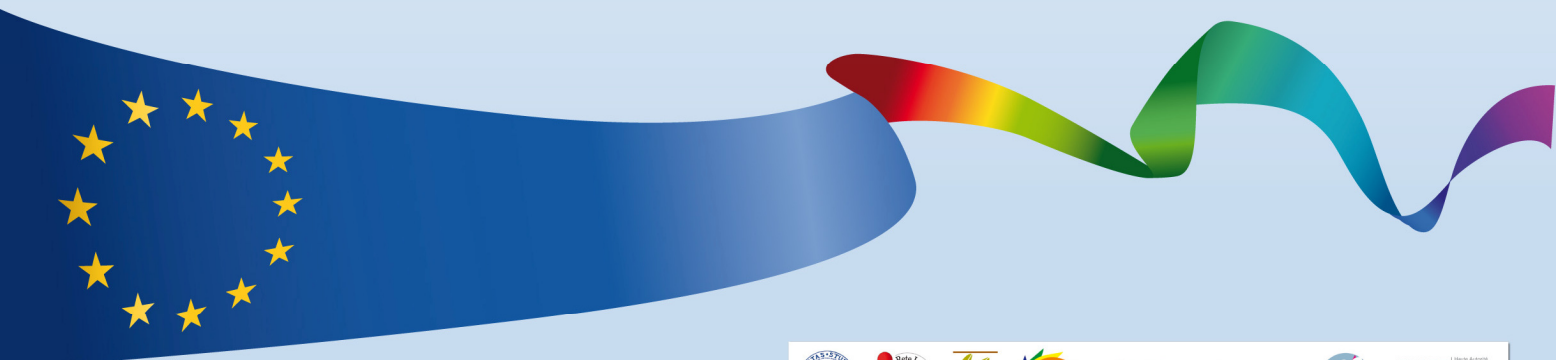




The Equal Jus Legal Handbook to LGBT Rights in Europe



Equal Jus



Info: <http://www.equal-jus.eu/>

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**The Equal Jus Handbook to LGBT Rights in Europe.
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The Equal Jus Legal Handbook to LGBT Rights in Europe

Forward

This handbook is an instrument aimed at lawyers and jurists. The Equal Jus Project aims to provide the tools needed by legal practitioners for better understanding of the protection afforded by European and national law in cases of discrimination on grounds of sexual orientation and gender identity. The handbook contains a European and national law section. Whereas the former is common to all national editions, the latter has been developed only in respect of the French, Italian, Lithuanian and Polish systems. For each part there are complementary online learning tools such as tutorials, case studies, and presentations on various legal aspects. The Equal Jus Database is a valuable tool and comprises legislation, case-law, literature and other legal documents. All resources are available on the www.equal-jus.eu website.

This handbook builds on other tools developed before and during the project and has been contributed to and implemented by others in an effort to avoid duplication and enhance synergies. This handbook does not provide a general introduction to the law on non-discrimination and its general principles under the European Convention for Human Rights and EU law. We advise you to become acquainted with the law on this area by consulting the Handbook on European Non-Discrimination Law jointly produced by the European Court of Human Rights and the FRA, the EU Fundamental Rights Agency, launched in March 2011 (available in most languages of the EU on fra.europa.eu and www.echr.coe.int). You can also practice and develop your skills with the resources offered by the Human Rights Education for Legal Professionals program of the Council of Europe: www.coehelp.org and keep currently updated on the most important Strasbourg case-law with the fact-sheets on the website of the European Court on Human Rights, section Press.

The international dimension of the protection of LGBT people is relevant to European citizens as well and is dealt with in this handbook. The International Commission of Jurists – ICJ website offers a number of valuable resources for gaining

an in-depth knowledge of international protection: www.icj.org. Finally, we recommend the FRA comparative report updated in 2010 and the upcoming study on the situation in all Council of Europe States produced by the Human Rights Commissioner Thomas Hammarberg for an in-depth look at the legal situation of LGBT people in each of the Member States. We have just directed you to some of the online resources which we consider to be complementary to the Equal Jus tools. You should also visit the websites of the organizations that will be presented below, which contain a wealth of useful publications and reports.

Part I - Introduction

The concept of human rights as a natural and inalienable attribute of every human being gained widespread acceptance only after World War II. It was not until then that people understood that it is necessary to acknowledge that human rights are a universal concept and that the power of the majority must sometimes be contained to insure the wellbeing of all members of society particularly minorities.

On foundations laid by the United Nations - regional systems of human rights emerged. Although these organizations were all founded to bring peace and stability to Europe, they were each established with different purposes: The Council of Europe promotes the rule of law, human rights, and democracy; The European Union was devised as an institution for promoting trade and economic stability for its members; The Organization for Security and Co-operation in Europe (OSCE) was founded to maintain peace and military security within Europe. Today, these organizations have evolved to address many overlapping issues - all dealing to some extent with human rights, although the Council of Europe remains principally involved in this area.

The principle of equality of all human beings before the law regardless of their characteristics is one of the basic principles of human rights. The concept of equality is very closely linked to the concept of non-discrimination. Equality before the law means that all should be treated equally. The concept of non-discrimination implies that any distinction in treatment without reasonable justification is prohibited. The Council of Europe has played a major role, the case-law of the European Court of Human Rights is an important

instrument in the fight against discrimination on grounds of sexual orientation and gender identity. The Parliamentary Assembly and the Committee of Ministers have adopted several relevant decisions regarding these issues.

Today European Union is entering into a new chapter in the history of human rights protection – it now has a capability to become a party to the European Convention on Human Rights, which definitely will level-up the quality of protection of human rights in Europe.

The battle against discrimination based on sexual orientation and gender identity can now be fought with a variety of instruments arising from International law, European law and national laws. In order to win this battle, LGBT people suffering discrimination must be supported by other actors, first of all by lawyers, but also by private or public entities engaged in the field of human rights protection.

The legal profession can be exceptionally effective in defending human rights and combating discrimination. The legal knowledge and social position of lawyers in modern democracies can help them to raise awareness within the wider society and in fighting inequalities both before the courts and beyond. National lawyers should consider international and European instruments for human rights protection in order to fight for the highest level of protection for groups and individuals exposed to discrimination. This can be done at national and international level (legislative protections), but also the in everyday practice of a law office. This hand-book is just one of the instruments offered to you by the Equal Jus Project.

Part II – Making non-discrimination rights effective: definitions, actors and strategies

Section A: Definitions

Bisexual – a person who is capable of being emotionally and/or sexually attracted to individuals regardless of their sex. Degree of preference and choice of primary relationship partner varies for each bisexual.

Gay – a person who feels sexual desire exclusively (or predominantly) for persons of his/her own sex. This term can be used to

describe both homosexual men and women, but mainly used to describe men.

Gender – an academic term that is used for the description and theoretical education of sex and sex roles.

Gender identity – psychological sense of being male or female (or both or neither).

Gender expression – how an individual chooses to express their gender.

Heterosexual – a person who is emotionally and/or sexually attracted to people of the opposite sex.

Homophobia – fear of, or anger toward homosexuality and/or homosexual and bisexual people.

Homosexual – a person who is emotionally and/or sexually attracted to people of the same sex.

Lesbian – homosexual woman.

LGBT – lesbian, gay, bisexual, transgender people.

Out – being openly lesbian, gay or bisexual.

Sex – either of the two traditional forms of individuals that are distinguished respectively as female or male.

Sexual orientation – an enduring emotional, romantic, sexual, or affectional attraction toward others. Sexual orientation exists along a continuum that ranges from exclusive heterosexuality to exclusive homosexuality and includes various forms of bisexuality.

Sex (or gender) reassignment – this is a collective term that refers to all medical procedures by which a person's physical appearance and function of their existing sexual characteristics are altered to resemble that of the other sex.

Transgender person – a collective term that describes individuals whose sexual identity and/or sexual expression partly or always differs from the norm of the sex that they have been assigned at birth. The term includes transsexuals, intersex persons, transvestites and other gender variant people.

Transphobia – fear of, or anger toward, transgender people.

Transsexual person – person who is transsexual defines oneself by a sex other than the one assigned at his/her birth, and often undergo hormone therapy and surgery (sex

reassignment) in order to change his/her physical sex.

Transvestite – a person who sometimes, often or always dresses in clothes that are traditionally associated with the opposite sex.

Section B: Actors

1. Lawyers

Lawyers have a vital role to play in strengthening the legal protection of LGBT rights. They are often the first port of call for victims of discrimination and, as such, must be in a position to recognize discrimination and take appropriate steps to seek a remedy. Because LGBT law is still developing, it attracts a passionate and dedicated group of lawyers. The work can encompass many practice areas and frequently takes its advocates to the cutting edge of civil rights law. With the landscape of LGBT rights law is constantly changing, it is an exciting field of practice.



SOURCES

Art. 14, *The Basic Principle on the Roles of Lawyers as Adopted by the UN Congress on the Prevention of Crimes and Treatment of Offenders*: "Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession".

2. The Equality Bodies

The EU anti-discrimination law requires Member States to designate or set up an Equality body (or bodies). National Equality bodies now exist in most EU Member States. Equality bodies function as independent organizations giving assistance to victims of discrimination, monitoring and reporting on discrimination issues, and promoting equality. They have a statutory remit to promote equality and combat discrimination in relation to one, some or all of the grounds covered by the EU Equal Treatment Directives – gender, race and ethnicity, age, sexual orientation, religion or belief and disability".

Most of EU Member States have implemented the racial equality Directive

(2000/43/EC) and the gender equal treatment Directives (2002/73/EC and 2004/113/EC) either by designating some existing institution or by setting up a new institution. There are no specific guidelines to Member States on how these bodies should operate so the organization and role of each body varies from country to country. European equal treatment legislation only requires that equality bodies are set up in the fields of race and ethnic origin and gender. However, in many countries however equality bodies deal with other grounds of discrimination including sexual orientation. Equality bodies as independent organizations are required to provide assistance to victims of discrimination. Most of the European Equality bodies are members of Equinet, the European Network of Equality bodies, which develops co-operation and facilitates information exchange between national Equality bodies across Europe. Several publications of great interest to lawyers concerning discrimination cases can be downloaded from the Equinet website.



ON-LINE

<http://www.equineteurope.org/>

3. The European Union Agency for Fundamental Rights

The European Union Agency for Fundamental Rights (FRA) was established in 2007 and since then operates as an advisory body of the European Union. The FRA's activities serve to promote fundamental rights and to provide the institutions and authorities of the Union and Member States with assistance and expertise on fundamental rights when implementing EU law. The FRA provides support to Member States in implementing measures and formulating appropriate courses of action. However, the Agency is not empowered to examine individual complaints or to exercise regulatory decision-making powers.

The FRA took up its work on LGBT rights following a specific request of the European Parliament in 2007 and has this task embedded in its Multiannual Framework (MAF) 2007-2012. A

comparative report on LGBT rights “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States Part I – Legal Analysis” was first published in 2008 and then updated in 2010. This FRA report is based on country reports and a comparative analysis. The second report “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation” was published on March 2009. In March 2011 a Handbook on European non-discrimination law was produced together with the European Court of Human Rights and will soon be available in several EU languages. All national reports and studies are freely available on the FRA website.



ON-LINE

http://www.fra.europa.eu/fraWebsite/home/home_en.htm

4. The European Parliament’s Intergroup on LGBT rights

The European Parliament’s Intergroup on LGBT Rights is an informal forum for Members of the European Parliament who are interested in issues that impact the lives of lesbian, gay, bisexual and transgender people. The Intergroup has 88 members, all of whom are democratically elected Members of the European Parliament. The work of the Intergroup consists of monitoring the work of the European Union, monitoring the situation of LGBT people in EU Member States and beyond, including following relevant European Court of Justice and European Court of Human Rights decisions, as well as relevant reports issued by the Fundamental Rights Agency, and liaising with civil society groups to relay their concerns at the European level. Members of the Intergroup take a positive stance on LGBT issues when they draft reports or amendments, when they vote in the Parliament, or when they deal with constituency affairs.

The Intergroup often takes an active part in promoting the human rights of LGBT people, or reminding Member States and their authorities of their human rights obligations under the various

international treaties. The Intergroup cooperates with civil society groups and European institutions by relaying their concerns at the European level and regularly meeting with non-governmental organizations.



ON-LINE

<http://www.lgbt-ep.eu>

5. Bar Associations, Trade Unions, NGOs

ECSOL

The European Commission on Sexual Orientation Law (ECSOL) is a non-governmental and non-political network of legal experts from Council of Europe States.

ECSOL is a forum for its members for exchange of information on important legal developments at the national, European and international level, collaboration, and discussion on important themes, and the conduction of research into all aspects relating to sexual orientation law. The website offers useful materials on the LGBT legal situation.



ON-LINE

<http://www.sexualorientationlaw.eu>

ETUC European Trade Union Confederation

(ETUC) works to defend human rights, trade union rights and equality for all workers at European level. This commitment also includes equal treatment, respect and dignity for LGBT workers. Founded in 1973, it now represents 82 trade union organizations in 36 European countries, plus 12 industry-based federations. The ETUC’s prime objective is to promote the European Social Model and to work for the development of a united Europe where working people, including LGBT workers, can enjoy full human and civil rights and high living standards.

Following the adoption of the ETUC recommendations on actions and activities promoting equal rights, respect and dignity for workers regardless of their sexual orientation or gender identity in December 2008, ETUC has set

up an informal network of trade unionists willing to share news and information on LGBT policies and activities.



ON-LINE

<http://www.etuc.org>

ILGA-Europe

ILGA-Europe is a Brussels-based non-governmental umbrella organization which represents its members, principally organizations of lesbian, gay, bisexual and transgender persons, at European level. Its membership comprises around 300 organizations from throughout Europe. ILGA-Europe enjoys consultative status at Economic and Social Council of the United Nations (ECOSOC) and participative status at the Council of Europe and receives financial support from the European Commission.

Since 2000, an important part of ILGA-Europe's work has been to provide information about developments in international and comparative human rights law related to sexual orientation to the Council of Europe's European Court of Human Rights, by seeking the permission of the Court to submit written comments on these developments as a third-party intervener in selected cases which could establish a principle applicable to all Council of Europe countries. Their website has a wealth of information on the current status of LGBT rights in Europe.



ON-LINE

<http://www.ilga-europe.org>

Human Rights Watch (HRW)

Human Rights Watch (HRW) is a nonprofit, nongovernmental human rights organization. The staff of which consists of human rights professionals including experts, lawyers, journalists, and academics of diverse backgrounds and nationalities. Each year, Human Rights Watch publishes more than 100 reports and briefings on human rights conditions in some 90 countries, generating extensive coverage in local and international media. HRW works for LGBT people's rights as well and includes the

issue as a separate topic in its reports and briefings. HRW documents and exposes abuses based on sexual orientation and gender identity worldwide – including torture, killing and executions, arrests under unjust laws, unequal treatment, censorship, medical abuses, discrimination in health and jobs and housing, domestic violence, abuses against children, and denial of family rights and recognition.



ON-LINE

<http://www.hrw.org>

Amnesty International (AI)

Amnesty International (AI) is a worldwide movement of people who campaign for internationally recognized human rights to be respected and protected for everyone. Its mission is to conduct research and generate action to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. AI considers people detained or imprisoned solely because of their homosexuality to be prisoners of conscience and calls for their immediate and unconditional release. It also calls for the decriminalization of homosexuality where such legislation remains. This entails reviewing all legislation which could result in the discrimination, prosecution and punishment of people solely for their sexual orientation or gender identity. AI's reports, all available online, can be a useful and authoritative source for demonstrating violations of the human rights of LGBT people, for example in their country of origin.



ON-LINE

<http://www.amnesty.org>

The International Commission of Jurists (ICJ)

The International Commission of Jurists (ICJ) is an NGO promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world, and enjoying consultative status in the UNESCO, the Council of Europe and the Africa Union. The ICJ runs a specific program on sexual orientation

and gender identity and focuses on especially on international law and standards. Several publications target legal practitioners and are available on the ICJ's website.



ON-LINE

<http://www.icj.org/>

INTERIGHTS

The International Centre for the Legal Protection of Human Rights works to promote respect for human rights through the use of law. It provides legal expertise to lawyers, judges, human rights defenders and other partners concerning international and comparative human rights law. This NGO is very active in strategic litigation, including discrimination based on sexual orientation and gender identity litigation. INTERIGHTS's website offers many resources for legal capacity building and standard setting activities, including legal publications.



ON-LINE

www.interights.org

Section C: strategies

1. *The role of strategic litigation (general remarks)*

When we discuss litigation from human rights perspective we very often understand it as one of the strategies for general human rights promotion. When used in this way litigation can expose different issues and uncover patterns of illegal conduct which systematically violate human rights. This kind of litigation is called strategic or impact litigation. As some authors describe, it involves selecting and bringing a case to the courtroom and uses the justice sector to achieve legal and social change through test cases¹. Impact litigation can be useful to strengthen certain groups' capacity for action, open new

¹http://www.crin.org/docs/Childrens_Rights_Guide_to_Strategic_Litigation.pdf

routes of participation and win concrete battles in the political sphere.

Successful law cases on sexual orientation and gender identity can make a significant contribution to the achievement of equal rights for LGBT persons. There are many valuable comparative practice examples of this type of litigation (see, Part IV of this publication). There are many factors to consider before bringing a case. When a comparison is drawn between strategic litigation and other legal services it is clear that it is designed not just to provide the best service possible, but also to make an impact on the future social and political landscape. Both (lawyer and the client) have to be ready for a broader publicity – cases of strategic litigation usually have wide coverage in the press. There are also specific aspects for a strategic litigation planning related to LGBT issues. According to ILGA-Europe's (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) Fact Sheet on Strategic Litigation to promote LGBT rights in Europe, the main factors² which should influence a decision to undertake strategic litigation, are:

- (a) Timing
- (b) Good facts
- (c) Group support
- (d) A suitable legal team
- (e) Resources
- (f) Other sources of support

Maybe the most important from these is timing. No less important for strategic litigation planning is sufficient information or "good facts", which can be proved in a court case, such as documents, witnesses, medical or official reports. Community or group support (LGBT NGO's, etc.) can greatly assist a strategic litigation case. Their support can be beneficial not only in general campaigning but also in providing information to the media and other interested groups. Because litigation can be so resource-intensive, it is wise to carefully assess and investigate your case and the claims you wish to bring before filing a lawsuit.³

²http://www.ilga-europe.org/home/how_we_work/litigation/resources/fact_sheet_strategic_litigation

³ You can find more resources on strategic litigation here: http://www.ilga-europe.org/home/how_we_work/litigation/resources

2. *The role of situation testing*

Situation testing is a systematic research procedure for creating controlled experiments analyzing employers' candid responses to employees' personal characteristics.⁴ Situation testing has other names such as situation tests, situational tests, testing, auditing, pair-comparison testing or paired testing and, more rarely discrimination testing or practical testing. In Europe, testing or situation testing are the most common expressions. In the USA, auditing and paired-comparison testing are frequently used. In France, the General Commission for Terminology (*Commission générale de terminologie et de néologie*) in line with the French Academy recommends the use of discrimination testing (test de discrimination).

The aim of this method is to bring to light practices whereby a person who possesses a particular characteristic is treated less favourably than another person who does not possess this characteristic in a comparable situation. This kind of preparation for a discrimination case works like a role-play, in which you compare "test-taker" (the person having the trait, which can potentially cause a negative assessment) to the situation of a comparatively positioned person (i.e. a person who does not have the characteristic which can potentially cause adverse treatment). If the feature distinguishing the two parties is basically the only or essential difference between them and a difference in treatment of the two can be explained only by that characteristic (different ages, race, religion, etc.), the comparison provides *prima facie* evidence of discrimination.

Beside its use in research, awareness raising and public policy development, situation testing has enormous potential to strengthen evidence in individual cases. Litigation testing targets a particular employer suspected of discrimination with the purpose of gathering facts pointing to a presumption of unequal treatment and allowing the judge to reverse the burden of proof. This methodology is very useful to expose cases of

direct discrimination on the ground of sexual orientation.⁵

⁴ Bendick M. Jr., Jackson C. and Reinoso V. (1994), "Measuring employment discrimination through controlled experiments", *Review of Black Political Economy*, 23, p. 25-48.

⁵ See I. Rorive, *Proving Discrimination Cases - the Role of Situation Testing*, 2009.

Part III - The international and European legal instruments against discrimination
Section A. The International system of protection of LGBT Rights⁶

I. UN bodies

Two main types of bodies which are concerned with the promotion and protection of human rights exist within the UN system, these are bodies created under the UN Charter, and bodies created under the international human rights treaties.

1. UN Charter Bodies

The main UN Charter body is the Human Rights Council. Pursuant to General Assembly Resolution 60/251 of 15 March 2006 the Human Rights Council assumed as of 19 June 2006 all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the ones of the Sub-Commission on the Promotion and Protection of Human Rights, and the Special Procedures established by the Commission on Human Rights. The Human Rights Council acts within the scope of the UN Charter, Universal Declaration of Human Rights, and other human rights instruments to which a particular State is party. Its main responsibility is to assess human rights situation in all 192 UN Member States through the Universal Periodic Review. Countries are selected for review with respect to equitable geographic distribution. All Member States of the Human Rights Council are reviewed during their term of membership.

The Human Rights Council's competence also covers examination of individual complaints. The complaints procedure is of great importance as an effective way to fight discrimination internationally. A person who deems his/her rights to be violated under the UN Charter, Universal Declaration of Human Rights, or other applicable instruments in the field of human rights law, is entitled to bring a complaint before the Human Rights Council. The procedure has been established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental

freedoms occurring in any part of the world and under any circumstances.

Under the UN Charter the United Nations' goals include the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 2 of the Universal Declaration of Human Rights provides that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Although none of these two international instruments explicitly mention sexual orientation or gender identity as grounds for unlawful discrimination, the Universal Declaration of Human Rights, nonetheless, provides a non-exhaustive list of grounds, thus leaving space for interpretation and case-law to evolve according to the developing social and civil context.

A communication is admissible provided, *inter alia*, its object is consistent with the UN Charter and the Universal Declaration of Human Rights, and other human rights instruments to which a State is party, and domestic remedies have been exhausted. It may be submitted either by a person or a group of persons, or an NGO or other organization acting in good faith and having a direct and reliable knowledge of the violations concerned. Two distinct working groups – the Working Group on Communications and the Working Group on Situations – are established with the mandate to examine the communications and to bring to the attention of the Human Rights Council consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.

The Human Rights Council also continues to work closely with the UN Special Procedures. "Special procedures" is the general name given to the mechanisms established to address either specific country situations or thematic issues in all parts of the world. Currently, there are 31 thematic and 8 country mandates. None of the thematic issues cover discrimination as such, and all the countries covered are outside Europe. To briefly sum up the

⁶ This part is an overview. An important complementary handbook is the ICJ's Sexual Orientation, Gender Identity and International Human Rights Law, Practitioner's Guide No. 4, 2009 and a useful collection of references is ICJ's Sexual Orientation and Gender Identity in Human Rights Law. References to Jurisprudence and Doctrine of the United Nations Human Rights System, 4th Updated edition, 2010.

role of the Human Rights Council while protecting LGBT rights, one must point out that:

- Firstly, since none of the two basic documents applied by the Human Rights Council (UN Charter and the Universal Declaration of Human Rights) explicitly prohibit discrimination on sexual orientation or gender identity grounds, the Human Rights Council does not initiate the inclusion of the LGBT rights issues in its annual reviews on its own initiative, and rather focuses on its explicit mandate. Therefore, the protection of LGBT rights stays undeveloped.
- Secondly, the only effective way to protect LGBT rights thus becomes the Complaints Procedure, which enables individuals to bring complaints before the Human Rights Council. If exercised often, this could lead to a development and establishment of sound practice of protection of LGBT rights within the UN system.

2. UN Human Rights Treaty Bodies

Although today there are eight UN bodies created under the human rights treaties, their practical benefit for individuals seeking protection of LGBT rights is rather low. Only five of the Committees accept petitions from individuals regarding violations of their rights: Human Rights Committee, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination against Women, Committee against Torture, and Committee on the Rights of Persons with Disabilities.

1. Human Rights Committee

The Human Rights Committee is a body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties (see Text box n. 12). Its functions include the following:

- Examination of the reports regularly submitted by the States parties on how the rights are being implemented. The Human Rights Committee then addresses its concerns and recommendations to the State party in the form of “concluding observations”;

- Examination of individual complaints with regard to alleged violations of the ICCPR by States parties to the First Optional Protocol;
- Publication of its interpretation of the content of human rights provisions, known as general comments on thematic issues or its methods of work.

The individual complaints procedure is by far the most efficient method of fighting discrimination and protecting LGBT rights. LGBT persons who claim that their rights and freedoms under the ICCPR have been violated may call the State in question to account for its actions if that State is a party to the First Optional Protocol. Though the grounds for discrimination listed in the ICCPR itself and in the First Optional Protocol do not explicitly include sexual orientation or gender identity, the Human Rights Committee in 1994 in the case of *Toonen v. Australia* held that the references to “sex” in Articles 2(1), (non-discrimination) and Article 26 (equality before the law) of the ICCPR should be taken to include sexual orientation. With this case, the Human Rights Committee created a precedent within the UN human rights system in addressing discrimination against lesbian, gays and bisexuals.

Once a complaint is lodged, there are a number of admissibility criteria that must be satisfied before the Human Rights Committee considers the merits of an individual communication under the Optional Protocol. Anonymous communications are to be considered inadmissible, as well as the ones abusing the right of submission of such communications. The Human Rights Committee does not consider a communication, which is being examined under another procedure of international investigation or settlement; or if not all available domestic remedies have been exhausted. This, however, rule does not apply where the application of the remedies is unreasonably prolonged.



SOURCES

International Covenant on Civil and Political Rights (ICCPR) provides that “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its

jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The First Optional Protocol states that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

The Human Rights Committee tends to accept the facts as alleged by the victim if it receives no information from the relevant State, or if the State merely submits refutations in general terms. The Human Rights Committee tends to accept the State's specific denials of certain facts unless the victim can provide documentary proof supporting his or her own assertions. In such cases, where the nature of a complaint may make it impossible for the victim to submit further relevant evidence, and/or that certain information is occasionally exclusively in the hands of the State party, the burden placed upon the State to refute the alleged victim's allegations becomes higher. Typically, it may take several years for a complaint to proceed from initial submission through the series of exchanges between the parties to a final decision by the Human Rights Committee.

2. Other Human Rights Committees

The international Covenant on Economic, Social and Cultural Rights (ICESCR) obliges the State Parties "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The non-exhaustive list is also said to include sexual orientation.

The Committee on Economic, Social and Cultural Rights monitors the implementation of the ICESCR through examining reports regularly submitted to it by the States Parties. With regard to individual complaints, the General Assembly unanimously adopted an Optional Protocol (GA resolution A/RES/63/117) to the ICESCR which provides the Committee competence to receive

and consider communications. The Optional Protocol was opened for signature in 2009. It will enter into force when ratified by 10 parties.

Article 2 of the Convention on the Rights of the Child submits that "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, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." Therefore, the Convention on the Rights of the Child might be relevant in addressing sexual orientation discrimination of LGBT persons who are parents or legal guardians of a child within the jurisdiction of a State Party, and discrimination of the children as well. Regrettably, the Committee on the Rights of the Child does not examine individual complaints, only the reports States Parties submit regarding the measures adopted and the progress made on the enjoyment of those rights.

II. OSCE's instruments

The OSCE is a political organization that seeks to exercise authority through political pressure, and not through an enforcement of obligations taken by the States. The OSCE Office for Democratic Institutions and Human Rights is active throughout the OSCE area in the fields inter alia of human rights, tolerance and non-discrimination, and rule of law. OSCE Missions and institutions are open to the involvement of LGBT people in its tolerance and non-discrimination programs.

Section B – The European legal instruments against discrimination based on sexual orientation and gender identity

I. Council of Europe

European Court of Human Rights

The European Convention on Human Rights (ECHR) provides the major source of international protection of LGBT rights. The ECHR is an international treaty under which the Member States of the Council of Europe promise to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction. The observance of the engagements undertaken by the Contracting Parties in the

ECHR and its Protocols is ensured by the European Court of Human Rights.

Article 14 of the ECHR states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Though the international treaty itself does not include direct reference to sexual orientation, the case-law adopted by the European Court of Human Rights clearly states that discrimination of the grounds of sexual orientation or gender identity is prohibited and must be abolished.

The ECHR empowers the European Court of Human Rights to examine inter-State cases and individual complaints regarding the alleged violations of the ECHR. Since the Court was established, almost all applications have been lodged by individuals alleging violations of the ECHR – over 30 000 individual applications are lodged every year. The European Court of Human Rights may receive individual applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the ECHR or its Optional Protocols, provided all the admissibility criteria had been fulfilled.

The European Court of Human Rights may only deal with the matter after all domestic remedies have been exhausted and within a period of six months from the date on which the final decision was taken. However, there are exceptions developed under the case-law on effective remedy. No anonymous applications or applications which are substantially the same as matters already examined by or submitted to the European Court of Human Rights or any other international investigation, will be dealt with by the Court. The new admissibility criterion of “significant disadvantage” has been introduced by Protocol No 14 in order to improve the efficiency of the European Court of Human Rights, and entered into force on 1 June 2010.

The final judgments of the European Court of Human Rights are binding on the Contracting

Parties. Protocol No 14 introduced a new mechanism to assist enforcement of judgments by the Committee of Ministers. If the European Court of Human Rights finds a violation of State’s obligation to abide by the final judgment upon the Committee’s request, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken.

The European Court of Human Rights has the longest and largest jurisprudence in addressing sexual orientation issues. It was the first international body to find that sexual orientation criminal laws violate human rights. In most of the cases of discrimination on the ground of sexual orientation or gender identity, the European Court of Human Rights has found the violations of the right to respect for private life and more recently family life in conjunction with Article 14.

3. Commissioner for Human Rights

The Commissioner for Human Rights is an independent institution within the Council of Europe, mandated to promote the awareness of and respect for human rights in 47 Council of Europe Member States. The fundamental objectives of the Commissioner for Human Rights are to assist Member States in the implementation of Council of Europe human rights standards; to promote education in and awareness of human rights; to identify possible shortcomings in the law and practice concerning human rights; and to provide advice and information regarding the protection of human rights across the region. The Commissioners for Human Rights thus focuses on encouraging reform measures to achieve tangible improvement in the area of human rights promotion and protection.

Being a non-judicial institution, the Commissioner’s Office cannot act upon individual complaints, but it can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals. The Commissioner’s reports contain both an analysis of human rights practices and detailed recommendations about possible ways of improvement. The reports are published and widely circulated in the policy-making and NGO community as well as the media.

The Commissioner is further mandated to promote awareness of human rights in Council of Europe Member States and closely cooperates with national Ombudsmen, National Human Rights Institutions and other structures entrusted to protect human rights. Discrimination based on sexual orientation and gender identity is currently a central concern in the Commissioner's work. He published an Issue Paper on Gender Identity in 2009 and will publish a comprehensive report containing a socio-legal analysis of the situation of LGBT persons in all Council of Europe member states in June 2011.

4. European Committee of Social Rights

The European Social Charter is a Council of Europe treaty which guarantees social and economic human rights. The European Committee of Social Rights is the body responsible for monitoring compliance by State Parties. The European Social Charter submits that "the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status." Though the provision does not make explicit reference to sexual orientation, it certainly might be perceived today as to include prohibition to discriminate on sexual orientation ground.

Every year the States Parties submit a report indicating how they implement the European Social Charter in law and in practice. The European Committee of Social Rights examines the reports and decides whether or not the situations in the countries concerned are in conformity with the European Social Charter. If a State takes no action on a Committee of Social Rights decision to the effect that it does not comply with the European Social Charter, the Committee of Ministers addresses a recommendation to that State, asking it to change the law and/or practice.

Under the Additional Protocol to the European Social Charter collective complaints may be lodged with the European Committee of Social

Rights. Individuals, however, do not enjoy this right, only organizations. Among the organizations entitled to bring complaints before the Committee of Social Rights are the international NGOs with consultative status with the Council of Europe, e.g. ILGA and, if the States agree to it, national NGOs. The complaint must be lodged in writing, relate to a provision of the European Social Charter and indicate in what respect the latter has not ensured the satisfactory application of this provision. After receiving a complaint and having decided it is admissible, the Committee of Social Rights draws up a report to present its conclusions as to whether or not the Contracting Party has ensured the satisfactory application of the provision of the European Social Charter. On the basis of the report, the Committee of Ministers adopts a resolution. If the Committee of Social Rights found that the European Social Charter has not been applied in a satisfactory manner, the Committee of Ministers adopts a recommendation addressed to the Contracting Party concerned. The Contracting Party concerned must provide information on the measures taken to give effect to the Committee of Ministers' recommendation in the next report it submits. Although the instruments adopted by the Committee of Social Rights and Committee of Ministers are of recommendatory character only, they make important legal statements as the 2009 case *Interights v. Croatia* on homophobic school text books has shown.

4. Parliamentary Assembly

The Parliamentary Assembly monitors the human rights situation in the Member States of the Council of Europe and provides recommendations as to what should be done in order to improve the existing practices. It encourages the Member States to take all positive measures to combat homophobic attitudes, particularly in schools, the medical profession, the armed forces, the police, the judiciary and the Bar, as well as in sports.

The non-binding resolutions and recommendations it has adopted so far regarding LGBT rights aimed at eliminating discrimination on the ground of sexual orientation (Recommendation 924/1981); ensuring that persecution on grounds of homosexuality would be recognized as a ground for asylum

(Recommendation 1470/2000); fighting homophobic attitudes in sports (Recommendation 1635/2003); ensuring that sexual orientation is considered a profound part of the identity of each and every human being (Resolution 1728/2010).

II. European Union

EU Law

Legislative work within the European Union has taken a number of legislative steps to combat discrimination based on sexual orientation. The European Parliament has taken since 1984 a strong stance against discrimination on ground of sexual orientation. Also the Commission has played a major role in affirming full equality. The Treaty of Amsterdam, in force as of 1 May 1999, eventually made substantial changes to the founding treaties on the EU, and enabled EU to fight sexual orientation discrimination. The Amsterdam Treaty is the first ever international treaty to explicitly mention and protect sexual orientation. Article 13 of Amsterdam Treaty (now Article 19 TFEU) submits that “the Council, acting unanimously on a proposal from the Commission and after consulting 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”.

In December 2000, the Council adopted a Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which aims to combat discrimination on the ground of, among others, sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. This principle means that there shall be no direct or indirect discrimination whatsoever on any of the grounds mentioned above.

The Framework Directive establishes the concept of direct and indirect discrimination. Direct discrimination occurs where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on any of the grounds mentioned above. Indirect discrimination occurs where an apparently neutral provision,

criterion or practice puts persons having a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. All EU Member States are obliged by the Framework Directive to ensure that judicial or administrative procedures for the enforcement of this Directive are available to all persons who consider themselves wronged by a failure to apply the principle of equal treatment to them. The Framework Directive also entitles organization, associations or other legal entities with a legitimate interest, to engage in any judicial or administrative procedure provided for the enforcement of this Directive.

The burden of proof lies upon the respondent party to prove that there has been no breach of the principle of equal treatment, i.e. after a person who considers himself/herself to be discriminated against, establishes before a court or other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to rebut the presumption and prove the opposite. The Framework Directive is binding upon the current Member States, while the Accession States are required to have completed national implementation of the Directive before joining the EU. Directive 2004/58/EC on the rights of citizens of the EU and their family members to move and reside freely within the territory of the Member States, acknowledges an obligation of the Member States to implement this Directive without discrimination on grounds such as sex and sexual orientation.

Proposal for a Council Directive (COM/2008/0426) aims to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market. This legal instrument would oblige Member States to ensure administrative or judicial procedures for its enforcement, and enable interested organizations to engage in the proceedings concerned. The burden of proof is placed on the respondent. As the European Commission has explained the burden of proof shifts in all cases alleging breach of the principle of equal treatment, because in discrimination cases,

it is often extremely difficult to obtain evidence, as this information is often in the hands of the respondent. This burden of proof does not shift where criminal law is used to prosecute allegations of discrimination. One must note that the EU law regards discrimination against transsexual persons as a form of sex discrimination. This principle was established by the European Court of Justice in the 1996 case of *P v S and Cornwall County Council*, where it was held that the dismissal of an individual following gender reassignment was unlawful discrimination on the grounds of sex. However, so far the Court has included under sex discrimination only persons who intend to undergo or have undertaken gender reassignment surgery.

2. Lisbon Treaty and the Charter of Fundamental Rights

Developments within the European Union had always had significant implications for LGBT rights protection and today, following the coming into force on December 1st, 2009 of the Treaty of Lisbon the influence of the EU in this area is set to grow further. The Charter of Fundamental Rights of the European Union with its expansive, innovative provisions is now legally binding throughout the EU, with the result that the fundamental rights that it contains become operational in respect of EU legislation and in relation to the implementation of EU law in national law. For the first time the EU has set out in one place fundamental rights from which every citizen can benefit.

The Charter of Fundamental Rights expressly sets out the prohibition on discrimination on the ground of sexual orientation: "Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited". In addition, Lisbon Treaty expressly states that fundamental rights, as guaranteed by the European Convention of Human Rights as they result from the constitutional traditions common to the Member States, constitute general principles of the European Union's law.

Finally, the Lisbon Treaty opens the way to accession of the EU to the ECHR. First of all, accession would entail that, besides reading the Charter in conjunction with the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, the European Court of Justice (and one could argue also national judges) would be able to directly apply the ECHR as part of EU law and EU law will have to be interpreted in the light of the ECHR. Secondly, this would mean that the EU will become subject to the jurisdiction of the ECHR, and its institutions will be accountable to the European Court of Human Rights in respect of matters governed by the ECHR in the same way that EU Member States are currently bound in respect of domestic matters. The European Court of Justice is called upon to construe the basic equality and non-discrimination provisions of the EU Charter and a stronger convergence with the case-law of the Strasbourg Court appears to be inevitable.

Part IV – The main fields of discrimination based on sexual orientation and gender identity: violation of specific rights

Section A. Discrimination of LGB persons

1. Same-sex couples

National legislatures and courts in most democratic societies are undergoing revolutionary changes and beginning to recognize that lesbian women and gay men have the same human capacity as heterosexual women and men to fall in love with another person, to establish a long-term emotional and sexual relationship with them, to set up a joint home/families, and possibly to raise children together. The national institutions in more and more Member States of the EU come to understand that same-sex couples therefore have the same emotional and practical needs as different-sex couples to have their relationships recognized by the law, and can justly claim access to the same rights and obligations as partners in different-sex couples.

People decide to enter in a legally recognized relationship, i.e. marriage out of love for another person, but also for more down-to earth reasons. States are vitally interested that their citizens create durable relationships because that helps to build a stable society. Therefore States grant citizens who marry or enter civil partnerships many privileges – providing for better economic and social security. Unfortunately, in most countries the civil status of marriage still refers only to heterosexual couples. The legislations concerning same-sex relationship differ almost in each Member State of the EU. Some of the countries have allowed gays and lesbians to enter into relationships equal to the ones heterosexual citizens can create, i.e. marriage (Netherlands, Belgium, Spain, Norway, Sweden, Portugal, Iceland). Others created separate legislation covering same-sex partnerships, granting same-sex couples the same, or some of the same rights that married couples have, without using the word ‘marriage’, which is reserved for the heterosexuals in form of civil agreement or a registered partnership (Andorra, Austria, Czech Rep., Denmark, Finland, France, Germany, Hungary, Ireland, Liechtenstein, Luxemburg, Netherlands, Slovenia, Switzerland, UK). Some other European countries may soon follow. As the European

Union leaves a large margin of appreciation for State regulations that concern family law – Member States are not obliged to enable same-sex couples to register a partnership. Some countries have in reliance upon this margin of appreciation decided not to enact legal regulations concerning same-sex couples (e.g. Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania). Same-sex partners in those States are treated by the law as single persons or as cohabiting partners.

European Court of Human Rights and European Court of Justice

Under the case-law of the European Court of Human Rights (ECtHR) any differentiation between married couples and same-sex partners is considered discrimination on the basis of sexual orientation. Most applications made to the ECtHR that concern same-sex partners relate to breach of either Art. 8 (right to private and family life) or Art. 12 (right to marry and found a family) taken alone or in conjunction with Art. 14 (the general clause on non discrimination).

There has been numerous judgments that stated that unmarried couples who make a deliberate choice not to register their union cannot expect the same preference the State grants partners in ‘legalized’ relationships (see, for instance, *Shackell v. UK*, No 45851/99). Nonetheless in *Karner v. Austria* (No 40016/98) the ECtHR held that unmarried same-sex couples must be granted the same rights and obligations as unmarried different-sex couples.

In *Schalk and Kopf* (No 30141/04) the Court ruled that Austria did not violate Article 12 in conjunction with Article 14 of the Convention by not granting same-sex couples access to marriage, as this decision falls within the margin of appreciation of the States. However, it clearly stated obiter dictum that two gay men or lesbian women living together in a non-formal relationship without children enjoy family life under Article 8. Same-sex couples shall therefore enjoy the same rights to family life as heterosexual couples do. The Court also hinted to the fact that the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. Even though the Court then inferred from the historical context and the overall wording of the Convention that marriage must be construed

as referring to opposite-sex couples, it considered that “[r]egard being had to Article 9 of the [EU Charter of fundamental rights], therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants’ complaint.” This means that, in a similar fashion to the reasoning in the case *E.B.* (see below), the Court could find a breach of Article 14 in conjunction with Article 12 if a same-sex married couple are not given the same rights as a different-sex couple in those countries where marriage, but not all family institutions are gender-neutral. The case *Chapin and Charpentier v. France* (No 40183/07) is pending and deals with this issue. In *Kozak v. Poland* (No 13102/02) the ECtHR confirmed its ruling *Karner v. Austria* and asserted that a blanket exclusion of persons living in a same-sex relationship from succession to a tenancy cannot be accepted as necessary for the protection of family by the State.

Until 2008 European Court of Justice has on numerous occasions expressed an opinion that the situation of same-sex partners, even registered ones, cannot be compared to the situation of spouses. Therefore, a different treatment was not deemed to be a breach of the general principle of equal treatment (*D. and Kingdom of Sweden v. Council of the EU*, joined cases C-122/99 P and C-125/99 P; *Grant v. South-West Trains Ltd*, case C-249/96).

However, in 2008 the landmark case of *Tadeo Maruko v. Versorgungsanstalt der deutschen Bühnen* (Case C-267/06) set a new precedent. Mr. Maruko lived with his partner in registered partnership. After his partner had died the VdB, the pension scheme for German theatre staff, refused to pay him a survivors pension as such pension are provided only for married partners. Mr. Maruko sued the VdB. The Bavarian Administrative Court Munich referred the case to the European Court of Justice for interpretation of the EU-Antidiscrimination-Directive. European Court of Justice ruled that Mr. Maruko has been directly discriminated against. The judges stressed that if the State allows same-sex partners to enter into a registered partnership any denial of benefits that are granted to married couples is discriminatory and constitutes a

violation of the anti-discrimination law. *Maruko* was the first case applying the 2000/78/EC Directive with regard to sexual orientation and some issues are still open. In *Römer v. Hamburg*, the Court made a finding of direct discrimination on the ground of sexual orientation” again “because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension”. The effect of the ruling is limited, in that it applies only to countries in which partnerships are reserved to persons of the same gender and are comparable to marriage in fact and in law. In such cases, the calculation of a supplementary retirement pension for members of a same-sex civil partnership couple should be equal to those applied to married couples under Employment Directive 2000/78/EC. In the course of its ruling the Court of Justice noted that; “as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States.”

2. Adoption of children by same-sex couples and parental rights

European Court of Human Rights

In *Kerkhoven, Hinke and Hinke v. Netherlands* (No 15606/89) the European Commission of Human Rights stated that a lesbian couple in a stable relationship rising a child to one of the women does not create a ‘family’ for the purpose of Article 8 of the Convention. At this point it was clear that in the opinion of the Commission the Convention protects ‘family life’ with regard to homosexuals only in respect of their relationship to their biological children. The first case that directly and positively addressed the issue of ‘family life’ of homosexuals in 1999 was *Salgueiro da Silva Mouta v. Portugal* (No 33290/96). A Portuguese national was denied the custody of his biological child on the ground that he was a homosexual and living with another man. For the first time in such a case the ECtHR held that there had been a violation of Article 8 (right to respect for private and family life) taken together with Article 14 (prohibition of discrimination) of the European Convention. In *Fretté v. France* (No 36515/97) the Court was for the first time confronted with an idea of a homosexual person creating a family with an adopted child. Mr Fretté was denied adoption, because he was

homosexual. The Court did not find a violation of Article 8 in this case and refused Mr Fretté the right to adopt, using an abstract argument that the child would be ‘brought up by a homosexual and deprived of dual maternal and paternal role models.’

The above mentioned case-law clearly shows the line the Court drew between homosexuals ‘private’ life and individual’s desire to establish a family manifested ‘publicly’. The ruling in *E.B. v. France* of 2008 (No 43546/02) overruled Fretté. In *E.B.* the Court ruled that denial of adoption rights to a single lesbian based on her sexual orientation constitutes a breach of Article 14 taken in conjunction with Article 8: “in rejecting the applicant’s application for authorization to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention”. The Court also departs explicitly from traditional gender roles as the decision in *Markine v. Russia* (application no 30078/06) on parental leaves in the armed forces demonstrates. An issue that will be dealt with by the Court soon is the refusal of a request for second parent adoption of a partner’s child by the cohabiting or registered same-sex partner. See pending cases *Gas and Dubois v. France* (no. 25951/07), declared admissible, and *X and Others v. Austria* (no. 19010/07).

The *J.M. v. UK* (no. 37060/06) judgment the Court held that the rules on child maintenance prior to the introduction of the Civil Partnership Act had discriminated against those in same-sex relationships and found a violation of Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property). The law at in question prevented the applicant from benefitting from reduced child maintenance where the absent parent had entered into a new relationship, married or unmarried, because the law took no account of same-sex relationships. This case is interesting because of the broad interpretation given by the Court to the notion of property under Article 1 of Protocol No 1, which may eventually cover a wide array of economic damages as a consequence of discrimination.

3. Employment and working conditions

European Court of Human Rights and European Court of Justice

The issue of discrimination of LGB people have been addressed by the ECtHR in numerous rulings. *Smith & Grady v. U.K.* (applications n. 33985/96 and 33986/96), and *Lustig-Prean & Beckett v. U.K.* (applications n. 31417/96 and 32377/96) are two applications by UK citizens that were positively determined by the Court and triggered significant changes in the national legal systems. In both rulings issued in 1999 the ECtHR stated that dismissing gays and lesbians from the armed forces after intimidating and invading investigations about their sexual orientation constitutes a breach of Article 12 of the Convention. After these two decisions the outcome in cases *Beck, Copp and Bazeley v. U.K.* (applications n. 48535/99; 48536/99; 48537/99) was not hard to predict. The applicants all alleged that the investigations into their sexuality and their discharge from the army as a result of the absolute ban on homosexuals in the armed forces that existed at the time, violated their rights under Articles 8 (right to respect for private life) and 14 (prohibition of discrimination) of the Convention. The applicants in *Beck, Copp and Bazeley* also complained under Articles 3 (prohibition of degrading treatment) and 13 (right to an effective remedy). The Court held, unanimously, that there had been a violation of Article 8 in all cases, in certain cases of Article 13 and no violation of Article 3.

With regard to the ECJ case law, see the *Maruko* case above. It is worth noting that the Court gives a broad interpretation of remuneration under Article 157 TFEU (formerly Article 141 TCE), which may include insurance coverage, survivor’s benefit, etc. The Member States retain their competence in family law, as Recital 22 of Directive 2000/78/EC reiterates, and there is no obligation on the part of the State to place registered civil partnerships on an equal footing with marriage. However, the Court clearly stated in *Maruko* and other decisions that in the exercise of that competence the Member States must comply with EU law and, in particular, with the provisions relating to the principle of non-discrimination.

4. Discrimination in other fields than labour market, i.e. insurance, banking services.

European Court of Human Rights and European Court of Justice

The European Court of Human Rights declared inadmissible a complaint from Mr. *Mata Estevez* (No 56501/00), a Spanish gay man, that he should have been entitled to a social security allowance payable only to “surviving spouses” after his male partner of more than 10 years had died in a road accident. The Court stated that the situation would be different if the partner were of the opposite sex, and that a refusal by the Spanish authorities to pay Mr Estevez a survivor pension following his partner’s death did not violate his right to respect for his private and family life and was not discriminatory. In particular, the Court held that “the applicant’s relationship with his late partner does not fall within Article 8 insofar as that provision protects the right to respect for family life”. It also held that the Spanish legislation had a legitimate aim in discriminating against Mr. Estevez, “the protection of the family based on marriage”.

In *P.B. and J.S. v. Austria* (No 18984/02), decided in 2010, the Court ruled on the extension of health insurance cover to same-sex cohabiting partners. The applicants claimed they had been victims of discrimination given the impossibility to have the second applicant’s health and accident insurance extended to include the first applicant. The Court held that there has been a violation of Article 14, read in conjunction with Article 8, as regards the period until the entry into of force of the first amendment to the CSSAIA (Insurance Act) that allowed the extension of the insurance on a same-sex partner. When examining the alleged discrimination the Court recalled, once more, that “very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention.” In this case, the Court stated that the Government did not give “any justification for the difference in treatment experienced by the applicants and that experienced by cohabiters of the opposite sex.” The Court went on further to reiterate that “in

cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought.” According to the Court, it must also be shown that the exclusion of certain categories of persons (in this case those living in a homosexual relationship) is necessary to achieve that goal. The Government, the Court noted, “did not advance any argument supporting such conclusion.”

5. Freedom of assembly and association

In some Council of Europe Member States basic fundamental rights like the freedom of assembly and association are imperiled by public authorities. The Strasbourg Court had to deal with two cases in this field, both relating to the obstacles to gay-pride parades. In *Bączkowski v. Poland* (no. 1543/06) the Court held that only post hoc remedies were available in respect of the decisions refusing permission for the event and that even though the march was held nevertheless there had been violation of Articles 11 (freedom of assembly and association), 13 (right to an effective remedy) and 14 (prohibition of discrimination). The same breaches were found in *Alekseyev v. Russia* (no. 4916/07, 25924/08 and 14599/09), where the judges considered that repeated bans over the years were not deemed necessary in a democratic society, that no effective remedy was available to the applicant to challenge those bans, and that the bans discriminated on the basis of sexual orientation.

6. Criminal law

The leading case law of the Strasbourg Court first dealt with criminal provisions or practices that targeted homosexuals in particular. Over the past decades the Court clearly stated that criminal provisions cannot discriminate on the grounds of sexual orientation and found a number of violations of Article 8 (respect for private life). The ground-breaking judgment certainly is *Dudgeon v. UK* (no. 7525/76), decided in 1981. Northern Irish legislation considered homosexual conduct between males as a criminal offence (so called sodomy laws). It was a restriction on the applicant’s right to respect for his private life that

the Court found disproportionate to the aims sought to be achieved, namely the protection "of the rights and freedoms of others" and "of morals".

In *Norris v. Ireland* (no. 10581/83) the ECtHR found that it could not be maintained that in Ireland there was a "pressing social need" to make homosexual acts criminal offences, thereby outlawing criminalization of homosexual conducts per se. See also *Modinos v. Cyprus* (no. 15070/89), *A.D.T. v. UK* (no. 35765/97). Article 8 in conjunction with Article 14 of the Convention also prohibits criminalisation of homosexual relations between an adult and an adolescent if the age of consent is discriminatory compared to the one established for opposite-gender intercourse or with young females. See among others *L. and V. v. Austria* (nos. 39392/98 and 39829/98), *S.L. v. Austria* (no. 45330/99) and *B.B. v. UK* (no. 53760/00). Retention of data by the police for offenses under criminal laws targeting homosexuals already considered to violate the Convention in previous judgments is currently an issue pending in Strasbourg in the case *F.J. v. Austria* (no. 2362/08).

7. Freedom of movement in the EU and refugee claims

Directive 2003/86/EC on the right to family reunification harmonizes national legislation on the conditions for admission and residence of third-country nationals. It is however a matter for each Member State to decide whether it shall extend this right also to unmarried or registered partners of the sponsor. Family members can be refused entry on grounds of public order, internal security and public health.

Directive 2004/83/EC establishes minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. The Directive does not provide a definition of "unmarried partner" or unmarried couple and only imposes an obligation on Member States to regard unmarried couples as a family if the "legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens". Yet again, the determination as

to whether the term family includes same-sex couples rests with the Member States.

Section B. Discrimination of transsexual and transgender

Transsexual people are those who permanently identify with the gender opposite to their biological sex. Most world jurisdictions recognize only the two traditional genders as carrying certain rights and obligations. This results in legal difficulties concerning transgender members of the society, especially in the field of family law and marriage. The degree of legal recognition of transsexualism varies throughout the world. Many countries extend legal recognition to sex reassignment by permitting a change of so called legal gender on the birth certificate despite the fact that not many trans people have their bodies permanently changed by surgery. Many more decide to semi-permanently change their appearance with hormonal therapies. In many countries, some of these modifications are mandatory to obtain legal recognition. The amount to which non-transsexual and transgender people can benefit from the legal recognition given to transsexual people, i.e. those that have undertaken gender reassignment surgery, varies. In some countries, an explicit medical diagnosis of transsexualism is (at least formally) necessary. In others, a diagnosis of gender identity disorder, or simply the fact that one has established a different gender role, can be sufficient for all or at least part of the legal recognition effects granted by the State.

1. Gender reassignment and change of name

European Court of Human Rights and European Court of Justice

Gender correction

Considering developments in the ECtHR case-law made by *I. v. UK* (No 25680/94) and *Goodwin v. UK* (No 28975/95) – both cited below – gender identity has been verified to be one of the most intimate areas of a person's private life. The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate. In these circumstances, in *Van Kuck v. Germany* (No 35968/97) the Court found that the interpretation of the term "medical

necessity” and the evaluation of the evidence in this respect which led to denial of surgery were not reasonable. The Court stated that there has been a violation of Article 8 of the Convention (right to privacy).

In *L. v. Lithuania* (No 27527/03) the Court found that the circumstances of the case revealed “a limited legislative gap in gender-reassignment surgery,” in Lithuanian legislations, which left the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity. The Court also stated: “Whilst budgetary restraints in the public health service might have justified some initial delays in implementing the rights of transsexuals under the Civil Code, over four years have elapsed since the relevant provisions came into force and the necessary legislation, although drafted, has yet to be adopted.” The State was forced to change their legislations under threat of financial repercussions.

Change of documents

Analyzing the first cases that had to be dealt with by the Court concerning the possibility to reflect the correction of gender in personal documents the reader is faced with opposite rulings in seemingly similar cases. In *Rees v. UK* (No 9532/81) and *Cossey v. UK* (No 10843/84) the ECtHR said that the State is not obliged to enable the reflection of the desired gender in a transsexual person’s birth certificate. In *B. v. France* however, the Strasbourg Court ruled in favour of the applicant that the State should allow a transgender person to change their documents of everyday use (ID, drivers’ license) to fit their corrected gender.

The rulings seem contradictory, but in fact relate to differences in the legislation of Member States. In UK birth certificates have only historical meaning, and altering in any way constituted falsification, whereas in France they can be amended to envisage the current situation of an individual. Another issue was that documents such as ID are used on daily bases and not having them adjusted to the applicant’ gender could lead to many distressful situations. Birth certificates, on the other hand, were treated by the

Court as documents available only to the administrative officers, and therefore their content was not open to the public.

In the 2002 judgments *Goodwin and I.* the Court issued for the first time a statement that no circumstance justifies the prohibition of transsexuals from benefiting from the right to enter marriage. In the Court’s opinion it would be unreasonable to make ones right to marry conditional on the ability or their willingness to have children and the use of the words ‘man’ and ‘woman’ to describe ones biological sex only.

2. Consequences of gender reassignment for family life

2.1. Parental relationships

European Court of Human Rights

For a long time the Commission expressed an opinion that family life in the understanding of Article 8 of the Convention is possible only between consanguine relatives, spouses or is created by lawful adoption. In *X, Y & Z v. UK* (No 21830/93) a transgender partner of the child’s biological mother was denied by the State authorities the formal recognition of a child-father relationship. Court stated that Article 8 does not create such an obligation for the respondent State, but it nonetheless recognized the existence of family life between the transsexual person and his partner’s child. For practical purposes, this judgment was overruled in the U.K. by *Goodwin and I.*, because recognition of transsexual men as legal fathers, where their non-transsexual female partners have undergone donor insemination, will follow from recognition of transsexual men as legally men. In *P.V. v. Spain* (No 35159/09) the applicant, a transsexual person, complained that restrictions on the contact arrangements with her son violated Article 8 in conjunction with Article 14 because they were discriminatory. The Court found that the restriction was lawfully based on the child’s well-being in view of the applicant’s temporary emotional instability.

2.2 Obligation for a married transgender to divorce

European Court of Human Rights

The Court dealt in November 2006 (*Wena and Anita Parry v. UK*, No. 42971/05, and *R. and F. v. UK*, No. 35748/05) with two cases where the applicants were married and had children and subsequently underwent gender reassignment surgery. They remained with his/her spouse as a married couple. Under the terms of the Gender Recognition Act 2004, the applicants had to divorce in order to obtain a Gender Recognition Certificate. The applications were rejected as manifestly ill-founded. The Court held that UK law was enacted by having in mind this consequence on married transsexuals and that the State had no obligation to take into account and accommodate that small number of marriages. In the pending case *H v. Finland* (No. 37359/09) the applicant complains that legal recognition of her new gender entailed the transformation of her marriage into a civil partnership.

3. Health care

According to the Transgender EuroStudy Surveying conducted by ILGA 80% of transgender people in the EU are denied State funding for hormonal therapy and 86% are refused State funding for surgery. The result is that more than 50% of transgender people undergoing surgery are covering their expenses out of their own pockets.

European Court of Human Rights

In *Schlumpf v. Switzerland* (No 29002/06) the ECtHR considered the refusal of an insurance company to pay for the gender-reassignment surgery and stated that the waiting period of two years, particularly in view of the applicant's age of 67, was likely to have an impact on her decision as to whether to have the operation, thus impairing her freedom to determine her gender identity. It pointed out that the Convention guarantees the right to personal self-fulfillment and reiterated that the concept of "private life" could include aspects of gender identity. It noted the particular importance of questions concerning one of the most intimate aspects of private life, namely a person's gender identity, for the

balancing of the general interest with the interests of the individual.

4. Free movement of transgender persons in the EU

Problems with free movement of transgender people may arise when the national law prevents them from being recognized in the desired gender in public records and from obtaining updated documents. It is also problematic when gender correction takes place in one State and an individual seeks recognition in another State.

5. Transgender asylum seekers

Asylum claims relating to transgender issues should be addressed in accordance with the 1951 United Nations Convention Relating to the Statute of Refugees provided all criteria of the refugee definition are met. The Convention treats transgender people as members of a 'particular social group' that might be vulnerable to discrimination.

6. Transgender people and employment

The case law of European Court of Justice concerning employment and related issues confirms that discrimination against transgender people is discrimination based on sex and thus is governed by the laws against sex discrimination which implement EU law.

Statistics cited by Council of Europe Commissioner for Human Rights Thomas Hammarberg in the Issue Paper on Human Rights and Gender Identity undoubtedly show that transgender people are often discriminated against in the field of employment. Studies show that only 31% of transgender respondents have full-time employment. 23% felt that they need to change their jobs because of the discrimination, 10% were victims of verbal and 6% of physical abuse in the workplace. 42% of respondents were afraid to change their gender, because they thought they might lose their jobs.

European Court of Human Rights and European Court of Justice

The European Court of Human Rights ruled that the applicant, Ms. Grant, was victim of unequal

treatment and the U.K. had violated its obligation to respect her private life when it refused to legally recognize her post-operative gender and consequently denied her a retirement pension at the same age as other women (case *Grant v. UK*, No 32570/03). A Press For Change activist secured employment protection for transsexual people throughout the European Union through the landmark case of *P v S and Cornwall County Council* (Case C-13/94). In view of the objective pursued by Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5 of the directive precludes dismissal of a transsexual person for a reason related to a gender reassignment.

In *KB v NHS Pensions Agency* (case C-117/01), the European Court of Justice dealt with a case arisen before the Gender Recognition Act 2004 came into force. The Luxembourg judges held that the inequality of treatment with regard to widower's pension when one of the partners is a transsexual relates to the capacity to marry, where marriage is a necessary precondition for its award. The legislation granting this benefit was found to be in principle incompatible with Community law. On April 27th, 2006, the European Court of Justice ruled that a British transsexual woman was discriminated against when she was treated as a man and refused a State pension in *Richards v Secretary of State for Work and Pensions* (C-423/04). The case has important implications for other transsexual women in the UK, who may be able to claim backdating of their pensions.

Since *P. v. S and Cornwall County Council* transsexual persons enjoy the strong protection provided under EU law for cases of sex discrimination. Directive 2006/54/EC implements the principle of equal opportunities and equal

treatment of men and women in matters of employment and occupation (recast). Its Recital 3 enshrines in EU law the ECJ jurisprudence by introducing an explicit reference in relation to discrimination based on 'gender reassignment'. Although it is yet to be seen whether transgender people non undertaking surgery may at same point in the future benefit from the same protection, it is clear that gender reassignment enjoys a broader protection than sexual orientation.

Conclusion

Since the Treaty of Amsterdam ratified in 1997 the EU is finally equipped to take measures against discrimination. Since then, EU has come a long way and anti-discrimination laws are now compulsory in a wide range of fields. It is worth keeping an eye on the most recent case-law of the ECtHR and the ECJ. The ECJ established *Römer*, in the context of the Employment Equality Directive 2000/78/EC, that the general principle of non discrimination, already affirmed in cases such as *Mangold* (C-144/04) and *Kücükdeveci* (C-555/07), applied also to sexual orientation. Moreover, European citizenship casts new light on the status of same-sex couples and same-parented families if one follows the novelty of the ECJ reasoning in the *Ruiz Zambrano* case (C-34/09), for instance in instances of family reunion with the same-sex third national partner. Nonetheless, there is still a lot to be done to ensure equal treatment of such vulnerable groups as gay, lesbians and transsexual people. That is why it is so important for lawyers to understand and apply the existing legislations in their professional work, but also to work as authorities in sensitizing the general public and the authorities that insuring the adequate level of human rights protection is a basis of every modern society.

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