



# SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION

*Presented at the ERA Webinar 'Applying EU Anti-Discrimination Law'*

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21/01/21

1

## 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'

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2

## WHAT IS GENDER IDENTITY?

'Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'.

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3

## THE RATIONALE BEHIND THE PROHIBITION OF DISCRIMINATION AGAINST LGBT PERSONS

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

Therefore, sexual orientation is a 'suspect classification' and, thus, discrimination on the ground of sexual orientation is prohibited in a number of legal instruments around the world.

Trans persons constitute a gender minority, given that for the majority of persons ('cisgender persons' aka 'cis') their gender identity and/or gender expression corresponds with the sex they were assigned at birth.

It is important to note that not all trans persons choose to have gender reassignment surgery. For some trans people, having gender reassignment surgery is not something they want, whilst others cannot have it for medical reasons.

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4



## HOW IT ALL BEGAN...

21/01/21

5

## 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)

## BINDING EU PROVISIONS/INSTRUMENTS WHICH **EXPLICITLY** PROTECT THE RIGHTS OF LGB PERSONS

## 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**.’

## 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

## 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)

## 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.

## BINDING EU INSTRUMENTS WHICH **EXPLICITLY** PROTECT THE RIGHTS OF TRANS PERSONS

## EU INSTRUMENTS – TRANS PERSONS

- Gender identity is not explicitly recognised as a prohibited ground of discrimination in the constituent EU Treaties (the TEU and TFEU), nor is it mentioned in the EUCFR.
- Moreover, there is no EU legislation which has as its aim *specifically* to protect the rights of trans persons.
- However, there are two pieces of EU legislation which adopt the more inclusive language of 'gender identity' and in this way can be read in a way which is inclusive of trans persons:
  - Directive 2012/29 ('Victims' Directive'), which creates 'minimum standards on the rights, support and protection of victims of crime'
  - Directive 2011/95 ('Recast Qualification Directive'), which regulates certain aspects of asylum and subsidiary protection law across the 27 EU Member States

## EU INSTRUMENTS – TRANS PERSONS

- There are two pieces of secondary EU legislation which provide some coverage for trans individuals, though this is through sex equality requirements:
  - Directive 2006/54 ('The Recast Directive') which implements the principle of equal opportunities and equal treatment of men and women in employment and occupation, and which in its third Recital notes (consolidating relevant CJEU case-law) that the scope of the principle of equal treatment for men and women also applies to discrimination arising from the gender reassignment of a person
  - Directive 2004/113 ('The Goods and Services Directive') which implements the principle of equal treatment between men and women in the access to, and supply of, goods and services for which the Commission has noted in a Report that the scope of the principle of equal treatment for men and women and the prohibition of sex discrimination also applies to discrimination arising from the gender reassignment of a person and that although there is no case law concerning gender identity more generally speaking as covered by the protection against sex discrimination the approach should be materially similar.

## CJEU CASE-LAW – SEXUAL ORIENTATION

### **GRANT V. SOUTH-WEST TRAINS (1998) & D AND SWEDEN V. COUNCIL (2001): THE EARLY CASES**

- 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
- Stable relationships between two persons of the same sex (*Grant*) and same-sex registered partnerships (*D*) ‘are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex’ for the purposes of EU law





## MARUKO (2008), RÖMER (2011), HAY (2013) EXCLUSION OF REGISTERED PARTNERS FROM BENEFITS AVAILABLE TO MARRIED COUPLES

- Cases involving Dir. 2000/78 and discrimination on the ground of sexual orientation as regards 'pay'
- *Maruko and Römer* – at the time, Germany allowed same-sex couples only to enter into a registered partnership, and opposite-sex couples only to enter into a marriage (i.e. registered partnerships were a status that was only available to same-sex couples).
- *Hay* – at the time, France allowed same-sex couples only to enter into a PACS (registered partnership) whereas opposite-sex couples could enter into a marriage or a PACS (i.e. PACS was a status available to both same-sex and opposite-sex couples).
- *Maruko and Römer*: survivor's pension & supplementary pension – *Hay*: special leave and bonus for staff who married --- these were only available to married couples: since same-sex couples could not marry (but only enter into a registered partnership), they were excluded from these benefits.
- CJEU:
  - If for a certain purpose (e.g. survivor's pensions/supplementary pensions/special leave & bonus) a Member State considers same-sex registered partnerships as equivalent to marriage, it must treat them in the same way
    - *Maruko and Römer*: It is for the national court to conduct the assessment as to whether they are considered 'equivalent'
    - *Hay*: The CJEU conducted the equivalence assessment itself
  - 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
  - In *Hay* the CJEU confirmed that the difference in treatment was *direct* discrimination on the ground of sexual orientation even though PACS was open to both same-sex and opposite-sex couples (unlike the registered life partnership in *Maruko and Römer*)

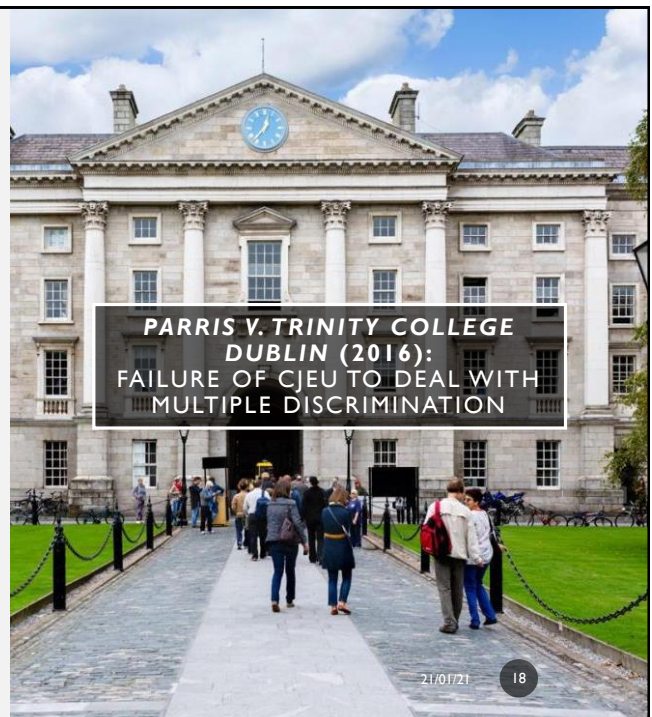
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21/01/21

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 60<sup>th</sup> 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'.

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21/01/21

18

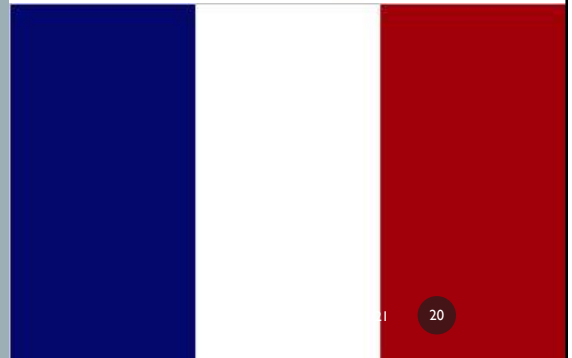


## ASOCIAȚIA ACCEPT (2013) AND NH (2020): HOMOPHOBIC SPEECH AMOUNTS TO DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION

- Do homophobic statements made by a potential employer amount to discrimination on the ground of sexual orientation contrary to Directive 2000/78?
- 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*; homophobic statements made by Mr NH, a lawyer, ruling out the recruitment of gay persons at his law firm.
- NGOs brought actions claiming that the statements amounted to discrimination on the ground of sexual orientation contrary to Dir. 2000/78
- CJEU:
  - An identifiable complainant who claims to have been the victim of discrimination not required for Art. 2000/78 to be breached
  - Discrimination by assumption is (also) prohibited by Dir. 2000/78
  - The limitations on the freedom of expression which ensue from the prohibition laid down in Dir. 2000/78 are justified.

## LÉGER (2015): FIRST AND – SO FAR – ONLY CASE INVOLVING DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION UNDER THE CHARTER

- 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?
- CJEU – 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.





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**COMAN (2018): SAME-SEX SPOUSES  
MUST BE RECOGNISED AS 'SPOUSES'  
FOR FAMILY REUNIFICATION  
PURPOSES WHEN THEY MOVE  
WITHIN THE EU**

- 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?
- CJEU: Yes (but with limitations...)
- NB: currently pending case from Bulgaria regarding the cross-border recognition of the birth certificate of a child with two mothers

21/01/21

21

**CJEU CASE-LAW – DISCRIMINATION BASED  
ON THE FACT THAT A PERSON HAS  
UNDERGONE GENDER REASSIGNMENT**

## P. V. S & CORNWALL COUNTY COUNCIL (1996)

- **Discrimination based on the fact that a trans person intends to undergo gender reassignment amounts to discrimination on the ground of sex**
- 'Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'.

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23

## KB V NHS AND ANOTHER (2004)

**Discrimination against a person who is in a relationship with a trans person who has undergone gender reassignment surgery amounts to discrimination on the ground of sex, even if the inequality of treatment does not undermine enjoyment of a right protected by EU law (namely, the award of the survivor's pension ('equal pay for equal work') but, rather, affects one of the conditions for the grant of that right (namely, the capacity to marry)**

→ What amounted to a breach of Art. 157 TFEU and Dir. 75/117 was not the regulations of the pension scheme which restricted the award of the survivor's pension to the surviving 'spouse' of a member of that scheme; rather, it was the pieces of UK legislation which prevented trans persons from being recognised legally in their acquired gender and from being able to marry a person of the sex to which they were deemed to belong before they underwent gender reassignment surgery, which amounted to a breach of EU law.

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21/01/21

24

## RICHARDS V SECRETARY OF STATE FOR WORK AND PENSIONS (2006)

**The denial to a trans woman who had undergone gender reassignment surgery of a retirement pension at the age that this was available to (cis) women (i.e. 60), on the ground that she was not recognised as a 'woman' under national law, amounted to discrimination on the ground of sex contrary to Dir. 79/7**

→ What amounted to a breach of Dir. 79/7 was not the UK legislation (Pensions Act 1995) which restricted the award of the retirement pension at the age of 60 to 'women'; rather, it was the lack of UK legislation which prevented trans persons from being recognised legally in their acquired gender and the resultant refusal to read the Pensions Act 1995 as applying equally to cis and trans women, which amounted to a breach of EU law.

## MB V SECRETARY OF STATE FOR WORK AND PENSIONS (2018)

**The denial to a trans woman who had undergone gender reassignment surgery of a retirement pension at the age that this was available to (cis) women (i.e. 60), on the ground that she was not recognised as a 'woman' under national law (because she did not acquire a full gender recognition certificate in accordance with the Gender Recognition Act 2004), amounted to discrimination on the ground of sex contrary to Dir. 79/7**

→ What amounted to a breach of Dir. 79/7 was not the UK legislation which restricted the award of the retirement pension at the age of 60 to 'women'; rather, it was the fact that the applicable UK legislation at the time required trans women who wished to acquire a full gender recognition certificate to apply to have their marriage annulled (this was in order to prevent the emergence of same-sex marriages [at a time when the UK had not opened marriage to same-sex couples] which would have ensued in case trans persons were married to persons who had the same sex as their acquired gender)

→ **No marriage annulment = no full gender recognition certificate = trans women who were married prior to undergoing gender reassignment could not be awarded a retirement pension at the same age that cis women who were married could get**



THANK YOU!

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