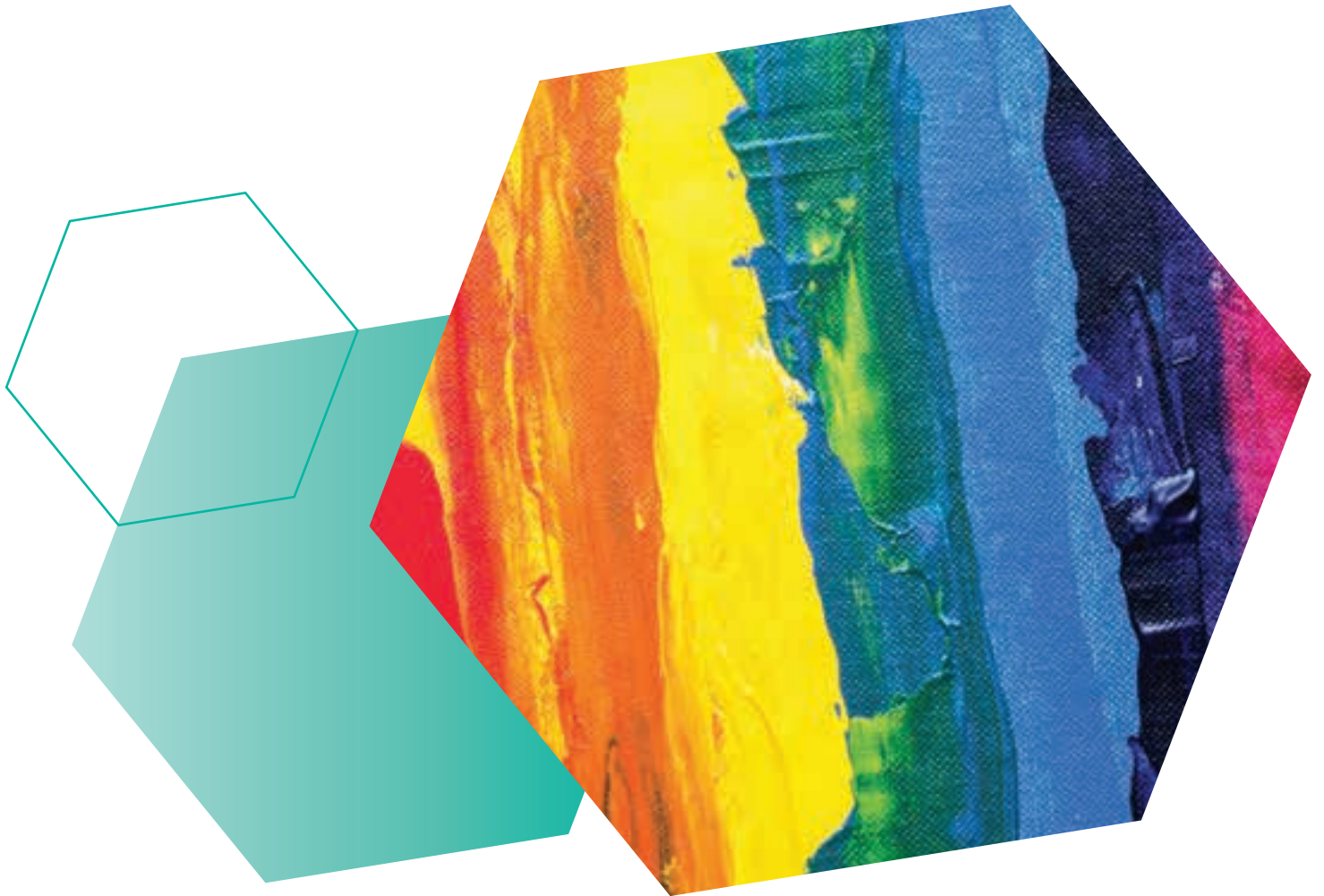


GLOBAL
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Protecting LGBTIQ Rights in Europe and the World

Assessing the Legal Frameworks

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Introduction

Recent decades have witnessed the emergence of a wide range of legal frameworks aimed at protecting the rights of LGBTIQ people both on a regional and international level. These frameworks have in turn played an important role in an overall increase in support for the rights of LGBTIQ people in many countries around the world.

However, the growth of anti-LGBTIQ sentiment in certain countries in recent years combined with a pushback against legal protections for LGBTIQ people threatens the progress which has been made and seriously undermines the rule of law.

In a [joint debate](#) at the European Parliament Civil Liberties Committee on Monday 30 November, MEPs addressed developments on the rule of law debate in light of the Article 7(1) TEU procedures and the state of LGBTIQ rights in Poland and Hungary, indicating the inextricable link between the two issues. Indeed, many of the advances made in extending protections to LGBTIQ people over recent decades rely on adherence to rule of law principles. In other words, one cannot exist without the other.

Against this background, this paper seeks to provide an overview of the existing legal frameworks which extend protections to LGBTIQ people. It focuses on key legal frameworks at the regional and international level: the European Union; the Council of Europe; the United Nations; and the Yogyakarta Principles. It highlights examples of best practice and identifies areas for improvement.

Moreover, it contends that while the existence of robust legal frameworks at regional and international level is an essential prerequisite to the advancement of LGBTIQ rights, an equally urgent priority for countries must be to ensure that the rule of law is upheld in order for the provisions of these frameworks to be properly implemented.

European Union

As core values of the European Union, the principle of equality and the prohibition of discrimination on the basis of sexual orientation have a strong legal foundation under EU law.

Articles 2 and 3 of the **Treaty on European Union** recognise equality, non-discrimination and respect for the rights of persons belonging to minorities, while **Article 10** of the **Treaty on the Functioning of the European Union (TFEU)** states that the EU should aim to combat discrimination in all its forms, including sexual orientation.

Moreover, **Article 21** of the **European Union Charter of Fundamental Rights**, which now has the same legal force as the founding Treaties, complements these treaty provisions by explicitly prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation.

Arguably, the most significant piece of EU legislation to date in terms of preventing discrimination against LGBTIQ people is **Article 19** of the **TFEU**. This article empowers the EU to take appropriate action to combat discrimination based on a range of factors, including sex and sexual orientation.

In sum, primary EU law provides a robust framework for the protection of LGBTIQ rights in two ways. First, EU institutions are obliged to respect the principle of non-discrimination and equality in all their policies. Second, the EU has the power to take action to combat

discrimination based on sex or sexual orientation in the framework of the special legislative procedure.

In addition to the founding treaties, the EU has adopted anti-discrimination directives and strategy papers which have specific implications for the protection of LGBTIQ rights. For example, the **Employment Equality Directive** and **Gender Equality Directive** specifically prohibit discrimination based on sexual orientation.

However, the **Employment Equality Directive** only prohibits discrimination in employment, occupation and vocational training contexts and faces considerable challenges to its application at Member State level. Another weakness of this directive is that its provisions do not affect national laws on marital status and benefits reserved for married couples. In this regard, national laws vary considerably with respect to the legal recognition of same-sex unions with several Member States still not recognising same-sex marriage.¹

The **Gender Equality Directive** goes a step further than the Employment Equality Directive in tackling discrimination against LGBTIQ people by referencing sex and gender reassignment. However, it fails to explicitly mention sex characteristics as a prohibited ground for discrimination.²

In 2008, the **European Commission** made a **proposal for a new “horizontal directive”** which would extend the prohibition of discrimination on the grounds of religion or belief, disability, age or sexual orientation beyond the area of employment.³ However, since unanimity has not yet been reached in the Council, the draft has remained blocked ever since.

Commission President, Ursula von der Leyen, affirmed the importance of equality in her political guidelines, and committed to propose new anti-discrimination legislation, giving a renewed sense of hope that this Directive may eventually be introduced.⁴ Moreover, in its 2018 report, the European Agency for Fundamental Rights (FRA) recommended that the EU legislative institutions should continue their efforts for the adoption of the Directive to ensure that the EU offers comprehensive protection against discrimination.⁵

The European Commission’s new [LGBTIQ Equality Strategy](#), which was launched on 12 November 2020, is a positive step in the right direction in this regard. It sets out a number of useful recommendations to address the existing legislative gaps concerning the protection of LGBTIQ people under EU law, while leaving room for improvement in other respects.

Despite the existence of a robust legislative framework at EU level and a number of initiatives to rectify the remaining gaps, a recent survey from FRA found that discrimination on grounds of sexual orientation, gender identity/expression and sex characteristics was actually increasing across the EU.⁶ This points to a need to adopt a more holistic approach. While strengthened legal frameworks and policy development can certainly lay the groundwork for more inclusive

¹ Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland and Slovakia.

² Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23).

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008PC0426>

⁴ https://ec.europa.eu/info/strategy/priorities-2019-2024_en

⁵ <https://fra.europa.eu/en/publications-and-resources/publications/annual-reports/fundamental-rights-2018>

⁶ FRA, *EU-LGBTI II - A long way to go for LGBTI equality* (14 May 2020) (FRA, second LGBTI survey). 43% of LGBTIQ people declared that they felt discriminated against in 2019, as compared to 37% in 2012.

and equal societies for LGBTIQ people, eradicating discrimination entirely will require a fundamental reshaping of socio-cultural attitudes towards LGBTIQ people that is both long term and multigenerational.

Council of Europe

The Council of Europe (CoE) has contributed significantly to bolstering legal protections for LGBTIQ people over the past two decades.

Recommendation CM/REC(2010)5 is perhaps the most significant contribution to date in this regard. Adopted on 31 March 2010 by the Committee of Ministers, the recommendation proposed that “legislative and other measures [should be] adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them”.⁷ The CoE **Sexual Orientation and Gender Identity Unit**, in particular, has proved to be essential in improving the legal and institutional frameworks across Member States by providing technical support, assisting with capacity building, sharing best practice and reviewing the implementation of the Recommendation.

As the first international human rights instrument to explicitly prohibit discrimination on the grounds of sexual orientation and gender identity, the Recommendation has laid the groundwork for further developments in this area. Moreover, the large number of Member States which have applied the Recommendation over the past decade is testament to its success in advancing the legal and social recognition of LGBTIQ people.

Since its adoption, 34 States have reviewed legislative and other measures for direct or indirect discrimination on the ground of sexual orientation and 33 States have reviewed discrimination on the ground of gender identity. Naturally, the rate of progress has differed substantially across Member States, with political change and shifting public opinion both spurring and hampering progress depending on the country in question. Nonetheless, the Recommendation’s status as an essential legal framework remains unchanged and it will continue to provide a solid foundation upon which to advance LGBTIQ rights in future.

The **case law of the European Court of Human Rights (ECtHR)** has also contributed substantially to strengthened legal protections for LGBTIQ people across Europe. The ECtHR monitors and enforces compliance with the European Convention on Human Rights (ECHR), a regional human rights treaty, drafted in 1950, to which all 47 Member States of the Council of Europe are party.

A conference to mark the [70th anniversary of the European Convention on Human Rights](#) took place in Strasbourg on **7 October 2020**, providing an occasion for practitioners and European Court of Human Rights officials, including the President of the Court, Robert Spano, to reflect on how the ECtHR has increased legal protections for LGBTIQ people across the 47 Member States of the Council of Europe.

⁷ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a

Despite the emergence of a large body of case law, threats to the rule of law in certain Member States have posed difficulties for the enforcement of ECtHR decisions. However, landmark judgments of the Court, notably, the cases of **Christine Goodwin v. the UK** on the legal gender recognition for transgender persons; **Oliari and Others v. Italy** on the recognition and protection of same-sex civil unions; as well as **Beizaras and Levickas v. Lithuania** and **Lilliendahl v. Iceland** on online hate speech directed at LGBTIQ persons, have all contributed to codifying LGBTIQ rights under the case law of the ECtHR. While the judgments of the ECtHR are binding and can lead to fines on Member States who fail to enforce its decisions, the extent to which certain Member States have failed to swiftly comply with the Court's judgments is an ongoing cause for concern.

The **Commissioner for Human Rights of the Council of Europe** has played an important role in promoting the equality and non-discrimination of LGBTIQ people over recent years by publishing thematic reports and organising events and workshops.

The current Commissioner for Human Rights of the CoE, Dunja Mijatovic has been particularly vocal in calling for greater protections for LGBTIQ people across Europe. In a memorandum published on Thursday 3 December 2020, [she called on the Polish authorities](#) to reverse the current negative trends targeting lesbian, gay, bisexual, transgender and intersex people and activists in the country. The memorandum builds on the Commissioner's work for the protection of the human rights of LGBTIQ people in Europe and follows online consultations with Polish authorities, national human rights structures and non-governmental organisations working on the rights of LGBTIQ people held between 12 and 23 October 2020.

In a 2015 report, '[Human rights and intersex people](#)', then CoE Commissioner for Human Rights, Nils Muižnieks, called on Member States to end medically unnecessary treatment of intersex persons and to facilitate the recognition of intersex people by making considerable improvements to equality law. Moreover, in a groundbreaking report entitled '[Human Rights and Gender Identity](#)' from 2009, then Commissioner, Thomas Hammarberg, was among the first prominent human rights actors to explore trans equality. In the paper, the Commissioner encouraged Member States to implement "international human rights standards without discrimination, and prohibit explicitly discrimination on the ground of gender identity".⁸

The Council of Europe arguably provides an even more comprehensive set of legal frameworks for the protection of LGBTIQ rights across its various institutions than the EU. However, it shares many of the same challenges that the EU does in terms of ensuring that progressive legislative frameworks are adopted and fully implemented at Member State level.

⁸ Commissioner for Human Rights of the Council of Europe, Human Rights and Gender Identity (29 July 2009) CommDH/Issue Paper(2009) <https://rm.coe.int/16806da753>, 18.

United Nations

In addition to the regional legal frameworks at European level, there is an extensive international framework for the protection of LGBTIQ rights which apply to a much larger number of states. While, gender identity, gender expression and sex characteristics are not expressly protected by any international treaty, the United Nations human rights system offers the most comprehensive framework for the protection of LGBTIQ rights.

States, for example, are obliged to respect, protect, and fulfil the human rights of all persons within their jurisdiction, including LGBTIQ persons, according to **Article 1 of the Universal Declaration of Human Rights**. Furthermore, the principle of equality and non-discrimination is protected under all the major international human rights treaties, including the International Covenant on Civil and Political Rights (Articles 2, 3 and 26), the International Covenant on Economic, Social and Cultural Rights (Articles 2 and 3) the Convention on the Rights of the Child (Article 2).

UN Human Rights treaty bodies have drawn attention to the violation of the rights of LGBTIQ people and provided recommendations on how States can fulfil their obligations under international human rights law in this area. The UN **Human Rights Committee** has repeatedly called on States Parties to guarantee equal rights to all individuals, regardless of their sexual orientation and gender identity.⁹

In addition, the UN Committee on Economic, Social and Cultural Rights, which monitors compliance with the International Covenant on Economic, Social and Cultural Rights, has affirmed that the non-discrimination guarantee of the Covenant includes sexual orientation and gender identity and intersex status.¹⁰

The Human Rights Council in Geneva has also emphasised the need for strengthened legal protection for LGBTIQ people by appointing Victor Madrigal-Borloz as an **Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity** in 2016.

Moreover, certain obligations to respect, protect and fulfil the human rights of LGBTIQ people also derive from **customary international law**, i.e., international obligations arising from established international practices, as opposed to obligations arising from formal written conventions and treaties. This includes peremptory norms of international law, such as the absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment.

Yogyakarta Principles

The document known as the Yogyakarta principles, after the Indonesian city where it was adopted in 2006, is a ground-breaking set of principles on sexual orientation, gender identity, and international law. The principles were drafted by the International Commission of Jurists

⁹ See for example, Human Rights Committee, Concluding Observations on Ecuador (CCPR/C/ECU/CO/6) 2016, paras. 11-12; Venezuela (CCPR/C/VEN/CO/4), 2015, para. 8; Austria (CCPR/C/AUT/CO/5), 2015, paras. 11-12; Republic of Korea (CCPR/C/KOR/CO/4), 2015, para. 13; Iraq (CCPR/C/IRQ/CO/5), 2013, para. 12(d); Chile (CCPR/C/CHL/CO/5), 2009, at para. 16.

¹⁰ The Committee on Economic, Social and Cultural Rights has used the term "intersex status" in its recent General Comments.

and the International Service for Human Rights to highlight the application of international law to human rights violations based on sexual orientation and gender identity.

As the rapporteur of the meeting, **Professor Michael O’Flaherty, Director of the EU Fundamental Rights Agency (FRA)**, made a significant contribution to the drafting and revision of the Yogyakarta Principles and has continued to promote the importance of recognising and protecting LGBTIQ rights in his capacity as Director of the Fundamental Rights Agency. Former President of Ireland and UN High Commissioner for Human Rights, Mary Robinson, was among the 29 signatories to the Principles.

The Yogyakarta Principles were reviewed ten years on from 2006 and the Yogyakarta Principles plus 10 document, known as the YP+10, was adopted on **10 November 2017** to supplement the original Yogyakarta Principles. The YP+10 document emerged from the intersection of the developments in international human rights law with the emerging understanding of violations suffered by persons on grounds of sexual orientation and gender identity and the recognition of the distinct and intersectional grounds of gender expression and sex characteristics.

While the Yogyakarta Principles and the Yogyakarta Principles+10 have not been translated into treaty law at the UN level, they have arguably attained the status of **customary international law**. However, as the Yogyakarta Principles do not have the same status as treaty law, they are non-binding and thus non-enforceable by law and much more likely to meet resistance to implementation by Member States, especially in countries where existing challenges to the rule of law exist.

Conclusion

Despite the existence of robust legal frameworks at the regional and international level which provide varied protections to LGBTIQ people, the slow rate of uptake and inadequate implementation at Member State level has significantly hampered further progress. Moreover, at the European level, certain countries have launched attacks on the rule of law by targeting the legal protections specific to LGBTIQ people.

The European Commission has taken concrete steps to address both the rule of law issue and the targeting of LGBTIQ rights by utilising a range of instruments in its toolbox, including the Article 7 procedures and the withdrawing of funding where EU principles are breached, as well as recently introducing a new LGBTIQ Equality Strategy. However, whether such initiatives can adequately compel EU Member States to urgently change their behaviour is an open question.

The Council of Europe, and particularly the European Court of Human Rights, have contributed significantly to extending protections to LGBTIQ people across Europe, while facing many of the same issues as the EU. Moreover, on the international level, there are no shortage of legally binding obligations for states to protect LGBTIQ rights within their jurisdictions.

However, considerable gaps remain in legislation which seeks to protect LGBTIQ people. Indeed, the new LGBTIQ Equality Strategy is designed to rectify many of the existing legislative gaps concerning the protection of LGBTIQ people under EU law.

Yet the fact that many countries with existing equality and non-discrimination legislation are not immune to the emergence or re-emergence of discrimination against LGBTIQ people is a considerable cause for concern.

While it is certainly true that robust legal frameworks are an essential prerequisite for eliminating discrimination against LGBTIQ people, it has become increasingly clear that such legal frameworks can only be effective in an environment anchored in the rule of law.