# 2 Which laws are LGBTI-inclusive?

OECD Member countries have signed and ratified many treaties, conventions and charters which embody international human rights standards relevant for LGBTI people. They are also influenced by the many non-binding recommendations and reports on LGBTI equality published by key human rights stakeholders. This chapter first presents these stakeholders, i.e. the European Union, the United Nations, the Council of Europe and the Organisation of American States. The chapter then focuses on the LGBTI-inclusive laws that result from applying international human rights standards to LGBTI issues. It deals with general provisions that are relevant for the inclusion of lesbian, gay, bisexual, transgender and intersex people altogether, before turning to group-specific provisions that aim to address the unique challenges faced by subgroups of the LGBTI population.

## Who are LGBTI+ individuals?

LGBTI is the acronym for "lesbian, gay, bisexual, transgender and intersex". LGBTI people are defined with respect to three distinct features: sexual orientation, gender identity and sex characteristics. Sexual orientation refers to a person's capacity for profound emotional and/or sexual attraction to, and intimate or sexual relations with different-sex individuals, same-sex individuals, or both different- and same-sex individuals. Sexual orientation allows for differentiating between heterosexuals, lesbians, gay men and bisexuals. Gender identity refers to a person's internal sense of being masculine, feminine or androgynous or neither. Gender identity permits distinguishing between transgender and cisgender individuals, a transgender (resp. cisgender) person being one whose gender identity differs from (resp. matches) her/his biological sex at birth. Sex characteristics refer to chromosomal patterns, hormonal structure, reproductive organs and sexual anatomy that determine an individual's sex. Sex characteristics sometimes do not match strict medical definitions of male or female. An individual whose sex characteristics are neither wholly female nor wholly male is called "intersex". Although these variations concern a minority of individuals, they are not pathological. Only a small proportion have medical conditions which might be life-threatening if not treated promptly (Fundamental Rights Agency, 2015[1]). Because they differ to the majority in terms of sexual orientation, gender identity and sex characteristics, LGBTI people are also referred to as "sexual and gender minorities".

While the size of a group should have no bearing on their access to human rights, it is important to note that the share of people who self-identify as LGBTI is substantial and on the rise. In the United States for instance, the percentage of people who come out as LGBT to survey interviewers has risen from 3.5% in 2012 to 4.5% in 2017. This trend is likely to continue in the future since it is driven by younger cohorts: in 2017, only 1.4% of US respondents born before 1945 considered themselves as LGBT, compared to 8.2% among millennials, i.e. individuals born between 1980 and 1999 (OECD, 2019[2]). The group of intersex people does not only include individuals born with atypical genitalia that are immediately detectable at birth or even before. It also comprises individuals born with subtler forms of physical, hormonal or genetic features that make them intersex and will be "discovered", if at any time, only later in life, e.g. during puberty[1]. To date, two studies have tried to provide a comprehensive estimate of the intersex population, based on a meta-analysis of medical research articles. Their measures vary from 0.5% (van Lisdonk, 2014[3]) to 1.7% (Blackless et al., 2000[4]) of the total population.

A "+" is often added to the LGBTI acronym to include people who do not self-identify as heterosexual and/or cisgender but who would not apply the LGBTI label to themselves either. These people include questioning individuals (individuals who are unsure about their sexual orientation and/or gender identity), pansexual individuals (individuals for whom sex and gender are irrelevant in determining whether they will be emotionally or sexually attracted to others), or asexual individuals (individuals who lack sexual attraction to anyone or show low or no interest in sexual activity).

Ensuring that lesbians, gay men, bisexuals, transgender and intersex individuals – commonly referred to as "LGBTI people" – can live as who they are without being stigmatised, discriminated against or attacked should be a concern for OECD governments, for at least three reasons. The first and most important reason is obviously ethical. Sexual orientation, gender identity and sex characteristics are integral aspects of our selves. Guaranteeing that LGBTI people are not condemned to forced concealment or retaliation when their identity is revealed is necessary for them to live their lives as themselves, without pretence. The second reason is economic. Exclusion of LGBTI people impedes economic development through a wide range of channels. For instance, it causes lower investment in human capital due to LGBTI-phobic bullying at school as well as poorer returns on educational investment in the labour market. Anti-LGBTI discrimination also reduces economic output by excluding LGBTI talents from the labour market and impairing their mental and physical health, hence their productivity. The third reason why LGBTI inclusion

should constitute a top policy priority is social. LGBTI inclusion is viewed as conducive to the emergence of less restrictive gender norms that improve gender equality broadly speaking and, consequently, expand social and economic roles, especially for women. Indeed LGBTI inclusion may prompt a departure from the mistaken views that (i) individuals fall into only two distinct biological sexes at birth (male and female) that perfectly match their gender identity; (ii) men and women unequivocally feel sexual attraction to one another; (iii) within these couples, men and women fulfil biologically determined roles. Evidence confirms that acceptance of homosexuality is strongly correlated with support for gender equality worldwide (OECD, 2019[2]).

Ensuring equal rights for LGBTI individuals is particularly critical for their inclusion into the wider society. One cannot expect to improve the situation of sexual and gender minorities if, to begin with, the law does not protect them against unequal treatment. Passing equality laws also improves LGBTI inclusion by shaping social norms. Individuals perceive legal changes as reflections of advancements in what is socially acceptable and many are willing to conform to these shifts (see Chapter 3 for further details). Consistent with the fact that equality laws are essential for LGBTI inclusion and thus economic development, recent research has confirmed their strong correlation with GDP per capita (Box 2.1).

### Box 2.1. LGB-inclusive laws are strongly correlated with economic development

A recent study analyses the relationship between the Global Index on Legal Recognition of Homosexual Orientation (GILRHO) and economic development in 132 countries, from 1966 to 2011. The GILRHO includes eight categories of legal rights representing most of the important legal steps that various countries have taken to strengthen the rights of LGB people: (1) legality of consensual homosexual acts between adults; (2) equal age limits for consensual homosexual and heterosexual acts; (3) explicit legal prohibition of sexual orientation discrimination in employment; (4) explicit legal prohibition of sexual orientation discrimination regarding goods and/or services; (5) legal recognition of the non-registered cohabitation of same-sex couples; (6) availability of registered partnership for same-sex couples; (7) possibility of second-parent and/or joint adoption by same-sex partners; and (8) legal option of marriage for same-sex couples. Each country with a law corresponding to each of the eight categories is awarded a full point per year since the relevant law entered into force. If the law in question only applied in part of the country, a half point is given irrespective of the number of states, provinces, or regions where the law applies. The study finds that an additional point on the 8-point GILRHO scale of legal rights for LGB persons is associated with an increase in real GDP per capita of approximately USD 2 000. A series of robustness checks confirm that this index continues to have a positive and statistically significant association with real GDP per capita after controlling for predictors of economic development that are correlated with the GILRHO, such as legal measures promoting gender equality.

Source: Badgett, Waaldijk and Rodgers (2019[5]), "The relationship between LGBT inclusion and economic development ", https://doi.org/10.1016/j.worlddev.2019.03.011.

But what is meant by "LGBTI-inclusive laws"? The right of every person to equality before the law is universal, as unequivocally set forth by Article 1 of the Universal Declaration of Human Rights of 1948: "All human beings are born free and equal in dignity and rights." In this setting, the protection of individuals on the basis of sexual orientation, gender identity and sex characteristics in OECD countries and beyond should not imply the creation of new or special rights for LGBTI people but, simply, extending the same rights to LGBTI persons as those enjoyed by everyone else by virtue of international human rights standards.

This chapter presents a critical set of LGBTI-inclusive laws that derives from applying these human rights standards to sexual orientation, gender identity and sex characteristics issues. Such standards include the

right to be free from discrimination, the right to freedom of expression, association and peaceful assembly, the right to be free from violence, the right to seek and to enjoy asylum from persecution in other countries, and the right to respect for private and family life. Notably, these standards are those underpinned by treaties, conventions or charters that have been signed and ratified by OECD countries and are therefore at least morally binding for those signatories. Section 2.1 presents the key providers of international human rights standards for OECD countries. Sections 2.2 and 2.3 focus on the set of LGBTI-inclusive laws that result from applying international human rights standards to LGBTI issues.[2] LGBTI-inclusive laws can be broken down into two categories: general provisions that are relevant for the inclusion of lesbian, gay, bisexual, transgender and intersex people altogether (Section 2.2), and group-specific provisions that aim to address the unique challenges faced by subsets of the LGBTI population (Section 2.3).

## 2.1. Key human rights stakeholders for OECD countries

Human rights laws in OECD countries are exposed to the human rights bodies of several international and regional organisations. Because it benefits from the strongest democratic legitimacy, the European Union (EU) who encompasses 22 OECD countries is the most powerful of these stakeholders. But other organisations are also playing a critical role, especially for non-EU OECD countries: the United Nations of which all OECD countries are members, the Council of Europe that includes all 27 European OECD countries (the 22 EU Members as well as Iceland, Norway, Switzerland, Turkey and the United Kingdom), and the Organization of American States that incorporates the four OECD countries located in North and South America (Canada, Chile, Mexico and the United States)[3].

### *2.1.1. The European Union*

The Charter of Fundamental Rights (CFR) constitutes the human rights instrument of the European Union[4] since 2009. The CFR contributes to the setting of strong human rights standards in Member countries. It inspires EU law, including regulations and directives, that Member countries are not only bound to implement but also to enforce in a way that complies with the CFR. The European Commission is in charge of ensuring that national legal systems align with the requirements of EU law. If they do not, the Commission can initiate infringement proceedings against Member countries. In this case, a letter of formal notice is sent, by which the Commission allows the Member country to present its views regarding the breach observed. If no reply to the letter is received, or if the observations presented by the Member country in reply to that notice cannot be considered satisfactory, the Commission will move to the next stage of infringement procedure, which is the reasoned opinion, i.e. a formal request to comply with EU law. If the country still doesn't comply, the Commission may decide to refer the matter to the Court of Justice of the European Union. Most cases are settled before being referred to the court though.

LGBTI equality has been a priority of the European Union since 2014, when the European Parliament issued a resolution on the "EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity", and called on the European Commission to develop "a comprehensive multiannual policy to protect the fundamental rights of LGBTI people" (European Parliament, 2014[6]). Following this resolution, the European Commission presented in 2015 the "List of actions to advance LGBTI equality" that was endorsed in 2016 by the Council of the European Union. This list of actions presents the concrete measures the Commission committed to undertake between 2015 and 2019 in order to step up efforts to combat discrimination based on sexual orientation, gender identity and sex characteristics. It encompasses the following main branches:

- "Improving rights and ensuring legal protection of LGBTI people and their families in key areas of EU competence", i.e. adoption at EU level of key legislation for LGBTI people;

- "Strong monitoring and enforcement of existing rights of LGBTI people and their families under EU law", i.e. ensuring that the specific issues related to sexual orientation and gender identity are properly taken into consideration in both the transposition and implementation of EU legislation;
- "Reaching citizens, fostering diversity and non-discrimination", i.e. improving the social acceptance of LGBTI people through broad and inclusive communication campaigns;
- "Supporting key actors responsible to promote and advance equal rights for LGBTI people in the EU" (Member countries, public and private organisations);
- "Figures and facts for policy makers on LGBTI challenges at the EU: data collection and research activities", i.e. improving available data on the situation of LGBTI people;
- "External action: LGBTI issues in enlargement, neighbourhood and third countries", i.e. raising matters of concern regarding the situation of LGBTI persons in those countries.

Following this list of actions, multiple efforts were conducted in order to ensure that LGBTI people are not left behind – many of which are detailed in this report. To strengthen these actions, a group of 19 Member countries[5] presented in 2018 a Joint Non-Paper on the future of the List of actions, asking for the adoption of an LGBTI strategy. In 2019, the European Parliament also called on the European Commission to adopt a new strategic document to foster equality for LGBTI people that is currently under preparation.

### *2.1.2. Other critical stakeholders*

On top of the European Union, the United Nations, the Council of Europe and the Organization of American States are playing an essential role to advance LGBTI rights among OECD countries. Although their capacity to sanction Member countries is more limited, these organisations are still instrumental in fostering state compliance with their human rights obligations (Carraro, 2019[7]).

#### *The United Nations system of human rights*

Human rights enforcement mechanisms are lacking at the global level. The only international court dealing with human rights violations is the International Criminal Court, but its scope is restricted to gross human rights violations such as genocide and war crimes.

Nevertheless, although hard coercion does not apply, the United Nations[6] (UN) is committed to trigger global adherence to human rights obligations through four leading entities:

- The Office of the High Commissioner for Human Rights (OHCHR) − created in 1993: the OHCHR assists governments to fulfil the obligations stipulated in the Universal Declaration of Human Rights, and supports individuals in claiming their rights. Although not legally binding, the Universal Declaration of Human Rights spelled out, for the first time in human history, basic civil, political, economic, social and cultural rights that all human beings should enjoy and has over time been widely accepted as the fundamental norm of human rights that everyone should respect and protect;
- The United Nations Human Rights Council (UNHRC) − created in 2006 in replacement of the United Nations Commission on Human Rights (UNCHR): the UNHRC is in charge of investigating allegations of breaches of human rights in UN Member states, in particular through the Universal Periodic Review, a peer review that analyses the situation of all 193 Member countries every four years and issues recommendations for improvement (a first cycle took place between 2007 and 2011, a second cycle between 2012 and 2016 and a third cycle between 2017 and 2021);
- UN treaty bodies, i.e. committees of independent experts in charge of monitoring governments' implementation of specific human rights conventions. Since the Universal Declaration of Human Rights (UDHR), nine core international human rights treaties have been adopted, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on

Economic, Social and Cultural Rights (ICESC). Together with the UDHR, these two covenants form the International Bill of Human Rights. These covenants have been ratified by all OECD Member countries[7] – except for the United States that signed but did not ratify the ICESC. One of the major tasks of UN treaty bodies is to undertake the state reporting procedure, during which state parties are evaluated on the implementation of their treaty obligations and receive recommendations for improvement;

- UN agencies involved in the promotion and protection of human rights: the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP), the International Labour Organization (ILO), the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Population Fund (UNFPA), and the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women).

The Universal Periodic Reviews of the UNHRC and the state reporting procedure of the treaty bodies are viewed as particularly successful at fostering compliance (Carraro, 2019[7]). They generate peer and public pressure that may lead countries to align with their human rights obligations for fear of material or reputational losses. Meanwhile, these mechanisms encourage progress by teaching countries how to meet their human rights obligations, through practically feasible recommendations, both realistic and detailed.

Since 2011, the UN system of human rights has strengthened its engagement in protecting LGBTI rights, as shown by the following milestones:

- In 2011, UNHRC passed a resolution requesting that the OHCHR drafts a report "documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" (UNHRC, 2011[8]). This was the first time that any United Nations body approved a resolution affirming the rights of LGBT persons, noting that the resolution was approved by a narrow margin but, significantly, received support from UNHRC members from all regions. The OHCHR report found that violence against LGBT people is pervasive worldwide (OHCHR, 2011[9]). This report paved the way to OHCHR's first landmark publication on LGBTI rights entitled "Born Free and Equal" (OHCHR, 2012[10]).
- In 2014, the UNHRC passed a second resolution that called for a report from the OHCHR on good practices for combating discrimination based on sexual orientation and gender identity (UNHRC, 2014[11]). This was the first time that a resolution on sexual orientation and gender identity issues was adopted by the UNHRC with the support of a majority of its members. The OHCHR report provides a list of recommendations to protect LGBT people against human rights violations that draws on UN Member states' best practices (OHCHR, 2015[12]). This report constituted the first step towards OHCHR's second landmark publication on LGBTI rights entitled "Living Free and Equal" (OHCHR, 2016[13]).
- In 2015, the OHCHR, together with ILO, UNAIDS, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UN Women and WHO, as well as the United Nations Office on Drug and Crime (UNODC) and the World Food Programme (WFP) issued a joint statement calling on governments to act urgently to end violence and discrimination against LGBTI adults, adolescents and children (OHCHR et al., 2015[14]). This initiative was applauded by the head of the United Nations – then Secretary-General Ban Ki-moon − in a historic address to the UN LGBTI Core Group, an informal group of UN Member states established in 2008 to promote LGBTI rights mainly through ongoing collaboration between Global South and Global North state diplomat: "When the human rights of LGBT people are abused, all of us are diminished. (…) This is not just a personal commitment – it is an institutional one. Some say I am the first Secretary-General to take up this cause – but I prefer to say I am the first of many. To lead this Organization means to carry out its sacred mission to deliver human rights for all people" (UN Secretariat General, 2015[15])

- In 2016, the UNHRC passed a third resolution to appoint an independent expert to identify the causes of violence and discrimination against people due to their sexual orientation and gender identity and discuss with governments how to protect those people (UNHRC, 2016[16]). That same year, the UN Security Council issued a press statement that "condemned in the strongest terms the terrorist attack in Orlando, Florida, on 12 June 2016, targeting persons as a result of their sexual orientation, during which 49 people were killed and 53 injured." This statement marked the first time the UN Security Council used language recognising violence targeting the LGBTI community (UN Security Council, 2016[17]).
- In 2018, Secretary-General António Guterres reiterated, on the occasion of the 70th anniversary of the Universal Declaration of Human Rights, that "the United Nations stands up for the rights of the LGBTI community." (UN Secretariat General, 2018[18]).
- In 2019, the UNHRC passed a fourth resolution to renew the mandate of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

### *The Council of Europe*

The European Convention on Human Rights (ECHR) constitutes the human rights instrument of the Council of Europe[8] (CoE) since 1953. This Convention benefits from strong enforcement mechanisms: the European Court of Human Rights is responsible for ruling on individual or state applications alleging violations of the civil and political rights set out in the Convention (after exhausting all remedies available at national level), and Member countries are obligated to execute judgements by the Court.

The Council of Europe is composed of two statutory bodies that are the guardians of the Council's fundamental values:

- The Committee of Ministers, made up of the foreign ministers of each Member country: this Committee notably monitors the execution of judgements by the European Court of Human Rights, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained;
- The Parliamentary Assembly, composed of 324 members drawn from the national parliaments of the Member countries: the resolutions and recommendations adopted by the Parliamentary Assembly in order to maintain strong human rights standards are politically binding (although not legally binding), meaning that they can be invoked in advocacy activities within each Member country.

The Commissioner for Human Rights is the third key human rights body within the Council of Europe. Established in 1999, it is independent and responsible for promoting awareness of and respect for human rights in the Member countries. To achieve its mandate, the Commissioner for Human Rights conducts visits to each Member country for an evaluation of the human rights situation, and issues reports, opinions and recommendations to governments.

Council of Europe's long-lasting commitment to protect LGBTI rights dates back to 1981, when the Parliamentary Assembly adopted a resolution urging Member countries to stop human rights violations against homosexuals (CoE Parliamentary Assembly, 1981[19]). This resolution was complemented in 1989 by a resolution on "the condition of transsexuals" (CoE Parliamentary Assembly, 1989[20]) and in 2000 by a resolution on "the situation of lesbians and gays" (CoE Parliamentary Assembly, 2000[21]). The role of the Council of Europe in creating a normative framework to promote equal treatment of LGBTI people has been strengthening since 2010 when:

- The Committee of Ministers issued a milestone document providing recommendations to Member countries "to combat discrimination on grounds of sexual orientation or gender identity" (CoE Committee of Ministers, 2010[22]);

- The Parliamentary Assembly adopted a resolution calling Member countries to end "discrimination on the basis of sexual orientation and gender identity" (CoE Parliamentary Assembly, 2010[23]).

These two initiatives paved the way to the Council of Europe's first landmark publication on LGBTI rights entitled "Discrimination on Grounds of Sexual Orientation and Gender Identity" (CoE Commissioner for Human Rights, 2011[24]).[9]

#### *The Organization of American States*

The American Convention on Human Rights constitutes the human rights instrument of the Organization of American States[10] (OAS) since 1978. The Convention has been signed and ratified by Chile and Mexico, but not by Canada and the United States.[11] The bodies responsible for overseeing compliance of the signatories with the Convention are:

- The Inter-American Commission on Human Rights (IACHR) whose main task is to receive, analyse, and investigate individual petitions alleging violations of specific human rights protected by the American Convention on Human Rights;
- The Inter-American Court of Human Rights whose mission is both adjudicatory (the Court hears and rules on the specific cases of human rights violations referred to it) and advisory (the Court issues opinions on matters of legal interpretation brought to its attention by other OAS bodies or Member countries).

In 2008, the General Assembly of the OAS adopted a resolution urging Member countries to combat "acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity" (OAS General Assembly, 2008[25]). The Inter-American Commission on Human Rights later published a milestone document on the protection and promotion of LGBTI rights to provide Member countries with guidance on actions to address the prevalence of violence and discrimination against LGBTI persons (IACHR, 2015[26]; 2018[27]).

## 2.2. LGBTI-inclusive laws: General provisions

This section and the next focus on the set of LGBTI-inclusive laws that result from applying international human rights standards to LGBTI issues. Section 2.2 deals with general provisions that are relevant for the inclusion of lesbian, gay, bisexual, transgender and intersex people altogether. These general provisions can be decomposed into five components: (i) protection of LGBTI people against discrimination, (ii) protection of LGBTI people's civil liberties; (iii) protection of LGBTI people against violence; (iv) protection of LGBTI people fleeing persecution abroad; and (v) establishment of an LGBTI-inclusive equality body, ombudsman or human rights commission.

### *2.2.1. Protection of LGBTI people against discrimination*

The binding instruments of the European Union as well as the 2019 resolution of the European Parliament on the rights of intersex people ensure strong protection against discrimination to LGBTI people (Box 2.2).

## Box 2.2. The European Union normative framework to prohibit discrimination against LGBTI people

### *On the protection of LGB individuals against discrimination*

Paragraph 1 of Article 21 of the European Union Charter of Fundamental Rights explicitly includes sexual orientation as a category protected from discrimination: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited". Additionally, in 2000, the Council of the European Union passed Council Directive 2000/78/EC, known as the EU Employment Equality Directive, which prohibits discrimination on the grounds of, inter alia, sexual orientation in the area of employment. In 2008, the European Commission presented a proposal for a Council directive on implementing the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief (the so-called "Horizontal Directive" that prohibits discrimination in education, social protection and the provision of and access to goods and services). The Horizontal Directive has not passed yet, though.

### *On the protection of transgender individuals against discrimination*

Paragraph 1 of Article 21 of the European Union Charter of Fundamental Rights lacks a provision that explicitly prohibits discrimination on the grounds of gender identity, but the Charter's list is not exhaustive and is open to broader interpretation as indicated in the wording "such as" as well as in the case law of the Court of Justice of the European Union (CJEU). More precisely, in the case of P v. S and Cornwall County Council 1996, the CJEU was requested to consider the scope of sex discrimination protections within Directive 76/207/EEC that prohibits discrimination on the grounds of sex in employment. The CJEU ruled that the category of sex protects gender identity although in a narrow sense. It held that the right to equal treatment and prohibition of discrimination is not confined solely on the fact that an individual is of one sex or the other. Rather, "it must extend to discrimination arising from gender reassignment… since to dismiss a person on the ground that he or she intends to undergo, or has undergone, gender reassignment is to treat him or her unfavourably by comparison with persons of the sex to which he or she was deemed to belong before that operation". The right to protection from discrimination for persons that have undergone gender reassignment is further emphasised in Directive 2006/54/EC (paragraph 3), which pertains to the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Moreover, although Directive 2004/113/EC on sex equality in access to goods and services does not expressly refer to gender reassignment, the European Commission has argued that the Directive should be interpreted as providing such protection.[1]

### *On the protection of intersex individuals against discrimination*

The protection of discrimination against intersex persons is not explicitly referenced in the binding documents produced by the European Union. However, in February 2019, the European Parliament adopted a resolution on the rights of intersex people in which it (i) "deplores the lack of recognition of sex characteristics as a ground of discrimination across the EU, and therefore highlights the importance of this criterion in order to ensure access to justice for intersex people"; (ii) "calls on the Commission to enhance the exchange of good practices on the matter"; (iii) "calls on the Member states to adopt the necessary legislation to ensure the adequate protection, respect and promotion of the fundamental rights of intersex people, including intersex children, including full protection against discrimination" (European Parliament, 2019[28]).

[1] See for example page 4 of the European Commission's Report on the application of Council Directive 2004/113/EC.

Although the human rights instruments of the United Nations, the Council of Europe and the Organization of American States do not explicitly prohibit discrimination against LGBTI individuals,[12] they include a broad protected category (i.e. "other status" or "any other social condition") that reflects that the list of protected grounds of discrimination is intended to be open-ended, illustrative, and non-exhaustive. Over time, this broad protected category has been interpreted as applying to sexual orientation, gender identity and eventually sex characteristics. More precisely:

- The Office of the High Commissioner for Human Rights (OHCHR) has repeatedly emphasised that grounds for discrimination must evolve with context and that sexual orientation, gender identity and sex characteristics are impermissible bases for distinction in international human rights law (OHCHR, 2012[10]). Moreover, the UN treaty bodies in charge of international human rights treaties that include a general article on discrimination have broadly confirmed that sexual and gender minorities are protected from discrimination under those treaties. For instance, in 2009, the Committee on Economic, Social and Cultural Rights that scrutinises Member states' compliance with the International Covenant on Economic, Social and Cultural Rights issued a general comment where "other status" is explicitly defined as including LGBTI individuals: "'Other status' as recognised in Article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognised as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace" (UN Committee on Economic, 2009[29]).
- Since 1991, the European Court of Human Rights (ECtHR) has increasingly relied on the following definition of discrimination in its judgments concerning violations of Article 14 of the ECHR: "treating differently, without an objective and reasonable justification, persons in relevantly similar situations" (Fredin v. Sweden 1991[13]), meaning that *any* group identity is viewed as a possible ground of unlawful discrimination. Consistent with this standard, the ECtHR has explicitly held that "the prohibition of discrimination under Article 14 of the Convention duly covers questions related to sexual orientation and gender identity" (Identoba and others v. Georgia 2015[14]). No case related to discrimination against intersex persons has been submitted to the ECtHR yet. However, there is little doubt that the ECtHR would establish on that occasion that sex characteristics are also a ground protected against discrimination under the category of "other status" referenced in Article 14 of the ECHR. Anticipating this stance, the Parliamentary Assembly of the Council of Europe published in 2017 a resolution that urges Member countries to "ensure that anti-discrimination legislation effectively applies to and protects intersex people, either by inserting sex characteristics as a specific prohibited ground in all anti-discrimination legislation, and/or by raising awareness (…) of the possibility of dealing with discrimination against [intersex people] under the prohibited ground of sex, or as an "other" (unspecified) ground where the list of prohibited grounds in relevant national anti-discrimination provisions is non-exhaustive" (CoE Parliamentary Assembly, 2017[30]).
- In 2017, the Inter-American Court of Human Rights (IACHR) clarified in a milestone advisory opinion that the expression "any other social condition" in Article 1 of the American Convention on Human Rights prohibits discriminatory laws, acts or practices based on an individual's sexual orientation and gender identity (IACHR, 2017[31]). The advisory opinion also calls for greater inclusion of all sexual and gender minorities, including intersex people.

The right for LGBTI people to be free from discrimination has been portrayed as potentially conflicting with other fundamental rights. Notably, some individuals invoke their right to freedom of religion or belief to justify discrimination against sexual and gender minorities, for instance by refusing to provide them with goods or services. Clerks may refuse to issue marriage licences, inns to rent lodgings, and bakers to make cakes for same-sex couples because of faith.

The right to freedom of religion or belief is deeply anchored in international human rights law, as shown by the International Bill of Human Rights (Article 18 of the UDHR and Article 18 of the ICCPR), as well as by Article 10 of the CFR, Article 9 of the ECHR and Article 12 of the ACHR. The right to freedom of religion or belief has two components. The first component consists in the right to freedom of thought, conscience and religion, which means the right to hold or to change one's religion or belief and which cannot be restricted under any circumstances. The second component entails the right to manifest one's religion or belief. According to international human rights law, the latter right can be restricted, but only under a limited set of conditions. In particular, to be permissible, a restriction on the freedom of religion or belief must aim to protect the rights and freedoms of others, where the term "others" refers to other persons individually or as members of a community. In this setting, numerous courts (e.g. in Canada, Spain or the United Kingdom) have found that claims for exemptions from anti-discrimination laws under the justification that these laws interfere with the right to manifest one's religion or beliefs may be dismissed.[15] The harm inflicted to LGBTI people who are turned away because of who they are (and to society as a whole because of denying the very principle of equality before the law) is indeed viewed as outweighing the harm to those whose discriminatory manifestation of religious belief cannot be accommodated (Donald and Howard, 2015[32]; INCLO, 2015[33]; UN Special Rapporteur on freedom of religion or belief, 2017[34]).

Consistent with this interpretation, the joint statement by the OHCHR and UN agencies on ending violence and discrimination against LGBTI people insists that "cultural, religious and moral practices and beliefs and social attitudes cannot be invoked to justify human rights violations against any group, including LGBTI persons" (OHCHR et al., 2015[14]). Similarly, in the two cases resolved by the ECtHR where religious freedom and the right to be free from discrimination were conflicting, the ECtHR ruled in favour of the latter (Box 2.3). Finally, the Inter-American Court of Human Rights affirmed in its landmark advisory opinion that philosophical or religious convictions "cannot condition what the Convention establishes in relation to discrimination based on sexual orientation" (IACHR, 2017[31]).

That said, religious freedom is a fundamental right that must be vigorously defended, meaning that when borderline cases come up, i.e. cases where the discriminatory consequences of religious freedom for LGBTI people is more difficult to establish, a diligent and cautious approach is critical to avoid magnifying tensions around LGBTI-related issues. In case of doubt, it may be advisable to refrain from employing legal sanctions or other restrictive measures (UN Special Rapporteur on freedom of religion or belief, 2017[34]). This stance was unanimously adopted by the Supreme Court of the United Kingdom in the case "Lee v Ashers Baking Company Ltd and others" that is now being assessed by the ECtHR (Box 2.3).

### Box 2.3. Tension between freedom of religion or beliefs and non-discrimination against LGBTI people: A summary of three cases submitted to the European Court of Human Rights

**Case 1: Ladele v. London Borough of Islington (2009)**

Lillian Ladele was employed by the London Borough of Islington, a local public authority, from 1992. Islington had a "Dignity for All" equality and diversity policy that especially targeted discrimination based on age, disability, gender, race, religion and sexuality. In 2002 Ms. Ladele became a registrar of births, deaths and marriages. Following the introduction of the Civil Partnership Act 2004, Islington designated all of its existing registrars as civil partnership registrars as well as marriage registrars. Ms. Ladele objected to being required to officiate at civil partnership ceremonies due to her Christian beliefs. Initially, Ms. Ladele was permitted to make informal arrangements with colleagues to exchange work so that she did not have to conduct civil partnership ceremonies. In March 2006, however, two colleagues complained that her refusal to carry out such duties was discriminatory. Ms. Ladele was informed that, in the view of the local authority, refusing to conduct civil partnerships could put her in breach of the Code of Conduct and the equality policy. She was asked to confirm in writing that she would henceforth officiate at civil partnership ceremonies. Ms. Ladele refused to agree and requested

that the local authority make arrangements to accommodate her beliefs. In May 2007 the local authority commenced a preliminary investigation. This investigation concluded in July 2007 with a recommendation that a formal disciplinary complaint be brought against Ms. Ladele that, by refusing to carry out civil partnerships on the ground of the sexual orientation of the parties, she had failed to comply with the local authority's Code of Conduct and equality and diversity policy. A disciplinary hearing took place on 16 August 2007. Following the hearing, Ms. Ladele was asked to sign a new job description requiring her to carry out straightforward signings of the civil partnership register and administrative work in connection with civil partnerships, but with no requirement to conduct ceremonies. Ms. Ladele made an application to the Employment Tribunal, complaining of direct and indirect discrimination on grounds of religion or belief and harassment. The Employment Tribunal held that she had been directly and indirectly discriminated against, as well as harassed. The Employment Appeals Tribunal reversed the decision, and Ladele appealed to the Court of Appeal. She claimed that allegations of direct discrimination and harassment should have been remitted. By contrast, Islington argued there was no choice, given the Equality Act (Sexual Orientation) Regulations 2007 to do anything but require Ms. Ladele to perform her full duties. The Court of Appeal upheld the Employment Appeal Tribunal's conclusions on 15 December 2009. The ruling by the Court of Appeal was confirmed by the European Court of Human Rights in 2013 in Eweida and Others v. the United Kingdom.

**Case 2: McFarlane v. Relate Avon Ltd (2010)**

Gary McFarlane was employed as a relationship counsellor by the Avon branch of Relate, a charity providing relationship support including counselling for couples, families, young people and individuals, sex therapy, mediation and training courses. He joined the organisation in August 2003, and a condition of his employment was acceptance of the group's equal opportunities policy, which required him to ensure "that no person... [receive] less favourable treatment on the basis of characteristics, such as... sexual orientation...". Relate was also a member of the British Association for Sexual and Relationship Therapy, whose Code of Ethics required the therapist to "avoid discrimination... on grounds of... sexual orientation." Mr. McFarlane initially had some concerns about providing counselling services to same-sex couples, but following discussions with his supervisor, he accepted that simply counselling a homosexual couple did not involve endorsement of such a relationship and he was therefore prepared to continue. In 2007 Mr. McFarlane commenced Relate's post-graduate diploma in psycho-sexual therapy (PST). By the autumn of that year there was a perception within Relate that he was unwilling to work on sexual issues with homosexual couples. In response to these concerns, Relate's General Manager met with Mr. McFarlane in October 2007. Mr. McFarlane confirmed he had difficulty in reconciling working with couples on same-sex sexual practices and his duty to follow the teaching of the Bible. The Manager expressed concern that it would not be possible to filter clients in order to prevent Mr. McFarlane from having to provide psycho-sexual therapy to lesbian, gay or bisexual couples. Despite his subsequent claims that he would agree to carry out relationship work where it involved same-sex sexual issues, Mr. McFarlane appeared unable to counsel same-sex clients in both relationship counselling and PST with regard to all the sexual issues they may have brought. In 2008, Mr. McFarlane was dismissed from his post. Mr. McFarlane applied to the Employment Tribunal, claiming in particular discrimination on the ground of religion or belief. This claim of discrimination was dismissed. Mr. McFarlane appealed against this dismissal to the Employment Appeal Tribunal that upheld the decision of the Employment Tribunal. Mr. McFarlane applied to the Court of Appeal for permission to appeal against the decision of the Employment Appeal Tribunal. On 20 January 2010 the Court of Appeal refused the application on the basis that there was no realistic prospect of the appeal succeeding in the light of the Court of Appeal judgment of December 2009 in Ladele v London Borough of Islington (2009). The ruling by the Employment Appeal Tribunal was confirmed by the European Court of Human Rights in 2013 in Eweida and Others v. the United Kingdom.

**Case 3: Lee v. Ashers Baking Company Ltd and others (2018)**

In 2014 Gareth Lee, a homosexual rights activist, placed an order with Ashers Baking Company, a Belfast bakery, for a cake decorated with the slogan "support gay marriage" as same-sex marriage was illegal at that time in Northern Ireland. The McArthurs, the owners of Ashers Baking Company who are Christians, declined the order and refunded Lee's money, saying they could not make a cake that supported something they found offensive to their religious beliefs. Lee complained to the Equality Commission for Northern Ireland that he had been directly discriminated against on the grounds of his sexual orientation, and the Equality Commission supported him in filing a discrimination lawsuit against Ashers and the McArthurs. The county court found in Lee's favour and fined Ashers GBP 500 in damages. Ashers appealed to the Court of Appeal, which upheld the original verdict on the grounds of direct discrimination. Ashers then appealed to the Supreme Court of the United Kingdom. In a unanimous ruling, the Supreme Court reversed the decisions at the Belfast county court and the Court of Appeal that Ashers had discriminated against Lee on the grounds of him being gay. The Supreme Court made a distinction between someone refusing to make a cake because of a message they were being asked to put on the cake and refusing to make a cake because the person requesting it had a protected characteristic. The court found that the McArthurs did not refuse to make the cake on the grounds of Lee's personal sexual orientation but on the grounds that they disagreed with the message they were being asked to put on it. They ruled there was no direct discrimination. The court also considered associative discrimination, but again ruled that there was no discrimination on the basis of Lee's sexual orientation, as the McArthurs did not refuse service on those personal grounds: they found that the McArthurs would have refused to make the cake carrying the message for any customer regardless of the customer's sexual orientation. In August 2019, this so-called "gay cake" case was referred to the European Court of Human Rights, which has yet to issue a ruling.

### *2.2.2. Protection of LGBTI people's civil liberties*

The universal guarantee of the rights to freedom of expression, peaceful assembly and association constitutes the foundation of every free and democratic society. Such rights are enshrined in international human rights law, including:

- The International Bill of Human Rights: Article 19 (freedom of expression) and Article 20 (freedom of peaceful assembly and association) of the UDHR, as well as Article 19 (freedom of expression), Article 21 (freedom of peaceful assembly) and Article 22 (freedom of association) of the ICCPR;
- The European Union Charter of Fundamental Rights: Article 11 (freedom of expression) and Article 12 (freedom of peaceful assembly and association);
- The European Convention on Human Rights: Article 10 (freedom of expression) and Article 11 (freedom of peaceful assembly and association);
- The American Convention on Human Rights: Article 13 (freedom of expression), Article 15 (freedom of peaceful assembly) and Article 16 (freedom of association).

International human rights treaties allow for restrictions on freedoms of expression, peaceful assembly and association. However, any restriction must pass a three-pronged test to be deemed permissible (UN Human Rights Committee, 2011[35]; Council of Europe, 2017[36]; IACHR, 2015[26]). More precisely, any restriction must altogether:

- Be lawful, i.e. "prescribed by law". Any interference with the exercise of freedoms of expression, peaceful assembly or association must have a basis in national law. In other words, the national law has to establish the conditions under which the rights may be limited, with sufficient precision so as to give individuals an adequate indication of what qualifies legal behaviour.

- Pursue legitimate aims, i.e. governments may only impose restrictions on the rights to freedom of expression, peaceful assembly and association in pursuit of a limited number of legitimate aims. The exact terms included in this list vary by fundamental rights convention but key grounds for restricting freedoms of expression, peaceful assembly and association relate to the following five dimensions:
  - Protection of national security, e.g. freedom of expression may be restricted when it consists in disclosing classified information;
  - Protection of public order, e.g. freedom of expression may be restricted when it consists in falsely yelling fire in a crowded movie theatre;
  - Protection of public morals, e.g. freedom of expression may be restricted when it consists in displaying pornographic content accessible to the public at large, free of charge and with no age restriction;
  - Protection of the reputation of others, e.g. freedom of expression may be restricted when it consists in falsifying facts to attack a person's honour;
  - Protection of the rights of others: e.g. freedom of expression may be restricted if it consists in intimidating voters in the framework of an electoral campaign.
- Be necessary in a democratic society. This condition has two implications.
  - First, governments must demonstrate that the restrictions placed on the right are necessary, i.e. they aim to avert a real and not only a hypothetical danger. For instance, two of the examples listed above would need to be specified in order to be judged as necessary. Restricting freedom of expression when it consists in revealing classified information will be viewed as critical to avoid a real danger only if the "classified" status is appropriately granted, i.e. applied to information whose disclosure would indeed pose a serious threat to national security. Similarly, restricting freedom of expression when it consists in displaying pornographic content accessible to the public at large will be viewed as necessary only if the term "pornographic" is not abusively used, which implies that it refers to adults engaged in sexual acts intended to cause sexual excitement, rather than merely kissing each other in a non-provocative way.
  - Second, governments must ensure that any restrictive measures fall within the limit of what is acceptable in a "democratic society", that is a society characterised by tolerance, pluralism and broadmindedness.[16] In particular, these restrictive measures must be proportional to the legitimate aim they pursue and be the least intrusive instruments amongst those which might achieve their protective function. This requirement seeks to guarantee that the relation between right and restriction is not reversed, a core characteristic of democracies.

Some countries have sought to justify restrictions to the rights to freedom of expression, peaceful assembly and association of LGBTI people on several grounds, chief of which the grounds of protection of public morals (UN Secretariat General, 2016[37]). These restrictions have recently taken the form of so-called "gay propaganda laws" similar to the provisions adopted by several Russian federal entities as early as 2006, a process which culminated in 2013 with the passage of the federal law "for the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values" (Box 2.4). Yet, gay propaganda laws do not pass the aforementioned three-pronged test, as demonstrated by judgements of the UN Human Rights Committee in charge of monitoring governments' implementation of the International Covenant on Civil and Political Rights (Irina Fedotova v. Russian Federation 2010[17]) and by rulings of the ECtHR (Bayev and others v. Russia 2017[18]).

### Box 2.4. Russia's gay propaganda law

The Russian federal law "for the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values" (Federal Law no. 135-FZ of 29 June 2013) was unanimously approved by the State Duma and signed into law by President Vladimir Putin in 2013. This law aims to protect children from being exposed to content presenting homosexuality as being a norm. It amends two child protection laws (Federal Law no. 124-FZ of 24 July 1998 and Federal Law no. 436-F3 of 29 December 2010) in order to add "information promoting non-traditional sexual relationships" among the list of "information prohibited for dissemination to children". Moreover, the law amends the Code of Administrative Offences of the Russian Federation by adding Article 6.21 devoted to "Promotion of non-traditional sexual relations among minors". Article 6.21 provides: "The promoting of non-traditional sexual relationships among minors, expressed in the dissemination of information aimed at creating in minors a non-traditional sexual orientation, promoting the attractiveness of non-traditional sexual relationships, creating a distorted image of the social equivalence of traditional and non-traditional sexual relationships, or imposing information about non-traditional sexual relationships, arousing interest in such relationships, if these activities do not contain acts punishable under criminal law, shall be subject to the imposition of an administrative fine, ranging from 4 000 to 5 000 roubles for citizens; from 40 000 to 50 000 roubles for officials; and, for legal entities, a fine ranging from 800 000 to 1 000 000 roubles or an administrative suspension of their activities for up to 90 days."

More precisely, these judgements have established that gay propaganda laws impose restrictions that fail to be justified as necessary in a democratic society for two reasons. First, these laws rely on ambiguous terms which may be used to ban any mention of homosexuality in public space. The scope of this limitation is unacceptably large in a democracy supposed to promote tolerance, pluralism and broadmindedness. In the case of Russia for instance, the wording "arousing interest in non-traditional sexual relationships" may include even neutral information on homosexuality. Moreover, the term "among children" is also vague and does not offer clarification of whether the restrictions concern expression in the presence of minors or in any place where minors could be present. Several convictions confirm that Russia's gay propaganda law serves to impose a broad range of limitations on LGBTI people's civil liberties. As an example, a man was fined for holding up a banner with the quote "Homosexuality is not a perversion" in front of the St. Petersburg City Administration, a public place that is not specifically assigned to minors.

Second, countries that pass gay propaganda laws typically invoke two objectives as reasons to restrict freedoms of expression, peaceful assembly and association of LGBTI people: protection of public morals and protection of the rights of others. These stated objectives fall inside the list of legitimate aims mentioned above, but given the way these objectives are defined, none of them appears to be necessary in a democratic society. Concerning the protection of public morals, the vague wording that characterises gay propaganda laws makes clear that the prohibition is not limited to the pornographic display of homosexuality. In other words, public morals are implicitly equated to the values and traditions of the (heterosexual) majority. Such a definition is not permissible in a democracy because it would imply that the exercise by a minority group of the freedoms protected in international human rights treaties is conditional on acceptance by the majority. As put forward by the Human Rights Committee in its general comment on Article 19 of the ICCPR "the concept of morals derives from many social, philosophical and religious traditions", meaning that any limitation imposed for the "purpose of protecting morals must be based on principles not deriving from a single tradition" (UN Human Rights Committee, 2011[35]). The second objective allegedly pursued by anti-gay propaganda laws consists of shielding minors from information that could convey a positive image of homosexuality and, hence, potentially convert them to a "homosexual lifestyle". Yet, there is no scientific evidence suggesting that the mere mention of homosexuality in the public domain would adversely affect children.[19] Therefore, the restrictions imposed

by gay propaganda laws are not necessary since they aim to avert only a hypothetical danger, not a real one.

All in all, international human rights bodies have concluded that gay propaganda laws are discriminatory to the extent that "the authors of the provisions under consideration have not put forward any reasonable and objective criteria to justify the prohibition of "homosexual propaganda" as opposed to "heterosexual propaganda"" (Venice Commission, 2013[38]).[20] Hindering expression promoting LGBTI people's rights, erecting barriers to the organisation of peaceful LGBTI public events such as pride parades, or impeding the registration, operation and access to funding of LGBTI human rights associations under the guise of preserving public morals and protecting children is incompatible with the underlying values of international human rights treaties. It is worthwhile stressing that invoking the protection of public order to ban pride parades or LGBTI human rights associations is judged by international human rights stakeholders as equally unsubstantiated. It is indeed incumbent on public authorities in a democracy to secure the right to freedom of assembly and association of individuals by protecting them from their opponents' physical violence. This protection is particularly necessary when those at risk of retaliation belong to minority groups since their views are more likely to be judged as unpopular by the majority (see Alekseyev v. Russia 2011[21] concerning LGBTI people's freedom of peaceful assembly and Zhdanov and others v. Russia 2019[22] concerning LGBTI people's freedom of association).

### *2.2.3. Protection of LGBTI people against violence*

Governments have an obligation under international human rights law to protect individuals from being arbitrarily deprived of their life by others, as well as from being exposed to torture or other cruel, inhumane or degrading treatment. Such an obligation is clearly stated in:

- The International Bill of Human Rights: Article 3 (right to life) and Article 5 (protection against torture) of the UDHR, as well as Article 6 (right to life) and Article 7 (protection against torture) of the ICCPR;
- The European Union Charter of Fundamental Rights: Article 2 (right to life) and Article 4 (protection against torture);
- The European Convention on Human Rights: Article 2 (right to life) and Article 3 (protection against torture);
- The American Convention on Human Rights: Article 4 (right to life) and Article 5 (protection against torture).

#### *Hate crime laws*

The duty to safeguard the right to be free from violence requires countries to take special measures of protection towards vulnerable groups, such as those aimed to deter hate crimes, i.e. crimes motivated by hatred against marginalised groups of people to which the offender believes the victim belongs. This objective is best achieved, at least as a first step, with the passage of so-called "hate crime laws" which permit authorities to deem acts motivated by bias against a protected list of grounds as an aggravating circumstance, either by defining such an act as a distinct crime or by enhancing punishment of an existing offense. That sexual and gender minorities should be part of the protected groups is unanimously upheld by international human rights stakeholders:

- The European Union (EU) has called for protection of LGBTI persons from violence in an assortment of non-binding resolutions and recommendations (European Parliament, 2014[6]). Moreover, the EU closely monitors the implementation of Directive 2012/29/EU (the Victims' Rights Directive) which ensures that all victims − including those subject to homophobic and transphobic bias motivated crime − receive appropriate information, support and protection and are able to

participate in criminal proceedings. The Directive lays down a set of binding rights for victims and clear obligations on Member countries to respect these rights in practice.

- In 2011, the OHCHR found that violence against LGBT people shows "a high degree of cruelty and brutality", including "beatings, torture, mutilation, castration and sexual assault" (OHCHR, 2011[9]). In 2015, the OHCHR explicitly recommended that states address such violence by "enacting hate crime laws that establish homophobia and transphobia as aggravating factors for purposes of sentencing" (OHCHR, 2015[12]). In 2018, in its General Comment on Article 6 (right to life) of the ICCPR, the Human Rights Committee urged states to take special measures of protection towards groups in situation of vulnerability, including "lesbian, gay, bisexual, transgender and intersex (LGBTI) persons", notably by adopting hate crime laws (UN Human Rights Committee, 2018[39]).
- In 2010, the Committee of Ministers of the Council of Europe recommended that Member countries ensure (i) "effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator" and (ii) "that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance" (CoE Committee of Ministers, 2010[22]). The Parliamentary Assembly has adopted numerous resolutions and recommendations that similarly condemn violence against LGBT persons and advocates the passage of hate crime laws as an important preventative and protective measure (CoE Parliamentary Assembly, 2010[23]; 2013[40]). In 2017, the Commissioner for Human Rights of the Council of Europe explicitly included intersex people in its recommendation about hate crime legislation. It states that "hate crime legislation should be reviewed to ensure that it protects intersex people. Sex characteristics should be included as a specific ground in equal treatment and hate crime legislation or, at least, the ground of sex/gender should be authoritatively interpreted to include sex characteristics as prohibited grounds of discrimination" (CoE Commissioner for Human Rights, 2017[41]).
- In 2015, in its landmark report on violence against LGBTI persons, the Inter-American Commission on Human Rights recommends Member countries to pass hate crime legislation in order to "identify, prosecute, and punish prejudice-based violence against persons due to perceived or actual sexual orientation and gender identity" (IACHR, 2015[26]). These recommendations are further echoed by the 2018 IACHR's report on Recognition of the Rights of LGBTI Persons (IACHR, 2018[27]). In this report, the IACHR recognises that several Member countries "have adopted legislation that specifically criminalises violence based on prejudice against LGBTI persons, or that establishes aggravating circumstances for crimes committed against this population". The IACHR expressly stresses its support to these measures by emphasising that they constitute "a first step towards effectively combating violence perpetrated on the basis of the victims' sexual orientation, gender identity and expression or body diversity."

### *Hate speech laws*

To fully deter hate crimes, it is important that governments also prohibit particularly severe forms of "hate speech". Evidence on the causal relationship between incitement to hatred and hate crime is indeed growing (Mueller and Schwarz, 2017[42]). Article 20(2) of the ICCPR sets forth that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[23] International human rights standards have clarified that "hate speech" provisions should include a broader range of protected characteristics than that initially considered by Article 20(2) of the ICCPR, including sexual orientation, gender identity or sex characteristics. The 2015 joint statement by the OHCHR and UN agencies insists on the importance of hate speech legislation to end violence and discrimination against LGBTI people (OHCHR et al., 2015[14]), as do several milestones documents issued by the Council of Europe (CoE Committee of Ministers, 2010[22]; CoE Parliamentary Assembly, 2010[23]; 2013[40]; CoE Commissioner for Human Rights, 2017[41]) as well as by the OAS (IACHR, 2015[26]; 2018[27]).

The EU has similarly stepped up its efforts to prevent and combat hate speech through Directive 2018/1808, which revises Directive 2010/13/EU (the so-called Audiovisual Media Services Directive). The revision underscores the battle to combat hate speech in all audiovisual content. It notably urges Member countries to ensure that audiovisual media services do not contain incitement to violence or hatred, based on the grounds listed in Article 21 of the Charter of Fundamental Rights, including sexual orientation.

### Box 2.5. Drawing the line between freedom of expression and hate speech

The prohibition in Article 20(2) of the ICCPR requires that:

- The speaker addresses a public audience, and her/his expression includes advocacy of hatred targeting a protected group based on protected characteristics, constituting incitement to discrimination, hostility or violence.
- The speaker specifically intends to engage in advocacy of discriminatory hatred and intends for or has knowledge of the likelihood of the audience being incited to a discrimination, hostility or violence. Recklessness and negligence are not sufficient as a standard of intent, meaning that consideration should be given to protecting communications that are simply ill-judged or flippant (such as a bad joke), or where the intent is more nuanced (to satire, provoke thought or challenge the status quo, including through art).
- The danger of the audience actually being incited to a proscribed act as a consequence of the advocacy of hatred, is likely and imminent. There must be a reasonable probability of discrimination, hostility or violence occurring as a direct consequence of the expression, but the proscribed outcome itself needs not actually occur. Evaluating whether this condition is fulfilled should include considering:
  - Whether the audience understands the advocacy of hatred as a call to acts of discrimination, hostility or violence;
  - Whether the speaker was in the position to influence the audience. Special considerations should be made when the speaker is a politician or a prominent member of a political party, a religious leader, a teacher, or a person of similar status due to the stronger attention and influence these individuals exert over others;
  - Whether the audience had the means to resort to acts of discrimination, hostility or violence;
  - Recent incidences of the targeted group suffering discrimination, hostility or violence as the result of incitement;
  - The length of time that passes between the speech and the time when discrimination, hostility or violence could take place is not so long to bring into doubt the causative impact of the expression.

Source: UN Rabat Plan of Action (OHCHR, 2013[43]) as well as the following publications by Article 19: The Camden Principles on Freedom of Expression and Equality (Article 19, 2009[44]), Prohibiting incitement to discrimination, hostility or violence (Article 19, 2012[45]) and 'Hate Speech' Explained. A Toolkit (Article 19, 2015[46]).

Of course, it is essential that hate speech legislation be not used to justify inappropriate restrictions on the right to freedom of expression. This objective implies that any limitation on hate speech passes the three-pronged test described in Section 2.2.2, meaning that it must (i) be prescribed by law, (ii) pursue legitimate aims and (iii) be necessary in a democratic society. Box 2.5 provides guidelines on how to concretely fulfil this requirement, based on the UN Rabat Plan of Action on the prohibition of incitement to hatred (OHCHR, 2013[43]), as well as the milestone documents produced by Article 19[24], in collaboration with various experts in international human rights law, including high-level UN officials.

For hate crime and hate speech legislation to be fully effective, governments should repeal any legal provisions that could be used to justify violence against LGBTI people, chief of which are those that criminalise homosexuality (see 2.3.1). But governments should also curtail the effectiveness of some legal tactics such as the "gay and trans panic defence" whereby the perpetrator of an offense claims that their victim's sexual orientation or gender identity not only explains but also excuses their loss of self-control and subsequent assault. Legislative action to combat this tactic should include: "(i) Requiring courts in any criminal trial or proceeding, upon the request of a party, to instruct the jury not to let bias, sympathy, prejudice, or public opinion influence its decision about the victims, witnesses, or defendants based upon sexual orientation or gender identity; and (ii) Specifying that neither a non-violent sexual advance, nor the discovery of a person's sex or gender identity, constitutes legally adequate provocation to mitigate the crime of murder to manslaughter, or to mitigate the severity of any non-capital crime" (American Bar Association, 2013[47]).

### *2.2.4. Protection of LGBTI people fleeing persecution abroad*

International refugee law is rooted in the UN Convention Relating to the Status of Refugees (1951), also known as the Refugee Convention. The Refugee Convention defines who a refugee is, thereby building upon Article 14 of the Universal Declaration of Human Rights which recognises the right to everyone "to seek and to enjoy in other countries asylum from persecution."[25] In 1967 the Refugee Convention was complemented by the UN Protocol Relating to the Status of Refugees. The Refugee Convention had restricted refugee status to those whose circumstances had come about "as a result of events occurring before 1 January 1951." It also had given signatory states the choice to interpret such events as "occurring in Europe or elsewhere." The 1967 Protocol removed these temporal and geographic restrictions. Consequently, under international refugee law, a refugee is defined as "any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[26] All OECD Member countries are parties to the 1967 Protocol.

In 2012, the UN High Commissioner for Refugees (UNHCR) clarified that lesbians, gay men, bisexuals, transgender as well as intersex persons are members of a "particular social groups", which is defined as "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society." This characteristic, the UNHCR recalls, "will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights" (UNHCR, 2012[48])

In this setting, international human rights stakeholders encourage countries to explicitly recognise persecution (or a well-founded fear of persecution) based on sexual orientation, gender identity or sex characteristics as a valid ground for granting asylum. This approach is essential to protect LGBTI people from violence, in a context where a substantial number of countries still engage in severe human rights violation against sexual and gender minorities (OHCHR et al., 2015[14]; CoE Commissioner for Human Rights, 2018[49]; IACHR, 2015[26]). The normative framework established by the Europe Union is particularly binding. Member countries are obliged to transpose in their national laws a set of Directives that notably aim to protect LGB and transgender asylum seekers. Moreover, the Court of Justice of the European Union (CJEU) has issued a number of rulings that clarify protections for LGBTI asylum seekers (Box 2.6).

### Box 2.6. The European Union normative framework to protect LGBTI people fleeing persecution abroad

The European Parliament and Council of the European Union have adopted several directives that clarify the protection of LGBTI asylum seekers in the European Union. Directive 2004/83/EC conveys that Member countries have an obligation to take sexual orientation into account when assessing the reasons for persecution of asylum seekers. Although gender identity is not explicitly referenced, the wording refers to "gender related aspects", suggesting that "membership of a particular social group" can also be interpreted as including gender identity. Directive 2011/95/EU revises and replaces Directive 2004/83/EC. It explicitly states that asylum persecution based on "membership of a particular social group" includes the grounds of sexual orientation and gender identity, which must be given due consideration when assessing an asylum seeker's well-founded fear of persecution. Finally, Directive 2013/32/EU on the procedures for granting international protection calls for interviewers performing assessments to competently take into consideration the sexual orientation and gender identity of the interviewee. All these directives establish legal standards and policies on how best to support and protect the rights of LGBTI asylum seekers, and Member countries have an obligation to transpose them into national law.[1]

In the same vein, the Court of Justice of the European Union (CJEU) has issued a number of rulings that clarify protections for LGBTI asylum seekers. In the case of Minister voor Immigratie en Asiel v. X and Y and Z v.Minister voor Immigratie en Asiel (2013), the CJEU found that homosexual asylum seekers constitute a "particular social group" under 2004/83/EC that, if returned to their country of origin, may be persecuted or sanctioned through imprisonment on account of their sexual orientation. The Court further asserted that LGBTI persons should not be expected to conceal their sexual orientation or gender identity to escape human rights violations, should they be returned to the countries from which they originated. In the case of A and Others v. Staatssecretaris van Veiligheid en Justitie (2014), the CJEU ruled that when determining the credibility of the declared sexual orientation of an asylum seeker, national authorities are prohibited from engaging in detailed questioning about the sexual practices of asylum applicants or submiting them to any "tests" to establish their homosexuality, because such evidence would of its nature infringe human dignity. Finally, citing Directive 2011/95/EU in the case of F. v. Bevándorlási es Állampolgársági Hivatal (2018), the CJEU found an asylum seeker may not be subjected to a psychological test in order to determine his sexual orientation. Performing such a test constitutes a disproportionate interference in the private life of the asylum seeker. While national authorities can commission the report of an expert to determine the asylum seeker's need for protection and credibility assessment, they are prohibited from doing so in a way that violates fundamental rights guaranteed by the Charter of Fundamental rights of the EU. Further, the national authorities and courts are prohibited from basing their decision exclusively on the report conclusions or being considered bound by it.

[1] Denmark is not bound by either directives due to Protocol 22 on its position annexed to the Lisbon Treaty. See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12016E/PRO/22.

### *2.2.5. Establishment of an LGBTI-inclusive equality body, ombudsman or human rights commission*

International human rights stakeholders have acknowledged the need for independent national human rights institutions, e.g. equality bodies, ombudspersons or human rights commissions, in order to implement equal treatment legislation. For instance, the Paris Principles that were adopted in 1993 by the UN General Assembly encourage states to establish a national structure in charge of promoting and

protecting human rights. The first component of this mission entails ensuring "the harmonization of national legislation, regulations and practices with the international human rights instruments to which the state is a party, and their effective implementation". The second component of this mission indicates that the national institution be endowed with a "quasi-jurisdictional competence", which means that it should be authorised to hear and consider complaints and petitions brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions or any other representative organisations (UN General Assembly, 1993[50]). The Commissioner for Human Rights of the Council of Europe further develops the critical role of national human rights institutions by distinguishing five complementary fields of expertise (CoE Commissioner for Human Rights, 2011[51]):

- Promotion: national human rights institutions (NHRIs) stimulate and inform a culture of compliance with the legislation among employers, service providers and policy makers, and support their capacity to put in place and implement equality and diversity policies, procedures and practices;
- Enforcement: NHRIs enable people to exercise their rights under equal treatment legislation including through provision of assistance to those experiencing discrimination;
- Communication: NHRIs contribute to and inform a culture of rights within society;
- Research: NHRIs develop a knowledge base on issues of discrimination and inequality by conducting and commissioning research and surveys;
- Multiplier effect: NHRIs encourage and enable a wide range of stakeholder organisations to take action on equality and discrimination.

Similarly, the 2017-21 Strategic Plan of the IACHR includes the strengthening of national human rights institutions among its key objectives (IACHR, 2017[52]).

International human rights stakeholders continue to repeatedly stress that the mandate of national human rights institutions should explicitly cover equal treatment of LGBTI people. EU Member countries are requested to "designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin" (Directive 2000/43/EC), as well as "on the grounds of sex" (Directive 2004/113/ and Directive 2006/54/EC). Although "sexual orientation", "gender identity" and "sex characteristics" are not explicitly mentioned in these directives, the EU exerts pressure on its members to implement antidiscrimination legislation protecting LGBTI people (Box 2.2), which has facilitated the inclusion of these grounds among the ones for which national equality bodies are responsible. The Commissioner for Human Rights of the Council of Europe similarly acknowledges that national human rights institutions "possess great potential for dealing with complaints on grounds of sexual orientation and gender identity as well as promoting the enjoyment of human rights by LGBT persons more generally" (CoE Commissioner for Human Rights, 2011[24]). Importantly, the Commissioner has also recommended that ombudspersons, equality bodies and human rights commissions be mandated to work on issues related to intersex persons (CoE Commissioner for Human Rights, 2017[41]). Consistent with these stances, the European Union and the Council of Europe have developed Equinet, the European Network for Equality Bodies that plays a critical role in coordinating, supporting and offering legal interpretation and implementation guidance for equality bodies across 36 different countries in Europe, including all EU Member countries. Within this network, discrimination based on sexual orientation and gender identity is explicitly presented as a type of discrimination equality bodies should combat.[27]

The United Nations and the Organization of American States are also active in encouraging national human rights institutions to protect LGBTI people. The OHCHR emphasises that they should combat "all forms of human rights violations on the basis of sexual orientation, gender identity and expression, and sex characteristics" (OHCHR, 2016[13]). Similarly, the IACHR expressly lists LGBTI people among the priority groups whose inclusion is targeted by the strengthening of national human rights institutions (IACHR, 2017[52]).

## 2.3. LGBTI-inclusive laws: Group-specific provisions

The general provisions presented in Section 2.2 are equally important for the inclusion of lesbians, gays, bisexuals, transgender and intersex individuals. But subgroups within the LGBTI population also face challenges that are unique to them. General provisions should therefore be complemented by provisions that seek to address these group-specific barriers. Group-specific provisions can be decomposed into two categories: those that aim to ensure equal treatment of LGB individuals ("LGB-specific provisions" hereafter) and those that aim to ensure equal treatment of transgender and intersex individuals ("TI-specific provisions" hereafter).

### *2.3.1. LGB-specific provisions*

Provisions flowing from international human rights standards that aim to foster equal treatment of lesbians, gay men and bisexuals more specifically can be broken down into five components: (i) equal treatment of same-sex and different-sex consensual sexual acts; (ii) ban on conversion therapy; (iii) legal recognition of same-sex partnerships; (iv) equal adoption rights, and (v) equal access to assisted reproductive technology.

#### *Equal treatment of same-sex and different-sex consensual sexual acts*

Two types of laws violate equal treatment of consensual same-sex and different-sex sexual acts. The first type consists of criminalising same-sex conducts between consenting adults by punishing acts against "order of nature", "morality", "decency" or acts of "debauchery". The second type of laws harmful to the equality of same-sex and different-sex consensual sexual acts establishes a higher age of consent for homosexual consensual acts. In such instances, young persons engaging in homosexual conduct are subject to criminal penalties that do not apply to young persons of the same age that engage in heterosexual conduct.

These laws obviously violate individuals' right to life whenever same-sex acts between consenting adults are criminalised with the death penalty. They also breach the right to equal treatment and freedom from discrimination and constitute an impermissible infringement of the right to privacy that international human rights law strongly defends. Article 12 of the UDHR, Article 17 of the ICCPR, Article 7 of the CFR, Article 8 of the ECHR and Article 11 of the ACHR, all recall that no one shall be subjected to arbitrary interference with their privacy, family, home or correspondence, nor to attacks upon their honour and reputation. Even in countries where these laws are passed but not enforced, their existence fosters an environment of intolerance, hostility and violence against LGBTI people by strengthening prejudice, stigmatisation and legitimisation of discrimination against them (OHCHR, 2011[9]).

Landmark publications from international human rights bodies clearly emphasise governments' obligation to repeal laws that criminalise same-sex sexual activities and set unequal ages of consent between homosexual and heterosexual consensual. This obligation has also been stressed in a series of rulings (Box 2.7).

### Box 2.7. Rulings by international human rights stakeholders urging Member countries to ensure equal treatment of same-sex and different-sex consensual sexual acts

In 1994, in the milestone decision of Toonen v. Australia, the Human Rights Committee found that the State's criminal code, which criminalised adult, consensual same-sex relations, interfered with and violated the individual's right to privacy (ICCPR, Article 17), even if its provisions had not been enforced for a decade. The Committee further ruled that sexual orientation is a ground protected from discrimination under the term "other status" in Article 26 and Article 2 of the ICCPR. Additionally, the

Committee also rejected the State's argument that criminalisation of homosexual practices is reasonably justified as a means of protecting public health or morals.

The European Court of Human Rights has issued several prominent rulings related to same-sex sexual acts. In the 1981 landmark ruling Dudgeon v. United Kingdom, the criminalisation of homosexual acts between two consenting adult males in England, Wales and Northern Ireland was found to violate the right to respect for private and family life under Article 8 of the Convention. In this ruling the Court emphasised that there is not a "pressing social need" for such acts to be criminalised nor sufficient evidence of the harm to vulnerable segments of society, and that though members of the public may regard homosexuality and same-sex acts as immoral, this does not warrant the imposition of penal sanctions between the relations of consenting adults. In 2001, in the case of Sutherland v. the United Kingdom, the Court found that the existence of different age limits of consent for consensual same-sex and different-sex acts constitutes discrimination (Article 14) in conjunction with a violation of the right to respect private and family life (Article 8) and, therefore, found that the same-sex age of consent should be equivalent to that of the different-sex age of consent. Similarly, in 2003, in the case of L. and V. v. Austria and S.L. v. Austria, the Court found that the state's imposition of a higher age of consent for male homosexual relations than for heterosexual or lesbian relations violated the Convention's prohibition of discrimination (Article 14) in conjunction with the right to respect for private life (Article 8).

In the case of Flor Freire v. Ecuador (2013), the Inter-American Court on Human Rights deemed that the state's distinction between sanctions for homosexual acts between consenting adults compared to those for heterosexual acts violated the prohibition of discrimination based on sexual orientation under Article 1(1) of the American Convention on Human Rights.

### *Ban on conversion therapy*

So-called "conversion therapy" refers to practices that aim to change an individual's sexual orientation from homosexual or bisexual to heterosexual.[28] Such practices encompass a wide range of approaches: individual or group talk therapies where the "patient" is repeatedly told that there is no such thing as homosexuality, that everyone is born heterosexual, that same-sex attraction is the result of childhood trauma or dysfunctional family relationships, etc.; spiritual interventions where the "patient" is treated as a demonic person in need for exorcism; more invasive or extreme physical methods such as aversion therapy (electric shocks, nausea-inducing medications), beating, detention, or "corrective" rape thought to conform the victims' sexual orientation to heterosexual norms. These techniques can be performed by perpetrators as diverse as medical or mental health professionals, religious personnel, traditional or spiritual healers or practitioners, or other entities such as social or self-help groups (OutRight Action International, 2019[53]).

Conversion therapy is rooted in the belief (i) that LGB people suffer from a pathological condition and (ii) that same-sex sexual orientation can be cured. Neither of these assumptions is true. Homosexuality is not pathological. It was officially declassified nationwide as a mental disorder as early as 1973, when the third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM) concluded that same-sex sexual attraction was part of the normal spectrum of human sexuality. This important move towards depathologising same-sex sexual orientation was confirmed in 1992, when the World Health Organization removed homosexuality from the tenth edition of the International Classification of Diseases (ICD). Homosexuality is not repressible or changeable either. In 2009, the American Psychological Association (APA) Task Force on Appropriate Therapeutic Responses to Sexual Orientation conducted a systematic review of the peer-reviewed journal literature on sexual orientation change efforts (SOCE) and came to the conclusion that "the results of scientifically valid research indicate that it is unlikely that individuals will be able to reduce same-sex attractions or increase

other-sex sexual attractions through SOCE" (American Psychological Association, 2009[54]). Consistent with this conclusion, recent research shows that sexual orientation is determined by a complex mix of genetic and environmental influences that are beyond individuals' control (Ganna et al., 2019[55]).

Yet, despite their extremely harmful effects, conversion therapies still occur everywhere in the world. They typically target minors whose consent is obtained through coercive or deceptive means. Among "survivors" utter denial and attempts at erasure of their true selves by those closest to them generate profound feelings of self-hatred, depression, and suicidality (OutRight Action International, 2019[53]).

Conversion therapies are strongly condemned by international human rights stakeholders. For instance, in its 2015 report, the OHCHR writes: "There is mounting concern about so-called 'conversion therapies' intended to 'cure' homosexual attraction. Such therapies have been found to be unethical, unscientific, and ineffective and, in some instances, tantamount to torture" (OHCHR, 2015[12]). In 2018, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity issued a report in which he reiterated concerns about the perpetration of conversion therapy and recommended that countries "ban so-called conversion therapy" (UNHRC, 2018[56]). Similarly, the resolution of January 2019 issued by the European Parliament is the first to "strongly condemn the promotion and practice of LGBTI conversion therapies, and encourage Member countries to criminalise such practices" (European Parliament, 2019[57]).

### *Legal recognition of same-sex partnerships*

Legal recognition of same-sex partnerships primarily aims to avoid discrimination against same-sex couples in access to pecuniary rights in a wide range of areas including taxation, social benefits, health care, tenancy, property, pension or inheritance. Such recognition takes three different forms ranging from basic, to advanced, to full-fledged. *Basic* legal recognition of same-sex partnerships consists of legalising same-sex *de facto* partnership (also called cohabitation) in order to grant cohabitating same-sex partners with at least some of the rights granted to cohabitating different-sex partners. *Advanced* legal recognition of same-sex partnerships entails legalising civil/registered/domestic partnership (also called civil union) to offer a wider set of rights to same-sex couples. Yet, these types of partnerships typically fail to grant to same-sex partners the same rights as those enjoyed by different-sex married couples: homosexual partners in these partnerships all too often have fewer entitlements than heterosexual spouses, in particular when it comes to inheritance rights even after a lifetime of sharing and acquiring property.[29] In the absence of same-sex marriage, this situation constitutes indirect discrimination on the grounds of sexual orientation to the extent that same-sex partners cannot access the rights reserved to married couples because the type of partnership that would allow them to do so is not legal. Consequently, *full-fledged* legal recognition of same-sex partnerships involves legalising same-sex marriage.

International human rights stakeholders have reiterated that there should be no difference in treatment between same-sex and different-sex couples (OHCHR, 2016[13]; CoE Parliamentary Assembly, 2009[58]; IACHR, 2017[31]). Notably, in jurisdictions where unmarried heterosexual couples are entitled to certain pecuniary benefits, those same benefits should be extended to unmarried same-sex couples (e.g. Young v. Australia 1999 (UN Human Rights Committee, 2003[59]), Karner v. Austria 2003[30] and P.B. and J.S. v. Austria 2010[31]). Similarly, civil partnerships for same-sex couples should be created whenever they exist for different-sex couples (e.g. Valliatanos and others v. Greece 2013[32]). Moreover, whenever same-sex marriage is not legal, countries should provide pecuniary benefits and entitlements equivalent to those associated with marriage (e.g. Oliari and others v. Italy 2015[33]).

EU members have no obligation to legalise same-sex marriage. Article 9 of the European Union Charter of Fundamental Rights provides that "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." Yet, EU members are exposed to increased pressure to recognise same-sex partnerships – same-sex marriage in particular – following the decision of the Court of Justice of the European Union (CJEU) in the so-called "Coman case" (2018)

(Box 2.8). In this case, the CJEU ruled that the term "spouse" in the regulation of freedom of movement in the European Union is "gender-neutral" and is inclusive of a "same-sex spouse", meaning that all EU Member countries are obliged to treat the same-sex spouse of an EU citizen just as they would a different-sex spouse – irrespective of whether or not the Member countries' laws provide the possibilities for same-sex marriage or civil partnership. In other words, EU countries where same-sex partnerships are not recognised are requested to amend their national laws to provide a legal framework ensuring proper implementation of the CJEU's ruling.

### Box 2.8. The Coman case (2018)

The Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne is a 2018 case of the Court of Justice of the European Union (CJEU) that involved Adrian Coman, a Romanian citizen who married his husband (a US citizen) in Belgium while residing there. Upon subsequently moving back to Romania, the couple found that Romania did not recognise their marriage, and a residence permit for the American spouse was denied by authorities. A legal challenge by Coman made its way through the Romanian courts until, in 2016, the CJEU was asked by the Romanian Constitutional Court to interpret the word 'spouse' in the context of EU law on freedom of movement.

The CJEU's ruling affirmed residency rights to same-sex couples in EU countries that do not recognise same-sex unions, if at least one partner is an EU citizen and if the marriage was legally performed in an EU Member country.

The international human rights law that flows from the International Bill of Human Rights and from the European Convention on Human Rights (ECHR) has not yet created an obligation on countries to allow same-sex couples to marry. Article 16 of the UDHR, Article 23 of the ICCPR and Article 12 of the ECHR define a right to marriage specifically for "men and women", a wording that, at the time of the writing of these human rights instruments, deliberately aimed to grant the right to marry only to partners of opposite biological sex.[34] This original meaning was recalled by the UN Human Rights Committee in Joslin v. New Zealand 2002 and by the ECtHR in Schalk and Kopf v. Austria 2010, two milestone cases in which the UN Human Rights Committee and the ECtHR rejected the claim that marriage equality could be grounded in the International Bill of Human Rights or in the ECHR. However, admitting that these Conventions are living instruments which must be interpreted in the light of present-day conditions, the human rights bodies of both the United Nations and the Council of Europe encourage countries to increasingly interpret the right to marry set forth in their Conventions as simply referring to "both sexes having an equal right to marry, rather than stipulating they must marry someone of the opposite sex" − see for instance OHCHR (2018[60]) and Schalk and Kopf v. Austria 2010. Indeed, as stated by the CoE Commissioner for Human Rights, "genuine commitment to full equality" requires that countries "seriously consider opening up civil marriage to same-sex couples" (CoE Commissioner for Human Rights, 2017[61]). Not only does marriage equality ensure full-fledged equal treatment of same-sex couples in accessing pecuniary rights, it also guarantees that their partnership is endowed with the same social significance as that attached to heterosexual marriage. Marriage is indeed a social institution with a long history that is viewed as more "symbolic" than civil partnerships (EJTN, 2018[62]). Researchers have recently confirmed the benefits for same-sex couples of being able to "upgrade" their civil partnership to a civil marriage, even in countries like the Netherlands where civil partnership and civil marriage are strictly similar in terms of rights and obligations. They show that same-sex partners who transformed their civil partnership into marriage had a substantially lower separation rate following this change than similar partners who stayed in a civil partnership, thereby suggesting that the symbolism of marriage is real and exerts a stabilising effect on same-sex partnerships (Chen and van Ours, 2019[63]).

Like the human rights bodies of the United Nations and the Council of Europe, the Organization of American States recognises that full equality between same-sex and different-sex partnerships can only be achieved with marriage equality. But this regional organisation has taken a step further in favour of same-sex marriage. In its 2017 advisory opinion, the IACHR ruled that signatories to the American Convention on Human Rights are *required* to allow same-sex couples to marry. Although Article 17 of the Convention adopts a similar wording as the human rights instruments of the United Nations and the Council Europe, stating that "the right of men and women of marriageable age to marry and to raise a family shall be recognised", the IACHR endorses a more progressive interpretation by affirming that Article 17 is not confined to a particular family model. According to the IACHR: "States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination relative to those that are formed by heterosexual couples" (IACHR, 2017[31]).

Legalising same-sex marriage entails benefits that extend beyond LGB individuals. Indeed, it prevents married transgender individuals from being forced to divorce in order to change their gender marker on their birth certificate and/or other identity documents. In most countries, legal gender recognition was originally conditioned on the transgender applicant to be unmarried. This *de facto* forced divorce requirement has since been removed in every country where same-sex marriage has become legal. But it is still in force in countries that do not provide for marriage equality.

### *Equal adoption rights*

Articles 16 of the UDHR, 23 of the ICCPR, 9 of the CFR, 12 of the ECHR and 17 of the ACHR recognise the right to not only marry, but also to found a family, a provision that is being re-interpreted so as to ensure the right to respect for private and family life for all people, including same-sex couples (OHCHR, 2018[60]). This evolution notably entails removing discriminatory restrictions in access to parenthood based on sexual orientation (OHCHR, 2016[13]).

Removing such restrictions first implies ensuring equal adoption rights for different-sex and same-sex couples (CoE Parliamentary Assembly, 2018[64]). In all countries, different-sex partners enjoy adoption rights, through joint-adoption by the two partners,[35] and second-parent adoption by one of the two partners. The latter type of adoption occurs when one of the two partners becomes the second *legal* parent of her/his partner's biological or adopted children, without terminating the legal parent status of her/his partner.[36] Second-parent adoption is critical for the well-being of the children raised by the two partners. In its absence, the children and the non-legal parent are deprived of rights if the partner who is the legal parent dies, or in the case of divorce, separation, or other circumstances that would bar the legal parent from carrying out parental responsibilities.

Discriminating against same-sex couples in access to adoption rights would only be justified if children were worse off when raised by same-sex rather than different-sex parents. Indeed, international human rights bodies have repeatedly stressed that there is no such thing as the right *to* a child. In other words, adoption must be viewed as "providing a child with a family, not a family with a child" (Pini and others v. Romania 2004), which implies that the child's best interest be prioritised whenever her interest competes with the interest of the partners who want to adopt. Yet, compelling empirical evidence shows no well-being deficit among children living with same-sex parents. Quite the contrary, these children are characterised by better education and health outcomes (Box 2.9).

### Box 2.9. Children are not worse off when raised by same-sex rather than different-sex parents (they are in fact better off)

Analysing how children fare with different-sex and same-sex parents is tricky since families with two different-sex parents are hardly comparable to families with two same-sex parents. Same-sex couples are less likely to be married than heterosexual couples, due to persistent or only recently removed legal barriers to same-sex marriage. Moreover, contrary to heterosexual partners, both homosexual partners cannot be biologically related to their children. In fact, at least until recently, most children being raised by same-sex parents were born to opposite-sex parents, one of whom is now in a same-sex relationship (Gates, 2015[65]). In other words, one of the same-sex parents is their biological parent, while the other is their stepparent (or their adopted parent in case second-parent adoption has occurred). The remaining set of children raised by same-sex parents have been either jointly adopted or conceived through artificial reproductive technology.

If not neutralised, these differences in family type can introduce statistical bias leading to finding a well-being deficit among children raised by same-sex parents. Same-sex parents' lower access to marriage is conducive to greater family instability and, hence, lower health and educational achievements among their children. Moreover, children of same-sex parents who originate from previous heterosexual marriages have typically undergone a parental breakup that can have negative repercussions on their psychosocial development. Finally, jointly adopted children and children conceived through artificial reproductive technology may suffer from living apart from at least one of their biological parents (Valfort, 2017[66]).

Due to data gaps, only a few studies have compared children in same-sex and different-sex households of similar family type, based on representative or administrative data. They all point to better education and health outcomes for children of same-sex couples. In the US, representative data show that grade repetition is lower among children from previous heterosexual relationships living with same-sex married parents rather than different-sex married parents (Watkins, 2018[67]). In the Netherlands, which became the first country in the world to legalise same-sex marriage in 2001, children raised by same-sex parents from their birth (who were therefore likely conceived through assisted reproductive technology) show substantially higher standardised test scores at the end of primary school than children raised by different-sex parents from birth. Based on administrative data, this result holds even after controlling for differences in socio-economic status across same-sex and different-sex parents. Indeed, given the time-consuming and costly procedures for same-sex couples to procreate through artificial reproductive technology, those who rely on such technology typically have higher levels of income and education and are older than different-sex biological parents (Mazrekaj, De Witte and Cabus, 2019[68]). Finally, based on Swedish administrative data that allow for tracking children from birth until age ten, children of lesbian couples conceived through artificial reproductive technology have a lower probability of diseases of the respiratory system until age ten than biological children of heterosexual couples, despite the fact that their birth weight is lower due to their exposure to fertility treatment (Aldén, Björklund and Hammarstedt, 2017[69]).

These positive results suggest that same-sex parents overinvest in their children's education in order to compensate for the unique stressors faced by same-sex families, including persistent stigma from society. Evidence is consistent with this supposition as same-sex parents spend more time with their children than different-sex parents. Women (regardless of their partners' sex) and partnered gay men engage in a similar amount of child-focused time with children (roughly 100 minutes per day). By contrast, partnered heterosexual men dedicate less than one hour to their children, on average (Prickett, Martin-Storey and Crosnoe, 2015[70]). The higher education and health outcomes of children of same-sex parents conceived through assisted reproductive technology (relative to biological children

of different-sex parents) may also reflect that same-sex parents who rely on this technology deliberatively choose to be parents. As stressed by the sociologist Michael Rosenfeld, "same-sex couples cannot become parents through misuse of, or failure of birth control as heterosexual couples can. Parenthood is more difficult to achieve for same-sex couples than for heterosexual couples, which implies a stronger selection effect for same-sex parents. If gays and lesbians have to work harder to become parents, perhaps those gays and lesbians who do become parents are, on average, more dedicated to the hard work of parenting than their heterosexual peers, and this could be beneficial for their children" (Rosenfeld, 2010[71]).

Consistent with this finding, international human rights courts have issued a number of rulings that establish equal parental rights for same-sex couples. In Europe, this trend started as early as 1999, with the case of Salgueiro da Silva Mouta v. Portugal in which the applicant, a gay man living with another man, was prevented by his ex-wife from visiting his daughter, in breach of an agreement reached at the time of their divorce. The European Court on Human Rights found that the state's refusal to grant custody and visitation to a parent living in a homosexual relationship violated the right to respect for family (Article 8) in conjunction with the prohibition against discrimination (Article 14) as guaranteed by the European Convention on Human Rights. Two consistent rulings concerning adoption rights followed. In E.B. v. France 2008 the Court held that, in the context of the French law that allows single persons to adopt a child, the refusal to grant approval for the purposes of adoption to an applicant because she was living with another woman "made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention". In X and others v. Austria 2013, the Court ruled that the impossibility of second-parent adoption being extended to an unmarried same-sex couple when state law provided this right to unmarried different-sex couples, constituted a violation of the prohibition of discrimination.

### *Equal access to assisted reproductive technology*

Removing discriminatory restrictions in access to parenthood does not only imply equal adoption rights across different-sex and same-sex couples. This objective also entails equal access to assisted reproductive technology (ART) (CoE Parliamentary Assembly, 2018[64]). In several countries, infertile different-sex couples have access to medically assisted insemination using sperm of a donor, or to *in vitro* fertilisation using donated sperm and/or egg. In a few countries, infertile different-sex couples in which the woman is unable to carry children on her own are also granted access to surrogacy.[37]

To the extent that there is no such thing as the right to a child, it is up to each country to legalise assisted reproductive technology. However, the principle of non-discrimination enshrined in international human rights law requires equal treatment across different-sex and same-sex couples in access to such technology, unless there is strong evidence showing that children raised by same-sex rather than different-sex parents are worse off. In other words, because empirical investigations in fact point to the opposite result (Box 2.9), access to assisted reproductive technology should be legal for same-sex couples as soon as this access is legal for different-sex couples.

Finally, equal treatment of same-sex and different-sex couples in access to ART should imply that automatic co-parent recognition in this setting be non-discriminatory. In other words, the same-sex partner of the parent who gives birth through medically assisted insemination or *in vitro* fertilisation should be automatically recognised as the second legal parent, as is the male partner of a woman who procreates through these techniques (CoE Parliamentary Assembly, 2018[64]).

### *2.3.2. TI-specific provisions*

Provisions flowing from international human rights standards that seek to address the unique challenges faced by transgender and intersex individuals aim at the following three objectives: (i) depathologising being transgender; (ii) allowing a non-binary gender option on birth certificates and other identity documents to better include non-binary transgender and intersex people; (iii) postponing medically unnecessary sex-normalising treatment or surgery on intersex minors until they can provide informed consent.

#### *Depathologising being transgender*

In 2016, various United Nations bodies together with the Commissioner for Human Rights of the Council of Europe, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights issued a joint statement that recalled that being lesbian, gay, bisexual and transgender "is part of the rich diversity of human nature" and that pathologisation of LGBT adults and children, i.e. branding them as ill based on their sexual orientation or gender identity, should be stopped. In particular, the joint statement expressed deep concern that "transgender children and adults continue to be pathologised based on international and national medical classifications" (OHCHR et al., 2016[72]).

Depathologising being transgender entails three policy actions. The first of these policy actions consists in not categorising being transgender as a mental illness in national clinical classification. This measure was first advocated by the European Parliament in its 2014 resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, where it urged the European Commission to "continue working within the World Health Organization to withdraw gender identity disorders from the list of mental and behavioural disorders and to ensure a non-pathologising reclassification in the negotiations on the 11th version of the International Classification of Diseases (ICD-11)" (European Parliament, 2014[6]). In 2019, the Member states of the World Health Organization adopted ICD-11 that indeed removes "gender incongruence", the terminology used to refer to transgender identity, from the list of mental health disorders. ICD-11 is planned to come into effect in all Member countries on 1 January 2022. However, this important move towards depathologising being transgender might not be followed by significant shifts at the national level. The implementation date is indicative, not mandatory, meaning that Member states are free to adjust to ICD-11 at their own pace.

The second policy implication of depathologising being transgender consists of permitting transgender people to change their gender marker in the civil registry, i.e. the elements such as sex at birth and first name that reveal an individual's gender. To the extent that being transgender is *not* a mental disorder, a person whose gender identity is at odds with their sex a birth should not receive psychiatric therapy for the purpose of re-aligning their self-perceived gender with their body. Rather, transgender individuals should be entitled to live as who they are and, hence, change their gender marker on their birth certificate and other identity documents. Ensuring that legal gender matches gender identity is essential for transgender people to live a life of dignity and respect. With no legal gender recognition, navigating everyday transactions (e.g. picking up a parcel at the post office), accessing accommodation, education, employment, and health care, travelling (e.g. boarding a plane), or even lodging a harassment complaint can become a repeated source of harassment, unfounded suspicion, and even violence. The need to legally recognise the gender identity of transgender people has been stated by human rights stakeholders on several occasions. In particular, in the case of B. v France 1992, the European Court of Human Rights found that the state's lack of legal recognition of the new gender identity of a male-to-female transsexual person constituted a violation of the right to respect for private life (Article 8 of the ECHR), and had placed the individual in a "daily situation which was not compatible with the respect due to her private life."

Finally, depathologising being transgender entails allowing transgender people to change their gender marker on birth certificate and other identity documents without having to meet medical requirements. Yet, because they view transgender identity as pathological, many countries condition legal gender recognition

on eugenic obligations such as sterilisation and/or sex-reassignment surgery or treatments that typically lead to infertility. Most countries also request a psychiatric diagnosis confirming the medical condition of the transgender person. In 2018, the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity strongly condemned that legal gender recognition procedures regularly force transgender people into "involuntary psychiatric evaluations, unwanted surgeries, sterilisation or other coercive medical procedures, often justified by discriminatory medical classifications" (UNHRC, 2018[56]). Council of Europe's bodies are similarly active in promoting legal gender recognition based on self-determination, i.e. the principle that transgender people's declaration of their gender identity for the purpose of obtaining gender recognition should not require validation by a third party, such as an expert or a judge (CoE Commissioner for Human Rights, 2009[73]; CoE Committee of Ministers, 2010[22]; CoE Parliamentary Assembly, 2015[74]). In 2017, the European Court of Human Rights ruled that the sterilisation requirement for legal gender recognition is in violation of Article 8 of the Convention (right to respect for private life), thereby urging all Council of Europe Member countries to bring their legislation and practice into line with this ruling (A. P., Garçon and Nicot v. France 2017). In its landmark Advisory Opinion OC-24/17, the IACHR also issues in-depth conclusions regarding legal gender recognition interpreted through the lens of the American Convention on Human Rights. The Court declared that legal gender recognition cannot require surgery, hormone therapy, sterilisation or bodily changes because that would violate the individual's rights to personal integrity (Article 5), privacy (Article 11) and to personal liberty (Article 7), as well as the prohibition of discrimination (Article 24). Furthermore, the Court called for legal gender recognition to be prompt, affordable, and based solely on the free and informed consent of the applicant, which rules out preconditions such as medical, psychological or psychiatric evaluations or certifications (IACHR, 2017[31]).

Obviously, access to a flexible gender recognition procedure is of critical importance for intersex people as well. Indeed, they are at risk of developing a gender identity at odds with the sex that was assigned to them at birth, in a context where cosmetic sex-normalising surgeries are still widespread (CoE Parliamentary Assembly, 2015[74]).

### *Allowing a non-binary gender option on birth certificates to better include intersex and non-binary transgender people*

The classification of humankind into two categories – "F" (female) and "M" (male) – and the entrenchment of those categories in civil registries and identification documents constitutes key organising practices in any society. Yet, these practices are founded on the misleading belief that every individual fits into binary female or male categories. As such, they expose people who cannot be clearly designated to these categories to human rights breaches, chief of which intersex individuals, as well as those among transgender individuals who view themselves as neither female nor male, or as both female and male.

Governments' obligation to protect, respect and ensure the human rights of all persons with non-binary gender identities has been repeatedly stressed by international human rights stakeholders. In its report "Living Free and Equal", the OHCHR urges countries to adopt legislation allowing the recognition of such identities (OHCHR, 2016[13]). As for the Parliamentary Assembly of the Council of Europe, it has adopted numerous resolutions about legal gender recognition that include non-binary persons. Resolution 2048 encourages countries to consider including a third gender option in identity documents "for those who seek it" (CoE Parliamentary Assembly, 2015[74]). Resolution 2191 calls on countries to ensure that wherever gender classifications are in use by public authorities, a range of options are available for all people, including those intersex people who do not identify as either male or female (CoE Parliamentary Assembly, 2017[30]). The IACHR also recognises, in its Advisory Opinion OC-24/17, that "some people do not identify themselves as either male or female or identify themselves as both" and that the right of non-binary persons to be officially recognised with their gender identity is enshrined in the American Convention on Human Rights (IACHR, 2017[31]). Finally, in its 2019 resolution on the rights of intersex people, the European

Parliament welcomed "flexible procedures to change gender markers (…) including the possibility of gender-neutral names" (European Parliament, 2019[28]).

Allowing a non-binary gender option on birth certificates presents a significant additional advantage as regards preserving the human rights of intersex individuals. By alleviating the pressure to categorise an intersex baby as either male or female, this legal provision contributes to reduce the perceived medical need for harmful sex-normalising treatment or surgery (Fundamental Rights Agency, 2015[1]), an issue extensively discussed in the next section.

### *Postponing medically unnecessary sex-normalising treatment or surgery on intersex minors until they can provide informed consent*

Although being transgender has been removed from the list of mental health disorders in ICD-11, variations in sex characteristics are still referred to as "disorders of sex development" and, hence, codified as pathologies (CoE Commissioner for Human Rights, 2019[75]). In this setting, even healthy variations of sex characteristics – cases where the life of the intersex newborn is not at risk – are viewed as needing "fixing" or, more precisely, "disambiguation" in order for the child to be clearly assigned as female or male.

According to a 2015 survey published by the EU Fundamental Rights Agency, so-called medically unnecessary "sex-normalising" surgeries on intersex infants and children are widespread. They are carried out in at least 21 of the EU Member countries (Fundamental Rights Agency, 2015[1]). These cosmetic non-emergency interventions on healthy bodies are nevertheless presented by medical practitioners as "medically necessary" to the extent that they are viewed as beneficial to the child's psychosocial development in a society that would otherwise stigmatise them for not conforming to the female-male binary system. However, evidence gathered by international human rights stakeholders shows that sex-normalising surgeries generate physical and psychological sufferings that far outweigh the negative effects of being potentially exposed to stigma for not having external genitals that look "normal" enough according to societal and medical conceptions to pass as female or male genitals.

These surgeries are often deeply invasive, leading to multiple follow-up surgeries, problems with hormonal balance, as well as painful scar tissue and intercourse. For instance, while vaginoplasty is frequently performed since a functional vagina is easier to construct than a functional penis, this feminising procedure has proven to be traumatic. As explained by the Commissioner of Human Rights of the Council of Europe, "when it is performed in early childhood, the neo-vagina must be kept open using a dilator, which is usually inserted regularly by the child's mother. This procedure is repeated throughout childhood and intersex people have stressed that it has been extremely painful and akin to a form of rape. The procedure may have to be continued later on in life as described by intersex people" (CoE Commissioner for Human Rights, 2017[41]).

The negative outcomes of sex-normalising surgeries are compounded by the fact that they are irreversible, meaning that no "cure" can be proposed when the gender identity of the child does not develop in conformity with their sex assigned at birth. The possibility of a divergence between gender identity and sex assigned at birth was long denied by doctors who believed in John Money's theory (Box 2.10). Yet, there is not sufficient evidence demonstrating that gender identity conforms with sex at birth when assigning an intersex child to a specific sex and raising that child as a child of that sex. For instance, among a sample of 272 intersex individuals in Australia, 8% self-identified as being transgender. This proportion is far above the most generous estimates of the share of transgender people based on nationally representative data (0.6%), which suggests that the probability of assigning the wrong sex to intersex children is much higher than expected (Jones et al., 2016[76]; Flores et al., 2016[77]; OECD, 2019[2]).

### Box 2.10. The popularity of sex-normalising surgeries on intersex babies

The prevailing medical opinion is that ambiguous sex can and should be "fixed", and in fact, genital surgeries on intersex babies have become routine in spite of the fact that they are rarely medically necessary. Emphasis is placed on the newborn's ability to pass for one sex or the other, thus meeting social expectations, rather than on the child's best interests and welfare.

Current approaches to reassigning or "fixing the sex" of intersex people find their root in the science of the 1950s, especially in the work of John Money who was one of the first researchers to publish theories on the influence of societal constructs of "gender" on individual formation of gender identity. Money notably concludes that gonads, hormones and chromosomes do not automatically determine a child's "gender role", and that therefore, "mixed-sex children" can be assigned to the "proper gender" early in their childhood and be nurtured within that gender role provided the appropriate behavioural interventions ensue. Based on the belief that the best results from such assignments were achieved when the babies were not older than around two years of age, Money established the Johns Hopkins Gender Identity Clinic in 1965 that began performing sexual reassignment surgery in 1966.

Money gained increased notoriety following his intervention in the case of David Reimer, a boy who, after his penis was accidentally burnt off during a botched circumcision, was transitioned into and raised as a girl (Brenda), beginning at the age of 22 months. Money initially reported the case as a success, and he continued to follow the case annually for a decade. During that time, his view of the malleability of gender became the dominant viewpoint among physicians and doctors and led to the growing popularity of sex-reassignment surgeries. However, during his teen years Reimer transitioned back to his male state, indicating that, in spite of the dresses that he was made to wear and the oestrogen that he was administered, he never felt female. Plagued by the deep psychological trauma of this experience, he committed suicide in 2004 at the age of 38.

In spite of the negative outcome of Reimer's case (…) Money's theory had a disproportionate impact on medical procedure regarding intersex treatment and continues to inform the medical practices that affect intersex newborns today. Notably, in a case that reached the US courts in 2013, Mark and Pam Crawford, the parents of M.C. (an adopted child), sued North Carolina over a surgical procedure alleging that "the state of South Carolina violated M.C.'s constitutional rights when doctors surgically removed his phallus while he was in foster care, potentially sterilising him and greatly reducing, if not eliminating, his sexual function". M.C. was born with a condition called "ovotesticular disorder of sexual development," which included a 2-centimeter penis at birth, a small vaginal opening, both ovarian and testicular tissue, and high blood testosterone levels. Although doctors initially said that "either sex of rearing" would be possible, they eventually operated on the baby to make the genitalia appear more female, removing the penis and testicular tissue. Pam Crawford noted that she "was really sad that that decision had been made for him," and that "it's become more and more difficult just as his identity has become more clearly male. The idea that mutilation was done to him has become more and more real. There was no medical reason that this decision had to be made at that time." Estimates of assigning the wrong sex to intersex people vary between 8.5% and 40%. Many intersex children end up rejecting the sex they were assigned at birth demonstrating the major infringements on their psychological integrity.

Source: CoE Commissioner for Human Rights (2017[41]), "Human Rights and Intersex People", www.coe.int.

The view that medical and surgical treatment of intersex minors is necessary and desirable both for society and the people involved is increasingly questioned and challenged. A shift in the medical perspective towards intersex people is perceptible among a number of practitioners, following the 2012 Opinion of the Swiss National Advisory Commission on Biomedical Ethics (NEK-CNE). The NEK-CNE clearly indicates that "[a]n irreversible sex assignment intervention involving harmful physical and psychological consequences cannot be justified on the grounds that the family, school or social environment has difficulty in accepting the child's natural physical characteristics". It thus recommends that any irreversible sex assignment treatment should be deferred until "the person to be treated can decide for him/herself", as long as no urgent intervention is necessary to prevent severe damage to the person's body or health. In the commission's view, a child "attains capacity between the ages of 10 and 14 years" and even before this age children should be able to participate in decision making in an age-appropriate manner. NEK-CNE also stresses the need to protect the child's integrity, indicating that "[p]rofessional psychosocial counselling and support should be offered free of charge to all affected children and parents" (NEK-CNE, 2012[78]).

This approach is strongly promoted among international human rights stakeholders who unanimously view non-consented medically unnecessary sex-normalising treatment or surgery on intersex minors as akin to (i) torture and other cruel, inhumane or degrading treatment or punishment; (ii) a violation of the right to private life. One of the most comprehensive resources produced by the United Nations is the interagency statement written by seven United Nations bodies including the OHCHR and the World Health Organization. In the report's recommendations for actions, the bodies urge countries to "provide legal guarantees for full, free and informed decision-making and the elimination of forced, coercive and otherwise involuntary sterilisation, and review, amend and develop laws, regulations and policies in this regard." It further notes that, "in the absence of medical necessity, when the physical well-being of a person with an intersex condition is in danger", the treatment should be postponed "until the person is sufficiently mature to participate in informed decision-making and consent" (OHCHR et al., 2014[79]). Additionally, in its report on good practices for combating discrimination based on sexual orientation or gender identity, the OHCHR explicitly urges Member countries to "prohibit medically unnecessary procedures on intersex children" (OHCHR, 2015[12]). Within the Council of Europe, the Parliamentary Assembly has issued two landmark resolutions. Resolution 1952 calls for countries to ensure that no person is subjected to unnecessary medical or surgical treatment unless it is vital for the health of the child; to guarantee bodily integrity, autonomy and self-determination; and to provide intersex children and their families with adequate counselling and support (CoE Parliamentary Assembly, 2013[80]). Resolution 2 191 more explicitly calls for Member countries to "prohibit medically unnecessary sex-"normalising" surgery, sterilisation and other treatments practised on intersex children without their informed consent" (CoE Parliamentary Assembly, 2017[30]). As for the Organization of American States, the General Assembly has adopted numerous resolutions that call broadly for Member states to protect intersex people through laws and policies that ensure medical practices are consistent with human rights standards (OAS General Assembly, 2013[81]; 2016[82]; 2017[83]; 2018[84]). In its report on the recognition of LGBTI persons, the IACHR explicitly recommends that Member countries prohibit any unnecessary medical intervention that is conducted without the free, prior and informed consent of the intersex person concerned. This report and the IACHR report on violence against LGBTI persons maintain that such surgeries on intersex infants should be postponed until the individual can provide such consent (IACHR, 2015[26]; 2018[27]). Finally, in its 2019 landmark resolution on the rights of intersex people, the European Parliament (i) "strongly condemns sex-normalising treatments and surgery"; (ii) "welcomes laws that prohibit such surgery, as in Malta and Portugal", and (iii) "encourages other Member states to adopt similar legislation as soon as possible" (European Parliament, 2019[28]).

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## Notes

[1] For instance, the intersex Canadian playwright and filmmaker Alec Butler explains that, born female and brought up as a girl, his life suddenly changed at 12, when he « grew a beard and had a period ». See https://www.bbc.com/news/magazine-36092431 (last accessed on 24 October 2019).

[2] The resulting set of LGBTI-inclusive laws is broad. It covers most of the legal provisions promoted by the Yogyakarta Principles, a landmark set of precepts that was developed in 2007 and 2017 by international human rights experts to address abuses endured by LGBTI individuals worldwide. These experts included the International Commission of Jurists, the International Service for Human Rights, as well as other human rights stakeholders representing 25 different countries and diverse backgrounds. The rapporteur responsible for drafting the Yogyakarta Principles adopted was Irish human rights expert Michael O'Flaherty, currently Director of the European Union Fundamental Rights Agency, the European Union body tasked with collecting and analysing data on fundamental rights.

[3] Only five OECD countries do not depend on a regional system of human rights and are therefore only exposed to the guidance of the United Nations: Israel and the four OECD countries located in Asia Pacific (Australia, Japan, Korea and New Zealand).

[4] The European Union (EU) was established when the Maastricht Treaty came into force in 1993. It is a political and economic union among 28 Member countries that is structured by the European Council, the European Commission, the European Parliament, the Council of the European Union and the Court of Justice of the European Union (also called the European Court of Justice). Although it has no legislative power, the European Council defines the European Union's overall political direction and priorities. While the European Commission proposes new laws, the European Parliament acting as co-legislator with the Council of the European Union have the power to adopt and amend legislative proposals, negotiate policies and decide on the budget of the European Union. The European Court of Justice ensures the uniform application of EU law and resolves disputes between EU institutions and Member states, and against EU institutions on behalf of individuals.

[5] These 19 Member countries are: Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Sweden and the United Kingdom.

[6] The United Nations (UN) is an intergovernmental organisation created in 1945. It is made up of 193 Member states tasked with addressing the most pressing issues confronting humanity, including human rights. The United Nations is based on five principal organs: (i) the General Assembly, a deliberative assembly of all UN Member states in charge of issuing non-binding resolutions to states or suggestions to the Security Council; (ii) the Security Council, responsible for the maintenance of international peace and security that may adopt binding resolutions; (iii) the Economic and Social Council, responsible for co-operation between states regarding economic and social matters; (iv) the International Court of Justice which decides disputes between states that recognise its jurisdiction; (v) the UN Secretariat, the administrative arm of the UN in charge of writing reports and studies for the General Assembly and the Security Council.

[7] In doing so, OECD countries have committed to ensuring that every individual enjoys the rights covered by these instruments and agreed for these rights to be invoked in a national or international court.

[8] The Council of Europe is an intergovernmental organisation created in 1949 with the aim of upholding human rights, democracy and the rule of law in Europe. It is made up of 47 Member countries.

[9] See as well the background document at the following link: https://rm.coe.int/discrimination-on-grounds-of-sexual-orientation-and-gender-identity-in/16809079e2.

[10] The Organization of American States is an intergovernmental organisation created in 1948 in order to achieve solidarity and cooperation among its 35 member countries, including Canada, Chile, Mexico and the United States.

[11] The United States signed but did not ratify, while Canada neither signed nor ratified the American Convention on Human Rights.

[12] The foundational human rights instruments of the United Nations, the Council of Europe and the Organization of American States urge Member countries to prohibit discrimination on a list of protected grounds. More precisely: (i) Article 2 of the Universal Declaration of Human Rights (UDHR) provides: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." A similar list of grounds protected against discrimination is stated in some of the core international human rights treaties that followed the UDHR, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Moreover, Article 7 of the UDHR ensures a freestanding right to non-discrimination that can be invoked without having to be linked to another protected right: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."; (ii) Article 14 of the European Convention on Human Rights (ECHR) states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Additionally, Article 1 of Protocol 12 to the ECHR that came into force in 2005 provides a general non-discrimination clause and thereby affords a scope of protection which extends beyond the "enjoyment of the rights and freedoms set forth in [the] Convention." More precisely, Article 1 of Protocol 12 provides that "the enjoyment of any right set forth by law shall be secured without discrimination on any grounds," and that "no one shall be discriminated against by any public authority on any [of these] ground[s]."; Article 1 of the American Convention on Human Rights (ACHR) affirms: "The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." Additionally, Article 24 of the ACHR ensures a freestanding right to non-discrimination: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

[13] Fredin v. Sweden, 12033/86, Council of Europe: European Court of Human Rights, 18 February 1991, available at http://hudoc.echr.coe.int/eng?i=001-57651.

[14] Identoba and others v. Georgia, 73235/12, Council of Europe: European Court of Human Rights, 12 May 2015, available at http://hudoc.echr.coe.int/eng?i=001-154400. In this ruling, the European Court of Human Rights (ECtHR) clarified for the first time that transgender people are protected against discrimination on grounds of gender identity under Article 14 of the European Convention on Human Rights. The ECtHR has established that sexual orientation is a ground protected against discrimination under the category of "other status" referenced in Article 14 of the Convention in several rulings, the first

of which was Salgueiro da Silva Mouta v. Portugal where the ECtHR was forced to conclude that "there was a difference of treatment (...) based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention." (Salgueiro da Silva Mouta v. Portugal, 33290/96, Council of Europe: European Court of Human Rights, 21 December 1999, available at http://hudoc.echr.coe.int/tur?i=001-58404).

[15] This code of conduct is especially relevant when these claims emanate from civil servants or providers of goods and services. By contrast, the cost of not abiding by antidiscrimination laws may be lower, and the cost of not respecting the right to freedom of religion or beliefs higher in other contexts, for instance when they relate to the internal affairs of a religious community (e.g. the autonomous recruitment of clergy).

[16] These characteristics justify that international human rights stakeholders have developed a large jurisprudence that provides the media with an almost absolute protection of their freedom of expression. This privilege is especially enforced when the media disseminate information on politicians and high-ranking officials, notably in matters of public controversy or public interest (e.g. political debate during electoral campaigns).

[17] See http://www2.ohchr.org/english/bodies/hrc/docs/CaseLaw/CCPR-C-106-D-1932-2010.doc.

[18] Bayev and others v. Russia, 67667/09, Council of Europe: European Court of Human Rights, 20 June 2017, available at http://hudoc.echr.coe.int/eng?i=001-174422.

[19] Quite the contrary, a rapidly growing academic literature is providing compelling evidence that hindering expression promoting LGBTI people's rights increases suicide among LGBTI people, especially at teen age (OECD, 2019[2]).

[20] The Venice Commission, whose official name is the European Commission for Democracy through Law, is an advisory body of the Council of Europe, composed of independent experts in the field of constitutional law.

[21] Alekseyev v. Russia, 4916/07, 25924/08 and 14599/09, Council of Europe: European Court of Human Rights, 11 April 2011, available at http://hudoc.echr.coe.int/eng?i=001-101257.

[22] Zhdanov and others v. Russia, 12200/08, 35949/11 and 58282/12, Council of Europe: European Court of Human Rights, 16 July 2019, available at http://hudoc.echr.coe.int/fre?i=002-12561.

[23] The European Convention on Human Rights does not place a positive obligation upon states to prohibit expression in the same terms as Article 20(2) of the ICCPR. Nevertheless, the European Court of Human Rights has recognised that certain forms of harmful expression must necessarily be restricted to uphold the objectives of the Convention as a whole: "[A]s a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued." (Erbakan v. Turkey, No. 59405/00, 6 June 2006, para 56). As regards the American Convention on Human Rights, Article 13(5) sets a positive obligation on states to make an "offense punishable by law (…) any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin."

[24] Article 19 is a British human rights organisation founded in 1987 with a specific mandate and focus on the defence and promotion of freedom of expression worldwide. The organisation takes its name from Article 19 of the Universal Declaration of Human Rights that sets forth the right to freedom of expression.

[25] Article 22 of the American Convention on Human Rights echoes Article 14 of the Universal Declaration of Human Rights by providing: "7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes. 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

[26] A person becomes an asylum seeker by making a formal application for the right to remain in another country and keeps that status until the application has been concluded. The applicant becomes an "asylee" if their claim is accepted and asylum is granted.

[27] See https://equineteurope.org/.

[28] Most recent statements and legislation rely on the term "conversion therapy" to also describe attempts to change an individual's gender identity from transgender to cisgender.

[29] See https://www.lawsandfamilies.eu/.

[30] Karner v. Austria, 40016/98, Council of Europe: European Court of Human Rights, 24 October 2003, available at http://hudoc.echr.coe.int/eng?i=001-61263.

[31] P.B. and J.S. v. Austria, 18984/02, Council of Europe: European Court of Human Rights, 22 October 2010, available at http://hudoc.echr.coe.int/eng?i=001-100042.

[32] Valliatanos and others v. Greece, 29381/09 and 32684/09, Council of Europe: European Court of Human Rights, 7 November 2013, available at http://hudoc.echr.coe.int/eng?i=001-128294.

[33] Oliari and others v. Italy, 18766/11 and 36030/11, Council of Europe: European Court of Human Rights, 21 October 2015, available at http://hudoc.echr.coe.int/eng?i=001-156265.

[34] Article 16 of the UDHR provides: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family", while Article 23 of the ICCPR affirms: "The right of men and women of marriageable age to marry and to found a family shall be recognised." Moreover, Article 12 of the ECHR states: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

[35] In this report, joint adoption refers to a process whereby (i) the legal relationship between a child and her/his biological parents is extinguished; (ii) the adopting partners become the two legal parents of the child.

[36] In this report, second-parent adoption refers to so-called "*full* second-parent adoption", meaning that the partner who adopts her/his partner's biological or adopted children becomes the second *legal* parent. Some countries recognise a second type of second-parent adoption, that is deemed as "simple". *Simple* second-parent adoption occurs (i) when there are already two legal parents (one of the two partners and another person external to the couple – e.g. his former wife or her former husband) and (ii) when the number of legal parents is limited to two (which is the rule in most countries). In this case, the partner who

adopts her/his partner's biological or adopted children is granted legal custody, but does not become a legal parent. Japan is an exception. There can be more than two legal parents, which means that second-parent adoption always designates a *full* second-parent adoption in this country.

[37] Surrogacy is an arrangement, often supported by a legal agreement, whereby a woman (the surrogate mother) agrees to become pregnant and give birth to a child for another person(s) (the intended parent(s)) who is or will become the parent(s) of the child. Surrogacy can be "traditional", in which case it involves the artificial insemination of a surrogate. Surrogacy can also be "gestational", in which case an embryo created by *in vitro* fertilisation is implanted in a surrogate.