

**“Peace Dialogue Campus Network:
Fostering Positive Attitudes between
Migrants and Youth in Hosting Societies”**



Cultural Conflict and Migration in the EU: Can it be resolved? The cases of LGBTI and Female Circumcision at the ECHR

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Overview



The aim of this session is to help you understand:

- International and EU laws on LGBTI and Female Circumcision issues
- Current migration in the EU on these issues

International legal instruments related to international migration



- **Refugees**

- 1951 Convention relating to the Status of Refugees
- 1967 Protocol relating to the Status of Refugees

- **Migrant workers**

- 1949 ILO Convention concerning Migration for Employment (Revised 1949) (No. 97)
- 1975 ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Supplementary Provisions) (No. 143)
- 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- 2011 ILO Convention concerning Decent Work for Domestic Workers (No. 189)

- **Smuggling and trafficking**

- 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
- 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air

International Refugee Protection:



- Universal Declaration of Human Rights 1948, article 14: the right to **seek** and enjoy asylum.

'Seek' implies right to entry. But declaration is non-binding!

- Refugee Convention 1951, stipulates when individuals are recognized as refugees (alongside with article 3 ECHR)

- Article 33, *non-refoulement* principle – refugees cannot be sent back if that puts them in danger. (*Binding!*)

- “Protection gap” entailing: whole-set rights are triggered as soon as migrants (often illegally) arrive at the territory, but they have ***no right to have rights*** outside the jurisdiction.

In focus: Key features of the Refugee Convention



- Non-arbitrary expulsion
- Non-refoulement
- Socio-economic rights and fundamental rights

Non-refoulement: cornerstone of refugee protection



Article 33: prohibition of expulsion or return ("refoulement")

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

EU Laws on protecting LGBTI asylum seekers



EU countries are moving backward when it comes to protecting LGBTI issues.

<https://www.euronews.com/2019/05/14/lgbt-rights-in-europe-some-countries-moving-backwards-on-equality-for-first-time-in-a-deca>

EU Laws on protecting LGBTI asylum seekers



Directive (2011/95/EU)

Defines the criteria for international protection, expressly mentions sexual orientation and gender identity as one of the possible reasons for persecution (Article 10).

Directive (2013/33/EU)

Member States must take into consideration gender- and age-specific concerns and the situation of vulnerable persons when housing applicants for international protection (Article 18 [3])

Article 21 includes a list of persons who qualify as vulnerable persons under the directive.

Although LGBTI applicants are not explicitly mentioned, this list is not exhaustive, so it can be argued that LGBTI asylum seekers can also be regarded as vulnerable

EU Laws on protecting LGBTI asylum seekers



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2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

International and EU Laws on Female Circumcision



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National Laws on Female Circumcision - Sweden



Sweden became the first country in Europe to legislate specifically against the practice. In that year the Swedish parliament approved a law (Act Prohibiting the Genital Mutilation of Women, 1982:316) affirming that "An operation may not be carried out on the outer female sexual organs with a view to mutilating them or bringing about some other permanent change in them [...] regardless of whether consent has been given for this operation or not.

In 1998 this act was amended to make the penalties for those convicted of carrying out FGM/C more severe. Depending on the gravity of the consequences, under Swedish law a perpetrator can face a term of imprisonment of up to 10 years.

<https://www.unicef-irc.org/research/pdf/Responses%20to%20FGMC%20Europe.pdf>

National Laws on Female Circumcision - France

- In 1983 the French high court recognized that cases of Female Circumcision could be prosecuted under what was then article 312 of the Penal Code.
- Under the new French Penal Code introduced in 1994, article 222(9) deals with acts of violence resulting in mutilation and imposes a penalty of 10 years imprisonment.
- Article 222(10) states that when this crime is committed against a minor under the age of 15, the penalty is 15 years imprisonment, or 20 years when the act is carried out by a parent, caregiver or other person with authority over the child.

National Laws on Female Circumcision - Germany

- The 2001 Penal Code does not specify FGM/C as a crime, but identifies “bodily injury”, “dangerous bodily injury”, “maltreatment of wards”, “serious bodily injury” and “bodily injury resulting in death”

National Laws on Female Circumcision - Netherlands

- The government has stated that articles 300-309 and 436 of the Penal Code are applicable to Female Circumcision

National Laws on Female Circumcision - Italy

- Art. 583 of the penal code establishes punishment by imprisonment from 4 to 12 years to whoever, without any therapeutic need, would cause mutilation to female genitals
- The second Paragraph sanctions with imprisonment from 3 to 7 years whoever (without any therapeutic needs) would cause "harms" to female genitals different from the ones listed in the previous paragraph and bringing to physical or psychological illness.

- Specific legislation, together with legislation that is modified to make a specific reference to Female Circumcision, can be seen as a clear national affirmation that this practice is an unacceptable crime
- European states have also had to take into account the issue of Female Circumcision as grounds for asylum.
- In 1994, the United Nations High Commission for Refugees issued a statement affirming that a woman could be considered a refugee if she or her daughter or daughters feared being forced to undergo Female Circumcision in their country of origin, or considered that they would face persecution if they refuse to submit to the practice

YET...

- The European Court of Human Rights (ECHR) does not think so when it comes to asylum seekers basing their claim on Female Circumcision

Collins Akaziebe vs. Sweden

- A Nigerian woman from Delta State, sought asylum in Sweden when she was 25 years old and pregnant, on the ground that she wanted to avoid being submitted to female circumcision was denied asylum on grounds that female circumcision was not included as a ground for asylum under Swedish law, and because female circumcision was prohibited by law in Nigeria and this prohibition was observed in at least six Nigerian states. An internal flight alternative was therefore available, according to the Swedish authorities.
- The ECHR ruling was that prevalence of female circumcision for the whole country of Nigeria is around 19 % and female circumcision is prohibited by law, therefore, the applicant was not at risk.
- The Court stated that “if you can manage to get from Nigeria to Sweden, you can manage to protect your child from FGM”.
- In other words, if a woman is strong enough to stand up against cultural oppression, she is too strong for outsider protection.

Ameh vs. United Kingdom

- A Nigerian woman claimed asylum in the UK for herself and her daughters on grounds of fear of female circumcision,
- The ECHR held that the mother could rely on Nigerian authorities, women NGOs and her own family for protection against her daughter being forced to undergo female circumcision.

RBAB vs. The Netherlands

- Five Sudanese nationals whose asylum request was based on the claim that, if they were sent back to Sudan, their daughters would be subjected to female circumcision.
- This application was rejected by the Dutch Court on the grounds that the family failed to establish that they did not belong to the group of higher educated people who, according to a report drawn up by the Netherlands Ministry of Foreign Affairs, were able to resist the practice of female circumcision.
- On appeal, the ECHR concluded “that the question of whether a girl or young woman will be circumcised in Sudan is mainly one of parental choice and finds it established that when parents oppose [female circumcision] they are able to prevent their daughter(s) from being subjected to this practice against their wishes”.
- Thus, the ECHR is reluctant to offer protection to asylum seekers on female circumcision related grounds.

LGBTI Cases

- M.E. concerns Sweden's refusal of a homosexual Libyan's asylum claim and the government's decision that he must return to Libya temporarily in order to apply for family reunion with his partner, a permanent resident of Sweden to whom he is married. The Swedish authorities indicated that the reunification process would take about four months. The applicant argued that removal to Libya, even for four months, would entail a risk of ill-treatment contrary to Article 3 of the European Convention on Human Rights("ECHR") due to his sexual orientation.
- A six-to-one majority of the ECtHR concluded that, based on the applicant's decision not to reveal his sexual orientation to his family back in Libya, he has made an 'active choice to live discreetly' due to 'private considerations' rather than fear of persecution. In the majority's view, 'even if the applicant would have to be discreet about his private life [during the four months in Libya], it would not require him to conceal or suppress an important part of his identity permanently or for any longer period of time'. Such a short term of discretion 'cannot by itself be sufficient to reach the threshold of Article 3
- This judgment is in line with other cases where the Court expected gay men to ward off a risk of inhuman treatment by living discreetly

What the European Court of Justice said about cases like this

- The EU Court of Justice in 2013 held that it is determinative whether 'on return to his country of origin his homosexuality would expose him to a genuine risk of persecution', and added: 'The fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect.'
- It expressly held that 'the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation'.

Implications from the Courts

- In the Strasbourg line of thinking, asylum can be denied because people are expected to give up fundamental rights in order to protect themselves against harm, instead of being granted asylum in Europe in order to be protected from harm.
- In the Luxembourg line of thinking, the idea that people have to give up the rights which refugee law was designed to protect is counter-intuitive.
- The shift from 'we cannot guarantee all human rights of everyone everywhere' to 'LGBTI people should not be sent back to the closet' marks a shift towards a more universalist notion of human rights, and away from a local and culturalized notion of human rights.

Implications from the Courts

- In both lines of case law, two positions are taken simultaneously while there is considerable tension between them.
- On the one hand, as a practical matter Europe can only grant asylum to people facing really bad human rights violations; people facing 'minor' violations will have to get by on their own.
- On the other hand, Europe positions itself as the region with the most advanced human rights protection in the world, which logically includes protection against 'minor' human rights violations (and possibly considers the notion of minor human rights violations as a contradiction in terms).

Human rights against culture?

- Europe is seen as the location where human rights are realized and other parts of the world where this is not the case allows asylum seekers to claim inclusion instead of exclusion
- The notion of Europe as characterized by human rights can be reiterated in such a manner that it legitimizes the exclusion of non-European asylum seekers, but this often implies the idea that human rights are not fundamental.

Case – Story of an asylum seeker

- An LGBTI asylum seeker was told he will not have a problem with being gay in the Philippines and his request was denied. The migration people had clearly not read his file, because it had more to it than just being gay. It stated that he was HIV and was fighting for the rights of people with HIV. The asylum seeker sent his complaint to Freedom House and the UN, organizations he had worked with, and that is the only reason his case was looked at again.
- What about the people who don't have such connections?

Questions?



