APPENDIX I: EUROPEAN REGIONAL SYSTEMS AND SOURCES OF LAW

1. **COUNCIL OF EUROPE**

The Council of Europe is comprised of forty-seven countries. These include all the countries that are located within the geographical boundaries of Europe and Turkey, excluding only Belarus, Kosovo, and the State of the Vatican City (and/or the Holy See). Thus, the Council of Europe has jurisdiction over the vast majority of countries that for the purpose of this report are included in the European region. The Council of Europe was established in 1949 by the Treaty of London (also known as the Statute of the Council of Europe) and constitutes the first and oldest pan-European organization, with its headquarters situated in Strasbourg, France. Its main objectives are the advancement of parliamentary democracy, respect for human rights, and establishment of the rule of law.

Precisely because of these objectives, one fundamental legal pillar of the Council of Europe is the European Convention on Human Rights, drafted in 1950 and entering into force in 1953. The European Convention (together with its 13 protocols) sets the standard for protection and mechanisms for enforcement of civil and political rights in the member states. Becoming a party to the European Convention on Human Rights is a condition for joining the Council of Europe: according to the Parliamentary Assembly Resolution 1031(1994) member states are expected to ratify the Convention within one year from accession to the organization (Art 9).

1.1.1. Organs of the Council of Europe

For the purpose of this report, the relevant organs are:

**Parliamentary Assembly of the Council of Europe**

The Assembly is composed of 318 members of the domestic parliaments of the member states. The number of representatives from each country depends on the size of the country itself. The representatives are appointed by the domestic parliaments and thus not elected directly by the citizens of the member states. The Assembly is divided into ten committees and holds four plenary sessions per year. Among its main areas of work there are issues of protection and promotion of human rights and democracy, situation of migrants and refugees, and social cohesion. The Assembly adopts recommendations and opinions (with a two-thirds majority), as well as resolutions (with simple majority). All these statements are legally non-binding on member states but can be seen as political expressions with a certain persuasive value.

**Committee of Ministers**

The Committee of Ministers is the 'executive organ' of the Council of Europe. It is a governmental body composed of representatives of the ministries of foreign affairs of the member states, but functions also as a collective forum to respond to regional issues or challenges. The ministers meet only once a year, but the Committee functions permanently at the level of deputies. The Committee carries out most political functions of the Council of Europe: it decides on the admission of new member states; negotiates and concludes the opening for signature of conventions and agreements; and issues recommendations to member states. Other responsibilities include budgetary, programming, and policy implementation tasks.

**European Court of Human Rights**

Although the European Court of Human Rights is established by the European Convention of Human Rights, and not by the Statute of the Council of Europe, it will for the purpose of this research be included among the Council of Europe organs. As noted above, by virtue of the fact that signature and ratification of the European Convention is a requirement for membership in the organization, the Court has jurisdiction over all states of the organization. The Court receives individual petitions by individuals from member states alleging violations of their human rights. The Court holds public hearings and delivers final judgments. Its judgments are binding on the member states and are often used as a basis for future legal developments. The Court has the power to order reparations to victims of human rights violations.

1 Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, FYR of Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and United Kingdom.

2 Belarus and the State of Vatican City/Holy See are excluded by the Council of Europe because they do not meet the democratic parameters required to obtain membership. Kosovo has not been admitted as of yet, due to the fact that its status under international law is disputed by some members of the organization. While the State of Vatican City/Holy See and Kosovo never joined the organization, Belarus was suspended in 1996.

3 Resolution 1031(1994) on the honouring of commitments entered into by member States when joining the Council of Europe, adopted on 14 April 1994.
was a gatekeeper, deciding on the admissibility of petitions. If a petition was an application that is identical to one already under consideration by the Court, it is not admissible if it has purposes other than redressing human rights violations (for instance, to jurisdiction, topic, ratification status, and respondent party, which only can be a state; (f) no application filed with another international body: the application is not admissible if filed with another international body (such as UN treaty bodies); (g) compatibility of the application with Convention provisions: the application is not admissible if it is incompatible with the Convention with reference, for instance, to jurisdiction, topic, ratification status, and respondent party, which only can be a state; (h) no manifestly unfounded applications: the application is declared as inadmissible if it does not amount to a violation of the Convention; and (i) abuse of the right to file an application: the application is not admissible if it has purposes other than redressing human rights violations (for instance, propaganda).

Because of all these conditions, the decision on admissibility may contain substantive elements and help clarify the Court's interpretation of the rights under the Convention. Some admissibility decisions have been included in this report. Judgments of the Court may be subjected, on request of the petitioner, to jurisdiction, topic, ratification status, and respondent party, which only can be a state; (f) no application filed with another international body: the application is not admissible if filed with another international body (such as UN treaty bodies); (g) compatibility of the application with Convention provisions: the application is not admissible if it is incompatible with the Convention with reference, for instance, to jurisdiction, topic, ratification status, and respondent party, which only can be a state; (h) no manifestly unfounded applications: the application is declared as inadmissible if it does not amount to a violation of the Convention; and (i) abuse of the right to file an application: the application is not admissible if it has purposes other than redressing human rights violations (for instance, propaganda).

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Article 46(1) of the Convention establishes the binding nature of the Court's decisions, by asserting that contracting parties are obliged to observe the Court's judgements irrespective of their declaratory nature.

5 In certain circumstances (for instance, when member states cannot guarantee a fair and speedy trial) this condition may be waived.
6 Similarly, there are exceptions to this rule.
The enforcement of the decisions of the Court depends first of all on the states themselves. The decisions often establish that damage compensation be granted to the individual petitioner, but also oblige states to take all necessary measures to remove the causes of the violation in order for further breaches not to occur. The Council of Europe Committee of Ministers has a monitoring role over the enforcement of rulings of the Court; for this purpose, it may adopt resolutions, declarations, or recommendations to member states, or request a member state to report on the measures taken to implement a judgement of the Court. When a member state repeatedly refuses to implement the ruling of the Court, the Committee can issue a threat of suspension of its membership in the Council of Europe. Finally, the Parliamentary Assembly may engage with a state’s delegates to clarify why a member state has not complied with a decision. Such a process may also involve the Secretary General of the organization.

In considering whether or not a right has been infringed upon, a key notion in the Court’s case law is the so-called margin of appreciation that member states have in balancing the exercise of an individual right established by the Convention and the state’s legitimate restriction of that right. The margin of appreciation doctrine was first elaborated in the case Handyside v. United Kingdom with regard to discretionary powers states have in limiting the exercise of the right to freedom of expression. This doctrine emanates from the notion of subsidiarity, that is, the idea that contracting states are sovereign and therefore have the main responsibility in enacting the rights and principles established by the Convention, with certain margins of discretion for how the realization of the rights will be guaranteed. Discretion, however, is not unlimited, and for this reason the margin of appreciation may be subjected to review by the Court in order to ensure effective protection of the rights enlisted in the Convention.

Limitations of rights are only permitted within certain criteria established by the Convention itself and the case law of the Court. Any restriction of a right must be in accordance with the law, meaning that it cannot be arbitrary; must be accessible (the individuals whose rights are likely to be affected must have access to the norm); and must be certain. Further, the limitation must serve a legitimate aim and must be necessary in a democratic society (“in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others," as established by the text of the Convention itself). In order to fix the limits of those parameters, the Court has established that the exceptions must respond to the principle of proportionality, meaning that there must be a reasonable relationship between the legitimate goal to be achieved (for example, protection of health and morals) and the means used to achieve this goal.

The Court has developed tests to establish the legitimacy of the limitation of rights and thereby the limits of the margin of appreciation left to the states. For instance, in Handyside a four-question test was introduced to consider the margin of appreciation of the state in limiting the right to freedom of expression and to private life vis-à-vis the protection of morals:

- Is there a pressing social need for a restriction of a right under the Convention?
- If so, does the particular restriction under examination correspond to this need?
- If so, is the restriction a proportionate response to that need?
- In any case, are the reasons presented by the authorities relevant and sufficient?

Similarly, the Court has elaborated a discrimination test to consider claims of violation of the principle of non-discrimination under article 14. Discrimination for the purposes of Article 14 occurs (a) when the discrimination claim refers to a protected right; (b) when there is a different treatment of persons in analogous or relevantly similar situations; and (c) when the difference in treatment has no objective and reasonable justification. ‘Objective and reasonable justification’ means that the relevant measure has a legitimate aim and is proportionate to the aim sought to be realized.

7 Application no 5493/72, decided on 7 December 1976. See for a discussion about this case Chapter 7B: Sexual expression, below.

8 See Article 6, right to respect for family and private life. Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression), and 11 (freedom of assembly and association) all contain variations of this list of allowed limitations.


11 For an explanation of the particular nature of the non-discrimination provision in Article 14 and the need to establish a connection between discrimination and one of the protected rights under the Convention, see Chapter 1A: Non-discrimination on account of sex, sexual orientation, gender identity, marital status, and HIV-status.
In defining the margin of appreciation of contracting states, the Court has also elaborated a so-called European consensus standard, according to which patterns of similar practices or norms among contracting states can justify the recognition of a wider or narrower margin. This standard has been key in determining decisions on issues related to sex, sexuality, and gender identity.

1.1.2. Sources of Law of the Council of Europe

Relevant sources of law within the Council of Europe are recommendations, resolutions, and conventions.

Recommendations and resolutions can be adopted by either the Committee of Ministers or by the Parliamentary Assembly. They are non-binding. Acts related to the execution of the judgments of the European Court of Human Rights take the form of resolutions.

Conventions are concluded by the Committee of Ministers. They are, as other treaties under international law, subjected to signature and ratification by member states, after which they become binding. Since its establishment the Council of Europe has adopted more than 200 treaties on human and social rights, the media, freedom of expression, education, culture, cultural identity, cultural diversity, sports, local self-governance, health, and legal, regional, and state-level cooperation. The most important Council of Europe Convention is the European Convention on Human Rights, for the reasons indicated above. Just as the Convention on Human Rights established the European Court of Human Rights, other treaties establish monitoring bodies, such as committees or groups of experts. None of these, however, has the authority and powers of the Court.

Several conventions are relevant to this report. Among them is the European Social Charter, approved in 1961 and revised in 1996, which enlists and guarantees social and economic rights. The Charter establishes as its monitoring body the European Committee on Social Rights, formed by 15 independent experts appointed by the Committee of Ministers. The main functions of the Committee of Social Rights are (a) to conduct periodic reviews on the implementation of the Charter by member states, followed by the adoption of non-binding conclusions; and (b) to exercise a quasi-judicial function by receiving collective complaints on the violation of the Charter by member states. Complaints are subjected to a procedure similar in structure to that of the European Court of Human Rights: a preliminary decision on the admissibility of the complaint is followed by hearings and a final decision on the merit. Decisions of the Committee of Social Rights are non-binding.

1.2. European Union

The European Union (EU) consists of twenty-seven European countries. Today's EU is the result of 50 years of evolution, which started with the creation of the European Communities in the middle of the twentieth century. The EU is a supra-national political and economic union of European democratic countries, through which member states exercise their shared interests, which include peace and prosperity, economic and social development, and protection of the rights and interests of their citizens.

The European Communities were originally established as a system of economic integration, which was the main purpose of the project during its first phase. Over the years it evolved into new phases. During its second phase, between 1993 (with the Treaty of Maastricht) and 2009 (with the Treaty of
Lisbon) the EU rested on three pillars, which were a combination of integration and intergovernmental cooperation. The first pillar addressed mainly economic matters, by regulating the integration of the member states through the three communities. This was the only pillar where a state could be overruled by majority decisions taken by other states, and over which the European Court of Justice had jurisdiction. The second pillar regulated common foreign and security policy, while the third pillar addressed cooperation in justice and home affairs. Decisions in the second and third pillars were taken by consensus (thus, all member states could exercise their veto power), just as in other international organizations. Starting in 2009, with the entry into force of the Treaty of Lisbon, a new phase has begun for the EU: the pillars system is replaced by one single and consolidated entity, the European Union, which succeeds the legal personality of the European Communities.

The EU is a ‘hybrid’ organization if compared to other international organizations. While EU member states remain independent and sovereign nations, they also have delegated some of their competences to the European institutions. The EU is therefore both a supra-national and an intergovernmental organization. The competences of the EU have increased over time. The initial market integration model, aimed at developing economic cooperation, was extended to include the free movement of goods, services, people, and capital, with competences over employment and social affairs, agriculture, competition, consumers’ protection, energy, transport, external trade, and other fields. With time the EU expanded to areas not strictly related to economic integration, such as, among others, monetary affairs (with the creation of the common currency), foreign policy, human rights, development and humanitarian aid, justice, security, and home affairs, with the development of common policies on immigration, visas, and asylum.

1.2.1. Organs of the European Union

For the purpose of the present report, the relevant organs are:

European Parliament

The European Parliament represents the citizens of the EU, being the only institution of the Union whose representatives are directly elected by the citizens of all member states. The number of members from each country is determined by the size of the population of each member state. The most important prerogatives of the Parliament are its legislative, financial, and democratic supervision powers, exercised in collaboration with the Council of Ministers and the European Commission. The Parliament also has the decisive role in appointing the President of the European Union and commissioners of the European Commission. All decisions of the Parliament are reached by a simple majority.

Council of the European Union

Also known as the Council of Ministers or simply the Council, this is the principal legislative organ of the EU. It is formed by the ministers of the member states’ governments (the ministers of finance, for example, when economic matters will be addressed, or the ministers of foreign affairs, when foreign policy decisions will be taken). Thus, it is the institution in which national interests are represented. Any decision of legislative nature must involve the Council, though in many areas it shares its legislative powers with the European Parliament.

Key tasks of the Council include adoption of EU legislation; coordination of economic policies of the member states; negotiation of international treaties between the EU and one or more states, or with other international organizations; approval of the budget (together with the Parliament); articulation of common foreign and security policies; and the coordination of cooperation between national courts and police forces of individual states in criminal matters. In decisions taken within its legislative function, the Council increasingly makes use of qualified majority.

European Commission

The Commission is the executive arm of the Union, responsible for the implementation of the decisions of the Council and the Parliament. It represents the interests of the EU as a whole. Members of the Commission are proposed by national government, but they are obliged to act impartially and in compliance with the sole interests of the EU. The main competences of the Commission are the ‘legislative initiative,’ that is, the task of drafting legislation for further consideration by the Council and the Parliament; the supervision, together with the European Court of Justice, of the implementation of EU legislation; the implementation and management of the budget; and the representation of the EU in international relations.
European Court of Justice

The Court was established in 1952 and its jurisdiction was progressively extended to cover the so-called first pillar (the European Communities), as well as limited areas of the other pillars. The Court is the judicial arm of the EU. It is responsible for the interpretation and application of EU law. In this capacity, it decides on domestic cases that call for interpretation of EU law, as well as individual claims against any of the EU institutions. The Court exercises constitutional, administrative, and civil law jurisdiction. Its judgments are solely based on EU law. It also expresses its views on the (lack of) harmonization of national legislation with European law.

The judicial power of the Court is exercised in five ways: (a) preliminary ruling procedure: domestic courts may seek advice regarding the interpretation or the validity of EU law prior to a decision on a domestic matter; (b) action for failure to fulfil an obligation: the Court can take actions against a member state that is failing to fulfil its obligation under EU law; (c) action for annulment: an applicant may seek the annulment of a measure adopted by an EU institution, if the measure appears to be contrary to the EU treaties; (d) action for failure to act: individual or institutional applicants can bring a claim about the failure of EU institutions to make decisions when so required; (e) action for damages: any applicant (individual or company) that suffered damage due to action or omission of the EU institutions and their staff may seek compensation. For the purpose of this report, decisions of the European Court of Justice will mainly be discussed when domestic courts have asked for preliminary rulings, under (a), above.

The European Court of Justice is formed by 27 judges (one from each member state) and eight Advocates General (who are required to provide independent opinions regarding cases that raise new points of law). The Court sits in plenary, also called Grand Chamber, formed by 13 judges, or in smaller chambers, formed by either three or five judges. There is also a General Court, formed in 1988 to relieve the Court of some of its case-load. (Until 2009 this was known as the Court of First Instance.) The General Court is attached to the European Court of Justice and has jurisdiction to determine at first instance most actions brought by individuals and the member states. The General Court’s decisions may be appealed to the European Court of Justice. Referrals for preliminary rulings ((a), above) can only be made to the European Court of Justice, which is why the jurisprudence of the General Court is of less interest for the present report.

The judgments of the Court are binding on member States and on individuals, on the basis of the principle of supremacy of EU law. This principle implies that, in case of conflict between EU law and national law, the former prevails and must be applied by domestic judges. Also, the judgments of the European Court of Justice have direct effects in domestic jurisdictions: they constitute precedents that can be applied directly by domestic courts.

1.2.2. Sources of law of the European Union

The European Union is founded by a series of treaties that gradually have come to establish the characteristic of the EU legal system. Through those treaties member states agreed to renounce parts of their sovereignty, in order to allow EU institutions to adopt common norms that are effective in the whole Union. The EU thus has a sui generis legal system that evolved in accordance with the needs and objectives of European (economic) integration. As already mentioned, EU law has supremacy over domestic law and has direct effects in member states.

Upon adoption, all sources of EU law are published in the Official Journal of the EU, in all its official languages. Judgments of the European Court of Justice are an important component of EU law, particularly with regard to interpretation of provisions of EU founding treaties. Sources of law and judgments of the Court constitute the so-called aquis communautaire: the entire body of legislation of the European Communities and the European Union.

Sources of European law may be divided into:

Primary law

Treaties: the founding treaties establishing the European Communities and the European Union are the main sources of EU primary law. Any other amending treaties and treaties between the EU and accession countries are also sources of primary law. The Treaty of Rome (or the EEC Treaty), establishing the European Economic Community, was signed in Rome 1957. In 1992 the Treaty of Maastricht (Treaty on European Union) instituted the EU and the Euro as its currency. These founding treaties were later amended by the Treaty of Amsterdam (1999) and the Treaty of Nice (2003). The last major treaty significantly amending the founding treaties is the Treaty of Lisbon, which entered into force in 2009. Through this treaty, the Charter of Fundamental Rights of the European Union (2000)
became binding. The Charter now has the same legal value as the other EU treaties.

EU treaties are not different from other treaties under international law. In order to become binding they have to be signed and ratified by the member states. Most of the key treaties of the EU entered into force only following the ratification by all member states. This was due to the fact that those treaties modified the structure of the EU institutions and its sources of law, and had to be binding on all member states in order to allow the organization to exercise its functions.

**Secondary law**

Sources of secondary law are those established by the treaties. Secondary law relevant for this report includes the following:

- **Regulations** are approved either by the Commission (if legislative authority has been delegated from the Council) or jointly by the Council and the Parliament. They are rules of general application, in the sense that once approved, they are immediately and directly applicable in all member states. When necessary, member states are required to harmonize their national legislation to adhere to the regulations.

- **Directives** are legislative acts establishing the results that have to be achieved, leaving it up to the member states to decide the form and methods by which to achieve these results. In other words, directives leave some discretion to the states regarding how they will harmonize their domestic systems in order to implement the established requirements. For this reason, directives leave a period of time for their implementation. In case of lacking implementation or implementation inconsistent with the directive, member states may be subject to judicial procedure before the Court and to sanctions. Directives are binding on member states but do not on their face have direct effect. However, the Court has established that they may have direct legal force under some circumstances, when their implementation is lacking or deficient.\(^{18}\)

- **Decisions** are approved either by the Council (sometimes jointly with the Parliament) or by the Commission. These are rules without general application, but rather addressed to specific parties, whether individuals or member states. They are directly applicable and fully binding on their addressees.

- **Framework decisions** are similar to directives in that they establish a goal but leave the choice of form and methods of implementation to be determined by national authorities. They are binding as to the result of the measure. Framework decisions are used to align the laws and regulations of the member states within specific subject areas. Proposals are made to the Council on the initiative of the Commission or of a member state, and have to be adopted unanimously. Framework decisions replaced the legal instrument common action (or joint action), which was used under the Maastricht Treaty between 1993 and 1999. The common or joint action was a coordinated action by the member states on behalf of the Union or within the Union framework, where the EU's objectives could be obtained more effectively by the use of common criteria rather than by member states acting individually.

- **Recommendations** are non-binding legal acts expressing views of different EU bodies on particular issues. Even if not binding, recommendations have a certain political weight, since they are approved following the majority rules established for other legal acts. In this report, recommendations from the European Parliament and the Council will on a few occasions be discussed.

### 1.3. Relationship between the European Union and the Council of Europe

The EU and the Council of Europe are two separate international organizations, although they share a significant proportion of their membership. Nevertheless, the leading role of the Council of Europe in the field of human rights has led to significant cooperation and connections between the two organizations.

Formally, the Union recognizes the rights under the European Convention for Human Rights and is obliged to respect them. Article 6(2) of the Treaty on European Union reads:

*The Union shall respect fundamental rights, as guaranteed by the European Convention*

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\(^{18}\) This doctrine of direct effect was established in the case Van Gend en Loos v. Nederlandse Administratie der Belastingen (1963) with regard to treaty provisions. The Court held that if the relevant treaty provision is sufficiently clear and precisely stated, unconditional or non-dependent, and confers a specific right for the citizen, it is directly applicable without domestic implementation having taken place. In Grad v. Finanzamt Traunstein (1970) the Court held that this principle can in some circumstances also apply to directives.
Furthermore, following the entry into force of the Treaty of Lisbon that confers legal personality to the European Union, it is likely that the EU at some point will sign and ratify the European Convention on Human Rights. If so, the EU as a legal system will be subjected to the external scrutiny and control of the European Court of Human Rights, whose case law would become applicable by the European Court of Justice. Based on Article 6(2) (above), however, the provisions of the European Convention of Human Rights already constitute key principles for the EU and its institutions. In particular, considering that EU treaties are the interpretative basis for the European Court of Justice, human rights principles set by the Convention have a particular significance, given the specific mentioning of the Convention in Article 6(2). In several of its rulings, the European Court of Justice has expressly made reference to the European Convention on Human Rights.

For the same reason, increasingly there is a connection between the case law of the European Court of Human Rights and the European Court of Justice when they are called to judge on similar issues. It is not unusual that the decisions of the latter follow the reasoning of the former. For instance, the jurisprudence of the European Court of Human Rights has been mentioned in European Court of Justice judgments related to gender identity. With the entry into force of the Charter of Fundamental Rights of the European Union (2009) it is likely that this trend will continue and the decisions on human rights issues of the two European courts will become more and more consistent and interrelated.

2. **Domestic Legal Systems**

As mentioned, the European region for the purposes of the present study consists of 53 nations. Needless to say, it is impossible here to give an overview of the legal systems in all these countries. Only a few general remarks will be made here.

The great majority of European nations belong to the civil law legal tradition. The roots of this tradition can be traced to Roman law, with Emperor Justinian’s *Corpus Juris Civilis* as its fundamental legal text. Church law, or canon law, has also had strong influence on the evolution of the civil law tradition, in particular in areas of family law, criminal law, and procedural law. Other doctrinal strands that have been influential are natural law (*inter alia* on the concept of inalienable rights and separation of governmental powers) and legal positivism. Civil law systems tend to be characterized by their comprehensive legal codes that organize broadly defined legal areas in large legislative collections: civil codes, criminal codes, criminal procedural codes, family law codes, etc. This structure, modelled closely after the *Corpus Juris Civilis*, gained wide recognition in the nineteenth century, when the main European nations adopted civil codes based on the model of the French *Code Napoléon* of 1804. Many European countries still have the bulk of their body of law organized in codes; for the purpose of this report, criminal (or penal) codes and civil codes will be addressed in particular. There are, however, civil law countries that do not organize their law around codes. Similarly, bodies of systematic legislation covering broad areas of the law also exist in many common law nations. Therefore the notion that civil law systems are codified statutory systems, whereas common law systems are uncodified and based primarily on judicial decisions, is a broad oversimplification. Nevertheless, the ideology behind the legal codes in civil law systems tends to distinguish them from common law systems. The codes attempt to be complete, coherent, and clear, thereby representing a sharp separation of powers in the system of law and government: the legislator makes the law, while judges merely apply it. This relates to another important feature of the civil law tradition, which is the relatively weak status of judicial precedents. Law is not, as in common law systems, shaped or determined by judges – at least not to the same extent. Judicial decisions as such are not a source of law, although judges in civil law systems tend to be influenced by prior decisions in practice.

Though there are common features of most civil law systems, it is important to bear in mind that there are also important differences within Europe among regions, countries, and subtraditions, which have

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19 See *P. v. S. and Cornwall County Council*, Case C-13/94 (1996), and *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, Case C-117/01 (2004). These cases are discussed in Chapter 4: Gender identity, gender expression, and intersex.


21 Ibid., p. 12.

22 Merryman and Pérez-Perdomo, pp. 27-28, 32-33.
separate origins and developments in different stages of history. Therefore, the mere characterization of a country as belonging to the civil law tradition does not, in fact, tell us much about how the legal system of that country operates. For example, in some civil law systems – notably in the Nordic countries – the legislative history of statutes is a crucial source of law, used by judges as one of the most important tools for interpretation of legal norms. In other civil law countries the legislative history does not enjoy this status. The countries that were part of the Soviet bloc used to be characterized as belonging to a third legal tradition: the socialist legal tradition. All of them were civil law countries before the Soviet era, and all of them have returned to a civil law model after the end of the cold war. Their legal systems do, however, still share characteristics that emanate from the socialist era (for example, the extraordinarily weak status of legal precedents).  

Furthermore, it should be noted that like all legal traditions, the European civil law systems are in flux and changing over time. For instance, the influence of US and British legal traditions, on one hand, and the increasing adjudication of international human rights norms (not the least by the European Court of Human Rights), on the other, have in recent decades made European domestic courts more susceptible to legal precedents than previously. Moreover, since the Second World War, a strong movement toward the establishment of constitutional review by courts – traditionally a common law feature – has swept through the civil law world. Thus, some civil law countries, like Germany and Italy, have created constitutional courts whose role it is to assess the constitutionality of legal provisions, with the power to strike down laws (constitutional review). In other civil law countries, like Sweden and France, courts do not have this power. Instead, in Sweden a parliamentary judicial committee examines the constitutionality of a statute before it is promulgated, while in France a non-judicial constitutional council exercises the same role (constitutional preview).

This report includes and discusses codes/statutes as well as jurisprudence from the European civil law countries. Emphasis is clearly on legislation, however. Since the status of precedents in civil law countries is comparatively weak, cases from these countries are both less authoritative and harder to find in translation than codes and statutes. Furthermore, courts in many civil law countries are often brief in their reasoning, thus not providing as much interpretative wealth as common law courts. Legislation, by contrast, tends to be detailed in most civil law countries, structured both in comprehensive codes and in statutes that are narrower in scope.

In the region there are only two common law countries, the United Kingdom and Ireland, and one state with a mixed civil and common law system (Israel). In these states, like in other common law systems, legal precedents play an important role both as a primary source of law and in the evolution of law over time. Cases from these countries tend to be more extensive than in other European countries, with more substantive reasoning. Thus, while British, Irish, and Israeli written law also is included in this report, the reader will notice that case law from in particular the United Kingdom has been given considerable room and attention. This is not due to the sophistication of British jurisprudence as such, but reflects the fact that British courts have addressed many issues related to sexual health and human rights. Because of the country’s common law tradition, British case law explores these issues in more depth than most other domestic courts in the region.

24 Merryman and Pérez-Perdomo, pp. 134-142.
APPENDIX II: LAWS AND REGULATIONS

REGIONAL

Council of Europe

- European Convention of Human Rights, Council of Europe Treaty Series – No. 5 (1950), with its 13 Protocols
- Convention on Cybercrime, Council of Europe Treaty Series – No. 185 (2001)

European Union

- Treaty establishing the European Economic Community (Treaty of Rome) (1957)
- Treaty of Amsterdam (1997)
- Treaty of Lisbon (2007)
- EU Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261
- Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and

**Domestic**

**Albania**
– Law no. 9669 of 18 December 2006 on measures against violence in family relations
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