

VII. EDUCATION, INFORMATION, AND EXPRESSION RELATED TO SEX AND SEXUALITY

A. SEXUALITY EDUCATION AND INFORMATION

1. Introduction⁷⁸⁶

Sexuality education and information are crucial for sexual health in several respects. As will be elaborated below, such information – obtained within or outside of educational settings – is necessary for the ability to make informed choices about sexual matters and for protection against HIV and other sexually transmitted infections. Sexual information can also break taboos about STIs and sexual violence and inspire those who suffer from sexuality related problems to seek help. In relation to pregnancy, contraception, and abortion, scientifically-based sexual information is critical to avoid unwanted pregnancies or unsafe abortions and to counteract superstitious beliefs about contraceptive methods. Furthermore, sexuality education can serve as an important tool for tolerance and openness in society. When presented in a non-discriminatory and non-judgmental manner, it can challenge gender stereotypes and fearful or negative attitudes towards sexuality in general and towards those who engage in non-conforming, consensual sexual practices in particular.

Both sexuality education and sexual information are covered in this chapter, while sexual expression will be addressed separately in the next sub-chapter. Rights to education, information, and expression are interdependent, and the impact of each on sexual health must be addressed with an eye to their interrelation. Nonetheless, it is important to bear in mind that *education* (both formal and informal) constitutes a specific right, a distinct field of law, and a distinct field of practice (characterized by mutual exchange between teachers and students). In international human rights law, education is both seen as a right in itself, and an indispensable means of realizing other human rights, and states have a corresponding obligation to take steps toward the full realization of this right, without discrimination.⁷⁸⁷ In the European region, sexual education has been addressed either as a subset to the right to education or to the right to health. Sexual *information* is a broader term; a right to receive and impart information on matters related to sexuality without unjustified interference by the state, falling under the internationally recognized right to expression and information.⁷⁸⁸ In Europe, this matter has arisen, *inter alia*, with regard to the possibility for non-state actors to spread information about abortion services, or opportunities for young persons to obtain information about contraceptive methods in order to be able to make informed decisions related to their sexual activities.

Sexuality education, as a component of education, is understood to be essential to the full development of the human personality, in addition to being an essential means to protect oneself from sexual ill-health, whether from sexually transmitted infections, unwanted pregnancies, or sexual violence and abuse.⁷⁸⁹ Many different sectors of law are essential to ensure adequate education in general and adequate sexuality education in particular. These sectors include administrative regulations concerning educational curricula, constitutional provisions on the right to education and equality and non-discrimination law (regarding sex, gender, sexual orientation, race, religion, disability, health status, and national status, among other grounds). Other important laws engaged to support effective sexuality education include those protecting freedoms of speech and expression and laws guaranteeing both teachers and students safe and non-discriminatory environments.

Sexuality education is understood to include not only accurate, age appropriate, scientifically supported *information* on health, sexual health, and sexuality as an aspect of human conduct, but also *ideas* on non-discrimination and equality, tolerance, safety, and respect for the rights of others, which are delivered through trained agents using age- and context-appropriate pedagogical *methods*. In particular, a

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

787 See, *inter alia*, Article 26 of the UDHR, Articles 28 and 29 of the CRC, and Articles 13 and 14 of the CESC. The Committee on Economic, Social and Cultural Rights, General Comment 13 (Right to education), UN Doc. E/C.12/1999/10 (1999), stresses that “education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence”. According to the Committee, “education in all its forms and at all levels shall exhibit the following interrelated and essential features: a) availability; b) accessibility; c) acceptability; and d) adaptability.”

788 See, *inter alia*, Article 19 of the UDHR, Article 19 of the ICCPR, and Article 10 of the ECHR.

789 See in particular CEDAW, CRC and CESC.

rights-based approach to sexuality education requires the participation and contributions of young people, particularly adolescents and young adults.⁷⁹⁰ Sexuality education and comprehensive access to sexual information contribute to health through promoting individuals' ability to have preferences for, and act on, decisions that protect their health, as well as determine the number and spacing of children. Sexuality education and information are also essential to each person's ability to develop themselves and their sense of self-worth, particularly in regard to any decision regarding their sexual and gender identity and sexual behaviour as an aspect of their personhood.

Under international human rights standards, it is clear that states must refrain from arbitrarily censoring scientifically accurate sexual health information or dispensing misinformation in sexuality education programmes.⁷⁹¹ While the state has the primary duty to ensure sexuality education in its system of primary and secondary education to reach the widest range of people, voluntary organizations must be involved and protected from intimidation and censorship. For example, reaching people in sex work, or men who have sex with men, with sexual information is often done most effectively by voluntary organizations rather than the state, which may be associated with police abuse and exclusionary policies.

Limitations on the rights of information regarding sexual health can be life-threatening. Broad censorship of factual information about family planning for women and men, legal access to abortion to save the health or life of the woman, or HIV/AIDS prevention denies individuals the ability to protect their health and lives. In addition, restrictions on information reinforce discrimination, gender stereotypes and inequality in society (for example, when information is denied to unmarried adolescent girls, married women lacking husbands' permission, or those in same-sex sexual relationships). Restrictions or censorship of research about 'difficult' or disfavoured topics or groups (for example, non-reproductive or non-marital sexual practices; or groups espousing controversial ideas about sexuality) can interfere with scientific exploration and discovery, resulting in increased levels of sexually transmitted infections, unwanted pregnancies, unsafe abortion and other preventable burdens of disease and ill-health.⁷⁹²

Sexuality education and information must be flexible in their format to reach both school going and non-school going youth (especially street youth) and must be available to adults throughout their lives. Women in particular often face *de facto* bars to accessing comprehensive sexual information, and special steps, supported by law, must often be taken by the state to reach young married adolescents (who often leave school early). However, it is important to distinguish rights-based, necessary, and affirmative measures that must be taken to reach targeted populations and the rights-denying and less effective tactics that assume certain categories of information are relevant only to specific populations. For example, assuming that only 'gay-identified' populations need information about anal sex (in the face of evidence that heterosexual youth engage in anal sex to avoid pregnancy) and condom use is to fail to provide effective sexual health education and information. To assume laws on education for women or information only targeting women are all that is needed to ensure population-wide use of contraception (as if men in heterosexual relationships do not need to understand family planning) or to assume that men who have sex with men only need education on condom use with men (as if they did not also have sex with women) is to provide insufficient sexuality education, and thus to fail to protect the health and rights of the general population.

Children have specific rights to age-appropriate and comprehensive sexuality education, which is made accessible to them regardless of gender, disability, or national status. International rights standards elaborate the importance of sexuality education and information, especially for adolescents, to support them in determining their lives and identities, and to live free of abuse and preventable illness and unwanted pregnancy. Sexuality education, understood to be an obligation of the state, is often in constructive tension with the rights of parents and families. While families have the right to raise their children consistent with their religious and cultural beliefs, the rights of the child to objective and scientifically supported information (commensurate with their evolving capacity) is coupled with the duty of the state to present information and education in an objective and pluralistic manner to that child. This set of rights and duties means that parents cannot bar their children from receiving such critical information.

Regarding access to material with sexual content more generally for persons under 18, whether in print, internet or other media, is a specific domain of censorship. While some international standards permit prior restraint in the service of protecting minors,⁷⁹³ other rights-based standards recommend

790 See CRC General Comments.

791 CRC, General Comments 3 and 4

792 Barriers to access to information about medical research, including the development of pharmaceuticals, are a key component of sexual health rights. However, while this report acknowledges that legal regulatory regimes, such as TRIPS, the fundamental health rights component of, this report does not directly address them.

793 See, e.g., the American Convention on Human Rights.

that adolescents in particular require access to information and education about sexuality, in order to protect their sexual health as well as permit them to share the benefits of scientific progress and participate in their communities and culture. Information about sexuality and sexual health is also important to the development and expression of adolescents' full personality without discrimination.⁷⁹⁴ Reasonable time, manner and place restrictions may be allowed to inhibit accidental viewing of age-inappropriate material with sexual content by minors, but assumptions of hypothetical harm of incitement to sexual activity are disallowed.

Finally, it is important to remember that education's impact on sexual health is not limited to sexual health education. As noted above, education is a vehicle for realizing other rights and for contributing to all persons' ability to live lives of equality, dignity, and freedom.⁷⁹⁵ The importance of non-discriminatory access to education for all is critical to supporting the rights and sexual health of persons who might otherwise be stigmatized and excluded from formal and informal opportunities for education. Laws that mandate or permit discrimination against students or teachers on the grounds of sexual orientation, gender expression or marital status are not only violations of the right to education but also contribute to the stigmatization of persons excluded on these grounds, and thus ultimately erect barriers to their health.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

The Court has addressed both sexual education and sexual information under Article 2 of Protocol 1 (right to education) and Article 10 (right to information); the latter claim has in particular dealt with the right to convey and receive information about abortion services.

In its landmark decision on *sexuality education*, Kjeldsen, Busk Madsen and Pederson v. Kingdom of Denmark,⁷⁹⁶ the applicants were six parents whose children were of school age. They claimed that obligatory sexuality education for their children was contrary to the beliefs they held as Christian parents and constituted a violation of the obligation to respect the rights of parents, as part of the right to education under Article 2 of Protocol 1 (P1) to the Convention. Since 1970, sexuality education had been part of the compulsory curriculum in state schools in Denmark; its content being adjusted to the maturity level of the students.

The second sentence of Article 2 of P1 guarantees that the State shall "respect the rights of parents to ensure [that] education and teaching [will be] in conformity with their own religious and philosophical convictions." The Court noted that this provision must be read in light of Articles 8 (right to respect for private and family life), 9 (right to freedom of thought, conscience, and religion), and 10 (right to freedom to receive and impart information and ideas) of the Convention. It follows from this, in the first place, that the planning of the curriculum falls within the competence of the state, and that the second sentence of Article 2 of P1 does not prevent states from imparting education or information with religious or philosophical content. On the other hand, information or education included in the curriculum must be conveyed in an objective, critical, and pluralistic manner. The Danish compulsory sexuality education was aimed at giving the students information about sexual matters in a correct, objective, precise, and scientific manner. It amounted in no way to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour. In conclusion, the Court found that the disputed legislation did not offend the applicants' religious or philosophical convictions to the extent forbidden in Article 2 of P1.

In Open Door and Dublin Well Woman v. Ireland,⁷⁹⁷ the Court addressed the right to impart and receive *sexual information*, in the form of information about abortion services. The applicants were, among others, two non-profit organizations that offered counselling services to pregnant women in Ireland and that had received an injunction to restrain them from providing information about abortion facilities outside of the country. The applicants complained that the injunction violated, *inter alia*, their right to impart or receive information under Article 10 of the Convention.

The Court concluded that the injunction clearly constituted an interference with the rights of the applicants to impart and receive information. The restriction pursued a legitimate aim under the Convention – the protection of morals – which in Ireland includes the protection of the life of the unborn. With regard to whether the restriction was necessary in a democratic society, the Court reiterated that

794 See CRC, general comments 3 and 4.

795 UDHR article 26, and Committee on Economic, Social and Cultural Rights, GC 13.

796 Application nos. 5095/71; 5920/72; 5926/72, decided on 7 December 1976.

797 Application nos. 14234/88 and 14235/88, decided on 29 October 1992.

freedom of expression is applicable also to information and ideas that may offend, shock, or disturb the state or any sector of the population. The Irish injunction was of absolute nature and imposed a 'perpetual' restraint on the provision of services under examination. The applicant organizations neither advocated nor encouraged abortion, but rather explained to pregnant women what options were available to them. It was not illegal for a pregnant woman to travel to another country to have an abortion, and women could obtain information about this option through other sources. The Court also noted that the injunction created a risk to the health of those women who would seek abortions at a later stage in their pregnancy due to lack of proper counselling.

All these considerations led the Court to the conclusion that the injunction had been disproportionate to the aims pursued and, accordingly, that the interference with the applicants' rights to receive and impart information was not necessary in a democratic society. Thus, for these reasons, there had been a violation of Article 10.

Domestic aftermath

In 1995, the Irish Government introduced a new law, the Regulation of Information (Services outside the State for the Termination of Pregnancies) Act 1995⁷⁹⁸ to regulate the availability of information about abortion services abroad. Under certain conditions, the law permits information to be provided about facilities abroad where Irish women may lawfully undergo abortion. The information has to be truthful and objective and not advocate or promote the termination of pregnancy. The law precludes any commercial link between the abortion clinics and the information providers and places many other conditions on the information provided and on its providers.

In 2009, the European Court of Human Rights examined a similar case, again addressing information services related to abortion. In Women on Waves and others v. Portugal,⁷⁹⁹ the applicants were a Dutch foundation and two Portuguese associations working for sexual rights. The Dutch group, Women on Waves, had chartered a ship and sailed to Portugal to campaign in favor of the decriminalization of abortion, but the ship was banned from entering Portuguese territory and its entry was blocked by a Portuguese warship. The applicant organizations complained that this measure had violated their rights to freedom of expression under Article 10 of the Convention.

The Court acknowledged the legitimate aims pursued by the Portuguese authorities (prevention of disorder and protection of health), but reiterated that pluralism, tolerance, and broadmindedness toward ideas that may seem offensive or shocking are prerequisites for a democratic society. It observed that the ship had not trespassed on private land or publicly owned property and noted the lack of evidence that the applicants had intended to breach Portuguese abortion legislation. In seeking to prevent disorder and to protect health, the Portuguese authorities could have resorted to less restrictive means that would not have interfered so strongly with the applicants' rights. The interference, thus, had been disproportionate to the aims pursued, and the Court again concluded that there had been a violation of Article 10.

European Social Charter and European Committee of Social Rights

As part of the right to protection of health, the European Social Charter establishes an obligation on behalf of the contracting parties to provide education for the promotion of health. This has been interpreted by the Committee to include the right to non-discriminatory *sexuality education* (see below).

Article 11 – The right to protection of health⁸⁰⁰

With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:

[...]

to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;

[...]

798 No 5/1995, passed on 12 May 1995.

799 Application 31276/05, decided on 3 February 2009. The full decision is as of December 2009 available only in French. A press release is available in English.

800 This article is identical in the 1961 and the 1996 version of the Charter.

In International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia,⁸⁰¹ the complainant argued that Croatian rules on sexuality education violated Art 11§2 of the Charter, as well as the non-discrimination clause in the Preamble of the Charter. It claimed, *inter alia*, that the sexual and reproductive health information provided in Croatian schools was discriminatory on grounds of sexuality and/or family status. The Committee agreed. In examining the material in question, it held that

certain specific elements of the educational material used in the ordinary curriculum are manifestly biased, discriminatory and demeaning, notably in how persons of non-heterosexual orientation are described and depicted. [...] These statements stigmatize homosexuals and are based upon negative, distorted, reprehensible and degrading stereotypes about the sexual behaviour of all homosexuals. [...] The Committee holds that such statements serve to attack human dignity and have no place in sexual and reproductive health education: as such, their inclusion in standard educational materials constitutes a violation of Article 11§2 in the light of the non-discrimination clause of the Preamble to the Charter (para 60).

The Committee went on to clarify that states parties have a positive obligation under the Charter to ensure the effective exercise of the right to protection of health by means of non-discriminatory sexual and reproductive health education. This education must not perpetuate or reinforce social exclusion, demeaning stereotypes, embedded discrimination, or the denial of human dignity often experienced by historically marginalized groups such as persons of homosexual orientation. The reproduction of state-sanctioned material with discriminatory content does not only have a discriminatory and demeaning impact on non-heterosexual persons but also “presents a distorted picture of human sexuality to the children exposed to this material.”

In conclusion, the Committee found that the discriminatory statements contained in educational material used in the ordinary curriculum constituted a violation of Art 11§2, in light of the non-discrimination clause.

3. European Union

The issues of sexuality education and information fall outside of the scope of binding EU law.

In The Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and others,⁸⁰² the European Court of Justice addressed the issue of whether the Irish prohibition of distribution of material containing information about abortion services abroad (before the Open Door and Dublin Well Woman case was decided by the European Court of Human Rights, above) was legal under the EC Treaty. While the Court concluded that medical termination of pregnancy constitutes a ‘service’ under the Treaty, it also found that the restriction imposed by the Irish government was not illegal under EC law. The case dealt with the matter from an exclusively economic angle and, thus, was not decided on freedom of information grounds. The Court stated that even though the interpretation of Community law in general should be in accordance with the European Convention on Human Rights, it had no jurisdiction over national legislation lying outside Community law. For these reasons, the case is of limited relevance here.

4. Domestic legislation and case law

In **Portugal**, several laws reiterate the right to *sexual education* in schools, emphasizing the importance of non-discrimination, inclusion, gender equality, and positive messages about sexuality as key features of such education. As early as 1984, in Law 3/84: Sexual education and family planning,⁸⁰³ the right to sexual education was established as a component of the fundamental right to education. This law has since been complemented by several other laws and decrees.⁸⁰⁴ In November 2005, the Minister of Education issued a statement, which defined sex education as a compulsory part of health promotion.⁸⁰⁵

In August 2009, Law 60/2009⁸⁰⁶ was adopted. This law makes sexual education compulsory in private and public primary, secondary, and professional schools. This law establishes that the objectives of

801 Complaint no. 45/2007, decided on 30 March 2009.

802 Case C-159/90, decided on 5 March 1990.

803 Available in Portuguese only.

804 For example, youth sexuality education is regulated in Law 120/1999: Strengthening the Guarantee of Access to Reproductive Health, 11 August 1999, complemented by Decree DL 259/2000, 17 October 2000.

805 Minister of Education, Statement n.o 19 737/2005 (2nd series), 15 June 2005. Available in Portuguese only.

806 Law 60/2009 of 6 August: Establishing a regime to be applied to sexual education in schools. Translation is author's own.

sexual education are:

- a. *Giving positive value to sexuality and affection between persons as part of their individual development, respecting the pluralism of the Portuguese society;*
- b. *Developing skills in young people that enable them to make informed and safe choices in the field of sexuality;*
- c. *Improving emotional and sexual relationships of young people;*
- d. *Reducing negative consequences of sexual behavior, like unwanted pregnancy and sexually transmitted infections;*
- e. *Developing] the capacity for protection against all forms of exploitation and abuse;*
- f. *Respecting difference and in particular different sexual orientations;*
- g. *Giving positive value to an informed and responsible sexuality;*
- h. *Promoting gender equality;*
- i. *Recognizing the importance of participation in educational processes of parents, students, teachers and health professionals;*
- j. *Understanding scientifically the functioning of biological reproductive mechanisms;*
- k. *Eliminating behaviors based on sex discrimination or violence based on gender or sexual orientation (Article 2)*

Each school or group of schools must have a teacher who coordinates health and sexual education, as well as an interdisciplinary team for health and sexual education. In this way, sexual education is cross-curricular and integrated in different school subjects. Sexual education can be provided by school teachers, health professionals and certain NGOs. Parents are not allowed to withdraw their children from lessons.⁸⁰⁷

In **Denmark**, the 2000 Law on Primary Education⁸⁰⁸ makes “Health and Sexuality Education and Family Matters” one of the compulsory subjects in primary education. The Ministry of Education defines the minimum standards for health and sexuality education and family matters.⁸⁰⁹ New minimum standards entered into force in August 2009, and like their predecessors, these are based on a broad and positive notion of health, which includes sexuality. Students should get insights into the values and circumstances that affect health, sexuality, and family matters and reach an understanding of the importance that family life and sexuality have for health, as well as the connection between health and environment. The teaching should be linked to the students’ own experiences to promote the development of commitment, self-confidence, and enjoyment of life. The standards are broadly defined and provide individual teachers with wide discretion to define how they will be met. By 9th grade (between 15 and 16 years of age), however, students should be able to, *inter alia*, understand and relate to social and communitarian influences on identity, gender roles, and sexuality and the roles that cultural norms, media, and friendship play; discuss how feelings and love are related to health, sexuality, and family life; and discuss how negative consequences of sexual encounters can be avoided.⁸¹⁰ As part of this process, students shall, among other things, learn about sexually transmitted infections, discuss different kinds of family constellations, discuss pleasure, discuss limits and responsibility in relation to sexuality, consider abortion and contraceptive methods, and learn to analyze messages from media and the advertising sector.⁸¹¹

In **France**, sexuality education is approached holistically, integrating it in the school curriculum as a whole and not confining the topic to the subjects of biology or ethics. Sexuality education is nationally mandated in the Code of Education, with at least three sessions required per school year.⁸¹² Parents

807 According to information in International Planned Parenthood Federation (IPPF)/The SAFE Project, “A Reference Guide to Politics and Practices. Sexuality Education in Europe,” 2006, p. 74.

808 LBK nr 730 of 21/07/2000, Chapter 2 §7(2). Only available in Danish.

809 Common goals 2009, Health and sexual education and family matters, Booklet 21. Only available in Danish.

810 Ibid. p. 7.

811 Ibid. p. 12.

812 Code of Education, article L312-16, as modified in 2004 (Law no 2004-806 of 9 August 2004 – art. 48)

cannot withdraw their children from lessons.⁸¹³ This provision is complemented by a 2003 circular, specifying how the law should be implemented and establishing minimum standards.⁸¹⁴ According to the circular, sexuality education must integrate biological knowledge and psychological, emotional, social, cultural and ethical dimensions of sexuality. It should cover the prevention and reduction of sexual risks, the fight against violence and sexual exploitation of young people, and the fight against racism and homophobia. The circular defines the objectives differently for different age groups (primary schools, lyceums, and colleges), and also provides guidelines for the training of teachers.

In a recent **German** case, the German Constitutional Court reached a conclusion similar to that of the European Court of Human Rights in *Kjeldsen, Busk Madsen and Pederson*, mentioned above. In its case 1 BvR 1358/09,⁸¹⁵ the German Court decided that children can be required to attend sexual education classes, despite their parents' religious objections. The case was brought by Baptist parents, who had been fined for keeping their sons home from a school programme on sexual abuse and also from another event celebrating Carnival. The Court held that even though religious freedom is a fundamental right in Germany, there is also a strong state interest in compulsory education. For as long as the school maintains a neutral and tolerant stance towards the parents' religious values, compulsory education is valid, including on sexual matters. Given that Germany is a federal state, sexual education programmes might vary from state to state. Regardless, the outcome of the case is that no schoolchild in Germany can be exempted from attending sexual education for religious reasons.

With regard to *sexual information*, a legal reform in the **United Kingdom** in 2003 put an end to a legal provision that banned information on homosexuality from being taught or published (called "promoting homosexuality"). In 1988, a new section was inserted in the *Local Government Act 1986*, prohibiting a local authority from "intentionally promot[ing] homosexuality or publish[ing] material with the intention of promoting homosexuality" or "promot[ing] the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship."⁸¹⁶ Following 15 years of debate, the provision was repealed by section 122 of the *Local Government Act 2003*.

Another aspect of sexual information in the **United Kingdom** was addressed in 1986. In the House of Lords case *Gillick v. West Norfolk and Wisbeck Area Health Authority*,⁸¹⁷ the issue was whether a doctor could give advice and then lawfully prescribe contraception to a 16-year-old girl without her parents' consent. The case was brought by a mother of five daughters under the age of 16, who objected to a circular from the Department of Health and Social Security, which stated that under exceptional cases a doctor could lawfully prescribe contraception to girls under 16 without parental consent.

Relevant to the sexual health of young persons, through the provision of adequate sexual information, were the findings that girls under 16 can consent to contraceptive advice and treatment and that parents do not have absolute authority over older children, not even on sexual matters. The judge recognized that it is preferable that a teenager discusses the matter of contraceptives with her parents but acknowledged that in some cases the obligation to inform the parents may not be in the best interest of the child:

[T]here may be circumstances in which a doctor is a better judge of the medical advice and treatment which will conduce to a girl's welfare than her parents. It is notorious that children of both sexes are often reluctant to confide in their parents about sexual matters, and the [Department of Health and Social Security] guidance under consideration shows that to abandon the principle of confidentiality for contraceptive advice to girls under 16 might cause some of them not to seek professional advice at all, with the consequence of exposing them to 'the immediate risks of pregnancy and of sexually-transmitted diseases.'

The judge went on to discuss under what conditions it should be lawful for the doctor to prescribe contraceptives to girls under the age of 16.⁸¹⁸ Regarding the right to sexual information, the relevant outcome of the case is the finding that under-aged women in certain circumstances have a right to information about contraceptives even when their parents may object and the recognition that such information is imperative to the promotion of sexual health in broader terms. Furthermore, the case

813 According to information in IPPF/The SAFE Project (2006), p. 44.

814 Primary and secondary education. Student health: sexuality education in schools, colleges, and lycées. Circular No 2003-027 of 17 February 2003. Only available in French.

815 Decided on 21 July 2009, only available in German.

816 This new section was inserted by Section 28 of the Local Government Act 1988.

817 House of Lords, [1985] 3 All ER 402, [1985], decided on 17 October 1985. See also Chapter 6A: Abortion and contraception.

818 See Chapter 6A for the content of these so-called Fraser Guidelines.

establishes the right to confidentiality on sexual matters for a person under the age of 16 who has reached a certain level of maturity. This is closely linked with the right to make an informed choice without the threat of disclosure and/or reprisals.

In contrast to the permissive and rights-focused policies for sexual education and information discussed above, **Lithuania** adopted the Law on the Protection of Minors Against the Detrimental Effect of Public Information⁸¹⁹ in 2009 (entering into force on 1 March 2010). By international standards, this law severely restricts access to sexual information. In its first version, the law prohibited so-called public information “whereby homosexual, bisexual or polygamous relations are promoted,” as well as any kind of information “of an erotic nature.” After its approval in July 2009, the law received strong international criticism, from, among others, the European Parliament. It was amended before entering into force. The modified version was adopted in December 2009. All references to homosexuality and bisexuality were removed; however, according to news reports the amended version includes sweeping bans on information that relates to any kind of sexual activities outside of marriage. Among other things, it labels as detrimental to youth all information “which scorns family values and promotes the concept of marriage and family formation, other than stipulated in the [Constitution and laws of Lithuania],” information “which is of an erotic nature,” and information “which promotes sexual intercourse.”⁸²⁰ Dissemination of information conforming to any of these topics shall be banned from places accessible to persons under the age of 18. Commentators have expressed concern that even though the law no longer includes explicit references to homosexuality and bisexuality as banned topics, its effects are still “worryingly homophobic.”⁸²¹ Its prohibition of all sexual information except for that which refers to traditional family building will have the effect of prohibiting all information about non-heterosexual orientations, same-sex relationships, other non-conforming sexual activities, and extra-marital sex in places where young persons could access it.

5. Concluding remarks

The European Court of Human Rights and the European Committee of Social Rights have defined *sexual education* in schools as a component of the right to education (the Court) or the right to health (the Committee), respectively. This positioning of sexual education within a human rights framework is important and has at least two relevant repercussions for sexual health.

First, it means that the state has an obligation to provide such education in a non-discriminatory and non-judgmental manner and to not exclude any relevant information or distort facts for young people – as shown by the case against Croatia before the European Social Committee. This is crucial for the ability of young persons to make informed choices about their sexuality and for their right not to suffer discrimination.

Second, as pointed out by the European Court of Human Rights, compulsory sexual education for children does not violate state obligations to respect the religion or the philosophical convictions of their parents. If sexual education is presented in a neutral and respectful manner, states may prohibit parents from withdrawing their children from such education. Though the Court only examined whether the compulsory nature of sexual education in schools was in violation of *parents’ rights*, the effect of the decision is that it guarantees the right to sexual education for *children* even when they come from homes where their parents wish to keep them ignorant of sexual matters. The German Constitutional Court has reached the same conclusion.

On the domestic level, several European laws and policies have integrated principles of a tolerant, non-discriminatory, and cross-disciplinary approach to sexuality education. The mandatory nature of such education is also expressed in the laws of some countries. This illustrates the importance placed upon this issue in these countries and the recognition of the disadvantages of allowing some children to be kept unaware of topics related to sexuality. The Portuguese attempt to present sexuality as a *positive* force is interesting; such an approach is likely to better enable young persons to make informed and responsible choices related to sexual matters than a fear- or harm-based approach, which has been employed in other countries. Furthermore, the three countries here examined all explicitly recognize the links between sexuality and health in their regulations on sexuality education, without restricting the topic of sexual health to the absence of disease or sexual violence.

819 Official translation to English available of the *first version of the law*; its amended version (that entered into force in March 2010) is not available in English. Information about the amended version collected from the following internet sources: <http://www.ukgaynews.org.uk/Archive/10/Mar/0101.htm>, <http://www.globalpost.com/dispatch/europe/100317/lithuania-gay-rights>, <http://www.amnesty.org/en/news-and-updates/homophobic-law-enter-force-lithuania-2010-02-26>, and <http://www.lgbt-ep.eu/press-releases/lithuanian-law-enters-the-statute-book/>. All sites last visited on 5 April 2010.

820 According to Global Post article “Will Lithuanian law on ‘family values’ harm gay rights?,” at <http://www.globalpost.com/dispatch/europe/100317/lithuania-gay-rights>. Last visited on 5 April 2010.

821 Ibid.

While providing sexuality education is primarily a state obligation (as part of the state obligation to fulfil the internationally recognized right to education), the right to *sexual information* implies both positive and negative obligations on behalf of states. Positive obligations may include a duty to provide the population with information about contraceptives and protecting young persons' right to such information even in the absence of parental consent – as illustrated by *Gillick v. West Norfolk*. Negative obligations include allowing information about sexual matters to flow freely, without state interference on moral or other grounds (in the absence of strong justifications for such interference).

This latter aspect of sexual information was addressed by the European Court of Human Rights (in relation to information about abortion services in countries where such services are illegal) in *Open Door and Dublin Well Woman* and *Women on Waves*. The Court concluded that restriction of information about abortion services under the circumstances presented in those cases violated the right to impart and receive information under Article 10. Thus, even though the Court has declined to state that the Convention grants the right for a woman to terminate a pregnancy (see Chapter 6A), it establishes that states cannot without solid justification restrict information about services to that end. These findings distinguish the *service itself* from *the right to learn about the service and thus make an informed choice*. The Court's jurisprudence shows that with regard to certain contentious issues, such as the legality of abortion, states enjoy a wide margin of appreciation. However, the margin of appreciation is much narrower when such fundamental rights as the right to information are concerned – even when the relevant information concerns the very contentious issue of abortion. These decisions effectively illustrate the importance the Court has ascribed to information about sexual and reproductive matters to protect the well-being of the individual.

State obligations to refrain from the restriction of sexual information are further highlighted by the Lithuanian law on the protection of minors, which has received strong criticism internationally. Needless to point out, if enforced, this law will give Lithuanian youth a distorted view of sexuality, as well as leave them ignorant of information that is crucial for the protection of their sexual health. These consequences would contradict statements from the European Court of Human Rights and the European Committee of Social Rights in their jurisprudence on sexuality education and sexual information, as well as on the right to information and non-discrimination more broadly.

B. SEXUAL EXPRESSION

1. Introduction⁸²²

This chapter focuses on sexual expression, identifying its particular implications for sexual health. Here should however be reiterated that the right to freedom of expression is intrinsically linked to the right to information, covered by the preceding sub-chapter. In international human rights, information and expression are understood to have a dynamic relationship with each other. Article 19 of the International Covenant on Civil and Political Rights states that the right to freedom of expression includes “the freedom to seek, receive and impart information of all kinds”. Inherent in freedom of expression is a corresponding right: the freedom to hear the ideas and opinions that are expressed. Information is rendered meaningless if it cannot be expressed to others, whether through scholarly, scientific, popular, medical, political, or artistic channels. Rights to expression imply the right of everyone to hear and know of the opinions of others, and to access the information on which those opinions are based.⁸²³

Expression that has importance to sexual health spans genres, fields of knowledge and media. It includes social and political analysis of sexual arrangements and norms in society, and creative and artistic expression that describes human experience, including works that allude to or depict behaviour or speech deemed sexual. Sexual expression may be conveyed via text, image, and speech. Methods of communication may be verbal or non-verbal, and involve many types of media – print, film and video, electronic, internet, performance – and many domains, including – newspapers, songs, books, scholarly papers, movies, television, internet sites, and the radio.⁸²⁴ Sexual expression can also be understood as a broader concept, namely as speech or actions that express one's sexual orientation or gender identity (such as two persons of the same sex holding hands or kissing in public, or a transgendered person appearing in public spaces in accordance with his or her preferred gender). This interpretation of sexual

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

823 See, e.g., the Inter-American Court decision in the “Last Temptation of Christ” case, I/A Court H.R., Case of “The Last Temptation of Christ” Olmedo-Bustos et al. v. Chile. Merits, Reparations, and Costs. Judgment of February 5, 2001. Series C No. 73., reiterated in Inter-American Court of Human Rights, Consultative Opinion 5/85, “Compulsory Membership Association Prescribed by Law for the Practice of Journalism,” November 13, 1985, paras. 64 and 65, available at http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf. Last visited on 30 October 2009.

824 Another rapidly expanding area of legal and rights analysis on information and expression focuses on the rules governing cyberspace and internet communication.

expression goes beyond the traditional notion of freedom of expression as a political right.⁸²⁵ Regardless of how narrowly the concept is framed, the right to sexual expression is based on a notion that sexuality is a fundamental part of a person's individuality and sense of self. Sexual expression, thus, is closely connected with self-discovery, expression of individuality, and emotional well-being.

The right to sexual expression is a subsection of freedom of expression in general, which has wide international recognition.⁸²⁶ Therefore, under international law standards, unpopular, offensive or dissident sexual speech, and even speech that under national law is deemed 'against public morals,' may be protected. Interference with sexual expression can be allowed only to the extent that limitations of expression generally are allowed under international human rights law and should be subject to the same level of scrutiny. International human rights norms permit restrictions only as determined by law, and as necessary to protect national security, public safety, public morals, public order, public health, or the fundamental rights and freedoms of others.⁸²⁷ The Siracusa Principles (1984) provide a roadmap for evaluating when and whether these permissible grounds for limiting rights have been met.⁸²⁸ In the short section on 'public morality,' the Principles note that "[s]ince public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community."⁸²⁹ In each case, the Siracusa Principles affirm a rights-oriented test of proportionality (including concern for the abusive nature of the criminal law as a mode of regulating speech) and non-discrimination.⁸³⁰

The application of human rights principles to material with sexual content has a limited history, because the affirmative right to sexual expression is relatively recent as a topic for elaboration in human rights standards.⁸³¹ This lack of an extensive doctrine on sexual speech and rights to sexual expression in international human rights law presents an important opportunity for developing a coherent health and rights approach. Stringent national criminal laws often have direct effects on the sexual health and overall rights of individuals, as well as long-term damaging effects on the provision of effective services and information necessary to promote sexual health. Sexual health information and expression is vital to all persons and groups (not just marginalized populations) in attaining the highest standard of health, well-being, and personal development.

Denials of forms of expression, such as restrictions on association, political speech, publication, protests or rallies, can result in indirect but powerful health effects. Such restrictions curtail the ability of persons and groups (e.g. women protesting sexual abuse in health clinics, demonstrations for gay or transgender rights, the publication of material with information about HIV/AIDS or sexual non-discrimination, or transgender persons and sex workers seeking redress for police abuse) to present grievances, make rights claims and influence law and public policy. In this context, sexual expression can be understood as the opportunity for groups of non-conforming sexual identities or practices to vocalize their legitimate claims, thus serving both as a component of and a tool for inclusion and non-discrimination.

825 As pointed out by the Special Rapporteur for Freedom of Expression of the Interamerican Commission on Human Rights, such expressions shall be seen as a specially protected form of speech, given how closely related sexual orientation and gender identity is to personal identity and dignity. See the Report of the Office of the Special Rapporteur for Freedom of Expression of the Interamerican Commission on Human Rights, as part of the Annual Report of the Interamerican Commission 2008, p. 133.

826 As enshrined in Article 19 of the UDHR, Article 19 of the ICCPR, Article 10 of the ECHR, Article 13 of the IACHR, and Article 9 of the ACHPR.

827 See for example the UDHR, ICCPR, ICESCR.

828 United Nations Economic and Social Council, U.N. Subcommission on Prevention and Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

829 The principles also state that "[t]he margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant." which means that the state is scrutinized closely for regulations that impact the rights of marginalized groups or ideologically dissident views differentially. "Without discrimination, the law must protect the freedom to express minority views, including those potentially offensive to a majority. Protection does not ebb or retract its ambit where expression ceases to utter what is approved, or inoffensive, or indifferent. To be meaningful, it must safeguard and sentinel those views that offend, shock, or disturb the State, or any sector of the population." "Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45," E/CN.4/1995/32, December 14, 1994 (Referencing jurisprudence of the European Court of Human Rights, see below (*Handyside v. United Kingdom*)).

830 *Id.*; See also: Article 19, *Camden Principles on Expression and Equality*, April 2009, available at, <http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (accessed on October 30, 2009). These principles similarly emphasize the close relationship between equality and freedom of expression, as equal abilities to speak (especially by otherwise marginalized groups) are a key element of a pluralistic and functional democracy. Available at, <http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>

831 UN Special Rapporteur on the Right to Health

A diverse array of laws provide the framework for permissible speech, publication, performance, research and other forms of expression, on one hand, and permissible limitations on the right to expression, on the other hand. These laws include criminal codes, intellectual property law, and administrative/regulatory laws, for example. In many nations, legal limitations have been placed on material featuring sexuality as the subject matter. Often (but not always) using criminal law, limitations utilize terms such as 'obscene,' 'indecent,' 'offensive,' 'pornographic,' 'prurient,' or 'against public morals' to indicate what material cannot be published, distributed, purchased, or viewed/read, as the case may be.

These terms and the definitions provided for them are often problematic. First, they fail to give notice about what they cover: it is not possible in advance to infer what type of sexual content is prohibited or limited, without extensive research into prosecutions and convictions in that country and legal system. Second, these terms are highly variable and unstable: terms have undergone changes in meaning, as law evolves historically, and they also vary considerably in meaning from one national legal system to another. Caution is thus advised against unwarranted assumptions that the nature of the prohibited texts or images can be easily known from the legal term employed. For example, historically, the term 'obscenity' has been applied to scientific and medical research; health and self-help instruction aimed at consumers; artistic expression, including novels, paintings, and performances; erotic instructional material; recreational and popular entertainment, including songs and humor; political satire; and expression of unconventional political speech about sexual behaviour or arrangements in society. Terms such as 'obscenity' or 'pornography' have decidedly negative connotations. In some political contexts, the label 'obscenity' affixed to sexual health texts or images makes it difficult for advocates to question the designation or defend the material in question, for fear of being labelled deviant or immoral. Indeed, historical struggles over what can be said and shown about sexuality are, at their core, contests over social and political questions. Tellingly, 'obscenity' was the legal term used to penalize family planning information in the late nineteenth and early twentieth centuries in a number of countries.

Material with sexual content is sometimes prohibited on grounds that it is harmful to the character, dignity or morals of women. Such laws constitute a form of gender stereotyping, which draws on assumptions that women are keepers of chastity or should remain untouched by sexual information; thus, women are 'harmed' simply by viewing such material or by being viewed as sexual actors. Other arguments for limiting material with a sexual content assert that it may lead to violence against women.⁸³² Gender inequality in general and violence against women in particular are complex social problems, influenced by discriminatory norms, beliefs, and practices in law and society. Depictions of women (sexual and non-sexual) may be stereotyped or convey ideas of women's inferiority. While international human rights bodies express concern that gender-stereotyped images may contribute to discrimination and thus seek measures to discourage their ubiquity and promote alternative and more diverse images, they do not endorse the criminalization and censorship of these materials.

In the European region, many states reject sweeping and poorly defined grounds for state interference such as 'obscenity' or 'indecent,' and instead require *individualized harm* to justify restriction. The rationale behind the harm-based approach is to protect real persons from being harmed in the production of the material (such as child pornography when real children have been exploited in the process) or to protect persons from being exposed unwillingly to material with sexual content (such as indecent exposure or pornographic material shown to people who have not consented or who are unable to consent). Even the concept of harm, however, is diffuse and can be interpreted broadly or narrowly, dependent on political and moral considerations. As will be shown, while several European legislatures define legitimate interference with the right to sexual expression restrictively, the European Court of Human Rights has not yet set a clear standard for what restrictions on sexual expression are permitted under the Convention's protection of freedom of expression and information.

In the following, the *harm-based approach* is to be understood as a presumption of individualized harm, as explained above, as opposed to a broader notion of harm to society, public morals, or the family. The discussed norms and cases have been divided into two rough categories: *erotic expression* and *sexual expression as a tool for political action*. This distinction, while acknowledging that these two categories poorly capture the multitude of forms that sexual expression can take, is aimed at highlighting how sexual expression is both a right in and of itself and a tool to advance claims for other sexual rights.

State regulation of child pornography is addressed in Chapter 5B.2: Sexual violence and exploitation of children.

832 See, e.g., CEDAW general recommendation 19: see International section.

2. Council of Europe

Jurisprudence of the European Commission of Human Rights

Erotic expression

In *Scherer v. Switzerland*,⁸³³ the applicant was an owner of a sex shop for homosexuals, where he sold magazines, books, and video films and where he also showed films. He did not advertise the films; customers heard about them by word of mouth. In 1983, the owner showed a video film comprised almost exclusively of sexual acts. In total nine people watched the film in his shop. The sex shop was searched, the film confiscated, and proceedings were brought against the owner. He was found guilty of “publishing obscene items” under Swiss penal law. He argued to the Commission that this conviction violated his right to respect for his private life and his right to expression under Articles 8 and 10 of the Convention.

The Commission noted that the applicant's shop was not discernible from the street and that it was unlikely that the room where the films were projected would be visited by persons who were unaware of the subject matter of the films. In further emphasizing the need for *harm* to occur for penalization to be acceptable, the Commission reiterated that

[t]here was no danger of adults being confronted with the film against or without their intention to see it. It is furthermore undisputed that minors had no access to the film, as there was a control in the shop ensuring that such persons had no access. (para 62)

The Commission went on to state that domestic authorities are generally best suited to undertake an assessment as to the protection of the morals of adult persons. However,

[i]n the Commission's opinion, the present case does not concern the protection of morals of adult persons in Swiss society in general, since no adult was confronted unintentionally or against his will with the film. Where this is so, there must be particularly compelling reasons justifying the interference at issue. In the present case, no such reasons have been provided by the Government.

Thus, the applicant's conviction did not correspond to a “pressing social need,” such that the interference was found to be disproportionate to the aim pursued and could not be considered necessary in a democratic society. The Commission found a violation of Article 10.⁸³⁴

Jurisprudence of the European Court of Human Rights

Erotic expression

The jurisprudence of the European Court of Human Rights on erotic expression shows that the Court grants states a wide margin of appreciation in their determination of what is necessary for the protection of morals under Article 10 (freedom of expression).

In *Müller and others v. Switzerland*,⁸³⁵ the applicants had been found guilty of publication of obscene material after having displayed paintings with sexual content in an art exhibition. They claimed that their right to expression under Article 10 of the Convention had been infringed upon.

The Court found that the measures taken by the authorities had a legitimate aim under Article 10(2), in that they were aimed at the protection of morals and of the rights of others. With regard to whether the measures were necessary in a democratic society, the Court reaffirmed the importance of free artistic expression but also cautioned that artists are not immune to the limitations provided for in Art 10(2). The paintings in question had been widely accessible to the public and depicted “sexuality in some of its crudest forms.” The Court agreed with the Swiss Federal Court that the applicants were “liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity” (para 36). Thus, having regard to the margin of appreciation granted states under Art 10(2), the Court found no violation of Art 10.

833 No. 17116/90, report of 14 January 1993; Court no. 19/1993/414/493, decided on 23 March 1994, *struck out of the list*. See also *X Ltd. and Y v. United Kingdom* (Application 8710/79, decision of 7 May 1982) on the admissibility of the application (also known as the *Gay News* case), in which the Commission examined a case where published material with sexual content led to a conviction for blasphemous libel. The Commission found that the freedom of expression could be restricted on religious grounds to protect ‘the rights of others,’ and that domestic authorities were best situated to determine the appropriate level of protection for religious feelings. Thus, the application of the blasphemy law in the case under consideration did not violate Article 10.

834 The Commission referred the case to the Court, but it was struck off the list due to the applicant's death.

835 Application no. 10737/84, decided on 24 May 1988.

Similarly, in Handyside v. United Kingdom,⁸³⁶ the applicant had been found guilty of publication of obscene material after having published a schoolbook with sexual content, encouraging young people to take a liberal attitude towards sexuality. The books had been seized and confiscated. Here too, the Court found that the interference with the applicant's freedom of expression both had a legitimate aim and was necessary in a democratic society. Famously, the Court noted that freedom of expression under the Convention is applicable also to ideas that "offend, shock or disturb the State or any sector of the population" and that every condition or restriction imposed in this sphere must be proportionate to the legitimate aim pursued (para 49). However, in the actual case, the Court found that the intended audience was young and that protection of the morals of the young is a legitimate aim under the Convention. Again using the margin of appreciation doctrine, the Court found that the seizure and confiscation of the books could be deemed necessary for the achievement of this aim. Under the same doctrine, it was irrelevant that other member states had taken no measures to limit the distribution of the book. Consequently, the Court found no violation of Article 10.

Kaos GL v. Turkey⁸³⁷ is currently, as of August 2011, pending before the Court. The case involves questions about the legitimacy of state restrictions of freedom of expression on the ground of 'public morality.' Kaos GL is a Turkish LGBT organization that publishes the KAOS GL Magazine – Turkey's only LGBT magazine. In July 2006, the 28th issue of the magazine was confiscated by the Prosecutor's Office as its feature article was considered a breach of public morality. The issue examined and critiqued pornography-related issues and included a picture of men in sexual positions.⁸³⁸ In December 2006, a criminal court case was filed against the owner and chief editor of the magazine.⁸³⁹ The organization contends before the European Court of Human Rights that the confiscation of the magazine and the criminal procedure violated the owner's right to freedom of expression (Article 10), right to a hearing (Article 6), and the right to non-discrimination on account of sexual orientation (Article 14) under the Convention.⁸⁴⁰

Sexual expression as a tool for political action

The applicants in Baczowski and others v. Poland⁸⁴¹ were representatives of Polish organizations that had been denied authorization to take part in a march for equality and against discrimination of minorities. Among them were organizations acting for the benefit of persons of homosexual orientation. In a radio interview about the upcoming demonstrations, the mayor had made homophobic remarks and stated that there would be "no public propaganda about homosexuality" and that "propaganda about homosexuality is not the same as exercising one's freedom of assembly." The applicants claimed that their rights to peaceful assembly, under Article 11, and the right to an effective remedy, Article 13, had been infringed upon.

The Court reiterated the importance that freedom of peaceful assembly holds in a democratic society and how only limited interference can be justified under the Convention. It found that the applicants' rights had been interfered with unlawfully because both the interpretation of the relevant law, and the law itself, violated the right of assembly under the Polish constitution. In conclusion, the decision to refuse authorization had violated the applicants' rights under Article 11 and 13 of the Convention. Taking into account the strong personal views the mayor had expressed against homosexuality, the Court also found that there had been a violation of the right to non-discrimination, Article 14 in conjunction with Article 11.⁸⁴²

Similarly, in Alekseyev v. Russia (Application nos. 4916/07, 25924/08, and 14599/09, decided on 21 October 2010), the applicant was an organizer of several marches in Moscow drawing attention to the discrimination of gays and lesbians and promoting tolerance. He had repeatedly been refused the right to hold the marches by the Moscow mayor's office, which had made reference to the need to protect public order, health, and morals. The applicant contended that these repeated bans violated his right to assembly and association, and that the bans had been discriminatory on the basis of his and other participants' sexual orientation. The Court reiterated that the right to peaceful assembly

836 Application no. 5493/72, decided on 7 December 1976.

837 Application no. 4982/07, submitted on 18 June 2009.

838 See <http://news.kaosgl.com/item/2006/7/31/kaos-gl-magazine-is-banned>. Last visited on 25 November 2009.

839 See <http://news.kaosgl.com/item/2006/12/26/lawsuit-against-the-turkish-lgbt-magazine>. Last visited on 25 November 2009.

840 According to Statement of facts presented before the Court, only available in French. See also "Third Party Intervention" submitted by Article 19, Human Rights Watch, and the Miller Institute for Global Challenges. Available at <http://www.law.berkeley.edu/files/ThirdPartyInterventionKAOSGL.pdf>. Last visited 25 November 2009.

841 Application no. 1543/06, decided on 3 May 2007.

842 See for another aspect of the case in Chapter 5D: Police brutality, failure to respond, hate crimes and hate speech.

and association by a minority group cannot be conditional on its acceptance by the majority, and that there is a long-standing European consensus on certain fundamental rights for homosexuals. It stressed that “it is only through fair and public debate that society may address such complex issues” as gay rights. Consequently, the applicant’s right to assembly and association under Article 11 had been violated. The Court also found that he had suffered discrimination because of his sexual orientation, Article 11 in conjunction with Article 14.

As for *other Council of Europe conventions*, see Chapter 2C: Age of consent, and in Chapter 5B.2: Sexual violence against children for a discussion of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse.⁸⁴³ For a discussion of this convention’s relevance for the sexual expression of youth, see below.

3. European Union

The Council of the European Union Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography⁸⁴⁴ has been addressed in Chapters 2C and Chapter 5B.2.

As pointed out in those sections, both the Council of Europe Convention and the EU Framework Decision attempt to strike a balance between the legitimate state obligation to protect children against any kind of sexual exploitation, which may express itself as child pornography, and the protection of the sexual expression of teenagers who are in the process of discovering and developing their sexuality. These documents are based on a notion of *harm*, since the assumption is that child pornography is harmful for children who have been exploited in the process, such that it should be criminalized. Where the production of pictures has taken place with the consent of adolescents and for their own use, or where no real child has been involved in the production, harm cannot necessarily be presumed, which is why states parties may exclude such acts from criminal liability.

Here, it should be reiterated that the new EU Framework Decision addressing sexual abuse, sexual exploitation of children, and child pornography (proposed in March 2009, not yet in force)⁸⁴⁵ does *not* contain any opportunity to exclude criminal liability for child pornography whose production did not involve real children. The proposed Framework Decision thus sharpens the rules compared to the 2004 Decision, by mandating the criminalization of all kinds of child pornography even when the crime, it may be argued, is victimless. From a freedom of expression point of view, such sweeping criminalization raises concerns.

4. Domestic legislation and case law

Erotic expression

Specific provisions against child pornography are increasingly adopted in all countries of the region. This topic is covered in the chapter on sexual exploitation of children. For the purpose of *adult erotic expression*, so-called obscenity legislation or its equivalent is more relevant. Several countries make *individualized harm* the determining factor for legitimate restriction. This means that sexual expression can be restricted legitimately to protect individuals from involuntary exposure to material with sexual content – either if they do not want to see the image or if persons are deemed unable to express valid consent.

The only **Swedish** obscenity legislation is a limited provision in the Swedish Penal Code⁸⁴⁶ (except for criminalization of child pornography, which is more extensive) and a law regarding film censorship, although the latter law is about to be abolished. The Penal Code penalizes “unlawful exhibition of pornographic pictures,” which requires both that the exhibition is public and that it typically has a disturbing effect. The crime is defined as follows:

A person who, on or at a public place, exhibits pornographic pictures by means of displays or other similar procedure in a manner which is apt to result in public annoyance, shall be sentenced for unlawful exhibition of pornographic pictures to a fine or imprisonment for at most six months. This also applies to a person who sends through the mail to or otherwise furnishes another with unsolicited pornographic pictures. (Law 1970:225) (Chapter 16, Section 11; emphasis in original)

843 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.

844 2004/68/JHA of 22 December 2003, OJ L 13.

845 Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA. Com (2009) 135 final, 25 March 2009. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0135:FIN:EN:PDF>. Last visited on 4 February 2010.

846 Official translation.

The Swedish film censorship law dates from 1911 and is the oldest such law in the world. Among the grounds that can motivate censorship is “if the film or video can seem corrupting/depraving” or if it has “showings of sexual violence or coercion or showings of children in pornographic contexts” (Art. 4). In 2009, however, a government appointed expert suggested that film censorship for adults be abolished and the film censorship board disbanded. The Swedish Government, public opinion, and the overwhelming majority of private and public bodies to which the proposed measure was referred for consideration have expressed themselves in favor of the abolition.⁸⁴⁷

The **Netherlands** has a criminal provision similarly narrow in scope. The Dutch Penal Code subjects to criminal liability “he who knows or has serious reasons to suspect that an image or object is offensive to decency and (1) displays publicly or offers this image or object in or at public places; or (2) sends this image or object to another person, otherwise than at this person’s request” (art. 240).⁸⁴⁸

In **Spain**, in addition to the prohibition on producing and handling child pornography, it is illegal to sell, show, or distribute pornographic material to minors (Spanish Penal Code, Art 186). Furthermore, it is illegal to perform exhibitionist obscene acts before minors and disabled persons (Art 185).⁸⁴⁹

The **United Kingdom** still has a piece of legislation that explicitly bans ‘obscene’ material without requiring harm in the sense described above. This makes the British law unusual in a European context and troubling from a freedom of expression point of view. The Obscene Publications Act 1959⁸⁵⁰ (OPA) covers all publications including material available on the internet. It defines as obscene any article whose effect “tend[s] to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it” (Section 1). Courts decide whether the material in question has this tendency to deprave or corrupt. Except for a recent case that has been dropped, there have been no prosecutions under the OPA since 1991.⁸⁵¹ Since the passing of the Human Rights Act 1998, any restriction in accordance with the OPA has to be compatible with freedom of expression as understood by the Human Rights Act and the European Convention on Human Rights.

In 2008, the Criminal Justice and Immigration Act 2008⁸⁵² was passed in the United Kingdom. Section 63 criminalizes possession of extreme pornographic images. These are images that are “produced solely or principally for the purpose of sexual arousal” that “in an explicit and realistic way” portray one of four categories of “extreme acts.” Extreme acts are defined as acts that threaten a person’s life; acts which result, or are likely to result, in serious injury to a person’s anus, breasts, or genitals; acts that involve sexual interference with a human corpse; or a person performing an act of intercourse or oral sex with an animal, whether dead or alive (Subsection 7). The image also must be “grossly offensive, disgusting or otherwise of an obscene character” and “a reasonable person looking at the image would think that any such person or animal was real.”

There are various defenses available for persons who *participated* in the activities depicted (if, for example, the acts did not involve the infliction of any non-consensual harm on any person, and if it can be shown that the image portraying a human corpse did not in fact involve a real corpse) (Section 66). However, such defenses cannot be claimed by onlookers, which include those filming an activity if they are not also participants in the activity. The only defenses for *mere possession* relate to when the person came across the image without being aware of its pornographic nature, or when the person “had a legitimate reason for being in possession of the image” (Section 65).

Thus, the law criminalizes possession of a certain category of images even when these have been consensually produced, without evidence that anybody was harmed in the production of the material, and without evidence that viewing of the material would lead to harm. For those reasons, these sections of the law have been criticized by legal scholars and representatives of the BDSM community.⁸⁵³

847 See <http://www.regeringen.se/content/1/c6/12/79/25/16fd1b8a.pdf> (expert opinion, in Swedish). Last visited on 25 November 2009.

848 Private translation.

849 Only available in Spanish. Translation is author’s own.

850 Enacted 29 July 1959, as amended.

851 The case – of a man charged with depicting a fictional torture and murder of the members of a girls pop group on a fantasy pornography site – was dropped in 2008 when the prosecution offered no evidence that the story had been easily accessible by the public. See http://news.bbc.co.uk/2/hi/uk_news/england/tyne/8124059.stm and <http://www.guardian.co.uk/world/2009/jul/04/girls-scream-aloud-obscenity-laws>. Both sites last visited on 25 November 2009.

852 Enacted 8 May 2008.

853 See, *inter alia*, Andrew Murray, “Consent and Harm in Relation to Pornography,” May 2009, available at <http://www.backlash-uk.org.uk/murray905.html>. Last visited on 25 November 2009.

Similar to the prohibition of child pornography when no real child was involved in its production, it can be argued that these provisions under certain circumstances constitute a victimless crime, which raises concerns from the standpoint of freedom of expression of the individual.

Sexual expression as a tool for political action

In **Turkey**, the Supreme Court examined in 2009 to what extent it is legitimate for the state to limit the freedom of expression and freedom of assembly for a group advocating for LGBT rights. In its decision [2007/190-2008/236](#) (May 2009),⁸⁵⁴ the Supreme Court of Appeals examined a lower court decision that had ordered the closing of the LGBT rights organization Lambda Istanbul. The prosecutor had demanded that the organization be disbanded on the alleged ground that its objectives violated Article 56 of the Turkish Civil Code, stating that “[n]o association may be founded for purposes against law and morality,” and Article 41 of the Turkish Constitution, establishing that the family is the foundation of Turkish society. The lower court had, however, ordered the closing of the organization on purely procedural grounds.⁸⁵⁵ According to the Supreme Court decision, Lambda’s statute did not constitute opposition to Turkish values. It ruled that “sexual identity and orientation are facts that people do not choose of free will, but that stem from birth or upbringing and a person has no control over.” The decision recognized the right of assembly and organization for lesbian, gay, bisexual, and transgender people. However, the Court also stated in its decision that

*[s]hould the association go against its own regulations in [the] future by carrying out activities to encourage lesbian, gay, bisexual, transvestite and transsexual orientations and to make them more common, [...] an application for the dissolution of the association could be made.*⁸⁵⁶

This statement limits the positive scope of the judgment considerably, in that it places restrictions on what kind of activities the organization can engage in and, in particular, shows an unwillingness to grant persons of non-normative sexual orientations and gender identities the same right to political action as others. From the viewpoint of sexual expression, it indicates a troubling limitation to the freedom of expression of sexual minorities in Turkey.

Lambda Istanbul has appealed the decision to have the problematic phrase removed. As of December 2009, the case was pending.

5. Concluding remarks

The European Union, Council of Europe, and several European domestic legislations have adopted a harm-based approach to both erotic expression and other kinds of sexual expression. This is illustrated by regulations in particular on child pornography, as explored elsewhere, and provisions protecting people in general against involuntary exposure to material with sexual content. Adult and voluntary production of pornographic or other erotic material not depicting minors as well as the consumption of such pornography is legal in most countries in the region. Recent UK legislation on the criminalization of possession of ‘extreme pornographic images’ is an exception to this trend. The Swedish, Dutch, and Spanish provisions are clearly based on the harm-principle: there is no blanket ban in those countries on the distribution of pornographic material to the general public, or on the voluntary production of such material. Harm is presumed when children are involved in the production of pornographic material, or when persons are involuntarily exposed to such material. Within the latter group also fall persons who are presumed to be unable to consent, as illustrated by the Spanish provision.

The jurisprudence of the European Court of Human Rights shows that the Court has decided to grant member states wide margins of appreciation in determining what kind of material is accepted under domestic ‘public morality’ provisions. This cautious attitude, in which the Court declines to clearly state that risk for individual harm must be present to justify state interference (or, at least, the Court leaves the definition of harm to the states parties) fails to set a standard for the protection of erotic expression as a subsection of freedom of expression under Article 10. In fact, the decision of the European Commission in [Scherer](#) is the strongest so far, explicitly stating that since there was no risk of involuntary exposure or exposure to children (that is, harm), there was no justification for restriction. It is left to be seen whether

854 Decided on 29 May 2009. The case is only available in Turkish.

855 Information about the content of the case from various online sources. These include <http://bianet.org/english/gender/113986-european-parliament-s-cashman-worried-about-lambdaistanbul-court-case>, and <http://www.amnesty.org/en/news-and-updates/good-news/turkish-lgbt-organization-wins-appeal-against-closure-20090121>, and <http://news.kaosgl.com/item/2008/11/30/request-to-ban-turkish-gay-rights-group-rejected>. All last visited on 22 December 2009.

856 According to an unofficial translation provided by the LGBT researcher at Human Rights Watch, Juliana Cano Nieto, in email correspondence of 6 July 2009.

the Court will make a clearer pronouncement on its position on the relationship between harm and state restriction in Kaos GL v. Turkey, currently pending before the Court.

By contrast, in Baczkowski, the Court reiterated that only limited restrictions to freedom of assembly are allowed in a democratic society and made clear that this applies to sexual rights advocacy equally as to other claims – thus making explicit the protection of sexual expression as a tool for political action under the Convention. It is further relevant that the Court found a violation of the right to non-discrimination on the basis of sexual orientation – for the first time applying this ground, as implied in Article 14, taken together with Article 11, the right to assembly. The finding in Alekseyev v. Russia reiterated this strong stance.

Finally, in the same vein, it is positive that the Turkish court has acknowledged that sexual orientation may be inherent to a person's identity and therefore worthy of protection under the Turkish constitution. However, it is deeply problematic – and, in fact, contradictory – that the court reserves the right of the state to dissolve an organization if it would 'encourage' LGBT behaviour. This latter statement shows a lack of real recognition of the right to expression for persons of non-conforming sexual orientations or gender identities.

