively, following assisted insemination carried out abroad, with sperm from an anonymous donor. The District Court denied the application for second parent adoption, mainly because the sperm donor had remained anonymous – which is contrary to Swedish legislation and not possible when sperm donation takes place within Sweden. According to the District Court, this had deprived the children their right to know who their father was, and that circumventing this fundamental right by means of using adoption was unacceptable.

According to the Court of Appeal (whose rulings are final), adoption in both cases and thereby the security of two legal parents was in the best interest of the child. There is no legal requirement that fatherhood be determined for adoption to be granted. The Court found that both women had a strong parental connection to the children and that adoption had been recommended by the Social Services who had given their expert opinion. The Court also noted that no special concerns arise with regard to the fact that the cases involved a same-sex couple rather than an opposite-sex couple.

By contrast to the Swedish provision that the best interest of the child requires that the identity of egg and sperm donors is known, Denmark has instead opted for anonymity. According to Act 923 of 4 September 2006 on assisted conception in relation to medical treatment, diagnostic, and research etc.\textsuperscript{316} a requirement for both egg and sperm donation is that donors are anonymous to the woman/couple undergoing the treatment (§ 14). Similarly, the identity of the receiving woman/couple will not be revealed to the donor.\textsuperscript{317}

**Spain: same-sex marriage, adoption, and ART**

In Spain, the Civil Code was modified on 1 July 2005, through Law 13/2005,\textsuperscript{318} allowing same-sex couples to marry. Article 44 of the Civil Code now states that [a] man and a woman have the right to marry according to the provisions in this Code. Marriage shall have the same requisites and effects when both parties are of the same or of different sex.\textsuperscript{319}

Other changes in the Code are merely cosmetic: they replace ‘husband and wife’ with ‘spouse,’ ‘mother and father’ with ‘parents,’ etc. Married same-sex couples in Spain now have exactly the same rights and obligations as opposite-sex married couples, including the right to jointly apply for

\textsuperscript{311}The Children and Parents Code (1949:381).

\textsuperscript{312}Ibid, Chapter 1 § 9, amendment (2009:254).

\textsuperscript{313}See background information in District Court Case T 499-08, Uppsala District Court, 22 October 2008. In this case, two women challenged this rule, as one of them after three unsuccessful attempts of assisted insemination turned 40, which is the age limit to undergo the procedure. Six attempts are covered by Swedish health insurance, but the partner had been denied the right to undergo the remaining three, with reference to the above-mentioned rule. The District Court found that the couple had been unlawfully discriminated against. The ruling has been appealed.

\textsuperscript{314}Göta Court of Appeal (appeals court for south eastern Sweden), decided on 9 February 2007.

\textsuperscript{315}Göta Court of Appeal (appeals court for south eastern Sweden), decided on 9 February 2007.

\textsuperscript{316}Available in Danish only.

\textsuperscript{317}Information about the law from Danish Health Agency, Sundhedsstyrelsen, December 2006. Available in Danish at [http://www.sst.dk/publ/PUBL-2006/KOT/KUNSTIG_BEFRUGTNING/VEJL_IVF_OA_DEC06.PDF](http://www.sst.dk/publ/PUBL-2006/KOT/KUNSTIG_BEFRUGTNING/VEJL_IVF_OA_DEC06.PDF). Last visited on 20 February 2010.

\textsuperscript{318}Law 13/2005 of 1 July, by which the Civil Code is modified in the area of the right to contract marriage, (BOE núm. 157, de 02-07-2005, pp. 23632–23634). Only in Spanish.

\textsuperscript{319}Translation is author’s own.
the adoption of children. According to Spanish Ministry of Justice Resolution 2005/21656, it is constitutional under the new law for a Spanish citizen to marry a foreign citizen of the same sex, or for two foreigners of the same sex to marry, if they reside in Spain, regardless of whether same-sex marriage is legal in their home country.

The constitutionality of the law has been questioned before the Constitutional Court by the opposition party, Partido Popular. As of July 2011, the case is pending.

Adoption is open for single persons without any special requirements in the law. According to the wording of Article 175 in the Civil Code joint adoption is only allowed for married couples, whether opposite-sex or same-sex. However, Law 21/1987 establishes that when the law for adoption purposes mentions 'spouses,’ these provisions will also be applicable to a man and a woman who live together in a couple on a permanent basis, analogous to that of a married couple. In the autonomous regions of Navarra, Catalonia, and Aragón, this provision has opened up the possibility also for non-married same-sex couples to adopt.

Spain also has a non-discriminatory regulation on artificial reproduction technologies. According to Act 14/2006, of 26 May, on techniques of assisted human reproduction, any woman over 18 years and with full legal capacity can be the recipient or user of the techniques regulated in this Act, for as long as she freely, consciously and expressly has submitted her written consent to the procedure. The woman may be the user or recipient of the techniques regulated in this Act independent of her civil status or sexual orientation. (Art 6(1))

Thus, single or partnered lesbian women have access to both assisted insemination and IVF, with their own or donated eggs. Another interesting detail in the Spanish law, from a rights perspective, is that it especially calls for disability access to the centers that get authorized to perform the services in question.

The original version of the law did not consider the legal relationship between the same-sex partner of a woman undergoing the procedure and the child born of that procedure. In 2007, Law 3/2007, of 15 March, regulating the correction of the appearance in registries of the sex of persons amended the above-mentioned act to rectify this. The amendment specifies that when a child has been born with assisted reproduction techniques to a woman who is married to another woman, the female spouse can declare her maternity before the Civil Registry and obtain co-parenthood. The law still does not contemplate co-parenthood of an unmarried same-sex partner; for her, the option remains to adopt the child. This is a distinguishing factor from unmarried opposite-sex couples, where the male partner can recognize the child before the Civil Registry.

United Kingdom: ART for same-sex couples and single women

Access to artificial reproduction technologies for women regardless of marital status or sexual orientation has been allowed in the United Kingdom since the passing of the Human Fertilisation and Embryology Act 1990. The National Health Service (NHS) offers funding for fertility treatment. The number of treatment cycles available with public funding varies from region to region.

Before 2008, the Act did not state that single, non-married, and/or gay women were barred from

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320 Regulated through Law 13/2005, where the possibility to take part in adoption procedures for same-sex couples is mentioned in the preamble, and, consequently, Article 175 of the Spanish Civil Code, as amended.

321 Ministerio de Justicia (BOE 313 de 31/12/2005), Referencia 2005/21656.

322 Law 21/1987, of 11 November, through which certain articles in the Civil Code and the Civil Procedural Code are modified in the area of adoption.


324 Only in Spanish.

325 Translation is author’s own.

326 Additional disposition 1a, amending Article 7 of the 2006 Act, to include this provision in Article 7.3. See for more information about this law Chapter 4: Gender identity, gender expression, and intersex.


328 Enacted 1 November 1990.

the procedure, but the wording of the law suggested that women who were not in a heterosexual relationship would be disadvantaged in practice, when assessed for eligibility. Section 13(5) provided that a woman would not be treated unless “account ha[d] been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father).”

This article was revised as part of a major amendment to the 1990 Act, the Human Fertilisation and Embryology Act 2008. According to the new wording:

A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth. (Section 14(2), amending section 13(5) of the 1990 Act, emphasis added)

This new gender-neutral wording suggests that preference will no longer will be given women in opposite-sex, as opposed to same-sex, relationships. Moreover, it also opens the possibility for single women to be taken more seriously than previously; ‘supportive parenting’ includes a wider group of potential supportive parenting figures than only the official partner. Both assisted insemination and IVF are open to lesbians and single women.

According to the 1990 Act, only the biological mother was considered a parent when same-sex couples had fertility treatment. The 2008 amendment also provides for a same-sex partner of the woman undergoing the treatment to be recognized as co-parent of the child. This applies either to the registered partner of the woman undergoing the procedure, or to a non-registered female partner who has consented to taking on full parenthood. The law makes clear that the two partners have to be in an intimate relationship with each other (Section 54 (2)(c)).

Similarly, the amendment allows for the same-sex partner of a man using surrogacy to be recognized as the other legal parent of the child (Section 54 (1)).

Case law: best interests of the child justifying adoption by lesbian woman

In the Northern Irish High Court case NIFam 3 (06 January 2004), the first applicant, J, was a woman who together with her husband had raised a girl in foster-care. After divorcing her husband, the applicant entered into a lesbian partnership with the second applicant, A, and the foster girl came with her. The girl lived with the two applicants from the age of two and thrived in their household. The first applicant applied to adopt the child, and both applicants issued an application for a joint Residence Order in respect of the child.

Adoption for same-sex couples is not allowed in Northern Ireland. However, under the Adoption (Northern Ireland) Order 1987 single persons can adopt. The Order provides that the court or adoption agency shall regard the welfare of the child as the most important consideration in its decision. The judge assessing the application from the two women found that the Order was drawn widely and does not distinguish, as a matter of public policy, between one member of a same-sex cohabiting couple and one member of an opposite-sex cohabiting couple, applying to adopt a child. Each can successfully do so. The judge stated that “[t]he law is not moribund. It must move to reflect changing social values and a shifting cultural climate,” and cited other cases where homosexual parents had been allowed to adopt as single persons. The judge continued:

Reason therefore must colour the thread of the court’s approach at a time when basic assumptions may be shifting and the law must be in tune with the ever changing needs and values of society. In England and Wales, under the Adoption and Children Act 2002, […] a “couple” – meaning “two people (whether of different sexes or of the same sex) living as partners in an enduring family relationship” and thus including homosexual couples – will be able to apply to adopt. This is but one more indication of the evolving nature of the law albeit that the Act does not apply in Northern Ireland. (para 14)

In conclusion the judge stated that granting the adoption was in the best interest of the child and prevented discrimination:

[T]he 1987 Order permits an adoption application to be successfully made by a single applicant, whether he or she at that time lives alone or cohabits in a heterosexual,
homosexual, lesbian or even asexual relationship with another person who it is proposed should fulfill a quasi parental role towards the child. Any other conclusion would be both illogical, arbitrary and inappropriately discriminatory in a context where the court’s duty is to regard the welfare of the child as the most important consideration. (para 15)

With regard to the Residence Order, allowing both partners to make decisions about the child, inter alia on medical and educational matters, the judge concluded that it was in the best interest of the girl that both partners be granted such authority. The judge found that the girl was used to shared care from both J and A, and it would be confusing in her life if parental responsibility were to be vested in only one “whereas equality in practice had prevailed as a matter of fact in the past between J and A.” A shared Residence Order was granted.

5. Concluding remarks

There is a tendency in the region to recognize other kinds of family units than the traditional institution of a marriage consisting of a man and a woman. Different countries have opted for different solutions. Going beyond traditional marriage can mean several different things. It can mean extending rights to same-sex couples, including opening up marriage to same-sex couples, or it can mean extending family rights to unmarried couples, whether of the same or the opposite sex. One model balanced between same-sex marriage and equal rights to cohabitants is registered partnership – recognizing a union between two persons of the same or opposite sex and attaching significant rights to this union, but making it a model clearly separate from that of marriage.

The Dutch case is worth paying attention to. While the Netherlands also recognizes same-sex marriage, it is important to note that its regime for cohabitation virtually puts cohabitants on equal footing with married couples. This provides couples, whether same-sex or opposite-sex, with a real choice regarding how to regulate their co-living. It also signifies that all persons living in a couple are granted the same level of state protection and have the same rights and obligations, which is an important expression of non-discrimination.

Another interesting case is the Swedish model that allows for same-sex marriage. In practice the Swedish regime will not have different effects than its Spanish or Dutch equivalents. However, the Swedish choice to remove references to gender altogether is symbolically relevant. Instead of tagging along same-sex couples to the traditional concept of marriage, that is, between a man and a woman, the Swedish legislature chose to redefine marriage as a concept (“those two who marry each other will be spouses”). Sweden became the first country in Europe to present a definition of marriage that does not build on the old, opposite-sex institution, but in a subtle sense tries to redefine it altogether.

With regard to the EU regulations, these still do not unconditionally establish that registered partners and de facto couples be included in the family concept. However, the provisions referred to constitute an important step forward, from a non-discrimination point of view. EU law has slowly started to recognize that, within certain limits, rights historically only awarded to spouses now shall extend to partners living in other constellations than traditional marriage, thus illustrating a gradual recognition of a wider family concept. Non-discrimination for (same-sex and opposite-sex) unmarried couples is crucial for their well-being. Also, practically, partners’ possibility to live together as a family is critical to their psychological and emotional health. This recognition of same-sex and unmarried partners’ rights may also constitute a first step toward the inclusion of this group in health and social security benefits, still not recognized by Union law.

The Hungarian, Israeli, and Slovenian cases focus on the practical effects of discrimination between opposite-sex and same-sex couples, regardless of the label of the relationship. As pointed out by the Israeli Supreme Court, the purpose of provisions on certain types of benefits is not to strengthen the institution of marriage. Their purpose is to facilitate life in companionship in a myriad of ways, many of which have direct relevance for sexual health. Nothing distinguishes such companionship if the partners are of the same or of the opposite sex. While the Hungarian, Israeli, and Slovenian courts examined practical consequences of discrimination or non-discrimination, their decisions also demonstrate an increasing willingness in the region to acknowledge a broader family concept. As elegantly stated by the Slovenian court, these decisions also illustrate the growing recognition of sexual orientation as a “human characteristic that importantly defines the individual.”

As regards adoption, all pertinent laws and cases make very clear that the best interest of the child is paramount. In that regard, there is no right to adopt, for single persons or for same-sex or opposite-sex couples. However, as pointed out by the European Court of Human Rights, when the right to apply for an authorization to adopt exists for a single person, then a person of homosexual orientation must have the same right.
The first conclusion drawn from the summary above is therefore that, in adoption procedures, when adoption for single persons is allowed, discrimination based on sexual preference and stereotypical notions about homosexuals cannot be tolerated. In this context the F.B. case deserves closer attention. The case allows for a more generous understanding of what a family is – and can be – than what French law until then had recognized. It is tempting to criticize the hetero-normative basis of the French arguments here: when allowing single, but heterosexual, people to adopt, there is always the chance that the person later will establish a heterosexual unit with another person who then can take on a parental role and provide for the desired ‘otherness’ in relation to the child. If the single person is homosexual, such hopes are in vain. The Court shows that this, explicit or implicit, reasoning cannot be tolerated. If the state has established that non-traditional units (single people) can adopt, then this has to be taken at face value and not contain secret incentives for these people to conform and ‘become traditional.’ Ultimately, the Court shows that it is not willing to rule out gay parenting, which is a step toward equal rights between same-sex and opposite-sex couples.

Having stated that, it is striking that the Court reached different conclusions in Fretté and E.B. The main difference is that in the first case the applicant was a man and, in the second, a woman. Looking at the two cases in a parallel fashion, it is hard not to reach the conclusion that the Court itself has applied prejudicial notions of male versus female aptitude for bringing up children. The reasons it presents in E.B. to distinguish the case from its earlier holding in Fretté are entirely unconvincing. The Court here seemed blind to its own belief in the stereotypical notion that a woman is more apt to raising a child than a man. On the other hand, six years had passed between the two cases. The more benevolent interpretation of the different outcomes is that, in response to legislative changes in the region, the Court by 2008 found that time was ripe to embrace homosexual parenthood.

The second important conclusion is that, even though most countries in the region still do not allow for same-sex couples to adopt, a trend in parts of the region points towards the recognition that a non-discriminatory attitude towards parents is also in the best interest of the child. At least the northern part of the region has started to acknowledge that the best interest of the child is to have loving parents, regardless of their sexual orientation. Both the Swedish and the Northern Irish cases clearly illustrate this trend. In both cases the courts concluded that adoption is in the best interest of the child even though it could be argued that the applicants in both cases had circumvented relevant law. The family concept has clearly evolved; rather than moralistic or rigid standards for what kind of family should be the norm, the legislation and case law discussed here demonstrate a more pragmatic view. In this view, the notion that children can thrive in a loving home environment, regardless of its composition, is dominant.

Artificial reproduction technologies are relevant because they highlight the issue of non-discrimination and the right to access to (reproductive) health services. Several European states have in recent years expanded the scope of their ART legislation to include individuals other than those living in opposite-sex marriages. The Netherlands, Sweden, Spain, and the United Kingdom provide illustrative examples in this regard; in all these countries partnered lesbian women can now access fertility treatment. Treatment is also available to single women in the Netherlands, Spain, and the United Kingdom. In Sweden, there must be a biological connection to at least one parent: either the woman’s own egg or her male partner’s sperm must be used. This has the consequence that IVF with another woman’s egg is not available to lesbians; thus, infertile lesbians are excluded from treatment which is concerning from a non-discrimination point of view. No such distinction is made in the Netherlands, Spain, or in the United Kingdom. Other variations can be found in regard to recognition of parenthood for the same-sex partner of the woman undergoing treatment. Whereas Sweden, the United Kingdom, and Spain grant immediate co-parenthood to the partner, in the Netherlands she still has to adopt the child. Recent legislative changes in this regard in Spain, the United Kingdom and, pending, in the Netherlands, suggest a trend towards a facilitated process for same-sex partners to be recognized as parents – in line with the pragmatic trend described above regarding adoption.

Marriage – or, to some extent, registered partnership – continues to constitute a major precondition not only for spousal benefits but also for state-sanctioned family building. Marriage or registered partnership is a precondition for joint adoption in the Netherlands and, at least officially, Spain, while Sweden makes ART available only to married or registered couples. The EU regulations on rights to movement and residence provide another example. Even though there are signs in the region that this criterion is less strictly upheld than previously (illustrated for example by Spanish jurisprudence on joint, unmarried adoption), relationships sanctioned by the state are still privileged over non-regulated relationships. From the viewpoint of a non-discriminatory approach to sexual relationships, this hierarchy may be questioned as unnecessarily disadvantageous for couples who choose not to or cannot marry.
B. TERMINATION OF MARRIAGE

1. Introduction

The ability to terminate a marriage is closely linked to issues of sexual health. This is particularly true when violence, of a sexual nature or not, is present in the relationship, with obvious strong repercussions on sexual health. Dissolution of the marriage is one of the most effective remedies to situations of intimate partner abuse. Even absent violence, a person’s well-being will be affected negatively in a host of other ways if he or she is stuck in a relationship that has broken down. One consequence is for example the inability to enter into a new marriage, in societies adhering to the principle of monogamy, as long as the first marriage is still legally valid.

In the European region, divorce is legal in almost all countries and in most parts of the region the issue is not perceived as controversial. Only a few examples will be provided here.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

In an early case involving domestic violence, the issue of judicial separation – in the absence of legal right to divorce – was raised under the Convention. In Airey v. Ireland, the applicant, an abused woman, sought separation from her husband. Judicial separation, while technically available in Ireland under certain circumstances, could only be granted through a High Court proceeding, for which legal aid was not available. The applicant did not have the financial resources to pay a solicitor, such that the remedy was effectively unavailable to her. The Court found that the failure of the state to provide an effective and accessible remedy – in this case for the woman concretely to be able to pursue separation – constituted both a violation of her right to access to a court under Article 6(1), and a breach of her right to family life under Article 8, as this right also entailed positive intervention of the state in situations in which protective measures concerning family life were required.

In Johnston v. Ireland, a couple could not marry because one of them was already married (although separated) and was not allowed a divorce under Irish law. They had a daughter who because of this arrangement could not achieve ‘legitimate’ status. The couple complained that their inability to marry each other violated Article 12, the right to marry, and Article 8, the right to respect for private and family life, under the Convention.

In making references to the travaux preparatoires of the Convention, and to Article 16 of the Universal Declaration of Human Rights, the Court held that a right to divorce cannot be derived from Article 12. Nor did it find that the right to dissolve a marriage could be derived from a right to respect for private and family life under Article 8. It did, nevertheless, find that the situation of the daughter violated her (and her parents’) rights under Article 8.

In 1987, as a response to the Court’s judgment in Johnston v. Ireland, the Irish parliament enacted a law equalizing the rights of all children, regardless of whether they were born within or outside marriage. Divorce became legal in Ireland in 1997, after the passage of a referendum on divorce in 1995.

3. European Union

The issue of dissolution of marriage falls outside of the scope of binding EU law.

4. Domestic legislation

In Finland, divorce is regulated in the Marriage Act. According to its Section 3 the marriage will be dissolved when a court grants the spouses a divorce. Under Sections 25 and 26 the spouses have the right to divorce after a reconsideration period of six months from the date of filing a petition for the dissolution of the marriage. Divorce can be granted without a reconsideration period if the spouses have lived separated for two years without interruption before filing for divorce.

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334 Application no. 6289/73, decided on 9 October 1979.
335 Application no. 9697/82, decided on 18 December 1986.
337 Family Law (Divorce) Act 1996, No. 33/1996..
338 Marriage Act 13.6.1929/234, official version available in Swedish, unofficial translation in English reflecting correctly the provisions here discussed.
According to Section 28 proceedings for divorce can be initiated by the joint request of the spouses or upon the request of one of them. If the petition has been filed by one spouse alone, the court shall give the other spouse an opportunity to be heard. In the case of mandatory reconsideration period the court shall inform the spouses of the availability of family mediation to them. The spouses are not required to list the reasons for divorce in the application. When hearing the divorce case the court does not consider the spouses' personal relationship or the reasons for divorce.339

After a legal reform in 2005 in Spain, divorce requires neither previous judicial separation, nor the manifestation of grounds or reason for the request. These requirements were abolished in Law 15/2005,340 with the express recognition that the free development of personhood, as protected by the Constitution, requires that the will of the person who no longer wishes to be married must be at the center of a divorce proceeding. The law, in other words, stresses the voluntary and consensual nature of the marriage contract and thus provides that requiring certain grounds for divorce would run contrary to the (constitutionally protected) free will of the spouses.341 The 2005 law also modified other civil legislation, facilitating the preconditions and procedure by which divorce can be granted.

According to Articles 81 and 86 of the law, the divorce procedure can be initiated either at the request of one of the spouses or at the request of both (alternatively at the request of one of them with the consent of the other) if three months have passed from the day the marriage was contracted. An application for divorce can be filed earlier than three months after marriage when there is evidence of risk for life, physical integrity, freedom, moral integrity, or sexual freedom for either one of the spouses or for a child/children in the household. Divorce will be granted if the application has been filed in accordance with these criteria (Art 81 and 86).

Regulation of divorce is fully operative in relation to all marriages, regardless of whether the spouses are of the same or of opposite sex.342

5. Concluding remarks

In Johnston, the European Court of Human Rights declined to rule that Article 12 of the Convention, the right to marry, also includes a right to terminate marriage. However, much time has passed since that ruling, and the European region now shows a strong consensus on the right to divorce. Finland and Spain provide examples of countries that grant divorce upon the request of one party, without requiring the presentation of reasons or justifications. The Spanish legislature makes the motives for this approach explicit: if marriage is a contract that relies on the will of the two parties to it, then once the will of one or both of the spouses is absent, the foundation of the contract has broken down. This rationale leads to an abolishment of the requirement of grounds for divorce. In addition, pre-specified grounds for the granting of divorce can lead to humiliating state interference in intimate affairs. Suffice to conclude here that for the sexual health of both parties to an intimate relationship, easily accessible, non-moralistic, and non-intrusive divorce procedures based on the free will of spouses are to be preferred.

C. Forced marriages

1. Introduction

According to international human rights instruments recognizing the right to marry, marriage shall not be entered into without the free and full consent of the intending spouses.343 Forced marriages clearly violate these principles. To force a person to marry contrary to his or her will can also imply a violation of a myriad of other rights, such as the right to liberty and security of person, the right not to be subjected to cruel and degrading treatment, and the right not to be held in servitude.344 When expressed as child marriages, forced marriages also run contrary to several well-established rights of children, such as the right to health, the right to be protected from harmful practices, the right to

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340 Law 15/2005, of 8 July, through which the Civil Code and the Civil Procedural Law are modified in the area of separation and divorce. Only in Spanish.

341 Introduction to the law (“Exposición de motivos”).


343 Article 23, ICCPR, Article 16, CEDAW.

344 See, for example, Articles 7, 8 and 9 of the ICCPR.
education, and the right to freedom from abuse and exploitation. The risk of domestic violence and sexual abuse is also elevated in forced marriages. For these reasons, forced marriages have serious negative impact on sexual health.

In Europe there is a strong consensus against the practice of forced marriages, but European countries have taken different approaches to the problem. The main difference is the manner in which it is addressed: whether as a separate offense in criminal law legislation (as in Norway), falling under other criminal law provisions such as coercion or duress (as in Germany), or addressed primarily through civil legislation (as in the United Kingdom).

2. Council of Europe and the European Union

The issue of forced marriages has not been addressed by the European Court of Human Rights, or by binding European Union law.

Conventions in the Council of Europe Treaty Series

The Council of Europe Convention on preventing and combating violence against women and domestic violence (opened for signature in May 2011, not yet in force) defines and criminalizes forced marriage as a form of violence. It states that:

Article 32

Parties shall take the necessary legislative or other measures to ensure that marriages concluded under force may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim.

Article 37

1. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.

2. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised.

Article 59 also addresses the residence status of those displaced for the purposes of forced marriage.

3. Domestic legislation and case law

Marriages entered without the free will of the two parties involved are deemed null and void in a number of European states. These include Belgium, the Czech Republic, Germany, Hungary, Portugal, and the Russian Federation. Criminal law approaches to forced marriages vary.

Norway is one of the few European countries that have chosen to directly penalize forced marriage. According to a recent (2003) amendment to the Norwegian Criminal Code, forcing a person to enter into marriage “through recourse to violence, deprivation of liberty, undue pressure or other unlawful behaviour, or through the threat of such behaviour” is a criminal offense, punishable with imprisonment up to six years (Article 222 (2) of the Criminal Code).

To enter into marriage or partnership with a person below the age of 16 is also a criminal offence, as well as aiding and abetting the contracting of such marriage (Article 220). All the coercive elements mentioned are also punishable separately under Norwegian law; however, by creating a separate crime for forced marriages it is possible to punish it more severely than if only the ordinary charges had applied.

This criminal provision is accompanied by several civil law provisions safeguarding the right of the child not to be forced to marry. According to a new provision in the Children Act, when parents or...
others enter into a binding marriage agreement on behalf of a child, this will have no legal force (Article 30a). Finally, new amendments to the **Marriage Act** entered into force on 1 June 2007. This amendment states that a marriage contracted outside of Norway will not be valid in Norway if one of the parties to the marriage was under the age of 18 when the marriage took place, the marriage was entered into without both parties being physically present during the ceremony (marriage by proxy or telephone marriage), or if one of the parties was already married (Article 18a).

In **Germany**, forced marriage is not a separate crime. However, forced marriage was added to the **Criminal Code** in 2005, in the list of particularly serious cases of duress under the provision on coercion. This amendment was made in connection with other amendments to the Penal Code on trafficking of women. The provision now lists as one especially serious case “if the offender causes another person to engage in sexual activity or to enter into marriage,” being punishable with up to five years of imprisonment (Section 240).

There is no law expressly prohibiting forced marriage in the **United Kingdom**, and to force somebody into a marriage is not a specific criminal offense. The status of forced marriages has recently been the subject of debate in the UK. Opponents have expressed concern that such legislation could drive forced marriage underground and prevent victims from seeking help, and so far no criminalization has been instated.

Instead, forced marriage has been subject to civil legislation. The **Forced Marriage (Civil Protection) Act 2007** introduces 19 new sections into the **Family Law Act 1996**. According to the Forced Marriage Act, British courts have the power to issue Forced Marriage Protection Orders. The purpose of these is both to protect a person from being forced into marriage, and to protect persons who already have been forced into marriage (Article 63A). The orders can contain “prohibitions, restrictions or requirements” or “other terms” that the court considers necessary in the individual case to prevent the forced marriage from taking place, or to protect a victim of a forced marriage from its effects (Article 63B). They can include, *inter alia*, orders to prevent a forced marriage from occurring, order to hand over passports, to stop intimidation and violence, and to stop a person from being taken abroad.

The terms may relate to conduct both within the UK and outside the UK. They can relate both to the person about to be forcefully married and to anybody aiding, abetting, or encouraging the forced marriage. Force is to be understood not only when there are threats of violence to the victim, but also when threats are made of violence against other parties, such as against the victim’s family, or self-violence, such as when the perpetrator threatens to commit suicide if the marriage does not occur.

The courts can attach powers of arrest to the orders, so that a person who breaches the order can be arrested.

It is not clear from the wording of the Act, nor from its explanatory notes, what effect a Forced Marriage Protection Order will have if issued after a forced marriage already has taken place. According to official information, an order can be made “to protect someone who has already been forced into marriage, to help remove them from the situation,” but it is unclear if this will lead to the nullification of the marriage, or only to the physical separation of the person in need of protection from her alleged spouse or family.

The Act has been criticized for its focus on legal measures rather than on more long-term preventative social measures. Another, more general, criticism implies that honour-related crimes in the UK tend
to be treated as different by nature from other violence against women, instead of being perceived as part of the same problem.\textsuperscript{359} This distinction may result in further stigmatization of immigrant communities and insufficient legal and social response to the victims of violence.

Here should also be mentioned Tajikistan, which expressly outlaws forced marriages, but only with regard to under-aged girls. According to the Criminal Code of the Republic of Tajikistan,\textsuperscript{360} forcing a girl to marry who has not attained the age of marriage, and concluding a marriage agreement with an under-aged person, shall be punished with up to five years of imprisonment (Articles 168 and 169).

While the criminal law provisions only penalize forced marriage of children, civil law legislation emphasizes the voluntary nature of marriage more in general. According to Article 1(4) of the Family Code of the Republic of Tajikistan,\textsuperscript{361} family relations are regulated in accordance with the principles of the voluntary nature of a union between a man and a woman; equal rights of spouses; settlement of family issues by mutual consent; priority of family child-rearing; and caring for the welfare and development of the rights and interests of minors and disabled members family.

\textit{Case law: granting asylum based on threat of forced marriage}

In Swedish case UM 721-07,\textsuperscript{362} the Swedish Migration Court granted asylum to a 15-year-old Tunisian girl on the ground that she risked being subjected to forced marriage if she were to return to Tunisia. The Court established that being forced to marry is a violation of human rights sufficiently serious to be understood as persecution in the meaning of the Refugee Convention. The applicant had made a credible claim: following the death of her father, her family in Tunisia had undergone serious economic hardship and several men had asked her mother for her hand. Her sister had been forced to marry at the age of 15, and forced marriages were not uncommon in the part of Tunisia she originated from. Accordingly, her fear of persecution was found to be well-founded.

The Court accepted the claim that the Tunisian authorities would be unable or unwilling to provide protection to the applicant upon return:

\begin{quote}
The Court finds that, given [the applicant's] particular situation as an under-aged girl, in an environment where forced marriages in practice are tolerated at least locally, and where it is associated with shame to oppose such a marriage, it cannot be ensured that she would be granted protection from the authorities to avoid forced marriage.\textsuperscript{363}
\end{quote}

\section{Concluding remarks}

On one hand, marriages entered without the free will of the two parties involved are deemed null and void in many European states. On the other hand, in most European countries, forced marriage is not a separate criminal offense. This option is based on the fear that express penalization of forced marriage may drive such marriages underground, which would place the coerced party in an even more vulnerable position than otherwise, from which she would be less likely to seek help. Instead, in these countries forced marriage can be punished with reference to the different criminal behaviours that it involves, such as rape or sexual violence, false imprisonment, psychological duress, kidnapping and abduction, offenses against the person, threats, indecent assault, etc. There are a few exceptions: countries that have chosen to penalize forced marriage as such, or to include forced marriage in their penal codes as a particularly serious case of coercion. Norway is an interesting case in this regard.

The United Kingdom example, on the other hand, shows a different approach to the problem of forced marriages. While not deeming it a less serious rights violation, the UK has opted for civil law measures, including the possibility for the courts to issue Forced Marriage Protection Orders. These have a strong preventative element – intending to prevent forced marriages from happening in the first place – which, from a sexual health point of view, has significant advantages.
D. ADULTERY

1. Introduction

Adultery laws criminalize extra-marital sex and tend to target women rather than men. Such laws are a means by which the state regulates non-conforming consensual sexual behaviour, and have clear negative consequences on the sexual health of the ‘offending’ party. Adultery on its face is not addressed by international human rights law, but many states appear to view criminalization of sex outside of marriage as a violation of human rights. UN treaty bodies have not condemned adultery laws as such, but have criticized those that impose more severe penalties on women than on men for adultery as violating the principle of equal treatment.364

Adultery is no longer a crime in any country in the region. Therefore only a couple of points will be made here. The European Court of Human Rights has recognized in one case that termination of employment because of adulterous behaviour is a violation of the right to privacy under Article 8; and that the risk to be subjected to severe physical punishment for having committed adultery constitutes a risk of torture, thereby giving rise to the obligation of states parties to grant asylum under Article 3. However, this case reflects the strong prohibition of torture under the Convention rather than constituting a rights-based statement against adultery laws. Domestically, adultery provisions in the Turkish criminal law were struck down as discriminatory by the Constitutional Court in 1996 and 1998, and more recent attempts to reinstate them have been unsuccessful.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

In Jabari v. Turkey365 the applicant was an Iranian woman who had fled to Turkey after having had an extra-marital sexual relationship and who on that ground had been questioned and detained by Iranian police. She had been rejected asylum in Turkey on procedural grounds and complained before the European Court of Human Rights that, since she had committed adultery, she risked being subjected to torture or inhuman or degrading punishment upon return to Iran.

The Court examined reports on the punishment of adultery in Iran, suggesting that harsh punishments including stoning and flogging are carried out under Iranian Islamic law. It found that punishment for adultery by stoning still remained on the statute book. The Court concluded that there was a real risk that the applicant would be subjected to treatment contrary to Article 3, and that a deportation to Iran therefore would be in violation of Turkey’s obligations under the Convention.

This case illustrates the Court’s strong stance against cruel and inhuman punishments, and reiterates its earlier case law on the obligation of non-refoulement for contracting states when there is a risk of such treatment in a country of origin. The Court did not express an opposition to adultery laws per se. However, for the purpose of sexual health the case still carries certain relevance, as it demonstrates that in extreme cases of adultery laws, the European Convention on Human Rights offers protection in the form of asylum for the person at risk of punishment under such laws.

In N. v. Sweden366 the issue of extra-marital relationships again came up before the Court in relation to an asylum claim. The applicant was an Afghan woman who had applied for asylum in Sweden on the ground, inter alia, that she had separated from her husband and initiated a relationship with a Swedish man, which she claimed would expose her to violence, social exclusion, and persecution if she were to be returned to Afghanistan. She had been denied asylum in Sweden, and argued before the Court that a deportation of her would violate Sweden’s obligations under Article 3, prohibition of inhuman or degrading treatment or punishment.

The Court noted that the applicant had been separated from her husband for five years and that unaccompanied women in Afghanistan tend to suffer discrimination and social stigma, and that the fact that she may have initiated a relationship with a Swedish man could expose her to extreme punishment if this were to become known in Afghanistan. It found that there were “substantial grounds for believing that if deported to Afghanistan, the applicant [would face] various cumulative risks of reprisals which fall under Article 3 of the Convention from her husband X, his family, her own family and from the Afghan society.” Thus, if the applicant were to be deported Sweden would violate its obligations under Article 3. The judgment illustrates how the Court takes seriously the risks that

364 See, inter alia, Human Rights Committee, General Comment No. 28 (Equality of rights between men and women), at 31.
365 Application no. 40035/98, decided on 11 July 2000.
366 Application no. 23505/09, decided on 20 July 2010.
women may suffer when transgressing social norms such as the obligation to stay with and faithful to their husbands.

The Court examined the issue of adultery from a very different angle in the recent cases Obst v. Germany\(^{367}\) and Schüth v. Germany\(^{368}\). In both cases, the applicants were church employees who had been fired because of having had extra-marital affairs. One of them, Mr. Obst, held a high position in the Mormon church, while Mr. Schüth was an organist and choir master in a Catholic parish. Both of them had complained about their dismissals to German labour courts. These courts had determined that the requirements of the Mormon church and the Catholic church regarding marital fidelity did not conflict with fundamental principles of the German legal order, and had upheld the dismissals. In both cases, the applicants complained that by not overturning their dismissals, the German courts had violated their right to respect for their private lives under Article 8.

The Court stated initially that it had to examine the balance struck by the German courts between the applicants’ right to respect for their private life under Article 8 on the one hand, and the Convention rights of the Catholic and Mormon churches, on the other – and whether the German courts had afforded the applicants sufficient protection. In regard to Mr. Obst, the Court found no violation of his Article 8 rights. It observed that since he had grown up in the Mormon church, he had been or should have been aware of the importance of marital fidelity when he signed the employment contract, and how an extra-marital affair would be incompatible with his high position in the church. Thus the balance struck by the German courts had not been unreasonably harsh on the applicant and his rights under Article 8 had not been violated.

In the other case, by contrast, the Court reached a different conclusion. It observed that the German courts had not taken into account the nature of Mr. Schüth’s position in the church, which was not within the group of employees who in case of serious misconduct had to be dismissed. The courts had not taken into account his \textit{de facto} family life – he was separated from his wife and living with a new partner who expected their child – and thus the interests of the Church employer had not been balanced against his right to respect for his private and family life, but only against his interest in keeping his post. It was not reasonable to interpret his signing of an employment contract as “an unequivocal undertaking to live a life of abstinence in the event of separation or divorce.” The Court concluded that the German labour courts had failed to weigh Mr. Schüth’s rights against those of the Church employer in a manner that was compatible with the Convention, and thus his Article 8 rights had been violated.

There seem to be two determining factors in the difference in outcome between the cases: on one hand, the different positions the two men held in their respective churches and the related foreseeability of dismissal for such conduct; and on the other the severity of the effects the dismissals had on the two applicants. While not determining that adultery should never be punished in a labour setting, the Court in the Schüth case was clearly critical of the German courts’ rather mechanical acceptance of the arguments from the Catholic church, arguments that had not taken into account the applicant’s personal situation. For the purpose of sexual health, the case is relevant in that it underlines the right to respect for private and family life in a situation like the one at hand, as well as demonstrating a certain skepticism toward moral arguments that negatively affect life choices that do not harm others.

3. European Union

The European Union does not address the issue of adultery as part of its binding law. However, the prospect of reintroducing adultery laws in Turkey stirred strong reactions from the European Union in 2004 and was effectively presented as a bar to the initiation of Turkish accession negotiations with the EU (see below). This suggests that laws criminalizing adultery are understood to violate human rights norms that increasingly are seen as fundamental to the Union.

4. Domestic legislation and case law

Adultery existed as a crime in domestic legislation in Europe until recently. In Turkey, the former Penal Code made adultery a crime with different criteria for men and women: Article 440 provided that a woman had committed adultery if she had had sexual relations with a man other than her husband, and Article 441 that a man had committed adultery if he had lived openly with a woman other than his wife. The Turkish Constitutional Court repealed Article 441 in 1996 and Article 440 in 1998; both times with the motivation that the provisions violated the principle of equality before the law under Article 10.

\(^{367}\) Application no. 425/03, decided on 23 September 2010. Only available in French; press release available in English.

\(^{368}\) Application no. 1620/03, decided on 23 September 2010. Only available in French; press release available in English.
of the Turkish constitution.\textsuperscript{369} In 2004, the Turkish government announced its intention to reintroduce adultery as a crime in the new Turkish Penal Code. This proposal met strong reactions from women's rights and other groups both domestically and internationally, and was withdrawn after statements from EU representatives declaring that such a move could negatively affect Turkey's accession negotiations with the Union.\textsuperscript{370}

E. **Polygamy/Polygyny**

1. **Introduction**

Polygamy is illegal in practically all European states, which is in line with strong pronouncements from international human rights bodies.\textsuperscript{371} Even if laws and statements condemning this practice tend to use the term 'polygamy' (form of marriage where a person has more than one spouse) such a practice usually in fact takes the form of 'polygyny' (a man has more than one wife). Thus, the practice is highly gendered. As such, polygyny is both an illustration and reinforcement of women's inequality with men, and an arena where abuse of women tends to occur. These concerns have strong bearings on sexual health.

Nevertheless, as will be shown, European policies on polygamy intersect with immigration regulation and as such leave much to be desired with regard to the practical rights of some of the women (and children) concerned. Both EU law and domestic legislation on this subject reflect concerns about the principle of gender equality. However there seems to be less concern about the consequences these principles may have on individuals, in particular on (immigrant) women who in the name of gender equality should be able to benefit from them.

Here should also be mentioned bigamy, which means to be involved in more than one marriage simultaneously. Bigamy is considered unlawful in almost all European countries, and can render harsh punishments according to criminal law provisions.

2. **Council of Europe**

*Jurisprudence of the European Commission of Human Rights*

There are three cases from the European Commission of Human Rights related to polygamous immigrant families being denied family reunification on the basis of their polygamous status. They were all declared inadmissible, on similar grounds.

The most interesting case is *Bibi v. the United Kingdom*,\textsuperscript{372} The applicant was the daughter of a woman who was the first of two wives of a Bangladeshi national and resident in the United Kingdom. The man's second wife had settled first with him in the United Kingdom, and on that ground the first wife was refused entry. The daughter, who had been admitted to the United Kingdom as her father's offspring, complained that the denial to let her mother join them was a violation of her right to respect for her family life under Article 8 of the Convention.

The Commission reiterated, as in the other similar cases, that there is no right to enter or reside in a particular country under the Convention, and that states have considerable margin of appreciation in the field of immigration. However, the exclusion of a person from a country where he or she has close relatives may raise an issue under the right to respect for family life in Article 8. Given that the applicant had lived with her mother for nine years, a family life had been established between them. The refusal of entry to the applicant's mother constituted an interference with the right to respect for the daughter's family life under Article 8. However, this interference was found to be justified, as it was based on “the preservation of the Christian based monogamous culture dominant in [the] country,” taking into account the right of a contracting state to deny full recognition to polygamous marriages


\textsuperscript{371} See Committee on the Elimination of Discrimination Against Women, General Recommendation 21 (Equality in marriage and family relations) at [14], and Human Rights Committee, General Comment on 28 (Article 3 (Equality of Rights between Men and Women)) at [24].

\textsuperscript{372} Application 19628/92, decided on 29 June 1992. The other cases are M. and O.M. v. the Netherlands (application 12139/86, decided on 5 October 1987), and E.A and A.A v. the Netherlands (application 14501/89, decided on 6 January 1992).
in conflict with their own legal order. Furthermore, the Commission established, all facts about United Kingdom immigration law and the general disapproval of polygamy in the country had been known to the applicant’s father when he chose to have his second wife join him. In conclusion, the Commission found no violation of Article 8 and declared the application inadmissible.

Thus, the Commission acknowledged the family tie between the mother and daughter but did not legitimize polygamous families’ right to be together per se. States can limit the right of members of those families to reunify, on the basis of culture and morals. It is noteworthy that the Commission did not reach this conclusion through an analysis of women’s rights. Furthermore, the Commission used the argument that the father must have been aware of the legal situation in the United Kingdom when bringing his second wife. This, one could argue, is beside the point, since the rights of the father were not claimed to have been infringed upon. It was the daughter’s, and, as a consequence, her mother’s rights that potentially had been violated — and one can imagine that they had not been consulted before the father decided to choose that the second wife would join him. For these reasons, the case raises several human rights-related concerns.

3. European Union

Council Directive 2003/86/EC on the right to family reunification determines the conditions for the exercise of the right to family reunification by third country nationals who reside lawfully in the territory of a member states. Here, EU law allows member states to restrict the right to family reunification on polygamous grounds:

_The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households._ (para 11)

4. Domestic legislation

In France, according to Article 147 of the French Civil Code, a second marriage cannot be entered into unless the first has been dissolved. Bigamy is a crime according to the Penal Code, sanctioned with imprisonment or fine. If the civil servant officiating the marriage is aware of the first marriage, he or she will also be subject to punishment.

In 1993, a law was passed that prohibited living in a polygamous household in France, regardless of whether the arrangement had been concluded legally in another country. The provisions about polygamy were part of a new immigration law, the so-called second Pasqua law. According to this law, the issuance or renewal of a resident permit for an immigrant depends on the absence of polygamy. This means that only one wife of a French male resident and her children are allowed to enter France, in the context of family reunification. If a man brings in more than one wife, he will lose his residence permit. For polygamous families who were admitted before 1993, only the first spouse — that is, the wife who first benefited from the right to family reunification — can have her residence card renewed. The rights of the first spouse were clarified in a Government circular issued on 25 April 2000; she will be legally protected, and her resident permit will not be affected by the fact that she lives in a polygamous arrangement. The other wives will receive temporary residence cards, until their status has been resolved (that is, until they either leave their husbands and establish separate households, or return to their home countries). Since 2003, parents of children with French citizenship (that is, children who were born in France) are no longer protected against deportation, if they live in polygamy.

Various commentators have criticized the demand for the so-called de-cohabitation of other wives than

373 Unofficial translation available. The Belgian (Art 147), Luxembourghian (Art 147) and Swiss (Art. 96) civil codes have exactly the same or very similar provisions.

374 Article 433-20 of the Penal Code. Unofficial translation available.


the first, pointing out that this leaves already vulnerable women in even more precarious situations.\(^{379}\) A circular issued in 2001 provides for support and specific benefits to the de-cohabiting women, aiming at helping them obtain a certain level of autonomy.\(^{380}\) Most notably, the circular provides for subsidized housing for the parting women.

According to the United Kingdom Offences against the Person Act 1861, as amended, persons convicted of the crime of bigamy may be subject to imprisonment up to seven years (Section 57). This ban does not apply to non-citizens, if the second marriage has been contracted outside of England or Ireland.

Section 2 of the Immigration Act 1988 rules that the polygamous spouse of a United Kingdom resident or citizen has no right of abode, if another spouse of the same resident/citizen already has been admitted to country (subsection (2)).\(^{381}\) This will not preclude the spouse from re-entering if she previously entered the United Kingdom as the sole spouse of the UK resident/citizen (subsection (4)).

British legislation is similar to its French counterpart in that it clearly prohibits polygamy to be contracted on British territory, and bars family reunification of more than one wife per immigrant man. However, in contrast with the French regulations, the British government acknowledges that polygamous families do exist in the United Kingdom, and polygamous marriages contracted legally outside of the United Kingdom are legal in the sense that the British states will not actively try to break them up. Similarly, the UK has opted for the path that these families should not be discriminated against in welfare legislation; polygamous households can collect certain welfare benefits such as housing benefits,\(^{382}\) community charge benefits,\(^{383}\) and tax benefits.\(^{384}\) These regulations have been much criticized, and were subject to a government review that was finalized in 2008. The review recommended not to cut the benefits to polygamous families, with the argument that this might contravene British and international human rights legislation.\(^{385}\)

In several former Soviet republics, the practice of polygamy/bigamy apparently still exists, even though it is considered an offense under criminal and/or family law. For example, in Kazakhstan, Law No. 321-1 “Marriage and the Family” provides that marriage is prohibited between persons of whom at least one is already in another registered marriage (Art 11).\(^{386}\) Pursuant to the Criminal Code of Tajikistan, the practice to contract marriage with two or more women (labelled polygamy, though the provision in fact targets polygamy exclusively) is punishable with a fine or correctional labour (Art 170).\(^{387}\) According to news reports, in several Central Asian republics proposals to legalize polygamy have emerged in recent years, primarily with reference to demographic imbalances (‘surplus’ of women following war).\(^{388}\) Thus far, to the knowledge of the author these proposals have not led to legislative change.

In relation to the above, it is relevant to briefly reflect upon legal arrangements that could allow polyamorous relations, entered into with full consent of all parties and with the same status for men

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380 Circular DPM/AC/14/2001/358, relating to the lodgment of de-cohabiting women of polygamous marriages engaged in a process of autonomy. Minister of Employment and Solidarity, 10 June 2001.

381 The Immigration Rules that accompany the legislation make these provisions gender neutral and also apply them to civil unions (para 278). The rules were last updated in July 2011. Available at UK Border Office website at [http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/](http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/), last visited on 27 July 2011.

382 Housing Benefit Regulations S.I.2006/213, section 23.


386 Law of the Republic of Kazakhstan dated December 17, 1998 No. 321-1 “Marriage and the Family”. Private translation by Ukrainian lawyer and researcher Oksana Shevchenko. However, according to news reports polygamy is not criminalized in Kazakhstan, as opposed to in the other Central Asian republics. See, e.g. Eurasianet.org, “Central Asia: Increase in Polygamy Attributed to Economic Hardship, Return to Tradition,” 20 October 2002, at [http://www.eurasianet.org/departments/culture/articles/day/10101002.shtml](http://www.eurasianet.org/departments/culture/articles/day/10101002.shtml), last visited on 20 April 2010. The author has been unable to confirm this fact.

387 Unofficial translation.

and women. Such a model would break completely with the idea of the monogamous unit as a basic cornerstone of society. As of today there is no such example in Europe. However, a law from Portugal is worth mentioning. It regulates the situation of two or more persons living together, thereby awarding limited protection to those who share a household who are not married, and who may be more than two in number. The law, Law No 6/2001 of 11 May on measures of protection for persons who live with shared economy, does not specifically target people who have a sexual or emotional relationship, but could be relied upon in situations of consensual polyamorous arrangements. The target group of this law is people who live in consensual unions, that is, persons who have been living together for more than two years and who have established a mutual household that includes mutual assistance and sharing of resources. Persons who qualify for protection under the law are awarded, inter alia, benefits similar to those granted married persons relating to leave, absence, and official holidays, certain tax benefits, and protection of the domicile. Article 3d) provides that the law is not applicable when either person is submitted to a situation of physical or psychological duress or when his/her self-determination is threatened.

5. Concluding remarks

Polygamy does not exist as a widespread practice in most parts of Europe and is consistently outlawed throughout the region. According to reports, the practice of polygyny prevails in some of the Central Asian republics, although it is not sanctioned by law. In other parts of Europe the issue of polygamy is brought to the fore mainly with regard to immigrant groups, or persons born in European countries but of non-European origin. Countries that are recipients of large numbers of immigrants all have a ban on polygamy: this means that for reunification purposes, they prohibit men who reside lawfully from bringing in more than one wife. The treatment of immigrant polygamous families that are already established in European states varies slightly, but most European countries share strong anti-polygamy policies as demonstrated by provisions of criminal, civil, and immigration law.

As pointed out by international human rights bodies, polygamy as practiced traditionally is detrimental to the sexual health and rights of women, given the power imbalance between the spouses and the lack of sexual autonomy for the woman as a consequence of the arrangement. As pointed out by the Human Rights Committee, polygamy is also an inadmissible discrimination against women. In that regard, strong anti-polygamy policies, combining criminal, civil, and immigration law, can be considered good practice.

However, polygamous marriages do exist in many European countries and, regardless of principled positions against polygamy, there is a need to protect the rights of women and children who live in such arrangements. In practice, blanket bans against polygamy often leave women in a precarious position. The most emblematic area is immigration law. Rights become critical both with regard to women and children who have been admitted entry – but who have no protection under domestic laws on property, inheritance, etc. – and those left behind in their home countries and who may face extreme stigma, discrimination, and poverty. The EU Directive on family reunification illustrates this dilemma. It explicitly states that it is with concern for the rights of women and children that restrictive measures can be taken against reunification on polygamous grounds. However, while the principled statement is commendable, the Directive will be implemented in a world where polygamous families exist. The question may be legitimately posed whose rights are promoted by such a ban: it hardly benefits the wives who may be left without financial support in the face of society’s scorn in their home countries, or the children who will be separated from one of their parents.

For these reasons, the United Kingdom serves as an interesting example in the region. While having the same ban on polygamy and family reunification for polygamous families as other European states, the British state allows such families welfare benefits and thereby a certain level of social protection.

From another perspective, strong positions against polygamy such as those that can be found in Europe presuppose that women can never consent to polygamy. It is true that complicated and possibly structural power dynamics are involved in arrangements such as polygamy, which may render concepts such as consent fictive. Nevertheless, from a rights perspective, policies that give no room for adult consent should be examined closely.

F. Tests and Conditions Placed on Marriage

1. Introduction

A health and rights approach has implications for state practices (de jure or de facto) that exclude adults from marriage. Mandatory, pre-marital health tests (to determine HIV status, for example) or other tests of physical characteristics (virginity tests, which may be privately administered but tolerated by the state) are unjustified interferences with privacy and impede core rights to bodily integrity. Categorical exclusion from marriage on these or other grounds linked to health and physical characteristics (disability, for example) violates principles of non-discrimination.

Pre-marital HIV tests also serve to further stigmatize the HIV positive community, and lead to serious discrimination against HIV positive persons who, in effect, cannot marry. This not only violates the right to access marriage as such, but also infringes upon a multitude of rights and privileges attached to marriage by law in most countries, such as the right to health insurance.

In the European region, there are few examples of countries that put conditions on marriage, other than age-limits, prohibition of close relatives to marry, and restrictions on marriage for same-sex couples (as addressed above). Mandatory medical tests before marriage are uncommon. Here will only be mentioned Russia, and other former Soviet republics, where the practice has been expressly outlawed. This is a response to a past practice that was found to be discriminatory and in violation of human rights. In Uzbekistan, mandatory medical testing before marriage still prevails.

2. Council of Europe and the European Union

The issue of tests and conditions placed on marriage has not been addressed by Council of Europe conventions or the European court of Human Rights, nor by binding European Union law.

3. Domestic Legislation

In Russia, pursuant to the Family Code, public health care institutions carry out an optional medical examination for people who will marry. This medical examination is free of charge and only conducted with the consent of the individuals who marry. The legislation does not allow mandatory testing for HIV infection.

The relevant provision reads:

Chapter III, Article 15. Medical examination of people who marry

1. Medical examination of persons who marry, as well as advice on medical and genetic issues and family planning, are carried out by the state and municipal health care system at the place of their residence, free of charge, and with the consent of the persons who marry.

2. Results of the medical examination of person who marry constitute a medical secret and can be communicated to the person whom the individual who was tested intends to marry only with the consent of said individual.

3. If one of the persons who marry hides from the other party the presence of venereal disease or HIV infection, this can result in filing for annulment of marriage in the court (Articles 27–30 of this Code).

The same regulations of medical examination/HIV testing of people who marry exist in all former Soviet Republics, with one exception:

Uzbekistan still mandates that people who will marry must undergo a medical examination for mental illness, drug addiction, venereal diseases, tuberculosis, and HIV/AIDS, as regulated by the Family Code of the Republic of Uzbekistan. These standards are aimed at creating conditions for the formation of healthy families and prevent the birth of children with hereditary and genetic diseases.

If the tested person is HIV positive or has any of the other diseases or conditions mentioned, this will

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390 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.
391 Advocacy of mandatory premarital HIV testing as a way of protecting women's health and rights in marriage is misplaced; interventions are better directed to supporting women's full and free decision to marry, or when and under what conditions to have sex within marriage.
392 Available in Russian only. Translation by Ukrainian lawyer and researcher Oksana Shevchenko.
393 Available in Russian. Content explained by by Ukrainian lawyer and researcher Oksana Shevchenko.
serve as an impediment to marriage (Art 17). From 2009, if the intending spouses are over fifty years old, the medical examination will only be performed with their consent.\footnote{On Amending article 17 of the Family Code, supplementing Article 17 of the Family Code, signed on 7 September 2009. Available in Russian only, content explained by Ukrainian lawyer and researcher Oksana Shevchenko.}

4. Concluding remarks

While the practice of mandatory tests or other conditions placed on marriage is not common in the region, it is interesting to note that the express prohibition of the practice appears in parts of the region where mandatory HIV testing was previously wide-spread.\footnote{See Section 1D: Mandatory HIV testing.} This illustrates the growing recognition of a rights-based approach to HIV and other sexually transmitted diseases, as well as an increasing emphasis placed on a voluntary and fully informed nature of HIV testing in general. The Uzbek example stands in stark contrast to this trend.

G. Incest

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

Incest can be defined as sexual intercourse between persons who are so closely related by blood or affinity that their relationship is prohibited by law or, in some jurisdictions, that they cannot marry. Criminal laws proscribing incest are found in many jurisdictions, but they reflect extremely diverse conceptions of kinship, social appropriateness, and risk. Prohibitions against incest vary greatly regarding the type of kin one must avoid having sexual relations with, reflecting important social principles of proximity and distance rather than degrees of biological relatedness. Indeed, some incest laws prohibit sexual relations between individuals who have no biological relationship whatsoever, although they are legal relatives (like step-parents or in-laws). Some incest laws prohibit sexual contact between adults and young people under the age of consent (in which case the sexual contact could not be seen as consensual), and the law serves as protection against abuse. Other laws more expansively forbid sexual conduct between persons in specified kinship relationships, even if they are all adults and there is no evidence of abuse.

This chapter will primarily address different European approaches to consensual sexual relationships between closely related adults. Incest in the context of abuse or exploitation of children within the family will mainly be addressed in Chapter 5B.2: sexual violence and exploitation of children.

There are no clear international human rights standards on how adult consensual incest should be regulated, and states’ approaches vary. In Europe, some countries criminalize incest under all circumstances, whereas others perceive the family link as an aggravating circumstance when a crime has been committed against a minor or when force or violence have been employed.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

The European Court of Human Rights has not addressed the issue of incest. It has, however, examined a ban on the right to marry for close relatives. In B. and L. v. the United Kingdom,\footnote{Application no. 36536/02, decided on 13 September 2005.} the Court considered a case where two individuals related as former father-in-law and daughter-in-law were unable to marry under British legislation. The Court found that since this particular relationship was not banned under incest legislation, it made little sense that their union could not be formalized through marriage. The Court found that Article 12 of the Convention, the right to marry, had been infringed upon.\footnote{The holding of this case is more important for the purpose of sexual health and rights than the reasoning of the Court. The Court implies that, had sexual relationships between parents- and children-in-law also been criminalized, and had there been no exceptions to this rule, it could also have accepted the ban to marry. Such reasoning does not seem to embrace the notion of sexual self-determination and health of adult persons wishing to marry each other. However, the outcome is still relevant: the Court does not allow random and nonsensical infringements upon the right to marry even if justified with notions of ‘protection of the family.’ The Court also criticized British investigations into suitability as to who could marry, suggesting that the decision to marry is a fundamentally private affair with which the State should interfere as little as possible.}

Conventions in the Council of Europe Treaty Series

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual
Abuse does not explicitly mention incest, but mandates contracting parties to penalize sexual activities with children where “abuse is made of a recognised position of trust, authority or influence over the child, including within the family” (Art 18). According to Article 28, when sexual exploitation or abuse has been committed by “a member of the family, a person cohabiting with the child or a person having abused his or her authority,” this shall be seen as an aggravating circumstance (Art 28.d).

3. European Union

The proposed EU Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography contains exactly the same wording as the Council of Europe Convention (above) on penalization of abuse within the family (Art 2(b)(ii)) and sexual exploitation and abuse within the family as an aggravating circumstance (Art 7(2)(c)). As of April 2010, the Framework Decision is not yet in force.

4. Domestic legislation and case law

On the domestic level, the debate surrounding incest mainly concerns the issue of whether consensual sexual relations between close relatives who have reached the age of consent should be penalized or not. In several European countries, *inter alia* Spain, Turkey, Belgium, and the Netherlands, such relations are not criminal, while in others, such as the United Kingdom, Germany, and Sweden, incest is always a crime, regardless of whether it occurs between consenting adults or not.

In the Spanish Penal Code, incest is not a specific offense. Instead, when a sexual offense has been committed against a family member, the family tie will be considered an aggravating factor and lead to harsher punishment. Legal age of consent is 13, so sexual relations within the family with a child under 13 will always be considered a crime (and for the age group 13–16, special provisions on deception apply, see below). And of course, sexual acts including violence, intimidation, and lack of consent are criminal regardless of familial relationship. Consensual sex between adults who are close relatives, however, is not a crime.

More concretely, relevant parts of Article 180 of the Penal Code read as follows:

> The above types of conduct [that is, sexual aggression or rape] shall be punished with four to 10 years’ imprisonment for aggression under article 178 and 12 to 15 years’ imprisonment for aggression under article 179 under any of the following circumstances:

> 3. When the victim is especially vulnerable due to age, illness or situation, and without fail when the victim is under 13 years of age.

> 4. When the person responsible avails himself/herself of a relationship of superiority or kinship to commit the crime, being an ascendant relative, descendant relative or sibling of the victim by nature or adoption.

> If two or more of the above circumstances are present, the punishment shall be in the upper half of the penalties provided for in this article.

Article 181 governs sexual abuse (defined as “constraining the sexual freedom or sexual safety of another person without violence or intimidation and without consent”), according to which sexual activity with children under the age of 13 will always be considered “without consent.” The provision has the same aggravating circumstances with regard to those who abuse their positions of power in order to restrict the liberty of the victim. Article 183 further criminalizes sexual abuse by means of deception of a person between 13 and 16 years, and has the same aggravating circumstances as mentioned above.

399 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.


402 The translation is unofficial, from Council of Europe, Legislation in the Member States of the Council of Europe in the Field of Violence Against Women, EG (2004)2. In comparison with the original Spanish text the translation is accurate.
It is noteworthy that the Spanish regulation is gender neutral and applies to both opposite-sex and same-sex sexual relations: sexual abuse within the family can be committed by men or women/boys or girls, on men or women/boys or girls.

**Case law: challenging the penalization of incest between consenting adults in Germany**

In Germany consensual sexual relations between family members is always a crime under Article 173 of the Criminal Code. The provision reads:

(1) Whoever completes an act of sexual intercourse with a consanguine descendant shall be punished with imprisonment for not more than three years or a fine.

(2) Whoever completes an act of sexual intercourse with a consanguine relative in an ascending line shall be punished with imprisonment for not more than two years or a fine; this shall also apply if the relationship as a relative has ceased to exist. Consanguine siblings who complete an act of sexual intercourse with each other shall be similarly punished.

(3) Descendants and siblings shall not be punished pursuant to this provision if they were not yet eighteen years of age at the time of the act.

This article was challenged, and eventually upheld, in the German Constitutional Court in 2008. In the case, 2 BvR 392/07, the appellants were a brother and a sister who for seven years had been in a sexual relationship and had four children together. The brother had been sentenced to three and a half years of prison on four counts of incest, in accordance with Article 173.2 of the Penal Code.

The issue before the Court was whether the provision in Article 173.2, making sexual intercourse between natural siblings a crime, was incompatible with the inviolability of human dignity and the right of every person to free development of his personality, Articles 1.1 and 2.1 of the German Basic Law, respectively.

The Court stated that the *raison-d’être* of the punishment in the relevant law was the protection of marriage and the family. It held that it is not incorrect to assume that incestuous relationships between siblings can lead to serious consequences damaging the family and society. Furthermore, the Court declared that the provision corresponds with a societal conviction “based upon cultural history” that incest should carry criminal penalties, and that it has a law-stabilizing as well as preventative function. The Court acknowledged that the law limits the right to sexual self-determination but concluded that this is not an impermissible limitation. It reached this conclusion by stating that “[s]exual intercourse between siblings does not affect them exclusively, but rather, can have effects on the family and society and consequences for children resulting from the relationship.” It warned against “genetic disease” and found it “not far-fetched that the children of an incestuous relationship have significant difficulties in finding their place in the family structure and in building a trusting relationship to their closest caregivers.”

In conclusion, the Court found that the relevant provision did not violate the Basic Law.

According to news sources, the couple has appealed to the European Court of Human Rights, arguing that article 173.2 violates their right to respect for their family and private life under Article 8, and also that the punishment has no clear social objective.

**5. Concluding remarks**

To reiterate, this chapter does not address child molestation. For this topic see Chapter 5B.2: sexual violence and exploitation of children.

Regarding consensual sexual relations between close relatives who have reached the age of consent, there are two converging trends in Europe. One trend affirms the view that such relations should not be criminalized, and emphasizes the voluntary nature of private sexual relations among adults. Several European countries have taken this path, including Spain, as shown. The other trend is criminalization, based on moral and cultural concerns and preoccupied with the possible negative effects on children of incestuous relationships. The German case discussed above is a clear illustration of this view.


404 Decided on 26 February 2008. The whole opinion is only available in German, but the official press release issued by the Court is available in English. Quotes are from that release.

Looking closer at the German case, the reasoning of the Court is problematic from a sexual health and rights perspective. The Court loosely referred to morals and societal convictions without examining whether those supposed convictions are based mainly in prejudices and archaic views on sexuality and the family. The references to the risk of genetic diseases in the offspring of incestuous relationships also raise concern. First, the law does not address the sexual relations of other groups of individuals who are at high risk of passing on genetic disorders (women over forty, persons who themselves suffer from hereditary genetic diseases, etc.). This obvious inconsistency is not addressed by the Court. Second, the Court seems to assume that children with genetic disorders are unwanted in society, an assumption with strong ideological overtones.

As pointed out, there are no clear human rights standards for how to address adult and voluntary incest. Nonetheless, state regulation of voluntary sexual relationships between adults always raises concerns from the view of sexual self-determination, and a strict enforcement of incest laws with regard to consenting adults may have negative sexual health repercussions. Regardless of whether incestuous relationships are to be perceived as ‘healthy’ or ‘unhealthy,’ it can be argued that criminal law is an inadequate tool to address them. Even if tragic or traumatic circumstances have led the parties to their relationship, state interference or prosecution of one or both parties is unlikely to improve their situation. Furthermore, the model of non-criminalization, shown by the Spanish example, entrusts adult persons with responsibility for their sexual (and reproductive) choices. This is an important message that reaches far beyond the relatively few cases of incest that may occur.

On the other hand, looking more closely at the Spanish regulations, it is preoccupying that a person as young as 13 is deemed capable of consenting to sex within the family. Given structural and power imbalances often involved in the family setting, there would seem to be potential for the sexual coercion of young adolescents, with detrimental effects on their sexual health. The problem has partially been addressed by the Spanish legislature by making sexual abuse by means of deception against 13-16-year-olds a separate crime, but this latter provision does not address sexual coercion within the family specifically. However, this potentially problematic point is linked to legislation on age of consent, however, and not to the regulations on incestuous relationships as such.