

APPENDIX I: EUROPEAN REGIONAL SYSTEMS AND SOURCES OF LAW

1. COUNCIL OF EUROPE

The Council of Europe is comprised of forty-seven countries.¹ 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).² 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)³ 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

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.

regarding violation of the rights established by the European Convention on Human Rights and, through its judicial role, interprets the Convention and issues decisions on breach or compliance with its substantive articles.

The Court's decisions are *binding* for the state that is found in violation of the norms established by the Convention. Furthermore, the decisions constitute source of law for all member states. The exact status of the case law of the Court under domestic law of the member states depends on the individual legal systems. In many countries the decisions of the Court are directly applicable by domestic courts, whether they are equated with domestic precedents or can/must be used to interpret domestic law. In other words, while the Court's case law has immediate effects on the state party which is the respondent to the petition, and may establish concrete remedies for the applicant, it is also applicable, either directly or indirectly, in all member states. The Court exercises a quasi-constitutional supervision role over the exercise of state power,⁴ and for this reason its case law is highly relevant for the purpose of this report.

Prior to 1999, the European system of protection of human rights was dual: the *European Commission on Human Rights* was a gatekeeper, deciding on the admissibility of petitions. If a petition was considered admissible, the Commission established the facts through an opinion on the merit of the case, followed by an attempt to reach a friendly settlement and, finally, by referring the case to the Court. Before 1999, member states could also opt for not accepting the jurisdiction of the Court. Through the entry into force of Protocol 11, which amended the Convention, the Commission ceased to operate and the Court became the sole and mandatory judicial body under the Convention.

The Court is composed of one judge per contracting state. Since 1999, cases are considered by *committees* comprising three judges, *chambers* comprising seven judges, and the *Grand Chamber* comprising 17 judges. With the entry into force of Protocol 14 on 1 June 2010, simplified procedures have been established on admissibility to improve the Court's efficiency and relieve its workload. Petitioners before the Court may be individuals, NGOs, or groups of persons, if they believe that their rights under the Convention or its protocols have been violated and if the responsibility of the contracting state can be shown. Contracting States may also initiate a complaint in relation to an alleged violation of the Convention or its protocols committed by another contracting state.

Key conditions for *admissibility* of cases are (a) *the status of the petitioner*: the petitioner has to be the victim of the violation (family members may be recognized as victims); (b) *exhaustion of domestic legal remedies*, as established by Article 35 of the Convention;⁵ (c) *deadline for filing the application*: applications must be filed no later than six months following the last valid national ruling;⁶ (d) *no anonymous applications*: applications must contain data of the applicant – the Court then decides whether or not to reveal the identity of the petitioner, based on the reasons presented by the petitioner; (e) *no identical applications*: an application that is identical to one already under consideration by the Court and filed by the same person is not admissible, unless it is based on different facts; (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 parties, to a hearing before the Grand Chamber within three months following the first judgment. Decisions become final and enforceable either after three months or immediately after the judgment of the Grand Chamber (which constitutes a final appeal).

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.

4 Mark W. Janis et al, *European Human Rights Law*, Oxford, 2000, p. 467.

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 Kingdom⁷ 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 itself⁸). 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?⁹

Similarly, the Court has elaborated a *discrimination test* to consider claims of violation of the principle of non-discrimination under article 14.¹⁰ Discrimination for the purposes of Article 14 occurs (a) when the discrimination claim refers to a protected right;¹¹ (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 8, 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.

9 See Council of Europe/The Lisbon Network, "The Margin of Appreciation," available at http://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/ECHR/Paper2_en.asp. Last visited on 2 May 2010.

10 See Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (the Belgian Linguistics case) (application no 1474/62, etc, decided on 23 July 1968). For a thorough discussion of the standards for non-discrimination claims in the European Court of Human Rights (as well as in other international human rights courts and bodies), see Interights: Non-discrimination in International Law. A Handbook for Practitioners (2005).

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.¹² This standard has been key in determining decisions on issues related to sex, sexuality, and gender identity.¹³

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.¹⁴ 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 Union¹⁵

The European Union (EU) consists of twenty-seven European countries.¹⁶ 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.¹⁷ 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

12 See "The Margin of Appreciation," supra note 15., and Lawrence Helfer, "Consensus, Coherence and the European Convention on Human Rights," 26 CORNELL INT'L L.J. (1993).

13 See, inter alia, Marxx v. Belgium (1979), Dudgeon v. United Kingdom (1981), Goodwin v. United Kingdom (2002), and M.C. v. Bulgaria (2003). All these cases are discussed below, in their respective chapters.

14 In the future these experts will be appointed by the Council of Europe Parliamentary Assembly.

15 For more information on the EU, its history, institutions and bodies, see http://europa.eu/index_en.htm.

16 Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom. It should be noted that EU law is becoming a legislative criterion for third countries, especially in South-East Europe, that are at some stage of negotiation of accession to the Union (particularly Croatia, Serbia, Bosnia and Herzegovina, Montenegro, Albania, Macedonia, Turkey). In other cases specific agreements involve third countries (such as, for example, the Schengen Agreement, that has been signed by non member States, such as Switzerland, Iceland and Norway).

17 The term 'European Community' was used until the Treaty on European Union (the Maastricht Treaty) came into force in 1993. The term 'European Community' included the three Communities established by the Treaties of Paris and Rome. The full name was the European Communities, which included the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community. In 1967, official terminology began to use the term Community to denote all three.

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 inter-governmental 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

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.

for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

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 on 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.¹⁹ 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.²⁰ 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.²¹ 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 uncoded 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.²² 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

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.

20 For a thorough discussion of the origins and early features of the civil law tradition, see John Henry Merryman and Rogelio Pérez-Perdomo, *The civil law tradition: an introduction to the legal systems in Europe and Latin America*, Stanford, 2007, pp. 7-14.

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).²³

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.²⁴ 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 evolvement 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.

23 Ewoud Hondius, "Precedent and the Law," *Electronic Journal of Comparative Law*, vol. 11.3 (December 2007), pp. 11-12.

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
- European Social Charter, Council of Europe Treaty Series – No. 35 (1961) and No. 163 (1996)
- Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence – Council of Europe Treaty Series – No. 210 (2011)
- Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, Council of Europe Treaty Series – No. 201 (2007)
- European Convention on the Adoption of Children, Revised version, Council of Europe Treaty Series – No. 202 (open for signature 2008)
- Convention on Cybercrime, Council of Europe Treaty Series – No. 185 (2001)
- Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series – No. 197 (2005)

European Union

- Treaty establishing the European Economic Community (Treaty of Rome) (1957)
- Treaty on European Union (Treaty of Maastricht) (1992)
- Treaty of Amsterdam (1997)
- Treaty of Lisbon (2007)
- Charter of Fundamental Rights of the European Union (2000)
- Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1976] OJ L 39
- Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the Recast Directive), [2006] OJ L 204/23
- EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 372/37
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L304/12
- Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography, 2004/68/JHA, adopted 22 December 2003
- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158
- Council Directive 2003/86/EC on the right to family reunification, [2003] OJ L 251
- 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

sexual exploitation of children [1997] OJ L 63

- Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [2002] OJ L 203

DOMESTIC

Albania

- Law no. 9669 of 18 December 2006 on measures against violence in family relations
- Law No. 8045 of 7 December 1995 on the interruption of pregnancy

Austria

- Penal Code, only available in German
- Protection from Violence Act, GeSchG, 30 December 1996
- Second Protection from Violence Act, 2. GeSchG, 8 April 2009

Belgium

- Act of 10 May 2007 aimed at combating certain forms of discrimination
- Criminal Code

Bosnia Herzegovina

- Law on Gender Equality in Bosnia Herzegovina, 21 May 2003

Bulgaria

- Law on Protection Against Discrimination, 1 January 2004

Croatia

- Gender Equality Law 116/2003, 30 July 2003
- Labour Act (2004)

Denmark

- Act 923 of 4 September 2006 on assisted conception in relation to medical treatment, diagnostic, and research etc.
- Law on Primary Education, 2000

Finland

- Marriage Act, 13.6.1929/234
- Law No. 563 of 28 June 2002 on the determination of sexual identity of transsexual persons
- Ordinance No. 1053 of 3 December 2002 on the organization of examinations and treatment for the purposes of sex change and on the medical statement determining the gender of transsexual persons
- Penal Code, 39/1889

France

- Law 99-944 of 15 November 1999 relating to a civil solidarity pact
- Law no. 93-1027 of 24 August 1993 on the regulation of immigration and on the conditions of entry, reception, and residency of foreigners in France
- Law No 2003-1119 of 26 November 2003 on the regulation of immigration, on residency of foreigners in France, and on nationality
- Penal Code (1994)

- Law No. 2001-588 on Voluntary Interruption of Pregnancy and on Contraception, incorporated in the Public Health Code
- Code of Education

Germany

- Criminal Code, 13 November 1998
- Act on the change of the first names and the determination of sexual affiliation in special cases (Transsexual law), 10 September 1980
- Act Regulating the Legal Situation of Prostitutes (Prostitution Act), 20 December 2001

Hungary

- Civil Code, Act IV of 1959
- Act XXIX of 2009 on Registered Partnership and Related Legislation and on the Amendment of Other Statutes to Facilitate the Proof of Cohabitation
- Criminal Code
- Act LXXV of 1999 on Organized Crime
- Act LXIX of 1999 on Violation of Administrative Rules
- Decree 41/1999 (IX.8.) of the Minister of Health

Iceland

- Act on Registered Partnership, No. 87, 12 June 1996
- Law 65/2000, amending Icelandic Act on Registered Partnership, 27 June 2006

Ireland

- Criminal Law (Sexual Offences) Act 1993, No. 20/1993
- Criminal Law (Rape) Act 1981, no. 10/1981
- Criminal Law (Rape) (Amendment) Act 1990, no. 32/1990
- Child Trafficking and Pornography Act, no 22/1998
- Criminal Law (Human Trafficking) Act 2008, no 8/2008
- Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking (secondary legislation), 7 June 2008
- Regulation of Information (Services outside the State for the Termination of Pregnancies) Act 1995, No 5/1995

Israel

- The Prevention of Sexual Harassment Law, 5758 – 1998, 10 March 1998

Italy

- Penal Code, of 19 October 1930
- Act no. 164 of 14 April 1982, on regulations regarding the rectification of the attribution of sex
- Act of 15 February 1996 no. 66, on regulations against sexual violence
- Act of 5 August 1981, no. 442, repealing the relevance of honour in criminal matters

Kazakhstan

- Law of the Republic of Kazakhstan dated December 17, 1998 No. 321-1 “Marriage and the Family”
- Order No. 435: On the guidelines of medical investigation of people with gender identification disorders (Order of the Minister of Health of the Republic of Kazakhstan), 3 June 2003

Lithuania

- Law on the Protection of Minors Against the Detrimental Effect of Public Information (2010)

Moldova

- Law on Preventing and Combating Trafficking in Human Beings, No. 241-XVI, 20 October 2005
- Law on Prevention and Control of HIV/AIDS, No. 23-XVI, 16 February 2007

Netherlands

- Penal Code, 3 March 1881
- Civil Code
- Act on reception of foreign children for adoption, 8 December 1988
- Act of 21 December 2000 amending Book 1 of the Civil Code (adoption by persons of the same sex)
- General anti-discrimination law, 2 March 1994
- Law on the termination of pregnancy of 1 May 1981
- Decree of 17 May 1984 laying down provisions for the implementation of the Law on the termination of pregnancy (Government decree)
- Public Health Act, 460 Act of 9 October 2008
- 461 Decree of 27 October 2008, laying down new requirements regarding public health matters (Public Health Decree) (Government decree)

Norway

- Criminal Code, LAW-1902-05-22-10
- Act on Children and Parents (Children Act), LAW-1981-04-08-7
- Act on marriage, LAW-1991-07-04-47
- Act N° 74 of 15 December 1995 on the prohibition of genital mutilation, LAW-1995-12-15-74
- Child Protection Act, LAW-1992-07-17-100

Portugal

- Law No 6/2001 of 11 May on measures of protection for persons who live with shared economy
- Law 59/2007, amending the Penal Code, 4 September 2007
- Law 120/99: Strengthening the Guarantee of Access to Reproductive Health, 11 August 1999
- Government Decree 259/2000, 17 October 2000
- Law 3/84: Sexual education and family planning, 24 March 1984
- Law 60/2009 of 6 August: Establishing a regime to be applied to sexual education in schools, 6 August 2009

Russia

- Law on Prevention of the Spread in the Russian Federation of Illness Caused by Human Immunodeficiency Virus (HIV), 30 March 1995
- Federal Law on the Legal Status of Foreign Citizens in the Russian Federation, 21 June 2002
- On Approval of List of Employees for Individual Occupations, Industries, Enterprises, Institutions and Organizations that Pass a Compulsory Medical Examination to Detect HIV Infection During the Mandatory Pre-Admission for Employment and Periodic Medical Examinations, Government Resolution No 877, 4 September 1995
- Criminal Code (1996)

- Family Code (1995)
- Fundamentals of Legislation on Health Care, No. 5487-1, 22 July 2007
- Government Resolution No. 485, 11 August 2003, on abortion

Serbia

- Law on the Prohibition of Discrimination, April 2009
- Criminal Code, Nos. 85/2005, 88/2005, 107/2005

Slovenia

- Law of 20 April 1977 on medical measures to implement the right to a free decision regarding the birth of children

Spain

- Law 12/2009, of 30 October, regulating the right to asylum and subsidiary protection, No. 17242, 30 October 2009
- Law 13/2005, of 1 July, by which the Civil Code is modified in the area of the right to contract marriage, 1 July 2005
- Law 21/1987, of 11 November, through which certain articles in the Civil Code and the Civil Procedural Code are modified in the area of adoption, 11 November 1987
- Law 14/2006, of 26 May, on techniques of assisted human reproduction, 26 May 2006
- Law 3/2007, of 15 March, regulating the correction of the appearance in registries of the sex of persons, 15 March 2007
- Law 15/2005, of 8 July, through which the Civil Code and the Civil Procedural Law are modified in the area of separation and divorce, 8 July 2005
- Organic Law 10/1995, of 23 November, of the Penal Code (Spanish Penal Code)

Sweden

- Discrimination Act (2008:567), 5 June 2008
- Law (2009:253) amending the Marriage Code, 2 April 2009
- The Children and Parents Code (1949:381)
- Cohabitation Act (2003:376), 12 June 2003
- Genetic Integrity Act (2006:351), 18 May 2006
- Penal Code (1962:700)
- Communicable Diseases Act (2004:168), 7 April 2004

Switzerland

- Penal Code, of 21 December 1937

Tajikistan

- Criminal Code of the Republic of Tajikistan
- Family Code of the Republic of Tajikistan, 29.04.2006r., No.183

Turkey

- Criminal Code, Law No. 5237/2004, 26 September 2004
- General Hygiene Law, Law No. 1593/1930, 24 April 1930
- General regulations on prostitutes and brothels in order to fight against sexually transmitted diseases, Council of Ministers' Decree 30/3/1961, No: 5/984

- Social Insurance Act, Law No. 506/1964

Ukraine

- Basic Laws of Ukraine on Health, N 2802-XII, 15 December 1992
- Law on Prevention of the Disease AIDS and Social Protection of Population, 12 December 1991
- About Improvement of Voluntary Counselling and Testing HIV Infection (Order of the Ministry of Health of Ukraine no. 415, 19 August 2005)
- On Approval of Regulations on Health Care of Persons Held in Remand and Institutions of the State Penitentiary Department of Ukraine for Execution of Punishment (Order of the Ministry of Justice of Ukraine No. 143/4364, 9 March 2000)

United Kingdom

- Sex Discrimination Act 1975, 12 November 1975
- Sex Discrimination (Gender Reassignment) Regulations 1999, No. 1112, 25 March 1999
- The Sex Discrimination (Amendment of Legislation) Regulations 2008, No. 963, 1 April 2008
- Employment Equality (Sex Discrimination) Regulations 2005, 5 September 2005
- SDA Amendment Regulations SI 2008/656, 8 March 2008
- Employment Equality (Sexual Orientation) Regulations 2003, Statutory Instrument 2003/1661, 26 June 2003
- Homosexual Offences (Northern Ireland) Order 1982, (No. 1536 (N.I. 19)), 27 October 1982
- Sexual Offences Act 2003, 20 November 2003
- Offences against the Person Act (OAPA) 1861
- Human Fertilisation and Embryology Act 1990, 1 November 1990
- Human Fertilisation and Embryology Act 2008, 13 November 2008
- Forced Marriage (Civil Protection) Act 2007, 26 July 2007
- Immigration Act 1988, 10 May 1988
- Gender Recognition Act 2004, 1 July 2004
- Civil Registration Act 2004, 18 November 2004
- Domestic Violence, Crime and Victims Act 2004, 15 November 2004
- Criminal Justice and Public Order Act 1994, 3 November 1994
- Youth Justice and Criminal Evidence Act 1999, 27 July 1999
- Female Genital Mutilation Act 2003, 30 October 2003
- Children Act 1989, 16 November 1989
- Criminal Justice Act 2003, 20 November 2003
- Homicide Act 1957, 21 March 1957
- Coroners and Justice Act, 12 November 2009
- Disability Discrimination Act, 7 April 2005
- Obscene Publications Act 1959, 29 July 1959
- Criminal Justice and Immigration Act 2008, 8 May 2008

APPENDIX III: TABLE OF CASES

Within each category in alphabetical order.

REGIONAL

Council of Europe

European Court of Human Rights

- *A v. Croatia*, application no. 55164/08, 14 October 2010
- *A, B and C v. Ireland*, application no. 25579/05, 16 December 2010. Grand Chamber judgment
- *A.D.T. v. the United Kingdom*, application no. 35765/97, 31 July 2000
- *Abdulaziz, Cabales and Balkandali v. United Kingdom*, application no. 9214/80; 9473/81; 9474/81, 28 May 1985
- *Airey v. Ireland*, application no. 6289/73, 9 October 1979
- *Aleksanyan v. Russia*, application no. 46468/06, 22 December 2008
- *Alekseyev v. Russia*, application nos. 4916/07, 25924/08, and 14599/09, 21 October 2010
- *Amegnigan v. the Netherlands*, application no. 25629/04, *Admissibility decision*, 25 November 2004
- *Angelova and Iliev v. Bulgaria*, application no. 55523/00, 26 July 2007
- *Arcila Henao v. The Netherlands*, application no. 13669/03, *Admissibility decision*, 24 June 2003
- *Aydin v. Turkey*, application no. 23178/94, 25 September 1997
- *B. and L. v. the United Kingdom*, application no. 36536/02, 13 September 2005
- *B. B. v. United Kingdom*, application no. 53760/00, 10 February 2004
- *B. v. France*, application no. 13343/87, 25 March 1992
- *Baczkowski and others v. Poland*, application no. 1543/06, 3 May 2007
- *Beck, Copp and Bazeley v. the United Kingdom*, application nos. 48535/99, 48536/99 and 48537/99, 22 October 2002
- *Bevacqua and S. v. Bulgaria*, application no. 71127/01, 12 June 2008
- *Branko Tomasic and others v. Croatia*, application no. 46598/06, 15 January 2009
- *Burghartz v. Switzerland*, application no. 16213/90, 22 February 1994
- *C.R. v. the United Kingdom and S.W. v. the United Kingdom*, application nos. 20166/92 and 20190/92, 22 November 1995
- *Collins and Akaziebie v. Sweden*, application no. 23944/05, *Admissibility decision*, 8 March 2007
- *Cossey v. United Kingdom*, application no. 10843/84, 27 September 1990
- *D. v. United Kingdom*, case number 146/1996/767/964, 2 May 1997
- *Dickson v. United Kingdom*, application no. 44362/04, 4 December 2007
- *Dudgeon v. the United Kingdom*, application no. 7525/76, 22 October 1981
- *E. and Others v. United Kingdom*, application no. 33218/96, 26 November 2002
- *E.B. v. France*, application no. 43546/02, 22 January 2008
- *E.S and Others v. Slovakia*, application no. 8227/04, 15 September 2009
- *Enhorn v. Sweden*, application no. 56529/00, 25 January 2005
- *Evans v. United Kingdom*, application no. 6339705, 10 April 2004

- *F. v. United Kingdom*, application no. 17341/03, *Admissibility decision*, 22 June 2004
- *Fretté v. France*, application no. 36515/97, 26 February 2002
- *Gas and Dubois v. France*, application no. 25951/07, declared admissible on 31 August 2010
- *Goodwin v. United Kingdom*, application no. 28957/95, 11 July 2002
- *Grant v. the United Kingdom*, application no. 32570/03, 23 May 2006
- *Hajduova v. Slovakia*, application no. 2660/03, 30 November 2010
- *Handyside v. United Kingdom*, application no 5493/72, 7 December 1976
- *I. v. the United Kingdom*, application no. 25680/94, 11 July 2002
- *J.M. v. the United Kingdom*, application no. 37060/06, 28 September 2010
- *Jabari v. Turkey*, application no. 40035/98, 11 July 2000
- *Johnston v. Ireland*, application no. 9697/82, 18 December 1986
- *Karner v. Austria*, application no. 40016/98, 24 July 2003
- *Khudobin v. Russia*, application no. 59696/00, 26 October 2006
- *Kiyutin v. Russia*, application no. 2700/10, 10 March 2011
- *Kjeldsen, Busk Madsen and Pederson v. Kingdom of Denmark*, application nos. 5095/71; 5920/72; 5926/72, 7 December 1976
- *Kontrova v. Slovakia*, application no. 7510/04, 31 May 2007
- *Kozak v. Poland*, application no. 13102/02, 2 March 2010
- *L. and V. v. Austria*, application nos. 39392/98 and 39829/98, 9 January 2003
- *L. v. Lithuania*, application no. 27527/03, 11 September 2007
- *Laskey, Jaggard and Brown v. the United Kingdom*, no. 109/1995/615/703-705, 19 February 1997
- *Lustig-Prean and Beckett v. the United Kingdom*, application nos. 31417/96 and 32377/96, 27 September 1999
- *M.C. v. Bulgaria*, application no. 39272/98, 4 December 2003
- *Marckx v. Belgium*, application no. 6833/74, 13 June 1979
- *Maslova and Nalbandov v. Russia*, application no. 839/02, 24 January 2008
- *Menesheva v. Russia*, application no. 59261/00, 9 March 2006, final judgment 9 June 2006
- *Modinos v. Cyprus*, application no. 15070/89, 22 April 1993
- *Müller and others v. Switzerland*, application no. 10737/84, 24 May 1988
- *N. v. Sweden*, application no. 23505/09, 20 July 2010
- *N. v. United Kingdom*, application no. 26565/05, 27 May 2008
- *Nachova and others v. Bulgaria*, application nos. 43577/98 and 43579/98, 6 July 2005 (Grand Chamber decision)
- *Ndangoya v. Sweden*, application no. 17868/03, *Admissibility decision*, of 22 June 2004
- *Norris v. Ireland*, application no. 10581/83, 26 October 1988
- *Obst v. Germany*, application no. 425/03, 23 September 2010
- *Open Door and Dublin Well Woman v. Ireland*, application nos. 14234/88 and 14235/88, 29 October 1992
- *Opuz v. Turkey*, application no. 33401/02, 9 June 2009
- *P.B. and J.S. v. Austria*, application no. 18984/02, 22 July 2010

- *Perkins and R v. the United Kingdom*, application nos. 43208/98 and 44875/98, 22 October 2002
- *Pichon and Sajous v. France*, application no. 49853/99, *Admissibility decision*, 2 October 2001
- *R.H. v. Austria*, application no. 7336/03, 19 January 2006
- *R.R. v. Poland*, application no. 27617/04, 26 May 2011
- *Rantsev v. Cyprus and Russia*, application no. 25965/04, 7 January 2010
- *Rees v. United Kingdom*, application no. 9532/81, 17 October, 1986
- *S.C.C. v. Sweden*, application no. 46553/99, *Admissibility decision*, 15 February 2000
- *S.H. and Others v. Austria*, application no. 57813/00, 1 April 2010
- *S.L. v. Austria*, application no. 45330/99, 9 January 2003
- *Salgueiro da Silva Mouta v. Portugal*, application no. 33290/96, 21 December 1999
- *Salmanoğlu and Polattas v. Turkey*, application no. 15828/03, 17 March 2009
- *Schalk and Kopf v. Austria*, application no. 30141/04, 24 June 2010
- *Schlumpf v. Switzerland*, application no 29002/06, 8 January 2009
- *Schuler-Zgraggen v. Switzerland*, application no. 14518/89, 24 June 1993
- *Schüth v. Germany*, application no. 1620/03, 23 September 2010
- *Siliadin v. France*, application no. 73316/01, 26 July 2005
- *Smith and Grady v. the United Kingdom*, application nos. 33985/96 and 33986/96, 27 September 1999
- *Stoica v. Romania*, application no. 42722/02, 4 March 2008
- *Tysiac v. Poland*, application no. 5410/03, 20 March 2007
- *Van Kück v. Germany*, application no. 35968/97, 12 June 2003
- *Vermeire v. Belgium*, application no. 12849/87, 29 November 1991
- *Vo. v. France*, application no. 53924/00, 8 July 2004
- *W v. Commission*, Case F-86/09, 14 October 2010
- *Woditschka and Wilfling v. Austria*, application nos. 69756/01 and 6306/02, 21 October 2004
- *Wolfmeyer v. Austria*, application no. 5263/03, 26 May 2005
- *Women on Waves and others v. Portugal*, application 31276/05, 3 February 2009
- *X, Y and Z v. United Kingdom*, Ccase no. 75/1995/581/667, 22 April 1997
- *X. and Y. v. the Netherlands*, application no. 8978/80, 26 March 1985
- *Yakovenko v. Ukraine*, application no. 15825/06, 25 October 2007
- *Yazgül Yilmaz v. Turkey*, application no. 36369/06, 1 February 2011
- *Z v. Finland*, application No. 22009/93, 25 February 1997

European Commission of Human Rights

- *Bibi v. the United Kingdom*, application no. 19628/92, 29 June 1992
- *E.A and A.A v. the Netherlands*, application 14501/89, 6 January 1992
- *Karara v. Finland*, no. 40900/98, 29 May 1998
- *M. and O.M. v v. the Netherlands*, application 12139/86, 5 October 1987
- *Scherer v. Switzerland*, no. 17116/90, 14 January 1993

- *Sutherland v. United Kingdom*, application no. 25186/94, 1 July 1997
- *X Ltd. and Y v. United Kingdom*, application no. 8710/79, 7 May 1982

European Committee of Social Rights

- *International Centre for the Legal Protection of Human Rights (INTERRIGHTS) v. Croatia*, complaint no. 45/2007, 30 March 2009

European Union

European Court of Justice

- *Adoui and Cornuaille v. Belgian State*, Cases C-115 and 116/81, 18 May 1982
- *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, Case C-268/99, – 20 November 2001
- *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, Case 43/75, 8 April 1976
- *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, Case 149/77, 15 June 1978
- *Jürgen Römer v. Freie und Hansestadt Hamburg*, Case C-147/08, 10 May 2011
- *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, Case C-117/01, 7 January 2004
- *Lili Georgieva Panayotova and Others v. Minister voor Vreemdelingenzaken en Integratie*, Case C-327/02, 16 November 2004
- *Maruko v. Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, 1 April 2008
- *Netherlands v. Ann Florence Reed*, Case C-59/85, 17 April 1986
- *P. v. S. and Cornwall County Council*, Case C-13/94, 30 April 1996
- *Richards v. Secretary of State for Work and Pensions*, Case C-423/04, 27 April 2006
- *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and others*, Case C-159/90, 5 March 1990
- *X v. Commission*, Case C-404/92 P, 5 October 1994, appeal against a judgment of the Court of First Instance

DOMESTIC

Austria

- Senat II Federal Equal Treatment Commission/7. Gutachten, 178 1 (2006)
- *VfGH 21.06.2002*, Austrian Constitutional Court, G 6/02, 21 June 2002
- *VwGH 27.02.2009, 2008/17/0054*, Austrian Administrative High Court, 27 February 2009

Belgium

- *Merck, Sharp and Dohme BV v. Belgium*, Belgian Constitutional Court, case 150/2006, 11 October 2006

Germany

- *BverfGE 39, 1*, German Federal Constitutional Court, 25 February 1975
- *BVerwG 2 WD 9.06*, German Federal Administrative Court, 24 April 2007
- *1 BvL 3/03*, German Federal Constitutional Court, 6 December 2005
- *1 BvL 10/05*, German Federal Constitutional Court, 27 May 2008
- *5U 51/08*, Civil Appeals Court Cologne, 3 September 2008
- *1 BvR 1358/09*, German Federal Constitutional Court, 21 July 2009

- 1 BvR 3295/07, German Federal Constitutional Court, 11 January 2011
- 2 BvR 392/07, German Federal Constitutional Court, 26 February 2008

Hungary

- *Decision of the Constitutional Court No. 14/1995 (III. 13.)*, 13 March 1995
- *Decision of the Constitutional Court No. 154/2008 (XII. 17.)*, 15 December 2008

Israel

- *El Al Israel Airlines Ltd. v. The Respondents: Yonatan Danilowitz & The National Labor Court*, Case no. 721/94, 30 November 1994

Italy

- *Decision no. 161 of 23 May 1985*, Italian Constitutional Court
- *Decision no. 37352 of 10 October 2007*, Italian Supreme Court
- *Decision no. 26345 of 25 June 2009*, Italian Constitutional Court
- *Decision no. 8286/2010 of 3 March 2010*, Italian Supreme Court

Netherlands

- *NJ 1994/347*, Dutch Supreme Court, 18 June 1993, no. 15015
- *2659/03 IV/SB, AR1860*, Dutch Supreme Court, Criminal Section, 18 January 2005, no. 02659/03

Slovenia

- *Decision U-I-425/06-10*, Slovenian Constitutional Court, 2 July 2009

Spain

- *Decision no. 105/2005*, Spanish Supreme Court, Penal Division, application no. 812/2004, 29 January 2005

Sweden

- *B 4651-02*, Svea Court of Appeal, decided on 31 May 2002
- *ÖÄ 3324-06*, Göta Court of Appeal, 9 February 2007
- *UM 721-07*, Stockholm Migration Court, 25 April 2007²⁵

Switzerland

- *Mr. S v. Mr. S2 and Ms. R*, Geneva Court of Justice, 23 February 2009

Turkey

- *Decision no. 2007/190-2008/236*, Turkish Supreme Court of Appeals, 29 May 2009

United Kingdom

- *Andrei Ivanov v. The Secretary of State for the Home Department*, [2008] ScotCS CSOH_15, Scottish Court of Sessions, judicial review, 31 January 2008
- *CO/9490/2008*, [2009] EWHC 2220 (Admin), England And Wales High Court (Administrative Court), 4 September 2009
- *F. and Angus Aubrey Thompson v. Secretary of State*, [2008] EWHC 3170 (QB), England and Wales High Court of Justice, 19 December 2008
- *Gillick v. West Norfolk and Wisbech Area Health Authority*, House of Lords [1985] 3 All ER 402,

25 The name of the applicant in this case is confidential for her protection; thus, a copy of this case is not included in the database.

17 October 1985

- *Go Kidz Go Ltd v. Bourdouane*, Employment Appeal Tribunal, EAT/1110/95/*unreported*, 10 September 1995
- *London Borough of Islington v. Miss L. Ladele*, Employment Appeal Tribunal, Appeal No. UKEAT/0453/08/RN, 19 December 2008
- *NIFam 3*, (Ref: GILC4074), High Court of Justice in Northern Ireland, family division, decided 6 January 2004
- *North West Lancashire Health Authority v. A., D., G.*, [2000] 1 WLR 997. Court of Appeal (Civil Division), 29 July 1999
- *PO v. Secretary of State for the Home Department*, PO (Trafficked Women) Nigeria CG [2009] UKAIT 00046, Asylum and Immigration Tribunal, 23 November 2009
- *R v. Bahador*, [2005] EWCA Crim 396, England and Wales Court of Appeal, 15 February 2005
- *R v. Feston Konzani*, England and Wales Court of Appeal, [2005] EWCA706, 17 March 2005
- *Regina v. Mohamed Dica*, English and Wales Court of Appeals [2004] EWCA Crim 1103, 5 May 2004
- *Regina v. Olugboja*, [1982] Queen’s Bench 320, [1981] 3 All England Law Reports 443, 17 June 1981
- *SB v. Secretary of State for the Home Department*, SB (PSG - Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 00002, Asylum and Immigration Tribunal, 26 November 2007
- *Sheffield v. Air Foyle Charter Airlines*, Industrial Tribunal, Case No. 1200389/97, 29 May 1998
- *Smeaton v. Secretary of State for Health*, [2002] EWHC 610 (Admin), England and Wales Court of Justice, 18 April 2002
- *Strathclyde Regional Council v. Porcelli*, Scottish Court of Session, [1986] IRLR 134, 31 January 1986

APPENDIX IV: REGIONAL NON-BINDING MATERIAL

Documents discussed in the main text, within each category in order of appearance. ²⁶

COUNCIL OF EUROPE

Parliamentary Assembly

- *Resolution 1031(1994) on the honouring of commitments entered into by member States when joining the Council of Europe*, adopted on 14 April 1994
- *Recommendation 1470 (2000) on the Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe*, adopted on 30 June 2000
- *Recommendation 924(1981) on discrimination against homosexuals*, adopted on 1 October 1981
- *Resolution 1327 (2003) on honour crimes*, adopted on 4 April 2003
- *Resolution 1681(2009): Urgent need to combat so-called honour crimes*, adopted on 26 June 2009
- *Resolution 1607 (2008), Access to safe and legal abortions in Europe*, adopted on 16 April 2008
- *Resolution 1579 (2007). Prostitution – Which stance to take?*, adopted on 4 October 2007

Committee of Ministers

- *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, adopted on 31 March 2010
- *Recommendation no. R (89) 14 on the ethical issues of HIV infection in the health care and social settings*, adopted on 24 October 1989
- *Recommendation No. R(93) 6*, adopted on 18 October 1993
- *Recommendation No. R (98) 7*, adopted on 8 April 1998
- *Recommendation R (2002)5 of the Committee of Ministers to member States on the protection of women against violence*, adopted on 30 April 2002

EUROPEAN UNION

European Parliament

- *Resolution on stiffer penalties for homosexuals in Romania*, B4-1057, 1063 and 1081/96, adopted on 19 October 1996
- *Resolution of 3 December 1998 on Romania's application for membership of the European Union, with a view to the European Council to be held in Vienna 11-12 December 1998*, A4-0428/98
- *Resolution on equal rights for gays and lesbians in the EC*, B4-0824 and 0852/98, adopted on 17 September 1998
- *Resolution of 12 September 1989 on discrimination against transsexuals*, OJ No C 256 of 9 October 1989
- *Resolution on the role of women in Turkey in social, economic and political life*, 2004/2215(INI), adopted on 6 July 2005
- *Resolution on women's role in social, economic and political life in Turkey*, 2006/2214(INI), adopted on 13 February 2007
- *Resolution on sexual and reproductive health and rights*, 2001/2128 (INI), adopted 3 July 2002

²⁶ All materials here listed are included in relevant parts in the database accompanying the report, either in original language or in English translation.

APPENDIX V: SELECT BIBLIOGRAPHY

- Hans Akveld and Dick Hessing, "Dutch Legal Responses to AIDS," in Stanislaw Frankowski (ed.), *Legal Responses to AIDS in Comparative Perspective*, The Hague, 1998
- James Baldwin, *Disease and Democracy*, Berkeley, 2005
- Samantha Besson, "Gender Discrimination under EU and ECHR law: *Never Shall the Twain Meet?*", *Human Rights Law Review* HRLR 8 (2002), 647-682
- Vahit Bıçak and Edward Grieves, *Mukayeseli Gerekceli, Türkçe-İngilizce, Türk Ceza Kanunu* (Turkish-English translation of Turkish Penal Code), Ankara, 2007
- James Chalmers, *Legal Responses to HIV and AIDS*, Portland, 2008
- Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women*, EG (2004)2
- Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women*, EG (2009)3
- Jessika Deblonde et al, "Antenatal HIV Screening in Europe: a Review of Policies." *European J of Public Health* v.17 no.5 (2007)
- Gunilla Ekberg, "The Swedish Law that Prohibits the Purchase of Sexual Services," *Violence Against Women*, Vol. 10 No. 10, October 2004, 1187-1218
- European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States*, 2008
- Aisha Gill, "Honour Killings and the Quest for Justice in Black and Minority Ethnic Communities in the United Kingdom", *Criminal Justice Policy Review* Online First, January 2009
- Global Rights, "Demanding Credibility and Sustaining Activism: A Guide to Sexuality-based Advocacy," 2009
- Joëlle Godard, "PaCS Seven Years On: Is it Moving Towards Marriage?," *Int. J. of Law, Policy and the Family*, 21 (2007), 310-321
- Birgitt Haller, "The Austrian Legislation Against Domestic Violence", report for Coordination Action Against Human Rights Violations, June 2005
- Birgitt Haller et al, "The Austrian Protection against Domestic Violence Act 1996", in *Crime Policy in Europe*, Council of Europe, 2004
- Lori Heise, with Adrienne Germain and Jacqueline Pitanguy, *Violence against Women: The Hidden Health Burden*. Washington (World Bank), 1994
- Lawrence Helfer, "Consensus, Coherence and the European Convention on Human Rights," 26 *Cornell Int'l L.J.* (1993)
- Ewoud Hondius, "Precedent and the Law," *Electronic Journal of Comparative Law*, vol. 11.3 (December 2007)
- Rosemary Horgan, "The European Convention on Adoption 2008: Progressing the Children's Rights Polemic," *International Family Law*, September 2008
- Sara Hossain and Lynn Welchmann (eds), '*Honour: Crimes, paradigms and violence against women*, London, 2005.
- Human Rights First, *Overview: Hate Crime Report Card*, 2007
- Human Rights First, *Violence Based on Sexual Orientation and Gender Identity Bias*, 2008
- Pinar Ilkkaracan (ed), *Deconstructing Sexuality in the Middle East*, Hampshire, 2008
- International Centre for Reproductive Health, "Responding to female genital mutilation in Europe. Striking the right balance between prosecution and prevention," 2009
- International Planned Parenthood Federation (IPPF)/The SAFE Project, "A Reference Guide to Politics and Practices. Sexuality Education in Europe," 2006
- Mark W. Janis et al, *European Human Rights Law*, Oxford, 2000
- Orit Kamir, "Israel's 1998 Sexual Harassment Law: Prohibiting Sexual Harassment, Sexual Stalking,

- and Degradation Based on Sexual Orientation in the Workplace and in all Social Settings” (2005), 7 *International Journal of Discrimination and the Law*, 315-336
- Barbara Kavemann and Heike Rabe, “The Act Regulating the Legal Situation of Prostitutes – implementation, impact, current developments” (2007), p. 10
- Gregory A. Knott, “Transsexual law unconstitutional: German Federal Constitutional Court demands reformation of law because of fundamental rights conflict,” *Saint Louis University Law Journal* 54 (2009-10), p. 10.
- Nancy Krieger, “Genders, sexes, and health: what are the connections – and why does it matter?” *Int J Epidemiol.* 2003 Aug; 32(4):652-7
- Slavka Kukova, “Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation, report on Bulgaria,” European Union Agency for Fundamental Rights/FRA (2008)
- Don Kulick, “Sex in the New Europe: the Criminalisation of Clients and Swedish Fear of Penetration,” *Anthropological Theory*, Vol. 3, No. 2, 199-218 (2003)
- Rick Lawson et al, “Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Netherlands,” European Union Agency for Fundamental Rights/FRA (2008)
- Paul Lemmens et al, “Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Belgium,” European Union Agency for Fundamental Rights/FRA (2008)
- Els Leye et al, “An analysis of the implementation of laws with regard to female genital mutilation in Europe,” *Crime Law Soc Change* (2007) 47:1-31.
- Ana Llanza i Sicart and Susana Navas Navaro, *Matrimonio homosexual y adopción. Perspectiva nacional y internacional*, Madrid, 2006
- Kathy Mack, “Continuing Barriers to Women’s Credibility: A Feminist Perspective on the Proof Process.” 4 *Crim. L.F.* 327 (1993)
- Yuval Merin, *Equality for same-sex couples: the legal recognition of gay partnerships in Europe and the United States*, Chicago, 2002
- John Henry Merryman and Rogelio Pérez-Perdomo, *The civil law tradition: an introduction to the legal systems in Europe and Latin America*, Stanford, 2007
- Joanna Z. Mishtal, “Matters of ‘Conscience’: The Politics of Reproductive Healthcare in Poland.” *Medical Anthropology Quarterly*, v. 23 no. 2 (June 2009)
- Nuala Mole, “Asylum and the European Convention of Human Rights,” Council of Europe, 2000
- Norwegian Ministry of Justice and the Police, “Purchasing Sexual Services in Sweden and the Netherlands. Legal Regulation and Experiences,” 2004
- OSCE, Office for Democratic Institutions and Human Rights (ODIHR), *Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2008*
- OSI/Penny Saunders, “Eight Working Papers/Case Studies Examining the Intersections of Sex Work Law, Policy, Rights and Health,” OSI June 2006
- Svetlana V. Polubinskaya and Elana Vassilieva, “HIV Specific Legislation in the Russian Federation,” 18 *Med. & L.* 351 (1999)
- Susan Power, “Legal Studies and the Potential for the Reform of Irish Rape Law” 2 *Galway Student L. Rev.* 77, 83-85 (2007)
- Anika Rahman and Nahid Toubia, *Female genital mutilation: a guide to laws and policies worldwide*, 2000, p. 152.
- Noya Rimalt, “Stereotyping Women, Individualizing Harassment: The Dignity Paradigm of Sexual Harassment Law Between the Limits of Law and the Limits of Feminism.” 19 *Yale. J. L. & Feminism* 391 (2008),
- Gayle Rubin, “The Traffic in Women: Notes on the Political Economy of Sex,” in Rayna Reiter (ed.), *Toward an Anthropology of Women*, New York, 1975
- Edwige Rude-Antoine, “Forced marriages in Council of Europe member states: a comparative study of legislation and political initiatives,” Council of Europe (2005)
- STI AIDS Netherlands, “A Delicate Balance: The State of Affaire of HIV and Other STIs in the Netherlands,” 2004

- TAMPEP, "Sex Work in Europe. A mapping of the prostitution scene in 25 European countries," 2009
- TAMPEP, "Sex Work, Migration, Health: A Report on the Intersections of Legislations and Policies Regarding Sex Work, Migration, and Health in Europe," 2009
- Temkin, Jennifer, *Rape and the Legal Process*, Oxford, 2002
- Mario Vincovic, "Gender Equality and the process of harmonisation of the Croatian Labour Law." *Croatian Yearbook of European Law and Policy*, Vol. 1. No. 1. May 2005
- Linda Weil-Curiel, "Female Genital Mutilation in France: a Crime Punishable by Law," in Susan Perry and Celeste Marguerite Schenk (eds), *Eye to Eye: Women Practicing Development Across Cultures*, London, 2001
- Stephen Whittle et al, *Transgender EuroStudy: Legal Survey and Focus on The Transgender Experience of Health Care*, Transgender Europe and ILGA-Europe, 2008
- Women for Women's Human Rights (WWHR) – New Ways, "Turkish Civil and Penal Code Reforms from a Gender Perspective: the Success of Two Nationwide Campaigns," February 2005
- Zhores A. Medvedev, "Evolution of Aids Policy in the Soviet Union: Serological Screening 1986-7." *BMJ*. 1990 March 31; 300(6728): 860–861
- Petra Östergren, "Sexworkers Critique of Swedish Prostitution Policy," 2004

