

EQUALITY AND NON-DISCRIMINATION

Class #5

SCHEDULLE

Discrimination based on sexual orientation

- Legal framework
- Retrospective overview and current issues
- Case-law

LEGAL FRAMEWORK - UN

Art. 2 (1)

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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**.*

Art. 26

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or **other status**.*

International Covenant on Civil and Political Rights

LEGAL FRAMEWORK - UN

“Other status” as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized 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.

General Comment No. 20 , Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)

LEGAL FRAMEWORK - CoE

Art. 14

*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**.”*

European Convention for the Protection of Human Rights and Fundamental Freedoms

European Court of Human Rights case-law:

- P.V. v. Spain
- S.L. v. Austria
- E.B. v. France

LEGAL FRAMEWORK - CoE

Art. 8

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

European Convention for the Protection of Human Rights and Fundamental Freedoms

European Court of Human Rights case-law:

- Karner v. Austria

LEGAL FRAMEWORK - EU

Art. 21 (1)

*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.*

Charter Of Fundamental Rights Of The European Union

Art. 1

*The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or **sexual orientation** as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.*

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

LEGAL FRAMEWORK – DEFINITIONS

Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender.

Yogyakarta Principles on the Application of International Human Rights law in Relation to Sexual Orientation and Gender Identity

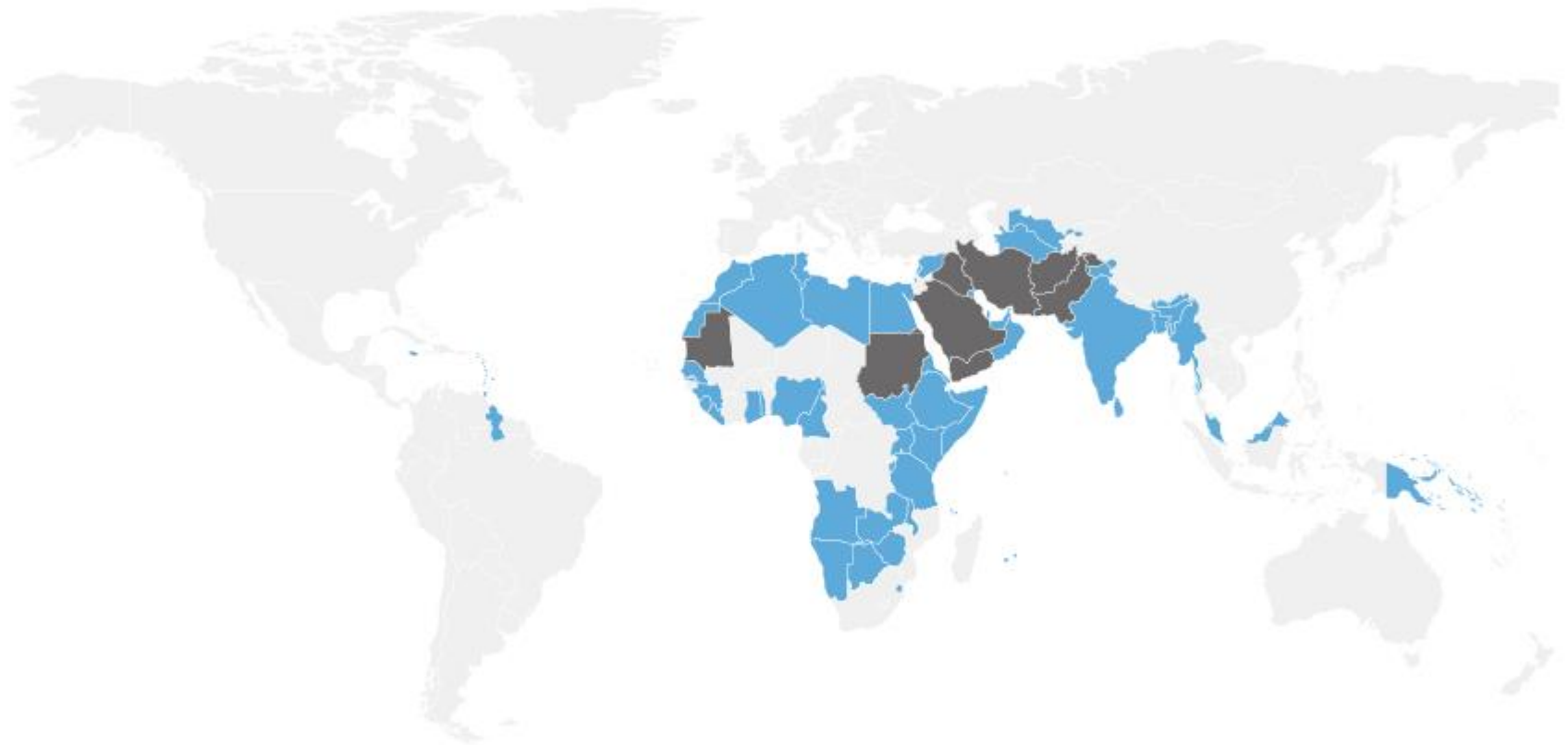
LGBT people – an umbrella term used to encompass lesbian, gay , bisexual and transgender persons. It is a heterogeneous group that is often bundled together under the LGBT heading in social and political arenas.

Intersex - an intersex person is born with sexual anatomy, reproductive organs, hormone and/or chromosome patterns that do not fit the typical definition of male or female. This may be apparent at birth or become so later in life. An intersex person may identify as male, female, both, neither or something else. Intersex people can have any sexual orientation and gender identity.

CURRENT ISSUES

- Hate crime and hate-motivated incidents
- Criminalization of homosexuality
- „Conversion therapy“
- Freedoms of assembly and expression
- Same-sex marriage

CURRENT ISSUES



■ Death penalty
■ Imprisonment

Source: ILGA State Sponsored Homophobia Report 2017

Table 1.1: Decriminalisation of same-sex consensual acts between adults

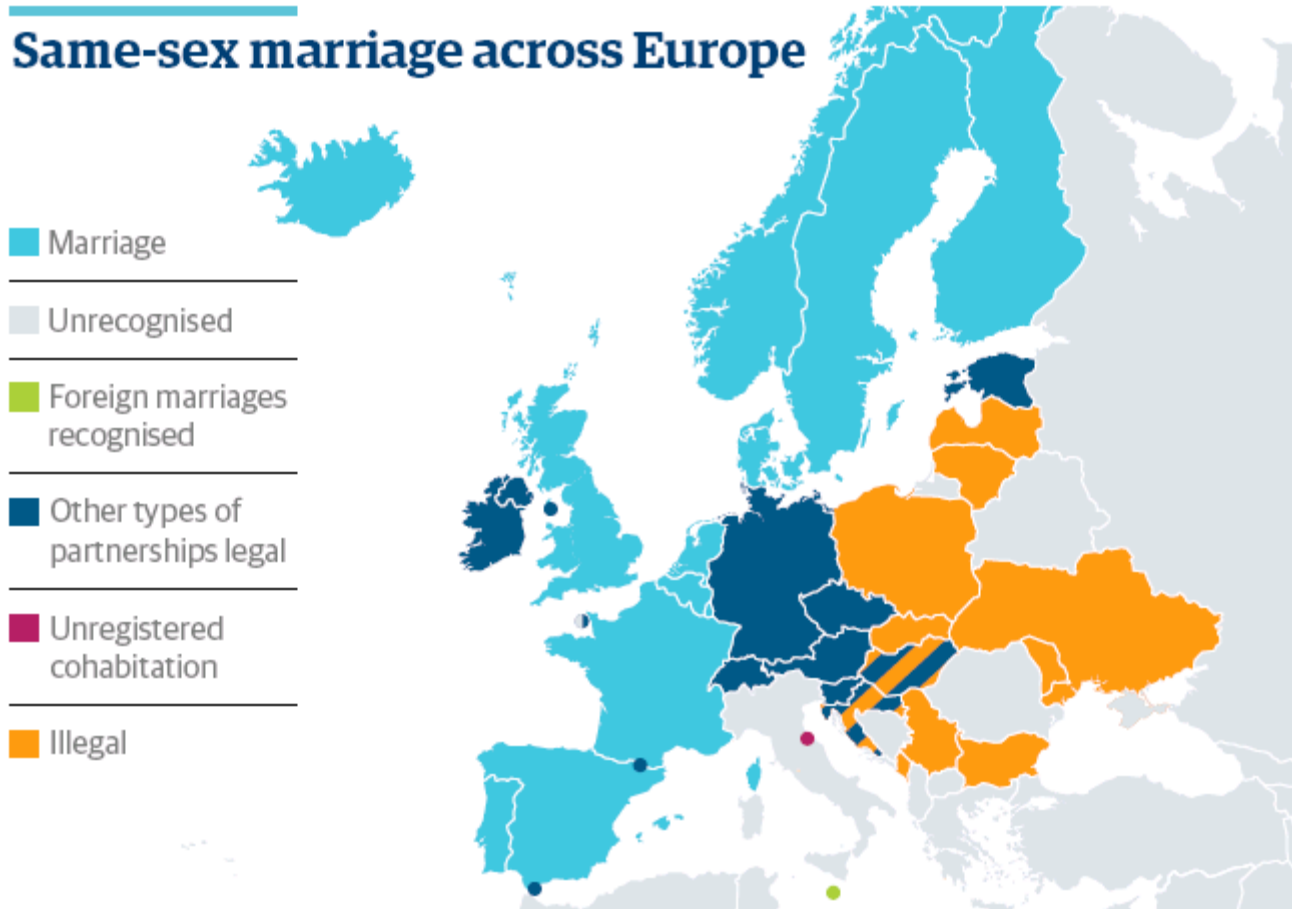
Country	Year of decriminalisation
Armenia	2003
Azerbaijan	2001
Georgia	2000
Cyprus	1998
Bosnia and Herzegovina	1998 [BiH] / 2000 [Rep. Srp.] 2001 [Brcko District]
"The former Yugoslave Republic of Macedonia"	1996
Romania	1996
Albania	1995
Moldova	1995
Serbia	1994
Ireland	1993
Lithuania	1993
Russian Federation	1993
Estonia	1992
Latvia	1992
Ukraine	1991
Liechtenstein	1989
Portugal	1945 / 1983
United Kingdom	1967 [England + Wales] / 1981 [Scotland] / 1982 [Northern Ireland]
Spain	1822 / 1979
Croatia	1977
Montenegro	1977
Slovenia	1977
Malta	1973
Norway	1972
Austria	1971
Finland	1971
Germany	1968 [DDR] / 1969 [BRD]
Bulgaria	1968
Hungary	1962
Czech Republic	1962
Slovak Republic	1962
Greece	1951
Sweden	1944
Switzerland	1942
Iceland	1940
Denmark	1933
Poland	1932
Italy	1810 / 1890
San Marino	1865
Turkey	1858
Netherlands	1811
Belgium	1794
Luxembourg	1794
Monaco	1793
France	1791
Andorra	–

CURRENT ISSUES

Map 3.1: Bans and/or administrative impediments on large LGBT events since 2004



CURRENT ISSUES



A map of the acknowledgement of same-sex relationships across Europe as of 2015 (provided by The Guardian)

TOONEN V. AUSTRALIA

Toonen v. Australia

- Decision of the United Nations Human Rights Committee (UNHRC)
- UNHRC monitors implementation of the International Covenant on Civil and Political Rights by its State parties
- The First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to violations of the Covenant by States

! Important test-relevant topic - Individual complaints to the Committee (procedure, incl. admissibility criteria)

TOONEN V. AUSTRALIA

Toonen v. Australia

- UNHRC decision of 31 March 1994 8 April 1976, Communication No. 488/1992
- **Submitted by:** Nicholas Toonen
- **State party:** Australia
- **Subject matter:** Provisions of the Tasmanian Criminal Code (Sections 122(a) and (c), and 123) which criminalized all forms of sexual contact between consenting adult men in private

TOONEN V. AUSTRALIA

Toonen v. Australia

Art. 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

Art. 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Art. 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

TOONEN V. AUSTRALIA

Toonen v. Australia

The author affirms that Sections 122 and 123 of the Tasmanian Criminal Code violate articles 2, paragraphs 1, 17 and 26 of the Covenant because:

(a) they do not distinguish between sexual activity in private and sexual activity in public and bring private activity into the public domain. In their enforcement, these provisions result in a violation of the right to privacy, since they enable the police to enter a household on the mere suspicion that two consenting adult homosexual men may be committing a criminal offence.

(...)

(b) they distinguish between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity, and

(c) the Tasmanian Criminal Code does not outlaw any form of homosexual activity between consenting homosexual women in private and only some forms of consenting heterosexual activity between adult men and women in private. (...)

ASOCIAȚIA ACCEPT

Asociația Accept

- CJEU judgement of 25 April 2013, C-81/12, ECLI:EU:C:2013:275
- Reference for a preliminary ruling – interpretation of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
- **Applicant in the main proceeding:** Asociația Accept (NGO whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights)
- **Defendant in the main proceeding:** Mr Becali and SC Fotbal Club Steaua București SA ('FC Steaua')
- **National court:** Curtea de Apel București
- **Subject matter:** Equal treatment in employment and occupation, Public statements

-> Compare with Feryn C-54/07

ASOCIAȚIA ACCEPT

Questions

1. Do the provisions of Article 2(2)(a) of [Directive 2000/78] apply where a shareholder of a football club who presents himself as, and is considered in the mass media as, playing the leading role (or “patron”) of that football club makes a statement to the mass media in the following terms:

“Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Obviously people will talk, but how could anyone write something like that and, what’s more, put it on the front page ... Maybe he’s [the football player X] not a homosexual ... But what if he is? I said to an uncle of mine who didn’t believe in Satan or in Christ. I said to him: “Let’s say God doesn’t exist. But suppose he does? What do you lose by taking communion? Wouldn’t it be good to go to Heaven?” He said I was right. A month before he died he took communion. May God forgive him. There’s no room for gays in my family and [FC Steaua] is my family. It would be better to play with a junior rather than someone who was gay. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose.”

“Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Maybe he’s not a homosexual. But what if he is? There’s no room for gays in my family, and [FC Steaua] is my family. Rather than having a homosexual on the side it would be better to have a junior player. This isn’t discrimination: no one can force me to work with anyone. I have rights just as they do and I have the right to work with whoever I choose. Even if God told me in a dream that it was 100 percent certain that X wasn’t a homosexual I still wouldn’t take him. Too much has been written in the papers about his being a homosexual. Even if [player X’s current club] gave him to me for free I wouldn’t have him! He could be the biggest troublemaker, the biggest drinker ... but if he’s a homosexual I don’t want to know about him.”

ASOCIAȚIA ACCEPT

Questions

2. To what extent may the abovementioned statements be regarded as “facts from which it may be presumed that there has been direct or indirect discrimination” within the meaning of Article 10(1) of Directive 2000/78 ... as regards the defendant [FC Steaua]?

3. To what extent would there be *probatio diabolica* if the burden of proof referred to in Article 10(1) of [Directive 2000/78] were to be reversed in this case and the defendant [FC Steaua] were required to demonstrate that there has been no breach of the principle of equal treatment and, in particular, that recruitment is unconnected with sexual orientation?

4. Does the fact that it is not possible to impose a fine in cases of discrimination after the expiry of the limitation period of six months from the date of the relevant fact, laid down in Article 13(1) of [GD No 2/200]1 on the legal regime for sanctions, conflict with Article 17 of [Directive 2000/78] given that sanctions, in cases of discrimination, must be effective, proportionate and dissuasive?’

LÉGER

Léger

- CJEU Judgment of 29 April 2015, C-528/13, ECLI:EU:C:2015:288
- Reference for a preliminary ruling – interpretation of Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components
- **Applicant in the main proceeding:** Geoffrey Léger
- **Defendant in the main proceeding:** Ministre des Affaires sociales, de la Santé et des Droits des femmes (Minister for Social Affairs, Health and Women’s Rights) and Établissement français du sang (French Blood Agency)
- **National court:** Tribunal administrative de Strasbourg
- **Subject matter:** Eligibility criteria for blood donors

Question

In the light of Annex III to Directive [2004/33], does the fact that a man has sexual relations with another man constitute in itself sexual conduct placing him at a risk of acquiring severe infectious diseases that can be transmitted by blood and justifying a permanent deferral from blood donation for persons having engaged in that sexual behaviour, or is it merely capable of constituting, in the light of the circumstances of the individual case, sexual behaviour placing him at a risk of acquiring infectious diseases that may be transmitted by blood and justifying a temporary deferral from blood donation for a period determined after cessation of the risk behaviour?

S.L. V. AUSTRIA

S. L. v. Austria

- ECHR judgement of 9 January 2003, application no. 45330/99
- **Submitted by:** Mr S.L., Austrian national
- **State party:** Republic of Austria
- **Subject matter:** Article 209 of the Austrian Criminal Code, which penalised homosexual acts of adult men with consenting adolescents between fourteen and eighteen years of age.

“A male person who after attaining the age of nineteen fornicates with a person of the same sex who has attained the age of fourteen years but not the age of eighteen years shall be sentenced to imprisonment for between six months and five years.”