Sexual Health and Human Rights in the European Region
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Sexual Health and Human Rights in the European Region

Johanna Westeson

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INTRODUCTION

A. WHO PROJECT ON SEXUAL HEALTH AND HUMAN RIGHTS

This report constitutes the European section of a large global project on sexual health and human rights, commissioned by the World Health Organization (WHO). The aim of the global WHO project, which began in 2008, is to develop a series of publications that can contribute to the recognition, understanding, and application of human rights standards related to sexuality and sexual health. The main assumption is that by means of canvassing authoritative standards articulated under international, regional, and national laws and jurisprudence related to sexual health issues, normative guidance for states can be provided, which may facilitate state efforts to improve protection of rights relating to sexual health. The project seeks to document and analyze how human rights standards have been specifically applied to sexual health issues in international, regional, and national laws and jurisprudence. It complements other WHO initiatives related to sexual health, particularly through defining state obligations related to sex, sexuality, and sexual health.

Since 2008, the International Council on Human Rights Policy (ICHRP) has been working with the Department of Reproductive Health and Research of the WHO with the goal to edit and publish the research produced by this project. ICHRP work on this front builds on the 2009 publication of the ICHRP Discussion Paper on Sexuality and Human Rights, which mapped the confusions and dilemmas in the area of sexual rights and suggested principles to guide future work.

B. PROCESS AND SCOPE

A group of international experts on sexuality and human rights was commissioned in 2008 to elaborate one international report and seven regional reports, exploring the application of human rights standards to sexuality in their respective regions and in international law. The experts organized their reviews of the international, regional, and national legal standards related to sexual health and human rights around the following eight topics:

1. Non-discrimination as relevant to sexual health;
2. Penalization of sexual activities;
3. State regulation of marriage and family as relevant for sexual health;
4. Gender identity, gender expression, and intersex;
5. Violence as relevant for sexual health;
6. Access to health services in relation to sex and sexuality;
7. Education, information, and expression related to sex and sexuality;
8. Sex work.

These topics were chosen, refined and elaborated through extensive discussions during three successive WHO technical consultations. While these eight common topics appear in each regional report, researchers were given discretion to develop sub-topics as relevant to their regional and national contexts.

The topics were chosen with regard to four criteria: demonstrated causal importance to sexual health and well-being; relevance to core WHO goals of promoting sexual health for all persons, with particular consideration to the enhancement of gender equality; prioritization of poor and underserved populations and groups; and selection of laws and policies that intersect with fundamental questions of human rights.

In choosing these eight topics, and in their ensuing research, the WHO experts identified themes of global significance to rights and health in relation to sexuality, while attending carefully to regional diversity, as well as national and local specificity (including legal, cultural, political, social, economic, and historical concerns). These eight topics are further contextualized within an empirical literature on sexuality and sexual health.

The analysis of the eight topics and their importance for sexual health relies on the contemporary understanding that health and well-being are influenced by material and social conditions. Many policy makers concerned with sexual health are accustomed to reviewing laws that explicitly address health (i.e., the regulation and content of health services) for their health and rights impacts. This

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1 Drawn primarily from a common introduction to all regional and international reports, elaborated by Alice M. Miller.

2 The regions covered by the project are Africa, Latin America and the Caribbean, Europe, the Middle East and North Africa, the United States and Canada, South East Asia, and the Western Pacific. The unedited regional reports are all available on the ICHRP website (http://www.ichrp.org/en/projects/140).
Legal and educational systems are clearly part of ensuring the highest attainable standard of physical and mental health. Thus, this project incorporates topics for investigation in light of the understanding that health is shaped by structural conditions, as well as by law and policy. It is well accepted that the social determinants of health have effects at individual, group, and population levels. The WHO project stresses, however, that these social determinants are themselves often produced by state action through law and authoritative policy. Thus, many key material factors affecting sexual health are often not inevitable or unchangeable, but rather represent discrete choices made by legislators, administrators, courts, and executives. In addition, therefore, this review analyzes laws affecting rights and material conditions that do not on their face address health, but which, social determinants-based analysis shows, have an effect on health. These include laws on discrimination (Chapter 1), violence (Chapter 5) and sex work (Chapter 8). Specific ‘chapeaux,’ or introductory remarks, further elaborate why each issue addressed is an important focal points for policy makers wishing to understand how to use law to promote sexual health and human rights.

The legal frameworks and standards which determine so many of the key factors of health may be in alignment, tension, or contradiction with human rights principles. The promotion of sexual health is inextricably tied to the promotion of fundamental human rights, such as non-discrimination, privacy, protection from violence, access to information, and rights to expression and association, as well as the rights that support meaningful participation in society and politics. In regard to sexual health, states have made legal and political commitments to protect the health of people through the application of human rights principles, expressed through their national laws, and through commitments in international and regional human rights treaties and consensus documents. The WHO project, therefore, proceeds from the premise that law and policy can have strong effects on sexual health as well as on rights, and that there is a dynamic relationship between the promotion of fundamental human rights and the promotion of sexual health. A rights-based analysis of laws related to each of these eight topics asks questions about the relationship between a law’s focus and scope, as well as its historical development, to analyze the law’s actual or potential implications for the health and rights of a wide range of people. At all times, we are concerned with the law’s impacts on the health of all people without discrimination.

For each of the topics and sub-topics, the report highlights laws which promote sexual health, and notes laws which are likely to impede or diminish it. This analysis focuses solely on the formal content of statutes, judicial decisions or other duly enacted laws. The reports do not assess their implementation. Therefore, they do not evaluate which regions or countries have succeeded in promoting sexual health and rights in each of the eight topic areas. Rather, the project examines contemporary law and policy in order to identify different paths through which the social and material conditions that promote (or impede) sexual health and rights can be shaped. Thus, it rests on the assumption that law can promote rights and enhance freedom, autonomy, and well-being of the individual, but also acknowledges the limit of law alone as a tool for social and political change. The reports must therefore be read as a contribution to the discussion of how sexual health and sexual rights can be enhanced and protected, but not as a formula leading to their instant realization.

State responsibility is a key aspect of law that is made visible in these analyses. These reports identify laws through which states themselves promote or violate rights. Laws that expressly provide gender-neutral protection from sexual assault, for example, promote the sexual health of all by recognizing that women, men, and children need protection from sexual violence, and break free of historical stereotypes that connect the harm of rape to women only. They also reinforce the state’s obligation to respect rights and to protect against the abuse by others. In contrast, laws criminalizing consensual sexual activity between adults, for example, both violate internationally accepted rights of privacy and also drive underground persons afraid to seek information that could protect their health.

States are also responsible for ensuring that they use due diligence to protect against harms by others. Laws that fail to provide an effective response to coercive sex or marital rape by husbands, for example diminish women’s rights to bodily integrity and decision-making, as well as their control over the conditions of safer and desired sexual activity within marriage.

4 See Chapter 5A and 5B of this report.
In sum, there are many topics upon which the law acts that may have relevance to sexual health. The WHO project has carefully selected eight specific issues, with numerous related sub-topics that WHO experts believe are critical to building the best legal frameworks that can sustain sexual health. The analysis is built from a synthesis of the best of public health practice with the insights of international human rights law and best practices across all WHO regions.

C. European Region

1. Geographical extension and scope of research

For the purposes of this research, the European region is composed of fifty-three states, including all the countries of the European continent except for the State of the Vatican City (or the Holy See, which is commonly recognized as subject of public international law), as well as a number of countries beyond the geographical boundaries of the European continent. These are the republics of Central Asia that originated from the dissolution of the Soviet Union, as well as Israel and Turkey.

By no means does this research aim at offering a complete and exhaustive analysis of legislation and case law on sexual health and human rights of any of the domestic legal systems of which the region is comprised. Instead, the report analyzes legal practices around sexual health and human rights within the context of different sources of law, jurisprudence, and case law stemming from the above-mentioned countries, based on the judgment of the author as to which are the most representative examples that can be considered good practices from the region, taking into account the limitations and challenges that the research has presented (see further: Methodology).

While this document explores selected examples from domestic legislation and case law, particular emphasis has been given to norms and jurisprudence from the two most important regional systems present in Europe: the Council of Europe and the European Union. The structure, legal status, sources of law, and relevance for human rights of these two systems are elaborated in Appendix 1.

2. Regional systems and sources of law

Each chapter of this report will focus first on sources of law and case law from the two regional systems, and second on domestic jurisdiction of individual countries of the region. The rationale for this structural choice is the following.

First, sources of law (both hard and soft law) from the Council of Europe and the European Union (EU) have a significant impact on the development of domestic legislation and case law. In some cases this has to do with the binding nature of the jurisprudence and the supra-national sources of law. In other cases it is due to the fact that decisions taken by supra-national institutions, even if not legally binding on member states, either express a political commitment of the member states themselves or call for region-wide legal and policy change.

Second, organs from both the Council of Europe and the EU have articulated themselves extensively in almost all fields considered by this report. The norms and jurisprudence of these organs therefore have significant relevance for sexual health and human rights. Their body of decisions, norms, and non-mandatory material constitutes a vast resource for the topics under consideration that may serve as useful inspiration to policy makers both within and beyond the region.

A longer explanation of the Council of Europe and the EU, and their respective memberships, objectives, organs (including the European Court of Human Rights) and sources of law can be found in Appendix 1, alongside a short explanation of the two major types of domestic legal system in the region.

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5 A draft version of parts 1 and 2 of this introduction was prepared by Stefano Fabeni. The author wishes to express her gratitude for his assistance.
METHODOLOGY

The WHO project on sexual health and human rights aims at mapping and analyzing legal practices that bear on sexual health, focusing in particular on laws and jurisprudence that through their intent, design, outcome, and reasoning have positive effects on sexual health. Criteria for selecting ‘good practices’ have been that the laws or cases a) promote sexual health, b) explicitly use a human rights framework, or implicitly make references to established human rights principles, and c) do not violate other human rights standards and norms, by intention or effect. By the application of these criteria, often legal materials that have been included have both positive and problematic aspects. Strengths as well as potential weaknesses have been highlighted in the discussion of the material or in remarks concluding each chapter. As mentioned in the Introduction, this project does not intend to analyze or evaluate implementation or practical impact of laws. Notes on implementation have been included occasionally, if there is reliable information about negative impact on sexual health emerging as a consequence of the implementation of a law, which was unintended by the legislature but may highlight weaknesses of the law itself (see for instance Chapter 8: Sex work).

As also noted in the introduction, this report does not intend to be exhaustive in its presentation and analysis of laws and jurisprudence surrounding sexual health in Europe. Rather, its aim is to be illustrative – giving examples of how legislatures and courts in the region have approached issues related to sexual health, with a particular focus on models that use a human rights framework, based either on international, regional or national/constitutional human rights standards. Thus, this report does not necessarily claim to have selected ‘the best’ European laws and cases in their application to sexual health, nor does it single out some countries as ‘superior’ or more ‘rights-promoting’ than others in regard to protection of sexual health. Instead, this report focuses on legal standards that enhance sexual health by the use of a human rights framework. Material has been selected primarily to demonstrate how, in diverse parts of the region, law is used as a tool to, inter alia, respect and protect sexual autonomy, fight discrimination on sexual or sexuality grounds, offer adequate protection against sexual violence, and promote access to sexual health services while respecting the integrity and self-determination of the individual. In limited cases laws or jurisprudence have also been highlighted that may control or restrain sexuality or compromise sexual health. These materials have been selected to illustrate conflicting trends in the region or to draw attention to issues that are particularly problematic from a human rights standpoint. However, the reader should keep in mind that the aim of this project is not to highlight human rights violations nor to systematically document practices that prejudice sexual health.

The information in this report has been obtained by extensive research on legal materials from the European region. This includes regional material from the Council of Europe and the EU, and domestic laws and case law related to sexuality and sexual health from across the region. The author has been assisted by researchers in Russia, Hungary, and Moldova, and has also on an ad hoc-basis consulted experts in the region to clarify specific issues. To the extent possible primary sources have been consulted, through the use of official databases. Attention has been drawn to relevant legal material through concluding observations by UN committees, Council of Europe and NGO publications, academic studies, and news reports.

The author has attempted to select material from as large a portion of the region as possible, representing the diversity of its legal systems as well as attempting to achieve a geographical, socio-economic, religious, cultural, and historical balance to the extent possible. That said, some remarks should be made regarding the impediments to achieving a fully representative picture of the region. First, some countries and courts in the region have in recent years adopted a clearer rights-approach in their legislation relating to sexual health than others. These countries will for natural reasons appear more frequently than others in the report. Second, language constraints have made it difficult to access material from parts of the region, as have technological challenges (legal material not available online, for example). The latter point is closely associated with the third remark, which relates to the availability of reliable sources (government or NGO reports, academic studies, etc.) that have guided the author in finding and understanding relevant material. Such sources in accessible languages have been difficult to find from several countries in the region.

Finally, strong emphasis has been placed on the two regional systems and their respective courts. This may not create a geographical or cultural imbalance per se – the Council of Europe encompasses all countries in the region except for six, and EU standards have relevance not only for member states but also for all accession countries – but rather an imbalance between domestic and regional levels, where the latter may seem to have been given disproportionate weight and depth of analysis. The reasons for this have been elaborated in some depth in the introduction. Suffice to reiterate here that both Council of Europe and EU organs have addressed some issues related to sexuality
with remarkable fervour and sophistication of analysis, which distinguishes them from many other international bodies. This fact, in combination with the considerable influence of both the Council of Europe (in particular the European Court of Human Rights) and the EU, also beyond the region's borders, motivates paying particularly close attention to their laws and jurisprudence.

The issue of the huge diversity of languages in the region merits some special attention. To the extent possible, official translations of legislation and case law have been used, provided by or with the approval of official organs such as national parliaments, government entities, or courts. However, most European countries do not provide official translations into English of legal material. The author and the research assistants have knowledge of a number of European languages and in other cases unofficial, but reliable, translations are available. Regardless of how the material has been made accessible, it has been noted whether translations are official or unofficial, if they have been carried out for the purpose of the project, or if the content of a law or a case has been brought to the attention of the author in other ways. Occasionally, the author has relied on information about the content of a law or case through secondary sources. In these cases only reliable sources have been used, such as government information, Council of Europe publications, or reports from well-reputed NGOs. The lack of a direct translation and the source of the information have always been duly noted.

Similarly, in exceptional cases the author has referred to cases based on information in news reports, when the original case has been impossible to locate. In those situations, only reliable news sources have been used, and the information has been verified by multiple reports.

Because this report, and the project in its entirety, focuses on law, non-binding materials have been addressed only occasionally. The rationale for including such material in some cases, primarily from the Council of Europe Parliamentary Assembly and the European Parliament, has been either that its content is of particular interest, or that it has had a demonstrated influence on regional or domestic policy or case law. As for domestic policies, these have only been addressed when a particular topic tends to be regulated by policies rather than by law in the region. This is true, inter alia, for aspects of regulation of sexual activities in prison, treatment of intersex individuals, access to contraception, access to sexual health services, and sexuality education.

Parts of the introductions to some of the chapters have been drawn from reflections elaborated by Professors Alice M. Miller and Carole S. Vance, exploring the relevance of the topic in relation to sexual health and laying out its relation to established human rights standards. These remarks are based on careful considerations of legal, social, economic, and cultural factors that influence the promotion or denial of sexual health for individuals globally, and give guidance as to how a human rights framework can be applied to issues surrounding sexuality. These remarks have been incorporated fully or partially in all regional reports for the present project, and set a common framework for analysis.

The substantive research for this regional report was initiated in March 2009 and finalized in April 2010. Further research was undertaken in July 2011 to bring the case law of the European Court of Human Rights and European Court of Justice up to date. The information regarding these sources of law, therefore, can be considered up to date as of June 2011. For all other sources of law, the author has made an effort to ensure the accuracy of laws and jurisprudence as of 31 December, 2009, although more recent materials have on occasion been included, when they address issues that are of particular interest for the topics under consideration. Due to the large number of countries included in the region, the diversity of legal systems, difficulties in accessing updated material in reliable translations, and time constraints, this report may contain errors or inaccuracies. Readers interested in citing particular laws are therefore strongly encouraged to confirm the status of the legal material presented here before using it for their own work.
I. NON-DISCRIMINATION AS RELEVANT TO SEXUAL HEALTH

A. NON-DISCRIMINATION ON ACCOUNT OF SEX, SEXUAL ORIENTATION, GENDER IDENTITY, MARITAL STATUS, AND HIV STATUS

1. Introduction

The right to non-discrimination is a fundamental principle in all human rights, as it is the obligation of the state both to ensure equal protection of the law and to take steps to eliminate discrimination by others to achieve equality. Although many of the topics dealt with in this report overlap with discrimination, this opening sub-chapter focuses primarily on general anti-discrimination protections in law, as well as court decisions where discriminatory laws and practices have been struck down by European and domestic courts. Later sub-chapters under this heading examine specific expressions of discrimination, such as sexual harassment and mandatory HIV testing. Asylum laws on European and domestic levels are also included in this chapter, since most asylum claims related to sexuality are strongly connected with discriminatory practices in the asylum seeker’s country of origin. Other chapters address more indirect (but no less obvious) forms of discrimination, such as laws that prohibit persons of the same sex to marry or to access adoption procedures, or laws failing to respond to marital rape.

The principle of non-discrimination has multiple associations with sexual health. Inequality among and between persons and groups is a strong predictor of the burdens of ill health, including sexual health. Inequalities are manifest through differential access to services and resources and in individuals’ ability to participate in the policies and laws that govern their lives, as well as to seek remedies for abuses committed against them. Discrimination operates through processes of inequality that are rarely linked solely to one characteristic of a person, but are often fuelled by multiple factors including sex, age, class, race, sexual orientation, marital status, national status, disability as well as health status, which includes HIV status.

In the European region, the principle of non-discrimination is strongly rooted at both the regional and domestic level. Non-discrimination with regard to nationality became a cornerstone of the early economic cooperation within the European Communities, in order to facilitate the free flow of goods and services across borders. Thus, the rationale for the principle of non-discrimination was pragmatic and primarily economic and market-based. However, the principle has since spilled over into other fields, prohibiting discrimination on the basis of sex and sexual orientation, among other grounds, within an array of fields covered by EU law. Consequently, these provisions have taken root on domestic level in the EU member states and also outside of the Union to varying degrees. Many states in the region have both strong constitutional protection for the principle of equality, and detailed non-discrimination laws that specifically mention sex and sexual orientation as prohibited grounds for discrimination. Gender identity is still only recognized as protected ground in a few states.

Contrasting with the strong emphasis on non-discrimination within the EU, and in light of other international human rights treaties, the European Convention on Human Rights has a comparatively weak non-discrimination provision – one that is not freestanding but which can only be applied in conjunction with any of the substantive rights under the Convention. The European Court of Human Rights has declared that sexual orientation is a protected ground under the Convention, but in general the jurisprudence of the Court shows a reluctance to extensively apply Article 14 (non-discrimination) to cases of sexual orientation and gender identity. In many cases where sexual activities or sexual identity have caused negative treatment by the state, the Court has found a violation of the right to private life under Article 8, and has not found a reason to separately examine the issue under Article 14.

2. Council of Europe

European Convention on Human Rights

Article 14 of the ECHR includes sex as one of the prohibited grounds of discrimination in the enjoyment of the rights under the Convention. It reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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6 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.
7 WHO, 25 Questions on Health and Human Rights. As noted in international legal standards, international human rights, humanitarian, criminal and labour law all are premised on principles of equality and non-discrimination.
It is important to note that Article 14 only prohibits discrimination with regard to the rights protected by the Convention; thus a violation of Article 14 can only be found in conjunction with one of the Convention's substantive rights. In this sense, Article 14 is different and substantially weaker than the non-discrimination clause in the International Convention on Civil and Political Rights, Article 26. The fact that Article 14 must be taken together with another Convention right does not mean that there must also be a violation of the substantive right, however.  

Protocol No. 12 to the Convention establishes a freestanding prohibition of discrimination (regarding “any right set forth by law”), where sex again is one of the listed grounds:  

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As of 3 August 2011, 18 countries have ratified Protocol No. 12. As of 31 December 2009 there is no case law from the Court under Protocol 12 relevant for the present report.

The Convention and its Protocol do not explicitly mention sexual orientation or gender identity as prohibited grounds for discrimination, but the list in both provisions is non-exhaustive and has been interpreted by the Court to at least include sexual orientation (see below).

**Jurisprudence of the European Court of Human Rights**

The Court has specified the obligations of member states to ensure the right to non-discrimination on the basis of sex in various cases. Only two important examples will be mentioned here.

(i) Discrimination on the basis of sex: unjustified difference in treatment of men and women – The applicants in Abdulaziz, Cabales and Balkandali v. United Kingdom were three women of immigrant background who resided lawfully in the United Kingdom, and whose husbands had been refused to join or remain with them. The United Kingdom applied stricter rules for the granting of permission for husbands to join their wives than vice versa, justified with reference to the protection of the domestic labour market and the maintenance of “public tranquillity.” The applicants challenged these decisions, claiming discrimination on the basis of sex, race, and, in one case, birth, under Article 14 taken together with Article 3 (prohibition of torture) and Article 8 (respect for family life).

The Court determined that the applicants had suffered discrimination on the basis of sex under Article 14 in conjunction with Article 8, given that it was easier for a man settled in the United Kingdom to be granted permission for his spouse to join him than for a woman in a similar situation. Even though the aim to protect the domestic labour market was legitimate under the Convention, this did not legitimize the difference in treatment of male and female immigrants.

The Government objected that given that it acted more generously than required under the Convention – admitting non-national wives and fiancées of men settled in the United Kingdom – it could not be in violation of Article 14. The Court firmly rejected this argument:

The notion of discrimination within the meaning of Article 14 […] includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention. (para 82)

The Court acknowledged that States enjoy a certain margin of appreciation in assessing whether otherwise similar situations may justify difference in treatment, but stressed that “the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention” (para 78).

(ii) Discrimination on the basis of sex: challenging gender stereotyping – In Schuler-Zgraggen v. Switzerland the applicant was a woman who had lost her job because of illness and had received full disability pension. After having had a child, she was disallowed her pension because her health was getting better and she was able to assume large parts of her household and childcare responsibilities. Upon appeal, the Federal Insurance Court granted her a partial pension, examining how the applicant was limited in her capacity as a housewife, but not whether she was fit to work in her

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8 See Abdulaziz, Cabales and Balkandali v. United Kingdom, below.
9 Application no. 9214/80; 9473/81; 9474/81, decided on 28 May 1985.
10 Application no. 14518/89, decided on 24 June 1993.
previous employment. It assumed that when the applicant became a mother she would have given up her job regardless of her illness. The applicant contended that in the exercise of her right to a fair trial under Article 6, she had been discriminated against on the ground of her sex (Article 14).

The Court reiterated from its decision in Abduraziz et al that very weighty reasons would have to justify differential treatment on the basis of sex under the Convention. The reasoning of the Federal Insurance Court introduced a difference of treatment based on the ground of sex only, which had no justification under the Convention. In conclusion, the Court found a violation of Article 14 taken together with Article 6.11

(iii) Discrimination based on sexual orientation linked to parenthood, child maintenance, insurance, spousal benefits, and military service – In several cases, the Court has found that state interference with same-sex couple’s sexual (or other) activities constitutes a violation of Art 8 separately (violation of right to private and family life), without declaring discrimination under Art 14 (non-discrimination). In these cases, the Court has generally not established that discrimination has not occurred; rather, it has found it unnecessary to examine the case under Article 14 once it has established that one of the substantive articles has been violated.12

That said, the Court has indeed on a few occasions ruled that discrimination on the basis of sexual orientation is prohibited under Article 14, even though sexual orientation is not explicitly included in the list of banned grounds of discrimination. Here will be mentioned cases where violation of Article 14 has been found (Salgueiro, Karner, J.M., P.B. & J.S.), and cases where the violation – though described as an interference with Article 8 – expressed itself as a clearly discriminatory employment practice (Lustig-Prean and Beckett). For cases on penalization of same-sex behaviour, see Chapter 2.

The first case where sexual orientation was found to be one of the protected grounds under Article 14 was Salgueiro da Silva Mouta v. Portugal.13 The applicant, who was divorced and had an under-aged daughter, now lived in a relationship with another man. His former wife had been awarded parental responsibility by the Lisbon Court of Appeal, with the right to contact for the applicant. The Court of Appeal argued that custody of young children should as a rule be awarded to the mother, that the father’s homosexual lifestyle was an abnormality, and that children should not grow up in the shadow of abnormal situations. The father turned to the European Court of Human Rights when the mother refused to let him see his children. He argued that the decision of the Court of Appeal had been based on his sexual orientation, which both violated his right to respect for family life and constituted unlawful discrimination under the Convention.

The Court found that there had been a difference in treatment of the father and the mother, which was based on the applicant’s sexual orientation. It established that ‘sexual orientation’ is “a concept which is undoubtedly covered by Article 14 of the Convention” (para 28). The father’s homosexuality had been a decisive factor in the decision of the Portuguese court. While the decision pursued a legitimate aim – the protection of the rights and health of the child – the differentiated treatment lacked objective or reasonable justification. The Court accordingly found that there had been a violation of Article 8 taken together with Article 14.14

In J.M. v. the United Kingdom,15 the applicant was a woman who, after the divorce from her husband, 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. She 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. The Court agreed. It noted the purpose of the domestic regulation, which was to avoid that the absent parent

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11 Another case in which the Court has challenged gender stereotypes is Burghartz v. Switzerland (Application no. 16213/90, decided on 22 February 1994), in which a husband was refused to adopt his wife’s surname when they got married. The Court found that this differential treatment lacked an objective and reasonable justification and amounted to discrimination, Article 14 taken together with Article 8.

12 The phrases commonly used are that “it is not necessary also to examine the case under Article 14” or that “no separate issue arises under Article 14.” See, for instance, Dudgeon v. United Kingdom, 1981, Lustig-Prean and Becket v. United Kingdom, 1999, and A.D.T. v. United Kingdom, 2000.

13 Application no. 33290/96, decided on 21 December 1999. See also L. and V. v. Austria and S. and L. v. Austria, 2003 (where a difference in age of consent for opposite-sex and same-sex activities was found discriminatory under Article 14 in conjunction with Article 8; discussed in Chapter 2C. Age of consent).

14 Worth noting is that the Court did not discuss or explore whether sexual orientation actually constitutes a ground for discrimination as prohibited by Article 14 but simply stated that this is the case. Due to the fact that this was the first time that the Court made clear that sexual orientation is covered by the protection under Article 14, the case is referred to as an important precedent in this regard.

15 Application no. 37060/06, decided on 28 September 2010.
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.

Worth noting is that 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.

In *P.B. and J.S. v. Austria*, the applicants were a same-sex couple that complained that the medical insurance linked to the employment one of them held as a civil servant did not cover the partner, on the sole basis that they were of the same sex. Austrian law provided that only close relatives or partners of the opposite sex qualified as dependants. The applicants contended that they were discriminated against on the basis of their sexual orientation, in violation of Article 8 in conjunction with Article 14. The Court reiterated that states are granted only a narrow margin of appreciation in regard to different treatment based on sexual orientation, and noted that the Austrian government had given no justification to the difference of treatment in this case. It found that the applicants had been discriminated against with regard to their family life under Article 8. Importantly, the Court stated in this case for the first time that a same-sex couple not only has a right to "private life" under Article 8, but also to "family life," which can be seen as an important step towards recognizing same-sex family constellations on equal terms with opposite-sex families in a myriad of ways:

> [T]he Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life,” just as the relationship of a different-sex couple in the same situation would. (para 30)

Austrian law changed in 2007, when the insurance act was amended and formulated in a neutral way that made no distinction between same-sex and opposite-sex cohabitees. Thus, as in the previous case, requested changes already taken place at the time of the Court’s judgment.

In *Karner v. Austria*, the applicant had survived his partner, Mr. W, who died in 1994. The couple had lived together in a flat which was rented in W’s name, and upon W’s death the landlord brought proceedings against the applicant for termination of the tenancy. The applicant contested the claim, arguing that he had the right to succeed to the tenancy in accordance with Austrian law which provided for this right to unmarried life companions. The Austrian Supreme Court found that the notion ‘life companion’ did not include same-sex partners and that the landlord therefore could terminate the lease. The applicant claimed to have been the victim of discrimination on the basis of his sexual orientation and that Austria therefore had violated Article 14 in conjunction with Article 8. The Court agreed. It found that even though protection of the traditional family as such may justify different treatment, the measure has to be proportional to the aim sought. The Court stated in this regard:

> In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of [the relevant rule]. (para 41)

The Court did not find that Austria had presented legitimate reasons to exclude the group same-sex partners from the right to succeed to tenancy and therefore, Article 14 taken together with Article 8 had been violated.

In 2010, the Court came to the same conclusion in a case with similar circumstances. In *Kozak v. Poland*, the applicant had been denied succession to the tenancy after his deceased same-sex partner on grounds specifically related to his sexual orientation. Poland was found by the Court to have violated Article 8 in conjunction with Article 14.

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16 Application no. 18984/02, decided on 22 July 2010.
17 According to the facts presented in the case before the Court.
19 Application no. 13102/02, decided on 2 March 2010.
In Lustig-Prean and Beckett v. the United Kingdom20 the applicants were two homosexual men who separately had been discharged from the British naval force when their homosexuality had been discovered. According to UK law, homosexual conduct could be a ground for administrative discharge from the armed forces, and according to Government policy on homosexual personnel in the armed forces homosexuality was incompatible with service. The applicants complained that these laws and regulations violated their rights to respect for private life under Article 8.

The Court found that the investigations by the military police into the applicants' homosexuality, the preparation of a final report, and the administrative discharge on the sole ground of their sexual orientation, constituted a direct interference with the applicants' right to respect for their private lives. While the interferences could be said to pursue legitimate aims (‘interests of national security’ and ‘the prevention of disorder’), they did not qualify as necessary in a democratic society. The Government's arguments were also based on statements and alleged evidence questioned by the Court on the basis of their non-scientific character and sweeping generalizations. In conclusion, neither the investigations about the applicants' sexual preferences, nor their discharge on grounds of their homosexuality in pursuance of the Government policy, could be justified under the Convention. The applicants' rights under Article 8 had been violated.21

As a consequence of Lustig-Prean and Beckett and related cases, the United Kingdom lifted its ban on homosexuals in the army in 2000, replacing it with a code of conduct named Armed Forces Code of Conduct,22 which “applies to all members of the Armed Forces regardless of their gender, sexual orientation, rank or status.”

(iv) Gender identity discrimination – The Court has strongly pronounced itself on the right to respect for private and family life for transgender persons, in B v. France (1992), Goodwin v. United Kingdom (2002), and Grant v. United Kingdom (2006). In none of these cases has it found a separate issue under Article 14. See for a discussion of these cases Chapter 4: Gender identity, gender expression, and intersex.

(v) Marital status discrimination – The question of discrimination based on marital status has prevalently (if not exclusively) been considered by the Court in cases related to the rights of children who, under the law of the country, were considered ‘illegitimate’ when born out of wedlock. Although this approach does not directly reflect a sexual rights issue, the Court has pointed to a relevant principle when stating that marital status should not affect basic rights – not of non-married adults, nor of children living outside of the traditional family unit.

In Marckx v. Belgium23 the applicant was an unmarried woman with a young daughter. The applicant complained of the manner the Belgian law required unmarried mothers to register and officially adopt their own children. The birth itself did not establish a legal bond between mother and child. This had, among other things, effects on the possibilities of the mother to give or bequeath her property to her child. The applicant claimed that these provisions negatively affected both her and her daughter's rights under Article 8 of the Convention. She also claimed that the provisions were discriminatory in relation to the rights of ‘legitimate’ families.

The Court held that the Belgian law violated Article 8 both taken alone and in conjunction with Article 14. It established that unmarried mothers and children born outside of marriage enjoy rights to respect for their family life under the Convention, and with regard to maternal affiliation, family relationships, and certain patrimonial rights, unmarried mothers and their children have the same rights as married mothers and ‘legitimate’ children. The state, when regulating family ties, has to act in a way that avoids "any discrimination grounded on birth.”24

20 Applications nos. 31417/96 and 32377/96, decided on 27 September 1999.

21 The applications of the above case were joined by the applications in the similar case of Smith and Grady v. the United Kingdom (applications nos. 33985/96 and 33986/96, decided on 27 September 1999). The Court's reasoning is identical in the two cases, though there were minor differences in circumstances (e.g., Smith was a woman). In the cases of Beck, Copp and Bazeley v. the United Kingdom (applications nos. 48535/99, 48536/99 and 48537/99, decided on 22 October 2002), and Perkins and R v. the United Kingdom (applications nos. 43208/98 and 44875/98, decided on 22 October 2002) the outcome was the same since no material differences from the above cases were found. Violations of Article 8 (in both cases) and of Article 13 (in Beck, Copp and Bazeley) were established.


23 Application no. 6833/74, decided on 13 June 1979.

24 The issue of different treatment of children born out of wedlock came up again in Johnston v. Ireland (Application no. 9697/82, decided on 18 December 1986), where the Court also addressed whether there is a right to divorce under the Convention (see Chapter 3B: Termination of marriage). See also Vermeire v. Belgium (Application no. 12849/87, decided on 29 November 1991), where the issue was inheritance rights of 'illegitimate' children. This case addresses family and property rights of the child rather than sexual health-related aspects of the parents, however, it is important to note that the Court again strongly condemned discrimination based of birth status.
Following the Marxx judgment, in March 1987 the Belgian Civil Code was revised, ending discrimination of unmarried mothers and children born out of wedlock and thereby bringing Belgian law in line with the Convention.\(^{25}\)

**Discrimination based on HIV status** – In Kiyutin v. Russia,\(^{26}\) the Court for the first time stated that discrimination on the basis of HIV status is prohibited under the Convention. The applicant was an Uzbek national who resided in Russia and had married a Russian. He was in 2004 denied a residence permit in Russia after having tested positive for HIV. When he reapplied for a permit in 2009 it was determined that he was in the country as an unlawful resident, and by reference to the Russian Foreign Nationals Act – restricting the issue of residence permits to foreign nationals who could not show their negative HIV status – he received a deportation order. He claimed to have been discriminated against on the basis of his HIV status, relying on Articles 8 and 14 of the Convention.

The Court noted that the right for an alien to enter and settle in a particular country is not guaranteed under the Convention, and reiterated that Article 14 only applies in conjunction with one of the substantial rights. Nevertheless, the state must organize its immigration policies so that it is compatible with its human rights obligations, in particular the right to respect for a foreign national’s family life and the right not to be subject to discrimination. Referencing the UN Commission on Human Rights, it noted that “other status” in non-discrimination clauses in international legal instruments can be interpreted to cover health status, which includes HIV infection. It concludes that a distinction made on account of a person’s health status should be covered – “either as a form of disability or alongside with it” – by the term “other status” in the text of Article 14.

The Court stated that the applicant enjoyed a right to family life with his Russian wife and their child under Article 8. It reiterated that a State’s margin of appreciation for a legitimate restriction of rights under Article 8 is narrower when these rights apply to a particularly vulnerable group and found, interestingly, that HIV positive persons constitute such a group. It explained:

> HIV infection has been traced back to behaviours – such as same-sex intercourse, drug injection, prostitution or promiscuity – that were already stigmatized in many societies, creating a false nexus between the infection and personal irresponsibility and reinforcing other forms of stigma and discrimination, such as racism, homophobia or misogyny. In recent times, despite considerable progress in HIV prevention and better access to HIV treatment, stigma and related discrimination against people living with HIV/AIDS has remained a subject of great concern for all international organizations active in the field of HIV/AIDS. […] The Court therefore considers that people living with HIV are a vulnerable group with a history of prejudice and stigmatization and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status. (para 64)

The Court noted that a very large majority of European states do not impose any restrictions on the entry, stay or residence of people living with HIV, that experts have concluded that travel restrictions on people living with HIV cannot be justified by reference to public health, and that public health can even be harmed by a policy that lends itself to viewing HIV as something “foreign” and thus to the false view that the HIV can be kept out. It concluded that the exclusion of the applicant, who belonged to a particularly vulnerable group, had not been shown to have a reasonable and objective justification and that the Russian government therefore had overstepped the narrow margin of appreciation afforded to them. It found that the applicant had suffered discrimination on account of his health status under Article 14 in conjunction with Article 8.

See Chapter 2B, Criminalization of HIV transmission, and Chapter 6B, Access to health service for HIV and other sexually transmitted infections for additional cases related to negative treatment due to HIV-positive status.

**European Social Charter and the European Committee of Social Rights**

The European Social Charter (revised version, 1996) contains a general non-discrimination clause:

> The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status. (Article E)

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\(^{26}\) Application no. 2700/10, decided on 10 March 2011.
It also establishes the right of women and men to equal treatment and equal opportunities in occupation and employment (Article 20), and the prohibition of discrimination on the basis of family responsibilities (Article 27). According to the appendix to Article 20, provisions concerning the protection of women shall not be deemed discrimination. However, the revised Charter (1996) shall be interpreted ensuring that such protections “must be justified objectively by needs that apply exclusively to women.”

This means that they should be restricted to the ‘biological’ protection of women during pregnancy, childbirth and the post-natal period. For example, women may not be prohibited from night work. According to the European Committee of Social Rights, “exceptions to the equality principle on behalf of women must be objectively justified by their particular needs. The underlying principle is that if night work is harmful, it is just as detrimental to men as to women.”

Part 1 of the Charter enlists a number of rights and principles, the effective realization of which the parties must strive to achieve. This part of the 1961 version of the Charter included a prohibition of discrimination on the basis of marital status:

*Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection.* (Part 1, para 17)

Interestingly, the wording on “marital status and family relations” has disappeared in the 1996 revised version of the Charter, possibly as discrimination on the basis of marital status no longer is seen as a major problem in the region. Regardless, states that have ratified the 1961 version are still bound by the provision. The Charter does not explicitly prohibit discrimination based on sexual orientation, sexual practices, gender identity, or inter-sex.

The European Committee of Social Rights has in numerous cases found that women have been discriminated against under the Charter, *inter alia* in cases related to pregnancy and childbirth. Finland was found not to be in conformity with the Charter because the legislation did not require the reinstatement of women dismissed unlawfully for reasons linked to pregnancy or maternity leave, and because a ceiling was placed on the compensation payable in the event of unlawful dismissal. A similar situation in Belgium was also found to go against the Charter. In Cyprus the situation was found inconsistent with the Charter since the courts could only order reinstatement of an unlawfully dismissed employee if the enterprise concerned had more than twenty employees.

### 3. European Union

**European Union binding law**

Equality and non-discrimination are fundamental principles of EU law. This is illustrated *inter alia* by the prohibition of discrimination on grounds of nationality (Article 12, EC Treaty) and in the principle of equal pay for equal work (Article 141, EC Treaty). Discrimination based on sex and nationality were mentioned explicitly in the originary EC Treaty, for the reason that, even at a time in which human rights and non-discrimination did not constitute core pillars of the EU (then EEC), addressing discrimination on grounds of sex and nationality was considered key in ensuring the free flow of goods and services.

The principle of non-discrimination on ground of sex, in other words, was considered a fundamental element for a functional market. Since then, the principle of non-discrimination has gained wider recognition within EU law, and grounds other than sex and nationality have been added. Thus, while the principle was justified primarily by economic reasons, it has since gained the status as a social and human right central to EU law.

The principle of equality between men and women is recognized as one of the EU’s goals described...
in Articles 2 and 3 of the EC Treaty. On December 1, 2009, the Treaty of Lisbon entered into force, introducing the EU Charter of Fundamental Rights into European Primary law. The Charter reinforces the fundamental nature of the prohibition of discrimination within the Union. It lists several prohibited grounds for discrimination including sexual orientation. This is the first internationally binding document making a ban on such discrimination explicit:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. (Art 21.1)

Equality between women and men is established in a separate article in the Charter:

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex. (Article 23)

The Charter has also adopted gender neutral language, for example that “[e]veryone has the right to respect for his or her private and family life, home and communications” (Article 7, emphasis added).

The Treaty of Lisbon, in addition to incorporating the Charter of Fundamental Rights, provides that the Union shall “combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child” (para 3).

Article 13 of the EC Treaty, introduced by the Amsterdam Treaty in 1998, constitutes the legal basis for the adoption of secondary law prohibiting discrimination, on different grounds and within different areas of EU law. It establishes that the Council can “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” Both before and after Article 13 was introduced, the Council has adopted several directives addressing the issue of non-discrimination on the basis of sex and sexual orientation. As all directives, these must be implemented in all member states within a certain time period; if not satisfactorily implemented, they can be applied directly under the EU doctrine of direct effect. Gender discrimination at work and in services constitutes one of the areas addressed most frequently by Council directives. In Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, the relationship between equal treatment and the prohibition of sex discrimination was defined in the following manner:

[T]he principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status. (Art 2(1))

Many directives have been adopted that concretize this principle. In 2006, a directive was adopted to group in the same legal text all previous directives relating to sex discrimination at work: Directive

34 Article 2 reads: "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States." (emphasis added). Article 3 specifies the activities the Community will undertake for the purposes of Article 2, and concludes with stating: "In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women." (Art 3(2)).

35 The text of the Treaty of Lisbon does not include the Charter. However, Article 1(8) of the Treaty of Lisbon provides that Article 6(1) of the Treaty on European Union is to be replaced by the following: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

36 For an explanation of this term, see Appendix 1.


Chapter 1: Non-Discrimination as Relevant to Sexual Health

2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the so-called Recast Directive).\textsuperscript{39} Recital 3 of its preamble underlines that the Court of Justice has found the principle of equal treatment between men and women also to apply to discrimination arising from gender reassignment (in Richards v. Secretary of State for Work and Pensions, see below). Although preambles of EU Directives are not directly legally binding, they are a source of interpretation of the text. By including Recital 3 the EU lawmaker has formally included the prohibition of discrimination on grounds of gender reassignment into the notion of sex discrimination. Whether the notion of gender reassignment only includes individuals who have undergone or are planning to undergo major genital surgery, or whether it applies to any transgender individual under any kind of treatment, is not fully clear. However, the lack of definition of gender reassignment, that might imply, \textit{inter alia}, hormone treatment, suggests a wider understanding than one that recognizes only surgical procedures.

In 2000, the Council adopted a directive concretizing, among other grounds, the prohibition of sexual orientation discrimination in employment-related areas. \textit{EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation}\textsuperscript{40} flows from the possibility laid out by Article 13 of the EC Treaty, mentioned above, for the Council to take concrete action to combat discrimination. It covers discrimination on the grounds of religion or belief, disability, age, and sexual orientation. It complements earlier directives calling for the implementation of the principle of equal treatment between men and women (above), and between persons irrespective of racial or ethnic origin (2000).

The Directive covers both direct and indirect discrimination, and private as well as public sectors, with regard to employment, self-employment, occupation, access to vocational guidance and vocational training, employment and working conditions, dismissal and pay, and labour union involvement (Art 3). Harassment is deemed a form of discrimination (Art 2.3), and the burden of proof shifts to the respondent once facts suggest that discrimination has occurred (Art 10.1). This latter rule does not apply in criminal proceedings. The Directive does not prohibit positive action for disadvantages linked to the protected grounds (Art 7). It requires that effective judicial or administrative remedies be available, and it provides for legal standing for organizations having a legitimate interest in the application of the norms, among others (Art 9).

On 2 July 2008, the Commission adopted a proposal for a new directive which would provide for the protection against discrimination on the same grounds (age, disability, sexual orientation, and religion) beyond the workplace. It would ensure equal treatment in the areas of social protection, including social security and health care, education, and housing.\textsuperscript{41} As of 31 December 2009, the proposal has still not been adopted by the European Council.

\textit{European Court of Justice judgments}

The European Court of Justice has a rich jurisprudence in which it applies the principle of \textbf{non-discrimination on the basis of sex}. The cases are numerous: as early as 1976 the Court established that the principle of non-discrimination on the basis of sex in relation to equal pay for equal work could be applied directly to member states without the requirement of domestic legislation.\textsuperscript{42} Two years later, in \textit{Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena},\textsuperscript{43} the Court recognized that the equality between men and women was a general principle and a fundamental right of EU law:

\begin{quote}
The court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.\textsuperscript{44}
\end{quote}

In regard to \textbf{discrimination on the basis of sexual orientation}, the European Court of Justice ruled

\begin{flushright}
\textsuperscript{39} [2006] OJ L 204/23. As of 15 August 2009, above-mentioned Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC were repealed, as their provisions have instead been incorporated in the new over-arching Recast Directive.

\textsuperscript{40} [2000] OJ L 303/16.


\textsuperscript{43} Case 149/77 [1978].

\textsuperscript{44} Ibid, at paras 26–27.
on a topic similar to that of Karner v. Austria in Maruko v. Versorgungsanstalt der deutschen Bühnen. Here, the court examined whether the above-mentioned Directive 2000/78 applied to a German occupational pension scheme. The applicant had been in a so-called life partnership (civil union for same-sex couples according to German law) with another man. When the partner died, the applicant applied to the pension institution for a widower’s pension, but was denied the pension on the ground that the scheme did not cover surviving life partners. He claimed that he was thereby discriminated against on the basis of his sexual orientation.

The Court found that the pension scheme was to be regarded as ‘pay’ in the terminology of the relevant Directive, hence the Directive was applicable. The preamble of the Directive states that it is without prejudice to national laws on marital status and benefits that derive from marital status, but, the Court reiterated, this does not exempt member states from having to respect the principle of non-discrimination under EU law. The Court noted that same-sex partners could not marry under German law. Instead, life partnership had been established as a way for the state to recognize same-sex relationships, with significant similarities to the institution of marriage. The Court ruled that when member states have established a model for same-sex partnership, such that the situation of life partners is comparable to that of spouses with regard to survivor’s benefits, less favourable treatment of life partners than of spouses constitutes direct discrimination under the Directive. It was for the national court to determine whether the situation of the applicant was comparable to that of a legal spouse.

In 2011 a similar case was brought before the Court. In the case, Jürgen Römer v. Freie und Hansestadt Hamburg, the issue was whether a pensioner who had entered into a registered life partnership and had received a supplementary retirement pension lower than that granted a married pensioner had suffered unlawful discrimination under Directive 2000/78. The European Court of Justice answered in the affirmative. It concluded that when marriage is reserved to persons of different gender, and when registered life partnership exists for persons of the same gender, and when the life partner is in a legal and factual situation comparable to that of a married person, then there is direct discrimination on the ground of sexual orientation if the pension granted is lower for the registered partner than for the married person. In short, the Court reiterated its stance in Maruko, that when the situation of same-sex life partners is comparable to that of spouses, they should have access to the same employment benefits.

In the EU employment case W v. Commission, the issues of discrimination on the basis of marital status and sexual orientation coincide. The case was decided by the Civil Service Tribunal, which is a specialized tribunal within the Court of Justice adjudicating disputes between the EU and its civil servants. The applicant was a Commission contract staff member who had been refused household allowance for his same-sex partner, based on the fact that they were not married. Household allowances could be granted to same-sex as well as to opposite-sex couples, but only where “the couple has no access to legal marriage in a Member State.” The applicant lived in Belgium but had dual Belgian and Moroccan citizenship. Same-sex marriage is legal in Belgium, but the couple wished not to marry, arguing that entering into a same-sex marriage would put the applicant at risk in Morocco, where homosexual acts are illegal and homosexuals are routinely persecuted. Thus, the issue was whether the applicant could access the relevant benefit while staying unmarried, since same-sex marriage would imply real risks to him in one of his home countries.

The Tribunal noted that the extension of entitlement to the household allowance to officials registered as stable, non-marital partners, including those of the same sex, reflected the non-discrimination principle as enshrined in fundamental EU instruments, where sexual orientation has been included as a banned ground for discrimination. It further stressed that access to legal marriage, the absence of which was a condition for granting of the benefit to non-married couples, should not be “construed in a purely formal sense” but should take into account whether access to marriage for the couple in question was “practical and effective.” For the applicant, the Tribunal observed, risks involved with entering into a same-sex marriage were real and serious in any contacts with one of his two home countries. In conclusion, and relying on jurisprudence from the European Court of Human Rights, the Tribunal stated forcefully that the applicant’s access to marriage in Belgium could not be “regarded as practical and effective.” Thus, the decision by which he was denied household allowance was annulled.

In several cases, the Court has examined the right not to be discriminated against on the basis of gender identity – though this has been more narrowly framed as discrimination in relation to gender reassignment. The important principle here is that the Court has determined that gender identity/gender reassignment discrimination is included in the notion of sex discrimination.

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45 Case C-267/06, decided on 1 April 2008.
46 Case C-147/08, decided on 10 May 2011.
47 Case F-86/09, decided on 14 October 2010.
In P. v. S. and Cornwall County Council, the central issue was whether dismissal because of gender reassignment could be considered discrimination based on sex under Directive 76/207/EEC. The applicant had decided to undergo gender reassignment and, upon informing her employer of the decision, was dismissed from her work. She claimed that this dismissal violated the Directive, whose article 5(1) prohibits discrimination on grounds of sex with regard to working conditions, which includes dismissal.

The Court found that discrimination against a person for reasons related to gender reassignment is covered by the Directive in question; dismissal of a transsexual for such reason therefore violates the Directive. The most significant finding is that ‘sex,’ as read by the relevant Directive, includes not only the traditional understanding of the two sexes but also of situations arising from gender reassignment. Unfavourable treatment linked to gender reassignment thereby effectively became a new ground for discrimination, as a subcategory of discrimination on the basis of sex. The Court also made references to the principle of equality as a fundamental principle of Community law and stated that the relevant Directive is but an expression of said principle.

It is important to bear in mind that this decision only relates to issues linked to gender reassignment (without specifying whether this includes non-surgical treatment or not), and not to gender identity issues more broadly. The Court uses consistently the term ‘transsexual,’ suggesting that the scope of its findings is limited to a group of persons who have undergone, or are in the process of undergoing, genital corrective surgery.

In 1999, the British parliament enacted the Sexual Discrimination (Gender Re-assignment) Regulations Act, in response to the P. v. S and Cornwall County Council case. The law prohibits less favorable treatment of individuals in employment linked with gender reassignment procedures (see below).

In K.B. v. National Health Service Pensions Agency and Secretary of State for Health, the claimant was a woman employee of the British National Health Service. Her partner, R., had undergone female-to-male gender reassignment. The two would have liked to marry but were unable to do so since R. could not have his sex changed on his birth certificate and, accordingly, was still considered female by British law. Marriage in the UK requires two people of opposite sex. R. could not be the assigned beneficiary of a widower's pension under the NHS pension scheme in the event of the death of K.B., since they were not married. K.B. claimed that this constituted sex discrimination, contrary to the principles on equal pay for men and women of Article 141 of the EC Treaty and Directive 75/117/EEC.

The Court found that what was at stake in the case was not whether it was correct to make marriage a precondition for pension rights, but rather the capacity itself to marry. Thereafter, the reasoning of the Court is confusing and seems to reflect that the judges were divided among themselves. On one hand, it stated that it was for national courts to decide whether cases like this should be seen as sex discrimination under the EC Treaty or not. On the other hand, it held that legislation that bars a couple such as K.B. and R. from marrying in principle is incompatible with the principle of equal pay for men and women in Article 141 (which also covers benefits such as pensions), since marriage is a requirement for one of them to be able to access the widower's pension. The Court referred to the European Court of Human Rights cases Goodwin v. United Kingdom and J. v. United Kingdom (see Chapter 4, below), where the Court had found a breach of the right to marry under Article 12 of the European Convention on Human Rights.

In conclusion, the holding appears to be that member states should revise legislation which bars transsexuals from marrying a person of the opposite sex after gender reassignment. Strictly speaking, the issue of marriage must be considered beyond the jurisdiction of the Court, as family law is within the competence of member states. Therefore, this decision – while confusing in its reasoning – is both surprising and, in its references to the European Court of Human Rights, unusually progressive in its reach.

In Richards v. Secretary of State for Work and Pensions, Ms. Richards had undergone male-to-female gender re-assignment surgery, and had been denied a retirement pension from the day she turned 60 on the ground that she was born male. The retirement age for men was 65 in the UK. She claimed that this violated the prohibition of discrimination on the basis of sex in matters of social

48 Case C-13/94, decided on 30 April 1996.
50 Case C-117/01, decided on 7 January 2004.
52 Case C-423/04, decided on 27 April 2006.
recommendation, Council of Europe's Parliamentary Assembly.

unlawful discrimination. and specifies that affirmative action for the enhancement of gender of itself and in its effect,” gives a detailed description of how discrimination is to be understood, the basis of sex shall be counteracted, prohibits any legal provision that is discriminatory “either and motherhood.

for the protection of work and health of women and conditions that allow women to combine work education and in public, political, and cultural activities, and also by establishing special measures to hold offices, and to receive public honours and decorations.

specifies that men and women shall have equal rights for example in education, employment, and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honour and decorations. 

In Croatia, rights and freedoms shall be enjoyed regardless of gender, and inequality with regard to gender is prohibited in states of emergency where rights otherwise may be restricted. 

Poland specifies that men and women shall have equal rights for example in education, employment, and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations. 

In Ukraine, the Constitution prescribes how gender equality will be obtained in practice, by, inter alia, providing women with opportunities in education and in public, political, and cultural activities, and also by establishing special measures for the protection of work and health of women and conditions that allow women to combine work and motherhood. 

The constitution of Malta has detailed instructions as to how discrimination on the basis of sex shall be counteracted, prohibits any legal provision that is discriminatory “either of itself and in its effect,” gives a detailed description of how discrimination is to be understood, and specifies that affirmative action for the enhancement of gender equality will not be considered unlawful discrimination.

4. Regional non-binding material

Political bodies of the Council of Europe as well as of and the European Parliament (EU) have issued numerous recommendations and resolutions on issues related to discrimination on the grounds of sex, sexual orientation, and gender identity. Worth mentioning here is the Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted in March 2010. The recommendation has a clear human rights focus, stressing that human rights equality standards should be applied to sexual orientation and gender identity, and characterizing violations of the rights of LGBT persons as violations of widely recognized rights. These include the right to life, security and protection from violence (with regard to hate crimes and hate speech), freedom of association, expression, and peaceful assembly, right to respect for private and family life, right to seek asylum, and right to non-discrimination in employment, education, health, housing, and sports. The Recommendation highlights the need for comprehensive legislation, policies, and strategies to combat sexual orientation and gender identity discrimination in these areas, calls for effective legal remedies and appropriate sanctions when discrimination occurs, and gives a clear mandate to national human rights mechanisms to address such discrimination.

5. Domestic legislation and case law

(j) Prohibition of discrimination on the basis of sex in national constitutions – Most European constitutions have a clause prohibiting sex discrimination. These vary widely in structure and level of detail. Approaches to this issue include the prohibition of sex discrimination before the law and/or in enjoyment of rights; promotion of gender equality in different spheres of society; gender neutral language; and special protection for women.

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55 Adopted on 31 March 2010.

56 Article 14 and 17, respectively, Croatian Constitution. Translation of the Croatian Constitution provided by the Croatian Constitutional Court.


59 Article 45, Maltese constitution. Official version (English is one of Malta’s official languages).
Several constitutions, most notably in Eastern Europe, have special protective clauses of mothers, women, and children. While these provisions may guarantee women the right to maternity leave and reproductive health care, they also often include paternalistic components, calling for special protections for women in the workplace and banning women from certain ‘dangerous’ work situations. These aspects of the provisions build on stereotypes of women as more fragile and more worthy of protection than men, and present child-rearing as a task of women exclusively. Examples include Hungary, where mothers shall receive support and protection before and after childbirth and where separate regulations also shall ensure the protection of women and youth in the workplace, and Turkey, where minors, women, and persons with physical and mental disabilities shall enjoy special protection with regard to working conditions. The Irish constitution merits special attention in this regard. It celebrates the role of the woman as home-maker, and for the so-called protection of the family, the Irish state shall ensure that mothers “shall not be obliged by economic necessity to engage in labour” so that they can fulfil their “duties in the home.”

Many constitutions call for equality between spouses. Examples include Georgia and Belarus.

(ii) Prohibition of discrimination on the basis of sexual orientation in national constitutions – Several European constitutions now prohibit discrimination based on sexual orientation. In Sweden, where this ground was introduced through an amendment of the constitution in 2003, public institutions shall combat discrimination on grounds of, inter alia, sexual orientation “or other circumstances affecting the private person.” Portugal added sexual orientation to the list of protected grounds in the constitution in 2004, specifying that “[n]o one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty” on the basis of, among many other grounds, sexual orientation.

In Switzerland, the new constitution (1999) does not mention sexual orientation or sexual practices explicitly, but prohibits discrimination on the basis of ‘way of life.’ This, according to commentators, is aimed to include sexual orientation.

(iii) Domestic anti-discrimination laws – As mentioned above, all EU member states have an obligation to implement all anti-discrimination directives, including Directive 2000/78/EC, prohibiting discrimination on the basis of sexual orientation in employment-related contexts. Most member states now have established comprehensive anti-discrimination regimes, where legal provisions are accompanied by monitoring bodies and procedural safeguards. Accession countries, mostly in the Balkans, must also comply with these requirements in order to be considered for membership, and several have already adopted interesting anti-discrimination laws.

Bosnia Herzegovina passed a wide-ranging law against gender discrimination in 2003, the Law on Gender Equality in Bosnia Herzegovina. It sets forth the right to gender equality and non-discrimination in all sectors of society, including education, economy, employment, social welfare, health care, public life, and the media, regardless of marital or family status (Art 2). The law covers direct and indirect discrimination; spells out obligations on behalf of the authorities to enforce the law; and orders the establishment of a special agency whose role it is to monitor the implementation of the law. For the purposes of this report it is noteworthy that it specifically addresses sexual harassment in education and employment (Arts 6 and 8) as well as prohibits “[a]ll forms of violence in private and public life on the grounds of gender” (Art 17). In regard to access to health care, it establishes, inter alia, an equal right to family planning services regardless of gender (Art 13).

60 Article 66, Hungarian Constitution. Unofficial translation.
61 Article 50, Turkish Constitution. Official translation, published by the Office of the Prime Minister.
62 Article 41, Irish Constitution.
63 “Marriage shall be based upon equality of rights and free will of spouses.” (Article 36.1). Official translation.
64 “Marriage, the family, motherhood, fatherhood, and childhood shall be under the protection of the State. On reaching the age of consent women and men shall have the right to enter into marriage on a voluntary basis and start a family. A husband and wife shall be equal in family relationships.” (Article 32) – note that both fatherhood and motherhood shall be protected. Official translation.
65 Chapter 1, Article 2, Swedish Instrument of Government. Official translation.
66 Article 13, Portuguese Constitution. Official translation provided by Portugal’s Constitutional Court.
67 Article 8, Swiss Constitution. Official but unauthoritative translation.
69 Passed on 21 May 2003. English translation provided by the UNDP.
Interestingly, the law deliberately uses the term ‘gender,’ defined as the “socially established role of women and men in public and private life as distinct from the expression bestowed by biological attributes” (Art 4 a), and consistently prohibits discrimination on this ground, as opposed to on the ground ‘sex.’ This approach may suggest that discrimination on the ground of gender identity also could be covered under the law, although this has not been made explicit in the law.

In Belgium, the federal anti-discrimination law is named Act of 10 May 2007 aimed at combating certain forms of discrimination. It 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)). Sex discrimination and racial discrimination are covered by other laws.71

Worth noting is the inclusion of “current and future state of health” as a protected ground, as it provides protection against discrimination based on HIV or AIDS-status. According to a report commissioned by the European Union Agency for Fundamental Rights in 2008, “in practice the Belgian equality body […] regularly finds discrimination of homosexuals to be intricately bound up with fears and prejudices regarding [HIV/AIDS and other] sexually transmitted diseases.”72

The anti-discrimination Act was introduced as part of the implementation of Directive 2000/78/EC, but has a wider scope than the directive in that it does not only cover employment-related fields, but also provision of goods and services, social security and benefits, membership in labour organizations, official documents or records, and participation in a wide range of public activities (Art. 5). It is worth noting, however, that since the Act is federal, it does not include discrimination in matters under regional or local legal authority.

Considering that discrimination is often hard to prove and penalize, it is relevant that the Act introduces special measures to make it enforceable. These include making discriminatory agreements or contracts invalid (Art 15), shifting burden of proof to the alleged discriminator in court cases (Art 28), allowing interest groups to bring legal action under the Act (Art 30), and making criminal sanctions available. When discrimination has been legally established, lump sums will be payable to the victim, which makes it unnecessary for victims to prove the actual amount of damages they have suffered (Art 18). The law gives the government equality body, the Centre for Equal Opportunities and Opposition to Racism, wide-ranging powers to bring claims under all disputes that arise under the Act (Art 29).

The three criminal provisions included in the Act are incitement to hatred, discrimination, or violence (Art 22), prohibition of discriminatory conduct by civil and public servants (Art 23), and the introduction of aggravating circumstances for certain hate crimes (Art 33).

One potentially problematic point is to be found in Article 11, which allows for direct or indirect ‘distinctions,’ when these are regulated by other legislation. This provision has been criticized for allowing the law-maker to opt out from the obligations under the anti-discrimination Act, just by creating another law that goes against it.73

Bulgaria adopted a comprehensive anti-discrimination law in 2003,75 which integrates all EU equality directives, including Directive 2000/78/EC. It is commendable in its wide scope and its mention of international obligations, including human rights obligations. The law bans direct or indirect discrimination on many grounds, including sex and sexual orientation, but it also places the right to non-discrimination in an international context, by specifically expanding its list of protected grounds.

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71 Ibid, p. 12.

72 Ibid.

73 Articles referred to and explained in Lemmens, Heylen, Vandeven, and Vrielink (2008), and by the author’s own comparison of the provisions described there with the text in Dutch and French.


to “other grounds, established by the law, or by international treaties to which the Republic of Bulgaria is a party” (Art 4). The prohibition of discrimination applies to any legal right at all, as established by the Bulgarian Constitution and the laws of Bulgaria (art. 6). It does not distinguish between public and private employment, education, or services. Multiple discrimination is mentioned specifically, as discrimination on more than one of the grounds (additional provisions, § 1.11).

The law established a body (Commission for protection against discrimination) responsible for providing protection under all grounds covered by the law, including sexual orientation (arts. 40–49). It has wide-ranging powers related to investigative, legal, preventative, and remedial work.

A fact that raises concern for the purpose of sexual health is that sexual orientation is mentioned as one of the protected grounds, but does not appear as a ground for which special measures should be taken in order to achieve better integration and representation. Sex, ethnicity, language and, in some cases, disabilities, are mentioned repeatedly as grounds that call for special positive measures, or as areas where special caution must be taken so that discrimination will not occur. Sexual orientation is not. For example, Article 27 specifically mentions that the law applies to discrimination on the grounds of sex in the military service and armed forces, and Article 35(1) calls on education-providers to combat gender stereotyping and discriminatory depictions of racial and religious groups and persons with disabilities. In neither case are sexual orientation or sexual minorities mentioned. On the other hand, several of these provisions relate to quotas – encouraging a balanced participation between men and women and representative participation of persons belonging to ethnic, religious, or language minorities. Quotas may indeed be a less desirable and less effective tool to combat sexual orientation discrimination.

In Serbia, a new anti-discrimination law entered into force in April 2009. Serbia is not a member of the EU. This law therefore shows that the trend toward more comprehensive and inclusive anti-discrimination regimes goes beyond what is imposed on EU member states. The Serbian law stands out as one of the few anti-discrimination laws in the region, and the only in Eastern Europe, that bans discrimination on the basis of gender identity. Its list of protected grounds is long, including gender, gender identity, sexual orientation, health, and marital and family status (Art 2(1)). Article 21, Discrimination on the grounds of sexual orientation, includes both the right to keep one’s sexual orientation private, and to openly declare it, which is worth noting as an interesting manner to frame the issue:

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)

Gender identity discrimination is explored in the context of ‘Discrimination on the grounds of gender’ (Art 20), establishing first the fundamental principle of equality of genders, and then laying out the prohibition of discrimination based on gender as well as gender change:

Discrimination shall be considered to occur in the case of conduct contrary to the principle of the equality of the genders; that is to say, the principle of observing the equal rights and freedoms of women and men in the political, economic, cultural and other aspects of public, professional, private and family life.

It is forbidden to deny rights or to grant privileges, be it publicly or covertly, pertaining to gender or gender change. It is forbidden to practise 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. [Emphasis added]

Making gender identity discrimination part of a general prohibition of gender discrimination underlines the recognition that gender identity is something all humans have and not only a feature of transgendered persons. This way of framing the issue is in line with the approach taken by the European Court of Justice. The latter part of the provision, however, may raise concerns as the prohibition of public advocacy of certain conduct may run contrary to the protection of freedom of speech.

The Serbian law also prescribes the establishment of an anti-discrimination body, the Commissioner for the Protection of Equality (Arts 28–34) that will, inter alia, receive complaints, file charges, and generally monitor compliance with the law.

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76 The Law on the Prohibition of Discrimination, unofficial translation by Labris Serbia, solicited by UNDP Serbia.
Discrimination based on gender identity has also been addressed in the United Kingdom and in Sweden. In the United Kingdom, gender identity discrimination has been framed as a problem closely linked with the treatment a transgendered individual is undergoing. The British Sex Discrimination Act 1975, as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999, now includes discrimination on the basis of gender reassignment, defined as negative treatment resulting from the ground that a person intends to undergo, is undergoing, or has undergone gender reassignment (Section 2A(1)). Gender reassignment is defined broadly, referring not only to surgery but to “a process which is undertaken under medical supervision” to change physiological or other characteristics of sex (Section 82(1)). This includes hormonal treatment. Even so, the provision is clearly narrower than its Serbian and Swedish (below) counterparts, as it does not include transgendered individuals who cannot or do not wish to undergo any kind of medical treatment. The section of the British law was included as a consequence of the ECJ judgment P v. S and Cornwall County Council, and covered originally only discrimination in employment and vocational training. In 2008, the law was amended to include prohibition of discrimination on gender reassignment grounds to the areas of provision of goods, facilities or services, disposal or management of premises, and consent for assignment or sub-letting.

The law provides for four so-called “Special Genuine Occupational Qualifications” that apply exclusively to the gender reassignment ground, and are clauses that identify circumstances in which it may be legal to discriminate against a transgendered person otherwise protected by the law (Section 7B(2)). These provisions specify that the discrimination protection does not apply under certain conditions when the person may perform intimate physical searches as part of his or her job, when the person holds a job in which he or she may be called on to live in someone’s private home, when the job includes co-living with colleagues, such as in the military, and when the holder of the job provides vulnerable individuals with personal service.

From a human rights point of view, it raises concern that these exceptions apply exclusively to transgendered people, thus singling them out. It seems that these restrictions are to a large extent built on prejudices and presumptions about reactions transitioning between genders may stir. Furthermore, the law does not specify when the process of gender reassignment is to be considered complete, nor does it define what populations are to be considered ‘vulnerable.’ On the other hand, following the entry of the EU Recast Directive, 2006/54, as mentioned above, which includes gender identity discrimination under the notion of sex discrimination, these provisions may be challenged if they violate any of the principles under the Directive.

In Sweden, the Discrimination Act prohibits discrimination broadly, and includes as one of its protected categories “transgender identity or expression.” This latter ground is defined as somebody “not identify[ing] herself or himself as a woman or a man or express[ing] by their manner of dressing or in some other way that they belong to another sex” (Section 5(2)). Contrasting with the British category, this definition has the advantage of including transgendered individuals who are not undergoing or intending to undergo any kind of medical treatment.

(iv) Domestic case law –

(1) Shifting of burden of proof

Sweden provides an interesting Supreme Court case, which examined the prohibition of discrimination based on sexual orientation. The Supreme Court found that two lesbian women who had been showing affection publicly in a restaurant, and who had been aggressively approached by the restaurant owner and asked to leave, had been unlawfully discriminated against for reasons of their sexual orientation. The Court applied the then-valid Swedish anti-discrimination law, Article 9 of which banned discrimination related to sexual orientation in the provision of goods and services. The Court also relied on Article 21, according to which it is for the respondent to show that discrimination had not occurred, if the plaintiff has shown that there were circumstances suggesting discriminatory treatment.

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77 Passed on 12 November 1975.
80 The latter two exceptions apply only when a person intends to undergo gender reassignment or is in the process of doing so.
82 Swedish Supreme Court, NJA s. 170, only available in Swedish.
The Court found that the facts – that the two women had been kissing and hugging gently and that opposite-sex couples showing the same level of affection were left undisturbed – were established, and the respondent did not succeed in showing that its treatment had not been discriminatory.

(2) Employer-imposed protective measures

In case 178 1 (2006) before Austria’s Federal Equal Treatment Commission, the Commission discussed ‘protective measures’ taken by an employer to shield a person from discrimination, against the will of the person. The applicant was a policeman. After announcing his (homo)sexual orientation in his workplace and suffering negative treatment he had been transferred against his wishes from a special unit to another post, while the other colleagues involved in the incident had not faced consequences. The Equal Treatment Commission concluded that he suffered unlawful discrimination on the basis of his homosexuality. Although the employer argued that it had transferred the applicant to protect him against possible harassment, the court ruled that such measures must not be taken against a person’s will.

(3) When non-discrimination and religion conflict

In the 2008 British case London Borough of Islington v. Miss L. Ladele before the Employment Appeal Tribunal, the claimant (here, respondent) was a state-employed Registrar who, among other things, registered marriages. When the Civil Partnerships Act 2004 came into force, she refused to register partnerships between same-sex couples because she claimed doing so was inconsistent with her Christian faith. The council where she worked insisted that she perform at least some of such duties, disciplined her, and threatened her with dismissal when she refused. The claimant contended that she had been subject to direct and indirect discrimination as well as harassment because of her beliefs, and the Employment Tribunal agreed that she had suffered direct discrimination.

The Employment Appeal Tribunal ruled that there was no proper legal basis to conclude that discrimination had been established. It held that the applicant had not been directly discriminated against or subjected to harassment on the basis of her religious beliefs but rather disciplined on the basis that she had failed to perform work duties. She had also not been indirectly discriminated against, as the requirement for all registrars to perform civil partnerships, while adversely affecting persons who shared the applicant’s religious beliefs, could be objectively justified as a proportionate measure designed to give effect to the principle of equality of treatment that public authorities were expected to respect. As such, the court concluded that disciplining a local authority official for refusing to register same-sex civil partnerships does not constitute religious discrimination.

(4) Gender identity discrimination

In another United Kingdom case, Sheffield v. Air Foyle Charter Airlines, the applicant was a pilot who had undergone male-to-female gender reassignment. She had successfully worked as a pilot for many years. When applying for a job with Air Foyle Ltd. she was called to attend a seminar organized by the employer but was then not called for an interview. She asserted that the sole reason she had not been called for an interview was that she was a transsexual and that this fact had become known to the company.

The Industrial Tribunal dismissed the employer’s defense that the applicant was unable to work in a team, was hazardous to safety, that she flaunted her femininity, and that pilots were unwilling to fly with her. The applicant had the necessary experience, qualifications, and a stellar record for the position. The Tribunal unanimously held that the reason or the principal reason for the company’s decision not to call her for an interview was because of the knowledge that she was a transsexual. This finding was evidenced by the fact that she had originally been short listed for an interview but later removed from the list.

The Tribunal found that the applicant had been unlawfully discriminated against under the Sex Discrimination Act 1975. The Act did still not prohibit discrimination based on gender assignment, but the Tribunal reached its conclusion applying its provisions on sex discrimination.

6. Concluding remarks

Non-discrimination as a principle is strongly recognized in the region, primarily within the European Union and consequently on the domestic level in EU member states and in accession countries. Unlike the EU bodies, the European Court of Human Rights has not treated non-discrimination as a

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84 Senat II der Gelichbehandlungskommission des Bundes/7. Gutachten, 178 1 (2006), only available in German.
86 Industrial Tribunal, Case No. 1200389/97, decided on 29 May 1998.
core principle of its jurisprudence. The European Court of Human Rights has, nevertheless, issued important decisions clarifying and expanding what the principle entails under the Convention. Here it should be noted that the principle is so strong in the region and legislation so wide and varied that it is close to impossible to make an exhaustive analysis. Merely a few concluding remarks will be made.

**Marital status discrimination**, after the issue was settled by the European Court of Human Rights in *Marxx v. Belgium* in 1979, no longer appears to be a contentious issue in the region. Such discrimination is virtually outlawed in law and in practice – at least with regard to non-married heterosexual couples and their children.

The prohibition of discrimination on the basis of **sexual orientation**, while still not as generally accepted as anti-discrimination based on sex, is reaching increasing acceptance. This ground has recently been included in several constitutions and modern anti-discrimination laws in the region tend to include sexual orientation in their lists of banned grounds. The new Serbian anti-discrimination law serves as a good example. The entry into force of the Treaty of Lisbon on 1 December 2009, giving the Charter of Fundamental Rights and its prohibition of discrimination on the basis of sexual orientation primary law status within the EU, is another landmark in this regard. The consistent term used in these constitutions and laws is ‘sexual orientation’ (except for in the Swiss constitution) which implies an identity-based view on sexuality rather than a behaviour-based view. This suggests that a person has to self-identify as a lesbian, gay, or bisexual person in order to be covered by the protection under the laws, which may constitute a potential limitation to the reach of these provisions.

The European Court of Human Rights *Karner* case is of great importance in the context of sexual orientation discrimination. It points to the importance for same-sex couples to be included in the concept of family and of the right for same-sex partners to be included in social benefits traditionally only awarded to legal spouses. It also makes clear that the margin of appreciation afforded to states is narrow where there is a difference in treatment based on sexual orientation, which is why states have to present exceptional reasons for legally being able to grant same-sex couples less beneficial measures than opposite-sex couples. This principle is applicable and obligatory in many other areas than in the one under examination in the case, as shown by the judgments in *J.M. v. the United Kingdom* and *P.B. and J.S. v. Austria*. The latter case is especially important for the explicit statement that same-sex couples have a right to “family life” under Article 8, an important step towards recognising same-sex family units on equal terms with opposite sex families.

As regards **gender identity discrimination**, the right for a transgendered person not to suffer discrimination has not been as universally recognized – at least not spelled out as such. So far, only three countries in the region have an explicit prohibition of gender identity discrimination. In one of those, the United Kingdom, the prohibition only applies to discrimination related to gender reassignment, which appears to exclude persons not undergoing treatment. The UK law also has several troubling exceptions that illustrate that prejudices against the transgender community still prevail. However, the fact that the European Court of Justice in *P v. S and Cornwall County Council* declared that gender identity discrimination is a subcategory of sex discrimination under EU law is significant and has had consequences on the domestic level. Following the European Court of Justice decision, the EU Council decided to include in the preamble of the Recast Directive 2006/54 gender reassignment in the notion of sex. Even if the preamble is not legally binding, this establishes an important principle. Precisely because the protection from gender identity discrimination has been included in the concept of equal treatment between men and women, this protection may be stronger in practice than the protection granted on the ground of sexual orientation.

Finally, **discrimination based on health status**, including HIV status has now been tackled by the European Court of Human Rights in *Kiyutin v. Russia* and is also recognized and prohibited in some countries’ anti-discrimination laws. Two such examples are Belgium and Serbia. In Belgium, as discussed, HIV discrimination is often intertwined with discrimination based on sexual orientation, which shows the importance of taking a broad view on discrimination and not treating the grounds as mutually exclusive.

**B. SEXUAL HARASSMENT**

1. **Introduction**

At national and international levels, one of the critical developments in anti-discrimination law is the recognition that sexual harassment (unwanted sexuality-based verbal or physical activities in workplace or educational settings which create a hostile environment) functions as a barrier to equality, and as

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87 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.
such counts as a form of discrimination. Sexual harassment can have health effects in two ways. First, the harassment itself can be coercive or abusive enough to have direct mental or physical health effects. Second, in driving the harassed workers out of their employment, it may remove them from a key source of health benefits. Women are disproportionately the targets of this form of harassment, although men may also face this abuse. Freedom from sexual harassment enhances other kinds of freedoms, such as the freedom to speak one's mind, to prosper professionally, and to develop healthy relationships with colleagues and partners. Sexual harassment can also be understood as an unwanted intrusion in the intimacy and sexual life of the individual, violating the right for the individual to define his or her own sexuality, sexual activities, and sexual limits. Sexual harassment can express itself based on sex, sexual orientation, or gender identity: all these grounds are equally serious and should be counteracted as such.

The prohibition of sexual harassment in the work context has gained considerable recognition within the European Union over the last ten years. The EU has established that sexual harassment falls under the notion of unlawful discrimination on grounds of sex and thus violates the principle of equal treatment – sexual harassment being defined in part by violating the right to dignity of the person being subjected to it. Its express prohibition comes up primarily, but not exclusively, in relation to equal relations between men and women in the workplace. The European Social Charter couches sexual harassment as a violation of the right to dignity at work, while the Council of Europe Convention on preventing and combating violence against women and domestic violence, although yet to enter into force, defines and criminalizes sexual harassment as a form of violence. Both the right to equality and the right to dignity also underpin domestic provisions on sexual harassment in the region. In the United Kingdom and Croatia, for example, sexual harassment is framed as an expression of sex discrimination but its definition includes violation of the right to dignity. Other jurisdictions, such as Israel, focus on the degrading and humiliating character of sexual harassment, thus framing it first and foremost as a breach of the right to dignity. However, as will be discussed, the Israeli law also (albeit secondarily) understands sexual harassment as a breach of the right to equality; a sophisticated understanding of the complex nature of sexual harassment that Israeli courts, comments suggest, have failed fully to embrace.

2. **Council of Europe**
   
   **Conventions in the Council of Europe Treaty Series**
   
   The **Council of Europe Convention on preventing and combating violence against women and domestic violence** opened for signature on May 11, 2011, and has thus not yet entered into force. The Convention (discussed in more detail in Chapter 5A: Domestic & Intimate Partner Violence) defines and criminalizes sexual harassment as a form of violence rather than discrimination.

   Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction. (Article 40)

   **European Social Charter**

   In the revised version of the European Social Charter (1996), freedom from sexual harassment is recognized as part of the right to dignity at work:

   **Article 26 – The right to dignity at work**

   With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations:

   1. to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct;

   2. to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.

   According to the Explanatory Report, sexual harassment is to be understood as “unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of workers, including the conduct
of superiors and colleagues." The second paragraph of the article aims at forms of victimizing conduct affecting the right to dignity at work other than sexual harassment.

3. European Union

The prohibition of sexual harassment was made part of mandatory community law for the first time in 2002 and has since gained considerable recognition as a key part of labour regulations that are binding on all member states. The directives described below must be implemented by all member states within a certain time period; if not implemented, they can be applied directly under the doctrine of direct effect. The EU Council Directive 2000/78/EC clarifies that harassment is a form of discrimination but does not explicitly mention sexual harassment. The express prohibition of sexual harassment was introduced in the so-called Sexual Harassment Directive in 2002. This specifically categorizes such harassment as a form of discrimination, in violation of equal protection.

In 2006, a new directive incorporated all previous directives related to equal treatment of men and women, as well as certain developments arising from the case law of the European Court of Justice, in one legal text. The Sexual Harassment Directive was repealed accordingly, but the content relating to sexual harassment remains the same. The new, so-called Recast Directive, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (see also above under 1A), defines 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 (Art 2)

and 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 (Art 2)

Harassment and sexual harassment are included in the concept of discrimination (Art 2(2)(a)), and prohibited as such (Arts 4–14). Thus, sexual harassment is framed as an expression of discrimination, however its definition includes a violation of the right to dignity. The prohibition includes both so-called ‘quid pro quo’ harassment (benefits or other conditions of employment made contingent on the provision of sexual favors, or the rejection thereof resulting in negative treatment or loss of benefit) and ‘hostile work environment’ harassment. It is noteworthy that the definition of sexual harassment includes conduct with the effect of violating a person’s dignity. This means that it is not necessary to show that the alleged harasser intended to violate the victim's dignity; it is sufficient to show that this was the outcome of the conduct.

The Directive sets guidelines for sanctions, legal action, and compensation for victims of sexual harassment. It specifically states that no prior upper limit may be fixed for compensation (Art 18). Member states must establish government agencies for the promotion of equality (Art 20), and anti-discrimination laws must be enforced (Art 17). The Directive obliges member states to encourage employers and those responsible for vocational training to take measures to prevent all forms of sexual discrimination, in particular harassment and sexual harassment (Art 26). Furthermore, the Directive eases the burden of proof on the part of the person claiming to have been discriminated against, which includes persons claiming to have been harassed. Once facts exist from which it may be presumed that harassment has occurred, the victim of sexual harassment will not have to prove,
against a more powerful counterpart (the employer), that the alleged conduct took place (Art 19).\textsuperscript{94}

In 2004, the prohibition of sexual harassment was reiterated in Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services,\textsuperscript{95} employing the same definitions as those described above. Here, the prohibition applies to persons providing goods and services available to the public and transactions carried out in the public context.

As of December 2009, the European Court of Justice has not provided guidance for the interpretation of the notion of sexual harassment in the meaning of Directives 2006/54/EC and 2004/113/EC.

4. Domestic legislation and case law

(i) Comprehensive and inclusive laws prohibiting sexual harassment – The United Kingdom implemented the provisions of Directive 2002/73/EC relating to sexual harassment in the Employment Equality (Sex Discrimination) Regulations 2005,\textsuperscript{96} which amended the existing Sex Discrimination Act (1975). A person now subjects a woman to harassment, including sexual harassment, if

(a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect –

(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 –

(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.\textsuperscript{97}

According to Section 4A (5) and (6), harassment and sexual harassment of women as defined above is to be read as applying equally to the harassment of men. Importantly, it also covers 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)).\textsuperscript{98} 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).

Further amendments to the Sex Discrimination Act (1975) were introduced in 2008 in order to bring UK regulations in line with EU Directives. The SDA Amendment Regulations SI 2008/656 came into effect on 6 April 2008.\textsuperscript{99} The definition of gender harassment is expanded to protect against harassment when “[a person] engages in unwanted conduct that is related to [the victim’s] sex or that of another person” (Section 3). This change enables claims to be made by somebody who is not personally subjected to the unwanted conduct, but the effect of which nonetheless violates his or her dignity or creates an intimidating environment. Moreover, the 2008 amendment includes a specific provision to make an employer liable for sexual harassment of employees by third parties. The employer will become liable if he or she fails to take reasonably practicable (proactive and reactive) steps to protect the employees, where sexual harassment is known to have happened on at least two occasions (Section 4, amending Section 6 of SDA).

Furthermore, the United Kingdom has a specific statute establishing criminal liability in the case of

\textsuperscript{94} This was regulated in Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (OJ L 14, 20.1.1998, p. 6) until the passage of Directive 2006/54/EC, which now incorporates these principles.

\textsuperscript{95} [2004] OJ L 372/37.

\textsuperscript{96} In force on October 1, 2005.

\textsuperscript{97} Section 4A (1) of the Employment Equality Regulations, amending the Sex Discrimination Act.

\textsuperscript{98} See for a discussion of this limitation above under Chapter 1.

\textsuperscript{99} SDA Amendment Regulations SI 2008/656.
harassment, sexual or otherwise, including the crime of putting people in fear of violence and allowing for the court to issue restraining orders when a person’s conduct will amount to harassment.\textsuperscript{100}

Finally, the Employment Equality (Sexual Orientation) Regulations 2003\textsuperscript{101} includes a provision specifically covering harassment on grounds of sexual orientation:

\textit{For the purposes of these Regulations, a person (“A”) subjects another person (“B”) to harassment where, on grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of - (a) violating B’s dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect. (Section 5)}

In Croatia\textsuperscript{102} (a candidate country but not yet a member state of the EU), the Gender Equality Law 116/2003\textsuperscript{103} determines the general basis for the protection and promotion of gender equality and protection against gender discrimination. Harassment and sexual harassment are covered by this law, and are considered forms of gender discrimination, linking the unwanted conduct to a violation of the personal dignity, creating an “unpleasant, unfriendly, humiliating or insulting atmosphere” (Art 8). Similarly in 2003, harassment and sexual harassment were introduced and banned in Croatian labour law with the amendment of the Labour Act.\textsuperscript{104} Both these laws made sexual orientation a prohibited ground for discrimination, with the consequence that sexual harassment based on sexual orientation is covered under the harassment provisions.

Article 30 of the Labour Act is named “The protection of workers’ dignity,” and contains a long list of obligations conferred on the employer for the protection of the employees from harassment or sexual harassment. When harassment takes place, this is understood to violate “employment obligations”. Interestingly, when this occurs, under certain conditions the victim has the right to cease working until he or she is offered protection, with guaranteed full compensation. This provision merits close attention, with the caveat that it remains unclear what actions the employer should take in order to prevent harassment and sexual harassment in order to fulfill its obligations under the article. According to commentators, codes of conduct and provisions of collective agreements probably need to be enacted on this issue to specify the duties of the employer.\textsuperscript{105}

Israel\textsuperscript{106} has a comprehensive sexual harassment law that differs slightly in perspective from other such laws in the region. The Prevention of Sexual Harassment Law,\textsuperscript{107} enacted by the Knesset in 1998, declares as its purpose “to prohibit sexual harassment in order to protect the right to respect, human dignity, liberty and privacy and to promote equality between the sexes” (Art 1). In other words, here the issue of sexual harassment is framed \textit{primarily} as an injury to the right to human dignity and respect, in combination with an infringement of the right to equality.

Article 3 of the law defines sexual harassment. The concept includes, \textit{inter alia}, sexual blackmail or threats; indecent acts; repeated propositions of a sexual character or references with sexual connotations against the wishes of the person receiving them; and intimidating or humiliating remarks concerning a person’s sex/gender, sexuality, or sexual tendencies. If committed against persons of a dependent or subordinate status (minor-parent/tutor, patient-doctor, and employee-employer), remarks and propositions of a sexual nature will be deemed sexual harassment even if the victim has not made known that he/she is not interested. Furthermore, ‘prejudicial treatment’ is prohibited, defined as any harmful act which originates in sexual harassment or complaints related to sexual harassment. This is to be understood as intimidation or retaliation, which can occur simultaneously to the harassment and before unwelcome sexual advances have been rejected.\textsuperscript{108}

\begin{thebibliography}{99}
\bibitem{100} Protection from Harassment Act 1997, passed on 21 March, 1997.
\bibitem{102} Published in the Official Gazette no. 116 on 22 July 2003, in effect on July 30th 2003. Official translation.
\bibitem{105} Prevention of Sexual Harassment Law, 5758 – 1998, SH 166, approved on 10 March 1998. Translation to English appears to be official.
\end{thebibliography}
The law prohibits sexual harassment everywhere; it does not distinguish sexual harassment in the workplace from sexual harassment in other – public or private – places (Art 4). It defines sexual harassment both as a tort and as a criminal offense (Arts 5-6). The harasser has personal liability – as opposed to employer liability, for example, when committed between colleagues in a workplace – and can, thus, both be subjected to criminal law punishment (Art 5), and civil law liability (Art 6). That said, the employer also has extensive duties to prevent sexual harassment in the workplace and to deal with cases of sexual harassment and adverse treatment when they have occurred (Arts 7-9 and 11).

Interestingly, and without precedent in Israeli law, the law provides for punitive damages without damage having to be proved (Art 6(b)). What must be shown is only conduct that the law has defined as harassment. According to the explanatory note accompanying the law, the damage “is often inflicted on the harassed person’s dignity, self-confidence, and his right to respect and to a reasonable quality of life […]. Since these injuries are inherent in the nature of the harassing behavior, the proof of conduct embodies the proof of damage.” This, according to a commentary, is a way to protect ‘strong’ harassed persons – even those who do not have emotional breakdowns following harassment – by insisting that all harassed persons suffer injury to their dignity and self-worth and deserve the protection of the law.

As seen, the objective behind the law was to combine the dignity paradigm with the equality paradigm, and not to see those two approaches as mutually exclusive in sexual harassment law. However, as one commentator has pointed out, Israeli courts have favored the ‘dignity’ aspect over the ‘equality’ aspect, in the sense that the discriminatory features of sexual harassment have to a large extent been excluded from legal analysis. This approach, framing the harm of sexual harassment in gender-neutral terms, has had a tendency to disguise the gendered significance of most cases of sexual harassment. The jurisprudence applying the law has also been criticized for understanding harm to dignity as a moral harm, or harm to the honour of women. Such approach implies that women are vulnerable, sexually pure, and in need of special protection, and may uphold rather than undermine gender inequalities.

(ii) Case law: sexual harassment as sex discrimination – In the Scottish Court of Session case Strathclyde Regional Council v. Porcelli (1986) the respondent, Mrs. Porcelli, was a science laboratory technician employed by the appellants. She had complained to an Industrial Tribunal that her employers had discriminated against her in violation of the Sex Discrimination Act (1975). Her complaint included allegations that two of her fellow employees, both male, had subjected her to a course of vindictive and unpleasant treatment which compelled her to transfer to another workplace. The Employment Appeal Tribunal found that the campaign against the claimant included sexual harassment, directed towards her because she was a woman, and the Scottish Court of Session agreed:

[T]his particular part of the campaign was plainly adopted against Mrs Porcelli because she was a woman. It was a particular kind of weapon, based upon the sex of the victim, which […] would not have been used against an equally disliked man. (para 9)

The possibility that the two colleagues might have treated an equally disliked man as unfavourably as they treated Mrs. Porcelli was beside the point. It was the choice of actions taken that was to be examined. The campaign had expressed itself in sexual harassment, a “particularly degrading and unacceptable form of treatment which it must be taken to have been the intention of Parliament to restrain [in the context of the Sex Discrimination Act].” In conclusion, the Court found that the claimant had been discriminated against based on her sex.

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108 Quote from Kamir, p. 13.
111 An example of this tendency, according to Rimalt, can be found in the Supreme Court decision Israel v. Ben-Asher, CSA 67/3/96 [1998] IsrSC 52(1) 650 – technically decided before the law was enacted but applying the principles of the draft law.
112 Rimalt mentions as an example of this paternalistic approach the Supreme Court decision Galili, HCJ 1284/99 Jane Doe v. IDF Commander [1999] IsrSC 53(2) 62.
114 This was before the introduction of the amendments of Sex Discrimination Act (1975) in 2005 (above). The case shows that UK Courts before the amendment of the Act had already established that sexual harassment is an unlawful form of sex discrimination, falling under the general prohibition of sex discrimination.
(iii) Employer responsibility for harassment subjected by third party – In the 1995 British Employment Appeal Tribunal case the Go Kidz Go Ltd v. Bourdouane115 the applicant was an employee of a company hosting children’s parties who was sexually harassed by a male parent while working at such a party. She was dismissed by her employer upon complaining about the matter. The Tribunal stated that it is sufficient for a complainant to show that behaviour is sexually offensive to a woman in order to establish discrimination under the Sex Discrimination Act. According to the Act an employer has a duty to take all reasonable steps to prevent such discrimination from taking place whenever it is within the power of the employer to prevent it, even if the harassment is imposed by non-employees. The Tribunal held that the employer had failed to take steps to stop the harassment. As a consequence, the employer was found guilty of sex discrimination.

(iv) Conflict between sexual harassment and freedom of expression – In the German case BVerwG 2 WD 9.06116 the issue was sexual harassment in the workplace on the ground of sexual orientation. A superior soldier had greeted his subordinate on his birthday with the words “Good luck, my gay friend” in the presence of a third party. The subordinate soldier had not given his consent for his sexual orientation to be revealed.

According to the Federal Administrative Court, the constitutionally protected freedom of expression has its limits, when the equally protected rights to of personal dignity and the protection of privacy are at stake (Articles 1 (1) and 2 (1) of the German Constitution). These rights empower each person to determine his or her attitude toward his or her sexuality, including whether and in what form he or she would like to reveal his sexual orientation or provide it as a topic of discussion. The Court found that the behaviour of the superior soldier constituted sexual harassment in the workplace as well as a violation of duty and comradeship.

5. Concluding remarks

As seen, the prohibition of sexual harassment has gained strong recognition in European Union law. Once sexual harassment was acknowledged as a form of sex discrimination, its prohibition has followed from the strong stance against discrimination in general within the EU legal framework. The EU position on sexual harassment, focusing in particular on harassment in the workplace, has taken root in domestic legislation in Europe, including in countries that are not yet members of the Union, such as Croatia. Worth pointing out is that both in the United Kingdom and in Croatia the prohibition includes sexual harassment based on sexual orientation.

Sexual harassment includes both behaviour that is ‘objectively’ offensive and harmful, such as sexual blackmailing by way of threats or sexual intimidation or humiliation, and behaviour that per se is neutral but becomes offensive if undesired by the recipient. In this latter category fall sexual propositions and references to a person's sexuality. Such conduct can be desirable, when performed with mutual consent, which is important to recognize. For this reason, the UK provisions stress that relevant conduct must be ‘unwanted’ and the Israeli law prohibits behaviour “where the person has shown to the harasser that he is not interested.” Demonstrating objection, however, may be difficult in situations of power imbalance, such as in a workplace when the perpetrator is a person in a position of power in relation to the victim. In fact, power dynamics are often present in situations where sexual harassment occurs. The Israeli lawmaker has tackled this problem by specifically mentioning situations of dependence or hierarchy, exempting the victim in those situations from having to show her or his discomfort. In the EU and in several domestic laws, recognizing this power imbalance that may make it difficult for the victim of sexual harassment to make a claim against a more powerful counterpart, a shifting of the burden of proof to the alleged perpetrator has been provided, once basic facts are established.

The Israeli law also does not require that personal injury be shown in order to create liability for sexual harassment. This is based on the notion that conduct that typically constitutes sexual harassment per se injures the dignity of the person, such that the reaction of the individual subjected to it is of less relevance. This strong focus on dignity makes the Israeli law differ slightly from other regulations examined here, although the violation of dignity is at the core of the definition of sexual harassment in all of them. The Israeli approach, by not placing sexual harassment primarily in the realm of sex inequality and structural oppression of women, makes the prohibition easier to apply in situations of same-sex harassment, or harassment of men. However, this approach may also obscure the fact that most expressions of sexual harassment in fact take place within the framework of male dominance.

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116 Federal Administrative Court, decided on 24 April 2007. Only in German.
over women and are linked to structural inequalities between the sexes. Furthermore, if the concept of dignity is interpreted as (female) ‘honour’ or a ‘moral’ good, the law might lead to the reinforcement of gender stereotyping, which would appear to be contrary to the intentions behind the Israeli law.

C. MANDATORY HIV TESTING

1. Introduction

Research demonstrates that mandatory HIV testing, particularly when separated from therapeutic intervention, is unjustified on public health grounds, as it has not been proven to result in greater access to or sustained use of treatment, nor in more effective sharing of information with sexual partners. Moreover, such testing violates the rights to privacy and security of the person. It is also often discriminatory, both in application and effect. Laws and policies mandating or allowing non-consensual HIV testing tend to selectively target marginalized groups believed to be at higher risk of HIV infection, such as sex workers or prisoners. Because the testing is done in ways that violate privacy (such as when police officials receive results for registered prostitutes) and which do not result in either treatment of the affected persons or in good preventative practices more generally, it can be criticised as discriminatory. Mandatory testing also has a tendency to increase discrimination against persons living with HIV, disempowering them and exposing them to society’s scorn.

Voluntary and consensual HIV testing has for these reasons obvious bearing on sexual health and human rights. From a public health perspective, voluntary testing has proven to be more effective in the fight against HIV. From a rights perspective, the voluntary nature of such testing is imperative in order to respect the individual’s rights and to combat discrimination and social exclusion.

In Europe, mandatory HIV testing has largely been abolished. Widespread mandatory testing was previously practiced in Eastern Europe and the former Soviet Union in the wake of the emergence of the HIV crisis, but several countries in the former Eastern Bloc have now included provisions in their HIV/AIDS regulations explicitly stating that testing must be conducted on a voluntary basis. This distinguishes these states from most other European countries, where mandatory testing was never practiced on a large scale and where the voluntary nature of testing therefore is not explicitly emphasized in legal text. One area where mandatory testing has arisen in Europe is with regard to HIV testing following criminal activity, in particular of sex offenders after rape who do not consent to testing. While in Scotland a general proposal to allow for compulsory testing of assailants was rejected on human rights grounds, in the Netherlands such testing following rape has been allowed with reference to the victim’s right to eliminate the uncertainty raised by the risk of transmission.

2. Council of Europe

Neither the European Court of Human Rights nor the European Committee for Social Rights has addressed the issue of mandatory HIV testing.

3. European Union

European Court of Justice

The case X v. Commission mainly concerns issues of disclosure of HIV status, but is worth mentioning in the context of mandatory HIV testing. It relates to the principles underlying the opposition to mandatory testing in that the Court makes clear that a person’s refusal to undergo an HIV test has to be respected in its entirety and cannot be circumvented by giving the test another name.

The appellant in the case had applied for employment as a typist with the Commission, and had been asked to undergo a medical examination, including various biological tests. One of these was a lymphocyte count of which he had been unaware. He had declined the suggestion that he would also be tested for HIV. The medical officer reported him unfit for recruitment. The appellant argued that the lymphocyte count to which he had been subjected equated a dissimulated HIV antibody screening test, to which he had withheld his consent. Carrying out this test without his informed consent, he contended, constituted an interference with his physical integrity and therefore violated Article 8 of the European Convention on Human Rights.

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


119 Case C-404/92 P, decided on 5 October 1994, appeal against a judgment of the Court of First Instance.
The European Court of Justice stated that medical tests in order to establish fitness for recruitment are lawful, and that a person has to be found physically fit for the performance of duties concerned before hire. However, in the case the appellant had expressly refused to undergo the HIV screening test. The Court held that any test that was likely to point to or establish the existence of HIV/AIDS was therefore also precluded. The lymphocyte count in question apparently had provided the medical officer with sufficient information to draw the conclusion that the appellant may be a carrier of HIV. Therefore, the decision that the appellant had been found unfit for the position concerned should be annulled.

4. Regional non-binding material

There is an abundance of non-binding material from both the Council of Europe and the European Union on HIV related issues. In these documents, the importance of HIV testing being voluntary is clear, although the issue generally is mentioned in passing. The documents stress the use of "voluntary counseling and testing," sometimes with the addition "with full protection of confidentiality and informed consent." These documents generally operate within a public health framework, stressing that voluntary testing is the more effective means by which an end to the pandemic can be achieved. There are also occasional statements where a rights-approach to the problem of mandatory testing can be detected, such as in the 1989 Council of Europe Committee of Ministers Recommendation No. R (89) 14 on the ethical issues of HIV infection in the health care and social settings. It establishes that compulsory screening, in the absence of curative treatment, is "unethical, ineffective, unnecessarily intrusive, discriminatory and counterproductive." The same document further highlights the discriminatory nature of mandatory screening, recommending that public health authorities make sure that such compulsory screening is not imposed on any group of the population, but in particular not on especially vulnerable populations, such as prisoners, immigrants, and military recruits.

5. Domestic legislation and case law

As mentioned, mandatory HIV is no longer a widespread practice in Europe. Rather than impose testing, some countries have opted to mandate that health providers offer HIV screening. For instance, in France, Finland, Poland, and Sweden, health care providers must offer HIV tests to pregnant women, who are free to refuse. In France, physicians have been required to offer HIV testing to all pregnant women since 1993. Under the French Public Health Code, "[a]t the first prenatal visit, following information on risks of infection, an HIV test is offered to the pregnant woman" (Art L2122-1). This provides legal support for HIV testing while still preserving the patient's rights.

From 1987 in the Soviet Union (and continuing in the Russian Federation), sanitary-epidemiological policies were passed and implemented. These policies were based on mandatory HIV testing for as much of the population as possible, especially for those considered 'risk groups.' Health officials believed that a policy of medical isolation and criminalization was necessary to contain the spread of HIV, and severe criminal sanctions were used to punish and isolate HIV positive individuals. In response to the development of knowledge about the pandemic and under international influence, these practices have to a large extent been abandoned in the former Soviet republics. Mandatory HIV testing has been severely restricted.


121 Adopted by the Committee of Ministers on 24 October 1989.

122 For a history of compulsory HIV testing and other public health measures in response to the arrival of HIV in Europe, see James Baldwin, Disease and Democracy, Berkeley, 2005, pp. 51–85.


124 Law 93-121 on various social measures, Art. 48, establishing Article L2122-1 of the Public Health Code. Unofficial translation of this article from French Conseil National du Sida.


126 Medvedev. [HIV positive foreigners were deported and HIV positive Soviets were isolated].
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Russian government officials declared that the Russian entry bans for HIV infected foreigners would In 2008, following a US decision to ease HIV/AIDS-related travel restrictions, news sources report that Russian Government.

Additionally, the 2002 Federal Law on the Legal Status of Foreign Citizens in the Russian Federation, states that a foreign citizen will not be issued a residence permit or, if previously issued, such permit will be terminated, if the alien cannot show a certificate that he or she has “no disease caused by human immunodeficiency virus (HIV) or suffer from one of the infectious diseases that pose a danger to others.” The list of such diseases is approved by a federal executive body, authorized by the Russian Government.

In 2008, following a US decision to ease HIV/AIDS-related travel restrictions, news sources report that Russian government officials declared that the Russian entry bans for HIV infected foreigners would be modified or rescinded. As of December 2009, the law is still in place. As described in Chapter 1, the European Court of Human Rights recently found that the actions of the Russian State in denying a residency permit to a foreign national on the ground of his HIV status was discriminatory and violated his right to a family life with his Russian wife and their children.

In Ukraine, like in Russia, mandatory HIV testing is banned. Article 57 of the 1992 Basic Laws of Ukraine on Health, as amended, establishes that public health institutions are obliged to implement special measures of prevention and treatment of so-called ‘dangerous social diseases,’ of which AIDS is listed as one. According to the law On Prevention of the Disease AIDS and Social Protection of Population, citizens of Ukraine have the following rights:

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)

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)

The above-mentioned federal law on prevention and spread of HIV poses HIV related conditions on entry for foreign citizens. According to its Article 10 (“Conditions of entry to The Russian Federation of foreign citizens and stateless persons”), non-nationals who will come to Russia for more than three months will only get a visa subject to the production of a certificate proving that they are not carriers of HIV. This provision does not apply to members of diplomatic missions and consular institutions of foreign states and to employees of international intergovernmental organizations and their families. Additionally, the 2002 Federal Law on the Legal Status of Foreign Citizens in the Russian Federation, states that a foreign citizen will not be issued a residence permit or, if previously issued, such permit will be terminated, if the alien cannot show a certificate that he or she has “no disease caused by human immunodeficiency virus (HIV) or suffer from one of the infectious diseases that pose a danger to others.” The list of such diseases is approved by a federal executive body, authorized by the Russian Government.

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Additionally, the procedure for voluntary HIV testing and counselling in Ukraine is regulated by a Ministry of Health Order from 2005, About Improvement of Voluntary Counseling and Testing HIV Infection. This order reiterates that HIV testing may be performed only with the informed and voluntary consent of the patient. Informed and voluntary consent is defined as follows: that the patient has been given sufficient information in a language accessible format; that he/she has realized all positive and negative consequences of revealing his or her HIV status, and that he/she has given written consent to the test before it takes place. Pressure or coercion to undergo testing is not permitted.

In some western European countries, compulsory testing has been discussed following criminal activity, based on the notion that victims of crime or law enforcement personnel have a right to know whether they have been subjected to risk of transmission. In Scotland, the Scottish Police Force proposed in 2002 that the parliament should pass legislation that would make it compulsory for "assailants and others who have caused police officers to be exposed or potentially exposed to such risk to submit to a blood test." The Scottish executive went even further, proposing that the right to insist on a blood test would be made available not just to police officers but also to others "caught up in comparable circumstances." A working group established to consider these proposals acknowledged that compulsory testing may interfere with UK obligations under the European Convention on Human Rights, and also that the proposals were not likely to reduce the risk of actual transmission of HIV. For these reasons, the proposals did not lead to legislation.

A related issue is that of mandatory testing of sex offenders who have committed rape and who do not voluntarily agree to be tested. In the Netherlands this issue came up in 1991, when a woman who had been raped demanded that the rapist undergo an HIV test, and the offender refused to do so with reference to his right to bodily integrity under the Dutch Constitution. The Dutch Supreme Court found for the woman, ruling that a blood test was necessary. The Court argued that it was the right of the woman that the consequence of the rape be mitigated, and that the uncertainty concerning HIV transmission was one of those consequences. Thus, she had a substantial interest in eliminating this uncertainty, which justified a blood test against the will of the rapist. However, the Court also emphasized that the rapist's request not to be informed about the result of the test had to be respected.

6. Concluding remarks

In the European region, mandatory HIV testing is no longer practiced except for under very exceptional circumstances. No binding regional documents outlaw the practice; nevertheless, the examination of non-binding statements from both the Council of Europe and the European Union demonstrate that the issue is treated with an obviousness that suggests a consensus around the belief that mandatory testing is outdated, discriminatory, and contrary to human rights standards.

While mandatory testing was prevalent when HIV/AIDS first became known in the Soviet Union and, after its dissolution, in the former Soviet Republics, these countries have to a large extent abandoned the practice. An increasing awareness of HIV/AIDS as a human rights issue, the right to non-discrimination of persons living with HIV, and state obligations to provide for respectful and consensual testing and health care can be discerned. The Ukrainian policies provide a good example in this regard.

Some problematic points remain. The list of professions for whom mandatory testing is required in Russia seems arbitrary and nonsensical, and has a strong discriminatory element. The Russian travel and entry ban on HIV positive foreigners is another troubling aspect, but should probably be seen as an isolated remainder of a policy which since has largely been abolished. Reports suggest that this ban is about to be abandoned, which again points to the trend to embrace a more rights-based approach to HIV/AIDS.

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139 Ibid.
In other European countries, calls for mandatory HIV testing, in particular of immigrants and refugees, appear occasionally on the political scene.\textsuperscript{140} So far, these have been dismissed, both on public health and human rights grounds. Similarly, the proposal that the police in Scotland would have a right to demand testing of assailants following criminal activity was rejected, primarily with reference to rights under the European Convention. The Netherlands, in allowing for non-consensual testing of a sex offender following rape, weighed the rights of the victim of the crime against the right to bodily integrity of the offender, and concluded that the victim's right to mitigate the consequences of the crime took precedence. This case must be seen as an exception to the general practice in Europe that only consensual testing should be allowed, and can be explained by the presence of conflicting rights in the case and the overriding interest in limiting the harm for the victim of sexual crime.

D. Asylum on the Basis of LGBT-Related or Gender-Based Persecution or HIV Status

1. Introduction

Asylum granted as a consequence of well-founded fear of persecution based on LGBT-related or gender-based persecution or on the grounds of HIV status is a response to situations where serious violations of sexual rights or the right to health are at risk of occurring. In this sense, asylum is to be understood as a remedy to a dangerous situation, which can serve as best practice as a last resort when an individual's sexual health is seriously threatened. Since discrimination – on the basis of sex, on the basis of real or perceived sexual orientation or gender identity, or on the basis of HIV status – underlies most persecution relevant for this report, the legal framework of asylum will be covered in this chapter. Individual cases where asylum has been granted will be addressed in the chapters examining the particular violations that have given rise to the asylum claim.\textsuperscript{141}

2. Council of Europe

Jurisprudence of the European Court of Human Rights

The European Convention on Human Rights does not establish a right to seek or to be granted asylum. However, the Court has repeatedly addressed the issue of asylum under the Convention's substantive articles, establishing that the (European) host country may be in violation of the Convention when expelling a person to a country where he or she is at risk of persecution or violence. In this sense, it has found that the Convention has extraterritorial application.\textsuperscript{142} For the purpose of this report, it is relevant to point out cases where the Court has examined the right to asylum for HIV positive persons who cannot access treatment in their country of origin, as addressed in Chapter 6B: Access to STI/HIV treatment. In one case the refusal to grant an Iranian man asylum in the United Kingdom, when claiming persecution based on his homosexual orientation, was upheld by the Court in 2004. This case is mentioned briefly in Chapter 2. Additionally, in N. v. Sweden, the Court ruled that Sweden would violate its obligations under Article 3 were it to deport an Afghan woman who had separated from her husband and initiated a relationship with a Swedish man. This case is discussed in Chapter 3D: Adultery.

Conventions in the Council of Europe Treaty Series

The Council of Europe Convention on preventing and combating violence against women and domestic violence\textsuperscript{143}, opened for signature on May 11, 2011, and thus not yet in force, provides that states shall ensure that gender-based violence against women may be recognized as a form of persecution for the purpose of asylum (Art. 60). The Convention is discussed more fully in Chapter 5A: Domestic & Intimate Partner Violence.

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\textsuperscript{141} See, \textit{inter alia}, Chapter 3C, asylum granted based on the threat of being subjected to forced marriage, and Chapter 6B, asylum granted based on HIV status and lack of treatment in country of origin.


\textsuperscript{143} Council of Europe Treaty Series No. 210, May 11, 2011.
3. European Union

European Union regulations on immigration, border control, protection of refugees, and granting of asylum are too numerous and complex to list here. Worth mentioning for the purpose of this report is, nevertheless, a recent directive that establishes both that a ‘particular social group’ (within the meaning of the Geneva Convention) 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.

This so-called Qualifications Directive (2004)\(^{144}\) establishes common criteria for the identification of persons in need of international protection under European asylum law and sets out minimum standards for benefits that should be available to such persons in all member states. The Directive should have been implemented by all member states by 10 October 2006. Given that the Directive contains minimum standards, states are allowed to introduce or maintain more favorable provisions.

The Directive adopts the Geneva Convention definition of a ‘refugee’ as a person who has a well-founded fear of being persecuted in his or her home country on one of a number of grounds, among them the membership of a particular social group (Art 2 (c)). The fact that the applicant has suffered past persecution, serious harm, or direct threats is an indication that he or she has a well-founded fear of persecution (art 4.4). Nevertheless, international protection needs can also arise sur place; that is, the application can be based on events that have taken place since the applicant left his or her country or origin, or on activities in which the applicant has engaged after leaving his or her home country (Art 5). Agents of persecution can include the state (Art 6(a)), parties or organizations controlling the state or a substantial part of its territory (Art 6 (b)), or non-state actors, if it can be demonstrated that the state is unable or unwilling to provide protection (Art 6 (c)). The latter category is particularly relevant for persecution linked to sexual health since persecution on sexual grounds or gender-based violence commonly, but by no means always, occurs in the private sphere.

The Directive 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)).

Article 10 addresses reasons for persecution. With regard to the concept of persecution based on membership of a social group, it establishes that a group shall be considered a ‘particular certain group’ when:

- 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))

The same Article then continues:

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article (Art 10.1(f)).

Finally, the Article clarifies that 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). This is a clarification crucial for persecution based on real or perceived homosexuality and non-conforming gender identity.

The Directive also addresses subsidiary protection in situations where an applicant faces “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 indiscriminate violence in situations of armed conflict) upon return to his or her country of origin (Art 15).

Minimum standard of benefits for a person who has been declared a refugee and granted asylum are worded in general terms. The “content of international protection” listed in the Directive includes protection from *refoulement* (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).

4. **Regional non-binding material**

Worth mentioning here is the 2000 Council of Europe Parliamentary Assembly Recommendation 1470 (2000) on the Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe.145 This recommendation urges member states to examine the question of recognition of homosexuals as members of particular social groups in the meaning of the Geneva Convention, which would ensure that persecution on grounds of homosexuality would be recognized as a ground for asylum.

5. **Domestic legislation**

According to standing policy and case law in the Netherlands, the definition of being persecuted for reasons of membership of a particular social group in the sense of the Geneva Convention includes being persecuted for reasons of sexual orientation or gender identity.146 This is laid out in the *Aliens Circular*,147 a policy document specifying various criteria related to immigration and asylum issues, in interpretation of the *Aliens Act* (2000). An LGBT asylum seeker, in order to qualify for refugee status, must have a well-founded fear of persecution due to his/her sexual orientation or gender identity. The existence of a penalty clause in the country of origin that concerns LGBT people exclusively is to be considered an act of persecution. However, the criminal sanction must reach a certain gravity in order to justify the recognition as a refugee; sole criminalization does not automatically lead to the conclusion that an LGBT person from that country is a refugee.148

An LGBT asylum seeker can also be granted residence in the Netherlands if he or she can show substantial grounds for believing that he/she faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment upon return, in the meaning of Article 3 of the ECHR, Article 7 of the ICCPR, or (with regard to torture) Article 3 of the CAT.149 The situation of LGBT people in the country of origin can also be a reason for so-called protection for humanitarian reasons. This is protection for persons for whom the Minister considers that for pressing humanitarian reasons it cannot be required that they return to their country of origin, even though they do not qualify for refugee status.150 This protection for humanitarian reasons has in recent times been applied to Iranian LGBT persons.151

With regard to gender-based persecution, the *Aliens Act* does not specifically mention such persecution as a basis for asylum. However, the *Aliens Circular* advocates a “gender-inclusive approach to asylum.”152

In Spain, a new asylum law was passed in 2009. In this law, *Law 12/2009, of 30 October, regulating the right to asylum and to subsidiary protection*,153 persecution both on the basis of gender and on the basis of sexual orientation have been included as grounds for asylum. These grounds have been defined as separate grounds, not included in the term ‘social group.’ Instead, refuge will be granted to

145 Adopted on 30 June 2000.


149 Pursuant to Article 29(1b) of the *Aliens Act*.

150 Article 29(1c) of the *Aliens Act*.


153 No. 17242, promulgated on 30 October 2009. Only available in Spanish; translation is author’s own.
a person who “because of a well-founded fear of persecution on account of race, religion, nationality, political opinions, membership in a particular social group, gender or sexual orientation” (emphasis added) is outside of his or her country of origin and cannot return (Art. 3). According to Article 6, acts that constitute persecution must reach a certain level of gravity. Among such acts are “acts of physical or psychological violence, including acts of sexual violence” (Art 6 (2) (a)), “procedures or punishments that seem disproportionate or discriminatory (Art 6 (2) (c)), and “acts of sexual character that affect adults or children” (Art 6 (2) (f)).

From the text of the law, it appears that persons of a particular sexual orientation or gender can also constitute a ‘social group’ in the meaning of the law. Article 7(1)(e), defining ‘particular social group’ as a ground for protection states that with account taken to the prevailing circumstances in the country of origin, the concept of a particular social group can include a “group based on a common characteristic of sexual orientation, sexual identity, and/or age,” as well as persons who flee their countries of origin in response to a well-founded fear of persecution on account of gender and/or age. Agents of persecution may be agents of the state, agents of organizations or groups controlling the state, or non-state actors, when the state or other relevant entities are unable or unwilling to provide protection (Art 13).

According to one commentary, the reference to “prevailing circumstances in the country” in Article 7 (defining membership in a particular social group) may limit the scope of protection for women or persons persecuted on the basis of sexual orientation. This caveat, according to the commentary, could imply that persecution that is wide-spread and normalized, in particular when committed within families or communities, would not be perceived as sufficiently serious.154

6. Concluding remarks

Asylum law is included in this report only to demonstrate that severe persecution on grounds related to sexual health has in recent years been acknowledged as a ground that can lead to asylum. In the wake of the Second World War, refugee status was granted exclusively for individual persecution primarily on account of ethnicity/race, religion, and political opinion: violations of ‘traditional’ civil and political rights, committed by state agents.155 While the legal framework has remained virtually the same – based on the definitions and limitations of the Geneva Convention – the understanding of what groups may deserve protection has expanded. There is a growing acceptance in the European region that, for the purpose of asylum law, persecution can take other forms than the ‘traditional’ without being less serious. This includes the acknowledgement that the source of persecution can be non-state actors or entities, such as perpetrators of domestic violence or mob violence against gays and lesbians, when there is no effective system to bring the perpetrators to justice and to protect the victims. It also includes the recognition that sexual orientation, gender identity, and gender are characteristics that are as innate to a person as her ethnicity or religion, and that it would be unreasonable to expect her to change or hide these characteristics in order to live free from persecution. This means that persons who share these characteristics deserve protection from persecution as members of a particular social group in the meaning of the Geneva Convention or, in the Spanish law, as individuals persecuted on account of their sexuality or gender.

Asylum laws on EU and domestic levels are part of a broader body of law related to immigration in general and immigration control in particular. Both the legal provisions and their application merit critical examination from a human rights perspective. It is not the intention of this report to engage in this debate, but merely to draw attention to how asylum can be a remedy of last resort when the sexual health of a person is seriously threatened.

For individual cases, see relevant chapters discussing the violation that motivated the asylum claim.


155 The two by far most important international documents granting a right to asylum being the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol.
II. PENALIZATION OF SEXUAL ACTIVITIES

A. INTRODUCTORY REMARKS

In almost every state, criminal law is not only used to deter and prosecute sexual conduct understood to be violent or otherwise coercive, but is also applied to a wide range of consensual sexual conduct occurring between adults in private. In the second case, criminal law is used selectively to enforce certain moral, religious, or cultural standards. These standards are often arbitrary (i.e., not necessary or justifiable in a democratic society) and have negative impact on rights and on sexual health. Moreover, police practices regarding consensual adult sexual conduct in private – sometimes under cover of criminal law enforcement, but often without actual juridical basis in the law – can have grave effects on health and rights, especially of persons who are already socially marginalized. The criminalization of consensual sexual conduct between adults in private constitutes direct state interference with respect to private life; it also violates the right to equality and non-discrimination. Criminalization of consensual conduct between adults can proscribe sexual practices (“sodomy”, “unnatural offenses”), sexual conduct between same-sex partners, sexual conduct between unmarried partners, and sexual conduct outside of marital relationships.

Criminalization of consensual, private sexual behaviour among adults has many consequences for sexual health. Persons whose sexual behaviour is deemed a criminal offense strive to hide their behaviour and relationships from agents of the state and others, not availing themselves of sexual health services on offer. Research has documented that those engaged in sexual behaviour deemed criminal evade or do not take full advantage of HIV and STI services for prevention and treatment of disease, fearing compromised medical privacy or doubting health providers’ respect for confidentiality. These consequences may be exacerbated by other characteristics of the person, which render them more vulnerable to abuse by authorities under the criminal law such as disfavoured sex, gender, race, ethnicity, or national status. Many legal systems fail to create remedies that both eliminate immediate barriers (i.e., the stigma that criminalization causes or exacerbates) and reach the underlying basis for abuse (race, national status, sex, or gender).

Similarly, seeking out sex education, contraceptive information and services, or abortion (even when it is legally permitted) is compromised by fear of identification, arrest, and prosecution for engaging in proscribed but consensual and desired forms of sexual behaviour. Furthermore, sexual practices conducted quickly and secretly to avoid detection do not foster safer sex practices or good communication between partners. Criminalization of consensual behaviour is a direct impediment and barrier to the ability to access appropriate care and services for sexual health, leading to no care, self-care, or care at the hands of non-professionals, with predictably poor results.

In addition to reduced ability to access existing information and services, persons who do reach services report being ill-treated by medical providers on the grounds of their illegitimate status, should it become known. Refusal to make clinic appointments, refusal to treat, or treatment with gross disrespect, private shaming, or public disparagement are among the abuses reported, along with hurried and inferior care. Name-calling, violation of medical privacy, and segregation to specific treatment areas removed from other patients are reported. These experiences reduce the likelihood that patients will return for future care.

Moreover, the criminalization of consensual sexual conduct has additional consequences beyond its direct effect on access to and quality of care for sexual health. Criminalization intensifies and reinforces stigma against persons engaging in, or imagined to engage in, sexual conduct which is against the law. Persons or groups of persons thus stigmatized are targets of violence (sexual and non-sexual), extortion, and other violations by state and non-state agents. Blackmail is frequently reported, with stigmatized persons afraid to report blackmail to the police or other authorities, for

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

157 As numerous international rights cases and authorities have noted, the use of the criminal law to impose religious or moral beliefs on citizens in regard to sexual conduct is an arbitrary and discriminatory use of the power of the state which cannot be sustained under rights review. See Section on International human rights law

158 Definitions of sodomy can include both same-sex and heterosexual anal or oral sex; definitions of unnatural sexual practices are often even broader, but generally capture a range of non-reproductive sexual practices.

159 Sexual health services include access to health care in regard to sexually transmitted infections, HIV, contraception, abortion, and sexual function and dysfunction, as well as access to comprehensive and accurate information about sexuality. Sexual health services must incorporate principles of non-discrimination, in regard to educational content as well as access.
fear of arrest (and because extortionists are not uncommonly police officers operating extra-murally). Those committing ‘consensual sexual crimes’ are thus targets for a range of abuses, which can be committed against them with impunity. Persons stigmatized through real or imagined violation of laws against consensual sex face reduced enjoyment of the full range of other rights, particularly rights to bodily integrity, education, expression and association, and employment. For example, impunity for police abuse (sometimes reaching the level of torture) has been associated with many criminal laws against same-sex conducts as well as regimes criminalizing prostitution.

A. Penalization of same-sex conduct and other non-conforming sexual practices

1. Introduction

The European region has taken a lead in decriminalizing same-sex conducts between consenting adults in private. The European human rights system was the first in the world to apply human rights parameters to penalization of same-sex behaviour, in Dudgeon v. United Kingdom, as early as 1981 (see below). The privacy argument, used by the Court, has since been employed both in international jurisprudence and by domestic courts. The leading case internationally to apply privacy and non-discrimination rights to issues of consensual same sex, Toonen v. Australia, was decided thirteen years after Dudgeon, in 1994.

On the other hand, there have been cases that illustrate a limit to the European Court of Human Rights’ willingness to recognize the rights under Article 8 for persons who either engage in non-conforming (but fully consensual) sexual practices or identify as homosexuals. As will be discussed below, these cases can be criticized from a sexual self-determination point of view, and raise questions about whether the Court is fully ready to embrace a view on sexual privacy as a value as fundamental as other aspects of human privacy and dignity.

On the domestic level, many European states have a long tradition of respecting privacy rights, flowing from the strong influence of Enlightenment theories and, from a legal viewpoint, Napoleonic laws. Decriminalization of same-sex conduct has followed as a consequence of these, and by the end of the nineteenth century France, Italy, Spain, Portugal, Belgium, and the Netherlands had all decriminalized same-sex sexual conducts among consenting adults. More recently, the rulings of the European Court of Human Rights have had great influence over domestic legislatures; almost without exception, countries that have been found to be in violation of privacy rights for criminalizing non-conforming sexual behaviour have reformed their laws accordingly. EU policies have also had strong influence, in particular over candidate member states.

A few countries in the region, all of them former Soviet republics, still penalize consensual same-sex behaviour.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

(i) Penalization of same-sex practices in private between two persons – In Dudgeon v. the United Kingdom the applicant was a homosexual man living in Northern Ireland. According to Northern Irish criminal law, ‘buggery’ (anal intercourse) and ‘gross indecency’ between males (e.g. mutual masturbation, oral-genital contact) were punishable with various degrees of imprisonment, regardless of whether they took place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants were consenting. The applicant, who had been subject to a police investigation as regards his same-sex activities, claimed that he had experienced fear, suffering, and psychological distress directly caused by the laws in question. He contended that the relevant provisions violated his right to respect for private life under Art 8 of the Convention.

The Court found that the existing legislation constituted a continuing interference with the applicant’s right to respect for his private life, which includes his sexual life, within the meaning of Article 8 (1). The risk of harm to vulnerable sections of society requiring protection, or effects on the public, provided insufficient justification to argue that there was a “pressing social need” to make homosexual acts criminal offences. Furthermore, moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards could

160 See for example statements from the Special Rapporteur on Torture.
162 Application no. 7525/76, decided on 22 October 1981.
not warrant interfering with the applicant's private life to such an extent as to criminalize private homosexual relations. In conclusion, the restriction imposed on the applicant, by reason of its breadth and absolute character, was found to be disproportionate to the aims sought to be achieved. The Court concluded that the applicant's rights under Art 8 had been violated. 163

By contrast, here should be mentioned F. v. United Kingdom, 164 in which the Court declared inadmissible an application from an Iranian homosexual man who had been denied asylum in the United Kingdom. The Court argued that the applicant had not shown that he would be at real risk of extra-judicial execution or torture on the ground of his sexual orientation upon return. It was clear that Iran did not respect the right to private and family life for homosexuals, but, held the Court, this right is less fundamental than the right not to be subjected to ill-treatment. Thus, "it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention." The applicant's application was declared manifestly ill-founded. In conclusion, possible violations under Article 8 (of a self-identified homosexual man) are not sufficiently 'serious' to motivate asylum under the Convention. This outcome raises significant concerns from a sexual health perspective.

(ii) Penalization of group sex among men – In A.D.T. v. the United Kingdom 165 the applicant was a gay man whose house had been searched by the police, finding videotapes that contained footage of the applicant and four other men engaging in oral sex and mutual masturbation in his home. He had been convicted of the offense of gross indecency. ‘Gross indecency’ was understood to mean mutual masturbation, intercrural contact, or oral-genital contact between men, when not committed in private. An act where more than two persons were involved was not considered to have been committed ‘in private.’ The applicant complained that his right to respect for his private life under Article 8 had been violated.

The Court agreed. It stated that the fact that more than two persons were involved did not render the acts public. Likewise, nothing suggested that the videotapes would have been made available to the public. Therefore, the applicant was the victim of an interference with his right to respect for his private life, both in relation to the existing legislation, and with regard to the conviction for gross indecency. Since the activities were 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) to determine whether the interference was justifiable for the protection of health and morals. It found no such justification. In conclusion, the Court held that there had therefore been a violation of Article 8.

(iii) Penalization of consensual sadomasochistic sex – The applicants in Laskey, Jaggard and Brown v. the United Kingdom 166 were three men who had been arrested for being involved in gay sadomasochistic activities between adults, acting in private and with full consent. They had been found guilty of assault and wounding and convicted to imprisonment, and complained before the Court that their right to respect for private life under Article 8 had been violated.

The Court reaffirmed that the interference under the relevant law pursued a legitimate aim under the Convention of ‘protection of health and morals.’ It then discussed whether this interference could be deemed to be ‘necessary in a democratic society’ and whether the interference was proportionate to the aims sought. The Court accepted that one of the roles of the state is to regulate activities that involve the infliction of physical harm – whether in the course of sexual conduct or not. In commenting on the consent of the victim it argued that both public health considerations and the general deterrent effect of criminal law were at stake, as well as the personal autonomy of the individual. Furthermore, state authorities were entitled to have regard not only to actual harm but also to “the potential for harm inherent in the acts in question.” It found that the interference could be deemed necessary in a democratic society, and not disproportionate to the aims pursued. In conclusion, the Court found no violation of Article 8.

From the perspective of sexual health and sexual self-determination, the reasoning of the Court and the outcome of this case have significant problems. By contrast with its findings in Dudgeon and A.D.T, the Court here allowed the invasion of privacy in the name of protection of bodily integrity. It

163 This case was used as an important precedent for Norris v. Ireland (application no. 10581/83, decided on 26 October 1988), and Medinos v. Cyprus (application no. 15070/89, decided on 22 April 1993): cases in which circumstances were very similar and the outcome the same.

164 Application no. 17341/03, Admissibility decision, decided on 22 June 2004.

165 Application no. 35765/97, decided on 31 July 2000.

is noteworthy however that the alleged crime had no victim – there was no physical damage to the parties, who all had fully consented to the practice. This case illustrates unwillingness on behalf of the Court to fully extend the rationale of the above-mentioned cases to all situations of non-conforming sexual practices, conducted in private and with full consent.167

3. European Union

No binding law from the European Union addresses penalization of sexual activities directly. However, a prohibition of same-sex activities among consensual adults in private runs contrary to EU non-discriminatory provisions where sex and sexual orientation are protected grounds. See Chapter 1.

4. Regional non-binding material

Both the Council of Europe and the EU have strongly condemned the penalization of consensual same-sex behaviour.168 Here will be highlighted only a few important documents. For example, the fact that the European region has been leading the call for decriminalization of same-sex conduct is illustrated by the Council of Europe Parliamentary Assembly Recommendation 924/1981 on discrimination against homosexuals.169 This early document, which inter alia recommended that all laws criminalizing homosexual acts between consenting adults be abolished, and that all special records on homosexuals be destroyed, was the first document of its kind in the world issued by an international organization.

A contemporary example of great weight is Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the the Council of Europe Committee of Ministers in March 2010. This recommendation covers a wide range of issues and uses human rights parameters to strongly recommend that all laws that penalize consensual same-sex behaviour between adults be repealed (para 18).

Other crucial documents are three resolutions by the European Parliament from the late 1990s, addressing Romanian sodomy laws in relation to Romania’s status as a candidate accession country to the EU.170 They condemn the Romanian criminalization of same-sex conduct, as well as the fact that Romania modified its sodomy law of the time (Article 200 of the Romanian Criminal Code) to introduce stiffer penalties for same-sex conduct. These European Parliament resolutions are an expression of the fact that respect for LGBT rights (as part of respect for human rights) is part of the Copenhagen criteria on admission of new member states.171 Article 200 of the Romanian Criminal Code, which prohibited sexual relations between persons of the same sex, “committed in public or producing a public scandal,” was repealed in 2001, on the ground that it both ran contrary to the respect for private life, as protected by the Romanian Constitution, and Romania’s 2000 anti-discrimination law.172 The repeal is widely believed to have taken place in response to European Parliament and Council of Europe pressure. For these reasons, the European Parliament documents probably represent the most

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167 Here should be mentioned the case of K.A. and A.D. v. Belgium (applications 42758/98 and 45558/99, decided on 17 February 2005. So far in French only), in which the applicants had engaged in sadomasochistic sex and had been convicted of occasioning bodily harm. Like in Laskey et al, their conviction was not found by the Court to be in violation of Article 8. However, the big difference in this case was that here one of the participants, the wife of one of the applicants, clearly had withdrawn her consent to partake. The Court focused on the unwillingness on behalf of the applicants to stop the activity, which involved an increasing degree of violence towards the non-consenting party. From a sexual health and rights perspective, this decision goes well in line with principles of consent and the right not to be subjected to sexual violence.


169 Adopted on 1 October 1981.


171 A country seeking membership of EU must conform to the conditions set out by Article 49 and the principles laid down in Article 6(1) of the Treaty on European Union. The criteria were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. One of these is “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.” See http://europa.eu/legislation_summaries/accession/accession_criteria_copenhagen_en.htm. Visited on 24 February 2010.

successful strategy that the EU has pursued in order to obtain the repeal of legislation criminalizing same-sex conduct in a candidate accession country.

5. Domestic legislation

As mentioned above, several European countries abolished criminal provisions outlawing same-sex activity as early as in the nineteenth century. In the twentieth century, Poland decriminalized same-sex activity in 1932, followed by Denmark in 1933, Iceland in 1940, Switzerland in 1942 and Sweden in 1944. More recent examples include Slovenia (legal since 1977), Russia (1993), Azerbaijan (2000), and Romania (discussed above). By now, consensual acts between same-sex adults are legal in most countries in the region. Exceptions include Uzbekistan and Turkmenistan; see below.

The above-mentioned cases from the European Court of Human Rights have had concrete effects in the relevant countries:

Following Dudgeon (1981), male homosexual sex was decriminalized in Northern Ireland in 1982, through the passing of the Homosexual Offences (Northern Ireland) Order 1982. Following A. D. T (2000), the Sexual Offences Act 2003 was passed in the United Kingdom, which abolished the crime of gross indecency and decriminalized group sex in private.

The government of Ireland took legislative action after the European Court of Human Rights decision in Norris (1993). The Irish Criminal Law (Sexual Offences) Act 1993 entered into force on 7 July 1993, modified the Irish criminal legislation regarding homosexual acts. Since the entry into force of the new law, same-sex acts between consenting male adults of more than 17 years and capable of valid consent are no longer offenses. Female same-sex acts were never criminalized.

Cyprus did not immediately change its legislation on consensual same-sex activity after the European Court of Human Rights decision in Modinos (1993). In 2002, the criminal provisions that prohibited consensual sexual activity among adult males who are over the age of consent were repealed in the Southern, Greek, part of the island. However, a provision criminalizing sexual relations between consenting adult males is still in effect in the Northern, Turkish part of Cyprus though, according to reports, seldom enforced.

Prior to 1993 sexual intercourse between men was a criminal offense in Russia. There was no criminal liability for same-sex conduct between women. With the passing of a federal law in 1993, introducing changes to the Criminal Code, voluntary sexual intercourse between men ceased to be a crime. The term ‘sodomy,’ previously used for both consensual and non-consensual same-sex activities, remained as part of Articles 132 (sexual assault), 133 (coercion to perform sexual acts), and 134 (sexual intercourse and other sexual acts with a person under the age of sixteen) in the new Russian Criminal Code, passed in 1996. According to a 2004 Directive from the Supreme Court, clarifying peculiarities of the application of Articles 131 and 132 of the Criminal Code, ‘sodomy’ is to be understood as sex between men, but only forced or violent ‘sodomy’ is criminalized. Similarly, the same articles mention ‘lesbianism,’ which is also criminalized when expressed through violence or force.

177 Information from Turkish LGBT information site, Turkeygay.net, at http://www.turkeygay.net/cyprus.html, last visited on 9 December 2009.
178 Information and translations in this section from researcher and Ukrainian lawyer Oksana Shevchenko.
180 Please note that the translation provided by OSCE (http://oilegislationline.org/), uses the term ‘pederasty’ instead of ‘sodomy.’ This translation is incorrect.
181 Translation by researcher and Ukrainian lawyer Oksana Shevchenko.
182 Directive no 11 of 15 June 2004, only available in Russian.
Similar to Russia, Kyrgyzstan decriminalized consensual same-sex activity between men in 1999.\textsuperscript{184} Same-sex conduct between women was never penalized. However, similar to Russian criminal law, the Kyrgyz Criminal Code still singles out same-sex relationships as ‘sodomy’ and ‘lesbianism,’ making ‘forced’ sodomy or lesbianism subject to prosecution as essentially distinct from opposite-sex sexual violence.\textsuperscript{185}

Uzbekistan and Turkmenistan still criminalize ‘sodomy,’ understood as all sex between men. Furthermore, in Turkmenistan male homosexuality is considered a mental disorder. Neither country regulates same-sex activities between women.\textsuperscript{186}

6. Concluding remarks

There is an almost total consensus in the region that consensual, adult same-sex activities should not be regulated by criminal law. This is shown by the strong laws on non-discrimination based on sexual orientation, as covered by other chapters of this report, but also by the fact that almost all countries have abolished criminal law provisions penalizing consensual same-sex conduct.

The case law of the European Court of Human Rights demonstrates that total bans on consensual same-sex activities in private violate Article 8 of the Convention. Similarly, bans on (homo)sexual activities between more than two persons, conducted in private and with full consent, also infringe upon the right to private life under Article 8 of the persons involved. The Court has so far not recognized that bans on consensual sadomasochistic sex may run contrary to privacy rights, as illustrated by its decision in Laskey et al. Here, the Court limited the notion of privacy even in the presence of consent of individuals to sexual practices that were clearly harmless, for the reason that sadomasochistic practices could result in some kind of ‘vulnus,’ or wound, to the physical body. This outcome is unfortunate from a sexual rights point of view. The Court’s statement about “the potential for harm inherent in the acts in question” indicates a failure to understand the nature of sadomasochistic practices. Similarly, the Court’s declaration about the limited reach of Article 8 in asylum procedures, in F. v. United Kingdom, raises concerns as it suggests a view on sexual identity as less crucial to individual dignity and personhood than other personal characteristics.

The former Soviet Republics are among the countries in the region that last decriminalized consensual same-sex behaviour, with a couple of notable exceptions where male homosexual sex is still a criminal offense. With some variations, penal codes of former Soviet Republics are based on the old Soviet or the more recent Russian criminal law. It is noteworthy that Russia and Kyrgyzstan, while having decriminalized consensual same-sex conduct for both men and women, still use special terms for sexual crimes where the perpetrator is of the same sex as the victim, instead of employing a gender-neutral language on rape and other sexual crimes. This is problematic. Separating sexual crime in these two groups – same-sex and opposite-sex – reinforces the idea that same-sex and opposite-sex sexual crimes are essentially different, and also involves the risk of further stigmatizing same-sex activities. A neutral system would criminalize sexual acts performed without consent without drawing any distinction based on the gender(s) of perpetrator and victim.

B. Criminalization of HIV transmission

1. Introduction\textsuperscript{187}

Specific criminalization of HIV transmission (through sexual and other behaviour) has recently become a popular state response to HIV. However, a rights and health analysis suggests many problems with this approach and that the appropriate application of existing criminal law (on assault, for example) is more suitable and effective.\textsuperscript{188} Criminal statutes vary greatly in terms of what is prohibited: intentional sexual conduct (i.e., intending to cause transmission and infection) or sexual behaviour that is

\textsuperscript{184} Information gathered by researcher and Ukrainian lawyer Oksana Shevchenko.


\textsuperscript{187} Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.

\textsuperscript{188} See Special Rapporteur on the Right to Health
deemed reckless. To avoid criminal penalty, some laws require the infected person to announce his or her status to the potential partner prior to sexual relations, while others require taking protective steps (using a condom). Across such laws, the definition of prohibited sexual practices is often vague, violating the basic principle of criminal law that conduct must be described with sufficient clarity to give notice. Other laws explicitly (or de facto) are used to address only specific populations perceived to be particularly prone to ‘risky behaviour,’ for example, persons in sex work or men who have sex with men, such that the laws may be discriminatory in substance or application. Efforts to criminalize reckless or intentional transmission of HIV are often undertaken on the grounds of protecting vulnerable women (especially wives) against infection by male partners. Paradoxically, these laws are often turned against women. Women in many parts of the world face negative consequences upon disclosing their HIV status, on one hand, or refusing sex, on the other, which leaves them more vulnerable to acting in a way that can lead to their prosecution.\footnote{See, for example, Open Society Institute, “10 Reasons to Oppose the Criminalization of HIV Exposure or Transmission,” (2008). Available at http://www.soros.org/initiatives/health/focus/law/articles/publications/publications/10reasons_20080919/10reasons_20081201.pdf. Visited on 27 December 2009.}

Although laws criminalizing intentional or careless HIV transmission might serve as strong statements of social disapproval about harmful or reckless sexual behaviour, the most significant effect on sexual health is that such laws discourage people from being tested and knowing their HIV status. Weighing the very small number of cases prosecuted under these laws against their impact suggests legislators turn to them as symbolic rather than functional interventions. Nonetheless, their negative rights and health consequences, in part through discriminatory policing and associated abuses, are felt by already stigmatized populations (for example, LGBT people, sex workers, and immigrants).

For these reasons, UNAIDS urges governments to limit criminalization to cases of intentional transmission, i.e. to the unusual cases where a person knows his or her HIV positive status, acts with the intent to transmit HIV, and does in fact transmit it. Furthermore UNAIDS recommends that if criminal law is used, the law should not be HIV specific but general criminal law should be applied; it should not be applied when the person did not know or did not understand that he or she was HIV positive; it should not be applied to acts that pose no substantial risk of transmission, or if the carrier of the virus took reasonable measures to reduce such risk; it should not be applied to cases where the partner was aware of the person’s positive status, and there was no deceit or coercion; and it should not be applied when the reason for concealment was the fear of violence or other serious consequences.\footnote{UNAIDS, “Policy Brief on Criminalization of HIV Transmission 2008,” available at http://data.unaids.org/pub/Chapter2/PenalizationofSexualActivities.pdf. Visited on 21 December 2009. See also OHCHR and UNAIDS, International Guidelines on HIV/AIDS and Human Rights (2006), UNAIDS Geneva Guideline 4: “Criminal and/or public health legislation should not include specific offences against the deliberate or intentional transmission of HIV, but rather should apply general criminal offences to these exceptional cases. Such applications should ensure the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.”}

UNAIDS and the UN Office for the High Commissioner for Human Rights also recommend states to ensure that any application of criminal law to HIV transmission should be in full consistency with their international human rights obligations, respecting in particular an individual’s right to privacy, highest attainable standard of health, freedom from discrimination, equality before the law, and liberty and security of the person.\footnote{UNAIDS “Policy Brief on Criminalization of HIV Transmission 2008,” referring to Articles 3, 7 and 12 of the UDHR, and Article 12 of the ICESCR.}

For the purpose of sexual health and rights, the recommendations from UNAIDS provide useful guidance. Public health as well as general human rights concerns strongly suggest a restrictive approach to the application of criminal law in the combat of HIV/AIDS.

In the European region general criminal law tends to be used, applying provisions such as causing grievous bodily harm or assault, to prosecute cases of HIV transmission. Reckless transmission is generally punishable. However, several courts in the region have applied these provisions cautiously in cases of HIV, and, in their jurisprudence, have highlighted the many potential pitfalls of broad penalization of reckless transmission. Courts in the United Kingdom, Switzerland, and the Netherlands have addressed issues such as consent to the risk of contracting HIV on behalf of the sexual partner; real risk of transmission as opposed to a mere theoretical risk; and the need to establish reckless intent to cause harm on behalf of the defendant. In a commendable fashion, the courts have in these cases shed light on legal complexities involved in the application of criminal law on sexual, non-violent conduct where public health is at stake, and have carved out criteria for a narrower application of provisions criminalizing HIV transmission.
2. **Council of Europe**

**Jurisprudence of the European Court of Human Rights**

The European Court of Human Rights has not addressed the issue of criminalization of HIV transmission directly. However, one case merits attention in this context, which dealt with compulsory isolation of an HIV positive person. Criminal law had not been applied in his case (but administrative law), but state interference with his rights to liberty and freedom of movement in order to prevent HIV transmission from taking place suggests parallels with cases of prosecution and punishment for post-facto HIV transmission.

In the case, **Enhorn v. Sweden**, the applicant was a HIV positive man who based on his HIV status had been kept in confinement for long stretches of time by Swedish authorities. Swedish courts had determined that he was unable to comply with measures prescribed to him aimed at preventing him from spreading the HIV infection and had ordered confinement under the Swedish Infectious Diseases Act. In total, the order to deprive him of his liberty was in force for seven years, while the time he spent in isolation amounted to one year and a half. The applicant claimed that the decision to deprive him of his liberty went contrary to his right to liberty and security under Article 5 of the Convention.

The Court found that the deprivation of liberty as such had a basis in Swedish law, and that the HIV virus qualifies as a disease sufficiently dangerous to public health and safety as to justify restriction of rights. However, the Court argued that the Swedish government could have taken more lenient measures to prevent the applicant from spreading the virus. Moreover, the length of isolation was such that a fair balance had not been struck between the need to prevent the virus from being spread and the applicant's right to liberty. In sum, the Court found a violation of Article 5.

The case has obvious connections to health and rights. First, it concerns basic rights such as liberty and self-determination when the state takes restrictive measures against an individual whose mere liberty is judged to be a danger to public health. It also highlights how the applicant's sexuality as such was seen as dangerous by the Swedish state. The authorities had concluded that only detention could possibly prevent this man from engaging in reckless sexual behaviour and thereby spread the infection, even though very few facts about his past behaviour pointed in this direction. In relation to criminalization of HIV transmission, this case is relevant in that the Court emphasized that Swedish authorities had not complied with its international human rights obligations in its combat against the virus – as strongly urged by the UNAIDS (above). The use of criminal law or, here, administrative law with coercive elements, shall be used as a last resort in measures fighting HIV. Here, coercive measures had been taken that were not deemed to be the last resort available to the authorities. The Court's decision illustrates that states cannot exclude individuals from rights protection even though they carry the HIV virus; a holding of equal significance for issues of criminalization of HIV transmission.

3. **European Union**

This aspect of criminal law falls outside of the scope of binding EU law.

4. **Domestic legislation and case law**

Research shows that there is a tendency in the region increasingly to resort to criminal law in the combat against HIV. Prosecutions for HIV transmission have increased in Europe during recent years and several new laws have been introduced in the region with the effect of criminalizing transmission and/or exposure. Opposing trends also exist, however. The examples below have been selected to show that in several countries, although criminal law in fact is available for cases of unintentional transmission – contrary to recommendations by UNAIDS – there are significant legal safeguards to prevent criminal law from being employed in an arbitrary or abusive manner. In particular, jurisprudence has shed light upon many of the complexities brought to the fore in cases of unintentional transmission, and several courts have managed to narrow down the application of criminal law to very specific and exceptional cases.

In the **United Kingdom**, there is no specific criminal law provision on transmission of HIV. Instead,
transmission falls under Sections 18 and 20 of the Offences against the Person Act (OAPA) 1861, as amended. Section 18 is understood to regulate ‘intentional’ transmission. It provides that a person who “unlawfully and maliciously by any means whatsoever wound[s] or cause[s] any grievous bodily harm to any person… with intent” or who “do[es] some… grievous bodily harm to any person,” will be punished by life imprisonment. Attempt at intentional transmission is also punishable. According to the Terrence Higgins Trust, an international AIDS organization, no prosecution for HIV transmission has been successful under Section 18 of OAPA. This is because the burden of proof for conviction for this crime is very high, in comparison with the crime of ‘reckless’ transmission (below).  

Reckless transmission is regulated in Section 20. The term ‘reckless’ does not appear in the actual legal text, but the concept is understood to be part of this provision (see, inter alia, in Regina v. Dica, below). Section 20 provides that “whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person,” will be liable for inflicting bodily injury and sentenced to prison. In legal terms ‘reckless’ means that the carrier of the virus was careless either before sex – not notifying his or her partner that he or she had HIV (or lying about it), or during sex – not taking measures to protect the partner. In such a case no intention has to be shown on part of the offender for his or her sexual partner to contract HIV – instead, the crime consists of not trying to stop transmission from happening. In this case only actual transmission will be punished. No HIV transmission means that no crime has been committed. In conclusion, to secure a guilty verdict for reckless transmission of HIV, the prosecution has to prove that actual transmission took place; that no means of protection were taken; that the carrier of HIV was aware of his or her HIV status; that the carrier of HIV was (or should have been) aware of the risk of transmission; and that the partner did not explicitly give informed consent to sex with an individual he or she knew had HIV.

Case law: consent to risk of HIV transmission

In the case of Regina v. Mohamed Dica, the appellant was an HIV positive man who had had unprotected consensual sex with two different women who both contracted HIV. The defendant claimed that the two women had known that he was HIV positive, which they denied. The prosecution had not alleged that the defendant intentionally had infected the women. In the lower court, he had been found guilty of reckless grievous bodily harm and sentenced to eight years in prison. The trial judge withdrew the issue of consent from the jury, holding that whether or not the complainants had known of the appellant’s condition, their consent, if any, was irrelevant and provided no defense. According to the trial judge, earlier case law deprived the complainants “of the legal capacity to consent to such serious harm.”

The Court of Appeal, in contrast, found that consent was at the core of the case, determining that the relevant issue was whether the complainants had been consenting to the risk of infection with HIV. Such consent would provide a defense under Section 20 of the OAPA.

The Court discussed various situations in which adults engaging in sexual activity subject themselves to risks:

These, and similar risks, have always been taken by adults consenting to sexual intercourse. Different situations, no less potentially fraught, have to be addressed by them. Modern society has not thought to criminalise those who have willingly accepted the risks, and we know of no cases where one or other of the consenting adults has been prosecuted, let alone convicted, for the consequences of doing so.

The problems of criminalising the consensual taking of risks like these include the sheer impracticability of enforcement and the haphazard nature of its impact. The process would undermine the general understanding of the community that sexual relationships are pre-eminently private and essentially personal to the individuals involved in them. And if adults were to be liable to prosecution for the consequences of taking known risks with their health, it would seem odd that this should be confined to risks taken in
the context of sexual intercourse, while they are nevertheless permitted to take the risks inherent in so many other aspects of everyday life, including […] the mother or father of a child suffering a serious contagious illness, who holds the child’s hand, and comforts or kisses him or her goodnight. (paras 50–51)

The Court also noted the possible negative public health consequences of criminalization of the transmission of sexually transmitted diseases:

We have taken note of the various points made by the interested organisations. These include the complexity of bedroom and sex negotiations, and the lack of realism if the law were to expect people to be paragons of sexual behaviour at such a time, or to set about informing each other in advance of the risks or to counsel the use of condoms. It is also suggested that there are significant negative consequences of disclosure of HIV, and that the imposition of criminal liability could have an adverse impact on public health because those who ought to take advice, might be discouraged from doing so. If the criminal law was to become involved at all, this should be confined to cases where the offender deliberately inflicted others with a serious disease. (para 54)

In conclusion, the Court established that only if the complainants did not consent to the risk of transmission could the defendant be held responsible for the crime. It held that the trial judge had erred when withdrawing the issue of consent from the jury, and ordered a retrial.199

Case law: informed consent and honest belief in informed consent

In R v Feston Konzani,200 the Court of Appeal examined the issue of consent more directly. The appellant was an HIV positive man who had been aware of his infection since 2000. He had had unprotected sexual intercourse with three women without notifying them of his HIV status. They had all contracted HIV. He had been sentenced to ten years of imprisonment for recklessly inflicting grievous bodily harm on them with Section 20 of the OAPA.

The Court of Appeal reiterated the finding in Regina v Dica, that the issue of consent on behalf of the partner is key to establishing criminal liability. Here, the Court also stressed that the consent has to be informed in order to provide the defendant with a defense. Furthermore, the Court noted that there may be situations where the defendant honestly believed in the consent of the partner, even if such consent had never been expressed. This could also provide him with a defense under Section 20:

[We] accept that there may be circumstances in which it would be open to the jury to infer that, notwithstanding that the defendant was reckless and concealed his condition from the complainant, she may nevertheless have given an informed consent to the risk of contracting the HIV virus. By way of example, an individual with HIV may develop a sexual relationship with someone who knew him while he was in hospital, receiving treatment for the condition. If so, her informed consent, if it were indeed informed, would remain a defence, to be disproved by the prosecution, even if the defendant had not personally informed her of his condition. […] (para 44)

In the present case, the jury had found that the complainants had not given a willing or informed consent to the risk of contracting the HIV virus. The Court of Appeal did also find no evidence, direct or indirect, that the appellant honestly had believed that any of the complainants had consented to the specific risk of contracting the virus. The appeal was dismissed.

In the Netherlands, Article 82 (1) of the Criminal Code201 provides that transmission of serious illnesses falls under the crime of ‘grievous bodily harm.’ Articles 300–304 detail different kinds of grievous bodily harm and their respective punishments. From this can be drawn that HIV transmission can result in criminal liability. Article 300 penalizes physical abuse – that may result in serious bodily harm or death – and equates intentional injuring of a person’s health with physical abuse. Intentional HIV transmission could further be penalized under Articles 302 and 303: aggravated physical abuse and premeditated aggravated physical abuse. Actual transmission does not need to occur for liability to arise.202

199 In the retrial, the jury at the London Central Criminal Court on 23 March, 2005, found Dica guilty of recklessly infecting one of the two women with HIV. According to news reports, the defendant had persuaded the woman to have unprotected sex with him, even though she wanted to use condoms. See, inter alia, report about the case at http://news.bbc.co.uk/2/bl.uk_news/england/london/4375793.stm. Last visited on 27 December 2009.


201 3 March 1881, as amended. Unofficial translation of excerpts available in English.

202 As understood by the general rule attempt to the commission of crimes, Article 45.
Case law: examining conditional intent/criteria for recklessness

Several prosecutions of cases of HIV exposure occurred in the Netherlands between 2001 and 2005. With a Supreme Court ruling in 2005, these effectively ended. In the ruling, 2659/03 IV/SB,203 the Dutch Supreme Court examined the appeal against a sentence for grievous bodily harm resulting in two years and three months imprisonment for an HIV positive man. In 1999 on one occasion he had unprotected oral and anal sex with a 16-year-old boy, without disclosing his HIV status.

The Supreme Court noted that the Appeals Court had decided that the acts had created a “substantial possibility of grievous bodily harm being inflicted on the victim.” The Supreme Court discussed the notion of ‘conditional intent’ - required in Dutch law to secure a conviction for grievous bodily harm – and came to another conclusion:

That fact that a person infected with the HIV virus who has unprotected sexual contact poses a danger does not in itself mean that the sexual acts in question create the kind of possibility of infection with the HIV virus – and thus causing grievous bodily harm – that can be considered substantial in answering the question whether a conditional intent existed according to general empirical rules. (para 3.6)

This conclusion – that the evidence did not prove that there was a substantial possibility for infection – was reached after the Court had cited medical expert evidence that the chance of HIV transmission in the actual case (analex in which the victim had penetrated the accused) was one in 500. The Court noted that “under unusual circumstances involving increased risk” the conclusion could be different, but that in the case under consideration no such exceptional circumstances had 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. In conclusion, the Court set aside the judgment of the Appeals Court and remitted it back to be re-adjudicated and resolved.

According to commentators, this case means that it is irrelevant whether actual transmission occurred or not. The case centers on the notion of conditional intent, compared to the concept of recklessness used in the United Kingdom. The notion of conditional intent is based on the assumption that a person's intention is directed either indirectly or recklessly towards hurting another person physically. However, as noted by the Court, most cases of transmission of HIV are neither intentional nor recklessly intended.

This decision effectively rules out the possibility of a successful prosecution for grievous bodily harm for HIV transmission in the Netherlands. The Dutch legislature has chosen not to enact legislation that would punish unprotected sex by HIV positive people without regard to actual risk.

Case law: acquittal when significantly low risk of transmission

In Switzerland, HIV transmission can be penalized by Articles 122 (causing grievous bodily harm) and 231 (spreading of human disease) of the Swiss Penal Code.204 Attempt is penalized. In a February 2009 case, the Geneva Court of Justice examined an appeal from an HIV positive defendant who had been sentenced to 18 months of imprisonment.205 He had had unprotected sex without disclosing his HIV status to two female complainants, and had been found guilty by the Police Court of attempted spread of a human disease and attempted serious bodily harm, in November 2008. No transmission of the virus had occurred. The appellant had been aware of his HIV status since 1998 and had undergone treatment since then. Since 2008, his viremia had been undetectable. He did not have hepatitis B, syphilis, Chlamydia, or herpes. His doctors had assured him that there was no risk of transmission. He admitted to having engaged in unprotected sex.

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According to expert testimony, the risk of contamination when the infected person is undergoing successful treatment, whose viremia is undetectable, and who does not have any other infections, is too low to be scientifically quantified. Based on these facts, and since the appellant fulfilled all these criteria, the Court found that Articles 231 and 122 of the Criminal Code did not apply. The appeal was granted and the appellant was acquitted of those counts. This was the first ruling of its kind in the world.206

203 AR1860, Supreme Court, Criminal Section no. 02659/03; Decided on 18 January 2005. Full case only available in Dutch; unofficial translation to English of excerpts available. The accuracy of the translation has been confirmed through the kind assistance by André den Exter at the Institute of Health Policy and Management at the Erasmus University, Rotterdam.
204 21 December 1937, as amended. Not available in English.
205 Mr. S v. Mr. S2 and Ms. R: Order of Geneva Court of Justice, 23 February 2009. Available in English translation.
By contrast to the above mentioned laws should be mentioned Tajikistan, which singles out transmission of venereal diseases as a separate crime. Article 126 of the Criminal Code expressly punishes infection with a venereal disease by an individual “who knows about […] his illness.” Thus, intention to infect does not appear to be part of the definition of the crime. The provision raises concerns as it creates the idea that sexually transmitted infections require special attention, compared to other transmissible diseases, with significant risk for stigmatization and/or harassment of persons with HIV or other sexually transmitted infections.

5. Concluding remarks

The European region shows conflicting trends with regard to the criminalization of transmission of HIV. There are tendencies showing an increasing use of criminal law, which raises concerns from both a public health and a human rights-perspective. Prosecutions for HIV transmission have increased in Europe during recent years, and several new laws have been introduced in the region with the effect of criminalizing transmission and/or exposure. Bodies of law other than criminal law are also used to restrict rights of HIV positive persons. For example, Swedish administrative law not only allows the isolation of HIV positive persons, as illustrated by Enborn v. Sweden, but can also impose an obligation on an HIV positive person to notify sexual partners about his or her HIV status (regardless of whether engaging in protected or unprotected sex), and can prohibit an HIV positive person from sharing needles with others.

On the other hand, case law shows a tendency to restrict the scope of criminal law to cases of intentional or at least actual transmission. The British Appeals Court, as seen above, has grappled with the notion of consent and effectively limited criminal liability to cases where no consent to the risk of transmission, or no credible belief that such consent existed, can be established. The Swiss case emphasizes that there must be real, as opposed to only hypothetical, risks of transmission. The Dutch Supreme Court has established the most far-reaching rule, effectively barring convictions for grievous bodily harm in cases of non-intentional transmission, with its reasoning around substantial risk and the need to establish intent to cause harm.

The legal rules discussed above are all, with the exception for the Tajik provision, general criminal law rules and not STI/HIV or even disease-specific. Transmission can be punished through provisions on assault or the causing of grievous bodily harm. Where the crime can be committed through recklessness (in Hungary or the United Kingdom) or conditional intent (in the Netherlands), penalization will only happen when actual transmission has taken place – though the Dutch case law, as discussed, suggests that there is less concern with actual transmission and more with the level of risk involved. Convictions for intentional transmission, where attempt can also be punished, are in fact very unusual.

C. Age of consent

1. Introduction

The legal age of consent is the age over which young people are considered by law capable of consent to sexual conduct. The notion of age of consent is based on an assumption that children, being more vulnerable than adults, need special protection against sexual abuse, and that there is a certain age under which the consent of the child becomes merely fictional. Consequently, sex with a person under that age will be prosecuted as statutory rape.

The overall theme for this chapter is the agency and autonomy of the minor to use his or her body for sexual purposes. At what point has the underage subject been entrusted agency over his or her (sexual) body? By determining that age, has the state struck a reasonable balance between the legitimate state interest in protecting minors from sexual abuse and coercion, and the equally legitimate right of the young person to explore his or her sexuality? Differently put, are considerations of freedom from sexual harm framed in a way that also respects the evolving capacities of the child? Are rules on age of consent non-discriminatory, regardless of sex and sexual preferences, or is there a difference in treatment of boys and girls, on one hand, and of same-sex conduct and opposite-sex conduct, on the other?

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207 Tajik Criminal Code, unofficial translation. Please note that the author has not been able to confirm the accuracy of the translation or what year it was made.


As for international human rights standards, the Committee of the Rights of the Child has emphasized that the age of consent should be the same for boys and girls, but has refrained from recommending a particular age. The Committee has recognized the minor's right to autonomy/agency in declaring that the age of consent should reflect their status as rights-holders, “in accordance with their evolving capacity, age and maturity.”

The European Court of Human Right has addressed the topic of age of consent from a non-discriminatory angle, examining cases where one particular sexual constellation has been deemed more detrimental to youth than others. The tendency in several countries was previously to set a higher age of consent for male same-sex activities than for opposite-sex and female same-sex activities. The Court has effectively struck down such regulations as discriminatory and unlawful.

Domestically, the legal age of consent varies strongly in the region, from the age of 13 in Spain, to 18 in Malta and Turkey. Different concerns play a part. Protection of youth is one, moral considerations may be another. However, most countries have set their age of consent to be lower than 18, which tends to be the age of majority and the legal age to marry. An interesting dilemma arises when the state on one hand has set the age of consent below 18, and, on the other hand, has agreed to penalize child pornography involving all persons under 18, under all circumstances. As will be shown, both the European Union and the Council of Europe have attempted to tackle this possible discrepancy.

2. Council of Europe

Jurisprudence of the European Commission of Human Rights

In Sutherland v. United Kingdom, the applicant was a young homosexual British man who complained that he, after the age of 16 but before the age of 18, could have been subject to criminal proceedings when engaging in sexual activity, while the same had not been the case had he wanted to practice opposite-sex activities. According to the British Sexual Offences Act, women could consent to sexual activities – whether with men or with other women – from the age of 16, while for same-sex acts between men the age of consent was 18. The applicant claimed that this discrepancy was a violation of his right to private life under Article 8 of the Convention, and discriminatory under Article 14.

The Commission swiftly dismissed the government's argument for maintaining the different ages of consent and found instead that no objective and reasonable justification existed for the difference. Interestingly, for the purpose of sexual health, it discussed public health considerations in relation to the HIV/AIDS epidemic and the need to be able to reach young men with information and preventative measures:

[To reduce the age of consent to 16 might have positively beneficial effects on the sexual health of young homosexual men without any corresponding harmful consequences. (para 60)]

In conclusion, the Commission found a violation of Article 8 in conjunction with Article 14.

The case, when reaching the Court, was struck off the list, since the United Kingdom had at that time changed the law and made the legal age of consent 16 years for all.

Jurisprudence of the European Court of Human Rights

The substantive issue reached the Court a few years later, in a string of cases against Austria and the United Kingdom. In all cases, the Court found for the applicants on similar grounds as in Sutherland. Only one case will be commented on here. In L. and V. v. Austria, Austrian courts had convicted both applicants of homosexual acts with adolescents. According to the Austrian Criminal Code, sexual acts between an adult male and a male teenager between the ages of 14 and 19 were prohibited; offenders were subject to imprisonment up to four years. For female same-sex and opposite-sex acts, legal age of consent was 14 years.

The Court noted that there was a growing consensus in Europe to apply equal age of consent for same-sex and opposite-sex acts. It also took notice of the fact that the majority of experts before

210 Committee on the Rights of the Child, General Comment 4 (Adolescent Health) at [9].
211 Application No. 25186/94, decided on 1 July 1997.
212 The cases being L. and V. v. Austria (application nos. 39392/98 and 39829/98, decided on 9 January 2003), S. L. v. Austria (application no. 45390/99, decided on 9 January 2003), R. B. v. United Kingdom (application no. 53760/00, decided on 10 February 2004), Woditschka and Wilfling v. Austria (application nos. 69756/01 and 6306/02, decided on 21 October 2004), Wolfmeyer v. Austria (application no. 5263/03, decided on 26 May 2005), and R. H. v. Austria (application no. 7336/03, decided on 19 January 2006).
the Austrian parliament had expressed themselves in favor of an equal age of consent in a debate on the issue in 1995 – a recommendation subsequently ignored by the Austrian parliament. The Court established that the issue at hand was whether there was an objective and reasonable justification for why teenage boys needed more protection against relationships with adult men than teenage girls (with either adult men or women). It found no such justification. Instead, the Court declared that the Criminal Code provision in question “embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority,” and that such biased views could not serve to justify a difference in treatment under the Convention. Such biases, stated the Court, could not be accepted any more than “similar negative attitudes towards those of a different race, origin or colour.” Hence, the Court found that the provision was discriminatory and thus violated Article 8 in conjunction with Article 14.

Austria changed its provisions and made the age of consent 14 for all, after the applicants had been convicted but before the Court decided on the case.\textsuperscript{214} Practically therefore, the Court’s decision did not impact Austrian legislation.

Conventions in the Council of Europe Treaty Series

Both the Council of Europe and the EU have taken into consideration the discrepancy between domestic rules on age of consent and blanket prohibitions of child pornography for all under-18-year-olds, mentioned above. Legal documents prohibiting child pornography from these regional bodies make an attempt to distinguish between exploitation of children, on one hand, and consensual sexual expressions of youth, on the other. This can be understood as a way to oppose and combat sexual exploitation of children while at the same time respecting the evolving agency of the minor to use his/her body for sexual purposes.

One example can be found in the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, which is not yet in force.\textsuperscript{215} According to its Article 20(3), each party to the Convention may reserve the right not to apply the provisions on criminalization of producing and possessing pornographic material when this

\begin{quote}
involve[s] children who have reached the age set in application of Article 18, paragraph 2 [that is, the legal age of consent], where these images are produced and possessed by them with their consent and solely for their own private use.
\end{quote}

Furthermore, Article 18(3) sets forth that the provisions on criminalization of sexual activities with children “are not intended to govern consensual activities between minors.” Commenting on this provision, in the Explanatory Report to the Convention, the Committee of Ministers state that:

\begin{quote}
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)
\end{quote}

3. European Union

Similarly, the EU Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography\textsuperscript{216} offers a caveat for young persons’ consensual experimentation with technology for sexual purposes. A child is defined as any person below the age of 18 years, and all conduct relating to pornography involving children shall be made punishable. However, in language identical to that of the proposed Council of Europe Convention (above), this Framework Decision holds that a member state can exclude from criminal liability conduct relating to child pornography, where “images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use” (Art. 3(2)).

This provision then acknowledges that the determination of consent may be difficult in certain situations of power imbalance when young people are involved, and sets forth that even where consent has been established, it will be considered invalid if “for example superior age, maturity, position, status, experience or the victim’s dependency on the perpetrator has been abused in achieving the consent” (Art. 3(2)).

\textsuperscript{214} Section 206, Austrian Penal Code, read in conjunction with Section 74, establishing that the term ‘unmündig’ means under 14. An exception is established for cases where one partner is younger than 16 years and not sufficiently mature to understand the significance of the sexual act; in these cases the act can also be punishable. (Section 207b).

\textsuperscript{215} Council of Europe Treaty Series – No. 201. Open for signature on 25 October 2007. As of April 2010 it had been ratified by Albania, Denmark, Greece, Netherlands, and San Marino. It will enter into force on 1 July 2010.

\textsuperscript{216} 2004/68/JHA, adopted 22 December 2003.
Chapter 2: Penalization of Sexual Activities

The exception provided for by both the Council of Europe and the EU sends an important message as it recognizes some degree of sexual autonomy of the minor. At the same time, one can easily imagine difficulties in the operative applications of these norms. In this era, with technologies developing quickly and distinctions between private and public material on the internet blurring, one may wonder what the criteria for images produced and possessed solely for private use will be. How will they be applied if the young person produces images privately and then posts them on a site that can be publicly accessed? Or if he or she sends them voluntarily to an older person, whose possession of such images is not protected? These are only a couple of examples illustrating why this exceptional provision, while recognizing the legitimacy of sexual autonomy of youth, can encounter significant complications when applied in practice.

4. Domestic legislation and case law

Age of consent is generally regulated by criminal law provisions, establishing under what age engaging sexually with children will be considered a crime. Sexual activity with a child under that age is equated to rape, regardless of whether force, violence, or coercion was employed. Punishment for statutory rape may be lower than punishment ascribed for other kinds of rape, depending on the circumstances in the case. In addition to statutory rape provisions, several countries in the region also have provisions that penalize sexual activities with teenagers who have just reached the age of consent and who may be in a particularly vulnerable situation due to coercion, dependency or other circumstances that threaten the sexual self-determination of the young person.\footnote{Legal age of consent vary strongly in the region, from 13 years in \textit{Spain}\footnote{Article 181, Spanish Criminal Code. According to Article 183, sexual abuse by the use of deception with a minor between 13 and 16 will render punishment.} to 18 years in \textit{Turkey}\footnote{Articles 103 and 104 Turkish Penal Code; sexual contact without the use of force with a minor between 15 and 18 is illegal but renders lower sentence than with "sexual attempt against children who are under the age of fifteen."} and \textit{Malta}. Most European countries now have the same legal age of consent for same-sex and opposite-sex acts. Exceptions include \textit{Greece}, where the general (and apparently gender-neutral) age of consent is 15,\footnote{Article 339, Greek Criminal Code, information from website with legislation of INTERPOL member states on sexual offences against children, updated April 2006, available at \url{http://www.interpol.int/Public/Children/SexualAbuse/National_laws/csaGreece.asp}. Last visited on 11 December 2009.} but where another article establishes that “[s]odomy committed by an adult through the seduction of a person under seventeen (17) years of age, or for financial gain, shall be punished with imprisonment of at least three (3) months.” This implies that so-called sodomy, or sex between men, will be illegal if one party is under the age of 17. It is, however, not clear from the legal text whether ‘seduction’ merely implies sexual contact, or if an element of coercion or abuse of power has to be present in order for criminal liability to arise.}

In \textit{Portugal}, age of consent was equalized to be the same for same-sex and opposite-sex couples in 2007, after sexual orientation was included as a banned ground for discrimination in the Portuguese Constitution in 2004. The age of consent in Portugal is 14.\footnote{Article 347, Greek Criminal Code, ibid.}

The \textit{Penal Code}\footnote{Italian Penal Code (1930), as amended. Only available in Italian.} of \textit{Italy} establishes different ages of consent, not depending on whether the parties are of same or of opposite sex, but related to power dynamics and age difference. Article 609 quarter of the Italian Penal Code establishes the general age of consent as 14 years. However, if the older party to the sexual relation is a parent, guardian, cohabiting adult, or any adult exercising custody or being responsible for the education or treatment with the youngster (inter alia a doctor, teacher, tutor, or temporary custodian), the age limit for sexual contact is 16 years. If, finally, the age difference between two minors is less than three years, there is a diminished age of consent – setting the age limit at 13.

From a sexual health perspective the Italian model has significant benefits, as it \textit{both} recognizes situations of power imbalance where there may be a heightened risk for coercion and abuse, \textit{and} acknowledges that the sexual autonomy of young people close in age should be respected.

\textit{Case law: same-sex relationship alternating between legal and illegal violating the principle of equality}

In \textit{Austria}, the Constitutional Court examined the different ages of consent between male same-sex
couples and all other couples in 2002. As commented on above, Section 209 of the Austrian Criminal Code made same-sex contacts between young men punishable, if one party was over 19 and the other between 14 and 19, while the age of consent for opposite-sex couples and female same-sex couples was 14. The Court pointed out that Article 209 had the practical effect of making a same-sex relationship between young men alternately punishable and not punishable – depending on the age and age difference of the parties involved. If the two young men were 16 and 18, the relationship was legal, but as soon as the older party turned 19, he would be guilty of an offence. This shifting nature of the legality of one and the same relationship, according to the Constitutional Court, violated the principle of equality under the Austrian Constitution. The provision was struck down. As pointed out above, the Austrian parliament made 14 years the equal age of consent for all in July 2002.

The reason the European Court of Human Rights considered the Austrian cases, even though the Austrian Constitutional Court had struck down the provisions and the Austrian Parliament already had repealed the law, was that the legislative changes did not affect the situation of persons who already had been convicted according to Section 209.

5. **Concluding remarks**

As pointed out above, age of consent for sexual activity goes to the core of how the state assesses the autonomy of a minor to take decisions on the exercise of his or her sexuality. A healthy development of sexual life, respecting the evolving capacities of the child, may be negatively affected by state restrictions. Such restrictions may present themselves as age limits for all so high that the consensual sexual experimentation of sexually mature youth is severely infringed upon, or as age limits differentiated by sexual orientation. More permissive approaches to sexual activity of youth can also, as pointed out by the European Commission of Human Rights, have positive public health effects in that they make sexual information about sexually transmitted diseases and contraceptive methods more easily accessible. At the same time, states have a responsibility to protect the sexual development and sexual health of the minor vis-à-vis abuse or coercion. These two considerations imply a balancing act on behalf of the legislature.

As shown, in the European region there is no clear consensus on what that age limit for sexual autonomy should be; age of consent varies between 13 and 18 years. The countries that have set their age limit low tend to have protective clauses for the younger part of the sexually active population, recognizing that they may be particularly vulnerable to coercion or abuse. The Italian provision illustrates an especially interesting example in that regard.

The European Court of Human Rights jurisprudence on sexual consent is very clear in that it reaffirms the Court’s strong opposition to differentiated treatment based on sexual orientation without strong justification. Worth noticing is that the Court in [*L. and V.*](#) took the opportunity to reproach the Austrian government for its prejudicial views on male homosexual behaviour. The Austrian provision and the government’s way of defending it reflected an attitude toward male homosexuality as something undesirable and potentially dangerous in society against which young men should be protected. The Court declared that such view emanated from biases against the homosexual minority that could not be used to defend discriminatory laws. By now, almost all European countries apply an equal age of consent to same-sex and opposite-sex relations. The Greek exception raises concerns; regardless of whether ‘seduction’ in the Greek provision is interpreted narrowly or extensively, the separate article for male same-sex behaviour implies that homosexuality is less accepted than heterosexuality, and suggest that homosexuals are more likely to solicit sex with minors than others.

As for the Council of Europe and European Union provisions on possible exemptions from pornography laws for certain consensual youthful sexual activities, these illustrate a recognition of the complexity of the issue. Even if it may be difficult in practice to distinguish a case of exploitation from one of consensual activity, or a case of material produced for private purpose from one produced for public exposure, these provisions are interesting from a sexual health and rights perspective. They allow member states to nuance their laws against child pornography, thereby acknowledging that young people who have reached the legal age of consent but not yet the age of majority have been entrusted by their respective states to be sexually active. While maintaining a firm opposition to sexual exploitation of children, these exceptions also acknowledge that young people may consent to experimenting with expressions of their sexuality through the use of technology. Insofar as this behaviour is an expression of their sexual agency and autonomy, there should be possibilities to exempt it from criminal liability.

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D. **Consensual Sex in Prisons**

1. **Introduction**

The criminalization of sexual conduct in prison (or other custodial facilities) is complex. In some cases it claims to seek to reduce or eliminate violent, non-consensual sexual relations between prisoners or between prisoners and guards. However, it also functions as a system of control, invasion of privacy, and erosion of sexual rights for persons in prison. The restriction of rights, a consequence of having been sentenced to imprisonment, will in many cases lead to a restriction of access to health services, on one hand, and to human relationships, on the other. This is problematic from a sexual health perspective. Thus, in addition to protecting detainees from coerced sex, prisons must also create an enabling environment for maintaining sexual health. This includes, at minimum, the provision of sexual health information, including information about HIV prevention and safer sex; condoms; and contraceptives (as appropriate). Some prison systems provide for conjugal visits as a way to maintain sexual health and well-being.

This chapter will address the issue of state approaches to consensual sexual activity in prison, in close connection with the problem of HIV and other sexually transmitted infections in prison. However, for access to sexual health services for inmates, see Chapter 6B: Access to HIV and STI services.

Most countries in Europe regulate their policies on sexual activities in prisons by local decree or prison-by-prison regulations. For that reason, it has proven difficult to find laws that govern this area.

2. **Council of Europe**

**Non-binding Council of Europe documents**

The Committee of Ministers has in several recommendations addressed the issue of health in correctional institutions, including questions related to sexual health and in particular HIV/STIs. Worth mentioning here are two documents in which the Committee has presented a permissive attitude to safe sexual relations in prisons. In Recommendation No. R (93) 6, the Committee pronounces itself in favor of condom distribution in prison:

> In the interest of preventing HIV infection, prison and health authorities should make condoms available to prisoners during their period of detention and prior to their provisional or final release. Each State should be free to select the most appropriate channel for this purpose: medical service, sale in canteens or any other arrangements suited to current attitudes, the type of prison population concerned and the prison establishment's mode of operation. (para 7)

In Recommendation No. R (98) 7, the Committee also recommends the right to conjugal visits for inmates, without restricting this right to legal spouses or opposite-sex partners:

> Consideration should be given to the possibility of allowing inmates to meet with their sexual partner without visual supervision during the visit. (para 68, appendix)

3. **European Union**

Issues related to consensual sexual relations in prison fall outside of the scope of binding EU law.

4. **Domestic legislation, case law, and policy**

In the Netherlands, a Ministry of Justice policy circular governs measures to be taken with regard to infectious diseases in prison in the Netherlands, including HIV. The circular, dated 2 August 2001, applies to all sectors under the mandate of the Dutch Department of Correctional Institutions. Its purpose is to prevent the spread of infectious diseases within correctional facilities and after release from prison. Principles that permeate the policy are the right to confidentiality for an inmate with an infectious disease, isolation only in situations where this is absolutely necessary from a medical point of view, and right to adequate health care. Emphasis is placed on information to inmates about infectious diseases, including HIV/AIDS, but the circular also recognizes that the state has a

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

228 Adopted on 18 October 1993.

229 Adopted on 8 April 1998.

230 Ministry of Justice Circular, 2 August 2001, replacing the AIDS Policy of January 24 1996, nr 532656/96/DJt. Unofficial translation provided by Marianne van der Sande, Head of Epidemiology and Surveillance, Centre for Infectious Disease Control, Bilthoven, Netherlands.
responsibility to ensure that sexual activities in prison can take place in a safe manner: as a protective measure, the circular establishes that condoms be made available to inmates, “(also) suitable for sexual anal activity.”  

Similarly, in Moldova, the Law on Prevention and Control of HIV/AIDS (2007) mandates free of charge condom distribution in all prisons (Art 9 b)), as part of harm reduction programmes whose realization shall be ensured by the Ministry of Justice.

In Sweden, there is no express policy on condom distribution in prisons. However, according to Swedish Department of Corrections Information service, “condoms are provided by the Department of Corrections for conjugal visits and are available (free of charge) in visitation rooms and visitation departments.”

Undisturbed same-sex conjugal visits for inmates are allowed in Belgium for inmates since 2000. According to a Circular Letter of the Minister, 5 July 2000, such will be possible after three months of imprisonment and only with a partner with whom the inmate has had a stable affective relationship for at least six months. The Act of January 2005 on the legal position of prisoners has adopted the same rule, but this part of the Act has as of December 2009 not yet entered into force. A Departmental circular (1715) of 5 July 2000 on the protection of affective relationships between inmates and their environment formulates several minimum rules applying to all penitentiaries. Rooms where so-called ‘undisturbed visits’ can take place must be equipped with sanitary facilities, adapted furniture, facilities for personal hygiene, such as face cloths, towels, soap, condoms, sanitary towels, etc.

Furthermore, a Departmental circular (1785) of 18 July 2006 relating to the issue of drugs in prisons recognizes that in prisons diseases such as HIV, hepatitis B, and hepatitis C occur more often than elsewhere; for these reasons prison medical services must make sure that inmates can dispose of condoms.

The Ukrainian penitentiary system is regulated by various orders and decrees such as the order On Approval of Regulations on Health Care of Persons Held in Remand and Institutions of the State Penitentiary Department of Ukraine for Execution of Punishment. Pursuant to this order, the administration of penitentiary institutions, regardless of the presence of HIV positive inmates, has an obligation to ensure conditions that are conducive to reducing the risk of HIV infection. These include the prevention of HIV transmission through medical means; accessibility of disinfection for the use of both detained and convicted; provision of safe shaving equipment; and availability of condoms for the use of both detained and convicted.

As regards prison rape, European countries do not tend to have special laws addressing this crime, but apply provisions regulating rape in ordinary criminal laws. Within these laws, some countries address rape perpetrated on persons deprived of their liberty, or when a position of power is being abused, as particularly serious circumstances that render harsher punishments. Examples include Italy, where the Criminal Code establishes as an aggravating circumstance (under the general provisions of rape) sexual violence perpetrated on a person subjected to limitations of his or her personal liberty, punished with up to 12 years of prison (Art 609-ter, no. 4). Similarly, in Serbia, sexual violence committed by a person in an authority position is treated in the Criminal Code as an aggravating circumstance. This is defined as “abuse of position [by inducing] to sexual intercourse or an equal act a person who is in a subordinate or dependant position” (Art 181).

In Germany, the Criminal Code addresses sexual violence on inmates as a crime of sexual self-
determination, treating sexual abuse of prisoners, patients and institutionalized persons not as an aggravating circumstance but as a separate crime. It states that

(1) Whosoever engages in sexual activity with a prisoner or a person detained by order of a public authority, who is entrusted to him for upbringing, education, supervision or care, by abusing his position, or allows them to engage in sexual activity with himself shall be liable to imprisonment from three months to five years. [...] (Section 174a)

The following section addresses situations when a person is subjected to criminal proceedings and another person in some way is entrusted with authority to impose a custodial or other measure on him or her. If the latter person engages in sexual activity with the former, abusing the relationship of dependency, this will result in criminal liability (Section 174b).

5. Concluding remarks

Given the scarcity of legal material in this field, it is difficult to draw any clear conclusions on European region policies with regard to consensual sexual relations in prison. Nevertheless, a few remarks can be made. It is clear that the HIV/AIDS pandemic has highlighted the special vulnerability of the prison population to sexually transmitted infections, and across the region measures have been called for in order to counteract the spread of the virus in prisons. What is interesting, for the purpose of sexual health and rights, is when these measures recognize that sexual activity will take place in prison and that therefore condoms shall be available to inmates. The Council of Europe statements and the domestic policies mentioned above do not draw the conclusion that in order to stop the spreading of HIV sexual relations should be banned, but rather, that safer sexual behaviour should be encouraged. While this approach may stem from purely instrumental concerns – from a public health perspective, condom distribution has simply shown to be more effective than bans on sexual activity in prison – it also may have the effect of allowing sexual experiences for prisoners. As long as sexual encounters in prison occur with full consent and safeguards are in place to prevent and remedy prison rape and other kinds of sexual abuse, an open attitude towards sexual activity in prison may benefit the sexual health of inmates.

Similarly, regulations that allow conjugal visits for prisoners, such as the Belgian policies, can be beneficial for their sexual health. It is important to keep in mind that imprisonment legally limits a set number of rights – freedom of liberty and movement being the most obvious of them – but that generally, a prison sentence does not include restrictions of other aspects of human existence that are crucial for a person’s well-being.

In Europe, prison rape does not tend to be addressed as a separate crime, but is rather prosecuted under regular criminal provisions on rape, possibly with the deprivation of liberty or the dependent position of the victim established as aggravating circumstances. The rationale for these latter regulations is the same as in other provisions highlighting sexual crimes in situations of power imbalance, acknowledging that custodial situations can create unhealthy dependency dynamics and extreme vulnerability to sexual coercion or violence. Thus, these provisions target sexual crimes committed by officials on prisoners or detainees, and do not address rape between inmates.

E. Decriminalization of sex outside of marriage

Pre-marital sexual relations have not been criminalized in the European region for decades. However, concern has been raised over criminal laws that set the age of consent unusually high, thereby effectively making older teenagers who engage in sexual activity subject to prosecution. In Turkey the Penal Code sets the age of consent at 18 (Article 104), establishing that sexual intercourse absent any force with a person between 15 and 18 can render two years imprisonment. Similarly, according to Article 203 of the Criminal Code of Malta, whosoever “by lewd acts, defiles a minor of either sex” (that is, any person under 18) will be liable to prison up to three years.242

In addition to the restrictive effects of these provisions on the sexual agency of minors, as discussed in Chapter 2C, they may also lead to discriminatory outcomes. The CEDAW Committee, in commenting on the Turkish provision, expresses concern that “the penalization of consensual sexual relations among young people between 15 and 18 years of age may have a more severe impact on young women, especially in the light of the persistence of patriarchal attitudes.”243

242 However, the Maltese provision is subject to interpretation. It can be argued that if the young person is sexually mature and consents to the relation, he or she cannot be ‘defiled’ and, thus, no crime will be committed. See a comment by Maltese lawyer Dr. Aron Mifsud Bonnici, at http://www.ageofconsent.com/malta.htm. Last visited on 2 March 2010.

F. VIRGINITY TESTING

1. Introduction

Virginity testing is a practice that violates a number of human rights principles. Testing a woman with the purpose of finding out whether she has engaged in sexual relations runs contrary to the principle of non-discrimination based on sex, the right to physical and psychological integrity, the right not to be subjected to cruel and degrading treatment, and the right to respect for one's private life. The CEDAW Committee, in discussing the Turkish practice of forced gynaecological examinations of women in the investigation of allegations of sexual assault in 1997, noted that "such coercive practices were degrading, discriminatory and unsafe and constituted a violation by state authorities of the bodily integrity, person and dignity of women." 244

In most parts of the European region, virginty testing has never been a widespread practice. The country where such tests have been commonly practiced, and where the issue has recently been widely discussed, is Turkey. This chapter will therefore focus on Turkey, while also recognizing that the lack of legislation and jurisprudence from most other countries in the region is merely a sign that virginity testing does not tend to occur or is largely socially unacceptable in those other countries. This, in turn, demonstrates a wide consensus in the region about the discriminatory and violent nature of the practice.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

In Salmanoğlu and Polattas v. Turkey, 245 the issue before the Court was whether the treatment of two young women in police custody amounted to torture and inhuman and degrading treatment under Article 3 of the Convention. As part of their claim, the two women complained that they had been taken to a hospital by the police in order for their virginty status to be established and to determine whether they had had recent sexual relations. The authorities contended that these tests were carried out following complaints about sexual violence, although the applicants alleged that they had presented no such complaints at the time. The government claimed that the applicants had consented to the tests, but there was no evidence of any written consent presented to the Court.

The Court found that the ill-treatment the women had been subjected to in police custody amounted to violations of Article 3 in several ways. In relation to the virginty tests, it established that they had been carried out without any legal and medical necessity. While it was unclear whether consent had been given, the Court considered that even assuming that valid consent had been given,

that there could be no medical or legal necessity justifying such an intrusive examination on that occasion as the applicants had yet not complained of sexual assault when the tests were conducted. The tests in themselves may therefore have constituted discriminatory and degrading treatment. (para 88)

The main part of the case related to allegations of actual abuse in custody. However, the statement quoted above illustrates that the Court took the opportunity also to condemn the virginty testing itself. While not stating that virginty tests could never be justified as part of an examination following complaints about sexual abuse, the Court suggested that under the circumstances, the tests themselves may have violated Article 3.

The issues of virginty testing and informed consent were at the core of the Court's examination in an important case decided in 2011. In the case, Yazgül Yılmaz v. Turkey, 246 the applicant was a young woman who at the age of 16 had been taken into police custody, accused of lending support to the illegal group PKK. While in custody, the police requested a medical and gynecological examination, to establish whether there was evidence of sexual assault and whether the applicant's hymen had been broken. The examination was carried out against the applicant's will. After the applicant's release a few days later, she suffered post-traumatic stress and depression. She complained, among other things, that the fact that she had been subjected to a gynecological examination without her consent violated her right not to suffer torture and degrading treatment under Article 3.

The Court stressed that gynecological examinations can be traumatizing, in particular for a minor, and that the obtaining of a minor's consent should be surrounded by minimum guarantees that are

245 Application no. 15828/03, decided on 17 March 2009.
246 Application no. 36369/06, decided on 1 February 2011. Only available in French; press release available in English.
commensurate with the importance of the examination as such. It did not agree with the practice of automatic gynecological examinations of female detainees in order to avoid false accusations of sexual assault against police officers. Such a practice, according to the Court, ignored the interests of detained women, and did not respond to any medical necessity. In the case, the applicant had not complained of rape during her detention – but of sexual harassment. Such complaints could not possibly have been disproven by an examination of her hymen. The examination had caused the applicant deep distress and anxiety, which had been virtually ignored by the authorities. In conclusion, the Court found that the examinations of the applicant amounted to degrading treatment, prohibited under Article 3.

This case is important because it emphasizes the importance of informed consent to gynecological examinations and the special safeguards necessary when a minor is involved. Moreover, it clearly questions the practice of virginity testing as a response to accusations of sexual abuse. It rightly underlines that gynecological tests should never be carried out contrary to the will of the involved person and that there are inherent risks for abuse and humiliation unless necessary safeguards are taken – not least when the subject of the investigation is a minor. Finally, it points to the inadequacy of assuming that virginity tests could provide protection in situations where sexual harassment or sexual abuse may occur. From a sexual health and human rights perspective, the clear link established between virginity tests and the protection afforded under Article 3 is of highest relevance.

3. European Union

The issue of virginity testing falls outside of the scope of binding EU law.

4. Domestic legislation

As indicated, in Turkey forced gynaecological exams and virginity testing were earlier widely practiced. The issue was raised in the CEDAW Concluding observations on Turkey in 1997, and then again in 2005. In the earlier version of the Statute of Awards and Discipline in the High School Education Institutions of the Ministry of Education, coming to effect in January 1995, ‘proof of unchastity’ was a valid reason for expulsion from the formal education system. The practice that tended to be employed to gather evidence for ‘unchastity’ was virginity testing. In March 2002, this wording was revised by the Ministry of Education, and references to ‘unchastity’ were removed. Instead, expulsion is now allowed of students whose behaviour “contradicts commonly accepted social values and influences the educational atmosphere in a negative way.”

In 1999, a statute was issued by the Ministry of Justice with the purpose of eliminating virginity testing, differentiating it from legally required vaginal or anal examinations. Circumstances in which such examinations could take place are alleged rape, sexual conduct with minors, and crimes related to prostitution. Vaginal or anal examinations without the consent of the woman can only be ordered by a judge, and only when there are no other means of proving the alleged crime. In the new Turkish Penal Code (2004), these principles have been codified in law. According to Article 287, entitled ‘Genital Examination,’ anyone who performs or takes a person for a genital examination without proper authorization from a judge or a prosecutor can be sentenced to imprisonment.

The 1999 statute and the new Penal Code provision mark that the Turkish state no longer tolerates widespread virginity testing. However, even if the possibility to perform such tests has been restricted, the law still allows for tests without the consent of the woman in some cases. The failure to explicitly ban non-voluntary virginity testing has been criticized by women’s groups. As pointed out by the CEDAW Committee 2005: “[t]he Committee is concerned that genital examinations of women, or virginity tests, may still be carried out under certain circumstances without the consent of

249 Ministry of Justice, Decree no 27/123, 1999.
252 Ibid, p. 60.
the woman.”

While gynaecological exams can be legitimately performed in order to establish rape, virginity testing as part of a rape investigation suggests that rape can only be committed against a woman who has not previously engaged in sexual relations – and/or that the non-virgin status of an unmarried woman must imply that she has been raped. Both these assumptions violate women’s rights to health and dignity in a number of ways. The Turkish law thus leaves room for forced examinations that violate women’s right to sexual health and sexual self-determination and contradict accepted human rights norms.

5. Concluding remarks

Virginity testing is not a common practice in the European region. It exists, or has existed, primarily in Turkey and in some of the Central Asian republics. Recent legislative changes in Turkey are positive signs, showing a change in how female sexuality is perceived and a deeper understanding of the practice’s discriminatory and violent nature. These reforms should be read in conjunction with other recent reforms in Turkish penal law, outlawing concepts such as crimes of ‘honour,’ ‘chastity,’ and ‘morality’ (as discussed in Chapters 5B: Sexual violence, and 5E: Honour crimes). However, Turkish provisions still fall short of completely prohibiting non-consensual virginity testing, which opens the possibility of abuse and raises concerns from a sexual health point of view.

Furthermore, the statement from the European Court of Human Rights in the Yilmaz case affirms that this practice constitutes degrading treatment, as prohibited under Article 3 of the Convention.

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

Introductory remarks

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

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

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

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

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

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

254 These introductory remarks have been drawn from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.
255 UDHR article 16; ICESCR article 10, ICCPR article 23, CRC Preamble, CRPD article 23.
256 CEDAW, for example, notes the importance of temporary special measures to ensure substantive equality between men and women, noting that equality does not mean identical treatment in many areas of public and private life, See, General Recommendation 25, UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures), 2004, available at: http://www.unhcr.org/refworld/docid/453882a7e0.html. Last visited 29 March 2010.
A. **SAME-SEX MARRIAGE, PARTNERSHIP, COHABITATION, ACCESS TO ADOPTION, AND ARTIFICIAL REPRODUCTION TECHNOLOGIES**

1. **Introduction**

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

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

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

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

2. **Council of Europe**

*Jurisprudence of the European Court of Human Rights*

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

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

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

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

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

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

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

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

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

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

260 Application no. 36515/97, decided on 26 February 2002.

261 Application no. 43546/02, decided on 22 January 2008.

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

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

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

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

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

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

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263 Application no. 25951/07, declared admissible on 31 August 2010. The hearing in the case took place on 12 April 2011. Statement of facts available only in French.

264 The other case, Evans v. United Kingdom, (application no. 6339705, decided on 10 April 2004) concerned the right for a man to withdraw his consent to the storage and use of embryos jointly created by a couple. The Court found that he had such a right under the Convention and that the United Kingdom thus had not violated the rights under Article 8 of his former wife. The case has no major bearing on sexual health.

265 Application no. 44362/04, decided on 4 December 2007.

266 For a discussion on the right to conjugal visits in prison, see Section 2D: State regulation of sex in prisons.

267 Application no. 57813/00, decided on 3 November 2011 (Grand Chamber).
violated their right to private and family life; Article 8 taken together with Article 14 of the Convention.

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

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

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

Conventions in the Council of Europe Treaty Series

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

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

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

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

European Union binding law

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

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

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

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

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

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

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


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

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

**European Court of Justice judgments**

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

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

4. **Domestic legislation and case law**

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

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

**Hungary: common-law marriage and registered partnership**

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

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274 Case C-59/85, decided on 17 April 1986.
275 Case C-249/96, decided on 17 February 1998.
277 Article 110, Constitution of Latvia, as amended on 15 December 2005, reads: “The State shall protect and support marriage – a union between a man and a woman, the family, the rights of parents and rights of the child. [...]” Official translation.
need for partners to be involved in a sexual relationship. Case law: opening common-law marriage to same-sex couples

The provision that made the institution of common-law marriage open only to opposite-sex couples was challenged in 1995 and the Hungarian Constitutional Court passed its decision No. 14/1995 (III. 13.) on 13 March 1995. The petitioner argued both that common-law marriage as it stood and civil marriage were discriminatory on the ground of sex and therefore unconstitutional, since both excluded same-sex couples.

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

"[i]t is arbitrary and contrary to human dignity [...] that the law [on common-law marriage; meaning all regulations considering common-law marriage as an economic and emotional union] withholds recognition from couples living in an economic and emotional union simply because they are same-sex."

(Section III para 3)

The Court established that denying same-sex couples benefits awarded to opposite-sex couples in common law marriages runs contrary to Section 70/A of the Hungarian Constitution, which prohibits discrimination (but does not list sexual orientation explicitly as a protected ground). If third parties are affected, however, exclusion of rights for same-sex couples may not be discriminatory in violation of the Constitution.

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

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

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

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

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

284 Ibid, p. 132.


286 Only available in Hungarian.

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

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

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

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

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

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

France: registered partnership

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

Netherlands: recognizing same-sex marriage, unmarried cohabitation, and adoption and ART for same-sex couples

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

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

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

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

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

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292 Godard, p. 315.


294 Ibid.

295 Ibid.


299 2 March 1994. See in particular Articles 1 and 7 (1)(c).
recommended that the female partner of a woman giving birth can acknowledge the child as her own, equal to the possibility now open only for men. Such acknowledgment can be done before or after the birth of the child. As of December 2009, legislative proposals in line with these recommendations were being prepared by the Dutch government.300

Sweden: cohabitation, same-sex marriage, ART

The Swedish marriage legislation was amended in 2009 to include the right of same-sex couples to marry. The relevant change in the country’s Marriage Code entered into force on 1 May 2009, through the Act (2009:253) amending the Marriage Code,301 at which time the Act on Registered Partnership302 was abolished. Article 1 of the Marriage Code now states: “This Code contains provisions about marriage relations. Those two who marry each other will be spouses.”303 Hence, the legislature chose not to mention same-sex couples specifically, but rather to make its language gender neutral.

Registered same-sex partners have been able to adopt children since 2003, either jointly or in the form of second-parent adoption, and also to jointly exercise custody over children.304 Most other rights of married spouses were also enjoyed by registered partners before the reform. Thus, allowing for same-sex marriage is important symbolically but does not imply significant practical changes compared to the previously recognized registered partnership.

Same-sex or opposite-sex couples also have the option of cohabitation, which is regulated by law. The Swedish Cohabitation Act,305 defines cohabitants as “two people who live together on a permanent basis as a couple and who have a joint household.” No distinction is made between same-sex and opposite-sex couples, and there is no set time period to prove the permanent nature of the relationship. The act applies only to romantic relationships (“on a permanent basis as a couple”) and, hence, excludes siblings or friends who live together. The law mainly covers issues of the joint home and household goods and gives limited rights to cohabitants. However, as in the Dutch case, other legislation has also equated cohabitants with spouses, making the total body of rights for cohabitants rather wide-reaching. For instance, cohabitation is equated with marriage with regard to survivor’s pension, inheritance tax, residence permit and citizenship for foreign partner, and next-of-kin privileges for medical purposes.

Cohabitants (same-sex or opposite-sex) cannot jointly adopt children.306 Individual adoption is allowed, but may be difficult in practice if the individual lives in a relationship but has opted not to marry. Authorities may question why the partners have not married and see this as a sign that the relationship is unstable, which could be considered negative for the child.

Assisted fertilization with donated sperm and in-vitro fertilization are regulated in the Genetic Integrity Act.307 Assisted insemination for cohabiting opposite-sex couples has been allowed since 1984. In 2005, the law was changed so that cohabiting lesbian couples also can undergo insemination within the Swedish national health care system.308 The procedure is still not open to single women. With regard to IVF, a fertilized egg may be introduced into the body of a woman only if she is married, cohabiting partner, or registered partner, and her spouse or partner has consented to the procedure.309 There must be a biological link to at least one of the parties using ART; either the egg or the sperm must come from one of the two partners/spouses. There are thus no possibilities for infertile lesbians to receive treatment. The child who has been conceived by artificial insemination or fertilization outside of the body has, when having reached “sufficient maturity,” the right to access the information available about the sperm- or (in the case of IVF in an opposite-sex couple) egg-donor.310

300 Information from Kees Waaldijk, University of Leiden, at http://www.law.leiden.edu/organisation/meijers/research-projects/samesexlaw.html (last visited on 8 December 2009), and via email correspondence.
301 2 April 2009, only in Swedish.
302 Repealed through Act (2009:260) repealing the act on registered partnership, 2 April 2009.
303 This translation is author’s own.
304 The Children and Parents Code (1949:381), as amended, Chapter 4 and § 3:1 Act (1994:1117) on registered partnership (providing that what is said about ‘spouses’ in other legal texts will also include registered partners. This law has now been repealed, see above).
308 The Genetic Integrity Act, Chapter 6.
309 The Genetic Integrity Act, Chapter 7 § 2.
310 Ibid, Chapter 6 § 5 and Chapter 7 § 7, respectively.
The Swedish Children and Parent Code\textsuperscript{311} establishes that in case of artificial insemination or assisted fertilization, the partner or spouse of the woman undergoing the treatment will be considered co-parent to the child, if the partner/spouse has agreed to the treatment and it is likely that the child was conceived through it.\textsuperscript{312}

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

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

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

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

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

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

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

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

\textsuperscript{311} The Children and Parents Code (1949:381).
\textsuperscript{312} Ibid, Chapter 1 § 9, amendment (2009:254).
\textsuperscript{313} See background information in District Court Case T 499-08, Uppsala District Court, 22 October 2008. In this case, two women challenged this rule, as one of them after three unsuccessful attempts of assisted insemination turned 40, which is the age limit to undergo the procedure. Six attempts are covered by Swedish health insurance, but the partner had been denied the right to undergo the remaining three, with reference to the above-mentioned rule. The District Court found that the couple had been unlawfully discriminated against. The ruling has been appealed.
\textsuperscript{314} Göta Court of Appeal (appeals court for south eastern Sweden), decided on 9 February 2007.
\textsuperscript{315} Göta Court of Appeal (appeals court for south eastern Sweden), decided on 9 February 2007.
\textsuperscript{316} Available in Danish only.
\textsuperscript{317} Information about the law from Danish Health Agency, Sundhedsstyrelsen, December 2006. Available in Danish at \url{http://www.sst.dk/publ/PUBL-2006/KOT/KUNSTIG_BEFRUGTNING/VEJL_IVF_OA_DEC06.PDF}. Last visited on 20 February 2010.
\textsuperscript{318} Law 13/2005 of 1 July, by which the Civil Code is modified in the area of the right to contract marriage. (BOE núm. 157, de 02-07-2005, pp. 23632–23634). Only in Spanish.
\textsuperscript{319} Translation is author’s own.
the adoption of children. According to Spanish Ministry of Justice Resolution 2005/21656, it is constitutional under the new law for a Spanish citizen to marry a foreign citizen of the same sex, or for two foreigners of the same sex to marry, if they reside in Spain, regardless of whether same-sex marriage is legal in their home country.

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

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

Spain also has a non-discriminatory regulation on artificial reproduction technologies. According to Act 14/2006, of 26 May, on techniques of assisted human reproduction:

[a]ny woman over 18 years and with full legal capacity can be the recipient or user of the techniques regulated in this Act, for as long as she freely, consciously and expressly has submitted her written consent to the procedure. The woman may be the user or recipient of the techniques regulated in this Act independent of her civil status or sexual orientation. (Art 6(1))

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

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

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

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

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

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

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

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


324 Only in Spanish.

325 Translation is author's own.

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


328 Enacted 1 November 1990.

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

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

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

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

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

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

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

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

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

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

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

> [T]he 1987 Order permits an adoption application to be successfully made by a single applicant, whether he or she at that time lives alone or cohabits in a heterosexual,  

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331 Section 42(1) (civil partners) and Section 43 (b) and (c) (unregistered partners), respectively, of the Human Fertilisation and Embryology Act 2008.
332 High Court of Justice in Northern Ireland, family division. Ref: GILC4074, decided on 6 January 2004.
333 Northern Ireland has to a large degree separate legislation from the rest of the United Kingdom.
homosexual, lesbian or even asexual relationship with another person who it is proposed should fulfill a quasi parental role towards the child. Any other conclusion would be both illogical, arbitrary and inappropriately discriminatory in a context where the court’s duty is to regard the welfare of the child as the most important consideration. (para 15)

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

5. Concluding remarks

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

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

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

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

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

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

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

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

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

Marriage – or, to some extent, registered partnership – continues to constitute a major precondition not only for spousal benefits but also for state-sanctioned family building. Marriage or registered partnership is a precondition for joint adoption in the Netherlands and, at least officially, Spain; while Sweden makes ART available only to married or registered couples. The EU regulations on rights to movement and residence provide another example. Even though there are signs in the region that this criterion is less strictly upheld than previously (illustrated for example by Spanish jurisprudence on joint, unmarried adoption), relationships sanctioned by the state are still privileged over non-regulated relationships. From the viewpoint of a non-discriminatory approach to sexual relationships, this hierarchy may be questioned as unnecessarily disadvantageous for couples who choose not to or cannot marry.
Chapter 3: State Regulation of Marriage and Family and Its Relevance for Sexual Health

B. TERMINATION OF MARRIAGE

1. Introduction

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

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

2. Council of Europe

Jurisprudence of the European Court of Human Rights

In an early case involving domestic violence, the issue of judicial separation – in the absence of legal right to divorce – was raised under the Convention. In Airey v. Ireland,\(^{334}\) the applicant, an abused woman, sought separation from her husband. Judicial separation, while technically available in Ireland under certain circumstances, could only be granted through a High Court proceeding, for which legal aid was not available. The applicant did not have the financial resources to pay a solicitor, such that the remedy was effectively unavailable to her. The Court found that the failure of the state to provide an effective and accessible remedy – in this case for the woman concretely to be able to pursue separation – constituted both a violation of her right to access to a court under Article 6(1), and a breach of her right to family life under Article 8, as this right also entailed positive intervention of the state in situations in which protective measures concerning family life were required.

In Johnston v. Ireland,\(^{335}\) a couple could not marry because one of them was already married (although separated) and was not allowed a divorce under Irish law. They had a daughter who because of this arrangement could not achieve 'legitimate' status. The couple complained that their inability to marry each other violated Article 12, the right to marry, and Article 8, the right to respect for private and family life, under the Convention.

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

In 1987, as a response to the Court’s judgment in Johnston v. Ireland, the Irish parliament enacted a law equalizing the rights of all children, regardless of whether they were born within or outside marriage.\(^{336}\) Divorce became legal in Ireland in 1997, after the passage of a referendum on divorce in 1995.\(^{337}\)

3. European Union

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

4. Domestic legislation

In Finland, divorce is regulated in the Marriage Act.\(^{338}\) According to its Section 3 the marriage will be dissolved when a court grants the spouses a divorce. Under Sections 25 and 26 the spouses have the right to divorce after a reconsideration period of six months from the date of filing a petition for the dissolution of the marriage. Divorce can be granted without a reconsideration period if the spouses have lived separated for two years without interruption before filing for divorce.

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

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

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

Regulation of divorce is fully operative in relation to all marriages, regardless of whether the spouses are of the same or of opposite sex.\(^{342}\)

5. **Concluding remarks**

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

C. **FORCED MARRIAGES**

1. **Introduction**

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

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

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


343 Article 23, ICCPR, Article 16, CEDAW.

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

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

2. Council of Europe and the European Union

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

Conventions in the Council of Europe Treaty Series

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

Article 32

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

Article 37

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

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

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

3. Domestic legislation and case law

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

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

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

This criminal provision is accompanied by several civil law provisions safeguarding the right of the child not to be forced to marry. According to a new provision in the Children Act, when parents or

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345 See Articles 19, 24, 28, 29, 34 and 39 of the CRC.
349 Unofficial translation of this article from Edwige Rude-Antoine, “Forced marriages in Council of Europe member states: a comparative study of legislation and political initiatives,” Council of Europe (2005). Compared with the Norwegian original, the translation is correct.
others enter into a binding marriage agreement on behalf of a child, this will have no legal force (Article 30a). Finally, new amendments to the Marriage Act entered into force on 1 June 2007. This amendment states that a marriage contracted outside of Norway will not be valid in Norway if one of the parties to the marriage was under the age of 18 when the marriage took place, the marriage was entered into without both parties being physically present during the ceremony (marriage by proxy or telephone marriage), or if one of the parties was already married (Article 18a).

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

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

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

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

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

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

The Act has been criticized for its focus on legal measures rather than on more long-term preventative social measures. Another, more general, criticism implies that honour-related crimes in the UK tend

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357 Ibid.
to be treated as different by nature from other violence against women, instead of being perceived as part of the same problem. This distinction may result in further stigmatization of immigrant communities and insufficient legal and social response to the victims of violence.

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

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

Case law: granting asylum based on threat of forced marriage

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

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

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

4. Concluding remarks

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

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

359 Ibid, p. 7, pp. 9–10, etc. See for a more thorough discussion on this topic Chapter 5E: Honour crimes.
362 Stockholm Migration Court, decided on 25 April 2007. The name of the applicant is confidential for her protection.
363 This translation is author’s own.
D. Adultery

1. Introduction

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

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

2. Council of Europe

Jurisprudence of the European Court of Human Rights

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

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

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

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

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

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

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

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

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

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

3. European Union

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

4. Domestic legislation and case law

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

[^367]: Application no. 425/03, decided on 23 September 2010. Only available in French; press release available in English.
[^368]: Application no. 1620/03, decided on 23 September 2010. Only available in French; press release available in English.
of the Turkish constitution.\textsuperscript{369}

In 2004, the Turkish government announced its intention to reintroduce adultery as a crime in the new Turkish Penal Code. This proposal met strong reactions from women’s rights and other groups both domestically and internationally, and was withdrawn after statements from EU representatives declaring that such a move could negatively affect Turkey’s accession negotiations with the Union.\textsuperscript{370}

E. Polygamy/Polygyny

1. Introduction

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

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

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

2. Council of Europe

Jurisprudence of the European Commission of Human Rights

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

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

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


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

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

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

3. European Union

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

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

4. Domestic legislation

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

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

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

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

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


the first, pointing out that this leaves already vulnerable women in even more precarious situations.\footnote{See, for example, Bertrand Bissuel, “Divorce, or Else…”, World Press Review, April 2002, available at http://www.worldpress.org/europe/0402/lemonde.htm, last visited on 20 February 2010.} A circular issued in 2001 provides for support and specific benefits to the de-cohabiting women, aiming at helping them obtain a certain level of autonomy.\footnote{Circular DPM/AC/14/2001/358, relating to the lodgment of decobating women of polygamous marriages engaged in a process of autonomy. Ministry of Employment and Solidarity, 10 June 2001.} Most notably, the circular provides for subsidized housing for the parting women.

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

Section 2 of the \textit{Immigration Act 1988} rules that the polygamous spouse of a United Kingdom resident or citizen has no right of abode, if another spouse of the same resident/citizen already has been admitted to country (subsection (2)).\footnote{The Immigration Rules that accompany the legislation make these provisions gender neutral and also apply them to civil unions (para 278). The rules were last updated in July 2011. Available at UK Border Office website at http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/, last visited on 27 July 2011.} This will not preclude the spouse from re-entering if she previously entered the United Kingdom as the sole spouse of the UK resident/citizen (subsection (4)).

British legislation is similar to its French counterpart in that it clearly prohibits polygamy to be contracted on British territory, and bars family reunification of more than one wife per immigrant man. However, in contrast with the French regulations, the British government acknowledges that polygamous families do exist in the United Kingdom, and polygamous marriages contracted legally outside of the United Kingdom are legal in the sense that the British states will not actively try to break them up. Similarly, the UK has opted for the path that these families should not be discriminated against in welfare legislation; polygamous households can collect certain welfare benefits such as housing benefits,\footnote{Social Security Contributions and Benefits Act 1992, section 133.} community charge benefits,\footnote{Social Security Contributions and Benefits Act 1992, section 133.} and tax benefits.\footnote{Circular DPM/AC/14/2001/358, relating to the lodgment of decohabiting women of polygamous marriages engaged in a process of autonomy. Minister of Employment and Solidarity, 10 June 2001.} These regulations have been much criticized, and were subject to a government review that was finalized in 2008. The review recommended not to cut the benefits to polygamous families, with the argument that this might contravene British and international human rights legislation.\footnote{The Immigration Rules that accompany the legislation make these provisions gender neutral and also apply them to civil unions (para 278). The rules were last updated in July 2011. Available at UK Border Office website at http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/, last visited on 27 July 2011.}

In several former Soviet republics, the practice of polygamy/bigamy apparently still exists, even though it is considered an offense under criminal and/or family law. For example, in Kazakhstan, \textit{Law No. 321-1 “Marriage and the Family”} provides that marriage is prohibited between persons of whom at least one is already in another registered marriage (Art 11).\footnote{Law of the Republic of Kazakhstan dated December 17, 1998 No. 321-1 “Marriage and the Family”. Private translation by Ukrainian lawyer and researcher Oksana Shevchenko. However, according to news reports polygamy is not criminalized in Kazakhstan, as opposed to in the other Central Asian republics. See, e.g. Eurasianet.org, “Central Asia: Increase in Polygamy Attributed to Economic Hardship, Return to Tradition,” 20 October 2002, at http://www.eurasianet.org/departments/culture/articles/day/10/10/2002.shtml, last visited on 20 April 2010. The author has been unable to confirm this fact.} Pursuant to the \textit{Criminal Code} of Tajikistan, the practice to contract marriage with two or more women (labelled polygamy, though the provision in fact targets polygyny exclusively) is punishable with a fine or correctional labour (Art 170).\footnote{See, for example, Brady, Brian: “Polygamy claimants keep the money”, The Independent, 22 February 2009, available at http://www.independent.co.uk/news/uk/politics/polygamy-claimants-keep-the-money-1628957.html, last visited on 20 February 2010.} According to news reports, in several Central Asian republics proposals to legalize polygamy have emerged in recent years, primarily with reference to demographic imbalances (‘surplus’ of women following war).\footnote{See, for example, Bertrand Bissuel, “Divorce, or Else…”, World Press Review, April 2002, available at http://www.worldpress.org/europe/0402/lemonde.htm, last visited on 20 February 2010.} Thus far, to the knowledge of the author these proposals have not led to legislative change.

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

\footnote{Circular DPM/AC/14/2001/358, relating to the lodgment of decohabiting women of polygamous marriages engaged in a process of autonomy. Ministry of Employment and Solidarity, 10 June 2001.}
and women. Such a model would break completely with the idea of the monogamous unit as a basic cornerstone of society. As of today there is no such example in Europe. However, a law from Portugal is worth mentioning. It regulates the situation of two or more persons living together, thereby awarding limited protection to those who share a household who are not married, and who may be more than two in number. The law, Law No 6/2001 of 11 May on measures of protection for persons who live with shared economy,\(^{389}\) does not specifically target people who have a sexual or emotional relationship, but could be relied upon in situations of consensual polyamorous arrangements. The target group of the law is people who live in consensual unions, that is, persons who have been living together for more than two years and who have established a mutual household that includes mutual assistance and sharing of resources. Persons who qualify for protection under the law are awarded, inter alia, benefits similar to those granted married persons relating to leave, absence, and official holidays, certain tax benefits, and protection of the domicile. Article 3d) provides that the law is not applicable when either person is submitted to a situation of physical or psychological duress or when his/her self-determination is threatened.

5. Concluding remarks

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

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

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

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

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

F. **Tests and Conditions Placed on Marriage**

1. **Introduction**

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

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

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

2. **Council of Europe and the European Union**

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

3. **Domestic legislation**

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

The relevant provision reads:

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

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

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

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

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

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

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

391 Advocacy of mandatory premartial HIV testing as a way of protecting women's health and rights in marriage is misplaced; interventions are better directed to supporting women's full and free decision to marry, or when and under what conditions to have sex within marriage.

392 Available in Russian only. Translation by Ukrainian lawyer and researcher Oksana Shevchenko.

393 Available in Russian. Content explained by by Ukrainian lawyer and researcher Oksana Shevchenko.
serve as an impediment to marriage (Art 17). From 2009, if the intending spouses are over fifty years old, the medical examination will only be performed with their consent.394

4. Concluding remarks

While the practice of mandatory tests or other conditions placed on marriage is not common in the region, it is interesting to note that the express prohibition of the practice appears in parts of the region where mandatory HIV testing was previously widespread.395 This illustrates the growing recognition of a rights-based approach to HIV and other sexually transmitted diseases, as well as an increasing emphasis placed on a voluntary and fully informed nature of HIV testing in general. The Uzbek example stands in stark contrast to this trend.

G. INCEST

1. Introduction396

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

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

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

2. Council of Europe

Jurisprudence of the European Court of Human Rights

The European Court of Human Rights has not addressed the issue of incest. It has in one case, however, examined a ban on the right to marry for close relatives. In B. and L. v. the United Kingdom,397 the Court considered a case where two individuals related as former father-in-law and daughter-in-law where unable to marry under British legislation. The Court found that since this particular relationship was not banned under incest legislation, it made little sense that their union could not be formalized through marriage. The Court found that Article 12 of the Convention, the right to marry, had been infringed upon.398

Conventions in the Council of Europe Treaty Series

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

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

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

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

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

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

[...]

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

[...]

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

[...]

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

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

399 Council of Europe Treaty Series – No. 201. Open for signature on 25 October 2007. As of April 2010 it had been ratified by Albania, Denmark, Greece, Netherlands, and San Marino. It will enter into force on 1 July 2010.


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

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

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

- (1) Whoever completes an act of sexual intercourse with a consanguine descendant shall be punished with imprisonment for not more than three years or a fine.
- (2) Whoever completes an act of sexual intercourse with a consanguine relative in an ascending line shall be punished with imprisonment for not more than two years or a fine; this shall also apply if the relationship as a relative has ceased to exist. Consanguine siblings who complete an act of sexual intercourse with each other shall be similarly punished.
- (3) Descendants and siblings shall not be punished pursuant to this provision if they were not yet eighteen years of age at the time of the act.

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

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

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

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

5. Concluding remarks

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

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


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

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

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

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

A. Introductory Remarks

This chapter examines the way that state regulation of gender identity and expression influences the health of individuals and groups. Gender, gender relations, and gendered characteristics are important features through which health, including sexual health, is mediated. Gender identification can be both assigned and assumed by individuals, the latter in part by acting in socially gendered ways, i.e., by exercising one's right to expression by means of gendered speech, deportment, or identification/self-naming. When people enact or express gendered conduct, it can conform to or clash with social conventions for male- or female-identified bodies.

To become fully accepted in society requires the acquisition of gender traits, so that persons are socially recognizable. No one lives untouched or outside of gender systems, yet all human rights are meant to be enjoyed equally by all persons regardless of their sex, and ultimately their gender. The inability to live one's life fully and with security in accord with one's preferred gender expression and identity has a negative effect on well-being. In addition, state violence, discrimination, and efforts to mandate gender identity and expression exclude or diminish the access of gender non-conforming persons to the social institutions necessary to live a life with dignity: education; regular employment; family and marriage; and access to appropriate and quality health care.

Two streams of rights-based work address gender as a place of rights and health violations. The analysis of gender-based violations tends to focus on girls and women, while the work on gender identity or gender expression tends to focus on persons called ‘gender non-conforming’ or ‘transgender,’ i.e., persons whose gender expression differs from that which is socially normative, based on their perceived body characteristics at birth (sex assigned at birth). Both streams of rights work challenge culturally stereotyped thinking, norms, and expectations about men and women, including but not limited to their sexual behaviour.

As noted in the chapters on violence, gender-based violence often functions to reinforce gender inequality and discrimination. Violence is directed at non-conforming persons, such as women who transgress local gender norms by enrolling in school or acting sexually outside of marriage, for example, or men who fail to behave in sufficiently ‘masculine’ ways. State-sponsored violence and discrimination against gender non-conforming persons; toleration of such acts committed by non-state actors, including relatives and community members; or taking (or failing to take) steps to reduce and prevent discrimination and abuse are ways in which state action in the context of gender expression can affect sexual health.

The social rules of gender are in part codified and maintained in law, so that there are legal consequences for transgressing the rules regulating gender. These laws can in themselves be abusive of rights to privacy, equality before the law, freedoms of expression and association, with effects on the health of the gender non-conforming person. States also regulate gender expression by permitting, mandating, controlling, or forbidding surgeries and medical interventions for the purpose of modifying the bodies of persons to align with specific expectations about gender.

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


408 Some gender non-conforming persons seek to alter their bodies to conform to a chosen gender (often called transsexuality); others adopt speech, dress, or habits associated with one gender but do not alter or wish to alter their bodies.

409 Normative rules regarding masculinity and femininity (dress, appropriate work, modes of verbal and non-verbal expression, for example) are not uniform but can vary across historical period and culture.

410 The social rules of gender, called gender systems that organize the assignments and valuations of persons may vary between and within societies, and may also change historically. Nonetheless, they are implemented through powerful rules, incentives, and socialization, operating through social institutions (church, family, state, health and education, e.g.), which assign status, govern behaviour, and determine access to resources and social legitimacy based on conformity to local gender norms. See Gayle Rubin, “The Traffic in Women: Notes on the Political Economy of Sex,” in Rayna Reiter (ed.), Toward an Anthropology of Women, New York, 1975.

411 While international human rights law has not fully responded to gender expression as a form of expression, the basic reasoning articulated in the Siracusa Principles [See Chapter 7B: expression and information chapeau] which constrain the arbitrary use of state power to restrict expression can be fruitfully applied. These principles would protect gender non-conforming non-verbal expression such as cross-dressing, and physical deportment as well as verbal expression of gender variance from state regulation, especially from penalization in the criminal law, an unjustified and arbitrary interference with fundamental rights. State justification by recourse to broad claims of public health and morality, especially where such claims rest on gender stereotypes forbidden under article 5 of CEDAW, would not be sustainable.
Current rights claims include the freedom to access medical technologies and interventions for bodily modification, to better reflect the person’s perceived or chosen gender, congruent with prevailing standards of professional practice and patient consent. In addition, claims include the ability to transition to a new gender without submitting to compulsory surgeries, particularly sterilization, or other state-mandated procedures that infringe on privacy rights, and rights to reproduce and found a family. In addition, basic protections against discrimination in the right to access mental and physical health services must apply.

In many societies, the transgender population is marginalized through discrimination and violence, often pushed to the edges of survival with decreased access to basic health services, housing, and employment. This exclusion is compounded for members of lower caste, class, and minority groups. Attempts by transgendered persons to generate income through selling sex or engaging in other criminalized and/or stigmatized practices render them more at risk of violence, including sexual violence. Many policing surveillance systems and morals and public decency regulations are used to harass and target them, for false arrest and extortion, sexual favors, and other abuses. Many persons of gender-variant behaviour or identities are also highly mobile, in part to escape police surveillance and in part to seek out new communities outside the influence of their natal homes and find tolerance or acceptance. In these cases, travel is a resourceful strategy, but at times a risk factor for sexual ill-health, as transgendered persons move outside networks of regular care and information.

Human rights law as a system has evolved to address many of the serious rights implications of laws and state practices regulating gender. First, it increased its capacity to address gendered harms to women. More recently, formal human rights practice has recognized police abuse of transgender persons, or the unwillingness of the law to recognize transition from one sex to another, or living with a gender which is not bounded in the fixed binary. In the last decade, many human rights courts at national and regional level have recognized privacy, health, and non-discrimination rights in striking down laws which exclude transgendered persons from the basic protection of the law.

In the following chapter will be addressed issues related to access to change of legal gender – such as the right to change name and indication of sex on official documents – and access to health services for transgendered individuals. State efforts to combat discrimination against gender non-conforming individuals have been mainly addressed in Chapter 1, non-discrimination, whereas laws against violence and harassment based on gender identity are discussed in Chapter 5, violence.

A. Civil registration and names

1. Introduction

This chapter relates to the state interest in registering all persons’ sex at birth, which may cause problems for an individual who wishes to transfer from one gender to the other and to be recognized as such by the state, or to live as a ‘third gender’ – outside of the binary categories of ‘man’ or ‘woman’ – and gain recognition accordingly. State regulation of this area, with all different aspects of a person’s life that may be affected, will impact the individual’s well-being in a host of ways. Contemporary rights and health work on gender expression and transgendered persons implies corresponding state obligations. In order for a transgendered individual to live in accordance with his or her preferred gender, in law and in fact, the state has obligations to, inter alia, provide for the possibility to change name and legal gender, provide access to treatment and health care (including, when relevant, gender reassignment surgery), and ensure the right to marry or to stay married.

Gender identity issues have been addressed on several occasions by both regional courts in Europe. They are also widely regulated on the domestic level, with particular focus on issues

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412 The term ‘transgender’ is an umbrella term for people whose gender identity and/or gender expression differs from what is normative, given the sex they were assigned at birth, including cross-dressers, pre-operative, post-operative or non-operative transsexuals. Transgender people may define themselves as female-to-male (FTM, assigned a female biological sex at birth but who have a predominantly male gender identity) or male-to-female (MTF, assigned a male biological sex at birth but who have a predominantly female gender identity); others consider themselves as falling outside binary concepts of gender or sex. Transgender people may or may not choose to alter their bodies hormonally and/or surgically: the term is not limited to those who have the resources for and access to gender reassignment through surgery. Transgender is not about sexual orientation; transgender people may be heterosexual, lesbian, gay or bisexual. From: Global Rights: Demanding Credibility and Sustaining Activism: A Guide to Sexuality-based Advocacy, 2009.

413 See below the jurisprudence of the European Court of Human Rights, in particular Goodwin v. United Kingdom (2002), Van Kück v. Germany (2003), and L. v. Lithuania (2007). Note however that the Court so far only has addressed the rights of transsexuals (persons who either have undergone gender reassignment surgery, or are in the process of doing so). So far, the Court has not addressed the the right to gender identity as a broader category than the specific rights of post-operative transsexual individuals.
linked to transsexuality. Trends show that more recent legislation, especially following key European jurisprudence, has increasingly adopted a perspective on gender identity less focused on medicalization and more attentive to the psychological and social well-being of the individual. Whereas 30 years ago the primary concern of law- and policy-makers was to grant gender reassignment only following specific psychological and surgical procedures strictly regulated by law, today the individual's well-being is emerging as a parameter for the individual's right to determination of his or her gender identity.

Several topics are worth highlighting here. One is that state regulation of a person's transition from one gender to the other can follow a two-step model. The first stage is regulating the criteria for name change, in order to have a first name corresponding to one's acquired gender. The next step is regulating the criteria for a change of legal gender, which will appear on one's birth certificate, driver's license, and other official documents. This model was illustrated most clearly in the German Transsexual Law, recently amended. German law allows name change without surgery, but until recently required that a correctional genital surgery had taken place for a change of legal gender. Spain and the United Kingdom, among others, break with this model, allowing change of legal gender even without surgery, when certain criteria have been fulfilled.

Another issue worth paying attention to is the ambiguous nature of the concept ‘gender reassignment.’ The British law – read in conjunction with the UK anti-discrimination provisions where individuals who have undergone or will undergo gender reassignment are a protected group – demonstrates this, as does jurisprudence from the European Court of Justice (covered in Chapter 1A under Gender identity discrimination). While gender reassignment is now a legal concept, to which rights and obligations are attached, its meaning is not always immediately clear. Does the concept, in a given domestic context, refer to surgery exclusively, or does it also include other kinds of treatment, such as hormone treatment? Or does it simply mean transitioning from one gender to another, with or without medical intervention? This is relevant from a rights-perspective, in that the more broadly the concept is understood, the more inclusive is the group to which rights and protections are awarded under the relevant law.

The definition of gender reassignment in the domestic sphere is also relevant when assessing whether gender identity issues are primarily viewed as medical, psychological, and/or social concerns. This is linked to the third issue worth paying attention to, namely the degree to which ‘transsexualism’ is seen as a disorder/illness. The European Court of Human Rights has framed transsexualism primarily in this way, and has thus motivated the right to treatment (in Van Kück) from the perspective of state obligations to provide relief when medical conditions exist. As will be discussed, this understanding of the issue implies its own complications from the point of view of right to self-determination and agency.

Finally, it is crucial to bear in mind in this context that a general confusion about terminology characterizes European approaches to gender identity issues. This is not only true with regard to the undefined concept of gender reassignment, already discussed. The concepts of ‘gender identity,’ ‘transsexualism,’ and ‘transgenderism’ are usually not defined domestically, and language is also not consistent throughout Europe and across jurisprudence. One example of this is, again, the German law, the official name of which indicates that it regulates name-change and sexual affiliation, suggesting a broad view on gender identity issues. It is usually referred to however as the ‘transsexual law’ (Transsexuellengesetz), suggesting a narrower scope, mainly referring to persons undergoing surgery and thereby changing biological sex.

In the following, to describe the procedure by which the state recognizes transition from one gender to the other for all legal purposes, the term ‘change of legal gender’ has been employed.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

In B. v. France, the applicant had undergone male-to-female gender reassignment surgery in 1972. Domestic courts had denied her the right to change the sex on her birth certificate and other identity documents. This, according to the applicant, forced her to disclose intimate person information to third parties, and had negative effects on her professional life. She claimed that the state's refusal to “recognise her true sexual identity” was a breach of the right to respect for private life in Article 8 of the Convention.

The Court held that the applicant found herself in a daily situation which is not compatible with the
respect for her private life under the Convention. In particular, the Court referred to the state's refusal to correct the sex noted on the applicant's birth certificate; the refusal to allow her to change her forename to a feminine name; and the impossibility to change the legal gender on so many official documents. Great distress was caused on a daily basis when the legal gender on the documents differed from the apparent sex. All of these factors taken together made the Court conclude that the applicant's right to respect for her private life had been violated under Article 8.

The Court reached in this case a different conclusion from previous cases involving transsexuals in the United Kingdom, in Rees v. United Kingdom (1986),416 and Cossey v. United Kingdom (1990).417 In these two cases, the failure of the state to recognize a change of gender, for civil status purposes, was not found to violate the right to respect for private life under Article 8. The main differences between these cases and B. v. France were factors related to the level of intrusion in the private life of the applicants, following state failure to recognize change of gender. In the British cases, transsexuals could not amend their birth certificates, but they could change their names, and there was no national ID card where sex appeared. Thus, the space for violation of a person's privacy in his or her daily life was more limited. In France, as in other civil law systems, the invasion of privacy is generally deeper. Nevertheless, B. v. France can be seen as an important door-opener in which the Court for the first time pushed for state recognition of and respect for a person's sexual and gender identity. This case led the way to a broader acknowledgement of rights, in that the Court later reversed its previous jurisprudence regarding the United Kingdom (see below) and more fully recognized post-operative transsexuals’ rights to privacy.

The case Goodwin v. United Kingdom418 was decided when more than fifteen years had passed since the UK was first under scrutiny for its treatment of transsexuals in Rees.419 The applicant was a post-operative male-to-female transsexual, whose treatment and surgery had been provided and paid for by the National Health Service. Nevertheless, she could not have her sex corrected on her birth certificate; her national insurance number still showed her sex to be male; she had been informed that she was ineligible for state pension at the age of entitlement for women in the UK; and she was forced to pay the higher car insurance premium applicable to men. She also claimed to have been subject to harassment at work and that the state had not granted her proper protection against discrimination. All in all, the applicant claimed that the state failure to legally recognize her changed sex caused her “numerous discriminatory and humiliating experiences in her everyday life.” She also complained that, although she lived with a man, they could not marry under British law as long as her birth certificate showed that her sex registered at birth was male, which she argued violated the right to marry under Article 12.

The Court reached in this case a different conclusion from previous cases involving transsexuals in the United Kingdom, in Rees v. United Kingdom (1986),416 and Cossey v. United Kingdom (1990).417 In these two cases, the failure of the state to recognize a change of gender, for civil status purposes, was not found to violate the right to respect for private life under Article 8. The main differences between these cases and B. v. France were factors related to the level of intrusion in the private life of the applicants, following state failure to recognize change of gender. In the British cases, transsexuals could not amend their birth certificates, but they could change their names, and there was no national ID card where sex appeared. Thus, the space for violation of a person's privacy in his or her daily life was more limited. In France, as in other civil law systems, the invasion of privacy is generally deeper. Nevertheless, B. v. France can be seen as an important door-opener in which the Court for the first time pushed for state recognition of and respect for a person's sexual and gender identity. This case led the way to a broader acknowledgement of rights, in that the Court later reversed its previous jurisprudence regarding the United Kingdom (see below) and more fully recognized post-operative transsexuals’ rights to privacy.

The Court came to the conclusion that the state had violated the applicant's right to respect for her private life under Article 8, and thus changed course from its previous case law on transsexuals' claims in the UK. The Court found it illogical that the state, while financing and providing for treatment and surgery, failed to fully recognize the change of gender in law. It noted that transsexuality had wide international recognition as a medical problem for which treatment can be provided to afford relief. It stressed the right of transsexuals to “personal development and to physical and moral security,” and stated that it could no longer be seen as sustainable for transsexual individuals to have to live in “an intermediate zone as not quite one gender or the other.”

The Court also examined the applicant's right to marry, and found that the fact that she could not marry violated Article 12. In this finding, it made an important statement. Article 12 provides for the fundamental right to marry and to found a family. The Court explained that the second aspect – to found a family (that is, to have children) – cannot be seen as a condition of the first – to marry. In other words, couples who cannot (or will not) conceive or parent a child should for this reason not be deprived of the right to marry. With regard to the terms 'man and woman' in Article 12, the Court agreed with the applicant that these could no longer refer to a determination of gender by purely biological criteria. The Court thereby opened the door to a less biological way of perceiving sex and gender.

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416 Application no. 9532/81, decided on 17 October, 1986.
417 Application no. 10643/84, decided on 27 September 1990.
418 Application no. 28957/95, decided on 11 July 2002.
419 I. v. the United Kingdom (Application no. 25680/94, decided on 11 July 2002) raised many of the same issues and was decided on the same date as Goodwin. The Court employed the same reasoning and came to the same conclusion in the two cases. Likewise, in Grant v. the United Kingdom (Application no. 32570/03, decided on May 23 2006), the issue was again the difference in retirement age between men and women and that the applicant was forced to work until the pension age for men, though she now lived as a woman. The Court referred back to Goodwin and stated the lack of legal recognition of the applicant's acquired gender again constituted a breach of the right to respect for private life under Article 8.
Finally, the Court stated that the right to marry has to been seen as the right to marry a person of one's choice. The applicant lived and identified as a woman and would only wish to marry a man – therefore the argument that she could still marry a woman (her former opposite sex) was an artificial argument.

In X, Y and Z v. United Kingdom the Court examined the right to legal recognition as a parent when one of the two care-providers was a transsexual. The issue was whether a post-operative female-to-male transsexual should be allowed to register as the father of a child, born to his female partner by means of artificial insemination by donor. British authorities had denied the applicant the right to register as father on the child's birth certificate. While the European Commission of Human Rights came to the conclusion that Article 8 had been violated, the Court found that this was not the case, making references to the "complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States" that transsexuality still raised. According to the Court, states should be afforded a wide margin of appreciation in cases like the one at hand and could therefore still deny the 'social father' the right to also be recognized legally as father of the child.

It is possible but not certain that this case is overruled by Goodwin (above). One may argue that as Goodwin established the right for a transsexual woman to be recognized as a legal woman, from this should follow that since a transsexual man now can be recognized as a legal man, he should also be allowed to register as legal father. On the other hand, the Court's jurisprudence on adoption suggests that this may not be an automatic consequence. The Court stresses that there is no right to adoption for anybody, but only a right to be assessed without discrimination – and what matters is the best interest of the child. From that perspective, it is possible that the Court would continue to leave to the discretion of states to decide whether a transsexual parent would indeed qualify as legal parent.

In L. v. Lithuania the applicant had been registered at birth as female but had early on realized that his mental sex was male. He had undergone partial surgery for gender reassignment but was unable to complete the process due to lack of adequate legislation in Lithuania. Even though a Gender Reassignment Bill had been prepared and approved by the Government, the parliament had refused to implement it. For as long as the process had not been concluded, the applicant could not change his 'personal code' according to which his sex was still female. Hence, the fact that he was identified legally as a woman while his appearance was male made him subject to hostility and caused him great psychological distress, while also impairing his functioning in society in various ways.

The Court noted that while it was possible according to Lithuanian law to change both gender and civil status, there was a legislative gap with no law regulating full gender reassignment surgery. Until such law was enacted, no medical facility in Lithuania would undertake the surgery. The outcome was that the applicant found himself in an intermediate situation, without being able to receive full legal recognition as a man. The Court noted that this left him in a "situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity." The failure on account of the State to provide for the relevant legislation was found to be a violation of the applicant's right to respect for private life under Article 8 of the Convention.

It is noteworthy that the Court used the term 'true identity' with regard to the applicant's male gender identity. As long as the Lithuanian state had not enacted legislation regulating gender reassignment surgery, which was a precondition for full legal recognition of a change of gender, the state did not allow for people in this category to live according to their true identity. This, the Court found, had detrimental effects on their well-being.

Of great importance are the remedies ordered by the Court in this case, which were unusually concrete. The applicant was awarded 5 000 EUR in non-pecuniary damages. Furthermore, the Court ruled that Lithuania should pass the required piece of legislation within three months, and that, if it failed to do so, it should pay the applicant 40 000 EUR in pecuniary damages. In July 2008, Lithuania paid the 40 000 EUR to the applicant so that he could undergo a full sex change operation. However, as of March 2011 the law has still not been passed. On the contrary, a ban on gender reassignment surgery was proposed by conservative parliamentarians, in an attempt to amend the national Civil Code.

3. European Union

The European Court of Justice has in three important judgments examined transsexuals' rights not to be discriminated against in relation to gender reassignment. These cases, P. v. S. and Cornwall County

421 See for a more thorough discussion on the Court's jurisprudence on adoption Chapter 3A, Same-sex marriage, partnership, cohabitation, access to adoption and artificial reproduction technologies.
422 Application no. 27527/03, decided on 11 September 2007.
Sexual Health and Human Rights in the European Region

4. Non-binding regional material

Both the Parliamentary Assembly of the Council of Europe and the European Parliament have issued recommendations and resolutions on rights of transsexuals, both with regard to non-discrimination and the right to correction of gender on official documents. Worth highlighting here is a statement from a 1989 European Parliament resolution, in which the Parliament shows a sensibility to structural problems rarely seen in legal documents. It expresses that

whereas transsexuality is a psychological and medical problem, [it is] also a problem of a society which is incapable of coming to terms with a change in the roles of the sexes laid down by its culture.

In 2009, the Council of Europe Commissioner of Human Rights released a report on the rights of transgendered persons with a long list of detailed recommendations to member states. This document explicitly includes all transgendered persons, thus not only those who have undergone corrective surgery.

5. Domestic legislation and case law

In the United Kingdom, having undergone gender reassignment surgery is not a precondition for legal change of gender. The Gender Recognition Act 2004 provides that a person of either gender who is 18 or older can make an application for a ‘gender recognition certificate’ on the basis of “living in the other gender” (Section 1 (1)). In the determination of applications, a Gender Recognition Panel must grant the application if it is satisfied that the applicant has or has had gender dysphoria, has lived in the acquired gender for at least two years, and intends to continue living in that gender. Furthermore, the application must include two reports, either by two medical practitioners whereof one is practicing in the field of gender dysphoria, or one report by a psychologist practicing in that field and one by a medical practitioner (Section 3). The report issued by the expert in the field of gender dysphoria must include “details of the diagnosis of the applicant’s gender dysphoria.”

When an application has been granted, the applicant will get a full gender recognition certificate, if he or she is unmarried, and, if married, an interim gender recognition certificate (Section 4). If the applicant is married, the marriage must be annulled or dissolved, and after that a full gender recognition will be granted by the court that dissolved the marriage. Schedule 3 to the UK Civil Registration Act 2004 allows married individuals, who wish to stay together when one of them is changing gender, to register as civil partners immediately after their marriage has been annulled.

According to Section 9 of the Gender Recognition Act, where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender. The law is not retroactive. Thus, a legal change of gender does not alter any property, parental, or inheritance rights (Sections 9, 12, 13, 15 and 16).

The British Gender Recognition Act exemplifies the shift in thinking about transgendered persons, recognizing their right to be recognized legally in their acquired gender with or without genital surgery. Nevertheless, even without the requirement of surgery, transgenderism is seen as a medical condition requiring a variety of accompanying certifications by medical practitioners, which can reproduce the stigma associated with transgendered persons and deprive them of a sense of agency. Another problematic point is the requirement not to be married for full recognition in the acquired gender. This does not imply that a post-operative transsexual cannot marry – it is a mechanism whereby the institution of marriage is reserved for opposite-sex couples. In the individual case it will mean...
that a happily married person will have to choose between getting a divorce and gaining full public recognition for his or her preferred gender.

In Spain, legal change of gender is regulated by Act 3/2007 of 15 March, regulating the rectification of entry related to the sex of persons in the civil register.\textsuperscript{431} Here the expression ‘real gender identity’ is used to describe why it may be necessary to change the official registration of a person’s gender. The Act’s purpose is “to regulate the necessary requirements to obtain a change of the entry in the civil register related to the sex of a person, when this entry does not match to his/her real gender identity. It also provides for name change so that [the name] will not be discordant with the claimed sex.”

According to Article 1, any Spanish national “with sufficient capacity” and over the age of majority will be able to request a rectification of his/her sex in the civil register. The correction of the entry will be granted when two criteria are fulfilled. First, gender dysphoria must have been diagnosed, by means of a report from an accredited physician or clinical psychologist showing that the condition has been persistent and stable and that the person does not suffer from a relevant personality disorder. Second, the person must have been medically treated during at least two years to fit his or her physical characteristics to those of the claimed gender. This criterion does not require gender reassignment surgery. When health or age reasons make it impossible to comply with this second criterion, exemptions can be made (Art 4).

Once the decision is made that the legal gender has been changed, this will have immediate effects on the civil registry. The correction in the registry will allow the individual to exercise all rights attached to his or her new condition (Art 5). The civil registry will itself notify government bodies and agencies when the change has been made (Art 6). However, no publicity of the person’s sex correction will take place without special authorization (Art 7).

In Germany, change of legal gender is regulated in the Law on the change of the first names and the determination of sexual affiliation in special cases (in short, the Transsexual Law).\textsuperscript{432} This law resulted from a Federal Constitutional Court decision in 1978,\textsuperscript{433} in which an individual born biologically male who had undergone hormone treatment and surgery sought to be recognized as a woman, primarily to alleviate employment-related problems. The Court based its decision on the right to individuality according to Article 1 of the Constitution, and held that the recognition of a sex change operation would not conflict with social mores as long as it was medically indicated. The Transsexual Law was adopted two years later.

Until recently this law provided for two different procedures with corresponding requirements, whereby one allowed for name change (the so-called minor solution), and the other for full legal recognition of belonging to the other sex (the so-called major solution).

In January 2011 the German Constitutional Court struck down important parts of this law, finding that the requirement that the transgendered person undergo surgery (the ‘major solution’) in order to access civil partnership, was incompatible with the right to sexual self-determination and physical integrity, protected under the German constitution. In effect, this decision removed the difference between the ‘major’ and the ‘minor’ solution under German law.\textsuperscript{434}

Case law: partnership rights for pre-operative transsexuals and dropping the precondition for unmarried status, sterilization and gender reconstruction surgery

The German Federal Constitutional Court has in several important decisions expanded the rights of transgendered persons under the Transsexual Law. Three examples will be mentioned here.

In decision 1 BvR 3295/07,\textsuperscript{435} the Constitutional Court struck down important parts of the Transsexual Law, holding that the requirements to undergo sterilization and gender reconstruction surgery in order to achieve full legal recognition of the claimed sex were unconstitutional, in a case regarding the right to enter into a civil partnership for a male born, transgender woman who had not undergone gender reassignment surgery. The Court found that the requirement that the transgendered person undergo surgery – the ‘major solution’ – in order to access civil partnership, was incompatible with the right to

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\textsuperscript{431} Unofficial translation to English available.


\textsuperscript{434} Decision 1 BvR 3295/07. The case is only available in German; press release available in English.

\textsuperscript{435} July 2011, after the main research for this report had been completed.
sexual self-determination and physical integrity, protected under the German constitution.

In case 1 BvL 3/03, the Court was whether the obligation to reverse the name change under the minor solution upon marriage was constitutional, when the gender identity of the transgendered person was the same as that of her partner. The Court held that a male-to-female pre-operative transsexual, who had taken a female name under the minor solution, was allowed to keep the new name after entering into marriage with a woman. This decision did not put into question the constitutionality of the mandated reversal of name change upon marriage as such, but focused on the fact that a pre-operative ‘homosexual transsexual’ (in the wording of the Court) could not formalize her relationship with her new gender identity intact. Civil partnerships were available to same-sex couples in Germany, but not when the two partners were of the opposite (legal) sex. In the case under consideration, the applicant’s gender identity and name were female, but her legal gender was male – thus, she could not preserve her gender identity and have her partnership recognized either through same-sex partnership or opposite-sex marriage. Absent a possibility for couples like this to register as same-sex partners, the Court found it inconsistent with the constitutional right to free development of personality, combined with the right to human dignity, to force the applicant to reverse her name change when getting married.

Under the partnership law, heterosexual pre- or non-operative transgendered persons could register their partnership without having to change their names back. In this sense, the case has been understood to mean that the Court found no justification for discrimination against transsexuals based on sexual orientation. In discussing differences in criteria between the ‘minor’ and the ‘major’ solution, the Court established that the transsexuality of a person who has opted for the ‘minor solution,’ and not undergone surgery, is not less real or irreversible than the transsexuality of a post-operative individual. In acknowledging this, the Court also recognized the psychological rather than physical nature of gender identity and of change of gender, and that many transgendered persons do not desire to go through surgery but that their gender identity nevertheless must be acknowledged by the law. It thereby established that more rights flow from the minor solution than had earlier been recognized.

Until 2008, a requirement for the major solution was, in addition to those discussed above, that the individual had to be unmarried. However, in May 2008 the Federal Constitutional Court ruled that this requirement was unconstitutional. In the case, 1 BvL 10/05 the applicant was a man who had been married for 56 years and had three children, and who at the age of 72 had decided to undergo a sex change operation to live fully as a woman. He applied for recognition of his new gender under the ‘major solution’ of the law. The couple wished to remain married. The Court found in its decision the law unconstitutional, as it forced individuals to choose between the constitutionally protected fundamental rights of individual integrity, on one hand, and of marriage, on the other. As a consequence, the law was changed so that the unmarried requirement was dropped in July 2009.

In Kazakhstan, the possibility to change legal gender flows from a ministerial order that sets forth criteria for medical investigations of persons with “gender identification disorders.” The Minister of Health Order No. 435: On the guidelines of medical investigation of people with gender identification disorders is related to a 1999 decree on changing and annulling records of civil status. Its purpose is to solve “complaints, statements and referrals of citizens on the issues of gender identity disorders.”

The core of the Order is to be found in its enclosed guidelines. Interestingly, this document allows for change of legal gender without gender reassignment surgery. It is built on the notion that gender change can be allowed once the presence of ‘gender identity disorder’ has been established – and that such disorder can be established without the person having undergone any kind of treatment. The change in name and sex at the civil registry is recognized as either ‘social’ or ‘biological’ sex – dependent on whether surgery has been undertaken or not (para 4, Guidelines).

436 Only available in German.
438 The author was helped in the interpretation of this case by the written explanation by Philipp Braun, Lesbian and Gay Federation in Germany, at http://www.igl-europe.org/europe/guide/country_by_country/germany/landmark/transgender_case_in_german_constitutional_court, Last visited on 24 March 2010.
However, even with this acknowledgement that gender identity goes beyond physical appearance, the issue is heavily medicalized. An individual medical investigation is conducted through an in-hospital stay (para 2, Guidelines), and investigations of the psychiatric, neurological and somatic conditions of the person will be carried out (para 3, Guidelines). Thereafter, based on the investigation, the person will be presented before a special commission that will make conclusions about the person’s medical condition and then recommend either “change of the social (passport) or biological (surgical correction) sex” (para 4, Guidelines). The law is then accompanied by an extensive list of tests and medical documents necessary for the investigation, including blood and urine test, HIV test, liver-test. X-ray of skull in two projections, and conclusions from a ‘sexopathologist,’ an endocrinologist, and a psychologist.

An annex to the Order contains the form that has to be filled out once a person has undergone all required investigations and tests. This is the form that will confirm that a person qualifies for change of legal gender. The focus of the Order is on the medical investigation itself, and thus it gives no guidance as to what consequences flow from a new legal gender having been granted (inter alia on marriage, status with regard to children, and other civil law areas). Those topics are not regulated, as this is the only piece of legislation addressing gender identity concerns in Kazakhstan.441

According to Civil Registry legislation in most former Soviet republics, once a person has the correct medical form – resulting from the medical investigation that is regulated in the Kazakh Order – the change of legal gender can follow. Therefore, the medical investigation and the provision of the relevant form are key to the registry of a new legal gender.442 Compared to other laws in the region, however, most of which include a requirement for surgery and other preconditions before a change of legal gender can take place, the Kazakh Order is unusually liberal. It does not require gender reassignment surgery, nor unmarried status, childlessness, or sterilization. Nor does it set a specific age under which gender change cannot take place. All these are preconditions that are common both in Central Asia and in other parts of the European region. Seen in its context, the Order can be described as progressive. However, it also has problematic points, as it requires a myriad of confusing and potentially humiliating procedures and takes as its point of departure the assumption that the individual in question is ill. The opinions, feelings, and background of the person involved count for very little. The list of tests that accompany the investigation also raises concerns, as several of these can be described as over-inclusive, irrelevant, and subjecting the individual to the risk of discrimination (e.g. HIV test).

Case law: recognizing gender identity and widening the right to health

The Italian Act no. 164 of April 14 1982443 establishes that gender reassignment (change of legal gender and name on civil status records and papers) is dependent on the decision of a court, relying on expert opinions on the psycho-physical condition of the individual under examination. Judges may also authorize surgical intervention, when necessary. Once the transition has been completed, the judge orders the correction of identity papers and records. Judges have consistently considered genital surgery a requirement for name change and correction of identity records. After the entry into force of the Act, it was challenged before the Italian Constitutional Court, with the argument that permitting gender reassignment was unconstitutional under Article 5 of the Civil Code, forbidding acts of disposal over one’s own body, with reference to Article 32 of the Italian Constitution, guaranteeing the right to health.

The Constitutional Court, in its Decision no. 161 of 1985,444 not only declared that the Act was constitutional, but also recognized the existence of a fundamental right to gender identity. The Court acknowledged the “contrast between psychological and biological sex” in transsexual persons, but, above all, admitted that the law recognized a new concept of sexual identity. This, contended the Court, is based not only on a person’s sexual attributes, but also on psychological and social factors, from which follows the concept of “sex as a complex feature of an individual’s personality, determined by a set of factors.” Here should be stressed that the Court recognized a broad view of the ‘right to health’ under the Constitution, including not only physical health, but also mental well-being, in relation to which any changes to one’s body, if made with a view to ensuring mental health, are perfectly legal. Moreover, the expression of one’s sexual identity is an inviolable right under Article 2 of the Constitution (guaranteeing the inviolability of human rights), as this expression allows transsexual persons to fully develop their personalities, intimately and psychologically, as well as in relationship with others.

According to conversation on Dec 9, 2009, with Anna Kirey, founder of Kyrgyz LGBT rights organization Labrys and sexual rights activist in Central Asian countries.

Ibid.

Act no. 164 of 14 April 1982, on regulations regarding the rectification of the attribution of sex, Only available in Italian, content explained by Stefano Fabeni.

Decided on 23 May 1985. Only available in Italian, translation provided by Stefano Fabeni.
Case law: recognizing a right to legal change of gender without surgery

In the Austrian Administrative High Court 2009 case VwGH 27.02.2009, 2008/17/0054, the applicant was born male and, after hormone therapies and cosmetic measures, had been living as a woman. The authorities refused her a female name and corresponding documents, since she had not undergone gender reassignment surgery. Removal of genitals was a precondition in Austria for a legal change of gender. The applicant alleged that every time she exhibited one of her documents (driver’s license, identification card, passport, birth certificate, etc.) she had to expose her transsexuality which, she claimed, violated her right to privacy.

The issue before the Court was whether a mandatory sex change operation was a lawful prerequisite for the recognition of a person’s new gender. It concluded that surgery could not be a legal precondition for attaining the change of legal gender. In reaching this conclusion, the Court referred to the psychological aspects of the sense of belonging to the opposite sex from 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 gender in a way that is obvious to outside observers, then there is no reason that the authorities cannot use these psychological aspects alone as basis for the approval of change of legal gender. In the relevant case, the Court ordered the Ministry of the Interior to reconsider the case of the applicant, based on the notion that gender change can be a fundamentally psychological process.

6. Concluding remarks

See below: joint concluding remarks for Chapter 4A and 4B.

B. Access to health services, including insurance coverage

1. Introduction

Under established human rights principles, the right to health includes the right to access to appropriate health services. For transgendered individuals, this right includes the possibility of undergoing whatever procedure – surgical or not – is determined necessary by the person in order to change gender, as well as of receiving follow-up treatment. These health services shall be respectful of the wishes of the person, guarantee him or her confidentiality, and avoid humiliating or discriminatory treatment. Of particular interest is also to what extent these services are covered by public health insurance since, if they are not covered, they will be effectively unavaliable to persons of insufficient means. At the same time, public funding also increases state control over the bodies of transgendered individuals. This may reinforce state notions of what the ‘appropriate’ remedy to gender identity discomfort is. This, in turn, may open the door to intrusive state medical and psychological assessments that may be questionable from the perspective of a right to privacy.

The European Court of Human Rights has assessed the right to state funding for gender reassignment treatment, primarily under Article 8 (right to respect for private life) of the Convention. In a 1999 UK case, the Court of Appeal grappled with a similar question. As will be shown, in these cases the courts do not establish that there is a right to funding for surgery for transgendered persons as such. Rather, the courts examine particular conditions that have lead to the denial of insurance coverage in individual cases, declaring such conditions disproportional and disrespectful of individual rights.

In several European countries, funding for hormone treatment and gender reassignment surgery is covered by national health insurance schemes. As will be shown, the scope of coverage varies, however, and distinctions between what is deemed ‘necessary’ and what is seen as merely ‘aesthetic’ dictate whether the relevant procedure will be covered or not. In places such as the United Kingdom where public health services are strongly decentralized, the assessment of whether a procedure is ‘core’ or ‘non-core’ is made locally. This makes it difficult to foresee what level of coverage will be available in the individual case.

445 Decided on 27 February 2009. Only available in German.


447 Ibid. While not discussing the right to gender reassignment treatment directly, the Committee addresses the need for health services to be economically accessible/affordable for all, as part of state obligations to fulfill the right to health under the Convention.
2. Council of Europe

Jurisprudence of the European Court of Human Rights

In *Van Kück v. Germany*\(^\text{448}\) the applicant had undergone hormone treatment and male-to-female gender re-assignment surgery. She had been able to change her first name to a female name. The case concerned her possibilities of getting her costs for the hormone treatment and surgery reimbursed by her health insurance company. When the private company refused to cover her costs, she challenged this decision in court. The German court denied her the right to have her costs covered, based on the assumption that the treatment and surgery were not “medically necessary” and that the applicant had deliberately caused her transsexuality, which exempted the insurance company from liability. She claimed that the German court decision violated, *inter alia*, her right to respect for private life under Article 8 of the Convention.

The Court found this burden to prove the medical necessity of the treatment to be disproportionate, and thus that the applicant’s respect for her private life had been violated under Article 8. The Court also found that the handling of the case in German courts did not satisfy the requirements of a fair hearing, which amounted to a violation of Article 6.

It is important to note that the Court did not rule that costs for gender reassignment should be covered by private or public health insurance under Article 8.\(^\text{449}\) At stake was the level of respect or disrespect with which the German court had treated the applicant’s (self-declared) transsexuality. However, the finding that the German court had not respected the applicant under Article 8, led the Court to the conclusion that reimbursement should have been granted. From that can possibly be drawn that reimbursement for gender reassignment expenses is, if not a right under Article 8, a logical conclusion of the right to respect for sexual self-determination.

The applicant in *Schlumpf v. Switzerland*\(^\text{450}\) was a male-to-female transsexual who, similar to the previous case, had been denied reimbursement from her health insurance company for gender reassignment surgery. The reason she had been denied coverage was that according to Swiss case law, reimbursement was only mandatory in cases of “true transsexualism.” True transsexualism could, according to the Swiss High Court, only be established after a so-called observation period of two years, which in this case had not elapsed before the operation took place. The applicant was 67 years old when she underwent the surgery and claimed that her age justified an exemption from the two-year rule.

The Court determined that the two-year rule was likely to influence the decision to undergo the procedure of the applicant, given her age, and that the rule therefore impaired her freedom to determine her gender identity.\(^\text{451}\) In mechanically applying the rule, without taking into consideration the particular situation of the applicant, a fair balance had not been struck between the interests of the insurance company and those of the applicant. Therefore, there had been a violation of the right to respect for private life under

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\(^{448}\) Application no. 35968/97, decided on 12 June 2003.

\(^{449}\) The Court noted: ‘In the present case, the central issue is the German courts’ application of the existing criteria on reimbursement of medical treatment to the applicant’s claim for reimbursement of the cost of gender reassignment surgery, not the legitimacy of such measures in general. Furthermore, what matters is not the entitlement to reimbursement as such, but the impact of the court decisions on the applicant’s right to respect for her sexual self-determination as one of the aspects of her right to respect for her private life’ (para 78).

\(^{450}\) Application no 29002/06, decided on 8 January 2009. So far available in French only. Press release in English.

\(^{451}\) Note that in the official press release from the Court, in English, the term ‘gender identity’ is used, while in the French text of the case (the whole case has so far not been translated into English) the Court uses the term ‘identité sexuelle,’ which has a slightly narrower connotation than the English concept ‘gender identity.’
Article 8. The Court reaffirmed that issues of gender identity concern one of the most intimate aspects of private life, which have to be respected by states under the Convention.

The Court noted again that the Convention does not guarantee reimbursement for sex-change operations. What was assessed was not the right to reimbursement per se but the rigidity of the two-year rule.\(^{452}\) However, as in the Van Kück case, the Court addressed a very practical aspect of gender identity issues, and stressed the need for the state to take individual, emotional concerns into consideration in order for Article 8 to be respected.

3. **European Union**

Right to gender identity treatment does not fall within the scope of binding EU law.

4. **Domestic case law and legislation**

In **Finland**, it is possible to get a change of gender legally approved without surgical procedure. According to **Law No. 563 of 28 June 2002 on the determination of sexual identity of transsexual persons**,\(^{453}\) it will be determined that a person’s sexual identity is different from the sex registered at birth if the person demonstrates a medical examination attesting to the fact that he or she permanently finds him/herself belonging to the opposite sex; has undergone sterilization or is otherwise proven to be infertile; is over age of majority; and is unmarried and not in a registered partnership (1§). A person who is married or in a registered partnership may get their gender change approved, if the spouse or partner gives his/her consent – in those cases, a marriage will automatically be turned into a registered partnership, and a partnership into a marriage (§2).

The Finnish Social Affairs and Health Ministry has given specific instructions concerning the treatment of transsexual people in **Ordinance No. 1053 of 3 December 2002 on the organization of examinations and treatment for the purposes of sex change and on the medical statement determining the gender of transsexual persons**.\(^{454}\) This Ordinance regulates examinations and treatment for the purposes of sex change; establishes guidelines for the multi-professional working group with specialist knowledge concerning transsexualism; and sets forth criteria for a treatment plan and for the medical statement determining the gender of transsexual persons. Preconditions for treatment are that the person finds him/herself permanently belonging to the other gender, lives according to a gender role corresponding with that other gender, and has undergone sterilization or is otherwise proven infertile. The medical examination of the person must result in a statement by a psychiatrist attesting to the fact that these criteria have been met.

Types of available treatment include psychological, hormonal, and surgical treatment, in accordance with the needs defined by the person and the medical staff involved in the examination. Gender reassignment surgery is performed at only one hospital in the country: the university hospital in Helsinki, where a specialist on plastic surgery performs the procedure.

In Finland, health care is given high priority as a public responsibility, and thus Finnish public health insurance provides funding for most aspects of gender reassignment treatment. According to a 2008 report, treatments such as hormone therapy, vagino-plasty, breast-augmentation, mastectomy, and hysterectomy are all covered by public health insurance; for psycho-therapy and hair removal, public funding is also occasionally available.\(^{455}\)

In the **United Kingdom**, the Department of Health allocates funding for treatment of all conditions to the 152 local Primary Care Trusts (PCTs). Each PCT sets its own priorities on how to distribute the money it has received from the Department of Health. For this reason there is no nationwide uniform policy on what elements of gender reassignment treatment will receive public funding.

**Case law: establishing a basic right to funding for gender reassignment treatment**

However, a basic right to public funding for gender reassignment treatment was established in 1999 through the decision of the British Court of Appeal (Civil Division). In the case, **North West**

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452 It is interesting to note, for the purpose of this report, that the two-year rule is part of the WHO definition of transsexualism.

453 For the diagnosis transsexualism to be made, “the transsexual identity should have been present persistently for at least 2 years” according to the WHO “Classification of Mental and Behavioural Disorders”, available at [http://www.who.int/classifications/icd/en/bluebook.pdf](http://www.who.int/classifications/icd/en/bluebook.pdf), Last visited on 8 May 2010.

454 Official versions available in Swedish and Finnish.

Lancashire Health Authority v. A., D., G.,456 the petitioners, in the words of the judge, suffered from gender dysphoria. The local health authority had refused them treatment, including surgery, under the National Health Service (NHS) scheme because of its policy not to conduct surgery in the absence of ‘overriding clinical need’ or other exceptional circumstances. The applicants argued that they were ill and that, given that the Authority had classified transsexualism as an ‘illness,’ its policy not to fund their treatment was irrational.

The main issue in the case was whether the application of said policy was rational and, therefore, could be deemed proper. The judge found it incoherent that the Authority on one hand declared transsexualism an illness and, on the other, stated more or less automatically that individual cases did not correspond to an overriding clinical need and so refused funding for the condition's treatment:

> Accordingly, given the Authority’s acknowledgment that transsexualism is an illness, its policy, in my view, is flawed in two important respects. First, it does not in truth treat transsexualism as an illness, but as an attitude or state of mind which does not warrant medical treatment. Second, the ostensible provision that it makes for exceptions in individual cases and its manner of considering them amount effectively to the operation of a “blanket policy” against funding treatment for the condition because it does not believe in such treatment.

Thus, the judge declared that a policy to fund treatment for gender identity dysphoria only in exceptional cases was not irrational as such, but that the possibility of obtaining funding in such cases had to be real and not merely fictional. Each person's needs had to be assessed individually. In conclusion, the judge ordered that the matter be remitted to the Authority for reformulation of its policy, to give proper weight to its acknowledgement that transsexualism is an illness.

This case has been understood to establish a ‘floor’ under which no Primary Care Trust can go, in regard to funding for gender reassignment treatment. According to the NHS, most PCTs will fund specialist psychiatric assessment and hormonal medication. Some will fund hair removal and speech therapy. With regard to surgery, funding opportunities vary. Many PCTs have adopted the view that there are ‘core procedures’ that will be funded (such as chest reconstruction for a transgendered man), while ‘non-core procedures’ (such as facial feminizing surgery or breast augmentation) may be deemed aesthetic or cosmetic, and will therefore not receive funding.457

Case law: the right to respect for gender identity for imprisoned transgendered person linked to right to treatment

Another United Kingdom case, from 2008, highlights how state recognition of a person's true gender identity is intertwined with that person's right to gender reassignment surgery. In the Administrative High Court case AB. v. the Secretary of State for Justice and the Governor of HMP Manchester,458 the claimant was a 27-year-old pre-operative transgendered woman serving a prison sentence for having committed various violent crimes. She sought judicial review to challenge the decision that she be kept within the male prison and thus not transferred to a female prison facility. She had been undergoing the process for gender reassignment, though not surgery, and had in 2006 been granted a certificate under the Gender Recognition Act recognizing her as a woman for all purposes.

In prison, the claimant dressed as a woman to the extent possible, and was held in a special unit due to safety concerns. Her identification as female did not allow her to participate in the full range of prison activities, which hindered her progress towards release. Furthermore, the Gender Identity Clinic treating the claimant would not approve her gender reassignment surgery until she had spent a considerable amount of time living in role as a woman, which under present circumstances could only happen within a female prison. Thus, as long as the claimant remained in the male prison she was unable to progress towards surgery.

The Administrative Court examined the case in light of UK obligations under the European Convention on Human Rights, and in particular Article 8, the right to respect for private life, and Article 14, non-discrimination. In quoting a 2008 UK Appeals Case, the Court reiterated that the right to personal autonomy under Article 8 should make the person the “master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image […] and also of the ‘zone of interaction’ […]” between

himself and others” (para 39). The Court emphasized that the continued detention of the claimant in a male prison interfered with her ability to progress to full gender reassignment – hence placing a significant restriction on her autonomy and her wishes to seek to qualify for surgery. This interference was found to go “to the heart of her identity [and] appear[ed] to be closely related to her offending behaviour.”

In conclusion, in denying the claimant’s right to transfer to the female prison the State limited her personal autonomy, identity, and integrity, and its justifications for doing so were all insufficiently weighty. Her continued detention in a male prison was found to be in breach of Article 8 of the Convention.

In this context it may be worth mentioning a passage in the above-mentioned (non-binding) Council of Europe Commissioner on Human Rights 2009 report “Human Rights and Gender Identity,” in which the Commissioner addressed the special needs for health services of transgendered individuals in correctional institutions:

“[P]roblems are faced by transgender people in prison who may face periods of time without hormone therapy. This may result in a long time without treatment and may cause serious health problems, such as the development of osteoporosis in transsexual men, and irreversible physiological changes to take place such as the development of baldness in transsexual women. Transsexual people will frequently face difficulties in accessing assessment, hormone therapies, or surgery as many prisons or prison systems feel they do not have the facilities to manage transsexual prisoners, or in some cases they are seen as forgoing their right to such treatments because of their conviction.”

5. Concluding remarks

Matters concerning gender identity raise an array of issues, that all demand separate legal responses. Gender identity concerns areas that are deeply personal, intimate, and constitutive of the person. At the same time, when individuals transgress the traditional divide between ‘male’ and ‘female,’ the issues raised tend to stir strong public reactions. On one level, it may be relevant to reflect upon why the state claims an interest in regulating and registering the individual’s sex at all. On a more practical level, however, given that most societies organize themselves in fundamental ways around categories of ‘men’ and ‘women,’ it is important to examine how the rights of persons not conforming to traditional gender roles are being guaranteed and protected. From a human rights perspective, the self-determination of the individual, both with regard to establishing his or her true gender identity, and to choosing the adequate remedy when she will undergo a gender or sex change, must be seen as paramount.

For the purpose of sexual health, several of the European bodies have emphasized the connection between gender identity and well-being. In L. v. Lithuania, the European Court of Human Rights stressed the right of every person to live by his or her ‘true identity,’ and in Recommendation 1117 the Parliamentary Assembly of the Council of Europe states that the ‘sexual identity’ of a person is an important feature of his or her personality. These statements clearly link gender identity to issues of psychological and social well-being.

Three health-related aspects of gender identity have been examined here. One is the fact that transsexuality/transgenderism is still to a large extent seen as a mental disorder. The second aspect relates to state recognition, or denial, of a transgendered individual’s true gender identity, and the effects such state action has on that individual’s well-being. The third relevant aspect is access to health care for transgendered persons, as primarily discussed in Chapter 4B.

With regard to the first issue the following can be concluded. In the region, the dominant view is that transsexuality is seen as an illness, or at least a ‘mental disorder.’ On one hand, this approach provides an obvious connection with health, and the right to health. If the pre-operative state of the transgendered individual is seen as a medical/psychological problem, it can be argued that the state, under its obligations to respect and fulfill the right to health, has a responsibility to provide for and support adequate remedy, namely treatment and (when appropriate) surgery. Only when a person’s ‘mental sex’ corresponds with his or her ‘apparent sex,’ will that person have attained an acceptable level of health.

On the other hand, it is problematic to medicalize the issue and make legal recognition of a person’s gender identity so dependent on surgery or other medical requirements, such as sterilization. Surgery and sterilization are serious interferences with the physical integrity of a person. Statements from the transgendered/transsexual community strongly argue that gender identity goes beyond the physical
appearance, and that there is danger in pathologizing the issue of transsexuality.\footnote{See, \textit{inter alia}, the Stop Trans Pathologization 2012 website, available at \url{http://stp2012.wordpress.com/}, Last visited on 26 November 2009.} A medical approach also tends to lead to stigmatization and social exclusion of transgendered persons. There will always be individuals who do not wish to undergo, cannot afford, or for some other reason cannot access gender reassignment surgery; it is critical that their rights also be respected both with regard to civil status registration, health care access, and state protection against violence.

In European Court of Human Rights jurisprudence, the approach to the issue of state responsibility to enable an individual to change his or her legal gender has so far been strongly linked to a view of transsexuality as a ‘medical condition,’ albeit with strong psychological bearings for the individual. A more inclusive and social perspective on gender identity issues comes across in the European Parliament 1989 resolution on discrimination against transsexuals. In this document, the European Parliament states that transsexuality points to a reluctance in society to accept more fluctuating gender roles. While this document is non-binding, it may still suggest an increasing willingness in Europe to widen the view on gender identity matters – also demonstrated by some recent domestic legislation on gender change.

The Italian Constitutional Court declared as early as 1985 that a right to gender identity is inherent in the human rights recognized by the Italian Constitution, and that gender identity is linked to psychological and social factors. This has not affected a basic tendency to require surgery for legal recognition of a new gender in Italy, however. More recent European legislation and case law have taken a less medicalized approach to the possibility of transition from one gender to the other and getting legal recognition for this transition. Examples from Spain, the United Kingdom, and Kazakhstan illustrate that surgery is no longer always required in order for legal change of gender to be recognized. The Austrian Administrative High Court recently reached the same conclusion. However, even where official gender change no longer depends on surgery, problematic aspects remain in several of these laws. These include requiring sterility and non-married status to qualify for a new legal gender or, in the Kazakh Order, an extensive, obligatory medical assessment with features that have an innate potential for discrimination and abuse. From a human rights perspective, the Spanish law may be the one providing the most permissive and most rights-based approach with regard to state recognition of a transgendered person’s gender identity. Not only are requirements such as sterilization or non-married status absent in this law; it also offers flexibility to individuals who may be unable to undertake the medical treatment that the law otherwise requires in order to grant a change of legal gender. This illustrates a recognition both of the importance a legal change of gender may have for the individual, and how this process may for many people be more complex than previously acknowledged.

As for a right to treatment for transgendered individuals, it is worthwhile to analyze the European Court of Human Rights cases from a health and rights perspective. On one hand, in \textit{Van Kück} the Court states that the freedom to define oneself as a female (or male) person constitutes one of the most basic essentials of self-determination. This suggests a view on gender identity as something over which the individual has a certain level of control and which should be respected as such. On the other hand, the Court stresses the nature of transsexuality as a medical condition – suggesting a state of disease which can be objectively verified and corrected. These two perspectives are somewhat incoherent. However, the Court reconciles them by the statement that transsexuality is a disease if the person involved herself perceives it as such, which was the case in Van Kück. In a curious way this approach protects both the right to sexual self-determination for the individual and the medicalized view of transsexuality, on which (according to the Court) the right to reimbursement relies.

Both cases discussed here suggest that the Court looks favourably upon the right for transsexuals to live fully according to their preferred gender. Here it is important to point out that the Court so far has only addressed the rights of either post-operative transsexual individuals or individuals seeking surgery. The Court has not addressed the right to treatment, or the right to change of legal gender, for pre-operative transgendered persons. The Court has, thus, not ruled that there is a right to ‘gender identity’ \textit{per se}. Until such a statement is made, the contradiction between self-determination of gender identity and the medicalized approach will not be fully resolved. Again, the enactment of permissive laws and policies on the domestic level, such as in Spain and to some extent in Finland and the United Kingdom, constitute an approach that more clearly embraces the right to gender identity as such.
C. **INTERSEX**

1. **Introduction**

Persons born with genitalia or bodies deemed gender ambiguous or gender non-conforming fall under the broad label of ‘persons with intersex conditions.’ The causes of these developments are diverse, including a variety of genetic anomalies and hormonal over- and under-exposures during fetal development, many of which are discovered shortly after birth or during childhood. Although most manifestations are not life-threatening, it has become common to alter the infant's or child's body, particularly sexual organs, to conform to gendered physical norms, including through (repeated) surgeries, hormonal interventions, and other measures. The rationale for gender reassignment or ‘normalizing’ surgery for minors includes reducing gender confusion for the child and parents, responding to parental concerns that the child be normal and accepted, and to promote the child's social integration and happiness.

Until recently, states have generally given minimal attention to these interventions, requiring only parental consent (assumed to be motivated by the ‘best interests of the child’) and in conformity with locally accepted, general standards of medical care. Intersex advocates have emphasized the insufficiency of these conventional standards, highlighting the lack of the child's consent for drastic interventions that are irreversible; life-long in their consequence for physical and mental health, particularly sexual response; and the absence of medical justification for imposing these interventions in childhood, before the person has the opportunity and mature judgment to determine the advantages and disadvantages of these procedures.

Legally and politically, the claims of persons with intersex conditions engage not only with children's rights, but also more generally with claims to the highest attainable standard of health, non-discrimination, and autonomy-privacy rights around determining one's own gender. Specific legal issues involve informed consent procedures (for parents, intersex children, and intersex adults undergoing surgery later in life); potential violations of bodily integrity; self-determination; and rights to privacy.

There appear to be few binding laws, official policies, or uniform medical regulations regarding the treatment of intersex individuals in Europe. Indeed the appropriate course of treatment for children born intersexed or with ambiguous genitalia is increasingly contested within the medical community, and there has been no substantive quality control regarding irreversible genital surgery interventions. However, there are a few promising policies in the region that are promoting a ‘wait-and-see’ approach, not only to avoid potential physical and sexual complications as a result of neonatal surgery, but also to allow the child to grow to an age when he or she can clearly express his or her own gender identity and can elect whether or not to undergo such surgery. There are also a limited number of cases where individuals have successfully sued doctors who performed surgeries and removed reproductive organs without informed consent.

The Council of Europe bodies have not addressed the human rights of intersex individuals; nor has it arisen in the context of EU law. In 2009, a German intersex activist group filed a shadow report to the 6th National Report of the Federal Republic of Germany to CEDAW, claiming, *inter alia*, that uninformed surgery removing reproductive organs may constitute a violation of the right to reproductive self-determination, the right to health, and the right to reproductive and health education and access to medical services. The CEDAW Committee, in its Concluding Observations, criticized the German government's poor dialogue with organizations promoting the rights of intersex individuals, and urged the German government to improve such dialogue “in order to better understand their claims and to take effective action to protect their human rights” (para 62). The Committee also requested a report in two years regarding the state’s efforts to do so (para 67).

2. **Domestic policy and case law**

According to news reports, in the United Kingdom the National Health Service (NHS) has adopted a policy that discourages surgery to ‘normalize’ babies born with genital ambiguity and abandons policies of non-disclosure to parents of such babies. Researchers have been unable to locate this policy or to get information from persons involved in its adoption. Doctors are trained to discuss issues related...
to genital ambiguity with parents and refer them to one of the major medical centers in the UK for tests and genetic analysis. Parents are to be informed of the risks associated with ‘genital normalization’ surgeries, such as potential impairment of future sex life and sexual sensation. In particular, British parents are discouraged from seeking surgery solely for reasons of social acceptability.

Similarly, and also according to news reports, in Switzerland some hospitals now adhere to a policy of surgical intervention only if the configuration of the genitals adversely affects urinary or bowel function. In those hospitals chromosome tests are carried out on infants of indeterminate sex, and doctors advise parents to wait until their child can choose a gender itself.465

Germany has established medical guidelines to address the treatment of intersex children, which, inter alia, establish that surgery on intersex infants generally is not called for, and stress that parents must have full and clear information before a decision about infant surgery can be made.466 Some ethical guidelines have also been developed, in which the right of the child and future adult to bodily integrity, life quality, ability to procreate, sexual experiences, and free development of personality are listed as important principles. Furthermore, the right of both children and parents to participate in the decision of how to address the intersex condition is stressed.467 However, intersex activists report that these guidelines do not clearly distinguish between medically indicated treatments and purely cosmetic surgeries. For this reason the guidelines can easily be misused to the effect that parents can consent to any kind of surgery they want for the child, regardless of medical necessity.468

In the German case 5U 51/08,469 a civil appeals court in Cologne addressed the issue of lack of informed consent in ‘normalizing’ surgery of an intersex individual. In 2007 an intersex woman sued a surgeon for pain and suffering due to the removal of her ovaries and uterus over 30 years earlier. She was born with an enlarged clitoris which was mistakenly taken to be a penis, and was raised as a boy. During a routine appendectomy at the age of 17, doctors observed that she had a uterus and ovaries, which were subsequently removed by the surgeon without her knowledge or consent. The claimant only discovered that she was biologically female later in life. Since she was 18 at the time of the surgery, she had a chance to sue before the statute of limitations expired.

The Court determined that the operation “doubtlessly” had been illegal due to lack of informed consent, and thus that the claimant’s self-determination had been violated. It stated that the doctors present and surgeon in charge should have immediately ceased the operation, sewn the patient back up, and discussed their discovery with her in detail rather than concealing their findings. The claimant was awarded €100,000 in damages.

3. Concluding remarks

It is difficult to draw conclusions on European policies on the rights of intersex individuals, given the scarcity of the material. Nevertheless, the fact that so few official policies exist is in itself an indication that the intersex condition is still taboo, under-reported, and under-researched in the region. This fact raises serious concerns regarding the rights of persons born with ambiguous genitalia. In particular, the protection of fundamental rights of children is critical, given the social pressure to assign a gender on an infant at birth and the tradition of subjecting infants to ‘normalizing’ surgery regardless of medical necessity. Under standard legal norms parents can decide on most issues concerning their young child. However, it may be argued that assigning a gender touches issues so deeply individual to the person that he or she should be able to decide it when capable of doing so. No country in the European region appears to have legally binding policies on restriction of non-necessary surgery to that end or on informed consent. In fact, most countries seem to lack even clear guidelines for medical staff. This leads to the conclusion that the rights of intersex individuals, not only to bodily integrity and self-determination but also to sexual health, broadly speaking, are still severely under-protected in the region.

That stated, it should be acknowledged that although modest, a few policies have emerged in the region that embrace the perspective that cosmetic genital surgery of children is problematic both from a medical and a rights-based perspective. The adoption of policies that discourage ‘normalizing’


468 According to email by intersex activist at Swiss organization Zwischengeschlecht.org in April 2010.

469 Civil Appels Court Cologne, decided on 3 September 2008. Only available in German.
surgery on infants, if only on hospital level – as well as the German court’s recognition that genital surgery without informed consent is a breach of the right to self-determination – are small steps in the direction towards a less dogmatic and more rights-based approach to intersexuality.
V. VIOLENCE AS RELEVANT FOR SEXUAL HEALTH

Introductory remarks

The types of violence considered in this review include sexual violence, as well as non-sexual violence directed at persons because of their real or imagined sexual practices, expressions, associations, or identities.

Forms of sexual violence include rape, coerced sex, child sexual abuse, sexualized forms of domestic and intimate partner violence, FGM, so-called honour crimes, and trafficking into forced prostitution. Sexual violence can be and is directed at women, men, girls and boys, and at any group in a position of vulnerability, though available data suggests a higher incidence of sexual violence directed against women and girls. Sexual violence in its diverse forms impairs sexual health through physical injury, psychological trauma, transmission of disease through unprotected sex, particularly HIV and STIs, and through unwanted pregnancy and subsequent unsafe abortion or maternal mortality. Victims of sexual violence are often held responsible, in part or in whole, for the violence. The resulting feelings of shame, dishonour, spoiled identity, and guilt make it difficult to report incidents of violence and seek treatment and care for related physical and psychological injuries. Sexual violence is thus responsible for a significant disease burden from the national and global perspective. The extensive social and health system costs stemming from sexual violence, however, may be significantly reduced through prevention and earlier, more effective state intervention.

A comprehensive review of sexual health must also consider violence committed against persons because of their real or imagined sexual characteristics, even though delivered through non-sexual means (i.e., non-sexual assault or injury). These real or imagined sexual characteristics or attributes might include sexual behaviour or practices, having a same-gender sexual partner, lack of virginity, having extramarital sex, sexual contact with social ‘inferiors’ or members of ‘enemy’ groups, ‘bad reputation’, ‘dishonour’ to the kin group, and sexual ‘disobedience.’ Although the violence may take other forms than rape or sexual injury, the physical and psychological effects are otherwise similar: injury, reduced ability to access health care for these injuries, and increased disease burden.

Violence is an assault on the fundamental rights to life and bodily integrity, and may also be both a sign and consequence of gender discrimination. Sexual violence against women and girls reduces freedom of movement, association, and speech, as well as reducing their access to education, work, the public sphere and political participation. Sexual violence, however, is directed not just at women and girls, but also at men, boys, and transgender persons who are thought to transgress social norms of appropriate masculine or feminine behaviour (in dress, manner, speech, or work). Sexual violence reinforces and stems from other forms of inequality, serving to reinforce hierarchies of power based on class, race, ethnicity, caste, or other important social divisions. Sexual violence thus serves as an extra-legal form of punishment and control, which may be administered informally by state agents or by non-state actors (family members, neighbors, or workmates). It is intended to induce shame and diminish the reputation of the victim of violence, resulting in social exclusion, damaged reputation, and diminished life prospects.

In addition, sexual and non-sexual violence directed at sexually stigmatized persons reduces their capacity to access and enjoy other rights – the right to health and health services, freedom of movement, freedom of expression, political participation, livelihood, and free and unforced marriage. It erodes personal agency, serves as a marker of stigma and subordination and promotes fear and terror, especially in conditions of conflict and ethnic cleansing. National and international law must address ways to effectively prevent, investigate, and respond to sexual and non-sexual violence. The bodies of law that address violence more directly include human rights, humanitarian, refugee, and international criminal law.

A. DOMESTIC AND INTIMATE PARTNER VIOLENCE

1. Introduction

Violence that occurs in the domestic sphere, between spouses and other intimate partners, has
serious repercussions for sexual health. Domestic violence is often accompanied by sexual violence, or by threats of sexual violence. Violence or threats of violence are often used by one partner to pressure the other into engaging in sexual activities against his or her will. Because intimate partner violence occurs between partners who normally have a sexual life together, it dramatically affects the victim’s sexual life and impairs his or her autonomy. In addition, violence can be used to restrict a person in his or her contacts with the outer world, with work, health services, and friends; all of which affects his or her well-being in fundamental ways.

UN Treaty bodies have on repeated occasions highlighted issues of domestic and intimate partner violence as potential human rights violations – and have stressed state responsibilities to prevent and combat such violence under relevant treaties. So-called positive state obligations are key in this regard. As pointed out by the Human Rights Committee, there are circumstances when state failure to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress harm caused by private persons may give rise to violations under relevant treaties. While the effectiveness of remedies is always crucial in the practical realization of rights of all kinds, it is particularly important to stress this aspect in relation to the prevention and fight against domestic violence, because of the nature of the intimate space in which it takes place, and the closeness between perpetrator and victim.

Best practices in preventing and combating intimate partner violence can be understood as clarity in domestic legal provisions regulating the behaviour of individuals, prohibiting intimate violence against anyone, regardless of sex, age, race, sexual orientation, social status and other attributes. Practical and effective remedies that apply the law as it was intended by the legislature are necessary, so that protection is offered to the victim/survivor of domestic violence, and the perpetrator is brought to justice with his/her rights of due process intact. In more practical terms, domestic legal frameworks should offer practical and immediate access to justice by allowing victims, or anyone with knowledge of domestic violence occurring, to stop the violence, obtain protection and/or non-molestation orders where applicable, have these enforced by police and receive timely assistance to cope with the consequences of the violence.

In Europe there is a wide consensus around the need to effectively prevent and combat domestic violence, as reflected by the new Council of Europe Convention on domestic violence (discussed below), and laws have been enacted in most countries in the region. Nevertheless, as forcefully reiterated in the case law of the European Court of Human Rights, implementation of the laws often falls short of complying with relevant human rights standards, regardless of the breadth and rights-focus of the legislation on paper. For that reason, and as will be further discussed in the chapter on sexual violence, it is important to keep in mind that law alone is an insufficient tool to effectively come to terms with the problem of intimate partner violence.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

The Court has in recent years examined several cases involving intimate partner violence, and has repeatedly stressed that states have a positive obligation to protect women from such violence. These cases have given rise to claims under Article 2, 3, and 8 of the Convention. So far, the Court has not examined state obligations when intimate partner violence has occurred in same-sex relationships.

An early case in which the Court addressed domestic violence in relation to the right for the battered spouse to judicial separation from the perpetrator was Airey v. Ireland. For discussion of this case see Chapter 3B: Termination of marriage.

In Kontrova v. Slovakia, the applicant was a woman whose husband had killed himself and the couple’s two children after having subjected her to violence and threats for years. The applicant had

473 See, inter alia, Human Rights Committee, General Comment 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (2004)), Committee Against Torture, General Comment No. 2 (Implementation of article 2 by States parties (2008)) , Committee on Economic, Social and Cultural Rights, General Comment 14 (The right to the highest attainable standard of health, Art. 12 of the ICESCR (2000)) and General Comment 16 (The equal right of men and women to the enjoyment of all economic, social and cultural rights, Art. 3 of the ICESCR (2005)) and CEDAW Committee, General Recommendation 19 (Violence against women (1992)).

474 Human Rights Committee, General Comment 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004)), at [8].

475 See for instance CEDAW Committee, General Recommendation 19 (Violence against women (1992))

476 Application no. 6289/73, decided on 9 October 1979.

filed two complaints about her husband’s violence and threats with the local police, but the response from the police had been inadequate and led to no interference. The applicant complained that the Slovakian state had failed to protect the life of her two children and had therefore violated Article 2 of the Convention, guaranteeing the right to life.

The Court reiterated that Article 2 not only requires the state to abstain from the unlawful taking of life, but also to take appropriate steps to safeguard the lives of the persons within its jurisdiction. This positive obligation includes the primary duty to secure the right to life by putting in place effective criminal-law provisions to deter offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. For this positive obligation to arise, it must be established 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 they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (para 50).

In the present case, the applicant had communicated to the police department serious allegations of violence and threats that she and her children had been subjected to by her husband. These included long-lasting physical and psychological abuse, beatings with an electric cable, and threats with a shotgun. Thus, the authorities were well aware of the situation. Under specific provisions of Slovakian police regulations, the police had several obligations to act. These obligations had not been complied with; on the contrary, the police had advised the applicant to modify her complaint so that it would lead to no further action. The direct consequence of this failure to comply with its positive obligations was the death of the applicant’s children. The Court therefore found that the Slovakian state had violated Article 2 of the Convention.

In Bevacqua and S. v. Bulgaria, the issue of domestic violence was brought under a claim that there had been a violation of Article 8, the right to respect for family and private life. The applicants were a woman and her son. The woman had suffered domestic abuse on repeated occasions from her husband and had left the family home with her son. When she complained to the prosecutor’s office about the violence, the prosecutor refused to institute criminal proceedings against her former husband. The reason was that the injuries fell into the category of light bodily injuries, for which only private prosecution proceedings were available. The applicants complained that the Bulgarian authorities had failed to take necessary measures to secure respect for their family life, and had failed to protect the mother against the violent behaviour of her former husband. This, they claimed, constituted a violation of, inter alia, Article 8 of the Convention.

The Court reiterated that states have positive obligations under Article 8 to protect individuals from violence stemming from private parties. The Court also noted that victims of domestic violence are particularly vulnerable, and that several international bodies have emphasized the necessity of active state involvement in their protection. The Court did not agree with the applicants that the Convention requires state-assisted prosecution, as opposed to prosecution by the victim, in all cases of domestic violence. However, it found that in the case under consideration, Bulgarian law did not sufficiently provide for adequate protection, and measures taken by the police and prosecuting authorities had not proven effective. The Court found that

> the authorities’ failure to impose sanctions or otherwise enforce [the former husband’s] obligation to refrain from unlawful acts was critical in the circumstances of this case, as it amounted to a refusal to provide the immediate assistance the applicants needed. The authorities’ view that no such assistance was due as the dispute concerned a “private matter” was incompatible with their positive obligations to secure the enjoyment of the applicants’ Article 8 rights. (para 83)

In conclusion, the Court found that Bulgaria had violated its positive obligations to protect respect for the applicants’ family and private life that arise under Article 8.

The following year, the Court addressed the issue of serious domestic violence again, in Branko Tomasic and others v. Croatia, and reiterated its findings that states have positive obligations under Article 2, the right to life. In this case, the Croatian state had failed to take all reasonable steps to protect the lives of a woman and her daughter against the violent partner/father, in spite of knowledge about his violent past. The case shows that the obligation to protect persons from domestic violence extends to situations where the partners are not married.
Two recent decisions have reinforced the Court’s findings in the above-mentioned cases. In A v. Croatia, 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. For a long time, the applicant was forced to live in hiding from her violent ex-husband. The applicant complained that the Croatian state had failed to provide her with adequate protection and thereby failed in its positive obligations under Article 8, among other articles. The Court agreed. It found that the authorities’ failure to implement measures ordered by 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. Thus the Court found a violation of Croatia’s positive obligations under Article 8.

Circumstances were similar in Hajduova v. Slovakia, where 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. 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. He had, however, 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 8. Here, also, the Court found that the lack of sufficient measures in reaction to the husband’s behaviour breached the state’s obligation to secure respect for the applicant’s private life. This failure to provide protection amounted to a violation of Article 8.

The Hajduova case is similar to those mentioned above. However, 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.” This is an important statement that shows an understanding of psychological factors involved in intimate partner violence, and emphasizes the width of the space in which states have clear positive obligations when such violence occurs or may occur.

In the Court’s 2009 decision on domestic violence, Opuz v. Turkey, the applicant was a woman who had been subjected to years of serious violence and death threats by her husband, and whose mother had been killed by her son-in-law when she tried to escape the household together with the applicant. Criminal proceedings had been brought against the husband several times, but they had either been dropped (when the applicant and her mother withdrew their charges due to threats from the applicant) or had resulted in fines. The husband had finally been convicted to life imprisonment after the murder of the applicant’s mother, but had been released pending the appeal proceedings, during which period he subjected the applicant to new threats. The applicant had requested protection from the authorities, but no such measures were taken until the European Court of Human Rights interfered.

The applicant alleged that the Turkish authorities failed to protect the life of her mother, and that they had neglected her own right to protection from repeated violence, death threats and injury. She supported her claim on, inter alia, the right to life (Article 2), the right not to be subjected to torture or inhuman or degrading treatment or punishment (Article 3), and the right to non-discrimination (Article 14).

The Court found that violence, even of lethal character, had been foreseeable for a long time both with regard to the applicant and her mother, given the husband’s past violent behaviour. The final attack against the mother had been planned. The authorities had repeatedly decided to discontinue criminal proceedings after the charges had been dropped, refraining to interfere in what they perceived to be a “family matter.” They had also remained passive in spite of clear signs that the violence was escalating. This behaviour on behalf of the authorities, despite the fact that there was a legislative framework in place for domestic violence matters, demonstrated that Turkey had failed to establish a system by which such violence could be effectively counteracted. The response to the husband’s conduct had been “manifestly inadequate to the gravity of the offences in question,” and the judicial

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480 Application no. 55164/08, decided on 14 October 2010.
481 Application no. 2660/03, decided on 30 November 2010.
482 Application no. 33401/02, decided on 9 June 2009.

108 Sexual Health and Human Rights in the European Region
decisions revealed a “lack of efficacy and a certain degree of tolerance” to the acts of the husband. In conclusion, the authorities had not shown due diligence, as required under Articles 2 and 3 of the Convention. The Court found that the right to life of the mother and the right not to be subjected to inhuman treatment of the applicant had been violated.

In addition, the Court held that the applicant had been able to show that the great majority of victims of domestic violence in the relevant region of Turkey were women, that the general and discriminatory judicial passivity created a climate conducive to domestic violence, and that the violence suffered by the applicant and her mother therefore could be described as gender-based. Based on those conclusions, the Court ruled that Turkey had also violated Article 14, the right to non-discrimination, taken together with Articles 2 and 3.

In E.S and Others v. Slovakia, the issue of interest was the level of protection that is required of states in order for them to fulfill their obligations under the Convention to counteract intimate partner violence. In particular, the case addressed 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 four of them had suffered ill-treatment from the husband/father, and one of the daughters had been subjected to sexual abuse by him. After Mrs. E.S. 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 the 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 Mrs. E.S. could apply for an order “requiring her husband to refrain from inappropriate behaviour.” Instead, Mrs. E.S. moved away with her children 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.

The Court found that the alternative measure proposed by the Slovak government – the order restraining the husband from inappropriate behaviour – would not have provided the applicants with adequate protection. The fact that Mrs. E.S. had been barred from having the husband removed from the apartment until the divorce had been finalized – about a year after she had filed criminal complaints against him – implied that there had been no effective remedy by which she could ensure that she and her children would be safe. The nature of the allegations was so serious that they required immediate protection. In conclusion, the Court found that Slovakia had failed to protect the rights of both E.S. and her children from ill-treatment, thereby violating Articles 3 and 8.

Conventions in the Council of Europe Treaty Series

The Council of Europe Convention on preventing and combating violence against women and domestic violence opened for signature as recently as May 11, 2011, and has thus not yet entered into force. It will enter into force when it has been ratified by at least ten countries, eight of which must be Council of Europe members. It is an ambitious instrument, covering a wide range of aspects of violence against women and domestic violence. It includes detailed provisions on prevention, protection and support, as well as on a multitude of substantive law areas. Among the forms of violence that it defines and criminalizes are physical violence, sexual violence, psychological violence, forced marriages, female genital mutilation, stalking, forced abortion and forced sterilization, sexual harassment, and honour crimes. The Convention specifies that engaging in non-consensual acts of a sexual nature shall always be criminalized, and stresses that this applies also to acts committed by spouses or former spouses (Art. 36). Similarly, when an offence of violence covered by the Convention is committed by a former or current spouse or partner or by a member of the family, this shall be treated as an aggravating circumstance in the determination of the sentence in a legal proceeding (Art. 46a). Furthermore, the Convention provides that victims of gender-based violence whose residence status depends on that of a spouse or partner, shall, “in the event of particularly difficult circumstances”, have access to autonomous residence permits (Art. 59), and that states shall ensure that gender-based violence against women may be recognized as a form of persecution for the purpose of asylum (Art. 60). The Convention establishes a group of experts on action against violence against women and domestic violence to monitor the implementation of the Convention (Arts 66-70).

The Convention stresses that states are obliged to “exercise due diligence to prevent, investigate,
punish and provide reparation for acts of violence [...] perpetrated by non-State actors" (Art. 5), thus incorporating the notion of due diligence as the standard of care demanded of states.

Interestingly, the Convention encourages parties to apply it to “all victims of domestic violence,” while paying “particular attention to women victims of gender-based violence” (Art. 2.2). In other words, and also by including both “violence against women” and “domestic violence” in the title of the text, it also addresses violence occurring in same-sex couples. It is striking, however, that the Explanatory report accompanying the Convention does not mention violence occurring in same-sex couples, but more vaguely refers to “violence committed against men and children,” in its commentary on Article 2.2. Regardless of this potential flaw in the intentions behind the text, the new Convention offers a comprehensive legal framework to prevent violence, to protect victims and also to end impunity of perpetrators, and it can be interpreted to apply both to women victims of gender-based violence, and in situations when intimate partner violence occurs in other constellations.

3. European Union

The issue of domestic/intimate partner violence does not fall within the scope of EU binding law.

4. Regional non-binding material

Council of Europe bodies have issued a myriad of non-binding statements on the issue of violence against women (rather than intimate partner violence taken more broadly). An important recommendation in this field is the Recommendation R (2002)5 of the Committee of Ministers to member States on the protection of women against violence, adopted in 2002. This text treats domestic violence as a human rights violation, and defines it as a structural problem, based on unequal power relations between women and men in society, and contains many specific recommendations on legislative, preventative and other measures to be taken by states in order to combat violence against women.

Similarly, the European Commission and the European Parliament have taken multiple initiatives and issued many non-binding statements on this topic, also focusing on violence against women specifically. Neither the Council of Europe nor the European Union statements address violence in same-sex relationships.

5. Domestic legislation

Most European countries have some kind of domestic violence legislation. Provisions against domestic violence are primarily found in criminal law, but there are also regulations on social measures and prevention, including state responsibilities to detect and respond to situations of intimate partner violence. In the following section, which should be seen as illustrative rather than representative, countries have been selected based on geographical and cultural diversity, where laws cover both criminal law and prevention/social measures, where same-sex partner protection is explicitly included in domestic violence provisions, and where a broad definition of violence has been employed (psychological, physical, sexual, economic).

In Albania, the Law no. 9669 of 18.12.2006 on measures against violence in family relations entered into force on 1 June 2007. The law has considerable strengths, including a broad definition of violence and of ‘family members’ granted protection under the law, and a multi-disciplinary response to domestic violence, involving several different state agencies. It also aims to prevent and reduce domestic violence, and guarantee protection through legal procedures that are both effective and easily accessible to the affected party.

The law defines violence as any act or omission of one person against another, resulting in “violation of the physical, moral, psychological, sexual, social and economic integrity” (Art. 3). It applies to violence committed against, inter alia, spouses and former spouses, cohabiting partners and former cohabiting partners, siblings, parents, and children, and close relatives of spouses and cohabiting partners (Art. 3). The law is gender-neutral. Albania does not legally recognize same-sex partnership; it is unclear from the wording of the law if cohabiting same-sex partners are included in the definition of ‘family members’ under the law.

The law takes a holistic view of the problem of domestic violence, considering its legal, social, and health-related aspects. It specifically equips different state organs with different responsibilities. While
the Ministry of Labor, Social Affairs and Equal Opportunities is the primary authority (Art. 5), other agencies with responsibilities under the law include the Ministry of the Interior, the Ministry of Health, the Ministry of Justice, and local authorities (Art. 7). Together, these bodies ensure/oversee activities such as the establishment of special domestic violence units within the police, training of different legal actors, budgeting for free legal assistance to victims, and establishing rehabilitation centres for both victims and perpetrators.

Victims of domestic violence can be granted protection orders or emergency protection orders by a simple procedure; petition for such orders can be presented to the court (or, in urgent cases, to the police station) by the victim, by his/her legal representative, or by the police or prosecutor (Art 13). The petitioner has the right to legal assistance free of charge (Art 14). The court issues the protection order if there is “sufficient basis to believe that the respondent may commit an act of family violence” and if the order is necessary to protect the security, health and well-being of the victim (Art 17). A carefully designed judicial procedure is set up to guarantee due process in the issuance and administration of the orders, including the right to appeal.

In conclusion, Albania has set up a law that both recognizes the complexity of the phenomenon of intimate partner violence and establishes a model by which the state can effectively respond to the problem, while maintaining due process guarantees for the alleged perpetrator.

In the United Kingdom, legislation and policy address the problem of domestic and intimate partner violence with a focus on victim’s rights, employing a wide definition of who a victim may be and specifically including same-sex partners in this definition. Focus has been placed on different kinds of judicial orders that can be issued by courts in order to restrict the agency of the perpetrator and expand the agency of the victim or potential victim.

Domestic and intimate partner violence is addressed by several pieces of criminal and civil legislation, including the Offences Against the Persons Act 1861, the Family Law Act 1996 and the Protection from Harassment Act 1997. In 2004, these laws were complemented by the Domestic Violence, Crime and Victims Act 2004. The relevant legislation does not contain a definition of domestic violence. According to the United Kingdom Home Office, however, domestic violence should be understood as

any threatening behaviour, violence or abuse between adults who are or have been in a relationship, or between family members. It can affect anybody, regardless of their gender or sexuality. The violence can be psychological, physical, sexual or emotional. It can include honour based violence, female genital mutilation, and forced marriage.488

The 2004 Act reinforces the rights of victims and witnesses of domestic violence. It amends existing legislation to make the breach of a non-molestation order a criminal offense (Section 1),489 and to make same-sex and non-cohabiting partners eligible for non-molestation and occupation orders (Section 3 and 4).490 A non-molestation order prohibits “a person (the respondent) from molesting another person who is associated with the respondent,”491 the application for which can be made by the “associated person” (that is, the victim or potential victim of violence or harassment) to the court. In determining whether to issue a non-molestation order, the court must regard all relevant circumstances, including the need to secure the health, safety and well-being of the applicant or any relevant child.492 An occupation order can enforce the applicant’s right to remain in the common dwelling against the respondent, in practice preventing a violent partner from staying in the shared home.493 Furthermore, the 2004 Act makes it possible to impose restraining orders (preventing the recipient from doing anything specified by the order) on a person who has been acquitted of an offense, if the court considers it necessary to do so to protect a person from harassment by the defendant (Section 12(5)).494

Cases of domestic violence are brought by the Crown Prosecution Service to Specialist Domestic Violence Courts, which represent a coordinated approach to the problem of domestic violence and

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489 Amending Part 4 of the Family Law Act 1996 (c. 27).

490 Amending Part 4 of the Family Law Act 1996 (c. 27).

491 Section 42(1)(a), Family Law Act 1996 (c. 27).

492 Section 42(5), Family Law Act 1996 (c. 27).

493 Sections 33–41, Family Law Act 1996 (c. 27).

494 Amending Section 5 of the Protection from Harassment Act 1997 (c. 40).
in which the police, prosecutors, court staff, the Probation Service and specialist support services for victims are all involved. The specialised courts are not regulated by law: they were initiated by the Home Office and operate in accordance with a Resource Manual.495 While there is no single model for how they should be run, they aim to place the victim at the center of all services and to handle domestic abuse cases fast and effectively by efficient coordination between the different agencies. All personnel have received special training on domestic abuse.496

Austria provides another example of domestic violence legislation that collects provisions from different regulations in one comprehensive act, seeking to provide victims or potential victims of domestic violence with effective protection. It offers an elaborate scheme of protective measures that are available to a wide group of persons, and emphasizes coordination between different state agencies in order to render the protection effective.

The first Austrian Protection from Violence Act497 came into force in 1997. It has been amended several times. The last amendment in June 2009 resulted in the adoption of the Second Protection from Violence Act,498 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. The Acts bring together provisions on, inter alia, eviction and barring orders (regulated by the Security Police Act), longer term protection by means of a protection order or temporary injunction (regulated by the Enforcement Code), intervention centers that offer free counselling services and support to victims, and various criminal law provisions.

The Security Police Act protects any victim of intimate partner violence who lives in the same residence as the perpetrator. This includes spouses, partners, children and other relatives, as well as other lodgers. Since 2003, Austria grants unregistered cohabitating same-sex couples the same limited set of rights as unmarried cohabiting opposite-sex couples.499 This suggests that same-sex partners are included in the scope of protection granted by this law.

A barring order will be issued “if a dangerous assault on a person's life, health or freedom appears imminent.”500 If a perpetrator threatens or injures a person in the same household, the police shall evict that person from the home and surroundings and bar them from re-entrance. This applies regardless of whether he or she is the owner of the home. The barring order is valid for an initial term of two weeks.501 The police must then without delay inform the so-called intervention centres of every eviction and barring order. The centres are non-governmental organisations, funded by the Federal Ministries of the Interior and Social Affairs and the Ministry of Women's Affairs.502 These centres will proactively contact the victim, offering counselling services and advice. They also act as a link between criminal law agencies, the victim, and the offender in order to provide effective protection. When a barring order has been issued, the victim can apply for longer-term protection by means of a protection order or temporary injunction (regulated by the Enforcement Code), intervention centers that offer free counselling services and support to victims, and various criminal law provisions.

Austria grants unregistered cohabitating same-sex couples the same limited set of rights as unmarried cohabiting opposite-sex couples.503 504

497 GeSchG (NR. GP XX RV 252 AB 407 S. 47. BR. 5300 AB 5311 S. 619.), 30 December 1996
499 Following the European Court of Human Rights decision in Karner v. Austria in 2003 (see Section 1A of this report), according to ILGA Europe, at http://www.ilga-europe.org/europe/advocacy_lobbying/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country#austria. Visited on 8 February 2010.
502 According to email correspondence from Dr. Birgitt Haller, Institute of Conflict Research, Vienna, on Feb 8, 2010.
503 Regulated by § 382b of the Enforcement Code (Exekutionsordnung, RGBl. Nr. 79/1896, as amended).
Worth noting is that in the case of violence, the police have to react without the express consent of the victim or even against the victim's will. The decision to issue a barring order lies exclusively with the police and does not consider the victim's opinion. Even if the victim invites the offender to re-enter the home, this will be treated as a violation of the order and dealt with as an offense. By contrast, the decision to apply for a temporary injunction lies exclusively with the victim. The provision giving the police exclusive discretion to order the measure was introduced to stress that the state as such condemns domestic violence, and to prevent the victim from being pressured by the offender.\footnote{Haller et al (2004), p. 42.}

The Second Protection from Violence Act also introduces a new offense, called “Continued violence over a longer period of time.”\footnote{§ 107b of the Austrian Penal Code (Strafgesetzbuch, BGBl. Nr. 60/1974, as amended), as amended by Article V of 2nd Protection from Violence Act, 2009.}

In Portugal, on 4 September 2007, the Parliament passed Law 59/2007 which amends the Penal Code, \textit{inter alia}, to expand the category of victims in its domestic violence law. The provision now includes ill-treatment between unmarried, same-sex, and former couples, as well as abuse between parents and children. If the violence takes place within the family home, this will be considered an aggravating factor. Article 152 of the Portuguese Penal Code now sets forth that:

\begin{quote}
[\textit{w}h]oever, on repeated occasions or not, inflicts physical or psychological harm, including physical punishment, deprivation of liberty, and sexual offenses:
\begin{itemize}
\item[a)] on a spouse or ex-spouse;
\item[b)] on a person of the opposite or same sex with whom he/she has or has had a relationship analogous to that of spouses, even without cohabitation;
\item[c)] on the parent of a common descendant of the first degree, or
\item[d)] on a particularly defenceless person, on account of age, disability, illness, pregnancy or economic dependency, with whom he/she cohabits;
\end{itemize}

will be punished with imprisonment up to five years […]\footnote{This translation is author’s own. Thanks to Esteban Restrepo for providing advice on the translation.}
\end{quote}

6. Concluding remarks

The abundance of non-binding statements from the Council of Europe bodies and the European Parliament, as well as the new Council of Europe Convention, show that both regional bodies have a real commitment to the widespread problem of domestic violence. On both the regional and domestic level, such violence is mainly approached in terms of violence against women. Domestic violence perpetrated against men, as well as same-sex intimate partner violence, is generally neglected. While it is important to stress the structural and discriminatory nature of violence against women committed by men, the myriad of statements discussing the problem exclusively from one perspective risks making other forms of intimate partner violence invisible.

The European Court of Human Rights has, in a series of cases, examined serious incidents of domestic and intimate partner violence. The common denominator in the Court's findings is that the states have been found responsible for omission or failure to protect the victim(s). What can be drawn from this is that the state under the Convention has the positive obligation to intervene even in one of the most private spheres of individual life. This positive obligation has obvious relevance for sexual health and human rights. Intimate partner violence impedes women and men from leading full and dignified lives and enjoying respectful relationships without fear and intimidation. For the sake of their health and rights, it is crucial that states take seriously the obligation to protect them from such violence, which includes the facilitation of speedy divorce and custody proceedings.

\textit{Kontrova} was the first case in the European Court that applied the notion of positive state obligations, or due diligence, to cases of domestic violence, when a claim arose under Article 2. The Court had long before established the notion that such a positive obligation exists, but it was important for it to clarify that this obligation also exists in cases of domestic/intimate partner violence. In \textit{Bevacqua}, this obligation was expanded to also apply in allegations of violations of the right to respect for private and family life under Article 8. These cases make clear that domestic abuse shall no longer be seen as a ‘private matter’ within the family, but instead as one where the state has a real obligation to intervene. The \textit{Tomasic} case also shows that for the Court, the state has an obligation to intervene regardless of whether or not the victim
of the violence and her aggressor were married or not, while the Hajduova case showed that states may have a duty to intervene even where threats have not materialized into physical violence.

In Opuz, the Court reiterated and strengthened due diligence jurisprudence on intimate partner violence. This was the first time that the Court recognized that the failure to adequately respond to gender-based violence could amount to a violation of Article 14. In so doing, the Court made references to other international instruments and bodies where violence against women has 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).

On a domestic level, recent legislation in the selected countries show that considerable focus has been placed on effective protection of the victim in cases where domestic or intimate partner violence has occurred or is imminent. The countries have chosen different means of achieving this, but the role of easily available protection orders of different kinds is central, as is the efficient coordination between different state agencies. Albania makes such coordination explicit and obligatory, suggesting a view of domestic violence not only as either a legal, social, or medical problem, but as a combination of these. Furthermore, the broad definition of violence and of who may be granted protection is a commonality of these laws. The United Kingdom and Portugal explicitly include same-sex partners, while the wording of the law in Albania and Austria implicitly suggests that same-sex partners will fall under the scope of protection. Portugal chose to explicitly expand the scope of protected categories by means of a recent legal reform, thereby acknowledging not only that domestic violence is a phenomenon not exclusive to opposite-sex couples, but also that persons living in same-sex relationships deserve exactly the same legal protection as opposite-sex partners. Furthermore, Portugal, as well as the United Kingdom, now defines violence occurring between partners or former partners who do not cohabit, as domestic violence. This demonstrates an understanding that unhealthy relationships can take various forms, and that the special power dynamics of intimate partner violence can be equally strong and damaging when the couple does not share a home.

The power given to the police in Austria to issue and enforce a barring order without the consent of the victim gives rise to several reflections. While the law is based on insight into the complex psychological nature of intimate partner violence, an unintended consequence of the barring order is that the state may violate the victim's right to self-determination. Paternalistic legal options towards adult persons are always complicated and merit special attention; however, in cases of domestic violence particular power dynamics tend to be involved that may justify such state imposition of measures. The fact that only the first barring order is at the discretion of the police is also worth remembering – after the first two weeks, the matter is exclusively in the hands of the victim. The first period can thus be seen as a ‘cooling off’-period, where the perpetrator is removed from the vicinity of the victim in order to provide him or her with a safer environment in which to consider options.

B.1 **SEXUAL VIOLENCE (ADULTS)**

1. **Introduction**

As noted above, sexual violence violates a number of well-established human rights principles. The state has a direct responsibility to prevent and remedy sexual violence carried out by state actors, but also has an obligation to exercise due diligence with regard to sexual violence committed by non-state actors by developing preventative schemes, by effectively protecting survivors and by bringing those responsible to justice.

International human rights standards on sexual violence include the principle that rape is a crime against the individual, rather than the community, and should be criminalized regardless of whether it was committed within marriage, and regardless of the gender of the perpetrator and survivor. Rape under certain circumstances has been considered torture by various international human rights bodies. According to recent developments in international criminal law, lack of resistance on behalf of the survivor shall not be assumed to imply consent; no elevated corroboration requirements should exist for rape; and the sexual history of the survivor cannot be inferred in defense of the perpetrator.

European legislation and jurisprudence on sexual violence reflect all these issues. Accordingly, this chapter will highlight the criminalization of marital rape, the gender neutrality of rape provisions, the constitutive elements of rape (force/resistance or consent), rape as torture when committed by state officials in detention or police custody, sexual violence as a crime against the self-determination of the individual victim rather than against his or her family’s ‘honour,’ and the abolishment of special procedural requirements for convictions in rape cases. As will be shown, the strongest trend in the region is to increasingly embrace a rights-based approach for the victims of sexual violence, regardless of what form the violence takes.
As is the case with domestic and intimate partner violence, given the abundance of laws and material on sexual violence in the region, the reader is strongly encouraged to keep in mind that the selection of examples is merely illustrative. There are many more examples of laws and jurisprudence in the region where a rights-based perspective permeates norms on sexual violence. Another aspect worth remembering is that sexual violence, perhaps to a larger degree than other human rights violations covered by this project, tends to be severely under-reported in all societies. Issues such as the stigma and shame associated with sexuality, dependency on the perpetrator when violence occurs within an intimate relationship, and lack of trust in the police and other law enforcement authorities, all contribute to the fact that much sexual violence is never reported, and/or ends in impunity. Therefore, while assessing progress made to combat sexual violence, and in designing models to that end, one should bear in mind that laws have a limited reach and other measures must be taken in tandem with legislation.

This chapter will also briefly discuss state responses to sexual violence, by looking at state treatment of sexual offenders. Given the stigma attached to sexual offenses, this group is particularly vulnerable to abuse of their fundamental rights. For the purpose of sexual health and rights, it is important to monitor post-penalty schemes for control over sex offenders, to ensure that such control strikes a reasonable balance between its protective purpose and the rights to privacy, bodily integrity, and reproductive choices of the person subjected to its provisions. Two topics will be addressed here: sexual offender registration, and mandatory surgical or chemical castration of offenders. Most European countries do not keep separate registers, with special requirements, for sex offenders. The United Kingdom is one of the few states that does; one crucial feature of the British system is that the registers are strictly confidential and thus unavailable to the general public for review. With regard to castration of sex offenders, a Council of Europe committee has questioned whether individual rights are violated by a compulsory scheme imposing castration of sex offenders in Poland and in the Czech Republic.

2. Council of Europe

*Jurisprudence of the European Court of Human Rights* 507

**Marital rape** – In *C.R. v. the United Kingdom* and *S.W. v. the United Kingdom*, 508 the applicant was a man who admitted, in the first case, attempting to force his wife to have sexual intercourse with him and, in the second case, succeeding in doing so, at knife-point. British courts had sentenced him to three years’ imprisonment and five years’ imprisonment, respectively, for attempted rape, and rape. Relying on a 1736 legal statement declaring that a man cannot be guilty of raping his wife, the applicant contended that this was a general common law principle still effective at the time he attempted to force himself upon his wife. He therefore claimed that his conviction for attempted rape and rape violated Article 7 of the Convention, prohibiting retroactive criminal legislation.

The applicant had been convicted according to the British 1976 Sexual Offences Act (as amended), which states that a man committed rape if he had “unlawful sexual intercourse with a woman who at the time of the intercourse [did] not consent to it.” The British courts dismissed the notion that the word ‘unlawful’ meant only outside of marriage, and found that the 1976 Act presented no obstacle to a ban on marital rape. In 1994, after the events under consideration, the law was reformed and the word “unlawful” was removed.

The Court noted that the crucial issue was related to the definition of rape in the 1976 Act and, in particular, to the word ‘unlawful.’ The question was whether removal of marital immunity as understood by older common law would conflict with this statutory definition of rape. The Court saw no reason to disagree with the British courts’ finding that the word ‘unlawful’ in the definition of rape did not prevent them from modifying a common law understanding, which had become anachronistic and offensive. The Court repeated the statement from the British Court of Appeals that “a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim,” and stated that British case law had firmly established that rape was a crime regardless of whether committed within marriage. This legal development had been sufficiently foreseeable.

In addition, the Court reiterated the importance of seeing the Convention as a whole and that the application of its principles must be internally consistent. It is contrary to the spirit of the Convention to use it to defend serious violations of the rights of another person. In finding no violation of Article 7, the Court took this opportunity to express its objection to the notion of immunity for marital rape altogether:

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507 For other important cases where the Court has examined allegations of sexual violence, see Section 5B.2: Sexual violence (children).

508 Application nos 20166/92 and 20190/92, decided on 22 November 1995.
What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife [is] in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom. (para 44)

Constituent elements of rape and positive state obligations/due diligence

In M.C. v. Bulgaria, the applicant was a young woman who alleged that two different men raped her when she was 14 years old. The two men admitted to having sexual intercourse with the girl, but contended that it had been consensual. The forensic report did not indicate violence or major physical resistance. According to the applicant, she had not resisted the sexual advances more strongly since she had been panicked and fear-struck. In the domestic investigation, Bulgarian prosecutors concluded that there was insufficient evidence that the young woman had been forced to have sex, and the accusations were dropped. The applicant claimed that the Bulgarian interpretation of the law was inadequate, given the complicated psychological factors involved when sexual violence is employed, and in particular with regard to young victims. She complained that Bulgaria had violated its positive obligations under Article 3, prohibiting torture and inhuman and degrading treatment and punishment, and Article 8, the right to respect for family and private life, of the Convention.

The Court stated firstly that in many European countries physical resistance on part of the victim is no longer a necessary requirement for convictions for rape. Instead, focus lies on lack of consent as a constituent element of the offense. As a general statement, the Court affirmed that a broad interpretation of what may constitute rape is necessary in order for states to comply with their positive obligations under the Convention:

[T]he Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States’ positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim. (para 166)

The issue in the case was not the wording of the Bulgarian rape law – which did not differ significantly from other European legislation – but its application and, in particular, the meaning given to words such as ‘threat’ or ‘force.’ The Court found that the investigation in the present case had serious flaws. Given that there was no ‘direct’ proof of rape – such as evidence of violence or physical resistance – the prosecutors appeared to have adopted the view that they could not exclude the possibility that the alleged perpetrators did not understand that the applicant did not consent to sex. Confusing and contradictory facts undermining the alleged perpetrators’ statements were not sufficiently examined by the prosecutors.

In a case like the present, the Court established, the investigation must be centred on the issue of whether consent to sex had been present. The Bulgarian authorities had not adopted this approach. Thus, the Court held,

the investigation of the applicant’s case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States’ positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse. (para 185)

Consequently, the Court found that Bulgaria had violated its positive obligations under Article 3 and Article 8 of the Convention. Worth noting is that the Court did not use the concept ‘due diligence’ – a concept elaborated by the Inter-American Commission on Human Rights – in setting a standard for state obligations when violations have been committed by non-state actors. However, the Court’s discussion about positive state obligations is understood to set a similar standard to that of due diligence; in its later jurisprudence, the Court has started to use the latter term directly.

Furthermore, the Court referred in this case explicitly to “the effective protection of the individual’s sexual
autonomy” as part of positive state obligations under the Convention. This is worth paying attention to. The Court appears to suggest that 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.

**Sexual violence in detention/rape as torture**

In several cases the European Court has found the crime of rape against a (female) detainee to constitute torture, prohibited by Article 3 of the Convention.

In **Aydin v. Turkey** the applicant was a Kurdish woman who, at the age of 17, had been detained by Turkish security forces. She alleged that she had been ill-treated and raped while in detention, and that her ill-treatment and sexual assault amounted to torture, in violation of Article 3 of the Convention. Furthermore, she contended that the failure of the Turkish authorities to carry out an effective investigation into her complaints was in itself a violation of Article 3, alternatively a violation of Article 6 § 1 (right to a fair trial) or Article 13 (right to an effective remedy before a national authority).

The Court reaffirmed that the prohibition of torture and inhuman and degrading treatment in Article 3 enshrines one of the fundamental values of democratic societies. In finding that the rape of the applicant had amounted to torture (and not ‘only’ to inhuman or degrading treatment), the Court emphasized the special vulnerability of a detainee, as well as the psychological effects of rape, which distinguishes this kind of ill-treatment from other kinds.

Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally. (para 83)

With regard to the failure to effectively investigate the claims of torture, the Court noted that the medical investigations of the applicant following her complaints had serious flaws. The Court emphasized that medical examinations following allegations of rape must be undertaken with all appropriate sensitivity and by properly trained medical professionals. It also criticized the fact that the investigations focused on whether the applicant had lost her virginity, rather than trying to establish whether she was a rape victim.

To conclude, the Court found that the rape of the applicant in custody amounted to torture in violation of Article 3, for which the state was responsible. This was the first time that the Court found sexual violence in detention to constitute torture under the Convention. Furthermore, the serious flaws of the investigation following the applicant’s complaint, including the inadequacies of the medical investigations amounted to a violation of the right to an effective remedy under Art. 13.

The holding in Aydin has since been reaffirmed by the Court in two cases against Russia, in which police brutality and rape of young women have been classified as torture, in the first case, and as degrading and inhuman treatment, in the second.

**Conventions in the Council of Europe Treaty Series**

As described above, the Council of Europe Convention on preventing and combating violence against women and domestic violence opened for signature in May 2011. Unsurprisingly, one of the issues it deals with is that of sexual violence. Article 36, on ‘sexual violence, including rape’, states that member parties shall criminalize penetration (vaginal, anal or oral) of a sexual nature and other acts of a sexual nature when they are non-consensual, and emphasizes that “Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.” Importantly, it recognises the necessity to apply these provisions to acts committed against former or current partners.

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513 In this regard, the Court can be said to essentialize sexual violence as inherently worse or more damaging and traumatizing than other kinds of violence. Several scholars have noted the potential risks with this approach, see, e.g., the scholarship by Katherine M. Franke, in particular Putting Sex to Work, 75 U. Denver L. Rev. 108 (1998) and Theorizing Yes: An Essay on Law, Feminism, & Desire, 101 Colum. L. Rev. 181 (2001). This discussion, however, while valid when analyzing a society’s approach to sexual crimes, goes beyond the scope of this study.

514 See more on this topic in section 2F: Virginity testing.

515 Meneshova v. Russia, Application no. 59261/00, decided on 9 March 2006, final judgment on 9 June 2006, and Maslova and Nalbandov v. Russia, application no. 839/02; decision on 24 January 2008.

The Convention also mandates “legislative or other measures” for the establishment of rape crisis or sexual violence referral centres to provide medical and forensic examination, trauma support and counselling for victims.” (Art. 25)

3. **European Union**

The issue of sexual violence does not fall within the scope of binding EU law.

4. **Regional non-binding material**

There are many non-binding statements condemning sexual violence from various Council of Europe and European Union bodies, most addressing sexual violence and domestic and intimate partner violence together. Here will only be mentioned a few of these statements.

In 2009, the Parliamentary Assembly of the Council of Europe passed several statements specifically addressing the issue of sexual violence against women.517 While these documents offer forceful language against sexual violence and urge member states to take measures to effectively combat the problem, in civil life or in armed conflict, they only address sexual violence committed against women, and not sexual violence as something that affects men and women, regardless of sexual orientation.

Worth reiterating here is also the Council of Europe's Recommendation No. R (2002) 5 of the Committee of Ministers on the protection of women against violence. Paragraph 35 of its appendix, referred to directly by the European Court of Human Rights in M.C. v. Bulgaria (above), provides that member states should:

> penalise sexual violence and rape between spouses, regular or occasional partners and cohabitants; penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance; [and] penalise sexual penetration of any nature whatsoever or by any means whatsoever of a non-consenting person.

5. **Domestic legislation and case law**

**Progressive legal reform and abolishing sexual crimes as crimes against morals**

In several European countries, recent criminal law reforms have abolished references to morals and family honour in provisions against sexual violence. One example is Turkey. The Turkish Penal Code was reformed in 2004 and introduced major changes in its laws on sexual crimes. These changes included removal of patriarchal concepts, different classification and more progressive definitions of sexual crimes, and longer sentences for sexual crimes.

For example, while sexual crimes were earlier classified as “crimes against society/crimes against public morality and family,” indicating familial and societal ownership over women’s bodies and sexualities, they are now considered under the category “crimes against sexual inviolability.” All references to concepts such as ‘morality,’ ‘ chastity,’ ‘ decency,’ ‘ honour,’ ‘ shame,’ and ‘ public customs’ have been eliminated. Earlier, crimes of rape and sexual abuse were defined as “forced seizure of chastity and attack on honour”; the perpetrator of rape or abduction could avoid punishment by marrying the victim; and killing by the mother of an infant born out of wedlock received a reduced sentence, with the pretext that this crime was committed in order to cleanse the woman’s honour.518 All such elements have been removed.

The new code defines sexual assault as “violat[ing] the physical integrity of another person, by means of sexual conduct,” and is gender neutral (Art. 102).519 The marital rape exemption has been abolished. Sexual abuse or assault of children can no longer occur with the consent of the child (Art. 103) and sexual harassment in the workplace has been included as a crime (Art. 105). The code also provides for aggravated sentences for so-called honour crimes.520

As discussed in other chapters of this report, women’s and human rights groups have criticized

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517 These are, inter alia, Resolution 1670 (2009) and Recommendation 1873 (2009), on sexual violence against women in armed conflict, both adopted on 29 May, 2009, and Resolution 1691 (2009) and Recommendation 1887 (2009), on rape of women, including marital rape, both adopted on 2 October, 2009.


519 Turkish Penal Code, Law No. 5237, passed on 26 September 2004.

520 See for a more detailed discussion of this Chapter 5E: Honour crimes.
certain provisions in the new code for not fully embracing sexual and bodily rights of women and others. For example, critical voices have underlined that honour crimes have been framed narrowly, that the new Penal Code falls short of criminalizing all cases of non-consensual genital examinations of women, that discrimination based on sexual orientation has not been included as a crime, and that consensual sexual relations between 15 and 18 are still unlawful.\footnote{See, for example, Pinar Ilkkaracan and Liz Ercevik Amado (2008) and information from Women for Women’s Human Rights – New Ways. For more detailed discussion of these aspects of Turkish criminal law, see Chapters 5E: Honour crimes, 2F: Virginity testing, and 2C: Age of consent.}

\textbf{Italy} offers another example in the category of countries that have reformed their criminal laws in order to frame sexual crimes as offenses against the person instead of against the society or community. The Act of 15 February 1996 no. 66\footnote{Only available in Italian; content explained by Stefano Fabeni.} reformed the old criminal law section on sexual crimes, labelled ‘crimes against morals,’ and instead placed sexual crimes under the category ‘crimes against the person.’ With this legislation, penalties for sexual violence increased, a new provision was created for sexual violence committed by a group of individuals, and sexual assault (that is, sexual violence without penetration) was made a crime of sexual violence.

\textit{Case law: sexual violence includes sexual coercion within a couple}

In the Italian Supreme Court decision no. 26345 of 25 June 2009,\footnote{Corte di Cassazione Sezione III penale, sentenza 25.06.2009 n. 26345. Only available in Italian; content explained by Stefano Fabeni.} the Court established that since there is no right to sex within a couple (married or unmarried), sexual coercion that occurs among spouses or partners shall be classified as sexual violence. In the case under consideration, the man had previously threatened his wife on several occasions. He admitted to having assaulted his wife, but not that he had raped her, since she had not physically resisted his sexual advances. The Court found that her lack of physical resistance to sexual acts could not serve as justification for the coercion, in particular as it had been proven that the husband was well aware of the implicit lack of consent on behalf of his wife.

\textit{Constituent elements of rape and gender neutral rape legislation}

While earlier domestic European rape legislation often required proof of physical resistance on behalf of the victim, several European countries have reformed their laws in order to emphasize \textit{lacking consent} as a constitutive element of rape. In the application of these laws, physical force and resistance can be seen as \textit{evidence} of lack of consent, rather than legal requirements in their own right.

In \textbf{Belgium}, the \texttt{Criminal Code}, as amended in 1989, stresses lack of consent as the main constituting element of rape. The provision is gender neutral; rape can accordingly be committed against a man or a woman, by a man or a woman. The provision now reads:

\begin{quote}
Any act of sexual penetration, of whatever nature and by whatever means, committed on a person who does not consent to it shall constitute the crime of rape.
\end{quote}

\begin{quote}
In particular, there is no consent where the act is forced by means of violence, coercion or ruse or was made possible by the victim’s disability or physical or mental deficiency.\footnote{Belgian Criminal Code, Article 375, § 1 and 2. Translation provided by Interrights, intervening in M.C. v. Bulgaria before the ECtHR, and referred to in the decision. I have used the translations referred to by the Court.}
\end{quote}

Similarly, in \textbf{Ireland}, criminal law provisions on rape specify that failure to resist on behalf of the victim does not have to imply consent:

\begin{quote}
A man commits rape if (a) he has sexual intercourse with a woman who at the time of intercourse does not consent and (b) at the time he knows she does not consent or is reckless as to whether or not she is consenting. (1981),\footnote{Section 2(1), \texttt{Criminal Law (Rape) Act. 1981}, no. 10/1981.} and
\end{quote}

\begin{quote}
It is hereby declared that in relation to an offence that consists of or includes the doing of an act to a person without the consent of the person, any failure or omission by that person to offer resistance to the act does not of itself constitute consent to that act. (1990)\footnote{Section 9, \texttt{Criminal Law (Rape) (Amendment) Act. 1990}, no. 32/1990.}
\end{quote}

The Irish rape legislation, while commendable in its emphasis on consent rather than on resistance, is
not yet fully gender neutral, and therefore not completely in line with international human rights norms. The 1981 Act only recognizes rape by a man against a woman. In the 1990 Act, the definition of rape has been expanded to include “penetration (however slight) of the anus or mouth by the penis,” (thus committed against a woman or a man, by a man), and “penetration (however slight) of the vagina by any object held or manipulated by another person” (thus committed against a woman, by a man or a woman).527 Penetration of the anus with an object other than with a penis does not constitute rape.

The 1990 Amendment also explicitly abolishes the marital exemption in relation to rape. Nevertheless, marital rape is not yet fully equalized with other sexual offenses, as criminal proceedings in such cases only can be instituted with the consent of the Director of Public Prosecutions.528

Case law: consent as a state of mind

In the United Kingdom appeals case Regina v. Olugboja,529 (1981), the issue was what meaning ‘consent’ had in the context of rape law. Two teenage girls had been given a ride home with the defendant and his friend. The friend raped one of the girls, who was 16 years old, in the car. When they were later indoors, the defendant asked the same girl to take off her pants, which she did. She alleged that she did so because she was frightened and the room was dark. She said to him “Why can’t you leave me alone,” after which he pushed her to a sofa and had sexual intercourse with her. She did not fight back, scream, or cry. The defendant was convicted of rape.

The appeals court dismissed the appeal against the judgment. In the appeal, Lord Justice Dunn declared that “consent is a state of mind.” He said:

[The jury] should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent. […] [Members of the jury] should be directed to concentrate on the state of mind of the victim 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. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place.

The case illustrates that while it may in cases be difficult to determine what the victim's state of mind was, it is nevertheless important to establish that consent by nature has this subjective character to it. The Olugboja case emphasizes that such factors as resistance and signs of distress may serve as supporting evidence to the state of mind of the victim, but do not substitute for lack of consent as the main constitutive element of the crime. The case clarifies this distinction between legal requirement and supporting evidence.

In Russia, the Supreme Court has provided guidance as to how rape shall be understood, and has stressed the victim's rights in the criminal procedure. The Criminal Code of the Russian Federation defines rape as “…sexual relations with the use of violence or with the threat of its use against a victim or other persons, or in taking advantage of the victim's helpless condition.”530 In Directive no 11 of 15 June 2004, the Russian Supreme Court emphasizes a uniform application of the criminal law in cases of sexual assault.531 This includes that every criminal investigation into the allegations of rape shall be conducted with due regard to the victims' rights and to the prevention of re-victimization. The Directive underlines that the offense of rape may be committed against a woman as well as against a man, and that when the victim voluntarily has intoxicated herself/himself with alcohol, the perpetrator can still be convicted of rape.

In this context, it should be mentioned that in Kyrgyzstan, Article 129 of the Penal Code (‘On rape’) provides that rape can only be committed against a woman. There is no legal recourse for a man who has been raped. At least one case has been documented where a man-to-woman transgendered individual was gang-raped and subsequently denied the right to report the crime because the police

527 Section 4 (a) and (b), Criminal Law (Rape) (Amendment) Act, 1990.
528 Section 5(1) and (2), Criminal Law (Rape) (Amendment) Act, 1990.
531 Only available in Russian. Content explained by Ukrainian lawyer and researcher Oksana Shevchenko.
refuse to acknowledge her gender identity as a woman. Another example of rape-law which falls short of complying with international human rights standards is the Romanian provision on sexual assault, which exempts the rapist from criminal liability if he, before the ruling becomes final, marries his victim.

In Spain, the Supreme Court case 105/2005 addressed the requirements for a conviction in a rape trial when no eyewitnesses could corroborate the alleged incident. The complainant was a woman who alleged to have suffered several counts of marital rape. The husband, who denied the charges, had been convicted to seven years imprisonment for rape. He appealed to the Supreme Court, contending *inter alia* that there was not sufficient corroborative evidence to support the claim and that his wife had not demonstrated resistance to his advances.

The Court discussed at length the balance that had to be struck between, on one hand, the right to justice for victims of sexual violence and, on the other, the right to due process for the alleged offender and the importance of the presumption of innocence. It determined that with regard to crimes that tend to occur in private, such as crimes against sexual liberty, courts have to closely examine three aspects of the accusation. These are, first, the absence of circumstances suggesting underlying motives on behalf of the victim, such as a desire for revenge, retaliation, confrontation, or similar interests; second, believability of the accusation, of a kind that meets the standard of proof required in civil cases; and, third, internal coherence of the accusation over time, without ambiguities and inconsistencies. These criteria were not to be seen as preconditions that had to be met for a conviction in a sexual crimes case, since, for example, the existence of sentiments of revenge on behalf of the victim will not necessarily mean that the crime has not occurred. However, close attention must be paid to these three aspects.

In the case under consideration, the Court established that the complainant's account was credible and sufficiently coherent, and also supported by a forensic report. With regard to the claim that she had not demonstrated sufficient resistance, the Court stated that lack of resistance by itself does not mean that the crime of rape has not been committed. It noted that if sufficiently strong and clear force is being employed, then resistance is unnecessary, since what constitutes the crime is the action of the perpetrator, not of the victim. The Court established that consent or lack of consent of the victim is what matters for the determination of the existence of the crime. In conclusion, it upheld the conviction and dismissed the appeal.

**Procedural matters:**

(a) *Abolishing the corroboration warning in sexual violence cases* – The so-called corroboration warning, previously frequent in common law systems, requires the judge to instruct the jury in cases of sexual assault that they must be careful not to convict the defendant on the victim’s uncorroborated evidence. This warning – not required with regard to other crimes that are frequently committed in private, without eyewitnesses – is based on an idea that women for whatever reason may invent stories of rape and that it therefore is important to corroborate the allegations in order not to convict innocent men. The required corroboration warning has been widely criticized for its discriminatory and misogynist nature, and is expressly banned in modern international criminal law. The two common law countries in the region, United Kingdom and Ireland, have both recently abolished or restricted the obligatory corroboration warning in cases of sexual violence.

In the United Kingdom, the mandatory corroboration warning in trials on sexual and other offenses was abolished in 1994. However, only the mandatory nature of the corroboration warning was repealed; the provisions do not prohibit the judge from ‘warning’ the jury in accordance with the old rule, if the judge finds it appropriate in the individual case. Given that defendants in sex trials, like all other defendants, are protected by general criminal law principles that establish that guilt must be determined in accordance with principles of proof applicable to other crimes.

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533 Article 197(5) of the Romanian Criminal Code reads: “The crimes [of rape] shall be dismissed if, before the ruling has been declare definitive, the marriage intervened between victim and the perpetrator.” Information, including English translation, from International Helsinki Federation for Human Rights, *Women 2000: An Investigation into the Status of Women’s Rights in Central and South-Eastern Europe and the Newly Independent States* (9 November 2000), p. 364. Romanian-speaking Moldovan researcher and lawyer Doina Ioana Strâştenea confirms that this provision is still valid.


Chapter 5: Violence as Relevant for Sexual Health
proven beyond all reasonable doubt, one may question why there would ever be a need for a specific warning. According to commentaries, the British Court of Appeal has showed strong support for the legislative reform, and stated that in most cases there is no need for a warning.\textsuperscript{537}

In Ireland a similar legal reform took place in 1990.\textsuperscript{538} While the Irish provision also abolishes the obligatory nature of the warning, it conveys more strongly than its British counterpart that judges may still be required to give warnings about the uncorroborated testimony of the victim in rape trials. From the point of view of equality before the law, and considering the essentially offensive underlying assumptions of the corroboration warning, this failure to fully abolish the use of the corroboration warning raises certain concerns.

(b) Limiting the possibility of bringing up the sexual history of the victim – In both Ireland and the United Kingdom the right of the defense counsel to bring up the sexual history of the complainant in a sexual assault trial has been limited. According to both the Irish Criminal Law (Rape) Act 1981,\textsuperscript{539} and the British Youth Justice and Criminal Evidence Act 1999,\textsuperscript{540} the complainant’s sexual history can only be brought up with the leave of the court. According to the British statute, such leave may be given if, \textit{inter alia}, the question relates to a relevant issue in the case, and a refusal to give such leave might result in rendering unsafe conclusions of the jury or the court. In Ireland, a judge shall give leave

\begin{quotation}
if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the court might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied.\textsuperscript{541}
\end{quotation}

The Irish legislature thus allows the defense to plead that the victim’s sexual history can be included, thereby placing the sexual past of the victim in the spotlight. The purpose of the regulation was to emphasize that such information is irrelevant and as a general rule should be banned; the caveat risks having the opposite effect. According to news reports, the British provision limiting the right to use sexual history evidence has also proven ineffective. It is often circumvented by the counsel of the defendant, and the government is looking into tightening the provision.\textsuperscript{542} For the purposes of both procedural rights and the sexual health of victims of sexual crimes, the development of these rules merits close attention.

The issue of whether the sexual history or behaviour of the victim should be allowed came up in the United Kingdom Court of Appeals case \textit{R v. Bahador},\textsuperscript{543} in which the complainant was a woman who had been sexually assaulted. The defendant alleged that he had earlier that evening seen her on stage at a nightclub taking part in a competition which involved exposing her breasts and simulating oral sex. The trial court was asked to accept that her alleged behaviour on stage was relevant to the defendant’s ‘honest belief’ that she would consent to having sex with him, under the exceptions provided by Section 41 of the Youth Justice and Criminal Evidence Act 1999 (see above). The trial judge refused leave to the defendant to mention the complainant’s alleged behaviour or to cross-examine her about it.

In the Court of Appeal, defence counsel argued that the conviction was unsafe as a result of this evidence not being admitted. The counsel for the Crown argued that pushed to its logical conclusion the argument of the defendant would mean that every stripper who performed at a club would convey the message that she was thereby also consenting to be touched in a sexual manner by a complete stranger. The Court of Appeal, in looking purely at the question of relevance (as understood by the Youth Justice and Criminal Evidence Act), declared that “we feel compelled to conclude that as the appellant’s defence was one based on his honest belief, it is difficult to say that what he contended to

\begin{footnotes}
\item[538] Section 7, \textit{Irish Criminal Law (Rape) (Amendment) Act 1990.}
\item[539] Section 3.
\item[540] Sections 41–43.
\item[541] Criminal law (Rape) Act 1981, section 3(2)(b).
\item[543] [2005] EWCA Crim 396, England and Wales Court of Appeal, decided on 15 February 2005. See also the paper “Sexual Offences Act 2003/ Vulnerable witnesses/ S41 Youth Justice and Criminal Evidence Act 1999”, Updated to September 2005 by Peter Rook QC.
\end{footnotes}
have taken place on the stage could not be relevant.” However, there were several factors in the case that indicated that the complainant’s alleged behaviour on stage had not had any determining effect on the actions taken by the defendant. For those reasons, it could not be said that the exclusion of the evidence had rendered his conviction unsafe. The appeal was dismissed.

**Responses to sexual violence: sexual offender registration and surgical or chemical castration**

Although most European countries have databases for criminal records, these contain records of all criminal offences. Few countries have specialized registration for sexual offenders. A system similar to that employed in the USA – with special sex offender registries that follow separate rules from other databases for criminal records – has recently been discussed in Germany. However, the constitutionality of such procedure has been called into question, and so far no legal measures in that regard have been taken.544

Nevertheless, separate sexual offender registries exist in Europe. The main difference between these and their US equivalents is that the European registries are not open for public inquiry. In the United Kingdom, the Violent and Sex Offender Register (ViSOR) is a UK-wide database of records of convicted sex offenders, convicted perpetrators of serious violent crime, and so-called ‘potentially dangerous persons.’545 The database, which is designed to enhance the protection of the public and reduce risk of serious harm, stores and shares information about the individuals registered in it, but is confidential and can only be accessed by a limited number of categories of people: police, probation and prison personnel (including private companies running prisons).546

Registry of sex offenders is regulated in accordance with the Sexual Offences Act 2003.547 All persons convicted under Schedule 3 of the Act – including a long list of sexual offences – are subject to notification requirements, as well as persons not found guilty of such an offence by reason of insanity (Section 80). This implies that they must register with the police and notify them of their names, address, date of birth, national insurance number and passport details within three days of their conviction or release from prison (Section 83). Registrants must inform the police, within three days, of any changes of address, as well as plans to spend seven days or more away from their home or to travel abroad (Sections 83 and 84). Failure to do so is an offense that can carry a term of imprisonment (Section 91). The length of the required notification period depends on the gravity of the crime for which the individual has been convicted; it varies from two years to “an indefinite period” (Section 82).

**Case law: indefinite sex offender registration violates right to privacy**

In 2008, the indefinite registration period for sexual offenders was challenged in court. In the case F. and Angus Aubrey Thompson v. Secretary of State,548 the claimants were two individuals who on the basis of their convictions under the Sexual Offences Act were subject to the notification requirements for an indefinite period. The result was that they would remain on the Sex Offenders Register for the rest of their lives, without possibility of review. One of the applicants was 11 years old at the time of the offense and 16 when the case was decided. The claimants argued that the indefinite notification requirement without the opportunity for review violated the right to respect for their private and family life under Article 8 of the European Convention on Human Rights.

The High Court of Justice, in focusing on the absence of the right of review, found such absence incompatible with Article 8 of the European Convention. It stressed that the notification requirement was not intended to have a punitive purpose; instead, its objective was to protect potential victims. Therefore, the notification was no longer called for when the relevant offender no longer posed a risk of re-offending. Denying a person, who believed that he had ceased to be a danger to the public, the opportunity to seek to show that he no longer presented a risk of re-offending, was found to run contrary to the rights under Article 8.


545 ViSOR was created as part of the Multi-Agency Public Protection Arrangements (MAPPA), formed under the Criminal Justice and Court Services Act 2000. Registry under ViSOR is required for “violent and sexual offenders” as defined by Section 88 of the Criminal Justice and Court Services Act 2000, and for “potentially dangerous persons” (non-convicted persons “whose behaviour gives reasonable grounds for believing that there is a present likelihood of them committing an offence or offences that will cause serious harm,” see MAPPA Guidance 2009, at http://www.lbhf.gov.uk/Images/MAPPA%20Guidance%2003%2003%2003%2003%2003%2003%2003%2003%2003%2003%2003%2003%2003%2003.pdf. Last visited on 11 March 2010.


547 Enacted 20 November 2003.

As for surgical or chemical castration imposed on convicted sex offenders, there are worrying signs in Europe that practices that run contrary to accepted human rights standards are gaining popularity. In the **Czech Republic**, those who have committed serious sexual offenses are encouraged to undergo surgical castration. According to the 1996 **Law on the care for the people's health**, such an operation should only be performed at the request of the person concerned, and only with free and informed consent. Nevertheless, the Council of Europe body the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment issued a report in 2009 strongly criticizing the practice of surgical castration in the Czech Republic. The report suggested that in practice, information given to patients about the effects of the procedure was limited, and that in most cases, the application of the procedure was “at least partially instigated by fear of long-term detention.” These factors, the Committee concluded, put into question the concept of free and informed consent. The Committee stressed that surgical castration is “a mutilating, irreversible intervention [that] cannot be considered as a medical necessity in the context of the treatment of sex offenders,” and recommended that the Czech Republic bring to an immediate end the application of the practice.

In **Poland**, a law was adopted in November 2009, making chemical castration compulsory for adults who had raped children or immediate family members. The practice of chemical castration for sex offenders has been offered on a voluntary basis elsewhere, but Poland is the only country in Europe where it is mandatory. From a human rights perspective this practice raises serious concerns, as it violates a host of recognized human rights principles, such as the right to bodily integrity, the right not to be subjected to inhuman or degrading treatment or punishment, and the right to private and family life. EU politicians have proposed that the Polish policy be challenged by bringing a case to the European Court of Human Rights.

### 6. Concluding remarks

Legal responses to sexual violence in the European region show conflicting trends. On one hand, fighting sexual violence against women is high on the agenda of the regional organizations. These organizations have issued powerful statements calling for, *inter alia*, the immediate criminalization of marital rape and the abolition of required evidence of force or resistance in rape trials. Many countries have also incorporated these principles into their domestic legislation, and there are signs that the perception of sexual violence as something committed against the family’s ‘honour’ – rather than against the bodily and psychological integrity of the victim – is fading. The recent reform of the Turkish penal code, where archaic references to ‘honour,’ ‘shame,’ and ‘chastity’ have been abolished, is an illustration of this – even though problematic aspects still prevail.

On the other hand, several countries resist these rights-based approaches to sexual violence. This is not only true in the extreme cases where, for example, a sex-offender can avoid criminal responsibility by marrying his victim (Romania) or where there is no recourse for men who have been raped (Kyrgyzstan). The case law of the European Court of Human Rights shows that a number of countries may have sufficiently clear laws on paper but inadequate mechanisms for implementing these laws, or resistance within police and prosecutorial sectors to the application of more modern and rights-based approaches to sexual self-determination. Here should be reiterated that the lack of clarifying case law and reports from many countries, despite the existence of modern and inclusive laws, is a sign that sexual violence is still a significant and under-reported problem. This is even truer when it occurs within the home. The stigma attached to sexual violence in many countries and power relations between perpetrator and victim make the law insufficient to bring the phenomenon to the surface and to deal effectively with it.

Considering the vast number of laws and variances in practices in the region, special attention should be given to the jurisprudence of the European Court of Human Rights as a guiding tool for human rights.

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550 The Committee is the monitoring body established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment (Council of Europe, ETS No. 126), Art 1.

551 Ibid, paras 43–44.


standards related to sexual violence. The Court has elaborated important principles in this area that have strong bearing on sexual health. Its condemnation of immunity for marital rape in C.R. and S.W. v. the United Kingdom leaves little room for interpretation. In M.C. v. Bulgaria, the Court addressed how the concepts of ‘resistance’ and ‘consent’ shall be interpreted in order for state compliance with the Convention to occur, and set the standard for positive state obligations in response to sexual violence. For the purpose of sexual health and rights, it is of particular importance that the Court referred to the applicant’s ‘sexual autonomy’ as a protected value under the Convention. Finally, in Aydın v. Turkey the Court establishes that rape in custody is a particularly cruel and degrading form of ill-treatment which under certain circumstances qualifies as torture – and expresses concern over the employment of virginity testing as a means of investigating rape claims.

Several European countries are increasingly focusing on the absence of consent rather than force and, in the case of the common law countries in the region, restricting corroboration requirements and the right to bring up the sexual history of the victim. It is true that a too strict emphasis on the lack of consent on behalf of the victim has its own dangers from a rights-based perspective. In practice, if the prosecution is forced to prove beyond reasonable doubt that the complainant did not consent, this could lead to a process of re-victimization. The conclusion in R. v. Bahador, that the appellant’s defense was “based on his honest belief” about the complainant’s consent to his sexual advances, illustrate this point, although in the case this so-called honest belief did not affect the outcome.

As for state responses to sexual violence, in regard to how sexual offenders are treated after they have served their sentences, two topics merit attention. The first is separate sexual offender registration, which is rare in the region. Of the few countries that do have separate registries, the United Kingdom provides an illustrative example. Its requirements are fairly limited – they mainly consist of the obligation of the sex offender to notify the police of his or her whereabouts – and the registries are strictly confidential, available only to the police, probation, and prison administration. However, the possibility of subjecting a sex offender to indefinite notification requirements raises concerns from a human rights standpoint. The failure to provide the person subjected to such requirements with an opportunity for review was recently struck down by a British court.

The second issue in this regard that has strong bearing on sexual health is the mandated castration – surgical or chemical – of sex offenders. Both the recent Polish initiative to impose chemical castration on a category of sex offenders and the Czech practice of surgical castration with limited possibilities to reject the procedure, have attracted international attention and have adequately been described as serious infringements on basic human rights.

### B.2 Sexual Violence and Exploitation of Children

#### 1. Introduction

As explored above, sexual violence and sexual exploitation have many negative repercussions on sexual health. Children and teenagers are particularly vulnerable to sexual violence and exploitation, not only because of their limited ability to protect themselves, compared to adults, but also because sexual violence may have wider-reaching long-term negative consequences on a person who has not fully developed physically, psychologically and emotionally. In order to protect the sexual health of children, states have an obligation to prevent sexual violence and exploitation from taking place, protect and provide rehabilitation to children when such violence has occurred, and establish effective law enforcement against perpetrators.

Within a sexual health and human rights framework, it is also crucial that measures against sexual exploitation of children not be framed or implemented in a way that hinders young people from engaging in consensual sexual activities and exploring their sexuality. Provisions against sexual exploitation of children must be framed in a fashion that is sufficiently broad to target violence, exploitation, and coercion, but also sufficiently narrow, non-moralistic, and non-discriminatory to leave room for youths’ healthy expressions of sexuality.

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


556 The Committee on the Rights of the Child recommend that the minimum age for sexual consent should “closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity.” General Comment 4, CRC/GC/2003/4 (2003), at 9. See further Chapter 2C: Age of consent.
This chapter will also address state regulation of what is called ‘child pornography;’ an area handled differently by different regimes.\textsuperscript{557} Photographs, videos, or other depictions of sexual behaviour or sexualized poses of actual minors are not permitted, and many states have adopted criminal statutes toward this end. As noted above, the freedom from sexual abuse or exploitation of persons less than 18 years of age is of paramount importance and an obligation of the state. Bearing in mind fundamental rights to freedom of expression, however, it is also important that such provisions not be over-inclusive. A rights-based approach to child pornography focuses on coercion of, and harm to, \textit{actual children}, regardless of the sex and gender of the minor. Many current criminal law regimes, aiming at discouraging any market for child pornography and in light of the alleged relationship between such a market and incentives for actual abuse of minors, criminalize possession of such images, as well as their production and distribution. Criminalization of possession is an emerging topic in international criminal law, although the rights standards are also evolving, and many international agreements may not pass national constitutional or international rights review.\textsuperscript{558} As an element of contemporary rights evolution, however, some regions have exempted material with a sexual content made by adolescents by and for their own private use from penalization, as will be shown below.

The European region shows strong commitment to the fight against sexual exploitation of children, both on regional and domestic levels. This chapter will address regional and domestic criminal provisions on sexual violence against children and regulation of child pornography. It overlaps in part with Chapter 2C: Age of consent, Chapter 5F: Sexual exploitation and trafficking, as it has relevance for persons under the age of 18, and Chapter 7B: Sexual expression.

2. \textbf{Council of Europe}

\textit{Jurisprudence of the European Court of Human Rights}

Sexual violence towards children/positive obligations of states:

In \textit{X. and Y. v. the Netherlands},\textsuperscript{559} the applicants were a 16-year old mentally disabled young woman and her father. The girl had been sexually assaulted in the family home where she lived, and the father reported the incident to the police. Because of her mental condition, the young woman was unable to sign the complaint herself, and so her father signed it on her behalf. For the legal provision that would be most appropriate for the crime – ‘indecent assault by the abuse of dominant position’ – Dutch criminal law required that action be taken by the victim personally. Thus, the father’s signature was not accepted. Other provisions were found not to be applicable for other reasons, and regulations related to age of consent could not be used since the young woman was over 16. Hence, the case exposed a gap in the law, and the complaint was not proceeded with. The applicants complained that the failure of the state to provide a criminal law remedy against the perpetrator violated their right to respect for private and family life under Article 8.

The Court acknowledged that there are many ways for states to ensure the right to respect for private life in accordance with the Convention, and that criminal law may not be the only appropriate path. Still, the Court found that in the present case, the Dutch law offered no effective protection of a person in the applicant’s position. Given the seriousness of the crime, it was not sufficient to provide for civil law provisions, under which the applicants could have brought a claim for damages:

\textit{The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated. (para 27)}

The Court found that, “taking account of the nature of the wrongdoing in question,” the applicant had been the victim of a violation of Article 8. It is worth noting that the Court found a violation under the right to respect for family and private life, in a case of sexual violence, rather than under Article 3 (prohibition of inhuman and degrading treatment). This finding is surprising, and innovative, while also troubling as this outcome can have

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\textsuperscript{557} CRC, Optional Protocol on the Convention on the Sale of Children, which is contributing to the development of specific attention in the law on ‘child pornography’, albeit one with great variability.

\textsuperscript{558} CRC Optional Protocol above, Preamble and article 3 of the Optional Protocol.

\textsuperscript{559} Application no. 8978/80, decided on 26 March 1985.
the effect of minimizing the seriousness of the crime.\textsuperscript{560} It may in part be explained by the early date by which the decision was made; this was before the Court had developed its doctrine on ‘positive state obligations’ under Article 2 and 3 in regard to violence committed by private actors.\textsuperscript{561} However, the Court emphasized that the case involved “fundamental values and essential aspects of private life,” suggesting that within the scope of Article 8 some issues are more fundamental than others, and that sexual violence would be among the more serious breaches under the article.

Seven years later violence committed against children by a non-state actor was instead raised under Article 3. In E. and Others v. United Kingdom,\textsuperscript{562} the applicants were four siblings who for years had suffered sexual and physical abuse from their stepfather. The stepfather had been convicted by UK Courts on two occasions, but only subjected to lenient sentences that allowed him to continue to live at home, where the abuse continued. The applicants claimed that the local authorities had failed to protect them from the abuse, which they argued constituted a violation of Article 3.

The Court recognized that the abuse for which there had been criminal convictions was known to the authorities and thus, the authorities should have been aware that the children remained at risk. Yet, the social services failed to carry out a thorough investigation into the situation in the household. In finding a potential causal relationship between the inaction on behalf of the authorities and the continued abuse in the home, the Court held that the United Kingdom had failed to live up to its obligations under Article 3. It stressed in particular the failure to thoroughly investigate the suspected ill-treatment.\textsuperscript{563} It is noteworthy that the Court, in discussing the effect of the government omission, clarified what the test for such omission is – which is of relevance for other cases of violence in the home and closely related to the standard of ‘due diligence.’\textsuperscript{564}

\begin{quote}
The test under Article 3 does not require it to be shown that “but for” the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State. (para 99)
\end{quote}

**Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse and Convention on Cybercrime**

The 2007 Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse,\textsuperscript{565} has three main purposes: to prevent and combat sexual exploitation and sexual abuse of children, to protect child victims, and to promote national and international cooperation against sexual exploitation and sexual abuse of children (Art 1).

Article 2 contains a non-discrimination principle, including non-discrimination on the basis of sex, sexual orientation, state of health (which includes HIV status), and disability. The list is not exhaustive but indicative.\textsuperscript{566} The Convention contains preventative measures (Chapter II), protective measures and assistance to victims (Chapter IV), establishment of intervention programmes for alleged offenders (Chapter V), and substantive criminal law (Chapter VI). It is permeated by a child-rights perspective, encouraging child participation (according to their evolving capacity) in the design and implementation of preventative state policies, and stressing that assistance to victims shall take due account of the child’s views, needs and concerns and always take into account the best interest of the child. The Convention also stresses that intervention programmes and measures for alleged offenders

\begin{itemize}
\item \textsuperscript{560} The Court has repeatedly held that Article 2 and 3 contain principles of more fundamental character than Article 8. This is clearest in its case law on asylum, when the question arises as to whether deportation to a non-state party would invoke responsibilities for the deporting state party. See, \textit{inter alia}, \textit{Bensaid v. United Kingdom} (Application no. 44599/98, decided on 6 February 2001), and \textit{F v. United Kingdom} (Application no. 17341/03, \textit{Admissibility decision}, decided on 22 June 2004).
\item \textsuperscript{561} See, for example, \textit{M. C. v. Bulgaria}, 2003 (with regard to Art. 3 and Art. 8), \textit{Kontrova v. Slovakia}, 2007 (with regard to Art. 2), and \textit{Bevacqua and S. v. Bulgaria}, 2008 (with regard to Art. 8).
\item \textsuperscript{562} Application no. 33218/96, decided on 26 November 2002.
\item \textsuperscript{563} See also cases that do not address sexual health but that underline the obligation of authorities to conduct investigations in potential situations of abuse and ill-treatment. This obligation is highly relevant in situations of sexual violence committed by third parties. See, for example, \textit{Kaya v. Turkey}, 1998, \textit{Jordan v. the United Kingdom}, 2001, \textit{Finucane v. the United Kingdom}, 2003, \textit{Isaeva v. Russia}, 2004, and \textit{Adali v. Turkey}, 2005.
\item \textsuperscript{564} A concept elaborated by the Inter-American Commission for Human Rights, as discussed above. See IACHR \textit{Velazquez Rodriguez v. Honduras}, Series C No. 4, Judgment of 29 July 1988, and (applied to domestic violence), in \textit{Maria da Penha v. Brazil}, Case 12.051, Decision of 16 April 2001, Report No. 54/01.
\item \textsuperscript{565} Council of Europe Treaty Series – No. 201. Open for signature on 25 October 2007. As of April 2010 it had been ratified by Albania, Denmark, Greece, Netherlands, and San Marino. It will enter into force on 1 July 2010.
\item \textsuperscript{566} According to the Explanatory Report, para 43, available at \texttt{http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm}.
\end{itemize}
must be applied with respect for the principle of innocence and with due process guarantees intact, and that no such programme can be imposed on anybody.567

As for constituent elements of rape and other kinds of sexual abuse, the Explanatory report to the Convention stresses the importance of keeping in mind the case law of the European Court of Human Rights, and in particular M.C. v. Bulgaria where the Court established that physical resistance on behalf of the victim should not be a requirement for a conviction of rape.568

The Convention states that for the purpose of establishing when child abuse is present, each party shall determine the legal age of consent (18(2)). The same article determines that the prohibition of sexual activities with children younger than the age of consent is not intended to govern consensual sexual activities between minors. This last clarification is important for the purpose of sexual health and rights of adolescents. In the words of the Explanatory Report:

*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.*569

Article 19, addressing child prostitution, makes no mention of whether the minor in question has reached the legal age of consent or not. The assumption underlying this provision is that a person younger than 18 cannot consent to sex work, regardless of whether he or she can consent to sex without remuneration – or that the risk of exploitation in these situations is simply too serious.

The Convention mandates states to criminalize all dealings with child pornography (Article 20). ‘Child pornography’ is understood as “any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes,” and thus includes images with sexual content of children even when no actual child was involved in the production of the material, for instance images with a person appearing as, or realistic images representing, a minor engaged in sexually explicit conduct. However, states parties can decide to exclude from criminal liability the production and possession of such material when it consists exclusively of simulated representations or realistic images of a non-existent child (Art 20(2)). Furthermore, as discussed above, the same article provides for an exception for consensual and private production and possession of pornographic material of children who have reached the legal age of consent (Art 20(3)). States parties can also opt not to criminalize access to child pornography which has been knowingly obtained (Art 20(4)).

The Convention prohibits recruiting a child into participating in pornographic performances or causing a child to participate in such performances without, again, providing for the exception when children have reached the legal age of consent (Art. 21.1(a)). There is no definition of ‘pornographic performances,’ but according to the Explanatory Report, the provision is intended to deal “essentially with organised live performances of children engaged in sexually explicit conduct.”571 One can imagine difficult issues of interpretation arising under this article. Corruption of children (defined as the intentional causing of a child to witness sexual abuse or sexual activities, without having to participate), applies only to children who have not reached the age of consent (Art 22).

In conclusion, the Convention strongly condemns sexual exploitation of children, while also acknowledging that persons who are technically under-age (that is, under 18) but over the age of consent have a legitimate right to explore their sexuality in a consensual manner. However, this does not apply when money or any other kinds of remuneration are involved.

The Council of Europe Convention on Cybercrime includes a provision on child pornography. Its Article 9 obliges states parties to make the production, provision, distribution, procurement and possession of child pornography a criminal offense. Child pornography includes pornographic material that visually depicts a minor engaged in sexually explicit conduct, a person appearing to be a minor engaged in sexually explicit conduct, and realistic images representing a minor engaged in

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567 Ibid, para. 104.
568 Ibid, para. 121.
569 Ibid, para 129. See also Chapter 2C: Age of consent.
570 See also Chapter 2C: Age of consent.
571 Ibid, para. 147.
sexually explicit conduct. The term ‘minor’ shall include all persons under 18 years, but states parties may set a lower age-limit (not lower than 16 years). States parties may opt out of the penalization of the procurement and possession of child pornography, as well as of the penalization of images where no real children were involved in the production of the images.

Worth mentioning is also the Council of Europe Convention on Action against Trafficking in Human Beings – explored in Chapter 5G: Sexual exploitation and trafficking. This Convention targets human trafficking of both adults and children.

European Social Charter and the European Committee of Social Rights

Article 7.10 of the European Social Charter provides:

> With a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake:

> (...) 

> to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work. 574

This, according to the Committee, includes protection against sexual exploitation, child prostitution, child pornography, and trafficking of children. Under the Charter, states must criminalize all acts of sexual exploitation, adopt a national action plan combating the sexual exploitation of children, and protect children against the misuse of information technologies.575 In concluding remarks on a Polish report in 2005, the Committee asked for clarification on whether purchasing sexual services from those between 15 and 18 was criminalized in Poland. According to the Committee, buying sex from persons under 18 should always be a crime. At the same time, the Committee stressed that the minor selling sex should not be criminalized and that programmes should be in place to assist the reintegration of child sex workers.576

3. European Union

The Council of the European Union Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography contains similar definitions to the Council of Europe Convention, but has a clearer focus on law enforcement. Its primary purpose is to establish the responsibility of member states to make acts of sexual exploitation of children and child pornography punishable.

Similar to the Council of Europe Convention, its definition of child pornography includes both material with sexual content where real children have been involved, and realistic images of non-existent children or those over 18 who appear to be children (Art 1), but just as in the Council of Europe Convention member states can under certain circumstances opt to exclude from criminal liability images that do not depict real children. Otherwise it shall be punishable to produce, distribute, disseminate, transmit, supply or make available, acquire or possess child pornography (Art 3).

Article 2 defines the offenses concerning sexual exploitation of children that are covered by the Framework Decision. They include coercing or recruiting a child into prostitution or into participating in pornographic performances, profiting from such activities, and engaging in sexual activities with a child where coercion or abuse of trust have been involved, or where money or other kinds of remuneration has been given in exchange for the child engaging in sexual activities.

As of February 2010, a new Framework Decision addressing sexual abuse, sexual exploitation of children and child pornography has been proposed, which would repeal the 2004 Framework Decision. The proposed decision mandates the penalization of possession of child pornography, and does not contain any possibilities to exclude criminal liability for child pornography whose production did not involve real children.

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574 This wording is identical in the 1961 and the 1996 revised version of the Charter.


4. **Domestic legislation**

**Sexual violence and abuse of children**

Criminal law provisions prohibiting sexual violence and sexual abuse against children exist in most legal systems, and demonstrate the near-consensus around the heightened state responsibility to protect minors against sexual abuse. As has been shown in Chapter 2C, all states set an age-limit under which sexual contact with a minor will always be considered a crime, due to the child's presumed lack of ability to consent. Here will only be mentioned a couple of examples of what different sexual activities states have chosen to penalize, and how they have approached the issue of abuse of minors who are over the age of consent but in a situation of particular vulnerability, and therefore deemed to be in need of special protection.

In **Sweden**, the age of consent is 15 years. The crime 'rape of a child' includes having sexual intercourse or carrying out another sexual act comparable to sexual intercourse with a child under 15. The same rubrication applies if the act is committed with a child who is between 15 and 18, if the perpetrator is the child's parent or guardian or in any other way responsible for the child's care or supervision. Furthermore, the Penal Code includes the prohibitions to “sexually touch” a child under the age of 15, which also applies to a person who “exposes himself or herself to another person in a manner that is likely to cause discomfort.” The same chapter of the Penal Code also addresses sexual exploitation of a child; sexual abuse of a child; sexual intercourse with an offspring or a sibling; exploitation of a child for sexual posing, and purchase of a sexual act from a child.

Age of consent in **Germany** is 14 years of age. A person over 18 who abuses a person under 16, will be liable for 'sexual abuse of youths.' To ‘abuse’ in this context is defined as committing sexual acts on the person by exploiting a coercive situation or for compensation; or allowing such acts to be committed on the perpetrator by the younger person; or to induce the younger person to commit sexual acts on a third person by means of coercion. When the age difference is even larger, in that the perpetrator is over 21 and the child under 16, the coercive element is absent in the definition of the crime. In those situations it will suffice that sexual acts take place and that the older person “thereby exploits the victim's lack of capacity for sexual self-determination.” It is unclear from the wording of the provision whether the age difference will presume that such exploitation takes place, or whether the prosecution will have to show that there was an exploitative element for liability to arise. The fact that these latter cases will only be prosecuted upon complaint, unless there is a “special public interest” in prosecuting the case ex officio, suggests that exploitation will have to be shown. Finally, in all cases of sexual abuse of youth under the provision, punishment can be dispensed if, “in consideration of the conduct of the person against whom the act was directed, the wrongfulness of the act is slight.”

**Child pornography**

The other area where sexual exploitation of children is addressed in domestic legislation relates to prohibition of child pornography. As shown above, all EU member states are mandated to prohibit the coercion or recruitment of a child for the purpose of the production of child pornography, as well as the production, distribution, dissemination, transmission, or supply of such pornography.

There are variations on how the prohibition of child pornography has been framed. Many European countries ban the production and dissemination of child pornography even when no real child was involved in the making of the image. This can take two forms: prohibiting images of a person who appears as a child but who in fact was older than 18 at the time of the production, or prohibiting drawings, paintings, or other simulated images of children involved in sexual activities. An example of the former model is **Ireland**, whose Child Trafficking and Pornography Act prohibits a visual representation “that shows or, in a case of a document, relates to a person who is or is depicted as being a child and who is engaged in or is depicted as being engaged in explicit sexual activity” (emphasis added). **Sweden** is an example of the latter model. According to its Penal Code, a person who “portrays a child in a pornographic picture,” or who handles such pictures in different circumstances.
ways, will be liable for a child pornography offense.\textsuperscript{586} To ‘portray’ means to depict using any method, not only photography. The law provides for an exception for drawings, paintings, or similarly handcrafted pictures, but only as regards depiction and possession; even with such images, it is illegal to disseminate, transfer, grant use, exhibit, or make them available to others.\textsuperscript{587}

In contrast, Finland only prohibits images where real children were involved in the making of the image. Its Penal Code prohibits the distribution of sexually obscene pictures or visual recordings “depicting children, violence or bestiality.”\textsuperscript{588} Distribution in this context means to manufacture, offer for sale or for rent, export, import, or distribute by other means. According to subsection (4) of the same article, a child is understood to be a person under 18 or a person whose age cannot be determined, but who can justifiably be assumed to be under 18. Aggravating circumstances are, inter alia, if the child was particularly young or if the picture also depicts severe violence. The legal text does not define the terms ‘pictures’ and ‘depicting’ to clarify whether these include only photographic images or also images produced without the involvement of a real child (paintings, drawings, computer-produced images, etc.). However, the legislative history of the provision addresses these issues. 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 not necessary to extend the prohibition to also cover painted, drawn or otherwise simulated images.\textsuperscript{589} 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.

5. Concluding remarks

At the European level, there are strong binding and non-binding statements against sexual violence and exploitation of children. These documents tend to focus primarily on criminal law measures. During the last decades internet-related crimes such as online child pornography have drawn increasing attention from a law enforcement point of view.

The 2007 Council of Europe Convention and the 2005 EU Framework Decision attempt to strike a balance between forceful responses to sexual exploitation and abuse of children, on one hand, and permissiveness of the exploration of sexuality for young people, on the other. This is particularly clear in the 2007 Convention, which in its explanatory report specifically expresses the undesirability of over-inclusive penal provisions that may result in bans on young persons’ consensual sexual activities. In this regard, the Convention sets a good example from a sexual health and rights point of view.

The European Court of Human Rights has addressed state responsibilities to take action when sexual abuse of children occurs. The Court acknowledged, as early as 1985 in X and Y v. the Netherlands, that the state must make remedies available when sexual violence against children is perpetrated by private actors. It is true that the Court in the case did not use the language of ‘positive obligations,’ and that it found a breach of the right to respect for private life rather than a breach of the prohibition of cruel treatment. Still, the case is an early example of the doctrine of positive obligations in cases of violence by non-state actors, which the Court has later elaborated. Similarly, in E. v. United Kingdom, the Court discussed the nature of states obligations to interfere in incidences of private violence, and underlined in particular the duty to perform thorough investigations when abuse is suspected.

Domestic criminal law provisions penalizing sexual violence against children are intrinsically linked to domestic principles about the sexual autonomy of children/age of consent. The German and Swedish examples illustrate how states grapple in different ways with the ‘grey zone’ of sexual activity of and with minors who are close to the legal age limit, and, in particular, when the other party is substantially older. The German example shows an insight into potentially destructive power dynamics between older and younger sexual partners, on one hand, while also recognizing that such relationships can be fully consensual and should, in those instances, not be penalized.

In regard to child pornography, there is a strong consensus in the region that the production and handling of such pornography should be criminalized. The primary rationale for this strong stance is the need to protect children from harm, presumed to result from the production as well as the dissemination of material with sexual content involving minors. Variations exist between different laws, however,


\textsuperscript{587} Ibid.

\textsuperscript{588} Finnish Penal Code (39/1889), as amended. Chapter 17, Section 18a. Unofficial translation, provided by the Finnish Ministry of Justice.

primarily in relation to penalization of the production of child pornography where no actual child has been involved. In these cases, the rationale for protection of a real child is less obvious. The regional instruments make it optional for states to penalize the production and possession of such images. On the domestic level, states have opted for different paths. The Finnish legislature discussed the issue in the legislative history of the relevant provision, and concluded that because the main objective of the law was protection of the well-being of children against exploitation and abuse, there was no need for criminalization when no child had in fact been involved. The Finnish solution attempts to address the dilemma that arises when it is difficult to determine whether simulated images of children or youth in sexual situations have artistic and informational value, or whether they are to be classified as child pornography and banned. From the point of view of freedom of expression, the Finnish model has advantages, requiring that interferences with this right be as narrow and clearly defined as possible.

C. FEMALE GENITAL MUTILATION

1. Introduction

Female genital mutilation (FGM) is a practice that has been strongly condemned in various international human rights documents and by several human rights bodies. The practice can be extremely painful and have long-term negative effects on the sexual and reproductive well-being of women and girls. Its aim also tends to be to control the sexuality and/or reserve the virginity of girls, based on notions of the essentially different nature of male and female sexuality and on a perceived right of the family and/or community to exercise control over women's sexual life. Such a view is contrary to an understanding of the right to sexual self-determination for all. Some versions of FGM may also hinder women from experiencing sexual pleasure.

However, blanket bans on all versions of FGM for all women, including adult women who may consent to the procedure, is problematic. While such an approach – predominant in the European region – stems from an understanding of power dynamics involved that may make the issue of consent irrelevant even for adult women, it simultaneously raises concerns from the viewpoint of women's right to self-determination and bodily integrity.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

The European Court of Human Rights has, as of December 2009, addressed only one case involving FGM, in which the application was found inadmissible. In the case, Collins and Akaziebie v. Sweden, the applicants were mother and daughter, nationals of Nigeria who had sought asylum in Sweden. The issue was whether Sweden would violate its obligations under Article 3 of the Convention by returning the applicants to Nigeria, where they claimed that they ran the risk of being subjected to FGM. The Court found the application manifestly unfounded, as the applicants failed to demonstrate that they would face a real and concrete risk of being subjected to FGM upon return. Nevertheless, the Court took the opportunity to express its general stance on FGM as a practice in violation of Article 3:

"It is not in dispute that subjecting a woman to female genital mutilation amounts to ill-treatment contrary to Article 3 of the Convention. Nor is it in dispute that women in Nigeria have traditionally been subjected to FGM and to some extent still are. (para 12)"

Conventions in the Council of Europe Treaty Series

The Council of Europe Convention on preventing and combating violence against women and domestic violence (discussed primarily in Chapter 5A: Domestic and Intimate Partner Violence, above) includes FGM as a form of violence against women. Article 38 states that parties shall criminalize all forms of FGM as well as any coercion or incitement of a woman or girl to undergo the procedure.

590 See further Chapter 7B: Sexual expression.

591 See inter alia CEDAW, arts 5, 10, and 12 (as interpreted by the CEDAW Committee in General Recommendations 14, 19, and 24), ICESCR, art 12 (as interpreted by the Committee on Economic, Social and Cultural Rights in General Comment 14), and CRC, arts 19 and 24(3) (as interpreted by the Committee on the Rights of the Child in General Comment 4). See International law section for details.

592 Another case involving the threat of deportation of an asylum seeker who alleges that her daughters will risk FGM upon return to Nigeria is currently pending before the Court; Izevbekhai v. Ireland (application no. 43408/08, lodged on 11 September 2008).

593 Application no. 23944/05, Admissibility decision, decided on 8 March 2007.

3. **European Union**

Issues related to FGM fall outside of the scope of binding EU law.

4. **Regional non-binding material**

There are multiple statements from both the Parliamentary Assembly of the Council of Europe and the European Parliament, strongly condemning the practice of FGM. In these declarations, member states are encouraged to either describe FGM as torture or as a “fundamental violation of human rights,” and to take strong measures – primarily by the means of criminal law – to combat the practice. They consistently describe FGM as a practice where consent will not exempt the practitioner from criminal liability, not even when performed on adult women.595

5. **Domestic legislation and case law**

Domestically, legislation in most European countries subjects those who perform FGM to heavy penalties under criminal law provisions. An increasing number of European countries have laws specifically prohibiting FGM. In other countries, FGM can be prosecuted under existing criminal law provisions on assault. Laws differ as to, *inter alia*, whether the prohibition of FGM has extraterritorial application, and as to what degree health care and child care providers have a duty to report suspected FGM regardless of policies on confidentiality.596

**Norway** has one of the strongest anti-FGM legislations in Europe. According to the *Act No. 74 of 15 December 1995 on the prohibition of genital mutilation*,597 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. The girl or woman herself will not be penalized. However, consent from the woman or girl in question does not exempt the person who performed the procedure from punishment (§ 1). Professionals in childcare, education, after-school programmes, health professions, social services, and religious organizations who intentionally abstain from trying to assist a person who is in danger of undergoing FGM – for instance by omission to file a report – will be punished with a fine or with a short prison sentence. This obligation to report a risk of FGM is in effect regardless of whether the professional has an obligation of confidentiality (§ 2). The act applies in Norway and extraterritorially. The extraterritorial application means that 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. The provision has been included to hinder children from being taken from Norway to other countries to have the procedure performed there.598

According to the Norwegian *Child Protection Act*,599 when child protection services have been informed about the risk of FGM being performed on a girl, they have an obligation to take action to protect her. Protection can include the withholding of passports or other documentation, or, as a last resort, the removal of the girl from her home.600

The **United Kingdom** *Female Genital Mutilation Act 2003*601 targets FGM committed on ‘girls’ only, but clarifies later that “[g]irl includes woman” (Section 6). A person is guilty of the offence of female genital mutilation if “he excises, infibulates or otherwise mutilates the whole or any part of a girl’s labia majora, labia minora or clitoris” (Section 1(1)). No offense is committed if an approved person performs “a

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599 LAW-1992-07-17-100, as amended.


601 Enacted 30 October 2003.
surgical operation on a girl which is necessary for her physical or mental health,” or surgery related to childbirth, for purposes connected with labour or birth (Section 1(2)). The Act also expressly penalizes a person who helps a girl mutilate her own genitalia (Section 2). It makes it an offense to assist a non-UK national or resident to mutilate a girl's genitalia overseas, if this is done in relation to a UK national or resident (Section 3), and it penalizes FGM outside of the UK by a UK national or a permanent UK resident (Section 4). The act provides for the penalty of imprisonment up to 14 years (Section 5).

The British Act is silent on the issue of whether consent of the woman exempts the act from punishment. However, it specifies that in order to determine whether the operation is necessary for the girl's mental health, in Section 1(2), “it is immaterial whether she or any other person believes that the operation is required as a matter of custom or ritual” (Section 1(5)). This suggests that there are indeed limited possibilities to consent to the procedure, and that the exception provided for the girl's mental health requires medically indicated rather than subjective elements of mental ill-health.

As for child protection, local authorities have responsibilities when FGM has taken place or may occur under the Children Act 1989. These include general duties to safeguard and promote the welfare of the child by providing a range of services (Section 17), but also the duty to investigate when there is a suspicion that a child is suffering or is likely to suffer harm (Section 47). In extreme cases, authorities may issue a non-authorization to leave the country, withhold passports of parents or of the girl, suspend parental authority or, as a last resort, remove the child from the family (using a ‘Prohibited steps order’ (Section 8), ‘Supervision orders’ (Section 35), ‘Emergency protection order’ (Section 44), or Care and supervision orders (Section 31)).

In France, by contrast, there is no specific legislation on FGM. According to articles 222-9 and 222-10 of the French Penal Code, violence involving mutilation is an offence that carries heavy penalties. Where the victim is a child under 15, the maximum penalty is 15 years' imprisonment; if committed by the parents or grandparents, it is 20 years. The term ‘female genital mutilation’ does not appear in the legislation. However, according to a Cassation Court judgment in 1983, removal of parts of the clitoris that results from wilful violence constitutes mutilation in the meaning of then Article 312-3 of the Penal Code (now Article 222-9). Since then, FGM cases have been understood to fall under this provision.

With regard to prevention of FGM in France, an official circular on the integration of immigrant communities includes guidelines for action to be taken by the districts (départements) where relevant communities live, in order to prevent FGM from being performed.

Case law: damages for FGM and imprisonment for practitioner and parents

France is the country of Europe where most legal cases have been brought following suspicion of FGM. Until 2009, at least 37 criminal cases had been brought before the highest criminal court in the country (Assize Court of Paris). In one of those, the case of Hawa Gréou, decided on 17 February 1999, a young woman reported the excision-practitioner who had performed FGM on her and her sisters in the 1980s. During the investigation the address book of the excision-practitioner was seized, which allowed 48 other child victims to be identified, and 25 parents to be put on trial. The practitioner was sentenced to eight years of prison, and the mother of the girls to two years of prison; the other parents were sentenced to suspended prison penalties. The 48 victims were granted 80,000 Francs each in damages.

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603 In force since 1994, as amended. Unofficial translation available.
605 Information from Anika Rahman and Nahid Toubia, Female genital mutilation: a guide to laws and policies worldwide, 2000, p 152.
6. **Concluding remarks**

European laws express strong condemnation and zero-tolerance of the practice of female genital mutilation in the European region. While there is also in some instances preventative work to hinder FGM from taking place, and child protection laws to protect children who run the risk to be subjected to the practice, the bulk of anti-FGM efforts are to be found in criminal law. The methods chosen to outlaw the practice vary: either by the passing of specific criminal laws (such as in Norway and the United Kingdom) or by the application of general criminal law provisions (such as in France). Common features of these provisions are that whoever subjects a woman or a girl to genital mutilation will face harsh prison sentences; that the girl or woman herself will not be liable; and that aiding and abetting is punished equally harshly. In some countries, such as Norway, inaction when a girl or woman is about to be subjected to FGM is also criminalized, including for professionals who operate under an obligation of confidentiality. This last provision, which can have troublesome effects in practice, illustrates how seriously the practice of FGM is taken in European countries. Both the British and the French laws also explicitly apply extraterritorially, in order to curb incentives to go abroad to perform the operation on a child.

A common feature of both the FGM-specific laws and the Council of Europe and European Parliament resolutions is that consent of the woman undergoing the surgery will not matter – or at least, consent will not exempt criminal liability for those executing it. This approach has clearly been taken in order to prevent the victim from being pressured to give her consent, also based on the fact that young girls are at the greatest risk of being subjected to the procedure. A general criminal law principle is that children under a certain age cannot consent to such things as sex, or marriage. Nevertheless, the surveyed laws do not distinguish between FGM performed on adult women and children. While the recognition of the power structures and cultural pressure often involved is commendable, as is the intention to outlaw a very harmful practice, this blanket notion that no consent is possible raises concerns, given that consent in other areas is generally acknowledged for persons over the age of 18.

Another aspect of the strong European stance against FGM, that may have significant negative effects, is calls for mandatory health check-ups of asylum seekers or of certain immigrant groups, in order to ensure that women from so-called risk groups are protected. As shown in other chapters of this report, mandatory health check-ups always have problematic aspects, as their mandatory nature may undermine the agency and self-determination of the person they are aimed to protect, and risk making certain groups go underground and/or refuse contact with health services altogether. In addition, in the context of FGM in Europe, since FGM is a phenomenon that largely appears in immigrant communities, such mandatory examinations may have a heavily stigmatizing effect, further exposing certain immigrant communities to prejudice and exclusion.

In conclusion, many countries of the European region – primarily those with large immigrant communities – have taken strong and forceful measures to combat FGM. This is praiseworthy from a human rights standpoint, considering the harmful and discriminatory effects of the practice, as shown by strong statements by several UN treaty bodies. However, while international human rights bodies have not recommended that the practice be combated by criminal law measures first and foremost, this is the route most forcefully chosen by Western European governments. Precisely because the targeted populations in Europe are almost exclusively of immigrant background, the blanket statements and the strong emphasis on criminal law may have negative side-effects – and may not be the most effective means by which to combat the practice of FGM.

D. **HATE CRIMES, POLICE BRUTALITY AND FAILURE TO RESPOND**

1. **Introduction**

Governments have an obligation under domestic law to combat all crime. The concept of hate crimes – crimes that express or are motivated by biases towards a particular group in society – is a recognition that governments consider crimes more serious when they are rooted in religious, ethnic, or other hatred that spread harm and fear among whole communities. Hate crime legislation also serves as a complement to non-discrimination legislation, as a means to further underline that the state does not tolerate negative treatment on discriminatory grounds. This chapter will cover violent

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609 See, for example, European Parliament resolution of 24 March 2009 on combating female genital mutilation in the EU, 2008/2071(INI), which states that women and girls who are granted asylum in the EU because of the threat of FGM should, as a preventative measure, “have regular check-ups by health authorities and/or doctors, to protect them from any threat of FGM being carried out subsequently in the EU” (para 4). See also information about a recent debate in Norway, where a parliamentarian has suggested that all women and girls of specific immigrant communities undergo regular health check-ups: [http://www.fgmnetwork.org/gonews.php?subaction=showfull&id=1183069956&archive=&start_from=&ucat=1&](http://www.fgmnetwork.org/gonews.php?subaction=showfull&id=1183069956&archive=&start_from=&ucat=1&). Last visited on 5 March 2010.
crimes that target persons on the basis of real or perceived non-conforming sexual behaviour and/or sexual identities. Closely linked to so-called hate crimes is police brutality based on homophobia or transphobia, as well as action or inaction on behalf of the police in response to such violence committed by non-state actors.

In the European region, there is a growing recognition that hate crimes occur not only because of contempt for certain racial, ethnic or religious groups, but also in relation to individuals who belong to sexual minorities or who are perceived as transgressing sexual norms. As will be shown, this recognition comes across in recent legislation where sexual orientation has been added to lists of protected grounds in hate crimes legislation, and in non-binding condemnation of homophobia and homo- and transphobic crimes on a regional level. Gender identity as an explicit protected ground is still largely absent in the region.

Hate crimes are often addressed in conjunction with hate speech – forms of expression spreading, inciting, promoting or justifying hatred based on intolerance, which may effectively lead to the commission of hate crimes. Nevertheless, hate speech falls outside of the scope of this study; other aspects of legitimate limitations to freedom of expression for the purpose of sexual health will be addressed in Chapter 7B: Sexual expression.

Issues of police brutality and failure to respond by the police to violent crimes linked to hatred for sexual behaviour or identity merit separate attention. In these cases, the state is directly responsible – by action or by direct omission – for the violation. However, while it is easy to find “bad” practices in this regard, responses to such practices are mainly covered by hate crimes legislation and implementation, on one hand, and by (non-legislative) schemes to monitor police activity and provide models for accountability in the event of police abuse, on the other. Here only a few examples of state responses to police brutality or failure to respond will be mentioned.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

The Court has not directly addressed the issue of hate crime or police brutality based on sexuality-related biases. Nevertheless, its case law on other, but related, matters gives an indication of how it would respond, were such issues to arise before it.

The case of Baczkowski and others v. Poland610 deals mainly with freedom of expression and assembly, and is discussed in Chapter 7B: Sexual expression. However, the reasoning of the Court is interesting because it indicates that states have a positive obligation to protect participants in gay rights demonstrations from attacks. The Court stated that

> [g]enuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms. […] This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation. (para 64)


This, it can be argued, does not only include removing obstacles to assembly, but also to providing active protection to participants. According to one commentator, this quote “could be interpreted as a duty of the government to protect the participants of gay pride marches from hate motivated acts committed against them while enjoying freedom of assembly.”611

In Nachova and others v. Bulgaria612 the issue was violence on ethnic grounds, and the Court concluded that biases on the ground of race/ethnicity had affected the response of the authorities. Among other things, the Court declared that the authorities had a positive obligation under the procedural aspect of Article 14 to investigate possible racist motives. The obligation to conduct an effective investigation into the deprivation of life must always be employed without discrimination. In addition, states have a duty to “take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.” This reasoning, it may

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610 Application no. 1543/06, decided on 3 May 2007.
612 Applications nos. 43577/98 and 43579/98, decided on 6 July 2005. Decided by the Grand Chamber of the Court.
be argued, could be equally applied to a situation where the real or perceived sexual orientation or gender identity of the victim motivated a crime. 613

3. European Union

The issues of hate crimes based on sexuality biases and police brutality/failure to respond to such crimes have not been addressed by binding EU law. In 2008, a new Framework Decision was adopted on the combat of racism and xenophobia by means of criminal law, according to which states are obligated to ensure that racism or xenophobic motivation is considered an aggravating circumstance in the application of criminal law.614 So far no similar initiative has been taken to address crimes motivated by homophobic or transphobic biases.

4. Non-binding regional documents

On the regional level, there are strong statements against hate crimes on the grounds of sexual orientation or gender identity. Here should be reiterated the recently adopted Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity:615 This document urges governments, inter alia, to conduct effective, prompt and impartial investigations into allegations of crimes where the sexual orientation or gender identity of the victim is suspected to have constituted a motive for the perpetrator; pay particular attention to crimes in this category committed by law enforcement personnel; make bias motives aggravating circumstances in sentencing; and take special measures to protect lesbians, gays and transgender persons in prison against bias-motivated crimes related to their sexual orientation or gender identity.616

5. Domestic legislation and case law

Here will be addressed criminal laws whose sentencing guidelines take into account aggravating circumstances such as motives, or characteristics of the crime, that are based on contempt for specific groups, traditions or behaviours. This means that when the prosecution can show that the crime either expressed itself in or was motivated by (this varies by legislation) hatred or biases towards those groups, the perpetrator will receive a harsher sentence. There are also countries that have created specific offences for violence motivated by certain biases, rather than making such motivation a general aggravating factor. As far as this researcher knows, no such legislation exists with regard to sexuality-related biases in Europe.617

Historically, the first grounds to be addressed by hate crimes legislation were racial, ethnic and religious stereotypes or biases. Lately, however, sexuality-related biases have been included; some penal codes in the region have been amended to explicitly include hatred for real or perceived sexual orientation as an aggravating factor in sentencing of violent crimes.618 Greece illustrates this trend. In 2009, the country adopted a new law that stipulates that a crime committed on the basis of national, racial or religious hatred, or hatred on the ground of sexual orientation, constitutes an aggravating circumstance for sentencing.619 Similarly, a new Norwegian Penal Code, which comes into force in 2012, stipulates harsher sentences for hate crimes in general and mentions as aggravating circumstances crimes that have their origin in inter alia, “homosexual or lesbian orientation, disability

613 See for similar findings Angelova and Iliev v. Bulgaria (application no. 55523/00, decided on 26 July 2007), and Stoica v. Romania (application no. 42722/02, decided on 4 March 2008).


615 Adopted on 31 March 2010.


or other circumstance related to groups of people requiring a special level of protection.\(^{620}\)

The most common model in European hate crimes legislation is to let the aggravating element apply generally, that is, to all penalized action under criminal law, though there are also countries where the aggravating factor only applies in a defined set of criminal offences.\(^{621}\)

Sex/gender and health status of the victim are also sometimes included in the list of protected grounds, as in the Netherlands and Spain, respectively (see below). To explicitly include health status implies that contempt for a person’s real or perceived HIV status can be an aggravating circumstance similar to other bias-motivated crimes, which has relevance for sexual health. While gender is included in some provisions, there is so far no European law that explicitly includes hatred for a person’s gender identity in the list of biases that may render harsher punishment, though several countries make their lists of biases non-exhaustive.\(^{622}\) The general Serbian anti-discrimination law (which is not a criminal law statute), includes gender identity as one of the “personal characteristics” that are protected by the law.\(^{623}\) Its Article 13 lists “severe forms of discrimination” and specifies that discrimination is to be considered severe if it “involves an act punishable by law, predominantly or solely motivated by hatred or enmity towards the aggrieved party on the grounds of a personal characteristic of his/hers.”\(^{624}\) This suggests that crimes motivated by gender identity biases (as well as biases towards real or perceived sexual orientation) will indeed be judged more severely than if the motive had been absent. However, the author has not been able to obtain information on Serbian responses to hate crimes more generally and, specifically, whether the biases can be considered aggravating factors and thus result in elevated sentences.

In the Spanish Penal Code, crimes motivated by the sexual orientation, sex, and illness/health status of the victim (alongside with ideology, religion or faith, ethnicity, race, nationality, and disability) will receive a harsher punishment than if that motivation had been absent. The Spanish provision requires that the bias motivated the crime: according to Article 22, aggravating circumstances are “the commission of a crime due to […] the sex or sexual orientation, or the illness or disability” of the victim (emphasis added).\(^{625}\)

In the Netherlands, criminal law does not establish bias motivations as aggravating circumstances. Instead, every four years, the Public Prosecution’s Department issues a so-called Discrimination Directive, the latest of which was issued in 2007.\(^{626}\) The Directive establishes guidelines for the investigation, prosecution, and sentencing of crimes involving acts of discrimination. Dutch law provides protection against discrimination on grounds of race, religion, nationality, personal beliefs, gender, sexual orientation, handicap, age, or similar grounds – a non-exhaustive list. When discrimination on one of those same grounds motivates a crime, the Directive establishes that the prosecutor shall request a 25 percent penalty enhancement.\(^{627}\)

In the United Kingdom, since 2003, biases on the grounds of presumed or real sexual orientation will serve as an aggravating circumstance in the application of criminal law. On the Home Office’s website explaining what hate crimes are, ‘transgender’ is also found on the list among the grounds that can motivate such crimes.\(^{628}\) However, the laws specifying what kind of bias types that are covered by

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621 According to FRA 2008, p. 121.

622 See, *inter alia*, Swedish Penal Code, Chapter 29, §2(7), stating that aggravating circumstances are when the motive of the crime was to aggrieve a person or a group of people “by reason of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance,” and the Finnish Penal Code, Chapter 6, § 5, which, while not mentioning neither sexual orientation nor gender identity, states that the punishment will be more severe when the crime has been committed against a person belonging to a national, racial or ethnic population group or any other such group and it has been committed due to the membership of the group. Translation of both statutes (from Swedish) is author’s own.

623 *Zakon protiv diskriminacije*, the Law on the Prohibition of Discrimination, unofficial translation by Labris Serbia. See for more information about this law Chapter 1A: Non-discrimination on account of sex, sexual orientation, gender identity, marital status, and HIV status.

624 Ibid, Article 13, p. 7.

625 Article 22 of the Spanish Penal Code, only available in Spanish. The translation is author’s own.


627 Ibid.

provisions on aggravating circumstances list religion, race, sexual orientation, and disability, but not gender or gender identity.  

The relevant provision of the Criminal Justice Act 2003 reads:

**Article 146**

*Increase in sentences for aggravation related to disability or sexual orientation*

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

(i) the sexual orientation (or presumed sexual orientation) of the victim, or

(ii) a disability (or presumed disability) of the victim, or

(b) that the offence is motivated (wholly or partly)—

(i) by hostility towards persons who are of a particular sexual orientation, or

(ii) by hostility towards persons who have a disability or a particular disability.

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph .

Here should be noted that the provision, unlike its Spanish counterpart, covers both actual motivation (crime being motivated by hostility towards persons of a particular sexual orientation; 2(b)), and what may be called presumed motivation (demonstrated hostility at the time of the crime or immediately after the crime; 2(a)). In other words, actual intent of the perpetrator to commit the crime because of the sexual orientation of the victim does not have to be shown. Furthermore, it is noteworthy that the court has no discretion in whether to treat the bias-motivation as an aggravating factor or not: it must do so.

**Local policy**

The London Metropolitan Police have developed an Equalities Scheme (2006–2010), aiming at guaranteeing fair and equal treatment to all, and specifically addressing age, disability, gender (including marital status), race, religion, and sexual orientation as “strands of diversity” covered by the scheme. If implemented correctly, the scheme will also serve to prevent police brutality, and ensure that the police respond accurately to hate crimes based on biases against, inter alia, a person’s sexual orientation or gender identity. The scheme provides a framework for monitoring, consulting, engaging and reviewing all existing policies, procedures and practices. The scheme takes as its point of departure legal obligations to respect diversity and combat discrimination, for example, with regard to sexual orientation, the Civil Partnership Act 2004, the Employment Equality (Sexual Orientation) Regulations 2003, the Human Rights Act 1998, and the Protection from Harassment Act 1997.

An express objective of the Equalities Scheme is to work to build trust between the LGBT communities and the police, so that victims will come forward and report homophobic and transphobic crimes. The scheme stresses the need to ensure that such matters are dealt with sensitively by maintaining
confidentiality.\textsuperscript{633} It also explicitly addresses the fact that homophobic crimes have sometimes not been recorded, particularly in the area of low-level/volume and public transport-related crimes.\textsuperscript{634}

\textit{Case law: police brutality based on sexual orientation as persecution}

A British court addressed the issue of police brutality in the asylum appeals case \textit{Andrei Ivanov v. The Secretary of State for the Home Department}.\textsuperscript{635} The petitioner was a Moldovan gay man whose application for asylum was based on the police brutality he had suffered in his home country due to his sexual orientation. After having demonstrated openly that he had a relationship with another man, he had repeatedly been beaten, assaulted and threatened by the police. He had been arrested on repeated occasions and harassed while in detention. The initial application for asylum had been rejected; the Scottish Court of Sessions reviewed the decision to deny the petitioner leave to appeal.

The bulk of the Court’s decision examined whether it had been correct to assume that there was a safe internal flight option in Moldova for the petitioner, as argued by the immigration judge. The Court found that the enclosed background material supported the argument that homophobia is widespread in Moldova and that police brutality against homosexuals was not limited to the petitioner’s home area. For those reasons, the Court granted the petitioner leave to appeal the denial of his asylum claim.

The case is relevant in that the Scottish court recognized that police brutality on the grounds of sexual orientation can be a serious enough violation of both sexual self-determination and physical integrity to justify an extreme form of protection: political asylum in another country.

6. Concluding remarks

State responses to police brutality or hate crimes, or crimes motivated by hatred for a specific group or for specific non-conforming individual characteristics or behaviours, can take many different forms. Preventative work is key to increasing tolerance generally in society. For such work, social and educational initiatives, on multiple levels of society and carried out by a multitude of actors, play important roles. Such initiatives often take non-legislative forms, as shown by the diversity scheme of the London Metropolitan Police that, if implemented correctly, may curb police brutality and effectively prevent and respond to hate crimes. However, when looking at legal measures (as is the main objective of the present study), the focus tends to be on the forms criminal law responses to hate crimes have taken. In recent years, several European states have included crimes based on hatred for perceived or real sexual orientation as aggravating circumstances in criminal law. This illustrates that there is a growing recognition that such motivations should be perceived on equal terms with other biases – biases that have long been recognized as justifying a harsher response on behalf of the state than other crimes. So far, no state has entered gender identity explicitly as a protected ground under hate crimes legislation, though one may argue that in several countries such biases would fall under existing provisions that offer non-exhaustive lists of protected grounds, or that include gender.

The European Court of Human Rights has not expressly addressed hate crimes or police brutality rooted in sexuality or sexual behaviour. However, its reasoning in both \textit{Baczkowski} and \textit{Nachova} suggests that under the Convention there are wide-reaching state responsibilities to combat such crimes. This probably includes a positive duty to protect participants in demonstrations in support of LGBT rights from hate motivated acts (Baczkowski), and a responsibility to examine possible sexuality-related biased motives behind violent crimes (Nachova). The finding in Nachova that Article 14 has a procedural aspect is important, and would apply equally to cases where protected grounds other than ethnicity were examined, such as sexual orientation or gender identity. Not only must the state carry out its investigations without discrimination – it also must take proactive steps to investigate evidence of discriminatory motivations behind crimes. In the words of the Court, this is of utmost importance “to secure the enjoyment of the right to life without discrimination” – any kind of discrimination, and not only racial, one might add.

E. Honour Crimes

1. Introduction

Practices commonly referred to as honour crimes have clear negative consequences for the sexual
health of those subjected to them. Honour crimes can take various forms – from direct violence to more subtle control – and are usually a means by which the community attempts to exercise control over an individual’s sexuality and her sexual choices. While honour crimes tend to be committed by non-state actors, the state becomes complicit if, in the application of criminal law, the honour element leads to immunity for the perpetrator, serves as a mitigating circumstance in sentencing, or in any other form results in the crime being addressed more leniently than other crimes of similar gravity.

Honour crimes tend to be discussed mainly with regard to women who transgress (or are perceived to transgress) social mores related to their sexuality, such as notions of chastity, virginity, and fidelity. It is however important to bear in mind that honour crimes illustrate more generally how non-conforming sexualities, gender/gender expressions and sexual behaviours – especially by women – expose individuals to extreme punishment. These individuals may be lesbians, in some cases gay men, transgendered individuals, sex workers, or women who do not live according to culturally or socially appropriate standards. The pressure to which they are exposed, because of their sexuality or because of sexual decisions others make on their behalf, and the fear of consequences if they do not conform, are hugely detrimental to their psychological and physical sexual health. These pressures and threats either force them to adjust to conventional situations and behaviours against their will, or expose them to extreme violence.

The international community has forcefully condemned honour crimes in recent decades. There are clear international human rights standards obliging states to suppress all gender-based killings justified by reference to custom, tradition or religion. In particular, international human rights bodies have condemned the so-called honour defense – blanket affirmative defenses to homicide or assault when these have been committed ‘in the name of honour’ of the family or community.

In Europe, honour crimes have been discussed widely over the last years, as instances of honour killings have occurred within immigrant communities in Western Europe. Furthermore, honour crimes occurring in Turkey, and lenient state responses to such crimes, have stirred much attention both internationally and within Turkey. The new Turkish Penal Code has forcefully addressed the problem, as part of a significant reform of Turkish criminal law. While problems remain, the new code has been commended for not only removing the honour defense but also for making the honour element of a crime an aggravating factor in sentencing.

This chapter covers both legal responses to honour crimes and, briefly, the notion of ‘crimes of passion.’ There are still laws in Europe that allow for reduced sentences on the grounds of ‘passion,’ or allow for other provocation defenses, including in cases where a violent act or murder has been committed against a woman following supposedly ‘provocative’ behaviour such as alleged infidelity. There are similarities between ‘honour crimes’ and ‘crimes of passion,’ but also significant differences. The honour element of a crime, socially speaking, responds to a perceived duty to restore the honour of a family or community, which has supposedly been broken or harmed by the behaviour of a member of that family or community. The way to repair the honour is to kill or severely injure the person who allegedly has brought dishonour upon the family. In some legal contexts the honour element serves as immunity for the perpetrator (or as a mitigating factor). In passion crime defenses, the emotion that triggered the crime is considered to having diminished the capacity of the person to act in a balanced way and may, therefore, be perceived as a mitigating circumstance or, in extreme cases, as temporary incapacity. These are generally offered to excuse the perpetrator for having acted in response to a ‘provocation’ of the victim. There are similarities between the two types of defenses, in that circumstances that trigger the crime may be similar (extra-conjugal relationships or notions of unacceptable sexual behaviour, for instance). Furthermore, in both cases the law offers a certain level of indulgence for the violent reaction, thereby in part serving to uphold moral codes that the non-conforming behaviour of the victim has challenged. However, the dynamics in the two kinds of crimes are very different. Honour crimes are not caused by a wave of ‘passion’ or ‘rage,’ but are extra-judicial solutions, sometimes sanctioned by the legal system, to restore the respectability of the family.

While these important differences exist, the two notions also overlap. For instance, passion defenses are used to justify honour crimes. The Turkish and the Italian legislatures and courts have attempted

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636 See CEDAW, Art 5(a); CERD, Art 7, ICCPR, Arts 8, 14 and 26, CEDAW Committee General Recommendation 19 (1992), at [24]. Human Rights Committee, General Comment 28 (2000), at [31], and numerous concluding observations from the CEDAW and the CRC Committee. See for more detailed information the International law section.

637 See inter alia CEDAW Committee, General Recommendation 19 (1992), at [24].

to address this problem, as will be discussed below.

Finally, among feminists and other activists in Europe, a lively debate is taking place around the question of whether honour crimes should be treated as fundamentally different from other kinds of violence against women, or whether they should be framed in the same terms, illustrating the same power dynamics. There are arguments in favor of both positions. Suffice to state here that regardless of how honour crimes are framed conceptually, they are a serious violation of human and sexual self-determination, and the state has a corresponding obligation to combat them without stigmatizing immigrant communities or increasing racial tension.

2. Regional material

The European Court of Human Rights has not addressed the issue of honour crimes. On the non-binding level, both Council of Europe bodies and the European Parliament of the EU have forcefully condemned honour crimes. For example, the Parliamentary Assembly of the Council of Europe has called on member states to “amend national asylum and immigration law in order to ensure that immigration policy acknowledges that a woman has the right to a residence permit, or even to asylum, in order to escape from ‘honour crimes,’” and to make sure that honour crimes are offenses that result in punishment commensurate with the gravity of the acts, “either by creating a specific offence or by making provision for penalties to be aggravated.” The new Council of Europe Convention on preventing and combating violence against women and domestic violence (discussed primarily in Chapter 5A: Domestic and Intimate Partner Violence, above) emphasizes that “culture, custom, religion, tradition or so-called “honour” shall not be considered as justification” for any acts of violence covered by the scope of the Convention, both in its General Obligations (Art. 12) and in a dedicated Article (Art 42, “Unacceptable justicications for crimes”). Article 42 also addresses the incitement of a child to commit acts of violence in the name of “honour”.

3. Domestic legislation and case law

Honour crimes

In most European countries, honour crimes are penalized under general criminal law provisions on murder or assault, or under legislation on violence against women. Consanguinity between victim and perpetrator, as well as premeditation of the crime, can serve as aggravating factors, depending on circumstances.

In Turkey, honour crimes are addressed directly. As mentioned elsewhere in this report, the Turkish Penal Code was reformed in 2004 and a number of provisions dealing with women’s sexuality were changed. The reform has been praised as an important step in recognizing women’s rights to bodily integrity and sexual independence, although parts of the new code still raise concerns in this regard. Before the reform, honour killings were considered crimes of extreme provocation and the Penal Code allowed sentence reductions to perpetrators. In the reformed code, so-called custom killings are instead defined as ‘qualified cases’ of murder, or aggravated homicide.

Article 81 of the Penal Code provides that intentional killing will result in life imprisonment. Article 82, ‘Qualified cases’ (according to some commentators, ‘aggravated homicide’), lists a number of circumstances that will serve as aggravating factors in a murder trial. This list includes, inter alia, when the killing has been committed “with premeditation” (Art. 82 a)), “against a direct ascendant, direct descendant, spouse or sibling” (Art. 82 d)), “with the motive of a blood feud” (Art. 82 j)), and “with the
motive of tradition” (Art. 82(k)). In those cases, punishment will be “aggravated life imprisonment.”

Furthermore, an article in the old Penal Code that regulated cases of ‘unjust provocation’ – which was often misinterpreted by judges to cover honour killings and result in reduced sentences – has been modified. The new article provides for reduced sentences if the crime was committed under the effect of severe emotional distress caused by an ‘unjust act’ (as opposed to ‘unjust provocation’) (Article 29). This means that the perpetrator of an honour killing will not benefit from the reduced sentence, since the provocation he has experienced will not qualify as an ‘unjust act.’ This new wording was motivated in the legislative process to prevent its application to honour killing cases.647

Finally, a new provision has been included to ensure that members of the family who conspired with the killer will be punished, independently of whether the act was committed by a minor. It is not unknown for the so-called family assembly, formed by the men of the extended family, to pick an under-aged boy from the family to commit the crime, so that he receives a reduced sentence or no sentence at all (if under 11 years old). The other family members would have no charges pressed against them.648 According to the new Article 38, anyone who forces another to commit a crime will receive the same punishment as the perpetrator or, if the perpetrator is a minor, the punishment appropriate to the crime. Using one’s power arising from a family relationship in the ascending or descending line will increase the punishment, as well as if the perpetrator is a minor, regardless of family relationship. The relevant parts of the provision read:

**Article 38: Incitement**

(1) A person who incites another to commit an offence shall be subject to the penalty appropriate to the offence that is committed.

(2) Where there is incitement to offend by using influence arising from a direct-descendent or direct-antecedent relationship, the penalty of the instigator shall be increased by one-third to one half. Where there is incitement of a minor, a direct-descendent or direct-antecedent relationship is not necessary for the application of this section.

Women’s rights groups have criticized the terminology of Article 82(k), which uses the term killings “with the motive of tradition” (or, in some translations, “custom killings,” or “killings in the name of customary law”).649 Killings with the motive of tradition’ is a narrower term than ‘honour killings,’ and in Turkey is primarily associated with practices prevalent in eastern and south-eastern regions of Turkey, among a predominantly Kurdish population. Referring to ‘tradition’ hence suggests that the crime only occurs in regions of the country where traditional customs prevail, and by one ethnic group in particular. The term is not understood to include so-called crimes of passion among other populations.650 The women’s rights movement in Turkey pressed hard for the use of the term ‘honour killing,’ but any connection between the term ‘honour’ and criminal penalty was vehemently opposed by members of the conservative party AKP in the parliament.651 The result of the legislative compromise was to instead use the term ‘tradition,’ which, according to women’s rights groups, is unfortunate as it limits the scope of the provision and also has certain overtones of ethnic and racial prejudice.

In 2008, there was a judicial setback to the new more progressive Turkish regime on honour killings. According to a draft 2008 EU Commission progress report on Turkey, the Turkish Cassation Court ruled that sentences for honour killings (or, with the terminology of the code, killings with the motive of tradition) will only be given if there is evidence showing that a decision of the family assembly had preceded the murder.652 The NGO shadow report from Kurdish Human Rights Project to the Committee on the Elimination of Racial Discrimination, 2009, describes the same court case:

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646 In some versions of the code, subparagraph (h) (concealing of an offence or destroying evidence) is missing; thereby making “with the motive of a blood feud” subparagraph (i), and “with the motive of tradition” subparagraph (j). The researcher has been unable to corroborate which version is correct; here has been used the published translated version.


648 According to Women for Women’s Human Rights, Turkish Civil and Penal Code Reforms from a Gender Perspective: the Success of Two Nationwide Campaigns, February 2005.


650 Pinar Ilkkaracan, Deconstructing Sexuality in the Middle East, Hampshire, 2008, p. 53.


Despite [the reform of the Penal Code], the Court of Cassation has established a new condition which can only be described as a backward step in the prevention of honour killings. The 1st Criminal Department of the Court of Cassation has decided that “if there is no proof showing that the crime is committed by the decision of family council it can not be defined as an ‘honour killing.’” This condition will result in the acquittal of potential perpetrators who encouraged the committing of honour killing if it is not proved that the crime was committed following a decision by the family council.

On the other hand, in July 2006, the Turkish Prime Minister issued a circular on combating honour killings and domestic violence which, according to EU sources, has had some effect by improving cooperation between public institutions tackling the issue.

Case law Sweden: honour killing resulting in life imprisonment

In the Swedish appeals court case B 4651-02 of May 2002, a father who had killed his daughter was sentenced to life imprisonment. The family was of Kurdish background, and the daughter had been subjected to repeated threats and violence from her father and brother for having adopted a ‘western’ lifestyle and, primarily, for having a Swedish boyfriend. The daughter had in the media openly discussed the threats she was subjected to in order to raise awareness of honour-related violence, and in 2001 she spoke before the Swedish parliament. In January 2002, her father murdered her with a gun at point-blank range; according to police reports he claimed that he killed her for having brought dishonour upon the family. The father was sentenced to life imprisonment by the lower court. The appeals court confirmed the sentence, despite the fact that the accused had at that point withdrawn his confession. The appeals court concurred in the reasoning of the lower court, which stated that the way by which the woman was killed “can be equated with a regular execution.” The honour motive was not directly explored by the courts.

Crime of passion defenses

The notion of crime of passion or provocation defense still exists in several European criminal laws. These are related to the idea that certain (sexual or otherwise) behaviour on behalf of the victim that stirs up a sense of rage or jealousy in the perpetrator would in part justify his (criminal) act. As such, this ‘passion’ or ‘provocation’ can serve as a mitigating circumstance in the following trial. This defence has frequently been used in cases of murder or violence committed against women, using the idea that a woman’s (sexual or otherwise) behaviour offends the honour of a man, or her family, and thus partially justifies violent action against her. However, as pointed out above, there are important differences between crimes committed out of rage or ‘passion’ and the more deliberate honour crimes.

In the United Kingdom, criminal law allows for a ‘partial provocation defense’ in cases of murder. This legal construct has traditionally been used to mitigate punishment for murder in so-called crimes of passion. The Homicide Act 1957 has the following provision:

**Provocation**

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

(Section 3)

This provision was criticized for allowing perpetrators of murder of women, when ‘provoked’ to kill based on something the victim has said or done, to be convicted for manslaughter instead of murder – and comparisons have been made to the legal response of honour crimes in other countries. The

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653 Report available at [www2.ohchr.org/english/bodies/cedl/docs/ngos/KHRPTurkey74.doc](http://www2.ohchr.org/english/bodies/cedl/docs/ngos/KHRPTurkey74.doc). Reference made to a document in Turkish at. Last visited on 6 May 2010.

654 Prime Minister’s Circular on Violence against Women 2006/17.


656 Svea Court of Appeal B 4651-02, decided on 31 May 2002. Available only in Swedish, translation is author’s own.

657 Enacted 21 March 1957.
British government declared its intention to abolish the provision in July 2008 and in October 2010 Section 3 (the provocation provision) of the Homicide Act was repealed and replaced with Sections 54 and 55 (‘Partial Defence to Murder’) of the Coroners and Justice Act 2009. The new clauses state that loss of self-control will constitute a partial defence to murder in certain circumstances, including if the act had a ‘qualifying trigger’. Qualifying triggers include “fear of serious of violence” (applicable inter alia in cases of domestic violence), and words and/or conduct which caused the defendant to have a “justifiable sense of being seriously wronged.” An act of sexual infidelity is not to be considered such exceptional circumstance.  

**Italian** criminal law provided for an explicit honour crime defense until 1981. Article 587 of the former criminal code established that whoever discovered unlawful sexual relations on part of his spouse, daughter or sister, and “in the fit of fury occasioned by the offense to their or their family’s honour” caused her death, would be punished with imprisonment from three to seven years. Personal injury caused under the same circumstances was subjected to one third of ordinary penalties. This provision was repealed by the Act no. 442 of 5 August 1981 after which no legal distinction exists between honour-related and other homicides or assaults.

Presently, Italian law provides for a provocation defense when a crime has been committed following a wrongful act. According to the Italian Penal Code, “having reacted in a state of rage induced by the wrongful act of another” may serve as a mitigating circumstance (Article 62.2). Mitigation of the sentence can thus follow from a particular subjective emotional state of the perpetrator of the crime. Recently, in Decision no. 37352 of 10 October 2007, the Italian Supreme Court had the opportunity to examine the reach of this provision, in a case where a man had killed his wife upon learning that she had an extra-conjugal relationship. The Court upheld the lower court’s decision, denying the possibility that honour could constitute a mitigating circumstance under Article 62. The Court held:

*The homicide, committed by the husband to defend his honor – which was supposedly offended by his wife’s alleged romantic relationship – and dictated by a misunderstood sense of male pride, was the expression of an emotional state that is valued negatively by the common ethical conscience, insofar as it is a manifestation of a reprehensible and excessive sense of male superiority.*

4. **Concluding remarks**

Honour crimes have been widely debated in Europe in recent years. Some western European countries have seen honour crimes occur within sections of their immigrant communities, which has stirred public debate both about failed integration policies and women’s rights more generally. In Turkey, a country where honour crimes were previously viewed as less severe by the state, recent legislative changes illustrate a positive trend. According to the most recent Penal Code, the so-called honour element of a killing will now be perceived as an aggravating instead of a mitigating factor in a criminal trial, thereby signaling that the notions on which such elements are based are not accepted in a modern society and run contrary to individual rights. There are, however, still problematic aspects of the Turkish regulations and their application in court, which is why the legal developments in this field should be monitored carefully.

Several European countries still allow for so-called provocation or passion defenses, used traditionally to reduce the seriousness of a crime committed in a moment of passion stirred by provocative behaviour on the part of the victim. The classic case is that of a man who kills or assaults his wife upon finding that she has had an extra-conjugal affair or that she is leaving him for another man, and whose violent reaction is received by a certain degree of indulgence by the legal system. As pointed out above – these crimes are different from honour crimes in that the former originate in emotional blindness, the latter in careful premeditation based on notions of honour that must be repaired. The state response to the two kinds of crimes are related, nevertheless, when the honour and the passion element are seen as mitigating circumstances: in both cases the state condones a certain violent reaction that is strongly gendered and based on archaic notions of ‘appropriate’ male and female sexual behaviour. In this context the recent British legislative reform, emphasizing that the provocation

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659 Article 587 of the so-called Rocco Code of 1931. See for a discussion of this provision Maria Gabriella Bettiga-Boukerbout, “‘Crimes of honour’ in the Italian Penal Code: an analysis of history and reform,” in Hossain and Welchmann, pp. 230–244. Translation of the provision is from Bettiga-Boukerbout’s article. Common homicide rendered imprisonment between 21 and 24 years, according to Art. 575 of the Rocco Code.


661 Only available in Italian; private translation.
defense cannot be used to excuse violence in reaction to infidelity, is interesting. Italian legislation allows for a provocation defense under certain circumstances, but the Supreme Court has made clear in strong language that this article does not provide defenses for emotional states such as a perception of harmed honour or “a misunderstood sense of male pride.”

F. SEXUAL EXPLOITATION AND TRAFFICKING

1. Introduction

Trafficking is detrimental to sexual health in multiple ways, and has in recent decades received much attention as a serious problem that must be fought by means of international cooperation. Trafficking violates the rights of the trafficked person in a host of ways; among these can be mentioned the right not to be subjected to forced labour or to inhuman or degrading treatment; the right to privacy and bodily integrity; the right to the highest attainable standard of health, and freedom of movement. From a sexual health perspective, it is especially important to emphasize the risk of sexual abuse and vulnerability to sexually transmitted infections. While trafficked persons who end up in the sex industry are particularly exposed to these perils, these risks are prevalent in all kinds of trafficking, given the repressive working conditions and the coercive and violent nature that are characteristic of this crime.

Trafficking and sexual exploitation must be forcefully prevented and combated. In this process, whether trafficking has occurred for sexual exploitation or for any other reason, it is paramount that a human rights framework be employed. This is true with regard to preventative measures against trafficking – making sure that these do not restrict fundamental rights such as the right to movement, the right to seek asylum, or the right to make a living. It is further imperative that human rights standards be applied in the field where anti-trafficking measures meet immigration policies; a complicated intersection of international policies that has to be closely monitored.

Furthermore, for the purpose of sexual health and human rights, it is critical to safeguard the rights of sex-trafficked persons – or alleged sex-trafficked persons. They should be granted confidentiality to make sure that their personal data is not dispersed. When a border has been crossed and the trafficked person has arrived in the host country illegally, she or he should be treated with respect and not forcefully expelled. Possibilities for trafficked persons to stay in the host country, temporarily or permanently, should be considered. It is also of the utmost importance that the rights of sex workers or migrants are not violated under the pretext of anti-trafficking measures. For the purpose of this report it is of special relevance that the rights to medical, psychological and other services for trafficked persons be respected – regardless of how they have come to be in exploitative situations (non-discrimination) and regardless of whether they are able or willing to cooperate with law enforcement authorities. Special attention should be given to those who have been subjected to sexual abuse. Here it should be reiterated that all trafficked persons, regardless of what kind of trafficking they have been exposed to, should be granted sexual health care and counselling services.

In the European region, the issue of human trafficking is intrinsically linked to immigration policies, as trafficking has been perceived as a problem not only in regard to human rights but also as a potential source of illegal immigration. Therefore, much of the regulatory material on trafficking is concerned with the status of the trafficked person in the host country; including conditions for temporary residence permits, and responsibilities of the host country for the fate of the trafficked person upon return to the country of origin.

The response to trafficking from the criminal justice system, while relevant in the combat against trafficking, falls outside of the present study.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

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See, inter alia, Article 14.2 of the Palermo Protocol.

In January 2010,\textsuperscript{666} for the first time ever, the European Court of Human Rights decided a case involving allegations of human trafficking in Rantsev v. Russia.\textsuperscript{667} The applicant was the father of a young Russian woman, Ms Rantseva, who had died under mysterious circumstances in Cyprus. She was in Cyprus on a so-called 	extit{artiste} visa, but had only worked in a cabaret for three days when she tried to leave her employment. It is unclear from the facts of the case if her work involved sexual services or not, although the Court, making references to various reports, states that “it is widely acknowledged that trafficking and sexual exploitation of cabaret artistes is of particular concern.” The applicant was found dead after having fallen or jumped out of the window of an apartment where she was held. The criminal investigations concluded that her death had been an accident and found no evidence to suggest criminal liability for it. The father alleged that Ms Rantseva had been trafficked to Cyprus for sexual or other exploitation, that the Cypriot authorities had failed to protect her while she was still alive, and that they had failed to take steps to investigate and punish those responsible for her death. He claimed that Cyprus had violated its obligations under numerous articles of the Convention, including Article 2 (right to life), Article 3 (right not to be subjected to inhuman or degrading punishment or treatment), and Article 4 (prohibition of slavery and forced labour). He also claimed under Article 2 and Article 4 that Russia had failed to protect his daughter against trafficking and to investigate her alleged trafficking and death.

Cyprus conceded unilaterally that it had violated Articles 2, 3, 4, 5 and 6 of the Convention, and declared that it had appointed experts to independently investigate her death. This declaration notwithstanding, and with reference to scarce case law on the application of Article 4 to cases of trafficking in human beings, the Court decided to examine the case on its merits.

The Court found that Cyprus had violated Article 2 in its procedural aspect, when failing to effectively investigate Ms Rantseva’s death. The different allegations related to trafficking were examined under Article 4, prohibition of slavery and forced labour. The Court concluded that trafficking in human beings, by its very nature and aim of exploitation, is prohibited under Article 4 of the Convention. It found that Cyprus had violated its positive obligations under Article 4 in two main ways. Given the regime of artiste visas in Cyprus (\textit{inter alia} making the 	extit{artiste} dependent on her employer for her immigrant status), Cypriot authorities had not afforded Ms Rantseva practical and effective protection against trafficking and exploitation. This was illustrated by the fact that Cyprus had failed to put in place a legal and administrative framework to combat human trafficking. Furthermore, the Court found that Cyprus had failed to take measures to protect Ms Rantseva despite clear signs, which were known to the authorities, that she might have been trafficked. The Court also found Russia in violation of Article 4, with reference to its failure to investigate how and where Ms Rantseva had been recruited.

The case is relevant for the purposes of sexual health and rights firstly in that it makes clear that human trafficking falls under the scope of Article 4 of the Convention and, secondly in that it establishes an obligation for states to take positive steps to protect potential victims of human trafficking and to investigate once there are allegations of trafficking having taken place. Regardless of whether trafficking involves sexual or non-sexual exploitation, these findings are important for the well-being of trafficked persons. The Court chose not to explore specifically whether Ms Rantseva had been exploited sexually; in that regard, the Court accepted that trafficking is not only for sexual purposes, which corresponds with understandings of the phenomenon in international law.

\textit{Conventions in the Council of Europe Treaty Series}

The Council of Europe continued, for much longer than many other international bodies, to employ a definition of trafficking that was confined to sexual exploitation and thereby mostly targeted towards women and girls.\textsuperscript{668} Its most important document, the \textit{Council of Europe Convention on Action against Trafficking in Human Beings},\textsuperscript{669} adopted in May 2005 and entered into force in February 2008, finally abandoned this definition.

\textsuperscript{666} In Siliadin v. France (application no. 73316/01, decided on 26 July 2005) the Court examined a case where a teenage Togolese girl had been brought to France to work as a domestic servant, without remuneration and without possibility to leave. The Court concluded that France had violated its obligations under Article 4, prohibition of slavery and forced labour (finding that the treatment of the applicant had amounted to servitude and forced and compulsory labor), but fell short of establishing whether she had been trafficked and, if so, whether trafficking was prohibited under Article 4.

\textsuperscript{667} Application no. 25965/04, decided on 7 January 2010. At the time of writing the judgment had not yet become final; it will become final at the latest three months after the date of the judgment, unless reference of the case to the Grand Chamber will be requested (Article 44 § 2 of the Convention).


\textsuperscript{669} Council of Europe Treaty Series – No. 197, open for signature on 16 May 2005, in force on 1 February 2008.
The Convention is intended to be a supplement to the UN Palermo Protocol, aiming particularly at strengthening the rights of trafficked persons.\textsuperscript{670} It covers sexual trafficking and other kinds of trafficking (forced labour/servitude, removal of organs), national as well as transnational. Guaranteeing gender equality is at the core of its purpose, as well as “to protect the human rights of victims of trafficking.” (Art. 1a and b). Its definition of human trafficking is identical to that of the Palermo Protocol, including action (recruitment, transportation, transfer, harboring or receipt of persons), means (threat or use of force or other forms of coercion, abduction, fraud, of deception, abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person), and intent/goal (for the purpose of exploitation) (Art. 4a).\textsuperscript{671} Recruitment, transportation, transfer, harboring or receipt of children will be considered trafficking regardless of whether any of the coercive means were used (Art 4c).

The Convention mandates contracting states to promote a human rights-based and a child-sensitive approach in their preventative programmes, and to use gender mainstreaming (Art. 5.3). What qualifies as a human rights-based approach has not been defined. Instead, in the Explanatory Report, the drafters confuse a human rights-based approach with gender mainstreaming, suggesting that as long as gender mainstreaming has been used, this will also satisfy the criteria for a rights-based approach.

Chapter III of the Convention is titled “Measures to protect and promote the rights of victims, guaranteeing gender equality.” In contrast with the Palermo Protocol, it provides for a process by which victims can be identified correctly (Art. 10). In this process, the special situation of women and child victims must be taken into account. States parties shall ensure that a person who is believed to have been the victim of trafficking shall not be removed from the territory to which he or she was taken until the identification process has been completed (Art. 10.2). There is also a special clause providing for the protection of the private life and identity of victims (Art. 11). The minimum requirements for assistance to victims include (inter alia; here only those with bearing on health) standard of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance, and access to emergency medical treatment (Art. 12.1). Victims who are lawfully resident within the territory of a Party and who do not have adequate resources shall be provided with necessary medical or other assistance (Art. 12.3). This means that only victims who legally reside in the country have the right to full medical assistance, beyond emergency care. Examples of such non-emergency medical assistance can be assistance to a trafficked person during pregnancy or to a trafficking victim with HIV/AIDS.\textsuperscript{672}

Of importance is the clause which states that “[e]ach Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness” (Art. 12.6). The Convention makes clear that for the implementation of the provisions on assistance to victims of trafficking, services must be provided on a consensual and informed basis (Art. 12.7). In this process, due account shall be taken into the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care. This provision prohibits, for example, forced HIV tests on trafficking victims.\textsuperscript{673}

According to Article 13, 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. Furthermore, Article 14 obliged States Parties to issue a renewable residence permit if the competent authority “considers that [his or her] stay is necessary” either owing to the personal situation of the trafficked person, or for his or her cooperation in the legal process. For child victims, the residence permit shall be issued in accordance with the best interests of the child.

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. 16.2). This wording means that 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, to determine whether


\textsuperscript{671} The fact that the definition is identical to the definition in the Palermo Protocol means that the European Convention has the same weaknesses and ambiguities as its UN equivalent (confusion about the meaning of sexual exploitation and exploitation of prostitution, undefined status of sex work, etc). According to the Explanatory Report, these terms have intentionally been left vague, in order for the Convention to be without prejudice to how sex work is regulated in domestic legislation. Explanatory Report, para 88. For a discussion of the definition of trafficking in the Palermo Protocol, see the International law section.

\textsuperscript{672} Explanatory Report, para 165.

\textsuperscript{673} Explanatory Report, para 171.
a residence permit should be issued. The Convention does not provide any guidance as to what principles this assessment will be based on. The host country must conduct a risk assessment before returning children (Art. 16.7) but not in other cases. As pointed out by commentators, this suggests that in practice contracting parties are not obliged to take on any legal or moral responsibility for the safety and security for trafficked persons returned against their will.674 However, interestingly, the Explanatory Report mentions that the drafters considered that it was “important to have in mind” European Court of Human Rights jurisprudence on states’ responsibility to conduct a risk assessment in cases of extradition and deportation as regards risk of torture upon return.675 While not elaborating this further, this comment suggests that even if there is no requirement for a full risk assessment, states still cannot fully escape responsibility for the fate of the returned victim.

Finally, according to Article 26, states must ensure that there is no possibility of imposing penalties on trafficking victims for illegal activities in which they have engaged. This is relevant in particular with regard to persons trafficked for sexual purposes in countries where sex work is illegal.

3. European Union

Human trafficking is mentioned explicitly in the Treaty of the European Union as one of the crimes that will be prioritized in the police and judicial cooperation of the EU. In this context, there is no mentioning of the rights of trafficked persons.676

In 2004, the Council of the European Union adopted the Council Directive 2004/81/EC on Residence Permit for Trafficking Victims.677 The Directive defines the conditions for the granting of temporary residence permits to third-country nationals who have been the victims of human trafficking and who are willing to cooperate with the authorities in fighting trafficking. It applies to trafficked persons who have entered the Union legally as well as illegally (Art. 3.1). The Directive provides for a reflection period for the victim of human trafficking, the duration of which will be determined according to national law, and during which victims cannot be deported and will have access to emergency medical treatment (Art. 6.1). The member states must make sure that during the reflection period victims will be granted “standards of living capable of ensuring their subsistence” (Art. 7.1). For the most vulnerable, and “where appropriate and if provided by national law,” there shall also be psychological assistance available (Art. 7.1). After the expiry of the reflection period, a temporary residence permit can be granted to victims whose cooperation is clearly beneficial to the law enforcement authorities (Art. 8).

While focusing on trafficked persons and giving them an incentive to cooperate, this document is troublesome from a human rights point of view. It provides for no protection of persons who are not required to give testimony or who for some reason cannot cooperate with law enforcement officials – or of those who have given testimony, benefited from the regime, and then have been repatriated against their will. As pointed out by a commentator, the purpose of the Directive was to facilitate law enforcement against traffickers while also concerned with the risks of illegal immigration into the Union: “Clearly, the overwhelming concern of the Commission was to ensure that the proposed visa regime was not open to opportunistic abuse or to aggravating the problem of illegal migration into the Union.”678

The European Council adopted Joint Action 97/154/JHA in 1997 concerning action to combat trafficking in human beings and sexual exploitation of children. In the preamble of this document, the Council establishes first that the fight against trafficking “is likely to contribute to the fight against certain unauthorized immigration and to improve judicial cooperation in criminal matters,” and later that trafficking in human beings and the sexual exploitation of children “constitute serious infringements of fundamental human rights, in particular human dignity.” This, again, suggests a prioritization of the fight against illegal immigration over the concern for the rights of trafficked persons, which raises concerns from a human rights standpoint.


676 Article 29 of the Treaty of the European Union (as amended by the Amsterdam Treaty).

677 EU Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261.

678 Gallagher, p. 169.

The definition of trafficking in human beings for the purposes of the Joint Action only refers to sexual trafficking and requires border crossings. The definition of trafficking is vague; it basically only refers to the movement between states, for the purpose of sexual exploitation (Title I Aims). Measures that member states are required to take are almost exclusively related to law enforcement. Title II.F(b) requires states to ensure “appropriate assistance to victims and their families,” including enabling them “to return to their country of origin, or any other country which is prepared to accept them, with the full rights and protections accorded to them by the national law of the Member States.” No mention is made of the possibility for a trafficked person to get a residence permit in the host country.

In 2002, the Council of the European Union adopted a Framework Decision on trafficking, the EU Framework Decision on Combating Trafficking in Human Beings. The definition of human trafficking used in the Framework Decision is very similar but not identical to that of the Palermo Protocol, with the main difference that the EU Framework Decision makes explicit that pornography can be one form of sexual exploitation. The Framework Decision has a clear focus on criminal law cooperation and does not approach trafficking through a human rights lens. Its victim protection regime is close to non-existent: its only reference to victims’ rights regards children, and is vague in content: “Where the victim is a child, each Member State shall take the measures possible to ensure appropriate assistance for his or her family” (Art. 7.3). No mention is made of a right for a trafficking victim to stay in the host country. The Framework Decision has strongly influenced member states’ policies, and has been widely criticized for not protecting the rights of trafficked persons nor addressing the root causes of the phenomenon.

4. Non-binding regional material

There is an abundance of non-binding material from both the Council of Europe and the European Union on the issue of trafficking. While the Council of Europe documents are fairly consistent with the Convention, discussed above, the statements from the European Parliament and the EU Expert group report are significantly different from binding EU policies. Roughly speaking, the non-binding material tends to be less concerned with law enforcement and focuses more on the human rights of trafficked persons.

5. Domestic legislation and case law

Services to trafficked persons and possibility of residence

Legislation of many European states provides for the reflection/recovery period for trafficked persons as called for by the Council of Europe and EU mechanisms. In addition, many also offer temporary residence permits after the expiration of the reflection period. The terms of these vary, however.

In Ireland, the Criminal Law (Human Trafficking) Act 2008 was passed in response to the EU Framework Decision, the Palermo Protocol, and the Council of Europe Convention, discussed above. Its definition of trafficking is slightly different from the definition in the Council of Europe Convention in that the coercive element is not part of the definition. To ‘traffic’ is defined only as procuring, recruiting, transporting, etc. a person, causing a person to enter or leave the state, taking custody of a person, or providing a person with accommodation or employment (Section 1). However, a person who traffics another will be guilty of an offence, if the trafficker, “for the purpose of exploitation,” coerced, threatened, abducted, used forced against, deceived, etc., the trafficked person (Section 4). In other words, the coercive element and the exploitative purpose are constitutive of the crime but not inherent to the definition of trafficking as such.

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681 There is also a reference to Art. 4 the Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings: this article refers to victims’ right to receive information during a criminal process.

682 According to Gallagher, p. 167.


The practical difference between this definition and the internationally accepted definition is minimal; however, it is worth noting that the Irish legislature has decided to neutralize the term ‘trafficking’ and make it only about the action without also including means and intent in the definition.

The Human Trafficking Act is primarily concerned with criminal enforcement, and has few provisions on the protection and rights of trafficked persons. However, simultaneously with the Human Trafficking Act 2008, the Government passed the secondary legislation Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking.\(^{685}\) This notice provides, inter alia, for a 45-day recovery and reflection period for suspected victims of human trafficking, regardless of whether they agree to assist law enforcement agencies in the investigation or prosecution of the traffickers (paras 5–7). During this period, the person cannot be subject to removal. Nevertheless, the recovery and reflection period can be terminated if the trafficked person voluntarily renews his or her contacts with the alleged traffickers, if it is in the interest of national security, or if victim status was claimed improperly (para 8). Paragraph 9 clarifies that the granting of the recovery and reflection period does not of itself create any entitlement for the person to assert a right to residence in Ireland, once the 45 days have passed. However, temporary residence permission for six months can be granted to the person, on condition that he or she has cut off all relations with the alleged traffickers, and that his or her collaboration is necessary for the investigation or prosecution against the perpetrators (para 11).

Similar to the recovery and reflection period, the granting of temporary residence permission can be revoked. The permission may be revoked, inter alia, when the person no longer wishes to assist the police or the prosecution, in the interest of national security, or when the investigation or prosecution has been terminated (para 13). When the trafficked person is under 18, attention should be paid to the best interest of the child in the granting and revocation of temporary residence permission.

The Moldovan Law on Preventing and Combating Trafficking in Human Beings\(^{686}\) covers both trafficking (the definition of which is similar to the European Convention definition), and other kinds of abusive practices, such as the exploitation of persons, compulsion to perform work or service by use of force, threat or coercion, slavery, compulsion to engage in prostitution or to participate in pornographic performances, compelled harvesting of organs or tissues, using a woman as a surrogate mother, abusing children with a view to illegal adoption, etc.

The Moldovan law provides for extensive assistance to trafficked persons, unconditional on their collaboration with law enforcement agencies. They shall be offered, inter alia, assistance in physical, psychological, and social recovery through specialized services; a minimum package of social and medical assistance including free health care, and protection and assistance by the public administration authorities (Art. 20). Foreign citizens will be offered a reflection period of 30 days, during which expulsion is prohibited, and during which they are entitled to psychiatric and psychological counselling and to medical and social assistance. During the same period, they have the right to legal assistance free of charge, and to pursue civil claims and lawsuits against their traffickers (Art. 24(4)).

It is unclear from the wording of the law what happens when a lawsuit has not been terminated within the 30 days and whether this affects expulsion proceedings against trafficked persons.

The law also guarantees trafficked persons from other countries assistance with their voluntary return to their home states. Importantly, a risk assessment shall be carried out; no repatriation may take place if there are reasons to believe that their safety would be endangered upon their return:

\[\text{The Republic of Moldova shall grant assistance to foreign citizens and stateless persons who are victims of trafficking in human beings upon their voluntary repatriation to their country of origin on an emergency basis and shall ensure their transportation in completely safe conditions to the state border of the Republic of Moldova, unless otherwise provided in international treaties. The victim of trafficking in human beings may not be repatriated or expelled to his/her country of origin or to a third state if, upon estimating the risk and safety, reasons are found to presume that his/her personal safety or the safety of his/her family will be endangered. (Art. 24(1))}\]

However, there is no special provision in this law to grant the trafficked person permanent residency in Moldova.

In the Netherlands, human trafficking is defined in the Criminal Code, where liability for trafficking...
The definition is similar to the internationally accepted definition and includes trafficking both for the purpose of sexual and other kinds of exploitation. According to reports, in 2009 a new description of target groups appeared in implementing guidelines to the Alien’s Act (see below), in order to state more clearly that immigration benefits to trafficked persons apply identically to those who have been trafficked for work in the sex industry and those who have been exploited for other reasons.

The rights of victims of human trafficking to a reflection period and temporary residence permit are regulated in the so-called B9-regulation, as part of the Aliens Act Implementation Guidelines 2000. This regulation applies to foreign nationals; thus not to Dutch trafficked persons or victims who are legally resident in the Netherlands as EU citizens. If there is suspicion that a person residing illegally in the Netherlands has been trafficked, he or she is given the opportunity to use a three-month reflection period. During this period, he or she resides legally in the country and has the right to medical care and basic social services. Residence beyond the reflection period is conditioned on the willingness and ability to file a formal complaint or otherwise cooperate with law enforcement authorities, and like in Ireland, the temporary residence permit will last for the duration of the investigation and trial. The possibilities for residence permit have been gradually expanded. For example, a victim can, since 2006, be offered the right to continued residence in the Netherlands if the criminal prosecution results in a conviction. Continued residence can also be possible if the trial ends in acquittal but the trafficked person has been in the Netherlands on the basis of a B9-permit for over three years. Since 2007, the B9-regulation also provides for a temporary residence permit for trafficked persons who do not necessarily report a case of human trafficking but who cooperate in some other way with the investigation and prosecution, \textit{inter alia}, by providing witness testimonies. Finally, since January 2008, a victim can ask the immigration authorities to assess if he or she is eligible for continued residence beyond the termination of the proceedings, even if the criminal case is still pending, if she has resided in the country for over three years on a B9-permit. In particularly distressing cases there is also a possibility to grant victims of human trafficking a residence permit on purely humanitarian grounds, \textit{inter alia} when it is obvious that the person has been trafficked but is too frightened to cooperate with the investigation.

\textit{Case law: status of former trafficked persons under asylum law – ‘social group’ and risk of being re-trafficked}

In the 2007 \textit{United Kingdom} immigration appeals case of \textit{SB v. Secretary of State for the Home Department}, a young woman, national of Moldova, appealed against the decision to refuse her application for asylum and humanitarian protection. She had been trafficked into United Kingdom for the purposes of sexual exploitation. She subsequently gave evidence against the person responsible for her sexual exploitation ("Z"), which resulted in his successful prosecution. Z received a term of imprisonment, but at the time of the immigration hearing, he was at large. SB feared harm at the hands of Z, Z’s family and Z’s associates if returned to Moldova.

The Tribunal determined that for asylum purposes “former victims of trafficking for sexual exploitation” can be considered members of a ‘particular social group’ in the understanding of the Refugee Convention. In allowing the appeal, the Tribunal concluded that

\begin{quote}
the Appellant is at a heightened risk of ill-treatment in Moldova which […] is at least in part related to her experience of having been trafficked for the purposes of sexual exploitation in the past, that is, it is at least in part related to the fact that she is a member of a particular social group (comprised of “former victims of trafficking for sexual exploitation”), although this does not mean that there is insufficient protection
\end{quote}

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689 Guidelines to the implementation of the Aliens Act (2000). The author has not found these guidelines in English translation. Information from Replies to the list of issues (CCPR/C/NLD/Q/4/1 to be taken up in connection with the consideration of the fourth periodic report of the Netherlands (CCPR/C/NLD/4, CCPR/C/NLD/4/Add.1; CCPR/C/NLD/4/Add.2), Human Rights Committee, 5 May 2009.


691 Ibid.

In the 2009 case of PO v. Secretary of State for the Home Department before the Asylum and Immigration Tribunal, the appellant was a citizen of Nigeria who appealed against the decision to remove her as an illegal entrant. She had entered the United Kingdom in 2005, brought by a person for the purposes of working as a prostitute. After months of repeated rape by the trafficker and his acquaintances, the woman escaped and applied for asylum. She feared return to Nigeria because, she claimed, she was at risk to be re-trafficked, either by the same people or by a different gang. She also feared retribution from members of the gang who had trafficked her, who would not have been reimbursed for the role they played in her transportation to the United Kingdom. Additionally, the appellant believed that she would have difficulty in obtaining accommodation and employment and this would increase the risk of re-trafficking.

As general conclusions, the Tribunal held that

\[\text{[t]here is in general no real risk of a trafficking victim being re-trafficked on return to Nigeria unless it is established that those responsible for the victim's initial trafficking formed part of a gang whose members were to share in the victim's earnings or a proportion of the victim's target earnings in circumstances where the victim fails to earn those target earnings. It is essential that the circumstances surrounding the victim's initial trafficking are carefully examined.}\]

The Tribunal went on to find that there was no evidence that the trafficker and his acquaintances belonged to a trafficking gang or network. Upon return to Nigeria, the appellant would be offered protection; there were medical and counselling facilities available, and, if she was willing to cooperate, Nigerian authorities would also attempt to track down and prosecute her trafficker. In conclusion, it found that there was no real risk of re-trafficking. The appeal was dismissed.

 Monetary compensation for trafficked persons

In the United Kingdom, a trafficked person may pursue compensation through several different mechanisms. First, the individual may receive compensation under a compensation order made by a criminal court upon the conviction of an offender. Second, he or she may receive a compensation award through an application to the Criminal Injuries Compensation Authority (CICA). The scheme provides for two types of compensation: personal injury awards to victims of crime, and fatal injury awards to immediate family members of a victim who has died as a result of a violent crime. Third, the individual may pursue a civil suit directly against her trafficker in court. These mechanisms are not designed to apply particularly to trafficked persons, but have been successfully used in that regard. According to reports, in July 2007 the first successful compensation awards were made to two young Romanian women who had been trafficked for sexual exploitation, and at least three additional applications have since resulted in successful outcomes for several other women trafficked for sexual exploitation.

6. Concluding remarks

Regarding the response to the phenomenon of human trafficking in the European region, there is one trend that is clear and uniform: the sense that the phenomenon has to be urgently counteracted. Anti-trafficking pronouncements and measures have exploded in the last decade, on regional as well as on domestic levels. In relation to what action to take, however, there are different approaches.

As seen, binding instruments of the European Union so far have favoured law enforcement measures and immigration control, with a strong focus on prosecution of responsible traffickers rather than prevention or protection of trafficked persons. This approach is problematic from a sexual health and human rights point of view. It makes trafficked persons' residence in the country, and, to some extent, their well-being, conditional upon their willingness and ability to cooperate with the law enforcement authorities. This

695 The official website of the Criminal Injuries Compensation Authority, which administers the scheme, is found at www.cica.gov.uk. Northern Ireland has its own compensation scheme (Northern Ireland Criminal Injuries Compensation Scheme) for victims of violent crimes.
policy does not take into account the multitude of reasons why such cooperation may be problematic or dangerous for the individual. Also in cases where a trafficked person chooses to cooperate, this approach is complicated; the knowledge that he or she can stay only for as long as the investigation continues may serve as an incentive not to cooperate as effectively as they otherwise could. This kind of conditioning creates a sense of uncertainty, which is detrimental to health under the best of circumstances, but in particular when an individual has suffered hardship and abuse. The EU policies on trafficking are also closely linked with immigration policies. Such link entails an inherent risk that emphasis will be placed on the fight against illegal immigration into the Union rather than on a true rights-focused approach serving to prevent the phenomenon and to provide protection to those suffering under it.

The Council of Europe Convention, by contrast, has a clearer victim-focused approach and expresses more explicitly that human trafficking is a question of violation of rights. While not ignoring the need to take criminal law measures to fight the phenomenon, the Convention balances those with strong provisions on prevention and the rights of victims. Nevertheless, a clearer statement on what obligations flow from the application of a so-called human rights-approach would be desirable. By blurring the boundaries between a ‘human rights approach’ and ‘gender mainstreaming,’ the drafters fail to acknowledge that a rights-based approach is a richer concept requiring, inter alia, participation of trafficked persons in decisions of concern to them, non-discrimination (not only between men and women) and accountability as regards rights claims. It seems particularly important that the human rights-based approach be given substantive meaning in an area like trafficking which traditionally has implied risks for paternalism towards the victims.

Minimum requirements for assistance, according to the Convention, include medical and psychological care, and the victim’s right to privacy is strongly emphasized. Similarly, services shall be provided on a consensual and informed basis. It is problematic, however, that those in the territory illegally are guaranteed only emergency care. In this way a trafficked person – who by nature of the crime will often be present illegally in the host country – can easily be denied the medical and psychological assistance he or she may need, not the least for the recovery of his or her sexual health. It is troubling that medical care related to pregnancy and HIV/AIDS are not deemed ‘emergency care.’ Similarly, this provision highlights the question of whether health and psychological services that follow from sexual abuse and deprivation of sexual autonomy will be considered ‘emergency care.’

The Convention does not link access to services to a willingness to cooperate in the criminal investigation, which is commendable from a rights perspective. Nevertheless, while the Convention favours voluntary repatriation, it does not exclude forceful expulsion of an alien trafficked person. The host country has an obligation to assess the personal needs of the trafficked person before returning him or her, which is not the same as a risk-assessment of the situation in the country of origin. A clear risk assessment is only mandated in relation to trafficked children; nevertheless, comments suggest that the host country must take on at least a minimum of responsibility for the well-being of the trafficked person upon return.

In domestic legislation, as seen, these different approaches appear to varying degrees. Moldova offers a generous package to trafficked persons of protection and assistance during the reflection period, unconditional of legal status or willingness to collaborate. Moldova is also mandated by law to conduct a risk assessment before a trafficked person can be returned to his or her country of origin. Ireland also provides for assistance and support during the reflection and recovery period, but, if temporary residence status is granted, such status can be terminated abruptly once the investigation is finalized. The length of the reflection period varies; in Moldova it is 30 days, in Ireland 45 days, and in the Netherlands three months. After the reflection period, all three countries condition a temporary residence permit on the trafficked person’s willingness and ability to cooperate with law enforcement authorities.

Here should be highlighted that according to both regional and domestic laws, the two models for permitted stay in the host country are very different in nature. The entitlement to a recovery and reflection period without special preconditions, and during which medical and psychological services are available, is based on rights-concerns and is in the interest of the trafficked person. The granting of temporary residence permission, on the other hand, tends to be exclusively in the interest of the authorities: it is conditioned by full cooperation with the law enforcement agencies, and can (at least according to EU law and in Ireland and the Netherlands, as discussed above) be revoked as soon as the investigation is over. The Dutch provision, also offering a possibility to grant residence status under particular distressing circumstances to a person on merely humanitarian grounds, deviates from this binary model and provides a solution that better takes into account the complicated psychological and structural dynamics often involved when human trafficking has occurred.
VI. ACCESS TO HEALTH SERVICES IN RELATION TO SEX AND SEXUALITY

A. Introductory Remarks

Health services, as well as health systems that organize and ensure the appropriate delivery of health services and goods, are essential for the promotion of sexual health. The structure and delivery of health care must be seen as contributing to the experience of being a full valued member of one's society. A health and human rights-based approach to health services focuses not only on the technical and clinical quality of services, but also on the design, delivery, and use of these services. In addition to evaluating the impact of health services on the rights to health and life of all persons without discrimination, a rights-based analysis examines how the structure and delivery of sexual health services interacts with other key human rights principles. This includes assessing the legal and policy framework of health services with attention to values of equality, dignity, freedom, and autonomy for all. Such evaluations address the laws and policies determining the distribution, content, accessibility, and delivery of services, as well as accountability for inadequate services. Moreover, a rights-based framework recognizes that untreated or inadequately treated sexual health conditions are themselves often a source of stigma for affected persons and groups.

While the state is ultimately responsible for ensuring the availability, accessibility, acceptability, and quality of health services, the state itself is not the only provider of these services. The state remains responsible, however, to ensure that non-state actors do not discriminate and that non-state actors providing services to marginalized populations are not themselves discriminated against nor face restrictions on their rights to association and expression.

Four key aspects of accessibility for health services have been spelled out in international human rights law and are applicable to services necessary for sexual health: (1) non-discrimination, which in the sexual health context means that health services must be accessible without discrimination, including on the basis of sex, gender, sexual conduct, marital status, or sexual orientation; (2) physical accessibility, which requires health services to be within safe physical reach of all persons, including persons in detention, refugees, and women facing restrictions on movement; (3) economic accessibility, which means that health services are affordable to all, including marginalized populations; and (4) information accessibility, meaning the right to seek, receive, and impart information and ideas concerning sexual health, including the availability of relevant services, even services challenging dominant sexual mores.

Each of these four aspects must be considered in connection with the wide array of health services important to sexual health. The scope of these services includes the prevention and treatment of STIs and HIV/AIDS (including voluntary testing, post-exposure prophylaxis, and access to anti-retroviral therapies); contraception (including condoms and emergency contraception); and abortion services. Laws that erect barriers to access to contraception or safe abortion services deny girls and women their fundamental right to determine if and when sexual activity will become reproductive, thereby reducing their sexual well-being. Laws that fail to provide adequate access to goods and services in the context of sexual assault (such as forensic tests as well as treatment of injuries and STIs) also have a seriously negative impact on the right to (sexual) health as well as on other rights.

In general, an analysis of health service laws must consider not only the necessary scope of the laws, but also the barriers that specific populations and marginalized sub-groups may face. Does the law on its face or in practice exclude unmarried women from, for example, accessing contraception? Does the law provide for information on and distribution of sexual health services in ways that will reach young married women or men who have sex with men? Is the privacy of persons seeking information and services protected explicitly, or does the law subordinate their rights to police registration of HIV status of sex workers, for example? Are there other laws penalizing behaviour, such that a person seeking care would be reluctant to disclose his or her actual sexual practices? Do the services reach populations in prison and non-nationals, including migrants, refugees, and so-called undocumented persons? Are insurance or social welfare schemes supporting access to health services non-discriminatory and adequately accountable to meeting health and rights protections?

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


699 General Comment 14, CESC C. For further discussion, see International Human Rights Law section, [add place].

700 General Comment 14, CESC.
HIV status (actual or imputed) can also function as a major barrier to accessing general health services, or conversely, HIV positive status can result in coercive services (for example, mandatory testing). Specific groups, such as persons in sex work or men having sex with men can also be singled out for coercive health services (mandatory health checks and tests). These services are often rationalized as public health measures but fail on both effectiveness and ethical grounds.701

Persons under 18 years of age face particular barriers in accessing sexual health services, care, and information. The right for all persons to consent to health services and procedures is fundamental. Generally, the parents or guardians of minors may retain formal powers of consent. However, respect for the principles of the evolving capacity of the child and of his or her best interest suggests that older adolescents should be able to access appropriate and necessary services without recourse to parental involvement or consent. In addition, the right to enjoy confidentiality in regard to sexual health services and care should be respected. Persons under the age of 18 have the right to accurate, comprehensive, and age-appropriate sexual health information, following from their general right to information. This right applies regardless of the nature of the provider (state or non-state actor), and the information may not be restricted on discriminatory grounds (for example, sex, gender, or sexual orientation).

A. Abortion and contraceptives

1. Introduction

As noted above, access to contraceptives and to safe and legal abortions is relevant for sexual health in multiple ways. Easily available contraceptives, accessed without discrimination, enable women and men to freely decide if they want sexual activity to result in reproduction, which results in significant advantages for their sexual health. Access to abortions enables women to exercise control over their bodies in the case of unwanted pregnancies. Furthermore, termination of a pregnancy is sometimes necessary to preserve the physical and mental health of the woman, including when the pregnancy was a consequence of rape.

The UN Committee on the Elimination of Discrimination Against Women has stated that “barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”702 In the context of abortion, this can be translated into an obligation to provide abortion services at a minimum when the health of the pregnant woman is at stake and when pregnancy is the result of rape.703 It is important to keep in mind, however, that access to abortion is always facilitated best where abortion is available on request, even when the woman’s health is what motivates her to seek the procedure. In those cases, she will not have to endure procedures that may be humiliating and lengthy, such as proving that her health condition is ‘sufficiently serious’ or obtaining a police report or court order that confirms she has suffered sexual violence. She will not have to go through complicated administrative processes to show that her condition falls under relevant provisions; experience shows that even when a woman’s condition is well within the legal framework, provisions that condition her right to the service tend to restrict availability in practice.704 Furthermore, in countries where there are bars to legal abortion, whether total bans or conditions on availability, the prevalence of illegal and unsafe abortions is much higher than in countries where abortions are legal – which by itself constitutes a serious health risk to women.705 Thus, the availability of abortion without restriction for a reasonable gestational period has significant advantages from a sexual health point of view.

As will be shown, many countries in Europe have permissive abortion laws, making abortion either available on request during the first trimester or providing broadly defined conditions that justify abortion during that period. There are exceptions, however, and also variations in how states have framed the right to abortion and specific elements of that right.

In regard to contraception, in many countries in the western part of the region access to contraceptives

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701 Systems that impose mandatory testing on certain groups based on their alleged or actual higher risk often drive persons further from care and services. These mandatory tests also violate medical norms in that testing is not provided for the health benefit of those tested, but rather for the good of others (most clearly shown in laws that mandate tests without providing for treatment of tested individuals). See also Chapter 1: Non-discrimination.

702 Committee on the Elimination of Discrimination Against Women. General Comment 24 (women and health), 5 February 1999, at [14].

703 See, for example, the reasoning of the Human Rights Committee in KL v. Peru, CCPR/C/85/D/1153/2003, decided on 17 November, 2005. Discussed in the International section of this project.

704 For examples of this, see Tysiac v. Poland, below, and KL v. Peru, op cit.

is uncontroversial. In these countries, regulation tends to fall under general policies on health insurance coverage and access to medication, and not specific policies only addressing contraceptives. Condoms and most hormonal contraceptives are easily available without discrimination based on marital status or on other grounds. In many western European nations, contraception is publicly funded under public health insurance schemes. Some countries subsidize the cost of contraception for everyone, while others limit subsidies to women of a given age or income.\textsuperscript{706} A few countries explicitly guarantee the right to access family planning methods in constitutional provisions or in statutes. Some courts in the region have addressed issues such as adolescents’ access to contraception without parental consent and the conflict between access to contraception and the religious convictions of pharmaceutical providers.

Yet in several countries in the eastern part of the European region access to hormonal contraceptives is limited, primarily for economic reasons. Many states in Central and Eastern Europe lack legal and policy frameworks that protect reproductive rights. This, among other things, allows states to exempt contraceptives from state subsidies and from public health insurance coverage.\textsuperscript{707} Therefore many women cannot afford modern family planning methods and thus their right to affordable and good-quality contraceptives is frequently violated.\textsuperscript{708}

2. Council of Europe

Jurisprudence of the European Court of Human Rights

Abortion

In Tysiac v. Poland,\textsuperscript{709} the applicant was a woman who had suffered from myopia (nearsightedness) since she was a child. Upon learning that she was pregnant for the third time, she consulted different doctors to find out whether the pregnancy would have detrimental effects on her health in general and her eyesight in particular. The doctors concluded that the pregnancy and a potential delivery constituted risks to the applicant’s eyesight but refused to issue a certificate for the pregnancy to be terminated. Under Polish law, abortion is prohibited except when the pregnant woman’s life or health is in danger, the fetus is severely malformed, or the pregnancy was a result of rape. The applicant had her baby, and her eyesight deteriorated drastically. It was determined that she needed constant care and assistance in her daily life. The applicant lodged a criminal complaint in a Polish court against one of the doctors, alleging that his refusal to authorize an abortion caused her to suffer severe bodily harm by way of almost losing her eyesight. The complaint was dismissed.

In her case before the European Court of Human Rights, the applicant submitted that her right to respect for private life and her physical and moral integrity under Article 8 had been violated both substantively – as she had been denied a therapeutic abortion – and procedurally – as Poland had not lived up to its positive obligations to provide her with a comprehensive legal framework to guarantee her rights.

The Court noted that the issue was not whether the Convention guarantees a right to abortion but rather whether Poland met its obligation under the Convention to provide actual access to abortion under the specific provisions of Polish law that allowed the procedure in certain circumstances. The Court 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 access to such abortion in practice. Furthermore, relevant procedures must ensure that women have access to information about their rights under the abortion laws and that decisions on the legality on abortion be made in a timely fashion.

Without determining whether the applicant’s health problems were sufficiently serious to qualify her for a therapeutic abortion under Polish law, the Court held that her fear of losing her eyesight was not irrational, and that the procedure leading to the conclusion that she could not terminate her pregnancy had several flaws. The Court concluded that Poland had failed to meet its positive obligation to secure the right to physical integrity arising under Article 8.


\textsuperscript{708} For a demonstration of how access to contraception is perceived as included in the right to sexual and reproductive health, see, for example, the UN Committee on Economic, Social, and Cultural Rights, in its Concluding Observations on Poland, U.N. Doc. E/C.12/1/Add.82 (2002), para 28, and its Concluding Observations on Armenia, U.N. Doc. E/C.12/1/Add.39 (1999), para 15.

\textsuperscript{709} Application no. 5410/03, decided 20 March 2007.
It is worth noting that the Court did not discuss the adequacy of the Polish law on access to abortion or whether there are rights-problems with a legal approach as restrictive as the Polish law. Nevertheless, the case has a clear impact on the issue of sexual health and rights. What was under examination was whether there was actual access to a therapeutic abortion, as provided for under Polish law and, more specifically, whether the procedure for determining whether such access should be granted complied with guarantees under the Convention. These procedures, the Court held, must provide the pregnant woman with the opportunity to question the examining doctors’ conclusion if she is in disagreement with their findings. The procedures must be timely. It is not sufficient to provide mechanisms by which the pregnant woman retroactively can bring disciplinary or criminal proceedings against the medical personnel involved. In short, the right to abortion (a consequence of sexual activity) as prescribed by law must be translated into real access for the health of the woman to be preserved.

**Domestic aftermath**

In September 2009, a Polish court awarded Ms Tysiac 7.400 euros in damages in her suit against a Catholic magazine that had compared her with a child murderer and had compared abortion to the experiments of Nazi war criminals at Auschwitz. The magazine stated that the judgment of the European Court of Human Rights compensated Ms Tysiac for wanting to kill her child. According to the Polish court in Katowice, southern Poland, Catholics have the right to express their disapproval with abortion, but they do not have the right to vilify individuals. The judge stated that the magazine had shown “contempt, hostility and malice” towards Ms Tysiac.[710]

In A, B and C v. Ireland,[711] the restrictive Irish law on abortion was challenged by three women who had traveled 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. One of the women had suffered from alcoholism, depression and poverty and considered herself unfit to take care of a baby; the other initially feared an ectopic pregnancy 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; and the third 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.

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. It also noted that the restrictive law 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 fetus 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,[712] 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 Irish law was ineffective and inappropriate. In conclusion, 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 violated.

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The A, B and C case is interesting in many ways. 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, and bears similarities with the outcome in the Tysiac case. 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 fetus 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.

In R.R. v. Poland, the Court found for the first time that the denial of abortion-related medical service could amount to degrading treatment under Article 3. The applicant was a woman who, when 18 weeks pregnant, had learnt that her fetus might suffer from a severe genetic abnormality. Abortion is allowed under Polish law in cases of fetal abnormality. However, doctors refused to make a referral for an amniocentesis, which would determine the state of the fetus. The applicant saw several doctors in different parts of the country, all of whom refused to make the relevant referral and some of whom criticized her for considering an abortion. In one hospital she was made to stay for three days while tests unrelated to her concern were conducted. When she finally managed to have an amniocentesis – after reporting to a hospital as an emergency patient, claiming to suffer a miscarriage – she was in her 23rd week of pregnancy. When she received the results of the test two weeks later – confirming that the fetus had Turner syndrome – it was too late to have a legal abortion. She gave birth to a baby with Turner syndrome. She claimed before the European Court of Human Rights that she had suffered degrading treatment under Article 3 and that her right to respect for her private life under Article 8 had been violated.

The Court agreed. It noted that the applicant repeatedly had tried to obtain access to genetic testing and for weeks had been made to believe that she would undergo necessary tests. She was sent to different doctors, several far from her home, and was even hospitalized for no clear purpose. The Court also noted that she was in an extremely vulnerable position, having to “endure weeks of painful uncertainty concerning the health of her foetus, her own and her family’s future and the prospect of raising a child suffering from an incurable ailment.” This anguish was further aggravated, according to the Court, by the fact that the diagnostic relevant services were at all times available and that she according to Polish law was entitled to them. All in all, concluding that the applicant had been “shabbily treated by the doctors dealing with her case,” the Court found that her suffering reached the level of degrading treatment, prohibited under Article 3.

In regard to the claim under Article 8, the Court repeated – referring to both Tysiac and to A, B and C – that once the decision to legally allow abortion in certain situations had been taken, there had to be a coherent framework in place to guarantee the practical access to the relevant health services. In particular, there had to be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the health of the fetus be made available to the pregnant woman. It reiterated that the Convention is intended to “guarantee not rights that are theoretical and illusory but rights that are practical and effective.” In this case, by failing to provide timely access to prenatal testing as guaranteed under Polish law, the Polish state had breached its positive obligations under Article 8.

The finding that humiliations suffered by a woman when denied abortion-related services may amount to degrading treatment under Article 3 is hugely important from a health and rights point of view. In addition, in its discussion on claimed violations under Article 8, the Court made an important remark. Discussing the right of physicians to refuse certain services on grounds of conscience, the Court stated that States are obliged to “organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals […] does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.” As references to a right to so-called conscientious objection in the abortion context are becoming increasingly common in Europe, this statement has great importance for the sexual health and rights of women in the region.

713 Application no. 27617/04, decided on 26 May 2011.
Finally, it is worth noting that the applicant in the 2004 case *Vo v. France*[^714] requested that the Court hold that Article 2, the right to life, protects the life of the unborn. While the Court declined to do so, it did not hold that the Convention does *not* protect the life of the fetus.

**Contraceptives**

In *Pichon and Sajous v. France*[^715] the Court considered the case of two pharmacy owners who on religious grounds refused to provide doctor-prescribed contraceptives to several women. They were subsequently found guilty of violating France’s Consumer Code, which stated that it was prohibited to refuse to sell a product or provide a service to a customer for no legitimate reason.

The pharmacists contended that their rights to freedom of thought, conscience, and religion under Article 9 of the Convention had been violated. Thus, the case addressed the well-known issue concerning ‘conscience clauses:’ the conflict between respect for medical providers’ individual religious beliefs and respect for patients’ beliefs and health. The Court stated that the protection of freedom of religion in Article 9 “does not always guarantee the right to behave in public in a manner governed by that belief.” It noted that the sale of contraceptives was legal and occurred on medical prescription nowhere other than in a pharmacy. Taking these facts into account, “the applicants [could not] give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they [could] manifest those beliefs in many ways outside the professional sphere.” Thus, the application was declared inadmissible.

### 3. European Union

While the European Court of Justice has determined that abortion services are medical activities that qualify as ‘services’ under the EC Treaty, it has also found that it is not contrary to Community law in a state where abortion is illegal to prohibit the distribution of information about where to obtain this service when the information providers are not directly linked to the overseas clinics.[^716] The issue of access to contraceptives or abortion as a health and rights issue falls outside of the scope of binding EU law.

### 4. Regional non-binding material

Both the Parliamentary Assembly of the Council of Europe and the European Parliament of the EU have called for the liberalization of abortion. In *Resolution 1607 (2008), Access to safe and legal abortions in Europe*,[^717] the Parliamentary Assembly calls on Council of Europe member states to decriminalize abortion within reasonable gestational limits, to guarantee women’s effective right to access safe and legal abortions, and to lift restrictions that hinder, *de jure* and *de facto*, access to safe abortions. Its EU counterpart, in the *European Parliament resolution on sexual and reproductive health and rights*,[^718] recommends that, “in order to safeguard women’s reproductive health and rights, abortion should be made legal, safe and accessible to all,” and that member states should refrain from prosecuting women who have undergone illegal abortions. Furthermore, the European Parliament calls upon the member states to provide sexual and reproductive health services that include high quality advice and counselling adapted to the needs of specific groups, such as immigrants. Addressing contraceptives specifically, the Parliament urges governments to strive to provide contraceptives free of charge or at low cost for “underserved groups” such as young people, ethnic minorities, and the socially excluded and to ensure that people living in poverty have better access to contraception and other means to prevent sexually transmitted diseases. The resolution also recommends that member states and candidate countries facilitate access to affordable emergency contraception.

### 5. Domestic legislation and case law

#### Abortion

In Slovenia the right to reproductive choice is recognized constitutionally. The *Slovenian Constitution* sets forth:

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[^714]: Application no. 53924/00, decided on 8 July 2004. This case is not discussed in detail here because it focuses on the potential right to life of the fetus rather than on health service-related issues.


[^717]: Adopted on 16 April 2008.

[^718]: 2001/2128 (INI), adopted 3 July 2002.
Article 55 (Freedom of Choice in Childbearing)

(1) Everyone shall be free to decide whether to bear children.

(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.\textsuperscript{719}

This right is regulated in a provision in the Slovenian Law of 20 April 1977 on medical measures to implement the right to a free decision regarding the birth of children,\textsuperscript{720} which provides that abortion is available on request during the first ten weeks of pregnancy (Art 17). Abortion is free under the country’s health care system. After the first ten weeks, abortion is permitted “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). Slovenia does require parental authorization when the pregnant person is a minor.\textsuperscript{721}

In the Netherlands, abortion is regulated in the Law on the termination of pregnancy of 1 May 1981 and the Decree of 17 May 1984 laying down provisions for the implementation of the Law on the termination of pregnancy.\textsuperscript{722} Abortion is permitted on request of the pregnant woman at virtually any time between implantation and viability, if performed by a physician in a clinic licensed to perform the procedure. Hospitals that carry out abortions after 13 weeks of pregnancy must meet special requirements and must have received special approval (Section 6(2) of the Law, Chapter 4 of the Decree). Termination of a pregnancy when the fetus “may reasonably be assumed to be capable of remaining alive outside the mother’s body” is a crime according to the Dutch Penal Code (Section 82a). According to reports, fetal viability is set at 24 weeks, but abortions are rarely performed after 22 weeks.\textsuperscript{723} Parental or guardian consent is required for girls under 16 seeking abortion.\textsuperscript{724}

Abortions may only be performed by physicians in a licensed hospital or clinic (Section 2 of the Law). A woman seeking an abortion must consult a physician, who is obliged to assess whether the woman has made the decision to terminate her pregnancy freely (Section 5(2)(b) of the Law). After the consultation, the woman has to wait six days before the termination of her pregnancy can be performed (Section 3(1) of the Law). Following the termination of the pregnancy, the law proscribes that the woman and those nearest to her “have access to adequate aftercare, including information regarding methods of preventing unwanted pregnancies” (Section 5(2)(d) of the Law). Furthermore, the clinic where the procedure is performed shall ensure that the privacy of the woman be respected to the extent possible, that she be “treated as a mature person,” and that rules are adopted governing the independent hearing of complaints from her (Section 16 of the Decree). Abortion costs are reimbursed by the national health insurance.\textsuperscript{725}

In France, the Law No. 2001-588 on Voluntary Interruption of Pregnancy and on Contraception\textsuperscript{726} regulates abortion. Since 2001, abortion is available during the first twelve weeks if the woman is in a “state of distress” (Art L2212-1). It is the woman herself who determines whether this criterion is fulfilled, such that abortion in practice is available on request during the first trimester. The pregnant woman must consult with a doctor before the procedure, and it is also recommended that she consult with an appropriate family or social counselor (Art L2212-4). If she is a minor, the consultation with a family or social counselor is obligatory. However, interestingly, if the minor wishes to keep the termination of her pregnancy secret from her family, the law permits this if she is accompanied by another adult of her choosing (Art L2212-4 and L2212-7). The law also states that post-abortion counselling on contraceptives should be proposed to minors (Art L2212-7).

At any point after the first twelve weeks, the pregnancy can be interrupted if two physicians confirm that the woman’s health is endangered or that the fetus has a serious abnormality (Art L2213-1).

The costs for abortion are 80 percent covered by public health insurance. Women under 18 or living

\textsuperscript{719} Official translation.
\textsuperscript{720} Excerpts available in unofficial translation.
\textsuperscript{722} Both available in unofficial translation.
\textsuperscript{723} International Planned Parenthood Federation, Abortion Legislation in Europe, January 2007, p. 45.
\textsuperscript{724} Ibid.
\textsuperscript{725} Ibid.
\textsuperscript{726} Incorporated in the Public Health Code, not available in English translation.
in conditions of poverty can receive a 100 percent reimbursement.727

In **Albania**, Law No. 8045 of 7 December 1995 on the interruption of pregnancy728 came into force in 1995. Article 10 states that “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. Abortion is available until the twenty-second week of pregnancy when the pregnancy is the result of a rape or other sexual crime, or when “other social reasons” are present. 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 (Art 9). Parental authorization for unmarried girls under 16 is required.

The **German** Constitutional Court held as early as 1975 that while the fetus’s right to life was protected under the German Constitution, abortion had to be permitted where the pregnancy would seriously compromise the fundamental interests of the woman.729 The Court declared that when the “right to life and bodily inviolability” of the woman was at stake, she could not be expected to sacrifice these for the unborn life. This was the case, for instance, when there was a “danger to her life or the danger of a serious impairment to the condition of her health.” It also held that the legislature was free to legalize the interruption of pregnancy in the case of “other extraordinary burdens for the pregnant woman” of similar seriousness.730 However, abortion legislation has been the subject of significant controversy and political debate. Termination of pregnancy is unlawful under Section 218 of the Penal Code,731 subject to certain exemptions, last revised in 1995. Exemption is granted in cases of abortion on request within 12 weeks of conception, subject to the pregnant woman receiving counselling at least three days before the procedure. According to Section 219, the aim of the counselling should be to protect the right to life of the unborn child and encourage the woman to continue with the pregnancy. Termination is lawful up to 12 weeks in the case of rape, and on medical grounds when the life, physical or mental health of the woman is threatened (there is no specified time limit to this exception).732

**Contraceptives**

**Belgium’s** Constitutional Court, in the 2006 case Merck, Sharp and Dohme BV v. Belgium,733 examined pharmaceutical pricing statutes and addressed policies for state subsidized drugs. The Court noted that drugs could be added to the list of reimbursed medicines to meet a public health goal, and the reduction of unwanted pregnancies was found to be such a public health goal. Thus, contraceptives, for public health reasons, constitute a type of drug that must be made accessible to the public at an affordable price.

**Portugal’s** constitution explicitly guarantees a right to family planning. The state has a duty to protect the family as provided in Article 67 of the constitution, which includes the following:

> With respect for individual freedom, guaranteeing the right to family planning by promoting the information and access to the methods and means required therefore, and organising such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned. (Art 67.2 (d))734

Portugal has implemented this guarantee through Law 120/99,735 which requires primary and secondary schools to teach students about human sexuality, including AIDS and other sexually transmitted diseases, contraceptive methods, and gender equality. That law also states that condoms will be available at schools through vending machines because of the importance of condoms in preventing AIDS and other STIs.736 As for adults, Decree 259/2000 requires all hospitals within Portugal’s national health service that provide obstetric or gynecological care to also offer family planning counselling.737

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728 Available in unofficial translation.
730 Ibid., at 648.
731 Available at http://www.iuscomp.org/bqla/statutes/StGB.htm#218. Last accessed 3 August 2011.
733 Constitutional Court, case 150/2006, 11 October 2006. Only available in French.
735 Law 120/1999, Strengthening the Guarantee of Access to Reproductive Health (11 August 1999), Art 2.1. Only available in Portuguese. For more about legal provisions on sexuality education in Portugal, see Chapter 7A. Sexual education and information.
736 Ibid. at Art. 3.2.
Furthermore, hospitals must ensure the free distribution of contraception.\textsuperscript{738}

In the United Kingdom, case law has established that it is lawful for doctors to provide contraceptive advice and treatment to minors without parental consent, provided certain criteria are met. This policy was laid out in Gillick v. West Norfolk and Wisbech Area Health Authority in 1985.\textsuperscript{739} The criteria specified by the judge – that have come to be known as the Fraser Guidelines – are also considered applicable to abortion.\textsuperscript{740} According to these guidelines, it is lawful for doctors to provide contraceptives and other treatment without parental consent if, inter alia, the health professional is satisfied that the young person will understand the professional's advice, cannot be persuaded to inform his or her parents, and that it is in his or her best interest to be given contraceptive advice or treatment with or without parental consent.\textsuperscript{741}

In 2002, the issue of emergency contraception was brought to the attention of the England and Wales Court of Justice. In Smeaton v. Secretary of State for Health,\textsuperscript{742} the Society for the Protection of Unborn Children [SPUC] challenged a government decision to reclassify a particular emergency contraceptive (the so-called morning after-pill) as a drug that could be sold without a doctor's prescription. SPUC claimed that the drug in question was an abortafacient, arguing that anything that might prevent a fertilized egg from implanting was equivalent to abortion – even though emergency contraception cannot end a pregnancy if a fertilized egg is already implanted in the womb. Because the provision of emergency contraception did not meet the statutory requirements for legal abortion, SPUC argued, it was criminal.

Taking pains to point out that, “[i]t is no part of my function as I conceive it to determine the point at which life begins,” and that it was not the job of the court to concern itself with religious or moral issues, the judge noted that SPUC’s argument, if taken to its logical conclusion, could call into question the lawfulness of all hormonal contraception and intra-uterine devices, both of which had been in popular use in the UK for about 50 years.\textsuperscript{743} The Court found that the drug in question was a contraceptive, not a form of abortion, and allowed the government's over-the-counter policy to proceed.

As mentioned, however, there are also troubling trends regarding access to contraceptives in the European region, in particular in its central and eastern parts. For example, in Slovakia – an economically prosperous country that is an EU member and part of the Euro zone – hormonal contraceptives are not covered by the obligatory public health insurance scheme, requiring women to pay for these drugs out of pocket.\textsuperscript{744} This policy clearly contradicts and undermines the Slovak abortion law, according to which unintended pregnancies should be prevented and which, for this reason, requires that prescription contraceptives be provided free of charge.\textsuperscript{745} Similarly, in Poland, the number of state-refundable oral contraceptives was recently reduced, which has severely limited their availability in that country.\textsuperscript{746} This decision to withdraw funding for modern family planning methods has been criticized by several human rights bodies.\textsuperscript{747}

As discussed by the European Court of Human Rights in Pichon (above), pharmaceutical providers may object to the sale of contraceptives on religious or moral grounds. In some countries, such

\textsuperscript{738} Ibid. at Art 6.3.

\textsuperscript{739} House of Lords [1985] 3 All ER 402, decided on 17 October 1985.

\textsuperscript{740} The guidelines are available at http://tsgcr2ta.notsec.qcv.uk/apps/pr/diary/memdiary.nsf/0/FBTD9F429A5FCD95802573D90

\textsuperscript{741} See also Chapter 7A: Sexual education and information.

\textsuperscript{742} [2002] EWHC 610 (Admin), decided on 18 April 2002.

\textsuperscript{743} Paras 54–72.


‘conscience clauses’ have been codified in law. **Poland**, for instance, allows physicians to withheld services contrary to their consciences, but they must document the patient’s opportunities to obtain treatment elsewhere.\textsuperscript{748} According to commentaries, in practice, that requirement is frequently unfulfilled.\textsuperscript{749} This raises sexual health concerns because individual physicians may effectively be able to successfully prevent their patients from accessing desired health care.

### 6. Concluding remarks

Abortion policies still vary across Europe, but since the 1970s there has been a strong trend in the region to liberalize abortion. In a few small European countries, abortion is completely prohibited (Malta, Andorra, and San Marino). Other countries have varying degrees of restrictions with regard to access to service. Some permit abortion only to save the woman’s life (Ireland), while others also permit abortion to preserve her physical health (Poland), and her mental health (Spain, Israel). Some countries also permit abortion for socio-economic reasons (United Kingdom, Cyprus, Finland, Iceland).\textsuperscript{750} Many countries that have restrictive laws make exceptions for pregnancies that are the result of rape or incest, though it is well-known that in practice it may be difficult to access an abortion in such cases.\textsuperscript{751}

However, in most European countries abortion is now available without restriction during the first period of pregnancy. Gestational limits for free access to abortion vary between ten and 24 weeks, and there are also differences with regard to whether parental notification for minors is required.\textsuperscript{752} The accessibility of abortion services in practice is also affected by whether abortion falls under national health insurance coverage.

Several courts have struck a balance between the rights of the pregnant woman and the state’s interest in protecting potential life, reaching the conclusion that the fundamental protection of the rights of the woman requires that abortion be legal when certain minimum conditions exist.\textsuperscript{753} With regard to access to health care and the right to health in relation to abortion, there are early examples, including from Germany. The European Court of Human Rights clarified in \textit{Tysiac} (2007) that states’ obligations under the Convention require them to make legal norms that allow for abortion under certain circumstances – albeit restrictively – also available in practice, with due regard and respect to the opinions and feelings of the pregnant woman.

Contraception policies in many countries in the region are permissive and well in line with international standards for access to sexual health care without discrimination. In those countries, public funding for contraceptives tends to be available, which underlines the recognition that access to family planning methods has a clear public health value – as also made explicit by the Belgian Constitutional Court. British case law has established that, under certain circumstances, adolescents should be able to access contraceptives even without parental consent. In other countries, however, including Slovakia, hormonal contraceptives are excluded from public health insurance coverage, and in many Central and Eastern European states there are no state subsidies at all for such drugs. Thus the access in practice to safe and modern family planning methods is clearly limited in these countries, which is problematic from a health and rights point of view and which has been criticized repeatedly by UN human rights bodies. The European Court of Human Rights has hardly addressed issues surrounding access to contraceptives. It has, however, indirectly pointed to the importance of easily accessible

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\textsuperscript{748} According to Joanna Z. Misztal, “Matters of ‘Conscience’: The Politics of Reproductive Healthcare in Poland.” Medical Anthropology Quarterly, v. 23 no. 2 (June 2009), at p. 169, and in Federation for Women and Family Planning et al., Report to the UN Human Rights Committee in Connection with the 6th Period Review of Poland.” (July 2009) [discussing The Act of the medical doctor profession and the dentist profession of 5th of December 1996 – unified text. Journal of Laws No 226, item 1943, as amended.] The FWFP’s Report translates Article 39 of the Act as: “the doctor may abstain from accomplishing medical services discordant with his/her conscience, (…) nevertheless s/he is obliged to indicate real possibilities of obtaining the service from another doctor, or in another medical institution and justify his/her decision and mention about the refusal in the medical documentation.” FWFP, at p. 3.

\textsuperscript{749} Ibid in and Misztal at 163–172.


\textsuperscript{753} These include courts in Italy, Germany, Spain, and France. See Amicus Brief prepared by the Center for Constitutional Rights, The Lowenstein International Human Rights Clinic at Yale Law School, Red Alas, and Gómez-Pinzón, Linares, Samper, Suárez, Villamí Abogados S.A. presented before the Colombia Constitutional Court, Case No. DS764, May 2005, available at \textit{http://reproductiverights.org/sites/crr.civicrmactions.net/documents/BriefColombia_English_0605_FINAL.pdf}. Last visited on 20 December 2009.
family planning methods, when it, in Pichon, dismissed the application that alleged that the obligation to provide such drugs violated the right to freedom of religion. Furthermore, its more explicit recent statement on the need to regulate health professionals’ right to conscientious objection, in R.R v. Poland, may also have bearing on access to contraceptives in the region – even though that decision addressed access to abortion-related services and not contraceptives.

B. ACCESS TO STI AND HIV/AIDS SERVICES

1. Introduction

Access, both financially and logistically, to services and treatment for HIV and other sexually transmitted infections (STIs) has obvious bearings on sexual health, as noted above. Most European nations have publicly funded health insurance schemes, under which HIV/STI prevention and treatment generally fall. Therefore, most residents in European countries have at least formal access to such treatment, to the same extent that they can access other health services. However, there are individuals who fall outside of such schemes, or persons who have difficulty accessing such services in practice. This chapter will highlight two such groups: detainees/prisoners and migrants, whether undocumented or asylum seekers.

The European Court of Human Rights has addressed the accessibility of HIV treatment in prison in a few cases, in particular in former Soviet Republics where HIV prevalence is high, and has highlighted the states’ obligation to provide treatment to this group under the right not to suffer inhuman treatment or punishment (Article 3). In several cases and with mixed conclusions, the Court also has addressed the right of HIV positive immigrants to obtain asylum or residence on humanitarian grounds in Europe based on lack of adequate treatment in their home countries.

Domestically, migrants who are either undocumented or whose status has not yet been formalized often fall outside of health insurance schemes. Therefore, in the region there is a particular need to monitor access to HIV/STI services for migrants. Lack of resident status and health insurance, as well as schemes that charge fees based upon insurance status, are among the main factors that deprive migrants of access to HIV/STI treatment. Even when undocumented migrants are formally entitled to treatment, they are often reluctant to contact official health agencies, as doing so increases the likelihood of police investigations, expulsion, or deportation.

Generally, it has been difficult to find legal standards and jurisprudence specifically targeting the right to HIV/STI services in Europe, because these services tend not to be regulated separately, and/or many issues that have bearing on practical access to HIV/STI services tend to be regulated by local policies. Thus, the following will provide a few examples gleaned from the wide array of regulations on (sexual) health care in Europe, only to highlight a few issues that may have a particular impact on sexual health.

2. Council of Europe

Jurisprudence of the European Court of Human Rights

In several cases, the European Court of Human Rights has examined the right to adequate medical care for HIV positive persons who are held in detention. While in the individual cases, transmission may have taken place as a result of intravenous drug use and not through sexual interactions, these cases are still relevant from a sexual health point of view. HIV/AIDS is often linked (in reality but even more in public perception) to sexual behaviour, and the stigma attached to HIV/AIDS, regardless of mode of transmission, can clearly be traced to its supposed links with sexuality and with groups that are perceived to engage in non-conforming sexual activities.

In Yakovenko v. Ukraine, the applicant was an HIV positive man who had spent about one year in pre-trial detention on suspicion of burglary. He also suffered from tuberculosis. He argued that his ill-treatment while in police custody, the inhuman conditions of detention, and the lack of medical assistance violated Article 3 of the Convention. With regard to the latter claim, the Court noted that prison authorities did not take any urgent medical measures upon learning that the applicant was HIV positive. He was not brought before an infectious diseases doctor for treatment, nor was he monitored for any other infectious diseases. He was transferred each month to a different prison facility in another town for ten days, and information about his HIV condition appeared not to have been shared with the staff of the other facility. There was no medical

755 Other cases where the Court examined similar claims are Khudobin v. Russia (application no. 59696/00, decided on 26 October 2006), and Aleksanyan v. Russia (application no. 46468/06, decided on 22 December 2008).
practitioner at the staff of the second facility. The applicant did not receive appropriate treatment until he was admitted to a local AIDS center three months after his condition had been discovered.

The Court reaffirmed its earlier case law, stating that inadequate health care while in detention may amount to ill-treatment violating Article 3 of the Convention. In the present case, it concluded that the authorities had failed to provide timely and appropriate medical assistance to the applicant in connection with his HIV and tuberculosis infections. This failure amounted to inhuman and degrading treatment under Article 3.

In D. v. United Kingdom, the applicant was a citizen of St. Kitts, who was imprisoned in the United Kingdom for drug possession. While in prison he was found to be HIV positive. After his release, he was to be deported from the UK and returned to St. Kitts. He challenged the decision to deport him, claiming that his forced return would expose him to inhuman and degrading treatment in violation of Article 3 of the Convention because in St. Kitts he would have no access to health care or adequate treatment. He would suffer homelessness, lack of proper diet, and poor sanitation, which would expose him to opportunistic infections. Hospital facilities on the island were also severely limited. These circumstances would dramatically hasten his death.

At the time of the Court’s deliberation, the applicant was in advanced stages of AIDS. The Court found that the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment under Article 3. It reached this conclusion even though the deterioration of his health would stem from factors that “cannot engage either directly or indirectly the responsibility of the public authorities of [St. Kitts] or which, taken alone, do not in themselves infringe the standards of [Article 3].” In other words, the Court ascribed responsibility for the man’s well-being to the country where he was present – the UK – and found this responsibility so serious that deporting him to St. Kitts would amount to inhuman treatment and infringement of Article 3. However, the Court stressed that it was the exceptional individual circumstances in the case that led it to this conclusion:

[The Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison.]

However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3. (para 54)

The Court in its later jurisprudence has maintained that there is a very high bar for finding a violation of Article 3 following the expulsion of an HIV infected person to a country where he or she cannot expect the same level of treatment as in the host country. In a number of cases, the Court has assessed claims similar to those of D., but in no other case has it found that the host country would violate Article 3 following forced deportation. The main distinguishing factors from D. v. United Kingdom have been that the applicants in the later cases have not been as critically ill as D. and that they have not been able to show that no treatment would be available to them upon return to their countries of origin.

European Social Charter and the European Committee of Social Rights

Article 11 of the European Social Charter guarantees the right to protection of health:

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

1. to remove as far as possible the causes of ill-health;

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

3. to prevent as far as possible epidemic, endemic and other diseases.

756 See İhan v. Turkey, Grand Chamber, application no. 22277/93, § 87, and Sarban v. Moldova, application no. 3456/05, § 90.


758 See Karara v. Finland (no. 40900/98, Commission decision of 29 May 1999, S.C.C. v. Sweden (application no. 46553/99, Court decision of 15 February 2000), Arcila Henao v. The Netherlands (application no. 13669/03, Court decision of 24 June 2003), Ndangoya v. Sweden (application no. 17868/03, Court decision of 22 June 2004), Amegnigan v. the Netherlands (application no. 25629/04, Court decision of 25 November 2004), and N. v. United Kingdom (application no. 26565/05, Court decision of 27 May 2008).

759 This article has the same wording in both versions of the Charter.
To date, the European Committee of Social Rights has not addressed the issue of HIV/STI treatment under Article 11 in any of its decisions on the merits, but it has highlighted in one of its country conclusions that states must arrange for special treatment of AIDS patients.\footnote{Conclusions XVII-2, Latvia, p. 504 (2004).}

3. European Union

The issue of access to STI/HIV health services falls outside of the scope of binding EU law.

4. Domestic legislation, policy, and case law

Residents in the Netherlands are legally obliged to take out health insurance for themselves and their dependents.\footnote{Ministry of Health, Welfare, and Sport, "Obligatory Health Insurance" (March 2008), available at http://www.minvws.nl/en/folders/z/2008/obligatory-health-insurance1.asp. Last visited on 29 December 2009.} Health insurance companies cannot refuse to cover individuals for the standard insurance package, regardless of the applicant’s age or state of health; however, the amount of contribution required may vary.\footnote{Ibid.} Those whose income falls under a minimum level are entitled to a health care allowance to assist in paying part of the contribution.\footnote{Ibid.}

All citizens have access to municipal public services for preventative care, including care for infectious diseases. Hospitals must provide basic health care in emergencies; additional care is available upon the discretion of the medical staff.\footnote{Ibid} Temporary residence permits are available for undocumented people who suffer an acute medical situation, defined as a condition where lack of access to treatment in the country of origin would result in death within three months or severe physical or psychological damage.\footnote{Ibid}


A recent policy letter on sexual health from the Dutch minister of Health clarifies that relevant sources in interpreting the Netherlands’ STI and HIV/AIDS policies are (1) the UNGASS Declaration of Commitment on HIV/AIDS (2001), by which the Netherlands pledged to pursue an integrated policy on HIV/AIDS and endorsed the principle that people living with HIV/AIDS should be involved in the design of the policy and implementation; (2) the Dublin Declaration on Partnership to Fight HIV/AIDS in Europe and Central Asia (2004); and (3) the Political Declaration (2006), which commits the country (with other UN nations) to universal access to comprehensive prevention, treatment, care, and support.\footnote{According to the Dutch Minister of Health, Welfare and Sport in a Parliamentary document: Policy letter – Sexual Health, to the President of the House of Representatives, 27 November, 2009. PG/CI-2965226, p. 7. Available at http://english.minvws.nl/en/kamerstukken/pg/2010/sexual-health.asp. Last visited on 29 April 2010.}

Curative care for STIs is provided by general practitioners, dermatologists, and venerologists; there are also six government-funded STI clinics in four large urban areas and STI clinics at municipal health departments.\footnote{461 Decree of 27 October 2009, laying down new requirements regarding public health matters (Public Health Decree). Available in official translation to English.} The Minister of Health funds a programme for the rapid detection and treatment of...
STIs among high-risk groups, who can receive free, anonymous testing for STIs and HIV and get treatment, if necessary.771 Such care is supplementary to that provided by the general practitioner and is funded from the budget of the Ministry of Health, Welfare and Sport. Furthermore, on 1 January 2010 the Minister of Health introduced a uniform HIV testing policy with the goal of combating the stigmatization of people living with HIV by making testing “a routine affair.” The policy provides that every client of municipal health services throughout the Netherlands will be given a routine HIV test, with the possibility of opting out.772

Uninsured people and those without a residence permit are entitled to “medically necessary care,” as described in the National Health Insurance Act (ZFW) and the Exceptional Medical Expenses Compensation Act (ZEW).773 All care in relation to HIV, AIDS and other STIs is deemed medically necessary.774 The Dutch organization AIDS Fonds indicates that uninsured people and those without residence permits can always get tested for HIV and that the results of these tests do not affect asylum or residency permits.775 Some specialty clinics provide free HIV treatment and support to HIV positive persons, regardless of their legal status. Further, some university hospitals offer confidential (albeit not anonymous) treatment even though this is not part of an official policy or programme; rather, the scope of treatment depends on the discretion of the health care provider.776 Because such treatment does not include other services, such as counselling or referral to specialized clinics, there is often a substantial lag time between diagnosis and actual treatment.777 However, rapid tests are increasingly available, particularly in Amsterdam, and promise to improve access to testing.

In the United Kingdom, citizens, asylum applicants, and those who have been lawfully living in the UK for 12 months are entitled to free treatment by the National Health Service (NHS). Medical treatment for emergencies is always free for all people, including for undocumented migrants. Treatment for certain STIs and infectious diseases is also free. HIV testing, diagnosis, and initial counselling sessions are free for all, but additional HIV treatment and hospital care are chargeable for those who do not meet the criteria for free NHS services. Undocumented persons, those whose asylum appeal has had a final refusal and are waiting for deportation, individuals on visitor visas, and overstayers may be charged for HIV treatment.778

The rights of HIV positive people in the UK to access health services are protected by the Disability Discrimination Act (DDA) of 2005.779 The Act makes it illegal to discriminate against people with HIV, from the point of diagnosis, in health care, employment, education, and the delivery of other goods and services. For example, it is unlawful for service providers to refuse to provide services to HIV positive persons, to provide a lower standard of service or to prove it on worse terms. The Act fundamentally altered the approach of earlier anti-discrimination legislation by placing positive duties and responsibilities on public bodies to promote equality for disabled people, removing the burden of seeking legal recourse from disabled individuals.

In 2009, the British government published the NHS Constitution, which guarantees the rights of patients.780 Access to NHS service is based on clinical need and free of charge, except in limited conditions sanctioned by the parliament. In determining what treatment a patient should receive, British law prohibits health and social care providers from discriminating unlawfully on grounds of

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771 “High-risk groups” include for people who “1) belong to social sub-groups with an increased risk of STI; 2) have already received a warning about STI from the services that trace sources and contacts; 3) have symptoms characteristic of STI; 4) are 25 years old or younger or; 5) wish to undergo an anonymous test.” See Dutch Minister of Health, Welfare and Sport in a Parliamentary document: Policy letter – Sexual Health, to the President of the House of Representatives, 27 November, 2009. PQ/CW-2965226, p. 15. Available at http://english.minvws.nl/en/kamerstukken/pq2010/sexual-health.asp. Last visited on 29 April 2010.

772 Dutch Minister of Health Policy letter, pp. 26–27.

773 “A Delicate Balance,” at 63.

774 Ibid. at 62.


777 TAMPEP, 108.


race, sex, disability, gender identity, religion, belief, or sexual orientation. The NHS Constitution guarantees patients the “right to be treated with dignity and respect” in accordance with human rights standards and mandates that service providers adhere to equality and human rights legislation. Finally, the NHS Constitution also sets out patients’ rights to complaint and redress, including the right to make a claim for judicial review if a patient believes she or he has been directly affected by an unlawful act or decision of an NHS body.

Case law: ensuring non-discriminatory health services for HIV positive individuals

The Disability Discrimination Act was recently used to challenge discrimination against an HIV positive person by a National Health Service trust in Northern Ireland. According to news reports, the staff at a Northern Irish hospital refused to perform an endoscopy on a HIV positive man even though the hospital had the facilities and appropriate procedures in place to do so. The NHS trust informed the claimant in a letter that the treatment had been denied him on the basis of his HIV status. The claimant had to wait four months for an alternative form of examination and suffered substantial anxiety and distress because of the delay.

Thought to be the first case in which the Disability Discrimination Act has been invoked to challenge discrimination against an HIV positive person accessing health care services, the Equality Commission for Northern Ireland supported the patient’s case challenging the discriminatory treatment he received from the hospital. The NHS trust settled the case in April 2009, giving the claimant £4,000 and issuing an apology for denying him the care to which he was entitled and the distress he experienced as a result. The trust also agreed to review policies related to the provision of services for HIV patients.

The Moldovan Law on Prevention and Control of HIV/AIDS (2007) addresses the issue of right to prevention of and treatment for HIV/AIDS and has incorporated a clear rights-approach. Citizens, foreign citizens, and stateless persons who live or temporarily reside in Moldova have the right to a free, anonymous medical test to determine HIV status (Art 11). The law allows “immigrants, emigrants, refugees and asylum seekers [the] benefit of [anti-retroviral treatment] and treatment of opportunistic infections according to the legislation in force” (Art 10(3)). The law does not identify the laws that govern these categories of non-nationals or specify whether undocumented migrants are included in this group. According to Article 19(1), “the state shall ensure universal access of all persons living with HIV to [anti-retroviral] treatment and treatment of opportunistic infections free of charge through the National Programme on Prevention and Control of HIV/AIDS and STIs.” The law also prohibits discrimination of HIV positive persons in the health care setting, namely: “each individual shall have access to medical services, regardless of perceived or actual HIV status” (Art 25 (1)), and no health institutions “shall deny access to health care services to persons living with HIV or those perceived or suspected to be HIV infected, nor charge the said persons higher fee” (Art 25 (2)).

All HIV tests require written voluntary and informed consent, and mandatory testing is prohibited; for minors, both the child and parents or legal guardians must provide written informed consent (Art 13). All HIV tests and diagnoses are confidential (Art 14), although HIV infected individuals are required to disclose their status to spouses or sexual partners.

5. Concluding remarks

It is difficult to draw any general conclusions about European approaches to HIV/STI treatment for the reasons noted above (lack of specific regulations, policy- rather than law-regulated, local variations, etc.). Sufficient to conclude here that the jurisprudence of the European Court of Human Rights, as well as the Dutch and British regimes, indicate that the application of human rights norms to the treatment of sexually transmitted infections, including HIV/AIDS, is an approach that is gaining recognition in the region. The European Court concluded both in Yakovenko and in D, that failure to provide treatment for HIV/AIDS can amount to inhuman treatment under the Convention; thus placing the positive duties of the state to protect and promote the right to health on par with the fundamental obligation not...
to subject a person to maltreatment. In the United Kingdom, both the Disability Discrimination Act and the NHS Constitution have clear rights-based approaches to state responses to ill-health. This is particularly important in regard to sexually transmitted infections and HIV/AIDS, given the social stigma that tends to accompany such conditions precisely due to their (perceived) relation to sexuality and non-conforming sexual behaviour. The Northern Irish case shows that the British regulations also have teeth – that the guarantees to non-discriminatory treatment can be enforced and, when violated, can lead both to sanctions against the wrongdoer and to a revision of practices. In Moldova, the universal right to treatment for persons living with HIV and AIDS has been guaranteed in law, which, in combination with the same law’s prohibition of discrimination against HIV positive persons, provides significant legal protection for members of this group.

As pointed out above, undocumented migrants are particularly vulnerable to violations of their rights to sexual health services in Europe due to their illegal status and lack of health insurance and/or difficulties in practical opportunities to access care. The Netherlands, Moldova, and to some extent the United Kingdom attempt to tackle the rights-related problems that arise when this group suffers from serious health conditions, such as from HIV/AIDS. The Netherlands appears to have established a regime where migrants can access health services regardless of their legal status, at least theoretically with the guarantee that coming forward for (sexual) health reasons will not attract the attention of immigration authorities or the police. The Moldovan law acknowledges the specific need of treatment for migrants and refugees, while not clearly stating what services and protection they can expect in practice. However, it should be reiterated that regardless of legal guarantees, the practice can be very different, and the very fear of being subjected to deportation may impede undocumented migrants from seeking treatment, regardless of whether medical confidentiality will in fact be respected by the health provider. One big obstacle to real access to qualitative and non-discriminatory care is also lack of trustworthy information. By the very nature of living ‘underground,’ it is difficult for undocumented migrants to access information in relevant languages about services and treatment. Needless to say, these problems must be tackled by a wider approach than by legal means alone.
VII. EDUCATION, INFORMATION, AND EXPRESSION RELATED TO SEX AND SEXUALITY

A. SEXUALITY EDUCATION AND INFORMATION

1. Introduction

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

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

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

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

786 Drawn in part from general WHO chapeau text elaborated by Alice M. Miller and Carole S. Vance.
787 See, inter alia, Article 26 of the UDHR, Articles 28 and 29 of the CRC, and Articles 13 and 14 of the CESCR. The Committee on Economic, Social and Cultural Rights, General Comment 13 (Right to education), UN Doc. E/C.12/1999/10 (1999), stresses that “education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence”. According to the Committee, “education in all its forms and at all levels shall exhibit the following interrelated and essential features: a) availability; b) accessibility; c) acceptability; and d) adaptability.”
788 See, inter alia, Article 19 of the UDHR, Article 19 of the ICCPR, and Article 10 of the ECHR.
789 See in particular CEDAW, CRC and CESCR.
rights-based approach to sexuality education requires the participation and contributions of young people, particularly adolescents and young adults.\textsuperscript{790} Sexuality education and comprehensive access to sexual information contribute to health through promoting individuals’ ability to have preferences for, and act on, decisions that protect their health, as well as determine the number and spacing of children. Sexuality education and information are also essential to each person’s ability to develop themselves and their sense of self-worth, particularly in regard to any decision regarding their sexual and gender identity and sexual behaviour as an aspect of their personhood.

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

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

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

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

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

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\textsuperscript{790} See CRC General Comments.

\textsuperscript{791} CRC, General Comments 3 and 4

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

\textsuperscript{793} See, e.g., the American Convention on Human Rights.
that adolescents in particular require access to information and education about sexuality, in order to protect their sexual health as well as permit them to share the benefits of scientific progress and participate in their communities and culture. Information about sexuality and sexual health is also important to the development and expression of adolescents’ full personality without discrimination. Reasonable time, manner and place restrictions may be allowed to inhibit accidental viewing of age-inappropriate material with sexual content by minors, but assumptions of hypothetical harm of incitement to sexual activity are disallowed.

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

2. Council of Europe

**Jurisprudence of the European Court of Human Rights**

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

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

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

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

The Court concluded that the injunction clearly constituted an interference with the rights of the applicants to impart and receive information. The restriction pursued a legitimate aim under the Convention – the protection of morals – which in Ireland includes the protection of the life of the unborn. With regard to whether the restriction was necessary in a democratic society, the Court reiterated that
freedom of expression is applicable also to information and ideas that may offend, shock, or disturb the state or any sector of the population. The Irish injunction was of absolute nature and imposed a ‘perpetual’ restraint on the provision of services under examination. The applicant organizations neither advocated nor encouraged abortion, but rather explained to pregnant women what options were available to them. It was not illegal for a pregnant woman to travel to another country to have an abortion, and women could obtain information about this option through other sources. The Court also noted that the injunction created a risk to the health of those women who would seek abortions at a later stage in their pregnancy due to lack of proper counselling.

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

Domestic aftermath

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

In 2009, the European Court of Human Rights examined a similar case, again addressing information services related to abortion. In Women on Waves and others v. Portugal799 the applicants were a Dutch foundation and two Portuguese associations working for sexual rights. The Dutch group, Women on Waves, had chartered a ship and sailed to Portugal to campaign in favor of the decriminalization of abortion, but the ship was banned from entering Portuguese territory and its entry was blocked by a Portuguese warship. The applicant organizations complained that this measure had violated their rights to freedom of expression under Article 10 of the Convention.

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

European Social Charter and European Committee of Social Rights

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

**Article 11 – The right to protection of health**800

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

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

* [...]*


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

800 This article is identical in the 1961 and the 1996 version of the Charter.
In International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, the complainant argued that Croatian rules on sexuality education violated Art 11§2 of the Charter, as well as the non-discrimination clause in the Preamble of the Charter. It claimed, inter alia, that the sexual and reproductive health information provided in Croatian schools was discriminatory on grounds of sexuality and/or family status. The Committee agreed. In examining the material in question, it held that certain specific elements of the educational material used in the ordinary curriculum are manifestly biased, discriminatory and demeaning, notably in how persons of non-heterosexual orientation are described and depicted. [...] These statements stigmatize homosexuals and are based upon negative, distorted, reprehensible and degrading stereotypes about the sexual behaviour of all homosexuals. [...] The Committee holds that such statements serve to attack human dignity and have no place in sexual and reproductive health education: as such, their inclusion in standard educational materials constitutes a violation of Article 11§2 in the light of the non-discrimination clause of the Preamble to the Charter (para 60).

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

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

3. European Union

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

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

4. Domestic legislation and case law

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

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

801 Complaint no. 45/2007, decided on 30 March 2009.
802 Case C-159/90, decided on 5 March 1990.
803 Available in Portuguese only.
806 Law 60/2009 of 6 August: Establishing a regime to be applied to sexual education in schools. Translation is author’s own.
sexual education are:

a. Giving positive value to sexuality and affection between persons as part of their individual development, respecting the pluralism of the Portuguese society;

b. Developing skills in young people that enable them to make informed and safe choices in the field of sexuality;

c. Improving emotional and sexual relationships of young people;

d. Reducing negative consequences of sexual behavior, like unwanted pregnancy and sexually transmitted infections;

e. Developing] the capacity for protection against all forms of exploitation and abuse;

f. Respecting difference and in particular different sexual orientations;

g. Giving positive value to an informed and responsible sexuality;

h. Promoting gender equality;

i. Recognizing the importance of participation in educational processes of parents, students, teachers and health professionals;

j. Understanding scientifically the functioning of biological reproductive mechanisms;

k. Eliminating behaviors based on sex discrimination or violence based on gender or sexual orientation (Article 2)

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

In Denmark, the 2000 Law on Primary Education 808 makes “Health and Sexuality Education and Family Matters” one of the compulsory subjects in primary education. The Ministry of Education defines the minimum standards for health and sexuality education and family matters. 809 New minimum standards entered into force in August 2009, and like their predecessors, these are based on a broad and positive notion of health, which includes sexuality. Students should get insights into the values and circumstances that affect health, sexuality, and family matters and reach an understanding of the importance that family life and sexuality have for health, as well as the connection between health and environment. The teaching should be linked to the students’ own experiences to promote the development of commitment, self-confidence, and enjoyment of life. The standards are broadly defined and provide individual teachers with wide discretion to define how they will be met. By 9th grade (between 15 and 16 years of age), however, students should be able to, inter alia, understand and relate to social and communitarian influences on identity, gender roles, and sexuality and the roles that cultural norms, media, and friendship play; discuss how feelings and love are related to health, sexuality, and family life; and discuss how negative consequences of sexual encounters can be avoided. 810 As part of this process, students shall, among other things, learn about sexually transmitted infections, discuss different kinds of family constellations, discuss pleasure, discuss limits and responsibility in relation to sexuality, consider abortion and contraceptive methods, and learn to analyze messages from media and the advertising sector. 811

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

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808 LBK nr 730 of 21/07/2000, Chapter 2 §7(2). Only available in Danish.
810 Ibid. p. 7.
811 Ibid. p. 12.
812 Code of Education, article L312-16, as modified in 2004 (Law no 2004-806 of 9 August 2004 – art. 48)
cannot withdraw their children from lessons. This provision is complemented by a 2003 circular, specifying how the law should be implemented and establishing minimum standards. According to the circular, sexuality education must integrate biological knowledge and psychological, emotional, social, cultural and ethical dimensions of sexuality. It should cover the prevention and reduction of sexual risks, the fight against violence and sexual exploitation of young people, and the fight against racism and homophobia. The circular defines the objectives differently for different age groups (primary schools, lyceums, and colleges), and also provides guidelines for the training of teachers.

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

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

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

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

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

The judge went on to discuss under what conditions it should be lawful for the doctor to prescribe contraceptives to girls under the age of 16. Regarding the right to sexual information, the relevant outcome of the case is the finding that under-aged women in certain circumstances have a right to information about contraceptives even when their parents may object and the recognition that such information is imperative to the promotion of sexual health in broader terms. Furthermore, the case

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813 According to information in IPPF/The SAFE Project (2006), p. 44.
815 Decided on 21 July 2009, only available in German.
816 This new section was inserted by Section 28 of the Local Government Act 1988.
817 House of Lords, [1986] 3 All ER 402, [1985], decided on 17 October 1985. See also Chapter 6A: Abortion and contraception.
818 See Chapter 6A for the content of these so-called Fraser Guidelines.
establishes the right to confidentiality on sexual matters for a person under the age of 16 who has reached a certain level of maturity. This is closely linked with the right to make an informed choice without the threat of disclosure and/or reprisals.

In contrast to the permissive and rights-focused policies for sexual education and information discussed above, Lithuania adopted the Law on the Protection of Minors Against the Detrimental Effect of Public Information[819] in 2009 (entering into force on 1 March 2010). By international standards, this law severely restricts access to sexual information. In its first version, the law prohibited so-called public information “whereby homosexual, bisexual or polygamous relations are promoted,” as well as any kind of information “of an erotic nature.” After its approval in July 2009, the law received strong international criticism, from, among others, the European Parliament. It was amended before entering into force. The modified version was adopted in December 2009. All references to homosexuality and bisexuality were removed; however, according to news reports the amended version includes sweeping bans on information that relates to any kind of sexual activities outside of marriage. Among other things, it labels as detrimental to youth all information “which scars family values and promotes the concept of marriage and family formation, other than stipulated in the [Constitution and laws of Lithuania],” information “which is of an erotic nature,” and information “which promotes sexual intercourse.”[820] Dissemination of information conforming to any of these topics shall be banned from places accessible to persons under the age of 18. Commentators have expressed concern that even though the law no longer includes explicit references to homosexuality and bisexuality as banned topics, its effects are still “worryingly homophobic.”[821] Its prohibition of all sexual information except for that which refers to traditional family building will have the effect of prohibiting all information about non-heterosexual orientations, same-sex relationships, other non-conforming sexual activities, and extra-martial sex in places where young persons could access it.

5. Concluding remarks

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

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

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

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

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

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

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

B. SEXUAL EXPRESSION

1. Introduction

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

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

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


824 Another rapidly expanding area of legal and rights analysis on information and expression focuses on the rules governing cyberspace and internet communication.
expression goes beyond the traditional notion of freedom of expression as a political right. Nonetheless, how narrowly the concept is framed, the right to sexual expression is based on a notion that sexuality is a fundamental part of a person’s individuality and sense of self. Sexual expression, thus, is closely connected with self-discovery, expression of individuality, and emotional well-being.

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

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

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

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


See for example the UDHR, ICCPR, ICESCR.


The principles also state that “[t]he margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.” which means that the state is scrutinized closely for regulations that impact the rights of marginalized groups or ideologically dissident views differentially. “Without discrimination, the law must protect the freedom to express minority views, including those potentially offensive to a majority. Protection does not ebb or retract its ambit where expression ceases to utter what is approved, or inoffensive, or indifferent. To be meaningful, it must safeguard and sentinel those views that offend, shock, or disturb the State, or any sector of the population.” Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45,” E/CN.4/1996/32, December 14, 1994 (Referencing jurisprudence of the European Court of Human Rights, see below (Handyside v. United Kingdom)).

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

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

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

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

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

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

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

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832 See, e.g., CEDAW general recommendation 19: see International section.
2. Council of Europe

Jurisprudence of the European Commission of Human Rights

Erotic expression

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

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

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

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

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

Thus, the applicant's conviction did not correspond to a “pressing social need,” such that the interference was found to be disproportionate to the aim pursued and could not be considered necessary in a democratic society. The Commission found a violation of Article 10.

Jurisprudence of the European Court of Human Rights

Erotic expression

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

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

The Court found that the measures taken by the authorities had a legitimate aim under Article 10(2), in that they were aimed at the protection of morals and of the rights of others. With regard to whether the measures were necessary in a democratic society, the Court reaffirmed the importance of free artistic expression but also cautioned that artists are not immune to the limitations provided for in Art 10(2). The paintings in question had been widely accessible to the public and depicted “sexuality in some of its crudest forms.” The Court agreed with the Swiss Federal Court that the applicants were “liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity” (para 36). Thus, having regard to the margin of appreciation granted states under Art 10(2), the Court found no violation of Art 10.
Similarly, in Handside v. United Kingdom, the applicant had been found guilty of publication of obscene material after having published a schoolbook with sexual content, encouraging young people to take a liberal attitude towards sexuality. The books had been seized and confiscated. Here too, the Court found that the interference with the applicant’s freedom of expression both had a legitimate aim and was necessary in a democratic society. Famously, the Court noted that freedom of expression under the Convention is applicable also to ideas that “offend, shock or disturb the State or any sector of the population” and that every condition or restriction imposed in this sphere must be proportionate to the legitimate aim pursued (para 49). However, in the actual case, the Court found that the intended audience was young and that protection of the morals of the young is a legitimate aim under the Convention. Again using the margin of appreciation doctrine, the Court found that the seizure and confiscation of the books could be deemed necessary for the achievement of this aim. Under the same doctrine, it was irrelevant that other member states had taken no measures to limit the distribution of the book. Consequently, the Court found no violation of Article 10.

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

Sexual expression as a tool for political action

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

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

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

836 Application no. 5493/72, decided on 7 December 1976.
837 Application no. 4982/07, submitted on 18 June 2009.
841 Application no. 1543/06, decided on 3 May 2007.
842 See for another aspect of the case in Chapter 5D: Police brutality, failure to respond, hate crimes and hate speech.
and association by a minority group cannot be conditional on its acceptance by the majority, and that there is a long-standing European consensus on certain fundamental rights for homosexuals. It stressed that “it is only through fair and public debate that society may address such complex issues” as gay rights. Consequently, the applicant’s right to assembly and association under Article 11 had been violated. The Court also found that he had suffered discrimination because of his sexual orientation, Article 11 in conjunction with Article 14.

As for other Council of Europe conventions, see Chapter 2C: Age of consent, and in Chapter 5B.2: Sexual violence against children for a discussion of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse.\footnote{Council of Europe Treaty Series – No. 201. Open for signature on 25 October 2007. As of April 2010 it had been ratified by Albania, Denmark, Greece, Netherlands, and San Marino. It will enter into force on 1 July 2010.} For a discussion of this convention’s relevance for the sexual expression of youth, see below.

3. European Union


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

Here, it should be reiterated that the new EU Framework Decision addressing sexual abuse, sexual exploitation of children, and child pornography (proposed in March 2009, not yet in force)\footnote{Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA. Com (2009) 135 final, 25 March 2009. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0135:FIN:EN:PDF. Last visited on 4 February 2010.} does not contain any opportunity to exclude criminal liability for child pornography whose production did not involve real children. The proposed Framework Decision thus sharpens the rules compared to the 2004 Decision, by mandating the criminalization of all kinds of child pornography even when the crime, it may be argued, is victimless. From a freedom of expression point of view, such sweeping criminalization raises concerns.

4. Domestic legislation and case law

Erotic expression

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

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

A person who, on or at a public place, exhibits pornographic pictures by means of displays or other similar procedure in a manner which is apt to result in public annoyance, shall be sentenced for unlawful exhibition of pornographic pictures to a fine or imprisonment for at most six months. This also applies to a person who sends through the mail to or otherwise furnishes another with unsolicited pornographic pictures. (Law 1970:225) (Chapter 16, Section 11; emphasis in original)
The Swedish film censorship law dates from 1911 and is the oldest such law in the world. Among the grounds that can motivate censorship is "if the film or video can seem corrupting/depraving" or if it has "showings of sexual violence or coercion or showings of children in pornographic contexts" (Art. 4). In 2009, however, a government appointed expert suggested that film censorship for adults be abolished and the film censorship board disbanded. The Swedish Government, public opinion, and the overwhelming majority of private and public bodies to which the proposed measure was referred for consideration have expressed themselves in favor of the abolition.847

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

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

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

Since the passing of the Human Rights Act 1998, any restriction in accordance with the OPA has to be compatible with freedom of expression as understood by the Human Rights Act and the European Convention on Human Rights.

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

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

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


848 Private translation.

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

850 Enacted 29 July 1959, as amended.

851 The case – of a man charged with depicting a fictional torture and murder of the members of a girls pop group on a fantasy pornography site – was dropped in 2008 when the prosecution offered no evidence that the story had been easily accessible by the public. See http://news.bbc.co.uk/2/hi/uk_news/england/tyne/8124069.stm and http://www.guardian.co.uk/world/2009/jul/04/girls-scream-aloud-obscenity-laws. Both sites last visited on 25 November 2009.


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

**Sexual expression as a tool for political action**

In **Turkey**, the Supreme Court examined in 2009 to what extent it is legitimate for the state to limit the freedom of expression and freedom of assembly for a group advocating for LGBT rights. In its decision [2007/190-2008/236](http://news.amnesty.org/en/news-and-updates/good-news/turkish-lgbt-organization-wins-appeal-against-closure-20090121) (May 2009), the Supreme Court of Appeals examined a lower court decision that had ordered the closing of the LGBT rights organization Lambda Istanbul. The prosecutor had demanded that the organization be disbanded on the alleged ground that its objectives violated Article 56 of the Turkish Civil Code, stating that “[n]o association may be founded for purposes against law and morality,” and Article 41 of the Turkish Constitution, establishing that the family is the foundation of Turkish society. The lower court had, however, ordered the closing of the organization on purely procedural grounds. According to the Supreme Court decision, Lambda's statute did not constitute opposition to Turkish values. It ruled that “sexual identity and orientation are facts that people do not choose of free will, but that stem from birth or upbringing and a person has no control over.” The decision recognized the right of assembly and organization for lesbian, gay, bisexual, and transgender people. However, the Court also stated in its decision that

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

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

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

### 5. Concluding remarks

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

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

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


856 According to an unofficial translation provided by the LGBT researcher at Human Rights Watch, Juliana Cano Nieto, in email correspondence of 6 July 2009.
the Court will make a clearer pronouncement on its position on the relationship between harm and state restriction in Kaos GL v. Turkey, currently pending before the Court.

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

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

1. Introduction

This chapter examines how laws governing the exchange of sexual services for money or goods (often called ‘sex work’ or ‘prostitution’) influence the sexual health of persons in sex work, as well as facilitate or prevent discrimination, abuse and violence against them. States vary in how they approach prostitution or sex work in the law. Many use criminal law to prohibit various aspects of prostitution. Some countries penalize the sex worker, making selling of sex an illegal activity. Other countries claim that sex work by nature is related to men’s dominance over women and should be understood as part of the phenomenon of male violence against women. In this view, the sex worker is seen as a victim rather than as an offender. A few countries in Europe have, with this approach as their point of departure, decided to penalize the customers instead of the sex workers. Other states permit buying and selling of sexual services, subject to administrative regulations that govern work and labour practices generally. Others have developed regulatory schemes directed specifically at the people, conditions, and venues involved in the exchange of sexual services for money or goods, with strong penalties for violating these rules. In many countries sex work is unregulated, in the sense that exchanging sexual services for remuneration is not prohibited but also not perceived as a legitimate economic activity. These countries tend to penalize activities surrounding sex work such as pimping, procuring, and brothel keeping. All these models, with variations, exist in the European region.

Criminalization in particular marginalizes people in sex work: to avoid arrest, detention, or conviction, as well as general harassment and surveillance, people may distance themselves or hide from authorities in law, health and education, as well as from family; migrate to other towns or countries; or otherwise organize their lives outside formal social structures. Criminal convictions for prostitution have lasting social consequences, in addition to their direct effects through fines or detention. Criminal records may bar individuals from gainful employment, public housing, or other social benefits. Even in states that do not criminalize prostitution (but more so in states that do), people in sex work face significant social stigma. This stigma is variously linked to disapproval of sex for non-reproductive purposes or sex outside or before marriage, particularly for women, as well as the short-term exchange of sexual services for money. This stigma constrains sex workers from seeking support and enables abuse with impunity at the hands of both state and non-state actors, and also erects barriers to sex workers taking steps individually or through organizing to claim their rights, including rights to health.

Research on sex work finds that it takes multiple forms. Most exchanges of sex for money, food, or resources occur in informal labour sectors, often in combination with other work, as a livelihood strategy. Sex work is found at all socio-economic levels, with corresponding differences in income, danger, and vulnerability. The selling and buying of sexual services take place in a range of physical environments, including brothels, bars, clubs, homes, hotels, cars, streets, and out-door settings. The

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

858 In the following, the author uses the terminology as employed in the discussed documents. In these documents the predominant terms tend to be ‘prostitution’ and ‘prostitutes.’ When not directly referencing specific national or regional laws, the author uses the terms ‘sex work’ and ‘sex workers’ to describe the practices of, and the people engaged in, exchanging sexual services for money or goods, either regularly or occasionally. This definition of sex work is drawn from the UNAIDS Guidance Note on HIV and Sex Work (2009), citing UNAIDS Technical Update Sex Work and HIV/AIDS (2002). However, we acknowledge that sex workers might not be the best term to convey the multitude of people doing sex work or exchanging sexual services for money, as many people may not necessarily call themselves by this term, or have this ‘identity’.

859 The literature (English language) of the last two decades about prostitution law often characterizes legal approaches to prostitution with a set of terms claiming to delineate essential categories: abolitionist; prohibitionist; regulationist, as well as using the terms to decriminalize, to legalize, and to regulate. Despite their ubiquity, these categories do not enable careful analysis. First, the categories suggest that there are clear boundaries between ‘types’ of legal approaches, such that one can assign any national or local law to one category. These assignments are in fact very problematic; for example, does one consider systems that decriminalize the seller and criminalize the buyer “prohibitionist” or partial decriminalization? Further analysis grounded in empirical research reveals that it is mistaken to call this decriminalization, even of the seller, because in practice the person selling sex is not free of criminal surveillance. For example, sex workers may be taken into custody in order to be questioned or to ensure their evidence in any prosecution of the buyer. Furthermore, this taxonomy attends exclusively to laws governing the exchange of sexual services, ignoring the many overlapping laws (found in other parts of the criminal code, such as statutes punishing vagrancy or indecent conduct, as well as health codes, zoning and other administrative laws) that effectively penalize sex work over and above the offences listed in the criminal code. Finally, even more confusion has been engendered over the meaning and distinctions between ‘legalized’ and ‘regulated’ prostitution, as some use the term ‘regulation’ to refer to prostitution-specific registration and surveillance schemes, while others use the term to refer to any system in which the government plays a role in setting the conditions of work (which may be comparable to state regulation of safety and health in restaurants or other service sectors). As noted in the discussion in the text, different legalization schemes can be vary greatly in their promotion of equality, autonomy and health, as well as in their impact on sexual health.

860 Trafficking into prostitution or sex work is discussed in Chapter 5F. Conditions discussed here include a range of abuses, denial of rights, and other injustices, which do not, however, meet the definition of trafficking. See discussion of trafficking, below.

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context of sex work ranges from highly organized, with multiple participants, social differentiation, and inequality of power, to individual workers operating independently in the informal sector. Sex work may be arranged through direct personal contact (involving the sex worker or a go-between) or via telephone, Internet, or other modes of solicitation or advertisement. The persons involved in sex work can be male, female or transgender and may range in age.\textsuperscript{861}

This extensive variation in the people, places and practices which constitute ‘sex work’ has tremendous implications for health and rights-based policy interventions. Unequal and vastly different vulnerabilities and capacities of people in sex work defy any single characterization. Moreover, a health and rights-based evaluation also reveals that the participation of people in sex work is essential to devising interventions that respond to their needs. The dominance of criminalization as the legal response to sex work impedes cooperative and participatory measures.

Under conditions of criminalization, many people in sex work face steep barriers to realizing their fundamental rights, such as rights to health, equality, privacy, association, family life, housing and education, and participation in the cultural life of the community. Under regimes in which some forms of prostitution are legal, sex workers may continue to face social and practical exclusions because of the continued weight of stigma, or because the laws differentiating what is legal and what is criminal in regard to selling sex maintain surveillance over sex workers which render even legal sex workers vulnerable to both state and non-state abuse. Persons in systems that permit some forms of sex work, however, may have better opportunities to organize, share information, and to seek public redress for abuse and discrimination.

In many cases, the state and its agents are the primary abusers of persons in sex work. Arbitrary detention, irregular deportation, forced evictions and removal of children without due process are often committed under the claimed authority of law, but without formal warrant, arrest or other due process protection. Transgender sex workers, migrant sex workers and sex workers of minority racial or ethnic groups can be particularly vulnerable to abuse by law enforcement operating under the cover of the law. The precarious situation of undocumented migrant sex workers in European countries where sex work is otherwise legal will be highlighted below.

The use of raids, and exemptions from the need for independent review of warrants for entering premises or arrest, are common in legal regimes regarding prostitution, demonstrating high levels of state disregard for people in sex work. Extralegal abuses by state agents, including rape, assault, murder, theft, and extortion, are committed with impunity. Revolving door arrests and mass arrests coupled with a high degree of state-generated sensational publicity reveal the extent to which the spectacle of ‘punishing the prostitute’ continues to serve an interest of the state in controlling sexual behaviour through the production of the ‘prostitute’ as moral scapegoat. Often, these public arrests are tied to claims of state action on behalf of public health or public morals.

Health services, provided by both state and non-state actors, have historically not been a site of rights promotion for people in sex work. State health controls, through measures purportedly serving a public health purpose, are a frequent source of violations of sex workers’ rights: mandatory testing for STIs and HIV; routine infringements of confidentiality regarding HIV test results and other medical information; and mandatory health identity cards, which must be displayed to authorities on demand, thus violating the right to privacy. Furthermore, the tendency of health programmes designed for people in sex work to focus exclusively or disproportionately on STI and HIV prevention is a constraint on the right to health and violates rights to equal treatment, as sex workers need comprehensive health services for everything from contraception and pre-and post natal care, to dental care and overall care for physical and mental health.

The health status of many people in sex work can be quite variable: it is often relatively bad, in part related to insecurity of income, food and housing for the most vulnerable persons in sex work, and because of the difficulty of accessing appropriate and respectful health services for prevention or treatment. The barriers to care and accurate information are proportionate to socially discriminatory attitudes and legal barriers. That said, people in sex work with higher socio-economic status may enjoy relatively good health status, especially if they have access to adequate services – although they remain in jeopardy through police abuse and risk of incarceration.

Having multiple sex partners under conditions of unsafe sex increases the risk of sexually transmitted infections, yet prevention efforts directed at sex workers for STIs and HIV are often demeaning, discriminatory, substandard, and ineffective. Effective prevention programmes are often stymied by police practices under criminalization regimes. For example, while condom promotion is essential to

\textsuperscript{861} While persons under 18 years of age may be involved in sex work, under international standards their involvement is deemed abuse or exploitation [see UN Palermo Protocol]. Thus, persons less than 18 years involved in sex work should – under no circumstances – be treated as criminal offenders.
HIV prevention efforts, in many settings possession of condoms is used as evidence of criminal activity (engaging in prostitution). In many states, anti-retroviral treatment is denied to sex workers entirely or de facto, or persons deemed more ‘innocent’ are prioritized for treatment as a matter of policy.

Many people in sex work have little recourse to law to vindicate their rights, whether to custody of their children, rights to their wages, or prosecutions of perpetrators of violence. Often, police and other authorities will not register their complaints, and many sex workers come to believe that they do not enjoy the same status as other members of their community. Few legal defenses are mounted to challenge the arbitrary detentions or deportations of (alleged) sex workers or to investigate crimes committed against sex workers by law enforcement.

Much of what is termed ‘prostitution law’ (law directly prohibiting prostitution) is criminal law. However, many other laws (loitering, vagrancy, ‘riotous behaviour’ laws, zoning and housing laws, health codes, bar or cabaret licensing laws, public indecency laws, etc.) also have a direct effect on the practice of sex work. The criminal laws on prostitution vary widely: in order to analyze the specific effects of law, it is critical to identify with great specificity what particular acts are prohibited. Inquiry into law must ask: is the actual exchange of sex for money or goods a crime? Are other activities (by the sex workers themselves or others) criminalized, for example, solicitation (the public attempt to seek clients or make an offer for a sex/money exchange), pandering (to act as a go-between in facilitating the sexual exchange), living off the earnings of a prostitute, managing or renting premises for the purposes of prostitution, etc.?

Systems which permit sex work under regulatory codes vary widely in their impact on sexual health and rights. Some systems are rights and health violating, such as those which mandate health cards (as described above, for example), or which restrict the abilities of people registered as sex workers to choose their own housing or live with their families, or which condition limited health care services on registration. These systems transgress norms of equal protection of the law, as well as constrain underlying rights of privacy, family life, and rights to housing and health. Many legal regimes also severely constrict freedom of movement (through regimes of zoning and registration, or provisions barring workers from living together, or confining sex work to isolated areas), rendering persons in sex work more vulnerable to violence and other forms of abuse.

Other legal regimes are more rights and health promoting, particularly as they move toward greater integration with general labour regimes, so that the system ensures access to insurance and other social benefits, and ensures health and safety conditions akin to those found in other service sectors. Other key aspects of health and rights-promoting legal regimes for sex work are ensuring access to health services for a full range of mental and physical health concerns (and not solely for sexually transmitted diseases), and guaranteeing rights to organize and access to the courts to vindicate a full range of rights.

The historical usage of the word ‘trafficking’ to mean all prostitution has produced a great deal of confusion in the analysis of the relationship between law, human rights, health and sex work. The 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others equated all movement into prostitution with the international crime of trafficking. As noted, however, this Convention has been supplanted in practice by the 2000 Palermo Protocol, which focuses on trafficking as a crime defined by its use of force, fraud and coercion into a range of labour sectors, including but not limited to prostitution. (For persons under 18, however, movement into prostitution is deemed ‘trafficking’ even absent any force, fraud or coercion.) Trafficking as defined in the Protocol is a serious human rights violation, and it has serious effects on health. When the circumstances of persons in sex work fit the crime described in the Protocol, it is critical that authorities respond as they would to any other trafficked person: with full regard for their rights and with concern for the abuses they have suffered, including health consequences. Trafficked persons, including persons trafficked into prostitution, may face extreme abuse in their working conditions, lack of pay, inability to leave, and threats to selves and family members. Trafficked persons in sex work, therefore, are rarely able to organize, employ health promotion and disease prevention measures, and make decisions about clients, which lie at the core of successful sex worker-led health and rights based efforts.

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862 As noted above, many legal systems that are understood to “criminalize prostitution” do not, in fact, criminalize the specific acts of exchange – in part because the proof is so difficult to obtain, absent police surveillance in the private space where the sexual behaviour occurs, or direct police participation in the sexual acts themselves. A key reason given for law reform decriminalizing prostitution is corruption by law enforcement agents and abusive or rights-violating methods of surveillance. Confusion arises about terminology when sexual exchange per se is not criminalized, but the penumbral conduct is: some observers describe this as a legal environment in which ‘sex work is not a crime,’ while others deem the penalization of acts supporting the exchange of sex for money as ‘criminalization.’


864 See further Chapter 5F: Sexual exploitation and trafficking.
That said, for the purposes of the present study, it is critical to distinguish sex work/prostitution – where adult individuals offer sexual services in exchange for money and, in this process, may or may not be subjected to difficult working conditions, discrimination, or abuse – from sexual trafficking – which is a gross human rights violation involving coercion, violence or threat. Merging the two terms not only denies sex workers their right to self-determination and agency, ignores their realities, and endangers those engaged in it, but also risks making types of trafficking (other than sexual) invisible and thus leaves victims of non-sexual trafficking without proper protection. Such confusion also produces ineffective legal and health interventions such as ‘raid and rescue’ of un-trafficked sex workers, whose livelihoods, associations, and safety nets are torn apart by the raids.

As noted, there is agreement that persons under 18 should not engage in sex work. More difficult to formulate, however, are the legal and policy responses that constructively engage with teenagers engaged in survival sex or other forms of regular or irregular sex work, not infrequently occasioned by ejection from their natal homes or attempts to escape abuse. At minimum, they need access to services to help them protect their health, as well as education, housing and support that allows for rapid exit from sex work. Many health programmes which target young persons aged 14–24 fail to offer services to address the needs and contexts of the diversity of young people in sex work, including transgender or homosexual youth who may have escaped violence in their homes or communities.

2. **Council of Europe**

*Non-binding Council of Europe documents*

As discussed in Chapter 5, the Council of Europe has expressed itself strongly against forced prostitution and trafficking. In contrast, it has issued few statements on sex work in general. The most substantive existing document, while only a recommendation and therefore of weak legal authority, is worth exploring in some detail given that regional standards are otherwise lacking.

In its Resolution 1579 (2007), Prostitution – Which stance to take?, the Assembly condemns trafficking, forced prostitution, and child prostitution. It notes that approaches to adult prostitution vary widely in the region, with different variations of what this document calls ‘prohibitionist,’ ‘regulationist,’ and ‘abolitionist’ approaches. It defines ‘prohibitionist’ as countries that prohibit prostitution and penalize prostitutes and pimps alike, ‘regulationist’ as countries that seek to regulate rather than abolish prostitution, and ‘abolitionist’ – the majority of countries in the region – as states that seek to abolish prostitution by penalizing procurers and pimps rather than the prostitutes themselves. Countries that attempt to reduce the demand for prostitution by penalizing the client, with Sweden leading the way, are called ‘neo-abolitionist.’

The Recommendation notes that in many prohibitionist and abolitionist countries, prostitution is forced underground. This leads to a greater risk that organized crime will become involved, and that prostitutes will be more vulnerable, not least from a public health perspective. The document highlights the advantages of the regulationist approach, since it will grant prostitutes labour rights, access to medical care, etc, thus making prostitutes less dependant on pimps and criminal networks. The document also recognizes that not all prostitutes will have real access to these rights, and that there tends to be a gap between theory and practice in regulationist countries. It suggests that with regard to the recognition of personal vulnerabilities that may have led individuals to prostitution, the neo-abolitionist approach (penalizing the client, not the prostitute) has advantages.

The Assembly recommends Council of Europe member states to formulate an explicit policy on adult prostitution, avoiding double standards and policies that force prostitutes underground or under the influence of pimps. Instead, member states shall seek to ‘empower’ prostitutes (para 11.3). This will happen in particular by the following means:

- refraining from criminalizing and penalizing prostitutes and developing programs to help prostitutes leave the profession if they want to;
- addressing personal vulnerabilities of prostitutes (such as drug abuse, mental health problems, low self-esteem and history of child neglect or abuse);
- addressing structural problems seen as leading to prostitution (such as poverty, political instability, gender inequality, etc), including in prostitutes’ home countries;
- ensuring that prostitutes have access to safe sexual practices and enough independence to impose these on their clients;

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865 See, CRC, and First OP, ILO worst forms of child labour etc.

866 Adopted on 4 October, 2007.
• respecting the right of prostitutes who freely choose their profession to have a say in policies that concern them;
• ending the abuse of power by the police and other authorities towards prostitutes, by designing special training programs for these authorities.

3. European Union

European Court of Justice judgments

In a few cases, the European Court of Justice has addressed discrimination on the basis of the nationality of sex workers, and whether sex work should be perceived as a legitimate economic activity under EU law. While these issues, strictly speaking, are economic rather than health- or rights-focused matters, it is relevant to briefly examine these cases here, since non-discrimination and recognition of sex work as legitimate work often imply the right to social security, health insurance, and police protection.

In the joined cases Adoui and Cornuaille v. Belgian State the Court examined whether sex workers could be legally expelled under EC law from the territory of a member state because of their past work in prostitution. Two French women who had engaged in prostitution had been denied residence permits in Belgium on the grounds that their conduct was considered contrary to public policy. The issue before the Court was whether they could be legally expelled on the grounds of personal conduct under the EC Treaty. In Belgium, prostitution as such was (and is) not prohibited, though certain activities linked with prostitution were illegal.

The Treaty allows for the exception to the rule of free movement of persons on the basis of “public policy, public safety and public health” (former Art 46, now Art 56). The Court stated that Community law does not impose on member states a “uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy” (para 8). However, it found the Belgian expulsion illegal on discrimination grounds: when a state does not adopt repressive or otherwise genuine and effective measures to combat a certain conduct on part of its own nationals, it cannot restrict the admission on other nationals on the ground of that same conduct.

The Court also examined whether individuals engaged in prostitution could be expelled because they “could promote criminal activities” without evidence that the person in question had any “contacts with the underworld.” With reference to Directive 64/221/EEC on freedom of movement, the Court reiterated that measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned. Thus, ‘guilt by association,’ in this case systematic expulsion on the assumption that prostitution may or will be linked to criminal activity, cannot be accepted (para 11).

It is noteworthy that 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 not be considered as against public policy. The issue was primarily that of the right to equal treatment for nationals of other member states as for nationals of the host state – a typical EU topic. However, it is relevant that the Court treated the two women as if they were workers, for example, using the term ‘seeking employment’ when discussing the procedure by which the two plaintiffs could be re-admitted to Belgian territory.

In Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie, the plaintiffs were two Polish and four Czech nationals, all of whom wished to establish themselves in the Netherlands as window prostitutes. They had been denied residence permits by the Dutch Secretary of State on grounds of public interest. Poland and the Czech Republic had Association Agreements with the EC at the time, providing for the right to freedom of movement for workers and freedom of establishments in the EC for nationals of those countries.

The first relevant issue was whether prostitution was to be seen as an economic activity pursued in a self-employed capacity within the meaning of EC law and the relevant Association Agreements. The second relevant issue was whether the Netherlands could exclude prostitution from the notion of economic activity for reasons of, inter alia, public morality.

The Court noted that in the relevant Association Agreements, the list of economic activities was non-exhaustive, and held that prostitution is an “activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods.” Thus, prostitution was to be seen as an economic activity in the meaning of the Treaty and the Agreements.

867 C-115 and 116/81, decided on 18 May 1982.
As regards the second issue, the Court reiterated its finding from Adoui and Cornuaille, that the host state cannot deny residence permits on public policy grounds if it has not adopted effective measures to combat activities of the same nature when pursued by its own nationals. In conclusion, since prostitution was an accepted activity for nationals of the Netherlands, it could not be regarded as constituting a genuine threat to public order within the context of the relevant Agreements.

Finally, in Lili Georgieva Panayotova and Others v. Minister voor Vreemdelingenzaken en Integratie, the main issue was whether Dutch authorities could deny a permanent residence permit to non-nationals who wished to work in a self-employed capacity in the Netherlands, when they had not previously had temporary residence permits. The plaintiffs were six women from Bulgaria, Poland, and Slovakia who wished to work as prostitutes; a fact only known from the opinion of the Advocate General. Thus, the nature of the activity in which they wanted to engage – sex work – is not discussed by the Court. Rather, the Court accepts without hesitation that the six women wished to “work […] in a self-employed capacity” (para 2 and 9), and “with a view to establishment [in the Netherlands] as […] self-employed person[s]” (para 17). This demonstrates that the Court has incorporated and expanded its ruling from Jany. Partially, this can be explained by the fact that the type of work involved was not discussed by the referring Dutch court, which in itself indicates that the Dutch court has accepted previous findings of the Court in terms of how to perceive sex work.

4. Domestic legislation and case law

In the Netherlands, regulations on sex work aim at drawing a sharp line between involuntary prostitution, on one hand, and voluntary, adult sex work, on the other. Street prostitution and self-employed prostitution have never been illegal. Brothels were banned, but since the 1970s, prostitution businesses, like the famous shop windows of Amsterdam's Red Light District, sex clubs, and other forms of indoor prostitution were tolerated by the authorities as long as they were not linked to other criminal activities. There was also no strict control over migrant sex workers, who could operate fairly freely, even when they lacked documentation. However, sex workers could not enjoy labour rights available to other Dutch workers.

On 1 October 2000, the Dutch Criminal Code was amended in the sense that the formal ban on brothels was lifted and the prohibition of pimping was repealed. Thus, the new legislation made it legal to run a brothel and to solicit clients for a prostitute. Among the objectives of this legal reform were to control and regulate the employment of prostitutes through a municipal licensing system; to protect minors from sexual abuse; to protect the position of the prostitutes; and to reduce prostitution by foreign nationals residing illegally in the Netherlands. Legally, the term ‘making oneself available to perform sexual acts with a third party in return for payment’ is used to describe sex work in the Dutch context, but official sources use the term ‘prostitution’ for short. While formally legalizing voluntary exchange of sexual services for money, the reform simultaneously sharpened legal provisions against sexual exploitation and trafficking. The new Article 250a of the Criminal Code prohibited the exploitation of prostitutes and other forms of sexual exploitation, including inducing minors to engage in prostitution. Article 250a has since been replaced by the wider Article 273f, which includes all forms of trafficking of persons and incorporates Dutch obligations under the Palermo Protocol.

The new regime means that the Working Conditions Act and most other legislation that applies to the

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869 Case C-327/02, decided on 16 November 2004.
871 This chapter draws its information primarily from secondary sources. This is due partly to language difficulties, as few of the Dutch regulations are available in other languages than Dutch, and partly to the fact that most provisions in this field are passed on local level. Thus, national legislation is to a large extent lacking, see further below.
877 In current version valid from 1 July 2009. Available in unofficial translation.
business sector in general now cover prostitution as well. Operating a brothel is now a legal trade requiring a license and sex work is a profession with all rights (social insurance) and obligations (paying taxes) connected to legal work. Sex workers and brothel owners are supposed to negotiate working conditions and labour regulations.\textsuperscript{878}

The legal reform made sexual exploitation and trafficking a matter of criminal law, primarily through the application of Article 250a/273f of the Criminal Code, while regulation of voluntary prostitution became an administrative matter, primarily carried out on the local level. No national legislation was passed to regulate prostitution; the central government has only a guiding function and sets the framework in the fields of criminal law, immigration law, and public health. Instead, zoning policies and regulation of brothels are all adopted on municipal levels.\textsuperscript{879} To enable municipalities to do so, a new article was introduced in the \textit{Local Authorities Act} (Article 151a). This provision creates the possibility for the municipal council to adopt a local by-law, regulating businesses that provide the opportunity to have sexual relations with a third party in return for payment.\textsuperscript{880} This means in practice laying down conditions for the licensing of brothels, which includes both regulations on law and order – including fire and hygiene provisions, etc. – and provisions to improve working conditions for prostitutes. Almost all municipalities have introduced a licensing obligation.\textsuperscript{881} To support the municipalities, the Ministry of Justice and the Association of Dutch Municipalities (VNG) created a model by-law for municipal licensing; however, local governments are not obliged to adopt this model. According to an early study, 94\% of the municipalities have adopted provisions from this model by-law more or less unchanged.\textsuperscript{882} The Dutch Minister of Justice stated at the time of the reform that the decentralized nature of the regime does not intend to give municipalities the freedom to bar prostitution on moral grounds; complete banning of prostitution could in the opinion of the Minister conflict with the right to free choice of work, as guaranteed by the Dutch Constitution.\textsuperscript{883}

In 2009, a bill was elaborated by the Dutch government, proposing that a national law would replace the municipal by-laws and impose national standards for licensing of sex establishments. It would also make registration of prostitutes mandatory, possibly with the consequence that it would be a punishable offense to work without a registration number.\textsuperscript{884} As of late October 2009, the bill had not yet been presented to the Dutch Parliament.

So far, local authorities are responsible for ensuring that prostitutes have easy access to health care, while employers and the prostitutes themselves are responsible more concretely for health and working conditions. Employers’ responsibilities include pursuing a safe sex policy and encouraging prostitutes to undergo regular check-ups for STIs. There are no mandatory medical check-ups imposed on sex workers.\textsuperscript{885} A great number of enforcement mechanisms are in place to monitor the compliance with the rules on prostitution. These include the police and the Public Prosecution Service, the Labour Inspectorate and the Social Information and Investigation Service to control and enforce national legislation, but also special municipal enforcement bodies such as the Municipal Medical and Health Service and municipal building and housing inspectorate departments.\textsuperscript{886} The model local by-law contains the requirement that in order for the establishment to be granted license, no illegal migrant may work there; consequently, immigration authorities also play a key role in monitoring compliance with the regulations.\textsuperscript{887}

Commentators have pointed to problematic aspects and unintended side effects of Dutch regulations on sex work. One such problem regards undocumented migrant sex workers: since the reform resulted in stricter migration controls, many undocumented sex workers have gone underground. Needless to say, a movement underground will lead to extreme vulnerability of this group, with potentially serious

\textsuperscript{878} According to “Dutch Policy on Prostitution” (2004).
\textsuperscript{879} As explained by the National Rapporteur (2002). For this reason, the Dutch situation can only be described in general terms in this report; since policies vary between the municipalities focus has been placed on the national framework and some commonalities between the municipal regulations as described in reports.
\textsuperscript{880} As explained by the National Rapporteur (2002), p. 19.
\textsuperscript{881} Ibid, p. 20.
\textsuperscript{882} Ibid, p. 20.
\textsuperscript{883} Article 19, para 3. As described by the National Rapporteur (2002), p. 19.
\textsuperscript{885} According to “Dutch Policy on Prostitution” (2004).
\textsuperscript{886} National Rapporteur (2002), pp. 20–21.
\textsuperscript{887} Ibid.
health effects. Furthermore, the municipal by-laws have been criticized for the onerous requirements small businesses must meet in order to be granted licenses; this, according to commentators, has made it impossible for many self-employed sex workers or small-scale brothels to operate legally.888 Some commentators express concern that the regulations have created a two-tiered system, where working conditions have improved in the licensed brothels, but where sex workers in illegal brothels, including many migrant sex workers, are considerably more vulnerable to abuse, violence and labour exploitation than before.889 The proposed mandatory registration of sex workers also raises concern from a privacy point of view and may lead to a growing number of sex workers going underground.

In Germany prostitution is not only decriminalized but also regulated in a federal law, the Act Regulating the Legal Situation of Prostitutes (Prostitution Act).889 Before 2002, providing sexual services in exchange for payment as such was not illegal, but the activity was heavily restricted by several different legal regulations on activities surrounding prostitution.

The Prostitution Act is a contract law, with merely three articles regulating the contractual relationship between the prostitute and her or his client, on one hand, and the contractual relationship between the prostitute and the pimp/brothel owner, on the other. Its political aims were wide, however, and had a clear rights-focus. According to the explanatory Memorandum to the Act, 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 to exit prostitution for those who wish to do so.891

According to Article 1, when sexual activities have been undertaken in return for a previously established remuneration, this creates an enforceable right to payment. This means in practice that the ‘immorality clause’ – that previously made such agreements legally invalid and thereby unenforceable – has been abolished. Now agreements between a prostitute and a client, on one hand, and between a prostitute and her pimp, on the other, have legal validity. According to commentators, this removal of the ‘immorality label’ is the main change that came with the law – and it was the expectation of the legislature that by stating that prostitution was no longer to be deemed immoral from the point of view of contract law, this would lead to prostitution no longer being judged immoral in other areas of the law.892 In practice, after rendering a sexual service the prostitute can claim payment from her client (a right that can be enforced in law) (Article 1, 1st sentence); similarly, the prostitute can claim payment of a previously agreed remuneration from the brothel operator if she was present in the establishment and available for performance of sexual acts for a specific period of time (2nd sentence). Importantly, clients and brothel owners/managers do not have the right to demand that a (specific) sexual service be performed. This is intended to protect the sexual self-determination of prostitutes.893

Article 2 stipulates that only prostitutes themselves have the right to take action against clients to enforce payment. Thus, the right to payment cannot be transferred to third parties. This is intended to prevent prostitutes from becoming dependent on brothel owners/managers or pimps. Article 3 sets forth that prostitutes and brothel operators can agree on an employer/employee relationship; in this way prostitutes can access the statutory social insurance scheme which gives them rights to health insurance and pension funds. However, the same Article implies that even when they are in an employment situation, prostitutes should retain a high degree of autonomy (inter alia with regard to choice of client and type of sexual service).894

With the passing of the Act followed amendments made to the Criminal Code, decriminalizing the action called ‘promoting prostitution.’ Pimping is now a criminal offence only if it includes exploitation, or if in any way impairs the prostitute’s personal or economic independence, in accordance with Article 181a of the Criminal Code.

888 Ibid.
892 Ibid, p. 11.
893 As implicit in Article 1, according to Kavemann and Rabe (2007), p. 11.
894 According to the explanatory Memorandum accompanying the Act; as explained by Kavemann and Rabe (2007), p. 12.
Germany’s Prostitution Act, then, is limited in scope and does not entail any provisions on licensing, registering, or health requirements. This is because it is a federal law; many legal matters related to prostitution are under the jurisdiction of Germany’s federal states. For example, protection of public safety and order is a state matter, such that each German Land (state) has its own police law. Even local authorities have influence over the regulation of prostitution; all zoning decisions will be taken locally through by-laws drawn up by municipalities or local authorities.895

Commentators have noted that the German law has failed to solve some of the contentious issues that arise in relation to sex work and that have impact on the health and rights of sex workers. Many of these are similar to the problems encountered in the Netherlands. According to one commentator, the Act only considers documented migrant sex workers, thus leaving undocumented migrant sex workers as vulnerable as previously.896 Regardless of whether this is made explicit in the legislative history of the Act, it is hard to imagine that an undocumented sex worker would bring a claim against a client or brothel operator, thereby making herself known to the authorities. Obtaining an entry visa for the purpose of working as a sex worker is not possible.897 Furthermore, many prostitutes and brothel operators prefer not to conclude an employment contract (which, as described above, is a precondition for access to social insurance). The reasons are preserving anonymity and the fear of losing sexual autonomy (on the side of prostitutes), restricted right to give instructions to employees (on the side of brothel owners), and financial losses (on both sides).898 Finally, the expectation on part of the government that other legal changes would follow on the state level in accordance with the principles that underpin the Prostitution Act has not fully materialized. Correlating legislation in the fields of tax law, trading law, building and planning law, migration law, and zoning by-laws have yet to be passed in many states; similarly, the ‘immorality’ label on prostitution persists in case law and state legislation.899

As seen, Germany recognizes prostitution as a valid economic transaction. A similar view, though playing out in the field of criminal law, was recently illustrated by a court case in Italy, where prostitution is unregulated (that is, selling and buying sexual services is not prohibited but also not regulated). Italy’s Supreme Court established in its decision No. 8286/2010899 in March 2010 that having sexual intercourse with a prostitute and refusing to pay her is to be equated with sexual violence. The Court upheld a decision from the Court of Appeal in Genova in which a man had been convicted for sexual violence for having refused to pay a prostitute after the sexual act was concluded. The Court held that the man was fully aware of the abuse he was committing, because it was proven that the woman had consented to the act on the condition that she would be awarded payment of an established amount. The consent of the sex worker was made invalid by the fact that the man did not honour his commitment. The act thus retroactively became non-consensual sex, and so was classed as sexual violence.

In Hungary, some versions of sex work are legal, but surrounded by a wide array of restrictions that raise concerns with regard to the health and rights of sex workers. Self-employed prostitution was legalized in 1993, and Section 204 of the Hungarian Criminal Code891 penalizing prostitution was repealed accordingly. Promoting or exploiting prostitution remains a crime (by inter alia running a brothel or promoting prostitution in other ways; living on earnings of a prostitute; and pandering, through soliciting another person for sexual acts in order to make a profit).892 Previously prostitution was also considered an administrative offense; this offense was abolished in 1999 in Act LXXV of 1999 on Organized Crime.893 According to this law, a prostitute is a “person who offers sexual services in exchange for remuneration, regardless of source and timing of such remuneration” (Section 4E). She or he is permitted to offer sexual services to, and accept such offers from, persons over 18 years (Section 9(1)). Nevertheless, the Act LXXIX of 1999 on Violation of Administrative Rules still makes certain acts related to prostitution administrative offenses; these include cases in which “the invitation to engage in an act of prostitution is offensive” or when the prostitute lacks a medical certificate.894

897 Ibid.
899 Ibid, p. 27, p. 31, and Services4Sexworkers.
899 Supreme Court, Decision no. 8286/2010, 3 March 2010. Available in Italian only; content explained by Stefano Fabeni.
891 Excerpts of the Criminal Code relating to prostitution available in unofficial English translation.
892 Sections 205–207, Hungarian Criminal Code.
893 Section 4E and 9. Only available in Hungarian, translation by Hungarian lawyer and researcher Adrienn Esztervari.
894 Section 143. Excerpts available in unofficial English translation.
Violating these provisions may result in a fine or, when relevant, expulsion. The Decree 41/1999 (IX.8.) of the Minister of Health specifies health requirements for prostitutes, making it mandatory to undergo health checkups every three months for the detection of sexually transmitted infections. The regular checkups entitle the prostitute to the corresponding health certificate, which is a requirement for legally engaging in sex work. A recent survey indicates that most sex workers lack the medical certificate, primarily due to the fact that the mandatory screenings are sparsely available and costly for those who are not covered by national health insurance, and thus not available to most migrant and undocumented sex workers.

Tax legislation requires that prostitutes work on a self-employed basis, pay taxes and make regular contributions to pension funds and the national healthcare system. In order to obtain a license for a sex business activity, the prostitute must provide proof that he or she has no criminal record; a current lease for a flat; written approval from the local government; a formal school report; and a birth certificate. When the prostitute has an entrepreneur license, this gives access to national health care services, sickness allowance, pension, home loan, etc. The entrepreneur license does not indicate the type of business activity performed; from this can be concluded that there is no official registration of sex workers in Hungary.

Zoning laws are determined by local governments. So-called tolerance zones, where prostitution can be practiced, have to be at a certain distance from parliamentary buildings, public administration, judicial bodies, prosecution services, diplomatic and consular missions, schools, churches, cemeteries, and transport terminals. There is strong police control over street-prostitution in order to ensure that sex workers are following the rules that govern their activity, regardless of whether practiced by migrant or non-migrant sex workers. In practice, many local authorities have simply failed to designate the tolerance zones; therefore, many sex workers effectively work illegally.

In Turkey the legal situation for prostitution is in some perspectives the opposite to that of Hungary; in Turkey, street-prostitution is illegal while licensed brothels are legal. The Turkish General Hygiene Law provides that licensed prostitutes may operate in approved buildings known as “General Houses.” The Government decree General regulations on prostitutes and brothels in order to fight against sexually transmitted diseases contains licensing requirements and licensing processes for brothels, as well as rules for issuing identity cards for prostitutes. Such identity cards give them the right to some free medical care. According to the Social Insurance Act, prostitutes covered under the General Hygiene Law have the right to social security and those persons who employ them are considered employers.

According to the above-mentioned government decree, in order to receive a license the prostitute must be a Turkish citizen, over 21 years old, unmarried, have at least graduated from primary school, and have the ability to freely make a decision. Prostitutes working in official brothels must register with the municipality and acquire an ID-card that indicates the dates of their health checks. Prostitutes working in unofficial brothels, as well as rules for issuing identity cards for prostitutes. According to Section 1(3) of Act CXVII of 1995 on Personal Income Tax and Section 2(1) and 6 of Act CXV of 2009 on Self-employment. Only available in Hungarian, content explained by Hungarian lawyer and researcher Adrienn Esztervari.

According to Section 7 and 8 of Act LXXV of 1999 on Organized Crime.

The information on the regulation of prostitution in Turkey has been drawn from different sources and with the help of private translation. However, all information has not been possible to corroborate with primary source legal material. Before referencing this information, please consult primary sources.

General Hygiene Law, Law No. 1593/1930, approved on 24 April 1930. Excerpts available in unofficial translation; other provisions have here been privately translated.

See also general information in Council of Europe, Legislation in the Member States of the Council of Europe in the Field of Violence Against Women EG (2009/3) [2009], Volume II, p. 118.

General regulations on prostitutes and brothels in order to fight against sexually transmitted diseases, Council of Ministers’ Decree 30/3/1961, No: 5/984, available in Turkish only. Private translation.

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have been examined properly and, if not, to ensure that they see the health authorities. According to Article 129 of the General Hygiene Law, if a prostitute is diagnosed with an STI, she will be prevented from working and treated, if necessary with force.

Incitement to prostitution and sexual exploitation are criminalized. Article 227 of the Turkish Penal Code penalizes activities surrounding prostitution, such as encouraging another to become a prostitute, facilitating prostitution, or sheltering a person for this purpose. Any act aimed at benefiting from the income of a person engaged in prostitution, totally or partially, is considered encouragement of prostitution. According to Section 227(8), a person who “acts as a prostitute” shall be subjected to treatment or psychological therapy. It is unknown to the author if such treatment is mandatory or if it simply should be made available.

Sweden was the first country in the world to penalize only the purchase of sexual services, thus criminalizing the client instead of the sex worker. The Act (1998:408) that Prohibits the Purchase of Sexual Services entered into force on 1 January, 1999, and was part of a larger package of laws on violence against women. In 2005, this law was repealed and the same provision was instead transferred to the general Penal Code, in the chapter named “On sexual crimes.” The provision now reads:

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 of the first paragraph also applies if the payment was promised or given by another person. (Chapter 6 §11, emphasis in original)

Attempt is criminalized in accordance with general legal principles. Procuring sexual services is also penalized, defined as “promot[ing] or improperly financially exploit[ing] a person's engagement in casual sexual relations in return for payment” and may result in 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).

According to the legislative history of the Swedish law, the objective of the law penalizing the customer only was twofold: on one hand to be norm-setting, and on the other to clarify that prostitution is not socially acceptable. The purpose was not to punish the (female) prostitute. For potential clients the law should have a deterrent effect, but would also serve as a means to deter women from engaging in prostitution. The reason to criminalize solely purchase was explained as follows:

Even though prostitution as such is not a desirable societal phenomenon it is not reasonable to also criminalize [the woman] who, at least in most cases, is the weaker party who is exploited by others wanting to satisfy their sexual drive. It is also important to motivate prostitutes to seek help to get away from prostitution, so that they do not feel that they risk any kind of punishment for having been active as prostitutes.

The wording of the law is gender-neutral (penalizing both women and men clients, buying sex from male and female prostitutes) but is placed within a legal and philosophical framework of male violence against women and rests on assumptions of male dominance and female subordination. “Sexual
relation’ in the meaning of the law refers primarily to sexual intercourse, but other forms of sexual interaction are also included in the scope of the law. ‘Payment’ includes both economic reward and other kinds of rewards, 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.

On January 1, 2009, a law very similar to the Swedish law was introduced in Norway. The Norwegian law goes one step further than its Swedish equivalent in that it also criminalizes sexual services purchased by Norwegians abroad. Iceland followed suit in April 2009, making purchase of sexual services punishable with up to one year’s imprisonment.

5. Concluding remarks

European provisions on sex work vary extensively. They go from absolute prohibition, such as in Albania, Lithuania, Romania, and Serbia, to regulation, including in Germany, Hungary and Turkey and the Netherlands, to semi-abolition, such as in Sweden, Norway and Iceland. In many European countries, among them the United Kingdom, Ireland, France, Spain and Portugal, the exchange of sex for money is not prohibited, but organized activities surrounding such exchange are illegal and prostitution is not regulated.

Sex work brings to the fore a multitude of issues related to sexual health and human rights. Several of these issues are addressed in the Council of Europe Resolution 1579(2007). This document focuses on the empowerment and right to self-determination of sex workers, and is pragmatic in terms of what approaches to use in order for their rights to be best respected. The document highlights health aspects of sex work, and stresses that ‘prohibitionist’ and ‘abolitionist’ models may increase health risks for sex workers both with regard to violence (when sex work is forced underground and sex workers become more dependent on pimps and unsafe work conditions) and with regard to STIs (as sex workers will have less leverage concerning safe sexual practices if not allowed to operate openly.

Examining the three cases from the European Court of Justice, it is interesting to follow the development of the Court’s understanding of the nature of sex work. Its case law illustrates that it has increasingly accepted that sex work is an activity protected under EU regulations. These decisions are important in that they contribute to the normalization of sex work and thereby to the acknowledgment that those engaged in it merit the same level of protection and rights as others providing services for money.

The countries that have regulated sex work also show important differences. Laws vary both in detail and hierarchical level of regulation, and in relation to underlying principles of state involvement with the activity. The Netherlands and Germany both begin from a perspective that emphasizes the sexual self-determination of the sex worker. This perspective brings the logical conclusion that the sex worker has a right to provide sexual services, to work in organized establishments, and to be a part of the formal economy, but also to be protected from violence and abuse and to be able to exercise influence over what kind of services to offer and to whom. This perspective has many advantages, not the least with regard to health: the recognition of sex work as a legal activity helps protect sex workers from the worst kinds of exploitation and violence, and their inclusion in the formal economy gives them access to health care and preventative measures against STIs. However, the Dutch example also shows that over-regulation can be a problem for the rights of sex workers, not least in relation to the rights of undocumented migrants, and with regard to the autonomy and right to anonymity of the sex workers more broadly. While the German legislature made an explicit attempt to erase the label of ‘immorality’ from economic transactions around sex, commentators note that the activity is still largely perceived as immoral by the public, and is defined as such in much of surrounding law. This social stigma, in combination with the strong culture of illegality and criminal activities that tends to surround sex work, makes legal reform, taken by itself, an insufficient tool to achieve real change for sex workers’ rights.

The Turkish and, to some extent, the Hungarian examples, on the other hand, offer a model which is less based on sexual self-determination and more on a notion of prostitution as an undesired but unavoidable social phenomenon. Provisions from these two countries illustrate a level of regulation


925 Ibid.


927 According to information from Icelandic Centre for Gender Equality, at http://www.jafnretti.is/jafnretti/?D10cID=ReadNews&ID=523. Last visited on 12 April 2010.
so high as to raise concern from a privacy point of view and to have many negative repercussions for
the rights of sex workers. Particularly troubling are mandatory health check-ups that can be highly
intrusive and humiliating. Their mandatory and imposed nature has the consequence that many sex
workers will try to avoid them which, as the Hungarian example shows, often has the consequence that
sex workers end up working illegally and therefore outside of any social security and health protection
networks. The Turkish provision giving the police the power to force sex workers to undergo health
check-ups is especially worrying. Such a provision creates opportunities for corruption, blackmailing
and other serious abuses of police powers, such as sexual abuse and harassment.

Provisions that impose health screening illustrate a wider trend, which is to perceive sex workers (but
not clients) as carriers of disease and thereby ‘dirty’ in the eyes of society. This by itself may have a
heavily stigmatizing effect. On the other hand, administrative rules in many countries impose health
screening on other workers too (inter alia on those handling food). The questions are which authority
will grant the sex worker’s health certificate and monitor its accuracy, and by what process will it
be issued. If health authorities are responsible and the process is the same as for other workers, a
mandatory health certificate may be acceptable. However, if the police, as in Turkey, have powers
over this issue, the risk for abuse and continued stigmatization is imminent.

As far as the Swedish, Norwegian and Icelandic laws are concerned, these raise both different and
similar concerns. The laws that ban the purchase of sexual services have a very different justification
from laws that penalize the sex worker, instead shifting the focus to the customer as the wrongdoer.
However, the effect of the laws tends to be very similar; stigmatizing persons in sex work and forcing
the activity underground. If one assumes that sex workers (like other adults) have a certain degree
of agency, it is troubling to treat all (women) sex workers as victims. If a person has chosen to sell
sexual services or, at least, has determined that this is one possible way to make a living, then
penalizing customers will have an indirect effect on her/his choice and ability to support her–
or himself. Even though only one party to the transaction is under threat of prosecution, this threat will
have the consequence that sex work will be a less visible and more stigmatized activity – thereby
affecting the self-determination, sexual and otherwise, of the sex workers themselves. Furthermore,
the regulation will force sex workers to operate more secretly in order to find clients. Many fear that this
type of regulation will make sex workers more exposed to exploitation, less likely to report violence or
threats, and more dependent on pimps or criminal networks in order to be able to continue making
a living. Studies have shown that sex workers feel hunted by the police and dare not report abusive
customers. In addition, the Swedish model – while in theory part of an official effort to strengthen
women against male violence and dominance – bars sex workers from the enjoyment of social
security benefits, union organizing, and a position in society from which they can express their needs
and claim their rights. Social workers have found it more difficult to contact and help sex workers.
Finally, the prohibition of sexual procurement makes it difficult for sex workers to work together, which
increases their vulnerability to violence and abuse.928

928 For some of these critical views, see inter alia Petra Östergren, “Sexworkers Critique of Swedish Prostitution Policy” (2004),
Kulick, “Sex in the New Europe: the Criminalisation of Clients and Swedish Fear of Penetration,” Anthropological Theory,
Vol. 3, No. 2, 199–218 (2003). Some of these remarks have been summarized by Helen Self, at http://www.salli.org/muisto/
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The relationship of sexuality and sexual health to human rights, and indeed the very concept of sexual rights, remain matters of considerable controversy. A number of recent interventions and developments, positive and negative, at national and international levels have flagged this issue as one of the key battlegrounds on human rights territory. There is a bewildering array of legal and judicial responses to such issues and considerable challenges persist regarding recognition of rights claims related to sexuality and the obligations of states underlying all of these subjects.

This report constitutes the European section of a large global project on sexual health and human rights, commissioned by the World Health Organization (WHO), which aims to contribute to the recognition, understanding and application of human rights standards related to sexuality and sexual health. The report analyses legal practices around sexual health issues within the context of law, jurisprudence and case law in the European region, and explores the application of human rights standards to these issues, covering topics such as discrimination, violence, gender identity, same-sex relations, health services, regulation of marriage and sex work.