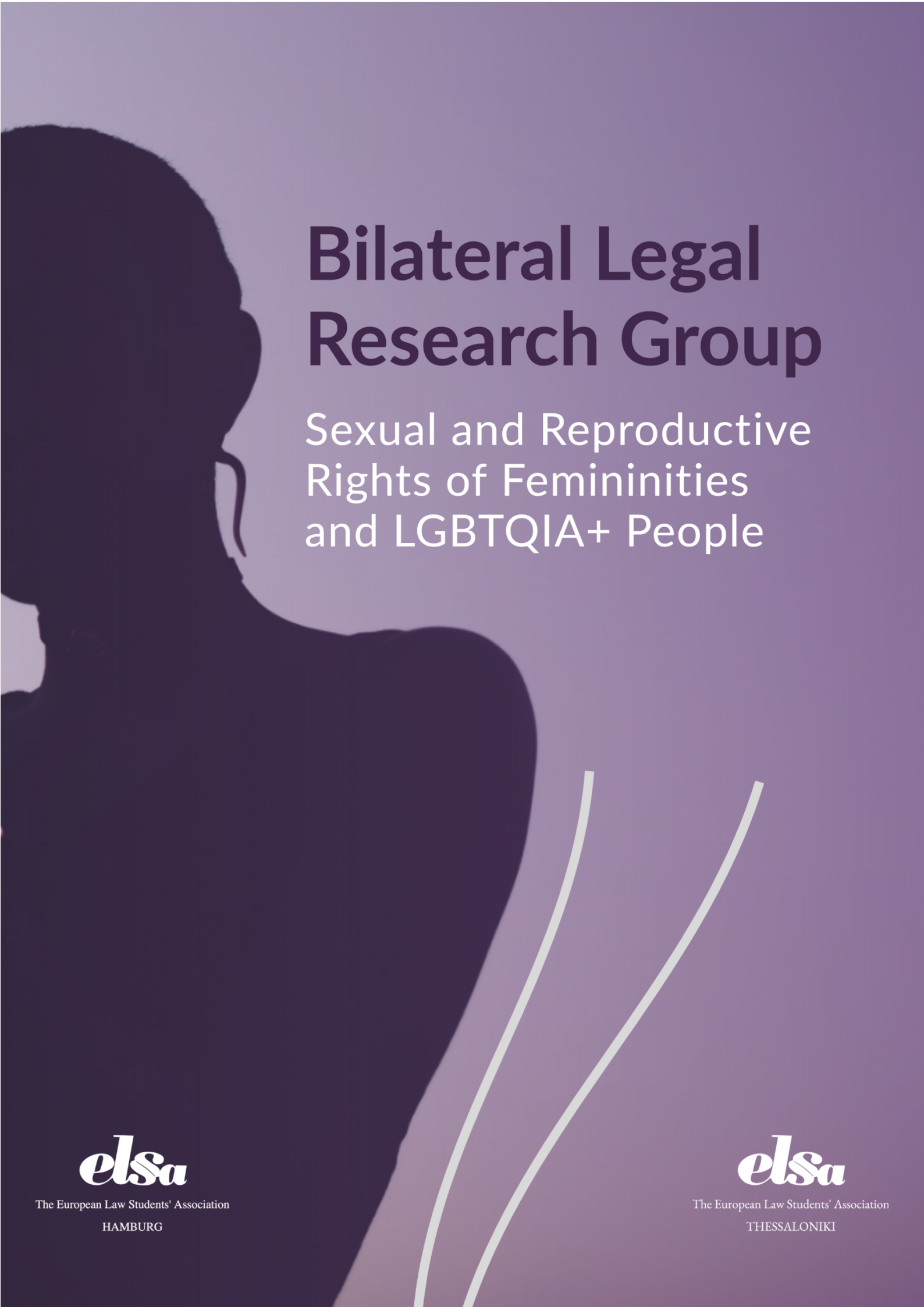

Bilateral Legal Research Group

Sexual and Reproductive Rights of Femininities and LGBTQIA+ People

elsa
The European Law Students' Association
HAMBURG

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THESSALONIKI

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Concluding Report of the Bilateral Legal Research Group of ELSA Hamburg and ELSA Thessaloniki on Sexual and Reproductive Rights of Femininities and LGBTQIA+ People

The European Law Students' Association
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FOREWORD

What is ELSA?

The European Law Students' Association (ELSA) is a non-political, non-governmental, non-profit making, independent Organisation which is run by and for students. ELSA has 43 Member and Observer countries with more than 375 Local Groups and 60.000 students. The Association was founded in 1981 by five law students from Poland, Austria, West Germany and Hungary. Since then, ELSA has aimed to unite students from all around Europe, provide a channel for the exchange of ideas and opportunities for law students and young lawyers to become internationally minded and professionally skilled. The purpose of the Association is to contribute to legal education, to foster mutual understanding and to promote social responsibility of law students and young lawyers. Our focus is to encourage individuals to act for the good of society in order to realise our vision: "A just world in which there is respect for human dignity and cultural diversity".

You can find more information about ELSA on http://www.elsa.org.

What is a Legal Research Group?

A Legal Research Group (LRG) is an academic, legal writing project that provides law students and young lawyers the opportunity to develop various legal skills, such as legal English, legal research and writing skills, as well as plenty of soft skills. A Legal Research Group is a group of law students and young lawyers carrying out research on a specified topic of law with the aim to make their conclusions publicly accessible. The project can work at local, national or international level. The first working LRG was formed by ELSA International in October 1996 to work on aspects of "International Criminal Law". Since the publication of that first research in 1997, ELSA International has launched LRGs on different topics of law, making the project more appealing and popular to its National Groups.

What is the Bilateral Legal Research Group on Sexual and Reproductive Rights of Femininities and LGBTQIA+ People?

In an attempt to make international collaborations and with the aim of adopting a more advocate and inclusive stance as a Network on important legal issues, ELSA Hamburg and ELSA Thessaloniki decided to form this year a Bilateral Legal Research Group on some of the most crucial topics of Sexual and Reproductive Health Law.

The research serves as a significant step towards raising awareness and increasing knowledge about sexual and reproductive rights, as well as providing additional and fruitful learning tools to law students internationally.

ACKNOWLEDGEMENTS

The Concluding Report of the Bilateral Legal Research Group on Sexual and Reproductive Rights of Femininities and LGBTQIA+ People, would not have been possible without the precious help and valuable support of many individuals.

ELSA Hamburg and ELSA Thessaloniki would first and foremost like to thank and congratulate the researchers and authors of this research; the ten under- and postgraduate law students that accepted the challenge to work on this difficult topic and managed to exceed all expectations. The passion and dedication you showed during the research period, your work ethic, your creative thinking and writing skills are admirable and made this project a success. Thanks to your extraordinary effort, you have provided the legal world with a valuable source of information on how Law is interconnected with Sexual and Reproductive Health, as well as Gender Studies.

We would also like to express our gratitude to our two Academic Supervisors, Dr. Andrea Kröpelin and Mrs. Paroula Naskou - Perraki for supporting our efforts from the very beginning, for the guidance and very useful feedback they provided us throughout our journey of making this research a reality.

Last but not least, special thanks to all the people that worked behind the scenes of this project and contributed to its achievement. Dear Linguistic Editors and Designers, without you this project wouldn't have been possible.

Thankfully yours,
Noëlle Sophie Marie Nowack and Theodora Fessatidou
Heads of Academic Coordinators of the Bilateral Legal Research Group on Sexual and Reproductive Rights of Femininities and LGBTQIA+ People.

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ABSTRACT

This Concluding Report contains the results of the Bilateral Legal Research Group that was conducted during the period of February 2022 to June of 2022 by ELSA Hamburg and ELSA Thessaloniki on the topic of Sexual and Reproductive Health Law.

Five law students from Germany and five law students from Greece joined forces and worked together in order to research and present their main findings regarding the following Sexual and Reproductive Rights: [i] the Right to Contraception, [ii] the Right to Abortion, [iii] the Right to Safe Birth and Access to Health Services, [iv] STIs and Harmful Sexual Health Practices, [v] Sexual Rights and Sexual Orientation of LGBTQIA+ People.

The research consists of five Chapters, dedicated to each one of the above-mentioned Rights. Each Chapter is further divided into Sub-Chapters. Starting with the illustration of the legal provisions of Germany and Greece on the above topics, the researchers make a comparative approach between the existing legislation of their respective countries to other EU and/or UN countries. They analyse the social reality of each topic as well as relevant jurisprudence, locate any legislative gaps and make suggestions about practical measures that could be enforced by their countries in order to ensure the full enactment and equal enjoyment of their citizens' sexual and reproductive rights.

We hope that our work will shed light on subjects of Health Law that haven't yet been efficiently addressed, establish the term "femininity" in the legal vocabulary and serve as a useful source of data for people wishing to gain more insight into the research topic. Our aim is to provide a positive example as to how a more inclusive legislation regarding sexual and reproductive rights could be established.

Introduction

By Ada Klenner and Angelos Papathanasiou

What is the Purpose of this Research?

Law, in particular Public International Law, always exists in a curious relation to society and politics. There is a delicate balance connected to any legal act - be it writing, administering or debating it - a balance that requires intricate knowledge of cultural, societal and even philosophical factors as well as historical denominators and the current political climate. If this seems challenging enough even on a local or national level, it is doubly complex on the international level.

This research seeks to take a closer look at the legal dimension of certain rights of femininities and LGBTQIA+ people. Further, through an in-depth analysis of existing legislative action taken in Public International Law and European Law, this work aims to uncover potential gaps in the legal framework. It includes questions on the transposition of certain rights into national legislation and assesses how far the implementation of these rights towards tangible duties of States has come. This report does not want to simply give an overview of an array of rights concerning LGBTQIA+ people and femininities, but rather also give regards to the stress field that continuously exists in any legal area between the written (or unwritten) law and the lived reality of individuals.

More specifically, this research project presented the opportunity for the researchers to deepen their knowledge on a more specific field of law traditionally not included in university curricula but nevertheless of great relevance. When the rights of minorities and marginalised persons are concerned, international legislation is influenced by political thinking potentially stronger than other areas, but the realisation of these rights is often overlooked and brushed aside with reference to the framework already in place. Before any attempts at filling in legislative gaps, however, there has to be a fundamental understanding of the process, contributing factors and the intersectionality of different legal dimensions. This is what this body of research seeks to provide as well, both for the researchers immersed in these topics but also for interested parties working to improve their knowledge of the rights of femininities and LGBTQIA+ people.

What do the Terms "Sexual and Reproductive Rights" and "Sexual and Reproductive Health" Refer to?

The World Health Organization (WHO) defines sexual health as a state of physical, emotional, social and mental well-being in regards to sexuality.[1] It is an integral part of general health and is to be distinguished from the mere absence of disease or dysfunction. The WHO also stresses the need for a positive approach to sexual relationships and for the enabling of safe, pleasurable sexual experiences without any discrimination, violence or coercion.

Reproductive health is categorised similarly, also postulating a state of complete physical, mental and social well-being stretching beyond the absence of disease.[2] This state has to concern all matters regarding the reproductive system, functions and processes.

Sexual and reproductive health intersect as they both presume the individual's freedom to and capability when and how often to reproduce as well as to have a satisfying sex life.

According to the European Institute on Gender Equality, reproductive rights are human rights recognised in international human rights documents that grant individuals the freedom and responsibility to decide on the number and spacing of their children as well as the information to decide upon it.[3] Reproductive rights also include the right to the highest attainable standard of reproductive health. The same is to be said about sexual rights, defined as the right of all persons to the highest attainable standard of sexual health without any discrimination, coercion or violence and in all matters relating to sexuality. Sexual rights also include the access to sexual (as well as reproductive) health care services and specific education.[4] Importantly, the right encompasses aspects of consensual relations and marriage, the free choice of a partner and to pursue a pleasurable and safe sexual life.

What do the Terms "Femininities" and "LGBTQIA+" Include?

LGBTQIA+

LGBTQIA+ is an abbrevation that stands for Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex, Asexual (and Agender), but also includes people who are part of the

[1] World Health Organization (WHO), *'Sexual health'* <https://www.who.int/health-topics/sexual-health#tab=tab_1> [accessed 16 June 2022].

[2] World Health Organization (WHO), *'Reproductive health'* <https://www.who.int/westernpacific/health-topics/reproductive-health> [accessed 16 June 2022].

[3] European Institute for Gender Equality, *'Reproductive rights'* <https://eige.europa.eu/thesaurus/terms/1350> [accessed 16 June 2022].

[4] European Institute for Gender Equality, '*Sexual rights'* <https://eige.europa.eu/thesaurus/terms/1381> [accessed 16 June 2022].

community, but for whom LGBTQIA+ does not accurately capture or reflect their identity, such as non-binary people.[5]

In particular, the term "lesbian"[6] refers to a woman who is emotionally, romantically, and/or physically attracted to other women, without it being necessary for them to have had any sexual experience. The term "gay" describes people who are in the aforementioned way attracted to people of the same gender in general. In practice, it is widely used to describe mostly gay men, since lesbian is often a preferred term for women, despite the fact that many of the latter use the term gay to describe themselves. The term "bisexual" [or bi (+)], refers to an individual who has the capacity for attraction - not necessarily equal levels of it - (emotionally, romantically, sexually, etc.) to people with the same, and to people with different, gender and/or gender identities as themselves. Thus, this term is usually used as an umbrella term so as to include pansexual people as well. The term "transgender" (or trans) describes a person, whose gender identity does not necessarily match their assigned sex at birth, and who may or may not decide to alter their bodies hormonally and/or surgically to match their gender identity. This term is used, as well, as an umbrella term to describe groups of people who transcend conventional expectations of gender identity or expressions, e.g. transsexual, genderqueer, gender variant, gender diverses, and androgynous. "Queer" is a term used by some people to desribe themselves and/or their community, and is valued by some for its defiance, by some because it can be inclusive of the entire community, and by others as they find it to be an appropriate term to describe their more fluid identities. The Q can also stand for questioning, namely those who are still exploring their own sexuallity and/or gender. Intersex conditions are understood to be various conditions that lead to atypical development of physical sex characteristic, e.g. external genitals that cannot be easily classified as male or female, incomplete or unusual development of the internal reproductive organs, inconsistency between the external genitals and the internal reproductive organs, abnormalities of the sex chromosomes, over- or underproduction of sex-related hormones, inability of the body to respond normally to sex-related hormones. Lastly, the letter A, standing for the term "asexual", is usually added in the abbrevation. The term "asexual" describes an identity and a sexual orientation, and is used to describe someone who does not experience sexual attraction towards individuals of any gender, althouth they may chose to engage in sexual behaviors for various reasons. By contrast, celibacy is the choice to refrain from engaging in sexual behaviors and does not comment on one's sexual attraction.

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[5] University of North Carolina Wilmington, *'LGBTQIA+; What All the Letters Mean'* <https://uncw.edu/lgbtqia/facstaff-resources/lgbtqia.html> [accessed 18 April 2022].

[6] The following definitions can be found at: University of North Carolina Wilmington, *'LGBTQIA+; What All the Letters Mean'* <https://uncw.edu/lgbtqia/facstaff-resources/lgbtqia.html> [accessed 18 April 2022]; PFLAG, *'PFLAG National Glossary of Terms'* <https://pflag.org/glossary> [accessed 18 April 2022]; The Center (The Lesbian, Gay, Bisexual & Transgender Community Center), *'What is LGBTQ?'* <https://gaycenter.org/about/lgbtq/#questioning> [accessed 18 April 2022].

The common denominator for all these terms is their deviation from the heteronormative[7] *status quo*, namely attitudes and behaviours that incorrectly assume gender to be binary, and that people should and will align with conventional exspectations of society for gender identity, gender expression, and sexual and romantic attraction.

Femininity

Simone de Beauvoir, an acknowledged philosopher and femininist,[8] states in the Introduction of her book "the Second Sex"[9] that "every female human being is not necessarily a woman; to be so considered she must share in that mysterious and threatened reality known as femininity". The latter is not only the biological representation of the female sex, but also the perception of the behavioural patterns and self-representation that are considered suitable for females in a specific place and time. The social perception of femininity is coined evidently by the fact that this term is not a solid and ecumenical term, but in contrast, it is a malleable situation, which varies between each culture.[10] In particular, the term gender refers to a transformation process through the variant cultural standards, values, roles and identities, from which the differences between the genders originate.[11]

Whether one is in favour of the complete abolishment of the gender identities, or supports the freedom of choice between them, or advocates for the alleviation of the gender dipole's regulatory standards, the social reality still formulates the term of femininity, particularly nowadays in a more radical way. This radicalisation has been expanded all through various social fields. For instance[12], stereotypes concerning colour preferences for each gender are put into question, the fashion and beauty industry is adjusting to the re-established term of femininity - although, outdated beauty standards still share their right amount of popularity -, and sexual and reproductive rights of femininites claim a significant part of the public dialogue. Moreover, LGBTQIA+ fluidity often coincides with the content of femininity, specifically as far as behavioural patterns and self-representation are concerned, which deviate from the heteronormative and patriarchical *status quo*.

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[7] LGBTQIA Resource Center, *'LGBTQIA Resource Center Glossary'* <https://lgbtqia.ucdavis.edu/educated/glossary> [accessed 18 April 2022].

[8] Stanford Encyclopedia of Philosophy, '*Simone de Beauvoir'* <https://plato.stanford.edu/archives/fall2010/entries/beauvoir/> [accessed 12 June 2022].

[9] Simone de Beauvoir, *The Second Sex* (Jonathan Cape, transl. and ed. by Howard M Parshley, Thirty Bedford Square London 1953/1956) 12; Deborah Cameron, *Φεμινισμός* (University Issues of Crete, transl. and ed. by Filotas Ditsas 2020) 101 [Greek].

[10] Deborah Cameron, i.b. 102.

[11] It is established that in social and historical sciences the term sex is used for the biological and physical determination and destination, whereas the term gender describes the social and cultural determination and destination, see also Eleni Rethimiotakis, Marina Maropoulou, Christina Tsakistrakis, *Φεμινισμός και Δίκαιο* (available at: <https://repository.kallipos.gr/handle/11419/6177>, Kallipos 2015) 15 et seq. [Greek].

[12] Deborah Cameron, i.b. 107 et seq.

At this point, it is notable how Article 3c of the Council of Europe's Convention of Istanbul on preventing and combating violence against women and domestic violence defines gender as the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men. It appears, thus, that the aforementioned social approach to gender, and consequently to femininity as well, is gaining ground in the international, european, and national (since the first two usually follow the procedure of ratification, when necessary, by the national legislative bodies) legal texts.

In summary, femininity cannot be defined in an intertemporal and inflexible way, but rather in reference to the social and cultural circumstances prevailing in a specific place and time, and that shall be rightly mirrored in the relevant legislations. After all, one is not born, but rather becomes a woman.[13]

Why is this Research Important for the Researchers and What Could it Offer to the Legal World?

The participating researchers had the chance to broaden their knowledge as far as sexual and reproductive rigths of femininities and LGBTQIA+ people are concerned, to review the current legislation in reference to the social reality, focusing mainly on Germany and Greece, and to make suggestions for a more inclusive legislation. The following findings are the result of a fruitful cooperation between Hamburg's (Germany) and Thessaloniki's (Greece) young/trainee lawyers and law students, who share a common interest in issues concerning gender and LGBTQIA+. Thus, apart from contributing to the corresponding legal discourse with their research, the participants managed to build a constructive dialogue between these two countries for the purpose of defending the sexual and reproductive rigths of femininities and LGBTQIA+ people.

Besides, the term femininity figures prominently among the pages of this research. Femininity, is a term widely used in social and historical studies for years, but still the law remains uneasy when it comes to regulating the changing tunes of the stalled heteronormative status quo. Furthermore, although LGBTQIA+ issues are gradually reflected in international, european and national legal provisions, the social reality underlines that LGBTQIA+ people still do not enjoy fully their fundamental sexual and reproductive rights. The current research aims at establishing the term of femininity in the legal word, by suggesting a wide interpretation of the word woman, in order for the latter to be more inclusive when it comes to queer people, by reference to the definition of the term gender. In addition, the following analysis of the de lege lata international, european, and national, with emphasis on German and Greek, legislation in relation to the sexual and reproductive rights - and specifically the rights to contraception, abortion, safe birth and access to health care services, the issues concerning sexually transmitted infections and harmful sexual health practices, as well as the sexual rights and orientations of

[13] Simone de Beauvoir, i.b. 273.

LGBTQIA+ people - hopes to offer a critical review of the current status quo, and thus make proposals for a more inclusive legislation, for the purpose of a stronger legal status and protection de lege ferenda of the sexual and reproductive rigths of femininities and LGBTQIA+ people.

Chapter 1: The Right to Contraception

By Ada Klenner and Maria Bellou

After a brief overview over different kinds of contraception, this section will discuss whether or not there is a right to contraception in International Law and how it translates to governmental responsibilities before giving an overview of relevant cases and a more detailed perspective on German and Greek legislation, with a closing look at the potential to improve the existing legal framework.

Pregnancy prevention can occur at different times during the procreational process. Some hormonal contraceptives prevent the fertilisation of an egg by suppressing ovulation altogether and thickening the cervical mucus to slow down sperm. Others contain so-called "abortifacients" which block a fertilised egg from nesting in the uterus or in the case of emergency contraceptives like the morning after pill purposefully trigger ovulation in order to achieve the same. Non-hormonal contraception works by killing the sperm once it is inside the woman's body through e.g. a diaphragm covered in spermicide cream or the uterine toxicity created by a copper IUD. Alternatively, sperm can be stopped from fertilising through a physical barrier via condom.[14]

Recognising the fact that there are other methods of contraception and that the ones listed are used with varying frequency, this paper will nevertheless set its main focus on hormonal contraception in the form of different pills and IUDs.

Another differentiation to be made is the one between contraception and abortion, despite the fact that they are commonly referenced in the same context. While contraception can be understood as the prevention of pregnancy, abortion is the prevention of childbirth. There are certainly similarities to be found - both represent essential elements of reproductive health and concern the need for women's self-determination. This contextual link also includes economic resources and its effects on family planning, another key aspect of female reproductive health. Despite these connections, however, abortion holds a vastly more controversial role in both the public and private discourse. By failing to separate the two properly, the right to contraception is at the risk of being held up in the same "pro-life" debates simply by proxy. The practical relevance became evident during the recent presidencies of Germany in the United Nations Security Council (UNSC) in April 2019 and July 2020. During the sessions, several States were seeking to enhance the protection of women and girls affected by sexual violence through Resolution 2467, including the now-modified No. 18 which in its former draft could have been interpreted as providing funding towards clinics that also performed abortions amongst many

[14] Overview in: Maisie Hill, *Period Power*, Ch. 7 subsection 5.

other services. During the debates, the US threatened to veto the entire resolution if the alleged support for abortions was not altered, leading to the vague wording now reading "including those who choose to become mothers". Even though this specific conflict does not relate to contraception per se, it nevertheless demonstrates how strong the aversion to abortion can be and how little some State Actors care to distinguish it from the larger undertaking of sexual and reproductive health in general.

This distinction also helps to dispel the persistent argumentation that legalising abortion leads to a form of "lazy" or "reckless" contraception.

1.1. Definition of the International Right to Contraception

The UN's Committee on Economic, Social and Cultural Rights found that the right to sexual and reproductive health guarantees the right to comprehensive education on reproduction in 2016.[15] This very much reflects the general approach of international treaty language: It is repeatedly stressed that women have a right to health just as much as men do under the legal equality of sexes. This right to health is deeply connected to reproductive health as part of their sexual health as well as the collective right to family planning. In a last step, several treaties specify thorough education and accessible information as necessary tools for the implementation of these rights.

An explicit mention of contraception can be found in the Beijing Action Plan No. 109 in reference to the support of research that examines the effect of unsafe and induced abortions on the contraceptive practices of women.[16] Far more commonly, texts refer to the umbrella term of reproductive health like the Agenda 2030, inter alia, Goal. 3.7 ("[…] ensure universal access to sexual and reproductive health-care services, […] and the integration of reproductive health into national strategies and programmes.").[17] Several treaties instead refer to the right to family planning, e.g. Article 23 para. 4 International Covenant on Civil and Political Rights (ICCPR) ("The right to […] found a family") and the Universal Declaration on Human Rights (UDHR), which is considered to incorporate principles of international customary law, Article 16 para. 1 ("Women of full age have the right to found a family […]").

In any event, reproductive health including contraception is a part of the general right to health afforded under Article 12 International Covenant on Economic, Social and Cultural Rights (ICESCR) as the respective committee and commentary take care to highlight. The General Comment No. 14 also stresses that maternal health care services are akin to non-derogable core

[15] UN Committee on Economic, Social and Cultural Right General Comment No. 22 (2016), *'The right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)'*, UN Doc E/C.12/GC/22 para 9.

[16] United Nations Economic and Social Commission for Western Asia, *'Beijing Declaration and Platform for Action'* <https://archive.unescwa.org/our-work/beijing-declaration-and-platform-action> [accessed 16 June 2022].

[17] United Nations, *'Transforming our world: the 2030 Agenda for Sustainable Development'* <https://sdgs.un.org/2030agenda> [accessed 16 June 2022].

obligations of States, even though the inclusion of contraception as a maternal health care service is subject to dispute.[18]

Another approach to construe the right to contraception is through the prohibition of gender-based discrimination found in a great number of legislative texts. Since the right to sexuality is commonly accepted as part of the international human rights, it stands to reason that for heterosexual women, contraception is an integral part of their sexual development and the lack thereof would present a substantial detriment based solely on their (biological) sex. Article 18 para. 3 of the African Charter on Human and People's Rights on the Rights of Women in Africa obligates States to ensure the eradication of discrimination of women and the protection of their rights. A similar sentiment can be derived from Article 3 ICCPR and ICESCR. In Article 23 para. 4 ICCPR in particular, the drafters set the obligation upon States to take appropriate steps for the equality of men's and women's rights during marriage.

Finally and perhaps most importantly, the ongoing need for a thorough treaty culminated in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Its Article 16 guarantees women's equal rights on deciding on the number and spacing of their children and to have access to the information, education and means to exercise these rights, i.e. means of contraception. Article 10 CEDAW also stipulates that the right to education encompasses the information on (healthy) family planning. Article 12 para. 1 picks up on the element of sex-based discrimination by stipulating the need for equal access to health care services for both men and women. A similar tone is struck with Article 14 para. 2 lit. b, which specifies the requirement for women's access to health care facilities that stretch towards information, counselling and services in family planning. The CEDAW's Committee likewise proposes that States help in the implementation of these rights as well as in the prevention of unwanted pregnancies through planning and sex education.[19]

In conclusion, it can be firmly determined that Public International Law intends for a right to contraception to exist. Just how far this right can be implemented, however, is another matter entirely.

1.2. Legal State Obligations Concerning Contraception Services

The General Comment 14 of the CESCR offers us a categorisation of government obligations concerning the general right to health, which can be applied to all internal elements of the right to health, including the right to contraception.[20] According to this, the right to contraception

[18] UN Committee on Economic, Social and Cultural Right, General comment No. 14 (2000), '*The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*', UN Doc E/C.12/2000/4 para. 21.

[19] CEDAW, General Recommendation No. 24 (1999), *''Article 12 of the Convention (Women and Children)'*

[20] Paul Hunt and Judith Bueno de Mesquita, *The Rights to Sexual and Reproductive Health* (Technical Report, University of Essex, Human Rights Centre, Colchester, Essex, 2007).

potentially binds governments to three principal obligations; (a) the obligation to respect, which entails abstention from interfering directly or indirectly in the practice of the right to contraception by the individual, (b) the obligation to protect, as to preclude third parties from interfering with the right of the individual to contraception, and accordingly to prosecute and punish such interferences and (c) the obligation to fulfil, which encompasses measures (such as laws, economic and social policies) that aim at the realisation of the right to contraception by individuals.[21]

Around the world, governments' obligations concerning contraception alternate between those three levels (respect, protect, fulfil), depending on the national and/or international legal provisions that are in effect for each country and can be found in national constitutions, international human right treaties and treaty bodies' general comments and recommendations. By systematising and analysing those provisions, we will reach a conclusion on what a State's particular obligations concerning contraception can be.

1.2.1. National Law

On a national level, very few constitutions refer to contraception, and those that do, broach it indirectly, as part of the right to *family planning*. In Article 61 of the Constitution of Paraguay, we trace an example of the obligation of the State to **respect** concerning the right to family planning, as "the State recognizes the right of persons to freely and responsibly decide the number and the frequency of the birth of their children". Such an obligation is also found in the Constitutions of Ecuador Article 66), Venezuela (Article 76), Portugal (Article 67) and Brazil (Article 226). On the other hand, the Constitutions of Portugal, Brazil, and Paraguay stand out as they establish obligations for their States to **fulfil** the right to family planning; in particular, the Portuguese State is obliged to promote "the information and access to the methods planning and means required" for family planning (Article 67), the Brazilian State is obliged to "provide education and scientific resources for the exercise of" the right to family planning (Article 226), while the Paraguayan State recognises the right of individuals to receive "education, scientific orientation, and adequate services" in the matter of family planning (Article 61). In this last Article of the Constitution of Paraguay, we can find the only provision of a national constitution that establishes the obligation of a State to **protect** the right of family planning from "any coercion on the part of official or private institutions", by establishing the obligation of the Paraguayan State to prohibit such coercions.[22]

[21] UNFPA and the Center for Reproductive Rights, *The Right to Contraceptive Information and Services for Women and Adolescents* (Briefing Paper, UNFPA and the Center for Reproductive Rights, 2010).

[22] Lucía Berro Pizzarossa and Katrina Perehudoff, *Global Survey of National Constitutions: Mapping Constitutional Commitments to Sexual and Reproductive Health and Rights* (Health and Human Rights Journal, 2017), 19(2), 279, 283.

1.2.2. International Law

1.2.2.1. Maputo Protocol

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is the only international treaty that goes as far as including "the right to choose any method of contraception" in its Article 14. The protocol has been ratified by 15 African nations, who are therefore obliged to ensure "the respect and promotion" of this right.[23] In 2014, the African Commission on Human and Peoples' Rights adopted the General Comment No. 2 on the aforementioned Article, where it is pointed out how crucial "the availability, accessibility, acceptability and good quality" of contraception is as well as numerous contraceptive methods are enlisted, in an effort to underline the need for variety.[24] Finally, in paragraph 63 of the Comment, States are being called to "remove all obstacles to the enjoyment by women" of their right to contraception. Such obstacles can be created by third parties, such as "patriarchal attitudes, harmful traditional practices, prejudices of health care providers", but also by the state itself, such as "discriminatory laws and policies". In total, the States that have ratified the Maputo Protocol are obliged to respect, protect, and fulfil the right to contraception.

1.2.2.2. CEDAW

The Convention on the Elimination of All Forms of Discrimination Against Women, that currently has 189 States parties, makes no mention of contraception. However, in Article 12, the Convention establishes the obligation of States to take all appropriate measures to ensure access of women to family planning. In 1999, the relevant treaty body, the Committee on the Elimination of Discrimination against Women, issued its General Recommendation No. 24 and connected the obligation of states to make contraception accessible to couples, who wish to limit their family size, to the general obligation of states to ensure that women realise their right to health care.[25] Additionally, it combined Articles 12 and 10 (h) of the Convention to confirm the obligation of states to ensure access to information about contraception, in ways such as "comprehensive sexuality education and awareness programs about the importance of contraceptives".[26]

In recent years, through its Concluding Observations towards States, the Committee has examined multiple aspects of state obligations concerning contraception; it has gone as far as introducing how patriarchal attitudes and cultural beliefs are some of the reasons for the low use of contraceptives in Iraq and consequently, that the state has an obligation to "conduct awareness-raising campaigns" to eliminate such obstacles and ensure women's free access to

[23] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003.
[24] ACHPR, General Comment No. 2 (2014), *'Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa'*, paras 53 and 56.
[25] CEDAW, General Recommendation No. 24 (1999), *'Article 12 of the Convention (Women and Health)'*
[26] CEDAW, General Recommendation No. 24, para. 28.

contraceptive methods.[27] In the case of Hungary, the Committee addressed the issue of emergency contraception and prescription requirements, urging the state to eliminate such requirements.[28] More recently, the Committee, in two of its Concluding Observations, highlighted the obligation to ensure "affordable access to contraception" in Mozambique and expressed its concern that "contraceptives are not paid for by health insurances" in Austria,[29] thus highlighting the topic of affordability as the next fight that needs to be won in the battlefield of state obligations concerning contraception.

1.2.2.3. ICESCR

The International Covenant on Economic, Social and Cultural Rights that has been ratified by 164 states includes no mention of contraception. Nevertheless, Article 12 of the Covenant has been interpreted by the Committee of the Covenant, in General Comments 14 and 22 of years 2000 and 2016, in a way that enlightens state obligations concerning contraception.[30] States are obliged to ensure the *availability* of a wide range of contraceptive methods - which are characterised as essential medicines.[31] As a matter of fact, the Committee points in the direction of WHO's Action Program on Essential Drugs,[32] which includes a variety of contraceptives, and affirms the obligations of states to ensure access to those essential drugs, as part of their core obligation to respect the right to health. The contraceptives must be *affordable* to all, which means that the state should make sure individuals are not disproportionately charged with the relevant expenses, by providing them with the necessary support to cover the costs of health insurance and to access health facilities that provide information, goods, and services on contraception.[33] For example, in 2019 the Committee instructed Slovakia to ensure that "a range of contraceptive methods are accessible through the national health insurance".[34] Additionally, they must be of *good quality*, which translates to "evidence-based, scientifically, medically appropriate and up-to-date".[35] The Committee also presents a wide spectrum of the obligation to respect the right to contraception; states should refrain from establishing legal or practical

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[27] CEDAW, Concluding Observations on the combined fourth to sixth periodic reports of Iraq (2014), UN Doc CEDAW/C/IRQ/CO/4-6, paras 42-43.

[28] CEDAW, Concluding Observations on the combined seventh and eighth periodic reports of Hungary (2013), UN Doc CEDAW/C/HUN/CO/7-8, para. 31 (b).

[29] CEDAW, Concluding Observations on the combined third to fifth periodic reports of Mozambique (2019), UN Doc CEDAW/C/MOZ/CO/3-5, para. 36(c); CEDAW, Concluding Observations on the ninth periodic report of Austria (2019), UN Doc CEDAW/C/AUT/CO/9, paras. 34-35.

[30] CESCR, General Comment No. 14 (2000), *'The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)',* UN Doc E/C.12/2000/4; CCESCR, General Comment No. 22 (2016), *'The right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)',* UN Doc E/C.12/GC/22

[31] CESCR General Comment 22, para. 13.

[32] World Health Organisation, *World Health Organisation Model List of Essential Medicines – 22nd List* (Geneva: World Health Organisation, 2021).

[33] CESCR, General Comment 22, paras 17, 28.

[34] CESCR, Concluding Observations on the third periodic report of Slovakia (2019), UN Doc E/C.12/SVK/CO/3, para. 42(a).

[35] CESCR General Comment 22, para. 21.

barriers that prevent access to contraceptives,[36] and from withholding or intentionally misrepresenting contraceptive information.[37] What is more, states are urged to take positive action in order to remove existing barriers, such as restrictions to free distribution and culturally based prejudices, and encouraged to carry out campaigns on women's right to have access to contraception.[38] Finally, the obligation to protect the right to contraception from abuses of third parties is enriched with the obligation of the state to make effective remedies available "when violations of informed consent and other abuses around contraceptive access and use have occurred".[39]

1.2.2.4. European Parliament Resolution

In 2021, the European Parliament adopted a – as was seen by many scholars – groundbreaking Resolution on the situation of sexual and reproductive health and rights in the EU.[40] In terms of contraception, the Parliament called on Member States to ensure "universal access to a range of high quality and accessible modern contraceptive methods and supplies", to provide "information on contraception for all" and to address any financial and social barriers that would prevent this.

1.2.2.5. CRC

The Committee on the Rights of the Child, which is the body that monitors the implementation of the Convention on the Rights of the Child by its 196 States parties, has added state obligations concerning the right to contraception specifically for adolescents via its General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health. Firstly, states should (consider to) allow underage persons to consent to contraception without the permission of a parent/caregiver/guardian.[41] Secondly, states should ensure that emergency contraception is "easily and readily available to sexually active adolescents". In 2019, in its Concluding Observations towards Argentina, the Committee pointed out the importance of sexual and reproductive health education, that is offered in schools, and of information about modern contraceptives that is available for adolescents "in accessible and confidential formats".[42]

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[36] CESCR General Comment 22, para. 34.

[37] CESCR General Comment 14, para. 34.

[38] CESCR, Concluding Observations of the Committee on the third periodic report of Ecuador (2012), UN Doc E/C.12/ECU/CO/3, para. 28.

[39] CESCR, General Comment No. 22, para. 64.

[40] European Parliament, Committee on Development, Committee on Women's Rights and Gender Equality, *'European Parliament resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health (2020/2215(INI))'*, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52021IP0314> [accessed 4 June 2022]

[41] Committee on the Rights of the Child, General Comment No. 15 (2013), *'The right of the child to the enjoyment of the highest attainable standard of health (art. 24)'*, UN Doc CRC/C/GC/15, para.31.

[42] Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth periodic reports of Argentina (2018), UN Doc CRC/C/ARG/CO/5-6, para. 32.

1.2.3. Obligations

To conclude, all these obligations of states that can be found scattered in national constitutions and international hard and soft law texts will be combined into a full comprehensive chart of what state obligations on the right to contraception can be.

OBLIGATION TO RESPECT	Obligation to refrain from establishing legal obstacles (such as spousal or parental consent requirements, restrictions based on marital status, requirements that women have a minimum number of children, prescription requirements for emergency contraception) and practical obstacles (such as restrictions to free distribution, restrictions on certain contraceptive methods, high costs) in accessing contraception.[43]
	Obligation to take positive action and eliminate such existing obstacles.
OBLIGATION TO PROTECT	Obligation to protect from any violation or abuse of the right to contraception by third parties or private institutions, such as "a pharmacists' refusal to distribute legally available contraceptive methods"[44] or a doctor's violation of the obligation to inform when prescribing or not prescribing contraceptives.
	Obligation to ensure that punishment and effective remedies are in place when such violations or abuses occur.
OBLIGATION TO FULFIL	Obligation to provide information on contraception that can lead to informed and consensual decisions on accessing contraception.
	Obligation to educate on contraception (specifically for children, as part of the mandatory school curriculum) and to promote awareness of gender equality issues that prevent women from accessing contraception.

[43] UNFPA and the Center for Reproductive Rights, *The Right to Contraceptive Information and Services for Women and Adolescents* (Briefing Paper, UNFPA and the Center for Reproductive Rights, 2010).
[44] ibid.

Obligation to ensure that contraception services are available, accessible, affordable, and of good quality.

Obligation to ensure that adolescents can consent to contraceptive treatments without the permission of a legal guardian.

1.3. The German Legislation around Contraception

The right to contraception is not awarded to German citizens by its main legislative texts. Explicit references to contraception are rare and ambiguous. Both the collections of written law as the main legal source and the jurisprudence by German courts as well as scholarly debates about them lack concrete mentions for the most part. One can find one paragraph that concerns the prohibition of forced sterilisation on children and adults living under tutelage.[45] Yet, this still remains unconnected to the larger question of contraception. As part of the social welfare legislation, § 24a *Sozialgesetzbuch V*[46] stipulates that publicly insured women be granted access to medical counselling about questions surrounding contraception. The single judgement made in connection to this paragraph regards a separate problem about the flexibility of the contraceptive's cost.[47]

The German government intended for the cost of contraception to be carried by the individual. In the context of welfare benefactors, an attempt to implement the right to contraception was included in German legislation via § 37b S. 2 No. 2 *Bundessozialhilfegesetz*[48] regulating that medically prescribed contraception drugs were to be covered through the welfare program. However, this regulation was limited in time to three years and expired on 01.01.2004. Afterwards, it was not renewed and the right it afforded was again limited to the aforementioned § 24a II *Sozialgesetzbuch V*, the norm restricting free contraception to under 22 year olds with prescriptions.

Understanding the practical difficulties of this, some counties have allocated certain special budgets within their fund for women in need.[49] However, while undoubtedly a step in the right direction, this is far from a legal certainty and even further from any actionable right.

[45] Civil Law Code 2002 [Buergerliches Gesetzbuch (BGB) §1905] [German] regulates the sterilisation of persons living under a legal guardianship and the requirements necessary for their guardian to agree to a procedure in their place.

[46] Social Law Code No. 5, 1988 [Sozialgesetzbuch (SBG) V Buch] [German].

[47] B3KR11/98R [2000] Bundessozialgericht, Neue Juristische Wochenzeitschrift [2002] 318 [German].

[48] Federal Legal Code about Social Welfare 1961 [Bundessozialhilfegesetz] [German].

[49] Women with a certain minimum income in inter alia the city-state of Hamburg are eligible to have their prescription contraceptives refunded through their insurance; see Hamburg, *'Kostenübernahme für Verhütungsmittel'*

Citizens are afforded the right to be informed about different methods of contraception by a healthcare professional, though. The details of this and the funding of informational clinics is regulated through the *Schwangerschaftskonfliktsgesetz*, the Law concerning Conflicts in Pregnancy.[50]

Another aspect to take into consideration when regarding legislation is a potential breach of some of the basic rights provided by the German Constitution, namely the right to equality between the sexes guaranteed in Article 3 para. 2 and the freedom to develop your personality without inhibitions as granted by Article 2 para. 1 as well as the right to a family under Article 6 para. 1.[51]

Article 2 para. 1 may be breached due to the fact that a pregnancy, especially an unwanted one, has a major impact on a woman's personality. This norm also grants persons the inviolability of their bodies, which arguably is altered through an involuntary fertilisation. A violation of Article 3 para. 2 could present itself through the fact that the risk of pregnancy lies on women, which makes their need for contraception more prevalent and leads to women having to spend more money. This indirectly forces a shift in a woman's budget to ensure the same self-determination and sexual freedom that men enjoy.

The far more extensive area of regulation in connection to contraception can be found in the public health sector. Germany prides itself on a progressive system of a myriad of social securities and a health care system that encompasses all manners of different services. After a system of general public healthcare was introduced in 1883, different administrations have shaped a two-tier-system for the German population throughout the decades. The vast majority of citizens (ca. 87%) are insured via the state insurance (*Gesetzliche Krankenkassen*), with another 11% having taken the option of private insurance (*Private Krankenkassen*). The fee in the state system is largely regulated and orients itself on the yearly income. In contrast, if the earnings exceed a certain amount, citizens can opt for the private system, which offers a broader array of services in return for a fee that ordinarily focusses on age and general health instead of income.[52]

Within public health insurance, there is a varying degree of coverage for contraception. Hormonal contraception for women includes the pill, IUD and implants as well as a diaphragm. Without a prescription, contraception cannot be free of charge. For young women, these

<https://www.hamburg.de/leistungen-hilfen/12939016/verhuetungsmittel/>[accessed 16 June 2022] [German].

[50] Law Concerning the Prevention and Management of Conflicts Related to Pregnancy 2018 [Gesetz zur Vermeidung und Bewältigung von Schwangerschaftskonflikten (Schwangerschaftskonfliktgesetz)] [German].

[51] Basic Law for the Federal Republic of Germany 1949 [Grundgesetz der Bundesrepublik Deutschland] [German].

[52] Bundesministerium für Gesundheit, *'Geschichte der gesetzlichen Krankenversicherung'* <https://www.bundesgesundheitsministerium.de/themen/krankenversicherung/grundprinzipien/geschichte.html> [accessed 16 June 2022] [German].

prescriptions will be fully covered until their 18th birthday, after which there is a partial fee that has to be carried privately. After the 22nd year however, hormonal contraception prescriptions require "medical necessity", which do not cover the prevention of pregnancy but rather conditions like acne.[53]

In an effort to make emergency contraception in particular more accessible, lawmakers removed it from the list of prescribed medication in 2015. However, in order for one's insurance to cover the cost of it, the patient needs a medical personnel's referral beforehand.[54] While in theory it enables easier access to this form of pregnancy prevention, it ignores the reality of the economic disbalance surrounding contraception in society. By requiring a prescription tied to a doctor's appointment in a situation that is defined by stress, urgency and often a general feeling of uneasiness, economically disadvantaged women bear the brunt of this and are indirectly forced to carry the cost themselves. It is well-documented that income inequality affects the usage of contraception - women in financially unstable situations being more likely to use cheaper and less safe methods of contraception or dispense with them entirely.[55]

While the social welfare system does allocate a certain amount to health care expenditures each month, it is rarely enough to fully pay for contraception, let alone the fact that other health care expenses cannot be taken care of as well. Even though there are certain means of contraception that are cheaper when calculated monthly like an IUD, they come with a bigger insertion cost of multiple hundred euros that neither insurance nor welfare will cover.

1.4. The Greek Legislation around Contraception

1.4.1. The Right to Contraception and Contraceptive Information in Greek Law

The right to contraception is not directly protected in Greek Law. It is one of the derivative rights of the right to reproduction, and in particular of its negative status (the right to non-reproduction).[56] According to the widely held scholar view, the right to reproduction is constituted on the right to free development of personality, which is established in Article 5 para. 1 of the Greek Constitution,[57] and generally protects the right to self-determination,

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[53] Mareice Kaiser, '*Warum Verhütung ein Menschenrecht ist*' (2018) <https://www.zeit.de/zett/politik/2018-06/kostenlose-verhuetung-fuer-alle?utm_referrer=https%3A%2F%2Fwww.google.com%2F> [accessed 16 June 2022] [German].

[54] Mareice Kaiser, '*Warum Verhütung ein Menschenrecht ist*' (2018) <https://www.zeit.de/zett/politik/2018-06/kostenlose-verhuetung-fuer-alle?utm_referrer=https%3A%2F%2Fwww.google.com%2F> [accessed 16 June 2022] [German].

[55] Heidrun Thaiss et al, frauen leben 3 - Familienplanung im Lebenslauf von Frauen (study on unwanted pregnancies, Bundeszentrale für gesundheitliche Aufklärung 2016) [German].

[56] Theodoros D. Trokanas, *Ανθρώπινη Αναπαραγωγή, Η ιδιωτική αυτονομία και τα όριά της* (Sakkoulas 2011), 101 [Greek].

[57] Konstantinos C. Chrysogonos and Spyros V. Vlahopoulos, *Ατομικά και Κοινωνικά Δικαιώματα* (4th edn, Nomiki Bibliothiki 2017) [Greek].

meaning the freedom of each individual to form its life according to its inclinations, abilities, interests and opinions.[58]
Contraception is directly mentioned in Law 3418/2005 (Code of Medical Ethics),[59] from which the importance of the availability and provision of contraceptive information can be derived. Also, the obligation of the doctor to provide the interested party with any valuable information concerning the topic of contraception is established in article 30 para. 1.

1.4.2. Contraceptive Methods in Greek Law

In various Ministerial Decisions issued by the Minister of Health periodically, in which medical products are categorised based on transcription requirements and social insurance coverage, we can find contraceptive medicinal products in all categories. For example, *Gynofen 35*, a medical product that contains Ethynyloestradiol, an oral hormonal contraceptive, is listed in the latest Ministerial Decision concerning medicines that require prescription by a doctor and are covered by social security.[60] Furthermore, *Mirena*, an intrauterine device, containing Levonorgestrel, is listed in the same Decision.[61] Emergency contraceptive medical products, such as *Postinor* that also contains Levonorgestrel and *EllaOne* that contains Ulipristal, are listed in the Ministerial Decision concerning medical products for which there is no prescription requirement.[62] Finally, *Yasmin* and *Yasminelle*, two oral contraceptive medical products that contain Ethynyloestradiol, are available without prescription by a doctor, and are not covered by social security.[63]

In conclusion, Greek legislation offers but minimum limitations to the use of (certain) contraceptives, ensures that there is social security support for some of them and encourages doctors to provide contraceptive information as a basic step to informed decisions and consent.

1.5. Comparative Approach of the two Legal Systems to other European Countries/EU/UN

When comparing the Greek and German approaches at legislating contraception, it becomes evident that, apart from the bare minimum, most decisions are left at the discretion of insurance providers instead of being regulated by law. Both national constitutions offer Articles from which a right to contraception could be derived. While there is some scholarly opinion for the Greek Article guaranteeing reproductive rights as part of the right to self-determination, there is no such debate by German legal practitioners. Further similarities can be drawn on the basis of the fact that both legislators agree that the access to contraceptives should not be obstructed.

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[58] Theodoros D. Trokanas, *Ανθρώπινη Αναπαραγωγή, Η ιδιωτική αυτονομία και τα όριά της* (Sakkoulas, 2011), 91 [Greek].
[59] Law 3418/2005 (Code of Medical Ethics) 2005 [Κώδικας Ιατρικής Δεοντολογίας] [Greek].
[60] Ministerial Decision D3(a)/61483/2018 Approval of positive catalogue of paragraphe 1, case a, of article 12 of N 3816/2010 2018 [Greek].
[61] ibid.
[62] Ministerial Decision D3(a)/46732/2021 Update of the catalogue of non-prescription medicines for the year 2021 2021 [Greek].
[63] Ministerial Decision DYG3a/oik.G.Y.153 Catalogue of pharmaceutical medicines that are prescribed by doctors and are not covered by social insurance 2012 [Greek].

In comparison to other countries, the intrinsic link between lawmakers and insurance providers seems to be the biggest obstacle everywhere. In the UK, contraception and the access to it was made free in 1974, but partially reversed in 2012. Due to the division of services between three separate health care providers and their specific funding allocations, the availability and costs of different forms of contraceptives varies significantly throughout the UK.[64]

Spain, on the other hand, has one of the most advanced health care services in the world with contraceptives being widely free of charge and readily available. Health insurance providers offer a broad array of financial subsidies and condoms are low priced, too. Naturally there are some bureaucratic hurdles to be overcome, but in comparison to other (European) countries, Spain can be regarded as a "role model".[65] A similar situation can be observed in Brazil, where the public health system subsidises a large number of contraceptives. In response to the spread of HIV during the 1980s, the use of condoms was widely promoted and is still prevalent today.[66]

1.6. The Social Reality of Contraception that has not been Legally Regulated yet

As with most (human) rights, there is a sizable discrepancy between the nominal condition set out by the legal text and the reality outside of the law. In this, the right to contraception, be it national or international, is no different. There are a multitude of factors to consider when assessing the effects of the right. The question has to be asked whether or not it is an actionable right that the state has a positive obligation to fulfil or rather a legal notion to grant protection against discrimination.

Currently, the right to contraception is not something a private individual can demand of the state but rather something that must not be unduly impeded or prohibited. Even within this distinction, there are numerous hindrances for women trying to exercise their right to obtain information or contraceptives. In several countries, unmarried women cannot acquire contraceptives for either legal or, more commonly, societal reasons. The enormous pressure certain cultural, religious and societal factions place upon women to abstain from sex for anything but procreation can prove detrimental to the fulfilment of their self-actualisation.[67] While reasons of accessibility play another role, especially in rural areas, it is the pressure put on women through societal structures that mainly inhibits their opportunities for receiving

[64] National Health Service (Family Planning) Act 1967.

[65] International Planned Parenthood Federation (IPPF), *'Why access to contraception is still an issue in Spain'* <https://europe.ippf.org/resource/why-access-contraception-still-issue-spain> [accessed 16 June 2022].

[66] C.B. do Nascimento Chofakian., C. Moreau, A.L.V. Borges, et al, *Contraceptive Discontinuation: Frequency and Associated Factors among Undergraduate Women in Brazil* (Reproductive Health Journal, 2019, available at: https://doi.org/10.1186/s12978-019-0783-9) 16, 131.

[67] Geo J Gender & L, *Access to Contraception* (2017) 18, 439, 441.

contraceptives.[68] Women across all cultures and human history have been denied the pleasurable aspect of sex which would render contraceptives redundant. However, as social movements in the west after the popularisation of the pill in the 60s and 70s have shown, women's liberation and empowerment are a key part of social change across the spectrum, a prospect that the patriarchy is adamant to prevent at all costs. Changes for women's lives through contraception can be witnessed on smaller scales as well, e.g. through the continued efforts to provide women in poorer communities on the African continent and the subsequent decline in HIV and unwanted pregnancies.

Similarly, religious barriers often play a role by objecting to inter alia all contraceptives as "life-preventing" or taking issue with (unmarried) women in particular for mainly the same reasons as mentioned previously.

Potentially the biggest factor that women have to counter is the financial burden of contraception. Even though hormonal contraceptive methods for men are being gradually researched, women are still the party more at risk when it comes to an unplanned pregnancy, as they are the ones bearing the physical and emotional consequences. Therefore, it stands to reason that the majority of women see themselves as responsible for preventing a pregnancy. As a consequence, however, women have to spend more money to retain the same level of freedom in their sexuality and family life as men. Furthermore, women in financially unstable situations may be unable to come up with the required amount for safe means of contraception. While certain hormonal methods like the pill or an IUD may be cheaper in the long run or covered by health insurance, these come with their own set of risks. Supplementing the body with hormones can have serious side effects that women may wish to avoid. Thus, if those methods of contraception are the economically accessible ones for certain women, they may be coerced into conceding their physical and psychological well-being in favour of some measure of self-determination.

Incidentally, this is one of the aspects of the right to contraception most readily remedied through legislative action. Instead of merely granting women the passive protection from potential discrimination, states could take action in supplying women, particularly women in financial struggles with free means of contraception. Since this would present most states with a considerable political, societal and fiscal shift, there are steps to reach that goal gradually. A first approach would be the inclusion of contraception in general health insurance plans. Since health insurance is usually regulated through national laws, if at all, it is highly unlikely that international law-makers could find a way to implement this on a global or even European scale. Nevertheless, if several international bodies are to be trusted in their classification of contraception as part of refundable health care services, its inclusion must be the logical

[68] Anne Ruetten, *Familienplanung ist ein Menschenrecht* (Plan International, 2020) <https://www.plan.de/news/detail/familienplanung-ist-ein-menschenrecht.html> [accessed 16 June 2022] [German].

consequence. Naturally there are key differences between contraception and other services provided through health insurance. And yet, the most equitable solution would seem to be a system of communal (financial) care that steps away from the idea of putting the responsibility on the individual. On smaller communal levels, some states are already implementing similar schemes, proving that such a solution is not impossible. There, women with financial needs are eligible to receive free or refundable contraceptives.

The inclusion in health care or social security programs could also be the solution to other much-debated aspects of the right to contraception. First among them is the question, what precisely insurance should cover. Many states already cover female hormonal birth control pills or implants to some degrees. However, condoms are not part of refundable contraceptives. This brings up several questions that remain unanswered by governments and health care providers across all legislations which will be introduced presently:

In contrast to the much-stressed wish for the elimination of all kinds of discrimination between men and women, the only reliable method for male contraception is not being included in most insurance plans. Through this, the expectation that preventing pregnancy is solely the woman's obligation is reinforced. Both the emotional and financial pressure of securing contraceptives mentioned above are evidently still being placed upon women. At first glance, the superficial reasoning for this seems evident - women become pregnant and methods to prevent this should therefore be targeted at women's physical condition. However, this ignores the reality of many men who are sidelined in their wish to avoid a pregnancy as well. Maintaining contraception or the lack thereof as a "women's problem" refuses many men the chance to also take up the responsibility and for couples to find alternatives to hormonal birth control.

Too often in discussions around reproductive health men exist solely in their capacity to cause a pregnancy. And while this is with good reason, no debate is complete without the recall that men also suffer without affordable contraceptives.

This circles back to the differentiation made between certain types of contraceptives and what they should achieve. Following a more traditional understanding of contraception, preventing a pregnancy is understood as the topmost priority, supported by treaty language frequently referring to "family planning". Nonetheless, in line with the inclusion of contraception as part of the general right to health, there is a case to be made that contraceptives should also provide protection from the spread of STDs. In this regard, condoms and dental dams are the only methods that can protect effectively from a broad array of infections. As a logical consequence of this, health care providers should also include condoms in their insurance plan.

Similarly, contraceptives should be refunded by insurance companies for a longer period of time. By setting a firm date for their coverage, be it 18, 22 or 25, profit-oriented companies deem women to be either financially stable enough to fund contraception or emotionally mature

enough to carry a baby to term. It also reinforces women's responsibility and their implicit misfortune to bear the physical impact of failed contraception.

A more flexible system that adjusts, e.g. to the factual income, is therefore necessary. With such a change, the societal expectation that at a certain point, sex should always lead to pregnancy could be altered. Likewise, it would further the realisation of the right to self-determination and sexuality, since women had more and more spontaneous means of fully developing and experiencing sex not just for procreation but for pleasure as well.

Finally, this leads towards the problem concerning the recipients of contraception. People not risking pregnancy through unprotected sex like homosexual and transgender persons would be entirely exempt from the right to contraception under the more narrow understanding of pregnancy prevention. Interpreting it to include STD prevention as well, though, more individuals could profit from their human rights.

The debate whether law shapes society or society shapes the law is far too complex to broach here, but it stands to reason that legislative change has the power to influence society. An example for this can easily be found in the legal equality of the sexes codified in countless constitutions and international treaties over the last decades. While the gradual acceptance of this truth - not just in an abstract, legal sense - can likely not be singularly contributed to law texts, their effect cannot be ignored, either.

A more accepting atmosphere towards sexuality and sex for non-reproductive reasons could likely result in a broader change in society and help overcome other obstacles like stigmatisation and cultural taboos.[69]

In the meantime, all states should continue with most already existing practices of broader and more comprehensive education on all topics related to contraception in its many forms.

1.7. Jurisprudence

National and international jurisprudence about contraception has grown slowly and steadily, following the breakthrough of the second wave of feminism. Since the landmark decision of Griswold v. Connecticut in 1965, where the *U.S. Supreme Court* recognised the constitutional right of married couples to buy and use contraceptives, various perspectives of the right to contraception have been examined by courts all around the world.

To begin with, the refusal of third parties to provide contraceptive services has led to court decisions that struggle to find a balance between the right to conscientious objection (to sell contraceptives) and the right to access to contraception.

[69] WHO, *Ensuring Human Rights in the Provision of Contraceptive Information and Services* (Luxembourg 2014).

In Pichon and Sajous v. France, the *ECtHR* examined the case of two pharmacists that refused to dispense lawfully prescribed contraceptive products for religious reasons and were consequently found guilty of the crime of refusing the sale of a product to a consumer by French courts.[70] The Court ruled that pharmacists "cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell [contraceptives]", taking into account that "the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy". In the phrasing of the decision, we observe that the right to access to contraception, through purchase in a pharmacy, is placed in the public sphere.[71] The Court does not refer to the private sphere (the right to personal freedom, which potentially includes the right to contracept), but to the public sphere (the right to access and the obligation to sell medical products subject to medical prescriptions in the professional environment of a pharmacy).[72] In this sphere, the right to religious freedom of the pharmacist slightly weakens.

On the other hand, the *Spanish Constitutional Court* omitted to consider the aforementioned decision of the ECtHR in a 2016 decision concerning a fine imposed on a pharmacist because he didn't sell condoms or emergency contraception pills in his pharmacy.[73] The Court recognised the pharmacist's right to conscientious objection that justifies his refusal to sell emergency contraception (but doesn't justify his refusal to sell condoms). In particular, it applied its previous jurisprudence, where it had recognised the right to conscientious objection of doctors to abortions, to the duty of a pharmacist to dispense the "morning-after pill". This was based on the lack of consensus in the scientific community about the abortive effects (or not) of the pill, which proves the conflict of conscience of the pharmacist about the right to life to be consistent. It is worth noting that the Court refers to women's right to sexual and reproductive health, which is ensured by the duty of pharmacists to dispense certain mandatory medicines (in this case contraceptive medicines, as mandated by Spanish Law), but doesn't go as far as recognising that a conscientious objection to this duty can harm this right. Nevertheless, one of the judges who expressed a minority opinion in the decision, pointed out that the Spanish Medicines Agency considers emergency contraception as a mean to prevent a possible pregnancy by administering it immediately after having sexual intercourse and in no case classifies it as a medicine to end a pregnancy that has already started. Consequently, he underlined the contradiction in differentiating emergency contraception to condoms and accepting the clause of conscience for the first but not for the latter, since they are both contraceptive methods.[74]

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[70] *Pichon et Sajous vs France* [2001] ECHR 2001-X [2002] 381.

[71] "Article 9 of the Convention does not always guarantee the right to behave in public in a manner governed by that belief".

[72] "[the applicants] can manifest those [religious] beliefs in many ways outside the professional sphere".

[73] The fact that this was not considered stems from a minority's judge opinion who mentions the decision to reach the opposite conclusion.

[74] Sentencia 145/2015 [2015] Constitutional Court of Spain [Spanish].

Generally, a significant quantity of the jurisprudence about contraception concerns the "abortive effects" of emergency contraception. For example, in 2008 the *Council of State of Colombia* was asked to rule on this matter after the government's decision to approve the sale and distribution of an emergency contraception pill, followed by a citizen's petition which sought to remove the drug from the national drug registry. The highest administrative court, after presenting evidence (deriving from national and international medical organisations, scientists and professionals) about the substances and effects of the specific pill that prevents the ovulation and is not effective after the implantation of the zygote has started, decided that emergency contraception is a contraceptive method and not an abortifacient. Therefore, it doesn't violate the constitutionally protected right to life, which, as the Court underlines, is protected not in its abstract form, but in reference to a particular subject – even unborn – not in reference to single male and female gametes as potential bearers of life.[75]

Furthermore, the Mapingure case of the *Supreme Court of Zimbabwe*, brings the right to contraception under the microscope of state's and state authorities' obligations.[76] Mapingure was a rape victim who sought contraception immediately. Due to the hospital's insistence that a police officer should be present for the contraceptives to be administered and the responsible police officer's absence, more than 72 hours passed (the time of eligibility of emergency contraception) before she was accompanied to the hospital by a police officer, at a time that she could no longer be treated with emergency contraception to prevent pregnancy and sexual infections. Following an appeal on the High Court's case, which talked of ignorance of the victim (ignorance as to the correct procedure to follow in order to acquire contraception) and didn't recognise an obligation of the officials to ensure she received contraceptive services, the Supreme Court ruled that the state was liable for failing to provide emergency contraception. In particular, it found "negligence on the part of the doctor and the police in ensuring that the pregnancy was prevented"; the doctor didn't act as any reasonable person in a similar position would act, foreseeing the probability of a pregnancy if contraceptives were not administered, while the police failed to comply with the "legal duty" – that doesn't stem from their statutory function, but from the specific circumstances – to assist in the prevention of Mapingure's pregnancy.[77] In other words, Mapirunge's right to sexual and reproductive health (and particularly the right to contraception) was hindered by procedural barriers, such as the absence of a police officer and the lack of a police report. This creates a liability of the state to compensate her, since the state is obliged to remove all laws, practices and barriers that undermine the right of a woman to contraception (see state obligations concerning contraception in section 1.2). In fact, the Court found that international standards, specifically

[75] Radicación No. 11001 0324 000 2002 00251 01 [2008] State Council of Colombia [Spanish].

[76] *Mapingure v Minister of Home Affairs & Others* [2014] Supreme Court of Zimbabwe Judgement No. SC 22/14.

[77] Southern Africa Litigation Centre, *'Judgement In Mapingure V The State: A Step Forward For Women's Rights Or A Token Gesture'* (2014) <https://www.southernafricalitigationcentre.org/2014/04/08/judgment-in-mapingure-v-the-state-a-step-forward-for-womens-rights-or-a-token-gesture/> [accessed 17 May 2022].

those set by CEDAW and the Maputo Protocol, impose certain obligations concerning "a woman's right to protect and control her biological integrity" that the Zimbabwean government failed to meet. As a result, the government was ordered by the Court to compensate Mapingure, because she suffered harm from the non-prevention of her pregnancy, whose "proximate cause was the negligent failure to administer the necessary preventive medication timeously".[78]

Finally, in *Imbong v. Ochoa, Jr.* the Supreme Court of Philippines, while examining various aspects of the right to contraception, it dramatically but realistically, notices that "nothing has polarised the nation more in recent years than the issue(s) of [...] contraception". As a matter of fact, the topic of contraception in Philippines has reached international judicial organs, with the most significant example being that of an inquiry of the CEDAW's Committee into "alleged systematic and grave violations" of various rights guaranteed in the Convention by Executive Order No. 003, an order issued in 2000 by the Mayor of the city of Manilla (capital city of Philippines) that promoted *natural family planning* and discouraged the use of modern forms of contraception".[79] The Committee notices that this Order essentially resulted in "the withdrawal of all supplies of modern contraceptives from all health facilities funded by the local government", a situation that hasn't changed through the years, as proved by Executive Order No.030, issued in 2011, that recognised the lack of access to contraceptive services and information and consequently supported the free choice by couples of their method of contraception. However it stated that there wouldn't be any funding for *artificial birth control*, while no other provision ensured the availability and affordability of contraceptives. In the words of the Committee we can observe how a de jure entitlement to contraceptives is completely void "in the absence of available commodities, adequate information and training of health-care personnel".[80]

In the court decision we are examining, the Supreme Court of Philippines rules on the (un)constitutionality of the Responsible Parenthood and Reproductive Health Law, a law issued in 2012 that guaranteed access to modern contraceptives to all Filipinos, including those living in impoverished communities, through governmental health centres, and also obligated governmental schools to provide reproductive health education.[81] The Court declared that the law was "not unconstitutional", while tracing certain unconstitutional provisions in it - most noteworthy being that concerning the spousal and parental consent for access to contraceptives. In particular, the Court's reasoning was based on the constitutional notion that the Filipino family is "the foundation of the nation".[82] Therefore any legal provisions that bar a spouse from

[78] Mapingure (n 76).

[79] Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (2015) <https://digitallibrary.un.org/record/794624?ln=en> [accessed 3 July 2022]

[80] Paroula Naskou - Perraki, *Το δικαίωμα στην υγεία* (Sakkoulas 2022) [Greek].

[81] *James M. Imbong v. Hon. Paquito N. Ochoa, Jr.* [2014] Supreme Court of the Republic of the Philippines G.R. No. 204819 [Filipino].

[82] The Constitution of the Republic of the Philippines, Article XV

"participating in the decision making process regarding their common future progeny" or the parents "of their authority over their minor daughter" wreck the family as a "solid social institution" and intervene in the "protected zone of marital privacy".[83] In other words, in this decision we observe how the tight connection between *contraception* and *family planning*, highly present also in international texts in a way that most of the times the first is presumingly included in provisions that regulate the second, can actually obstruct the realisation of the right to contraception, especially in countries where "a strongly-held [...] tradition of maintaining close family ties" is prevalent.[84] Consequently, as in the case we examine, the elimination of spousal or parental consent when a woman or girl tries to access contraception can be deemed unconstitutional.

Lastly, a mention should be made in what seems to be a political inspiration of the Court, that can give us a chance to add a political stroke in the past, the presence and the future of the right to contraception and its connection to eliminating poverty - a connection that is steadily being created in the past decades nationally and internationally, with legal texts such as the Millenium Development Goals and, more recently the 2030 Agenda for Sustainable Development.[85] In what can only be described as an enormous amount of political clarity the Supreme Court of Philippines declares that addressing the problems of rising poverty and unemployment through regulating the reproductive health and ensuring the right to contraception may be a "healthful intention", but it should be kept in mind that "the cause of these issues is not the large population but the unequal distribution of wealth" and "even if population growth is controlled, poverty will remain as long as the country's wealth remains in the hands of the very few". With this, comes the realisation that any goals that push towards the ensurement of the right to contraception, as desirable as that is, should be questioned legally and politically. For this report, the optimum motivation for a universally acknowledged right to contraception is the freedom of femininities to choose what to do with their bodies.

[83] *James M. Imbong* (n. 81)
[84] ibid
[85] UN General Assembly, *United Nations Millennium Declaration* 2000 (UN Doc A/RES/55/2); UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* 2015 (UN Doc A/RES/55/2).

Chapter 2: Right to Abortion

By Anna Clara Gross and Maria Kordi

2.1. Definition of Abortion

Gloria Steinem once said that abortion would be a sacrament if men were able to get pregnant. Men, however, cannot, thus the legal and political arguments for abortion rights today disregard the liberal legal doctrine by comparing the pregnant person with a man.[86]

But firstly, what is abortion? The term abortion refers to a termination of pregnancy "before the fetus is viable" or "before the fetus is able to live independently in the extrauterine environment, usually before the 20th week of pregnancy".[87] Globally, an estimated 73 million induced abortions occur every year.[88] During the first 12 weeks of pregnancy, this can be safely self-managed, in whole or in part, outside of a healthcare facility (for example, at home). In spite of this, 45% of all abortions are unsafe, 97% of which occur in developing countries. People with unplanned pregnancies face issues of not being able to abort safely due to barriers in obtaining legal, safe, timely, affordable, geographically accessible, respectful, and nondiscriminatory abortions. Consequently, abortions are commonly performed in an unsafe manner.

In spite of its preventability, unsafe abortions are a leading cause of maternal mortality and morbidity. It can have negative health consequences for women, communities, and health systems, as well as social and financial burdens. It is a human right and a critical public health issue to provide safe, timely, affordable and respectful abortion care. This issue pertains not only to the right to life and to physical and mental health at the highest level possible, but also to the right to reap the benefits of scientific progress in realising it. Further, questions of abortion are linked to women's right to choose freely and responsibly about how many, how far apart, and when to have children. As a final point, when it comes to abortion care that is inaccessible, the right to be free from torture, cruel, inhuman, and degrading treatment, punishment, and abuse is compromised.

Restricting access to abortion does not reduce the number of abortions, but it can affect how safe and dignified abortions are for women and girls undergoing them. There is a significant increase in unsafe abortions in nations with highly restrictive abortion laws. A supportive,

[86] Jonathan Bearak and others, *Unintended Pregnancy And Abortion By Income, Region, And The Legal Status Of Abortion: Estimates From A Comprehensive Model For 1990–2019* (The Lancet Global Health 2020) 8.
[87] Andreea Mihaela Niță and Cristina Ilie Goga, *A Research On Abortion: Ethics, Legislation And Socio-Medical Outcomes. Case Study: Romania* (Romanian Journal of Morphology and Embryology 2020) 61.
[88] Jonathan Bearak and others, *Unintended Pregnancy And Abortion By Income, Region, And The Legal Status Of Abortion: Estimates From A Comprehensive Model For 1990–2019* (The Lancet Global Health 2020) 8.

universally accessible, affordable, and well-functioning healthcare system, as well as respect for human rights alongside a supportive framework of law and policy are the trinity necessary for defining a supportive enabling environment for quality comprehensive abortion care.[89]

Whenever we think about abortion, we instinctively think of the huge debate on whether to legalise or criminalise it. Examining the right to abortion raises a number of ethical issues. Winston Nagan has simplified the categorisation of opinions centered around "abortion", classifying them into two major categories: those with the idea that the fetus is the primary element, and those centered around the rights of women.[90]

Moreover, research has shown that the legalisation of abortion can greatly reduce crime by reducing cohort sizes or by lower per capita offending rates for affected cohorts. In general, there are two main arguments for and against abortion. Firstly, by giving women control over their own body, reproductive choices empower women. Yet, many see abortion as a form of killing a human being. This results from the different opinions on when a foetus becomes "viable". Some view that a foetus reaches personhood only after being able to survive outside the womb, meaning after birth. Some see the beginning of personhood at conception, resulting in unborn babies having a right to life as human beings.

We must ask: are abortion restrictions protecting the dignity of the unborn children or infringing on women's rights to autonomy and bodily integrity?

Taking the decision to end a pregnancy voluntarily often involves a "moral conflict", since it is about human relationships, the goal of not hurting others, and responsibility towards them.

Almost all countries permit abortion in some circumstances, though the legal situation varies greatly by region; globally, only six countries outright prohibit abortion. Abortion is legal throughout most industrialised countries. About 125 countries restrict abortions, usually allowing it only under limited conditions, such as when the woman is at risk of bodily harm or mental damage, or when the foetus is abnormal. Several international frameworks and regional human rights courts that recognise access to safe abortion as a human right, including the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights. During the International Conference on Population and Development in Cairo in 1994, a program of action was signed committing to prevent unsafe abortions.

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[89] World Health Organization, *'Abortion'* (Who.int, 2022) <https://www.who.int/news-room/fact-sheets/detail/abortion> [accessed 16 June 2022].

[90] Andreea Mihaela Niţă and Cristina Ilie Goga, *A Research On Abortion: Ethics, Legislation And Socio-Medical Outcomes. Case Study: Romania* (Romanian Journal of Morphology and Embryology 2020) 61.

Article 2 of the European Convention on Human Rights (ECHR) provides substantive protection in addition to procedural obligations. This Article holds substantive obligations that require Member States to avoid taking actions to intentionally deprive individuals of their lives. Regarding the procedural obligations, Article 2 requires Member States to provide a good and thorough investigation whenever an individual dies because of state action. In the context of health care, Article 2 requires medical institutions to implement policies and procedures to protect patients' lives and an effective system to determine the cause of death occurring in a hospital and resulting in civil and/or criminal liability. It is thus possible for the European Court of Human Rights (ECtHR) to find a procedural violation even if it finds no substantive violation for the loss of life. As of now, the ECtHR has not heard any cases where a pregnant person was denied an abortion when her life was endangered because of the abortion laws of another Member State. A threat of suicide has also never been declared equivalent to the threat to life by the ECtHR, which examines abortion laws in Member States. The African Women's Protocol is the only international human rights instrument that explicitly declares that women have the right to access abortion when pregnancy interferes with either the mother's or the foetus's life. The Protocol urges ratifying states to go a step further and extend the right to women whose lives are "endangered" by pregnancy. As a result of this permissive and unqualified language, African women's access to abortions has been dramatically expanded.[91]

2.2. The German Legislation around Abortion

State abortion laws determine the conditions of abortion. In response to the high number of illegal abortions and deaths, many states changed their legislation in an attempt to legalise abortions.[92] Today, international organisations such as the United Nations and European Union consider sexual and reproductive rights to be fundamental rights, and support abortion as a fundamental right.[93] In the case of Germany, in general two primary positions affect the legal sphere of abortion. One opinion focuses on the foetus, whereas the other on the pregnant person. However, since 1996 another position has established itself in Germany. According to its view, this group holds a compromise between those two opinions in order to maintain Article 218 of the German Criminal Code. After years of bitter disputes, a return to relative and legal peace in Germany was a result of the compromise that manifests itself in Article 218 ff StGB. Germany, alongside many other European countries, legalised the disruption of pregnancy or at least decriminalised it. However, no state in Europe has completely decriminalised abortion

[91] European Court of Human Rights, *'Guide On Article 2 Of The European Convention On Human Rights'* (Echr.coe.int 2021) <https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf> [accessed 16 June 2022]; Satang Nabaneh, *'The Status Of Women's Reproductive Rights In Africa'* (Voelkerrechtsblog.org 2022) <https://voelkerrechtsblog.org/the-status-of-womens-reproductive-rights-in-africa/> [accessed 16 June 2022].

[92] Diana Bulgaru Iliescu and Beatrice Ioan, *Abortion-Between Procreative Liberty And Rights Of The Unborn Child* (Revista Romana de Bioetica 2005) 3.

[93] European Parliament, *'REPORT On Sexual And Reproductive Health And Rights'* (Europarl.europa.eu, 2013) <https://www.europarl.europa.eu/doceo/document/A-7-2013-0426_EN.html> [accessed 16 June 2022]; Cristina Ileana Vădăstreanua, *Legislative Measures On Violence Against Women. From International To Romanian Law* (Sociology and Social Work Review 2017) 1.

yet.[94] Criminal offences against nascent life are standardised in Articles 218 ff StGB and have their foundation in Article 13 of the Pregnant and Family Assistance Act or the Act to protect prenatal and expectant life, to promote a more child friendly society, to help with pregnancy conflicts, and on the regulation of abortion, dated July 27, 1992 (SFHG).

As of October 1, 1995, the after the division of Germany post-World War II freshly reunited old and new federal states' legal systems, which had been different up to that point, were eliminated, along with the interim solution imposed by the BVerfG, and a uniform legal basis for the entire federal territory was created.[95] The Catholic Church, in an 1864 Encyclical under the anti-modernist influence of Pope Pius IX, universally condemned the practice of terminating life once it had been conceived - a ban that quickly became entrenched in the nineteenth century's nationalistic struggles. In 1851, Prussia limited abortion; Bismarck followed suit, outlawing abortion and sending practitioners to hard labor under Articles 218 and 219 of the 1871 Criminal Code. As early as 1920, left-wing Reichstag delegates introduced the first of several proposed bills to liberalise the voting ban under the Weimar Republic, whose democratic constitution granted German women the right to vote. By 1926, the Independent Social Democratic Party of Germany, the Social Democratic Party of Germany and the Communist Party of Germany attempted to strike prohibitive paragraphs from the Code had succeeded at best in mitigating punishments for violators, mothers and accomplices. Almost immediately after Germany's unconditional surrender and its division into four zones of occupation in 1945, a new debate began, however, the 1871 Criminal Code remained in force pending promulgation of new West and East German constitutions in 1949. In spite of the fact that hundreds of thousands of rapes occurred within a week after the Allied Forces occupied major cities in Germany following the capitulation, the Code was rarely enforced. Abortion was most likely to be tolerated in cases involving Red Army soldiers. West German campaigns during 1946-48 failed to change the laws in their entirety, but hard labour and the death penalty were officially abolished in 1953.[96]

Maintaining the criminal punishability of abortion under the Penal Code was a result of the Federal Constitutional Court ruling that the unborn child has fundamental rights.[97] In addition, there is the option of advisory services, which aims to influence women's opinions rather than penalising them. Nevertheless, they should not paternalize the women, nor should it dictate a specific outcome. Advisory services should maintain a neutral stance. In a society that is not as

[94] Katja Krolzik-Matthei, *Abtreibungen In Der Debatte In Deutschland Und Europa* (Aus Politik und Zeitgeschichte 2019) [German].
[95] Order of the Second Senate of 28 May 1993 (1993).
[96] Joyce Marie Mushaben, *Concession Or Compromise? The Politics Of Abortion In United Germany* (German Politics 1997) 6.
[97] First Abortion decision [1993] BverfG 2 BvF 2/90, 2 BvF 4/92 and 2 BvF 5/92 paras. 1-434 [German].

tolerant as it should be, many women feel that these advisory services are more like obligations that may assist them in making their decision.[98]

Furthermore, Article 219a StGB forbids abortion advertisements. This involves spreading information about offering services publicly within an assembly or in writing for remuneration. Even though this is a violation of the freedom of information, it serves to protect the unborn child by preventing competition between doctors. Patients can be informed directly by their doctors or via the internet.[99] There are certainly several reasons to protect a maturing life. Yet, the defenders of Article 218 and Article 218a of the Criminal Code fail to recognise that an expectant life could not exist without its dignified mother, and thus has no unrestricted biological right to live completely independently from its mother. Two factors are deemed important when assessing a mother's right to life. One on hand it is dependent on her general healthy physical condition. Additionally, when assuming a free system of justice, it depends on the other pregnant person's decision to either thrive in order to keep the foetus alive for 9 months as well as whether a pregnant person would be willing to prepare their life to raise the child or abandon it after birth. We ought not to be able to force the pregnant person to deliver at the time of the earliest fruit cell divisions, and certainly not by threatening punishment. Furthermore, the 1993 judgement of the 2nd Senate of the BVerfG states that the state has a duty to protect pregnant women because of their right to protection and respect for their dignity (Art. 1 paragraph 1 GG), their right to life and physical integrity (Art. 2 paragraph 2 GG) and their personal rights (Art. 2 paragraph 1 combined with 1 paragraph 1 GG). According to BVerfGE 39, 1 [48 ff.], the protection of the pregnant person is more important than the protection of the unborn if the burden is so excessive that no reasonable pregnant person could be expected to sacrifice their own personal values to bear it. In 1993, the 2nd Senate decided the legislature should determine such exceptional circumstances in detail in accordance with the criterion of unreasonableness. Similarly, it is unseen how the state no longer grants unborn life an "absolute protection status" at a time when it itself has allowed exceptions to the abortion ban.[100]

It appears questionable if a pregnant person should have the right to decide what is reasonable for itself in regards to accepting and taking care of a possible child. Getting rid of penal regulations would not lead to irresponsible treatment of human life. Under civil law, certain protection periods may continue to be established. Unborn lives could also be protected under

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[98] See Matthias Kettner, *Beratung Als Zwang: Schwangerschaftsabbruch, Genetische Aufklärung Und Die Grenzen Kommunikativer Vernunft* (Campus Verlag, 1998) [German].

[99] See Jörg Gerkrath, *Das Verbot Der Werbung Für Den Ärztlichen Schwangerschaftsabbruch (§ 219A Stgb) Verstößt Gegen Vorrangiges Europäisches Recht* (Universität Luxemburg 2017) [German].

[100] See Emma Budde, *Abtreibungspolitik In Deutschland* (Springer-Verlag 2015); Katja Krolzik-Matthei, *'Abtreibungen In Der Debatte In Deutschland Und Europa'* (bpb.de, 2022) <https://www.bpb.de/shop/zeitschriften/apuz/290793/abtreibungen-in-der-debatte-in-deutschland-und-europa/> [accessed 23 June 2022] [German]; Vera Schürmann, *'Kompromiss Auf Zeit'* (Verfassungsblog, 2020) <https://verfassungsblog.de/kompromiss-auf-zeit/> [accessed 23 June 2022] [German].

criminal law at a later date of pregnancy. It is important to remember that law and order do not exist in a vacuum. They, too, can be shaped and transformed by prevalent social beliefs.

2.3. The Greek Legislation around Abortion

2.3.1. Historical Background

In Greece, as in the rest of Europe, abortion was legalised during the second half of the 20th century. In Europe, abortion was illegal until 1967, with the exception of Sweden and Denmark, while in Greece the long struggle for the self-determination of the bodies of people with vaginas did not yield results until 1986.[101]

The reasoning behind this rapid change - in a country where the church had and still has a particularly important role - was that considering the number of homicides and the - much higher - number of abortions in comparison, one can observe that there can be no homicidal intent in an abortion. Nevertheless, for historical and ideological reasons, artificial termination of pregnancy was included in the crimes against life.[102]

The change from full criminalisation to partial decriminalisation of the termination of a pregnancy was gradual and it took almost a century to lead to the regime we find today. For the first time, abortion is mentioned in the Criminal Law of 1834, where abortion with and without the consent of the pregnant woman was equally punishable by imprisonment. In 1924, the first differentiation between the two was made and in 1934 the crime became a misdemeanour. In 1939, the "moral indication" appears for the first time, decriminalising abortion in the case of rape, abuse of a minor for resistance, seduction of a minor, or incest and gradually, after many modifications, in 1986, the law 1609 brings drastic changes. In the next part of our report we will try to present a more detailed analysis of the aforementioned law.

2.3.2. Legal Regime

Law 1609/1986 enshrined for the first time that it is an obligation of the state to ensure the protection of the mother's health and the provision of care in organised nursing facilities during the artificial termination of pregnancy and that the relevant costs must be covered by the state. For details on the protection of the health of the pregnant person undergoing artificial termination of pregnancy, the law referred to Ministerial Decision A3b/1987[103], which provided the following:
For the termination of a pregnancy under 12 weeks, the medical procedure must be performed exclusively in hospitals, with the participation of an obstetrician and an anesthesiologist. The

[101] TANEA Team, *'Τι συμβαίνει σήμερα στην Ελλάδα με τις αμβλώσεις – Πότε και πώς καταφέραμε τη νομιμοποίησή τους'* (TA NEA, 2021) <https://www.tanea.gr/2021/03/17/greece/ti-isxyei-stin-ellada-gia-tis-amvloseis-pote-kai-pos-kataferame-tin-nomimopoiisi-tous/> [accessed 11 April 2022] [Greek].
[102] Elisavet Symeonidou-Kastanidou, *Εγκλήματα κατά προσωπικών αγαθών* (Nomiki Vivliothiki Publications 2016) 75-87 [Greek].
[103] Ministerial Decision A3b/oik. 2799/1987 [Greek].

pregnant person should be informed in writing of the consequences of the termination of the pregnancy and a health check and medical history should be taken. Persons undergoing the above procedure are entitled to three days of sick leave from work, or more if complications arise.

For the termination of a pregnancy more advanced that 12 weeks, the operation should instead be carried out only in public hospitals. All the above-mentioned requirements for the written information on the consequences and the health check still apply, but the involvement of a psychologist in the procedure was added. In addition, in this case, the number of days of sick leave to which the pregnant person is entitled is increased to five, which can be increased even more if complications arise. In both of the above cases, the costs of hospitalisation must be covered by the state or another insurance institution.

Article 304 of the new Penal Code, in force from July 1, 2019, defines the circumstances under which the artificial termination of a pregnancy is, as an act, unlawful.[104] The legal good protected in this provision is the embryo, but the bearer of the legal good is not the embryo itself, as it is not reduced to a separate legal personality, but those who have contributed to its creation, namely the people from whose genetic material the fertilised egg has been produced. This, of course, only happens while it is in the external world. Once the embryo is implanted in the uterus, and since the human body is not susceptible to domination, no subservient relationship of the non-pregnant parent to it can be conceived. For this reason, it is only the pregnant person's decision to terminate its pregnancy, regardless of whether it is the biological parent or merely acting as a surrogate parent. The mere consent of the other parent to the abortion performed by the pregnant parent does not constitute complicity.[105] In terms of time, the protection of the embryo varies according to the procedure: for natural reproduction, it starts from the moment of implantation in the uterus, i.e. approximately 13-14 days after fertilisation, while for medically assisted reproduction, protection is offered even before implantation, as provided for in particular by Law 3305/2005.

The law differentiates according to whether the act was performed by a third party, with or without the consent of the pregnant person, or by the pregnant person itself. [106] Anyone who, without the consent of the pregnant person, interrupts its pregnancy is punishable by up to ten years imprisonment. Conversely, the law states in Article 2 that: "Whoever, with the consent of the pregnant person or the persons having parental care or custody of it, if it is incapable of consenting, interrupts its pregnancy shall be punished with imprisonment for a term not exceeding three years or a fine, and if acting in a professional capacity, with imprisonment for a term not less than two years and a fine. Anyone who supplies a pregnant person with the

[104] Elisavet Symeonidou-Kastanidou, *Εγκλήματα κατά προσωπικών αγαθών* (Nomiki Vivliothiki Publications 2016) 75-87 [Greek].
[105] Athanasios Kontaksis, *Ποινικός Κώδικας* (Sakkoulas Publications 1991) 1920-1941 [Greek].
[106] Petros Kakkalis and others, *Ποινικός Κώδικας* (Nomiki Vivliothiki Publications 2000) 1270-1274 [Greek].

means to terminate its pregnancy shall be liable to the same penalty, reduced by the measure provided for in Article 83, provided that at least an attempt has been made to terminate the pregnancy".

We believe that a literal - albeit laconic - analysis of the concepts provided for in the law is necessary to understand the full meaning of what is provided for. Therefore, "consent" is considered to exist when it is based on the actual will of the pregnant person. Any form of physical or psychological violence or deception renders consent non-existent. With regard to cases of underage pregnant persons, the law states that consent may be given by the pregnant person itself or by the parents. However, if the pregnant person has given consent and is aware of the importance of its statement, the consent of the parents becomes superfluous, as it only concerns the removal of the wrongfulness of the act, and not the application of the Article. Thus, there is no injustice of the doctor's action in a case that the doctor proceeded to artificially terminate the pregnancy of a minor pregnant person with the consent of both it and its father, even if the minor subsequently claims that it gave its consent after pressure and threats from its father and its close family environment, which the doctor could not have known.[107] With regard to the supply of means of termination of pregnancy, this is only punishable if at least an attempt to perform the act was carried out.

One assumes the wrongfulness of the act when the pregnancy is more than 24 weeks along, and is punishable by imprisonment for up to six months or a fine (paragraph 3 of the Penal Code). On the contrary, the act is not considered unjust when the following conditions are cumulatively met:
(a) There is consent of the pregnant person or the parents, in the case of a minor.
(b) It is carried out by an obstetrician-gynaecologist, with the assistance of an anaesthetist and in the context of an organised nursing unit.
(c) The pregnancy has not exceeded 12 weeks or 19 weeks if it is the result of rape, seduction of a minor, incest or abuse of a person incapable of resisting. Where there is evidence of a serious abnormality in the foetus, ascertained by means of prenatal diagnosis, which results in the birth of a pathological newborn, or where there is an imminent risk to the life of the pregnant person or a risk of serious and lasting harm to its physical or mental health, there is no time limit. In this case, however, a certificate from the doctor responsible in each case shall be required.

Finally, it is provided that if a pregnancy is negligently interrupted or a foetus is seriously harmed, resulting in its death, during prenatal testing after the 24th week or during delivery, imprisonment of up to 3 years or a fine may be imposed.

[107] Case 3481 [1996] Council of First Instance of Athens [Greek].

2.4. Comparative Approach of the two Legal Systems to other European Countries/EU/UN

Within the EU Member States, there is a high degree of agreement regarding a pregnant persons right to abortion. Only Poland and Malta are an exemption on Europe's liberal abortion laws. Despite this, this issue is still considered highly controversial. Despite the rise of populism and anti-gender movements, the balance between a pregnant persons right to abortion and that of the foetus, remains a source of many legal and ethical discussions. Human rights are dealt with at several levels in Europe, intertwined by different legal orders, international, supranational and national ones.[108]

A total of 41 nations allow abortion on request or on broader social grounds. Among these countries, 39 have legalised abortion upon request, either without restrictions on the reasons why the abortion is being performed or for reasons of distress.[109] A fairly liberal approach on abortion can be found in Finland. Finland offers women a wide range of abortion options that are legal and free of charge. Introduced in 1970, the law allows abortion if at least one circumstance from a list of reasons for abortion can be fulfilled. Those reasons range from social reasons, such as considerable strain caused by living or other conditions, age below 17 years or age over 40 years and if a pregnant person has had at least four children already. Additionally, the foetus may be mentally handicapped, suffer from an illness or handicap, the pregnancy may pose a health risk to the mother, mother's illness or physical disability, or the mother or father may be unable to take care of the child. Lastly, ethical reasons need to be considered. Those include cases of rape, incest and other reasons mentioned in the penal law. Abortion can be performed up to 12 weeks of gestation, but this time frame can be extended to 24 weeks if there is a medical reason or if the foetus is in danger. Typically, one or two physicians must give their written permission.[110] For those exceptions to apply, the embryo must be affected by a serious disease or physical disability that can be safely backed up by a result of amniocentesis, ultrasonic examination, serological tests or another reliable examination.[111]

Poland is an example of a European country which enforced a controversial near-general ban on abortion. Together with Malta, it is one of only two European Union Member States that have not legalised abortion on request or broad social grounds.[112] In Poland, abortion is only

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[108] Ivana Tucak and Anita Blagojević, *EU and Comparative Law Issues and Challenges Series (ECLIC),* (ABORTION IN EUROPE 2020).

[109] Center for Reproductive Rights, *'European Abortion Laws: A Comparative Overview.'* (Reproductiverights.org 2022) <https://reproductiverights.org/wp-content/uploads/2020/12/European-abortion-law-a-comparative-review.pdf> [accessed 19 June 2022].

[110] See MIKA GISSLER and others, *Declining Induced Abortion Rate In Finland: Data Quality Of The Finnish Abortion Register* (International Journal of Epidemiology, 1996) 25.

[111] Law No. 239 (Abortion Legislation) 1970 [Finland] on the interruption of pregnancy, as amended by Law No. 564 1978 and Law No. 572 1985, subsection 5a.

[112] Amnesty International, *'Poland: Regression on abortion access harms women'* (2022) <https://www.amnesty.org/en/latest/news/2022/01/poland-regression-on-abortion-access-harms-women/> [accessed 22 April 2022].

permitted in situations of risk to the life or health of a pregnant person, or if a pregnancy is a result of rape. In practice, however, it is almost impossible for those eligible for a legal abortion to obtain one. The October 2020 ruling by the Constitutional Court found that a 1993 law allowing abortion in cases of severe and irreversible foetal abnormalities was unconstitutional. In 2019, 98% of abortions were carried out on those grounds, meaning that the ruling effectively banned the vast majority of pregnancy terminations.[113]

Poland already had one of the most restrictive abortion laws in Europe, and around 1000 legal terminations are performed each year. Since the 2020 ruling took effect on 27 January 2021, more than 1000 women have turned to the European Court of Human Rights in an effort to vindicate their rights, challenging Poland's highly restrictive abortion law and seeking justice. These cases mark the European Court of Justice's first direct challenges to Poland's abortion law and the 2020 Constitutional Court ruling. The petitioners claim that Poland's abortion law causes them serious harm and violates their rights to privacy and protection from torture and other ill-treatment. The Court is expected to begin ruling on some of these cases: K.B. v. Poland and 3 other applications; K.C. v. Poland and 3 other applications; and A.L.- B. v. Poland and 3 other applications[114].

2.5. International Legal Framework Concerning Abortion

The international legal framework concerning the human rights law derives initially from universal and regional treaties, treaty monitoring bodies, and further treaties establishing enforcement procedures. Its primary source is the 1948 Universal Declaration of Human Rights, whose content was developed into treaty obligations with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).[115]

The legal regime regarding reproductive and sexual rights, on the other hand, was developed mainly by advisory instruments, including human rights treaty bodies' General Commentaries, Concluding Observations, and other expert pronouncements such as those of the Special Rapporteurs. As such, these standards are considered non-binding and can face resistance in their application by states. However, they interpret and add detail to the rights and obligations contained in the respective human rights treaties.[116] According to Article 31 of the Vienna

[113] BBC News, *'Poland enforces controversial near-total abortion ban'* (2021) <https://www.bbc.com/news/world-europe-55838210> [accessed 22 April 2022].

[114] OMCT, *'Poland: Regression on Aborion Access Harms Women'* (2022) <https://www.omct.org/en/resources/news-releases/regression-on-abortion-access-harms-women-in-poland> [accessed 22 April 2022]..

[115] Juliana Laguna Trujillo, *'A legal obligation under international law to guarantee access to abortion services in contexts of armed conflict? An analysis of the case of Colombia'* (International Review of the Red Cross December 2021) <https://international-review.icrc.org/articles/international-law-access-to-abortion-armed-conflict-colombia-914#footnote23_en16a3a> [accessed 15 April 2022].

[116] Dinah Shelton, *Commentary and Conclusions* (editing in: D. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford 2000) 451.

Convention on the Law of Treaties, good-faith interpretations of human rights treaties oblige contracting states to consider the commentaries carried out by human rights treaty bodies, as they are a product of an authoritative body established by the contracting states themselves to interpret the treaty and to monitor and promote compliance thereof. The feminist critical perspective on international law notices that the production of a more robust soft-law standards system without the hard-law nature that obliges states towards compliance leads to a "compliance paradox"[117]. However, human rights treaty monitoring bodies, international tribunals and national courts interpreting the body of treaties on the right to life, health, being free from cruel, inhumane treatment and torture, privacy, and non-discrimination, among others, have made it clear that such treaties recognise and protect sexual and reproductive rights.[118]

In 1992, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) issued its General Recommendation No. 19 on violence against women. Referring to Article 16 of the CEDAW, which obliges states to take all appropriate measures to eliminate discrimination against women in all matters related to marriage and family connections, including the right to control freely and responsibly the number and spacing of their children, the Committee considered that practices such as forced sterilisation or abortion could harm women's physical and mental health and called on contracting states to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control. The Special Rapporteur on Violence against Women, Its Causes and Consequences, pointed out in her first report from 1999 that "direct State action violative of women's reproductive rights can be found, for example, in criminal sanctions against contraception, voluntary sterilisation and abortion. […] Within the context of reproductive health policy, State policies contribute to violence against women, manifested in forced abortions, forced sterilisation and contraception, coerced pregnancy and unsafe abortions."[119]

By 2005, human rights organisations had pointed out that the minimum standard was the accessibility and legitimacy of the abortion when the woman's life or health is in danger, in cases of rape and incest, and in cases of foetal abnormalities, and states should take action to ensure that women are not forced into unsafe abortion procedures.[120] Today, this standard is gradually

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[117] Center for Reproductive Rights, *Ensuring Sexual and Reproductive Health and Rights of Women and Girls Affected by Conflict* (briefing paper, New York 2017).

[118] Christina Zampas and Jaime M Gher, *Abortion as a Human Right: International and Regional Standards* (Human Rights Law Review, Vol. 8, No. 2 2008); Center for Reproductive Rights, *Ensuring Sexual and Reproductive Health and Rights of Women and Girls Affected by Conflict* (briefing paper, New York 2017); Center for Reproductive Rights, *Reproductive Rights are Human Rights* (New York 2009).

[119] Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences* (UN Doc. E/CN.4/1999/68/Add.4, 1999) 44.

[120] *K. L. v. Perú* [2005] Human Rights Committee (UN Doc. CCPR/C/85/D/1153/2003); Committee on the Rights of the Child, Concluding Observations on Chad (1999), UN Doc. CRC/C/15/Add.107 para. 30; CESCR,

being recognised by various human rights monitoring bodies and regional human rights tribunals along with the obligation to provide post-abortion care to women regardless of the legal status of the abortion.[121]

More specifically, the monitoring bodies of the UN human rights treaties have stipulated that in the states that abortion is legal under national law, it must be available, accessible (including affordable), acceptable, and of good quality.[122] In doing so, they indicated that states have an obligation to remove procedural barriers to abortion services, including third-party authorisation requirements, mandatory waiting periods, and biased counselling.[123] They have also urged countries to provide financial support to those unable to pay for abortion services and to ensure that qualified health-care providers are available and that provider refusals on the grounds of religion or conscience do not interfere with women's access to services.[124] In 2018, the UN Human Rights Committee, which oversees implementation of the International Covenant on Civil and Political Rights (ICCPR) made clear that the right to life includes the right to access safe and legal abortion.[125]

2.6. The Social Reality of Abortion that has not been Legally Regulated yet

Even today, 25.1 million unsafe abortions are performed each year worldwide and 41% of persons of reproductive age still live in countries with restrictive abortion laws[126]. Nevertheless, we could not overlook the fact that there has been a huge change in countries' abortion laws over the past 25 years. Nowadays, there are 5 different categories of abortion laws worldwide. The first - and strictest - one consists of all the legal regimes that prohibit abortions altogether. The laws of the countries in this category do not permit abortion under any circumstances, including when the person's life or health is at risk. Twenty four countries globally fall within this category and 90 million (5%) persons of reproductive age live in countries that prohibit abortion altogether. In the second category, abortions are permitted only to save a person's life. Forty two countries fall within this category. The third category includes the legal regimes that permit abortion on the basis of health or therapeutic grounds. In the fourth category, the laws

Concluding Observations on Chile (2004), UN Doc. E/C.12/1/Add.105 para. 53; *White and Potter v. U.S.A (Baby Boy)* [1981] IACHR Case No. 2141 paras 25–33.

[121] CESCR, General Comment No. 22 (2016), *'The Right to Sexual and Reproductive Health (article 12 of the International Covenant on Economic Social and Cultural Rights)'*, UN Doc. E/C.12/GC/22 para. 5; Office of the High Commissioner for Human Rights, *Practices in Adopting a Human Rights-Based Approach to Eliminate Preventable Maternal Mortality and Human Rights*, UN Doc. A/HRC/18/27 2011 para. 29.

[122] CESCR, General Comment No. 22 (2016), *'The right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)'*, para. 11-21, U.N. Doc. E/C.12/GC/22; CESCR, General Comment No. 14 (2000), *'The right to the highest attainable standard of health (art. 12)'*

[123] See e.g. CEDAW, Concluding Observations on Hungary (2013), U.N. Doc. CEDAW/C/HUN/CO/7-8 para. 31(c); CEDAW Committee, General Recommendation No. 24 (2008), *'Article 12 of the Convention (women and health)'* (20th Sess. 1999) para. 22, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II).

[124] CEDAW, Concluding Observations on Austria (2013), U.N. Doc. CEDAW/C/AUT/CO/7-8 para. 38-39.

[125] HRC, General Comment No. 36 (2018), *'The Right to Life'*, U.N. Doc. CCPR/C/GC/36 para. 8.

[126] Center for Reproductive Rights, *'The World's Abortion Laws - Center For Reproductive Rights'* (Center for Reproductive Rights 2022) <https://reproductiverights.org/maps/worlds-abortion-law> [accessed 19 June 2022].

are generally interpreted liberally to permit abortion under a broad range of circumstances. These countries often consider a person's actual or reasonably foreseeable environment and its social or economic circumstances in considering the potential impact of pregnancy and childbearing. Lastly, 1 million (36%) persons of reproductive age live in countries that allow abortion on request. Seventy two countries globally fall within this category. These regimes usually set gestational limits. The most common gestational limit for countries in this category is 12 weeks.[127]

There are huge differences between each continent and country regarding the category of the abortion law chosen, and a detailed analysis could not be contained in a single sub-paragraph of our research, so we will limit our detailed approach to the European continent. For more than sixty years, Europe has led the continuing global trend towards the liberalisation of abortion laws and the legalisation of woman's access to safe and legal abortion. Today almost all European countries allow abortion on request or on broad social grounds and only a very small minority maintains highly restrictive laws prohibiting abortion in almost all circumstances. The standard practice is to legalise abortion on request or on broad social grounds, at least in the first trimester of pregnancy. Almost all countries ensure that abortion is legal throughout the pregnancy when necessary to protect a pregnant person's health or life. In Europe, over 95% of persons of reproductive age live in countries that allow abortion on request or broad social grounds[128]. In total, 41 countries have legalised abortion on request or broad social grounds. Thirty nine of these countries have legalised abortion on request, either without restriction as to the reason or for reasons of distress. However, all these countries' laws also allow access later in pregnancy in specific circumstances, such as where a person's health or life is at risk. The standard practice across Europe is to not impose time limits on these grounds. Many European countries have enacted reforms to extend the time limits for access to abortion on request or broad social grounds. These reforms recognise that although most abortions in Europe take place during the first trimester of a pregnancy, rigid time limits can have harmful impacts, create pressure, and further complications for persons who seek abortion care.

Only six European countries retain highly restrictive abortion laws and do not permit abortion on request or on broad social grounds. These are Andorra, Liechtenstein, Malta, Monaco, Poland, and San Marino. Although the general trend has been one of progress towards liberalisation, in recent years, in some countries in Europe, there have been attempts to roll back existing legal protections for persons' access to abortion. At times, this has led to the introduction of new regressive preconditions that persons must fulfill before obtaining abortion care. There have also been attempts to completely ban abortion or to remove existing legal grounds for abortion. There have also been some court challenges contesting the

[127] Center for Reproductive Rights, *'The World's Abortion Laws - Center For Reproductive Rights'* (Center for Reproductive Rights 2022) <https://reproductiverights.org/maps/worlds-abortion-law> [accessed 19 June 2022].
[128] Center for Reproductive Rights, *'European abortion law a comparative review'* <https://reproductiverights.org> [accessed 22 April 2022].

constitutionality of access to abortion and seeking to advance medical professionals' entitlements to refuse legal abortion care.

Several European countries that have legalised abortion on request or broad social grounds maintain a range of procedural and regulatory barriers that impede access to abortion care in practice. For example, fifteen European countries still require a mandatory period to elapse between the date on which abortion is first requested and the date on which it takes place and mandatory counselling laws require women to undergo mandatory counselling or receive mandatory information from their doctors prior to abortion. Some countries require prior permission from parents, guardians, doctors, or official committees before individuals can access abortion care. These procedures disproportionately impact adolescent people, people with disabilities, people living in poverty, and people belonging to marginalised communities. In other European countries access to abortion care is jeopardised by medical professionals' refusals to provide abortion care on grounds of conscience or religion. In a small number of countries people are still required to explain that they are seeking an abortion because of their social or family circumstances or because continuing the pregnancy would cause them distress, which would then result in stigmatising abortion and undermining autonomous decision-making. Lastly, some countries in Europe that have legalised abortion on request or broad social grounds nonetheless maintain specific criminal sanctions for abortions performed outside of the scope of applicable legal provisions. However, more commonly laws specify that criminal sanctions, which can range from fines to prison sentences, apply to medical professionals or others who assist pregnant persons to obtain illegal abortion care. Criminalising abortion treats this form of medical care differently from any other health care and can cause significant harm to a pregnant persons' health and wellbeing.[129] All the aforementioned barriers could infringe the right to abortion and they should therefore be removed.

2.7. Jurisprudence

An abortion is one of the most intimate and personal decisions a person could ever make, a choice that are fundamental to a person's sense of dignity and autonomy. By protecting abortion rights, we safeguard constitutional values such as dignity, autonomy, equality, and bodily integrity. A femininity's dignity depends on this protection. Her decision must be her own. By having the governments make this decision for her, she is treated as less than a fully-formed adult human who can make her own decisions. A femininity cannot participate equally in society, politics, and economics without the right to make reproductive choices. It opens up doors that would otherwise be closed to women to decide when and if they want children.[130]

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[129] Center for Reproductive Rights, *'European abortion law a comparative review'* <https://reproductiverights.org> [accessed 22 April 2022].

[130] Center for Reproductive Rights, *'Constitutional Protection For The Right To Abortion: From Roe To Casey To Whole Woman'S Health'* (Reproductiverights.org 2022) <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/factsheets/Constitutional-Protection-for-the-Right-to-Abortion-Fact-Sheet2.pdf> [accessed 19 June 2022]; Ravi Chhikara, *The Conflicting Jurisprudence Behind The Laws On Abortion* (SSRN Electronic Journal 2020).

During Tysiąc v. Poland, a woman accused Poland of violating her human rights by denying her a legally permissible therapeutic abortion.[131] Ms. Tysiąc, in fear of losing her eyesight after a third delivery, claimed that doctors wrongfully denied her an abortion to protect her health as allowed by Polish law.[132] In rejecting Ms. Tysiąc's request, the European Court did not examine whether Polish law allowed her a right to an abortion, or whether the European Convention on Human Rights emphasises the right to abortion. Ratifying this view, the Court stated that since Polish law recognises a right to therapeutic abortion, the case would be better decided from the point of view of what the state is positively required to do to ensure that this right is effectively protected.[133] This is assessed through the different categories of duties of the Member States established through the European Convention on Human Rights. According to it, Member States have a duty to protect persons placed under their jurisdictions of the state.

A different case, A. B. And C. v. Ireland, the applicant A and B tried to argue to broaden the legal grounds for abortion.[134] Prior to the Protection of Life During Pregnancy Act in Ireland, no statutory exception to a strictly worded criminal prohibition existed.[135] In 1983, the Constitution of Ireland was amended by popular referendum to address concerns that the prohibition might be interpreted liberally. In Article 40.3.3, commonly known as the eighth amendment, the Constitution now states that the State acknowledges that every unborn child has a right to life. It guarantees the mothers right to life, while respecting, defending, and vindicating that right in law.[136] According to the Supreme Court of Ireland, this statute permits abortion only in cases where there is a real and substantial risk to the mother's health.[137] In this case, applicant C suffered from a rare form of cancer, but she was unable to access accurate information relating to the risks of pregnancy for her prognosis and treatment in Ireland. Due to her belief that without this information she would not be able to obtain a legal abortion in Ireland, she traveled to England to end her pregnancy. Having failed once again to provide criteria and procedures that would allow a woman to establish her right to an abortion in Ireland, the European Court held the Irish state to be in violation of its human rights obligations.[138]

Greek case law on artificial termination of pregnancy is limited and refers mainly to the criminal dimension of the act. The reference to Greek jurisprudence starts with the case 621/2021 of

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[131] ***Tysiąc v. Poland*** [2007] ECtHR 5410/03.

[132] Law on Family Planning (Protection of the Human Fetus and Conditions Permitting Pregnancy Termination) 1993 (Polish)

[133] Joanna N. Erdman, *Procedural Abortion Rights: Ireland And The European Court Of Human Rights* (Reproductive Health Matters 2014) 22.

[134] *A, B, and C v. Ireland* [2010] E.C.H.R. 2032, Eur. Ct. H.R.

[135] Offences Against the Person Act 1861, reprinted in 7 The Statutes 266 (3rd ed. 1950).

[136] Eighth Amendment to the Constitution Act 1983 (Amendment No. 8/1983), Art. 40.3.3.

[137] *Attorney General v. X* [1992] Supreme Court of Ireland 1 I.R. 1.

[138] Joanna N Erdman, *Procedural Abortion Rights: Ireland And The European Court Of Human Rights* (Reproductive Health Matters 2014) 22.

the Council of State.[139] This case refers to the artificial termination of pregnancy in the case of a "pathological newborn" and in this context, the Court stated the following: "From Article 304 of the Criminal Code stems that the rule is the prohibition of artificial termination of pregnancy. As an exception, it is not unjust to artificially terminate pregnancy (always with the consent of the pregnant woman)[140] when it is carried out under the conditions set out in paragraph 4 of the same Article, cases which constitute special grounds for removing the offence"[141]. Such a case also includes the artificial termination of pregnancy when modern means of prenatal diagnosis have shown signs of serious abnormality of the foetus leading to the birth of a "pathological newborn" and the pregnancy has lasted no more than 24 weeks. In such a case, provided that the other requirements of the law are met, the termination of the pregnancy appears to be justified. The Court stated that "the pregnant woman has the legal possibility to weigh freely, within the framework of Art. 5§1 of the Constitution, whether she, convinced of her religious, philosophical or other beliefs, will continue the pregnancy, accepting the birth of the "abnormal newborn" or will terminate it by consenting to the destruction of the embryo for the sake of her freedom and her - humanly - justified interest in having a healthy child. If she is married, this decision must be taken jointly with her husband under Art. 1387§1 of the Civil Code because it is a (basic) matter of conjugal life. The pregnant woman's choice to finally terminate such a pregnancy has as its constitutional foundation the provision of Art. 5§1 of the Constitution, which protects the free development of the individual's personality in a universal way, while protecting all the individual rights deriving from it, such as physical freedom, honour, health, but also some of their extensions. Such (extensions) include the choice or not to choose maternity in cases where the law allows such a choice under certain conditions. Therefore, if a pregnant woman is prevented (either by the act or omission of a third party) from enjoying this legal choice, her personality is unlawfully infringed within the meaning of Art. 57 of the Civil Code and, if the infringement is culpable, she is entitled to claim compensation for moral damage (Article 59 of the Civil Code). Her husband also has such a claim, even if he is not the directly aggrieved party, because, on the one hand, the decision to continue or terminate the pregnancy is not an individual matter for the pregnant woman but a common matter of their marital life and, on the other hand, because of his close (marital) relationship with the pregnant woman, the adverse consequences for her personality are also reflected on him"[142]. The abovementioned conclusions are also included in decisions 10/2013 of the Supreme Court[143] and 544/2007 of the Court of Appeal of Larissa.[144]

[139] 621 [2021] Council of the State Nomos database 798181 [Greek].

[140] In the following text the word "woman" is used when referring to the pregnant person because this was the terminology used by the Court in this specific case. The authors strongly support the use of the gender neutral word "person", in order to avoid discriminatory speech.

[141] 621 [2021], Council of State Nomos database 798181 [Greek]. .

[142] 10 [2013] Supreme Court of Greece [Greek].

[143] 10 [2013] Supreme Court, Nomos database 628915 [Greek].

[144] 544 [2017] Court of Appeal of Larissa, Nomos database 446630 [Greek].

Furthermore, case 3481/1996 of the Athens Court of First Instance,[145] referring to the case of a pregnant minor, stated that its consent is valid and binding if both the pregnant person and at least one parent consent, and this consent is not the result of coercion for the artificial termination of the pregnancy. The Court also stated that "in this case, the doctor is liable only if he was aware of the existing coercion of the pregnant woman"[146]. In a commentary on the above case in the journal "Defence",[147] it is stated that for the consent to be valid, it must be serious, it must actually correspond to the true will of the person giving consent, it must be given with knowledge of the actual situation and with the capacity to understand its significance, and finally it must exist at the time of the act.[148] Therefore, in certain cases, minors and mentally ill persons may also have the ability to give consent.[149]

On an international level, we can only make mention of observations of the CEDAW or other Committees on individual communications concerning violations of the right of abortion by member states. Starting with the views of the Committee on the Elimination of Discrimination against Women under Article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women concerning Communication No. 22/2009[150] regarding therapeutic abortions and the member state of Peru, the Committee noted in para. 7.12 that "the lack of legislative and administrative measures regulating access to therapeutic abortion condemns women to legal insecurity insofar as protection of their rights is completely at the mercy of gender prejudices and stereotypes, as shown in the present case. The sociocultural pattern based on a stereotypical function of a woman and her reproductive capacity guided the medical decision on which the physical and mental integrity of L.C. depended, subjecting her to discrimination by placing her on an unequal footing with men regarding the enjoyment of her human rights. The State's omissions and negligence in regulating access to therapeutic abortion created the conditions allowing agents of the State to discriminate against L.C. and prevented her access to the medical treatment she required, which also constitutes a violation of Articles 1 and 12 of the Convention". Also, in para. 7.14 the Committee stated that "the lack of regulation surrounding access to therapeutic abortion subjected L.C. to arbitrary action by agents of the State, which constituted a violation of her right to decide freely and responsibly the number of children she wished to have. Such interference therefore is a violation of the State party's obligations under Article 16, paragraph 1 (e), of the Convention".

[145] 3481 [1996] Athens Court of First Instance, Nomos 183870 [Greek].
[146] 3481 [1996] Athens Court of First Instance, Nomos 183870 [Greek].
[147] Defence [1997] 348 [Greek].
[148] N. Chorafas, Ποινικό Δίκαιο (9th edition), 188 [Greek]; G. Magkakis, Ποινικό Δίκαιο, 233 [Greek].
[149] Defence [1997] 348 [Greek].
[150] CEDAW/C/50/D/22/2009 [2011] CEDAW, < https://juris.ohchr.org/> [accessed 22 April 2022].

Also, the Human Rights Committee on its views concerning communication No. 2324/2013,[151] stated in para. 7.10 that "under the legal regime in the State party, women pregnant with a foetus with a fatal impairment, who nevertheless decide to carry the foetus to term, continue to receive the full protection of the public health-care system. Their medical needs continue to be covered by health insurance and they continue to benefit from the care and advice of their public medical professionals throughout the pregnancy. After miscarriage or delivery of a stillborn child, they receive any post-natal medical attention and bereavement care they need. By contrast, women who choose to terminate a non-viable pregnancy must rely on their own financial resources to do so entirely outside the public health-care system. (And although) "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant", […] the differential treatment to which the author was subjected in relation to other similarly situated women failed to adequately take into account her medical needs and socioeconomic circumstances and did not meet the requirements of reasonableness, objectivity and legitimacy of purpose".

[151] CCPR/C/116/D/2324/2013 [2016] CCPR, < https://juris.ohchr.org/> [accessed 22 April 2022].

Chapter 3: Right to Safe Birth and Access to Health Services

By Angelos Papathanasiou and Emma-Lynn Bury

3.1. The German Legislation around Safe Birth and Access to Health Services

The German legal system has high standards regarding statutory health care (insurance). Therefore, Germans are provided with generic legal provisions regarding their health. Generally, Art. 2 II of the Basic Law for the Federal Republic of Germany protects the right to life and physical integrity of all individuals.

Important Sources for expectant mothers:

- Schwangerschaftskonfliktgesetz/Law on the Prevention and Management of Pregnancy Conflicts
- Maternity Directives
- Mutterschutzgesetz/Maternity Protection Act
- Sozialgesetzbuch/German Social Security Code
- Guide to Maternity Protection given by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth

3.1.1. Legislation around Safe Birth and Access to Health Services

In Article 6 of the Basic Law for the Federal Republic of Germany, which protects all matters of marriage and family, women are granted further protection in the form of a legislative mandate, which has been primarily realised in the Maternity Protection Act.[152] Therefore, expectant mothers are insured comprehensively.

It is the state's responsibility to minimise the burdens resulting from pregnancy, birth and the period after giving birth. The state has fulfilled its responsibility in the form of public health care, measures for occupational health and safety, as well as care in the case of illness or unemployment.[153]

[152] Ingrid Schmidt, *Erfurter Kommentar zum Arbeitsrech*t (10th edn, CH Beck 2010), Art. 6 GG, Rn. 18 [German].
[153] 1 BvL 10/01 [2006] Bundesverfassungsgericht BVerfGE 115 [2006] 259 [German].

In 2018, due to the always changing societal and legal frameworks, the German Maternity Protection Act was thoroughly reformed.[154] The legislation of this act forms its base around the employment of women and is the core of maternal care in Germany. Thus, the focus lies on the status of employment of expecting and breastfeeding women. The type of employment (part-time, domestic workers, home workers etc.) though does not define the coverage of health care/occupational health.[155]

As aforementioned, the high standards of statutory health insurance in Germany result in expectant mothers being offered different types of measures depending on the stage of their pregnancy. The different maternity benefits include midwifery and the so-called personal maternity note, which serves the purpose of a record sheet of all screenings recorded during pregnancy. Furthermore, pregnant persons are provided with prenatal care, including the first check-up, antenatal visits (regular check-ups taking place every 4 weeks during pregnancy), ultrasound scans as well as other medical routines, including a variety of measures, such as urine analysis, blood pressure checks, weigh-ins, blood tests as well as pelvic exams. After birth, women are ensured postnatal care to protect the mother and newborn child.[156]

The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth explicitly uses the phrase "pregnant persons" instead of "pregnant women", indicating that it does not matter which sex was documented in their birth entry.[157] Nevertheless, when it comes to LGBTQIA+ persons, this topic remains more complex. LGBTQIA+ stands for Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex, Asexual and more, who are part of the community, but for whom LGBTQIA+ does not accurately capture or reflect their identity, such as non-binary people.[158] For this group, maternal care or even the option of pregnancy remains difficult.

The treatment of transgender people in Germany will serve as an example. In 1980, the TSG (Law for Transgender Persons) was adopted. For a long time, it regulated that transgender women were not allowed to become pregnant. As if this was not enough for the legislator, it was decided that someone with a personal gender identity - if different than assigned at birth -

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[154] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *'Gesetz zur Neuregelung des Mutterschutzsrechts'* (2021) <https://www.bmfsfj.de/bmfsfj/service/gesetze/gesetz-zur-neuregelung-des-mutterschutzrechts-73762> [accessed 24 May 2022] [German].

[155] Dr. Vanessa Wahl, *'Pregnancy: Legal Framework'* (Max Planck Institute of Molecular Plant Physiology) <https://www.mpimp-golm.mpg.de/2214241/Pregnancy_-Legal-Framework> [accessed 24 May 2022].

[156] Techniker Krankenkasse, *Pregnancy & Family, Maternity benefits* [German].

[157] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *'Guide to Maternity Protection'* <https://www.bmfsfj.de/resource/blob/191576/beddabe131e1d1c8e67c55b2c44b73f7/leitfaden-zum-mutterschutz-englisch-data.pdf> [accessed 18 June 2022].

[158] University of North Carolina, Wilmington, *'LGBTQIA+'* <https://uncw.edu/lgbtqia/facstaff-resources/lgbtqia.html.> [accessed 24 May 2022].

had to get sterilised.[159] In 2011, this particular regulation became obsolete. Following this, as well as the developing socio-ethical pressure regarding the equal treatment of LGBTQIA+ people in all aspects of life, the debate about the abolition of this law has also been on the table for quite a while - since 2017. The current governing coalition continues to aim at replacing the (outdated) TSG with a new "Autonomy Act". This finds support by Organisations such as the Federal Anti-Discrimination Ageny[160], the German Institute for Human Rights[161], the Human Rights Watch[162] and Amnesty International[163], as the TSG does not meet the requirements of the principle of equality as granted in Article 3 I of the Basic Law for the Federal Republic of Germany.[164] Unfortunately, as of now, one must say that the treatment of LGBTQIA+ people in Germany regarding the topic of pregnancy in general and thus also maternal health care, does not satisfy.

In conclusion, German statutory health care puts maternal care, the right of safe birth and its protection as well as postpartum care as a high priority. Nonetheless, several issues remain. Especially the less privileged, thus far more vulnerable groups and LGBTQIA+ people are exposed to various barriers regarding the "uncomplicated" provision of maternal health care services and are sometimes even deprived of their sexual and reproductive rights.

3.1.2. Legislation around Complications of a Pregnancy

Complications during pregnancy fall under the statutory health insurance, which is why there are check-ups every four weeks, as mentioned previously. In case of high risk pregnancies, the Federal Joint Committee intensifies the content of maternal care. The following definitions of complications are those provided by the World Health Organisation.[165]

The WHO defines maternal mortality as the "death of a woman from pregnancy-related causes during pregnancy or within 42 days of pregnancy".[166] In Germany, the maternal mortality rate lies at 7 out of 100.000. Compared to the global rate, which is 216 out of 100.000, this is a fairly

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[159] Prof. Dr. med. Claudia Wiesemann & cand. Med. Hanna Marla Frentz, *'Schwangerschaft transgeschlechtlicher Personen: eine Herausforderung für die Frauenheilkunde und Geburtshilfe'* (GebFra Magazin 07/2020) <https://www.thieme-connect.de/products/ejournals/pdf/10.1055/a-1125-8372.pdf.> [accessed 24 May 2022] [German].

[160] Annual report of the Federal Anti-Discrimination Agency (2020) 55 <https://www.antidiskriminierungsstelle.de/EN/homepage/_documents/download_jahresbericht_2020.pdf?__blob=publicationFile&v=1> [accessed 24 May 2022].

[161] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *'Gutachten 'Geschlechtervielfalt im Recht. Status quo und Entwicklung von Regelungsmodellen zur Anerkennung und zum Schutz von Geschlechtervielfalt'* 65 [German].

[162] Human Rights Watch, 'Deutschland: Trans-Personen in Koalitionsvertrag einbeziehen' (Pressemitteilung, 2021) <https://www.hrw.org/de/news/2021/10/21/deutschland-trans-personen-koalitionsvertrag-einbeziehen> [accessed 24 May 2022] [German].

[163] Amnesty International, *'Selbstbestimmung ist ein Menschenrecht!'* (2021) <https://www.amnesty.de/informieren/artikel/deutschland-btw21-selbstbestimmung-ist-ein-menschenrecht> [accessed 24 May 2022] [German].

[164] Lesben- und Schwulenverband, *'Das Selbstbestimmungsgesetz: Antworten zur Abschaffung des Transsexuellengesetz (TSG)'* <https://www.lsvd.de/de/ct/6417-Selbstbestimmungsgesetz> [accessed 24 May 2022] [German].

[165] Further referred to as "WHO".

[166] World Health Organization.

low number. Maternal mortality most often is a result of inadequate medical supply or treatment as well as malnutrition.[167] This goes hand in hand with the statement made above: vulnerable groups, who struggle to find adequate health care due to various barriers are also more likely to suffer maternal mortality.

According to the WHO, a stillbirth is the birth of an infant after 28 weeks of pregnancy that has died in the womb or during the birthing process. A miscarriage is the death of an infant before reaching 28 weeks of pregnancy.[168] In Germany, the legislator differentiates based on the weight of the infant. If it weighs less than 500 grams, it falls under the category of miscarriage. If it weighs more than 500 grams and is born dead or dies during the birthing process, it falls under the category of stillbirth.[169] 10-15% of pregnant women suffer from a misscarriage. This rate was published by the organisation "March of Dimes", which works on maternal and child health. It applies only to women who knew they were pregnant.

Aside from the mental load losing a baby puts on families or single women, dealing with it - especially in public - is problematic. Often, women who lose their babies are exposed to immense pressure when it comes to sharing their experience. The result of the pressure varies from staying silent about common feelings such as grief, shame and guilt to sharing it i.e. online (the latter especially applies to high-profile women as social media has become an influential platform). These different types of pressure often, if not for all women experiencing stillbirth or miscarriage, lead to mental health issues.[170]

To disburden women going through these traumatic experiences, the German legislator, especially the Federal Ministry for Family Affairs, Senior Citizens and youth, offers information to the affected.[171] For stillbirth, the MuSchG applies without alterations. This includes maternity pay as well as a prohibition of dismissal. In the case of a miscarriage though, the protection measures fall under more complex conditions. Legally, a miscarriage does not fall within the category of delivery. Maternity protection thus usually ends at the termination of the pregnancy. However, if the miscarriage takes place after 12 weeks, the affected person is subject to the

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[167] Malteser International, *'Müttersterblichkeit & Kindersterblichkeit: noch immer ein globales Problem'* <https://www.malteser-international.org/de/themen/so-helfen-wir/gesundheit/muettersterblichkeit.html> [accessed 24 May 2022] [German].

[168] World Health Organization.

[169] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *'Guide to Maternity Protection'* <https://www.bmfsfj.de/resource/blob/191576/beddabe131e1d1c8e67c55b2c44b73f7/leitfaden-zum-mutterschutz-englisch-data.pdf> [accessed 18 June 2022].

[170] David M. Purdie, *'Why we need to talk about losing a baby'* (World Health Organisation) <https://www.who.int/news-room/spotlight/why-we-need-to-talk-about-losing-a-baby> [accessed 23 May 2022].

[171] Deutscher Bundestag Wissenschaftliche Dienste, *'Regelung zum Umgang mit Fehlgeburten und totgeborenen Kindern'* <https://www.bundestag.de/resource/blob/575710/477f34ec9bb69ecf49b847153a207d96/WD-9-074-18-pdf-data.pdf> [accessed 23 May 2022] [German]

prohibition of dismissal.[172] These greater hurdles for persons who experience miscarriages, have been heavily criticised. Women who experience miscarriages can be equally affected by their experience concerning following health issues, that result in the inability to work - this often being mental health issues. Nevertheless, even after the reformation of the Maternity Protection Act in 2017 this has not thoroughly changed.[173]

In conclusion, the regulation of ways to deal with complications of pregnancy or the birthing process has improved but is still expandable.

3.2. The Greek Legislation around Safe Birth and Access to Health Services

The Greek legislator has been content with applying generic legal provisions in the field of medical law. In the first place, Article 21 § 1 and 3 of the Greek Constitution provides for special protection for maternity, and the health of the citizens in general.[174] By doing so, the adoption of positive measures in support of pregnant femininities, including both institutional interventions and material supplies, is legally valid.[175]

Moreover, Areios Pagos,[176] the Supreme Court of Civil and Criminal Justice in Greece, has considered medical malpractice as a form of unlawfulness, which in case of an infringement with fault, can lead to a compensation for the benefit of the patient. The legal basis for this claim are Articles 914 et seq. of the Greek Civil Code for the tort liability, Article 8 of the law 2251/1994 for the contractual liability of the service provider, the Articles concerning crimes against physical integrity, life and embryo of the Greek Criminal Code, and Article 105 of the Introductory Law of the Civil Code, for the civil liability of the State.

Aside from these, it is interesting how Article 2 § 2 of the Presidential Decree 351/1989 lists in a very detailed way the general and specific tasks of the graduates of the Obstetrics Department of the School of Health and Welfare Professions, before, during and after labour. They are focused on the monitoring, care, and preparation of the pregnant person for the childbirth (e.g. medical examinations, detailed information, issue of documents), checking the embryo and the uterus, the timely detection of any pathological problems of the pregnant or the embryo, the

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[172] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *'Guide to Maternity Protection'* <https://www.bmfsfj.de/resource/blob/191576/beddabe131e1d1c8e67c55b2c44b73f7/leitfaden-zum-mutterschutz-englisch-data.pdf> [accessed 18 June 2022].

[173] Kießling, *Beck Online Kommentar Sozialrecht* (64th edn, CH Beck 2022) SGB V § 24i Rn. 6 [German].

[174] Despite the fact that Article 21 § 1 of the Greek Constitution regards the institution of the family as the foundation of the maintenance and the promotion of the Nation, the right holders of the aforementioned rights to family and maternal care shall not be discriminated between natives and foreigners, since that would lead to a racist interpretation of the Greek Constitution. See also, Konstantinos C. Chrysogonos and Spyros V. Vlahopoulos, *Ατομικά και Κοινωνικά Δικαιώματα* (4th edn, Nomiki Bibliothiki 2017) 571 [Greek].

[175] Konstantinos C. Chrysogonos and Spyros V. Vlahopoulos, i.b. 567.

[176] Katerina Fountedaki, *Παραδόσεις Αστικής Ιατρικής Ευθύνης* (Nomiki Bibliothiki 2018) 43 et seq. [Greek]; 1227 [2007] Areios Pagos, Chronicles of Private Law [2008] 332 [Greek].

taking of any emergency measures, etc.[177] The above-mentioned provisions in conjunction with clinical protocols (soft law), which indicate the degree of fault and whether the medical act was performed *lege artis* or not, can establish the criminal, civil or disciplinary liability of the health professional, according to the aforementioned Articles of the Greek Criminal and Civil Code and Article 105 of the Introductory Law of the Civil Code.
In addition to that, the Single Regulation of Health Services, of the National Organisation of the Healthcare System (Official Journal of the Hellenic Republic, 4898/01.11.2018, vol. B'), foresees in article 5, chapter 2, that the beneficiaries are entitled to perinatal examinations free of cost, including e.g., blood tests, echographies, examinations of the embryo's DNA etc. Also, Article 38 of the aforementioned Regulation, provides that the beneficiaries can utilise care from midwives, public or private healthcare facilities for labour,[178] or forms of artificial or assisted reproduction, with the cost being fully or partially covered.

The equal access of the citizens to health services is enshrined in Articles 1 § 1 of the law 1397/1983 (which regulates the Public Healthcare System) and 4 § 1 of the Greek Code of Medical Ethics, according to which the doctor shall avoid discrimination of the patients. The same is laid down in Article 33 § 1 and 2 of the law 4368/2016 specifically for the uninsured and vulnerable social groups (e.g. access to maternity care to pregnant women who are uninsured or cannot afford to pay for it, irrespectively of their legal or political status).[179]

Moreover, Article 13 of the law 4486/2017 regulates the function of the "Health Visitor" in Primary Health Care. The role of a "Health Visitor" is, among others, to protect the vulnerable groups against the unequal access to health services. A "Health Visitor" indicates the individual needs of each patient, helps them understand the function of the healthcare system, and then refers them to the suitable health service.[180]

All in all, it can be said that the Greek legislation is satisfactory[181] in relation to maternal care. It is notable how the Greek legislator chose to be more specific as far as the tasks of the graduates

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[177] Konstantinos Fragkos, *Ιατρική Ευθύνη* (Sakkoulas 2018) 466-467 [Greek].

[178] According to the first amendment of the Single Regulation of Health Services, of the National Organisation of the Healthcare System (Official Journal of the Hellenic Republic, 889/14.03.2019, vol. B'), one is still entitled to free maternal care when having experienced a stillbirth after 22 weeks of pregnancy.

[179] Until April 2016, only labour was considered an "emergency" procedure and was therefore available at no cost in public healthcare systems; Cynthia H Malakasis, *Migrant Maternity Care in Athens, Greece, 2016-2017: A Policy Report* (available at: https://cadmus.eui.eu/bitstream/handle/1814/66787/RSCAS%20_PP_2020_02.pdf?sequence=1, European University Institute, Robert Schuman Centre for Advanced Studies Policy Paper 2020/02) 21; see also in contrast, the outdated Article 26 § 2a of the law 4251/2014, according to which third-country nationals, who cannot prove their legal stay in Greece, are being accepted in the national health care system only in emergency states, e.g. in case of labour.

[180] Evanthia Sakellari, *Ο ρόλος του επισκέπτη υγείας στην ομάδα υγείας της Πρωτοβάθμιας Φροντίδας Υγείας* (available at: https://repository.kallipos.gr/handle/11419/3309, Kallipos 2015) 111 [Greek].

[181] According to Max Roses and Hanah Ritchie, *'Maternal Mortality'* (Our World in Data 2013) <https://ourworldindata.org/maternal-mortality#licence> [accessed 2 April 2022], the number of maternal deaths in Greece in 2017 were 2, and the share of women that were expected to die from pregnancy-related causes was below 0.01%.

of the Obstetrics Department of the School of Health and Welfare Professions are concerned, despite the generic legal provisions that are usually adopted in the field of medical law, and how there is an attempt of making the above legislation more inclusive (e.g. as it happened with the foreigner pregnant femininities). Thus, it is clear that maternity is of high importance for the State.

3.3. Comparative Approach of the two Legal Systems to other European Countries/EU/UN

Comparing the different legislative approaches of European or - more generally - all countries in the world regarding the right to safe birth, the issues of maternal mortality and morbidity as well as the basic access to maternal health care services, is not simple.

Due to various different reasons, there is no particular international law regulating this specific topic. The main ones being the complexity of numerous different legal systems - within the European Union as well as globally - and their health care systems. Furthermore, socio-economic environments and (long) inherited opinions concerning specific issues on this topic (i.e. abortion), lead to circumstances that make it impossible for all groups of women to experience equal access to protection and maternal health care services. The result of this unequal treatment is a higher birth mortality rate among the less privileged groups as well as LGBTQIA+ people..

For example: In 2015 there were a total of 303.000 maternal deaths globally - which amounts to 800 women per day. Looking only at Europe, that same year, the number amounted to 1.800 maternal deaths, which makes up only a small part of the 303.000 deaths globally. The majority of the globally counted deaths comes from low income countries, in which the maternal mortality ratio is 50 times higher than in good situated ones.[182]

Looking at the European Union and its mortality rate, it is important to differentiate between the various member states. For instance: in Latvia, Hungary and Romania the percentage of maternal mortality ranges from 18% to 31.3% even though all three countries claim to have made maternal health one of their main priorities in health care services.[183]

Nevertheless, the right to health has been established as a fundamental human right globally, especially in the EU. Therefore, maternal health services (like any other health service) should theoretically be universally accessible.

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[182] UNICEF, *'Maternal Mortality'* (2019) <https://data.unicef.org/topic/maternal-health/maternal-mortality/> [accessed 25 May 2022].

[183] Elina Miteniece, et al., '*Barriers to accessing adequate maternal care in Latvia: A mixed-method study among women, providers and decision-makers.*' (available at: https://www.sciencedirect.com/science/article/abs/pii/S0168851018306298, Health policy, Vol. 123, Issue 1, Amsterdam, Netherland, 2019) 85-95.

The WHO and Europe have developed a strategic approach to support countries in reforming their health systems in this area.[184] This approach is primarily realised in the "Safe Childbirth Checklist" (SCC).

The SCC serves the purpose to improve the quality of provided care. It is a "facility-based reminder tool" that explains/checks 28 essential birth practices for adequate protection of the women and child. It is designed to prevent the main causes of maternal deaths, stillbirths and neonatal deaths.[185] The result of a study conducted at the Yaoundé Gynaeco-Obstetric and Paediatric Hospital in Cameroon, that overlooked the use of the SCC for 6 months, was a reduction of complications during the birthing process.[186]

Even though this approach by the WHO in cooperation with Europe is a good starting point and a step in the right direction, the way to equal and satisfying maternal health care for all groups of people remains a long one.

Finally, one can say that the European Union has made health care and thus maternal care a priority. It differs though how the different member states have implemented this in their legal systems as well as the satisfaction of the implementation though differs. Once again, it appears that the common thread is that less privileged groups/less privileged countries and LGBTQIA+ people face greater hurdles to obtain health and maternal care.

3.4. The Social Reality of the Issue that has not been Legally Regulated yet

3.4.1. Access to Maternal Care: the Unfortunate Social Reality for Immigrant Femininities and Trans People and the Inadequacy of the Current Legislation

3.4.1.1. Access to Maternal Care for Immigrant Femininities

Despite the fact that through recent years, Greece experienced a high influx of immigrants and refugees, including pregnant femininities, the country still struggles with ensuring a favourable access to healthcare systems for all femininities. In particular, its MIPEX[187] Score for Health remains 48, namely halfway favourable. It is still an unfortunate reality that immigrants in Greece continue to face obstacles in fully accessing healthcare and health services. While greater health information and support is provided, healthcare entitlements and services are still uneven

[184] WHO regional office for Europe, *'European strategic approach for making pregnancy safer: aims to ensure equitable and efficient provision of access to and use of high-quality skilled care'* (2009) <https://www.euro.who.int/en/health-topics/Life-stages/maternal-and-newborn-health/publications/2008/european-strategic-approach-for-making-pregnancy-safer-2008> [accessed 25 May 2022].

[185] WHO, *'WHO Safe Childbirth Checklist. WHO. World Health Organization'* <http://www.who.int/patientsafety/implementation/checklists/childbirth/en/> [accessed 23 May 2022].

[186] Julius Sama Dohbit, Namanou Ines Emma Woks, et. al., *'The increasing use of the WHO Safe Childbirth Checklist: lessons learned at the Yaoundé Gynaeco-Obstetric and Paediatric Hospital, Cameroon'* (BMC Pregnancy Childbirth 2021) 21, 497 <https://doi.org/10.1186/s12884-021-03966-4> [accessed 13 April 2022].

[187] Migrant Integration Policy Index, *'Greece'* <https://www.mipex.eu/greece> [accessed 26 March 2022].

for different categories of immigrants. In particular, although access to health services in relation to perinatal care has been improved, especially with the declaration that pregnant people will be accepted in public health care facilities during the whole pregnancy, and not only for the labour, irrespectively of their legal or political status,[188] the social reality underlines the remaining difficulties that deprive the aforementioned femininities of enjoying their full right to safe birth and access to healthcare systems, which is part of the indivisible core of their right to private and family life.

Language difficulties often appear to be a significant barrier to access to healthcare systems. Researches in the United Kingdom indicated that pregnant femininities who do not speak fluent English are at a greater risk of poor birth outcomes compared to their English-speaking counterparts, while factors such as racial discrimination, poverty, housing issues, poor mental health further exacerbate this risk.[189] In Greece, pregnant foreigners are facing the described risk as well.[190] In particular, they usually fail to book a (timely) appointment or navigate the local healthcare facilities' spaces and mechanisms.[191] The main reason is that they often have to deal with a Greek-speaking person, or a semi-automated phone,[192] which most likely end up connecting them to a Greek-speaking health professional too. Moreover, due to the nature of the healthcare services and the need for confidentiality and discretion, especially for pregnancy issues, pregnant femininities hesitate to visit those facilities. In other words, lacking knowledge of medical terminology, may result in them being subjected to medical intervention without their consent, or having to disclose thoughts and events to people from their family and/or friends, without in reality wanting to do so, because the latter usually have the role of an "informal" interpreter.[193]

Apart from that, another important obstruction for pregnant femininities to accessing health services is the so-called cultural vacuum.[194] Until recently, eastern mediterranean european countries faced high influxes of immigrants and refugees coming mainly from the Middle-Eastern countries, where a strong and established religious fundamentalism can be detected,

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[188] See Article 33 § 2 of the Law 4368/2016 in contrast to Article 26 § 2a of the Law 4251/2014.

[189] Hannah Rayment-Jones, James Harris, et. al., '*Project20: interpreter services for pregnant women with social risk factors in England: what works, for whom, in what circumstances, and how?*' (International Journal of Equity in Health 2021) 20 (1) <https://doi.org/10.1186/s12939-021-01570-8> [accessed 2 April 2022]; Lisa Diamond, Karen Izquierdo, et. al., '*A systematic review of the impact of patient–physician non-English language concordance on quality of care and outcomes*' (J Springer Link 2019) 34 (1) <https://doi.org/10.1007/s11606-019-04847-5> [accessed 2 April 2022].

[190] Maria Papadaki, Maria Iliadou, et. al., '*The Perinatal Journey of a Refugee Woman in Greece: A Qualitative Study in the Context of the ORAMMA Project to Elucidate Current Challenges and Future Perspectives*' (MDPI, sexes 2021) 2 (4) <https://doi.org/10.3390/sexes2040036> [accessed 3 April 2022]; Cynthia H. Malakasis, i.b., 14.

[191] Cynthia H. Malakasis, i.b., 14.

[192] Cynthia H. Malakasis, i.b., 14.

[193] Maria Papadaki, Maria Iliadou, et. al., i.b.; Grotti Vanessa, Malakasis Cynthia, et. al., '*Temporalities of emergency: Migrant pregnancy and healthcare networks in Southern European borderlands*' (Social Science & Medicine 2019) 222 (1) <https://doi.org/10.1016/j.socscimed.2018.12.022> [accessed 16 May 2022].

[194] Maria Papadaki, Maria Iliadou, et. al., i.b.; L Joseph, S Ismail, et. al., '*Barriers to healthcare access for refugees in Greece*' (European Journal of Public Health 2018) 28 (4) <https://doi.org/10.1093/eurpub/cky214.285> [accessed 16 May 2022].

that provokes and preserves an authoritarian patriarchal notion of living. Consequently, many femininities do not feel comfortable with close interactions with unknown men, especially when it comes to their body anatomy and their embryo, due to their religious upbringing and their previous social status.[195] The former condition may be enlarged, since a section of the local population is not always welcoming towards non Christian immigrants and thus, they do not always take into account their social background in order to create a safe space for the patient in question. That amplifies the feeling of being unwelcome, which these femininities may experience during their visit to a local healthcare system.

Last but not least, physical access to hospitals shall not be taken for granted. Foreigners may find it difficult to make their way to the nearest health care facility, since they are not particularly familiar with the Greek - mainly Athens' - public transportation system.[196] It is known that most of the refugees and immigrants stay in camps beyond the metropolitan area of the Greek cities, and therefore, they do not have the opportunity to adapt to the way of living in their new place of residence. In addition to that, ambulances may transport femininities to hospitals, but afterwards there is no provision for their safe return.[197]

From the above, it follows that a simple provision to accept the pregnant persons to the public health care services, irrespectively of their legal or political status, will remain an empty phrase, if more measures will not be taken towards a more efficient implementation of the right to safe birth and access to health services. In particular, there is a need for qualified personnel, such as health interpreters, who will be able to communicate with foreign femininities in their mother tongue, or at least in English, and to treat them with respect to their traditions and/or religion. Moreover, communication and information on pregnancy and maternal issues should be provided in the mother tongue of said femininity, or at least in English. The same applies to birthing classes, breastfeeding counselling and the prescription of prenatal examinations and drugs. "Health Visitors", who were installed by the aforementioned Article 13 of the law 4486/2017, can also contribute by explaining the function of the Greek Health Care System to them, indicating the locations of the facilities, the route, the on-call times, etc. Otherwise, the access of those pregnant people will remain limited, and the regularity of the Article 33 § 2c of the law 4368/2016, made in April 2016, will be nullified.

3.4.1.2. Access to Maternal Care for Trans People

The word "woman" figures prominently among the legal provisions in relation to pregnancy issues. Article 2 § 2 of the Presidential Decree 351/1989 for the general and specific tasks of the graduates of the Obstetrics Department of the School of Health and Welfare Professions, the Single Regulation of Health Services, of the National Organisation of the Healthcare System

[195] Maria Papadaki, Maria Iliadou, et. al., i.b.
[196] Cynthia H. Malakasis, i.b., 14.
[197] Cynthia H. Malakasis, i.b., 14.

(Official Journal of the Hellenic Republic, 4898/01.11.2018, vol. B'), and Article 33 § 1 and 2 of the law 4368/2016 regulate the rights of a pregnant woman during her pregnancy in relation to her safe birth and access to health services. Still, the historic - mainly - and purposive - in a lesser degree - interpretations of the aforementioned provisions lead to defining the word "woman" as the cisgender (cis) woman, namely the female whose gender identity and sex assigned at her birth are the same. Therefore, it can be argued, in principle, that transgender people are supposedly excluded from the relative legal regulations concerning their maternity rights.

Unfortunately, regarding trans people, the established social reality confirms that the current legislation is not inclusive. There are cases where trans people are fully deprived of their reproductive rights, and not only of their perinatal care and access to health care. In many countries, trans people have to renounce their reproductive capacities in order to legally enshrine their gender identity.[198] Such requirements include, for instance, "adjustment of sexual characteristics by means of medical-surgical treatment previously authorized by the courts"[199], "accomodation of the physical characteristics of the claimed sex"[200], "removal of sexual organs and mammary glands for trans men and the removal of sexual organs (testicles and penis) for trans woman"[201], or even requisition that the person requesting the change to certify that they are no "longer capable of producing children with their previous gender"[202] etc.[203] However, both the right to gender identity and reproductive rights are part of the indivisible core of the right to private and family life, and being forced to choose between them, apart from being an intolerable violation of human rights, incorporates the concept of "passive eugenics".[204] It is notable that the European Court of Human Rights has stated that such a sterilisation requirement can not be considered sufficient justification for the domestic courts' refusal to authorise the undergoing of a sex rearrangement surgery.[205]

[198] Blas Radi, '*Reproductive injustice, trans rights, and eugenics'* (Sexual and Reproductive Health Matters Taylor & Francis Online 2020) 28 (1) <https://doi.org/10.1080/26410397.2020.1824318> [accessed 9 April 2022].

[199] Law N. 164 (Rules on rectification of attribution of sex) 1982 [Norme in materia di rettificazione di attribuzione di sesso] [Italian].

[200] Law 3/2007, of 15 March, regulating the rectification of the mention of the sex of persons in the register.

[201] Article 2 of the Transsexuality Act, which is inserted into Article 62b of the Belgian Civil Code. The sterilisation requirement was banned in 2017.

[202] Dutch Civil Code, Section 1.4.13, Court order to change the description of gender on the birth certificate, Article 1:28 Transsexuality and a change of the birth certificate. On July 1 2014 the sterilisation requirement was rolled back.

[203] Blas Tadi, i.b.

[204] Blas Tadi, i.b.; James Bowman, *'The road to Eugenics'* (U. Chi. L. Sch. Roundtable 1996) 3(1) <https://scholar.google.com/scholar_lookup?hl=en&volume=3&publication_year=1996&pages=491-517&issue=2&author=J.+Bowman&title=The+road+to+eugenics> [accessed 9 April 2022].

[205] *Y Y v Turkey* [2015] European Court of Human Rights' Research Report of Bioethics and the case-law of the Court [2016] 62.

Furthermore, many trans people experience pregnancy losses, which according to recent researches are not related to taking testosterone.[206] For instance, a 32-year-old transgender man[207] presented in a hospital with severe lower abdominal pain and hypertension and was classified as a male in the medical records, despite the fact that he had already revealed his gender identity to the nurse. The latter did not consider it an emergency, since they thought that the transgender man was obese and had stopped taking blood pressure medicines. As a result, the medical staff was disoriented and did not consider his actual medical needs. When examined several hours later, he was found to be pregnant, but the ultrasound showed unclear signs of foetal heart activity. During the doctors' preparation to perform an emergency cesarean delivery, the transgender man delivered a stillborn baby. According to Dr. Daphna Stroumsa of the University of Michigan: "[a (cis) woman showing similar symptoms] would almost surely have been triaged and evaluated more urgently for pregnancy-related problems" and "the point is not what's happened to this particular individual but this is an example of what happens to transgender people interacting with the health care system"[208].

Greece, following the example of Argentina,[209] did not adopt the aforementioned concept of "passive eugenics" with its law 4491/2017 for the legal recognition of gender identity. However, a research carried out by the European programm FAROS showed how the Greek legislator still has not reached equal access of trans people to health services, and their reproductive rights, including their maternal rights. In particular, health professionals often feel uncomfortable treating trans people. More than 60% of the trans people who participated in the aforementioned research, claimed that being part of the LGBTQIA+ community had a negative impact on the way health professionals treated them, since their needs were not taken into proper consideration,[210] while it is also common to call them by their deadname,[211] which is still noted in their documents. As a result, it is a common practice that LGBTQIA+ people prefer

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[206] Damien W Riggs, Ruth Pearce, et. al., *'Men, trans/masculine, and non-binary people's experiences of pregnancy loss: an international qualitive study'* (BMC Pregnancy Childbirth 2020) 20 (1) <https://doi.org/10.1186/s12884-020-03166-6> [accessed 10 April 2022]; Luciano G Nardo, Raj Rai, et. al., *'High serum luteinizing hormone and testosterone concentrations do not predict pregnancy outcome in women with recurrent miscarriage'* (Fertility and Sterility 2002) 77 (2) <https://doi.org/10.1016/S0015-0282(01)02995-8> [accessed 10 April 2022]; Justin S Brandt, Amy J Patel, et. al., *'Transgender men, pregnancy, and the "new" advanced paternal age: A review of the literature'* (Maturitas 2019) 128 (1) <https://doi.org/10.1016/j.maturitas.2019.07.004> [accessed 10 April 2022]; in contrast to previous researches Marcus A Okon, Susan M Laird, et. al., '*Serum andogen levels in women who have recurrent miscarriages and their correlation with markes of endometrial function'* (Fertility and Sterility 1998) 69 (4) <https://doi.org/10.1016/S0015-0282(98)00007-7> [accessed 10 April 2022].

[207] Daphna Stroumsa, Hadrian Kinnear, et. al., *'The Power and Limits of Classification — A 32-Year-Old Man with Abdominal Pain'* (N. Eng. J. Med. 2019) 380 (1) <https://www.health.com/condition/pregnancy/transgender-man-pregnant> [accessed 9 April 2022].

[208] Daphna Stroumsa, Hadrian Kinnear, et. al., i.b.

[209] In 2012, Argentina was the first and only country to allow people to change their gender identities without being forced to undergo hormone therapy, surgery or psychiatric diagnosis, etc., see also Argentina's Law No. 26.743.

[210] FAROS, *'Stories of Discrimntion and Violence against LGBTQ+ people'* (2020) <https://orlandolgbt.gr/wp-content/uploads/2021/04/D2.6_Publication-of-research-report_v.f.pdf> [accessed 16 April 2020] [Greek].

[211] FAROS, i.b.

to visit specific health professionals, who are friendly and conscious of their sexuality and/or gender identity.[212]

It is, therefore, evident that the current legislation fails to provide adequate guarantees for the reproductive rights of trans people. Although they are not fully deprived of them - since the incapability of procreation is not a requirement for the legal recognition of their gender identity in Greece - they usually fail to implement and fully enjoy them due to the aforementioned barriers to accessing the health care services. Thus, it is important, that the relative legislation will become more inclusive by explicitly acknowledging that trans people are also entitled to the protective provisions concerning pregnant women, and by adjusting the necessary documents and the health care service's software to the specific needs of transgender, intersex, etc. persons.

Summarising these considerations, it is notable how Article 21 § 1 of the Greek Constitution does not refer specifically to the protection of the pregnant (cis) women, but to the protection of maternity in general. Pregnancy and motherhood shall not be considered a cis women' privilege, but a unique experience that could occur to every human, who is able to gestate. Taking this into consideration, Article 5 § 1 of the Greek Constitution, which guarantees personal development, including the rights of self-determination and reproduction, and Article 8 § 1 of the European Convention on Human Rights, which refers to the protection of the right to private and family life, militate in favour of a wide interpretation of the word "woman" and the inclusion of trans people in it. The latter obeys to the letter of Article 21 § 1 of the Greek Constitution, and thus, it does not circumvent the rigidity of the Greek Constitution, but rather adjusts the relative provision to the social actuality. It is high time to understand that the word "woman" is not synonymous for "mother"[213] and as Anna Weissman has pointed out, "by determining who is considered illegitimate to reproduce, there is a reflection of who can (and must) produce".[214]

3.4.2. Bereavement Leave for Miscarriage: a Selective Protection of Pregnant Persons

When it comes to labour law, pregnant persons enjoy the aforementioned special protection of maternity, which is guaranteed by Article 21 § 1 of the Greek Constitution, regulated in the current legislation and collective agreements, e.g. with the implementation of the maternal leave, allowance etc. Particularly, according to Article 15 § 1 of the law 1483/1984, as this was amended by Article 48 § 4 of the law 4808/2021, any termination of the contract during the pregnancy and within a time limit of eighteen (18) months for the pregnant person and six (6)

[212] FAROS, *'Publication of Research Report'* (2020) <https://www.faros2020.eu/wp-content/uploads/2021/04/D2.5_LGBTQI_stories_GR.pdf> [accessed 16 April 2020] [Greek].

[213] Blas Tadi, i.b.; Mauro Cabral, *'Hij*s del hombre'* <https://www.pagina12.com.ar/diario/suplementos/soy/1-1885-2011-03-11.html> [accessed 9 April 2022] [Spanish].

[214] Blas Tadi, i.b.; Anna L Weissman, *'Repronormativity and the reproduction of the Nation-state: the state and sexuality collide'* (Journal for GLBT Family Studies 2016) 13 (3) <https://doi.org/10.1080/1550428X.2016.1210065> [accessed 9 April 2022].

months for the father after the childbirth is considered void. It is notable how the Supreme Court of Greece[215] recognised that this protection applies to cases of stillbirths as well, on the grounds that these provisions serve the interests of both the newborn's and the mother's exhausted body.

Recently, on March 26 2021 New Zealand's Parliament voted in favor of the Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2), according to which mothers and their partners are entitled to three days paid bereavement leave in case they experience the end of a pregnancy because of miscarriage or stillbirth.[216] Greece has not implemented a bereavement leave for miscarriage yet, but a relevant question set by twenty-five Members of the Parliament to the Minister of Labour and Social Affairs is still pending from April 2021.

As elaborated under 4.2.2. stillbirth finds unrestricted protection by the MuSchG. In the case of a miscarriage though, the protection measures fall under more complex conditions. Legally, a miscarriage does not fall within the category of delivery. Maternity protection thus usually ends at the termination of the pregnancy. However, if the miscarriage takes place after 12 weeks, the affected person is subject to the prohibition of dismissal.[217] These greater hurdles for persons who experience miscarriages, have been heavily criticised. Women who experience miscarriages can be equally affected by their experience concerning following health issues, that result in the inability to work - this often being mental health issues. Nevertheless, even after the reformation of the Maternity Protection Act in 2017 this has not thoroughly changed.[218]

It is generally estimated that one in four pregnancies ends in a miscarriage[219] and thus the latter is the most common reason for losing a baby during the pregnancy.[220] Femininities often experience feelings of grief, guilt or self-blaming due to the traumatic and painful experience of miscarriage.[221] It is therefore important that the *de lege ferenda* legislation will fully endorse the *ratio* of adopting beneficial acts for pregnant persons, which is, firstly, the protection of the pregnant persons themselves, irrespectively of how their pregnancy might end. In other words, a coherent and effective implementation of the supra-legislative provisions concerning the

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[215] 1362 [2009] Areios Pagos, Report of Labour Law [2009] 1254 [Greek]; 194 [2005] Legal Council of the (Greek) State <http://www.nsk.gr/web/nsk/anazitisi-gnomodoteseon?p_p_id=nskconsulatories_WAR_nskplatformportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-4&p_p_col_pos=2&p_p_col_count=3> [Greek].

[216] See Holidays Act 2003, 69; cf. India's Maternity Benefit Act 2017.

[217] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *'Guide to Maternity Protection'* <https://www.bmfsfj.de/resource/blob/191576/beddabe131e1d1c8e67c55b2c44b73f7/leitfaden-zum-mutterschutz-englisch-data.pdf> [accessed 18 June 2022].

[218] Kießling, *Beck Online Kommentar Sozialrecht* (64th edn, CH Beck 2022) SGB V § 24i Rn. 6 [German].

[219] Panagiota Varnava, *'Miscarriages: reasons, symptoms and treatment'* (2022) <https://www.mitera.gr/arthra-ygeias/apovoles-aitia-simadia-kai-antimetopisi/> [accessed 14 May 2022]; Carla Dugas, Valori H Slane, *'Miscarriage'* (2022) <https://www.ncbi.nlm.nih.gov/books/NBK532992/> [accessed 14 May 2022].

[220] WHO, *'We need to talk about losing a baby'* <https://www.who.int/news-room/spotlight/why-we-need-to-talk-about-losing-a-baby> [accessed 14 May 2022].

[221] See WHO, i.b. and the reported cases there.

protection of maternity (especially at work) can only be achieved by ensuring that the pregnancy alone will be sufficient in order for pregnant persons to be entitled to the relevant beneficial acts. These can be adjusted to the conditions of the miscarriage, e.g. shorter leave than the already existing maternal leave. Implementing extra criteria, such as the delivery of a living infant, is a disproportionate measure, unable to serve the *ratio* of - among others - protecting the pregnant femininities.

3.5. Jurisprudence

3.5.1. The Case of Romani Women in Slovakia

In the beginning of the millenium, three applications with similar facts and complaints from women of the same social group were filed with the European Court of Human Rights against the Slovak Republic.[222]

Firstly, a Romani woman, who was sterilised during the delivery of her second child via Caesarean section on August 23, 2000, applied to the Court, and she complained under Article 3 of the Convention that she had been subjected to inhuman and degrading treatment on account of her sterilisation without her full and informed consent, and that the authorities had failed to carry out a thorough, fair and effective investigation into the circumstances surrounding her sterilisation. She also claimed that her Roma ethnicity – clearly stated in her medical record – had played a decisive role in the process of her sterilisation. The woman's sterilisation had serious medical and psychological after-effects and as a result she has been treated by a psychiatrist since 2008 and continued to suffer. She has also been ostracised by the Roma community. The woman complained invoking Article 8 of the Convention that her right to respect for her private and family life had been violated and Article 12 of the Convention that her right to found a family had been breached on account of her having been sterilised without her full and informed consent.[223]

The ECHR noted in the case V.C. v. Slovakia, no. 18968/07, judgement of November 8 2011, that sterilisation amounted to a major interference with a person's reproductive health status and, involving manifold aspects of personal integrity, required informed consent if the patient was an adult of sound mind. It also found that Slovakia had failed to fulfil its obligation under

[222] The Research and Library Division (in English only), under the supervision of the Department of the Jurisconsult, *'Research Report of Bioethics and the case-law of the Court'* (2016) <https://www.echr.coe.int/documents/research_report_bioethics_eng.pdf> [accessed 2 April 2022]; Council of Europe/European Court of Human Rights, *'Guide on Article 8 of the European Convention on Human Rights'* (2021) <https://www.echr.coe.int/documents/guide_art_8_eng.pdf> [accessed 17 May 2022]; Council of Europe/ECHR, *'Factsheet - Reproductive Rights'* <https://www.echr.coe.int/documents/fs_reproductive_eng.pdf> [accessed 17 May 2022].

[223] The Research and Library Division (in English only), under the supervision of the Department of the Jurisconsult, i.b.; Council of Europe/European Court of Human Rights, i.b.

Article 8 to respect private and family life in that it did not ensure that particular attention was paid to the reproductive health of the applicant as a Roma.[224]

A few years later, a new application was pledged to the ECHR. The applicant was once again a minor Roma woman, who was sterilised during the delivery of her second child via Caesarean section. Her hospital file - signed by the applicant - included typed information indicating that she had requested the sterilisation procedure, however, without a legal representative being present. Her sterilisation - allegedly carried out at her request - was approved by a sterilisation commission ex post facto on the grounds that the measure had been necessary because of her health being at risk. The woman denied that she had signed a request for sterilisation. She only remembered having signed some papers during the delivery with the help of a staff member. However, due to the circumstances, she had been unable to read the document herself.[225]

In the aforementioned case of N.B. v. Slovakia, no. 29518/10, judgement of June 12 2012, the Court found a violation of Article 3, since the applicant - a depressive woman unable to have children - had suffered severely due to the sterilisation operation. It also confirmed the breach of her right guaranteed in Article 8, since there had been no effective legal safeguards.[226]

Lastly, three more women applied to the Court against the Slovak Republic. They were Slovakian nationals of Roma ethnic origin, as well. The first applicant was sterilised during the delivery of her second child by Caesarean section. Following the pattern of the previous cases, the woman was not informed that she had been subjected to tubal ligation or that she had been sterilised, nor did she receive any information about post-sterilisation treatment. She first learned that the sterilisation had been carried out while reviewing her medical files with her lawyer. At the time of the sterilisation, the applicant was 16 years old and her legal guardians had not consented to the operation. Likewise, the second applicant was sterilised during her second delivery by Caesarean section. At the date of delivery, she was 17 years old and not legally married. Neither the second applicant nor her parents were informed of her sterilisation and they never signed any document consenting to it. She also suffered from serious medical side-effects caused by her sterilisation. The third applicant was sterilised during her fourth delivery by Caesarean section. Similarly, she was asked to sign a paper before the delivery, without understanding its content, and thus she submitted that she had not given informed consent of her own free will to the sterilisation and suffered medical side-effects caused by the sterilisation.[227]

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[224] The Research and Library Division (in English only), under the supervision of the Department of the Jurisconsult, i.b.; Council of Europe/European Court of Human Rights, i.b.

[225] The Research and Library Division (in English only), under the supervision of the Department of the Jurisconsult, i.b.; Council of Europe/European Court of Human Rights, i.b.

[226] The Research and Library Division (in English only), under the supervision of the Department of the Jurisconsult, i.b.; Council of Europe/European Court of Human Rights, i.b.

[227] The Research and Library Division (in English only), under the supervision of the Department of the Jurisconsult, i.b.; Council of Europe/European Court of Human Rights, i.b.

In the judgement of November 13 2012, no. 15966/04, L.G., M.K. and R.H. v. Slovakia, the Court found that, in the case of the first and second applicants, there had been substantive and procedural violations of Article 3 as well as a breach of Article 8. The Court confirmed that the applicants had been in a vulnerable position.[228]

At the same time, the issue started coming to light. In particular, the press, organisations and institutions were researching those cases, along with others that never reached the European Court of Human Rights. It was noted that the practice of forced sterilisation was firstly adopted by the communist regime of the area that provided monetary incentives to Romani women to undergo sterilisation. Although this policy was formally rescinded in the late 1980s, there were still health care facilities that insisted on deceiving Romani women into forced sterilisation between the 1990s and 2004. A report from the Centre for Reproductive Rights in 2003 stated about 110 cases where women had been forcibly or coercively sterilised, or had strong indications that they had been sterilised.[229]

After several investigations and recommendations, on July 12, 2021, Dunja Mijatović, the Council of Europe's Commissioner for Human Rights, contacted the Slovak Prime Minister Heger and the Minister of Justice Mária Kolíková via letter, addressing the pressing matter of sterilisations in the Slovak Republic, emphasising in its existing continuity, from the communist to the republic era and also to its discriminatory stance against Romani women, while recommending that immediate action should take place in order for those practises to end.[230] This made the government accept clearly its objective responsibility for failing to ensure that no sterilisations were performed without free and informed consent and to offer a speedy, fair, efficient and just redress to the victims. On July 15 2021, the Slovak Minister of Justice replied to Dunja Mijatović that the Ministry of Justice and the Prime Minister of Slovakia take the issue

[228] The Court, relying on the judgement of November 8 2011 concerning the above-mentioned case of V.C v Slovakia (no. 18968/07), reiterated and stressed the vulnerable position of Roma women in Slovakia, "who had been at particular risk due to a number of shortcomings in domestic law and practice at the relevant time" (see § 96); The Research and Library Division (in English only), under the supervision of the Department of the Jurisconsult, i.b.; Council of Europe/European Court of Human Rights, i.b.

[229] Center for Reproductive Rights, *'Romani Women Subject to Forced Sterilization in Slovakia'* (2003) <https://reproductiverights.org/romani-women-subject-to-forced-sterilization-in-slovakia/> [accessed 2 April 2022]; Council of Europe, *'Slovak Republic: the government should deliver justice to victims of forced sterilisation through a compensation mechanism'* (2021) <https://www.coe.int/en/web/commissioner/-/slovak-republic-the-government-should-deliver-justice-to-victims-of-forced-sterilisation-through-a-compensation-mechanism> [accessed 20 May 2022].

[230] UN Human Rights Committee, Recommendation, CCPR/C/SVK/CO/4 (2016), Concluding Observations on the fourth report of Slovakia; Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following his Visit to the Slovak Republic from 15 to 19 June 2015; Report by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe, November 24 2011; Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights, March 29 2006; Follow-Up Report on the Slovak Republic (2001 – 2005); Commissioner for Human Rights, Recommendation, CommDH (2003) 12 (2003) Concerning Certain Aspects of Law and Practice Relating to Sterilisation of Women in the Slovak Republic.

of sterilisations performed without informed consent very seriously.[231] Particularly, the Minister stated that she was in discussion with the relevant Ministries on how to examine claims of such sterilisations and how to provide reparations.[232] The Slovak cabinet led by Prime Minister Eduard Heger accepted the resolution on November 24, 2021 and apologised for the aforementioned sterilisation of women.[233]

Unfortunately, the aforementioned violence against the reproductive rights of Romani women is not restricted to the Slovakian territory. On August 29 2006, the Committee on the Elimination of Discrimination against Women found Hungary in violation of Articles 10 (h), 12 and 16 (1) (e) of the CEDAW[234] in the Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004. In particular, the author of the communication, a Hungarian Romani woman, stated that on January 2, 2001 she went into labour pain and her amniotic fluid broke accompanied by heavy bleeding.[235] While she was examined, the attending physician found that the foetus had died in her womb, informed her that a caesarean section needed to be performed, and then asked her to sign a form consenting to the caesarean section, which contained a barely legible note that had been hand-written by the doctor mentioning that "Having knowledge of the death of the embryo inside my womb I firmly request my sterilisation (a Latin term unknown to the author was used). I do not intend to give birth again; neither do I wish to become pregnant".[236] Thus, the Committee suggested that further measures had to be taken in relation to women's reproductive health and that the domestic legislation had to be reviewed on the principle of informed consent in cases of sterilisation.[237]

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[231] Council of Europe, '*Slovak Republic: the government should deliver justice to victims of forced sterilisation through a compensation mechanism*' (2021) <https://rm.coe.int/reply-of-ms-maria-kolikova-minister-of-justice-of-the-slovak-republic-/1680a33c17> [accessed 20 May 2022].

[232] Council of Europe, i.b.

[233] DW, *'Slovakia issues apology for forced sterilizations of Roma women'* (2021) <https://www.dw.com/en/slovakia-issues-apology-for-forced-sterilizations-of-roma-women/a-59926198> [accessed 20 May 2022].

[234] See Articles 10 (h) "States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: [...] (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.", 12 "1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation." and 16 (1) (e) "1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: [...] (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights" of CEDAW; see also P. Naskou - Perraki, *Το δικαίωμα στην υγεία* (Sakkoulas 2022) 165 et seq. [Greek].

[235] United Nations - Convention on the Elimination of All Forms of Discrimination against Women, "CEDAW/C/36/D/4/2004" (2006) <https://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%204-2004%20-%20English.pdf> [accessed 23 June 2022].

[236] United Nations - Convention on the Elimination of All Forms of Discrimination against Women, i.b.

[237] United Nations - Convention on the Elimination of All Forms of Discrimination against Women, i.b.

The described cases and facts are a resounding example of how reproductive rights are not always considered as part of the indivisible core of the right to private and family life. On the contrary, the danger of misinterpreting the reproductive rights as means for a state's, community's etc. aim for a racial purity is always lurking, especially in periods of crisis. However, the true meaning of those rights is to secure people's freedom to decide themselves on their body's capacities to or not to reproduce, and thus, they are indissolubly linked to the core of the right to private and family life. Restrictions of these rights in favour of the fulfilling of any national targets shall be established after careful relative weighting between the extent of the restriction and the national target, and of course they must not lead to a definitive loss of the rights, otherwise, there will be a serious violation of the right to private and family life, as well as the dignity of a human person.

Chapter 4: STIs and Harmful Practices Regarding Sexual Health

By Athanasios Beretsos and Meike Ly

4.1. Sexually Transmitted Infections

4.1.1. Definition of Sexually Transmittted Infections

Sexually transmitted infections (henceforth referred to as STIs) are infections which are spread predominantly via sexual activity, especially vaginal intercourse, anal and oral sex.[238] Depending upon their physiology, modern medicine generally divides STIs into three categories: bacterial, viral and parasitic. Bacterial STIs include chlamydia *(chlamydia trachomatis)*, gonorrhoea *(neisseria gonorrhoeae)* and syphilis *(treponema pallidum)*.[239] Viral STIs include genital herpes (*herpes simplex virus,* HSV-1 and HSV-2), HIV/AIDS (*Human Immunodeficiency Virus*, which, in its most advanced stage, is called *Acquired Immunodeficiency Syndrome*) and HPV (*Human Papillomavirus*),[240] while the most prominent parasitic STI is trichomoniasis (*trichomonas vaginalis*).[241] It is worth mentioning that bacterial vaginosis (BV, a disease of the vagina caused by excessive growth of bacteria) is not characterised as an STI per se. Nonetheless, it doubles the risk of contracting a number of them.[242]

Analysing the traits of each type of infection eludes the purpose of the present research. Even so, a clarification regarding terminology should be broached. The terms *"sexually transmitted infections"* and *"sexually transmitted diseases"* (STDs) are used interchangeably many a time. However, the scientific community has adopted the former since 1999 as it better incorporates asymptomatic infections.[243] Moreover, the term *venereal diseases* (deriving from Venus) has been abandoned whatsoever, as an antiquated euphemism which held only negative connotations.

As far as femininities in particular are concerned, STIs can also be transmitted vertically - from an infected mother to her child - during pregnancy, childbirth and breastfeeding. Vertical transmission is often overlooked as a cause of infection whenever STIs are being discoursed about, even though it can be fatal for the long-term health of the foetus, especially in the case

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[238] World Health Organization (WHO), *'Sexually transmitted infections (STIs) Fact sheet N°110'* (2021) <https://www.who.int/en/news-room/fact-sheets/detail/sexually-transmitted-infections-(stis)> [accessed 12 April 2022].

[239] Less common bacterial STIs are: chancroid, granuloma inguinale, mycoplasma genitalium, mycoplasma hominis and ureaplasma infection.

[240] Other viral STIs worth mentioning: viral hepatitis (especially the hepatitis B virus, HBV), molluscum contagiosum virus (MCV), as well as the Zika virus.

[241] Crab louse and scabies are also parasitic STIs.

[242] Chris Kenyon, Robert Colebunders, Tania Crucitti, *The global epidemiology of bacterial vaginosis: a systematic review* (American Journal of Obstetrics and Gynecology, Volume 209, Issue 6 December 2013) 505.

[243] World Health Organization (WHO), *'Guidelines for the management of sexually transmitted infections'* (2003) vi.

of HIV. On the other hand, existing medical procedures performed to avoid vertical transmission, such as elective caesarean section, are reported to increase maternal and infant morbidity, whilst incalculable immunological reasons render the possibility of infection unknown beforehand.[244] Therefore, femininities in such predicaments face an impossible dilemma, contrary to the rest of the population; delving into their legal status is all the more deemed imperative.

4.1.2. International Legal Framework[245]

One could not but commence with the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, which, in Article 12, establishes the right of women[246] to equal access to healthcare services. Specific provisions have been laid down in Article 14 for women in rural areas, so as to have access to adequate healthcare facilities. Furthermore, the right of everyone (including, but not limited to, femininities) to the highest attainable physical and mental health is enshrined in Article 12 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR).*

As it is authoritatively interpreted, Art. 12 CEDAW entails the obligation of States Parties to **indiscriminately ensure the access to sexual health information and services** for all femininities, regardless of their citizenship status - thus including trafficking victims - and with respect to their right to privacy and confidentiality.[247] Additionally, it should be noted that mandatory testing for STIs as a condition of employment is contrary to international law as it violates femininities' dignity.[248] Emphasis is also given on integrating education on sexual health in school curricula and addressing negative sexual stereotypes and discriminatory attitudes around STIs, whilst STIs are considered, at least in part, as an effect of discrimination against femininities themselves.[249]

On the other hand, Art. 12 ICESCR normatively necessitates, in the area of sexual health, the **availability of STI-prevention and treatment medicines**, as well as unprejudiced and

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[244] Omayma Amin, Jenna Powers, Katherine M. Bricker, Ann Chahroudi, '*Understanding Viral and Immune Interplay During Vertical Transmission of HIV: Implications for Cure'* (Front Immunol. 2021;12:757400, October 21 2021) <doi:10.3389/fimmu.2021.757400> [accessed 17 April 2022]; Caitlin E. Kennedy, Ping T. Yeh, Shristi Pandey, Ana P. Betran, Manjulaa Narasimhan, *Elective cesarean section for women living with HIV: a systematic review of risks and benefits* (AIDS, Volume 31, Issue 11 July 2017) 1579.

[245] The provisions of early legal texts, such as the United Nations Charter, the Constitution of the World Health Organisation and the Universal Declaration of Human Rights branch off the focus of the present research.

[246] The term "femininities" had (and still has) not been developed yet in the legal world.

[247] Informed decision-making is also noteworthy and includes fully understanding and accepting (or declining) a particular service, such as a diagnostic test for an STI or HIV, or intervention. See, in different context: United Nations Committee on the Elimination of All Forms of Discrimination against Women, *Views on Communication 4/2004: Ms. A. S. v. Hungary* (CEDAW/C/36/D/4/2004).

[248] CEDAW, General recommendation No. 24 (1999), *'Article 12 of the Convention (women and health)'* paras 18, 22.

[249] —, *Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review* (2014) 2.

proximate access to healthcare providers.[250] The available medical means ought to also be affordable and **of good quality**; scientifically approved and unexpired drugs and hospital equipment, skilled medical personnel and adequate sanitation are of indispensable importance.[251] The scope of the ICESCR overlaps that of the CEDAW, though not needlessly. In reality, enforced through the latter, the non-discrimination principle complements the removal of barriers which femininities with an STI face regarding the actualisation of their right to health.

It was insinuated above that minors are protected in equal measure. Nevertheless, owing to their physical and mental capacities not having fully evolved yet, they are in need of special normative care, which, for all femininities under 18 years of age,[252] is reflected in the *Convention on the Rights of the Child (CRC)*. Namely, Article 24.1 thereof centres on uninhibited access to STI-related information and preventive measures, such as voluntary counselling and testing. For their access to be truly uninhibited, it must be **confidential, free of any judgement from healthcare providers and detached from parental consent**, when such course of action is assessed to be to their best interest.[253] What is more, Art. 24.2.d acknowledges the profound implications of vertical transmission for the health of the child; inappropriate prenatal or postnatal health care of the mother inevitably results in the violation of the child's right to health, as well.

Lastly, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of Persons with Disabilities should all be cited as treaties which encompass provisos relevant to the rights of femininities concerning STIs.

4.2. Sexual Rights of LGBTQIA+ People around STIs and HIV

It can be easily inferred that the aforementioned standards - when suitable - also apply to LGBTQIA+ people. If anything, it is them who are affected the most by discrimination intersectorially.[254] To elaborate, they are discriminated against not merely for their sexual orientation or gender identity, but also for their HIV status, actual or presumed, in blatant contrast to *Article 26 ICCPR*, which guarantees the rights to **freedom from discrimination and equality before the law.**

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[250] CESCR, General comment No. 22 (2016), *'The right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)'* paras 13-14.

[251] Ibid para. 21.

[252] United Nations Committee on the Rights of the Child, General Comment No. 4 (2003), *'Adolescent health and development in the context of the Convention on the Rights of the Child'.*

[253] —, General Comment No. 15 (2013), *'The rights of the child to the highest attainable standard of health'* para. 31; General Comment No. 3 (2003), *'HIV/AIDS and the rights of the child'* para. 20.

[254] ILO, OHCHR, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP W, U. UN, '*Ending Violence And Discrimination Against Lesbian, Gay, Bisexual, Transgender And Intersex People'* (2015) <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/News%20and%20events/Stories/2015/Joint_LGBTI_Statement_ENG.PDF>[accessed 18 April 2022].

Therefore, refusal to make clinic appointments, refusal to treat, or treatment with gross disrespect, violation of medical privacy, private shaming, public disparagement and hurried or inferior care all constitute discriminatory practices and, as such, serious violations of international human rights law.[255] Conversely, **universal access to care and treatment, availability of antiretroviral therapy and robust HIV-prevention campaigns**[256] are all components crucial to the realisation of the right to health for LGBTQIA+ people (Articles 2.2 and 12 ICESCR).

In some countries, HIV transmission or exposure - and, in more severe cases, even consensual sexual conduct occurring between otherwise competent persons, who just happen to be members of the LGBTQIA+ community - are penalised.[257] Not only do such laws entrench stigma, discrimination and fear, but they also increase rather than decrease, as originally intended, HIV transmission, due to the simple fact that people are thus discouraged from getting tested to discover their HIV status (especially if testing positive would result in incarceration for, exempli gratia, being a carrier unbeknowst to them or admitting to non-heteronormative sex).[258] Consequently, **broad punitive measures in relation to HIV** actuate an indirect discrimination against HIV-positive LGBTQIA+ people (as much as against femininities) and, as a result, **deprive them of actual access to effective health care.**[259]

It is self-evident that the foregoing practices and laws do not target exclusively LGBTQIA+ people. However, they drastically contribute to the perpetuation of their pathologisation.[260] It then becomes clear that HIV vulnerability is not a matter of biology, but rather of social injustice.

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[255] United Nations General Assembly, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* (Report of the United Nations High Commissioner for Human Rights, NY, 2011) 18; Jennifer N. Sayles, Mitchell D. Wong, Janni J. Kinsler, David Martins, William E. Cunningham, *'The association of stigma with self-reported access to medical care and antiretroviral therapy adherence in persons living with HIV/AIDS'* (J. Gen Intern Med. 2009;24(10):1101–1108, August 4 2009) <doi: 10.1007/s11606-009-1068-8> [accessed 22 April 2022].

[256] Joint United Nations Programme on HIV/AIDS and Office of the United Nations High Commissioner for Human Rights, *International Guidelines on HIV/AIDS and Human Rights: 2006 Consolidated Version* (United Nations publication, Sales N° E.06.XIV.4) 38-39.

[257] World Health Organization (WHO), *Sexual health, human rights and the law* (2015) 22, 24.

[258] United Nations, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng - Sexual and reproductive health rights: challenges and opportunities during the COVID-19 pandemic* (July 16 2021) para. 57; United Nations Development Programme (UNDP), *Global Commission on HIV and the Law: Risks, Rights and Health* (July 2012) 31; UNDP, Joint United Nations Programme on HIV/AIDS (UNAIDS), *Policy Brief: Criminalization of HIV transmission* (2008) 1; Scott Burris, Edwin Cameron, *'The case against criminalization of HIV transmission'* (JAMA. 2008;300(5):578–581, August 6 2008) <doi:10.1001/jama.300.5.578> [accessed 23 April 2022]. It is also stated that the criminalisation of HIV transmission in the instance of intentional, malicious transmission is the only circumstance in which the use of criminal law may be appropriate.

[259] The same view is widely held internationally. See: United Nations, *Summary of the Human Rights Council panel discussion on the progress in and challenges of addressing human rights issues in the context of efforts to end the HIV/AIDS epidemic by 2030* (April 26 2016) para. 27.

[260] United Nations, *Report of the United Nations High Commissioner for Human Rights - Human rights in the response to HIV* (May 1 2019) para. 35; Mary Ott, John Santelli, *Sexually Transmitted Infections, Public Health, and Ethics;* Anna C. Mastroianni, Jeffrey P. Kahn and Nancy E. Kass (eds), *The Oxford Handbook of Public Health Ethics* (2019) 384-385.

4.3. The German Legislation around STIs

Following the increase of HIV and other sexually transmitted infections in 2001, Germany implemented the German Infection Protection Act ("IfSG") in the same year to contain the spread of the infections.[261] The main focus of the German Infection Protection Act is the prevention of the spread of all infections according to Section 1; effectively making the Act a part of risk prevention law and therefore a subcategory of German police law - meaning a violation of the German Infection Protection act can result in a penalisation by the police. The prevention of sexually transmitted diseases is included in the German Infection Protection Act.

The IfSG lists which STIs, inter alia, must be reported to authorities and when. The circumstances and data medical professionals and authorities must submit are determined in section 6 ff. and the measures to which they must adhere are listed in chapter 4, in order to ensure contact tracing and containment of the infections. Furthermore, chapter 4 determines the code of practice of prevention explicitly delegating the responsibility to the competent medical authorities in section 16. According to section 19 of the German Infection Protection Act, the medical authorities are obligated to provide anonymous counsel and examinations in case of STIs. In some instances, they are even obliged to offer treatment themselves or "treatment by a physician of the health office".

Active immunisations, for instance vaccinations or other treatments against the infections or diseases, are legalised in section 20. The control of communicable diseases is regulated in chapter 5 of the German Infection Protection Act. For instance, investigations are viable under section 25 to identify the person suffering from a disease.[262]

In the fight against STIs, Germany primarily focuses on the prevention of the spread and the education of the general public. This is also reflected in the German Infection Protection Act that highlights the prevention of STIs and puts overarching measures in place to trace and contain infections as soon as possible.

4.4. The Greek Legislation around STIs

A comprehensive STI strategy is absent in Greece.[263] A national coordination mechanism does exist, the Public Health National Agency, one of its subdivisions being the Directorate for the Prevention and Epidemiological Surveillance of HIV/AIDS, Sexually Transmitted Diseases

[261] Liebesleben, *HIV and STIs Prevention in Germany. An overview* (BZgA, 2012) 46.

[262] Landeszentrum Gesundheit Nordrheinwestphalen, '*Sexuell übertragbare Krankheiten*' (2019) <https://www.lzg.nrw.de/inf_schutz/sex_infekt/index.html> [accessed 20 April 2022] [German].

[263] European Centre for Disease Prevention and Control (ECDC), *Developing a national strategy for the prevention and control of sexually transmitted infections* (Stockholm 2019) 3. The obsolete 2008-2012 National Action Plan for HIV/AIDS has not been updated as of yet; it was not accompanied by provisions on other STIs, either.

(STDs) and Hepatitis,[264] but its action is virtually monitorial as far as bacterial STIs are concerned. Free and confidential testing for syphilis, chlamydia and hepatitis B and C is being carried out, however only in Athens.

In regard to HIV/AIDS, one is able to get tested anonymously - if so desired - and free of cost in five major cities. It could be argued that people (either femininities or the LGBTQIA+ minority) in rural areas are thus estranged from uncomplicated awareness of their sexual health status. In any case, testing for STIs in any health unit, public or private, is still affordable, yet only for people possessing a national social security number. Moreover, insured women are entitled to yearly Pap smear screening once they become sexually active.[265] Notwithstanding, a Pap smear does not show whether HIV has been contracted.

Regarding the available antiretroviral therapy, Greece provides advanced treatment (HAART - Highly Active Antiretroviral Therapy) from specifically trained medical personnel.[266] Though it can be rather expensive, people living with HIV are not burdened with the cost of their medicines.[267] Even so, viral load measurement and genotypic resistance testing is excessively delayed, owing to the lack of the required reagents in state laboratories. Accordingly, ascertainment of the development of the virus and adjustments to the pharmacological approach of each case are in that way hindered and new cases are often impossible to undertake.[268] Understaffing, extensive bureaucratic procedures and inadequate funding only exacerbate the situation.

In order to significantly decrease the possibility of infection immediately after possible exposure to HIV, femininities and LGBTQIA+ people can apply to the Directorate through any public hospital for Post-Exposure Prophylaxis (PEP) treatment, under the same terms as the general

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[264] Art. 8 of Law 4633/2019 (Establishment of a Public Health National Agency etc.) [Σύσταση Εθνικού Οργανισμού Δημόσιας Υγείας (ΕΟΔΥ)] [Greek].

[265] Art. 5.1.d of Common Ministerial Decision No. 80157 of November 1 2018 (Universal Health Benefits Regulation of the National Organisation for the Provision of Health Services) [Ενιαίος Κανονισμός Παροχών Υγείας (ΕΚΠΥ) του Εθνικού Οργανισμού Παροχών Υπηρεσιών Υγείας (ΕΟΠΥΥ)] [Greek].

[266] Attempts are being made not to discriminate against non-nationals. Art. 11.E of Law 2955/2001 establishes the right of economic migrants to antiretroviral treatment. Moreover, Art. 21.2 of Law 4251/2014 grants equal social security rights to non-nationals with a residence permit. During the refugee crisis, the 2017-2018 urgent healthcare intervention PHILOS programme of the EU Asylum, Migration and Integration Fund was utilised to provide health care and support to refugees in accommodation centres; the need for a framework for international protection applicants was apparent. Art. 59 of Law 4939/2022 (Ratification of the Codified Legislation on the reception, international protection of third-country nationals and stateless persons and the temporary protection in case of mass influx of displaced aliens) [Κύρωση Κώδικα Νομοθεσίας για την υποδοχή, τη διεθνή προστασία πολιτών τρίτων χωρών και ανιθαγενών και την προσωρινή προστασία σε περίπτωση μαζικής εισροής εκτοπισθέντων αλλοδαπών] [Greek], in conjunction with Art. 33 of Law 4368/2016, having taken into account the vulnerable state of HIV-positive people among others, orders for cession of a temporary social security number to applicants for international protection.

[267] Ministerial Decision No. 22008 of April 19 2022 (Revision of the List of Compensated Medicines of Article 251 of Law 4512/2018, as amended by Article 24 of Law 4633/2019) [Αναθεώρηση Καταλόγου Αποζημιούμενων Φαρμάκων του άρθρου 251 του ν. 4512/2018, όπως τροποποιήθηκε με το άρθρο 24 του ν. 4633/2019] [Greek].

[268] State Ombudsman, *Σχετικά με τις καθυστερήσεις στη διενέργεια εξετάσεων μέτρησης ιικού φορτίου και γονοτυπικού ελέγχου* (2017) [Greek].

population. Having evaluated the existing risk of infection, the patient's medical history and the source's medical records, if available or consensually given access to, the patient's data are encrypted and - should it be recommended by the examining doctor - PEP is administered.[269]

Contrariwise, Pre-Exposure Prophylaxis (PrEP) treatment is not available presently via public healthcare facilities, except for pregnant HIV-positive femininities and their neonates, depending on the results of perinatal testing.[270] If their or their partner's status is known beforehand, medically assisted reproduction methods could make a real difference in avoiding vertical transmission of HIV. Yet, their right to assisted reproduction[271] remains inactive despite the relevant technological advancements, as the institutionally mandated[272] units for HIV-positive people have not been established to date.

Discrimination against femininities and LGBTQIA+ minorities in relation to the aforementioned sexual health benefits cannot be condoned under *Article 21.3 of the Greek Constitution* and may lead to **state liability**, in accordance with Art. 105 of the Introductory Law of the Civil Code. Furthermore, the totality of these procedures is governed by the principles of informed consent and confidentiality. More specifically, the right to be informed - or not, for that matter - entails information on the infection, its development and its further consequences, possible treatment and its expected effectiveness and generally the provision of any relevant information.[273]

In this context, the observation that **any testing or treatment without the patient's (informed) consent is prohibited** is based on *Article 5, paragraphs 1 and 5, of the Greek Constitution*, which safeguards everyone's right to free development of their personality, an element of which is also their health.[274] On that matter, adolescents over 15 years of age are able to get tested without their parents' - otherwise required - consent, as they are presumed to

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[269] Public Health National Agency, Department of Epidemiological Surveillance of HIV/AIDS, *Κατευθυντήριες οδηγίες χορήγησης προφυλακτικής αντιρετροϊκής αγωγής (Post Exposure Prophylaxis - PEP) σε ενήλικες και εφήβους, μετά από πιθανή έκθεση στον HIV* (Athens EODY, 2022) [Greek].

[270] —, *Κατευθυντήριες οδηγίες για την πρόληψη της κάθετης μετάδοσης της HIV λοίμωξης από την μητέρα στο νεογνό* (Athens EODY, 2020) 4 [Greek].

[271] Art. 4.3 of Law 3305/2005 (Implementation of Medically Assisted Reproduction) [Εφαρμογή της Ιατρικώς Υποβοηθούμενης Αναπαραγωγής] [Greek] dictates that, in such cases, authorisation form the National Authority on Medically Assisted Reproduction (E.A.I.Y.A.) is required.

[272] Art. 4 & 5 of E.A.I.Y.A. Decision 2/2008 (Medical reproductive assistance to HIV-positive people) [Ιατρική υποβοήθηση αναπαραγωγής σε άτομα ορoθετικά για τον ιό της ανθρώπινης ανοσοποιητικής ανεπαρκείας] [Greek].

[273] Art. 11 of the Code of Medical Ethics (Law 3418/2005). See also: Art. 47.4 of Law 2071/1992 (Modernisation and Organisation of the Health System) [Εκσυγχρονισμός και Οργάνωση Συστήματος Υγείας] [Greek].

[274] The counterargument of public health concerns (Art. 21.3 of the Constitution) is no longer valid, as it is long known that STIs and HIV in particular are not transmitted through mere social contact and that they can be avoided through responsible sexual conduct. Theophano Papazisi, *Αστική ευθύνη και HIV/AIDS νόσος* (Sakkoulas 2003) 150-151 [Greek]. See also: Article 5 of the Oviedo Convention on Human Rights and Biomedicine (ratified by Law 2619/1998); Art. 12 of the Code of Medical Ethics [Κώδικας Ιατρικής Δεοντολογίας] [Greek]. For the same reasons, no third party has a right to be informed of such information. See: 4395 [2013] Hellenic Council of State (Supreme Administrative Court) NOMOS legal database [Greek]; 3545 [2002] Hellenic Council of State NoB [2003] 348 [Greek].

possess the necessary emotional and mental maturity to comprehend the importance of timely diagnosis and to be driven to secrecy out of fear of stigmatisation.[275]

The fact that, regardless of their employment status, **healthcare providers do not have the right to disclose their patients' sexual health status to third parties**, even to their spouse or sexual partner, much less to other family members, is anything but incospicuous. Health-related information is covered by the right to confidentiality,[276] an aspect of the general right to privacy, id est the right to present oneself as (and if) desired, especially in matters of sexual freedom *(Art. 5.1, 9.1.b and 9A.a of the Constitution)*.[277] Violation of medical confidentiality may lead to **criminal** (Penal Code, Art. 371), **civil** (Civil Code, Art. 57, 914 and 932) **or disciplinary liability.**

Concurrently, **medical staff are exempted from testimonial examination on patient-related information** in every jurisdiction (Code of Penal Procedure, Art. 212, Code of Civil Procedure, Art. 400, and Code of Administrative Procedure, Art. 183). If, due to breach of confidentiality or from any other source, third parties learn about one's sexual health status, discriminatory demeanour in any sector (employment, school, army, prisons, etc.) can under no circumstances be condoned[278] and equal treatment is to be redressed primarily through compensatory action.[279]

On the burning issue of HIV criminalisation, intentional transmission is treated as grievous bodily harm by Greek courts (Art. 310.2 of the Penal Code).[280] Broad HIV-specific provisions are not a component of the national criminal system, except for **sex workers**. Not only are they subjected to quarterly compulsory screening, but they also **face imprisonment if they resume**

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[275] Public Health National Agency, *Κατευθυντήριες οδηγίες για τη διάγνωση της HIV λοίμωξης σε κλινικές δομές και στην κοινότητα* (Athens EODY, 2022) 19 [Greek].

[276] The unnecessary disclosure of one's HIV status in certificates to be produced in various situations violates said right. See: *P.T v. the Republic of Moldova* [2020] ECtHR, no. 1122/12, judgement of May 26 2020. In the same context (military use), also: 1620 [2000] Hellenic Data Protection Authority.

[277] 1 [2017] Areios Pagos (Supreme Civil and Criminal Court of Greece, plenary session) NOMOS legal database [Greek]. See: Kostas Chrysogonos, Spyros Vlachopoulos, *Ατομικά και Κοινωνικά Δικαιώματα* (4th edn, NOMIKI BIBLIOTHIKI S.A. 2017) 292-294 [Greek]. Data processing is carried out only for specific purposes, listed in Art. 22.1 of Law 4624/2019 (Hellenic Data Protection Authority, measures implementing Regulation (EU) 2016/679) [Αρχή Προστασίας Δεδομένων Προσωπικού Χαρακτήρα, μέτρα εφαρμογής του Κανονισμού (ΕΕ) 2016/679] and, as mentioned above, on encrypted data; also: Art. 47.6 of Law 2071/1992.

[278] Haris Politis, *HIV/AIDS. Η προστασία του ιατρικού απορρήτου και των δεδομένων προσωπικού χαρακτήρα* in State Ombudsman, *Ιατρικό απόρρητο* (Seminar Minutes, May 29 2006, Athens) 180-182 [Greek]. Law 4443/2016 is the general Greek law on equal treatment and includes provisions regarding occupation in particular. Staff pressure cannot justify the dismissal of an HIV-positive employee. See: *I.B. v. Greece* [2013] ECtHR, no. 552/10, judgement of October 3 2013. For accommodation contracts specifically, see: Euripides Rizos, *Συμβάσεις Ξενοδόχων - Ταξιδιωτικών Πρακτόρων* (Sakkoulas 2016) 161 [Greek].

[279] Insufficient redress in cases of breach of privacy leads to violation of the right to respect for private life just as much. See: *Armonas v. Lithuania* and *Biriuk v. Lithuania* [2008] ECtHR, no. 36919/02 and 23373/03, judgement of November 25 2008.

[280] See, e.g. 1201 [2015] Areios Pagos NOMOS legal database [Greek], 63 [2007] Mixed Jury Court of Kos NOMOS legal database [Greek]. Also: 1083 [2017] Mixed Jury Court of Athens, where it was recognised for the first time that 'undetectable = untransmittable'.

their profession whilst having been found HIV-positive,[281] for an indefinite period of time and regardless of their viral load or taking effective precautions. The legal status of people engaging in sex work without authorisation is even more unfavourable. In any event, the criminal liability of sex workers should not be augmented by implementing Art. 285 of the Penal Code, which punishes the violation of statutory measures for the prevention of infectious diseases,[282] given that sexual transmission of HIV does not pertain, as required, to an indefinite number of people; rather, it might even be a sizeable number, but it is definitely finite.

4.5. Comparison to European Legislative Systems

4.5.1. Council of Europe (CoE) - EU Law

International community standards regarding sexual health have been imprinted on European regional organisations, as well, in an almost identical manner content-wise. Beginning from the *European Convention on Human Rights (ECHR)*, Article 8 establishes **the right to respect for private and family life**, in which the rights of free development of one's personality and physical and psychological integrity are encompassed.[283] Art. 14 ECHR further establishes the **prohibition of any dicrimination** on the enjoyment of the rights enshrined in the Convention. Even though a right to protection of health cannot be explicitly found in the ECHR, the European Court of Human Rights (ECtHR) has developed notable jurisprudence[284] on the matter over the years and has elevated **health care** to a protected right, as it **is a prerequisite for the preservation of human dignity** (Articles 2 & 3 ECHR).[285]

The right to (sexual) health is consolidated in the *revised European Social Charter (ESC),* namely in Article 11, and is viewed as having three aspects concerning STIs: provision of **appropriate and timely sexual health services for femininities on a nondiscriminatory** (in conjunction with Art. E ESC) **and consensual basis;**[286] relevant, objective and contemporary **sexual health education as part of the ordinary school curriculum**, in order to reduce sexually risky

[281] Art. 2.2 and 5.2 of Law 2734/1999 (People engaged in sex work etc.) [Εκδιδόμενα με αμοιβή πρόσωπα κ.λπ.] and Ministerial Decision No. 660 of February 22 2000 (Medical examination of people engaged in sex work) [Διενέργεια ιατρικού ελέγχου των με αμοιβή εκδιδομένων προσώπων] [Greek].

[282] *Contra* Maria Kaiafa-Gbandi, *Κοινώς επικίνδυνα εγκλήματα (Άρθρα 264-289 ΠΚ)* (3rd edn, Sakkoulas 2005) 504-505 [Greek].

[283] Paroula Naskou-Perraki, *Το δικαίωμα στην υγεία* (Sakkoulas 2022) 270 [Greek].

[284] Establishing a right to health has restricted effectiveness where discrimination on the grounds of HIV status persists. See, e.g. *Kiyutin v. Russia* [2011] ECtHR, no. 2700/10, judgement of March 10 2011.

[285] *International Federation of Human Rights Leagues (FIDH) v. France* [Complaint No. 14/2003] European Committee of Social Rights (ECSR) Decision on the merits [November 3 2004] para. 31.

[286] *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy* [Complaint No. 87/2012] ECSR Decision on the merits [September 10 2013] para. 66; *Confederazione Generale Italiana de Lavoro (CGIL) v. Italy* [Complaint No 91/2013] ECSR Decision on the merits [October 12 2015] paras. 162, 190. On the matters of equitable access (Art. 3) and, especially, consent (Art. 5), CoE's Oviedo Convention is to be noted, too. Also: *Transgender Europe and ILGA Europe v. Czech Republic* [Complaint No. 117/2014] ECSR Decision on the merits [May 15 2018] paras. 81-82.

behaviour,[287] along with free school medical services and regular examinations;[288] lastly, prevention via widely accessible immunisation programmes (for STIs such as HBV and HPV, against which vaccines have been developed), arrangements for reporting and notifying STIs and special treatment for HIV/AIDS patients.[289] In addition, everyone, irrespective of nationality, has the right to medical assistance or, at least, to benefit from social welfare services, invoking Articles 13.3 and 14.1 ESC, which translate to **a social security system that offers equal and effective access to the prior services.**[290]

In tandem, the European Union espouses - through the *Charter of Fundamental Rights of the European Union* and within the scope of its application - the sum of those rights which constitute the right to protection of sexual health; videlicet Article 7 (respect for private and family life), 21.1 (non-discrimination)[291] and 35 (health care). On a treaty level, Article 2 of the *Treaty on European Union* numbers respect for human dignity, freedom, democracy, equality, the rule of law, **respect for human rights, including the rights of persons belonging to minorities, and non-discrimination against femininities** among its values. What is more, Articles 5 and 6 of the *Treaty on the Functioning of the European Union (TFEU)* assort protection and improvement of health to the supporting competences of the EU and Article 168.5 TFEU provides for the adoption of incentive measures designed to protect and improve human health (the content of which is prescribed in paragraph 1 thereof).

On that basis, *Regulation (EU) 2021/522 ('EU4Health Programme')* aims to **fund Member States' actions to promote**, inter alia, **access to sexual and reproductive health care** and to support integrated and intersectional approaches to prevention, diagnosis, treatment and care (Article 4.g, as elaborated upon in Annex I.7.c).[292] Besides, *Directive 2011/24/EU* regulates cross-border health care in the internal market, whereas *Council Directive 2004/113/EC* implements the principle of equal treatment of femininities in the access to and supply of goods and services, including health services. As an interim conclusion, **femininities - citizens of the Union are** in principle **entitled** by EU law **to equitable STI care and treatment, in any Member State**

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[287] Council of Europe, Committee of Ministers, Recommendation No. R. (88) 7 (1988), '*School health education and the role and training of teachers*'; *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia* [Complaint No. 45/2007] ECSR Decision on the merits [March 30 2009] paras. 46-47.

[288] European Committee of Social Rights, Conclusions on Moldova, *'Article 11'* (2005) <https://hudoc.esc.coe.int/eng?i=2005/def/MDA/11/2/EN> [accessed 18 May 2022].

[289] European Committee of Social Rights, Conclusions on Latvia, *'Article 11'* (2005) <https://hudoc.esc.coe.int/eng?i=XVII-2/def/LVA/11/3/EN> [accessed 18 May 2022].

[290] Secretariat of the European Committee of Social Rights, *Digest of the case law of the European Committee of Social Rights* (Strasburg, December 2018) 150 ff.

[291] For the question of whether LGBTQIA+ people can be prohibited from donating blood, see: *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Établissement français du sang* [2015] CJEU C-528/13, ECLI:EU:C:2015:288.

[292] To date, two projects have been launched in the domain of sexual health: *'Action grants to support actions to improve access to human papillomavirus vaccination'* (EU4H-2021-PJ-08) and *'Action grants to support the implementation of best practices in community-based services for the human immunodeficiency virus (HIV) infection and acquired immunodeficiency syndrome (AIDS), tuberculosis, viral hepatitis and sexually transmitted infections'* (EU4H-2021-PJ-13), with countries such as Germany and the Netherlands to have taken action.

they might be present. Incidentally, European institutions accord the importance of personal autonomy and non-discrimination to femininities vis-à-vis their sexual health rights and call for raising awareness in relation to STIs through proper school infrastructure and commonly used communication and digital tools.[293]

4.5.2. Transnational Comparative Approach - Inferences

Such is the nature of the European legal order that the investigation of the individual legal systems of its Member States is indissociable. Germany and Greece inescapably take the lion's share in the present research. On their monitoring duties, it is in both countries incumbent upon healthcare providers to report cases of the most widespread STIs to the respective national authorities. During this process, the utmost respect for patients' privacy is paid. However, unlike the German election, STI-specific legislation no longer exists in Greece.[294]

As the human factor intervenes, in practice anonymity may not always be applied to the provision of sexual health services, especially in close-knit communities. The situation is exacerbated, with regard to Greek health care, by the long waiting times in primary healthcare facilities,[295] which drive femininities - especially those in rural areas, who cannot de facto access public sexual health facilities - to contracted laboratories, where testing is not always compensated and anonymity is not invariably observed. Often not knowing their rights, femininities are unable to seek remedies when the former are violated; it is vital that law enforcement officials keep abreast of relevant international developments and provisos.

Divergence is also noted on the topic of information around sexual health and STIs. Contrary to Germany, where emphasis is given on a central level, the Greek government idles on the issue. Sex and sexuality education is conducted in an inchoate manner and such affairs are deemed as taboo by a portion of the population, partly owing to the lack of effort to dissolve relevant misconceptions. Hence, the burden of information dispensation on sexual health falls upon the shoulders of civil society organisations. How inadequate sexual education affects the societal perception of femininities and LGBTQIA+ people shall be observed, to its exteme, through the specimen of the Republic of Poland, which faces European outcry[296] for banning - instead of modernising - sex education in schools as "corruptive" and where contraception,

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[293] European Parliament, Resolution (2021), *'The situation of sexual and reproductive health and rights in the EU, in the frame of women's health'* [2020/2215(INI), OJ C 81, February 18 2022] paras. 1, 65-66.

[294] Ministerial Decision No. 39A of April 2 2012 (Arrangements regarding the limitation of the transmission of Infectious Diseases) [Ρυθμίσεις που αφορούν τον περιορισμό της διάδοσης Λοιμωδών Νοσημάτων] [Greek] was (rightly) abolished in 2015, because it established mandatory STI screening for drug users, sex workers and migrants, and has not been replaced ever since.

[295] Organisation for Economic Co-operation and Development (OECD), European Observatory on Health Systems and Policies, *State of Health in the EU · Greece · Country Health Profile 2021* (2021) 13.

[296] European Parliament, Resolution (2019), *'The criminalisation of sexual education in Poland* [2019/2891(RSP), OJ C 208, June 1 202]..

abortion and IVF are demonised and LGBTQIA+ people are illustrated as pestiferous deviants.[297]

On another matter, in order to fortify their anti-discrimination legislation, both the Hellenic Republic and the Federal Republic of Germany recognise HIV/AIDS as a disability.[298] In parallel, they are both signatories to the *Dublin Declaration on Partnership to fight HIV/AIDS in Europe and Central Asia*, a valuable tool in assessing the effectiveness of national strategies. According to the most recent data available,[299] both states ought to incorporate an improved and multifaceted testing policy. Greece also needs to urgently minimise the interval between diagnosis and treatment and intensify HIV care for people who inject drugs[300] and migrants.

By way of contrast, Sweden and the Netherlands have an exemplary response against HIV to display, having achieved viral suppression for the majority of their citizens living with it (86% and 82%, respectively).[301] The success of the former is owed to a national strategy[302] which focuses on sufficient funding, transparency, cross-sectoral coordination and cooperation, as well as frequent follow-ups on its implementation. On the other hand, the Dutch action plan[303] accentuates healthy sexual development through proper sex education and utilises surveillance data to formulate effective medical treatment and public health measures. The necessary rights-based course of action for the legal orders under examination in the present research is thus more than apparent.

Barring governmental initiative, people living with HIV should not forsake the power they collectively wield. If they are not treated as active partners in designing responses to HIV,[304]

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[297] Notes from Poland, *'Polish parliament passes bill to "protect children from moral corruption" in schools'* (2022) <https://notesfrompoland.com/2022/01/14/polish-parliament-passes-bill-to-protect-children-from-moral-corruption-in-schools/> [accessed 25 May 2022].

[298] All Member States are encouraged to do so. See: European Parliament, Resolution (2010), *'A rights-based approach to the EU's response to HIV/AIDS* (P7_TA(2010)0284, OJ C 351, December 2 2011) para. 4. A 'horizontal equal treatment Directive' was proposed in 2008, but unanimity in the Council has yet to be achieved. This Directive could drastically assist in combating discrimination in healthcare on an EU level. See: Council of the European Union, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Progress Report* (No. doc.: 14046/21, November 23 2021).

[299] ECDC, *HIV Continuum of care - Monitoring implementation of the Dublin Declaration on partnership to fight HIV/AIDS in Europe and Central Asia: 2020 progress report* (Stockholm 2021) 33 ff.

[300] Towards that direction, STI interventions in substance abuse programmes are advisable.

[301] Ibid 35.

[302] Socialdepartementet, *Nationell strategi mot hiv/aids och vissa andra smittsamma sjukdomar* (National strategy for HIV/AIDS and other infectious diseases, Stockholm 2017) <https://www.regeringen.se/informationsmaterial/2017/12/nationell-strategi-mot-hivaids-och-andra-smittsamma-sjukdomar/> [Swedish]. For a brief in English, see: <https://www.folkhalsomyndigheten.se/the-public-health-agency-of-sweden/living-conditions-and-lifestyle/hiv-and-stis/> [both accessed 26 May 2022].

[303] National Institute for Public Health and the Environment, *National action plan on STIs, HIV and sexual health 2017–2022* (Bilthoven 2018) <https://www.rivm.nl/bibliotheek/rapporten/2017-0158.pdf> [accessed 26 May 2022].

[304] As they should, following the principle of Greater Inclusion of People Living with HIV and AIDS (GIPA) adopted at the WHO 1994 Paris AIDS Summit. Such instances prove that the European Union does not function independently of the international community, but, rather, both complement each other.

National Human Rights Institutions can prove crucial in increasing national accountability by intervening when discrepancies in the observance of their rights are noticed and reporting them to CoE, EU or UN bodies.[305] The German Institute for Human Rights and the Greek National Commission for Human Rights (GNCHR) are such institutions.

All in all, considering sexual health as a human right requires specific attention to groups of individuals living in vulnerable situations. Femininities are affected by STIs just as men are, but they experience added difficulties (especially in rural areas) due to economic dependence, gender bias, the limited power many have over their sexual lives and their lack of influence in decision-making. The adoption of positive measures is imperative and existing laws and policies around STIs should be tailored to the needs of femininities and LGBTQIA+ people, who are most in need of assistance;[306] seemingly neutral laws and policies can oftentimes prove to be more detrimental than beneficial to the expulsion of stigma.

4.6. Harmful Practices regarding Sexual Health

4.6.1. Definition of Harmful Practices regarding Sexual Health

The term "Harmful Practices" comprises all practices and behaviours that are rooted in the discrimination of sex, gender and age amongst others. Although most practices are considered to be a violation of human rights, inflicting physical and psychological harm to the affected individual, they are accepted in some societies. By upholding a practice over long periods of time some societies have come to the conclusion that these procedures are agreeable and even necessary.[307] Harmful Practices regarding Sexual Health can range from virginity testing or forced marriage to female genital mutilation.

4.6.2. Definition of Female Genital Mutilation (FGM)

Female Genital Mutilation (FGM), also known as female circumcision or female genital cutting, describes the practice of surgically removing a part or the entirety of the external female genitalia or causing other injury to the genital organs. From a medical standpoint, the procedure is not necessary and therefore non-therapeutic.[308] The removal is performed entirely based on cultural or societal beliefs. It is commonly performed as rite of passage from childhood into adulthood, but FGM is also performed on infants as well as on girls way into their adulthood.[309]

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[305] European Union Agency for Fundamental Rights (FRA), *A rights-based approach to HIV in the European Union* (Vienna, July 2010).

[306] Office of the United Nations High Commissioner for Human Rights, WHO, *Fact Sheet No 31 - The Right to Health* (UN Geneva, June 2008) 11-12.

[307] Unicef, '*Harmful practices, Child marriage and female genital mutilation are internationally recognized human rights violations'* (June 2021) < https://www.unicef.org/protection/harmful-practices> [accessed 20 April 2022].

[308] Bonita Meyersfeld, *Domestic violence as a violation of international human rights law* (Hart Publishing 2010) 95.

[309] Unicef, '*Harmful practices, Child marriage and female genital mutilation are internationally recognized human rights violations'* (June 2021) <https://www.unicef.org/protection/harmful-practices> [accessed 20 April 2022].

The reasons for practising FGM can be manifold and vary from region to region. Often, it is performed out of societal pressure. FGM is considered to be a necessary procedure and is uphold by the communities as a norm. Not only the fear of rejection is motivating the practice, but the girls must also undergo this step to concur with cultural ideals of modesty and marriageability. Some societies believe that the procedure will suppress potential sexual desire and ensure chastity and virginity of a female until marriage. Therefore, ensuring the honour of the female and honour of her family. Societies who regularly perform the practice of FGM are commonly accused of holding women in low esteem.[310]

Considering the immediate, the long-term and potentially life-threatening health complications following the practice of FGM the claim can be comprehensible. The affected girls and women are at high risk of having to endure the consequences of the operation their whole life.[311] For instance, possible consequences of the removal include infections as well as complications in child-birth and an increased infant and maternal mortality.[312] There are also no known health benefits following the procedure.[313]

It is believed that worldwide over 200 million girls and women were subjected to FGM. But only in 52 million cases of FGM it is believed that the procedure was supervised or performed by a medical professional.[314] FGM is commonly practised in over 30 countries across Africa, parts of Asia and the Middle East. However, due to transmigrations in recent times, the practice is found world-wide.[315] This development confronted national legislators with questions of human rights violation of children and women all over the globe.

4.6.3. International Legal Framework concerning Harmful Practices

4.6.3.1. United Nations Charter

The international legal framework derives from the Charter of the UN and the Universal Declaration of Human Rights (UDHR). The UN Charter provides the fundamental framework regarding human rights violations. Both the Charter and the UDHR set the standard that all human beings enjoy basic human rights. The Charter prohibits the discrimination of human

[310] Bonita Meyersfeld, *Domestic violence as a violation of international human rights law* (Hart Publishing 2010) 96.
[311] Ngianga-Bakwin Kandala, Paul Nzinga Komba, *Female Genital Mutilation around The World: Analysis of Medical Aspects, Law and Practice* (Springer 2018) 28.
[312] WHO, '*Female Genital Mutilation*' (2022). <https://www.who.int/en/news-room/fact-sheets/detail/female-genital-mutilation> [accessed 20 April 2022].
[313] Unicef, '*Female Genital Mutilation*' (2021) <https://www.unicef.org/protection/female-genital-mutilation> [accessed 20 April 2022].
[314] WHO, *WHO guidelines on the management of health complications from female genital mutilation* (WHO publishing 2016) VIII.
[315] Alice Edwards, *Violence against Women under international rights law* (Cambridge university press 2011) 150.

beings on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" in Article 2.[316]

4.6.3.2. Universal Declaration of Human Rights

Similarly, the UDHR renounces the discrimination and states that every individual enjoys the rights and freedom following the abolishment of said distinction. Although the term "Harmful Practice" isn't explicitly included in the Universal Declaration of Human Rights of 1948, there are several articles alluding to the various practices and addressing the necessity to ensure the safety of children and women. For instance, Article 5 of the UDHR states that "No one shall be subjected to torture or to cruel, inhumane or degrading treatment […]". Furthermore, Article 7 and 8 of the UDHR established the protection of discrimination under the law and states that all are equal. Article 7 promises that in case of an infringement of previously mentioned rights the violation shall be remedied by the competent national tribunals. The protection of the individual's privacy is acknowledged in Article 12. Article 16 sets the framework for marriage. The Article states that only men and women of full age shall marry, and demands the equality of both parties within the marriage as well as during the dissolution effectively saying that "marriage shall be entered into only with the free and full consent of the intending spouses." Additionally, Article 25 provides the protection of motherhood and childhood.

The core principles of the UDHR can be found in the two general human rights covenants: the International Covenant on Civil and Political Rights of 1966 (ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR). Both covenants add specifications ensuring the prohibition of discrimination.[317]

4.6.3.3. International Covenant on Civil and Political Rights

The ICCPR explicitly spells out the protection of individuals from "torture or cruel inhumane or degrading treatment or punishment" in Article 7 or from "arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation" in Article 17.[318]

4.6.3.4. International Covenant on Economic, Social and Cultural Rights

Article 3 of the ICESCR emphasises anew that the governments must guarantee equal rights to men and women "to the enjoyment of all economic, social and cultural rights". Furthermore, it is stated that the state parties must "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" in Article 12. In the General Comment No. 14 paragraph 21, the committee elaborated the phrase "Highest Attainable Standard of Health" as the responsibility of the states, inter alia, to "promote women's right to

[316] United Nations, '*United Nations Charter*' (2022) <https://www.un.org/en/about-us/un-charter> [accessed 20 April 2022].
[317] Universal Declaration of Human Rights 1948.
[318] International Covenant on Civil and Political Rights 1966.

health throughout their life span" and to construct strategies that "provide access to a full range of high quality and affordable health care, including sexual and reproductive services". The committee considers the reduction of women's health risks, lowering maternal mortality and the protection of the women from domestic violence an essential obligation of the participating states. Further clarifying that undertaking "preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights" is a necessity.[319]

4.6.3.5. Convention on the Elimination of All Forms of Discrimination Against Women

Another substantial international treaty regarding the international framework of harmful practices is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted in 1979. It is often regarded as an international bill of rights for women. The reason being that the UN human right systems implemented a Convention that solely focuses on the enjoyment *of human rights by women* and the elimination of discriminations that could impair the freedom of said women. The CEDAW Convention defines the discrimination against women in Article 1 as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". The committee explicitly states in CEDAW General Recommendation No. 19, paragraph 11 that "Traditional attitudes" for instance "family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision" are considered a violent act against women and therefore fall under the term of discrimination as defined in Article 1 of CEDAW. The committee recognises harmful practices and condemns their execution as violence against women in the General Recommendation; this can be similarly noted in paragraph 20, where the committee is specifically addressing the practice of FGM and its harms. Following the listing of the background the committee makes following recommendations regarding harmful practices in the General Recommendation No. 19: the participating States are required to "identify the nature and extent of attitudes, customs and practices that perpetuate violence against women, and the kinds of violence that result" and "report the measures that they have undertaken to overcome violence, and the effect of those measures" in recommendation (e). Another recommendation the committee expresses in (f) is that "effective measures should be taken to overcome the attitudes and practices. States should introduce education and public information programmes to help eliminate prejudices which hinder women's equality", also referring to the General Recommendation No. 3 urging the states to "adopt education and public information programmes, which will help eliminate

[319] International Covenant on Economic, Social and Cultural Rights 1966.

prejudices and current practices that hinder the full operation of the principle of the social equality of women."[320]

4.6.3.6. Convention of the Rights of the Child, 1989

The Convention of the Rights of the Child (CRC) is establishing the responsibility of the governments to ensure the safety and protection of children. The Convention requires the member states to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child". Therefore, they aim at shielding children from Harmful Practices regarding Sexual Health through legislative, administrative, social, and educational measures.[321]

4.6.3.7. African Charter on the Rights and Welfare of the Child, 1990

Additionally to the CRC, the African Charter on the Rights and Welfare of the Child proposes to banish all cultural customs that are harming the well-being and health of the child based on sex or alternate reasons.

4.6.3.8. Maputo-Protocol, 2003

The Maputo-Protocol poses another significant advancement regarding the abolishment of harmful practices in Africa regarding sexual health. It explicitly regulates the practice of female genital mutilation as well as other harmful practices. The Charta demands the implementation of educational measures to educate the public about FGM as well as to sanction the practice and to remedy the victims.

4.7. The German Legislation around Sexual Harmful Practices

In Germany, it is estimated that 50.000 girls and women have undergone FGM which makes it one of the major harmful practices regarding sexual health.[322]

Historically, the German Law did not react to the practice of FGM with a corresponding legal norm until 2013. The practice of female genital mutilation was considered to be an assault under

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[320] Bundesministerium für Familie, Senioren, Frauen und Jugend, '*VN-Frauenrechtskonv*ention (CEDAW): Staatenberichtsverfahren und Dokumente' (2021) <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/internationale-gleichstellungspolitk/vn-frauenrechtskonvention-cedaw-staatenberichtsverfahren-und-dokumente-80794#:~:text=Das%20%C3%9Cbereinkommen%20der%20Vereinten%20Nationen,und%20trat%201981%20in%20Kraft.> [accessed 15 April 2022] [German].

[321] Unicef, '*Convention on the Rights of the Child For every child, every right*' <https://www.unicef.org/child-rights-convention> [accessed 15 April 2022].

[322] BMfFSFJ, '*Erste Studie mit Zahlen zur weiblichen Genitalverstümmelung für Deutschland*' (2017), <https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/erste-studie-mit-zahlen-zur-weiblichen-genitalverstuemmelung-fuer-deutschland--113908#:~:text=In%20Deutschland%20leben%20knapp%2050.000,in%20Deutschland%20leben%2C%20davon%20bedroht> [accessed 20 April 2022] [German].

the sections of 223 ff. according to the German Criminal Code (StGB). A person who committed assault is generally sentenced up to five years of imprisonment or with a fine. Depending on the consequences after the procedure, the sentence varies. Due to the use of a knife or razor the practice often fell under the legal norm of section 224 I Nr. 2 StGB that penalises bodily harm "with a knife or other dangerous weapon"[323], raising the sentence up to six months to ten years.

In dire cases, where the victim would pass away due to the procedure, perpetrators would be liable for bodily harm resulting in death under section 227, resulting in a legal minimum sentence of three years.[324]

With the 47th Criminal Law Amendment Act of 24 September 2013 the legal norm of section 226a StGB was introduced which addresses the act of female genital mutilation as a felony instead of a simple criminal offence. With the introduction of the new legal norm and reclassification the sentence has been raised, now ranging from one to fifteen years imprisonment in severe cases.[325]

Further, with the introduction of section 226 StGB the legal prosecution abroad is feasible in some cases. For instance, if the victim is sent abroad for the procedure by legal guardians or if the guardians are not preventing the act, they would be liable to prosecution according to the German Criminal Code. So, the new Amendment is covering the domestic sphere of FGM to some extent. Additionally, the consent of the girls or their legal guardians does not affect the section of 226a StGB according to section 228, which regulates the consent regarding bodily harm. Also, the provisions for child protection are applicable for instance section 177 of the criminal code if the legal guardian neglects their duty of care or if they abuse the person they are in charge of according to section 225.

Additionally, civil law facilitates a prosecution of the legal guardian according to section 1666 if the "physical, mental or psychological best interests of the child or its property are endangered and the parents do not wish or are not able to avert the danger".

4.8. The Greek Legislation around Sexual Harmful Practices

In Greece, FGM was an almost unknown practice before the refugee crisis of 2015. International developments led the Greek government to the ratification of the Istanbul

[323] A literal translation of 'mit einem Messer oder einem anderen gefährlichen Werkzeug' (§ 224 I Nr. 2 StGB).
[324] Franziska Gruber i.a. (Terre des Femmes e.V.), *Studie zu weiblicher Genitalverstümmelung* (Terre de Femmes, 2005) 40 [German].
[325] Federal Republic Of Germany, *Contribution by the Federal Republic Of Germany to the report on good practices and major challenges in preventing and eliminating female genital mutilation, pursuant to the HRC resolution 27/22* (08.12.2014) 2.

Convention in 2018.[326] The adoption of a new Penal Code the following year offered the perfect opportunity for completing the criminalisation of such inhumane practices.

Explanatorily, perpetration of FGM was punishable already before 2019 as intended grievous bodily harm (Art. 310 of the Penal Code) and now calls for imprisonment of five to fifteen years. The consequential unintended death of the victim, as well as their status with regard to the perpetrator constitute aggravating circumstances (Art. 311-312). Owing to the gravity of the act, potential consent to undergo FGM - if such consent can even be considered valid - is indifferent.

The novelty on the matter was that, through the addition of Art. 315, even the imposition on a femininity to endure - or even seek out - genital mutilation is now punishable. The rationale behind this provision is that when FGM is part of long-lasting compulsory traditions, femininities find themselves in a weak position and are thus obliged to succumb to the volition of their husband or priest. However, the aforementioned behaviour is punished comparatively lightly, as it is a misdemeanour of up to five years of imprisonment. This choice seems reasonable taking into account that occurrence of FGM is not actually necessary for the application of this article; convincing the victim suffices.[327]

The criminal liability of the perpetrator of Art. 315 alters when he does not merely convince the femininity, but it is them who created the decision on the principal perpetrator (of Art. 310) to operate on the victim. Then the former is charged as an instigator and faces the same sentence as the latter. Generally, in any case the perpetrator of Art. 315 aids in the actualisation of the act, they are prosecuted according to Art. 310, a graver offence. Be that as it may, for the persuasion of the victim, specific intent to do so is necessary.[328]

In any case, such practices are against the Greek constitutional order, as they do not respect the value of the human being (Art. 2.1 of the Greek Constitution) and could, therefore, never be tolerated on Greek territory. Besides, torture, any bodily maltreatment, impairment of health or the use of psychological violence, as well as any other offence against human dignity are prohibited and punished as provided by law (Art. 7.2 thereof); in this instance, the law being the Penal Code.

[326] Law 4531/2018 (Ratification of the Council of Europe Convention on Preventing and Combating Violence against women and Domestic Violence and adaptation of the Greek legislation) [Κύρωση της Σύμβασης του Συμβουλίου της Ευρώπης για την Πρόληψη και την Καταπολέμηση της Βίας κατά των γυναικών και της Ενδοοικογενειακής Βίας και προσαρμογή της ελληνικής νομοθεσίας κ.λπ.] [Greek].

[327] Elisavet Symeonidou-Kastanidou, Εγκλήματα κατά προσωπικών αγαθών (4th edn, NOMIKI BIBLIOTHIKI S.A. 2020) 174 [Greek].

[328] Nikolaos Androulakis, Ποινικόν Δίκαιον, Ειδικόν Μέρος (Sakkoulas 1974) 29 [Greek].

4.9. Comparative Approach of the two Legal Systems to other European Countries/EU/UN

All member states of the European Union recognised the practice of FGM as a criminal act. This is reflected in the respective national legislation. Additionally, most European countries implemented the "principle of extra-territoriality". Therefore, it is possible to prosecute the act of FGM that was conducted in a foreign country, preventing daughters being taken to their origin country to have the practice performed.[329]

An example for a specific national provision is the legislation in the UK which introduced a whole legislative act devoted to the cause with the Female Genital Mutilation Act in 2003 and 2005 in Scotland. The prohibition of FGM was later amended in sections 70-75 of the Serious Crime Act in 2015.[330] Therefore, a person is guilty of committing FGM "if they excise, infibulate or otherwise mutilate the whole or any part of a girl's or woman's labia majora, labia minora or clitoris. To excise is to remove part or all of the clitoris and the inner labia (lips that surround the vagina), with or without removal of the labia majora (larger outer lips). To infibulate is to narrow the vaginal opening by creating a seal, formed by cutting and repositioning the labia" according to section 1 of the 2003 Act. The offence is also punishable if the perpetrator is assisting a girl carrying out FGM on herself according to section 2 of the 2003 Act and independently of - if it was performed in the UK or abroad by UK nationals or on a UK resident, even in foreign countries where the act is not considered an offence according to section 3 of the 2003 Act; implementing the principle of extra-territoriality. Additionally, if the FGM is carried out on a girl that is under the age of 16 the people in charge will face an prosecution of an offence under section 3A of the 2003 Act. The violation of section 1, 2 or 3 of the 2003 Act will result in a sentence up to 14 years imprisonment or a fine.[331] Furthermore, the legislators also included measures in civil law to ensure the prevention of FGM in section 5A and schedule 2 of the 2003 Act. For instance, preventing the arrangement of FGM abroad or establish an FGM Protection Order where (potential) victims – but also authorities or confidants – can apply for protection.

The UK legislation as well as the German legislation implemented a specific criminal provision against the practice of FGM. In comparison, the 2003 Act of the UK legislation is more extensive than section 226a of Germany's legislation. At most, section 226a deters with its heavy sentencing. Even though both regulations stipulate a heavy sentence of imprisonment, the Act

[329] Building bridges to end FGM, '*Legal Framework in Europe*' (2021) <https://copfgm.org/2021/08/anti-fgm-law-europe> [accessed 20 April 2022].

[330] Center for reproductive rights, '*Female Genital Mutilation (FGM) Legal Prohibitions Worldwide*' (2008) <https://reproductiverights.org/female-genital-mutilation-fgm-legal-prohibitions-worldwide/> [accessed 21 April 2022].

[331] GOV.UK, '*Guidance Female genital mutilation: resource pack*' (2022) <https://www.gov.uk/government/publications/female-genital-mutilation-resource-pack/female-genital-mutilation-resource-pack#legislation> [accessed 21 April 2022].

of 2003 includes a range of measures to prevent FGM from happening whilst section 226a only applies if the procedure already occurred.

An example for a general criminal provision is the French legislation. FGM is a crime in France according to Article 222-9 and 222-10 of the French Penal Code. FGM falls under an act of violation intended to cause "bodily harm, permanent infirmity or mutilation". Moreover, the French legislature also implemented policies resulting from its fifth interministerial plan for the prevention of violence against Women in 2017-2019 to tackle FGM directly.[332] In cases of FGM, general child protection law can be applicable like Article No. 375 of the Civil Code and the child can be placed in shelter if it is found that the child is psychologically or physically harmed. The Domestic Violence Act also addresses prevention of violence against children. Additionally, the French right of asylum includes a provision granting Asylum for survivors of FGM according to the Law No. 2015-925.

The enactment of legislation against FGM is different from country to country. Generally, it can be said that most of the European countries adopted a specific legal provision to deal with the occurrences of female genital mutilation like the German legislators rather than to adopt general provisions.[333] Greek legislators opted for a hybrid model, as depicted above.

4.10. Sexual Harmful Practices and Immigration Minorities

By ratifying the Council of Europe's Istanbul Convention, FGM is considered a crime in all 27 EU member states. According to the convention, all member states must ensure the protection and support of FGM victims. The specific goals of the EU for ending FGM are derived from the Communication towards the elimination of FGM from November 25, 2013, as well as the Gender Action Plan III for 2021-2025 and the EU Action Plan on Human Rights and Democracy for 2020-2024 and focus mainly on the data acquisition, prevention, and prosecution measures.[334]

The European Institute for Gender Equality (EIGE) contributes to the elimination of FGM by collecting data to get a more complete picture of the extent of the practice and ensuring an accurate data avaibility of the affected. By conducting statistics, calculating the recorded data, and combining it with the personal testimonials of FGM survivors EIGE can determine where and in what population group FGM occurs in particular.[335]

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[332] EIGE, *Female genital mutilation How many girls are at risk in France?* (EIGE, 09.11.2018) 1.

[333] Franziska Gruber i.a. (Terre des Femmes e.V.), *Studie zu weiblicher Genitalverstümmelung* (Terre de Femmes, 2005) 41 [German].

[334] European Commission, *'Questions and Answers about Female Genital Mutilation (FGM)'* (Brussels 2021) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_402> [accessed 21 April 2022].

[335] EIGE, *'Female Genital Mutilation'* (2022) <https://eige.europa.eu/gender-based-violence/female-genital-mutilation> [accessed 21 April 2022].

It is often believed that FGM safeguards the purity of the girl and offers benefits. By building institutions locally that promote the education about the practice, the EU pursues the goal to prevent FGM by changing social norms and by providing health education. By offering training packages to health professionals and workers in education, law-enforcement, etc. the identification of such practices is simplified, and the information is carried on to the general public. Thus, survivors are also able to receive proper treatment. The institutions are also a point of contact for girls and women at risk.[336]

In all EU members there are specific or general provisions implemented criminalising the act. It is also possible to prosecute the act of FGM in an outside country, according to the principle of extra-territoriality, preventing families to organise the procedure abroad or in their origin country. Moreover, the EU Strategy on victims' rights (2020 – 2025) pursues the goal to guarantee victim protection of gender-based crimes and implement measures at EU level to improve prosecution.

In asylum law, the girls and women at risk of FGM or survivors enjoy special protection under the EU law as well and are granted asylum as long as they can provide tangible evidence or are able to otherwise make a credible statement in personal interviews.

The member states of the EU therefore ensure the prevention of FGM and the protection of girls and women at risk by criminalising the practice FGM, implementing prosecution measures and promoting education amongst the general public as well as professionals.[337]

4.11. Jurisprudence

4.11. The Case of the First FGM Conviction in Portugal

In 2019, the defendant, who was 19 years old at that time, took her one and half year old daughter on a three-month long trip to Guinea-Bissau. During this trip, the defendant submitted her daughter to the practice of FGM.

Due to the novelty of the case regarding FGM it is believed that the judge chose to make an example by pursuing a zero-tolerance policy. The court found the practice arranged by the mother of the victim to be particularly reprehensible, highlighting the severity of the violation of human rights in this case. On 8 January 2021, the now 21-year-old defendant and mother of the child that was genitally mutilated back in 2019 was found guilty at Sintra Court and initially sentenced to three years of effective imprisonment for the crime of subjecting her child to FGM

[336] Amensty International, '*Contribution to the European Commission Consultation on Combating FGM in the EU End FGM european campaign*' (2013) <https://www.amnesty.eu/wp-content/uploads/2018/10/AI_Contribution_to_FGMconsultation_30_May_2013.pdf> [accessed 20 April 2022].

[337] European Commission, '*Questions and Answers about Female Genital Mutilation (FGM)*' (Brussels 2021) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_402> [accessed 21 April 2022].

- making it the first Portuguese conviction around FGM in Portugal since the introduction of FGM as a crime in 2015.[338]

Following the judgment, The European End FGM Network issued a statement denouncing the sentence that doesn't consider the reality of FGM: "Prosecution doesn't equal protection for girls and women subjected to cutting. A conviction means a case in which FGM hasn't been prevented. These harsh convictions, disregarding the context behind the practice, may in fact act as a deterrent for Survivors and women and girls at risk of FGM to come forward, making them fear the prosecution of their family and community."[339]

The statement of the European End FGM Network provided a strong foundation and reinforced the allegations brought forward by the defense attorney before the Court of Lisbon in appeal. In July 2021, the Court of Appeal of Lisbon suspended the sentence for imprisonment in consideration of the child. Imprisoning the mother would further harm the child and dismiss the root problem. The court ruled that the defendant was not able to stand up to the practice of FGM due to social norms imposed by her personal environment, the defendant being a survivor of FGM herself.

[338] Natacha Amora, '*Female Genital Mutilation in Portugal: collateral effects of its criminalisation'* (International Women's Initiative 2021) <https://www.theiwi.org/gpr-reports/female-genital-mutilation-in-portugal> [accessed 5 April 2022].

[339] European End FGM Network, '*Statement – First FGM conviction in Portugal*' (2021) https://www.endfgm.eu/news-en-events/press-releases/statement-first-fgm-conviction-in-portugal/> [accessed 5 April 2022].

Chapter 5: Sexual Rights and Sexual Orientation Of LGBTQIA+ People

By Farina Dobs and Theodoti - Dolina Tziotzora

5.1. Definition of the Right to Sexual Orientation, Gender Identity and Self-Orientation. Definition of Sexual Health for LGBTQIA+ People

5.1.1. Introduction

Human rights are rights that all people possess. Everyone - regardless of nationality, location of residence, sex, national or ethnic origin, color, religion, language, or any other status, such as age, disability, medical condition, sexual orientation, or gender identity - is entitled to human rights without discrimination. These rights are indivisible, universal, interconnected, and interdependent, whether they are civil and political rights (such as the right to life, equality before the law, and freedom of expression) or economic, social, and cultural rights (such as the right to work, social security, and education). As a response to the atrocities of World War II, human rights were conceived and expressed in the Universal Declaration of Human Rights (1948). Treaties, customary international law, general principles, and other sources of international law guarantee and protect universal human rights. International human rights law imposes obligations on governments to act in particular ways or refrain from acting in certain ways, in order to promote and defend people and groups' human rights and basic freedoms. By becoming parties to international treaties, states undertake obligations and duties under international law to respect, protect, and fulfil human rights. States are also required to respect human rights by not interfering with or restricting their enjoyment. Moreover, the commitment to protect compels States to protect people and organisations against third-party violations of human rights. Last but not least, States' commitment to fulfil implies that states must take proactive steps to promote the enjoyment of fundamental human rights.[340] More precisely, LGBTQIA+ rights are not distinct from other rights. LGBTQIA+ rights are universal human rights that all people enjoy. These rights include the freedom to demonstrate, the freedom to form associations, the freedom to live without fear of violence or death, the right to an education and job, and the right to respect for family and private life - all of which are fundamental universal human rights.[341]

[340] United Nations of LGBT Equality, *'International Human Rights Law And Sexual Orientation & Gender Identity'* (Unfe.org, 2017) <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf> [accessed 5 April 2022].

[341] Council of Europe, *'Sexual Orientation And Gender Identity (SOGI) - Questions And Answers'* (Rm.coe.int, 2014) <https://rm.coe.int/1680481ed5> [accessed 4 April 2022].

5.1.2 Right to Sexual Orientation, Gender Identity and Self-Orientation

First of all, in order to completely comprehend the concept of sexual orientation and gender identity, it is necessary to recognize and define the term "**transgender people**" ("trans people"). Trans people can be heterosexual, homoerotic, or bisexual in regard to their sexual orientation, while gender identity has nothing to do with sexual orientation.[342] The term trans includes those people who have a gender identity and/or a gender expression that is different from the sex they were assigned at birth.[343] 'Trans' is an umbrella term that includes, but is not limited to, masculinities and femininites with trans pasts and people who identify as transsexual,[344] trans, transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, non-binary, gender variant or with any other gender identity and gender expression which is not standard male or female, and who express their gender through presentation (e.g. self-referring language, clothing, etc.) or body modifications, including (but not necessitating) the undergoing of multiple surgical procedures.[345] It encompasses those who feel they have to, prefer, or choose to express themselves differently than the gender role given to them at birth, whether through clothing, accessories, mannerisms, speech patterns, cosmetics, or bodily alteration. More specifically, a transgender man is an individual who was assigned the gender "female" at birth but idientifies as a "male" or falls within a masculine gender identity range. A transgender woman is a person who was assigned the gender "male" at birth but identifies as a "female" or falls within the spectrum of feminine gender identities.[346]

Additionally, trans people, women and men, should not be confused with **"intersex people"**. Intersex persons are individuals who are "born with sexual anatomy, reproductive organs and/or chromosomal patterns that do not fit the typical definition of male or female".[347] This term is used to describe a wide variety of characteristics. Thus, intersex individuals are people who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex. The latter becomes evident, for

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[342] Primeminister.gr, 'Εθνική Στρατηγική για την Ισότητα των ΛΟΑΤΚΙ+' (2021) <https://primeminister.gr/wp-content/uploads/2021/06/ethniki_statigiki_gia_thn_isothta_ton_loatki.pdf> [accessed 5 April 2022] [Greek]

[343] 'Transgender' is, like the word 'trans', an umbrella notion which refers to all individuals who do not identify with their birth-assigned legal gender. However, some trans-identified people prefer the term 'trans' rather than 'transgender' as an acknowledgment that not all people have an experience of gender.

[344] The term 'transsexual' is often used to refer to individuals who undertake a process of full medical transition, seeking to align their bodily characteristics with their internal sense of gender. These people can have sex transition in a variety of ways from hormone replacement and partial / minor surgeries to total - irreversible surgeries (Galanou 2017:9).

[345] Peter Dunne and Marjolein Van den Brink, *'Trans And Intersex Equality Rights In Europe – A Comparative Analysis'* (Ec.europa.eu, 2018) <https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf> [accessed 4 April 2022].

[346] Council of Europe, *'Sexual Orientation And Gender Identity (SOGI) - Questions And Answers'* (Rm.coe.int, 2014) <https://rm.coe.int/1680481ed5> [accessed 4 April 2022].

[347] Intersex Society of North America, *'What Is Intersex?'* (InterACT, Advocates for Intersex Youth) <https://isna.org/faq/what_is_intersex/> [accessed 6 April 2022].

example, in secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure.[348] [349] Intersex people, like others, have a sexual orientation and gender identity.[350] It needs to be clarified that intersex people can have the same gender identity as any other human being. As a result, they are distinct from trans people in that their biological sex is not determined at birth. If they are assigned one of the two sexes at birth and later discover that they have a different gender identity from the biological sex assigned to them, they may be classified as trans. Individuals who are left to select their biological sex on their own throughout the course of their life, on the other hand, are not included in the term trans.[351]

Collectively, members of sexual minority groups are frequently referred to using the acronym "LGBTQIA+" which stands for lesbian, gay, bisexual, trans, queer, intersex and asexual. Discrimination based on sexual orientation and gender identity also impacts those who others believe or consider to be members of a sexual minority.[352] It is an undeniable fact that people all over the globe are subjected to violence and inequality — and, in extreme cases, torture and execution — because of who they love, how they appear, or who they are. Sexual orientation and gender identity are fundamental components of who we are and should never be used to justify discrimination or abuse.

Sexual orientation refers to each person's right for profound emotional, affectional and sexual attraction for, and intimate and sexual relations with, individuals of a different gender (heterosexual) or the same gender (homosexual, lesbian, gay) or more than one gender (bisexual).[353] It is an inherent or immutable enduring emotional, romantic or sexual attraction to other people. Heterosexuality, homosexuality and bisexuality are all sexual orientations. The

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[348] Peter Dunne and Marjolein Van den Brink, '*Trans And Intersex Equality Rights In Europe – A Comparative Analysis*' (Ec.europa.eu, 2018) <https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf> [accessed 4 April 2022]. This report adopts the definition of intersex set out by the Commissioner for Human Rights of the Council of Europe in his landmark 2015 report, '*Human rights and intersex people*'.

[349] Commissioner for Human Rights of the Council of Europe, *Human rights and intersex people: Issue paper,* (CoE, 2015) 13.

[350] UN Office of the High Commissioner for Human Rights, *'UN Free & Equal | Sexuality And Gender Are Not Black And White'* (UN Free & Equal) <https://www.unfe.org/sexuality-gender-not-black-white/> [accessed 9 April 2022].

[351] Natsi Despoina, and Papa Thomai, *'Η Νομοθετική Αντιμετώπιση Των Έμφυλων Διακρίσεων Στην Ελλάδα'*, (Heinrich-Böll-Stiftung, 2019) <https://gr.boell.org/el/2019/05/22/i-nomothetiki-antimetopisi-ton-emfylon-diakriseon-stin-ellada> [accessed 1 April 2022] [Greek].

[352] *'Sexual Orientation & Gender Identity'* (Ijrcenter.org) <https://ijrcenter.org/thematic-research-guides/sexual-orientation-gender-identity/#Health> [accessed 9 April 2022].

[353] International Justice Resourse Center, *'Sexual Orientation And Gender Identity (SOGI) - Questions And Answers'* (Rm.coe.int, 2014) <https://rm.coe.int/1680481ed5> [accessed 4 April 2022]; Park Andrew, *'Comment On The Definition Of Sexual Orientation And Gender Identity'* (Williamsinstitute.law.ucla.edu, 2017) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Yogyakarta-2nd-Sub-Feb-2017.pdf> [accessed 28 April 2022]; International Commission of Jurists (ICJ), '*Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*' (2007) <https://www.refworld.org/docid/48244e602.html> Preamble [accesssed 4 July 2022].

terms lesbian, gay and bisexual also refer to an individual's sexual orientation.[354] In addition, sexual orientation is not limited to a person's sexual preference but concerns its overall personal and social identity and is closely linked to personal relationships that meet the need for love, commitment and companionship.[355] It is distinct from other aspects of sexuality including biological sex, gender identity (the psychological sense of being male or female) and the social gender role (adherence to cultural norms for feminine and masculine behavior).[356] Generally, the right to sexuality incorporates the right to express one's sexuality and to be free from discrimination on the grounds of sexual orientation.

Sexual orientation is a relatively new concept in human rights law and practice, as well as one of the most contentious in politics. However, prejudices and negative stereotypes are firmly ingrained in our value system and behavioural habits, affecting the rights of many people. For many public officials and opinion leaders, homophobic prejudice is both legitimate and respectable - in a way that would be unacceptably offensive to any other minority. The key guiding principles of the rights approach to sexual orientation are, and should always be, equality and non-discrimination.[357]

Moreover, gender identity and sexual orientation should be distinguished.[358] **Gender identity** refers to a person's deeply felt, internal, and individual experience of gender, which may or may not correspond with the sex assigned at birth, and includes the personal sense of the body as well as other expressions of gender (that is, "gender expression") such as dress, speech, and mannerisms.[359] A person's sex is normally designated at birth and becomes a social and legal reality afterwards. Gender identity can be the same as or different from the sex assigned to a person at birth. Many people identify as either male or female. Some people, however, may identify with a non-binary gender or with no gender at all. A person's gender identity may be different than the gender that society might attribute to that person on the basis of external signifiers such as clothing or mannerisms.[360] In addition, **gender expression** is the external expression of one's gender identity, which can be shown through behaviour, dress, hairstyle, or

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[354] International Justice Resourse Center, *'Sexual Orientation & Gender Identity'* (Ijrcenter.org) <https://ijrcenter.org/thematic-research-guides/sexual-orientation-gender-identity/#Health> [accessed 9 April 2022].

[355] Primeminister.gr, 'Εθνική Στρατηγική για την Ισότητα των ΛΟΑΤΚΙ+' (2021) <https://primeminister.gr/wp-content/uploads/2021/06/ethniki_statigiki_gia_thn_isothta_ton_loatki.pdf> [accessed 5 April 2022] [Greek]

[356] University of Minesota, *'Sexual Orientation And Human Rights'* (Human Rights Library) <http://hrlibrary.umn.edu/edumat/studyguides/sexualorientation.html> [accessed 8 April 2022].

[357] Ibid.

[358] Council of Europe, *'Sexual Orientation And Gender Identity (SOGI) - Questions And Answers'* (Rm.coe.int, 2014) <https://rm.coe.int/1680481ed5> [accessed 4 April 2022].

[359] See Yogyakarta Principles, Preamble.

[360] International Justice Resourse Center, *'Sexual Orientation & Gender Identity'* (Ijrcenter.org) <https://ijrcenter.org/thematic-research-guides/sexual-orientation-gender-identity/#Health> [accessed 9 April 2022].

voice, and which may or may not adhere to socially prescribed behaviours and qualities associated with being masculine or feminine.[361]

5.1.3 Sexual Health for LGBTQIA+ People

LGBTQIA+ health refers to the physical, mental, and emotional wellbeing of lesbian, gay, bisexual, transgender, queer, intersex and asexual (LGBTQIA+) people. LGBTQIA+ people represent a subset of individuals among the broader category of sexual and gender diverse individuals.[362]A number of international and regional human rights treaties protect the rights to health for all people.[363] Defining the scope of the right to health in its General Comment No. 20, the Committee on Economic, Social and Cultural Rights confirmed that discrimination on the basis of sexual orientation or other status can result in a violation of the right to health.[364] Additionally, Yogyakarta Principle 17 identifies State responsibilities for ensuring individuals' right to the highest attainable standard of mental and physical health, while Principle 18 specifically addresses the right of LGBTI persons to be free from medical experimentation and non-consensual treatment.[365]

5.2. International and European Legal Framework and Legal Principles around the Protection of Sexual Rights of LGBTQIA+ People

The history of LGBTQIA+ rights in the world is drawn by little light and much shadow. Article 1 of the Universal Declaration of Human Rights states that:

"All human beings are born free and equal in dignity and rights".

But the reality looks different. The following topic deals with the issues LGBTQIA+ people have to deal with in terms of the right to abortion, family planning, pregnancy, sexual orientation and equal access to healthcare. The report also shows the progress made by some states in order to ensure the principle of the sexual rights of LGBTQIA+ people.

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[361] Human Rights Campaign, *'Sexual Orientation And Gender Identity Definitions'* (www.hrc.org) <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [accessed 25 April 2022].

[362] World Health Organization, *'Improving The Health And Well-Being Of LGBTQI+ People'* (Who.int) <https://www.who.int/activities/improving-the-health-and-well-being-of-lgbtqi-people> [accessed 6 April 2022].

[363] See, e.g., International Covenant on Economic, Social and Cultural Rights, art. 12; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter), art 16; European Social Charter (adopted 18 October 1961, entered into force 26 February 1965), ETS 35, arts. 11, 13.

[364] CESCR, General Comment No. 14 (2000), *'The right to the highest attainable standard of health'*, UN Doc. E/C.12/2000/4, para. 18.

[365] International Justice Resourse Center, *'Sexual Orientation & Gender Identity'* (Ijrcenter.org) <https://ijrcenter.org/thematic-research-guides/sexual-orientation-gender-identity/#Health> [accessed 9 April 2022].

5.2.1. Legal Framework and Legal Principles

In both, International and European law, legal framework and principles exist whose goal seems to be the protection of the sexual rights of LGBTQIA+ people.

5.2.1.1. International

One example is the Universal Declaration of Human Rights. Even though its Articles 1 and 2 want to ensure equality in dignity and rights for all human beings and furthermore prohibit distinction of any kind, due to e.g. sex, the rights of LGBTQIA+ people are not explicitly mentioned. The right to free sexual orientation in general does not appear at all in the whole document. Some assign these rights to the rights to personal freedom or autonomy which in fact are mentioned in the Universal Declaration of Human Rights.[366] Following the case G vs Australia (HRC, 2017) the UN Human Rights Committee declared, that Article 26 of the International Covenant on Civil and Political Rights (which entered into force in 1976) includes the prohibition of discrimination on the basis of gender identity, including the transgender status.[367]

The Human Rights council and other United Nation actors also clearly state that discrimination against LGBTQIA+ people is never legal. Their protection is a part of the core principles of human rights, written down in Article 1 of the Universal Declaration of Human Rights Resolution 17/19 Human rights, sexual orientation and gender identity' (14 July 2011) UN Doc No. A/HRC/RES/17/19, Recital No. 1 to the Preamble. Distinctions based on sexual orientation and gender identity are just as unlawful as distinctions based on skin cool, religion or any other status.[368] This attitude is consolidated in numerous UN-Resolutions, such as the UN Human Rights Council Resolution 32/2 which - as the title implies - serves the "Protection against violence and discrimination based on sexual orientation and gender identity".

5.2.1.2. European

Besides Article 1 of the Universal Declaration of Human Rights on an international level, the European Union also provides some legal framework and principles to attempt the protection of LGBTQIA+ people.

In article 21 of the EU Charter of Fundamental Rights the European Union states that:

"Any discrimination based on any grounds such as sex […] or sexual orientation shall be prohibited."

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[366]Gordon Brown, *The Universal Declaration of Human Rights in the 21st Century - A living Document in a changing world* (Global Citizenship Commission, Edition 1, 2. The Evolving Understanding of Rights I, 2016) 36-56.

[367]Peter Dunne, Majorlein Van den Brink, *Trans and intersex equality rights in Europe - a comparative analysis*; European Network of legal experts in gender equality and non-discrimination, European Commission, (2018) 38.

[368]United Nations for LGBT Equality, *'International Human Rights Law and Sexual Orientation & Gender Identity'* <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf> 1 [accessed 22 April 2022].

- Article 21 of the EU Charter of Fundamental Rights

Even though terms like gender identity, gender expression or sex characteristics are not explicitly mentioned in Article 21, the European Court of Human Rights clarifies that people's "gender identity" is a part of the protected characteristics in Article 14 of the European Human Rights convention.[369] It is also common ground in legal practice that the terms "sex" and "sexual orientation" do not only include the equality of men and women but also of trans people and furthermore homosexuality, bisexuality and asexuality.[370]

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex […] or other status."

- Article 14 of the European Human Rights Convention

To assure a legal ground to counter of discrimination based on sexual orientation or sex, the European Union uses the Article 19 of the Treaty on the Functioning of the European Union, which allows the European Council to take suitable actions to combat those discriminations. It also allows the European Parliament and the Council to adopt the basic principles of Union incentive measures to support actions taken by Member States in order to contribute to the achievement of this goal.

But the protection of LGBTQIA+ rights does not end with these articles. The European Union also provides us with secondary legislation on non-discrimination and equality.

The Committee of ministers of the Council of Europe published their Recommendation CM/Rec(2010)5, in which they proposed that "measures to combat discrimination on grounds of sexual orientation or gender identity" should be taken.

However one big issue in the European legislation remains. Intersex and non-binary people seem to be excluded from protection, because it is highly unclear if their identities can even be subsumed under the terms "sex(ual) orientation".[371] They are also never explicitly mentioned in any of the legal framework and principles. This symbolic act of visibility remains denied.

5.2.1.3. The Right to Family Planning, Pregnancy and Equal Access to Healthcare

Family planning, pregnancy and access to healthcare - all these things seem to be something that surrounds us at least at some point, be it directly in one's own life or in those of close ones.

[369]Peter Dunne, Marjolein Van den Brink, *Trans and intersex equality rights in Europe - a comparative analysis; European Network of legal experts in gender equality and non-discrimination* (European Commission 2018) 8.
[370]Hans D. Jarass, *Charta der Grundrechte der Europäischen Union: GrCh* (4. Auflage, 2021) [German].
[371]Peter Dunne, Marjolein Van den Brink, *Trans and intersex equality rights in Europe - a comparative analysis; European Network of legal experts in gender equality and non-discrimination* (European Commission 2018) 47.

The following part summarises how many issues this topic can cause for LGBTQIA+ people and how it's legally governed.

The right to health in general is guaranteed in Article 12 of the International Covenant on Economic, Social and Cultural Rights:

"The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

It remained unclear if sexual and reproductive rights are included in this Article until the Committee on Economic, Social and Cultural Rights released their General Comment No. 22 (2016) which stated: *"The right to sexual and reproductive health is an integral-art of the right to health inshrined in article 12 of the International Covenant on Economic, Social and Cultural Rights."* This comment also points out, that especially LGBTQIA+ people suffer from health related discrimination and a lack of legal framework.

5.2.1.4. Access to Healthcare

The constitution of the World Health Organisation states that health is a fundamental right of every human being. Therefore, states are in principle legally obligated to create structures so that the enjoyment of health can be reached without any discrimination.[372] It also expresses the need that *"health services should be affordable, accessible and acceptable to all, and that they should be provided with quality, equity and dignity".*[373]

In the European Union, equal access to healthcare is rooted in the Directive 2004/113/EC. It follows the purpose to implement "the principle of equal treatment between men and women in the access to and supply of goods and services". It becomes obvious already in the headline what leads to problems: The directive is based on a very binary view and therefore only names men and women. It remains completely unclear, if or how far the directive can protect people outside of these binary gender identities.[374]

Access to healthcare is regulated differently in every country of the world, because health care systems and health insurance companies work differently. This leads to differences among the treatments covered by the health insurance, depending on where you live.[375] For instance gender confirmation treatment is funded by health insurances in countries like Austria, Bulgaria or

[372]World Health Organisation, *'Human rights and health'* <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> [accessed 22 April 2022].
[373]World Health Organisation, *'Gender and health'* <https://www.who.int/health-topics/gender#tab=tab_1> [accessed 22 April 2022].
[374]Peter Dunne, Marjolein Van den Brink, *Trans and intersex equality rights in Europe - a comparative analysis; European Network of legal experts in gender equality and non-discrimination* (European Commission 2018) 77.
[375]Peter Dunne, Marjolein Van den Brink, *Trans and intersex equality rights in Europe - a comparative analysis; European Network of legal experts in gender equality and non-discrimination* (European Commission 2018) 77.

Norway, only partly funded in e.g. Hungary and not at all funded in countries like Estonia, Romania or Cyprus. In most countries of the EU, it is necessary to be medically diagnosed with "gender dysphoria" to even get access to any treatment like hormone therapy.[376] In addition to that, many treatments are often seen as cosmetic ones and therefore not subsidised or covered at all by health insurance. Even if you fulfill every criteria, there are often long waiting lists to get treatment, which is possibly caused by the lack of specialised health professionals.

All in all, the access to healthcare of LGBTQIA+ people not only differs extremely from country to country, but also lacks case law. The lack of specific legislation that deals with their needs might be the reason for that. LGBTQIA+ health issues and the legislature thereof often remains a grey zone.

5.2.1.5. Family Planning

When it comes to family planning, one of the most important international legal tools is the Convention of the Elimination of All Forms of Discrimination Against Woman (CEDAW). It was founded in 1979 by the United Nations General Assembly.[377] In its Article 16 it says:

"The [..] right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."

There is no other international treaty that explicitly protects the right of family planning for LGBTQIA+ people. Only the Yogyakarta principles want to ensure, that *"everyone* has the right to found a family, regardless of sexual orientation or gender identity". They acknowledge the fact that families can exist in many different forms. But as laudable as the Yogyakarta principles are, unfortunately they are not binding.

A look at the European Union shows that here, too, the legal situation for the protection of LGBTQIA+ people is far from all-encompassing. This could be explained by the fact that the European Union has no competence to legislate family related issues. Its only area of application is to decide whether the decision one country made in a case, can be implemented in another (European) country or to decide which jurisdiction may be implied in transnational cases.[378] Therefore the European Union can only clear procedural issues, when it comes to family related matters but not substantive ones.

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[376]Peter Dunne,Marjolein Van den Brink, *Trans and intersex equality rights in Europe - a comparative analysis; European Network of legal experts in gender equality and non-discrimination*, (European Commission 2018) 82.

[377]Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth, *'VN-Frauenrechtskonvention (CEDAW): Staatenberichtsverfahren und Dokumente'* (2021) <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/internationale-gleichstellungspolitk/vn-frauenrechtskonvention-cedaw-staatenberichtsverfahren-und-dokumente-80794> [accessed 22 April 2022] [German].

[378]Citizens Information Board, *'EU and family law'* (2021), <https://www.citizensinformation.ie/en/birth_family_relationships/eu_and_family_law.html> [accessed 22 April 2022].

Still, in its Article 12 the European Convention of Human Rights talks about the right to marry and start a family - unfortunately only directed at men and women. The same applies to Article 23 of the International Covenant on Civil and Political Rights:

"The right of men and women of marriageable age to marry and to found a family shall be recognised."
However, Article 8 of the European Convention of Human Rights Act stipulates:

"Everyone has the right to respect for his private and family life […]"

As decided in cases like Vallianatos and Others vs. Greece, same-sex couples can be included in the term "family". Nevertheless, states are allowed to reserve the right to marry to heterosexual couples. They have to offer at least some form of legal recognition e.g. through registered partnerships other than marriage[379].

The same applies to Article 9 of the Charter of Fundamental Rights of the European Union:

"The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

If LGBTQIA+ people are able to found a family or not, depends massively on the legislation of the country they live in. That leads to extremely different chances of LGBTQIA+ people to become parents. In some countries, it is possible for them to adopt children or get access to assisted reproduction. In other countries, there is no legislation on LGBTQIA+ family planning at all.[380]

5.2.1.6. The Right to Abortion for Transgender People

Looking at international abortion law, it quickly becomes apparent that the regulations only refer to "women" or "mothers". International legislation seems to blend out, that not only femininities but also transgender men, nonbinary and gender queer people can get pregnant and therefore seek abortion services.

But there is one legislation we have to take a deeper look at: The Resolution of the European Parliament on the situation of sexual and reproductive health and rights in the European Union in the frame of women's health. It calls to remove all barriers to sexual and reproductive rights across the European Union, and - other than the title might suspect - talks about the importance

[379] *Vallianatos and Others v. Greece* [2013] European Court of Human Rights (Reports on Judgements and Decisions 2013) §§ 91-92.
[380] European Parliament, '*Briefing: The rights of LGBTI people in the European Union*' (2016) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/582031/EPRS_BRI(2016)582031_EN.pdf"> [accessed 22 April 2022].

to include *all gender identities*, not explicitly only women. It wants to assure that every human being can decide freely and safely about their sexual and reproductive health.[381]

5.2.1.7. Pregnancy LGBTQIA+

The same applies to pregnancy legislation: There are only women mentioned as the affected ones. LGBTQIA+ pregnancies seem to be overlooked. Consequently, the big question arises: Are pregnant LGBTQIA+ people, who are not considered women from a civil point of view, even protected by law? Or might they even be discriminated all over the world? No final answer can be found. There is hardly any legislation or case studies.

What can be said is that some people demand an alignment of law that reflects the reality we live in by changing the words "(pregnant) woman" into "pregnant persons".[382] But up until now, the social reality that pregnant LGBTQIA+ people face, has not yet reached the legislation.

5.2.1.8. Sexual Rights of Intersex People

The issue intersex people have to deal with starts at a very low level, since it is unclear whether or not they are included in equal treatment legislation. Some countries choose the approach to say, that intersex people are included in the term "sex", others subsume the intersex status under the terms "gender identity" or "gender expression".[383]

So does the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 20: *"gender identity is recognised as among the prohibited grounds of discrimination; for example, persons who are transgender, transexual or intersex often face serious human rights violations […]".*

But the voices in favour of a more specific naming are getting louder. They aim to provide for more visibility of intersex people.[384]

Another conflict intersex people are often confronted with are medical interventions in childhood years. These so called "sex selection" or "preimplantation genetic diagnosis" are forms of discrimination against intersex people and their sex characteristics.[385]

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[381] Center for Reproductive Rights, '*EU Resolution Calls for Full Realisation of SRHR in the EU*' (2021) <https://reproductiverights.org/eu-srhr-resolution/> [accessed 22 April 2022].

[382] Catalin Daniel Pop, '*The Pregnant Man and Criminal Law. Towards Generating a New European Approach*' (Research Gate, 2021) <https://www.researchgate.net/publication/356390989_The_Pregnant_Man_and_Criminal_Law_Towards_Generating_a_New_European_Approach> [accessed 22 April 2022].

[383] Council of Europe, '*Human rights and intersex people*' <https://rm.coe.int/16806da5d4> [accessed 22 April 2022].

[384] Council of Europe, '*Human rights and intersex people*' <https://rm.coe.int/16806da5d4> [accessed 22 April 2022}.

[385] Morgan Carpenter, *Submission on the ethics of genetic selection against intersex traits* (2014); Robert Sparrow, *Gender eugenics? The ethics of PGD for intersex condi-Tions*, (American Journal of Bioethics, Vol. 13, No. 10, 2013) 29-38.

The aim of these surgeries is the uniformity of their physical appearance with one of their binary sexes. But since these surgeries often happen in childhood, they are also conducted without the child's consent. For many affected people, the truth about them being intersex only comes to light years later.[386] These treatments possibly present a violation of human rights, like the right to life, the right to respect for private life, the right to health and the rights of the child itself, which could be affected by the practice.

But some measures are being taken to protect intersex people. The European Union for example published a guideline with the goal of "Promotion the Enjoyment of all Human Rights" of LGBTI people, including intersex people and their issues.[387]

On top, more and more human rights actors are aware of the issues intersex people have to face. The UN High Commissioner for Human Rights Navi Pillay made a statement in 2014 claiming that intersex children have to go through *"medically unnecessary and irreversible surgeries and sterilizations"* and expressed how important it is to end *"human rights violations against LGBTI persons"*.[388]
The Commissioner for Human Rights of the Council of Europe and the Parliament Assembly also supports the UN statement.

All in all, one could conclude that sexual rights of intersex people are more and more seen. We still have to recognise that intersex people are almost never explicitly mentioned in legislation and that their visibility is very restricted.

5.3. Legal Measures Adopted by Germany for the Assurance of the Equal Enjoyment of Sexual Rights of LGBTQIA+ People

At first sight, it seems that the German government, as well as the German legislative are aware that measures have to be taken to ensure the principle of equality in terms of sexual rights of LGBTQIA+ people. In order to do so, they implement different laws and support different

[386] Swiss National Advisory Commission on Biomedical Ethics (NEK-CNE), *On the management of differences of sex development: ethical issues relating to 'intersexuality'*, (Opinion No. 20/2012, 2012); Intersexuelle Menschen e. V. / XY-Frauen, *Shadow Report to the 6th National Report of the Federal Republic of Germany on the United Nations, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* (2008)

[387] General Secretatriat of the Eruopean Council, '*Promoting the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender People'* <https://www.consilium.europa.eu/media/30731/en_lgbt.pdf> [accessed 22 April 2022].

[388] Nadi Pillay, '*Statement on the occasion of the presentation of the ILGA "LGBTI Friend of the Year" award and 2014 State-Sponsored Homophobia report and the Panel on International Human Rights Law and Sexual Orientation'* (Office of the High Commissioner for Human Rights) <https://www.ohchr.org/en/statements/2014/05/statement-navi-pillay-united-nations-high-commissioner-human-rights-occasion?LangID=E&NewsID=14654"> [accessed 22 April 2022].

human rights activities, e.g. adopting the "LGBTI Inclusion Strategy for Foreign Policy and Development Cooperation"".[389]

Germany is a member of the United Nation LGBTI Core Group as well as the Global Equality Fund, and is one of the founding states of the Equal Rights Coalition[390]. All these alliances aim to strengthen and support LGBTI communities and their rights. In its coalition agreement, the new German government also committed itself to a series of queer-friendly plans. Among other things, the abolition of transexual law is on the agenda. They even want to compensate inter - or trans people who have been affected by assault in the past - for instance through forced sterilisation (which was obligatory for trans people until 2011, before they could get their gender reassigned).[391]

But if we compare Germany to other European countries it only performs on an average level by reaching place 15 among 49 countries in the Rainbow Europe Ranking. This Rainbow Ranking was initiated by ILGA-Europe to provide an overview of the legal and policy situation for LGBTI people in Europe.

ILGA-Europe recommends some changes in German legislation to improve the rights of LGBTI people in Germany. The lack of inclusive language in the constitution is one aspect they are criticising. It only explicitly protects from discrimination based on "sex", not "sexual orientation", "gender identity" or anything similar. Trans parenthood also lacks recognition just as much as the alignment with available gender options does.[392]

But the government is aware of the issues and therefore sets itself a number of political projects to solve them: As an illustration, they want to incorporate the term "sexual identity" in Article 3 of the German constitution.[393] When it comes to family planning, the German government furthermore wants to reform the parentage law. Nowadays, there is still a legal imbalance between heterosexual parents and lesbian couples: While in heterosexual relationships the man automatically becomes the legal father of the child, born by his wife, the same automatic recognition does not apply to homosexual relationships: If the mother is married to another

[389] Federal German Government, '*LGBTI Inclusion Strategy for Foreign Policy and Development Cooperation*' <https://www.bmz.de/resource/blob/86808/85d349a058fd16148eb66266f0c78271/lsbti-inklusionskonzept-en.pdf> [accessed 22 April 2022].

[390] German Federal Office, '*LGBTI rights*, (2021) <https://www.auswaertiges-amt.de/en/aussenpolitik/themen/menschenrechte/07-lgbti/lgbti-rights/227620> [accessed 22 April 2022].

[391] Lesben- und Schwulenverband, '*Welche queerpolitischen Vorhaben stehen im Koalitionsvertrag der Ampel?*' <https://www.lsvd.de/de/ct/6303-Koalitionsvertrag-Queerpolitik> [accessed 22 April 2022] [German].

[392] Rainbow Europe, *'Germany*' <https://www.rainbow-europe.org/#8635/0/0> [accessed 22 April 2022].

[393] Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth, '*Handlungsschwerpunkte im Bereich LSBTIQ**', (2022), <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/gleichgeschlechtliche-lebensweisen-geschlechtsidentitaet/handlungsschwerpunkte-im-bereich-lsbtiq--73924> [accessed 22 April 2022] [German].

woman that gives birth, the latter is not automatically awarded a legal status as parent.[394] Until now, an adoption is necessary for homosexual couples if both of them want to be legally recognised as parents.[395] A particularly far-reaching difference lies in the fact that these couples are being inspected by the Youth Welfare Office before the other parent can adopt the child.[396]

In terms of sexual and reproductive rights one can also observe a lack of federal rules. Up to now, it is only possible for heterosexual couples to apply for partial cost coverage for medically assisted reproduction. All other couples have no chance of reimbursement.[397]

There is also no legislation that rules who even has access to medically assisted reproduction in Germany.[398] The possibility to found a family with the help of a surrogate mother is likewise prohibited. Even though it would be relatively easy to insert a corresponding legal basis for example into § 1591 BGB or § 1592 BGB, there are currently no efforts to do so.[399] Still, some voices of the jurisprudence classify the prohibition of surrogacy as unconstitutional.[400]

This leads to the circumstance that it is impossible for gay partners in Germany to start a family with a child genetically connected to one of the fathers (provided that the woman carrying the child is even willing to permanently leave her child to a third party - in this case the gay couple).[401] Consequently, family planning remains a very difficult topic for LGBTQIA+ people in Germany.

All in all, one could conclude that Germany is currently on the way to becoming a more inclusive state. Not everything has been figured out yet and LGBTQIA+ people still have to face issues in their (everyday) lives, but there is a general will to find solutions that develops more and more.

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[394] Dr. Elke Jansen, Kornelia Jansen, '*Regenbogenfamilien: Die rechtlichen Rahmenbedingungen'* (Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth) <https://www.regenbogenportal.de/informationen/regenbogenfamilien-rechtliche-rahmenbedingungen> [accessed 22 April 2022] [German].

[395] Julia Teschalde, Altmut Peukert, Christine Wimbauer, Mona Motakef, Elisabeth Holzleithner, *Elternschaft und Familie jenseits von Heteronormativität und Zweigeschlechtlichkeit* (Journal for Gender, Culture and Society Special Issue) [German].

[396] Dr. Elke Jansen, Kornelia Jansen, '*Regenbogenfamilien: Die rechtlichen Rahmenbedingungen*' (Federal Ministry for Family Affairs, Senior Citizens, Woman and Youth) <https://www.regenbogenportal.de/informationen/regenbogenfamilien-rechtliche-rahmenbedingungen> [accessed 22 April 2022] [German].

[397] Julia Teschalde, Altmut Peukert, Christine Wimbauer, Mona Motakef, Elisabeth Holzleithner, *Elternschaft und Familie jenseits von Heteronormativität und Zweigeschlechtlichkeit*, (Journal for Gender, Culture and Society Special Issue) [German].

[398] Jochen Taupitz, *Assistierte Befruchtung bei homosexuellen Paaren und alleinstehenden Frauen* (NJW 2021, 1430) [German].

[399] Katharina Lugani, *Warten auf die Abstammungsrechtsreform* (ZRP 2021, 176) [German].

[400] Christian Müller-Götzmann, *Artifizielle Reproduktion und gleichgeschlechtliche Elternschaft* (2009) 228, 259 [German].

[401] Nina Dethloff, *Gleichgeschlechtliche Paare und Familiengründung durch Reproduktionsmedizin*, (Friedrich-Ebert-Stiftung, 2016) 17, 41 [German].

5.4. Legal Measures Adopted by Greece for the Assurance of the Equal Enjoyment of Sexual Rights of LGBTQIA+ People

This section will examine the legal framework that exists today for the recognition and protection of the LGBTQIA+ rights in Greece. Perhaps the most pressing need of LGBTQIA+ people at international, European, and national level is to combat the stereotypes that have been assigned to them, which frequently lead to stigma and negative discrimination. As a result, the necessity for societal acceptance and visibility is the foundation for obtaining significant equality for LGBTQIA+ people. Therefore, legislative actions that empower individuals with effective protection and visibility are critical to attaining this aim.

More specifically, in Greece, homosexuality was a criminal offense up until 1951, when it became legal by the new Penal Code. However, discrimination in law against homosexuals was present until recently (article 347 of the Penal Code). More specifically, "incest against nature" (between men) was punished under Article 347 of the Penal Code. Nonetheless, this provision was repealed by Article 68 of Law 4356 of 2015, thus equalizing the age of consent and legalizing male prostitution, subject to existing prostitution regulations, and as a result, it decreased some of the discrimination suffered by LGBTQIA+ people.[402]

Moreover, one of the constant demands of homosexuals and same-sex couples was the legal recognition of their cohabitation[403]. This can be achieved in two ways: either by extending the marriage regardless of the sex of the bridegroom legally or by recognizing that the marriage as a contract does not depend on the sex of the parties, or by recognizing an alternative form of cohabitation, a civil union, which is not completely equated with the institution of marriage, but is quite similar to it. In Greece, the second way of recognizing their cohabitation, the civil partnership, with the enactment of law 4356/2015, which amended the previous law 3719/2008, applies to same-sex couples. On December 23, 2015, the Hellenic Parliament voted with 193 votes (56 against and 51 abstentions), the law on the extension of the civil partnership to same-sex couples. Civil partnership, as a form of civil union, was firstly instituted in Greece, on November 26, 2008, but was only available to opposite-sex couples.[404]

This fact prompted the landmark case of Vallianatos v. Greece, where four same-sex couples filed a complaint with the ECtHR, claiming that law 3719/2008 infringes their rights,

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[402] Law 4356/2015 (Greek civil union law) 2015 [Νόμος 4356/2015 Σύμφωνο συμβίωσης, άσκηση δικαιωμάτων, ποινικές και άλλες διατάξεις] (available at: http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wE4q6ggiv8WTXdtvSoClrL8RZsdmVE36E95MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyIq-BTkXB0ftEAEhATUkJb0x1LIdQ163nV9K--td6SIueGmNs7Z-S3JCeCUz2qD4JFoRtucSW1grhwY7YfRdKJf) [Greek].

[403] Homosexuals and same-sex couples are both mentioned because homosexuality refers to the emotional and/or sexual attraction of people of the same sex. The term same-sex couples refers only to gender. In other words, it is not excluded that people of the same sex, who are not homosexual, enter into a civil partnership, as many gay men and women marry people of the opposite sex for social, economic, or other reasons.

[404] Equaldex, *'2015 In LGBT Rights History, Timeline, Equaldex'* (Equaldex.com) <https://www.equaldex.com/timeline/2015> [accessed 26 April 2022].

particularly those derived from Articles 8 (protection of private and family life) and 14 (prohibition of discrimination)[405]. They claimed that the law introduces unjustified discrimination between heterosexual and same-sex couples, to the detriment of the latter.[406]

Here it is important to be mentioned that the ECtHR "condemned" the Greek state for its failure to include same-sex couples in the 2008 Law, an omission which thus discriminated against same-sex couples, and not because it stemmed from a positive ECHR obligation of legal recognition of the cohabitation of same-sex couples. The ECtHR has followed its general attitude of being cautiously progressive in its decisions, with this reservation stemming, in particular, from the restriction imposed by the domestic legal order of the states and their margin of appreciation.[407]

However, it is an undeniable fact that this conviction accelerated the processes and made it necessary to expand the civil union to same-sex couples in Greece. The civil partnership is a type of individual cohabitation - regardless of gender - that differs from the free association of persons in that it concerns individuals who do not choose to place their cohabitation within a legal framework. However, it is distinguished from marriage. Perhaps the most significant distinction between marriage and civil partnership is that the civil partnership contains primarily soft law provisions where it is up to the parties to regulate their individual relationship, whereas marriage contains primarily coercive law provisions with little room for self-regulation by the spouses.[408]

Therefore, as long as such discrepancies are permitted, there is wide room for additional discrimination and stereotype reinforcement. The general public appears to be unaware that homosexuality is simply a distinct manifestation of human sexuality and nothing more. As long as full rights are not recognized and full equality of rights is not achieved not only for homosexual and heterosexual couples, but also for heterosexual citizens and citizens whose sexuality, expression, and/or gender identity are not identified with the male-female social construct, the state becomes complicit in a culture of "do not ask, do not tell", which serves as a background for violent hate crimes, hate speech, and school and social bullying.[409]

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[405] *Vallianatos and Others v. Greece* [2013] ECtHR (Grand Chamber), Applications nos. 29381/09 and 32684/09, 7.11.2013 para 26 [Greek].

[406] Ibid.

[407] However, in the recent case of Oliari [*Oliari and Others v. Italy* [2015] ECtHR, Applications nos. 18766/11 and 36030/11, 21.7.2015, para 185] the ECtHR, overturned its above position, and went even further; it condemned Italy because it did not recognize a form of civil union for same-sex couples, recognizing that Article 8 of the ECHR enshrines a positive obligation for the Council of Europe member states to legally recognize same-sex couples' associations.

[408] Constandinidou-Stavropoulou Haroula, and Stavropoulos Konstantinos, *'Family Law In Greece: Overview'* (Uk.practicallaw.thomsonreuters.com, 2020) <https://uk.practicallaw.thomsonreuters.com/3-571-0094?transitionType=Default&contextData=(sc.Default)> [accessed 26 May 2022].

[409] Ntani Spyridoula and Moschovakou Nafsika, *'Οδηγός Ευαισθητοποίησης Για Την Πρόληψη Και Την Αντιμετώπιση Εκφοβισμού Σε Θέματα Σεξουαλικού Προσανατολισμού Και Ταυτότητας Φύλου'* (Kethi.gr, 2018) <https://www.kethi.gr/sites/default/files/wp-content/uploads/2018/06/%CE%9F%CE%94%CE%97%CE%93%CE%9F%CE%A3_2018.pdf> [accessed 8 May 2022] [Greek].

The state must protect its citizens, not only from fellow citizens but also from any arbitrariness or omissions of its own by anticipating and taking the appropriate measures for this purpose.

Furthermore, the legislation on civil partnerships was followed by the recent Law 4491/2017 "*Legal gender recognition - National Mechanism for Monitoring and Evaluation of the Action Plan on the Rights of the Child and other provisions*", which recognizes transgender people the right to change their legal gender without having to undergo a surgical alteration of their genitals. Indeed, by virtue of Law 4491/2017,[410] transgender people in Greece have the right to freely alter their legal gender by abolishing constraints and requirements, such as having medical interventions, sex reassignment operations, or sterilization procedures, in order for their gender to be legally recognized on their IDs. The bill provides this right to anybody above the age of 17. However, underage children aged 15 to 17 have access to the legal gender recognition procedure, but only under particular conditions, such as getting a certificate from a medical council. In case of gender reassignment from male to female or vice versa, apart from the indication of the gender in the civil-status certificate, the name is also corrected. Undoubtedly, gender identity was a long-standing claim of trans individuals that appears to have been realised with the adoption of the aforementioned law. Nonetheless, the reactions elicited varied, coming not only from conservative sections of Greek society but also from the trans community itself. This legislation has generated a wide range of opinions and reactions, with one side seeking even more legal protection and the other utterly opposed to any recognition of trans individuals. Especially, the bill was opposed by the Holy Synod of the Church of Greece, the Communist Party of Greece, Golden Dawn, and New Democracy.[411] In the end, 171 deputies voted in favour of the bill, while 113 voted against it.[412]

For the first time, the law for the recognition of gender identity attempted to provide a distinct, specialised piece of legislation that would introduce a method for the adjustment of trans people's registered gender. The necessity for the law emerged from the recognition that trans individuals are falling behind in the enjoyment of their individual rights, owing primarily to the previously unpleasant judicial procedure used in Greece to redefine their registered gender. In particular, the legislation has taken into account that trans people face many forms of discrimination throughout their life, including in personal relationships, at employment, in school, and even in medical treatment. Furthermore, it was acknowledged that trans people are

[410] Law 4491/2017 (*Legal Gender Recognition Law*) 2017 [Νόμος 4491/2017 Νομική αναγνώριση της ταυτότητας φύλου Εθνικός Μηχανισμός Εκπόνησης, Παρακολούθησης και Αξιολόγησης των Σχεδίων Δράσης για τα Δικαιώματα του Παιδιού και άλλες διατάξεις] (available at: https://www.taxheaven.gr/law/4491/2017) [Greek].

[411] The Economist, *'A Row Over Transgender Rights Erupts Between Greece's Politicians and Its Clerics'* (2017) <https://www.economist.com/erasmus/2017/10/13/a-row-over-transgender-rights-erupts-between-greeces-politicians-and-its-clerics> [accessed 12 May 2022].

[412] See Minutes of the Parliament, 'Q *Period of the Presiding Parliamentary Democracy, Synod C*, *Session G '*, 10.10.2017.

frequently the targets of criticism, hatred, violence, and racism, the primary cause of which is so-called transphobia.[413]

The Greek judiciary had already modified and adapted the prior law 344/1976 in the direction of safeguarding trans people from unreasonable, excessive, and even violent, requirements for the recognition of their gender identity. As a result, the issue is whether the explicit adoption of Law 4491/2017 on the legal recognition of gender identity represents progress for our society. Certainly, the explicit removal of the prior (jurisprudential) prerequisites of surgeries and medical certifications indicating gender discomfort prevent a potential jurisprudential regression. Also, the guarantees of secrecy that accompany the recognition process can only be positively assessed, as the negative social climate that prevails to the detriment of trans people is well known. However, there are many negative aspects of this legislation, such as the newly introduced conditions of full legal capacity and celibacy of persons wishing to have their gender redefined.[414]

Therefore, at the level of legal protection, Law 4491/2017 is characterized by timidity based on a consolidated social perception, regarding the identification of the gender with the individual's external genitalia and the preservation of marriage and the family as structures that presuppose the coupling of two heterosexual individuals. However, the law's position in public consultation and subsequent enactment "pulled" the subject out of obscurity and turned it into an occasion for informing and raising public awareness, even if it did so through controversy. Of course, the path to eliminating transgender discrimination is lengthy and requires new legislative actions to enhance the present legal framework (Law 4491/2017), because still, non-binary people have to choose between male or female gender since the legal recognition of non-binary gender in Greece is not legally recognized. Even though gender-neutral names can be used on IDs and birth certificates, following the case of Jason-Antigone Dane, one can only legally identify as male or female.[415]

Moreover, as early as 2008, when the first law on civil partnerships was passed, both the explanatory memorandum and the arguments put forward by the Greek government before the ECtHR made it clear that, for the Greek legislator, children raised in same-sex families do not require protection and that different sexual preferences automatically preclude a person from becoming a parent. A small step in order to stop perpetuating this prejudice that leads to negative discrimination - deprivation of the right to parenthood - against same-sex couples, with the consent of the state, was the recognition of the right of those who have entered into civil partnerships - hence and to same-sex couples - to become foster parents, after the entry into

[413] Natsi Despoina, and Papa Thomai, '*Η Νομοθετική Αντιμετώπιση Των Έμφυλων Διακρίσεων Στην Ελλάδα*', (Heinrich-Böll-Stiftung, 2019) <https://gr.boell.org/el/2019/05/22/i-nomothetiki-antimetopisi-ton-emfylon-diakriseon-stin-ellada> [accessed 1 April 2022] [Greek].
[414] Ibid.
[415] Equaldex, '*LGBT Rights In Greece*' (Equaldex.com, 2022) <https://www.equaldex.com/region/greece> [accessed 20 May 2022].

force of Law 4538/2018. However, in Greece, the right to adoption by same-sex couples is still not recognized and same-sex adoption in Greece is single only.[416]

Also, it is important to be mentioned that in Greece, there are no laws restricting the discussion or promotion of LGBTQIA+ topics and issues and that Greece prohibits discrimination and hate crimes based on sex characteristics. Thus, discrimination based on sexual orientation and gender identity is illegal in Greece. Moreover, in the same context, on December 9, 2016, the Hellenic Parliament passed the law 4443/2016, which added as *"suspicious"* criteria of discrimination "color", "ethnic origin", "pedigree", "chronic disease", "marital status", "social status", "gender identity" and "gender characteristics", while the term "genetic orientation", which was used in law 3304/2005, was corrected and changed to to sexual orientation.[417]

Last but not least, one progressive, recent step pertaining to LGBTQIA+ rights in Greece was the amendment, introduced in the context of the bill on the "Personal Doctor", which establishes a ban on so-called "treatments or conversion practices", which are methods aiming at changing or suppressing the sexual orientation, the gender identity or expression of an LGBTQIA+ individual. Until May 10, 2022, conversion therapies for LGBTQIA+ people were not banned and were held openly in Greece with the tolerance of the state as well as the responsible associations of mental health specialists. Research on this issue indicates that such therapies involve spiritual or religious leaders, alternative healers (homoeopaths, energy therapists, etc.) as well as health and mental health professionals.[418]

Therefore, it is obvious that in Greece, until recently, there was a lack of an adequate legal framework regarding discrimination on the grounds of sexual orientation, and mainly gender identity. In recent years significant efforts have been made in this direction. Greece now provides laws that protect LGBTQIA+ people from discrimination. In this way, it is important to mention that the country exceeds the OECD average.[419] However, there are still several areas where Greece can improve in terms of LGBTQIA+ inclusion and overall protection.

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[416] Natsi Despoina, and Papa Thomai, '*Η Νομοθετική Αντιμετώπιση Των Έμφυλων Διακρίσεων Στην Ελλάδα',* (Heinrich-Böll-Stiftung, 2019) <https://gr.boell.org/el/2019/05/22/i-nomothetiki-antimetopisi-ton-emfylon-diakriseon-stin-ellada> [accessed 1 April 2022] [Greek].

[417] The Community/Union legislation (directive 2000/78) prohibited discrimination based on sexual orientation in the workspace.

[418] Reuters, '*Greece Bans LGBTQ Conversion Therapy'* (reuters.com, 2022) <https://www.reuters.com/world/europe/greece-bans-lgbtq-conversion-therapy-2022-05-11/> [accessed 27 May 2022].

[419] OECDiLibrary, *'Are Laws In OECD Countries LGBTI-Inclusive?'* (Oecd-ilibrary.org) <https://www.oecd-ilibrary.org/sites/e22596d2-en/index.html?itemId=/content/component/e22596d2-en> [accessed 27 May 2022].

5.5. The Social Reality that LGBTQIA+ People Face that has not been Legally Regulated yet

The social reality for LGBTQIA+ people all over the world is very mixed. Whether or not they can lead a life with more or less discrimination is dependent on where they live. Although there is legislation that aims to protect them, unfortunately that does not mean that these rights are factually guaranteed.

Still, in more than 70 countries all over the world same-sex relations are criminalised. In at least five countries (Iran, Mauritania, Saudi Arabia, Sudan, Yemen, religious courts in regions of Somalia and Nigeria) people even have to face the death penalty.[420] These countries argue that same-sex relations are a threat to public health and welfare. Those arguments show how deeply rooted discrimination of LGBTQIA+ people really is.

And it is not only states outside of the European Union that represent a field of tension for LGBTQIA+ people. Up until 2011, people in Germany were being sterilised before they could get their gender reassigned[421] and states like Poland or Hungary position themselves more and more hostile towards the LGBTQIA+ community.

Therefore, even though we are equipped with some legislation that aims to protect the rights of LGBTQIA+ people, their visibility still remains very small. Their needs are not explicitly mentioned, and whether or not these people are protected by law, highly depends on the country they live in.

But on the bright side, it has to be acknowledged that LGBTQIA+ rights gain more and more importance. Within the European Union and the United Nations several efforts are being made to create LGBTQIA+ friendly mechanisms. The biggest piece of work is up to the individual countries.

5.6. Jurisprudence

5.6.1 Introduction

It is an irrefutable fact that international and regional jurisprudence has gradually and effectively promoted and enhanced the protection accorded to the LGBTQIA+ people's rights. Although sexual orientation and gender identity are not directly covered in the ECHR or its Additional Protocols, the European Court of Human Rights has addressed these problems extensively via

[420] United Nations for LGBTI Equality, '*Criminalization*' <https://www.unfe.org/wp-content/uploads/2018/10/Criminalization-English.pdf> [accessed 16 May 2022].
[421] Bundesverband Trans, *Sterilisationszwang für trans Personen seit 10 Jahren abgeschafft*, (January 8 2021) <https://www.bundesverband-trans.de/10-jahre-sterilisationszwang/> [accessed 22 April 2022] [German].

significant case law. More specifically, the Court seeks to broaden the scope of human rights protection by refraining from narrow approaches and adherence to the wording of the provisions by adopting a dynamic and evolving interpretation of the Convention and establishing at every opportunity that the Convention is a "living instrument". The European Court of Human Rights underlines in recent case law that its goal is to make a significant contribution to the endeavour to construct European public order, that is, to attain a minimum degree of human rights protection in all Council of Europe Member States.[422]

For that purpose, it investigates if there is a European consensus among the Member States, on subjects such as sexual orientation and gender identity, where national legal frameworks and national practices sometimes diverge substantially. Otherwise, when the diversity of national laws and the disparity between legislative correlations do not yet allow it to diagnose the existence of such a consensus, it usually dismisses the relevant actions, citing the discretion granted to the Member States by the Convention for the implementation of their obligations arising from it.

Following that, and in order to demonstrate both the European Court of Human Rights' progressive strengthening of the level of protection of sexual orientation and gender identity, as well as how individual issues of discrimination, violence, or hate speech are addressed in particular, it is appropriate to cite a reference to part of the Court's case-law.[423]

5.6.2 The Right to Respect Private and Family Life and the Home for LGBTQIA+ People

In general, the grounds for applying the European Convention on Human Rights in situations pertaining to sexual orientation and gender identity fall into two categories: rights insuring respect for freedom and rights safeguarding respect for non-discrimination. The European case law on sexual orientation and gender identity is a perfect example of the possibility of choosing between these two grounds of complaint. In matters involving sexual orientation and gender identity, the major freedom relied on by applicants is, first and foremost, Article 8, which protects the right to private and family life as well as the home.

More specifically, Article 8 of the Convention reads as follows: "*1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic*

[422] Frédéric Edel, *Case Law of the European Court of Human Rights Relating to Discrimination on Grounds of Sexual Orientation or Gender Identity* (Council of Europe, 2015) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168047fafd> accessed 27 May 2022.

[423] Papadopoulou Lina Triantafyllia, *'Sexual Orientation and Gender Identity Law in the European Union and Its Court of Justice'* (December 21 2018, In: Andreas R. Ziegler (ed.), Oxford Handbook of International LBGTI Law, 'Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC) Law from an International-Comparative Perspective', Oxford University Press 2019) <https://ssrn.com/abstract=3305093> accessed 4 May 2022.

society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

However, there is no exhaustive definition of the notion of private life, yet it is a wide term.[424] Since the Commission's decision in the case of X v. Iceland on 18 May 1976,[425] it has generally been accepted that the right to respect for private life includes "*the right to establish and develop relationships with other human beings, particularly in the emotional field, for the development and fulfilment of one's own personality*". In issues involving sexual orientation and gender identity, the Court has ruled that the right to respect for private life encompasses a person's sexual life, which is one of its most intimate elements. As stated explicitly by the Court in the Kozak v. Poland case: "Undoubtedly, sexual orientation, one of the most intimate parts of an individual's private life, is protected by Article 8 of the Convention". In other words, the emotional and sexual relationship which unites a gay or lesbian couple falls unquestionably within the scope of respect for private life, as the Court has held and in other cases such as Antonio Mata Estevez v. Spain, 10 May 2001, no. 56501/00, admissibility decision and Fernando dos Santos Couto v. Portugal, 21 September 2010, no. 31874/07.[426]

More broadly, the European Commission of Human Rights held that "*established lesbian or homosexual relationships*" fall primarily within the ambit of private life.[427] Also, in its famous Dudgeon judgment of 1981, when the Court was asked to review legislation in Northern Ireland that made homosexual acts between consenting adults a criminal offense, the Court established the principle that, regardless of any conviction, the penal prohibition of homosexuality was an interference with the right to respect for private life.[428] In addition, the Court has applied the aforementioned principle established in the Dudgeon judgement on several occasions, and in particular in the A.D.T. v. the United Kingdom[429] judgment, which also concerned the case of a homosexual person convicted for engaging in sexual relations with several men in a private context.

Furthermore, in its decision in Schlumpf v. Switzerland on January 9, 2009,[430] the Court summarised the general principles it has established in this field as follows: "*As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (X. and Y. v. the Netherlands, judgement of 26*

[424] *Niemietz v. Germany* [1992] ECtHR (Chamber), Application no. 13710/88, 16.12.992 para 29;Peck v. the United Kingdom [2003] ECtHR (Chamber judgement), Application no. 44647/98, 28.01.2003 para 57; Pretty v. the United Kingdom [2002] ECtHR, Application no. 2346/02, 29.04.2002 para 61.
[425] D&R No. 5, p. 86.
[426] See also *Laskey, Jaggard and Brown v. the United Kingdom* [1997] ECtHR (Reports of Judgments and Decisions 1997-I), 19.02.1997 para 36.
[427] Decision of the Commission, 10 February 1990, *B. v. the United Kingdom*, D&R No. 64, 278.
[428] *Dudgeon v. the United Kingdom* [1981] ECtHR, Application no. 7525/76, 22.10.1981.
[429] *A.D.T. v. the United Kingdom* [2000] ECtHR, Application no. 35765/97, 31.07.2000.
[430] *Schlumpf v. Switzerland* [2009] ECtHR, Application no. 29002/06, 09.01.2009.

March 1985, Series A no. 91, p. 11, §22), but can sometimes embrace aspects of an individual's physical and social identity (Mikulić v. Croatia, no. 53176/99, §53, ECHR 2002-I). Elements such as, for example, gender identification, name, sexual orientation and sexual life fall within the personal sphere protected by Article 8".[431]

As the Court has also stated, this Article also safeguards the right to personal growth as well as the freedom to establish and maintain relationships with other people and the outside world. As the right to self-determination is contained in Article 8 of the Convention, the Court considers personal autonomy to be an important principle underlying the interpretation of its guarantees.[432] In addition, since the core of the Convention is the respect for human dignity and freedom, the right of trans people to personal growth as well as physical and moral security is strongly safeguarded.[433]

Concerning the right to family life, it is vital to emphasise that the idea of family life is autonomous:[434] In the absence of any formal acknowledgment of family life,[435] the Court might thus consider facts such as applicants living together or the length of the relationship. The concept of "family" under Article 8 is not limited to marriage-based relationships, but may also encompass other de facto "family connections" when people cohabit without being married.[436] Therefore, even if there is no cohabitation, there may be enough links to create family life.[437] Regarding LGBTQIA+ people, in particular, it is now recognized that the right to respect for family life under Article 8 protects stable partnerships between people of the same sex or with a transgender person. This is a recent development that represents a significant shift.[438] Furthermore, the right to family life protects the parental bond that exists between a

[431] *Dudgeon v. the United Kingdom* [1981] ECtHR (Series A no. 45), Application no. 7525/76, 22.10.1981, pp. 18-19, para 41; *B. v. France* [1992] ECtHR, 25 March 1992, Series A no. 232-C, pp. 53-54, para 63; *Laskey, Jaggard and Brown v. the United Kingdom* [1997] ECtHR (Reports of Judgments and Decisions 1997-I), 19.02.1997, p. 131 para 36; *Smith and Grady v. the United Kingdom* [2000] ECtHR (ECHR 1999-VI), Application nos. 33985/96 and 33986/96, 25.10.2000, para 71.

[432] *Pretty v. the United Kingdom* [2002] ECtHR (ECHR 2002 III), Application no. 2346/02, 29.04.2002, para 61.

[433] *I. v. the United Kingdom* [2002] ECtHR [GC], Application no. 25680/94, 11.07.2002, para 70; and *Christine Goodwin v. the United* Kingdom [2002] ECtHR [GC] (ECHR 2002-VI), Application no. 28957/95, 11.07.2002, para 90; see also, for cases concerning the situation of transsexuals, *Rees v. the United Kingdom*, the judgment of 17 October 1986, Series A no. 106; *Cossey v. the United Kingdom*, the judgement of 27 September 1990, Series A no. 184; *Sheffield and Horsham v. the United Kingdom*, the judgement of 30 July 1998, Reports 1998-V; *Grant v. the United Kingdom*, Application no. 32570/03, ECHR 2006 and *X, Y and Z v. the United Kingdom*, the judgement of 22 April 1997, Reports 1997-II.

[434] *Marckx v. Belgium* [1979] Council of Europe: European Court of Human Rights, Application no. 6833/74, 13.06.1979, para 31, available at: https://www.refworld.org/cases,ECHR,3ae6b7014.html [accessed 27 May 2022].

[435] *Johnston and Others v. Ireland* [1986] ECtHR, Application no. 9697/82, 18.12.1986, para 56

[436] Ibid.

[437] *Kroon and Others v. the Netherlands* [1994] Council of Europe: European Court of Human Rights, Application no. 18535/91, 27.10.1994, para 30, available at: https://www.refworld.org/cases,ECHR,584a99574.html [accessed 27 May 2022].

[438] Papadopoulou Lina Triantafyllia, *Η μη αναγνώριση των ομόφυλων ζευγαριών ως 'οικογένειας' στη νομολογία των ευρωπαϊκών δικαστηρίων (ΔΕΚ και ΕΔΔΑ)* (Editing in: Xatzitrifon/Papazisi, Proceedings of the 2nd Interdisciplinary Conference 'Το φύλο και η συμπεριφορά του. Οικογένειες από ομόφυλα ζευγάρια', Epikentro, 2007) 31-45 [Greek].

homosexual or transgender parent and any children. It does not, however, ensure the right to found a family or the right to adopt.[439]

More precisely, the jurisprudence on whether same-sex couples in a stable emotional and sexual relationship can claim to have "family life" under Article 8 has evolved. Following the 2010 Schalk and Kopf decision, it is now established that the cohabitation of two people of the same sex who are in a stable relationship is not only a component of their private life, but also forms family life.[440] This landmark case, concerned two applicants, a same-sex couple living in a stable relationship, who had applied to the Austrian authorities for permission to marry. Their request was rejected on the grounds that marriage could only take place between persons of the opposite sex and the relevant administrative position was confirmed by the competent courts.[441] Before the European Court of Human Rights, the applicants complained about the refusal of the national authorities to allow them to marry, claiming that they had been discriminated against on the grounds of their sexual orientation since on the one hand, they had not been granted the required cohabitation permit and on the other, they had no other possibility of legal recognition. In this case, the Court broadened -for the first time-, the notion of family life, recognizing that a de facto cohabiting couple consistently falls within the notion of family life.[442] 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.[443]

Additionally, it is self-evident that if a person is the father or mother of a child, regardless of sexual orientation or gender identity, Article 8 applies to that existing family life. This is the conclusion from the Salgueiro da Silva Mouta case, in which the Court declared that the domestic court's decision to revoke a father's joint custody solely on the basis of his sexual orientation constituted an interference with the right to respect for family life.[444]

Concerning the right to respect for family life which also protects the relationship between two same-sex partners and the child of one of them living together in the same household, in the cases Gas et Dubois v. France (no. 25951/07) and X. and Others v. Austria (no. 19010/07), the

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[439] Papadopoulou Lina Triantafyllia, *Σεξουαλικός προσανατολισμός και ταυτότητα φύλου στο δίκαιο της Ευρωπαϊκής Ένωσης και στη νομολογία του Δικαστηρίου της* (P. Naskou-Perraki, N. Gaitenidis, St. Katsoulis (ed.) Ευρωπαϊκές Πολιτικές από και προς την προστασία των θεμελιωδών δικαιωμάτων, Sakkoulas 2018) 175-230 [Greek].

[440] *Schalk and Kopf v. Austria* [2010] ECtHR, Application no. 30141/04, 24.06.2010.

[441] Papadopoulou Lina (Triantafyllia), *Γάμος Ομοφυλόφιλων; Μια απόπειρα νομικής και δικαιοπολιτικής αξιολόγησης* (ΔτΑ 38/2008) 405-489 [Greek].

[442] The Court reiterates its established case-law in respect of different-sex couples, namely that the notion of family under this provision is not confined to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is ipso jure part of that "family" unit from the moment and by the very fact of his birth (see *Elsholz v. Germany* [GC], Application no. 25735/94 para 43, ECHR 2000-VIII; *Keegan v. Ireland*, 26 May 1994 para 44, Series A no. 290; and also *Johnston and Others v. Ireland*, 18 December 1986 para 56, Series A no. 112).

[443] *Schalk and Kopf v. Austria* [2010] ECtHR, Application no. 30141/04, 24.06.2010 para 92-94; Ibid para 106.

[444] *Salgueiro da Silva Mouta v. Portugal* [1999] ECtHR, Application no. 33290/96, 21.12.1999.

Court held that the concept of "family life" includes the relationship between two female partners and the child of one of them living together in the same household, regardless of the circumstances of the child's birth, i.e. whether he or she was conceived through medically assisted procreation (Gas et Dub) or was born outside marriage from a relationship with a father who recognized the child then left a sole parental authority to the child's mother (X. and Others v. Austria).[445]

5.6.3 Discrimination Based on Sexual Orientation and Gender Identity

As far as discrimination based on sexual orientation and gender identity is concerned, the concept of non-discrimination has mostly been applied in matters involving sexual orientation. In circumstances involving gender identity, the concept of non-discrimination has not been strictly followed. In the only real judgment relating to a transgender person in which the Court examined the facts of the case just from the perspective of Article 14 – P. V. v. Spain, 30 November 2010 – the Court concluded that the difference in treatment complained of by the transgender applicant was not, at least not directly, based on her gender identity.

More precisely, this case involved a transgender woman who had a son with her wife in 1998 prior to her gender reassignment. The Spanish courts had prohibited her from seeing her son after her divorce because her mental instability following the gender reassignment was likely to upset the boy. The applicant claimed that the access limitations were discriminatory based on her gender identity. The Court determined that, in this case, the reason justifying the restrictions was not the applicant's gender identity per se, but rather her mental instability as a result of the gender reassignment. Thus, the Court determined that this was a justified difference in treatment, rather than unjustified discrimination. (based on the applicant's gender identity).[446] Consequently, it is crucial for an applicant to succeed in proving that the distinction complained of is based on the criterion of gender identity or sexual orientation.

Accordingly, the Court concluded in this case that there has been no violation of Article 8 of the Convention taken in conjunction with Article 14.

Moreover, the Court has pointed out that when a distinction is based on sexual orientation, scrutiny tends to be very strict and the national margin of appreciation tends to shrink correspondingly, as stated, for example, in the L. and V. v. Austria judgment of 9 January 2003. In this case, the applicants complained of a difference in treatment based on their sexual orientation. Here, the Court reiterated that sexual orientation is a concept covered by Article 14, and differences based on sexual orientation require particularly serious reasons by way of justification.[447] The Court thus reached the conclusion that in the absence of any objective and

[445] *Gas et Dubois v. France* [2012] ECtHR, Application no. 25951/07, 15.03.2012; and *X. and Others v. Austria* [2013] ECtHR [GC], Application no. 19010/07, 19.02.2013.
[446] *P.V. v. Spain* [2010] ECtHR, Application no. 35159/09, 30.11.2010.
[447] *L. and V. v. Austria* [2003] ECtHR, Application nos. 39392/98 and 39829/98, 09.01.2003.

reasonable justification, the maintenance of a higher age of consent for homosexual acts than for heterosexual ones violated Article 14 taken in conjunction with Article 8.[448]

5.6.4 The Right to Sexual Freedom for LGBTQIA+ People

Another important evolution created by the jurisprudence of ECtHR is the principle established by the Dudgeon judgement.[449] This was the first case in which the Commission and the Court took a stand against laws that make homosexuality a criminal offense. The Court held in the Dudgeon v. United Kingdom case that the continued existence of legislation prohibiting homosexual acts in private between consenting adults constituted a permanent interference with the applicant's right to respect for his private life (including his sexual life), even if the law in question no longer gave rise to prosecutions. This decision confirmed the old European Commission on Human Rights' position, which stated in its report on the Sutherland v. United Kingdom case that, even if no prosecution or threat of prosecution existed, the mere existence of the legislation had constant direct repercussions on the applicant's private life.[450]

Also, in the Norris v. Ireland judgment, the Court stated even more emphatically than in the Dudgeon judgment that the interference with the right guaranteed in Article 8 arose from the mere existence of legislation punishing homosexual relations, regardless of whether or not it was actually enforced. In this case, the applicant, a homosexual, complained about the legislation, which, in his view, interfered unduly with his right to respect for his private life, and in particular his sexual life. The fact that the complained-of legislation had not been applied to the applicant did not exclude his complaint from being heard. As a result, an individual homosexual applicant did not have to be prosecuted or convicted in order to file a complaint with the Court against such restrictive legislation.[451]

Therefore, it is irrefutable that the European Convention on Human Rights guarantees equal sexual freedom. More precisely, it requires that the age of the sexual majority should be the same for homosexual and heterosexual relations. This principle was established by the L. and V. judgement and thus the leading decision again here is the L. and V. v. Austria judgement of 9 January 2003, which subsequently gave rise to a series of judgments against Austria.[452] At the time of the facts, the age of consent for sexual relations between adults and adolescents differed depending on whether heterosexual or male homosexual relations were involved: homosexual acts between adult males and consenting male adolescents aged 14-18 constituted a criminal

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[448] *Smith and Grady v. the United Kingdom* [2000] ECtHR, Application nos. 33985/96 and 33986/96, 25.07.2000 para 90.

[449] *Dudgeon v. the United Kingdom* [1981] ECtHR, Application no. 7525/76, 22.10.1981.

[450] *Sutherland v. the United Kingdom* [2001] ECtHR, Application no. 25186/94, 27.03.2001.

[451] *Norris v. Ireland* [1988] ECtHR (Plenary), Application no. 10581/83, 26.10.1988.

[452] *L. and V. v. Austria* [2003] ECtHR, Application nos. 39392/98 and 39829/98, 09.01.2003 paras 34-55; *S. L. v. Austria* [2003] ECtHR, Application no. 45330/99, 9.01.2003 para 37. Also: *Woditschka and Wilfing v. Austria* [2004] ECtHR, Application No. 69756/01, 21.10.2004; *Ladner v. Austria* [2005] ECtHR, Application no. 18297/03, 03.02.2005.

offense, whereas heterosexual acts between adults and consenting adolescents in the same age category did not. In this instance, the applicants, L. and V., were convicted under Austrian Criminal Code Article 209 of having homosexual relations with young males aged 14 to 18. Thus, the Court ruled that this legislation breached both Article 14 and Article 8 of the Convention.[453]

5.6.5 Legal Protection for Transgender People

Last but not least concerning the standard of protection accorded to transgender people, in the 1980s, the European Court of Human Rights maintained that European states generally enjoyed a wide margin of appreciation with regard to the protection of transgender people. This position subsequently got more complicated, necessitating a differentiation between issues in which states gradually lost their wide margin of appreciation and those in which it was retained. The wide national margin of appreciation was reduced circumstantially beginning in the early 1990s (the first finding of a violation dates back to 1992), then more extensively and decisively beginning in the early 2000s (following an important judgment delivered in 2002) with regard to all matters pertaining primarily to the recognition of gender reassignment and the ability of transgender people to marry. The Contracting States, on the other hand, retain a wide margin of appreciation in all matters concerning, since 2006, the establishment of a legal child-parent relationship with a non-biological child and, since 1997, the possible ramifications of the recognition of gender reassignment for non-recognition of the right to same-sex marriage.

European case law acknowledges a legitimate right of transgender people to legal recognition of their desired gender, as well as the right of transgender people to marry a person of the opposite sex in their preferred, post-operative gender. The first of these rights has been established circumstantially since the B. v. France judgement in 1992, and as a matter of principle since the well-known Goodwin v. United Kingdom case in 2002. However, that same Goodwin decision did not secure the second right until 2002. On both these questions, the European Court of Human Rights now leaves the Contracting States a narrow margin of appreciation and offers transgender people a standard of protection common to all European states. This has not always been the case. Previously, since the 1986 Rees v. United Kingdom judgement and a series of cases decided on that basis (Cossey in 1990 and Shefeld and Horsham in 1998), the Court had refused to recognize either of these rights and granted the Contracting States a wide margin of appreciation in these matters.

More specifically, in the Goodwin judgement delivered in 2002, the Court abandoned the Rees, Cossey and Shefeld and Horsham case law. Despite the persistence of differences of opinion between the Contracting States on legal recognition of sex changes, the Court considered that "*the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable*" and found that "*the respondent Government can no longer claim*

[453] *L. and V. v. Austria* [2003] ECtHR, Application nos. 39392/98 and 39829/98, 09.01.2003 and *S. L. v. Austria* [2003] ECtHR, Application no. 45330/99, 9.01.2003.

that the matter falls within their margin of appreciation". Consequently, Article 8 of the Convention now places a positive obligation on the Contracting States to give some form of legal recognition to gender reassignment and to allow post-operative transgender people to marry a person of the opposite sex (following gender reassignment).[454]

More specifically, in this case, the applicant complained about the lack of legal recognition of her redefined gender and in particular her treatment in terms of employment, social security rights, and retirement as well as her inability to marry. The Court found that there had been a violation of Article 8 "Right to respect for private and family life" of the Convention, based on and affected by a clear and continuing international trend towards increased social acceptance of trans people and the legal recognition of new gender identity of those who have undergone gender reassignment surgery. In particular, the Court, having held that it did not underestimate the difficulties or the significant consequences that such recognition would have, concluded that there were no significant public interest factors overshadowing the applicant's right for legal recognition of her gender reassignment. In other words, the Court ruled that there should be a relevant legal provision in the states for the legal recognition of gender identity, in order to avoid discrimination against trans people (Par. 91 of the decision).[455]

While states do have some discretion in deciding how to recognize gender reassignment it is still quite limited.[456] The Court has developed a body of case law affording transgender people a set of rights that might be viewed as corollaries to the right to gender reassignment recognition. Some of these were established in the B. v. France ruling of 1992, which dealt with the adjustment of civil status records as a result of gender reassignment. Others followed the Goodwin decision, such as the L. v. Lithuania judgement in 2007, the Van Kück judgement in 2003, or the Schlumpf judgement in 2009, concerning, respectively, the introduction of legislation allowing complete gender reassignment followed by full recognition, the admission of medical evidence of transsexuality before the courts, and the public nature of hearings relating to gender reassignment.[457]

Finally, it is observed that since 2001, when the decision in Mata Estevez was given, an increasing evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples. Therefore, certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of "family".

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[454] *Christine Goodwin v. the United* Kingdom [2002] ECtHR [GC] (ECHR 2002-VI), Application no. 28957/95, 11.07.2002 (available at: https://bit.ly/2Hmo1OK).

[455] Ibid.

[456] Ibid para 83.

[457] Other ECtHR decisions dealing with the issue of gender identity of transgender people who have undergone gender reassignment surgery are the following: 1) *Rees v. the UK* [1986], 2*) Cossey v. the UK* [1990], 3) *Grant v. the UK* [2006], 4) *Hämäläinen v. Finland* [2014], and decisions that focus on the conditions of access to such an operation are: 1) *Van Kück v. Germany* [2003], 2) *Schlumpf v. Switzerland* [2009], 3*) L. v. Lithuania* [2007], 4) *Y.Y. v. Turkey* [2015]. For ECtHR decisions concerning gender identity issues, see Newsletter - Gender Identity Issues, April 2016, on the website https://bit.ly/30tmDBB.

Conclusions

Below are the findings to which the members and authors of the Bilateral Legal Research Group on the topic of "Sexual and Reproductive Rights of Femininities and LGBTQIA+ People" concluded throughout their research about the five Sexual and Reproductive Rights analysed above.

Right to Contraception

In this chapter, through analysing various international, hard and soft legal texts, it became evident that there is an ongoing development to ensure the right to contraception and establishing relevant state obligations on an international level. On the other hand, access to contraceptive services and information is rarely regulated on the national level, with Germany and Greece not standing out from this observation. For both countries there is an exception on the topic of public health insurance, connecting the right to contraception to one of its core prerequisites; affordability. The affordability of contraceptives has been highlighted in this chapter as one of the goals that can be achieved in societal reality, through the "mould" of law. Ensuring affordable as well as accessible contraception, is a key element to the realisation of sexual and reproductive rights. Nevertheless, there are often even more basic fights to be won, than this of inclusion of contraception into public health insurance schemes, such as that of successful access to any kind of contraceptive services and information, as recent court cases from all around the world reveal.

Right to Abortion

Although the right to abortion is widely accepted by the international legal community, especially the United Nations, as a human right, it has not yet found the universal legal protection it deserves. The provision of legal and safe abortion is essential to safeguard the health and protect the lives of people around the world. Feminist organizations have been fighting for many years and have been able to secure significant achievements in the legalization of abortion. However, as the recent example of the United States of America shows, the end of the fight is not even near and legal professionals around the world should be on alert to protect and enhance its protection.

Discussions about the right to abortion are highly controvesial and split the opinions of the worlds' citizens in half. While the United States of America are moving towards stricter regulations, Europe is demonstrating a trend towards legalisation and the removal of legal and policy barriers. Yet, the European palette is highly diverse. Greece and Germany for example show a similar approach of granting the right to abortion in cases linked to a threat to life or other medical reasons including a threat to health. Additionally, in cases where a pregnancy resulted through the crime of rape. However, in Germany the right to abortion is still triesome

for pregnant persons as it is linked to a waiting period and mandatory counceling. Moreover, two opposites are the legals sphere regarding the right to abortion in Finland and Poland. While the nordic country is highly liberal and a pioneer in the eyes of many feminist groups, the other is critisized for a strict prohibition and criminilzation of abortion. Compromises between the two as seen in Germany is a step forward, yet not sufficient for pregnant persons to feel safe. Information is crucial for decision making and withholding it hardens this process.

Law and order are formed through social beliefs and customs. They are in constant movement, creating a dynamic of different periods. Many laws have exited before that are now unimaginable. When staying frozen, laws can prevent societies from developing. Lawmakers need to consider the changes of wind.

Right to Safe Birth and Access to Health Services

When it comes to regulating the right to safe birth and the access to health services, both Greek and German legislations are in principle satisfactory, as far as cis native women are concerned. In particular, the share of women that are expected to die from pregnancy-related causes in Greece is below 0.01%, while at the same time Germany puts maternal care, the right of safe birth and its protection as well as postpartum care as a high priority. Nonetheless, several issues remain.

The less privileged, thus far more vulnerable groups and LGBTQIA+ people are exposed to various barriers regarding the "uncomplicated" provision of maternal health care services and are sometimes even deprived of their sexual and reproductive rights. For instance, immigrant femininities still encounter obstacles concerning their maternal care in Greece, mostly due to their language and cultural vacuum with the native medical personnel. Article 33 § 1 and 2 of the law 4368/2016, which provided that pregnant persons will be accepted to the public health care services, irrespectively of their legal or political status, will remain an empty phrase, if more measures are not taken towards a more efficient implementation of the right to safe birth and access to health services, such as the recruitment of health interpreters. Apart from that, pregnant trans people do not enjoy their fair share of visibility in the *de lege lata* legislation. Thus, it is important that the words "woman" and "pregnant" are widely interpreted in order for the relative legislation to become more inclusive. After all, the word "woman" is not synonymous with "mother". Also, even though the German Maternity Protection Act has various regulations on how to deal with complications during pregnancy or birthing process, it is rather superficial and does not satisfy. In contrast to New Zealand's legislative innovation of the bereavement leave for miscarriage, Greece and Germany can still take more radical measures for an effective protection of maternity (especially at work) by ensuring that the pregnancy alone will be sufficient in order for pregnant persons to be entitled to the relevant beneficial acts, such as that bereavement leave, irrespectively of how the pregnancy might end. Finally, the example of the Romani women in Slovakia underlines that restrictions of the reproductive rights in favour of the fulfilling of any national targets shall be established after careful relative weighting

between the extent of the restriction and the national target, and of course they must not lead to a definitive loss of the rights, otherwise, there will be a serious violation of the right to private and family life, as well as the dignity of a human person. All in all, looking at the broader picture, the European Union has made health care and thus maternal care a priority. It differs though how the different member states have implemented this in their legal systems as well as the satisfaction of the implementation though differs. Once again, it appears that the common thread is that less privileged groups/less privileged countries and LGBTQIA+ people face greater hurdles to obtain health and maternal care.

STIs and Harmful Practices regarding Sexual Health

Combatting STIs and HIV/AIDS in particular is scarcely a matter of legislature; rather, it is a matter of effective policy. The achievement of proximate, timely, accessible and qualitative sexual health services, while desirable, meets with the hurdle that budgetary allocation is a matter of state discretion. What is not in its discretion, though, is the provision of adequate sexual education, especially targeting adolescents, in order to prevent STIs before the need to treat them emerges. Space for normative amelioration exists in relation to financially or otherwise disadvantaged femininities and their equitable access to STI care and treatment. Migrant and detained femininities should presently be the focus of national endeavours. On a final note, infection data should not be aggregated exclusively for epidemiological purposes; anonymous results could drastically contribute to a targeted per-population approach around STIs.

As far as harmful practices are concerned, statistical data on their incidence should be systematically collected, accompanied with preventive and protective measures to eliminate FGM. Awareness-raising campaigns and readily available information are also crucial, along with sufficiently trained health and social services professionals. Potential victims should be identified and aided before the inevitable happens. Finally, perpetrators of FGM, irrespective of nationality, are to effectively be brought to justice; the amendment of the relevant statute of limitations is advisable.

Sexual Rights and Sexual Orientation of LGBTQIA+ People

In theory, human rights belong to everyone. Logically, that includes LGBTQIA+ people. The Human Rights council and other United Nations actors state that discrimination against LGBTQIA+ people is never legal. But as the research shows, LGBTQIA+ people are far from being treated equally.

Especially the rights to family planning, pregnancy and equal access to healthcare are still mainly pervaded by a very binary worldview. This leads to drastic real life problems for LGBTQIA+ people, since they simply aren't mentioned in most of the legislation and there are uncertainties whether laws are applicable or not.

By outlining the legislative framework and the legal measures adopted by Greece and Germany to ensure LGBTQIA+ people's equal enjoyment of sexual rights some differences occured.

Undoubtedly, Greek society is not very progressive and it is obvious that in order to overcome the gender stereotypes engendered by deeply ingrained assumptions and biases in this country, effective and inclusive measures should be developed.

Until recently, the legislator adopted and maintained the same conservative approach to gender issues. However, as thoroughly examined in this research, various pieces of legislation have been implemented in recent years, mostly in accordance with European and international mandates, to assure the equitable treatment of all people regardless of sexual orientation or gender identity. However, there are several omissions that must be addressed, since the legislative framework demonstrates weaknesses and inconsistencies in this context. Nevertheless, it should be recognized that in Greece, besides the fact that until recently there was a lack of an adequate legal framework regarding discrimination on the grounds of sexual orientation and mainly gender identity, in recent years significant efforts have been made in this direction and Greece now provides laws that protect more effectively LGBTQI+ people from discrimination. However, it is estimated that a multi-level approach to the problem is required in order to attain significant equality for all people.

Taking a look at Germany it becomes clear that LGBTQIA+ people's needs are on the agenda. Therefore Germany is currently working on creating legislation that includes the needs of LGBTQIA+ people and creates visibility for the community. Some steps were already made, like for example the abolition of the transexual law and Germany's participation in alliances that aim to strengthen and support LGBTQIA+ people.

But the research also shows that there are still many (everyday life) problems that LGBTQIA+ people have to deal with. Be it the different treatment of homosexual and heterosexual couples when it comes to the recognition as parents, or the invisibility of people that don't fit into a binary worldview.

In both countries legislation has to change, in order to reach equality. It's an all-encompassing task, since the rights of LGBTQIA+ people must be included in every area of life and law. Germany and Greece seem to be aware that changes are needed and with some legislation they are driving change forward. But there is still a lot to do.

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