# Conversion Therapy and its Compatibility with European Human Rights Law

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Table of Contents



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## Abstract

Conversion therapy, which refers to a set of practices that aim to change or suppress the sexual orientation or gender identity of LGBTI people, causes harm to young European citizens. Notwithstanding, only three of 44 sovereign states in Europe have banned the practices. Moreover, the European organisations – the Council of Europe and European Union – have not taken sufficient action, although they have certain competences to adopt legislation in the field of LGBTI rights. In the absence of explicit legislation on conversion therapy, the article principally examines conversion therapy under European human rights law. More specifically, the article seeks to answer whether conversion therapy violates the individual rights of recipients and if individual rights grant providers a right to perform the practices under European human rights law. By extension, the article scrutinises whether a domestic ban on conversion therapy in European states can be justified considering the interests of states and providers. Finally, the article encompasses a normative assessment on the future regulation of conversion therapy in Europe.

**Keywords:** Conversion Therapy, LGBTI, Recipient, Provider, Promoter, European Human Rights Law, European Convention on Human Rights, Charter of the Fundamental Rights of the European Union

## A. Introduction

The research question of this article is whether conversion therapy is compatible with European human rights law. The term "conversion therapy" refers to a set of practices that aim to change or suppress the sexual orientation and gender identity,[1] including gender expression, of lesbian, gay, bisexual, transsexual and intersex

1 The term "sexual orientation" refers to "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender", see *International Commission of Jurists* (ICJ), Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2007, Preamble. The expression "gender identity" refers to "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms", cf. *ICJ*, Yogyakarta Principles, 2007, Preamble. The Yogyakarta Principles serve as binding international legal standards and the document is meant as an interpretative aid to existing international human rights treaties, cf. Additional Recommendation (i).

(LGBTI) people.[2] The expression "practices" denotes the methods or forms that are used to change or suppress the sexual orientation and gender identity of LGBTI people.[3] While proponents endorsing conversion therapy are referred to as "promoters", the individuals responsible for performing the practices are referred to as "providers".[4] Finally, LGBTI people who are exposed to conversion therapy are called "recipients".

With reference to this article, "European human rights law" is used as an umbrella term for the human rights systems of the Council of Europe (CoE) and the European Union (EU). While these systems are composed of independent frameworks, the organisations have created certain common principles to harmonise human rights protection in Europe.[5] Yet, since the CoE organs have adopted more instruments and developed richer case law relating to sexual orientation and gender identity than the EU organs, the focus will be on the instruments of the CoE.

The term "compatibility" refers to the question of whether conversion therapy corresponds to or conflicts with European human rights law, and thus serves as a connector between the two preceding terms. Due to the lack of sources on conversion therapy, this question will not be answered exhaustively. Rather, the focal point will be on the individual rights of recipients and providers under European human rights law. By applying the principles that have been established by the European courts so far,[6] the article seeks to answer how the European courts would approach cases of conversion therapy if an actual complaint was to be submitted before them. The aim is to uncover whether conversion therapy may violate the individual rights of recipients and providers under European human rights law and whether a ban on

2 www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-febr uary-2020 (13/11/2021), p. 17 ff. This term is also known as "conversion practices", "reparative therapy", "gay cure", "ex-gay therapy", "gender critical therapy", "Sexual Orientation Change Efforts" ("SOCE") and "Sexual Orientation, Gender Identity or Gender Expression Change Efforts" ("SOGIECE"). See also *United Nations Human Rights Council (HRC)*, 44th session, Practices of so-called "conversion therapy": Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/44/53, 1 May 2020, para. 17.

3 www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-febr uary-2020 (13/11/2021), p. 21.

4 *HRC*, 44th session, Practices of so-called "conversion therapy", fn. 2, p. 6.

5 The ECtHR has developed the "principle of equivalent protection", which entails that Member States will not be held responsible for actions emanating from the obligations they have assumed as being part of an international organisation, in this case the EU, provided that the organisation offers "equivalent" human rights protection, see ECtHR, App. no. 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], para. 155 The EU, by contrast, relies on the first sentence of Article 52(3) of the Charter of Fundamental rights of the European Union (CFREU), that stipulates that the meaning and scope of the Charter rights corresponding to the rights in the ECHR shall be the same. For instance, Article 4 of the CFREU corresponds to Article 3 of the ECHR and shall thus be interpreted coherently, see *EU*, Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35, p. 18. The aim is to harmonise the human rights protection in Europe (ibid., p. 33).

6 In terms of conversion therapy, the most important principles are the living instrument doctrine, the margin of appreciation doctrine and the principle of subsidiarity, see part D.

conversion therapy can be justified under the limitations to some of these individual rights.

## B. What is Conversion Therapy and How Does it Unfold?

### I. Origin

Conversion therapy emanated in the late 1800s due to the pathologisation of LGBTI people.[7] Scientists began to scrutinise and classify as illnesses numerous "socially unaccepted behaviours" that were deemed "sins" under moral or religious beliefs, such as homosexuality and transvestism.[8] While heterosexuals and cisgenders were perceived as the "biological norm", sexual and gender diversity was considered "a deviation, a perversion or a mental illness that could be cured, shifted or 'converted' with specific 'treatment'."[9] Many of the theories were based on Freudian concepts that attributed homosexuality to, inter alia, unconscious childhood conflicts, sexual abuse and dysfunctional parenting.[10] In the 1940s, psychologists and psychiatrists began to work as "providers of conversion therapy".[11] With the depathologisation of homosexuality in the early 1970s, however, health practitioners became unable to perform the practices, causing religious groups to take part in offering it.[12] With the depathologisation of homosexuality by the World Health Organisation (WHO) in 1990, combined with enhanced knowledge of sexual and gender diversity,[13] people got better knowledge of the harm conversion therapy causes. In the 2000s, providers made a "shape-shift", by decreasing the focus on "conversion" from gay to straight and diminishing the language used to help LGBTI people to gain "freedom from homosexuality".[14] Instead, some of the providers have reoriented their practices into getting recipients to "suppress" their sexual identities, through "living celibate lives, reclaiming their cisgender identities, and regaining social acceptance".[15]

7 www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-february-2020 (13/11/2021), p. 22. The term "pathologisation" can be defined as "the psycho-medical, legal and cultural practice of identifying a feature, an individual or a population as intrinsically disordered", see www.gate.ngo/gender-is-not-an-illness (13/11/2021), p. 4.

8 www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-february-2020 (13/11/2021), p. 22. See also *Yalcin*, p. 1.

9 Ibid.

10 Ibid.; www.outrightinternational.org/reports/global-reach-so-called-conversion-therapy (13/11/2021), p. 8.

11 www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-february-2020 (13/11/2021), p. 30.

12 Ibid., p. 38.

13 *Streed et al.,* TNEJM 2019/381, p. 501.

14 www.outrightinternational.org/reports/global-reach-so-called-conversion-therapy (13/11/2021), p. 11.

15 Ibid.

## II. Practices

The absence of European research reports on conversion therapy is not equivalent to the fact that the practices do not occur on the continent. In fact, several reports have documented that a range of providers, such as health practitioners and religious authorities, offer conversion therapy in numerous European states.[16]

In Russia, various health practitioners have been known to offer hypnosis to eradicate same-sex attraction.[17] Young people are also forcibly interned in clinics or camps, leaving them isolated and exposed to abuse. In 2012, for example, 16-year-old Ivan Kharchenko was forced by his father to intern in a clinic in Moscow that offered him psychotropic drugs to "cure" his homosexuality.[18]

Mental health practitioners seemingly use psychotherapy and counselling.[19] In 2019, for example, Spanish "coach" Elena Lorenzo was fined by local authorities for performing conversion therapy but soon after launched the course "Road to heterosexuality" (Camino a la heterosexualidad).[20] According to her website, the course is "a process of personal growth aimed at people with homosexual feelings", that should not be "confused with aversion or conversion therapies".[21] This case is a good example of the "shape-shift" that providers have made in the recent years.

Similarly, faith or religious-based organisations mainly rely on religious counselling.[22] In 2010, Irish journalist Cormac O'Brien went undercover to attend conversion therapy offered by a Christian group called "Courage".[23] The materials provided by this group included statements like "[i]t's not gay, it's not bad, it's SSAD", with the acronym referring to "Same Sex Attraction Disorder", as well as other false

16 *OHCHR*, Report on conversion therapy, 1/5/2020, available at: https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportOnConversiontherapy.aspx (13/11/2021), "Inputs received".

17 *BBC*, "Hypnosis and holy water: Russian 'cures' for gay people", available at: https://www.bbc.com/news/world-europe-39777612 (13/11/2021).

18 www.themoscowtimes.com/2012/04/25/gay-teen-forcibly-taken-to-drug-rehab-clinic-released-a14357 (13/11/2021).

19 www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-february-2020 (13/11/2021), p. 30. Others have been known to apply "aversion therapy", including electroshock and chemotherapy, to modify the behaviour of recipients (ibid., p. 24 ff.). In the late 1990s, for instance, a young man from Spain was told by his therapist to think of women while masturbating, and to pull a rubber band on his wrist every time he thought about men to reorient his homosexual thoughts to pain, see www.elpais.com/diario/2010/06/20/sociedad/1276984802_850215.html (13/11/2021).

20 https://www.eldiario.es/madrid/comunidad-madrid-terapias-homosexuales-internet_1_1474016.html (13/11/2021), www.caminoalaheterosexualidad.org (13/11/2021); www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-february-2020 (13/11/2021), p. 93.

21 www.caminoalaheterosexualidad.org (13/11/2021), "¿Qué es el Coaching de Identidad?".

22 www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-february-2020 (13/11/2021), p. 38 ff.

23 www.gcn.ie/gay-conversion-therapy-brand-new-ireland (13/11/2021).

and biased information about sexual and gender diversity.[24] In 2019, a Norwegian newspaper introduced the documentary "Homoterapi" (Gay therapy), with the aim of revealing how conversion therapy is performed in Norway.[25] One of the victims, Arne Christian Nielsen, tried to change his homosexual orientation for 13 years, from the ages of 13 to 26, with the "help" of the local Christian congregation "Kristent Fellesskap". He was, inter alia, sent to several gay camps in Norway and the United Kingdom, such as "Healing Week" in London in 2012, with 60 participants.[26] Another victim who grew up in a Muslim family, Brian Furnes, said that his family and community subjected him to negative social control, beatings and expulsion, leading him to change his name and disaffiliate his region.[27]

Providers also rely on rituals and spiritual cures, including exorcism to cast out "evil spirits". In Italy, for instance, Catholic priests have allegedly been asked by parents to perform exorcism on their children.[28] Another example concerns members of a Pentecostal church in Norway that attempted to change the sexual orientation of a woman by "asking the demons to depart".[29]

The number of examples demonstrates that conversion therapy takes a range of forms. Yet, these methods are, ostensibly, not exhaustive.

## III. Subjects

Proponents of conversion therapy, often responsible for coercing LGBTI people to go through the practices, are known as "promoters". In a global survey from 2020, former recipients of conversion therapy stated that parents were responsible in 22 per cent, religious leaders in 11.9 per cent, other community members in 11 per cent and mental health practitioners in 9.7 per cent of cases.[30]

The subjects responsible for performing conversion therapy, referred to as "providers", are mainly practitioners with health and faith or religious-based backgrounds. According to the same survey from 2020, medical and mental health prac-

24 Ibid. Also, a priest in the group stated that homosexuals were "people who would never find happiness, no matter how much they tried". An example from Russia involves 13-year-old Maria that was forced by her family to attend conversion therapy in a church, in which she had holy water poured over her and was beaten with rods. See *BBC*, "Hypnosis and holy water: Russian 'cures' for gay people", available at: https://www.bbc.com/news/ world-europe-39777612 (13/11/2021).

25 www.vg.no/spesial/2019/homoterapi (13/11/2021), episode 2 "Gay-campen" (The gay camp).

26 Ibid.

27 Ibid., episode 8 "Utstøtelsen" (The expulsion). Shockingly, a former provider named Ulf Lidman told that he stopped counting after 56 persons had committed suicide, see episode 1 "Himmel og helvete" (Heaven and hell).

28 www.d.repubblica.it/dmemory/2004/03/27/attualita/attualita/093vit39493.html (13/11/2021).

29 www.vg.no/spesial/2019/homoterapi (13/11/2021), episode 5 "Demonene" (The demons).

30 *Adamson et al*., p. 12. Additionally, 5 per cent of recipients were forced by school authorities, 4 per cent by state authorities and 3,6 per cent by their employers.

titioners were providers in 45.8 per cent of the cases, while 18.9 per cent were religious authorities, traditional healers and groups.[31] Moreover, recipients have identified conversion camps and rehabilitation centres as providers in 8.5 per cent, parents in 6,9 per cent, state authorities in 4.4 per cent and school authorities in 4.4 per cent of the cases.[32]

The religious and moral beliefs of promoters and providers seem to be the main reasons why individuals are subjected to conversion therapy.[33] Parents often force their children through the practices "to have them conform to expectations, either theirs or their communities, regarding sexual orientation and gender identity".[34] This includes "gender non-conformity in children" and "lack to adherence to stereotypical gender roles".[35] Finally, some providers appear to offer conversion therapy for financial gains.[36]

LGBTI individuals that are subjected to conversion therapy, referred to as "recipients", are often children and adolescents. In a survey from 2019, more than 80 per cent of the respondents were under the age of 24 and, of those, approximately half of them were under 18.[37] According to a report, children and adolescents are especially vulnerable to the practices, either because they can be "easily coerced" by their parents or because "false and biased ideas" are forced onto them.[38] Also, children do not have the capacity to consent to medical or mental health decisions, which makes them "especially prone to undue influence or coercion".[39] Conversion therapy causes immense harm to recipients. In a global survey from 2020, more than 97 per cent of the respondents stated that they had suffered damage such as suicidal thoughts and attempts, permanent physical harm, depression, anxiety, shame, guilt, self-hatred and loss of relationships with family and friends.[40] Many of them also said that they had irreparable damage, including repeated, disturbing and unwanted memories and dreams about conversion therapy, strong physical reactions as well as

31 Ibid., p. 11. Another report claims that faith or religious-based organisations are the most active providers of conversion therapy, see www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-february-2020 (13/11/2021), p. 38. In this sense, providers from eastern-European states are mainly recognised as health practitioners, see *HRC*, 44th session, Practices of so-called "conversion therapy", fn. 2, para. 27. In the United Kingdom, by contrast, more than half of providers seem to be part of faith-based organisations, see www.gov.uk/government/publications/national-lgbt-survey-summary-report (13/11/2021), p. 14.

32 *Adamson et al.*, p. 12.

33 www.outrightinternational.org/reports/global-reach-so-called-conversion-therapy (13/11/2021), p. 37.

34 *HRC*, 44th session, Practices of so-called "conversion therapy", fn. 2, para. 26.

35 www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-february-2020 (13/11/2021), p. 22.

36 *HRC*, 44th session,, para. 31.

37 www.outrightinternational.org/reports/global-reach-so-called-conversion-therapy (13/11/2021), p. 42.

38 www.ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-february-2020 (13/11/2021), p. 13.

39 *HRC*, 44th session, Practices of so-called "conversion therapy", fn. 2, para. 26.

40 *Adamson et al.*, p. 12. See also *Yalcin*, p. 2 f.

strong negative beliefs about oneself.[41] Hence, the practices are severely harmful to LGBTI people. As stated by Victor Madrigal-Borloz,[42] conversion therapy "provoke[s] profound psychological and physical damage in lesbian, gay, bisexual, trans or gender-diverse persons of all ages, in all regions of the world."[43]

### C. What is the Legal Status of Conversion Therapy in European States?

While the previous part indicates that conversion therapy causes harm to LGBTI people, less than a handful of European states have banned it. Among the reasons seems to be that conversion therapy, although the practices have existed for over a century, is a relatively new concept in the legal sphere in Europe. With reference to this part, a distinction is made between the position of states that have not banned conversion therapy and the regulation of states that have banned it. The aim is to provide an overview of the legal status of conversion therapy in Europe.

#### I. The Position of States That Have Not Banned Conversion Therapy

##### 1. States Not in Favour of Imposing a Ban

Several European states are evidently not in favour of banning conversion therapy. The reasons appear to be two-fold.

The first category of states seems to believe that existing laws are sufficient to protect LGBTI people from conversion therapy.[44] Denmark, for instance, holds that several provisions in its criminal code are applicable to the practices.[45] Also, conversion therapy may qualify as "unlawful coercion" in Sweden[46] or "arbitrary medical treatment" in Bosnia-Herzegovina.[47] Other states, such as Italy and Lithuania, contend that domestic laws and cooperation with LGBTI civil society organisations are sufficient to protect recipients.[48]

The second category of states has not taken an official position on whether conversion therapy should be banned and/or have not adopted mechanisms to combat it.[49] A local Non-Governmental Organisation (NGO) in Slovenia says that there is a systemic lack of information and enforcement mechanisms in the state and that, so

41 Ibid., p. 13–14.
42 Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, see *HRC*, 44th session, Practices of so-called "conversion therapy", fn. 2, para. 1.
43 Ibid., para. 86.
44 *OHCHR*, fn. 16. These states are Denmark, Sweden, Lithuania, Italy, Bosnia-Herzegovina and Ukraine.
45 Ibid., submission by Denmark, p. 1–2.
46 Ibid., submission by Sweden, p. 1.
47 Ibid., submission by Bosnia-Herzegovina, p. 1.
48 Ibid., submission by Lithuania, p. 1; submission by Italy, p. 1–8.
49 Ibid. These are North-Macedonia, Slovenia, Russia and Georgia.

far, three cases of conversion therapy have been detected.[50] In Russia, conversion therapy is allegedly widespread. The reason for this is that the Russian society is highly oriented towards preserving traditional gender norms, that is, treasuring heterosexual and cisgender people while ignoring the existence of LGBTI people.[51] While Georgia holds that various laws protect recipients,[52] a regional NGO has documented three cases where health professionals have sought to "treat gay persons".[53] According to a regional NGO, eastern-European states suffer from high levels of discrimination, and lack of legal regulation and enforcement mechanisms.[54]

### 2. States in Favour of Imposing a Ban

The debates about conversion therapy that have surfaced in recent years have led more and more European states to consider a ban on the practices. In the following, a distinction is made between states that have introduced bills and states that are in the process of evaluating a ban.

The first category of states has introduced legislative bills. In Ireland, a bill on conversion therapy was introduced to the Irish senate in 2018.[55] Under this Bill, both professionals and non-professionals are, with some exceptions, banned from performing the practices, and those found guilty may be fined up to 10,000 euros or imprisoned for up to one year.[56] The Bill got massive support by the Senate in the second reading in 2018 and has since advanced to the third stage.[57] In 2019, a draft bill proposing a ban on any form of conversion therapy was submitted to the Polish Parliament.[58] However, recent cases of discrimination against LGBTI people in Poland creates doubts as to whether a domestic ban will be introduced soon.[59] In

50 Ibid., submission by Association Legebitra, p. 1-2.
51 Ibid., submission by Association Legebitra, p. 6. Hence, the State does nothing to prevent conversion therapy from happening, see submission by *Coming out* and *Nuntiare et Recreare*, p. 2 ff. Even though a federal law imposes strict requirements on health practitioners to treat people in psychiatric care, Russia has not adopted specific laws to prevent any further dissemination of the practices, see p. 7 ff.
52 Ibid., submission by Georgia, p. 1.
53 Ibid., submission by the Eastern European Coalition for LGBT+ Equality, p. 1–2. For instance, one of the cases was reported to a state agency for medical activity, that stated that it was "beyond their competence to assess the doctor's comments on the issue of homosexuality".
54 Ibid., submission by the Eastern European Coalition for LGBT+ Equality, p. 2–3.
55 www.oireachtas.ie/en/bills/bill/2018/39/?tab=bill-text (13/11/2021).
56 Ibid., Sections 1 and 2.
57 Ibid., History of this Bill.
58 www.kph.org.pl/poland-with-the-new-act-banning-the-use-of-conversion-pseudotherapies-on-the-lgbt-people (13/11/2021).
59 *BBC*, "Poland LGBT: Diplomats from 50 countries call for end to discrimination", available at: www.bbc.com/news/world-europe-54317902 (13/11/2021); www.bloomberg.com/news/features/2020-11-22/lgbtq-news-homosexuality-makes-you-enemy-of-state-in-poland (13/11/2021). In 2020, the *European Union Agency for Fundamental Rights* (FRA) published a report on LGBTI rights in the EU Member States, with country data from

2021, the Norwegian Government introduced a legislative bill to regulate conversion therapy, after two proposals to the Parliament were rejected in 2019.[60]

The second category of states are considering a ban on the practices.[61] In 2018, the United Kingdom introduced a national LGBT action plan committing it to end the practices domestically.[62] In 2019, Austria unanimously passed a motion for a resolution on banning conversion therapy for minors.[63] In 2019, France created a commission to evaluate conversion therapy in a national context[64] that proposed the introduction of a provision on the practices in the penal code.[65] The same year, the Dutch Parliament accepted a statement to ban conversion therapy.[66]

## II. The Regulation of States That Have Banned Conversion Therapy

The diverse opinions about conversion therapy are reflected in the legal regulation in Europe. Today, merely four European states have banned the practices on a domestic or regional level. They are Malta, Spain, Germany and Albania.[67] Yet, while LGBTI people enjoy certain protection in these states, the various legal regulations differ. This section thus seeks to uncover the parities and disparities of the domestic and regional bans in Europe through a comparative analysis.

Poland indicating that discrimination against Polish LGBTI people is higher than other EU Member States, see *European Union Agency for Fundamental Rights*, A long way to go for LGBTI equality, 14/05/2020, available at: https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results (13/11/2021), Country data, Poland.

60 www.regjeringen.no/no/dokumenter/horing-forslag-til-regulering-av-konverteringsterapi/id2862957 (13/11/2021).

61 *OHCHR*, fn. 16. These are the United Kingdom, Austria, France, Slovakia, Norway, the Netherlands and Luxembourg.

62 www.gov.uk/government/publications/lgbt-action-plan-2018-improving-the-lives-of-lesbian-gay-bisexual-and-transgender-people (13/11/2021), p. 2.

63 (13/11/2021).

64 *OHCHR*, fn. 16, submission by France, p. 2.

65 https://www2.assemblee-nationale.fr/15/commissions-permanentes/commission-des-lois/missions-flash/pratiques-pretendant-modifier-l-orientation-sexuelle-ou-l-identite-de-genre-d-une-personne (13/11/2021), p. 4. In October 2021, the French Parliament unanimously voted in favour of a bill proposing a ban on banning conversion therapy, see https://apnews.com/article/emmanuel-macron-europe-france-gender-identity-4f5a40c02d1dfeca77d8fefb57a5bd14 (13/11/2021).

66 *OHCHR*, fn. 16, submission by the Netherlands, p. 1.

67 In 2020, Albania became the fourth European state to ban conversion therapy in Europe, although not in the traditional form of adopting a law. In May, the "Order of Psychologists" of Albania imposed a ban on psychologists to perform conversion therapy, see www.hrw.org/news/2020/05/20/albanian-psychologists-prohibit-anti-lgbt-conversion-therapy (13/11/2021). Given the fact that all Albanian psychologists are obliged to be members of the organisation, this decision constitutes a de facto ban on the practices (ibid.). However, since neither the Order of Psychologists nor Albanian authorities have disclosed a detailed scope of the ban, the ban will be omitted from this section.

## 1. Definitions and Scope

In 2016, Malta became the first European state to ban conversion therapy nationally through the adoption of the Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act (ACT No. LV of 2016). According to Section 2 of the Act, "conversion practices" is defined as "any treatment, practice or sustained effort that aims to change, repress and, or eliminate a person's sexual orientation, gender identity and, or gender expression". The Maltese Government informs that this wide definition was chosen to include a range of different practices, making the "intention of such practices" the common denominator.[68] Such practices include, for instance, counselling, psychotherapeutic services and religious practices.[69] Yet, Sections 2(a)-(c) comprise exceptions related to the exploration, development and affirmation of LGBTI people and their identities, including gender identity and gender expression, in addition to treatment of a mental disorder.[70]

Spain, by contrast, has not banned conversion therapy nationally. In 2017, an attempt was made to introduce a state regulation for the protection of the LGBTI community, however, this law never materialised.[71] Notwithstanding, five regions and autonomous communities in Spain have introduced regional laws to protect LGBTI people.[72] In 2016, the Community of Madrid adopted a law to protect LGBTI persons from phobia and discrimination on grounds of sexual orientation and gender identity (Ley No. 3/2016). Section 3(o) of the Act defines "sexual orientation and gender identity conversion or aversion therapy" as "all medical, psychiatric, psychological, religious or any other interventions that seek to change the sexual orientation or gender identity of a person".[73] Like the Maltese law, this definition is wide and not limited to specific practices. Conversely, the regional law in Murcia applies only to gender identity and gender expression,[74] and its scope is thus narrower than the other regional laws.

In 2020, Germany adopted a federal law to protect LGBTI people from conversion therapy (Gesetz zum Schutz vor Konversionsbehandlungen). Section 1(1) of the Act defines "conversion treatment" as "all treatments carried out on humans that are aimed at changing or suppressing sexual orientation or self-perceived gender identity". For the treatment to fall under the definition, attention must be given to the "overall context", such as the physical and psychological influences on a per-

68 *OHCHR*, fn. 16, submission by Malta, p. 1.
69 Ibid.
70 This exception does not apply to sexual orientation, gender identity and gender expression since neither of these constitute a disorder, see ACT No. LV of 2016, Title.
71 *OHCHR*, fn. 16, submission by G37 Despacho Internacional, p. 2. See also *Yalcin*, p. 10 ff.
72 They are Madrid, Murcia, Andalucía, Aragón and Valencia.
73 Equally broad definitions are found in the regional laws in Andalucía: Ley No. 8/2017, Sections 3(o), 6(1) and 6(2); Aragón: Ley No. 18/2018, Section 4(o); Valencia: Ley No. 23/2018, Section 7.
74 Ley No. 8/2016, Sections 8(3) and 14(3).

son.[75] Yet, Section 1(2) states that the Act does not apply to "treatment of medically recognised disorders of sexual preference". The draft law specifies that neither sexual orientation nor gender identity constitute a disorder but gives examples like fetishism, exhibitionism and paedophilia.[76] Finally, Article 1(3) contains an exception to cases involving surgical medical interventions or hormone treatments.[77]

### 2. Recipients

The national and regional laws in Europe qualify recipients differently. In Spain, the regional laws do not distinguish between minors and adults. However, recipients are unable to consent to conversion therapy, making the bans "absolute".[78] The national law in Malta, by contrast, qualifies recipients in terms of age. The law prohibits any provider from performing conversion therapy on a "vulnerable person", including children "under the age of sixteen years".[79] Adults may also qualify as vulnerable persons provided that they have a "mental disorder", or a national court determines that they are "particularly at risk", based on several factors.[80] A similar qualification is found in the German law. According to Section 3(1), providers are banned from performing conversion therapy on minors under the age of eighteen.[81] Yet, Section 3(2) specifies that the practices can be performed on adults, unless the consent is based on a "lack of will". Thus, while the regional laws in Spain do not permit adults and minors to consent to conversion therapy, the Maltese and German laws permit adults to give their consent, unless certain exceptions apply.

### 3. Providers

While the Spanish and German laws do not differentiate between different types of providers, Sections 3(a)-(b) of the Maltese law distinguishes professional and non-professional providers. Subsection 6 of Section 2 defines a professional as "a person who is in possession of an official qualification and, or a warrant to practise as a counsellor, educator, family therapist, medical practitioner […]" and so on. Several providers are thus included in the wording. By comparing Sections 3(a) and (b), the

75 *Deutscher Bundestag*, Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zum Schutz vor Konversionsbehandlungen, Drucksache 19/17278, 19 February 2020, p. 15.
76 Ibid., p. 9 and 15.
77 This exception applies, *inter alia*, where transgender minors want a breast reduction and hormone blockers, see ibid., p. 16.
78 Madrid: Ley No. 3/2016, Sections 7(3)(d) and 94(4)(c); Andalucía: Ley No. 8/2017, Section 62(e); Aragón: Ley No. 18/2018, Section 49(4)(c); Valencia: Ley No. 23/2018, Sections 7 and 60(4)(d)–(e).
79 Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, Section 3(a)(i), cf. Section 2 paragraph 8(a).
80 Ibid., Section 2 paragraph 8(a)-(b).
81 According to the draft law, minors are "in the phase of identifying themselves" and should thus be particularly protected from the negative effects of conversion therapy, see *Deutscher Bundestag*, fn. 75, p. 2 and 17.

distinction between professional and non-professional providers seems relevant for at least two reasons. Firstly, professionals have a greater responsibility and are thus banned from performing conversion therapy on anyone. Secondly, the penalisation level for professionals and non-professionals is dissimilar, cf. Section 4.

### 4. Criminalisation

Providers of conversion therapy are subjected to criminal liability under all the laws in Europe. The Maltese law differentiates the criminal liability of non-professional and professional providers. Section 4(1) states that non-professionals are subjected to a fine of up to 5,000 euros or imprisonment for up to 5 months.[82] Professional providers, inversely, can be fined up to 10,000 euros or be imprisoned for up to 12 months, cf. Section 4(2). The regional laws in Spain do not contain provisions on imprisonment, but providers may be fined and lose certain rights. For example, Section 72(3) of the regional law in Madrid stipulates that perpetrators can be fined up to 45,000 euros and lose their rights to either receive public aid, have ownership of centres or services, or to enter into agreements with the public administration.[83] Section 5(1) of the German law states that those who act contrary to the prohibition of conversion therapy in Section 2 shall be punished with a fine or imprisonment for up to one year.[84] The provision does not distinguish whether the practices are performed on adults or minors. Yet, the draft law stresses that conversion therapy performed on minors is "such a serious misconduct that the use of criminal law as the sharpest sword of the state is justified".[85] Section 5(2) contains an exception to the first paragraph in cases where conversion therapy is performed by "persons who act as guardians or guardians", provided that they do not "grossly violate" their duty of care or upbringing. Finally, Section 6(1) states that an "administrative offense" is committed by providers that advertise or offer the practices contrary to Section 3. Those who are found guilty can be fined up to 30,000 euros, cf. Section 6(2).

## III. Summary

As is apparent, the legal regulation of conversion therapy differs between European states. Even though only a few states have enacted bans, several of them have agreed

82 Additionally, the liability can be increased one to two times when conversion therapy is performed on a "vulnerable person", cf. the second subparagraph of Section 4(1).

83 Similar principles apply for the regional laws in the Communities of Andalucía: Ley 8/2017, Section 65(3); Aragón: Ley No. 18/2018, Section 51(3); Valencia: Ley No. 23/2018, Section 62(3).

84 Not all violations lead to criminal liability. The draft law specifies that "insignificant violations of bodily integrity or sexual and sexual self-determination" fall outside the penal provision and that, in order for the threshold to be exceeded, the treatment must be "objectively suitable for a person to be significantly harmed in their physical or mental development", see *Deutscher Bundestag*, fn. 75, p. 19.

85 Ibid.

to either introduce a ban or to assess whether a ban should be adopted in the future. The domestic and regional laws in Malta, Spain and Germany have both similarities and dissimilarities. While the legal regulation differs between them, the laws contain broad definitions and scopes, and cover several practices, subjects and penalisation. However, since the legal regulation in European states varies quite extensively, there is presently no European consensus on conversion therapy.

## D. Is Conversion Therapy Compatible with European Human Rights Law?

Neither of the European courts – the ECtHR[86] and the CJEU[87] – have so far dealt with cases related to conversion therapy. The legal situation of conversion therapy under European human rights law is therefore uncertain. Yet, the European courts have developed vital principles to safeguard individual human rights protection that may apply to cases of conversion therapy. Most important are the living instrument doctrine,[88] the margin of appreciation doctrine[89] and the principle of subsidiarity.[90] Based on these principles, this part focuses on the individual rights of recipients and providers, and state interests. The objective is to describe the present legal status of conversion therapy under European human rights law.

### I. Does Conversion Therapy Violate the Individual Rights of Recipients?

Under European human rights law, all individuals – including recipients – have the right to life, freedom from torture, private life and so on. Founded on the principles established by the European courts under these rights, this section examines

86 European Court of Human Rights (ECtHR or Strasbourg Court).

87 Court of Justice of the European Union (CJEU).

88 The ECtHR has stated that the ECHR is a "living instrument which [...] must be interpreted in the light of present-day conditions", see ECtHR, App. no. 8978/80, *Tyrer v. The United Kingdom*, para. 31. The rationale of this interpretation method is that the Convention must be adapted to modern society. The ECtHR has used the living instrument doctrine to, *inter alia*, determine the rights of homosexual and transsexual people, rights that were hardly envisaged when the ECHR was adopted 70 years ago, see ECtHR, App. no. 7525/76, *Dudgeon v. The United Kingdom*, para 60; ECtHR, App.no. 28957/95, *Christine Goodwin v. The United Kingdom* [GC] para. 85. Noteworthy is that the Court does not use the method to create new rights but rather applies it to existing situations considering societal developments, see ECtHR, App. no. 8978/80, *Tyrer v. The United Kingdom*, para. 31.

89 The margin of appreciation doctrine is described as a certain "latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies", see *Yourow*, p. 13.

90 The principle of subsidiarity entails that states have the primary responsibility for implementing Convention rights, while giving the ECtHR the competences to intervene where national authorities fail to safeguard the rights of individuals. The Court thus has a secondary control function, see ECtHR, App. no. 5493/72, *Handyside v. The United Kingdom*, para. 50; ECtHR, App. no. 19823/92, *Hokkanen v. Finland*, para. 55. The Court will only intervene in cases of "manifest disproportion between the gravity of the act and the punishment imposed", see ECtHR, App. no. 50231/13, *Sabalić v. Croatia*, para. 109.

whether conversion therapy is likely to violate the individual rights of recipients. Since providers of conversion therapy are more likely to be private actors rather than state agents,[91] the focus will be on the positive, not the negative, obligations of states.[92] Furthermore, conversion therapy is likely to interfere with the substantive aspect, as opposed to the procedural aspect, of the individual rights.[93]

### 1. The Right to Life

Conversion therapy exposes LGBTI people to high risks of committing suicide, as explained in part B.III, and may thus be inconsistent with the right to life under European human rights law. The right to life is enshrined in Article 2 of the ECHR and Article 2 of the CFREU.[94]

The ECtHR has held that Article 2 "may […] imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."[95] Yet, this obligation must be interpreted "in a way which does not impose an impossible or disproportionate burden on the authorities", because of "the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources".[96] For a positive obligation to emanate under Article 2, it is necessary to show that the authorities "knew or ought to have known at the time of the

91 *Adamson et al.*, p. 6; www.outrightinternational.org/reports/global-reach-so-called-conversion-therapy (13/11/2021), p. 8.

92 The ECtHR has found that several Convention rights impose "negative" and "positive" obligations on states. Negative obligations entail that states must refrain from violating Convention rights, see https://rm.coe.int/168007ff4d (13/11/2021), p. 5. Positive obligations, on the other hand, entail that states are responsible not only for the actions of state agents but also for the actions of private actors (ibid, p. 14). For the state to be held liable, it is necessary to show that the actions of the private actor originate from the failing of the state (ibid).

93 The Court has further found that the negative and positive on states can be divided into "substantive" and "procedural" obligations. In terms of substantive obligations, states may be obliged to intervene between individuals to prevent violations of Convention rights, see ECtHR, App. no. 8978/80, *X and Y v. The Netherlands*, para. 23. States must thus "take measures" to prevent violations, see ECtHR, App. no. 25599/94, *A v. The United Kingdom*, para. 22; ECtHR, App. no. 23452/94, *Osman v. The United Kingdom* [GC], para. 115. Procedural obligations, by contrast, entail a duty for states to implement "domestic procedures" to protect individuals from Convention violations and to ensure that individuals have "sufficient remedies" if their rights are violated, see https://rm.coe.int/168007ff4d (13/11/2021), p. 16.

94 European Convention on Human Rights (ECHR). Article 2 of the CFREU has the same meaning and scope as Article 2 of the ECHR, see European Union, Charter of Fundamental Rights of the European Union (CFREU), OJ C 326 of 26/10/2012, p. 391–407, Article 52(3); European Union, Explanations relating to the Charter of Fundamental Rights, fn. 5, p. 17–35, p. 17.

95 ECtHR, App. no. 23452/94, *Osman v. The United Kingdom* [GC], para. 115.

96 Ibid, para. 116. Thus, "not every claimed risk to life" entails a positive obligation for states to "take operational measures to prevent that risk from materialising".

existence of a real and immediate risk to the life of an individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".[97]

In *Keenan v. The United Kingdom*, in which a young man with several health problems committed suicide while being imprisoned, the question before the Court was whether the state had or should have had knowledge of the risk that he was going to commit suicide. The Court held that "persons in custody are in a vulnerable position" and that "the authorities are under a duty to protect them".[98] Therefore, it is "incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies".[99] States must thus take measures to "diminish the opportunities for self-harm", and whether they should be applied depends on "the circumstances of the case".[100] The Court found that the prison administration had fulfilled their obligation to protect Keenan since they had placed him under supervision when he had psychotic episodes.[101] Article 2 was thus not violated. In *Reynolds v. The United Kingdom*, in which a man diagnosed with schizophrenia committed suicide by jumping out of the window of a psychiatric unit, the outcome was different. The ECtHR held that the authorities had an "operational duty" to protect him because of his condition and that "this duty was not fulfilled", causing a violation of Article 2.[102]

Unlike *Keenan* and *Reynolds*, which were institutionalised when they committed suicide, recipients of conversion therapy are in most cases not subjected to state control. Yet, the Court has held that the positive obligation to safeguard lives applies in the context of "any activity, whether public or not, in which the right to life may be at stake".[103] States must therefore protect individuals regardless of whether the provider operates in the public or private sector. Also, Keenan and Reynolds had health problems and were in a vulnerable position. While the ECtHR has held that minors are in a vulnerable position under Article 2,[104] these cases illustrate that even adults may be in a vulnerable position. In this respect, Article 1 of the ECHR compels states to safeguard all individuals within their jurisdiction from risks relating to self-harm. The failure to do so is likely to cause a violation of the positive obligation under Article 2.

97 Ibid.
98 ECtHR, App. no. 27229/95, *Keenan v. The United Kingdom*, para. 91.
99 Ibid.
100 Ibid., para. 92.
101 Ibid., para. 99.
102 ECtHR, App. no. 2694/08, *Reynolds v. The United Kingdom*, paras. 61 and 68–69.
103 ECtHR, App. no. 48939/99, *Öneryildiz v. Turkey* [GC], para. 71.
104 ECtHR, App. no. 69546/12, *Cevrioğlu v. Turkey*, para. 57; ECtHR, App. no. 10551/10, *Zinatullin v. Russia*, para 28.

## 2. The Prohibition of Torture

Various forms of conversion therapy are likely to cause physical harm to recipients and may, therefore, be inconsistent with the prohibition of torture stipulated in Article 3 of the ECHR and Article 4 of the CFREU.[105]

Article 3 of the ECHR stipulates that no one shall be subjected to "torture or to inhuman or degrading treatment or punishment". In *Ireland v. The United Kingdom*, the ECtHR held that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3", followed by several relative criteria to be considered.[106] Moreover, the Court has stated that ill-treatment usually involves "actual bodily injury" or "intense physical or mental suffering" but that, in the absence of these aspects, other forms of damage can apply – such as if the treatment "humiliates or debases an individual".[107] Similarly, "discriminatory treatment", such as verbal and physical attacks against LGBTI people, may surpass the threshold.[108] Furthermore, "all forms of violence against children, however light, are unacceptable".[109] Various forms of ill-treatment, including conversion therapy, are thus likely to fall in under Article 3. Moreover, the ECtHR has held that Article 3 contains a positive obligation on states to "take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals".[110] This obligation entails a duty for states to provide effective protection to "children and other vulnerable individuals",[111] especially in the context of violence, abuse and neglect.[112]

105 Article 4 of the CFREU has the same meaning and scope as Article 3 of the ECHR, cf. CFREU, Article 52(3); EU, Explanations relating to the Charter of Fundamental Rights, fn. 5, p. 18. The ECtHR has held that Article 3 not only aims to protect "human dignity" but also the "physical integrity of individuals", see ECtHR, App. no. 18896/91, *Ribitsch v. Austria*, para. 38. This notion seems to be connected to bodily integrity, see *Von Arnauld/Von der Decken/Susi*, p. 387.

106 ECtHR, App. no. 5310/71, *Ireland v. The United Kingdom*, para. 162.

107 ECtHR, App. no. 11308/16 and 11344/16, *Tlapak and Others v. Germany*, para. 86.

108 ECtHR, App. no. 73235/12, *Identoba and Others v. Georgia*, para. 65.

109 ECtHR, App. no. 11308/16 and 11344/16, *Tlapak and Others v. Germany*, para. 86.

110 ECtHR, App. no. 25599/94, *A v. The United Kingdom*, para. 22; ECtHR, App. no. 29392/95, *Z and Others v. The United Kingdom* [GC], para. 73; ECtHR, App. no. 39272/98, *M.C. v. Bulgaria*, para. 149. Like Article 2, this obligation should not "impose an excessive burden on the authorities" in terms of "the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources", see ECtHR, App. no. 35810/09, *O'Keeffe v. Ireland* [GC], para. 144. Thus, not every risk imposes an obligation to act.

111 Ibid.; ECtHR, App. no. 25599/94, *A v. The United Kingdom*, para. 22. The wording "other vulnerable individuals" seems to refer to specific groups of individuals in challenging situations, including victims of ill-treatment, see ECtHR, App. no. 14811/04, *Gisayev v. Russia*, para. 116.

112 See, inter alia, ECtHR, App. no. 26692/05, *C.A.S. and C.S. v. Romania*; ECtHR, App. no. 25599/94, *A v. The United Kingdom*; ECtHR, *Z and Others v. The United Kingdom* [GC], fn. 109. Accordingly, states are not only required to provide effective protection to minors but also adults exposed to ill-treatment within the meaning of Article 3.

Whether a state will be held responsible for failing to protect individuals from ill-treatment under Article 3 depends on the knowledge of the state.[113] Case law under Article 3 is illustrative. In *Z and Others v. The United Kingdom*, four children suffered neglect and abuse by their parents over a long time, of which the state had knowledge about. The ECtHR held that the authorities were required to protect the children by taking necessary steps, by for example removing them from their home.[114] The Court held that the authorities had failed to do so, causing a violation of Article 3.[115] Conversely, in *D.P. & J.C. v. The United Kingdom*, which involved two siblings that were repeatedly raped and sexually abused by the partner of their mother, the ECtHR found that the social services had no information about the abuses and that, for this reason, they were not required to remove the children from their home.[116] Article 3 was thus not violated.

Several forms of conversion therapy involve physical and psychological abuse of LGBTI people, such as demeaning statements, beatings, aversion therapy, exorcism and so forth. Taken together, these practices are highly likely to fall in under Article 3. Where states have knowledge of ill-treatment of recipients, particularly children, and do not take measures that provide effective protection, Article 3 is likely to be violated. Yet, since Article 3 is composed of numerous relative elements, it is for the Strasbourg Court or domestic courts to determine whether conversion therapy is inconsistent with the provision.

### 3. The Right to Respect for Private Life

Conversion therapy intrudes into an utmost private sphere of LGBTI people, that is, sexual orientation and gender identity. The practices are thus likely to interfere with the right to respect for private life under European human rights law. This right is enshrined in Article 8 of the ECHR and Article 7 of the CFREU.[117]

The ECtHR has held that private life is a "broad term not susceptible to exhaustive definition"[118] and that it may "embrace multiple aspects of the persons' physical and social identity".[119] The Court has also found that "there may be positive obligations in an effective respect for [private life],"[120] that "may involve the adoption of measures designed to secure respect for private life even in the sphere of the

113 ECtHR, App. no. 35810/09, *O'Keeffe v. Ireland* [GC], para. 144.
114 ECtHR, App. no. 29392/95, *Z and Others v. The United Kingdom* [GC], para. 74.
115 Ibid., para. 75.
116 ECtHR, App. no. 38719/97, *D.P. & J.C. v. The United Kingdom*, para. 113.
117 Article 7 of the CFREU has the same meaning and scope as Article 8 of the ECHR, cf. CFREU, Article 52(3); EU, Explanations relating to the Charter of Fundamental Rights, fn. 5, p. 20. See additionally *Yalcin*, p. 22 ff.
118 ECtHR, App. no. 2346/02, *Pretty v. The United Kingdom*, para. 61; ECtHR, App. no. 44647/98, *Peck v. The United Kingdom*, para. 57.
119 ECtHR, App. no. 30562/04 and 30566/04, *S. and Marper v. The United Kingdom* [GC], para. 66.
120 ECtHR, App. no. 8978/80, *X and Y v. The Netherlands*, para. 23; ECtHR, App. no. 4587/09, *Lozovyye v. Russia*, para. 36.

relations between individuals themselves".[121] In this respect, "[c]hildren and other vulnerable individuals" should be afforded "effective protection".[122]

The positive obligations under Article 8 do not occur in every case, cf. the wording "may" in the X and Y case. The ECtHR must determine "whether the interest at stake requires the imposition of the positive obligation sought by the applicant,"[123] based on, inter alia, "the importance of the interests at stake" and "whether 'fundamental values' or 'essential aspects' of private life are in issue".[124] The Court has found that "physical and psychological integrity" are protected under private life,[125] and that sexual orientation and sexual life,[126] form part of this category. Furthermore, the ECtHR has held that "identity and autonomy" are part of private life,[127] including legal recognition of the "gender identity" of transsexual people.[128]

In cases involving conversion therapy, the ECtHR must firstly determine whether the specific interest forms part of private life under Article 8. While sexual orientation enjoys protection under private life, the situation may be different for gender identity.[129] Next, the Court must examine whether states have positive obligations based on, inter alia, the importance of the interests at stake. Since conversion

121 ECtHR, App. no. 8978/80, *X and Y v. The Netherlands*, para. 23.
122 Ibid., paras. 23–24 and 27.
123 *European Court of Human Rights*, Guide on Article 8 of the European Convention on Human Rights, 31 August 2021, available at: www.echr.coe.int/Documents/Guide_ Art_ 8_ENG.pdf (13/11/2021), para. 6.
124 ECtHR, App. no. 37359/09, *Hämäläinen v. Finland* [GC], para. 66.
125 ECtHR, App. no. 59320/00, *Von Hannover v. Germany*, para. 50. According to *Bublitz*, the term "psychological integrity" has not yet been defined by the ECtHR but seems to refer to protection of the "human mind", see *Von Arnauld/Von der Decken/Susi*, p. 387.
126 ECtHR, App. no. 41288/15, *Beizaras and Levickas v. Lithuania*, para. 109. This includes "sexual self-determination", see ECtHR, App. no. 35968/97, *Van Kück v. Germany*, para. 69.
127 According to the ECtHR, Article 8 "secures to individuals a sphere within which they can freely pursue the development and fulfilment of their personality", see ECtHR, App. no. 53251/13, *A.-M.V. v. Finland*, para. 76; ECtHR, Apps. 48151/11 and 77769/13, *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, para. 153.
128 The ECtHR has stressed that individuals have a right to determine their own sexual identity and that transgender people have a right to personal development as well as physical and moral security, see ECtHR, App. no. 79885/12, 52471/13 and 52596/13, *A.P., Garçon and Nicot v. France*, para. 93. The Court has dealt with several cases involving transgender people claiming a violation of Article 8. In a landmark judgment concerning a post-operative male-to-female transgender, the Court stated that while there was not yet evidence of a common European approach, there was "the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals", see ECtHR, App. no. 28957/95, *Christine Goodwin v. The United Kingdom* [GC], para. 85. In this respect, a violation of Article 8 has been found in several cases involving the failure of states to provide legal recognition of the gender identity of post-surgery transgender people, see ibid, para. 93; ECtHR, App. no. 32570/03, *Grant v. The United Kingdom*, para. 44; ECtHR, App. no. 27527/03, *L. v. Lithuania,* para. 60.
129 On the one hand, states are granted a narrow margin of appreciation since this area concerns an intimate aspect of private life, see ECtHR, App. no. 28957/95, *Christine Goodwin v. The United Kingdom* [GC], para. 93; ECtHR, App. no. 29002/06, *Schlumpf v.*

therapy affects an intimate aspect of LGBTI people, it is highly likely that states have positive obligations to take measures to safeguard them. Finally, the Court must determine whether the state has fulfilled their positive obligations. The failure of states to protect the physical and psychological integrity, as well as the identity and autonomy, of LGBTI people, is likely to violate Article 8.

### 4. The Prohibition of Discrimination

Conversion therapy exclusively targets LGBTI people and is thus highly relevant in the context of the prohibition of discrimination that is enshrined in Article 14 of the ECHR and Article 21(1) of the CFREU.[130]

Article 19(1) of TFEU grants the EU competences to adopt legislation to combat discrimination based on, inter alia, sexual orientation. In this respect, the EU may harmonise the laws of Member States both in respect of actions taken by state authorities and private individuals.[131] Accordingly, the EU has competences to ban conversion therapy explicitly. In 2018, the European Parliament (EP) passed Resolution 2017/2125(INI) on banning conversion therapy and urged the Member States to adopt similar measures. Additionally, in 2020, the European Commission (EC) introduced the LGBTIQ Equality Strategy 2020-2025, which stipulates, among other, that "[t]he Commission will foster Member States' exchange of good practice on ending these practices".[132] Yet, no legislation has been adopted so far, and whether a ban will be introduced remains to be seen.

Based on the wording of Article 14 of the ECHR and case law, four criteria must be fulfilled to find a violation.[133] Firstly, the wording "[t]he enjoyment of the rights and freedoms set forth in this Convention" stipulates that Article 14 merely applies

*Switzerland*, paras. 104 and 115. On the other hand, gender diversity is still contested among European states, causing them to be granted a wider margin of appreciation, see, for instance, ECtHR, App. no. 36515/97, *Fretté v. France*, para. 41.

130 Article 21(1) of the CFREU applies, in so far as it corresponds to Article 14 of the ECHR, in compliance with it, see EU, Explanations relating to the Charter of Fundamental Rights, fn. 5, p. 24 and CFREU, Article 52(3). Unlike the ECHR, this provision explicitly refers to "sexual orientation", but makes no reference to gender identity. Moreover, the provision draws on Article 19 of the TFEU and Article 14 of the ECHR, see EU, Explanations relating to the Charter of Fundamental Rights, fn. 5, p. 24. See additionally *Yalcin*, p. 22 ff.

131 Ibid., p. 24.

132 *European Commission (EC)*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM/2020/698 final, p. 15.

133 The prohibition of discrimination is also enshrined in Article E of the ESC, Article 1 of Protocol 12 to the ECHR, and Recommendation CM/Rec(2010)5 that requires CoE Member States to take measures to combat discrimination on grounds of sexual orientation or gender identity. Hence, LGBTI people enjoy extensive protection from discrimination.

together with one of the other Convention rights.[134] Conversion therapy is likely to fall within the ambit of Articles 2, 3 and 8. Article 14 is therefore applicable.

Secondly, the complaint must concern one of the protected grounds of discrimination in Article 14. While neither sexual orientation nor gender identity are listed explicitly in the provision, the ECtHR has found that both categories fall within it.[135] Since conversion therapy solely targets LGBTI people, this criterion is fulfilled.

Thirdly, the Strasbourg Court has stated that there must be a "difference in treatment of persons in analogous, or relevantly similar, situations".[136] In *E.B. v. France*, concerning a woman that lived in a same-sex relationship that was denied the right to adopt by French authorities, the ECtHR found a violation of Article 14 in conjunction with Article 8, since the national law permitted single persons to adopt and the authorities merely based their refusal on the "lifestyle" of the applicant.[137] This case is a good illustration of how differential treatment between heterosexual and homosexual people may cause a violation of Article 14.

The court concluded differently in *Hämäläinen v. Finland*, in which a transgender woman was denied legal recognition of her gender without changing her marriage to a cisgender woman into a civil partnership, since Finnish legislation did not allow same-sex marriages.[138] A majority of 14 judges held that the situation of the applicant was not "sufficiently similar" to the situation of cissexuals since they were not at risk of having a "forced" divorce like the applicant was.[139] Article 14 was thus not violated. A minority of three judges strongly opposed this view and stated that the reasoning had several shortcomings.[140] Based on the developments that have taken place in the case law of the ECtHR and the society in general, it is hard to disagree with the minority. Recipients will, naturally, compare themselves to the sit-

134 The ECtHR has held that Article 14 "does not presuppose a breach of one or more of such provisions" and that "it suffices that the facts of the case fall within the ambit of another substantive right of the Convention or its Protocols", see ECtHR, App. no. 34369/97, *Thlimmenos v. Greece* [GC], para. 40.

135 ECtHR, App. no. 73235/12, *Identoba and Others v. Georgia*, para. 96. The wording "any grounds such as" in implies that the list in Article 14 is not exhaustive, as well as the provision prohibits discrimination based on "other status". Unlike the ECHR, sexual orientation and gender identity are explicitly listed as protected grounds of discrimination in CoE, Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), Article 4(3).

136 ECtHR, App. no. 42184/05, *Carson and Others v. The United Kingdom* [GC], para. 61. The situation of the comparator group does not need to be "identical" to the situation of the applicant, see ECtHR, App. no. 7205/07, *Clift v. The United Kingdom*, para. 66. Taking into account the "particular nature" of the individual complaint, the applicant is merely required to show that s/he was in a "relevantly similar situation to others treated differently" (ibid.).

137 ECtHR, App. no. 43546/02, *E.B. v. France* [GC], paras. 88–98. See also ECtHR, App. no. 30141/04, *Schalk and Kopf v. Austria*.

138 See also EctHR, *Fretté v. France*, fn. 128; ECtHR, App. no. 29591/07, *Gas and Dubois v. France*.

139 ECtHR, *Hämäläinen v. Finland* [GC], fn. 123, para. 112.

140 Ibid., Joint dissenting opinion of Judges Sajó, Keller and Lemmens, paras. 17–21.

uation of heterosexual or cisgender people. If the Hämäläinen case is upheld, the Court will presumably find that LGBTI people and heterosexual or cisgender people are in different situations, because the latter group is not at risk of facing conversion therapy. This situation would be very unfortunate. Hence, the Court should take a stance against this position to provide transgender people with the protection they are entitled to. Whether the criterion will be fulfilled in cases of conversion therapy remains to be determined by the ECtHR.

Fourthly, the differential treatment must be capable of "objective and reasonable justification".[141] In this respect, the Court has found that Article 14 may impose positive obligations on states.[142] In *Horváth and Kiss v. Hungary*, involving two young Roma men that were misdiagnosed with mental disabilities and later segregated from other children in a remedial school with poor education quality, the Strasbourg Court found that states must implement "positive measures" to protect the right to education for members of groups that have been exposed to past discrimination, such as Roma people.[143] The Court found that the tests performed on the applicants were culturally biased and did not provide necessary safeguards against misdiagnosis and, for this reason, they could not serve as justification for the treatment of the applicants.[144] Consequently, there was a violation of Article 14 in conjunction with Article 2 of Protocol No. 1.

This case is, to a certain extent, transferrable to cases of conversion therapy. While the ECtHR makes it clear that states must take measures to protect groups of people that are at risk of being exposed to discrimination, such as Roma people, the same must apply for LGBTI people. Moreover, discrimination is often directed towards children and adolescents that have limited capacity to have their rights safeguarded. Hence, states may have positive obligations to protect recipients from conversion therapy, and a failure to do is likely to violate Article 14.

## II. Do Individual Rights Grant Providers the Right to Perform Conversion Therapy?

Not only recipients enjoy protection under European human rights law. Providers are also entitled to certain individual rights, such as freedom of thought, conscience and religion, freedom of expression, as well as parental rights. This section examines whether different providers, including religious authorities, health practitioners and parents, are entitled to perform conversion therapy based on their individual rights

141 ECtHR, App. no. 42184/05, *Carson and Others v. The United Kingdom* [GC], para. 61. Even though the wording of Article 14 contains no derogations, the ECtHR has held that the provision cannot be interpreted too extensive, since national authorities are faced with situations and problems requiring "different legal solutions" in addition to the fact that "certain legal inequalities tend only to correct factual inequalities".

142 ECtHR, App. no. 34369/97, *Thlimmenos v. Greece* [GC], para. 44; ECtHR, App. no. 69498/01, *Pla and Puncernau v. Andorra*, para. 59.

143 ECtHR, App. no. 11146/11, *Horváth and Kiss v. Hungary*, para. 104.

144 Ibid., paras. 119–121 and 123.

under European human rights law. The focal point will be on the substantive rights of providers, as opposed to procedural rights and justification of state interferences.

### 1. Religious Providers

Religious or faith-based organisations, comprising religious authorities, healers and groups, are among the most prominent providers of conversion therapy. All these providers are entitled to freedom of thought, conscience and religion under Article 9 of the ECHR and Article 10(1) of the CFREU.[145]

The ECtHR has held that Article 9(1) includes a right to "manifest" religion or belief.[146] However, since this right may affect others, it is subject to limitations under Article 9(2).[147] To enjoy protection under the first paragraph of Article 9, the Court has stated that "the act in question must be intimately linked to the religion or belief", which would be the case where, inter alia, "an act of worship or devotion […] forms part of the practice of a religion or belief in a generally recognised form".[148]

In *Van den Dungen v. The Netherlands*, the ECoHR[149] held that the distribution of anti-abortion material by a Christian man outside an abortion clinic did not constitute a manifestation of his religion or belief, although motivated by his faith.[150] In *Eweida v. The United Kingdom*, by contrast, the ECtHR found that the refusal of one of the applicants to counsel homosexual couples was a manifestation of his religion and beliefs, because it was "directly motivated" by his Christian beliefs on marriage and sexual relationships.[151]

In cases involving conversion therapy, the ECtHR must therefore carefully examine whether conversion therapy is sufficiently linked to religion or belief. If such a link is established, providers may claim that they have a right to perform the practices under Article 9(1). However, this right can be limited by states in accordance with Article 9(2). Conversely, if no such link is found, providers do not enjoy protection under Article 9.

145 Article 10(1) of the CFREU has the same meaning and scope as Article 9 of the ECHR, cf. CFREU, Article 52(3), and *EU*, Explanations relating to the Charter of Fundamental Rights, fn. 5, p. 21. See additionally Yalcin, p. 39 ff.

146 Ibid.

147 ECtHR, App. no. 48420/10, 59842/10, 51671/10 and 36516/10, *Eweida and Others v. The United Kingdom*, para. 80.

148 Ibid., para. 82. Accordingly, "a distinction must be drawn between an activity central to the expression of a religion or belief, and one which is merely inspired or even encouraged by it", see https://rm.coe.int/168007ff4f (13/11/2021), p. 15.

149 European Commission of Human Rights (ECoHR).

150 ECoHR, App. no. 22838/93, *Van Den Dungen v. The Netherlands*. The Commission, however, found that the case fell within the ambit of Article 10 of the ECHR.

151 ECtHR, App. no. 48420/10, 59842/10, 51671/10 and 36516/10, *Eweida and Others v. The United Kingdom*, para. 108.

## 2. Health Practitioners and Other Providers

Conversion therapy is offered by a range of providers, including health practitioners, conversion camps and rehabilitation centres, school authorities and employers. The common denominator is that these providers are entitled to freedom of expression under Article 10 of the ECHR and Article 11(1) of the CFREU.[152]

Article 10(1) of the ECHR includes a right to "impart information and ideas". The ECtHR has held that the provision covers all forms of expressions,[153] such as offending, shocking or disturbing expressions,[154] and opinions capable of causing harm to others.[155] Yet, since this right may affect others, it is subject to limitations under Article 10(2). For example, the provision does not protect ideas promoting the Nazi ideology,[156] instigation to hatred and racial discrimination,[157] and "hate speech",[158] such as homophobic expressions.

In *Lilliendahl v. Iceland*, concerning a man that was convicted for making homophobic statements, the ECtHR held that the concept of "hate speech" falls into two categories.[159] Firstly, "the gravest forms of hate speech" that may fall in under Article 17 and, secondly, "less grave forms of hate speech" that may be limited under Article 10.[160] The ECtHR found that the statements of the applicant fell in under the second category,[161] but that the assessment of the Icelandic Supreme Court was balanced.[162] The Court thus found the complaint to be manifestly ill-founded.

While expressions related to conversion therapy usually are demeaning and discriminatory, which may constitute "hate speech" within the meaning of Article 10(1), they are not very likely to fall in under Article 17 due to its high threshold. Accordingly, these types of expressions are likely to be protected under Article 10(1). States may nevertheless restrict this right under Article 10(2).

152 Article 11(1) of the CFREU has the same meaning and scope as Article 10 of the ECHR, see CFREU, Article 52(3), and *EU*, Explanations relating to the Charter of Fundamental Rights, fn. 5, p. 21.
153 https://rm.coe.int/168007ff48 (13/11/2021), p. 7.
154 ECtHR, App. no. 5493/72, *Handyside v. The United Kingdom*, para. 49.
155 https://rm.coe.int/168007ff48 (13/11/2021), p. 15-16.
156 ECoHR, App. no. No. 12194/86, *Kühnen v. The Federal Republic of Germany.*
157 ECoHR, App. no. 26551/95, *D. I. v. Germany.*
158 ECtHR, App. no. 35071/97, *Gündüz v. Turkey*, paras. 40 and 41. The ECtHR has so far not provided a definition of "hate speech". When determining this, it is vital to look at the "context" in which the expressions were given, whereas statements forming part of a public debate are less likely to fall in under the term, see *Jacobs/White/Ovey*, p. 441.
159 ECtHR, App. no. 29297/18, *Lilliendahl v. Iceland*, Decision of admissibility, para. 33. See also ECtHR, App. no. 1813/07, *Vejdeland and Others v. Sweden*.
160 ECtHR, App. no. 29297/18, *Lilliendahl v. Iceland*, paras. 34-35.
161 Ibid, para. 39.
162 Ibid, paras. 44–45 and 47.

### 3. Parental Rights

Parents may claim that their parental authority permits them to force their children to go through conversion therapy. Indeed, parents and their children have a right to "family life" under Article 8 of the ECHR and Article 7 of the CFREU, and a right to exercise parental authority is inherent in this notion.[163] Yet, when taking decisions involving children, the best interests of the child are of paramount importance.[164] In some cases, they may override the interests of parents.[165]

In Tlapak and *Others v. Germany*, the parents had been partly deprived of their parental authority, and the children placed in care, after the authorities found out that they had exposed their children to corporal punishment in the form of caning. The Court held that Articles 8 and 9 of the ECHR, combined with Article 2 of Protocol 1, gave parents the right to bring up their children in conformity with their religious convictions.[166] Yet, the Court stated that there were "relevant and sufficient" reasons for the authorities to interfere, and that domestic courts had struck a fair balance between the competing interests.[167] Article 8 was thus not violated.

Conversion therapy exposes children to physical and psychological harm that is clearly against their best interests. Hence, the interests of parents cannot supersede the harm these practices cause.

## III. Can a Domestic Ban on Conversion Therapy be Justified?

States are, under their own sovereign powers, free to adopt laws that ban or restrict unwanted conduct, such as conversion therapy. The question to be examined in this section is whether a domestic ban on the practices can be justified under European human rights law considering the interests of states and providers. To illustrate how these rights are weighed against each other, the German law on conversion therapy will be used as a reference.

The second paragraphs of Articles 8-11 of the ECHR authorise states to interfere in the rights listed in Articles 8(1) to 11(1) provided that three conditions are ful-

163 ECtHR, App. no. 11308/16 and 11344/16, *Tlapak and Others v. Germany*, para. 67; ECtHR, App. no. 68125/14 and 72204/14, *Wetjen and Others v. Germany*, para. 56. Moreover, the second sentence of Article 18(1) of the Convention on the rights of the Child (CRC) states that parents have the primary responsibility for "the upbringing and development of the child", of which States are bound to respect, cf. Article 14(2) of the CRC. See additionally *Yalcin*, p. 39 ff.

164 ECtHR, App. no. 41615/07, *Neulinger and Shuruk v. Switzerland* [GC], para. 135. See also the third sentence of Article 18(1) of the CRC.

165 ECtHR, App. no. 25735/94, *Elsholz v. Germany* [GC], para. 50. Parents may thus not make decisions that could cause harm to the health and development of the child, see ECtHR, App. no. 41615/07, *Neulinger and Shuruk v. Switzerland* [GC], para 135.

166 ECtHR, Apps. 11308/16 and 11344/16, *Tlapak and Others v. Germany*, para. 79.

167 Ibid, para. 100.

filled.[168] A precondition is that there is a state interference in one of the rights. A ban on conversion therapy is, as explained in section D.II, likely to interfere with Articles 9(1) and 10(1).

Firstly, the interference must be "prescribed by law". To fulfil this criterion, the ECtHR has held that the interference must have a basis in national law[169] and that this law must be "accessible" and "foreseeable".[170] The German law on conversion therapy is a federal law that entered into force on 13 June 2020. The law also defines the scope of conversion therapy, bans specific conduct and regulates offences. Consequently, the first criterion is likely to be fulfilled.

Secondly, the interference must be "in the interests of" one of the aims listed exhaustively in the second sentences of Articles 9-10 of the ECHR.[171] A ban on conversion therapy meets at least three legitimate aims. These are "prevention of disorder and crime",[172] "protection of health or morals"[173] and "protection of the rights and freedoms of others".[174]

Thirdly, the interference must be "necessary in a democratic society". To fulfil this criterion, the Court has held that the interference must "correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'."[175] The rigor-

168 While the wordings of the second sentences of Articles 8-11 are not identical, the limitations are sufficiently similar to approach them collectively, see *Jacobs/White/Ovey*, p. 307. Moreover, the European courts apply similar principles to justify state interferences in individual rights, see Article 52(1) and (3) of the CFREU and the second sentences of Articles 8-11 of the ECHR. See also *Yalcin*, p. 39 ff.

169 ECtHR, App. no. 30985/96, *Hasan and Chaush v. Bulgaria* [GC], para. 84. Both written and unwritten laws form part of this basis, see ECtHR, App. no. 6538/74, *The Sunday Times v. The United Kingdom (No. 1)*, para. 47.

170 ECtHR, App. no. 6538/74, *The Sunday Times v. The United Kingdom* (No. 1), para. 49. Additionally, the law must "afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise", see ECtHR, App. no. 30562/04 and 30566/04, *S. and Marper v. The United Kingdom* [GC], para. 95.

171 It is for the respondent state to show that the interference meets a legitimate aim, see ECtHR, App. no. 11138/10, *Mozer v. The Republic of Moldova and Russia* [GC], para. 194.

172 While Article 10(2) explicitly refer to this aim, Article 9(2) refers only to "protection of public order". Despite the difference in wordings, the aims are to some extent connected, see ECtHR, App. no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, *Engels and Others v. The Netherlands*, para. 98; *Jacobs/White/Ovey*, p. 314 and 319.

173 The aim "protection of health" not only refers to public health but also to individual health, see ECtHR, App. no. 11373/85, *Eriksson v. Sweden*, paras. 66–67. The aim is thus highly relevant in this context. See also *Yalcin*, p. 39 ff.

174 While this wording is found in Article 9(2), Article 10(2) refers to "protection of the reputation or rights of others". However, the latter aim is often applied in conjunction with the former aim, see *Greer*, p. 35; *Jacobs/White/Ovey*, p. 323. This aim is frequently invoked in child-care cases, see ECtHR, App. no. 46544/99, *Kutzner v. Germany*; ECtHR, App. no. 37283/13, *Strand Lobben and Others v. Norway* [GC]. Even though the aim was invoked under Article 8(2) in this case, Articles 8(2) and 9(2) contain corresponding wordings. See also *Yalcin*, p. 39 ff.

175 ECtHR, App. no. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, *Silver and Others v. The United Kingdom*, para. 97.

ousness of the restriction imposed on the individual must thus be balanced against the public interests, that is, the competing interests.[176] A preliminary question is how wide a margin of appreciation states should be afforded in cases of conversion therapy. Since there is presently no European consensus among the CoE Member States, and a ban on the practices restrict minor aspects of the individual rights of recipients, states are likely to be afforded a wide margin of appreciation. Furthermore, the balancing of the competing interests depends on the means taken by the state. A law banning providers from any interaction with LGBTI people, such as guiding and counselling, is likely to be disproportionate. By contrast, legislation preventing providers from imposing harm to recipients, like the German law, is likely to be proportionate. Hence, a domestic ban on conversion therapy presumably fulfils the third criterion. It is, however, for the ECtHR or domestic courts to determine whether a ban on conversion therapy will be justified considering all the facts of the case.

## IV. Conclusion

The former sections allow one to conclude that conversion therapy is not generally unlawful under European human rights law. On the one hand, conversion therapy is likely to violate the individual rights of recipients under the right to life, the prohibition of torture, the right to private life and the prohibition of discrimination. These rights impose positive obligations on states to penalise harmful conduct and to take measures to protect individuals from harmful and discriminatory conduct. Children and other vulnerable groups enjoy particular state protection. Where states have knowledge of risks relating to the individual rights of recipients, and do not take adequate measures to protect them, they will be held liable for violations. On the other hand, providers enjoy the right to freedom of thought, conscience and religion in addition to freedom of expression, and conversion therapy is likely to fall in under these rights. Yet, states may restrict these rights in accordance with the exceptions listed in the second paragraph of the respective provisions.

A domestic ban on conversion therapy preventing providers from harming recipients is likely to meet the cumulative criteria stipulated in Articles 9(2)-10(2) of the ECHR. The first criterion is presumably met when the law regulates the conduct of providers in a clear manner. The second criterion is likely to be met when the ban aims to protect public and/or individual interests, such as to prevent providers from imposing harm to recipients. The final criterion is most likely met if the ban safeguards public or individual interests and the interference is not too extensive to achieve these aims.

176 *Jacobs/White/Ovey*, p. 325. In terms of conversion therapy, the ECHR must decide whether the interests of the state to ban conversion therapy outweigh the interests of providers to perform the practices.

### E. How Should Conversion Therapy be Regulated in The Future?

The absence of legal regulation on conversion therapy in Europe allows providers to continue exposing LGBTI people to discriminatory and harmful practices to change or suppress their sexual orientation or gender identity. While conversion therapy has been reported in numerous European states, only three of 44 sovereign European states have explicitly banned the practices on a regional or domestic level. Evidently, a ban on conversion therapy is a result of political consensus and careful evaluations to avoid conflict with existing legislation. Nonetheless, the previous sections demonstrate that the practices cause harm to recipients, indicating that states ought to provide more protection to LGBTI people and, particularly, children and adolescents.

The European organisations have not taken sufficient action. The fact that the EU has explicit competences to ban conversion therapy, and hardly any action has been taken so far, is particularly worrying. The instruments of the CoE are highly suitable to combat conversion therapy in the CoE Member States. Yet, the lack of precedents causes doubts as to whether conversion is prohibited under European human rights law. Furthermore, the scarce division of competences between the European organisations and their Member States makes it hard to predict which of them is responsible for adopting bans. On the one hand, a ban by the CoE and EU would be cross-sectoral in the sense that the practices would be unlawful in all Member States of the respective organisation as such. Yet, disparities between the legal traditions of the Member States could make it difficult for the European courts to enforce such a ban. On the other hand, Member States can adapt and enforce domestic legislation according to their own legal traditions, by providing their own definitions on the practices according to national research and determining the level of penalisation of providers freely. Then again, the legal regulation of conversion therapy in European states could become even more diverse.

Regardless of whether conversion therapy is banned by the European organisations or their Member States, providing some form of legal regulation to safeguard the rights of recipients is an urgent matter. The lack of legal regulation and enforcement mechanisms could, in the worst-case scenario, lead to suicide or irreparable damage for LGBTI people across the European continent.

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