

Sexual Health and Human Rights in the European Region

European Law and Case Summaries

INTRODUCTION

The following is a list of summaries of European statutes and cases relevant to the topics discussed in the report [Sexual Health and Human Rights in the European Region](#) [International Council on Human Rights Policy (ICHRP), 2012]. The [numerous](#) statutes and cases are sorted into eight categories that correspond to the individual chapters of the full report:

1. Non-Discrimination as Relevant to Sexual Health, p. 2 ([open chapter text](#));
2. Penalization of Sexual Activities, p. 20 ([open chapter text](#));
3. State Regulation of Marriage and Family and Its Relevance for Sexual Health, p. 30 ([open chapter text](#));
4. Gender Identity, Gender Expression, and Intersex, p. 40 ([open chapter text](#));
5. Violence as Relevant for Sexual Health, p. 50 ([open chapter text](#));
6. Access to Health Services in Relation to Sex and Sexuality, p. 77 ([open chapter text](#));
7. Education, Information, and Expression Related to Sex and Sexuality, p. 84 ([open chapter text](#));
8. Sex Work, p. 91 ([open chapter text](#)).

This supplement is meant as a resource for students and professionals working with the report and is freely available and distributable throughout the public domain.

1. NON-DISCRIMINATION AS RELEVANT TO SEXUAL HEALTH

Case	ECtHR ABDULAZIZ, CABALES AND BALKANDALI V. UNITED KINGDOM, Application no. 9214/80; 9473/81; 9474/81, decided on 28 May 1985
Category	1A. Non-discrimination, sex
Nature & Scope of Authority	Binding for the United Kingdom, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<ul style="list-style-type: none"> • This decision joined three applications by women permanent residents of the UK who had been denied leave to have their non-UK national husbands join them. • The UK denied the applications on the basis of immigration rules passed to protect the domestic labor market in a time of high unemployment by curtailing “primary immigration” - immigration by a person expected to seek work in the UK to support a family. • Because men were understood to be the primary breadwinners, the new rules only applied to husbands joining wives, not wives joining husbands. • The Applicants appealed the decisions to the European Commission of Human Rights. The Commission found discrimination on grounds of sex. It referred the case to the ECtHR. • The UK accepted the law discriminated but argued that: <ol style="list-style-type: none"> 1. The discrimination was objectively and reasonably justified and not disproportionate to the aims of the measures. 2. The discrimination was in accordance with the law and necessary in a democratic society in the interests of the economic well-being of the country, the prevention of disorder, and the protection of the rights and freedoms of others. 3. The UK was acting generously by allowing wives to join husbands, so it should not be held in violation.
Issue	Does the UK have an objective and reasonable justification under the Convention for treating differently non-citizen men and women in the similar situation of applying for their spouses to join them?
Holding	No, the law violates Article 8 and 14 of the ECHR.
Rule	While a State has some margin of appreciation to treat like cases differently, it must have ‘very weighty reasons’ for a difference in treatment on the ground of sex for it to not violate its equal treatment obligations.
Application & Reasoning	<p>The Court found the UK's reasons not weighty enough. Although protection of the domestic labor market and public tranquillity were legitimate aims:</p> <ul style="list-style-type: none"> • The difference in husband's impact on the labor market compared to wives, or the slight reduction in husbands arriving because of the law was not enough to justify difference in treatment. • Public tranquillity was not served by the distinction between men and women • The generosity of the UK policy is irrelevant. It cannot treat a person or group, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention
Judgment	Article 14 taken together with Article 8 (art. 14+8) has been violated by reason of discrimination against each of the applicants on the ground of sex.
Notes	

Case	ECtHR CASE OF SALGUEIRO DA SILVA MOUTA v. PORTUGAL, Application no. 33290/96, 21 December 1999
Category	1A: non-discrimination; sexual orientation
Nature & Scope of Authority	Binding for Portugal, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<ul style="list-style-type: none"> • Applicant was divorced and had an under-aged daughter, and now lived in a same-sex relationship with another man. • Custody of the daughter was granted to the mother by a Lisbon Court, which stated that custody of young children should as a general rule be awarded to the mother and that the father's homosexual life style is an abnormality. Children should not grow up in the shadow of abnormal situations. • Applicant turned to the ECtHR arguing that the court had based its decision on the ground of his sexual orientation which constituted an unlawful ground for discrimination.
Issue	Did the Court of Appeal base its decision on considerations regarding the applicant's sexual orientation and, if so, were these justifiable under the Convention?
Holding	Yes, the Court of Appeal based its decision on concerns related to the applicant's sexual orientation. It had no objective and reasonable justification for treating the father differently from the mother solely on the basis of his sexual orientation.
Rule	Refusing child custody to a person simply because of his or her homosexuality is a breach of Article 8 of the Convention (respect for private and family life). Hence sexual orientation is a ground protected against discrimination under Article 14.
Application & Reasoning	<p>The Court considered whether the father and the mother had been treated differently by the Court of Appeals on account of the father's sexual orientation and, if so, the difference in treatment could be justified. The Court stated the following.</p> <ul style="list-style-type: none"> • The judgment of the Portuguese Court of Appeal constituted an interference with the applicant's right to respect for his family life. • The Portuguese court, in reaching its decision, took into account the fact that the applicant was a homosexual and living with another man. • There had therefore been a difference in treatment between the applicant and the mother based on the applicant's sexual orientation, a notion that fell within Article 14 of the Convention • Such a difference in treatment was discriminatory under that provision if it had no objective or reasonable justification; that is if it did not pursue a legitimate aim or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. • The protection of the health and rights of the child was a clearly legitimate aim. • However, there was no reasonable relationship of proportionality between the means employed and the aim pursued. The new factor – the father's homosexuality – had been decisive in the final decision and thus amounted to a distinction dictated by factors relating to the applicant's sexual orientation that were not permissible to draw under the Convention.
Judgment	Violation of Article 8 taken in conjunction with Article 14.
Notes	The Court did not discuss whether sexual orientation constitutes a ground for discrimination as prohibited by Art 14 but simply states that this is the case.
Case	ECtHR J.M. v. THE UNITED KINGDOM

	Application no. 37060/06, decided on 28 September 2010
Category	1A: non-discrimination; sexual orientation
Nature & Scope of Authority	Binding for the United Kingdom, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<p>The Court agreed. It noted the purpose of the domestic regulation, which was to avoid that the absent parent suffer an excessive financial burden when entering into new life circumstances. The Court could see no reason to assess this potential excessive financial burden differently because a person entered into a same-sex, rather than opposite-sex relationship. The Court concluded that there had been a violation of Article 1, Protocol 1, taken together with Article 14.</p> <ul style="list-style-type: none"> • The applicant was divorced from her husband, and was required to contribute financially to the upbringing of their children, who resided with the father. • After the applicant entered into a relationship with a woman, her child maintenance remained the same as previously, whereas the amount would have been reduced if she had started a relationship with a man. • The applicant claimed that she had been discriminated against on the basis of her sexual orientation, relying on her right to property, Article 1 of Protocol No. 1, in conjunction with Article 14.
Issue	Did the Secretary of State base its decision on considerations regarding the applicant's sexual orientation and, if so, were these justifiable under the Convention?
Holding	Yes, the Secretary of State based his decision on concerns related to the applicant's sexual orientation. He had no objective and reasonable justification for treating the mother differently solely on the basis of her entering a same-sex relationship.
Rule	Refusing to adjust a person's financial contributions towards child maintenance based on a same-sex relationship is a breach of Article 1, Protocol 1 of the Convention (right to property). Hence sexual orientation is a ground protected against discrimination under Article 14.
Application & Reasoning	<p>The Court considered whether the mother had been treated differently by the Secretary of State on account of her same-sex partnership, if so, the difference in treatment could be justified. The Court stated the following.</p> <ul style="list-style-type: none"> • The Court considered that the applicant could, for the purposes of Article 14, compare her situation to that of an absent parent who had formed a new relationship with a person of the opposite sex. The only point of difference between her and such persons is her sexual orientation; in all other relevant respects they are similar. • The applicant's maintenance obligation towards her children was assessed differently by the Secretary of State on account of the nature of her new relationship. • There had therefore been a difference in treatment in the case deriving from sexual orientation, a ground that falls within the scope of Article 14. • Such a difference in treatment was discriminatory under that provision if it had no objective or reasonable justification. • Bearing in mind the purpose of the domestic regulations, which were to avoid placing an excessive financial burden on the absent parent in their new circumstances, the Court perceived no reason for treating the applicant differently.
Judgment	Violation of Article 1, Protocol 1, taken in conjunction with Article 14.
Notes	This difference in treatment had already been eliminated in the United Kingdom by the time of the Court's decision, through the reforms introduced by the Civil Partnership Act in 2004. The Court therefore called for no legislative changes.
Case	ECtHR CASE OF KARNER v AUSTRIA Application no. 40016/98, decided on 24 July 2003

Category	1A: non-discrimination; sexual orientation
Nature & Scope of Authority	Binding for Austria, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights.
Facts & Background Law	<ul style="list-style-type: none"> • The Applicant lived with his same-sex partner W for five years in a flat rented in W's name. • W passed away and designated the applicant as his heir. The landlord sought to terminate the applicant's tenancy of the flat. • Austrian law gave the right to succeed a tenancy to a life companion. • The Supreme Court found that "life companion" should be interpreted according to the intention of the drafters, which was not to include persons of the same sex. • The Government accepted different treatment on the basis of sexual orientation but argued it had an objective and reasonable justification of protecting the traditional family.
Issue	Did the Austrian Supreme Court's decision not to recognize the applicant's right to succeed to a tenancy after the death of his companion amount to discrimination on the ground of his sexual orientation in breach of Article 14 of the Convention taken in conjunction with Article 8?
Holding	Yes, the Supreme Court's decision to treat the applicant differently on the grounds of his sexual orientation and deny him the right to succeed his life companion's tenancy breached Article 14 taken in conjunction with his Article 8 right to respect for his home.
Rule	A difference in treatment is discriminatory under Article 14 if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In cases of discrimination based on sex or sexual orientation, proportionality means "necessary in order to achieve" the legitimate aim.
Application & Reasoning	<ul style="list-style-type: none"> • The Court found that the case fell within the ambit of Article 8 right to the home. • The aim of protecting "the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment" • However, the means employed was not proportional to the aim in that Austria could not show that excluding persons living in a homosexual relationship from the Rent Act was necessary to protect the family.
Judgment	Violation of Article 14 taken in conjunction with Article 8.
Notes	

Case	ECtHR LUSTIG-PREAN AND BECKETT v UNITED KINGDOM , Application nos. 31417/96 and 32377/96, decided 27 September 1999
Category	1A: non-discrimination; sexual orientation
Nature & Scope of Authority	Binding for United Kingdom, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights.
Facts & Background Law	<ul style="list-style-type: none"> • Applicants were homosexual members of the British Royal Navy • When the applicants' sexual orientation was discovered, the Ministry of Defence, in accordance with UK law, conducted lengthy investigations into their sexual histories, wrote a report and then discharged them. • The applicants were denied judicial review on the basis of extremely deferential level of review of MoD decisions, upheld on appeal. • At ECtHr, UK argued admitting homosexuals into the armed forces would have a "significant and negative effect" on morale and so on military "fighting power." • Also, it should have a wide margin of appreciation to manage its armed forces because the military is a unique institution central to national security, and this particular issue is highly sensitive in the UK and should be a national decision.
Issue	Were the investigations into the applicants' homosexuality and their discharge from the Royal Navy on the sole ground that they are homosexual violations of Article 8 of the Convention taken alone and in conjunction with Article 14?

Holding	YES, investigations by the military police into the applicants' homosexuality, the preparation of a final report for the armed forces' authorities, and the consequent administrative discharge on the sole ground of sexual orientation constituted a direct interference with the applicants' right to privacy under Article 8. No separate issue arises under Art 8 + Art 14.
Rule	To justify interference under Article 8, when it concerns a most intimate part of an individual's life, particularly serious reasons must exist. An individual's sexual orientation constitutes such an intimate part of his or her life.
Application & Reasoning	<ul style="list-style-type: none"> • “The interests of national security” and “the prevention of disorder”, were legitimate aims. • Member states have a margin of appreciation to order their own system of military discipline. They may also interfere with private lives if a real threat to operational effectiveness exists, but the threat must be substantiated. • The interferences here were particularly severe because: <ol style="list-style-type: none"> 1. investigations were exceptionally intrusive 2. discharges had “a profound effect on [the applicants] careers and prospects” 3. policy is absolute and general, there was no room for considering the applicants' conduct or service records. • The evidence that admitting homosexuals would lead to low morale and threaten fighting power was based solely on negative attitudes to homosexuals. “To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above.”
Judgment	Violation of Art 8. Question of compensation reserved so parties can agree about just satisfaction to the applicants.
Impact and Implementation	The United Kingdom lifted its ban on homosexuals in the army in 2000, replacing it with a code of conduct named <u>Armed Forces Code of Social Conduct</u> that “applies to all members of the Armed Forces regardless of their gender, sexual orientation, rank or status.”
Notes	

Case	ECJ MARUKO v. VERSORGUNGSANSTALT DER DEUTSCHEN BÜHNEN, Case C-267/06, 1 April 2008
Category	1A Non-discrimination; sexual orientation
Nature & Scope of Authority	Ruling is binding on the referring German national court and any other national court in the EU before which a problem of the same nature is raised.
Facts & Background Law	<ul style="list-style-type: none"> Referral for a preliminary ruling by a German court on the applicability of Directive 2000/78 for equal treatment in employment and occupation, to a pension scheme that reserved the right to a widower's pension to a spouse, thus denying it to a life partner. German law provides for 'life partnership' for same-sex partners Main proceedings - Mr Maruko was a registered life partner of a man who had contributed to an occupational pension scheme. After his partner's death, Mr Maruko applied for a widower's pension from the scheme. The pension scheme refused his application because it only granted widowers pensions to spouses, not to life partners.
Issue	Is a pension scheme which allows only spouses and not life partners to apply for a widow/widowers pension precluded by Directive 2000/78?
Holding	Yes. Legislation which states that, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse (where, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit), is precluded by the obligation to prohibit discrimination based on sexual orientation under the Directive.
Rule	Direct discrimination occurs where one person is treated less favorably than another person who is in a comparable situation, on any of the grounds referred to in Article 1 of the Directive, including sexual orientation.
Application & Reasoning	<ul style="list-style-type: none"> The Court found that the life partnership system in Germany had been gradually harmonised with marriage, so that life partnership, while not identical to marriage, put life partners in a comparable situation to spouses. The pension scheme, by restricting the survivor's benefit to spouses, treated surviving life partners less favorably than spouses. If surviving spouses and life partners are in a comparable situation as concerns the survivor's benefit, the pension legislation would thus be direct discrimination based on sexual orientation under Directive 2000/78. It is for the national court to decide if surviving life partners are indeed in a comparable situation to surviving spouses as concerns the survivors benefit.
Judgment	Ruling on the applicability of Directive 2000/78 to main proceeding as above.
Impact and Implementation	Ruling affects mainly those EU countries that treat civil unions or life partnerships for same-sex couples similar to marriage.
Notes	The ECJ stopped short of making a blanket ruling across the EU and left the final decision about comparability of life partnerships with marriages to national courts.

Case	ECJ P. v. S. AND CORNWALL COUNTY COUNCIL, Case C-13/94, decided on 30 April 1996
Category	1A Non-discrimination; gender identity
Nature & Scope of Authority	Ruling is binding on the referring UK court and any other national court before which a problem of the same nature is raised.
Facts & Background Law	<ul style="list-style-type: none"> • Referral from UK court for an interpretation of 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, to the dismissal of a transsexual on grounds of gender reassignment. • Main proceedings – P was dismissed from a post as manager at an institution managed by the County Council after she informed her employers that she planned to undergo gender reassignment surgery. • P challenged the dismissal and the Industrial Tribunal sought a ruling on the applicability of the Directive.
Issue	Does gender reassignment come within the scope of the prohibition of discrimination based on sex?
Holding	Yes, discrimination because of gender reassignment is discrimination based on sex.
Rule	Discrimination in employment based on gender reassignment is a violation of the principle of equal treatment of men and women.
Application & Reasoning	<ul style="list-style-type: none"> • The Directive is the expression of the principle of equality, which is one of the fundamental principles of Community law. • In view of its purpose and the nature of the rights which it seeks to safeguard, the Directive must include the reassignment of gender, not only whether a person is one or the other sex. • Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavorably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment • Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Thus, it is a violation of the Directive.
Judgment	The Court rules that Article 5(1) of the Directive precludes dismissal of a transsexual for a reason related to a gender reassignment.
Impact and Implementation	In response to the ruling, in 1999 the British parliament enacted the Sexual Discrimination (Gender Re-assignment) Regulations Act. At the EU level, unfavorable treatment linked to gender reassignment effectively became a new ground for discrimination, as a subcategory of discrimination on the basis of sex.
Notes	This applies only to gender reassignment (although it is unclear whether surgical or non-surgical) and not gender identity in general. The use of the term transsexual implies only persons who have undergone or are in the process of undergoing gender reassignment surgery.

Case	ECJ K.B. v. NATIONAL HEALTH SERVICE PENSIONS AGENCY AND SECRETARY OF STATE FOR HEALTH, Case C-117/01, decided on 7 January 2004
Category	1A. Non-discrimination; gender identity
Nature & Scope of Authority	Ruling is binding on the referring UK court and any other national court before which a problem of the same nature is raised.
Facts & Background Law	<ul style="list-style-type: none"> • KB (a woman) was in a long-term relationship with R, who had undergone female-to-male gender reassignment surgery, but who had not been able to change the sex on his birth certificate. Thus KB and R could not marry under UK law. • KB paid money into an occupational pension scheme that restricted survivor's benefits to be paid to a widow/widower, which under UK law is a person married to the pensioner. Thus should KB die, R would not receive the benefit. • KB claimed that this was discrimination on the grounds of sex contrary to the principles of equal pay for equal work (Article 141 EC, Directive 75/117). • UK argued that both male and female workers with partners to whom they are not married are unable to benefit from the survivor's benefits, whatever their reason for not marrying. So the discrimination is not based on sex/gender reassignment but rather marriage.
Issue	Does the restriction on KB's capacity to marry her transsexual partner and so allow her partner to benefit from a survivor's pension violate the right to equal treatment in pay?
Holding	YES. The principle of equal pay precludes legislation which prevents a couple from fulfilling the marriage requirement which must be met for one of them to be able to benefit from the pay of the other.
Rule	Pension schemes cannot discriminate between life-partners and married couples in the same situation, where partners are prevented from marrying.
Application & Reasoning	<ul style="list-style-type: none"> • Survivor's pension schemes have been held to be "pay" under Article 141 EC • National governments have the discretion to decide whether to restrict the survivor's pension to spouses. This is not sex discriminatory because it is irrelevant whether the survivor is a man or a woman. • But there is inequality in treatment for a necessary precondition to enjoyment of the benefit – the right to marry.
Judgment	On the basis of the above ruling, it is for the national court to determine whether a person in K.B.'s situation can rely on Article 141 EC to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension
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Case	UNITED KINGDOM SHEFFIELD v. AIR FOYLE CHARTER AIRLINES LTD [1998] ET/1200389/97 Bedford Employment Tribunal.
Category	1A Non-Discrimination; gender identity
Nature & Scope of Authority	Employment Tribunals are independent judicial bodies that determine disputes between employers and employees over employment rights. Tribunal decisions are binding on the parties and set precedent for future claims in an employment tribunal in the UK.
Facts & Background Law	<ul style="list-style-type: none"> • The applicant was a pilot with over 25 years flying experience who had undergone male-to-female gender reassignment. • She applied for a pilot position with Air Foyle Ltd. and was invited to attend a seminar about the role. After attending, she was not called for an interview. No reasons were given for this decision, despite her requests. • She asserted that the sole reason she was not called for an interview was that she was a transsexual and this fact was known to the company. • The employer argued in defense that the applicant was not interviewed because of her character and personality. A member of the recruitment team claimed prior knowledge of the applicant that she was unable to work in a team; was hazardous to safety; flaunted her femininity; and pilots were unwilling to fly with her. • The Sex Discrimination Act 1975 did not prohibit discrimination on the basis of gender reassignment, but did prohibit sex discrimination.

Issue	Did the respondent discriminate against the applicant in the arrangements that it made for determining who should be offered employment on the grounds of her sex?
Holding	YES. The absence of detrimental evidence about the applicant's flying record, experience, or character demonstrate that her transsexuality was the sole reason that she was not interviewed, which amounted to sex discrimination under the Sex Discrimination Act 1975.
Rule	The process of recruitment and selection of an employee should be unaffected by a person's transsexuality. Taking the person's transsexuality into account amounts to sex discrimination under the 1975 Sex Discrimination Act.
Application & Reasoning	<ul style="list-style-type: none"> • It was common ground that the applicant had the experience and qualifications necessary for the position and all evidence suggested she had an unblemished flying record. • Nothing in the applicant's record was detrimental to her. • The Tribunal did not accept the evidence of the applicant's alleged personality flaws. The pilot who raised these issues failed to discuss them with her at the time they worked together, and he passed her as fit to fly as pilot in command. • The sole reason for not interviewing the applicant was then her transsexuality. This amounted to treating someone less favorably on the grounds of their sex.
Judgment	Unanimous decision that the respondent discriminated against the applicant contrary to the provisions of the Sex Discrimination 1975. Question of remedy adjourned.
Notes	

Case	UNITED KINGDOM STRATHCLYDE REGIONAL COUNCIL v. PORCELLI [1986] IRLR 134 Scottish Court of Session
Category	1B Sexual Harassment
Nature & Scope of Authority	The Scottish Court of Session is the supreme civil court in Scotland and has the authority to interpret Scottish civil law and apply UK law. Its decisions are binding on Scottish courts and tribunals, and have weight in other UK courts.
Facts & Background Law	<ul style="list-style-type: none"> • Male co-workers of the applicant at Strathclyde Regional Council disliked the applicant and sought to force her to leave with a campaign of "unpleasant behavior" including elements of sexual harassment. • The respondent sued the Council for sexual discrimination. • The law at this time prohibited discrimination on the grounds of sex (the Sex Discrimination Act 1976), but did not have a self-standing sexual harassment provision. • Employers are under a duty of care for their employees, so the law deems them to be vicariously liable for the actions of their workers. • The Council argued that the behavior was not sex discrimination although the workers used certain sexually charged terms - it was general abuse because they disliked her. A man would not have been treated differently if he was disliked.
Issue	Can behavior be discrimination on the ground of sex under the Sex Discrimination Act 1975 if it did not have a "sex related motive or objective"?
Holding	YES. Even though the abuse was motivated by not liking the applicant rather than being sexist, it was still different treatment on the ground of sex and thus discrimination.
Rule	"If the form of the unfavourable treatment or any material part of it which is meted out included a significant element of a sexual character to which a man would not be vulnerable, the treatment is on grounds of the woman's sex."
Application & Reasoning	<ul style="list-style-type: none"> • The Act is concerned with 'treatment' and not with the motive or objective of the person responsible for it. • The nature of the treatment and 'the weapon' used in this case included sexual harassment. This was used because the applicant was a woman. • Given that sexual harassment is a particularly degrading form of treatment based on sex, the Parliament must have intended it to be included under the Act.

	<ul style="list-style-type: none">• Crucially, an equally disliked man would not have been treated in the same way. It is irrelevant that an equally disliked man might have been treated more cruelly.
Judgment	Appeal of the Council dismissed.
Notes	

Statute	EU 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, of 5 July 2006 ([2006] OJ L 204/23) [the “Recast Directive”]
Nature, Scope & Source of Authority	Directives must be implemented in all member states of the European Union within a certain time period; if not satisfactorily implemented, they can in certain circumstances be applied directly under the doctrine of direct effect. The EC has the authority to enact directives pursuant to Article 288 of the Treaty of the Functioning of the European Union. The relevant Directive applies to all members of the working population in the EU member states, and to occupational social security and pension schemes.
History	Adopted to group all previous directives relating to sex discrimination at work, as well as some decisions of the European Court of Justice. As of 15 August 2009, Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC were repealed, and their provisions incorporated in the new over-arching Directive.
Substance	<ul style="list-style-type: none"> • Concretizes the principle of equality between men and women contained in the Treaty establishing the European Community. • Preamble notes that the principle of equal treatment of men and women includes discrimination arising from the gender reassignment of a person. • Seeks to eliminate, and requires member states to prohibit, direct and indirect discrimination on the basis of sex in matters of employment and occupation, in relation to: <ol style="list-style-type: none"> 1. Access to employment including promotion and vocational training 2. Working conditions, including pay 3. Occupational social security schemes. • Confirms that harassment and sexual harassment constitute discrimination on grounds of sex. Article 2 defines: <ol style="list-style-type: none"> 1. Harassment as: “where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment” 2. Sexual harassment as: “where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment” (Article 2) • Confirms that unfavorable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex.
Notes	

Statute	EU Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.
Nature, Scope & Source of Authority	Directives must be implemented in all member states of the European Union within a certain time period; if not satisfactorily implemented, they can in certain circumstances be applied directly under the doctrine of direct effect. The EC has the authority to enact directives pursuant to Article 288 of the Treaty of the Functioning of the European Union. Applies to all people in the EU member states with regards to both private and public sectors including public bodies.
History	Complements earlier Council Directives 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 and 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
Substance	<ul style="list-style-type: none"> • Extends the implementation of the principle of equal treatment to the grounds of religion or belief, disability, age, and sexual orientation as regards employment and occupation. • Covers both direct and indirect discrimination with regard to: <ol style="list-style-type: none"> 1. conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; 2. access to all types and to all levels of vocational guidance, vocational training, retraining, practical work experience; 3. employment and working conditions, including dismissals and pay 4. membership of, and involvement in, an organisation of workers or employers, or professional organizations, including the benefits provided for by such organisations. • Requires that discrimination on the basis of sexual orientation and other grounds mentioned is prohibited throughout the EC. • An exception is allowed for the very limited circumstances where a difference of treatment may be justified where a characteristic related to sexual orientation or other ground mentioned constitutes a genuine and determining occupational requirement. For such an exception, the objective must be legitimate and the requirement proportionate. • Harassment is deemed a form of discrimination • The burden of proof shifts to the respondent once facts suggest that discrimination has occurred except in criminal proceedings. • The Directive does not prohibit positive action for disadvantages linked to the protected grounds.

Statute	Belgium Act of 10 May 2007 aimed at combating certain forms of discrimination
Category	1A Non-Discrimination
Nature, Scope & Source of Authority	Belgium, federal law, thus does not cover discrimination in matters under regional or local legal authority.
History	Introduced as part of implementing Directive 2000/78/EC
Substance	<ul style="list-style-type: none"> • Addresses discrimination in a holistic manner, covers a wide array of protected grounds, and introduces various provisions to make redress for discrimination available in practice. • Protected categories are sexual orientation, age, marital status, birth, language, fortune, religion or belief, political conviction, current and future state of health, disability, physical or genetic characteristics, and social origin (Art. 4(4)). “Current and future state of health” provides protection against discrimination based on HIV/AIDS-status. • Broader than the Directive – in addition to employment-related fields the law also covers provision of goods and services, social security and benefits, membership in labor organizations, official documents or records, and participation in a wide range of public activities (Art. 5). • Introduces special measures to make discrimination enforceable: <ol style="list-style-type: none"> 1. making discriminatory agreements invalid (Art 15), 2. shifting burden of proof to the alleged discriminator (Art 28), 3. giving citizens standing to bring action under the Act (Art 30) 4. making criminal sanctions available. 5. offering lump sum pay-outs to the victim to avoid disputes over quantum of damages (Art 18).

	<p>6. empowering the government equality body to bring claims under all disputes that arise under the Act (Art 29).</p> <ul style="list-style-type: none"> • Criminalizes three forms of behavior: <ol style="list-style-type: none"> 1. incitement to hatred, discrimination or violence (Art 22), 2. discriminatory conduct by civil and public servants (Art 23), 3. aggravating circumstances for certain hate crimes (Art 33). • Allows for direct or indirect 'distinctions,' when these are regulated by other legislation.
Notes	<p>NOTE: NO ENGLISH TRANSLATION OF THE LAW; information gathered from Paul Lemmens et al, "Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Belgium," European Union Agency for Fundamental Rights/FRA (2008)</p>

Statute	Serbia Law on the Prohibition of Discrimination, Serbia
Category	1A Non-Discrimination
Nature, Scope & Source of Authority	National law of Serbia, entered into force April 2009
History	
Substance	<ul style="list-style-type: none"> • Bans discrimination on the basis of gender, gender identity, sexual orientation, health, and marital and family status, and others (Art 2(1)). • ‘Discrimination on the grounds of gender’ establishes the fundamental principle of equality of genders in public, private, professional and family life, and lays out the prohibition of discrimination based on gender as well as gender change (Art 20) • Forbids physical violence, exploitation, express hatred, disparagement, blackmail and harassment pertaining to gender, as well as to publicly advocate, support and practise conduct in keeping with prejudices, customs and other social models of behaviour based on the idea of gender inferiority or superiority; that is, the stereotyped roles of the genders. (Art 20) • Discrimination on the ground of sexual orientation includes both the right to keep one’s sexual orientation private, and to openly declare it: “Sexual orientation shall be a private matter, and no one may be called to publicly declare his/her sexual orientation. Everyone shall have the right to declare his/her sexual orientation, and discriminatory treatment on account of such a declaration shall be forbidden.” (Art 21) • Prescribes the establishment of an anti-discrimination body, Commissioner for the Protection of Equality (Arts 28-34), who will, <i>inter alia</i>, receive complaints, file charges, and generally monitor compliance with the law.
Notes	Unofficial translation to English by Labris Serbia

Statute	UNITED KINGDOM Employment Equality (Sex Discrimination) Regulations 2005
Category	1B Sexual Harassment
Nature, Scope & Source of Authority	Made by the Secretary of State of the United Kingdom. Entry into force on 1 October 2005 across the United Kingdom, except Northern Ireland,
History	Implements Directive 2002/73/EC relating to sexual harassment, amending the Sex Discrimination Act (1975)
Substance	<ul style="list-style-type: none"> • Section 4A(1) - A person subjects a woman to harassment, including sexual harassment, if: <ul style="list-style-type: none"> (a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect – <ul style="list-style-type: none"> (i) of violating her dignity, or (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, (b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect – <ul style="list-style-type: none"> (i) of violating her dignity, or (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or (c) on the ground of her rejection of or submission to unwanted conduct of a kind mentioned in paragraph (a) or (b), he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct. • The definition applies equally to: <ol style="list-style-type: none"> 1. Harassment based on a person's gender identity, however only in cases where the person intends to undergo, is undergoing, or has undergone gender reassignment (Section 4A(3)) 2. Harassment of men (Section 4A(5) and (6)) • The employer is liable for both direct harassment and for harassment occurring among co-workers, under the employer's obligation to take reasonable steps to prevent harassment at the workplace (Section 41).
Notes	Further amendments to the Sex Discrimination Act (1975), <u>SDA Amendment Regulations SI 2008/656</u> , were introduced in 2008 and entered into force 6 April 2008 to bring UK regulations more into line with EU Directives.

Statute	Croatia Gender Equality Law 116/2003
Category	1B Sexual Harassment
Nature, Scope & Source of Authority	Croatian national law
History	Passed by the Croatian Parliament on 14 July 2003 and came into effect on 30 July 2003
Substance	<ul style="list-style-type: none"> • Determines the general basis for the protection and promotion of gender equality and protection against gender discrimination, and defines and regulates the protection against discrimination based on gender and the creation of equal opportunities for women and men. • Defines gender discrimination: “any normative or real, direct or indirect differential treatment, exclusion or limitation based on one's gender which renders more difficult or denies equal recognition, enjoyment or exercise of human rights of men and women in political, educational, economic, social, cultural, civil and any other sphere of life.” • Harassment and sexual harassment are covered by this law and considered a form of gender discrimination, linking the unwanted conduct to a violation of the personal dignity, creating an “unpleasant, unfriendly, humiliating or insulting atmosphere” (Art 8). • Makes marital or family status and sexual orientation prohibited grounds for discrimination (Art 6(2)), with the consequence that sexual harassment based on these grounds is covered under the harassment provisions.
Notes	Croatia is presently an EU candidate country Official translation

Statute	Ukraine On Prevention of the Disease AIDS and Social Protection of Population
Category	1C Mandatory HIV Testing
Nature, Scope & Source of Authority	Ukraine national law, dated December 12, 1991.
History	
Substance	<p>[excerpts]</p> <p>Citizens of Ukraine have the following rights:</p> <p>The State guarantees the availability, quality, efficiency of HIV testing, including anonymous [testing], with preliminary and subsequent advice, as well as the provision of security for the subject of the medical examination and the staff. (Art 4)</p> <p>Medical examination of Ukrainian citizens, foreigners and stateless persons who permanently reside in the territory of Ukraine, or who are granted refugee status, is free. The medical examination is voluntary. (Art 7)</p> <p>[...] Information on the results of a medical examination, [including] the presence or absence of HIV infection in a person [...] is confidential and covered by medical confidentiality. The transfer of such information is permitted only to the tested person, and in cases stipulated by the law of Ukraine, as the legitimate representatives of [the person tested], health care, prosecutors, investigation and inquiry, and the courts. (Art 8)</p>
Notes	Translation by Ukrainian lawyer and researcher Oksana Shevchenko

Statute	EU 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
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	as persons who otherwise need international protection and the content of the protection granted, (2004) OJ L304/12 (“Qualifications Directive”)
Category	1D Asylum
Nature, Scope & Source of Authority	The Directive contains minimum standards. States may introduce or maintain more favorable provisions than those set out in the Directive.
History	The Directive is in force since 2004, and should have been implemented by all Member States by 10 October 2006.
Substance	<ul style="list-style-type: none"> • Establishes that a particular social group might include a group based on a common characteristic of sexual orientation, and that sexual violence as well as acts of gender-specific or child-specific nature can qualify as acts of persecution. • Establishes common criteria for identifying persons in need of international protection under European asylum law, and minimum standards for benefits that should be available to such persons. • Defines “refugee” in conformity with the Refugee Convention: a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it [...]. (Art 2 (c)) • Establishes that asylum assessment is to be carried out on an individual basis (Art 4.3). Past persecution, harm or direct threats of harm is a serious indication of a well-founded fear of persecution (Art 4.4). • International protection needs can arise <i>sur place</i>; the application can be based on events that have taken place since the applicant left his or her country or origin, or based on activities in which the applicant has engaged after leaving his or her home country (Art 5). • Agents of persecution may be the State, parties or organizations controlling the State or a substantial part of its territory, or non-State actors if the State, or organizations controlling the State, are unable or unwilling to provide protection (Art 6). • Qualifies acts of persecution as treatment “sufficiently serious by [its] nature or repetition as to constitute a severe violation of basic human rights” (Art 9.1). Examples of acts of persecution provided by the Directive, are “acts of physical or mental violence, including acts of sexual violence” (Art 9.2 (a)), legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner (Art 9.2 (b)), prosecution or punishment, which is disproportionate or discriminatory (Art 9.2(c)); or acts of a gender-specific or child-specific nature (Art 9.2 (f)). • Reasons for persecution (Art 10), establishing that a group shall be considered a “particular certain group” when: <ul style="list-style-type: none"> - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. (Art 10.1(f)) • a particular social group might include a group based on a common characteristic of sexual orientation • in the assessment of whether there is a well-founded fear of persecution, it is irrelevant whether the applicant actually possesses the characteristics that attract the persecution (Art 10.2) • a person qualifies for subsidiary protection in situations of risk for “serious harm” (death penalty or execution, torture or degrading or inhuman treatment or punishment, or serious threat to a civilian’s life or person by reason of

	<p>indiscriminate violence in situations of armed conflict) upon return to his or her country of origin (Art 15).</p> <ul style="list-style-type: none"> • minimum standard of benefits for a person who has been declared a refugee and granted asylum includes protection from <i>refoulement</i> (Art 21), access to relevant information (Art 22), maintaining family unity (Art 23), residence permit and travel documents (Arts 24 and 25), access to employment (Art 26), access to education (Art 27), access to welfare (Art 28), access to health care (Art 29), access to accommodation (Art 31), freedom of movement within the Member State (Art 32), and access to integration facilities (Art 33).
Notes	

2. PENALIZATION OF SEXUAL ACTIVITIES

Case	ECtHR DUDGEON V. THE UNITED KINGDOM, Application no. 7525/76, decided on 22 October 1981
Category	2A Penalization of Same-Sex Conduct
Nature & Scope of Authority	Binding for the United Kingdom, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<ul style="list-style-type: none"> • Applicant was a homosexual man living in Northern Ireland. • According to Northern Irish criminal law, ‘buggery’ (anal intercourse) and ‘gross indecency’ between males (mutual masturbation, oral-genital contact) were punishable with imprisonment, regardless of whether the acts were in public or private, the age or relationship of the participants, or the consent of participants. • The police investigated the applicant for his same-sex activities. • The applicant claimed he had experienced fear, suffering and psychological distress directly caused by the laws in question. • The UK argued the law was necessary for “protection of morals” and “protection of the rights and freedoms of others”, and that in Northern Ireland public morality condemned homosexuality.
Issue	Is a law criminalizing male sexual behavior necessary for the protection of morals and the rights and freedoms of others in Northern Ireland?
Holding	NO. The legislation was a continuing interference with the applicant’s right to respect for his private life within the meaning of Article 8 (1), which was not proportionate to the aims of protecting morals and the rights of others.
Rule	While the state can regulate sexuality, it must have particularly serious reasons for interfering in this most intimate part of a person's life. The moral attitudes of a society and fear of a decline in morals are not sufficient justification.
Application & Reasoning	<ul style="list-style-type: none"> • The Court accepted a legitimate aim of protecting vulnerable sections of society, such as the young, from homosexual activity, and that some regulation of all sexual activity may be justifiable, including some acts done in private. • It also accepted that the state has a margin of appreciation to pass laws to protect public morals, but where the law affects a most intimate part of a person's life, this margin is narrow. • The UK could not show a risk of harm to vulnerable sections of society, or negative effect on the public, sufficient to prove the law was necessary to meet a "pressing social need." • Furthermore, moral attitudes towards male homosexuality in Northern Ireland could not warrant interfering with the applicant’s private life to such an extent. • In conclusion, the restriction imposed on the applicant, by reason of its breadth and absolute character, was disproportionate to the aims sought to be achieved.
Judgment	The applicant’s rights under Art 8 had been violated.
Notes	<p>This case was significant as:</p> <ol style="list-style-type: none"> 1. it was the first successful case before the ECHR finding criminalization of homosexuality contrary to Article 8; 2. in 1982, the law on male homosexuality in Northern Ireland was changed to mirror the law in Scotland, England and Wales (decriminalizing same-sex activities in private)

Case	ECtHR A.D.T. V. U.K., Application no. 35765/97, decided 31 July 2000
Category	2A Penalization of Group Sex between Males
Nature & Scope of Authority	Binding for the United Kingdom, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<ul style="list-style-type: none"> • The applicant was a homosexual man whose home was searched by the police. • The search resulted in the seizure of photographs and footage of the applicant and four other men engaging in oral sex and mutual masturbation in his home.

	<ul style="list-style-type: none"> • He was convicted of 'gross indecency' under the Sexual Offences Act 1967, understood to mean mutual masturbation, intercrural contact, or oral-genital contact between men, when not committed in private. "Not in private" was defined by the SOA as where "more than two persons take part or are present". • No allegations of coercion, physical harm or sado-masochism were made, nor that the tapes were intended to be made public. • The applicant complained that his right to respect for his private life under Article 8 had been violated both by the existence of the law and the prosecution against him. • The UK argued that the sexual activity fell outside of the scope of "private life" because of the number of people involved and the videotape. • Further it argued that group sex, even in private, should be prohibited because the risk of it becoming public was "inevitable".
Issue	Was the existence of the law prohibiting private group sex and its use to prosecute the applicant justified to protect public morals or the rights and freedoms of others?
Holding	NO. There was no evidence that a law prohibiting sexual activity between more than two people in private was necessary to protect public health or morals.
Rule	Private sexual acts between consenting adults are protected by the right to a private life. Whether an act is private must be determined on the facts, but the mere involvement of more than two people is not enough to disprove privacy.
Application & Reasoning	<ul style="list-style-type: none"> • The Court found that the existence of the law, prohibiting sexual acts in private, did interfere with the applicant's right to a private life. • This interference could be justified if it could be shown to be necessary to protect public morality or health. Whether the act was in public or private was a relevant consideration. • In this case, despite the presence of more than two people, the acts were committed "in private" because: <ol style="list-style-type: none"> 1. the participants were a small and limited group of friends. 2. the circumstances were such that no one was likely to know about it. Although the videotape existed, it was not distributed and was unlikely to be distributed given the applicant's wish for anonymity. 3. the applicant was in any case prosecuted for the acts themselves, not the video or risk it would enter the public domain. • Since the acts had been found to be private, the Court adopted the same narrow margin of appreciation afforded state authorities as in other cases involving intimate aspects of private life (e.g. Dudgeon, above). • It found no evidence that the law prohibiting group sex was justifiable.
Judgment	Violation of Article 8 and the UK to pay the applicant damages, costs and expenses.
Notes	

Case	ECtHR ENHORN V. SWEDEN, Application no. 56529/00, decided on 25 January 2005
Category	2B: Criminalization of HIV transmission
Nature & Scope of Authority	Binding for Sweden, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<ul style="list-style-type: none"> • Swedish law gave County medical officers (CMOs) power to take "necessary measures" to prevent spread of infectious disease and placed a duty on infected persons to comply with medical officer's instructions. • The applicant was a HIV-positive man who was given a list of instructions by a CMO, including regular medical visits. • After the applicant failed to keep his appointments, the CMO petitioned the Court for an order that the applicant be kept in compulsory isolation in hospital to prevent the spread of the disease.

	<ul style="list-style-type: none"> • The Court ordered he be confined to a hospital for three months which was then extended several times for seven years. • The applicant complains that the involuntary confinement violated his right to liberty and security of the person (Article 5) and was disproportionate to the risk. • Sweden argued the confinement was only to “encourage the carrier of the dangerous infection to change his or her attitude and lifestyle” and that he had a personality disorder, had earlier shown a preference for boys, misused alcohol, and absconded a number of times from the hospital, so detention was necessary.
Issue	Was the confinement of the applicant a proportional response to the risk he posed?
Holding	NO. The compulsory isolation of the applicant was not a last resort to prevent him from spreading the HIV virus because less severe measures had not been considered and thus had not been found to be insufficient to safeguard the public interest. Further, the long period of isolation ordered did not balance his right to liberty with protection of the public.
Rule	Governments can confine a person only to prevent spread of infectious disease if a real risk of such spread exists and no less restrictive measures are available.
Application & Reasoning	<ul style="list-style-type: none"> • The Court found the confinement was a deprivation of liberty and could be examined under Art 5(1)(e) to prevent spread of infectious disease. • The Court accepted that the confinement had a basis under Swedish law and that the spread of HIV did pose a danger to public health and safety. • But, to be lawful under the Convention, detention must also be necessary and proportional. It asked “whether detention of the person infected is the last resort to prevent the spread of disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest.” • Sweden could not show it had considered and rejected any lesser measures to protect public safety. • Further, while the applicant had not complied with some instructions, he had complied with all others, and had even refrained from all sexual contact. <p>Extending the detention for seven years and keeping him in confinement for 18 months did not strike a fair balance between preventing the spread of disease and the applicant's personal liberty.</p>
Judgment	Violation of Article 5(1) and an obligation for Sweden to pay the applicant non-pecuniary damages, costs and expenses.
Notes	

Case	United Kingdom EWCA R v. MOHAMED DICA [2004] EWCA Crim 1103, decided on 5 May 2004
Category	2B: Criminalization of HIV Transmission
Nature & Scope of Authority	England and Wales Court of Appeals decisions are binding for England and Wales and have weight in Scotland and Northern Ireland.
Facts & Background Law	<ul style="list-style-type: none"> • The appellant was an HIV-positive man who knew of his infection. • He had unprotected consensual sex with two different women who both then contracted HIV. They claimed they would not have had sexual intercourse with him if they had known of his illness. He claimed they knew of his illness and consented to have unprotected intercourse anyway. • The defendant was charged with inflicting grievous bodily harm by being reckless as to whether the two women would be infected. • At the trial, the judge withdrew the issue of consent from the jury, holding that the complainants consent, if any, was irrelevant because the complainants did not have the legal capacity to consent to such “serious harm”.
Issue	Can consent be a defense to a charge of grievous bodily harm by recklessly transmitting an infectious disease?
Holding	YES. If the defendant can show that the complainant knew of his infection and consented to be exposed to the risk of contracting the disease, this would be a defense to the charge.
Rule	The state cannot hold a person criminally liable for transmitting a sexually transmitted disease if the partner gave informed consent to be exposed to the risk.
Application & Reasoning	<ul style="list-style-type: none"> • The Court found that ‘consent’ in this case was not simply consent to intercourse, but rather consent to be exposed to the risk of HIV infection. Thus: • If the defendant deliberately concealed his infection from the complainants: <ol style="list-style-type: none"> 1. This was effectively fraud. Consent to sexual intercourse obtained by fraud could not be considered real consent. • If the complainants had known of the defendants HIV status, the Court noted: <ol style="list-style-type: none"> 1. A consensual act of sexual intercourse is not unlawful merely because there are known health risks, as intercourse carries many risks. Society usually does not criminalize willingly accepting risks. 2. The problems with such criminalization are enforcement and its “haphazard impact” including state interference in a private act and possible negative effects on public health. • Therefore, the question of whether the defendant was reckless and whether the complainant consented to the risk of infectious disease is one of fact to be decided by the jury.
Judgment	Retrial ordered and issue of consent to be put to the jury.
Notes	

Case	UNITED KINGDOM EWCA R. v. KONZANI [2005]EWCA706, decided on 17 March, 2005.
Category	2B: Criminalization of HIV Transmission
Nature & Scope of	England and Wales Court of Appeals, binding for England and Wales and authority in

Authority	Northern Ireland and Scotland.
Facts & Background Law	<ul style="list-style-type: none"> The appellant was an HIV-positive man who was aware of his infection. He had repeated unprotected sexual intercourse with three women without informing them of his HIV-status. All contracted HIV. The appellant was sentenced to ten years imprisonment for recklessly inflicting grievous bodily harm on them in accordance with Section 20 of the Offences Against the Person Act 1861. The appellant argued on appeal that by consenting to having unprotected sex with him, the complainants were impliedly consenting to all of the risks associated with sexual intercourse, including HIV infection.
Issue	Does informed consent require knowledge that the defendant is HIV positive?
Holding	YES. A defense of informed consent is only available if the defendant had a genuine belief that the complainant was aware that he carried an infectious disease and she consented to being exposed to that disease.
Rule	A person may be criminally liable for transmitting HIV if he or she has unprotected sex with another person and does not inform them that s/he is carrying the disease. A person does not consent to exposure merely by being generally aware of the risk of HIV or other risks associated with sexual intercourse.
Application & Reasoning	<ul style="list-style-type: none"> The Court affirmed that informed consent to expose oneself to the risk of infection may be a defense to criminal liability for HIV transmission (R v Dica) It noted that this balances the interests of protecting public health and protecting personal autonomy in adult non-violent sexual relationships. Silence or deliberately concealing the infection does not enhance personal autonomy. The defendant must be able to prove that he or she genuinely believed that the complainant was giving his or her informed consent to exposure to the risk. This is a question of fact in all circumstances of the case. Silence from the defendant about his disease will usually be evidence of lack of informed consent, unless other surrounding circumstances suggest that the defendant could have genuinely believed that the complainant was aware. In this case, the Court found no evidence, direct or indirect, that the appellant honestly believed that any of the complainants had consented to the specific risk of contracting the virus.
Judgment	Appeal dismissed
Notes	

Case	Netherlands Supreme Court of the Netherlands RULING AR 1860 2659/03 IV/SB, 18 January 2005
Category	2B: HIV Transmission
Nature & Scope of Authority	Ruling is binding on all courts in the Netherlands.
History	Several prosecutions of cases of HIV exposure occurred in the Netherlands between 2001 and 2005.
Facts & Background Laws	<ul style="list-style-type: none"> An HIV-positive man had had unprotected oral and anal (in which the victim penetrated the appellant) sex with a 16 year-old on one occasion. He was sentenced

	<p>to a term of imprisonment and appealed.</p> <ul style="list-style-type: none"> Upholding the decision on appeal, the Appeals Court had asked whether the acts had created a “substantial possibility of grievous bodily harm being inflicted on the victim” and answered in the affirmative. It based its decision on the fact that the appellant knew he was HIV-positive and knew of a risk of transmission, and did not inform the complainant.
Issue	Was an HIV positive man engaging in unprotected sex automatically acting with conditional intent (similar to recklessness) sufficient to prosecute for grievous bodily harm?
Holding	NO. The Court must consider the actual risk of transmission present in the case to determine whether the appellant acted indirectly or recklessly to hurt another person.
Rule	A mere unprotected sexual act with a risk of transmission is not enough to show on its own that the HIV-positive person acted recklessly, sufficient to prove grievous bodily harm. <u>The actual risk of transmission must be shown to be substantial.</u>
Application & Reasoning	<ul style="list-style-type: none"> Intent will be proved if the accused knowingly or willingly aimed at inflicting grievous bodily harm on the victim, and conditional intent if he knowingly or willingly exposed himself to a substantial possibility that harm would occur. Whether a substantial possibility existed must be determined on the facts of the case, including the nature of the act and surrounding circumstances. Although the accused knew he was infected and risked infecting others through the acts proved, it has not been shown the risk was substantial. The Court cited medical expert evidence that the chance of HIV transmission in this case was one in 500 (anal sex in which the victim penetrated the accused). It noted that this risk alone was not sufficient to find that the accused had acted with conditional intent, although other “unusual circumstances involving increased risk” might make the conclusion different. In this case no such exceptional circumstances presented themselves. The Court emphasized that legislators, and not courts, should decide whether HIV-positive people who engage in unprotected sex should be punished, without regard to actual risk in the individual case.
Judgment	Decision of the Appeals Court set aside and case remitted back to be re-adjudicated and resolved
Notes	<p>This decision effectively ruled out the possibility of suing for grievous bodily harm in the Netherlands in cases of potential HIV transmission. The Dutch legislature has chosen not to enact legislation that would punish unprotected sex by HIV-positive people without regard to actual risk.</p> <p>Excerpts available in unofficial but reliable translation.</p>

Case	EComHR SUTHERLAND v. U.K. Application No. 25186/94, decided on 1 July 1997
Category	2C: Age of Consent
Nature & Scope of Authority	Binding for the United Kingdom, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<ul style="list-style-type: none"> Under the UK Sexual Offences Act, a man could consent to heterosexual intercourse at age 16 and homosexual intercourse at age 18. Several hundred men aged between 16 and 18 were charged with 'gross indecency' for having same-sex relations at the time the case was brought by the applicant. The applicant was a young homosexual male aged 16. He complained that the fact that he could be prosecuted for engaging in homosexual activity (but not for engaging in heterosexual activity) violated his right to private life under Article 8 of the Convention, and was discriminatory under Article 14.

	<ul style="list-style-type: none"> • The UK argued that he had not been charged and the police had never shown an interest in him, so his privacy had not been interfered with. • Further, the ECtHR had held that governments could regulate homosexual conduct (Dudgeon) and Commission precedent had upheld high ages of consent for homosexual acts. Discrimination was justified to protect “young men from conduct by which they will set themselves apart from the rest of society and which they may well regret when they reach greater maturity.”
Issue	Has there been a violation of Article 8 alone or taken in conjunction with Article 14 of the Convention by reason of the prohibition of consensual homosexual acts between males over the age of 16 but under the age of 18 years?
Holding	YES. The difference in the ages of consent was discriminatory and no valid reasons justified the discrimination.
Rule	
Application & Reasoning	<ul style="list-style-type: none"> • Regarding the applicant's right to privacy, the very existence of the legislation directly affected the applicant's private life because he was forced to either not engage in prohibited sexual acts before he turned 18, or risk prosecution. • Regarding discrimination, states can regulate homosexual conduct for purposes of “protecting morals” or “protecting the freedom of others” but given the intimacy of the issue, it must have serious reasons for doing so and the margin of appreciation is narrow (Dudgeon). • The Commission cited recent expert and medical opinion that young people's sexuality was almost always established by 16, and no harm would come of equalizing the ages of consent. • In light of the new evidence, the Commission reconsidered previous opinions, and found that no reasonable and objective justification for the discriminatory criminalization of homosexual acts between young men existed.
Judgment	Commission finds a violation of Article 8, taken in conjunction with Article 14.
Impact and Implementation	After this decision, the matter went before the British Parliament and the Sexual Offences (Amendment) Act 2000 equalizing the age of consent for all to 16. The Court struck the case out of the list.
Notes	

Case	ECTHR L. AND V. v. AUSTRIA Application nos. 39392/98 and 39829/98, decided on 9 January 2003
Category	2C: Age of Consent
Nature & Scope of Authority	Binding for Austria, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<ul style="list-style-type: none"> Article 209 of the Austrian criminal code penalized adult men who had consensual homosexual sex with adolescent males aged 14-18. Heterosexual or lesbian sex between an adult and an adolescent was not criminalized. The two applicants had been convicted of offenses under Article 209 and received suspended sentences of imprisonment. The applicants claimed that the law and their conviction interfered with their right to a private life, and was discriminatory on the ground of sexual orientation. They argued that no evidence existed to suggest that adolescents needed more protection from male homosexual relations than heterosexual or lesbian relations. Austria argued that Article 209 was necessary to protect the sexual development of male adolescents.
Issue	Was the difference in treatment of consensual sexual relations between adult and adolescent males, on one hand, and females or heterosexual couples, on the other, necessary for protecting the rights of adolescent males in a democratic society?
Holding	NO. No evidence was available that the difference in treatment was necessary.
Rule	States generally cannot discriminate in setting different ages of consent based on sexual orientation.
Application & Reasoning	<ul style="list-style-type: none"> The Court noted growing European consensus and consensus among Austrian parliamentarians to have equal ages of consent for heterosexual and homosexual relations for both men and women. It noted also current scientific agreement that sexual orientation was usually established by puberty and notions of male adolescents being “recruited” into homosexuality had been disproved. Thus the Government had not been able to offer any convincing and weighty reasons to justify the maintenance in force of the law. Bias on the part of a heterosexual majority towards a homosexual minority cannot amount to sufficient justification for differential treatment, any more than “similar negative attitudes on the basis of race, origin or colour.”
Judgment	Violation of Article 14 in conjunction with Article 8. Austria ordered to pay the applicants non-pecuniary damages plus costs and expenses.
Notes	This case was part of a string of cases following Sutherland against the UK and Austria on the substantive issue of equalization of the age of consent for homosexual and heterosexual men and women. The Austrian Government changed the law before this case was decided by the Court, so the case did not have any practical implications on Austrian law.

Statute	Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, Council of Europe Treaty Series – No. 201
Category	2C: Age of Consent, and 5B.2: Sexual Violence and Exploitation of Children
Nature, Scope & Source of Authority	Will enter into force on July 1, 2010.
History	Open for signature on 25 October 2007. As of April 2010 it had been ratified by Albania, Denmark, Greece, Netherlands and San Marino.
Substance	<ul style="list-style-type: none"> The Convention seeks to prevent the sexual exploitation and sexual abuse of children, provide support to victims, and build national and international cooperation to stop the sexual abuse and exploitation of children (Article 1)

	<ul style="list-style-type: none"> • A “child” is defined as any person under 18 years (Article 2). • Implementation, particularly of protection obligations, shall be secured without discrimination on any ground, including sex, sexual orientation, state of health (which includes in particular HIV status), and disability (Article 2). • Preventive measures required of states parties include legislative or other measures to prevent all forms of sexual exploitation and sexual abuse, including awareness raising and training of people who work in contact with children, educating children and the general public, and offering intervention programs for persons who believe they may commit an offense under the convention (Chapter II, articles 4-9) • Parties must ensure cooperation between different agencies and levels of government, provide them with sufficient resources, and establish mechanisms for data collection or focal points (Article 10). • Protective measures include making reporting of suspected cases mandatory by professionals working with children, establishing helplines, and offering both immediate and long-term assistance to victims (Chapter IV, Articles 11-14). • Intervention programs should be accessible to those charged and/or convicted of a sexual offence against a child, but the person must be informed about the program and must be able to refuse to take part (Articles 15-17). • Numerous offences are defined including child sexual abuse, child prostitution, child pornography, corruption of children (Chapter VI). • The first of these is criminalization of sexual activities with children below the legal age of consent. However, each party to the Convention shall decide their own legal age of consent (Art 18(2)). Further, provisions on criminalization of sexual activities with children “are not intended to govern consensual activities between minors” (Art 18(3)). • Provision is made to protect the child during criminal proceedings. • Parties must establish systems to collect data on the identity and genetic profile of sexual offenders, and share this information with other Parties (Article 37). • Chapter X establishes a monitoring mechanism in a Committee of Parties. • Numerous provisions require consideration of the best interests and rights of the child, for example in removing a victim from their family environment (Art. 14(3)), the investigation and prosecution of cases (Art. 30), protection measures during a trial (Art. 31). • Parties should also encourage the participation of children “according to their evolving capacity” in developing and implementing programs (Art. 9) • The production, offering or making available, distributing or transmitting, procuring or possessing child pornography is to be criminalized (Article 20), however states can make an exception for: material that consists “exclusively of simulated representations or realistic images of a non-existent child” or material involving children that have reached the age of consent established under 18(2) in the particular state, if the children are produced and possessed by them with their consent and for exclusively for their own use.
Notes	<p>Commenting on sexual activities between minors, the Committee of Ministers notes in the Explanatory Report that: It is not the intention of this Convention to criminalise sexual activities of young adolescents who are discovering their sexuality and engaging in sexual experiences with each other in the framework of sexual development. Nor is it intended to cover sexual activities between persons of similar ages and maturity. (para 129)</p>

Statute	<p>ECtHR CASE OF SALMANOĞLU AND POLATTAS V. TURKEY Application no. 15828/03, decided on 17 March 2009 as relevant to the issue of virginity testing</p>
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Category	2F: VIRGINITY TESTING
Nature & Scope of Authority	Binding for Turkey, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<ul style="list-style-type: none"> • Two young women were arrested by the anti-terrorist branch of the Turkish police for suspected involvement in a terrorist group and throwing Molotov cocktails. They were later convicted and sentenced to terms of imprisonment. • The complainants alleged sexual and physical mistreatment by the police while in custody. They further alleged that on the day of their arrest they were forced to submit to gynaecological examinations to determine their virginity status and whether they had had recent sexual relations. • The authorities contended that the tests were carried out following the complaints about sexual violence against the police, and that they had consented to the examinations
Issue	Can virginity testing by the state, consensual or not, be evidence of ill-treatment in police custody?
Holding	YES. If the virginity testing, even if consented to, was carried out without any legal or medical necessity, it can go towards a finding of ill-treatment in police custody.
Rule	
Application & Reasoning	<ul style="list-style-type: none"> • The Court noted that the Government had not shown that the tests were based on any statutory or legal requirement or on any medical necessity. • Further, it could not show any evidence of the applicants' written consent. The court noted that one applicant was 16 at the time of her arrest and questioned whether she could validly consent to the tests. • Finally, because the tests were carried out on the day of arrest, they were not in response to the allegations of later sexual violence in custody. • The court noted that the tests <i>in themselves</i> may then amount to discriminatory and degrading treatment, but did not make a finding on this as it was not at issue. • In this case, the above findings went to the lack of reliability of the medical examinations submitted by the Government to dispute the allegations of ill-treatment in custody. It found that by failing to ensure the effectiveness and reliability of the medical examinations, Turkey had violated Article 3.
Judgment	Violation of Article 3 in both substantive and procedural limbs, and payment of damages, costs and expenses to the complainants.
Notes	While the case related to allegations of abuse in custody, the reasoning of the Court suggests that virginity testing <i>as such</i> may be a violation of the Convention (Art 3).

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

Case	ECtHR E.B. V. FRANCE, Application no. 43546/02, decided on 22 January 2008
Category	3A Same-sex marriage, partnership, cohabitation, adoption, and ART
Nature & Scope of Authority	Binding for France, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<ul style="list-style-type: none"> • French law allowed for single-parent but not same-sex couple adoptions. • The applicant was a woman living in a stable lesbian relationship. She applied for single-parent adoption but mentioned her relationship. • The screening process, adoption board and courts denied her authorization to adopt (a precondition for adoption) based on, <i>inter alia</i>, failure to provide a 'paternal referent' (father figure) for the child. • The applicant submitted that the authorities based the decision on her 'lifestyle' – that is, her homosexuality – and that she was thus discriminated against on the basis of her sexual orientation in the enjoyment of her right to a private life. • France argued that the decision had been based on the best interests of the child, which included the need for a 'paternal referent.' It stated that experts were divided on the importance of a father-figure in a child's life, and so France should be allowed a wide margin of appreciation.
Issue	Did the French procedure to obtain authorization to adopt discriminate on the basis of sexual orientation, amounting to a violation of the applicant's right to a private life?
Holding	YES. The authorities had distinguished the applicant, as a single, homosexual person, from single, heterosexual, persons, who indeed were authorized to adopt, and thus discriminated against her on the basis of her sexual orientation.
Rule	Although individuals do not have a right to adopt a child, they do have a right not to be discriminated against on the basis of sexual orientation in any adoption procedures established by a national government.
Application & Reasoning	<ul style="list-style-type: none"> • The Court emphasized that Article 8 protection of the right to a private life does not include a <i>right to adopt a child</i>. However, because single-parent adoption is allowed under French law, the case fell within the ambit of Article 8. • The requirement of a 'parental referent' was held to be odd because it could "render ineffective the right of single persons to apply for authorisation". It seemed that it was a pretext for refusal on other grounds. • Further, although domestic authorities denied their decision was based on the applicant's homosexuality, the sexual preferences of the applicant featured to such an extent in their reasoning that it was "significant" and "revealing that her homosexuality was a determining factor". The sexual orientation of the applicant had "consistently [been] at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings."
Judgment	Violation of Article 14 of the Convention taken in conjunction with Article 8.
Notes	

Case	United Kingdom High Court of Justice in Northern Ireland IN THE MATTER OF M (ADOPTION: JOINT RESIDENCE ORDER: SAME SEX COUPLE), NIFam 3 (06 January 2004)
Category	3A Same-sex marriage, partnership, cohabitation, adoption, and ART
Nature & Scope of Authority	High Court of Justice in Northern Ireland, Family Division. Binding on the parties and of precedent value in Northern Irish family courts.
Facts & Background Law	<ul style="list-style-type: none"> • Decision in response to an application for a joint Residence Order for a foster child living with two women in a same-sex relationship, and an application for adoption by the first applicant.

	<ul style="list-style-type: none"> • The Adoption (Northern Ireland) Order 1987 allowed for single-parent adoption but not adoption for same-sex couples. In determining single-parent adoption, the court or adoption agency was required to regard the welfare of the child as the most important consideration in its decision. • First applicant, J, was a woman who had fostered a baby girl with her former husband during their marriage. Second applicant A was the new female partner of the first applicant. • The foster-child, M, had lived with the two applicants from the age of two and the relevant government agency supported their applications.
Issue	Does the law in Northern Ireland allow for adoption by a single person living in a same-sex relationship?
Holding	The law does not distinguish between a member of a same-sex or an opposite sex cohabiting couple applying to adopt a child. Each could successfully do so.
Rule	The overriding factor in adoptions is the welfare of the child. The sexual orientation of the adopting parents is not relevant to determining welfare.
Application & Reasoning	<ul style="list-style-type: none"> • In interpreting the 1987 Order, the judge noted that “[t]he law is not moribund. It must move to reflect changing social values and a shifting cultural climate,” and cited other cases where homosexual parents had been allowed to adopt as single persons. • Changes in the law in England and Wales in 2002 allowing for same-sex couples “in an enduring family relationship” to adopt was cited as evidence of the “evolving nature of the law.” • On the facts, granting the adoption was in the best interests of the child M. • Further, granting the Residence Order, allowing both partners to make decisions about the child, <i>inter alia</i> on medical and educational matters, was held to be in the best interest of M. The judge found that M was used to shared care from both J and A, and it would be confusing in her life if parental responsibility were to be vested in only one.
Judgment	Applications for a joint Residence Order and Adoption granted.
Notes	

Statute	EU 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 OJ L 158, 30.4.2004
Category	3A Same-sex marriage, partnership, cohabitation, adoption, and ART
Nature, Scope & Source of Authority	Directives must be implemented in all member states of the European Union within a certain time period; if not satisfactorily implemented, they can in some circumstances be applied directly under the doctrine of direct effect.
History	Amends Regulation (EEC) No 1612/68. Mostly gathers a great number of earlier directives on free movement within the Union.
Substance	<ul style="list-style-type: none"> • Lays down the conditions governing the right of free movement and residence in and the right of permanent residence in the territory for Union citizens and their family members (Article 1) • A “family member” may be a same-sex partner only if: <ol style="list-style-type: none"> 1. “the Union citizen has contracted a registered partnership” with that person under the law of a member state, AND 2. the host state treats registered partnerships “as equivalent to marriage” (Article 2(2)(b)). • For unmarried and unregistered partners, the Directive recognizes a category of “partner with whom the Union citizen has a durable relationship, duly attested” (Article 3(b)). While such a person is not a family member and does not have an absolute right to freedom of movement and residence, member states shall at least “facilitate entry and residence” for the person although they have a wider

	<p>margin of discretion to refuse that person entry.</p> <ul style="list-style-type: none"> The Directive's preamble prohibits discrimination based on sexual orientation (Recital 31). Suggests that a state cannot agree to admit unmarried opposite sex partners, while refusing entry or residence to same-sex partners.
Notes	

Statute	Hungary Art 685/A of the Civil Code of the Republic of Hungary, Act IV, 1959
Category	3A Same-sex marriage, partnership, cohabitation, adoption, and ART
Nature, Scope & Source of Authority	The Civil Code governs the financial and certain personal relations of Hungarian citizens, the state, local governments, economic and social organizations, and other persons. Other statutes pertaining to these relations should be construed in concert with this Act and in consideration of its provisions. (Section 1)
History	Domestic partnership (commonly known as common-law marriage) was included in the original 1959 Civil Code but applied only to heterosexual couples. The definition was expanded to include same-sex couples in 1996 after a decision of the Constitutional Court (Decision of the Constitutional Court No. 14/1995 (III. 13.)).
Substance	<ul style="list-style-type: none"> Article 685/A: domestic partnership will exist if the parties live together, share the same household, are in emotional and financial community, and demonstrate their togetherness toward any third party. If domestic partnership can be established, this entitles the couple to most of the rights and obligations of civil marriage, including social security and pension rights, inheritance, testimonial immunity, and mutual support duties. The existence of domestic partnership is established retroactively in each individual case on the facts. No registration or other formality is required to prove a domestic partnership, thus this distinguishes this institution from registered partnership.
Notes	<ul style="list-style-type: none"> Case-law has clarified that domestic partners need not be involved in a sexual relationship to be recognized. <p>Translation provided by Hungarian researcher and lawyer Adrienn Esztervari</p>

Statute	Netherlands Civil Code of the Netherlands (<i>Burgerlijk Wetboek</i>), Book 1: Individuals and Family; and Act on Reception of Foreign Children for Adoption 1988 (<i>Wet opnemng buitenlandse kinderen ter adoptie</i>)
Category	3A Same-sex marriage, partnership, cohabitation, adoption, and ART
Nature, Scope & Source of Authority	National law of the Netherlands
History	The right of same-sex couples to adopt children born in the Netherlands entered into force in 2001 (<i>Act of 21 December 2000 amending Book 1 of the Civil Code (adoption by persons of the same sex)</i>). The right of same-sex couples to adopt internationally entered into force in January 2009.
Substance	<ul style="list-style-type: none"> Both married and unmarried same-sex couples now have the right to apply for adoption of children born in the Netherlands (Book 1 of the Civil Code): <u>General right to adopt</u>: Adoption is effected by a decision of the district court at the joint request of two persons or at the request of one person alone. <u>Joint request</u>: The joint request by two persons can only be done if they have been living together during at least three continuous years immediately before the submission of the request. The request by an adopter who is the spouse,

	<p>registered partner, or other life partner of the parent, can only be done if s/he has been living together with that parent during at least three continuous years immediately before the submission of the request. The latter condition, however, does not apply if the child is born in the relationship of that parent and the adopter. (Art 227(2))</p> <ul style="list-style-type: none"> • Second-parent adoption: If the spouse, registered partner or other life partner of the parent of the child is adopting, the adopter and the parent must have been caring for the child for at least one year, unless the child was born in a relationship between the mother and her female life partner (Art 228). • Any couple of spouses may adopt a foreign child (Art 1 of the Act on reception of foreign children for adoption). Marriage is a requirement for both opposite-sex and same-sex couples who wish to jointly adopt internationally. Individual inter-country adoption is also possible
Notes	Only in Dutch; translation provided by Dr Kees Waaldijk

Statute	Sweden Swedish Marriage Code 1973 (Äktenskapsbalken) as relevant to same-sex marriage
Category	3A Same-sex marriage, partnership, cohabitation, adoption, and ART
Nature, Scope & Source of Authority	National law of Sweden
History	The Act on Registered Partnership ^(1994:1117) was abolished when this provision entered into force.
Substance	<ul style="list-style-type: none"> • “This Code contains provisions about marriage relations. Those two who marry each other will be spouses.” ^(Article 1) • Thus uses gender neutral language to make marriage open to any two persons regardless of their sex.
Notes	The new regime is important symbolically but does not imply significant practical changes compared to the previously recognized registered partnership. Only in Swedish

Statute	Spain Act 14/2006, on techniques of assisted human reproduction, 26 May 2006, Spain (<i>Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida</i>)
Category	3A Same-sex marriage, partnership, cohabitation, adoption, and ART
Nature, Scope & Source of Authority	National law of Spain
History	
Substance	<ul style="list-style-type: none"> • Overall objective of the law to regulate the use of scientifically proven assisted human reproduction techniques (Article 1). The list of accredited techniques is attached in an annex (Article 2). • Those who can receive or use the techniques covered by the Act include any woman over 18 years of full legal capacity, who has given express, free and informed consent. • Access to ARTs by single and/or homosexual women is explicitly granted by Article 6(1): “The woman may be the user or recipient of the techniques regulated in this Act independent of her civil status or sexual orientation.”
Notes	In 2007, an amendment to <u>Law 3/2007, of 15 March, regulating the correction of the appearance in registries of the sex of persons</u> , specified that when a child has been born with assisted reproduction techniques to a woman who is married to another woman, the female spouse can declare her maternity before the Civil Registry and obtain co-parenthood.

	Only in Spanish.
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Statute	United Kingdom Human Fertilisation and Embryology Act 2008
Category	3A Same-sex marriage, partnership, cohabitation, adoption, and ART
Nature, Scope & Source of Authority	Binding law in the United Kingdom, governing the licensing of fertility services in the United Kingdom.
History	Amends the <u>Human Fertilisation and Embryology Act 1990</u> which had first regulated access to fertility treatment, and set standards for storage of eggs, sperm and embryos and the use of human embryos in research. The 1990 Act mandated clinics to take account of the “welfare of the child (including the need of that child for a father)” before giving treatment to women. This excluded many single and lesbian women.
Substance	<ul style="list-style-type: none"> • Amends the 1990 Act, including the definition of who may be the parents of the child conceived through human fertilization. • Removes the requirement for clinics to consider the “need of that child for a father” and replaces it with the broader and gender-neutral term “need of that child for supportive parenting” (Section 14(2), amending section 13(5) of the 1990 Act) • Provides that either the husband or the same-sex civil union partner of the mother will be recognized as a parent of the child, unless it can be shown that the husband/partner did not consent to the fertility treatment (Sections 35(1) and 42(1)) • Non-registered female partners can also be recognized as a parent to the child if both the mother and the female partner provide notice that both of them agree that the partner be treated as a parent of the child (Section 44) • Men living in a civil union or enduring family relationship may become parents to a child born of a surrogate mother if they can show that the gametes of one partner was used to bring about the creation of the embryo (Section 54).
Notes	

Case	ECtHR AIREY V. IRELAND Application no. 6289/73, decided 9 October 1979.
Category	3D Termination of marriage
Nature & Scope of Authority	Binding for Ireland, Art 46(1) of ECHR. Moral authority for other States parties to the European Convention of Human Rights
Facts & Background Law	<ul style="list-style-type: none"> • Although divorce was not available in Ireland, a party could seek a decree of judicial separation by application to the High Court. • Legal representation was demonstrated to be necessary for a successful application, but legal aid was unavailable for any civil proceedings. • The applicant was a woman who sought separation from her husband on grounds of physical and emotional cruelty. • She did not have the financial resources to pay a solicitor and so could not find a solicitor willing to act for her; thus could not obtain judicial separation from her husband. • The applicant argued that the prohibitive costs of the application process made it impossible for her to terminate her marriage, which amounted to a violation of her right of access to the courts under Article 6, and a violation of her Article 8 right to a family life by virtue of not being able to access the procedures created by legislation regulating family matters.
Issue	Did the practical barriers to seeking the legal remedy provided in the law (here: judicial separation) amount to a denial of the right to access justice and the right to family life?
Holding	YES. The right to access justice is practical and effective, not just theoretical. Denying real access to legal procedures regulating family life is a denial of the right to a family life.
Rule	A state must ensure that its citizens have a right to access the legal procedures on marriage and family in practice, although it has a wide margin of discretion in how to achieve this.
Application & Reasoning	<ul style="list-style-type: none"> • The Court found that whether self-representation was a domestic remedy depended on if it would be effective, “in the sense of whether she would be able to present her case properly and satisfactorily.” Convention rights should not be theoretical or illusory but rather “practical and effective.” • In this case, the evidence showed that the procedure was complex and required legal assistance to access, and that the applicant would be greatly disadvantaged by representing herself. • Further, protection of the right to a family life sometimes “necessitates being relieved from the duty to live together.” This “obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto.”
Judgment	Violation of Article 6 and Article 8 and question of remedy reserved.
Notes	The Court did not examine the case under Article 12 (right to marriage), thus did not examine whether a right to terminate marriage is included in this right

Statute	Finland Marriage Act 1929 (Äktenskapslag 13.6.1929/234), as relevant to conclusion and dissolution of marriage (amended through law 411/1987)
Category	3D Termination of Marriage
Nature, Scope & Source of Authority	National law of Finland
History	
Substance	<ul style="list-style-type: none"> • A marriage will be dissolved when one of the spouses dies or when the spouses are granted a divorce (Section 3) • Spouses have the right to divorce only after a reconsideration period of at least six months from date of filing a petition for the dissolution of the marriage with the court, or the petition of one spouse is served on the other spouse (Sections 25 and 26) • A reconsideration period is not needed if the parties lived separately without interruption for at least two years before requesting the divorce, or the marriage had some irregularity (Sections 25 and 27) • Proceedings for divorce can be initiated by joint request of the spouses or one of the spouses alone. If the petition has been filed by one spouse alone, the court will give the other spouse a hearing.(Section 28) • In the case of mandatory reconsideration period the court shall inform the spouses of the availability of family mediation to them.(Section 29)
Notes	<p>Note that the spouses are not required to list the reasons for divorce in the application. When hearing the divorce case the court does not consider the spouses' personal relationship or the reasons for divorce.</p> <p>In Swedish and Finnish, unofficial translation to English</p>

Statute	United Kingdom Forced Marriage (Civil Protection) Act 2007, UK
Category	3C Forced Marriages
Nature, Scope & Source of Authority	Applicable within the territories of England, Wales, and Northern Ireland.
History	Amends the Family Law Act 1996 to provide civil remedies for forced marriage.
Substance	<ul style="list-style-type: none"> • British courts are granted the power to issue Forced Marriage Protection Orders to protect both person at risk of being forced into marriage or persons who already have been forced into marriage (Art 63A). • A forced marriage is defined as one not entered into with free and full consent of one of the parties (Art 63A (4)) • In issuing an order, the court must look at all circumstance of the case including the health, safety, well-being and wishes of the parties (Arts 63A (2) and (3)). • The court has wide discretion about the contents of the order, including “prohibitions, restrictions or requirements” or “other terms” that the court considers necessary in the individual case (Art 63B(1)). • The order can relate to conduct in the UK or abroad and to the conduct of anyone aiding and abetting or conspiring to force or attempt to force the marriage (Art 63B(2)). • The order can be made by the court on its own or on application by either the person to be protected or a relevant third party (Art 63C).

	<ul style="list-style-type: none"> The courts can attach powers of arrest to the orders, if the respondent has used or threatened violence against the person protected (Art 63H)
Notes	The Act is unclear about the effect of a Forced Marriage Protection Order if issued after a forced marriage has already taken place.

Statute	Portugal Law No 6/2001 of 11 May on measures of protection for persons who live with shared economy (<i>Lei N° 6/2001 de 11 de Maio de medidas de protecção das pessoas que vivem em economia comum</i>)
Category	3E: Polygamy/polygyny
Nature, Scope & Source of Authority	National law of Portugal.
History	
Substance	<ul style="list-style-type: none"> Establishes a regime to protect people who have lived in a situation of “common economy” [a consensual union] for two or more years (Article 1) Common economy is defined as people who have shared a common “table” and housing (food and accommodation) for two years and have established a life in common or mutual sharing of resources. It can apply to groups of two or more, as long as at least one has reached the age of majority (Article 2) It will not apply where there are contractual relationships of employment or property (such as a sub-lease) between the persons in the house. It also specifically excludes situations where one or more person has been physically or psychologically coerced (Article 3) The partner in the relationship will be granted the same legal benefits as a spouse relating to leave, benefits, taxes, and domicile. If more than two people are involved, only one can benefit from these rights (Article 4)
Notes	Although this law does not mention polyamorous relationships specifically, the reference to more than two persons in the relationship could encompass this. Proof of absence of physical or psychological coercion may be an obstacle to traditional polygamous arrangements however. Only in Portuguese

Statute	Russia Family Law of the Russian Federation as relevant to medical examinations and tests of those who marry
Category	3F: Tests and conditions placed on marriage
Nature, Scope & Source of Authority	Federal law of the Russian Federation
History	
Substance	Chapter III, Article 15. Medical examination of people who marry 1. Medical examination of persons who marry, as well as advice on medical and genetic issues and family planning, are carried out by the state and municipal health care system at the place of their residence, free of charge, and with the full consent of the persons who marry. 2. Results of the medical examination of person who marry constitute a medical secret and can be communicated to the person whom the individual who was tested intends to marry only with the consent of said individual. 3. If one of the persons who marry hides from the other party the presence of venereal disease or HIV infection, this can result in filing for annulment of marriage in the court (Articles 27 – 30).
Notes	Translation by Ukrainian lawyer and researcher Oksana Shevchenko.

Statute	Spain
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	Organic Law 10/1995, of 23 November, of the Penal Code (Spanish Penal Code) (Código penal español) as relevant to violence against minors in the family
Category	3G: Incest
Nature, Scope & Source of Authority	
History	
Substance	<ul style="list-style-type: none"> • The crime of sexual assault (the use of violence or intimidation to undermine the sexual freedom of another) is punishable with one to four years imprisonment (Article 178) • The crime of rape (sexual assault involving introduction of objects with intercourse, or oral or anal penetration) is punishable with six to twelve years imprisonment (Article 179) • Aggravating circumstances for crimes of rape and sexual assault include where the crime was committed a person who was especially vulnerable due to age or other reason (Article 180(3)) or when the perpetrator was a relative, including parent, child or sibling of the victim (Article (4)) • Article 181 governs sexual abuse (being defined as “constraining the sexual freedom or sexual safety of another person without violence or intimidation and without consent”), according to which sexual activity with children under the age of 13 always will be considered “without consent.” The provision has the same aggravating circumstances (including when committed by a family member). • Article 183 criminalizes sexual abuse by means of deception of a person between 13 and 16 years. The same aggravating circumstances apply.
Notes	Thus incest or relationships between close relatives will only be criminalized if it meets the standard of sexual assault or rape. The Spanish law is gender neutral and applies to both opposite-sex and same-sex sexual relations within the family. Only in Spanish

Case	Germany German Constitutional Court Decision of 28 February 2008 - 2 BvR 392/07
Category	3G Incest
Nature & Scope of Authority	Binding on German Courts.
Facts & Background Law	<ul style="list-style-type: none"> • The appellants were a brother and a sister who for seven years had been in a sexual relationship and had four children together. • The brother had been sentenced to three and a half years of prison on four counts of incest, in accordance with Article 173.2 of the German Penal Code.
Issue	Is the provision in Article 173.2, making sexual intercourse between natural siblings a crime, incompatible with the inviolability of human dignity and the right of every person to free development of his personality and right to sexual self-determination under the German Basic Law?
Holding	NO. The legislature had not overstepped its bounds under the Basic Law by penalizing sexual intercourse between siblings.
Rule	
Application & Reasoning	<ul style="list-style-type: none"> • The Court acknowledged that the legislature could not encroach upon the “core area of private life” under the Basic Law unless it was for a legitimate purpose and the means were necessary and proportional. • The Court then accepted the legislatures’ aim of “protection of marriage and family” as legitimate. • Further, it found sufficient basis for the legislature to meet this aim by penalizing intercourse between siblings because “incestuous relationships result in overlapping familial relationships and social roles and, thus, can lead to interference in the system

	<p>that provides structure in a family” and it is likely that the children of the relationship would have trouble finding their place in the family structure and “building a trusting relationship to their closest caregivers.”</p> <ul style="list-style-type: none"> • The Court also found that “eugenics grounds” and medical evidence of genetic defects for children of incestuous relationships justified the legislatures’ decision to penalize. • Further penalization was both necessary for preventing incestuous intercourse and “law-stabilizing effects,” as well as proportionate to the aim because the court could choose from a range of penalties in each case.
Judgment	Constitutional complaint dismissed.
Notes	Only available in German; press release available in English

4. GENDER IDENTITY, GENDER EXPRESSION, AND INTERSEX

Case	ECtHR CHRISTINE GOODWIN V. UNITED KINGDOM Application no. 28957/95, decided on 11 July 2002
Category	4A. Civil Registration and Names
Nature & Scope of Authority	Binding for the United Kingdom, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • Review of a decision to deny a post-operative male-to-female transsexual the right to change her sex on her birth certificate and national insurance registration, and to marry her male partner. • The applicant had undergone hormone treatment and gender reassignment surgery covered by national health insurance and had received a new passport and drivers licence. • The applicant argued that the inability to change her birth certificate meant that she was still treated as a man for many legal purposes, including retirement, calculation of car insurance, and marriage. It also meant employers could know her former sex, leading to harassment at work. • The applicant claimed the state had a positive obligation to legally recognize her changed sex, and that failure to do so amounted to a violation of her right to a private life under Article 8 and a violation of her right to marry under Article 12. • The Government argued that it had struck a fair balance between the applicant's rights and the public interest, and in any case it should have a wide margin of appreciation for policies towards transsexuals given the sensitivity of these issues and their legal complexity and expense.
Issue	Had the UK failed to fulfill a positive obligation to legally recognize the applicant's new gender, as part of its obligations to respect her right to a private life (Article 8) and respect her right to marry (Article 12)?
Holding	YES. The state had violated the applicant's right to respect for her private life and her right to marry by not fully recognizing her new gender.
Rule	States must ensure the ability of individuals to change their sex in law as well as in fact in order to protect their right to self-determination in their private life.
Application & Reasoning	<ul style="list-style-type: none"> • The Court held that Article 8, in protecting the personal sphere of the individual, included the right of all persons to establish details of their identity as individual human beings. • It noted that transsexuality had wide international recognition as a medical problem for which treatment can be provided to afford relief. • Transsexuals have a right to "personal development and to physical and moral security" and it could no longer be seen as sustainable for transsexual individuals to be forced to live in "an intermediate zone as not quite one gender or the other." • The Court found it illogical that the state, while financing and providing the treatment and surgery, failed to fully recognize the change of gender in law. • While changing the law would incur expense and inconvenience, the UK had not demonstrated concrete or substantial hardship or detriment to the public interest. • The Court also examined the applicant's right to marry, and held that the right to found a family (that is, to have children) cannot be seen as a condition of the right to marry. In other words, couples should not be deprived of the right to marry because they cannot (or will not) conceive or parent a child. • The terms 'man and woman' in Article 12 can no longer "refer to a determination of gender by purely biological criteria". Other factors include acceptance of gender identity disorder by the state, availability of gender reassignment surgery, and assumption by person of a new gender. • The essence of the right to marry is the right to marry a person of one's choice. The applicant lived and identifies as a woman and only wishes to marry a man – not allowing her to do so effectively bars her right to marry.
Judgment	Breach of Article 8 and Article 12. Costs and expenses awarded to the Applicant. Order for damages refused on the basis that the finding of the violations and the consequences

	of this constitute just satisfaction.
Notes	

Case	ECtHR L. v. LITHUANIA Application no. 27527/03, decided on 11 September 2007
Category	4A. Civil Registration and Names
Nature & Scope of Authority	Binding for Lithuania, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • An application to review the failure of Lithuania to pass a law enabling gender reassignment surgery and rectification of documents to recognize changed gender. • Lithuanian law recognized transsexuals' rights to change gender and civil status but this was dependent on full gender reassignment surgery. Facilities for conducting such surgery were unavailable because the government had not passed the draft enabling law, despite a four year delay. • The applicant was a person who wished to undergo female-to-male gender reassignment in Lithuania and to change his legal identity but was unable to do so. • He argued that being legally a woman but looking masculine made him subject to hostility, caused him psychological distress, and impaired his functioning in society in various ways. • He argued Lithuania had a positive obligation to provide him a lawful opportunity to change his gender. Failure to do so amounted to a violation of Article 8. • Lithuania cited “cultural specificities and religious sensitivities” that should give it a wide margin of appreciation, and that its laws were sufficient.
Issue	Did the State have a positive obligation to pass the specific law in order to respect the right to a private life of persons such as the applicant?
Holding	YES. The State's inaction violated the applicant’s right to respect for private life in terms of sexual identity, under Article 8 of the Convention.
Rule	A state must provide its citizens with the lawful ability to change their gender. Time for legislative process and financial burden may justify only a limited delay.
Application & Reasoning	<ul style="list-style-type: none"> • In determining whether a state has a positive obligation, the court balanced the rights of the applicant with the public interest. • The applicant was left in a “situation of distressing uncertainty <i>vis-à-vis</i> his private life and the recognition of his <i>true identity</i>” because of a limited legislative gap. • Only 50 transsexuals lived in Lithuania. The financial burden on the government in closing this gap would not be unduly heavy. It did not justify the delay. • The situation was not a fair balance between the individual and the public interest.
Judgment	The applicant was awarded 5,000 EUR in non-pecuniary damages. Lithuania was required to pass the necessary legislation within three months and if it failed to do so, it should pay the applicant 40,000 EUR in pecuniary damages.
Notes	In July 2008 Lithuania paid the applicant 40,000 EUR to undergo a full sex change operation. As of December 2009, the law has still not been passed.

Statute	United Kingdom Gender Recognition Act 2004
Category	4A. Civil Registration and Names
Nature, Scope & Source of Authority	Applicable in England, Northern Ireland, Scotland and Wales.
History	The Act was drafted in response to the ECtHR decision of Goodwin v. UK (2004). It came into effect on April 4, 2005.
Substance	<ul style="list-style-type: none"> • The Act allows transsexuals to legally change their gender and give them full recognition in the law as their acquired sex, including for marriage. • Change of gender occurs by the grant of a 'gender recognition certificate'. The certificate has the effect of making the persons gender for all purposes the acquired gender (Section 9) • The decision to grant a certificate is made by a Gender Recognition Panel. The panel is composed of at least one lawyer and one doctor, appointed by the Lord

	<p>Chancellor (Schedule 1).</p> <ul style="list-style-type: none"> Any person over 18 can apply for a certificate. S/he must show that s/he has been “living in the other gender” (Article 1). This requires proof the person: <ol style="list-style-type: none"> has or has had gender dysphoria; has lived in the acquired gender for at least two years intends to continue living in that gender until death (Section 2). Proof of gender dysphoria requires two medical opinions in support. One must be from a registered doctor, and the other from a specialist in gender dysphoria (either a doctor or a psychologist) that includes “details of the diagnosis of the applicants gender dysphoria” (Section 3). If the successful applicant is married, the marriage must be annulled or dissolved before s/he can receive a full certificate, but an interim certificate will be granted in the meantime (Sections 4 and 5). The law is not retrospective. A legal change of gender does not alter any property, parental or inheritance rights (Sections 12, 13, 15, 16).
Notes	

Statute	Spain Law 3/2007 Regulating the Rectification of the Entry related to the Sex of Persons in the Civil Register (Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas)
Category	4A. Civil Registration and Names
Nature, Scope & Source of Authority	Applicable throughout Spain.
History	Adds to the law on the Civil Register of 1957. That law states that all details of a person's civil and legal status must be recorded in the local registry and entry in the Registry is evidence of those facts. This registry is public. (Law of 8 June 1957, on the Civil Registry)
Substance	<ul style="list-style-type: none"> The Act creates a process for a transsexual to be fully recognized in law in his or her “real gender identity” by changing his or her “sex” entry in the civil register and by changing his or her name. The preamble notes that transsexuality, defined as a change in gender identity, has been recognized in medicine and psychology and is a social reality that demands a legislative response. The ability to change one's name and sex in the register, if it does not accord with one's identity, is necessary for the free development of the personality and the dignity of the person. An application for a change of the register can be made by any Spanish national “with sufficient capacity” and over the age of majority (Article 1). The application must be made to the local civil registrar (Article 3). “Sex” of the applicant can be changed in the registry if the applicant provides medical evidence from an accredited doctor that he or she: <ol style="list-style-type: none"> Has been diagnosed with <i>Gender dysphoria</i>. Gender dysphoria is defined as a dissonance between a person's physiological and morphological sex or gender, that has been persistent and stable, and that the person does not suffer from a relevant personality disorder. Has had <i>medical treatment</i> for at least two years towards a sex change, but not necessary including gender reassignment surgery. An exception to this can be made if health or age were a barrier to treatment (Art 4). If the civil registrar accepts the application, the entry in the civil registry will be changed immediately. The rectification of sex and name will allow the individual to exercise all rights attached to his or her new “condition”, but will not affect legal rights or obligations accrued before the change (Art 5). The civil registry will itself notify government bodies and agencies when the change has been made (Art 6). No publicity of the person's sex rectification will take place without special

	authorization (Art 7).
Notes	Only in Spanish.

Statute	Kazakhstan Minister of Health 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
Category	4A. Civil Registration and Names
Nature, Scope & Source of Authority	Binding in Kazakhstan.
History	Issued by the minister to implement a 1999 decision of the government about changes to civil status for citizens with “gender identity disorders”, namely: ‘Establishing of a Decree about the order of changing, restoring and annulling the records of civil status, form of the registration of acts of civil status and forms of civil status acts registration and forms of certificates issued based on the records in the books, and on the Guidelines of the order of registration of civil status acts in Republic of Kazakhstan’, on solving the complaints, statements and referrals of citizens non the issues of gender identity disorders. (No. 620, May 1999)
Substance	<ul style="list-style-type: none"> • The Order establishes a purely medical procedure for determining whether a person should be recognized as a different sex in law, or to change sex through surgery. It: <ol style="list-style-type: none"> 1. Confirms a set of guidelines for “medical investigation of people with sex identification disorder” and a list of medical tests and documents necessary to establish such a disorder (Article 1) 2. Orders the Director of the Center for Scientific Practice of Psychiatry, Psychology and Narcology of the Republic, to: <ol style="list-style-type: none"> 1. Establish a Commission for the medical examination of persons with gender identity disorders, 2. Carry out comprehensive examinations. 3. Design the indications for change of social (legal status) or biological (by gender reassignment surgery) sex. (Article 2) • The guidelines are attached to the Order and state that: <ol style="list-style-type: none"> 1. A diagnosis of gender identity disorder can only be made by a psychiatrist after the applicant has had an “in-hospital stay.” 2. The decision will be based on psychiatric, neurological and somatic examination and must be made within 30 days. 3. At the end of this time the Commission will make a conclusion and recommendations, which will then be signed by the Director and sent to the department of records at the Department of Justice. 4. The recommendations may be for biological sex-change (through treatment and surgery) and/or social sex-change through change of personal legal documents and government records (without requiring surgery) • The list of medical tests to be carried out during the examination are extensive including blood and urine tests, HIV testing, skull x-rays, hormonal and genetic analysis, and conclusions of a “sexopathologist,” a psychologist, and an endocrinologist.
Notes	No indication is included about what the consequences or rights attached to a report of the Commission will be, or whether there is a right to appeal. Unofficial translation by Anna Kirey, Labrys Kyrgyzstan

Case	Austria Austrian Administrative High Court Case VwGH 27.02.2009, 2008/17/0054 Decided on 27 February 2009
Category	4A. Civil Registration and Names
Nature & Scope of Authority	

Facts & Background Law	<ul style="list-style-type: none"> • The applicant was born male and, after hormone therapies and cosmetic measures, had been living as a woman. • The authorities refused the applicant a female name and corresponding documents, since she had not undergone gender reassignment surgery. Removal of genitals was a precondition for legal change of sex. • The applicant stated that every time she exhibited her documents (driver's license, identification card, passport, birth certificate, etc.) she had to expose her transsexuality which, she argued, violated her right to privacy.
Issue	Was a mandatory sex change operation a lawful prerequisite for the recognition of a person's new gender?
Holding	NO. Surgery could not be a legal precondition for attaining the change of legal gender.
Rule	
Application & Reasoning	<ul style="list-style-type: none"> • The court referred to the psychological aspects of the sense of belonging to the sex opposite to the birth sex. • When this sense of belonging with all probability is irreversible, and takes the form of an effort to appear as the other sex in a way that is obvious to outside observers, then authorities have no reason not to use these psychological aspects alone as basis for the approval of change of legal gender.
Judgment	Ministry of the Interior to reconsider the case of the applicant; based on the notion that sex change can be a fundamentally psychological process.
Notes	Only available in German.

Case	ECTHR VAN KÜCK V. GERMANY Application no. 35968/97, decided on 12 June 2003
Category	4B. Access to Health Services
Nature & Scope of Authority	Binding for Germany, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • A review of two decisions by German courts that denied the applicant reimbursement for hormone treatment and gender reassignment surgery. • German law required private health insurers to cover “expenses for curative treatment which is medically necessary,” which did not apply if the person deliberately caused his or her own disease. • The local court dismissed the applicants’ applications because she had not shown the treatment or surgery was medically necessary to relieve her physical or medical difficulties, and she had not taken less drastic means first like psychotherapy. • The Court of Appeal upheld this decision and further stated the applicant had deliberately caused her own disease by taking female hormones without a prescription because of her feeling of inferiority towards other men. • The applicant claimed that the German courts violated her right to a fair hearing and a private life by defining “medical necessity” too narrowly, misreading medical opinions with their own views of transsexuality and misconstruing facts about her life.
Issue	Had the application of criteria for reimbursement of medical treatment by the German courts interfered with the applicant's right to a fair hearing and her right to private life, including her self-determination and personal development?
Holding	YES. The way the court had interpreted and applied the law was unreasonable and violated the applicant’s right to sexual self-determination and to a fair hearing.
Rule	Decisions about medical treatment for transsexual persons must be based on medical opinion and respect a person's own view of her sexual identity as part of her right to respect for her private life.
Application & Reasoning	<ul style="list-style-type: none"> • In general, the Court found that the decision to refuse the reimbursement had been made “on the basis of general assumptions as to male and female behaviour” rather than professional medical opinion or the applicant's own statements about her “most intimate feelings and experiences.” • These conclusions led to a finding of denial of a fair hearing because: <ol style="list-style-type: none"> 1. it was inappropriate for the court to substitute its own views on medical necessity of treatment and causation of illness for the views of doctors, and 2. it placed an unfair and inappropriate burden of proving medical necessity on the applicant, in respect to an intimate part of her life. • The conclusions also led to a finding that Germany had failed to meet its positive obligations to respect the right of the applicant to a private life. The court had struck an unfair balance between the applicant's right to sexual identity as a basic “essential of self-determination,” and the rights of the insurance provider.
Judgment	Violation of Articles 6 and 8. Applicant awarded EUR 15,000 for non-pecuniary damage and EUR 2,500 for costs and expenses
Notes	The Court did not rule that costs for gender reassignment should be covered by private or public health insurance. It rather looked at the way the law as it stood in Germany was applied.
Case	United Kingdom Supreme Court of Judicature, Court Of Appeal (Civil Division) NORTH WEST LANCASHIRE HEALTH AUTHORITY v. A., D., G. [2000] 1 WLR 977. Decided on 29 July 1999
Category	4B. Access to Health Services
Nature & Scope of Authority	Binding in the United Kingdom.
Facts & Background Law	<ul style="list-style-type: none"> • The Health Authority's was appealing a court decision that quashed its refusal to fund gender reassignment surgery for the three respondents.

	<ul style="list-style-type: none"> • The respondents had been diagnosed by specialists as suffering from male-to-female “gender dysphoria illness” and as having a “clinical need for surgery.” • The Appellant had refused to fund the surgery based on its policy that such surgery was in the lowest priority category of treatments with “[n]o beneficial health gain or no proven benefit.” Treatments in this category would only be funded in cases of “overwhelming clinical need” or other exceptional circumstances, which the respondents were unable to demonstrate. • The applicants argued that this policy was irrational in that it was based on a lack of understanding about transsexualism. • The appellant justified its policy on grounds of limited financial resources to fund health services in the area and the need to prioritize based on scientific research.
Issue	Was the policy to consider gender reassignment treatment a lowest priority and not suitable for funding in the absence of 'overriding clinical need' rational?
Holding	NO. The policy was irrational in that it was inconsistent with state acknowledgement of transsexualism as an illness, as well as denied the respondents a real as opposed to fictional opportunity to prove their cases on their merits.
Rule	Once the state has accepted transsexualism as an illness, it must give it weight relative to other illnesses and provide sufferers of the illness a real opportunity to access treatment.
Application & Reasoning	<ul style="list-style-type: none"> • The judge noted the appellant had publicly accepted transsexualism as an illness. • Thus, the fact that the policy demonstrated an attitude of skepticism towards transsexualism as a medical condition and implied it was simply a state of mind needing psychiatric reassurance was incoherent. • Further, by stating that the treatment for the illness was ineffective, the policy made it impossible for the respondents to prove that they had an overwhelming clinical need for that treatment. • This meant that the conditions for obtaining treatment could never be met. The policy amounted to a blanket and “over-rigid” prohibition on funding treatment for the condition. It denied the respondents an opportunity to have their cases judged on their individual merits. • These two flaws meant that the policy was irrational
Judgment	The appellant's policy and the decisions the subject of this appeal quashed. Remitted to the appellant for reconsideration of its policy to give proper weight to its acknowledgement that transsexualism is an illness, apply that weighting when setting its level of priority for treatment, and make effective provision for exceptions in individual cases from any general policy restricting the funding of treatment for it
Notes	

Case	United Kingdom High Court of Justice, Administrative Court AB. v. SECRETARY OF STATE FOR JUSTICE AND THE GOVERNOR OF HMP MANCHESTER [2009] EWHC 2220 (Admin), decided on 4 September 2009
Category	4B. Access to Health Services
Nature & Scope of Authority	Binding on the UK Government, subject to appeal.
Facts & Background Law	<ul style="list-style-type: none"> • The claimant was a 27-year-old pre-operative transgender woman serving a life sentence for two violent crimes committed while she was a man. • She was diagnosed with gender dysphoria after incarceration and had begun living as a woman. For safety reasons, she was held separately from the main prison population and could not join prison activities that went towards her release. • The applicant wished to have gender reassignment surgery. Her doctors would not approve the surgery without her living as a woman in the women's prison for a set period of time. • However, the state refused her application to transfer to the women's prison on the basis that she would pose a risk to women prisoners and would have to be segregated for a time. This would have resource implications.

	<ul style="list-style-type: none"> The claimant argued that this decision effectively denied her the chance to access gender reassignment surgery, and so violated her right to respect for her private life under Article 8 of the ECHR.
Issue	Was preventing the claimant from attempting to meet the conditions necessary for her to undergo gender reassignment surgery an unjustified and disproportionate interference in her personal autonomy, in violation of Article 8?
Holding	YES. The continued detention of a pre-operative transgender woman in a male prison breached her right to privacy under Article 8 of the European Court of Human Rights and was unreasonable in the circumstances.
Rule	The right to privacy and personal autonomy includes a right to access health services for the treatment of gender dysphoria, unless the state has very clear and weighty justifications for refusing such access.
Application & Reasoning	<ul style="list-style-type: none"> The Court found that the interference with the Claimant's autonomy was "a significant and a personal one" that went "to the heart of her identity" and was "closely related to her offending behaviour". Article 8 was thus engaged. On that basis, the Court accepted that "economic and prevention of disorder objectives" were legitimate, and that the Secretary of State had "significant latitude" to exercise his discretion in balancing these objectives. However, the decision to refuse the Claimant's transfer and thus her access to surgery had not been made according to the law: <ol style="list-style-type: none"> Arguments about the risk posed by the Claimant did not consider medical opinion that her symptoms would worsen if she was denied the operation. Evidence about the costs of moving the Claimant was unclear and inconsistent, and did not consider costs of keeping her in the men's prison. Accordingly, the justifications were neither clear nor weighty enough to justify an interference "so intimately concerned with the Claimant's autonomy".
Judgment	Decision of the Secretary of State quashed, and a declaration that continued detention in a male prison is in breach of Article 8 of the ECHR.
Notes	

5. VIOLENCE AS RELEVANT FOR SEXUAL HEALTH

Case	ECtHR A V. CROATIA Application no. 55164/08, decided on 14 October 2010
Category	5A. Domestic and Intimate Partner Violence
Nature & Scope of Authority	Binding for Croatia, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> The applicant was a woman who for years had been subjected to serious threats and violence by her (former) husband, a man with serious mental illness and war-related trauma. The applicant had brought numerous proceedings against her ex-husband, and while some protective measures were implemented, most were not. Most sanctions imposed on the husband had not been enforced. Given the circumstances, the applicant and her daughter were forced to live in hiding from the violent ex-husband. The applicant complained that the Croatian state had failed to provide her and her daughter with adequate protection and thereby failed in its positive obligations under Article 8, among other articles (Art. 2, 3 6, 8, 11, 13, and 14).
Issue	Had the authorities failed to fulfill their positive obligation to protect the life of the applicant and her daughter, by not implementing protective measures against the ex-husband?
Holding	YES. The risk to the applicant and her daughter were reasonably foreseeable and the authorities had not done all that could reasonably be expected of them to avoid further risks.
Rule	The Court found that the authorities' failure to implement measures ordered by the domestic courts – both examining and addressing the husband's psychiatric problems, and providing the applicant with protection – left the applicant for a prolonged period in a position in which her right to respect for her private life was breached.
Application & Reasoning	<ul style="list-style-type: none"> The Court noted that the State authorities had a positive obligation to protect the applicant from the violent behaviour of her (former) husband. The Court stressed that the main purpose of imposing criminal sanctions was to restrain and deter the offender from causing further harm. However, those aims could hardly be achieved without the sanctions imposed being enforced. In light of this, the national authorities had failed to implement measures ordered by the national courts, aimed on the one hand at addressing the ex-husband's psychiatric condition, which appeared to have been at the root of his violent behaviour, and on the other hand at providing the applicant with protection against further violence by her former husband. The authorities thus left the applicant for a prolonged period in a position in which they failed to satisfy their positive obligations to ensure her right to respect for her private life, ultimately violating Article 8 of the Convention. On account of alleged violations of Articles 2, 3, 6, 11, 13, and 14 of the Convention, the Court found either the complaints to be incompatible with the provisions of the Convention or inadmissible due to lack of evidence.
Judgment	Violation of article 8 of the Convention
Notes	

Case	ECtHR HAJDUJOVA v. SLOVAKIA Application no. 2660/03, decided on 30 November 2010
Category	5A. Domestic and Intimate Partner Violence
Nature & Scope of Authority	Binding for Slovakia, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> The applicant's violent husband also had serious mental health problems. He had attacked the applicant verbally and physically and threatened to kill her, after which she and her children had moved away from the family home.

	<ul style="list-style-type: none"> • Slovak courts had found the husband guilty of threats, but instead of sentencing the ex-husband to prison had ordered that due to his mental illness he be sent to a hospital for psychiatric treatment. • The applicant's ex-husband had quickly been released from the hospital and had continued to subject the applicant to death threats. • The applicant complained that Slovakia, by failing to comply with the obligation to order that her husband be detained at the psychiatric hospital, had breached its obligations under Article 5 and 8.
Issue	Had the District Court failed to fulfill its positive obligation to protect the security of the applicant and the respect for her private and family life, by not taking action in detaining the ex-husband?
Holding	YES. The District Court did fail to take sufficient measures in response to the ex-husband's behaviour, thus breaching the state's obligation to secure respect for the applicant's private life.
Rule	The state has an obligation of due diligence to assess the threat posed to individuals within their jurisdiction and to take reasonable action within the scope of their powers to prevent violations of the victims' Convention rights.
Application & Reasoning	<ul style="list-style-type: none"> • In respect to Article 8, the Court found that the ex-husband's repeated threats following his release from the hospital, which constitute the basis of the applicant's complaint under Article 8 of the Convention, did not actually materialize into concrete acts of physical violence. • Notwithstanding, the Court considered that given the ex-husband's history of physical abuse and menacing behaviour towards the applicant, any threats made by him would arouse in the applicant a well-founded fear that they might be carried out. This, in the Court's estimation, would be enough to affect her psychological integrity and well-being. • The Court found that the lack of sufficient measures taken by the authorities in reaction to the ex-husband's behaviour, notably the District Court's failure to comply with its statutory obligation to order his detention for psychiatric treatment following his conviction on 7 January 2002, amounted to a breach of the State's positive obligations under Article 8 of the Convention to secure respect for the applicant's private life. • In respect to Article 5, the Court observed that in the following case, the applicant's complaint essentially concerns the authorities' failure to protect her "security of person" by ordering the detention of her ex-husband. The Court found that no such right exists under Article 5 of the Convention and that the concept of security must be understood in the context of physical liberty rather than physical safety.
Judgment	Violation of Article 8 only
Notes	One distinguishing feature is that the husband's violent behaviour that constituted the basis of the applicant's complaint under Article 8 – that is, his behaviour after his release from the hospital – consisted of threats that did not materialize into concrete physical violence. The Court determined that even though the applicant at that stage was not subjected to violence, her fears were well-founded given the husband's history of physical abuse. This fear, the Court concluded, "would be enough to affect her psychological integrity and well-being so as to give rise to an assessment as to compliance by the State with its positive obligations under Article 8 of the Convention."

Case	ECtHR OPUZ V. TURKEY Application no. 33401/02, decided on 9 June 2009
Category	5A. Domestic and Intimate Partner Violence
Nature & Scope of Authority	Binding for Turkey, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • Case alleging failure by the Turkish Government to protect the applicant and her mother from the applicant's husband, resulting in the mother's death. • Turkey had criminalized violence against family members and had a framework for protecting people at risk of violence. • The applicant was a woman who had been subjected to a pattern of escalating violence and abuse towards herself and her mother at the hands of her husband. Violence included beatings, knife attacks, hitting them with a car and eventually shooting and killing the applicant's mother. • The applicant made numerous criminal complaints against her husband and requests for protection from the state. No protection was ever provided. The charges resulted in fines or were dropped after she and her mother withdrew their complaints under duress from the husband. • The applicant alleged that the Turkish authorities had failed to protect the life of her mother in violation of her mother's right to life (Article 2) and failed to protect her from inhuman and degrading treatment or punishment (Article 3), and to equality of legal protection (Article 14). • Turkey argued the applicant had made protection impossible by withdrawing her complaints several times and by not seeking other remedies.
Issue	Had the authorities failed to fulfill their positive obligation to protect the life of the applicant's mother and the bodily integrity of the applicant, by not taking action after complaints had been withdrawn?
Holding	YES. The risk to the applicant and her mother had been reasonably foreseeable and the authorities had not done all that could reasonably be expected of them to avoid the risk.
Rule	The authorities have an obligation of due diligence to assess the threat posed to individuals within their jurisdiction and to take reasonable action within the scope of their powers to prevent violations of the victims' Convention rights, regardless of whether the victims withdrew their complaints against alleged perpetrators.
Application & Reasoning	<ul style="list-style-type: none"> • The Court noted the state had a positive obligation to establish a sufficient legal framework and implementation of that framework to ensure that protection of convention rights is practical and effective, not theoretical or illusory. • In respect to Article 2, the applicant must show "that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual ... from the criminal acts of a third party" and that the authorities did not do all that could be reasonably expected of them to avoid that risk. • In this case, the Court found that, given that the violence had been ongoing, escalating, and repeatedly brought to the attention of the authorities, lethal force had been foreseeable. The legislation and authorities' failure to use available means meant that the criminal law "did not have the adequate deterrent affect capable of" preventing violence towards the applicant's mother. • In respect to Article 3, the Court found that the local authorities had not remained totally passive, but they had not shown "the required diligence to prevent the recurrence of violent attacks against the applicant." • The fact that the applicant and her mother had withdrawn their statements did not absolve the government from ensuring protection to the two from violation of their Convention rights. • Further, the Court found that the "judicial passivity", even unintentional, towards implementing protection provisions mainly affected women, amounted to discrimination on the basis of sex under Article 14 in conjunction with Articles 2 and 3.
Judgment	Finding of a violation of Article 2 and Article 3 of the Convention, together with Article 14,

	and order for payment of 30,000 Euros in non-pecuniary damages plus costs to the applicant.
Notes	The Court reiterated and strengthened its due diligence jurisprudence on intimate partner violence. This was also the first time that Court recognized that the failure to adequately respond to gender-based violence can amount to a violation of Article 14. In so doing, the Court made references to other international instruments and bodies where violence against women have been placed in a context of discrimination against women, notably the Women's Convention (CEDAW), and the Inter-American convention on violence against women, the Belém do Pará Convention.

Case	ECtHR E.S. AND OTHERS v. SLOVAKIA Application no. 8227/04, decided on 15 September 2009
Category	5A. Domestic and Intimate Partner Violence
Nature & Scope of Authority	Binding for Slovakia, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • Case alleging failure by the Slovak Government to address the issue of interim protection measures such as requiring the offending party to leave the joint home in case of domestic violence. • The applicants were a woman and her three children, all of whom had suffered ill-treatment from the husband/father, and one of the daughters had been subjected to sexual abuse by him. • After the first applicant had filed for divorce she filed a criminal complaint against the husband for ill-treatment and abuse of her and her children. Simultaneously she requested that as an interim measure her husband be ordered to move out of the apartment that they held under joint tenancy. • The Slovak courts found that they could not restrict the husband's right to use the property while the divorce proceedings were pending; on appeal the courts contended that in the meantime the applicant could apply for an order "requiring her husband to refrain from inappropriate behaviour." • Instead, the applicants moved away from their home, family and friends. The former husband was later convicted of ill-treatment, violence and sexual abuse, and sentenced to four years' imprisonment. • The applicants claimed that the Slovak authorities' inability to protect them from abuse while the divorce proceedings were pending amounted to a violation of Articles 3 and 8 of the Convention.
Issue	Had the authorities failed to fulfill their positive obligation to protect the applicants from ill-treatment, by not taking action after complaints had been made against the husband and by not removing him from the apartment?
Holding	YES. The risk of further ill-treatment to the applicants had been reasonably foreseeable and the authorities had not done all that could reasonably be expected of them to avoid further abuse from the husband/father. Additionally, the authorities failed to meet the positive obligation to respect the family and private lives of the second, third and fourth applicants.
Rule	The authorities have an obligation of due diligence to assess the threat posed to individuals within their jurisdiction and to take reasonable action within the scope of their powers to prevent violations of the victims' Convention rights.
Application & Reasoning	<ul style="list-style-type: none"> • The Government admitted that the authorities failed to take appropriate measures to protect the second, third and fourth applicants from ill-treatment in violation of Article 3 of the Convention. The Government further admitted that the authorities failed to meet the positive obligation to respect the family and private lives of the second, third and fourth applicants. • The Court therefore found that the respondent State failed to discharge the positive obligation to protect the rights of the second, third and fourth applicants under Articles 3 and 8 of the Convention. • The Court also found that during the period of pending divorce, no effective remedy was open to the first applicant by which she could secure protection for herself and her children against the acts of her former husband. • Consequently, the Court found that the State did not offer the first applicant adequate protection against her former husband, the Court finds the respondent State failed to discharge the positive obligation to protect the rights of the first applicant under Articles 3 and 8 of the Convention.
Judgment	Violation of Articles 3 and 8
Notes	

Statute	Albania Law No. 9669 of 18 December 2006 on measures against violence in family relations
Category	5A. Domestic and Intimate Partner Violence
Nature, Scope & Source of Authority	National law of Albania
History	
Substance	<ul style="list-style-type: none"> • The purpose of the law is to both prevent and reduce domestic violence by appropriate legal measures, and to guarantee protection to family members subject to domestic violence, paying particular attention to children, the disabled and the elderly (Article 1). • Objectives of the law include: the establishment of an institutional framework by coordinating responsible ministries, setting up structures at both central and local levels and empowering the judiciary; and to guarantee “quick, affordable and simple services to victims” (Article 2). • Defines violence broadly as “any act or omission of one person against another, resulting in violation of the physical, moral, psychological, sexual, social and economic integrity,” and domestic violence as against both present or former spouses or cohabiting partners and their close relatives, as well as children, siblings and parents (Article 3). • The lead agency for overseeing implementation is the Ministry of Labor, Social Affairs and Equal Opportunities (Art. 5), with other Ministries of Interior, Health and Justice having line responsibilities for establishing units or services and training the appropriate persons (Art. 7). • All have a common duty, <i>inter alia</i>, to set up structures and nominate responsible individuals, to respond to any complaint filed by a victim or witness to violence and to “utilise reasonable means to protect the victim and prevent ongoing violence” including informing about the law and social services, giving transport to services, and providing police protection in “life endangering cases” (Art. 8). • Articles 10 to 23 establish a scheme for ordering protection orders and emergency protection orders by the family court. • Protection may include, <i>inter alia</i>, orders for the perpetrator to refrain from violence or harassment against, or communication or contact with the victim or other family member, removal of the perpetrator from the residence and forbidding the perpetrator to approach the house or workplace of the victim, moving the victim and children to temporary shelter, police protection, ordering payments of financial support by the perpetrator, or ordering rehabilitation programs (Article 10). • A petition can be filed by the victim, his/her lawyer or the police/ prosecutor, or, in emergencies, by a family member or social services representative. If the petition is filed by the police/prosecutor, the case will not be affected by the victim wishing to drop the case (Art 13). • The petitioner has the right to free legal assistance to prepare a petition for a protection order and is exempt from court taxes and fees (Art 14). • Protection orders must be issued where a person “fears that their security, health or well-being is in danger” from the perpetrator and the court finds “sufficient basis” that the perpetrator may commit “an act of family violence.” (Article 17). An emergency protection order can be sought where the perpetrator also “presents a direct and immediate threat” to the victim or their family members (Article 19). • Both victim and perpetrator have a right to be heard in all cases (Arts. 16 and 18) and to appeal the decision of the court (Art. 21). • After an order is issued, social services and police must “take all necessary steps to ensure immediate and continuous implementation/ execution” of the protection measures ordered (Art. 23).
Notes	Unofficial translation, found through the OSCE Presence in Albania.

Statute	Austria
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	Protection from Violence Act (1997) and the Second Protection from Violence Act (2009) (<i>Bundesgesetz zum Schutz vor Gewalt in der Familie – GeSchG</i> (NR: GP XX RV 252 AB 407 S. 47. BR: 5300 AB 5311 S. 619.), 30 December 1996, and 2. <i>Gewaltschutzgesetzes</i> (BGBl. I Nr. 40/2009))
Category	5A. Domestic and Intimate Partner Violence
Nature, Scope & Source of Authority	Collects provisions from different regulations on, <i>inter alia</i> , eviction and barring orders (Security Police Act), longer term protection orders or temporary injunction (regulated by the Enforcement Code), intervention centers and free counselling services and support to victims, and various criminal law provisions in one comprehensive act. Emphasizes coordination between state agencies.
History	The first Austrian Protection from Violence Act came into force in 1997. It has been amended several times; the last amendment in June 2009 resulted in the Second Protection from Violence Act, further strengthening the protection awarded to victims as well as regulating sexual crimes against minors. Both the first and second Acts are still in force.
Substance	<ul style="list-style-type: none"> • Police can issue a barring order “if a dangerous assault on a person’s life, health or freedom appears imminent.” The order bars a person from approaching the victim and if the threat is to a person in the same household, police can evict the perpetrator and bar him or her from re-entry, regardless of whether s/he owns the home. The order is valid for an initial term of two weeks (Security Police Act). • The decision to issue a barring order is entirely the decision of the police and is regardless of the victim’s wishes. A decision by the victim to re-invite the perpetrator into the home does not affect the barring order for the perpetrator. • The police must without delay inform “intervention centres” of every eviction and barring order. The centres are non-governmental organizations, funded by the Federal Ministries of the Interior and Social Affairs and the Ministry of Women’s Affairs. These centres will pro-actively contact the victim to offer counselling or advice and act as a link between law enforcement, the victim and perpetrator. • A victim who is the subject of a barring order can then apply for a temporary injunction to stop the offender approaching the home or other defined areas, for a fixed period of time. This is entirely the decision of the victim, not the police (under the Enforcement Code). • The Second Protection from Violence Act also introduces a new offence, called Continued Violence over a longer period of time (§ 107b Austrian Penal Code).
Notes	<p>Since 2003, Austria grants unregistered co-habiting same-sex couples the same limited set of rights as unmarried cohabiting opposite-sex couples, suggesting that same-sex partners are included in the scope of protection granted by this law.</p> <p>Neither law exists in English translation.</p>

Case	ECtHR C.R. v. THE UNITED KINGDOM AND S.W. v. THE UNITED KINGDOM Application nos 20166/92 and 20190/92, decided on 22 November, 1995.
Category	5B.1 Sexual Violence (Adults)
Nature & Scope of Authority	Binding for the United Kingdom, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> Two applications for review of convictions for marital rape under the UK Sexual Offences Act 1976, on the basis that they amounted to retroactive prosecutions in violation of Article 7 of the ECHR. English common law of 1736 stated that a man could not be found guilty of raping his wife because she gave general consent to intercourse by the act of marriage. The courts had read significant exceptions into this principle but did not finally declare that rape in marriage was always “unlawful” under the Sexual Offences Act until a 1991 House of Lord’s decision (R v R). The applicant was convicted of rape in marriage on the basis of R v R, even though he committed the acts before 1991. The UK courts said R v R was merely the development of the common law, and further that the immunity was “anachronistic and offensive” and should be abandoned.
Issue	Was the interpretation of the definition of rape under the UK Sexual Offences Act to include rape in marriage reasonably foreseeable by the applicants so that conviction for rape in marriage was not a retroactive prosecution?
Holding	YES. The law had been developing to exclude immunity for marital rape, and the applicant should have foreseen that forcing his wife to have intercourse with him could be considered “unlawful sexual intercourse” under UK law.
Rule	Rape in marriage is against the fundamental principles of dignity and freedom contained in the Convention and so can reasonably be abandoned through judicial interpretation of national law.
Application & Reasoning	<ul style="list-style-type: none"> The Court noted that Article 7 protection against retroactive prosecution was a fundamental right, but did not forbid judicial interpretation of the law nor the law’s adaptation to changing circumstances, as long as the development could be reasonably foreseen. Further, it must be read in light of the whole Convention. In this case, the UK Courts’ decisions had done no more than continue a perceptible line of case-law dismantling immunity for marital rape. This legal development had been sufficiently foreseeable. The Court repeated the British Court of Appeals statement that “a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.” It also noted that abandoning immunity for rape in marriage was in conformity “with a civilized concept of marriage” and with the fundamental principle of “respect for human dignity and freedom” under the ECHR.
Judgment	Applications dismissed.
Notes	

Case	ECtHR M.C. v. BULGARIA Application no. 39272/98, decided on 4 December 2003.
Category	5B.1 Sexual Violence (Adults)
Nature & Scope of Authority	Binding for Bulgaria, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the the Convention.
Facts & Background Law	<ul style="list-style-type: none"> Application for review of Bulgaria’s decision not to proceed with a rape prosecution due to lack of evidence of physical force. The applicant alleged she had been raped by two different men on the same day when she was 14 years old. The two men contended it had been consensual. The forensic report did not indicate violence or resistance. Bulgarian investigators interviewed witnesses but found conflicting versions of the events in question. They then closed the case for insufficient evidence that the

	<p>intercourse was non-consensual.</p> <ul style="list-style-type: none"> The applicant claimed Bulgarian law and practice did not provide effective protection against rape and sexual abuse because only cases in which the victim physically resisted were prosecuted, and further her case had not been investigated adequately. She complained this amounted to a failure to protect her physical integrity (Article 3) and her private life (Article 8).
Issue	Had the Bulgarian rape law, its application in this case, and the investigation “such significant flaws” as to amount to a breach of the state's positive obligations under Articles 3 and 8 of the Convention?
Holding	YES. The test of rape was the non-consent of the victim. The practice of restricting implementation of the law to cases of physical force, and the failure of investigators to consider all circumstances that could demonstrate non-consent, amounted to violations of Bulgaria's positive obligations.
Rule	States must ensure that all non-consensual sex acts, including those not involving physical force and resistance, are effectively investigated and prosecuted.
Application & Reasoning	<ul style="list-style-type: none"> The Court observed that while proof of physical force was historically required in many European countries, the defining feature had now become lack of consent determined by all surrounding circumstances. Thus the Court was persuaded that states were obligated under the convention to prosecute any “non-consensual sex act, including in the absence of physical resistance by the victim.” In this case, Bulgaria was unable to show evidence disproving the applicant's allegations that the law was applied too restrictively and that only cases involving physical force were prosecuted. Further, it found that the numerous flaws in the investigation had been due to a belief that physical resistance was a requirement of the charge, rather than exploring all the facts and surrounding circumstances to determine consent.
Judgment	There was a violation of Bulgaria's positive obligations under Article 3 and Article 8, and the State was to pay the applicant 8,000 Euro in non-pecuniary damages plus costs.
Notes	The Court referred to “the effective protection of the individual's sexual autonomy” as part of positive state obligations under the Convention, suggesting sexual autonomy, while not a right explicitly acknowledged in the Convention, is understood to be part of human dignity and therefore must be protected in the spirit of the Convention.

Case	ECtHR AYDIN V. TURKEY Application no. 23178/94, decided on 25 September 1997.
Category	5B.1 Sexual Violence (Adults)
Nature & Scope of Authority	Binding for Turkey, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> The applicant was a Kurdish woman who, at age 17, was detained by Turkish security forces on suspicion of involvement with the PKK. She alleged that during her detention she was blindfolded, stripped naked, beaten, hosed with pressurized water, and raped. After her release, she filed a complaint and was sent for a medical examination by the prosecution. The prosecution cited a lack of evidence to support her complaint, which did not lead to the filing of charges. Upon complaint to the European Commission on Human Rights, the Commission investigated the case and found the allegations of detention and rape true beyond a reasonable doubt. The applicant claimed, <i>inter alia</i>, that her treatment amounted to torture in violation of Article 3, and that the failure to investigate her complaints effectively amounted to a violation of Article 13 (right to an effective remedy).
Issue	Can rape in detention amount to torture on its own or in conjunction with other forms of ill-treatment?

Holding	YES to both. The accumulation of mental and physical violence, and the especially cruel act of rape amounted to torture in violation of Article 3. In this case, the rape alone would have been sufficient grounds to make such a finding. Further, the state authorities had failed to adequately investigate her case in violation of Article 13.
Rule	Rape of a detainee by security forces can amount to torture.
Application & Reasoning	<ul style="list-style-type: none"> • The Court reaffirmed that the prohibition of torture and inhuman and degrading treatment enshrines a fundamental value of democratic societies. • It stated that the rape of a detainee by an official of the State is an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability of the victim. • Further, rape can leave “deep psychological scars,” as well as causing acute physical pain and likely feelings of violation and debasement, distinguishing it from other kinds of ill-treatment. • Given the age of the applicant, and that she suffered a terrifying and humiliating experience as well as an accumulation of acts of violence, including rape, her treatment amounted to torture. • The failure of authorities to meaningfully investigate the allegations, to corroborate the evidence, or to provide effective medical examinations that considered whether the applicant was raped, not whether she was a virgin, amounted to a failure to provide an adequate remedy.
Judgment	Held there was a violation of Article 3 and Article 13 of the Convention. Turkey to pay the applicant £25,000 in damages plus costs.
Notes	The holding in Aydin has been reaffirmed by the Court in two cases against Russia. Police brutality and rape of a young woman was classified as torture in the first case, and as degrading and inhuman treatment in the second (<i>Menesheva v. Russia</i> , Application no. 59261/00, decided 9 March, 2006, and <i>Maslova and Nalbandov v. Russia</i> , application no. 839/02; decided 24 January, 2008)

Statute	Turkey Criminal Code, Law No. 5237/2004, 26 September 2004 <i>as relevant to sexual violence, honor crimes, age of consent, and virginity testing</i>
Category	5B.1 Sexual Violence (Adults); 5E. Honor Crimes
Nature, Scope & Source of Authority	National law of Turkey.
History	The new 2004 Criminal Code introduced major changes in Turkey's penal law, removing concepts such as ‘morality,’ ‘chastity,’ ‘decency,’ ‘honor,’ ‘shame,’ and ‘public customs,’ introducing higher sentences for sexual crimes, making sexual offenses gender neutral, and classifying these as “crimes against sexual inviolability” instead of “crimes against society/crimes against public morality and family.” In 2005 new amendments clarified the crime of sexual harassment in the home, school or workplace (Amended by Law 5377 dated 29 June 2005 /Article 13)
Substance	<ul style="list-style-type: none"> • The aim of the law is to protect rights and freedom of individuals (Article 1). • Committing an offense “in a state of anger or severe distress” may be grounds for a reduced sentence, only if it was caused by a tort/unjust act (Art. 29). This does not include when a person’s ‘honor’ has been harmed by the act. • Inciting another to commit a crime is subject to the penalty appropriate to the offence committed, and the penalty is increased if incitement was done by “using influence arising from a direct-descendent or direct-antecedent relationship” (Art. 38). • Deliberate killing is sentenced to life imprisonment (Art. 81) and aggravating factors include pre-meditation, killing of a parent, child, spouse or sibling, killing “with the motive of a blood feud” and “with the motive of tradition” (Art. 82(a),(d)(j)(k)). • Sexual assault is defined as where the perpetrator “violates the physical integrity of another person, by means of sexual conduct” and is punishable by between two and seven years imprisonment (Art 102(1)).

	<ul style="list-style-type: none"> • If the assault involves inserting “an organ, or other object” into the body, the crime will be punishable by seven to twelve years imprisonment, and cases of marital rape must also be investigated “subject to a complaint by the victim” (Art 102(2)). If the victim is a minor the sentence is eight to 15 years (Article 103(2)). • The sentence will be increased by half if the offence was committed: <ol style="list-style-type: none"> 1. “against a person who is physically or mentally incapable of defending themselves;” 2. “by misusing the influence derived from a position in public office or a private working relationship;” 3. against a blood relation or relative by marriage; or 4. by using weapons and in cooperation with more than one person (Article 102(3)). • If excessive force and violence greater “than is necessary to suppress the resistance of the victim” is used, the perpetrator will also be punished for “intentional injury” (Article 102(4)). • If the offence results in damage to the victim's physical or mental health, the penalty is a minimum of 10 years (Article 102(5)). • If the offence leads to the victim's death or leaves him/her in a vegetative state, the punishment is “aggravated” life imprisonment (Article 102(6)). • Sexual abuse of children is “any act of a sexual nature against a minor who has not completed fifteen years of age or, though having completed fifteen years, lacks the competence to understand the meaning and consequences of such acts” (Art. 103). • Sexual intercourse with person aged 15-17 years is “sexual intercourse with a minor” punishable by up to two years imprisonment (Art. 104). • Sexual harassment is penalized by a fine or up to two years imprisonment. 2005 amendments clarified that the penalty should increase by half if “these acts are committed by misusing the influence derived from a hierarchical, service, educational/training or a family relationship, or where such acts are committed by taking advantage of working at the same workplace.” The penalty imposed should be a minimum of one year if the victim was forced to quit their job or school or leave her family because of the harassment (Art. 105). • When a person “conducts genital examinations or dispatches a person for such, without a decision of an authorized judge or prosecutor,” this person will be sentenced to prison for up to a year (Art 287).
Notes	<p>Note that not all non-consensual genital examinations have been criminalized and that consensual sexual relations between ages 15 and 18 still are unlawful.</p> <p>Unofficial but partially incorrect translation available online (www.legislationonline.org); here used unofficial but published translation from Vahit Bıçak and Edward Grieves, <i>Mukayeseli Gerekceli, Türkçe-İngilizce, Türk Ceza Kanunu</i> (Turkish-English translation of Turkish Penal Code), Ankara, 2007.</p>

Case	United Kingdom Court of Appeals R. v. OLUGBOJA Decided on 17 June 1981 [1982] Queen's Bench 320, [1981] 3 All England Law Reports 443.
Category	5B.1 Sexual Violence (Adults)
Nature & Scope of Authority	Binding on the lower courts of the United Kingdom.
Facts & Background Law	<ul style="list-style-type: none"> An appeal against a conviction for rape under the Sexual Offences Act 1976, which defines rape as “unlawful sexual intercourse with a woman who at the time of the intercourse did not consent to it.” The defendant argued the statutory definition under the SOA had not changed the common law that a threat of violence to the victim or a close relative is required. Expanding the scope of the definition would invite an increase in rape charges. The defendant had admitted to having sexual intercourse with the complainant, who was 16 at the time. It was accepted that no force, threats or coercion had been used. The victim did not struggle or scream out. The circumstances were that the victim and her friend were promised a ride home but were instead taken to a bungalow in the forest. The defendant's friend raped the victim in the car. Later indoors the defendant said he would “fuck her” and she asked why couldn't he leave her alone. She was crying. But when he asked her to take off her trousers she did so and he pushed her onto the settee and had intercourse with her.
Issue	Is it, to constitute the offence of rape, necessary for the consent of the victim of sexual intercourse to be vitiated by force, the fear of force, or fraud; or is it sufficient to prove that in fact the victim did not consent?
Holding	The statutory definition of rape has changed the common law. Proof of force, threat, or fraud is no longer required to constitute the offence of rape; the touchstone is whether the victim consented to the sexual intercourse.
Rule	Consent is a subjective fact determined by all the circumstances of the case. Force, threats, or fraud may be evidence of lack of consent but are not determinative.
Application & Reasoning	<ul style="list-style-type: none"> Lord Justice Dunn reviewed the legislative history. He found that the drafting advisory group had stated that the common law position on rape was misleading because the test was consent, and lack of consent may exist without use of force or fraud. Accordingly, Dunn LJ found that the statute established a test of: “whether at the time of sexual intercourse did the woman consent to it?” Proof of force, fear or fraud was not necessary although they would usually be present. The jury should focus on the victim's state of mind “immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind.” The victim's state of mind after the act, and apparent acquiescence, does not necessarily indicate consent, which must be given before. Consent is different to submission. “Every consent involves a submission, but it by no means follows that a mere submission involves consent.”
Judgment	Appeal dismissed.
Notes	

Case	United Kingdom Court of Appeals F. v. SECRETARY OF STATE FOR JUSTICE, AND THOMPSON V. SECRETARY OF STATE FOR THE HOME DEPARTMENT Decided 19 December, 2008. High Court of Justice, [2008] EWHC 3170 (QB),
Category	5B.1 Sexual Violence (Adults)
Nature & Scope of Authority	Three-judge bench. Binding in the United Kingdom and Northern Ireland, subject to appeal

	to the House of Lords.
Facts & Background Law	<ul style="list-style-type: none"> • Challenge to the denial of a right to review for two individuals placed on a sex offender's register, on grounds of interference with their right to respect for their private and family life (Article 8 ECHR). • The claimants had been sentenced to terms of imprisonment for sexual offences against children and so were automatically subject to indefinite notification requirements under the Sexual Offences Act 2003. They had to notify police in person of changes to address or residence, and of any overseas travel, and would remain on the so-called Sex Offenders Register for the rest of their lives with no mechanism for review. • Claimant F was 11 years old at the time of the offense, and 16 when this case was decided. He argued that the requirements interfered with his Article 8 rights because, while not punishment, they "would impinge significantly on his ability to lead a normal life without any opportunity for him to establish that he has changed" and that the rationale for notification no longer existed. • Claimant Thompson said he could clearly demonstrate that he posed no measurable risk of reoffending and denial of an opportunity to prove this interfered with his rights. • The UK accepted that the notification requirements and register interfered with the claimants' article 8 rights, but said the interference was necessary to prevent crime and protect the rights and freedoms of others.
Issue	Was the notification requirement and life-long entry in the register proportional to meet the legitimate aims of crime-prevention and protecting others?
Holding	NO. In the specific cases of a young offender and a person who believes he presents no risk of re-offending, the lack of review mechanism was disproportionate.
Rule	"[A]s a matter of principle, an offender is entitled to have the question of whether or not the notification requirement continues to serve a legitimate purpose, determined"
Application & Reasoning	<ul style="list-style-type: none"> • The Court accepted that the automatic indefinite notification requirement was justified and should be continued during the life-time of the offender. • But, in the case of the child F, the Court noted that the common law has consistently approached measures to be applied to children on the basis that their immaturity is of prime importance and that a child "well may change as he or she matures". Accordingly, the absence of a right of review in the case of a young offender is incompatible with Article 8. • In the case of Thompson, while it would be difficult to demonstrate no risk of re-offending, a person who believes himself to be in that position should have an opportunity to seek to establish it.
Judgment	The indefinite nature of the notification requirement was incompatible with Article 8 of the ECHR.
Notes	

Case	ECtHR X. AND Y. v. THE NETHERLANDS Application no. 33401/02, decided on 9 June 2009
Category	5B.2 Sexual Violence and Exploitation of Children
Nature & Scope of Authority	Binding for the Netherlands, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • Challenge to a failure by the state to prosecute the sexual assault of a mentally-disabled woman in breach of its Article 8 obligations. • The age of consent in the Netherlands was 16. The law criminalized sexual intercourse with a person who was "helpless" but only in cases of physical helplessness. Sexual intercourse through "abuse of a dominant position" is also penalized, but only where the victim him or herself signs the complaint (§148). • The applicants were a mentally disabled young woman and her father. The girl was living in a home for the disabled when, after her 16th birthday, a relative of the owner of the home led her to his room and forced sexual intercourse. This event caused the girl "major mental disturbance."

	<ul style="list-style-type: none"> • The father took her to the police and signed a complaint on her behalf because it was accepted that she was unable to do so personally, thus making the case ineligible for prosecution under §148. • The case exposed a gap in the law and prosecutors would not proceed. • The applicants argued that the impossibility of having criminal proceedings instituted was a breach of the state's positive obligations under Article 8 respect for 'private life,' which covers physical and moral integrity. • The Government argued civil remedies were available and further that it was avoiding unacceptable paternalism towards the mentally disabled.
Issue	Was the failure of the Netherlands to provide a remedy in criminal law to the applicant a violation of her right to respect for her private life?
Holding	YES. The case was of such seriousness that the only appropriate remedy was through the criminal law, and so the Netherlands was in breach by not providing it.
Rule	All victims of sexual assault should have an adequate remedy in criminal law.
Application & Reasoning	<ul style="list-style-type: none"> • The Court acknowledged that there are many ways for states to ensure right to respect for private life in accordance with the Convention and that criminal law may not be the only answer. • Still, the civil law remedies offered to the applicants were insufficient. The case involved "fundamental values and essential aspects of private life". Effective deterrence was necessary and it could only be achieved by the criminal law, which is the usual avenue for such cases. • Further, the Netherlands had generally regulated this area through the criminal law; it had only come upon an unforeseen procedural obstacle in this case. • Because the criminal law was unable to protect the applicant, her Article 8 rights had been violated.
Judgment	Holds unanimously there was a violation of Article 8 and the respondent state to pay the applicant 3,000 Dutch Guilders in non-pecuniary damages.
Notes	Note that the Court declined to review the case under the expected provision of inhuman and degrading treatment under Article 3.

Statute	Germany Criminal Code as relevant to sexual violence and exploitation of children
Category	5B.2 Sexual Violence and Exploitation of Children
Nature, Scope & Source of Authority	Federal law; applies to acts committed domestically, on board a German ship or plane, or abroad against a German or internationally recognized legal interest.
History	
Substance	<ul style="list-style-type: none"> • Crimes against Sexual Self-determination are under Chapter 13. • Sexual acts on a person under 16 entrusted to the offender for "upbringing education or care", or on a person under 18 who is the offender's adopted child, is punishable for a maximum of five years (§174). • The age of consent in Germany is 14 years - sexual acts with a person under 14 (a child) is an offence punishable by 6 months to ten years imprisonment (§176(1)). • It is also an offence to induce a child to commit sexual acts on a third person, to commit sexual acts in front of a child, or induce the child to commit sexual acts on his own body (§176(2) and (3)). • "Serious sexual abuse" includes a sexual act with a minor by a person over 18 years; commission of a sexual act by more than one person; a sexual act that places a child in danger, damages his health, or impairs his physical or emotional development; or where the perpetrator has a prior conviction for child sexual abuse. Where the act places the child in danger of death or the offender "seriously physically maltreats the child", the minimum punishment is 5 years (§176a). • Child sexual abuse causing the death of the child at least recklessly must be punished by a minimum of 10 years imprisonment (§176b) • "Sexual abuse of youths" includes where:

	<p>1. A person over 18 abuses a person under 16 by committing a sexual act by exploiting a coercive situation or for compensation, or exploits a coercive situation to make the person commit sexual acts with a third person, punishable with a maximum of 5 years (§182(1))</p> <p>2. A person over 21 commits sexual acts with a person under 16 or induces the person under 16 to commit sexual acts with a third person, thereby exploiting "the person's lack of capacity for sexual self-determination." Punishable by up to 3 years imprisonment (§182(2))</p> <ul style="list-style-type: none"> The court can dispense with punishment in cases of sexual abuse of a youth if it believes that "in consideration of the conduct of the person against whom the act was directed, the wrongfulness of the act is slight." (§182(4))
Notes	Official translation available

Statute	Finland Criminal Code 1889 section 18 (as amended by law 650/2004) as relevant to penalization of child pornography
Category	5B.2 Sexual Violence and Exploitation of Children
Nature, Scope & Source of Authority	National law of Finland. Applies to any offense committed within Finland or within Finland's economic zone, on a Finnish ship or plane.
History	The government proposal establishes that the purpose of the provision is to protect children against harmful activities with an obscene content. For that reason it is limited to photographs and does not extend to painted, drawn or otherwise simulated images. The provision will only be applied to such images if a real child has been the model of the image in a way similar to when a photograph is taken, and the result clearly depicts the child in a sexually offensive way.
Substance	<ul style="list-style-type: none"> Prohibits the manufacture, sale, rental, export, import or otherwise distribution of sexually obscene pictures of children (and also violence and bestiality), punishable by up to two years imprisonment (§18(1)) An exception is made for works of art or works that have been approved by censors (§18(3)). A child is anyone under 18 years of age or a person whose age is unknown but "who can be justifiably assumed to be under 18 years of age" (§18(4)). Aggravating circumstances include distribution of sexually obscene pictures in which (1) the child is particularly young; (2) the picture also depicts severe violence or humiliating treatment of the child; (3) the offence is committed in a methodical manner; (4) the offence has been committed within the framework of a criminal organization. (§18a) Unlawful possession of a photograph, videotape, film or other realistic depiction of a child having sexual intercourse or participating in another obscene act is punishable by a fine or a maximum sentence of one year. (§19)
Notes	Unofficial translation, provided by the Finnish Ministry of Justice

Statute	Norway Act N° 74 of 15 December 1995 (as amended 2004) on the prohibition of genital mutilation
Category	5C Female Genital Mutilation
Nature, Scope & Source of Authority	Applies in Norway and extra-territorially. A person who is a national or resident of Norway and who has performed or aided or abetted in the performance of FGM, will not be exempted from punishment even if the procedure took place abroad.
History	
Substance	<ul style="list-style-type: none"> • Anybody who intentionally performs an operation on a woman's genital organs that damages or permanently changes them will be sentenced to three, six, or eight years of imprisonment, depending on how serious the consequences of the procedure are (§ 1). • Aiding and abetting, as well as reconstruction of the procedure after childbirth will be punished similarly, but the girl or the woman herself will not be penalized. However, consent from the woman or girl in question does not exempt from punishment (§ 1). • Professionals in childcare, education, after-school programs, health professions, social services, and religious organizations who intentionally abstain from trying to assist a person who is in danger of undergoing FGM – e.g. through filing a report – will be punished with a fine or with a short prison sentence (§ 2). • This obligation to report a risk of FGM is in effect regardless of whether the professional has an obligation of confidentiality (§ 2). • The same applies to leaders of a religious community (§ 2).
Notes	In Norwegian

Case	ECtHR BACZKOWSKI AND OTHERS V. POLAND Application no. 1543/06, decided on 3 May 2007
Category	5D. Hate Crimes, Police Brutality and Failure to Respond
Nature & Scope of Authority	Binding for Poland, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • Application for review of a decision by the Mayor of Warsaw denying permission for a march to support gay rights, under Article 11 (right of assembly) of the ECHR. • The applicants represented Polish organizations acting for the benefit of persons of homosexual orientation, who had been denied authorization to assemble on the basis of a fictitious planning requirement. • In a radio interview about the upcoming demonstrations, the Mayor stated he would not allow “public propaganda about homosexuality” and “propaganda about homosexuality is not to the same as exercising one’s freedom of assembly.” • Even though the march did take place without the permission, the applicants claimed that, <i>inter alia</i>, their rights to peaceful assembly, under Article 11, had been infringed, and in a discriminatory manner under Article 14.
Issue	Does the State have a positive duty to protect the right to assemble of unpopular minority groups, as well as a negative duty not to interfere?
Holding	YES. The Government had a positive obligation to protect the right of persons to peacefully assemble, particularly minority groups, by granting permission according to the prescribed law.
Rule	States may have a positive obligation to allow gay-rights demonstrators to march, and to actively protect them from the commission of hate crimes.
Application & Reasoning	<ul style="list-style-type: none"> • In respect to the Article 11 protection of the freedom to assemble, the Court noted that it has given particular weight to values of pluralism, tolerance and broadmindedness in its interpretation of “a democratic society.” • Democracy means a balance must be achieved that “ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.” • The state is the ultimate guarantor of a respect for pluralism and so its role cannot be reduced merely to an obligation not to interfere, for example in the right to freedom of assembly. • There must be positive obligations on the state to ensure the effective enjoyment of these freedoms, particularly “for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.” • The refusal of permission breached the Article 11 positive obligations because it denied demonstrators the presumption of legality, “a vital aspect” of the exercise of the right. This interference was not prescribed by law. • Regarding Article 14 in conjunction with Article 11, the Court held the mayor’s discriminatory public comments, made as permission for the march was being decided, “could have affected the decision-making process . . . and [so] impinged on the applicants’ right to freedom of assembly in a discriminatory manner.”
Judgment	Violations of Articles 11, Article 14 in conjunction with Article 11, and Article 13 (not discussed)
Notes	

Statute	United Kingdom Criminal Justice Act 2003 as relevant to hate crimes based on biases towards a person's sexual orientation
Category	5D. Hate Crimes, Police Brutality and Failure to Respond
Nature, Scope & Source of Authority	National law of the United Kingdom of Britain and Northern Ireland.
History	
Substance	<ul style="list-style-type: none"> • An Act to make provision about criminal justice (including the powers and duties of the police) (Preamble). • Part 12 sets out the “Matters to be taken into account in sentencing” • The court's consideration of the seriousness of an offence will also be affected by evidence of aggravation related to sexual orientation (§146(1)). • Aggravation related to sexual orientation [and disability] will be found where: <ol style="list-style-type: none"> 1. at the time of committing the offence or immediately before doing so, the offender demonstrated toward the victim of the offence hostility based on the sexual orientation (or presumed sexual orientation of the victim); or 2. the offence is motivated (wholly or partly) by hostility towards persons who are of a particular sexual orientation (§146(2)) • The court must treat the fact that the offence was committed in any of those circumstances as an aggravating factor and must state in open court that the offence was so aggravated (§146(3)). • It is immaterial for the purposes of [§146(2)] whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph (§146(4))
Notes	<ul style="list-style-type: none"> • Actual intent to commit the crime <i>because</i> of sexual orientation does not have to be shown; such motivation may be presumed from demonstrated hostility at the time the crime was committed. • The court has no discretion about whether to treat the bias-motivation as an aggravating factor.

Case	Scottish Court of Sessions ANDREI IVANOV V. THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Scottish Court of Sessions, judicial review of a case decided by the Immigration Appeal Tribunal, 31 January 2008, [2008] ScotCS CSOH_15.
Category	5D. Hate Crimes, Police Brutality and Failure to Respond
Nature & Scope of Authority	
Facts & Background Law	<ul style="list-style-type: none"> • Petition for judicial review of an Immigration Appeal Tribunal (IAT) decision, refusing a homosexual asylum applicant leave to appeal denial of his application. • The petitioner was a Moldovan national who claimed asylum in the UK on grounds that he had suffered police harassment and brutality in his home-town as a result of his membership of a particular social group - homosexuals in Moldova. • He recounted that, on holding hands with his partner in public, the police had been called, they had traced him, arrested him and assaulted him, and threatened to kill him and burn down his home if he did not leave the town. They then arrested and assaulted him several more times until finally he left. • The Government refused his application on the basis that sexual orientation was not a legitimate ground for asylum, and it did not find him credible. • On appeal, the IAT held that sexual orientation was a legitimate ground for claiming asylum and believed the petitioner's account. It also found discrimination and criticism against homosexuals in Moldova was "trenchant." But it refused his appeal on the grounds that his treatment did not amount to persecution under Article 3 of the ECHR and he should have moved to another city. • On appeal the petitioner claimed that the IAT had erred in finding that homosexuals could live safely in Moldova, or that it would not be unduly harsh to require him to relocate to another part of Moldova.
Issue	Did the IAT err in law by not finding that requiring the petitioner to move to a different part of Moldova, despite evidence of widespread discrimination against homosexuals, would be "unduly harsh"?
Holding	YES. The IAT made errors of law in its characterization of "unduly harsh" treatment.
Rule	The Court recognized that police brutality and discrimination against homosexuals could amount to a claim for persecution under the Refugee Convention.
Application & Reasoning	<ul style="list-style-type: none"> • The Court reviewed the case-law and noted that the question of internal flight was very complex and the IAT should have given it more consideration. • Further, the test should be whether relocation would be "unduly harsh" not whether he would be subject to persecution. On this basis, the findings of severe criticism and discrimination of homosexuals in Moldova satisfied the test. • Further, the IAT had not considered the affect of the relocation on the petitioner's right to respect for his private and family life under Article 8.
Judgment	The plea of the petitioner granted and a reduction of the IAT's determination decreed.
Notes	

Case	Sweden Swedish Appeals Court (Svea Hovrätt) Case B 4651-02 Decided 31 May 2002
Category	5E. Honor Crimes
Nature & Scope of Authority	
Facts & Background Law	<ul style="list-style-type: none"> • An appeal from the conviction of a father for shooting and killing his 26-year-old daughter for allegedly bringing 'dishonor' to the family. • The family was of Kurdish background. The court found the deceased had been subjected to repeated threats and violence from her father and brother for having adopted a 'western' lifestyle, in particular for having a Swedish boyfriend. As a result she had lived in hiding from her relatives away from her home-town. • The deceased had also become an advocate for the rights of immigrant women in Sweden. She had openly discussed the threats from her family in the media to raise awareness about honor-related violence. • In January 2002, the deceased's father shot her at point blank range and killed her. The father confessed and pleaded guilty to murder. He stated he acted to save his family's honor. • The trial court sentenced the father to life imprisonment on the basis that the way the woman was killed "can be equated with a regular execution." It did not explore the honor motive. • The father then appealed and also withdrew his confession.
Issue	Could the life sentence be confirmed although the accused had withdrawn his confession?
Holding	YES. All evidence, in combination with the fictitious character of the father's new account of what had happened, confirmed that the killing had occurred the way the trial court had established them, rendering the withdrawal of the confession irrelevant.
Rule	
Application & Reasoning	The appeals court concurred in the reasoning of the lower court.
Judgment	Sentence of life imprisonment confirmed.
Notes	Available only in Swedish.

Case	ECtHR RANTSEV v. CYPRUS AND RUSSIA Application no. 25965/04, decided on 7 January 2010.
Category	5F. Sexual Exploitation and Trafficking
Nature & Scope of Authority	Binding for Cyprus and Russia, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • Application by the father of a deceased trafficked woman, alleging that both origin (Russia) and destination (Cyprus) countries had violated the Convention by not preventing trafficking and not adequately investigating this case of trafficking. • The applicant's daughter, Ms Rantseva, had traveled from her home in Russia to Cyprus on an <i>artiste</i> visa obtained by her employer, a cabaret owner. Evidence suggested this was a common means of trafficking women into sexual exploitation. • Ms Rantseva had subsequently died trying to escape from an apartment associated with the cabaret by falling from the balcony. She had been detained in the apartment after fleeing the workplace and then returned to her employer by the police. Criminal investigations concluded her death was an accident but did not interview other women at her workplace, or consider the larger trafficking context. • The applicant alleged Cypriot and Russian authorities had breached their positive obligations to protect his daughter while she was alive, and to investigate and punish those responsible for her death, in violation of Article 2 (right to life), Article 4 (prohibition of slavery and forced labor) and Article 5 (freedom from arbitrary detention).
Issue	Did the Governments of Cyprus and Russia violate their obligations to Ms Rantseva by not protecting her while she was alive and not adequately investigating her death?
Holding	YES. Trafficking is within the scope of slavery or forced labor prohibited by Article 4. While both states had criminalized trafficking, they had not established the legal and administrative structures or trained law enforcement sufficiently to afford practical and effective protection from trafficking.
Rule	In addition to criminalizing trafficking, states must also review immigration and other policies and train law enforcement to ensure that protection from trafficking is real, practical, and effective.
Application & Reasoning	<ul style="list-style-type: none"> • The Court noted that the Article 4 prohibition of slavery is a fundamental and non-derogable obligation of parties to the Convention. Human trafficking “by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership” and thus comes within the scope of Article 4. • Article 4 places positive obligations on states to establish an effective legal framework, provide training to law enforcement, and to afford practical and effective protection from trafficking to persons within a state's jurisdiction. • While it noted that Cyprus had effectively criminalized trafficking, it had nevertheless failed in its positive obligations under Article 4 by: <ol style="list-style-type: none"> 1. maintaining an immigration regime that facilitated trafficking by tying a visa-holder to his or her employer; 2. failure of the police to inquire into Ms Rantseva's circumstances when she was in their custody, and instead returning her to the trafficker. • The Court found Russia also in violation of Article 4, with reference to its failure to investigate how and where Ms Rantseva had been recruited. • The Court also found that: <ol style="list-style-type: none"> 1. Cyprus had violated its procedural obligations to effectively investigate Ms Rantseva's death under Article 2, through numerous flaws in the investigation process. 2. Cyprus had violated its Article 5 obligations by detaining Ms Rantseva at the police station and then handing her into the custody of her employer without basis in law.
Judgment	Holds that Cyprus has violated its obligations under Article 4 and 5 its procedural obligations under Article 2 and is to pay the applicant 40,000 Euros plus costs. Holds that

	Russia has violated its procedural obligations to investigate trafficking under Article 4 and is to pay the applicant 2,000 Euros.
Notes	The Court chose not to explore specifically whether Ms Rantseva had been exploited sexually; in that regard, the Court accepted a notion of trafficking as broader than only for sexual purposes which corresponds with understandings of the phenomenon in international law.

Statute	Council of Europe Convention on Action against Trafficking in Human Beings, Adopted May 16, 2005 Council of Europe Treaty Series – No. 197
Category	5F. Sexual Exploitation and Trafficking
Nature, Scope & Source of Authority	Binding on States Parties. Applies to “all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime.”(Art. 2)
History	Open for signature on May 16, 2005, in force February 1, 2008. Intended to supplement the United Nations Protocol for the Prevention, Suppression and Prosecution of Trafficking in Persons (the Palermo Protocol).
Substance	<ul style="list-style-type: none"> • Purposes of the Convention are to prevent and combat trafficking in human beings, while guaranteeing gender equality; to protect the human rights of the victims of trafficking; to design a framework for protection and assistance, ensuring effective investigation and prosecution; and to promote international cooperation to combat trafficking (Article 1). • Defines human trafficking in accordance with the international definition under the UN Protocol for the Prevention, Suppression and Prosecution of Trafficking in Persons, especially women and children, namely requiring an act (recruitment, transportation etc.), a means (coercion, deception etc), and a purpose of exploitation (Art. 4a). • Child trafficking requires only an act, such as recruitment, for the purpose of exploiting the child; it is not required to prove the means used (Art 4c). • Mandates states parties to undertake prevention programs that are human rights-based and child-sensitive, and to use gender mainstreaming (Art. 5.3). A human rights-based approach is not defined. • Requires states to take measures that discourage “demand that fosters all forms of exploitation”, including research, education and awareness raising (Art 6). • States must strengthen border control and control of travel documents (Arts 7-9), but at the same time individuals who are identified as potentially trafficked must not be removed from the territory until it is confirmed whether they are a victim and provided assistance (Art. 10(1)-(2)) • Unaccompanied children are to be given representation of a legal guardian to act in the best interests of the child, and efforts should be made to contact the child's family if it is in his or her best interest (Art 10(4)). • The private life and identity of victims are to be protected (Art 11). • States are minimally required to provide victims with assistance for physical, psychological and social recovery, <i>inter alia</i>, appropriate and secure accommodation, emergency medical care, translation services, counselling and information and support to have their rights and interests protected during criminal proceedings (Art 12(1)). • States must “take due account of the victim's safety and protection needs” (Art. 12(2)), and in particular during any criminal investigation or prosecution of the perpetrators of trafficking (Art. 28). • Only victims who are lawfully resident within the territory of a Party shall be provided education, training and access to the labor market, and to longer-term medical assistance if they do not have adequate resources (Art 12(3-4)). • Assistance to a victim must not be “conditional on his or her willingness to act as a witness” (Art 12(6)). • Services must be provided on a consensual and informed basis and taking into account the special needs of persons in a vulnerable position and the rights of children (Art. 12(7)). • Victims or suspected victims of trafficking shall be granted a “recovery and reflection period” of at least 30 days during which expulsion cannot be enforced against them. During this period, presumed victims shall be entitled to minimum assistance according to Article 12(1), and safety and protection according to Article 12(2) (Art. 13). • A renewable residence permit must be issued to a victim if the competent

	<p>authority “considers that [the trafficked person's] stay is necessary” either because of his or her personal situation, or for his or her cooperation in the legal process. For child victims, the residence permit shall be issued in accordance with the best interest of the child (Article 14).</p> <ul style="list-style-type: none"> • Repatriation to the country of origin of a trafficking victim shall be conducted “with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary” (Art 16(1)). • The host country must conduct a risk assessment before returning children (Art 16(7)) but not in other cases. • States Parties must make sure that there is a possibility not to impose penalties on trafficking victims for illegal activities in which they have engaged. This is relevant in particular with regard persons trafficked for sexual purposes in countries where sex work is illegal (Article 26).
Notes	<p>Forced repatriation is allowed, though not recommended, under the Convention. It is for the authorities in the host country to assess the victim’s needs, and based on this assessment determine whether a residence permit should be issued. The Convention does not provide any guidance as to what principles this</p>

Statute	Moldova Law on Preventing and Combating Trafficking in Human Beings (<i>Moldova</i>) (No. 241-XVI of 20 October 2005, Official Monitor of the Republic of Moldova no. 164-167/812 of 9 December 2005)
Category	5F. Sexual Exploitation and Trafficking
Nature, Scope & Source of Authority	National law of Moldova. Constituted by the Constitution of the Republic of Moldova, the international treaties to which the Republic of Moldova is a party, the present law, and other normative acts that regulate relationships in this field (Article 3).
History	
Substance	<ul style="list-style-type: none"> • A law to regulate legal relationships concerning: <ol style="list-style-type: none"> 1. a) preventing and combating trafficking in human beings; 2. b) an assistance framework for (a) and for protection and granting assistance to trafficked persons; 3. c) cooperation between government and civil society in preventing and combating trafficking; and 4. d) cooperation with other states and with regional organizations competent in the field (Article 1). • Defines trafficking in accordance with the Council of Europe Convention and U.N. Trafficking Protocol definitions, however defines “exploitation” in more detail as “the abuse of a person in order to obtain profit, namely:” compelling to perform work or service; slavery; compelling to engage in prostitution or to participate in pornographic performances; compelling harvesting of organs or tissues; using a woman as a surrogate mother; abusing children with a view to illegal adoption; compelling to engage in begging etc. (Art. 2) • Establishes basic principles for combating trafficking, including, <i>inter alia</i>, observance of international human rights and fundamental freedoms, acknowledging trafficking as a crime affecting fundamental human rights, dignity and liberty, free access to justice, and holistic use of prevention measures (Art. 4). • Chapter II establishes an institutional framework, including the drafting of a National Plan of Action, establishing a National Committee comprising government, law enforcement and civil society representatives to act as a consultative body, and Territorial Commissions at the local level. • Chapter III provides for extensive protection and assistance to trafficked persons including the ability of NGO's to identify such persons (Art. 15); social rehabilitation to “reintegrate them back into a normal way of life” (Art. 16); establishment of Centers to provide a comprehensive range of legal, health, accommodation and other services (Art. 17); and free medical/legal assistance unconditioned on collaboration with law enforcement agencies (Art. 20). • The private life and identity of the victim of trafficking are to be protected, and disclosure of the above or of state protection measures is prohibited (Art. 21) • Moldovan diplomatic missions are given specific responsibilities to protect the rights and interests of Moldovan citizens who have been trafficked abroad, including providing new documents and repatriating victims for free (Art. 22). • Foreign citizens and stateless persons trafficked to Moldova are guaranteed: assistance in a language they can understand; a reflection period of 30 days during which they will receive free legal, medical and psychological assistance; safe passage to the Moldovan border; and non-refoulement “ if, upon estimating the risk and safety, reasons are found to presume that his/her personal safety or the safety of his/her family will be endangered.” (Art. 24)
Notes	<p>It is unclear from the wording of the law what happens to a foreign victim if they have a lawsuit that has not been terminated within the 30 days and whether this affects expulsion proceedings against a trafficked persons. Note also that the law does not contain any provision for granting a trafficked person permanent residence in Moldova.</p> <p>Excerpts available from www.legislationonline.org; unofficial translation provided by</p>

Case	U.K. Asylum and Immigration Tribunal SB v. SECRETARY OF STATE FOR THE HOME DEPARTMENT Decided 26 November 2007, SB (PSG – Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 00002
Category	5F. Sexual Exploitation and Trafficking
Nature & Scope of Authority	
Facts & Background Law	<ul style="list-style-type: none"> • An appeal against a refusal of a claim for asylum in the United Kingdom by a woman who had been trafficked into the territory. • The appellant was a young woman national of Moldova who had been trafficked into the United Kingdom for sexual exploitation and had then testified against her trafficker (“Z”), resulting in his conviction and imprisonment. It was not contested that the trafficker had since been released, was at large, had a large network in Eastern Europe, and his trafficking operation was still ongoing. • The appellant claimed that she feared harm at the hands of Z, Z's family and Z's associates if she returned to Moldova. She argues that she should be considered a member of a particular social group of women; former victims of trafficking; or former victims of trafficking for sexual exploitation. • The UK accepted that the appellant would be at risk on return to Moldova and that Moldova would provide insufficient protection. But it argued the appellant was not eligible for asylum because she was not a member of any recognized social group under the Refugee Convention. Further, any risk she faces in Moldova would be reprisals for testifying against Z, not because she had been trafficked.
Issue	Was the applicant a member of a particular social group, and would the risk of any future persecution in Moldova be because of such membership?
Holding	YES to both. The applicant was a member of the group of “former victims of trafficking for sexual exploitation” and the demonstrated risk to her safety in Moldova is at least related to her membership of this group.
Rule	The past experience of being trafficked may constitute a basis for a claim for asylum.
Application & Reasoning	<ul style="list-style-type: none"> • The Tribunal gave detailed consideration of the nature of particular social group under the Refugee Convention and the nexus with discrimination. • It concluded that a common background that cannot be changed (such as a past experience) can be considered an immutable characteristic that gives the group a distinct identity in society, and can be the basis for a finding of 'social group'. • The experience of being trafficked for sexual exploitation can be considered a common past experience. “Former victims of trafficking for sexual exploitation” can thus be considered a particular social group for asylum purposes. • In the very specific facts of this case, the applicant's heightened risk of ill-treatment or future acts of persecution in Moldova could be shown to be at least <i>related</i> to her individual past experience of being trafficked i.e. her membership of the particular social group. • Thus the Court held that the causal nexus between the heightened risk and her being a former victim of trafficking was sufficient to support a claim of asylum.
Judgment	Appeal allowed
Notes	

6. ACCESS TO HEALTH SERVICES IN RELATION TO SEX AND SEXUALITY

Case	ECtHR CASE OF TYSIAC v. POLAND Application no. 5410/03, decided 20 March 2007
Category	6A. Abortion and Contraceptives
Nature & Scope of Authority	Binding for Poland, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • Review of a failed criminal case against Polish doctors for refusing to allow the applicant an abortion despite danger to her health, based on her right to respect for her private life under Article 8. • Under Polish law abortion is prohibited except for when the pregnant woman's life or health is in danger, when the foetus is severely malformed, and when the pregnancy was a result of rape. • The applicant was a pregnant woman who suffered from myopia. Three ophthalmologists confirmed that trauma of childbirth could worsen her eyesight, but would not sign a certificate allowing an abortion. Her eyesight worsened dramatically after the birth. • The applicant's complaint against one doctor, alleging grievous bodily harm caused by his refusal, was dismissed. • The applicant submitted that the Government had violated her right to respect for a private life under Article 8, both substantively – as she had been denied a therapeutic abortion – and procedurally, arguing that Poland had not provided her a legal framework to guarantee her rights. • The Government responded that the doctors had made their recommendations in good faith and according to law.
Issue	Was there a <i>real</i> possibility to access a therapeutic abortion under relevant law, and, did the procedure by which this would be decided comply with guarantees under the Convention?
Holding	NO. While in law abortion was available for a person in the applicant's position, in practice it was not a <i>real</i> possibility, and further Poland did not have a framework to review the decisions of doctors.
Rule	A right to access abortion services under national law must be translated into real access, in order for the health of the woman to be preserved.
Application & Reasoning	<ul style="list-style-type: none"> • The Court noted that the issue was not to examine whether the Convention guarantees a right to abortion, but whether women in Poland had the ability to enjoy the protection of Polish laws in practice, namely to obtain an abortion when certain criteria applied. • It reaffirmed that states have certain positive obligations under Article 8. Once the state has decided that therapeutic abortions are legal under certain circumstances, the state must not arrange its legal framework in a way that severely limits the possibilities to obtain such abortion in practice. • Further, procedures must ensure that women can access information about their rights, ensure they can question doctors' conclusions, and be timely. It is not enough for women to be able to retroactively seek disciplinary or criminal proceedings after the birth. • Without considering whether the applicant's health problems were serious enough to qualify her for a therapeutic abortion under Polish law, the Court held that her health fears were not irrational. Further, the procedure in her case had been flawed. • In conclusion, Poland had failed to live up to its positive obligations to secure the right to private life under Article 8.
Judgment	Poland had violated the applicant's right to respect for private life and noting the severe distress and anguish caused to her, the Court ordered Poland to pay a substantial sum in non-pecuniary damages.
Notes	The Court did not discuss the adequacy of the Polish law on access to abortion.

Case	ECtHR A, B AND C v. IRELAND Application no. 25579/05, decided on 16 December 2010. Grand Chamber judgment
Category	6A. Abortion and Contraceptives
Nature & Scope of Authority	Binding for Ireland, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • The restrictive Irish law on abortion was challenged by three women who had travelled to England to terminate their pregnancies on different grounds. The Irish law only allows abortion when the life of the pregnant woman is in danger; not for health and well-being reasons. • Applicant A had suffered from alcoholism, depression and poverty and considered herself unfit to take care of a baby. • Applicant B initially feared an ectopic pregnancy after having taken the ‘morning-after pill’ and, while she knew at the time of travelling to England that this was not the case, she was not prepared to become a single parent. • Applicant C suffered from a rare form of cancer and feared that a pregnancy could cause a relapse and thus be life-threatening to her. • Applicants A and B complained that the prohibition of abortion for health and well-being reasons violated their right to respect for their private life under Article 8, and applicant C that the Irish failure to implement the legal right to an abortion in the case of a risk to the life of the woman violated the same article.
Issue	Was there a <i>real</i> possibility to access medical consultation and litigation options for a legal abortion under relevant law, and, did the procedure by which this would be decided comply with guarantees under the Convention?
Holding	NO. While in law abortion was available for a person in the third applicant’s position, in practice it was not a <i>real</i> possibility, and further Ireland did not have a framework to review the decisions of doctors.
Rule	A right to access abortion services under national law must be translated into real access, in order for the health of the woman to be preserved.
Application & Reasoning	<ul style="list-style-type: none"> • The Court first discussed the case of the first and second applicants. It acknowledged that the Irish law is out of line with the rest of Europe and, thus, that there was an undisputed consensus among Council of Europe states allowing broader access to abortion than under Irish law. • The Court also noted that the restrictive law had had a negative impact on all three applicants. Nevertheless, by referring to the lack of any legal or scientific agreement in Europe about when life begins, and to the fact that the rights of the pregnant woman and the foetus are inextricably linked, the Court decided that the strong consensus among European states was not sufficient to narrow down the broad margin of appreciation afforded states in abortion matters. • In applying the margin of appreciation, the Court noted that the applicants had been able to travel abroad to undergo abortions, and that the Irish law was based on “profound moral values of the Irish people in respect of the life of the unborn.” The Court concluded that a fair balance had been struck between the rights of the pregnant women and the rights invoked on behalf of the unborn. Thus the rights of the first two applicants, A and B, had not been violated. • With regard to C, the Court examined the claimed failure of the Irish state to implement the one exception to the prohibition of abortion: the right to abortion in a case where the woman’s life is in danger. It noted that no criteria had been laid down to interpret this principle, whether in legislation, case law or otherwise, by which to measure or determine the risk to the pregnant woman’s life, meaning that the precise application of the law was uncertain. Since the exception for the right to life of the pregnant woman had been established in case law, but no legal amendments had been made to the criminal provisions prohibiting abortion, these provisions on their face expressed an absolute prohibition. • The Court held it for evident that this legal situation constituted a chilling factor for both women and doctors in the medical consultation process. It also found that the possible recourse to the courts to determine if a woman qualified for abortion under

	<p>Irish law was ineffective and inappropriate.</p> <ul style="list-style-type: none"> The Court concluded that neither the medical consultation nor litigation options constituted effective and accessible procedures allowing the third applicant to determine whether she had a legal right to abortion. Thus, her right to her private life under Article 8 had been effectively violated.
Judgment	Violation of Article 8 for the third applicant only
Notes	<p>The Court's finding that the state has a positive obligation to legislate so that the exception to the prohibition of abortion will become real and not merely theoretical is important. The conclusions about the first two applicants, however, are confusing, and troubling from a health and rights perspective. The Court usually concludes that a strong consensus around a human rights issue in Europe significantly narrows down the margin of appreciation. Here, it found the opposite. In a strongly worded dissenting opinion, six judges expressed their dissatisfaction with this finding. They noted that the majority of the Court had shifted its focus away from the issue of balancing the right to life of the foetus against the right to health and well-being of the pregnant woman – an issue where most European states have determined that the health and well-being of the woman takes precedence. Instead, the majority of Court had focused on the question of when life begins – an issue where indeed a wide margin of appreciation exists. The dissidents called this disregard for the existence of a European consensus on the basis of moral views “a real and dangerous new departure in the Court's case-law.” Indeed, from a health and rights point of view, it is troubling that the Court failed to acknowledge that the woman's right to health and her right to life are inextricably linked, and that in the abortion context it is sometimes virtually impossible to distinguish one from the other. Therefore, a legal regime as strict as the Irish runs the risk to deny all women abortions, whether they seek them on life or health grounds.</p>

Statute	<p>Slovenia Law of 20 April 1977 on Medical Measures to Implement the Right to a Free Decision Regarding the Birth of Children</p>
Category	6A. Access to Abortion and Contraceptives
Nature, Scope & Source of Authority	National law of Slovenia
History	<p>The Slovenian Constitution sets forth Article 55 (Freedom of Choice in Childbearing)</p> <p>(1) Everyone shall be free to decide whether to bear children.</p> <p>(2) The state shall guarantee the opportunities for exercising this freedom and shall create such conditions as will enable parents to decide to bear children.</p>
Substance	<ul style="list-style-type: none"> “Abortion is a medical procedure performed at the request of the pregnant woman, provided that the pregnancy has not lasted more than 10 weeks.” (Article 17) “[Abortion after ten weeks] may be performed at the request of the pregnant woman only if the procedure entails a risk to the woman's life, health or future motherhood that is less than the risk to the woman or the child associated with continuation of the pregnancy or childbirth.” (Art 18). Before ten weeks, the women “shall submit her application for artificial termination of pregnancy, together with the report on the duration of the pregnancy and other medical reports, to the health care establishment which is to perform the artificial termination of pregnancy.” (Art 24) The establishment will refer her to the First Level Commission if it believes there are “medical contraindications” to performing the abortion. (Art 24) “Applications by a woman whose pregnancy is of more than 10 weeks' duration shall be examined by the First Level Commission.” The Commission can refuse the abortion if it does not consider the woman meets the conditions in Article 18. She can then appeal to the Second Level Commission. (Art 25)
Notes	Slovenia does require parental authorization in case the pregnant woman is a minor.

	Unofficial translation found through Harvard School of Public Health
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Statute	Albania Law No. 8045 of 7 December 1995 on the interruption of pregnancy
Category	6A. Access to Abortion and Contraceptives
Nature, Scope & Source of Authority	National law of Albania.
History	
Substance	<ul style="list-style-type: none"> • The law is based on the following principles: (Article 2) <ol style="list-style-type: none"> 1. Abortion should not be considered a method of family planning and health services at all levels “should use family planning services as a means of avoiding unwanted pregnancy.” 2. A woman has a right to accurate information and counseling before an abortion. 3. Abortions allowed under the law “must be effected in safe conditions for the women's health” 4. Women should be provided with medical care for post-abortion complications. 5. “Family planning counselling and service after abortion should be immediate with the view of avoiding unwanted pregnancies.” 6. Abortions are only allowed with the consent of the woman, and in the circumstances allowed under the law. • If a woman asks a doctor about abortion, he or she must inform the woman at the first visit about health risks of abortions, rights of and assistance available for mothers and children including adoption, agencies that can provide moral and financial support, and clinics and hospitals that can perform abortions (Article 4). • Parental authorization for unmarried girls under 16 is required (Article 8). • If the continuation of the pregnancy and/or childbirth would put the woman’s health or life at risk, or if there is an incurable deformation of the fetus, abortion is available at any time with the approval of 3 physicians (Article 9). • “when a woman considers that pregnancy causes psychological and social problems,” abortion on request will be performed up to the end of the twelfth week of pregnancy (Article 10). • Abortion up to 22 weeks is available when the pregnancy is the result of a rape or other sexual crime, or when “other social reasons” are present, with the approval of a commission of three specialists – a doctor, lawyer and social worker (Article 11). • All women's counseling services must provide information and counseling to women requesting abortion (Article 13). • State funding is available for abortions (Article 19).
Notes	Unofficial translation found through Harvard School of Public Health

Case	ECtHR D. v. UNITED KINGDOM Case number 146/1996/767/964, 2 May 1997
Category	6B. Access to STI and HIV/AIDS Services
Nature & Scope of Authority	Binding for the United Kingdom of Great Britain and Northern Ireland, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • Review of an administrative decision to remove an HIV-positive non-citizen to his place of origin where he had no accommodation, family, moral or financial support, and no access to adequate medical treatment • he applicant was a citizen of St. Kitts imprisoned upon entry into the UK for trafficking cocaine. While in prison he was found to be HIV-positive. After his release, immigration officers stated its intention to remove him. • Expert evidence demonstrated that due to the seriousness of his condition and the lack of health services in St. Kitts, removal would hasten his death. • At the time of the Courts deliberation, the applicant was in the last stages of AIDS and was confined to hospital. • The Applicant challenged the proposed removal on grounds, <i>inter alia</i>, that it would violate his rights under Article 3 to not be sent to a place where he would be subjected to inhuman and degrading treatment. • The UK undertook not to remove the applicant if he was unfit to travel, but argued such removal would not violate the Convention because the conditions he complained of were not due to any inhuman or degrading treatment by St. Kitts, merely his own illness and the poor state of healthcare in a developing country.
Issue	Would the removal of a person in the last stages of AIDS to a place where he would have no access to treatment, to accommodation or care amount to a violation of Article 3 of the Convention?
Holding	YES. The conditions that the applicant would experience in his home country, in combination with his very serious state of health, were so exceptional that they would amount to inhuman and degrading treatment, thus Article 3 prohibits the UK from removing him.
Rule	In exceptional cases, the removal of an HIV-positive person to a place where he will not have access to appropriate medical services can amount to a violation of the expelling state's Article 3 obligations.
Application & Reasoning	<ul style="list-style-type: none"> • The Court emphasized that states have the right to control the entry, residence and expulsion of aliens into their territories, and that, given the difficulties faced by States in controlling the harm caused by drug trafficking, the expulsion of alien drug couriers is a “justified response to this scourge”. • However, the right to expel is limited by the Article 3 obligation not to expel a person who would be subject to torture, inhuman or degrading treatment, and this “is irrespective of the reprehensible nature” of the person's conduct. • The Court found that Article 3 did not limit it to considering threats of inhuman and degrading conduct intentionally inflicted by public authorities, but for other contexts it “must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State.” • In this case, given the advanced stage of the applicant's illness, and given that the proposal was to remove him to a place where he would have no access to healthcare or any support network and so “would entail the most dramatic consequences for him,” the circumstances were determined to be sufficiently exceptional to justify a finding that his removal would violate Article 3.
Judgment	The implementation of the removal decision would violate the Applicant's rights under Article 3. The UK to pay the applicant, within three months, £35,000 in respect of costs

	and expenses less 33,216 French francs he had received in legal aid.
Notes	The Court has in later jurisprudence maintained that the bar is very high for finding a violation of Article 3 by expelling an HIV-infected person to a country where he or she cannot expect the same level of treatment as in the host country.

Statute	United Kingdom Disability Discrimination Act (DDA) 1995 as amended in 2005
Category	6B. Access to STI and HIV/AIDS Services
Nature, Scope & Source of Authority	Law applicable in England, Wales, Scotland and Northern Ireland. DDA obligations apply to a wide range of actors, including employers, trade organizations, occupational pension schemes, insurance services, and public providers of services, including goods and facilities.
History	The DDA was first passed in 1995 aiming to end discrimination against people on account of their disability. This Act has been significantly extended, including by the Disability Discrimination Act 2005, which specifically included HIV/AIDS infection in the definition of disability.
Substance	<ul style="list-style-type: none"> • “An Act to make it unlawful to discriminate against disabled persons in connection with employment, the provision of goods, facilities and services or the disposal or management of premises; to make provision about the employment of disabled persons; and to establish a National Disability Council.” (Preamble) • “A person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.” (Section 1(a)) • A person who has cancer, HIV infection or multiple sclerosis is to be deemed to have a disability, and hence to be a disabled person. HIV infection is to be interpreted as meaning “infection by a virus capable of causing the Acquired Immune Deficiency Syndrome”. (Schedule 1, sections 6A(1) and 9) • Providers of public services in the UK have a negative obligation to refrain from discriminating against a disabled person in (Section 19): “refusing to provide, or deliberately not providing ... any service which he provides, or is prepared to provide, to members of the public; failing to comply with any duty imposed on him [to take steps to ensure access by disabled persons to services] in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service; the standard of service which he provides ... or the manner in which he provides it to him; or in the terms on which he provides a service to the disabled person.” • A person discriminates if “for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and he cannot show that the treatment in question is justified” (Section 20(1)) • Service-providers also have a positive obligation to “take such steps as it is reasonable, in all the circumstances of the case, for [the provider] to have to take in order to change that practice, policy or procedure so that it no longer” makes it impossible or unreasonably difficult for a disabled person to make use of that service. (Section 21)
Notes	Health services are not specifically mentioned in the above sections, but they have been held to come within the definition of public services. In 2009 the DDA was used to challenge discrimination against an HIV-positive person by National Health Service

	in Northern Ireland for refusing to give him an endoscopy on the basis of his HIV-status.
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7. EDUCATION, INFORMATION, AND EXPRESSION RELATED TO SEX AND SEXUALITY

Case	ECtHR KJELDSEN, BUSK MADSEN AND PEDERSON v. KINGDOM OF DENMARK Applications no. 5095/71; 5920/72; 5926/72, decided on 7 December 1976
Category	7A. Sexuality Information and Education
Nature & Scope of Authority	Binding for Denmark, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • An application by three sets of parents of school-age children challenging the introduction of compulsory sexuality education in Danish state-run schools. • The introduction was made by a 1970 amendment to the Schools Act which provided sexuality education according to a child's age and maturity. • The Applicants claimed that obligatory sexuality education was contrary to their beliefs as Christian parents, and constituted a violation of Protocol No. 1 (P1) to the ECHR, Article 2, which states that, in guaranteeing the right of all persons to education, the State shall "respect the rights of parents to ensure [that] education and teaching [will be] in conformity with their own religious and philosophical convictions."
Issue	Did the introduction of compulsory sex education in State primary schools by the 1970 law violate parents' rights under the Convention?
Holding	NO. The disputed legislation did not offend the applicants' religious or philosophical convictions to the extent forbidden in Article 2 of P1.
Rule	The State can provide information about sexual matters to children as long as it does so in an objective and pluralistic manner and does not attempt to indoctrinate students with particular views about sexual behavior.
Application & Reasoning	<ul style="list-style-type: none"> • The Court noted that Article 2 was drafted to safeguard the possibility of pluralism in education necessary for a democratic society. • The relevant article must be read in light of the overall rights of both parents and children to education, to respect for private and family life (Art. 8), to freedom of thought, conscience and religion (Art. 9) and to freedom to receive and impart information and ideas (Art. 10). • This means that while the State has the competence to set and plan the curriculum including directly or indirectly religious or philosophical content, parents have a right to ensure the State does not "pursue an aim of indoctrination". • Any information given by the State must be "conveyed in an objective, critical and pluralistic manner." This right of parents applies to all aspects of the curriculum, not only matters of religious instruction. • The Danish compulsory sexuality education was aimed at informing students about sexual matters "correctly, precisely, objectively, and scientifically." It in "no way amount[ed] to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour."
Judgment	No breach of Article 2 of Protocol No.1.
Notes	

Case	ECtHR CASE OF OPEN DOOR AND DUBLIN WELL WOMAN v. IRELAND Applications no 14234/88 and 14235/88, decided on 29 October 1992
Category	7A. Sexuality Information and Education
Nature & Scope of Authority	Binding for Ireland, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • A challenge by two women's health non-profits to a court-ordered injunction restraining them from "counselling or assisting pregnant women within [Ireland] to obtain further advice on abortion or to obtain an abortion" outside of the country. • The Irish Constitution acknowledges "the right to life of the unborn." Abortion is prohibited in Ireland, as was at the time the provision of information advocating abortion or any method or treatment for procuring an abortion elsewhere. • The applicants, as part of their general counseling services for pregnant women, include abortion as an option and provided referrals to abortion clinics in the UK. In some cases it arranged the travel of the woman to the UK for the abortion. • The applicants complained that the injunction violated their right to impart information under Article 10 of the Convention. • The Government accepted the restriction interfered with Article 10 rights, but argued it was necessary to protect the right to life of the unborn.
Issue	Was the restriction on the freedom to impart information to pregnant women about abortion services necessary in a democratic society for the legitimate aim of the protection of morals?
Holding	NO. The injunction was disproportionate to the aims pursued and, accordingly, the interference with the applicants' rights to impart information was not necessary in a democratic society.
Rule	Restriction of information about abortion services may in certain circumstances violate the right to impart information under Article 10.
Application & Reasoning	<ul style="list-style-type: none"> • The Court accepted that the injunction was allowable under Irish law and that it had a legitimate aim of protecting morals, which in Ireland included protection of the life of the unborn. • However, it noted that the Irish Courts' ability to meet that aim was not "unfettered and unreviewable;" under the Convention their decisions must be necessary and proportionate. • In this case, the Court "was struck by the absolute nature" of the injunction and the "perpetual restraint" on the ability to provide information to pregnant women, regardless of their age, health or reasons for seeking the information. • The injunction was also found to be over-broad and disproportionate because: <ol style="list-style-type: none"> 1. The applicant organizations neither advocated nor encouraged abortion, but simply gave women options. 2. It was not illegal for a pregnant woman to travel to another country to have an abortion, and information about this option was in the public domain. 3. The injunction posed a risk to health of women who did not have the resources to find the information by other means, or were seeking later-stage abortions through lack of counseling. .
Judgment	A breach of Article 10. Ireland ordered to pay Applicants' costs and expenses and IR£25,000 to be paid to Dublin Well Woman in respect of damages.
Notes	<p>The Court refrained from deciding whether "others" under Art 10-2 of the Convention includes the unborn, whether the right to life includes the rights of the unborn, or whether women have a right to an abortion.</p> <p>In 1995 Ireland passed the <u>Regulation of Information (Services outside the State for the Termination of Pregnancies) Act 1995</u>, which under certain circumstances makes it legal to provide information in Ireland about abortion services abroad.</p>

Statute	Portugal
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	Law No. 60/2009 of 6 August 2009, establishing a system of sexual education in schools (Lei n.º 60/2009, de 6 de Agosto, Estabelece o regime de aplicação da educação sexual em meio escolar)
Category	7A. Sexuality Information and Education
Nature, Scope & Source of Authority	National law of Portugal. Applies to both primary and secondary schools, and to schools in the state-run, private, and professional education systems (Article 1)
History	
Substance	<ul style="list-style-type: none"> • Establishes that the objectives of sexual education are: (Article 2): <ol style="list-style-type: none"> 1. Giving positive value to sexuality and affection between persons as part of their individual development, respecting the pluralism of the Portuguese society; 2. Developing skills in young people that enable them to make informed and safe choices in the field of sexuality; 3. Improving emotional and sexual relationships of young people; 4. Reducing negative consequences of sexual behavior, like unwanted pregnancy and sexually transmitted infections; 5. [Developing] the capacity for protection against all forms of exploitation and abuse; 6. Respecting difference and in particular different sexual orientations; 7. Giving positive value to an informed and responsible sexuality; 8. Promoting gender equality; 9. Recognizing the importance of participation in educational processes of parents, students, teachers and health professionals; 10. Understanding scientifically the functioning of biological reproductive mechanisms; 11. Eliminating behaviors based on sex discrimination or violence based on gender or sexual orientation (Article 2) • Sexuality education is to be incorporated into general health education and in secondary schools mainstreamed into other areas (Article 3). The relevant government authority will set the specific curriculum guidelines suitable for each level of education (Article 4). • Every school must designate a teacher-coordinator of health and sexuality education, who will coordinate an interdisciplinary team of other teachers (Article 8). • At the beginning of each year, the head teacher, the specialist health and sex education teacher, and other teachers involved in sex education, will decide on content, themes, field-visits and guests for teaching sex education. (Article 7) • Schools can also partner with local community health services (Article 9) • Schools are also required to establish an “office of information and support”, housed within the school and open at least one morning and one afternoon a week, to direct students to further health and sexuality information and provide contraceptive protection (Article 10). • Parents, students and their representative structures must take an active role in the pursuit and achievement of the purposes of this Act (Article 11).
Notes	Only in Portuguese.

Case	United Kingdom House of Lords GILLICK v. WEST NORFOLK AND WISBECK AREA HEALTH AUTHORITY House of Lords, [1986] 1 AC 112, [1985] 3 All ER 402, decided on 17 October 1985
Category	7A. Sexuality Information and Education
Nature & Scope of Authority	Highest judicial authority in the United Kingdom.
Facts & Background Law	<ul style="list-style-type: none"> • An appeal from a failed challenge by a mother of five daughters under the age of 16 to a government Memorandum allowing doctors to prescribe contraception to girls under 16 without parental consent.

	<ul style="list-style-type: none"> • The Memorandum encouraged doctors “to persuade the child to involve the parent or guardian” but noted it would not be possible in “exceptional circumstances”, for example if the child lived away from their parents, or the parents were “unconcerned, entirely unresponsive, or grossly disturbed.” • The Department argued that the Memorandum was based on the principle of doctor-patient confidentiality and that if this was not respected for “young people”, they might not seek medical advice at all. • The appellant argued that the Memorandum was unlawful because (i) a child under 16 does not have legal capacity to consent (ii) it interferes with her parental rights and ability to properly discharge her duties.
Issue	Can a doctor lawfully prescribe contraception for a girl under 16 years of age without the consent of her parents?
Holding	YES. A doctor can prescribe contraceptives to a minor without her parent's consent if the doctor believes it best for the welfare of the particular child in all the circumstances, and the child is of a sufficient understanding and intelligence to legally consent.
Rule	Under-aged women in certain circumstances have a right to information about contraceptives, and to be prescribed contraceptives, even when their parents may object.
Application & Reasoning	<ul style="list-style-type: none"> • Regarding capacity to consent, the Court noted that children often consent to various medical treatments, and have the power to make contracts and give evidence under oath. Thus a girl under 16 did not lack legal capacity to consent to advice and treatment “merely by reason of her age”, if she has “sufficient understanding and intelligence to make up [her] own mind”. • On parental rights, the Court noted that times were changing, and that the changing status of women and availability of contraceptives raised new questions. However, it found that parental rights had never been absolute – they derived only from parents' duty to protect their children, and yielded as the child gained maturity. • The guiding principle is “what is best for the welfare of the particular child.” In most cases parents will be the best judge, and a doctor should always try and persuade the child to involve her parents. • However, in unusual circumstances the doctor may be the better judge of what is best for the child. Parents then do not have a right of absolute veto over advice and provision of contraceptives.
Judgment	Appeal dismissed
Notes	

Case	EComHR SCHERER V. SWITZERLAND No. 17116/90, report of 14 January 1993; Court no. 19/1993/414/493, decided on 23 March 1994, <i>struck out of the list</i> .
Category	7B. Sexual Expression
Nature & Scope of Authority	Binding for Switzerland, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • A challenge to a conviction by a Swiss Courts for a commercial but limited showing of a pornographic film to adults, on grounds of interference with freedom of expression (Article 10). • The applicant was an owner of a sex shop for homosexuals in Zürich, where he sold magazines, books, and videos. The nature of the shop was not discernible to passers-by, but customers knew of it through specialist magazines and friends. • In the back of the shop the applicant showed films. These were not advertised, and customers learned about them by word of mouth. • In 1983 the shop was searched and a film confiscated after a showing of the film for nine paying customers. The film consisted almost entirely of sexual acts. • The applicant was found guilty of ‘publishing obscene items’ under Swiss penal law.
Issue	Was the interference with the applicant's right to free expression in displaying a film to a limited number of consenting adults, without risk that others would unintentionally see the

	film, justified for the protection of public morals?
Holding	NO. Given the very low risk that the film would be public and that minors and adults would unintentionally see the film, the conviction of the applicant in this case was disproportionate to the aim of protecting public morals.
Rule	Individuals have a right to expression of sex-related material, even for commercial gain, as long as it is expressed in a way that protects minors and individuals who do not intend to view the material from being confronted by it.
Application & Reasoning	<ul style="list-style-type: none"> • The Commission accepted that protection of morals was a legitimate objective, but this case did not concern the protection of morals in Swiss society in general; minors could not access the film, and adults were not in danger of being confronted with the film without being aware of the subject matter and intending to see it. • For the government to interfere with the applicant's right to free expression in these circumstances, it must have a particularly compelling reason. No such reason was demonstrated. • Thus, the applicant's conviction did not correspond to a "pressing social need." The interference was disproportionate to the aim pursued, and could not be considered necessary in a democratic society.
Judgment	A violation of Article 10
Notes	The Commission referred the case to the Court, but it was struck out of the list from the Court due to the applicant's death in 1992.

Statute	Sweden Swedish Penal Code As relevant to sexual expression
Category	7B. Sexual Expression
Nature, Scope & Source of Authority	National law in Sweden
History	
Substance	<p>The Penal Code contains, in addition to prohibition of child pornography, an offense of 'unlawful exhibition of pornographic pictures,' which requires both that the exhibition is public, and that it typically has a disturbing effect:</p> <p>"A person who, on or at a public place, exhibits pornographic pictures by means of displays or other similar procedure in a manner which is apt to result in public annoyance, shall be sentenced for <i>unlawful exhibition of pornographic pictures</i> to a fine or imprisonment for at most six months. This also applies to a person who sends through the mail to or otherwise furnishes another with unsolicited pornographic pictures." (Law 1970:225) (Chapter 16, Section 11; emphasis in original)</p>
Notes	Official translation.

Case	ECtHR ALEKSEYEV v. RUSSIA Application nos. 4916/07, 25924/08, and 14599/09, decided on 21 October 2010
Category	7B. Sexual Expression
Nature & Scope of Authority	Binding for Russia, Art 46(1) of the European Convention of Human Rights. Moral authority for other States parties to the Convention.
Facts & Background Law	<ul style="list-style-type: none"> • The applicant was an organizer of several marches pickets in Moscow, from March 2006 through June 2008, drawing attention to the discrimination of gays and lesbians and promoting tolerance. • The applicant had repeatedly been refused the right to hold the marches by the Moscow mayor's office, which had made reference to the need to protect public order, health, and morals. • The applicant contended that these repeated bans violated his right to assembly and association, and that the bans had been discriminatory on the basis of his and other participants' sexual orientation, citing violations under Articles 11, 13, and 14 of the Convention.
Issue	Was the interference with the applicant's right to peaceful assembly in organizing a gay pride march, his lack of an effective remedy to contest the alleged violation of his freedom of assembly, and his discrimination on the grounds of sexual orientation, all justified for the protection of health, morals, and the rights and freedoms of others?
Holding	NO. Given the peaceful nature of the march and picket, and the public discriminatory statements by the Mayor of Moscow, the ruling against the applicant in this case was irrelevant to the aim of protecting public health and morals.
Rule	Individuals have a right to peaceful assembly, to proper recourse in order to appeal rulings, and protections against discrimination based on sexual orientation.
Application & Reasoning	<ul style="list-style-type: none"> • The Court reiterated that the right to peaceful assembly and association by a minority group could not be conditional on its acceptance by the majority, and that there is a long-standing European consensus on certain fundamental rights for homosexuals. • In regards to Article 11, the Court reiterated that any decision restricting the exercise of freedom of assembly must be based on an acceptable assessment of the relevant facts. The only factor taken into account by the Moscow authorities was the public opposition to the event, and the officials' own views on morals. • The Court further stressed that it is "it is only through fair and public debate that society may address such complex issues" as gay rights. Consequently, the applicant's right to assembly and association under Article 11 had been violated. • In regards to Article 13, the Court reiterated that, bearing in mind that the timing of public events was crucial for the organisers and participants, and provided that the organisers had given timely notice to the competent authorities, the notion of an effective remedy implied the possibility of obtaining a ruling concerning the authorisation of the event before the time at which it is intended to take place • Consequently, the Court found that the applicant had been denied an effective domestic remedy in respect of his complaint concerning a breach of his freedom of assembly,

	<p>thus concluding that there had been a violation of Article 13 in conjunction with Article 11 of the Convention.</p> <ul style="list-style-type: none"> • With regard to Article 14, the Court could not disregard the strong personal opinions publicly expressed by the mayor of Moscow and the undeniable link between those statements and the ban. In the light of those findings the Court considered that the applicant suffered discrimination on the grounds of his sexual orientation and that of other participants in the proposed events, clearly violating Article 14 in conjunction with Article 11 of the Convention.
Judgment	Violation of Article 11, as well as Articles 13 and 14 in conjunction with Article 11
Notes	

8. SEX WORK

Case	ECJ 115 AND 116/81, ADOUI AND CORNUAILLE V. BELGIAN STATE [1982] 3 CMLR 631, decided on 18 May 1982
Category	8. Sex Work
Nature & Scope of Authority	Ruling is binding on the referring Belgian national court and any other national court in the EU before which a problem of the same nature is raised.
Facts & Background Law	<ul style="list-style-type: none"> • A request by a Belgian Court for a preliminary ruling on the public policy exception to the free movement of people under EC law. • The EEC Treaty “ensures the free movement of workers” within the Community, but allows states to make an exception on the basis of “public policy, public safety and public health” (former Art 46, now Art 56). • The main proceedings involved a challenge by two French women to the refusal of their applications for residence in Belgium. The refusal to issue the permits was made was on the grounds that their conduct was considered contrary to public policy by virtue of the fact they worked as “waitresses in a bar which was suspect from the point of view of morals.” • In Belgium, prostitution as such was (and is) not prohibited, though certain activities linked with prostitution were illegal.
Issue	Whether an EC member state could rely on public policy grounds in EC law for expelling sex workers from its territory, if sex work was not an illegal activity in that territory.
Holding	NO. EC governments can only use the power of expulsion on public policy grounds for conduct that poses a serious threat to the territory, and the same standards of conduct must be applied to nationals as to non-nationals.
Rule	Sex workers will have the same benefits of free movement and non-discrimination as other workers in the EC as long as prostitution is not prohibited conduct in the territory in which they wish to reside.
Application & Reasoning	<ul style="list-style-type: none"> • The Court accepted that the exceptions allow EC governments to take measures against foreign nationals that they cannot take against their own citizens; namely expulsion. • But power of expulsion on public policy grounds must not be used to create an “arbitrary distinction” between acceptable conduct for nationals and non-nationals. • Further, while Community law does not impose “a uniform scale of values” about what is contrary to public policy, the matter must be “a genuine and sufficiently serious threat affecting one of the fundamental interests of society.” • Conduct cannot be considered so serious a threat as to deny residence, if the state has not adopted repressive or otherwise genuine and effective measures against the conduct on part of <i>its own nationals</i>. • Finally, the assessment of threat must be made on an individual basis based on each applicant's personal conduct. It is not acceptable for states to have a blanket refusal policy based on guilt by association. In this case systematic expulsion on the assumption that sex work is linked to criminal activity, cannot be accepted.
Judgment	This was an interlocutory step in the main proceedings, decisions on costs were for the Belgian Court.
Notes	The Court did not state that sex work should be legal, nor did it explicitly characterize it as ‘work’ or rule that sex work should <i>not</i> be considered as against public policy, but it did discuss the case in the context of ‘free movement of workers’.

Statute	Germany Act Regulating the Legal Situation of Prostitutes 2001 [Prostitution Act] Prostitutionsgesetz vom 20. Dezember 2001 (BGBl. I S. 3983),
Category	8. Sex Work
Nature, Scope & Source of Authority	A federal law, and thus limited in scope. It does not include provisions on licensing, registering, or health requirements or protection of public safety because these matters fall under the jurisdiction of Germany's federal states.
History	Passed on 20 December 2001, in force since 1 January 2002. Before 2002, providing sexual services in exchange for payment as such was not illegal, but the activity was heavily restricted by legal regulations on activities surrounding prostitution. Contracts between a prostitute and a client or a pimp were unenforceable as they were deemed "immoral" and thus had no legal status.
Substance	<ul style="list-style-type: none"> • A law regulating the contractual relationship between the prostitute and her or his client, on the one hand, and between the prostitute and the pimp/brothel owner, on the other. • The explanatory Memorandum to the Act explains that the "goals and expectations" were to improve the legal status of prostitutes; to abolish social discrimination against prostitutes; to abolish poor working conditions in the sex industry; to eliminate the basis for criminal activities that often surround prostitution; and to make it easier than previously to exit prostitution for those who wish to do so. • When sexual activities have been undertaken in return for previously established remuneration, this creates an enforceable right to payment. (Art. 1) <ol style="list-style-type: none"> 1. After rendering a sexual service, the prostitute has an enforceable right to claim payment from her client (1st sentence); 2. A prostitute can claim payment of previously agreed remuneration from a brothel operator if she was present in the establishment and available for performance of sexual acts for a specific period of time (2nd sentence). 3. Implicit in Article 1 is that clients and brothel owners/managers do not have the right to demand that a (specific) sexual service be performed. • Only prostitutes themselves have the right to take action against clients to enforce payment. (Article 2) • Prostitutes and brothel operators can agree on an employer/employee relationship. Prostitutes can then access the statutory social insurance scheme which gives the right to health insurance and pension funds. (Article 3) • Article 3 implies that, even as employees, prostitutes should retain a high degree of autonomy (<i>inter alia</i> regarding to choice of client, type of service).
Notes	After the Act was passed, the Criminal Code was amended to decriminalize the act of 'promoting prostitution.' Pimping is now a criminal offence only if it includes exploitation, or if it in any way impairs the prostitute's personal or economic independence (Article 181a of the German Criminal Code).

	Only available in German.
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Statute	Sweden Penal Code as relevant to the purchase of sexual services
Category	8. Sex Work
Nature, Scope & Source of Authority	Applicable throughout Sweden.
History	Sweden was the first country to penalize only the purchase of sexual services, thus criminalizing the client instead of the sex worker. In 1999, the Act (1998:408) that Prohibits the Purchase of Sexual Services was passed, as part of a larger package of laws on violence against women. In the 2005, through <u>Act 2005:90 on Amendments to the Penal Code</u> , the law was repealed and the same provision was instead introduced in the general Penal Code under Chapter 6, "On sexual crimes."
Substance	<ul style="list-style-type: none"> • "A person who, otherwise than as previously provided in this Chapter, obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most six months. The provision ... also applies if the payment was promised or given by another person." (Chapter 6 §11, emphasis in original) • "Promot[ing] or improperly financially exploit[ing] a person's engagement in casual sexual relations in return for payment" may render up to four years imprisonment (Chapter 6 § 12, 1-2 sentence). • Gross procuring, punishable with up to eight years in prison, involves large-scale activity, significant financial gain, or "ruthless exploitation of another person" (Chapter 6 § 12, 3 sentence) • Attempt is criminalized in accordance with general legal principles. • The wording of the law is gender-neutral (penalizing both women and men clients, buying sex from male and female sex workers). • 'Sexual relation' refers primarily to sexual intercourse, but other forms of sexual interaction are also included in the scope of the law. • 'Payment' includes both economic and non-economic reward, such as narcotics or alcohol. • Normal criminal law principles on aiding and abetting do not apply to the prostitute; thus, she cannot be found an accomplice to the criminal offense committed by the client.
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