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Sexual Orientation Change Efforts and Their  
Compatibility With International and  
European Human Rights Protection a  
Comparative Law Approach



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### **Preface**

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## **List of Abbreviations**

APA	American Psychiatric Association
CAT	United Nations Convention Against Torture
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CFREU	The Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-governmental Organization
PAHO	Pan American Health Organization
SOCE	Sexual Orientation Change Efforts
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCRC	United Nations Committee on the Rights of the Children

## A. Introduction

Acceptance of sexual orientation as a changeable concept has led to the practice of efforts to change someone's sexual orientation. While these efforts pose proven harms on the participant, they still manage to be a worldwide phenomenon. Sexual orientation change efforts (SOCE), also known as "reparative therapy" and "conversion therapy", are a range of practices that intend to change someone's sexual orientation from LGB to heterosexual.<sup>1</sup> SOCE have its roots deep in the normative-heterosexual paradigm which first accepted homosexuality as a sin and later as an illness. For several centuries, repression of homosexuality was justified theologically.<sup>2</sup> During the time of acceptance of homosexuality as a sin; because the sin was primarily in the act, there was no discourse of sexual orientation.<sup>3</sup> Alongside the growth of medicine and psychiatry, the medical model of homosexuality replaced the religious approach,<sup>4</sup> and homosexuality was accepted as a mental illness. Therefore, the main focus changed from the homosexual act to someone being a homosexual.<sup>5</sup> Although homosexuality has been removed from the mental disorders' lists many years ago<sup>6</sup> as a result of the long history of homosexuality being seen as an undesirable condition<sup>7</sup>, efforts to cure the condition have continued.<sup>8</sup> And the efforts to cure this pseudo problem<sup>9</sup> still cause harm to LGB individuals. This thesis aims to examine the compatibility

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<sup>1</sup> American Psychiatric Association uses the term sexual orientation change efforts to describe all means to change sexual orientation. This includes those efforts by mental health professionals, lay individuals, including religious professionals, religious leaders, social groups, and other lay networks such as self-help groups.; *American Psychiatric Association*, *Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, <https://www.apa.org/about/policy/sexual-orientation.pdf>, (last accessed on 14/10/2019).

<sup>2</sup> *Heinze*, p.38.

<sup>3</sup> *Ibid.*, p.39.

<sup>4</sup> *Chauncey*, *Salmagundi*, p.114, 115.

<sup>5</sup> *American Psychiatric Association*, (fn.1).

<sup>6</sup> The APA removed homosexuality from the list of mental illnesses (Diagnostic and Statistical Manual, DSM) in 1973; American Psychological Association declassified homosexuality as a mental disorder in 1975; The World Health Organization removed homosexuality from the International Classification of Diseases in 1990., *WHO Regional Office for Europe*, *Stop Discrimination Against Homosexual Men and Women*, <http://www.euro.who.int/en/health-topics/health-determinants/gender/news/news/2011/05/stop-discrimination-against-homosexual-men-and-women>, (last accessed on 14/10/2019); *kozuch*, *FlashbackFriday—Today in 1973, the APA Removed Homosexuality From List of Mental Illnesses*, <https://www.hrc.org/blog/flashbackfriday-today-in-1973-the-apa-removed-homosexuality-from-list-of-me>, (last accessed on 14/10/2019), *Morrow*, *Beckstead*, *TCP* 32(5), p.641, 642.

<sup>7</sup> *Haldeman*, *JCCP*62:2/1994, p.221, 222.

<sup>8</sup> DSM II classified homosexuality as a form of paraphilia but in the 7<sup>th</sup> edition of DSM II classification replaced as sexual orientation disorder. This category included individuals "who are either disturbed by, in conflict with, or wish to change their sexual orientation." DSM III had the same category under the "Ego-dystonic Homosexuality". Finally, with DSM IV (1994), homosexuality removed from the manual.; *Yoshino*, *YLJ*111/2001, p.771, 799.

<sup>9</sup> *Szasz*, in: *Szasz*, p.157, 159.

of SOCE with human rights protection. For this purpose, different SOCE methods, current practice and the legal situation regarding SOCE will be examined. Later, in the light of this information on SOCE, these efforts' relation to the protection of fundamental rights will be examined. This examination will be done separately for SOCE on minors and adults. In this regard, the most important concepts for the protection of SOCE participants are the child's best interest, the prohibition of ill-treatment, and the right to personal autonomy/ physical integrity. Therefore, the existence of states' obligation to ban SOCE and the possibility of such ban will be established in the scope of human rights protection.

## **B. History of Sexual Orientation Change Efforts**

### **I. "Curing" Homosexuality?**

In practice, sexual reorientation efforts can be conducted by therapists<sup>10</sup> or by religious ministries. However, no matter by whom these efforts were conducted, religious motivation is always part of the reasoning behind the reorientation efforts. Sexual reorientation efforts have been both biological and psychological. These efforts have included behavioral therapy<sup>11</sup>, psychodynamic interventions, drug and hormone therapy, and even surgery.<sup>12</sup> As for the sexual reorientation based on religious beliefs, the methods have shaped to create religious pressure by relying on the power of God, prayer, doctrinal prohibitions, and threats of damnation.<sup>13</sup> While some of the SOCE practices directly aim to change the sexual orientation, some of the SOCE practices are not targeting the conversion into heterosexuality but rather aiming not to act on their same-sex desires.<sup>14</sup> Nonetheless, the fundamental rationale behind SOCE is the perception of homosexuality as a preference of the individual not as an orientation.<sup>15</sup> In relation to this acceptance of homosexuality as a changeable condition, SOCE's "success" rate should be mentioned here. According to the various researches, SOCE are not only unsuccessful to "convert" homosexuals to heterosexuals, but these efforts are also very harmful to participants/ victims.<sup>16</sup> Although there are some studies

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<sup>10</sup> For example, The National Association for Research & Therapy of Homosexuality (NARTH) is a US-based non-profit organization that campaigns for the "right to treatment" of unwanted attractions. *NARTH*, <http://akegreen.org/Links/L29/index.html#>, (last accessed on 14/10/2019).

<sup>11</sup> Behavioral therapy included electric shock to the hands or genitals.; *Haldeman*, PP:RP33:3/2002, p.260, 260; More rarely some of the SOCE include aversive techniques and "corrective/ reparative rape"; *PAHO*, "Cures" For an Illness That Does Not Exist; Purported therapies aimed at changing sexual orientation lack medical justification and are ethically unacceptable, <https://www.paho.org/hq/dmdocuments/2012/Conversion-Therapies-EN.pdf>, (last accessed on 14/10/2019).

<sup>12</sup> *Murphy*, JSR29:4/1992, p.501.

<sup>13</sup> *Morrow*, *Backstead*, (fn.6), p.643.

<sup>14</sup> *George*, ALR68:3/2017, p.793, 796.

<sup>15</sup> *Morrow*, *Backstead*, (fn.6), p.643.

<sup>16</sup> *Shidlo*, *Schroeder*, PP:RP33:3/2002, p.249, 254-257.; *Nugraha*, NQHR35:3/2017, p.176, 181.

that support SOCE, findings of those studies are criticized based on their methodological and conceptual flaws.<sup>17</sup> In the same direction, according to the American Psychological Association's Task Force's report, there is a correlation between the rigor of experiment and positive findings on SOCE's outcomes. The report states that the least rigorous studies provide more positive findings on SOCE.<sup>18</sup> As for the harms of SOCE, studies have shown that the participants have suffered from depression, suicidal thoughts, internalized homophobia, self-hate, isolation, intimacy avoidance, sexual dysfunction, and abandonment of spirituality and religion.<sup>19</sup>

Various associations had condemned SOCE and pointed out these efforts' dangers for the participants. According to the Pan American Health Organization (PAHO)<sup>20</sup>, homosexuality cannot be considered as a pathological condition; thus, efforts to change someone's sexual orientation lack medical justification.<sup>21</sup> In accordance with the professional consensus, homosexuality is a natural variation of human sexuality and it does not have any harmful effect on health.<sup>22</sup> According to the PAHO, SOCE are not only ineffective but also consisted of very harmful practices.<sup>23</sup> Consequently, these efforts violate the "*primum non nocere*"<sup>24</sup> principle which is the first principle of medical ethics. The World Psychiatric Association acknowledged the "lack of scientific efficacy" of SOCE and "harm and adverse effect" of those efforts with its position statement.<sup>25</sup> The Royal College of Psychiatrists also highlighted that there is no sound scientific evidence that shows sexual orientation can be changed and there is evidence that SOCE are potentially harmful.<sup>26</sup> According to the APA, SOCE "...represent a significant risk of harm by subjecting individuals to forms of treatment which have not been scientifically validated...".<sup>27</sup> In accordance with the mentioned policy

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<sup>17</sup> Morrow, Backstead, (fn.6), p.644. For detailed criticism see p.644-646., *American Psychological Association, Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>, p.28, (last accessed on 14/10/2019).

<sup>18</sup> Ibid., p.35.

<sup>19</sup> Morrow, Backstead, (fn.6), p.646; *American Psychological Association*, (fn.17), p.41-43.

<sup>20</sup> *Regional Office of the World Health Organization*, (fn.6).

<sup>21</sup> Nugraha, (fn.16), p.177.

<sup>22</sup> Ibid., p.178.

<sup>23</sup> "...Besides the lack of medical indication, there is no scientific evidence for the effectiveness of sexual reorientation efforts. While some persons manage to limit the expression of their sexual orientation in terms of conduct, the orientation itself generally appears as an integral personal characteristic that cannot be changed. At the same time, testimonies abound about harms to mental and physical health resulting from the repression of a person's sexual orientation...", *PAHO*, (fn.11), p.2.

<sup>24</sup> "First, do no harm"

<sup>25</sup> Bhugra et. al, *OJWPA*15:32016, p.299.

<sup>26</sup> *Royal College of Psychiatrists*, Position Statement PS02/2014, [https://www.repsych.ac.uk/docs/default-source/improving-care/better-mh-policy/position-statements/ps02\\_2014.pdf?sfvrsn=b39bd77c\\_4](https://www.repsych.ac.uk/docs/default-source/improving-care/better-mh-policy/position-statements/ps02_2014.pdf?sfvrsn=b39bd77c_4), (last accessed on 14/10/2019).

<sup>27</sup> *American Psychiatric Association*, APA Reiterates Strong Opposition to Conversion Therapy, <https://www.psychiatry.org/newsroom/news-releases/apa-reiterates-strong-opposition-to-conversion-therapy>,

statements, many SOCE participants have expressed the negative effects of the therapy. The common effects of SOCE for the participants are not different from the ones expressed in the afore-mentioned policy statements, which are mostly suicidal thoughts and depression.<sup>28</sup> Although the perils of SOCE are undisputable in the science world, today these efforts still manage to be a lawful practice according to many countries' national laws. Continuing practice of SOCE despite the fact that homosexuality does not constitute a disorder or illness and the potential harm of these efforts on the people who were subject to SOCE shows us the construction of gender and heteronormativity in the society through law.

## II. Legal Situation Regarding Sexual Orientation Change Efforts

### 1. The United States of America

While there is no nationwide legislation banning SOCE in the USA until this date 18 states and the District of Columbia have introduced legislative bans on the issue.<sup>29</sup> California was the first state to issue a legislative ban on SOCE, the bill created a landmark for other states to follow. According to Californian Bill<sup>30</sup>, being an LGB individual is not a disease, disorder, deficiency, or shortcoming.<sup>31</sup> Furthermore, "*California has a compelling interest in protecting the physical and psychological well-being of minors, ..., and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts.*"<sup>32</sup> Consequently, Article 15 which states "*Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.*"<sup>33</sup> Was added to the Business and Professions Code. As for the mental health providers who continue engaging in SOCE with a minor, these practices would be considered as

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(last accessed on 14/10/2019).; For more statements on the harms of SOCE see; *Human Rights Campaign, Policy and Position Statements on Conversion Therapy*, <https://www.hrc.org/resources/policy-and-position-statements-on-conversion-therapy>, (last accessed on 14/10/2019), *British Psychoanalytic Council et. al, Conversion Therapy Consensus Statement*, <https://www.psychotherapy.org.uk/wp-content/uploads/2016/08/ukcp-conversion-therapy.pdf>, (last accessed 14/10/2019).

<sup>28</sup> For the various interviews with the participants see; *Picheta, 'A legal form of abuse': Conversion therapy is lurking in the shadows*, <https://edition.cnn.com/2019/01/21/health/conversion-therapy-europe-intl/index.html>, (last accessed on 14/10/2019).; *Ramaswamy, 'I still have flashbacks': the 'global epidemic' of LGBT conversion therapy*, <https://www.theguardian.com/world/2018/aug/08/i-still-have-flashbacks-the-global-epidemic-of-lgbt-conversion-therapy>, (last accessed on 14/10/2019); *National Center for Lesbian Rights, Born Perfect: Survivor Stories & Survivor Network*, <http://www.nclrights.org/bornperfect-survivor-stories-and-survivor-network/>, (last accessed on 14/10/2019).

<sup>29</sup> These states are California, New Jersey, Oregon, Vermont, New Mexico, Connecticut, Nevada, Rhode Island, Washington, Maryland, Hawaii, New Hampshire, Delaware, New York, Massachusetts, Maine, and Colorado; *Movement Advancement Project, "Equality Maps: Conversion Therapy Laws."* <http://www.lgbtmap.org/equality-maps/conversion-therapy>, (last accessed on 14/10/2019).

<sup>30</sup> Senate Bill No. 1172, 30 September 2012. Now codified at California Business & Professions Code, 865-865.2.

<sup>31</sup> Section 1 (a).

<sup>32</sup> Section 1 (n).

<sup>33</sup> Section 2, 865.1.



unprofessional conduct and be subject to discipline by the licensing entity.<sup>34</sup> Following the Californian ban, New Jersey also introduced a similar ban on SOCE on minors.<sup>35</sup> The most recent state to introduce a legislative ban is Colorado<sup>36</sup> which also followed a very similar technique to the Californian Bill.

The common ground between the state bans in the USA is that all of the legislations are only prohibiting “mental health providers” to perform SOCE on “minors”. The bans’ nature as only focusing on SOCE provided by the mental health providers have been criticized by some scholars on the grounds of driving individuals to non-licensed mental health providers.<sup>37</sup> According to this, by prohibiting the licensed professionals from performing SOCE on patients, SOCE will be conducted in the unregulated area since the bans do not include religious practitioners.<sup>38</sup> Considering the religious rationale behind SOCE, this argument causes serious cogitation. However, while the scope of the legislation is unsatisfactory, the reasons for determining the scope and the profound effect of the ban legislation should also be considered. One of the reasons for legislators to exclude religious practitioners from the scope of bans is the states’ wider discretion on licensed activities compared to the laws that directly affect religious practices, which require a closer examination.<sup>39</sup> Another practical reason is to avoid the religious dimension of bans under the First Amendment to the US Constitution and reduce the controversy around it. By this way, bans on SOCE has withdrawn the scientific credibility from the religious endeavors.<sup>40</sup> As for the bans’ limited scope to minors, it made the legislative procedure easier by eliminating the personal autonomy claims.<sup>41</sup> Furthermore, the mere existence of the legislative bans has an impact on LGBTQ rights and SOCE that is practiced by religious practitioners too.<sup>42</sup> This effect of legislation has been conceptualized by scholars as to the expressive theory of law.<sup>43</sup> According to this theory, the law affects behavior, independent from its sanction, and

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<sup>34</sup> Section 2, 865.2; “Any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider.”

<sup>35</sup> Assembly Bill No. 3371, 19 August 2013.

<sup>36</sup> House Bill No.19-1129, 31 May 2019.

<sup>37</sup> Sandley, HM:JLM24/2014, p. 247, 269.

<sup>38</sup> Ibid., p.270.

<sup>39</sup> George, (fn.14), p.823.

<sup>40</sup> Ibid., p.824.

<sup>41</sup> Primarily, the Californian Bill provided an action against therapists who conducted SOCE without the informed consent of individuals, therefore, it was protecting adults too. However, in the final version of the Bill, the ban’s reach was limited to minors, Ibid.824-825;

<sup>42</sup> Ibid. 825-829.

<sup>43</sup> For detailed information on the theory see: McAdams, p.22-56; McAdams, VLR86/2000, p.1649, 1676-1688; McAdams, OLR79/2000, p.339, 344-352; Anderson, Pildes, UPLR148/2000, p.1503, 1506-1508; Strudler, MLR60:3/2001, p.492, 492-498.

therefore, “law works by what it says in addition to what it does”.<sup>44</sup> In this direction, the expressive theory of law examines the effect of the law on changing the social meaning of an act.<sup>45</sup> This expressive attribute of law arises from the informational content of it. After all, legal rules reflect the legislators’ values and beliefs.<sup>46</sup> In this way, law not only reflects the societies’ existing values but also shapes them.<sup>47</sup> Therefore, despite the fact that the existing ban legislation in the USA is neither inclusive with regard to adults as victims nor religious practitioners as perpetrators, the message that it holds by emphasizing that being an LGB individual is a natural variation of human sexuality and drawing attention to the perils arising from the SOCE has an important role in shaping the society’s view on SOCE.<sup>48</sup>

In fact, this expressive effect can be seen in cases regarding SOCE and consumer fraud. In the case of *Ferguson v. JONAH*<sup>49</sup>, plaintiffs claimed that faith-based organization’s advertisement and practice of SOCE constituted a violation of the New Jersey’s consumer fraud act.<sup>50</sup> According to the plaintiffs, JONAH made misrepresentation by claiming that homosexuality was a curable mental disease; JONAH’s program could cure this disease and had a rate of success; the program worked in a specific time frame; and the program was based on science.<sup>51</sup> Consequently, the jury unanimously concluded that JONAH made misrepresentations on the base of advertisement, sale, and performance of SOCE and therefore, violated the consumer fraud act.<sup>52</sup> Accordingly, the Jury ordered JONAH and other defendants to pay 72,400\$ to compensate plaintiffs and furthermore, the Court ordered permanent injunctive relief that permanently enjoined defendants from any therapy, treatment, counseling, or activity with the aim of changing, affecting, or influencing sexual orientation.<sup>53</sup> It is evident that the consumer protection approach offers more comprehensive results

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<sup>44</sup> *McAdams*, VLR, p.1650-1651.

<sup>45</sup> *Gesinger*, ILR88:1/2002, p.35, 40.

<sup>46</sup> *McAdams*, Expressive, p.136,137; “... law provides information; information changes beliefs; new beliefs changes behavior.”

<sup>47</sup> *Ibid.*, the Author demonstrates this effect of law by restrictive abortion laws example. According to this, restrictive new legislations may create/ strengthen the stigmatizing perception of abortion for permissible procedures too. See p.138.

<sup>48</sup> *George*, (fn.14), p.827. In addition, even during the law-making process, SOCE and their dangers gained significant media attention. And researches show with the introduction of Californian Bill news reports on the issue has increased by %800. p.828.

<sup>49</sup> *Ferguson v. JONAH*, No. L-5473-12 (N.J. Super. Ct. Law Div. June 3–4, 2015).

<sup>50</sup> *Alexander*, ULLR55:32017, p.283, 293.; The case was the first consumer fraud claimed against SOCE practitioners in the USA and also the first verdict that stated homosexuality is not a disease as a matter of law., *Dubrowski*, NULR110/2015, p.77, 78-79.

<sup>51</sup> *Ibid.*, p.80.

<sup>52</sup> *Alexander*, (fn.50), p.293.

<sup>53</sup> Superior Court of New Jersey Hudson County, Law Division, Docket No. L-5473-12, Civil Action Order Granting Permanent Injunctive Relief and Awarding Attorneys’ Fees. The injunction also ordered JONAH to dissolve as a corporate entity and liquidate all of its assets.

compared to the bans which are only addressing SOCE provided by mental health providers on minors. However, the effect of those bans on the perception of SOCE should not be overlooked.

While legislative bans on SOCE have gained momentum in the USA, some of these bans have also been challenged before the courts. The Californian Bill was challenged in *Welch v. Brown*<sup>54</sup> and *Pickup v. Brown*<sup>55</sup>. In both cases, plaintiffs were seeking to enjoin Senate Bill No. 1172 on the basis of their First<sup>56</sup> and Fourteenth<sup>57</sup> Amendment rights.<sup>58</sup> According to the plaintiffs, the Senate Bill would violate their free speech and free exercise of religion rights under the First Amendment and parental rights under the First and Fourteenth Amendments.<sup>59</sup> In the *Welch v. Brown* case, plaintiffs sought preliminary and permanent injunctions.<sup>60</sup> The court examined the plaintiffs' claims based on the First Amendment right. According to the Supreme Court's case-law, the doctor-patient relationship is under the scope of free speech rights.<sup>61</sup> In addition, the Ninth Circuit has already found communication during psychoanalysis worthy of the First Amendment protection in another case.<sup>62</sup> The Court found that Senate Bill No. 1172 was restrictive of free speech and it was not content or the viewpoint-neutral; hence the Bill was subject to strict scrutiny.<sup>63</sup> As a consequence, the Court found that California was unlikely to fulfill its burden regarding the strict scrutiny and considering the possibility of plaintiffs to suffer irreparable harm, the Court granted a preliminary injunction.<sup>64</sup> As for the *Pickup v. Brown* case, the Court followed a different approach. According to the Court, Senate Bill No.1172 was not violating plaintiffs' free speech rights and it was merely regulating the conduct. Consequently, the plaintiffs' preliminary injunction claim was not successful.<sup>65</sup> Both cases were appealed to the Ninth

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<sup>54</sup> *Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012).

<sup>55</sup> *Pickup v. Brown*, 42 F. Supp. 3d 1347 (E.D. Cal. 2012).

<sup>56</sup> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

<sup>57</sup> Section 1; All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>58</sup> Plaintiffs of the cases wanted to prevent the scheduled implementation of the SB1172. *Friedman*, SL&PR25/2014, p.193, 196.

<sup>59</sup> *Sandley* (fn.37), p.258.

<sup>60</sup> *McCormick*, SULR48:1/2015, p.171, 188.

<sup>61</sup> *Ibid.*, p.189.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Kovalchek*, RJLR16:2/2015, p.428, 434.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Sandley* (fn.37), p.258.

Circuit and later consolidated. In the consolidated case<sup>66</sup>, the Ninth Circuit found that the First Amendment does not require heightened scrutiny of Senate Bill No.1172. In this regard, communication during psychoanalysis was indeed entitled to constitutional protection, but this does not mean it is immune from regulation.<sup>67</sup> In the Court's view, Senate Bill No.1172 was only regulating the conduct, SOCE treatment itself, not the speech in favor or against the SOCE and therefore, any effects arising from the Bill on free speech are accidental.<sup>68</sup> Following this view, the Bill would be upheld if it bears "a rational relationship to legitimate state interest."<sup>69</sup> Consequently, the Court accepted the protection of the minors' physical and psychological well-being as a legitimate state interest and upheld Senate Bill No.1172. After the Ninth Circuit's decision, plaintiffs of the cases filed a petition for a writ of certiorari to the Supreme Court. However, the Supreme Court denied the petition.<sup>70</sup>

Challenges against the ban legislation continued with *King v. Governor of New Jersey*<sup>71</sup>. Akin to the *Welch* and *Pickup* cases, plaintiffs of the case claimed Assembly Bill No. 3371<sup>72</sup> was violating their First and Fourteenth Amendment rights.<sup>73</sup> The New Jersey District Court followed a similar approach to the decision from the Ninth Circuit Court in *Pickup v. Brown*. In this direction, the Court ruled that Assembly Bill No.3371 was regulating conduct not speech and was not overbroad or vague.<sup>74</sup> The decision was appealed to the Third Circuit. Although the outcome of the case was the same as previous cases, the Third Circuit followed a different path compared to the Ninth Circuit. The Third Circuit found that verbal communication during SOCE constitutes speech and therefore, it is entitled to some degree of First Amendment protection.<sup>75</sup> However, this protection was limited for the licensed mental health providers who work for the state.<sup>76</sup> Consequently, Assembly Bill No.3371 was upheld by the Third Circuit. The plaintiffs of the case also submitted a petition for the writ of

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<sup>66</sup> *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013).

<sup>67</sup> *Ibid.*, "...Thus, the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate..."

<sup>68</sup> *McCormick*, (fn.60), p.195.

<sup>69</sup> See: "rational basis view.", *Ibid.*

<sup>70</sup> The Court denied the petition for writ of certiorari on June 30, 2014. *Robson*, The constitutionality of legal prohibitions of sexual conversion therapy, what are the issues involved in legal barriers to sexual conversion therapy?, <https://www.apadivisions.org/division-41/publications/newsletters/news/2014/10/legal-update>, (last accessed on 25/11/2019).

<sup>71</sup> *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014).

<sup>72</sup> Now codified at New Jersey Statutes Title 45. Professions and Occupations 45 § 1-54.

<sup>73</sup> *Kovalchek*, (fn.63), p.437.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> According to the Court, using an intermediate level of scrutiny would be appropriate., *Ibid.*

certiorari to the Supreme Court but as in the cases regarding Senate Bill No.1172, the Supreme Court denied the petition.<sup>77</sup>

Although the first cases brought against the bans were unsuccessful for the plaintiffs, SOCE supporters still keep filing cases against the bans in different states. Recently in a case<sup>78</sup>, concerning the Tampa/ Florida's city ban<sup>79</sup> on SOCE, plaintiffs claimed the ban was unconstitutional since it was prohibiting taking part in speech through counseling sessions.<sup>80</sup> According to the Magistrate Judge, plaintiffs established a substantial likelihood of success on the merits of their claims under the First Amendment.<sup>81</sup> Therefore, the Judge recommended a limited injunction against enforcing the ban against "...non-coercive, non-aversive SOCE counseling—that consists entirely of speech or "talk therapy"—is in the public interest."<sup>82</sup> The Judge took into consideration of the Third Circuit's view on SOCE and accepted that the efforts are entitled to some First Amendment protection.<sup>83</sup> Furthermore, a Supreme Court ruling, namely the National Institute of Family & Life Advocates (NIFLA) v. Becerra<sup>84</sup>, has been effective on the classification of Tampa's Ban as a content-based law. The NIFLA decision was about a Californian Act (the FACT) which required crisis pregnancy centers to provide information to their visitors that California state provides free or low-cost reproductive health services.<sup>85</sup> The plaintiffs of the case claimed that the FACT was violating their First Amendment rights. According to the Supreme Court, the Californian act was content-based because it altered the pregnancy crisis centers' speech by requiring them to

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<sup>77</sup> U.S. Supreme Court Declines to Hear Challenge Against New Jersey's LGBTQ Conversion Therapy Ban; Garden State Equality, Named in the Suit, Celebrates Court's Decision, <https://www.insidernj.com/press-release/u-s-supreme-court-declines-hear-challenge-new-jerseys-lgbtq-conversion-therapy-ban-garden-state-equality-named-suit-celebrates-courts-decision/>, (last accessed on 15/09/2019); *Livio*, N.J. ban on gay-to-straight conversion therapy for kids won't be overturned as U.S. Supreme Court rejects challenge, <https://www.nj.com/news/2019/04/nj-ban-on-gay-to-straight-conversion-therapy-for-kids-wont-be-overturned-as-us-supreme-court-rejects-challenge.html>, (last accessed on 15/09/2019).

<sup>78</sup> Case No. 8:17-cv-2896-T-02AAS, United States District Court Middle District of Florida Tampa Division, 30.01.2019, available at <http://lc.org/013019TampaPIOrder.pdf>, (last accessed on 15/10/2019).

<sup>79</sup> Ordinance 2017-47.

<sup>80</sup> *Schmidt*, Judge says Tampa conversion therapy ban violates First Amendment free-speech rights, <https://www.washingtonpost.com/religion/2019/02/02/judge-says-tampa-conversion-therapy-ban-violates-first-amendment-free-speech-rights/>, (last accessed on 15/10/2019).

<sup>81</sup> Case No. 8:17-cv-2896-T-02AAS, (fn.78).

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, "...Under King, Wollschlaeger, and Ordinance 2017-47, a communication during SOCE counseling is speech. Under King and Wollschlaeger, laws that ban certain communications between medical professionals and their patients are content-based laws..."; The difference between content-based law and content-neutral law is important to determine the level of review of the court. *Jacobs*, MGLR34/2003, p.595, 598.; For detailed examination of the notions also see; *Chemerinsky*, SCLR74/2000, p.49, 51-59.; In the context of the First Amendment, content-based law means that the law regulating the speech is based on the message conveyed and content-neutral law means that the law regulating the speech is not based on the expression itself. See also; *Jacobs*, p.409.

<sup>84</sup> *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

<sup>85</sup> *Chemerinsky*, *Goodwin*, NYULR94:1/2019, p.61, 63-66.

inform women.<sup>86</sup> Consequently, being a controversial judgment itself<sup>87</sup>, NIFLA also played a key role in the Tampa case.<sup>88</sup> Although there's no final decision on Tampa's ban yet, considering the preliminary injunction and NIFLA judgment, SOCE bans in the USA seem continuously being under discussion.

## 2. The European Union and the Member States

The Charter of Fundamental Rights of the European Union has been an important tool for the EU to protect fundamental rights within its borders. The non-discrimination article of the Charter prohibits discrimination based on sexual orientation.<sup>89</sup> And as for the Treaty on the Functioning of the European Union, Articles 10<sup>90</sup> and 19<sup>91</sup> are on the combating of discrimination based on sexual orientation.<sup>92</sup> Besides the primary sources of the EU, the Employment Equality Directive also prohibits discrimination on the grounds of sexual orientation.<sup>93</sup> Although the European Parliament has developed strategies to protect the rights of LGBTQ throughout the years, currently there is no EU-wide legislation prohibiting SOCE. Nevertheless, the European Parliament's annual report on the situation of fundamental rights in the EU in 2016<sup>94</sup> condemned all forms of discrimination against LGBTI people.<sup>95</sup>

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<sup>86</sup> Case No. 8:17-cv-2896-T-02AAS, (fn.78).

<sup>87</sup> *McNamara, Sherman*, CPR2018, p.197, 198-206.; *Chemersinsky, Goodwin*, (fn.85).

<sup>88</sup> "NIFLA expressly rejected the analyses in Pickup and King recognizing "professional speech" as a separate category of speech subject to different constitutional analysis... These four cases taken together indicate strict-scrutiny analysis applies to laws banning SOCE counseling..." Ibid., Case No. 8:17-cv-2896-T-02AAS, (fn.78).

<sup>89</sup> Article 21-Non-discrimination; 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited.

<sup>90</sup> Article 10- In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*.

<sup>91</sup> Article 19- 1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*.

<sup>92</sup> Another legal basis for equality and prohibition of discrimination is Article 2 and Article 3 of the TEU.; *Shreeves*, The rights of LGBTI people in the European Union, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621877/EPRS\\_BRI\(2018\)621877\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621877/EPRS_BRI(2018)621877_EN.pdf), (last accessed 15/10/2019), p.3.

<sup>93</sup> Council Directive (EC) No 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p.16-22.; The directive's scope is limited to employment and occupation (Article 1); Some other directives with LGBTQ implications are; Victims' Rights Directive, Free Movement Directive, Family Reunification Directive, Qualification Directive, *Shreeves*, (fn.89).

<sup>94</sup> European Parliament resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (2017/2125(INI)).

<sup>95</sup> Ibid., para.62.

Furthermore, with the resolution, the European Parliament welcomed the initiatives prohibiting SOCE.<sup>96</sup>

However, enacting SOCE bans is not a common practice for the member states. As for today, only two member states have SOCE ban legislation. Malta is the first EU member state to prohibit sexual reorientation efforts.<sup>97</sup> Compared to the previously examined USA legislation, Malta's ban on SOCE<sup>98</sup> is much more comprehensive. As a matter of fact, the act is not only prohibiting professionals<sup>99</sup> from performing SOCE, but it also prohibits any person to perform these kinds of efforts. In addition, the act distinguishes between professional and non-professional unlawful practices. Moreover, for any person, it is unlawful to perform SOCE on a vulnerable person<sup>100</sup>; or perform involuntary or forced SOCE; or advertise SOCE.<sup>101</sup> As for the professionals, it is unlawful to offer and, or perform SOCE on any person irrespective of whether compensation is received in exchange; or make a referral to any other person to perform SOCE on any person.<sup>102</sup> The second member state to have SOCE ban legislation is Spain. Although Spain does not have nation-wide ban legislation, autonomous communities<sup>103</sup> of Spain have enacted SOCE bans.<sup>104</sup> However, recently arguments for banning SOCE nation-wide gained momentum. Despite the Madrid ban on SOCE, an undercover journalist had attended a SOCE session provided by a diocese of the Catholic

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<sup>96</sup> Ibid., para.65 "...Welcomes initiatives prohibiting LGBTI conversion therapies and banning the pathologisation of trans identities and urges all Member States to adopt similar measures that respect and uphold the right to gender identity and gender expression; ..."

<sup>97</sup> ACT No. LV of 2016, 9<sup>th</sup> December 2016, An Act to affirm that all persons have a sexual orientation, a gender identity and a gender expression, and that no particular combination of these three characteristics constitutes a disorder, disease, illness, deficiency, disability and, or shortcoming; and to prohibit conversion practices as a deceptive and harmful act or interventions against a person's sexual orientation, gender identity and, or gender expression.

<sup>98</sup> SOCE or as written in the act conversion practices, "refers to 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...". Article 2.

<sup>99</sup> "...professional" refers to a person who is in possession of an official qualification and, or a warrant to practise as a counsellor, educator, family therapist, medical practitioner, nurse, pathologist, psychiatrist, psychologist, psychotherapist, social worker, and, or youth worker...". Article 2.

<sup>100</sup> Vulnerable person is defined as "under the sixteen years; or suffering from a mental disorder; or considered by the competent court to be particularly at risk when taking into account the person's age, maturity, health, mental disability, other conditions including any situation of dependence, the psychological state and, or emotional state of that person." Article 2.

<sup>101</sup> Article 3(a).

<sup>102</sup> Article 3(b).

<sup>103</sup> Madrid, Valencia, Andalusia, and Murcia.

<sup>104</sup> *International Lesbian, Gay, Bisexual, Trans and Intersex Association: Mendos, Lucas Ramon*, p.272.; For summary of the LGBTQ rights in Spain see; *ILGA Europe, Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People in Spain covering the period of January to December 2018*, <https://www.ilga-europe.org/sites/default/files/spain.pdf>, (last accessed on 15/10/2019).

Church.<sup>105</sup> After the news coverage, the health minister of Spain emphasized the practice was illegal in Madrid and called for the complete abolishment of SOCE practices.<sup>106</sup>

The member states' discussions on SOCE is not limited to Spain. A SOCE ban has been a contemporary topic in Germany too. Although SOCE is not commonly practiced in Germany, it is still practiced in religious communities.<sup>107</sup> Recently, the German health minister called for a nationwide ban, considering the scientific reports on the harms of sexual reorientation efforts.<sup>108</sup> In this direction, the minister set up a commission to work on the issue.<sup>109</sup> According to the reports from the commission, a SOCE ban is medically necessary and legally possible.<sup>110</sup> Current German legislation provides no legal protection for discriminatory pathologization and stigmatization caused by SOCE.<sup>111</sup> According to Prof. Dr. Martin Burgi's report, a SOCE ban can be justifiable on the grounds of protection of physical integrity, protection of personality rights (sexual self-determination), and prohibition of discrimination based on sexual orientation.<sup>112</sup> Nevertheless, the constitutionality of a SOCE ban would depend on its proportionality. Therefore, the ban's effect on different rights should be examined separately.<sup>113</sup> Following the reports and findings, a draft law<sup>114</sup> on the prohibition

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<sup>105</sup> Spanish Catholic Church probed over 'gay conversion' courses, <https://www.bbc.com/news/world-europe-47785097>, (last accessed on 15/10/2019).

<sup>106</sup> *Savage, Davies*, Spain's health minister calls for end to gay 'conversion therapy', <https://www.reuters.com/article/us-spain-lgbt-politics/spains-health-minister-calls-for-end-to-gay-conversion-therapy-idUSKCN1RF2IR>, (last accessed on 15/10/2019).

<sup>107</sup> Germany: Gay conversion 'therapy' ban presented, <https://www.dw.com/en/germany-gay-conversion-therapy-ban-presented/a-49135468>, (last accessed on 15/10/2019).

<sup>108</sup> Jens Spahn plant schnelles Verbot von Konversionstherapien, <https://www.zeit.de/politik/deutschland/2019-06/homosexualitaet-jens-spahn-konversionstherapie-verbot-gutachten-gesundheitsminister>, (last accessed on 15/10/2019).

<sup>109</sup> *Ibid.*

<sup>110</sup> *Bundesministerium für Gesundheit*, Kommission legt Anforderungen für ein wirksames Verbot von sogenannten Konversionstherapien vor, <https://www.bundesgesundheitsministerium.de/presse/pressemitteilungen/2019/2-quartal/kommission-verbot-konversionstherapien.html>, (last accessed on 15/10/2019).

<sup>111</sup> There is no criminal liability for medical and non-medical practitioners who practice non-illness treatments and there is no specific regulation on SOCE neither on adults nor on minors. But there are some non-specific sanctions in criminal and professional law such as intentional bodily harm or negligent bodily injury. For more details see; *Burgi*, Verfassungsrechtliche Rahmenbedingungen gesetzlicher Maßnahmen (insbesondere Verbote) gegen Therapien bzw. Behandlungen mit dem Ziel einer Veränderung der sexuellen Orientierung (sog. Konversionstherapien), [https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3\\_Downloads/K/Konversionstherapie/Gutachten\\_Prof.\\_Dr.\\_iur.\\_Martin\\_Burgi.pdf](https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/K/Konversionstherapie/Gutachten_Prof._Dr._iur._Martin_Burgi.pdf), p.9-12, (last accessed on 15/10/2019).

<sup>112</sup> *Ibid.* p.13-16.

<sup>113</sup> According to the report, freedom to conduct business/ profession (die Berufsausübungsfreiheit), scientific freedom (die Wissenschaftsfreiheit), and freedom of belief (die Glaubensfreiheit) would be the constitutional challenges for a SOCE ban. However, a SOCE ban that considers the proportionality principle in regard to the aforementioned rights would be constitutional. *Ibid.*, p.16-32.

<sup>114</sup> Entwurf eines Gesetzes zum Schutz vor Behandlungen zur Veränderung oder Unterdrückung der sexuellen Orientierung oder der selbstempfundenen geschlechtlichen Identität, [https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3\\_Downloads/Gesetze\\_und\\_Verordnungen/GuV/K/RefE\\_Konversionstherapieverbot.pdf](https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/K/RefE_Konversionstherapieverbot.pdf), (last accessed on 15/11/2019).



of the treatments for the alteration or suppression of sexual orientation or sexual identity has been published on 04.11.2019. The draft law prohibits the conduct of SOCE<sup>115</sup> on minors and non-consenting adults.<sup>116</sup> However, for consenting minors over 16 who have the ability to understand the scope and meaning of SOCE, the prohibition would not apply.<sup>117</sup> Furthermore, the draft law also prohibits to advertise, offer, and broker the prohibited treatment. According to the draft law, it is prohibited to advertise, offer, and broker SOCE to persons under 18.<sup>118</sup> However, in line with Article 2(2), if the person is over 16 and can understand the scope and meaning of SOCE, the prohibition would not apply.<sup>119</sup> Nevertheless, the public advertisement, offering, or brokering of SOCE is prohibited for the persons who are 18 years old or older.<sup>120</sup> Finally, the draft law sets up penal provisions and administrative offences. According to Article 5, imprisonment up to 1 year or a fine will be imposed on those who perform SOCE contrary to Article 2(1). And according to Article 6, in violation of the rules regarding the advertising, offering, and brokering of SOCE, the violation is punishable as an administrative offence by a fine up to 30.000 €. Lastly, the draft law establishes a counseling service for the people who are affected or might be affected by SOCE.<sup>121</sup>

Lastly, the SOCE debate in the UK should be mentioned in this chapter. As an outcome of the long debates on SOCE, in November 2015 a first Memorandum of Understanding on Conversion Therapy in the UK was signed by major psychological professional organizations.<sup>122</sup> Following the first edition, the second edition was released in October 2017<sup>123</sup>, and this edition was also signed by NHS England which made clear its objection to

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<sup>115</sup> In the scope of the draft law, treatment (conversion therapy) is defined as all measures that are performed on humans to achieve certain physical or psychological effects, without to be medically recognized and SOCE are described as treatments that seek to change or oppress the sexual orientation or self-directed sexual identity (Article 1); and most importantly the prohibition of SOCE is aimed at everyone. See: Ibid. p.12.

<sup>116</sup> Article 2(1); Es ist untersagt, Behandlungen im Sinne von § 1 Absatz 1

1. an einer Person unter 18 Jahren durchzuführen oder

2. an einer Person durchzuführen, deren Einwilligung zur Durchführung der Behandlung unter einem Willensmangel leidet.

<sup>117</sup> Article 2(2).

<sup>118</sup> Article 3(1).

<sup>119</sup> Ibid.

<sup>120</sup> Article 3(2).

<sup>121</sup> Article 4.

<sup>122</sup> Memorandum of Understanding on Conversion Therapy in the UK, <https://www.psychotherapy.org.uk/wp-content/uploads/2016/09/Memorandum-of-understanding-on-conversion-therapy.pdf>, (last accessed on 15/10/2019).

<sup>123</sup> Memorandum of Understanding on Conversion Therapy in the UK Version 2, <https://www.psychotherapy.org.uk/wp-content/uploads/2017/10/UKCP-Memorandum-of-Understanding-on-Conversion-Therapy-in-the-UK.pdf>, (last accessed on 15/10/2019).

SOCE. In 2018, the Government Equalities Office published a national LGBT survey<sup>124</sup>. After the National LGBT Survey's findings<sup>125</sup>, banning SOCE gained momentum in the UK. Following the survey, the Government Equalities Office published an LGBT Action Plan<sup>126</sup> and one of the key actions was bringing forward proposals to end the practice of conversion therapy in the UK.<sup>127</sup> The Action Plan states SOCE are wrong and the Government Equalities Office will fully consider all legislative and non-legislative options to prohibit promoting, offering and conducting SOCE.<sup>128</sup> In accordance with the Action Plan on 18 July 2018, the Counsellors and Psychotherapists (Regulation) and Conversion Therapy Bill 2017-19<sup>129</sup> was presented to the Parliament and passed the 1<sup>st</sup> reading on the same day.<sup>130</sup> The current version of the Bill prohibits any person from practicing or offering to practice SOCE.<sup>131</sup> At the moment, the legislation process of the Bill continues.

### 3. Asian Countries

Most Asian countries do not have SOCE regulations. Because of the lack of legal protection of LGBT individuals combined with different cultural, religious, social factors, SOCE continues to commonly exist among the Asian countries.<sup>132</sup> Although the Chinese Classification of Mental Disorders' 3<sup>rd</sup> edition declassified homosexuality as a mental disorder in 2001<sup>133</sup>, SOCE practices are still documented in China. However, SOCE have

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<sup>124</sup> *Government Equalities Office*, National LGBT Survey Summary Report, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/722314/GEO-LGBT-Survey-Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722314/GEO-LGBT-Survey-Report.pdf), (last accessed on 15/10/2019).

<sup>125</sup> According to the Survey, %2 of the respondents had undergone SOCE and %5 of the respondents had been offered SOCE. While %19 of SOCE conducted by healthcare Professional, %51 of them conducted by faith organization or group., *Ibid.*, p.14.

<sup>126</sup> *Government Equalities Office*, LGBT Action Plan: Improving the Lives of Lesbian, Gay, Bisexual, and Transgender People, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721367/GEO-LGBT-Action-Plan.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721367/GEO-LGBT-Action-Plan.pdf), (last accessed on 15/10/2019).

<sup>127</sup> *Ibid.*, p.2.

<sup>128</sup> *Ibid.*, p.14. The Action Plan also indicates the prohibition of SOCE will cover medical, commercial, and faith-based context., *Ibid.* p.14.

<sup>129</sup> A Bill to provide that the Health and Care Professions Council be the regulatory body for counsellors and psychotherapists; to prohibit conversion therapy; to make consequential provision for the protection of children and adults; and for connected purposes.

<sup>130</sup> Counsellors and Psychotherapists (Regulation) and Conversion Therapy Bill 2017-19.

<sup>131</sup> *Ibid.*,

Article 2 Conversion therapy: prohibition

(1) It shall be an offence for any person to practice, or to offer to practice conversion therapy.

(2) In this Act, "conversion therapy" is any form of therapy which demonstrates an assumption that any sexual orientation or gender identity is inherently preferable to any other and attempts to—

(a) change a person's sexual orientation or gender identity, or

(b) suppress a person's expression of sexual orientation or gender identity.

<sup>132</sup> *Outright Action International*, Harmful Treatment: The Global Reach of So-Called Conversion Therapy, <https://www.outrightinternational.org/sites/default/files/ConversionTherapyCover.pdf>, p.23, (last accessed on 15/10/2019).

<sup>133</sup> *Ibid.*, p.23-24.

been successfully challenged before the Chinese courts. In 2014, a Beijing court ruled on the electroshock therapy used during SOCE and found it unnecessary since homosexuality required no treatment.<sup>134</sup> Consequently, the Court ordered the clinic to pay compensation and post an apology on its website.<sup>135</sup> Following the Beijing court's ruling, in 2017 a court in Henan province also ruled on the issue. The plaintiff of the case was admitted to the hospital by his wife and relatives and he was forced to take medicine and have injections for 19 days.<sup>136</sup> Akin to the Beijing court ruling, the court rules in favor of the plaintiff and ordered the hospital to pay compensation and publish an apology. Despite the court rulings in favor of the plaintiffs, neither of the courts ruled on SOCE's legality in general. Consequently, medical facilities in China are still promoting SOCE commonly.<sup>137</sup>

South Korea is another Asian country to turn a blind eye on SOCE propaganda.<sup>138</sup> In 2014 and 2015, two pro-SOCE seminars by conservative Christian groups were held in public institutions premises.<sup>139</sup> Furthermore, certain organizations continue to offer "cure" for homosexuality and according to a 2016 survey, 40% of the respondents were subject to a homophobic statement by counselors.<sup>140</sup> While religious groups and organizations continue claiming homosexuality is a curable condition and promoting SOCE, the Korean Ministry of Health or expert medical organizations have not expressed any opinions on the issue.<sup>141</sup> In the meantime, in 2016 the Indonesian Psychiatrists Association classified homosexuality as a mental disorder that can be cured through proper treatment.<sup>142</sup> Likewise, Islamic Development Department in Malaysia started promoting SOCE in 2017 and it was reported that state officials were organizing SOCE courses aimed at transgender women.<sup>143</sup> Lastly, the only Asian country to have legal regulation on SOCE should be mentioned. In 2018, the Taiwanese government banned SOCE under both the Criminal Code and the Protection of

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<sup>134</sup> *International Lesbian, Gay, Bisexual, Trans and Intersex Association: Mendos*, (fn.104), p.271.

<sup>135</sup> *Ibid.*

<sup>136</sup> Gay Chinese man wins legal battle over forced conversion therapy, <https://www.bbc.com/news/world-asia-40490946>, (last accessed on 15/10/2019).

<sup>137</sup> *Bahandari*, Conversion Therapy Still Promoted in China, Investigation Finds, <https://www.sixthtone.com/news/1003870/conversion-therapy-still-promoted-in-china%2C-investigation-finds>, (last accessed on 15/10/2019).

<sup>138</sup> Outright Letter to Officials About State Endorsement of Conversion Therapy For Gays And Lesbians in South Korea, <https://www.outrightinternational.org/content/outright-letter-officials-about-state-endorsement-conversion-therapy-gays-and-lesbians-south>, (last accessed on 15/10/2019).

<sup>139</sup> *Outright Action International*, (fn.132), p.28.

<sup>140</sup> *Rainbow Action against Sexual Minority Discrimination*, Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea, [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/KOR/INT\\_CAT\\_CSS\\_KOR\\_27029\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/KOR/INT_CAT_CSS_KOR_27029_E.pdf), (last accessed on 15/10/2019).

<sup>141</sup> *Ibid.*

<sup>142</sup> *International Lesbian, Gay, Bisexual, Trans and Intersex Association: Mendos*, (fn.104), p.272.

<sup>143</sup> *Ibid.*

Children and Youths Welfare and Rights Act.<sup>144</sup> The Taiwanese ban covers both medical and non-medical SOCE practitioners.<sup>145</sup>

#### 4. Latin American Countries

As a global problem, SOCE are not a foreign concept in Latin American countries either. In one sense, Latin American countries had the most progressive LGBTQ laws for years.<sup>146</sup> For example, as early as 1999, the Colombian Constitutional Court ruled on the rights of intersex children and established the importance of informed consent and the best interest of the child in a landmark decision.<sup>147</sup> In Argentina, Uruguay, Brazil, Colombia, Mexico, and Ecuador same-sex marriage is legal.<sup>148</sup> Furthermore, the Inter-American Human Rights Court stated that the American Convention on Human Rights requires member states to allow same-sex couples to access civil marriage and recognize gender identity in a landmark advisory opinion.<sup>149</sup>

However, a backlash against LGBT rights has also been rising in Latin America.<sup>150</sup> Consequently, the legal process on LGBT rights is now challenged, especially by conservative groups.<sup>151</sup> Nevertheless, two Latin American countries, namely Brazil and Ecuador have enacted SOCE ban. The Brazilian Federal Council of Psychology issued a resolution in 1999 that prohibited all licensed psychologist to participate in events and services offering “ex-gay conversion treatments”.<sup>152</sup> Later, in 2013, the Commission for Human Rights of Brazil’s lower house of congress approved a bill<sup>153</sup> to repeal the resolution on the basis of the right of the person to receive professional guidance and division of

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<sup>144</sup> *Outright Action International*, (fn.132), p.26.

<sup>145</sup> *Ibid.* Taiwan finalizes conversion therapy ban Furthering the island’s reputation as a progressive champion of LGBTQ-inclusive policies, <https://medium.com/shanghaiist/taiwan-finalizes-conversion-therapy-ban-adb417e5ff44>, (last accessed on 15/10/2019).

<sup>146</sup> *Outright Action International*, (fn.132), p.30.

<sup>147</sup> Corte Constitucional de Colombia, Sentencia T-551/99, 02.08.1999; *Greenberg*, p.91-92; In the meantime, the European Parliament has adopted a resolution on the rights of Intersex people very recently, European Parliament resolution of 14 February 2019 on the rights of intersex people (2018/2878(RSP)).

<sup>148</sup> Judicial policymaking has been a very important part of the development of LGBT rights in Latin America, Piatti-Crocker, *Pierceson*, Unpacking the Backlash to Marriage Equality in Latin America, [http://www.wpsanet.org/papers/docs/crocker\\_pierceson\\_wpsa.pdf](http://www.wpsanet.org/papers/docs/crocker_pierceson_wpsa.pdf), (last accessed on 15/10/2019), p.4-5.

<sup>149</sup> Inter-American Court: States Must Recognize Gender Identity, Same-Sex Marriage, <https://ijrcenter.org/2018/01/16/inter-american-court-states-must-recognize-gender-identity-same-sex-marriage/>, (last accessed on 15/10/2019); *Ramirez*, Latin America Could Lead the Way for LGBT Rights in 2018, <https://www.hrw.org/news/2018/02/06/latin-america-could-lead-way-lgbt-rights-2018>, (last accessed on 15/10/2019).

<sup>150</sup> *Encarnación*, JD22:2/2011, 104, 114-116.

<sup>151</sup> *Corrales*, ERLACS100/2015, p.53, 58-59.

<sup>152</sup> *Outright Action International*, (fn.132), p.30.

<sup>153</sup> Projeto De Decreto Legislativo N° De2011.

powers.<sup>154</sup> Although the bill was later abandoned<sup>155</sup> the resolution was challenged before Brazilian courts. In 2017, an Evangelical Christian psychiatrist claimed that the resolution was discriminatory against her as a professional.<sup>156</sup> The applicant's license was revoked in 2016 after she offered SOCE.<sup>157</sup> The federal judge of the case ruled in favor of the applicant and overruled the resolution. However, later in January 2018, the same judge reinstated the ban.<sup>158</sup> As for Ecuador, the country has enacted a SOCE ban on professionals with the Ministerial Order No.767<sup>159</sup> and the Penal Code was changed to prohibit SOCE.<sup>160</sup> However, the ban was not effective enough to stop common SOCE practices in the country. According to the reports, 200 unlicensed clinics are still operating across the country.<sup>161</sup> Since most of these clinics usually exist in remote towns in Ecuador, it has been more difficult for the Ministry of Health to regulate them.<sup>162</sup>

## C. The Protection of Human Rights and Sexual Orientation Change Efforts

### I. Sexual Orientation Change Efforts on Minors and the Best Interest of the Child

Children have been recognized as right holders by the UN Convention on the Rights of the Child (CRC), the main legal instrument on the protection of children, since 1989.<sup>163</sup> The term "best interest" is a broad term that ultimately describes the well-being of a child.<sup>164</sup> While this well-being depends on various factors<sup>165</sup> in each concrete case, regardless of anything, the child's best interest should be a primary factor for each actor whose decisions

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<sup>154</sup> *International Lesbian, Gay, Bisexual, Trans and Intersex Association: Mendos*, (fn.104), p.270.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Phillips*, Brazilian judge approves 'gay conversion therapy', sparking national outrage, <https://www.theguardian.com/world/2017/sep/19/brazilian-judge-approves-gay-conversion-therapy>, (last accessed on 15/10/2019).

<sup>157</sup> *Ibid.*

<sup>158</sup> *International Lesbian, Gay, Bisexual, Trans and Intersex Association: Mendos*, (fn.104), p.270; *Outright Action International*, (fn.132), p.30.

<sup>159</sup> *International Lesbian, Gay, Bisexual, Trans and Intersex Association: Mendos*, (fn.104), p.270.

<sup>160</sup> "Article 151(3) of the Comprehensive Organic Penal Code of 2014 also criminalizes any act of torture (defined in broad terms) perpetrated with the intention of modifying a persons' sexual orientation.", *Ibid.*

<sup>161</sup> *Gutierrez*, Why 200 Lesbian Torture Clinics Are Still Operating in Ecuador, [https://www.huffpost.com/entry/ecuador-lesbian-torture-clinics\\_b\\_1087533](https://www.huffpost.com/entry/ecuador-lesbian-torture-clinics_b_1087533), (last accessed on 15/10/2019); *Guglielmone*, Fight Against "Reparative Sexual Therapy" in Ecuador, <http://www.coha.org/fight-against-reparative-sexual-therapy-in-ecuador/>, (last accessed on 15/10/2019).

<sup>162</sup> *Nichols*, Terrifying Photos Recreate The Horrors Of Gay 'Conversion Therapy' Centers The clinics are illegal in Ecuador but still operate in secrecy., [https://www.huffpost.com/entry/gay-conversion-therapy-camps-horrors\\_n\\_593ebc3de4b02402687b8697](https://www.huffpost.com/entry/gay-conversion-therapy-camps-horrors_n_593ebc3de4b02402687b8697), (last accessed on 15/10/2019).

<sup>163</sup> *Sandberg*, in: Falch-Eriksen, Backe-Hansen (eds.), p.15.; Actually, the Notion of the best interest of the child has its roots in the 1959 Declaration of the Rights of the Child., *Hammerberg*, The Principle Of The Best Interests Of The Child – What It Means And What It Demands From Adults, <https://rm.coe.int/16806da95d>, (last accessed on 15/10/2019). Establishing the rights of children was a two-tier process, first children were recognized as right holders and then vulnerable position of children that requires additional protection recognized., *Smith*, p438.

<sup>164</sup> *UNHCR*, p.14.

<sup>165</sup> Such as the age of the child, the maturity level of the child, the presence or absence of the parents, environment of the child., *Ibid.*

affect a child.<sup>166</sup> As a primary concern, protection of the child's best interest is also taken into consideration by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Therefore, European courts have also accepted children as right holders rather than just objects of protection.<sup>167</sup> As it set out in the first chapter, scientific findings indicate that sexual reorientation efforts are especially harmful and not successful in any matter. Therefore, SOCE should be examined under the concept of the child's best interest and other relevant provisions for the protection of children.

## 1. International Human Rights Law: The Convention on the Rights of the Child

As the most ratified human rights treaty<sup>168</sup>, the CRC has been the fundamental instrument for the protection of children<sup>169</sup> all over the world. The notion of child's best interest plays a very important role in matters concerning the child. Therefore, while evaluating SOCE's compatibility with the CRC, the importance and the interpretation of the notion should be emphasized. Furthermore, other provisions of the CRC are also vital to assess sexual reorientation efforts compatibility with the CRC. The CRC encompasses four fundamental principles, namely the best interest of the child as a primary consideration<sup>170</sup>; prohibition of discrimination<sup>171</sup>; right to life, survival, and development of the child<sup>172</sup>; and the children's right to express their views freely<sup>173</sup>.<sup>174</sup> Therefore, while assessing the SOCE on minors' compatibility with international human rights law, these principles should be taken into consideration.

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<sup>166</sup> The child's best interest is not a primary factor only for actions taken by state authorities but also for judicial bodies, parliamentary assemblies, and private institutions. *Hammerberg*, (fn.163).

<sup>167</sup> *FRA, CoE*, p.17.

<sup>168</sup> The world's most widely ratified human rights treaty in history, <https://www.unicef.org/child-rights-convention/what-is-the-convention>, (last accessed on 15/09/2019); UNTS vol. 1577, p.3; see members, declarations, and reservations: [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en), (accessed on 05.09.2019). Furthermore, the Convention entered into force within 10 months of its adoption. One of the reasons for the CRC's fast acceptance was its subject, children. See: *Tordes*, CHRLR30/1998, p.159, 167.

<sup>169</sup> Child defined as "... every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." (Article 1).

<sup>170</sup> Article 3: 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

<sup>171</sup> Article 2: 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

<sup>172</sup> Article 6: 1. States Parties recognize that every child has the inherent right to life.

<sup>173</sup> Article 12: 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

<sup>174</sup> *UNHCR*, (fn.164), p.14.

The best interest of the child principle is a vital element for the CRC.<sup>175</sup> The principle guides the interpretation of the Convention and in case of a conflict with the other provisions of the CRC, the principle must determine the course of action.<sup>176</sup> Despite its importance, the notion is not defined in the Convention. Instead, the best interest should be determined on a case by case basis. However, the UN Committee on the Rights of Children (UNCRC) has provided general comments for the interpretation of the principle. According to the general comment no.14<sup>177</sup>, the principle should be interpreted as both a substantive right and a guiding principle.<sup>178</sup> The UNCRC explains the best interest of the child as a three-dimensional concept. Firstly, it is a substantive right and therefore, it creates a genuine obligation for states which is directly applicable and can be invoked before a court.<sup>179</sup> Secondly, it is a fundamental legal principle for the interpretation of all legal provisions considering a child.<sup>180</sup> And finally, it is a rule of procedure, for this reason, in a decision that will affect a child or children in general, the decision-making process must include an evaluation of the best interest of the child.<sup>181</sup> Therefore, corresponding authorities should clarify the concept and make concrete use of it.<sup>182</sup> Moreover, the best interest of the child should be evaluated in line with the other general principles of the Convention, namely the right to non-discrimination (Article 2); the right to life, survival and development (Article 6); and the right to be heard (Article 12).<sup>183</sup> While assessing the best interest of the child in a concrete case, the assessment requires the participation of the child in line with Article 12.<sup>184</sup> In addition, as it is stated in Article 8, the child's identity should also be taken into consideration and according to the general comment, the identity of the child includes sexual orientation.<sup>185</sup>

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<sup>175</sup> The best interest of the child is the governing principle for the CRC and underpins the entire Convention.; *Smith*, p.454.

<sup>176</sup> *Hammarberg*, (fn.163).; If the child's best interest conflicts with other interests (such as public interest or parents' interests), the balance must be determined very carefully. Nevertheless, during the balancing process, the child's best interest should be taken into consideration as a primary consideration.; *Llorens*, in: Sormunen (ed.), p.8, 12-13.

<sup>177</sup> General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para. 1), 2013, CRC/C/GC/14.

<sup>178</sup> *Pobjoy*, ICLQ64:2/2015, p.327, 330.; *Ibid.*, para.6.

<sup>179</sup> *Ibid.*, para.6 (a).

<sup>180</sup> *Ibid.*, para.6 (b).

<sup>181</sup> *Ibid.*, para.6 (c).

<sup>182</sup> *Ibid.*, para.32.

<sup>183</sup> *Ibid.*, paras.41-45.; Considering the indivisibility and independence of children's rights all provisions of the Convention should be interpreted together. General comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (Article 24), 2013, CRC/C/GC/15, para.7.; Any right of the child should be implemented on the base of these fundamental general principles of the Convention., *Kolosoc*, in: Symonides, p.259, 266.

<sup>184</sup> *Ibid.*, fn.161, paras. 53-54.

<sup>185</sup> *Ibid.*, paras.55-57. Accordingly, the child's care, protection and safety, the situation of vulnerability, and the right to health should be taken into consideration., paras.71-77. Therefore, sexual reorientation efforts are

In regard to sexual reorientation efforts, scientific research shows their harms and various health organizations have already condemned these practices. SOCE poses dangers, especially for LGBT adolescents' mental and physical health.<sup>186</sup> Therefore, Article 24<sup>187</sup> of the CRC is particularly important for the evaluation of SOCE. According to the general comment on Article 24, States parties should ensure that discrimination is not undermining the article. Although the non-discrimination provision of the CRC does not include sexual orientation as one of the explicit grounds of discrimination, in accordance with the general comment, sexual orientation and gender identity are part of these grounds.<sup>188</sup> It also is the states' duty to ensure appropriate health services for all children<sup>189</sup>, and non-state actors are obliged to comply with the provisions of the Convention too.<sup>190</sup> Consequently, it is the States parties' duty to adopt all legislative, administrative and other appropriate measures for the application of Article 24 without any discrimination.<sup>191</sup> Therefore, it is evident that State parties have an obligation to prevent SOCE and in this regard, it is their obligation to take any necessary measures.

However, States parties' obligations do not only arise from the general comment on Article 24. Hence, sexual reorientation efforts having been accepted as a group of harmful practices, the general comment on the rights of the child on harmful practices<sup>192</sup> is very pertinent to the matter. The general comment defines harmful practices as practices that constitute denial of the dignity/ integrity of the individual and a violation of the rights and freedoms enshrined in the CRC<sup>193</sup>; that constitute discrimination and result in negative consequences such as physical and psychological harm<sup>194</sup>; that are traditional, re-emerging or emerging practices, prescribed and/or kept in place by social norms that maintain male dominance and inequality of women/children on the base of sex, gender, age, and other

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fundamentally contradicting with Article 8. See: *Nugraha*, (fn.16), p.9. Since sexual orientation is not a matter of choice, it should be protected as a part of personal integrity.

<sup>186</sup> *Hicks*, AULR49:2/1999, p.505, 517-518.

<sup>187</sup> Article 24: 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

<sup>188</sup> *Ibid.*, fn.167, para.8.

<sup>189</sup> *Ibid.*, para.27.

<sup>190</sup> *Ibid.*, paras.79-80.

<sup>191</sup> *Ibid.*, para.94.

<sup>192</sup> Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/ General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, CEDAW/C/GC/31-CRC/C/GC/18.

<sup>193</sup> And also, CEDAW, *Ibid.*, para.16 (a).

<sup>194</sup> *Ibid.*, para.16 (b): "...including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential."



intersecting factors<sup>195</sup>; finally that are imposed on women/ children by family members, community members, society at large regardless of whether the victim provides, or is able to provide, full, free and informed consent.<sup>196</sup> Regarding SOCE, it is evident that practices are fulfilling every criterion set by the CEDAW and the UNCRC on harmful practices.<sup>197</sup> Therefore, States parties to the conventions should have legislation aimed at eliminating harmful practices which must include appropriate implementing, monitoring, and effective enforcement of the legislation.<sup>198</sup> This shows that States parties not only have the obligation of enacting legislation on prohibiting SOCE but they also should ensure the effective enforcement of the legislation.

Another point to be considered is that the subject of SOCE is usually LGB adolescents. Regarding adolescence as a stage of life in which individuals are vulnerable<sup>199</sup> and the specific vulnerability of LGBT youths, SOCE must be evaluated from this specific vulnerability perspective. Thus, the UNCRC's general comment on the implementation of the rights of the child during adolescence points out adolescence as a source of discrimination itself.<sup>200</sup> Furthermore, as a primary consideration, the best interest of the adolescent requires that the views of the adolescents be taken into account as they acquire understanding and maturity.<sup>201</sup> The general comment categorizes LGBTI youth as adolescents requiring particular attention. Furthermore, the UNCRC recognizes that LGBTI youths are commonly subject to abuse, violence, stigmatization, and discrimination.<sup>202</sup> And most importantly, the UNCRC condemned sexual reorientation practices and urged State parties to eliminate these kinds of practices and take effective action for the protection of LGBTI youth.<sup>203</sup> Consequently, regarding the CRC and general comments on the subject, it is clear that SOCE on minors are not compatible with the international protection of human rights. Therefore, all

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<sup>195</sup> Ibid., para.16, (c), Although, sexual orientation is not explicitly listed in the paragraph it can be accepted as an intersecting factor.

<sup>196</sup> Ibid., para.16 (d).

<sup>197</sup> Furthermore, in a group of UN and international human rights experts' call for an end to discrimination and violence against LGBTI young people and children, SOCE are described as "unethical, unscientific, ineffective, and maybe tantamount torture." Discriminated and made vulnerable: Young LGBT and intersex people need recognition and protection of their rights International Day against Homophobia, Biphobia and Transphobia, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E>, (last accessed on 15/10/2019).

<sup>198</sup> Joint General Recommendation, (fn.192), para.12.

<sup>199</sup> General comment No. 20 (2016) on the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20, para.2.

<sup>200</sup> Ibid., para.21.

<sup>201</sup> Ibid., paras.22-23.

<sup>202</sup> Ibid. para.33.

<sup>203</sup> Ibid., para.34.

States parties to the CRC not only should enact legislation prohibiting SOCE, but they should also ensure the effective implementation of that legislation.<sup>204</sup>

## 2. European Human Rights Law

### a) The European Court of Human Rights and the Best Interest of the Child

The principle of child's best interest is not only a vital principle for the CRC, but it is also given importance by the ECtHR. Although provisions of the European Convention on Human Rights (ECHR) do not include the notion<sup>205</sup>, due to the ECtHR's interpretation techniques<sup>206</sup>, the best interest of the child took its place in the Court's jurisprudence. Although the best interest of the child has not been systematically applied by the ECtHR, the Court refers to the notion when an application involves a child.<sup>207</sup> The best interest of the child has been taken into consideration in relation to several Convention provisions, but mostly regarding the right to respect for private and family life (Article 8). The notion was applied under Article 8 in applications concerning adoption<sup>208</sup>, family reunification<sup>209</sup>, surrogacy treatment<sup>210</sup>, child custody and access rights<sup>211</sup>, and the right to know one's origin<sup>212</sup>. In addition, the concept was applied in cases regarding domestic violence<sup>213</sup>, sexual abuse of children<sup>214</sup>, property

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<sup>204</sup> On a normative base, this obligation for states arises from Articles 3 and 19; *Nugraha*, (fn.16), p.13.

<sup>205</sup> Only the Article 5 of the 7<sup>th</sup> protocol on the equality between spouses refers to the interests of the child. *Kilkelly*, HRQ23:2/2001, p.308-312.

<sup>206</sup> The Court's interpretation techniques have an importance for the effective protection of human rights. The dynamic interpretation (or evolutive) technique used by the Court for the first time in *Tyrer v. The United Kingdom* judgment; ECtHR, *Tyrer v. the United Kingdom*, App. No. 5856/72, 25 April 1978. According to this, "the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field" para.31. See also: *Dzehtsiarou*, GLJ12:10/2011, p.1730, 1731-1733.

<sup>207</sup> *FRA/ CoE*, (fn.167), p.30.; *Smyth*, EJML17/2005, p.70, 71.

<sup>208</sup> ECtHR, *Chbihi Loudoudi and Others v. Belgium*, App. No. 52265/10, 16 December 2014; ECtHR, *Schwizgebel v. Switzerland*, App. No.25762/07, 10 June 2010.

<sup>209</sup> ECtHR, *Mugenzi v. France*, App. No. 52701/09, 10 July 2014; ECtHR, *Tanda-Muzinga v. France*, App. No. 2260/10, Judgment of 10 July 2017; ECtHR, *Senigo Longue and Others v. France*, App. No. 19113/09, 10 July 2014; *ECtHR*, Fact-Sheet, Children's Rights, [https://www.echr.coe.int/Documents/FS\\_Childrens\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Childrens_ENG.pdf), p.4, (last accessed on 15/10/2019).

<sup>210</sup> ECtHR, *Mennesson v. France*, App. No. 65192/11, 26 June 2014; ECtHR, *Labassee v. France*, App. No. 65941/11, 26 June 2014.

<sup>211</sup> ECtHR, *N.Ts. v. Georgia*, App. No. 71776/12, 02 February 2016; ECtHR, *V.D. and Others v. Russia*, App. No. 72931/10, 09 April 2019; ECtHR., *Zaunegger v. Germany*, App. No. 22028/04, 03 December 2012; ECtHR., *Diamante and Pelliccioni v. San Marino*, App. No. 32250/08, 27 September 2011.; ECtHR, *Vojnity v. Hungary*, App. No. 29617/07, 12 February 2013; ECtHR, *Nazarenko v. Russia*, App. No. 39438/13, 16 July 2015.; ECtHR, *Bondavalli v. Italy*, App. No. 35532/12, 17 November 2015.

<sup>212</sup> ECtHR, *Mandet v. France*, App. No. 30955/12, 14 January 2016.

<sup>213</sup> ECtHR, *D.M.D. v. Romania*, App. No. 23022/13, Judgment of 03 October 2017.; the best interest of the child used for the assessment of Article 6 and Article 3 in the same case.

swap<sup>215</sup>, and when parents' rights conflict with the best interest of the child.<sup>216</sup> Moreover, the Committee of Ministers<sup>217</sup> in its recommendation<sup>218</sup> on the protection of children from violence states that "in all actions affecting children, including those to protect them from all forms of violence<sup>219</sup>, the best interests of the child should be the primary consideration."<sup>220</sup> Regarding SOCE, the recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity has importance<sup>221</sup>. With the recommendation, the Committee of Ministers recommends states to "ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them." Consequently, in a hypothetical application regarding SOCE, the best interest of the child principle and recommendations of the Committee of Ministers would be taken into consideration.

Considering the findings on SOCE<sup>222</sup>, the practice of sexual reorientation efforts should be examined under the right to respect for private life and the prohibition of torture (Article 3), inhuman, and degrading treatment. As a matter of fact, Article 8 of the ECHR protects the personal autonomy<sup>223</sup> and the physical and moral integrity of the person.<sup>224</sup> In accordance with the ECtHR's jurisprudence, personal autonomy is a part of the right to personal

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<sup>214</sup> ECtHR, *O'Keeffe v. Ireland*, App. No. 35810/09, Judgment of 28 January 2014.; the notion applied for the assessment of positive obligations under Article 3.

<sup>215</sup> ECtHR, *S.L. and J.L. v. Croatia*, App. No. 13712/11, Judgment of 07 May 2015; the notion applied for the assessment of protocol no.1, Article 1, namely the right to property.

<sup>216</sup> ECtHR, *Dubská and Krejzová v. The Czech Republic* (GC), App. Nos. 28859/11 28473/12, 15 November 2016.

<sup>217</sup> Although the Committee of Ministers' recommendations are not binding for State parties, they provide guidance for the interpretation of the ECHR. See: *CoE Research Division*, The use of Council of Europe treaties in the case-law of the European Court of Human Rights, [https://www.echr.coe.int/Documents/Research\\_report\\_treaties\\_CoE\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_treaties_CoE_ENG.pdf), (last accessed on 15/10/2019). The report shows several recommendations were used by the Court for the interpretation of the Convention in different cases.

<sup>218</sup> Recommendation CM/Rec(2009)10 of the Committee of Ministers to member states on integrated national strategies for the protection of children from violence.

<sup>219</sup> The recommendation defines violence as "including all forms of physical or mental violence, injury and abuse, neglect and negligent treatment, maltreatment or exploitation, including sexual abuse."

<sup>220</sup> Also, the recommendation lists sexual orientation as a discrimination ground.

<sup>221</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

<sup>222</sup> The methods and the perils of the efforts.

<sup>223</sup> ECtHR, *Pretty v. The United Kingdom*, App. No. 2346/02, 29 April 2002, para.61, ECtHR, *Christine Goodwin v. The United Kingdom*, App. No.28957/95, 11 July 2002, para.90; ECtHR, *Fernandez Martinez v. Spain*, App. No. 56030/07, 12 June 2014, para.126; ECtHR, *M. and M. v. Croatia*, App. No. 10161/13, 03 September 2015, para. 170; ECtHR, *Y.Y. v. Turkey*, App. No. 14793/08, 10 March 2015, para.57; ECtHR, *Carvalho Pinto De Sousa Morais v. Portugal*, App. No. 17484/15 Judgment of 25 July 2017, para.35.

<sup>224</sup> *Harris, et. al*, p.526; Moreover, the sexual orientation is an important part of the private life., *CoE*, Guide on Article 8 of the European Convention on Human Rights, [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf), p.29, (last accessed on 15/10/2019).

development which is a vital element for the interpretation of Article 8.<sup>225</sup> In this scope, personal autonomy, one's capacity for self-governance<sup>226</sup>, is closely related to self-determination.<sup>227</sup> Another important value protected under Article 8 is the moral, physical, and psychological integrity.<sup>228</sup> It is evident that SOCE can constitute an intervention in physical and/or psychological integrity. In the jurisprudence of the ECtHR, issues regarding medical care and treatment, especially, treatment without consent and medical negligence, are evaluated under the moral, physical, and psychological integrity.<sup>229</sup> Therefore, the value of a minor's consent is important for the assessment of SOCE under the ECHR. In this context, the Council of Europe's (CoE) Oviedo Convention<sup>230</sup> should be mentioned. In regard to the Convention, as a general rule (Article 5) intervention in the health field can only be in line with the Convention, if the person concerned has given free and informed consent. Moreover, the Convention protects the persons not able to consent and an intervention on a minor can only be carried out with the authorization of their representatives, in many cases their parents (Article 6). In addition, the opinion of the minor should also be taken into consideration in accordance with the minor's age and maturity level. As for scientific research, research on a person can be conducted only under certain conditions that set out in Article 16<sup>231</sup> of the Convention. Regarding the persons who are not able to consent, Article 17<sup>232</sup> sets out more

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<sup>225</sup> Ibid. p.19.

<sup>226</sup> Kühler, Jelinek, Autonomy and the Self, [https://www.uni-muenster.de/imperia/md/content/kfg-normenbegrueundung/intern/publikationen/kuehler/10\\_k\\_hler\\_-\\_autonomy\\_and\\_the\\_self.pdf](https://www.uni-muenster.de/imperia/md/content/kfg-normenbegrueundung/intern/publikationen/kuehler/10_k_hler_-_autonomy_and_the_self.pdf), p.2-3.

<sup>227</sup> Koffeman, (The right to) personal autonomy in the case law of the European Court of Human Rights, [https://openaccess.leidenuniv.nl/bitstream/handle/1887/15890/N.R.+Koffeman+-+\(The+right\)+to+personal+autonomy+in+the+case+law+of+the+ECtHR+\(2010\).pdf;jsessionid=DDBF8B04E5A1A212F2F8EDF182975197?sequence=3](https://openaccess.leidenuniv.nl/bitstream/handle/1887/15890/N.R.+Koffeman+-+(The+right)+to+personal+autonomy+in+the+case+law+of+the+ECtHR+(2010).pdf;jsessionid=DDBF8B04E5A1A212F2F8EDF182975197?sequence=3), p.16, (last accessed on 15/10/2019).

<sup>228</sup> Harris, et. al, (fn.224), p.541.

<sup>229</sup> Ibid., p.543-546.

<sup>230</sup> CoE, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, European Treaty Series No.164.

<sup>231</sup> Article 16 – Protection of persons undergoing research; Research on a person may only be undertaken if all the following conditions are met: i. there is no alternative of comparable effectiveness to research on humans; ii. the risks which may be incurred by that person are not disproportionate to the potential benefits of the research; iii. the research project has been approved by the competent body after independent examination of its scientific merit, including assessment of the importance of the aim of the research, and multidisciplinary review of its ethical acceptability; iv. the persons undergoing research have been informed of their rights and the safeguards prescribed by law for their protection; v. the necessary consent as provided for under Article 5 has been given expressly, specifically and is documented. Such consent may be freely withdrawn at any time.

<sup>232</sup> Article 17 – Protection of persons not able to consent to research 1 Research on a person without the capacity to consent as stipulated in Article 5 may be undertaken only if all the following conditions are met: i. the conditions laid down in Article 16, sub-paragraphs i to iv, are fulfilled; ii. the results of the research have the potential to produce real and direct benefit to his or her health; iii. research of comparable effectiveness cannot be carried out on individuals capable of giving consent; iv. the necessary authorisation provided for under Article 6 has been given specifically and in writing; and v. the person concerned does not object. 2 Exceptionally and under the protective conditions prescribed by law, where the research has not the potential to produce results of direct benefit to the health of the person concerned, such research may be authorised subject to the conditions laid down in paragraph 1, subparagraphs i, iii, iv and v above, and to the following additional conditions: i. the

conditions, according to this, the results of the research must have produced a real and direct benefit to person's health and research must only involve minimum risk and burden for the individual concerned.

Concerning that homosexuality is not a disease and sexual reorientation efforts are not accepted as a respectable medical practice by professional organizations, it is not possible to recognize SOCE as a medical treatment under the Oviedo Convention<sup>233</sup>. However, some might argue that sexual reorientation efforts constitute scientific research. In this case, SOCE should be examined under Articles 16 and 17 of the Oviedo Convention. SOCE has no real benefit on the concerned minor's health since homosexuality itself is not a disease. Moreover, concerning the proven harms of these efforts, SOCE cannot be seen as research which entails minimal risk and burden. Furthermore, bodily integrity is not only protected under Article 8 but also under Article 3 of the ECHR.<sup>234</sup> In fact, in many cases regarding bodily integrity, the ECtHR evaluated the facts under Articles 8 and 3 together.<sup>235</sup> Article 3 of the ECHR prohibits three acts, namely; torture, inhuman, and degrading treatment. These acts are distinguished from each other by the level of severity criterion.<sup>236</sup> Nevertheless, an act can only be considered under Article 3 if it reaches the minimum level of severity.<sup>237</sup> Consequently, where the level of severity criterion required under Article 3 was not reached, the infringement of bodily integrity is assessed under Article 8.<sup>238</sup> Torture being the most serious form of ill-treatment, the act needs to be intentional infliction of pain for the pursuit of a specific purpose such as gaining information, punishment or intimidation.<sup>239</sup> Therefore, torture is a deliberate and purposive form of inhuman treatment.<sup>240</sup> The inhuman treatment is an act that doesn't have sufficient intensity or purpose to be considered as torture.<sup>241</sup> In

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research has the aim of contributing, through significant improvement in the scientific understanding of the individual's condition, disease or disorder, to the ultimate attainment of results capable of conferring benefit to the person concerned or to other persons in the same age category or afflicted with the same disease or disorder or having the same condition; ii. the research entails only minimal risk and minimal burden for the individual concerned.

<sup>233</sup> The Oviedo Convention has been used by the ECtHR regarding the medical bodily interventions; ECtHR, *M.A.K. and R.K. v. The United Kingdom*, App. Nos. 45901/05, 40146/06, 23 March 2010, para.31; ECtHR, *Yazgül Yılmaz v. Turkey*, App. No. 36369/06, 01 February 2011, para.29; ECtHR, *Glass v. The United Kingdom*, App. No. 61827/00, 09 March 2004, para.58; ECtHR, *R.R. v. Poland*, App. No. 27617/04, 26 May 2011, para.83; ECtHR, *Costa and Pavan v. Italy*, App. No. 54270/10, 28 August 2012, paras. 21-23; ECtHR, *Nedescu v. Romania*, App. No. 70035/10, 16 January 2018, para.42.

<sup>234</sup> *Herring, Wall*, CLJ76:32017, p.566, 575.

<sup>235</sup> *Harris, et. al.*, (fn.224), p.541-543.

<sup>236</sup> *Long*, p.41.

<sup>237</sup> "It must cause either bodily injury or intense physical or mental suffering." *Harris, et. al.*, (fn.224), p.241.

<sup>238</sup> John Cooper, p.23; For example, unjustified strip searching of persons may not reach the threshold of Article 3, but it'd fall under the scope of Article 8 of the ECHR., *Rainey, Wicks, Ovey*, p.366.

<sup>239</sup> *Reidy*, p.12.

<sup>240</sup> *Ibid.*, p.13-14.

<sup>241</sup> *Ibid.*, p.16.

contrast to torture, inhuman treatment does not have to be intended to cause suffering.<sup>242</sup> And degrading treatment is an act that humiliates and debases the person concerned and affects their personality adversely.<sup>243</sup> The threshold for the violation of Article 3, in other words, the assessment of the minimum level of severity, depends on the facts of each situation.<sup>244</sup> This assessment includes the duration of the treatment, its physical and psychological effects, its purpose and intention, its context and manner, the sex, age, and state of health of the victim.<sup>245</sup> Accordingly, depending on the methods that are used, the duration of SOCE and their effects on the victim, sexual reorientation efforts may reach the minimum severity level under Article 3.<sup>246</sup>

Consequently, the child's best interest, as a primary concern, indicate that children should be protected from physical and psychological violence. Therefore, the application of Articles 3 and 8 would require the best interest notion to be taken into consideration. In the case of SOCE conducted by health-care professionals, the Oviedo Convention should also be regarded. In other instances, where SOCE conducted by non-professional individuals, the protection of the child's best interest is vital. Therefore, if SOCE are coerced on the minor in a non-professional context, such as the religious sphere, it will violate the personal autonomy of the child. Another point is where the concerned minor consented to sexual reorientation practice. It is true that child's view should be taken into consideration in accordance with the child's age and maturity. However, the child's best interest may require taking measures against the child's views. Therefore, considering the vulnerable position of LGBT children, proven harms of SOCE, and the best interest of the child, children should be protected from sexual reorientation efforts.

In this regard, another very important point is that in practice SOCE are not conducted by public institutions. In most cases, private individuals are responsible for sexual reorientation

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<sup>242</sup> *Cooper*, p.21; *Harris, et. al.*, (fn.224), p.241, 257.; Furthermore, ill-treatment for being a homosexual may constitute inhuman treatment.

<sup>243</sup> Contrary to inhuman treatment, actual physical and psychological suffering is not a requirement for classification as degrading treatment., *Vermeulen, Battjes*, in: Van Dijk, Van Hoof, Van Rijn, Zwaak (eds.), p.381, 399.

<sup>244</sup> *Cooper*, (fn.242), p.22.

<sup>245</sup> ECtHR, *Ireland v. The United Kingdom*, App. No.5310/71, 8 January 1978, para.162; ECtHR, *İlhan v. Turkey*, App. No.22277/93, 27 June 2000, para.84; ECtHR, *Gäfgen v. Germany*, App. No. 22978/05, 01 June 2010 para.88; ECtHR, *Bouyid v. Belgium*, App. No. 23380/ 09, 28 September 2015, para.86.; Although the purpose is a relevant factor for determining the minimum level of severity, the lack of purpose did not rule out considering the treatment as inhuman treatment., *Vermeulen, Battjes*, (fn.243), p.391-398.

<sup>246</sup> Where SOCE only consist of verbally condemning homosexuality it may be evaluated under degrading treatment, inhuman treatment, or under Article 8 depending on the duration, where electrocution, hormone/ drug therapy, or corrective rape were involved the so-called therapy would be evaluated under inhuman treatment or torture. In this scope, the nature of SOCE as only targeting homosexual individuals and in the case of minors the specifically delicate situation of homosexual adolescents should also be a consideration.

efforts. Therefore, whether this 3<sup>rd</sup> party infringement of the Conventional right can be linked to the failure of the state to comply with positive obligation<sup>247</sup> should be assessed. Under Article 1<sup>248</sup> of the Convention, states can be held responsible for private persons' infringement of the ECHR.<sup>249</sup> The ECtHR has already established the existence of positive obligation of states under Articles 8 and 3. Under Article 8, in the context of freedom from interference with physical and psychological integrity, following the ECtHR's case-law, there is a positive obligation<sup>250</sup> on the state to effectively protect individuals from grave interferences.<sup>251</sup> This positive obligation has been recognized especially in cases regarding the sexual abuse of a child or domestic violence.<sup>252</sup> As for Article 3, states' positive obligation arises from Article 1 of the ECHR. In the context of SOCE, if the interference does not reach the threshold requirement of Article 3, the Court would consider sexual reorientation efforts under Article 8. Moreover, the ECtHR can evaluate cases regarding physical and psychological integrity under the combination of Articles 3 and 8.<sup>253</sup> In this regard, the Court has emphasized the need for effective protection of children and other vulnerable persons in society.<sup>254</sup> For the effective protection of children, states should take reasonable steps to prevent ill-treatment of which authorities were aware or ought to be aware.<sup>255</sup> Furthermore, the measures taken must be in line with the best interest of the child.<sup>256</sup> Therefore, as positive obligation States have a duty to investigate allegations of ill-treatment and to take measures to prevent ill-treatment.<sup>257</sup> Accordingly, effective protection may require states to enact a legal framework against private individuals which concludes infringement with the rights enshrined under Articles 3 and 8.<sup>258</sup> Concerning SOCE, as it is established above, efforts themselves are

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<sup>247</sup> *Lavrysen*, p.79.

<sup>248</sup> Article 1: Obligation to respect Human Rights; The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

<sup>249</sup> *Beijer*, p.34-35.

<sup>250</sup> According to the Court, the positive obligation under Article 8 is inherent in the article since it refers to the right to respect., *Harris, et. al.* (fn.224), p.533.

<sup>251</sup> *Rainey, Wicks, Ovey*, (fn.238), p.365.

<sup>252</sup> *Ibid.*

<sup>253</sup> *CoE*, (fn.224), p.12.

<sup>254</sup> *Ibid.*; "...in cases relating to both Articles 3 and 8 the Court has stressed the relevance of the age of the minors concerned and the need, where their physical and moral welfare is threatened, for children and other vulnerable members of society to benefit from State protection." ECtHR, *Tlapak and others v. Germany*, App. Nos. 11308/16 11344/16, 22 March 2018, para.87.; *Wetjen and others v. Germany*, App. Nos. 68125/14 72204/14, 22 March 2018, para.74.

<sup>255</sup> *CoE*, (fn.224), p.20.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Vermeulen, Battjes*, (fn.243), p.405.

<sup>258</sup> *CoE*, (fn.224), p.12; "Regarding the protection of the physical and psychological integrity of an individual from other persons, the Court has previously held that the authorities' positive obligations – in some cases under Articles 2 or 3 of the Convention and in other instances under Article 8 taken alone or in combination with Article 3 – may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.", ECtHR, *Söderman v. Sweden*, App. No. 5786/08, 12

fundamentally against the best interest of the child. The ECtHR's jurisprudence obliges States to effectively protect children in line with their positive obligations. But this obligation should not be a disproportionate burden on the States. Therefore, States are only responsible for the ill-treatment that they were aware of or ought to be aware of. Considering SOCE being a contemporary topic all over the world and reports from several human rights NGOs on the issue, it is evident that states at least ought to be aware of sexual reorientation efforts. Consequently, the ECHR provisions and the Court's jurisprudence require States to take necessary measures to prevent SOCE on minors.

### **b) The Charter of Fundamental Rights and the Best Interest of the Child in the Jurisprudence of the Court of Justice of the European Union**

Although the EU fundamentally is not a human rights organization, as a primary source of the EU law, the Charter of Fundamental Rights (CFREU) is one of the most comprehensive human rights instruments.<sup>259</sup> As a matter of fact, prior to the CFREU, the CJEU also accepted the protection of fundamental rights as general principles of Community law.<sup>260</sup> Moreover, the protection of fundamental rights is also stated in the primary sources of the EU. According to Article 2 TEU, the Union is founded on the value of respect for human rights, and Article 3(5) TEU states that the EU should uphold and promote its values, should contribute to the protection of human rights and in particular the rights of the child.<sup>261</sup> Nevertheless, the CFREU constitutes the most important instrument for the protection of fundamental rights within the EU.<sup>262</sup>

As for sexual reorientation efforts, the CFREU establishes the right to respect for physical and mental integrity, underlines the particular importance of the free and informed consent (Article 3); the right to be free from torture, inhuman or degrading treatment (Article 4); the prohibition of discrimination on the ground of sexual orientation (Article 21); and the protection of the child's best interest as a primary consideration in all actions whether taken by a public authorities or private institutions (Article 24). Therefore, the best interest of the child is protected under EU primary law. However, the application scope of the CFREU is limited to the application of EU law (Article 51). In this regard, the EU has legislated for the

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November 2013, para.80.; Especially regarding children, it's states' duty to protect minors from serious, long-term neglect and abuse., *Vermeulen, Battjes*, (fn.243), p.408.

<sup>259</sup> *Beijer*, p.109.

<sup>260</sup> *Wetzel*, FLR71:6/2003, p.2823, 2836. And due to Community law, the Court has to take consideration of the common traditions of member states and the ECHR in the cases concerning the fundamental rights.

<sup>261</sup> Also see *supra*, p.10, TFEU articles on combating discrimination on the ground of sexual orientation.

<sup>262</sup> The Charter became legally binding in 2009 with the adoption of the Treaty of Lisbon. In accordance with Article 6 of the TEU, the CFREU is the part of primary EU law.



protection of children's rights in the areas of data and consumer protection, asylum and immigration, and cooperation in civil and criminal matters.<sup>263</sup> The CJEU has mostly applied the best interest notion in cases regarding the free movement and EU citizenship area.<sup>264</sup> In this regard, cross-border child abduction cases and immigration cases have particular importance in the CJEU's jurisprudence.<sup>265</sup>

Regarding the scope of application of the CFREU, whether a situation considering a child falls under the scope of EU law is determined on a case by case basis. More importantly, as SOCE are not practiced by state institutions, the horizontal application scope of the EU law has significant importance. In accordance with the CJEU's case-law, there should be available judicial remedies for individuals to challenge infringements of their rights under EU secondary law.<sup>266</sup> At this point, the consumer protection approach that is similar to the *Ferguson v. JONAH* case in the USA<sup>267</sup> can be relevant. Since sexual reorientation efforts are not considered as a respectable practice by the scientific communities, any advertisement and practice of SOCE claiming to change one's sexual orientation would constitute a misleading advertisement and prevent consumers to make an informed choice. Indeed, consumer rights and unfair commercial practices are regulated under EU law. According to the Directive 2005/29/EC,<sup>268</sup> unfair commercial practices shall be prohibited. The directive defines unfair commercial practices in its general clause as practice contrary to the requirement of professional diligence which that practice materially distorts or is likely to materially distort the average consumer's behavior.<sup>269</sup> And according to the special clauses, which regulate the main categories of unfair commercial practice,<sup>270</sup> if a practice is misleading or aggressive it shall be considered unfair.<sup>271</sup> Substantially, the directive's purpose is to protect the economic

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<sup>263</sup> *FRA/ CoE*, (fn.167), p.22.

<sup>264</sup> *Ibid.*, p.29.

<sup>265</sup> *Ibid.*, 29-30.

<sup>266</sup> *Beijer*, p.270.

<sup>267</sup> *Supra*, p.6.

<sup>268</sup> Directive (EU) 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22–39.

<sup>269</sup> These two criteria should be used together to identify the unfair commercial practice which does not fall under the specific clauses identifying specific types of unfair commercial practice., *Health & Consumer Protection Directorate-General*, p.14.

<sup>270</sup> *Abbamonte*, CJEL12:3/2006, p.695, 703.

<sup>271</sup> Misleading actions are defined in Article 6 of the directive. According to this, an action would be misleading if "it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer"; As for aggressive practice, if a practice affects the freedom of choice of the consumer by harassment or coercion. In this scope, if SOCE practitioners also harass the participants on the base of their homosexuality (especially in the context of religious SOCE practice, the threat of damnation is used to create religious pressure) this conduct can be considered under the aggressive practice in the means of the directive.; *Garde*, in: Devenney, James/ Kenny, Mel (eds.), p.164,192.

interests of consumers.<sup>272</sup> Thus, the directive does not regulate the health and safety aspects of the products<sup>273</sup> and does not concern the unsafe products' negative health effects on consumers.<sup>274</sup> However, any misleading claim from the trader on the safety of the product would fall under the scope of the directive.<sup>275</sup> Promoting SOCE as a practice that could cure<sup>276</sup> homosexuality and not mentioning the proven harms of these efforts would definitely fall under the scope of the directive. Therefore, the CFREU is applicable in the cases concerning SOCE in the scope of unfair commercial practice within the EU. Moreover, the directive itself recognizes the children as vulnerable consumers.<sup>277</sup> Consequently, SOCE fundamentally gives misleading information to participants and/ or LGB children's families. Therefore, regarding Article 5 of the directive on unfair commercial practice, it is EU member states' duty to prohibit SOCE and ensure that the directive's provisions are enforced.<sup>278</sup> In addition, there should be legal remedies against the practice of SOCE in the scope of unfair commercial practice.<sup>279</sup> Finally, since SOCE falls under the scope of the EU law, above mentioned CFREU articles should be taken into consideration for evaluation of these efforts.

## II. Sexual Orientation Change Efforts on Adults

### 1. International Human Rights Law: The International Covenant on Civil and Political Rights

Torture, inhuman or degrading treatment forms one of the most serious violations of human rights. Consequently, these forms of ill-treatment have been prohibited under several international human rights instruments and the prohibition accepted as an absolute norm.

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<sup>272</sup> *Abbamonte*, (fn.270), p.699.

<sup>273</sup> In the scope of the directive, product is defined as any good or service. See; Article 2(c).

<sup>274</sup> *Abbamonte*, (fn.270), p.699-700.

<sup>275</sup> *Ibid.*

<sup>276</sup> In addition to the general and specific clauses on unfair commercial practices, the directive also contains an exhaustive blacklist of unfair commercial practices which are presumed to be unfair. *Garde*, (fn.271), p.192. According to the list "*Falsely claiming that a product is able to cure illnesses, dysfunction or malformations*" is a practice that would be considered as an unfair practice in all circumstances. Although scientifically homosexuality is not a disease, SOCE practitioners are misleading the participants on several grounds. Firstly, by claiming homosexuality was a disease, secondly by claiming that homosexuality was a curable disease and they could cure it, and finally by not mentioning the perils of SOCE.

<sup>277</sup> However, the effectiveness of the provision has been criticized. See: *Garde*, (fn.271), p.192-194.

<sup>278</sup> Recital (22): It is necessary that Member States lay down penalties for infringements of the provisions of this Directive and they must ensure that these are enforced. The penalties must be effective, proportionate and dissuasive.

<sup>279</sup> Recital (21): Persons or organisations regarded under national law as having a legitimate interest in the matter must have legal remedies for initiating proceedings against unfair commercial practices, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings. While it is for national law to determine the burden of proof, it is appropriate to enable courts and administrative authorities to require traders to produce evidence as to the accuracy of factual claims they have made.

Moreover, the prohibition is accepted as part of international customary law.<sup>280</sup> As explained above<sup>281</sup>, the practice of SOCE might constitute torture depending on whether the specific practice reaches the threshold of severity and when the practice does not do so, the sexual reorientation effort should be examined under personal integrity in the means of the right to private life. In addition, SOCE are mostly practiced by private persons/ entities, thus it is more appropriate to examine SOCE under the International Covenant on Civil and Political Rights (ICCPR) rather than the United Nations Convention Against Torture (CAT).<sup>282</sup> It should also be mentioned here that the explanations regarding protection of adults from SOCE are also valid for the minors.<sup>283</sup> Under the ICCPR, Articles 7<sup>284</sup> and 10<sup>285</sup> are relevant for the prohibition of torture and other forms of ill-treatment. While Article 7 constitutes a general prohibition of ill-treatment, Article 10 concerns the ill-treatment in the context of deprivation of liberty.<sup>286</sup> Therefore, in the context of SOCE, Article 7 is the relevant provision of the ICCPR since it covers the specific attacks on personal integrity.<sup>287</sup> Another important point is that the ICCPR is applicable both for adults and minors. Therefore, the below explanations regarding the relationship between the ICCPR and SOCE are also valid for minors.<sup>288</sup> In this regard, similar to the ECHR, the ICCPR does not provide any definition of prohibited actions. Moreover, according to the general comment on Article 7, the Human Rights Committee (HRC) does not consider it necessary to establish sharp distinctions

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<sup>280</sup> Kälin, Künzli, p.320.; The Universal Declaration of Human Rights' 5<sup>th</sup> article on the prohibition of torture, inhuman and degrading treatment regarded as an expression of customary international law.; *Association for the Prevention of Torture (APT) and Center for Justice and International Law (CEJIL)*, p.6.

<sup>281</sup> *Supra*, p.25-27.

<sup>282</sup> See; CAT, Article 1(1); For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity* (emphasis added). *Nugraha*, (fn.16), p.16; Indeed, the ill-treatment which occurred in a non-governmental setting is not in the scope of the Convention. The CAT only deals with torture and other forms of ill-treatment which involve a public official or someone acting in an official capacity. *Burgers, Danielus*, p.1.; On the other hand, the ICCPR Article 7 doesn't require any kind of involvement of official capacity.; UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para.2: "It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, *whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.*" (emphasis added).

<sup>283</sup> Therefore, this chapter regarding the protection of adults from SOCE in International and European law also applies to the protection of children.

<sup>284</sup> Article 7; No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

<sup>285</sup> Article 10; 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

<sup>286</sup> *Association for the Prevention of Torture (APT) and Center for Justice and International Law (CEJIL)*, (fn.280), p.9.

<sup>287</sup> *Ibid.*

<sup>288</sup> Consequently, when SOCE are conducted on minors both the CRC and the ICCPR should be taken into consideration for the determination of sexual reorientation practices' compatibility with international human rights law.

between the prohibited actions. However, the general comment stated that the distinction between the actions lies in the nature, purpose, and severity of them.<sup>289</sup> Nevertheless, Article 7 protects both the physical and mental integrity of an individual.<sup>290</sup> In accordance with the HRC's jurisprudence, systematic beatings, electric shocks, threats, deprivation of food, denial of appropriate medical care can reach the threshold of severity and constitute ill-treatment under Article 7.<sup>291</sup> In addition, rape and other forms of acts of sexual violence are also considered to be a violation of Article 7.<sup>292</sup> Moreover, the Committee found that ill-treatment which concluded stigmatization and marginalization of the victim in the society also violates the private and family life.<sup>293</sup> As previously explained, SOCE causes severe depression and self-loathing so that, although, methods used differ, it is evident SOCE could constitute ill-treatment under Article 7.

The ill-treatment aspect of SOCE becomes rather clear when methods like drug/ hormone therapy or electric shocks are used. But even if condemnation, verbal contempt/ harassment is used depending on the duration and effects<sup>294</sup>, these methods could also constitute ill-treatment. The ill-treatment aspect of SOCE practices was not overlooked by the UN Human Rights Council, in several reports the harms of SOCE were emphasized. In the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health<sup>295</sup>, SOCE are described as inappropriate, "potentially can cause significant psychological distress", and can increase the stigmatization.<sup>296</sup> The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment called upon the repeal of any law allowing SOCE when it is enforced or practiced without the

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<sup>289</sup> General comment No. 20, (fn.282), para.4; "The Covenant does not contain any definition of the concepts covered by Article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied."; Therefore, the HRC commonly does not differentiate the prohibited behaviors under Article 7 but rather simply indicates the act concerned violated Article 7., *Joseph, Mitchell, Gyorki*, in: Martin, Benninger-Büdel, p. 156,159.

<sup>290</sup> General Comment No.20, (fn.282), para.5.

<sup>291</sup> *Joseph, Mitchell, Gyorki*, (fn.289), p.159-160.

<sup>292</sup> HRC, *Fulmati Nyaya v. Nepal*, Com. No. 2556/2015, 11 June 2019, para.7.2.

<sup>293</sup> *Ibid.*, para.7.8: "...The Committee considers, moreover, that the stigmatization, marginalization and shame endured by the author as a victim of sexual violence from her community, family and husband amounts to a disruption of her family life and marriage. In view of the above, the Committee finds a violation of Articles 17 and 23 (1) of the Covenant."

<sup>294</sup> According to the HRC, a treatment may constitute ill-treatment depending on the duration, its effects and the victim's age, sex, and health state. Consequently, SOCE victims' sexual orientation as a sexual minority would be a consideration for assessment of ill-treatment status of the acts., *Joseph, Mitchell, Gyorki*, (fn.289), p.158.

<sup>295</sup> UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 27 April 2010, A/HRC/14/20.

<sup>296</sup> *Ibid.*, para.23.

free and informed consent.<sup>297</sup> Moreover, the call for the repeal of the laws developed to call to enact bans on SOCE. In the report of the UN High Commissioner for Human Rights' Office<sup>298</sup>, SOCE<sup>299</sup> were condemned and states' obligation to protect all persons was emphasized.<sup>300</sup> According to the report, when forced or otherwise involuntary SOCE can breach the prohibition of torture and ill-treatment.<sup>301</sup> Therefore, the High Commissioner recommended states to ban SOCE.<sup>302</sup>

In light of these explanations, it is rather clear to establish the ill-treatment aspect of SOCE when it is conducted forcefully on an adult. Therefore, the situation regarding consenting adults and requirements for valid and informed consent should be examined in the context of SOCE. In international law, the importance of the consent and criteria for valid consent have been discussed regarding medical interventions.<sup>303</sup> Furthermore, the second sentence of Article 7 of the ICCPR prohibits medical or scientific experimentation without free consent. Only experiments that by their nature qualify as ill-treatment would be evaluated under Article 7. Other experiments conducted without free and informed consent would be evaluated under the right to privacy or the right to security of a person if they did not reach

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<sup>297</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013, A/HRC/22/53, 1 February 2013, para.88.; UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 January 2016, A/HRC/31/57, paras.48, 72 (i).

<sup>298</sup> Report of the Office of the United Nations High Commissioner for Human Rights Council, Discrimination and violence against individuals based on their sexual orientation and gender identity, 4 May 2015, A/HRC/29/23.

<sup>299</sup> *Ibid.*, SOCE were described as “*unethical, unscientific, ineffective and in some instances, tantamount to torture.*”, para.52.

<sup>300</sup> *Ibid.*, paras. 13-14; “*States have an obligation to protect all persons, including LGBT and intersex persons, from torture and other cruel, inhuman or degrading treatment or punishment in custodial, medical and other settings. This obligation extends to prohibiting, preventing, investigating and providing redress for torture and ill-treatment in all contexts of State control, including by ensuring that such acts are offences under domestic criminal law.9 State responsibility is engaged if public officials, including prison and police officers, directly commit, instigate, incite, encourage, acquiesce in or otherwise participate or are complicit in such acts, as well as if officials fail to prevent, investigate, prosecute and punish such acts by public or private actors.*”

<sup>301</sup> *Ibid.*, para.38.

<sup>302</sup> *Ibid.*, para.78 (g). In addition, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (UN Human Rights Council, A/HRC/38/43, 11 May 2018), recognized the harms of SOCE as causing pain and suffering and leading to depression, anxiety, and suicidal thoughts and called for a SOCE ban (paras. 28, 45, 47, 100).

<sup>303</sup> The importance of free consent regarding the scientific experiences and medical interventions have developed after WWII to ensure the prohibition of unethical medical experiments. In this direction, the Nuremberg Code describes voluntary consent as essential for medical experiments. And according to the Code, voluntary consent means, “*free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved, as to enable him to make an understanding and enlightened decision. This latter element requires that, before the acceptance of an affirmative decision by the experimental subject, there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person, which may possibly come from his participation in the experiment.*”.

the threshold of severity.<sup>304</sup> In the context of SOCE, any intervention without free or informed consent can be evaluated under Article 7 or Articles 17 and 9 depending on which methods were used.<sup>305</sup> Furthermore, especially in religious contexts, when SOCE are offered and conducted by religious functionaries, the practice of SOCE would cause, no matter what methods were used, marginalization and stigmatization of the SOCE participant. In line with the communication of Fulmati Nyaya, this stigmatization, marginalization, and feeling ashamed of being homosexual can constitute a violation of Article 17.<sup>306</sup> In this sense, regarding SOCE on adults without the application of the best interest of the child notion informed consent of the participating adult is vital. The consent can only be accepted as informed when it is based on the complete, objective, and comprehensive information about the treatment.<sup>307</sup> As explained above, SOCE are not accepted as a form of medical treatment by health organizations. Although there is no scientific basis for SOCE<sup>308</sup>, some might still claim that SOCE constitute scientific research<sup>309</sup> to further investigate human sexuality.<sup>310</sup> In the scope of medical research, SOCE practitioners are bound by the criterion of informed consent. Therefore, practitioners have to give objective and complete information on SOCE which means they must explain homosexuality is a normal variation of human sexuality, it is not possible to change sexual orientation, which methods they are going to use, and harmful consequences of SOCE.

Sexual reorientation efforts can also be seen as pseudo-treatment or alternative/ traditional healthcare which is not completely prohibited. In this context, the right to health is also relevant. According to the general comment of the Committee on Economic, Social, and Cultural Rights<sup>311</sup>, the right to health in all forms and levels must be scientifically and medically acceptable.<sup>312</sup> Thus, the obligation regarding the informed consent applies to alternative healthcare providers too. Moreover, it is states' duty to protect persons in their jurisdiction and this duty includes discouraging "the continued observance of harmful

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<sup>304</sup> *Joseph, Mitchell, Gyorki*, (fn.289), p.173.

<sup>305</sup> *CoE*, (fn.224).

<sup>306</sup> *Joseph, Mitchell, Gyorki*, (fn.289), p.158.

<sup>307</sup> *Chakvadze, G./ Chakvadze B.*, TCMGMJ/2017, p.21.

<sup>308</sup> Since homosexuality is neither an illness nor a changeable choice of an individual.

<sup>309</sup> On the other hand, SOCE can be accepted as pseudo-treatment which is not completely prohibited.

<sup>310</sup> *Supra*, p.24-25.

<sup>311</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant), 11 August 2000, E/C.12/2000/4.

<sup>312</sup> *Ibid.*, para.12 (d) Quality: "As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation."

traditional medical or cultural practices”.<sup>313</sup> Consequently, in regard to the ICESCR, it is states’ obligation to ensure all kinds of health services are scientifically and medically appropriate and this obligation creates a duty for states to enact bans on SOCE. As for the ICCPR, no matter what methods were used SOCE without informed consent would constitute ill-treatment. In case of the free, prior, and informed consent from the participant it is not easy to establish the ill-treatment aspect of SOCE. However, especially when violent methods were used and deprivation of liberty is at stake, the existence of free and informed consent is also not very clear considering the social pressure on homosexual individuals specifically in religious communities.<sup>314</sup> Finally, under Articles 7 and 17 of the ICCPR, states do not only have the duty to respect but also have the duty to protect the persons subject to their jurisdiction from violations of their rights by third parties.<sup>315</sup> Therefore, under international law states must take the necessary steps to prevent the abuse caused by SOCE and enact legislation to ban efforts on sexual reorientation.

## **2. European Human Rights Law: The European Convention on Human Rights**

As explained regarding the relationship between the child’s best interest and the ECHR, the Convention protects the freedom from ill-treatment and the right to personal autonomy, physical/ moral integrity of a person. In this scope, the above explanations concerning the protection of these rights and duties of state parties in relation to the SOCE on minors<sup>316</sup> are also valid for adult participants of SOCE. However, in the absence of the concept of the best interest of the child, the focal point for the adults is free and informed consent. In accordance with the aforementioned Oviedo Convention, any medical intervention can only be carried out with free and informed consent and the person concerned should be informed on the purpose, nature, consequences, and risks of the intervention.<sup>317</sup> Furthermore, concerning Article 16 of the Oviedo Convention, scientific research can only be carried out if risks of the research are proportionate comparing to the benefits, the concerned person is informed, and the research is

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<sup>313</sup> Ibid., para.51. However, at the same time, health services should be culturally appropriate and taking into account traditional healthcare (para.27, the paragraph itself is in regard to indigenous people’s right to health). Although these two paragraphs seem to be contradicting each other, this tension should be solved through the assessment of potential harms of the traditional healthcare, consent of the participant, respect for the participants’ autonomy, and the universality of human rights.; *Stuttaford et al.*, GHA7:1/2014, p.3-4.; Indeed, cultural relativity can never be considered as a justification for the violation of human rights.

<sup>314</sup> Marginalization and stigmatization of LGBT individuals and discrimination against LGBT should be a consideration in the assessment of the existence of free and informed consent. In this context, free and informed consent existence also discussed under forced sterilization of trans individuals., *Grzywnowicz*, *Consent Signed with Invisible Ink: Sterilization of Trans\* People and Legal Gender Recognition*, p.78, [http://antitorture.org/wp-content/uploads/2014/03/PDF\\_Torture\\_in\\_Healthcare\\_Publication.pdf](http://antitorture.org/wp-content/uploads/2014/03/PDF_Torture_in_Healthcare_Publication.pdf), (last accessed on 15/10/2019).

<sup>315</sup> *Kälin, Künzli*, p.334-335, 392-393.

<sup>316</sup> *Supra*, p.21-27.

<sup>317</sup> *Supra*, p.24.

ethically acceptable.<sup>318</sup> Free and informed consent is a highly important notion for medical interventions. Therefore, initially, SOCE without the consent of the adult should be examined.

According to the ECtHR's jurisprudence, any medical treatment without consent<sup>319</sup> falls within the scope of Article 8 of the ECHR.<sup>320</sup> In this regard, in the application of *Juhnke v. Turkey*<sup>321</sup>, the ECtHR concluded in light of the lack of substantive evidence on the applicant's refusal to gynecological examination, the medical interference did not breach Article 3.<sup>322</sup> However, following the facts<sup>323</sup> of the case, it is evident that the applicant had resisted the gynecological examination until she was persuaded to agree to it.<sup>324</sup> In this regard, the Court found that a person in detention cannot be expected to continue resisting considering the applicant was at the hands of authorities.<sup>325</sup> Therefore, the application should be examined under Article 8 in the context of medical intervention against the will of a person and without free and informed consent.<sup>326</sup> In the *Juhnke* application, the ECtHR concluded that the applicant was in a particularly vulnerable mental state and in this regard, the applicant's consent could not be considered as free and informed.<sup>327</sup> Thus, the Court found Article 8 was violated. In accordance with the *Juhnke* judgment, persuasion of an individual to an intervention may constitute an interference with Article 8. Regarding SOCE, it is very possible that homosexual individuals who live in religious communities may consent to SOCE because of insisting social sphere. However, this consent of the individual cannot be considered as free and informed consent. Consequently, adult SOCE participants should be given information regarding SOCE, including the proven harms of it and the methods which are going to be used and the consent should be given truly freely. Otherwise, conducting SOCE on a non-consenting adult would constitute interference with the rights guaranteed by

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<sup>318</sup> fn.231; In this regard, health organizations condemned SOCE and emphasized that these efforts were unethical.

<sup>319</sup> The consent should be free, informed, and express., *de Vries*, in: Van Dijk, Van Hoof, Van Rijn, Zwaak (eds.), p.667, 693.; ECtHR, *Juhnke v. Turkey*, App. No. 52515/99, 13 May 2008, para.76, "...in the light of the Court's settled case-law, according to which any medical intervention against the subject's will, or without the free, informed and express consent of the subject, constitutes an interference with his or her private life."; In the *Juhnke v. Turkey*, the applicant was arrested by Turkish soldiers in Northern Iraq in the context of cross-border operation on 5 or 6 October and on 24 October she was examined by a doctor., paras.5-11.

<sup>320</sup> *Harris, et. al*, p.544.; In addition, the threshold criteria of Article 3 are important. If the medical intervention without consent exceeds the threshold then it'd be evaluated under Article 3 as ill-treatment.; See: *Juhnke v. Turkey*, para.71.

<sup>321</sup> *Ibid.*

<sup>322</sup> Para.75.

<sup>323</sup> Paras.33-37, According to statements from a nurse and 2 midwives, the applicant wasn't forced to the gynecological examination but persuaded by the doctor.

<sup>324</sup> Para.76.

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*

<sup>327</sup> Para.77.



Article 8 and furthermore, depending on the method used, SOCE can also constitute infringement of Article 3.<sup>328</sup>

As for consenting adults, if SOCE are conducted by a mental health professional, medical negligence claims can be brought up. In fact, allegations regarding medical negligence can fall within the scope of Article 8.<sup>329</sup> In this scope, harms of SOCE are evident and accepted by several health organizations, therefore, a mental health professional should be aware of those risks, harms, and the ineffectiveness of SOCE. Otherwise, mental health professionals who provided sexual reorientation therapy must be held liable for mental suffering endured by the SOCE participant. Regarding states' positive obligations under Article 8, cases of medical negligence require states to provide a civil remedy to establish the liability.<sup>330</sup> Another aspect of SOCE is when efforts were conducted in a religious context without the involvement of health professionals. In this context, any forced SOCE without the consent of the participant would constitute an intervention in the participant's bodily integrity.

Therefore, the main problematic aspect is SOCE conducted with the free and informed consent of the participant. Firstly, concerning the Juhnke case, the consent should be truly freely granted. Furthermore, if the used methods constitute ill-treatment considering the threshold of severity criteria<sup>331</sup>, the consent of the adult participant might not be enough to justify the ill-treatment. As a matter of fact, according to the ECtHR, consent cannot excuse intentional or reckless causing of serious disabling injury.<sup>332</sup> Following the Court's rationale on the value of consent, it is conceivable to argue that consent cannot be a justification for serious forms of ill-treatment.<sup>333</sup> However, it is not easy to reach the same conclusion where

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<sup>328</sup> *Supra*, p.25-27.

<sup>329</sup> *Harris, et. al*, p.545; The most serious cases of medical negligence will fall under Article 2. ECtHR, *Vo v. France* (GC), App. No.53924/010, 8 July 2004; ECtHR, *Calvelli and Ciglio* (GC), App. No. 32967/96, 17 January 2002; ECtHR, *Silih v. Slovenia* (GC), App. No.71463/01, 09 April 2009.

<sup>330</sup> *CoE, Health-related issues in the case-law of the European Court of Human Rights*, [https://www.echr.coe.int/Documents/Research\\_report\\_health.pdf](https://www.echr.coe.int/Documents/Research_report_health.pdf), p.6-7, (last accessed on 15/10/2019).

<sup>331</sup> The assessment of the severity level depends on various factors such as the victim's health, sex, age, physical and psychological effects of the treatment. See: *supra*, p.26.

<sup>332</sup> ECtHR, *Laskey, Jaggard and Brown v. The United Kingdom*, App. Nos. 21627/93, 21826/93, 21974/93, 19 February 1997, para. 39.; The application was about whether the UK's interference on applicants' private life was in line with Article 8 of the ECHR. The applicants were convicted and sentenced to imprisonment due to sado-masochistic activities despite the fact that none of the participants of those activities pressed charges about applicants and sado-masochistic activities were between consenting adults. Sado-masochistic activities included "maltreatment of the genitalia (with, for example, hot wax, sandpaper, fish hooks and needles) and ritualistic beatings either with the assailant's bare hands or a variety of implements, including stinging nettles, spiked belts and a cat-o'-nine tails. There were instances of branding and infliction of injuries which resulted in the flow of blood and which left scarring.", see: para.8.

<sup>333</sup> However, the case of *Laskey, Jaggard and Brown* was righteously criticized for the stigmatization of homosexual individuals. Especially, considering that UK courts evaluated the act of a husband to brand his initials with a hot knife on his wife's body as a consensual activity between husband and wife and not a matter for criminal investigation. In contrast to the case of *Laskey, Jaggard and Brown*, the wife actually sought

SOCE do not constitute ill-treatment. In the case of *Jehovah's Witnesses and Others v. Russia*<sup>334</sup>, Russian courts dissolved the religious organization for the purpose of protection of health and protection of the rights of others.<sup>335</sup> According to the ECtHR, human dignity and human freedom are inherent through the ECHR, and self-determination and personal autonomy are important elements of the Convention.<sup>336</sup> And interference with the right to freedom of religion can be justified if individuals' choices are "*incompatible with the key principles underlying the Convention, such as, for example, polygamous or underage marriage or if they are imposed on the believers by force or coercion*"<sup>337</sup>, *against their will.*"<sup>338</sup> In this regard, the Court emphasized even if an individual's decisions are "perceived to be physically harmful or dangerous", they are still in the scope of self-determination.<sup>339</sup> Furthermore, many religious rituals may harm individuals' well-being<sup>340</sup> and the claim that a certain aspect of a belief causes damage to the health of citizens requires "actual harm to health as defined by law."<sup>341</sup> The Court also emphasized that the protection of citizens' health aim lacked any factual basis.<sup>342</sup> Consequently, the Court accepted that there were compelling

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medical treatment since her skin became infected (none of the activities in the case of *Laskey, Jaggard and Brown* "lead to any instances of infection, permanent injury or the need for medical attention", para.8)., *R v Wilson* (1996) 2 Cr App Rep 241 Court of Appeal, *Moran*, MLR61:1/1998, p.77, 83; *Petman*, NF:JELP5/2008, p.113,118.; Nevertheless, the ECtHR's reasoning in the *Laskey, Jaggard and Brown* shows there're some limits to consent to violence. Considering the proven harms and ineffectiveness aspect of SOCE, SOCE participants' consent should be evaluated in this sense.

<sup>334</sup> ECtHR, *Jehovah's Witnesses and Others v. Russia*, App. No.302/02, 10 June 2010.

<sup>335</sup> para.61; "*the District Court found that, in addition to the prohibition on blood transfusion, the activities of the applicant community had had a "negative influence on the mental state and mental health of the followers". This assessment rested on opinions of non-Witness family members who testified that they had seen "sudden and negatives changes of personality" in their relatives who had joined the applicant community and that many participants at religious meetings of Jehovah's Witnesses had "cried" and had complained thereafter "about colossal emotional exhaustion"*"; para.64; "*The District Court held that the interference with the applicant community's rights was justified, prescribed by law and pursued a legitimate aim because the applicant community had "violated rights and freedoms of citizens, and its activity led to the destruction of families, encroachments on the fundamental rights and freedoms of citizens and calls to refuse to perform duties to society... Taking into account that the [applicant] community violated constitutional rights and freedoms of citizens, the contemplated restriction on its rights and termination of its activity is justified and proportionate to the constitutionally significant aims."*

<sup>336</sup> Para.135.

<sup>337</sup> However, if there's coercion it is not possible to make a personal autonomy claim. Van Drooghenbroeck, in: Smet/ Brems, (eds.), p.58,71.

<sup>338</sup> Para.119.; Van Drooghenbroeck, (fn.337), p.70.; Nevertheless, the ECtHR accepted that there's a limit to individual autonomy, however, the scope of the limit is not clear.

<sup>339</sup> Ibid.

<sup>340</sup> para.144; "*...on a general note, that the rites and rituals of many religions may harm believers' well-being, such as, for example, the practice of fasting, which is particularly long and strict in Orthodox Christianity, or circumcision practised on Jewish or Muslim male babies. It does not appear that the teachings of Jehovah's Witnesses include any such contentious practices.*"; The ECtHR's comparison of practices of fasting and circumcision of male babies with rejection of blood transfusions and categorization of those practices as harmful practices without any proof have been criticized.; see: *Chaib, Jehovah's Witnesses of Moscow v. Russia: Strange considerations, but good conclusion*, <https://strasbourgobservers.com/2010/06/23/jehovah%E2%80%99s-witnesses-of-moscow-v-russia-strange-considerations-but-good-conclusion/>, (last accessed on 19/10/2019).

<sup>341</sup> Para.144.

<sup>342</sup> Para.146.

reasons for the interference, however, permanent resolution of the applicant together with the ban on its activities was disproportionate and the same aim could be reached by imposing less restrictive measures.<sup>343</sup> Accordingly, there are three important points of this judgment regarding the SOCE in religious context on consenting adults. Firstly, if a choice of a person in the religious context contradicts the key principles underlying the Convention, it is possible to limit personal autonomy. Secondly, the legitimate aim of protecting the health of citizens should have a factual basis. Considering the proven harms of SOCE, this aspect is rather easy to prove. Finally, the measures taken by the state should be proportionate. In the judgment of *Jehovah's Witnesses and Other*, the ECtHR also suggested less restrictive measures as a warning, a fine or withdrawal of tax benefits.<sup>344</sup> In this regard, although the ECtHR found Russia's measures against Jehovah's witnesses violated the right to freedom of religion, the main reasons for the violation were lack of relevant and sufficient reasons<sup>345</sup>, the permanent injunction of Jehovah's Witnesses, and prohibition of their activities for unlimited time and scope.<sup>346</sup> Therefore, a SOCE prohibition based on factual reasons which does not prohibit all of the activities of a religious community should be in line with the ECHR system.

Consequently, when SOCE are conducted on an adult participant, its compatibility is a matter of consent to a large extent. In accordance with the ECtHR's case-law, the consent should be informed and truly free. Therefore, in the case of the persuasion of the SOCE participant, consent cannot be accepted as valid. In this context, another important point is the professional liability of mental health providers and states' responsibility to provide remedies in case of medical negligence. In addition, the Court's case-law shows there are some limitations for consensual acts and SOCE providers' abuse of LGB individuals cannot be justified with the consent of the participant, especially, if the specific sexual reorientation effort causes serious mental and physical harm on the participant. Furthermore, as long as there is a factual basis on the harm of SOCE, it is not only possible for states to take necessary measures, depending on the concrete circumstances of SOCE, it is also an obligation for states.

### **III. Conflicting Human Rights: SOCE Providers' Fundamental Rights Claims**

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<sup>343</sup> Para.159.

<sup>344</sup> Para.159.

<sup>345</sup> Para.160.

<sup>346</sup> Para.159; *"The judgments of the Russian courts put an end to the existence of a religious community made up of approximately 10,000 believers and imposed an indefinite ban on its activities unlimited in time or scope. This was obviously the most severe form of interference, affecting, as it did, the rights of thousands of Moscow Jehovah's Witnesses who were, as a consequence, denied the possibility of joining with fellow believers in prayer and observance..."*

The main challenge for enacting ban legislation on SOCE is claims based on the protection of fundamental rights of providers of SOCE and parents who want their child to participate in sexual reorientation “therapy”. In this regard, several fundamental rights can be brought up to challenge SOCE prohibitions by supporters of SOCE.<sup>347</sup> In the context of international and European human rights protection, the freedom of religion, the freedom of science, parents’ right to raise their children as they see fit can be invoked to challenge ban legislations.<sup>348</sup> Regarding the indivisibility of human rights, it is rather hard to come up with a hierarchical list of fundamental rights<sup>349</sup>, therefore, the conflict of rights can be solved through the balancing approach.<sup>350</sup> In this regard, some criteria regarding the solution of the conflict of human rights have been developed in accordance with the case-law of human rights bodies. According to this, the first criterion is the abstract value of rights in the conflict.<sup>351</sup> The second criterion is the impact of the infringement<sup>352</sup> which is the evaluation of in the case of the protection of one of the rights how much is the other right is affected. Third, whether the core of one of the rights is affected in the case of the protection of the other right.<sup>353</sup> Fourth, whether additional rights are affected by the protection of one of the rights.<sup>354</sup> The fifth criterion is the general public interest which is intended to allow a holistic approach similar to the previous criterion. In this regard, assessment should be on whether the rights at stake supported by the public interest.<sup>355</sup> Sixth, the purpose criterion is whether the right at stake is used in line with its purpose. This criterion can be exemplified with the cases when the best interest of the child and parental rights are in conflict.<sup>356</sup> In this context, parental rights are not only for the protection of parents’ right to raise their children but these rights have a dual function<sup>357</sup> to obliging parents to protect their children. And finally, the last criterion is the responsibility which means the responsibility of right holders when they are

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<sup>347</sup> In the context of the USA’s jurisdiction, SOCE supporters’ claims were based on the freedom of expression, the freedom of religion, and parental rights., supra, p.7-10.

<sup>348</sup> The possibility of conflicts of human rights rejected by some scholars., *Smet*, in: *Smet/ Brems* (eds.), p.1, 4-5. Nevertheless, the protection of a fundamental right can be a reason for the restriction of another fundamental right. This is the case especially between the right to private life and the right to freedom of expression.

<sup>349</sup> *Brems*, HRQ27:1/2005, p.294, 303.; However, a division between derogable and non-derogable rights is also commonly discussed. According to this, when a derogable right conflicts with a non-derogable right, the second should prevail., see: *Farer*, AUILR8:1/1992, p.115, 115-116.; *Xu, Wilson*, PLR5:1/2006, p.31, 42-43.

<sup>350</sup> *Ibid.*; *Sullivan*, NYUJILP24:2/1992, p.795,823.; *Xu, Wilson*, (fn.349), p.41.

<sup>351</sup> This criterion is important for the holistic assessment of conflicting rights., see: *Smet*, in: *Smet/ Brems* (eds.), p.38,46.

<sup>352</sup> *Smet*, AUILR26:1/2010, p.183,189.; *Brems*, (fn.349), p.304.

<sup>353</sup> *Ibid.*; *Sullivan*, (fn.350), p.823.

<sup>354</sup> *Smet*, (fn.352), p.190, *Smet*; (fn.351), p.47.

<sup>355</sup> *Smet*, (fn.351), p.48.

<sup>356</sup> *Ibid.*48.

<sup>357</sup> *Ibid.*

using their rights.<sup>358</sup> This criterion can also be explained within the context of parental rights since parental rights inherently contain a duty for the parents to pay regard to the best interest of the child.<sup>359</sup>

In this context, the limitation regime of the fundamental rights is also important since enacting a SOCE ban would cause the limitation of the aforementioned rights.<sup>360</sup> In the scope of human rights protection, limitation of the non-absolute rights is possible under certain conditions.<sup>361</sup> Limitation of a right is allowed if it is in accordance with the law (prescribed by law, lawful), has a legitimate aim, and is necessary in a democratic society.<sup>362</sup> In the light of these explanations, SOCE bans and their relationship with other fundamental human rights should be assessed. It is clear that enacting a SOCE ban would constitute a limitation on the other rights. But if a limitation is in line with the limitation regime then it would not violate the concerned right. In this regard, parents' claim that prohibiting their children's participation in SOCE would interfere with their parental rights should be examined. The right to exercise parental authority over their children is indeed protected by the right to respect for family life.<sup>363</sup> However, parents not only have the right to raise their children as they see fit but they also have the duty to protect their children. When exercising parental rights, the child's best interest is a paramount consideration and SOCE as a harmful practice cannot be accepted as being in favor of the child's best interest. In consideration of the purpose criteria, where a child's rights conflict with other 3<sup>rd</sup> parties' rights, the child's best interest is the paramount consideration.<sup>364</sup> Therefore, banning SOCE on minors would have a legitimate aim<sup>365</sup> and considering the practice of SOCE's possibility to violate the minor's rights, the ban would be proportionate to the aim pursued.

In relation to SOCE, the freedom of religion can be restricted for the protection of public health and the protection of rights and freedoms of others.<sup>366</sup> Moreover, limiting the

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<sup>358</sup> Ibid., p.49.

<sup>359</sup> Furthermore, the responsibility of the right holder is especially evident under Article 10(2) of the ECHR., "...*The exercise of these freedoms, since it carries with it duties and responsibilities...*", Ibid.

<sup>360</sup> Supra, p.40.

<sup>361</sup> Consequently, the limitation of absolute rights is not possible.

<sup>362</sup> *Harris, et. al.*, (fn.224), p.521. The necessity in a democratic society includes the proportionality examination of the restriction.; Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev.1), <https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>, p.8, (last accessed on 17/10/2019).

<sup>363</sup> *de Vries*, (fn.319), p.706; *Kälin, Künzli*, p.382. Moreover, Article 2 of the Protocol 1 to the ECHR confirms parents' right to raise their children in accordance with their religious and philosophical views in the context of the right to education. "...*the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.*"

<sup>364</sup> *Smet*, (fn.351), p.48.

<sup>365</sup> Protection of the best interest of the child.

<sup>366</sup> *Harris, et. al.*, (fn.224), p.606.

freedom of religion not only possible in the sense of limitation clause, but as explained above it can be required as a positive obligation from states to effectively protect others' right to freedom from ill-treatment and the right to private life.<sup>367</sup> Believing homosexuality is a sin and sexual orientation can be changed through religious rituals most certainly falls under the scope of freedom of religion. This obvious conflict between the protection of physical/ moral integrity, personal autonomy and the freedom of religion can be solved through the criteria of conflict of human rights and the limits of freedom of religion. In the religious context, when SOCE are conducted without consent<sup>368</sup> or on minors, it would require states to take measures to protect individuals.

Furthermore, regarding the consenting adults, the case of *Laskey, Jaggard and Brown*<sup>369</sup> plays an important role. Indeed, the ECtHR found the conviction of the applicants because of the sado-masochist activities necessary in a democratic society as a mean of protection of health.<sup>370</sup> Consequently, following the rationale behind *Laskey, Jaggard and Brown*, the restriction of the freedom of religion can be justified based on the wider public interest.<sup>371</sup> According to the criterion of the impact of infringement, not regulating SOCE can cause serious violations of personal autonomy, furthermore, the cumulative effect of SOCE as the stigmatization of homosexuality should also be a matter of consideration.<sup>372</sup> On the other hand, the SOCE ban's impact on the freedom of religion can be assessed through SOCE's value according to that religion.<sup>373</sup> This criterion is especially important regarding the Jehovah's Witnesses judgment. Russian authorities' indefinite ban on the organization's activities for unlimited time and scope made it impossible for believers to practice their religion. However, a ban on SOCE would not produce the same outcome.

A ban on SOCE can also interfere with the freedom of science if sexual reorientation efforts are conducted by professional mental-health providers. Indeed, the right to science has been recognized under Article 15 of the ICESCR.<sup>374</sup> Although the freedom of science is not

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<sup>367</sup> *Hall*, JCL80:4/2016, p.241, 243. The author examines the practice of exorcism in the context of the freedom of religion. In fact, SOCE in religious context shows similarities with the practice of exorcism in the sense of causing serious harms and being conducted on contrary to scientific findings.

<sup>368</sup> Here, consent should be free and informed and shouldn't be persuaded upon the individual by any means.

<sup>369</sup> Fn.332.

<sup>370</sup> Para.50.

<sup>371</sup> *Hall*, (fn.367), p.248.; The Court found the restriction of personal autonomy, in the sense of not being able to consent sado-masochist activities, necessary in a democratic society on base of wider public interest.

<sup>372</sup> *Sullivan*, (fn.350), p.823.

<sup>373</sup> *Ibid.*, p.822. The importance of the religious practice within the concerned religion depends on whether the practice is an essential/ central aspect of the manifestation of the religion. This is determined whether the community following that religion consider the practice as essential for the manifestation of the religion.

<sup>374</sup> *Wyndham, Harris*, SEE20:4, 2014, p.827, 829.

protected as a stand-alone right either by the ECHR or ICCPR, academic freedom/ expression is protected under the freedom of expression by both of the ECHR and the ICCPR.<sup>375</sup> Moreover, Article 13 of the CFREU enshrines the freedom of science.<sup>376</sup> As for the national constitutional protection of the freedom of science, there are two main ways to ensure the scientific freedom; the first model is the protecting it as a stand-alone right, the second model, which is the most common model, is protecting the freedom to science under the right to freedom of expression or academic freedom. In this regard, it is important to assess whether SOCE can constitute scientific research. Scientific research can be defined as a methodical and systematic activity conducted in accordance with the scientific principles<sup>377</sup>, hence, scientific research requires the exclusion of non-scientific methods.<sup>378</sup> Therefore, if a sexual reorientation effort is conducted in accordance with these criteria, then it would be under the scope of the freedom of science's protection. Nevertheless, the freedom of science is not an absolute right and it can be limited in order to protect other fundamental rights.<sup>379</sup> Considering the criterion of responsibility of the right holder<sup>380</sup>, under the freedom of expression right holders have certain responsibilities.<sup>381</sup> Furthermore, the ethical component of scientific research obliges right holders to respect certain rules and others' rights.<sup>382</sup> Consequently, SOCE's close relation to parental rights, the freedom of religion, and the freedom of science/ expression is evident. However, while these rights are entitled to protection, they are also subject to a limitation pursuant to human rights law. Thus, in case of SOCE being conducted on minors, is amount to ill-treatment, forced, or give rise to mental or physical harm, the protection of the rights of the SOCE participant should prevail.

#### **D. Conclusion**

Regardless of the context of SOCE, the evaluation of SOCE's legality depends on scientific findings on sexual orientation to a great extent. Today's knowledge of human sexuality shows that homosexuality is a normal variation of human sexuality, therefore, it is

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<sup>375</sup> In this scope, freedom of research is a fundamental aspect of the academic freedom., *Vrieling et. al*, PSBS13/2011, p.117, 125.

<sup>376</sup> Article 13- Freedom of the arts and sciences: The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

<sup>377</sup> *Spigno*, Freedom of Scientific Research, <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e169?print=pdf>, p.1, (last accessed on 16/10/2019).

<sup>378</sup> In this scope, it is important that scientific research is not based on religious, ethical, political, racial, or other non-scientific arguments. See *Goudsmit*, PAPS94:2/1950, p.111.

<sup>379</sup> *Spigno*, (fn.377), p.5.

<sup>380</sup> *Supra*, p.40.

<sup>381</sup> *Supra*, p.40.

<sup>382</sup> As previously explained, consent of the participants, minimizing the risks, conducting in benefit of the participants and respect to human dignity are vital conditions for conducting scientific research on humans. *Supra*, p.25.

neither a mental illness nor deficiency. Furthermore, scientifically it is not possible to change someone's sexuality whether LGB to heterosexual or vice versa. But the problematic aspect of SOCE does not only lie in their inefficiency. As a matter of fact, sexual reorientation efforts pose great harm to participants. Therefore, the best interest of the child, the prohibition of ill-treatment and the right to private life are relevant provisions of international and European human rights protection. In this regard, the compatibility of SOCE with human rights protection depends on various elements. The first important distinction is whether SOCE are conducted on a minor or an adult. For SOCE on minors, the essential notion is the best interest of the child. Thus, if the methods of SOCE would cause physical and/or psychological pain on the participant minor, it is the states' duty to enact a ban on SOCE. As for adult participants of SOCE, the important distinction is the consent of the participant. When SOCE are coerced on adults, no matter which methods are used, it will constitute a serious interference with the right to personal integrity and self-determination. Therefore, due to positive obligations, it is the states' obligation to take necessary measures. Finally, for the evaluation of SOCE on consenting adults, vital points are the necessary features of consent and the value of consent in the sense of the possibility to consent at all to a certain action. In accordance with the jurisprudence on consent, it should be informed and given truly freely. Thus, consent cannot be accepted as valid if scientific findings on SOCE (such as these efforts' known harms and inefficiency) are not explained to the participant. Moreover, if the participants are somehow persuaded to participate in SOCE, their consent would not be accepted as truly given. Lastly, according to the ECtHR, not every action is consent appropriate. In this regard, if SOCE cause a serious amount of physical and/or psychological pain which amounts to ill-treatment, then the adult participant's consent would not be acceptable. Consequently, depending on different considerations states have the obligation to prohibit the practice of SOCE. Nevertheless, even when it is not an obligation for a state to take measures against SOCE, it is possible to enact a SOCE prohibition as long as it is proportionate regarding the particular practice of sexual reorientation.



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