



The European Union flag, featuring yellow stars on a blue background, is partially visible at the top of the slide.

DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION

Presented at the ERA Seminar 'Applying EU Anti-Discrimination Law'

Prof. Alina Tryfonidou, University of Reading

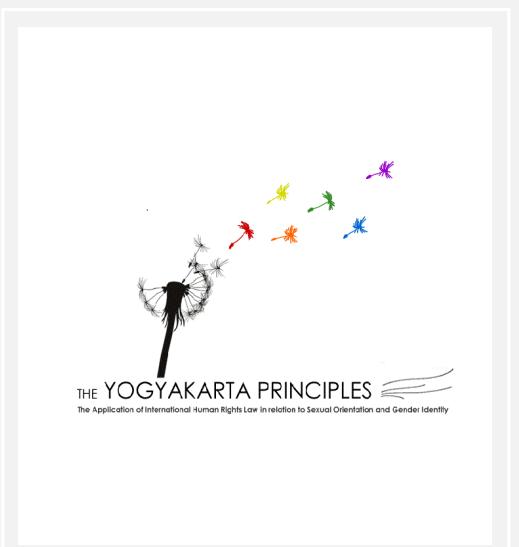
 This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

10/05/19

WHAT IS SEXUAL ORIENTATION?

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

Prof. Alina Tryfonidou, University of Reading



THE YOGYAKARTA PRINCIPLES

The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

10/05/19

LGB RIGHTS

Homosexual & bisexual sexual orientations are considered to be minority sexual orientations and, for this reason, persons who have these sexual orientations are, often, discriminated against

Lesbians, gays and bisexuals (LGB) have a minority sexual orientation

Is discrimination on the ground of sexual orientation prohibited by the law?

Should LGB persons enjoy the same rights as persons who have a majority sexual orientation (i.e. heterosexual persons)?

10/05/19

Prof. Alina Tryfonidou, University of Reading

3

HOW IT ALL BEGAN...



10/05/19

4

LGBT+ RIGHTS IN EUROPE

- Regional Cooperation in Europe after the end of World War II
 - 1949: Council of Europe founded
 - 1953: ECHR entered into force
- 1952 & 1958: Founding Treaties of what would later become the EU (ECSC, EEC, Euratom) came into force ('the Communities Treaties')

Neither the ECHR nor the Communities Treaties included any reference to LGBT rights

However, from the 1980s the EU institutions have adopted a series of soft-law measures which directly or indirectly contribute to the protection of LGB rights (see handout for examples)

Prof. Alina Tryfonidou, University of Reading

10/05/19

5

BINDING EU PROVISIONS/INSTRUMENTS PROTECTING THE RIGHTS OF LGB PERSONS

Prof. Alina Tryfonidou, University of Reading

10/05/19

6

ARTICLE 19(1) TFEU

'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**.'

Prof. Alina Tryfonidou, University of Reading

10/05/19

7

DIRECTIVE 2000/78

- **Purpose:** to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or **sexual orientation** as regards employment and occupation (incl. vocational training)
 - Problem: limited material scope → currently (since 2008) **proposal** for a (complementary) Equality Directive which would prohibit discrimination on the above grounds in the following areas:
 - Social protection, incl. social security and health care
 - Social advantages
 - Education
 - Access to and supply of goods and services which are available to the public, incl. housing
 - Prohibits direct & indirect discrimination on those grounds, as well as harassment and instruction to discriminate
 - Wide range of derogations & exceptions available – ‘inferior’ protection from these grounds of discrimination, when compared with measures prohibiting discrimination on the grounds of racial or ethnic origin and sex

Prof. Alina Tryfonidou, University of Reading

10/05/19

8

ARTICLE 21 EUCFR

'Any discrimination based on any ground such as sex, race, 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'.

No limitation in areas where the prohibition is applicable (unlike Dir. 2000/78), however, there are limits to the scope of application of the EUCFR

- Art. 51 EUCFR: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. [...]'.

A number of other EUCFR provisions (and fundamental human rights which are general principles of EU law) can be relied on by LGB persons and same-sex couples (e.g. Art. 7 EUCFR)

10/05/19

Prof. Alina Tryfonidou, University of Reading

9

ARTICLE 10 TFEU

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.

Prof. Alina Tryfonidou, University of Reading

10/05/19

10

ECJ CASE-LAW

Prof. Alina Tryfonidou, University of Reading

10/05/19

11

GRANT V. SOUTH-WEST TRAINS (1998)

- Discrimination on the ground of sexual orientation is not discrimination on the ground of sex (contrast with P v. S & Cornwall - trans) – use of the ‘equal misery’ argument (wrong comparator)
- At that time, discrimination on the ground of sexual orientation was not prohibited by EU law
- ‘In the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex’.

Prof. Alina Tryfonidou, University of Reading



10/05/19

12

D AND SWEDEN V. COUNCIL (2001)

- Swedish man working at the Council of the EU
- He had entered into a registered partnership with another man in Sweden
- He applied for a household allowance
- Council refused the allowance – only available to ‘married employees’
- CFI dismissed his claim – D appealed & ECJ dismissed the appeal
 - Equal misery argument (this did not amount to discrimination on the ground of sex)
 - ‘It is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner’.
- Registered partnership not equivalent to marriage for the purposes of the EU staff regulations



Prof. Alina Tryfonidou, University of Reading

10/05/19

13

MARUKO (2008)

- First case involving Dir. 2000/78 ('pay')
- At the time, in Germany, marriage was only open to opposite-sex couples, whereas same-sex couples (only) could enter into a registered life partnership
- Mr Maruko applied to receive a widower's pension under his registered life partner's compulsory occupational scheme.
- The pension was refused on the ground that this was only available to 'spouses'
- ECJ:
 - If for a certain purpose (e.g. survivor's pensions) a Member State considers same-sex registered partnerships as equivalent to marriage, it must treat them in the same way
 - It is for the national court to conduct the assessment as to whether they are considered 'equivalent'
 - If they are equivalent and they are not treated in the same way, this amounts to direct discrimination on the ground of sexual orientation and is prohibited by Dir. 2000/78

Prof. Alina Tryfonidou, University of Reading

10/05/19

14

RÖMER (2011)

- Very similar to *Maruko* – again, a case involving Dir. 2000/78 ('pay')
- German authorities refused to adopt for former employees who had entered into a registered life partnership with their same-sex partners the same method of calculating the supplementary pension to which they were entitled, as that which was used for former employees who were married to their opposite-sex partner
- ECJ
 - It is for the referring court to assess the comparability of marriage and registered life partnership in Germany, focusing on the rights & obligations of the spouses and registered life partners, as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnerships as legally equivalent to marriage.
 - If the assessment demonstrates that the two statuses are equivalent, the use of a different method of calculating the supplementary pension amounts to direct discrimination on the grounds of sexual orientation

Prof. Alina Tryfonidou, University of Reading

10/05/19

15

HAY (2013)

- Case involving Dir. 2000/78 ('pay')
- Similar to *Maruko* & *Romer* – refusal by French bank to award one of its employees who concluded a French PACS with his male partner, special leave & a bonus granted to staff who married
- ECJ conducted the 'equivalence' assessment itself
- ECJ confirmed that the difference in treatment was *direct discrimination* on the ground of sexual orientation, and this was so even though PACS was open to both same-sex and opposite-sex couples (unlike the registered life partnership in *Maruko* and *Romer*)

Prof. Alina Tryfonidou, University of Reading

10/05/19

16





Prof. Alina Tryfonidou, University of Reading

ASOCIAȚIA ACCEPT (2013)

- Another case involving Dir. 2000/78 (refusal of access to employment)
- Homophobic statements made by Mr Becali who was considered to play a leading role in FC Steaua Bucuresti, ruling out the recruitment of a footballer *thought to be gay*
- Accept (NGO) brought an action against the Romanian Council for Combatting Discrimination, which had partially dismissed a complaint following the statements
- ECJ:
 - An identifiable complainant who claims to have been the victim of discrimination not required for Art. 2000/78 to be breached

Note: Discrimination by assumption is (also) prohibited by Dir. 2000/78

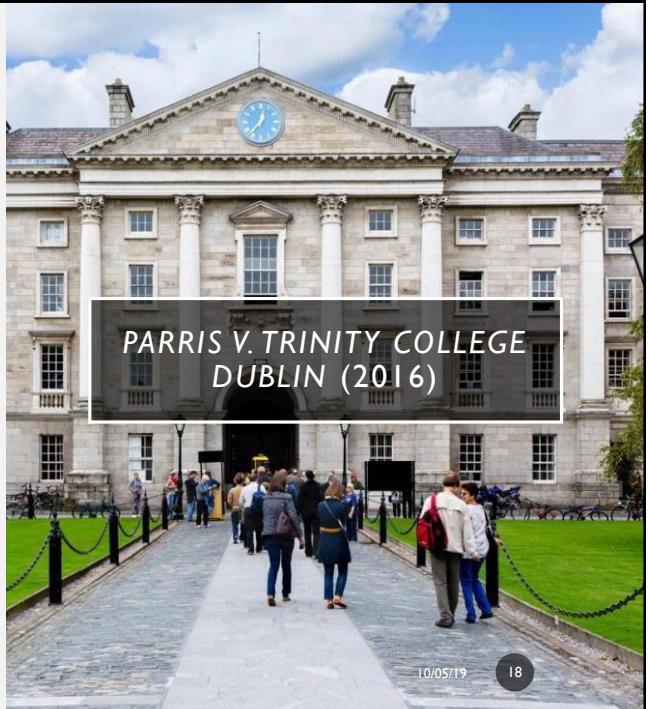
10/05/19

17

- Case involving Dir. 2000/78 ('pay')
- Ireland: (same-sex) civil partnerships could only be entered into since Jan 2011.
- Mr Parris (born in 1946) was already 60 years old by the time he could enter into a civil partnership in Ireland.
- He requested the TCD pension scheme that on his death the survivor's pension should be granted to his same-sex civil partner
- TCD refused as scheme provided that a survivor's pension was payable only if the claiming member had married or entered into a civil partnership before reaching the age of 60
- Was this discrimination on the ground of sexual orientation, contrary to Dir. 2000/78?
 - ECJ – no direct or indirect discrimination on the ground of sexual orientation: 'the fact that Mr Parris is unable to satisfy that condition is a consequence, first, of the state of the law existing in Ireland at the time of his 60th birthday, in particular the absence at that time of a law recognizing any form of civil partnership or a same-sex couple, and, secondly, of the absence, in the rules governing the survivor's benefit at issue in the main proceedings, of transitional provisions for homosexual members born before 1951' – Marital Status within MS competence: 'EU law, in particular Directive 2000/78, did not require Ireland to provide before 1 January 2011 for marriage or a form of civil partnership for same-sex couples, nor to give retrospective effect to the Civil Partnership Act and the provisions adopted pursuant to that act, nor, as regards the survivor's benefit at issue in the main proceedings, to lay down transitional measures for same-sex couples in which the member of the scheme had already reached the age of 60 on the date of entry into force of the act'.

Prof. Alina Tryfonidou, University of Reading

PARRIS V. TRINITY COLLEGE DUBLIN (2016)



10/05/19

18

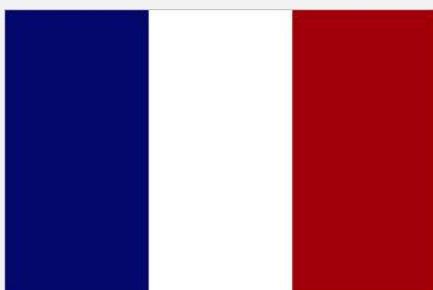
E.B. (2019)

- Case involving Dir. 2000/78 ('employment and working conditions' & 'pay')
- E.B. was a servicing police officer who was sentenced in the 1970s for an attempted offence of same-sex indecency on 2 minors – as a result of that, the Disciplinary Committee of the Federal Police Headquarters imposed on him as a penalty (with effect from 1976) a compulsory permanent retirement and b) a reduced pension (deduction set at 25%)
- ECJ
 - Situation fell within the material scope of the Directive (employment & working conditions' and 'pay')
 - Temporal scope of Dir.: can apply to situations which arose prior to the implementation deadline of the Dir. (3/12/2003) but whose legal effects extend after that date
 - Austrian law at the time criminalised attempted acts of male homosexual indecency committed against a minor, but did not do so with respect to attempted acts of heterosexual or female homosexual indecency against a minor: direct discrimination on the ground of sexual orientation
 - Early retirement: sanction became final before the expiry of the time limit for transposing Dir. 2000/78 & exhausted all of its effects at the time of its entry into force: can no longer be called into question on the basis of the Directive.
 - However, reduced pension continues to be regularly paid to E.B. Hence, Dir. 2000/78 requires a review of the reduction in the pension entitlement to be carried out in order to put an end to the discrimination on the grounds of sexual orientation: what must be examined is the extent to which a civil servant who, at that time, infringed his ethical obligations in a way comparable to E.B.'s infringement would have been subject to a disciplinary sanction if the male homosexual nature of that infringement had been disregarded.

Prof. Alina Tryfonidou, University of Reading

10/05/19

19



Prof. Alina Tryfonidou, University of Reading

LÉGER (2015)

Only case (to date) where the prohibition of discrimination on the ground of sexual orientation under the EUCFR (Art. 21 EUCFR) was relied on

French lifetime blanket ban on the donation of blood by MSM

Was the ban in breach of Art. 21 EUCFR?

ECJ – the ban *may* discriminate on the ground of sexual orientation, but it can be justified on the ground of public health: up to the referring court to decide whether the measure can be justified and, in particular, whether it is proportionate or whether there is a less restrictive alternative.

10/05/19

20



Prof. Alina Tryfonidou, University of Reading

COMAN (2018)

(strictly speaking) NOT a discrimination case

Romanian who moved to Belgium and wished to return to Romania

Married his TCN same-sex partner in Belgium

Couple relied on EU citizen's family reunification rights under EU free movement law in order for the TCN spouse to be able to reside in Romania

Interpretation of Dir. 2004/38: does the term 'spouse' include a same-sex spouse?

ECJ: Yes (but with limitations...)

10/05/19

21

THANK YOU!

a.tryfonidou@reading.ac.uk

Prof. Alina Tryfonidou, University of Reading

10/05/19

22

