Equality and Non-Discrimination under the ECHR and EU Law

A Comparison Focusing on Discrimination against LGBTI Persons

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Abstract 521
I. Introduction 522
II. Background and Context: Some Basic Differences between the ECHR and EU Law 524
III. The Prohibition of Discrimination under the ECHR and EU Law 527
1. A (in principle) Unitary Source vs Multiple Sources 528
2. Grounded in an Aristotelian Understanding of Legal Equality 529
3. An Accessory vs a Stand-Alone Prohibition 530
4. Discrimination Grounds 531
5. The Material Scope of the Prohibition of Discrimination 531
6. Different Forms of Discrimination 532
7. An Open vs a Closed System of Justification 534
IV. Illustration: Discrimination against LGBTI People 536
1. Introductory Remarks 536
2. I – Discrimination against Intersex People: The Missing Ground 538
3. T – Discrimination against Transgender People: Problems of Comparison and of the Scope of the Law 543
4. LGB – Discrimination on Grounds of Sexual Orientation: Forms of Discrimination and Justification in Particular 546
a) Recognising the Discrimination Ground of Sexual Orientation 546
b) The Scope of the Prohibition 549
c) The Meaning of Discrimination 551
aa) Comparability 551
bb) Direct and Indirect Discrimination, and Justification 554
d) Finally: The Role of Soft Law 559
V. Conclusion 560

Abstract

The contribution highlights differences in the legal approach of the European Convention on Human Rights (ECHR) of the Council of Europe on the one hand, and the law of the European Union (EU) on the other hand, with respect to the issue of legal equality and non-discrimination,

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with a particular focus on discrimination against LGBTI (Lesbian, Gay, Bisexual, Transsexual and Intersex) people. The differences discussed are both general (i.e. linked in particular to the origins, development and addressees of the two legal systems) as well as specific (i.e. linked in particular to the source, reach and definition of the prohibitions of discrimination under the two legal systems). The Handbook on European Non-Discrimination Law jointly published by the EU's Fundamental Rights Agency and the Council of Europe's Human Rights Court may be seen as an attempt to bring the two legal orders closer to each other even before the accession of the EU to the ECHR.

More specifically, the differences between EU and ECHR non-discrimination law are illustrated by looking more closely at the legal rules on discrimination against LGBTI people. The analysis shows that whilst discrimination against intersex people is the missing ground in both systems, discrimination against transgender people raises in particular problems of comparison as well as the scope of law, and discrimination on grounds of sexual orientation raises issues in particular related to the different forms of discrimination and justification. Overall, LGBTI rights and non-discrimination came into the picture only gradually and there are still important lacunae, in particular with respect to intersexual and transgender people. It is here that soft-law can and should play an especially meaningful role. Against this background, the adoption by the European Parliament of a report calling on the European Commission to adopt an EU Roadmap tackling homophobia, transphobia and discrimination on the grounds of sexual orientation and gender identity (so-called *Lunacek* Report) is very welcome.

I. Introduction

The aim of the present contribution[1] is to highlight differences in the legal approach of the European Convention on Human Rights (ECHR) adopted by the Council of Europe[2] on the one hand and the law of the Eu-

[1] The author wishes to thank Ms *Nelleke Koffeman*, Ph.D. candidate at Leiden University (Netherlands), for her helpful comments on a draft version of this text.

[2] On discrimination under the ECHR in general, e.g. *O. M. Arnardóttir*, Equality and Non-discrimination under the European Convention on Human Rights; *J. H. Gerards*, Art. 14. Verbod van discriminatie, in: Sdu Commentaar EVRM. Rechtspraak & Commentaar, 2013; *A. Peters/D. König*, Kapitel 21: Das Diskriminierungsverbot, in: O. Dörr/R. Grote/T. Marauhn (eds.) (Gesamtredaktion: S. Rupprecht/J. Thorn), EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, 2nd ed., Vol. II, 2013, 1301; and

ropean Union (EU)[3] on the other, with respect to the issue of legal equality and non-discrimination.[4] Underlying this aim is the question of how much room for action, in particular for standard-setting on the informal level (i.e. through non-binding measures) remains for the states, especially those belonging to the Council of Europe, in view of the perceived ever-increasing reach of EU law in this field.

As has been pointed out by authors such as *Besson*[5] and *Burri*[6] with respect to gender discrimination, by *Haverkort-Speekenbrink*[7] with respect to discrimination on grounds of religion and by *de Schutter*[8] more generally with respect to non-discrimination, there is a marked difference between the approaches of the ECHR and of EU law to the issues of equality and non-discrimination. This paper goes in the same direction but chooses a different focus, namely discrimination against LGBTI people. The paper begins with a brief overview of the most important differences between the legal systems of the ECHR and EU law, differences that are also important in the context of equality and non-discrimination (see II. below). Thereafter, the general differences between the prohibitions of discrimination under the ECHR and EU law will be described (see III. below). The specific focus on discrimination against LGBTI people will then serve as an illustration of some of the main differences between ECHR and EU non-discrimination law (see IV. below).

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the part on Art. 14 ECHR in: *C. Grabenwarter*, The European Convention for the Protection of Human Rights and Fundamental Freedoms. A Commentary, 2014.

[3] Generally on EU (social) non-discrimination law, e.g. *E. Ellis/P. Watson*, EU Anti-Discrimination Law, 2012, and *C. Tobler*, The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach, in: A. Rosas/E. Levits/Y. Bot (eds.), La cour de justice et la construction de l'Europe: Analyses et perspectives de 60 ans de jurisprudence/The Court of Justice and the Construction of Europe: Analyses and Perspectives on 60 Years of Case-law, 2013, 443.

[4] Very generally on equality and non-discrimination: e.g. *S. Fredman*, Discrimination Law, 2nd ed. 2011.

[5] *S. Besson*, Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?, HRLR 8 (2008), 647.

[6] *S. D. Burri*, Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and Some Case Law of the EU and the ECHR, Utrecht Law Review 9 (2013), 80.

[7] *S. Haverkort-Speekenbrink*, European Non-Discrimination Law. A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue, 2012, in particular 193 et seq.

[8] *O. de Schutter*, Discrimination under European Human Rights Law. Relevance for the EU Non-Discrimination Directives – An Update, available at <http://www.ab.gov.tr>.

II. Background and Context: Some Basic Differences between the ECHR and EU Law

Drawing in particular on the work of the authors mentioned in the introduction (though without making specific reference to them in the present context), this section very briefly recalls some general differences between the legal systems of the ECHR and the EU.

Looking back at the origins, a first difference concerns the place of non-discrimination law in the respective legal systems. Whilst the ECHR was established as a general bill of rights, including also the prohibition of discrimination under Art. 14 ECHR as a particular human rights aspect with the function of a minimum guarantee within a larger system of the same type, the original European Community law was essentially economic in nature. The European Coal and Steel Community, the European Atomic Energy Community (Euratom) and the European Economic Community (EEC, later renamed "Economic Community", EC) saw the prohibition of discrimination under the treaties as the cornerstone of economic integration and as a matter of ensuring a level playing field for competition. This included in particular discrimination on grounds of nationality, as well as the principle of equal pay for men and women, although the latter was formally part of EEC social law.[9] The recognition of human rights entered Community law only through the case-law of the European Court of Justice (formerly Court of Justice of the European Communities, ECJ, now Court of Justice of the European Union, CJEU).[10]

Second, ECHR and EU law differ in terms of their development, especially with regard to the scope of the law. From the beginning, the ECHR had a very broad material scope, meaning that it covered many aspects of life. Subsequently, the Convention developed mostly through case-law, in particular through the European Court of Human Rights' (ECtHR) doctrine of the Convention as a "living instrument" which must be interpreted in the light of present-day conditions. This means that much could be achieved through interpretation, making formal amendments to the ECHR or the adoption of new conventions unnecessary in many areas. This is also

[9] See in particular *L. Imbrechts*, L'égalité de rémuneration entre hommes et femmes, RTD Eur. 1986, 231, and *C. Barnard*, The Economic Objectives of Article 119, in: T. K. Hervey/D. O. O'Keeffe (eds.), Sex Equality Law in the European Union, 1996, 320.

[10] In the present contribution, the abbreviation CJEU is used throughout for reasons of simplicity, also in the pre-Lisbon context.

true of non-discrimination,[11] where, apart from Protocol 12, there have been no formal changes in the ECHR. Instead, the focus has rather been on the implementation and enforcement of the existing law.

In contrast, European Community law and later EU law developed very dynamically through Treaty revisions, the adoption of secondary law and case-law from the CJEU. This is particularly visible in the field of non-discrimination law, which developed[12] into a complex multi-layered system including some substantive prohibitions of discrimination in the Treaty on the Functioning of the European Union (TFEU, which is the revised and renamed former EC Treaty), a great deal of specific secondary law on different types of discrimination and with different fields of application, and a number of General Principles of equal treatment and non-discrimination that were recognised by the CJEU as part of EU primary law.[13] In contrast, there is no such general principle under the ECHR.[14]

More recently, some of these principles have found expression in the EU's Charter of Fundamental Rights (CFR) which, through the Lisbon Treaty revision, has been given the same legal status as the Treaties (Art. 6(1) TFEU) and which binds not only EU institutions but also EU Member States where they act within the scope of EU law (Art. 51(1) CFR, as interpreted by the CJEU).[15] The Charter contains a specific title on "Equality" with provisions on a number of different aspects. However, it should be added that the practical value of the General Principles and of the Charter is limited, as in most non-discrimination cases the relevant legal framework continues to consist of specific rules, in particular rules to be found on the level of secondary law. An apparent and confusing exception is Directive 2000/78/EC,[16] in respect of which the CJEU has held that the various prohibitions of discrimination mentioned in this Directive do not flow from the Directive itself but rather from General Principles, to which specific ex-

[11] On the development of case-law on Art. 14 ECHR, see e.g. *F. Tulkens*, L'évolution du principe de non-discrimination à la lumière de la jurisprudence de la Court européenne des droits de l'homme, in: J.-Y. Carlier (ed.), L'étranger face au droit. XXes journées d'études juridiques Jean Dabin, 2010, 193.

[12] See in particular *G. More*, The Principle of Equal Treatment: From Market Unifier to Fundamental Right, in: P. Craig/G. de Búrca (eds.), The Evolution of EU law, 1st ed. 1999, 517; *M. Bell*, The Principle of Equal Treatment: Widening and Deepening, in: P. Craig/G. de Búrca (eds.), The Evolution of EU law, 2nd ed. 2011, 611.

[13] See also *C. Tobler* (note 3).

[14] See *A. Peters/D. König* (note 2), paras. 5 and 6.

[15] CJEU, Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, judgment of 26.2.2013, n.y.r.

[16] Council Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

pression is given by the Directive in the field of employment and occupation (*Mangold*,[17] *Kücükdeveci*,[18] *Kristensen*[19]). More recently, the Court has confirmed that Art. 21 CFR is sufficient in itself to confer on individuals a right which they may invoke (*Association de médiation sociale*).[20]

The differences in development between the ECHR and the EU law also mean that new issues appeared in the two legal orders at different times. For example, the issue of protection against disadvantageous treatment based on a person's sexual orientation arose in ECtHR case-law early on, based on an interpretation of the Convention that linked sexual orientation to the right to private life under Art. 8 ECHR (though in the first such case, *Dudgeon v. UK*[21] in 1981, the ECtHR found it unnecessary also to look into Art. 14 ECHR). *Wintemute*[22] has argued that private life is affected in every case of sexual orientation or gender identity discrimination, and that Art. 14 ECHR can, therefore, always be invoked. In contrast, the CJEU, having declared itself unable to include the issue under the heading of sex discrimination (*Grant*),[23] was able to deal with questions relating to discrimination on grounds of sexual orientation arising in the Member States[24] only once the first cases arising under Directive 2000/78/EC reached it (namely *Maruko*[25] in 2008). Despite denying any basis of a prohibition under EC law before that Directive, the CJEU did refer to the case-law of the ECtHR. Obviously, given the dialogue between courts, the court that addresses an

[17] CJEU, Case C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981.

[18] CJEU, Case C-555/07 *Seda Kücükdeveci v. Swedex GmbH & Co. KG* [2010] ECR I-365.

[19] CJEU, Case C-476/11 *HK Danmark, acting on behalf of Glennie Kristensen v. Experian A/S*, judgment of 26.9.2013, n.y.r.

[20] CJEU, Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*, judgment of 15.1.2014, n.y.r.

[21] ECtHR, *Dudgeon v. The United Kingdom* (Application No. 7525/76), judgment of 22.10.1981.

[22] *R. Wintemute*, "Within the Ambit": How Big Is the Gap in Article 14 European Convention on Human Rights?, EHRLR 9 (2004), 366; *R. Wintemute*, Filling the Article 14 "Gap": Government Ratification and Judicial Control of Protocol No. 12 ECHR, EHRLR 9 (2004), 484.

[23] CJEU, Case C-249/96 *Lisa Jacqueline Grant v. South-West Trains Ltd.* [1998] ECR I-621. See generally *N. D. Hunter*, The Sex Discrimination Argument in Gay Rights Cases, Journal of Law and Public Policy 2000/2001, 397.

[24] As opposed to the EU's (previously: the Communities') internal employment law. In that regard, see CJEU, Joined Cases C-122/99 P and C-125/99 P *D and Sweden v. Council* [2001] ECR I-4319.

[25] CJEU, Case C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757.

issue for the first time has considerable power in setting the tone on the matter even if the legal context is not the same.[26]

A third difference concerns those obliged by the ECHR and EU law. Whilst the ECHR binds only its Signatory States, EU law other than directives can bind both Member States and individuals, e.g. employers.[27] Accordingly, individuals may be able to invoke EU law and to rely on it in proceedings against other individuals before national courts. Ultimately, the differences mentioned reflect a deeper difference in the nature of the organisations behind the ECHR and EU non-discrimination law. Whilst the Council of Europe is an intergovernmental organisation, the European Union has largely been a supranational organisation since the Lisbon revision. This has consequences with respect to enforcement. Given the ability of individuals to apply to the ECtHR, the ECHR is more developed than other public international law. There is also ECtHR case-law on enforcement issues related to discrimination, e.g. with respect to the burden of proof.[28] Nevertheless, EU law is considerably stronger, being characterised by a particularly sophisticated enforcement system. In the area of non-discrimination law, the most modern generation of EU directives contains explicit provisions on enforcement, dealing with, among other issues, the right to judicial access, the burden of proof and sanctions for discrimination. Much of the EU's present enforcement law developed in the context of issues related to non-discrimination.[29]

III. The Prohibition of Discrimination under the ECHR and EU Law

With respect to the prohibition of discrimination, there are a number of commonalities between the ECHR and EU law, namely their foundation in an Aristotelian understanding of equality, the recognition that discrimination can take different forms and that discriminatory action may be justi-

[26] Compare e.g. *F. G. Jacobs*, Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice, Tex. Int.'l L. J. 38 (2003), 547; *M. E. Villiger*, The Dialogue of Judges, in: C. Hohmann-Dennhardt/P. Masuch/M. Villiger (eds.), Festschrift für Renate Jäger. Grundrechte und Solidarität. Durchsetzung und Verfahren, 2010, 195.

[27] See e.g. *C. Tobler/J. Beglinger*, Essential EU Law in Charts, 3rd ed. 2014, Chart 8/3.

[28] See *O. M. Arnardóttir*, Non-discrimination Under Article 14 ECHR: The Burden of Proof, Sc. St. L. 52 (2007), 14.

[29] See *C. Tobler*, The Impact of Non-Discrimination Law in Developing a General Doctrine of Enforcement Under EU Law, in: E. Ellis/K. Benediktsdottír (eds.), Equality into Reality. Action for Diversity and Non-Discrimination in Iceland, 2011, 67.

fied, at least in principle, though beyond that principle there is a major difference in approach between the two systems with respect to justification. The same is true with respect to the sources of law, the discrimination grounds, the scope of the prohibition of discrimination and its nature as either a stand-alone or an accessory right. The following provides a general introduction to these issues, which is then illustrated in the specific context of discrimination against LGBTI persons.

1. A (in principle) Unitary Source vs Multiple Sources

One particularly important difference between the ECHR and EU law with respect to non-discrimination concerns the formal source of this prohibition. In the ECHR, there is one single provision on this issue, at least as far as the general level is concerned, namely Art. 14 (on the level of protocols to the ECHR, e.g. Art. 5 of Protocol 7, concerning equality between spouses, can be seen as a specific provision). Art. 14 ECHR (Prohibition of discrimination) provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[30]

As already stated, EU non-discrimination law is characterised by a multiplicity of sources. This is particularly true of the social field, where there are different legal instruments for different discrimination grounds which exist in addition to the Charter of Fundamental Rights and the EU's General Principles. In addition, these instruments reflect different stages in the development of the law. This is the case for sex discrimination, where the following specific Treaty provision and directives currently concern individual rights (namely Art. 157 TFEU as well as Directives 79/7/EEC,[31]

[30] An additional source of non-discrimination rights is the European Social Charter. However, compared to the Convention, it is less strong not only in terms of enforcement, but more fundamentally in terms of its reach among the Council of Europe's Signatory States. For example, the Social Charter has not been signed and ratified by two states (namely Liechtenstein and Switzerland) and has only been signed but not ratified by a number of others. The European Social Charter is not discussed in the present paper.

[31] Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24.

2004/113/EC,[32] 2006/54/EC[33] and 2010/41/EU;[34] a proposal for a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures[35] is pending).

In contrast, there is one single yet far-reaching directive concerning discrimination on grounds of racial or ethnic origin, namely Directive 2000/43/EC.[36] With respect to sexual orientation, religion or belief, disability and age, there is the more modest Directive 2000/78/EC.[37] In this field, a proposal for an additional directive has been pending for several years.[38]

2. Grounded in an Aristotelian Understanding of Legal Equality

Both the ECHR and EU law share a foundation in an Aristotelian understanding of equality, i.e. a general definition according to which legal equality means that similar situations are to be treated in the same manner and different situations are to be treated differently on the basis of their difference(s). Accordingly, both legal orders attribute great importance to comparability, and both recognise that discrimination can result from either different treatment of comparable situations or from the same treatment of different (non-comparable) situations.[39]

Under the ECHR, the recent case of *E.B. and others v. Austria*[40] is an example where the ECtHR found discrimination based on the same treatment

32 Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

33 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23.

34 Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ 2010 L 180/1.

35 COM(2012) 614 final.

36 Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

37 Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

38 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

39 CJEU, Case 13/63 *Italy v. Commission* [1963] ECR 165; ECtHR, *Thlimmenos v. Greece* (Application No. 34369/97), judgment of 6.4.2000.

40 ECtHR, *E.B. and Others v. Austria* (Application Nos. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07), judgment of 7.11.2013.

of non-comparable situations. The applicants complained that their convictions for homosexual acts with consenting adolescents within the age bracket of 14 to 18 years under Austrian criminal law remained on their criminal record even though the ECtHR had found the relevant provision of Austrian criminal law to be discriminatory and the Austrian Constitutional Court had annulled it. The ECtHR reiterated that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is not only violated in cases of differential treatment, but also when states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. In the present case, the ECtHR found that the failure to treat the applicants differently from other persons also convicted of a criminal offence, but where the offence in question had not been quashed by the Constitutional Court or otherwise abolished, amounted to discrimination on grounds of sexual orientation.

Overall, it would appear that the ECHR is stronger when it comes to recognising discrimination resulting from same treatment. In EU social law, so far there is an explicit provision actually *demanding* different treatment only with respect to discrimination on grounds of disability (namely Art. 5 of Directive 2000/78/EC, on reasonable accommodation).

3. An Accessory vs a Stand-Alone Prohibition

One particularly important difference between the ECHR and EU law with regard to non-discrimination concerns the basic nature of the respective laws: For those (numerous) Council of Europe states to which Protocol 12 does not apply, Art. 14 ECHR only guarantees an accessory right to non-discrimination, namely in the exercise of other rights under the Convention or any of its protocols, though within this framework the scope of the right to non-discrimination is very broad, as shown below.[41] Until about the year 2000, where the Court found a violation of another right, it tended to refrain from also examining the existence of discrimination under Art. 14 ECHR. In contrast, EU law contains many free-standing and specific non-discrimination provisions, i.e. provisions that grant a right to non-discrimination on their own, though usually within a limited field of application.

[41] See III. 5. below.

4. Discrimination Grounds

Most of the concepts concerning different forms of discrimination are tied to specific discrimination grounds. It is here that a particularly noticeable difference between the ECHR and EU law becomes apparent. Art. 14 ECHR is worded openly, i.e. it does not contain a closed list of discrimination grounds but only lists examples ("on any ground such as …"). Accordingly, it was possible for the ECtHR to recognise, and thereby add, grounds not explicitly listed or even to state that it is ultimately not necessary to determine on what ground a difference is based.[42]

In contrast, EU law outside its internal employment law (which is not discussed in this contribution) has traditionally been based on a closed system with a limited number of discrimination grounds, as enumerated in the statutory prohibitions of discrimination that developed over time. Today, Art. 21 CFR is different ("any discrimination based on any ground such as …"), though it is important to remember that the Charter binds the Member States only when they act within the scope of EU law. The meaning and reach of the different discrimination grounds under the ECHR and under EU law will be discussed further in the specific context of discrimination against LGBTI persons.

5. The Material Scope of the Prohibition of Discrimination

Given its link to the ECHR as a whole, the material scope of Art. 14 ECHR has always been very broad. It has been further broadened through the ECtHR's case-law. First, any additional rights which fall within the general scope of the Convention and which the state in question has voluntarily decided to provide are also covered.[43] Secondly, the application of Art. 14 ECHR does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. Rather, it is sufficient but also necessary for the facts of the case to fall "within the ambit" of the Convention.[44] With respect to issues not covered by the Convention, the prohibi-

[42] ECtHR, *Rasmussen v. Denmark* (Application No. 8777/79), judgment of 28.11.1984. *Gerards* has argued that the Court's approach to the recognition of discrimination grounds is inconsistent and confused; cf. *J. Gerards*, The Discrimination Grounds of Article 14 of the European Convention on Human Rights, HRLR 13 (2013), 99.

[43] The leading case on this matter is ECtHR, *Carson v. UK* (Application No. 42184/05), judgment of 16.3.2010.

[44] E.g. ECtHR, *Andrejeva v. Latvia* (Application No. 55707/00), judgment of 18.2.2009; see e.g. *J. H. Gerards* (note 2), C.1.1 Accessoir karakter; further e.g. *A. Baker*, The Enjoyment

tion of discrimination under the European Social Charter may be applicable.

In contrast, the material scope of specific non-discrimination provisions in EU law is often quite limited and uneven. For example, whilst Directive 2000/78/EC only applies in the field of employment and occupation, the material scope of Directive 2000/43/EC is considerably broader, also including e.g. employment-related social security, further access and supply of goods and services, and other matters such as education and social advantages. The only exception to this is the prohibition of discrimination on grounds of nationality, which applies in the full scope of EU law. The reach of the different non-discrimination rules will be further discussed in the specific context of discrimination against LGBTI persons.

6. Different Forms of Discrimination

Both the ECHR and EU law recognise that different forms of discrimination exist. In particular, discrimination can be either obvious or overt (direct discrimination), or covert (indirect discrimination), though the development of the concept of indirect discrimination began much earlier in the EU (then the EEC) than under ECHR law and today remains considerably more developed under EU law.

In the ECHR, the ECtHR's case-law definition of indirect discrimination is a comparatively recent one (*Hoogendijk*[45] in 2005), and it appears to be applied only relatively hesitantly and in limited contexts (namely in the context of the so-called Roma school segregation cases *D.H. and Others v. Czech Republic*,[46] *Oršuš and Others v. Croatia*[47] and *Horváth and Kiss v. Hungary*[48] concerning indirect discrimination on grounds of ethnic origin, though the latter had been argued before the Court as a direct discrimina-

of Rights and Freedoms: A New Conception of the "Ambit" under Article 14 EHRC, M.L.R. 69 (2006), 714.

[45] ECtHR, *Hoogendijk v. The Netherlands* (Application No. 8641/00), judgment of 6.1.2005.

[46] ECtHR, *D.H. and Others v. Czech Republic* (Application No. 57325/00), judgment of 13.11.2007.

[47] ECtHR, *Oršuš and Others v. Croatia* (Application No. 15766/03), judgment of 16.3.2010.

[48] ECtHR, *Horváth and Kiss v. Hungary* (Application No. 11146/11), judgment of 29.1.2013. The attorney-at-law for the applicants in this case was *L. Farkas*, the author of the report on "Segregation of Roma Children in Education Addressing Structural Discrimination through the Race Equality Directive" (for the European Commission), 2007.

tion case).[49] Under the ECHR, the concept of indirect discrimination is important despite the above-mentioned open catalogue of discrimination grounds under Art. 14 ECHR because of the ECtHR's differentiated approach to justification (to be discussed in the section on justification below).

In the EU, the distinction between direct and indirect discrimination originates from CJEU case-law.[50] Today, the most recent generation of secondary EU social non-discrimination law contains legal definitions of these concepts. For example, under Art. 2(a) of Directive 2004/113/EC direct discrimination on grounds of sex exists

> "where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation".

Art. 2(b) of the same Directive defines indirect sex discrimination as referring to the situation

> "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

The distinction between direct and indirect discrimination will be further discussed below in the specific context of discrimination against LGBTI persons.

In addition, the most recent generation of EU social non-discrimination law also mentions harassment and the instruction to discriminate. For the former, there are legal definitions. To take the example of Directive 2004/113/EC again, Art. 2(c) describes harassment related to sex as a situation

> "where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment".

As a result of the CJEU's case-law, there are also further concepts such as discrimination by association,[51] and there is a debate on whether a lack of

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[49] See *L. Farkas*' comments on the following blog website, with a link to the submission and applicants' observations: *A. Timmer*, Horváth and Kiss v. Hungary: A Strong New Roma School Segregation Case, Strasbourg Observers, 6.2.2013, available at <http://strasbourgobservers.com>.

[50] *C. Tobler*, Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law, 2005; *J. H. Gerards* (note 2), C.1.5.2 Geschiedenis van erkenning van het concept van indirect onderscheid.

[51] CJEU, Case C-303/06 *S. Coleman v. Attridge Law and Steve Law* [2008] ECR I-5603.

reasonable accommodation, in particular in the context of disability and against the background of the UN Convention on the Rights of Persons with Disabilities, must be seen as discrimination.[52] Both the ECHR and EU law also account for the legal concept of positive action, which is often construed as an exception to equal treatment even though in the present writer's view it is more logical to see it as "the other side" of equality. Whilst in EU law positive action is more developed, the case-law of the ECtHR appears to have the advantage that, depending on the situation, positive action may actually be demanded, rather than only allowed.[53]

7. An Open vs a Closed System of Justification

Both the ECHR and EU law accept that, in principle, discrimination can be justified. Strictly speaking, there is, in fact, no discrimination where there is justification. As long as justification has not been examined, there is at the most *prima facie* discrimination.

With respect to Art. 14 ECHR, the ECtHR stated generally in e.g. *Vallianatos and Others v. Greece*[54] (para. 76):

> "[I]n order for an issue to arise under Article 14 there must be a difference in the treatment of persons in comparable situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment […]."[55]

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[52] See e.g. *D. Schiek/L. Waddington/M. Bell* (eds.), Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, 2007, 632. In a broader context; outside the issue of disability, see e.g. *J. Ringelheim/E. Bribosia/I. Rorive*, Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?, Maastricht J. Eur. & Comp. L. 17 (2010), 137.

[53] *J. H. Gerards* (note 2), C.I.1. Positieve discriminatie en voorkeursbeleid.

[54] ECtHR, *Vallianatos and Others v. Greece* (Application Nos. 29381/09 and 32684/09), judgment of 7.11.2013. On this case, see e.g. the annotation by *N. Koffeman*, EHRC 2014/34.

[55] More generally on the issue of the margin of appreciation, see e.g. *N. Bamforth*, Families But Not (Yet) Marriages? Same-sex Partners and the Developing European Convention "Margin of Appreciation", Child & Family Law Quarterly 23 (2011), 128.

However, according to the ECtHR's case-law, discrimination on certain grounds is more suspect than on others (e.g. *Karner v. Austria*).[56] More specifically, differences in treatment on the basis of birth out of wedlock, sex, sexual orientation, race and ethnic origin, nationality and disability must be justified by "particularly weighty reasons" or "very weighty reasons" and be proportionate, i.e. there must a reasonable relationship of proportionality between the means employed and the aim sought to be realised; more specifically, the means must be suitable and necessary. In other cases, there is the broader possibility of objective and reasonable justification, which requires the pursuit of a legitimate aim and proportionality and leaves the States a certain margin of appreciation. According to *Danisi*,[57] very weighty reasons are increasingly required for justification under the ECHR. At the same time, it has been noted by *Koffeman*[58] that the Court's approach is not always consistent, especially where a wide margin "is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy" (e.g. *Schalk and Kopf*,[59] para. 97).[60]

Under EU law, what justification is available depends on the legal provision in question. Not all non-discrimination provisions mention justification. It also depends on the type of discrimination, direct or indirect (rather than on the ground as under Art. 14 ECHR). Traditionally, direct discrimination can be justified only on the basis of specific grounds enumerated in the relevant EU law (known as statutory derogations).[61] For indirect discrimination, the very definition of this concept as defined under EU law includes the broader element of objective justification. There are, however, exceptions where objective justification is also available for direct discrimination. This concerns notably age discrimination under Art. 6(1) of Directive 2000/78/EC and sex discrimination under Art. 4(5) of Directive 2004/113/EC. Furthermore, the range of statutory discrimination grounds may differ in different legal frameworks (compare e.g. Directives

[56] See e.g. ECtHR, *Karner v. Austria* (Application No. 40016/98), judgment of 24.7.2003; *D. Schiek/L. Waddington/M. Bell* (note 52), 36 et seq.

[57] *C. Danisi*, How Far Can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in Its Nondiscrimination Jurisprudence, International Journal of Constitutional Law 9 (2011), 793.

[58] *N. Koffeman*, (Annotation of *Schalk and Kopf*), EHRC 2010/92, point 10.

[59] ECtHR, *Schalk and Kopf v. Austria* (Application No. 30141/04), judgment of 24.6.2010.

[60] With respect to derogations, see also Art. 15 (1) ECHR.

[61] See e.g. *C. Tobler*, Rechtvaardiging van direct onderscheid in het EG-Recht. Het gesloten stelsel van discriminatiegronden in breder perspectief: discussie vervolgd, 2001, 121.

2000/43/EC and 2000/78/EC). – Again, this issue will be further discussed below in the specific context of discrimination against LGBTI people.[62]

IV. Illustration: Discrimination against LGBTI People

1. Introductory Remarks

Against the background outlined above, the present contribution will now turn to concrete examples in order to illustrate both the differences between the ECHR and EU law and the potential room for standard-setting within the framework of the existing legal framework, focusing on discrimination against LGBTI (Lesbian, Gay, Bisexual, Transsexual and Intersexual) people. There are different reasons for this choice. First, LGBTI people are particularly vulnerable as compared to other groups in our societies (and within the LGBTI group, intersex and transgender people are even more so than gay, lesbian and bisexual people).[63] In fact, legal recognition of discrimination against LGBTI people is relatively recent, which leaves room for development. As is evidenced by recent political developments also in Europe,[64] this is an area that needs much work (though, on the positive side, it has become topical in business, albeit mostly only in the form of LGBT, leaving out the I).[65] Second, in this area there are some interesting differences in the approach under the ECHR as compared to EU law. Finally, it should be remembered that at the root of discrimination against LGBTI people are often stereotypes concerning the sexes, meaning that there is also

62 See IV. below.

63 For the general situation of LGBTI people in Europe, see the Rainbow Europe Map and Index of May 2012 presented by the International Lesbian and Gay, Bisexual, Trans & Intersex Association (ILGA), available at <http://www.ilga-europe.org>; and the FRA's EU LGBT survey of May 2013, available via <fra.europa.eu> (unfortunately, this document omits the situation of intersex persons). With respect to the particular vulnerability of intersex and trans people, see e.g. *S. Agius/C. Tobler*, Trans and Intersex People. Discrimination on the Grounds of Sex, Gender Identity and Gender Expression (for the European Commission), 2012, 11 et seq.; <http://www.migpolgroup.com>.

64 Compare e.g. *P. Johnson*, "Homosexual Propaganda" Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?, Working paper 8.7.2013, available via <http://papers.ssrn.com>.

65 For example, IBM has received various awards for its work in the field of Lesbian, Gay, Bisexual and Transgender Diversity (<http://www-03.ibm.com>). See also e.g. the possibility offered by the bank Credit Suisse to buy into a portfolio of large companies with LGBT-friendly corporate policies (reported by the Financial Times, 21.10.2013), and the campaign of Apple Corporate Executive Officer *Tim Cook* for LGBT Workplace Rights (<http://www.macobserver.com>).

a link to sex discrimination, which remains one of the most fundamental problems of our present-day societies.[66]

It should be noted that the legal reach of the following discussion is limited. In the context of EU law, it is based on the Union's specific non-discrimination law, to the exclusion of other areas of law where discrimination merely plays an indirect role (such as asylum, at issue in the important recent case of *X., Y. and Z.*),[67] the free movement of same-sex couples between EU Member States (much debated in academic writing)[68] or the law on the Structural Funds. In the context of the CoE, the focus is on Art. 14 ECHR, to the exclusion of e.g. the reference to sexual orientation in the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 2007 or the reference to both sexual orientation and gender identity in the Convention on Preventing and Combating Violence against Women and Domestic Violence of 2011.

The discussion will begin with intersexuality (i.e. the I in LGBTI) and then continue to transgenderism (i.e. the T in LGBTI), both of these being aspects of gender identity. It then turns to sexual orientation (i.e. the LGB in LGBTI). Depending on the level of legal development of a given issue, the discussion will cover more or fewer issues. For example, it will be seen that with respect to intersexuality the main question in the present state of the law is whether it is recognised as a ground that potentially leads to discrimination. In contrast, this is firmly established with respect to sexual orientation, where there is therefore also case-law on other issues, for example on the scope of the law, the existence of discrimination and justification. Transsexuality is situated in between these two, at least under EU law, where it is recognised as a discrimination ground only to a certain extent

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66 See in this context e.g. *P. Johnson*, Heteronormativity and the European Court of Human Rights, Law Critique 2012, 43, further also *U. Sacksofsky*, Grundrechtlicher Schutz für Transsexuelle in Deutschland und Europa, in: C. Hohmann-Dennhardt/P. Masuch/M. Villiger (note 26), 675 (676 et seq.).

67 CJEU, Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v. X. and Y. and Z. v. Minister voor Immigratie en Asiel*, judgment of 7.11.2013, n.y.r.

68 See in particular *J. Rijpma/N. Koffeman*, Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?, in: D. Galle/L. Paladini/P. Pustorino (eds.), Same-Sex Couples before National, Supranational and International Jurisdictions, 2014, 455, with further references, and *C. Karakosta*, Portability of Same-sex Marriages and Registered Partnerships within the EU, Cyprus Human Rights Law Review 2 (2013), 53. See also *M. Župan*, Registered Partnership in Cross-border Situations – Where Invisibility to Law Lies?, in: N. Bodigora-Vukubrat/G. Sander/S. Barić (eds.), Invisible Minorities in Law, 2013, 95. There is no CJEU case-law yet on the matter. There is, however, some national case-law, see e.g. *M. Fichera/H. Hartnell*, All You Need Is Law: Italian Courts Break New Ground in the Treatment of Same-sex Marriage, Helsinki Legal Studies Research Paper No. 22, 2012, available through <http://papers.ssrn.com>.

and where one particularly problematic issue is that of the approach to comparability.

2. I – Discrimination against Intersex People: The Missing Ground

"Intersex" refers to those people who have genetic, hormonal and physical features that are neither exclusively male nor exclusively female, but are typical of both at once or not clearly defined as either. These features can manifest themselves within secondary sexual characteristics such as muscle mass, hair distribution, breasts and stature; primary sexual characteristics such as reproductive organs and genitalia; and/or in chromosomal structures and hormones. The term "intersex" has replaced the term "hermaphrodite", which was used extensively by medical practitioners during the 18th and 19th centuries.[69]

At the basis of the legal issues arising under the ECHR and EU law with respect to discrimination against intersex people lies the fact that intersexuality is not mentioned explicitly in the law and there is to date no case-law focusing squarely on discrimination against intersex people either under the ECHR or under EU law.[70] Also in other jurisdictions, intersex cases are rare, and even more so are cases concerning legally recognised discrimination on grounds of intersexuality.

In Germany, two national cases on issues other than discrimination (namely on alternative sex classification on civil status documents and on bodily integrity, respectively)[71] and an expert report have contributed to a recent change in the law on birth registers allowing for the registration of "indeterminate" sex. This makes Germany the first European country to provide for this possibility; countries on other continents did so before.[72]

With respect to discrimination, it may be illustrative to consider the decision by the High Court of Kenya, handed down in 2010, in the case *R.M. v. Attorney General & 4 others*.[73] The case concerned an intersex person who

69 *S. Agius/C. Tobler* (note 63), 89.

70 There are fleeting references to intersexuality in a number of judgments, e.g. in ECtHR, *Christine Goodwin v. United Kingdom* (Application No. 28957/95), judgment of 11.7.2002, para. 82.

71 See again *S. Agius/C. Tobler* (note 63), 83 et seq.; on the first of these cases, also *D. Schiek/L. Waddington/M. Bell* (note 52), 78.

72 Germany allows "indeterminate" gender at birth, <http://www.bbc.co.uk>.

73 *R.M. v Attorney General & 4 others* [2010] eKLR, see <http://kenyalaw.org>, also <http://www.interights.org>.

was raised as a male. When criminally convicted and sentenced to death, RM was put in prison among the general male death row population, where he was treated badly. In court, RM complained, among other things, about inhuman and degrading treatment at the hands of prison officials and about discrimination under section 82 of the Kenyan Constitution,[74] because the Constitution and the State failed to recognise or provide prison facilities for intersex people and because under Kenyan law it was not possible to state intersexuality on a birth certificate.

In the submissions to the High Court, references were made to case-law in Kenya and elsewhere. In the Kenyan context, the court was urged to follow Kenyan Judge *Ringera*, who stated that the Kenyan Constitution is a "living instrument with a soul and a consciousness [which] embodies certain values and principles, and must be construed broadly, liberally and purposely to give effect to those values and principles" (*R.M.*, para. 37). In the international context, among others the UN decision in the case *Edward Young v. Australia*[75] was cited for the proposition that the term "other status" was sufficiently open-ended to include intersex people. The court was also encouraged "to display the kind of judicial activism displayed by the Constitutional Court of Columbia" in finding that intersex people constitute a minority entitled to protection against discrimination by the state (*R.M.*, para. 54). Counsel for the applicant quoted from the Constitutional Court of Colombia, which in two decisions[76] had stated:

> "Intersex people question our capacity for tolerance and constitute a challenge to the acceptance of difference. Public authorities, the medical community and the citizenry at large have the duty to open up a space for these people who have until now been silenced. [...] We all have to listen to them, and not only to learn how to live with them, but also to learn from them."

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[74] Under section 82(1) and (2) of the Kenyan Constitution, no law shall make any provision that is discriminatory either of itself or in its effect and no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority. Under Art. 82(3), the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[75] UN CCPR, *Edward Young v. Australia*, Communications No. 941/2000 of 6.8.2003, CCPR/C/78/D/941/2000 (2003).

[76] Constitutional Court of Colombia, Sentensia No. 54-337/99 (*The Ramos Case*) and Sentensia T551/99 (*The Cruz Case*).

To some extent at least, the outcome of the case was favourable for RM in that the court granted RM's claim for damages for inhuman and degrading treatment at the hands of prison officials. In that regard, the judgment contrasts favourably with the case-law of the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights, since these so far have never upheld a complaint relating to sexual orientation (thus *Johnson*).[77] At the same time, the Kenyan High Court rejected all other claims in the *R.M.* case. With regard to discrimination, the court found that RM having been placed in the general male death row population was not a violation of his rights, as there had been an order that RM was to be accorded exclusive or separate accommodation from the general prison populace. In this respect, the judgment appears to disregard the fact that in spite of these instructions RM did indeed suffer maltreatment because of being an intersex person.

Turning to European law, it is interesting to note that in reaching its conclusions, the Kenyan High Court referred, among others, to case-law from the "European Court of Justice" (by which it actually meant the European Court of Human Rights) on transgender issues.[78] Given the lack of relevant case-law, the court could not refer to any judgment specifically on discrimination against intersex people. In the event that an intersex case should eventually reach the ECtHR, there should be no difficulty in recognising the relevance of such discrimination in the framework of the ECHR with its open list of discrimination grounds.

In contrast, including discrimination against intersex people in the present legal system of the EU might prove more difficult. With respect to the open list of grounds in the EU Charter of Fundamental Rights, it should be recalled that the Charter is applicable only where a matter falls within the scope of EU law. That is precisely not the case in many fields which are particularly problematic for intersex people, such as their medicalisation and pathologisation (and more specifically the practice of gender surgery on infants in order to make them appear more clearly male or female), but also their treatment with respect to e.g. sports activities in schools, marriage and military service.

As for the specific non-discrimination legislation of the EU, it will be recalled that it is based on a closed system of discrimination grounds that does not mention intersexuality as such a ground. This raises the question of

[77] *P. Johnson*, Homosexuality and the African Charter on Human and Peoples' Rights: What Can Be Learned from the History of the European Convention on Human Rights?, J. L. & Soc. 40 (2013), 249.

[78] See IV. 3. below.

whether intersexuality can, and perhaps even should, be seen as part of another, already recognised discrimination ground.[79] In this respect, *Schiek, Waddington & Bell*[80] have convincingly argued that since there is a close relation between intersexuality and gender or sex, it would not be illogical to classify distinctions based on intersexuality as being gender-based. Among others, the authors point to the CJEU's statement in *P. v. S.*,[81] according to which the scope of the EU's sex equality law goes beyond "the fact that a person is of one or other sex" (*P. v. S.*, para. 20). It is submitted that an understanding of the term "sex" along the lines of the statement made by Advocate General *Tesauro* in the *P. v. S.* case, namely that (biological) sex should not be seen as a dichotomy (i.e. male – female) but rather as a continuum (para. 17 of the AG's opinion), would be even more helpful. In this manner, the entire body of EU sex equality law would also apply to intersex people. Given its limitations in scope, this would still not be enough to address the plight of intersex people in an encompassing manner, but it would clearly be better than nothing. Further, conceiving of intersexuality as an aspect of sex would also allow for additional, specific legislative action on such matters based on the competence provisions that exist for combating sex discrimination, i.e. Arts. 19(1) and 157(3) TFEU.

Overall, it may be concluded that at present and with respect to LGBTI issues, intersex is the missing discrimination ground in both the ECHR and EU law. Given the absence of specific law and of relevant case-law, there is ample room for informal standard-setting in order to help to improve the situation of this particularly vulnerable group of people in our societies. However, whilst the Council of Europe's Committee on Equality and Non-Discrimination and its special Rapporteur for LGBT rights deal with questions of equality and non-discrimination on grounds such as gender identity or other status (in particular General Rapporteur *Haugli*'s Report "Tackling discrimination on the grounds of sexual orientation and gender identity" of 7.6.2013),[82] and whilst the Parliamentary Assembly of the Council of Europe (PACE) and the Committee of Ministers (CM) have adopted a resolution and several recommendations on, among others, gender identity (namely PACE Resolution 1728 (2010)[83] and Recommendations 1915

79 *S. Agius/C. Tobler* (note 63), 82.

80 *D. Schiek/L. Waddington/M. Bell* (note 52), 79. See also *S. Agius/C. Tobler* (note 63), 82.

81 CJEU, Case C-13/94 *P. v. S. and Cornwall County Council* [1996] ECR I-2143.

82 CoE, *H. Haugli*, Tackling Discrimination on the Grounds of Sexual Orientation and Gender Identity, see <http://assembly.coe.int>.

83 CoE, Resolution 1728 (2010) of the Parliamentary Assembly, "Discrimination on the basis of sexual orientation and gender identity" of 29.4.2010, see <http://assembly.coe.int>.

(2010)[84] and 2021 (2013);[85] CM Recommendation (2010)5),[86] so far there appears to be no particular focus in their work on intersex people. The same is true of the EU's Fundamental Rights Agency (FRA)[87] and for the (otherwise very useful) Handbook on European Non-discrimination Law published by the FRA together with ECtHR.[88] Two positive examples of EU soft law documents where intersex people are explicitly included are the report "Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression" commissioned by the European Commission and published in 2012[89] (which led to a seminar organised by the European Parliament's Intergroup on LGBT Rights on "Trans and intersex people. Challenges for EU law")[90] and the Council of Ministers' "Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons", adopted at the Foreign Affairs meeting of 24.6.2013.[91] However, this latter document concerns the EU's external action only. In addition, it has been argued that this external rhetoric is not consistent with internal practice (e.g. *Mos*).[92]

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84 CoE, Resolution 1915 (2010) of the Parliamentary Assembly, "Discrimination on the basis of sexual orientation and gender identity" of 29.4.2010, see <http://www.assembly.coe.int>.

85 CoE, Recommendation 2012 (2013), "Discrimination on the basis of sexual orientation and gender identity" of 27.6.2013, see <http://assembly.coe.int>.

86 CoE, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity of 31.3.2010, see <https://wcd.coe.int>.

87 See e.g. the following documents, where discrimination against intersex people is not mentioned: EU, Fundamental Rights Agency (FRA), Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States. Summary of findings, trends, challenges and promising practices, 2011 (available at <http://fra.europa.eu>), and Fundamental Rights Agency (FRA), Opinion 1/2013 of the European Union Agency for Fundamental Rights on the situation of equality in the European Union 10 years on from initial implementation of the equality directives (available at <http://fra.europa.eu>).

88 FRA/ECtHR, Handbook on European Non-discrimination Law, 2011, available online at <http://www.echr.coe.int>.

89 *S. Agius/C. Tobler* (note 63). This document also attracted press reports, see e.g. "Intersex People in EU: Ashamed and Invisible", euobserver of 12.6.2012 (available at <http://euobserver.com>).

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

91 Council of the European Union, Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, <http://www.consilium.europa.eu>.

92 *M. Mos*, Conflicted Normative Power Europe: The European Union and Sexual Minority Rights, Journal of Contemporary European Research 9 (2013), 78.

3. T – Discrimination against Transgender People: Problems of Comparison and of the Scope of the Law

"Transgender" (or "trans") is an inclusive umbrella term referring to those people whose gender identity and/or gender expression differs from the sex they were assigned at birth. It includes, but is not limited to: men and women with transsexual pasts, and people who identify as transsexual, transgender, transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, gender variant or any other gender identity and/or expression which is not standard male or female and express their gender through their choice of clothes, presentation or body modifications, including undergoing multiple surgical procedures.[93]

In the USA, the Senate has recently voted in favour of a bill banning workplace discrimination against gay and transgender people.[94] In Europe, transgender is not mentioned as a particular discrimination ground either in the ECHR or in EU law. There is, however, some case-law on this issue. It illustrates the difficulties that can arise with respect to the comparison that lies at the basis of a discrimination analysis and also with respect to the limited scope of the law.

Cases concerning transgender people first came to the ECtHR in the 1980s. The struggle of how to deal with them under the Convention is recapitulated in the *Goodwin* judgment (para. 73). To this day, most transgender cases do not involve Art. 14 ECHR.[95] A first recognition of a prohibition of discrimination against transsexual persons under the Convention came with the Court's judgment in the case *P.V. v. Spain*[96] in 2010. The applicant in this case was a male-to-female transsexual who had had a son prior to her gender reassignment and who faced restrictions in her right to visit the child. In its judgment, the ECtHR recalled the open list of Art. 14 ECHR with its merely indicative character and stated that transsexuality is without any

93 *S. Agius/C. Tobler* (note 63), glossary, 89.

94 See e.g. US Senate passes "Enda" gay rights bill. A bill banning workplace discrimination against gay and transgender people has passed the US Senate with significant cross-party support, BBC News, 7.11.2013, <http://www.bbc.co.uk>.

95 See generally on the ECtHR's case-law *C. Cojocariu*, Moving Beyond Goodwin: A Fresh Assessment of the European Court of Human Rights' Transgender Rights Jurisprudence, INTERIGHTS Bulletin Vol. 17 No. 3: Lawyering on the Margins 2013, 118. Specifically with respect to health care, see *S. Whittle/L. Turner/R. Combs/S. Rhodes*, Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care, 2008; further e.g. *N. Koffeman*, "Regel is regel" is niet genoeg. De toetsing van "bright line rules" door het EHRM, NJCM-Bulletin 2009, 623.

96 ECtHR, *P.V. v. Spain* (Application No. 35159/09), judgment of 30.11.2010.

doubt a notion that is covered by Art. 14 ECHR (*P.V.*, para. 30). It may therefore be concluded that, under the ECHR, transsexuality is a discrimination ground in its own right, i.e. a "stand alone ground". As a consequence, transgender persons are able to benefit from the prohibition of discrimination under the entire, broad ambit of the Convention. However, there appears to be no transgender case where the Court did find a violation of the prohibition of discrimination under Art. 14 ECHR.[97] Future case-law will show whether this will change.[98]

The situation is different under EU law, where preliminary rulings of the CJEU point to a finding of discrimination.[99] According to this case-law, under certain, narrow circumstances discrimination against trans people may amount to discrimination on the grounds of sex.[100] The case-law on this matter concerns cases where gender reassignment had led to disadvantageous treatment in employment. From a legal point of view, the challenge in these cases lies in the comparison made by the Court in order to analyse whether there had been different treatment on grounds of sex. In the previously mentioned case of *P. v. S.*, the Court stated that the dismissal of a male-to-female transsexual was due to sex given that the applicant would not have been dismissed had she remained a man, i.e. the Court in effect compared a man and a woman in the same person. In the subsequent case of *K.B.*,[101] the Court compared heterosexual couples of whom one partner is a worker (rather than individual workers) and where neither partner's identity is the result of gender reassignment surgery on the one hand with couples where the identity of one partner is the result of gender reassignment surgery on the other hand. Finally, in *Richards*[102] the Court compared the

[97] Though there are cases where it found violations of other rights; e.g. ECtHR, *Van Kück v. Germany* (Application No. 35968/97), judgment of 12.6.2003, with respect to Art. 8 ECHR (right to private life).

[98] See e.g. the pending ECtHR Grand Chamber case *Hämäläinen v. Finland* (Application No. 37359/09), pending, concerning the recognition of the applicant's gender change. This is a referral of *H. v Finland* (Application No. 37359/09), judgment of 13.11.2012, where the Court had found no violation of Art. 14 ECHR.

[99] In the preliminary ruling procedure under Art. 267 TFEU and with respect to questions of interpretation, the CJEU is called upon to interpret the EU law that is relevant to a concrete case pending before the referring national court, rather than to apply it to the case at hand.

[100] See generally e.g. *G. N. Toggenburg*, "LGBT" Go Luxembourg: On the Stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice, European Law Reporter 2005, 173 (175 et seq.).

[101] CJEU, Case C-117/01 *K.B. v. National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541.

[102] CJEU, Case C-423/04 *Sarah Margaret Richards v. Secretary of State for Work and Pensions* [2006] ECR I-3585.

treatment of a post-gender-reassignment male-to-female transsexual with that of women who did not undergo gender reassignment, i.e. the comparison was made within the group of women.

All three cases reflect the Court's wish to respect the post-gender-reassignment transsexual's wish to belong to the relevant sex. Laudable as this is, the comparison now used by the CJEU makes it difficult to see why such cases should be seen as sex discrimination cases. Moreover, so far the Court's case-law concerns gender reassignment only. Again, it could be argued that a broad understanding of the term "sex" as a concept going beyond the notion that a person is of one or other sex might be helpful in order to go beyond the present case-law. Again, this would have the advantage of making the adoption of secondary law based on Arts. 19(1) and 157(3) TFEU possible. Indeed, in the preamble to Directive 2006/54/EC[103] it is stated explicitly that in view of its purpose and the nature of the rights that it seeks to safeguard, the principle of equal treatment of men and women also applies to discrimination arising from the gender reassignment of a person.

However, from a conceptual point of view it would be preferable to recognise discrimination against transsexual persons as specific discrimination ground in its own right, under the name of "gender identity", as is done under the ECHR. The drawback under EU law is that this would require a treaty change, which is a formidable challenge. In addition, even in such a case EU law could then only apply within its limited scope and some particularly burning issues (including, again, in particular the medicalisation of trans people)[104] would not be covered. In this respect, the ECHR with its much more comprehensive ambit offers more, though there has been no single case where discrimination was actually found under Art. 14 ECHR, and there is so far no statement that justification for discrimination on grounds of transsexuality requires very weighty reasons.

It must be concluded that much remains to be done in both legal systems. Though to a lesser degree than in the case of discrimination on grounds of intersexuality, this leaves room for informal standard-setting. As noted above,[105] there are indeed a number of helpful documents addressing, among other things, discrimination on grounds of transsexuality both in the Council of Europe and in the European Union.

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[103] Directive 2006/54/EC of the European Parliament and of the Council of 5.7.2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23.

[104] *S. Agius/C. Tobler* (note 63), 15.

[105] See IV. 2. above.

4. LGB – Discrimination on Grounds of Sexual Orientation: Forms of Discrimination and Justification in Particular

"Sexual orientation" refers 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. It can be heterosexual, homosexual – i.e. lesbian or gay – and bisexual.[106]

Compared to intersexuality and transsexuality, discrimination on grounds of sexual orientation is far more developed in legal terms under the ECHR and EU law.[107] In the following, different elements of the discrimination analysis are addressed, though with a particular emphasis on the different forms of discrimination and on justification.

a) Recognising the Discrimination Ground of Sexual Orientation

In the ECHR, the open-ended list of discrimination grounds under Art. 14 ECHR does not mention sexual orientation. However, the issue was recognised by the ECtHR much earlier than under EU law, at least in principle, in the above-mentioned case of *Dudgeon v. The UK*. Here, the Court found a ban on same-sex activity under national law to be in violation of the right to private life under Art. 8 ECHR. With respect to Art. 14 ECHR, the Court reiterated that a simultaneous breach of a substantive article and of Art. 14 ECHR is possible, though only where a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case. In the case at hand, the Court found this not to be the case.

Subsequently, a certain degree of confusion arose with respect to the relevant discrimination ground under the ECHR. In its report on *Sutherland v. The UK*,[108] the then European Commission of Human Rights noted that it was not clear whether a difference based on sexual orientation is a difference

106 Yogyakarta Principles (<http://www.yogyakartaprinciples.org>). See also *C. Waaldijk*, The Right to Relate: On the Importance of "Orientation" in Comparative Sexual Orientation Law, inaugural lecture at Leiden University 2008, available through <https://openaccess.leidenuniv.nl>.

107 For a critical account with respect to the ECtHR, see *P. Johnson*, Homosexuality and the Court of Human Rights, 2013; also *P. Johnson*, "An Essentially Private Manifestation of Human Personality": Constructions of Homosexuality in the European Court of Human Rights, HRLR 10 (2010), 67.

108 ECtHR Commission report, *Sutherland v. The UK* (Application No. 25186/94), report of 1.7.1997.

based on "sex" or on "other status" for the purposes of Art. 14 ECHR. The reason for this was the fact that the Human Rights Committee set up under the United Nations' International Covenant on Civil and Political Rights (CCPR) had considered that sexual orientation was to be included in the concept of "sex" within the meaning of Art. 26 CCPR. In the *Sutherland* case, and for the purposes of Art. 14 ECHR, the European Commission of Human Rights considered it unnecessary to decide on the matter, arguing that in either event there was a difference in respect of which the Commission was entitled to seek justification. The matter was clarified in 1999 in *Salgueiro da Silva Mouta v. Portugal*,[109] concerning the refusal of child custody to a gay man because of his homosexuality. Here, the ECtHR stated that a difference based on a person's sexual orientation is "a concept which is undoubtedly covered by Article 14 of the Convention", adding that "the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "notamment")" (*Salgueiro da Silva Mouta*, para. 28). From this, it may be concluded that the Court recognises sexual orientation as a discrimination ground in its own right, rather than conceiving of it as being part of either "sex" or "other status".[110]

In EU law, sexual orientation has been an explicitly recognised discrimination ground since the Amsterdam revision, which introduced Art. 13 into the EC Treaty (now Art. 19 TFEU), which gave the EC the explicit competence to adopt legislation combating discrimination on grounds of, among others, sexual orientation. Subsequently, this led to the adoption of Directive 2000/78/EC.[111] When arguments concerning discrimination against homosexual people were first made before the CJEU in the *Grant* case[112] in the late 1990s, the applicant relied on the equal pay principle for men and women under what were at the relevant time Art. 119 of the EEC Treaty (today Art. 157(1) and (2) TFEU) and Directive 75/117/EEC[113] (since then incorporated into Directive 2006/54/EC). At that time, no other avenue was open given that Directive 2000/78/EC was not yet in force at the material

[109] ECtHR, *Salgueiro da Silva Mouta v. Portugal* (Application No. 33290/96), judgment of 21.12.1999.

[110] See e.g. *A.-M. Mooney Cotter*, Ask No Questions: An International Legal Analysis on Sexual Orientation Discrimination, 2010, 266.

[111] See generally *K. Waaldijk/M. Bonini-Baraldi*, Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive, 2006.

[112] CJEU, Case C-249/96 *Lisa Grant v. South-West Trains Ltd.* [1998] ECR I-621.

[113] Council Directive 75/117/EEC of 10.2.1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ 1975 L 45/19.

time and given also that Community law was based on a closed system of discrimination grounds.

The question in the *Grant* case was whether an employer's refusal to grant travel concessions to the person of the same sex with whom an employee has a stable relationship constitutes sex discrimination prohibited by Community law, where such concessions are granted to an employee's spouse or the person of the opposite sex with whom an employee has a stable relationship outside marriage. Ms *Grant*, who had a female partner, argued that her employer's decision would have been different if the benefits in issue in the main proceedings had been claimed by a man living with a woman, and not by a woman living with a woman. Accordingly, there was sex discrimination. Relying on *P. v. S.* concerning transsexuality,[114] she also argued that discrimination based on sexual orientation must be included in the concept of "discrimination based on sex" under the Treaty, since differences in treatment based on sexual orientation originate in prejudices regarding the sexual and emotional behaviour of people of a particular sex, and are in fact based on those people' sex.

However, the CJEU refused to accept this reasoning (for which it was subsequently much criticised by commentators).[115] As regards the already mentioned approach under the CCPR, on which Ms *Grant* tried to rely, the Court noted that the Human Rights Committee is not a judicial institution, that its findings have no binding force in law and that it did not give any specific reasons for finding that "sex" must be understood as including sexual orientation. The Court also noted that whilst the CCPR is an international instrument relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community (now: Union) law, it cannot in itself have the effect of extending the scope of the Treaty provisions beyond the competences of the Community. Rather, these were broadened only through the Amsterdam revision, by including Art. 13 EC, as already mentioned. Since then, a number of cases have reached the CJEU on matters involving alleged discrimination on grounds of sexual orientation – though so far these have only been cases concerning homosexuality, to the exclusion of bisexuality.[116]

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114 See IV. 2. above.

115 See e.g. *M. Bell*, Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT, ELJ 1999, 63.

116 Compare generally *K. Yoshino*, The Epistemic Contract of Bisexual Erasure, in: M. Albertson Fineman/J. E. Jackson/A. P. Romero (eds.), Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations, 2009, 201.

b) The Scope of the Prohibition

A further, very obvious difference between the ECHR and EU law with respect to the prohibition of discrimination on grounds of sexual orientation concerns the scope of this prohibition. As stated above, Art. 14 ECHR can apply within the entire, broad ambit of the Convention, and for those states that have ratified Protocol 12 even to issues beyond that scope.[117] Accordingly, the sexual orientation case-law of the ECtHR under Art. 14 ECHR deals with issues as different as the age of consent under criminal law for sexual relations (e.g. the above-mentioned case of *E.B. and Others v. Austria*, which is a follow-up on a number of previous cases concerning Austria), succession of a deceased partner's tenancy inheritance (e.g. *Kozak v. Poland*),[118] child custody (*Salgueiro da Silva Mouta v. Portugal*), adoption (e.g. *X and Others v. Austria*),[119] social security (*P.B. and J.S. v. Austria*),[120] public manifestations (*Genderdoc-M v. Moldavia*),[121] conditions of detention in prison (*X v. Turkey*)[122] and marital status or another form of legal recognition (e.g. the recent case of *Vallianatos and Others v. Greece*).[123]

Conversely, Directive 2000/78/EC only covers employment and occupation, even to the exclusion of employment-related social security and of other matters covered by other instruments of EU law dealing with other types of discrimination, such as access to services or social advantages. Against this background, the case-law of the CJEU concerning discrimination on grounds of sexual orientation deals exclusively with matters of employment and occupation, though it must be added that based on a broad interpretation of the concept of pay, this also includes entitlements to occu-

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117 See generally e.g. *F. Crisafulli*, Same-Sex Couples' Rights (Other than the Right to Marry) Before the ECtHR, in: D. Galle/L. Paladini/P. Pustorino (note 68), 409. Regarding the right to marry; and in the same volume, *P. Pustorino*, Same-Sex Couples Before the ECtHR: The Right to Marriage, 399.

118 ECtHR, *Kozak v. Poland* (Application No. 13102/02), judgment of 2.3.2010.

119 ECtHR, *X and Others v. Austria* (Application No. 19010/07), judgment of 19.2.2013.

120 ECtHR, *P.B. and J.S. v. Austria* (Application No. 18984/02), judgment of 22.7.2010.

121 ECtHR, *Genderdoc-M v. Moldavia* (Application No. 9106/06), judgment of 12.6.2012.

122 ECtHR, *X v. Turkey* (Application No. 24626/09), judgment of 9.10.2012.

123 ECtHR, *Vallianatos and Others v. Greece* (Application Nos. 29381/09 and 32684/09), judgment of 7.11.2013. Generally on the recognition of civil unions, see *K. Boele-Woelki/A. Fuchs* (eds.), Legal Recognition of Same-Sex Relationships in Europe. National, Cross-border and European Perspectives, fully revised 2nd ed. 2012; further e.g. *S. L. Cooper*, Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights, GLJ 12 (2011), 1746. See also more generally *M. Y. K. Lee*, Equality, Dignity and Same-Sex Marriage. A Rights Disagreement in Democratic Societies, 2010.

pational pension benefits. Similarly, in the context of employment matters, the Court was able to consider married status, even though this is not as such a field where the EU enjoys competences. These aspects are evidenced in *Maruko*, *Römer*[124] and *Hay*.[125]

In *Maruko*, the surviving partner of a registered same-sex couple in Germany was refused a widower's pension by the deceased partner's employer on the ground that the Pension Regulations granted a pension only to the opposite-sex spouse of the insured person. Similarly, the *Römer* case concerned the method of calculation of an occupational pension scheme in the form of a supplementary retirement pension for former employees of a local authority and their survivors, which favoured married recipients over those living in a registered life partnership, marriage in Germany not being open to same-sex partners. In both cases, the CJEU held that whilst Directive 2000/78/EC excludes from its scope social security and social protection schemes, it is stated in its preamble that it does cover benefits that are equivalent to "pay" within the meaning given to that term for the application of Art. 157 TFEU (on equal pay for men and women), and it found the benefits at issue in the two cases to be covered by the notion of pay.

As for the recent *Hay* case, it is more straightforward as far as the scope of EU law is concerned. The case concerned the refusal by Mr *Hay's* employer to award him days of special leave and a marriage bonus because Mr *Hay* was a partner in a civil solidarity pact (namely the so-called "*pacte civil de solidarité*", PACS) under French law rather than being married. The refusal was based on a collective agreement that restricts benefits in respect of pay and working conditions to employees who marry. The Court recalled that the concept of "pay" covers, in particular, any consideration, whether in cash or in kind, whether immediate or future, provided that the employee receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis. Accordingly, the Court held that Directive 2000/78/EC is applicable to a situation such as that which gave rise to the main proceedings.

Similarly straightforward in terms of scope is *ACCEPT*,[126] concerning public statements ruling out the recruitment of a footballer presented as being homosexual and made by the main sponsor of a professional football

[124] CJEU, Case C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg* [2011] ECR I-3591.

[125] CJEU, Case C-267/12 *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, judgment of 12.12.2013, n.y.r.

[126] CJEU, Case C-81/12 *Asociaţia ACCEPT v. Consiliul Naţional pentru Combaterea Discriminării*, judgment of 25.4.2013, n.y.r.

club, who was presenting himself and being perceived by the public as playing a leading role in the club. The challenge of this case lay less in the scope of Directive 2000/78/EC than in the question of whether, given the circumstances, the sponsor could be seen as acting for the club. The Court found this to be the case.

Positive as these cases may be, given the limited scope of the Directive it remains an unfortunate fact that the present EU law on discrimination on grounds of sexual orientation is unable to address the problem of such discrimination in people's everyday lives in its full breadth. At the same time, Directive 2000/78/EC having the character of a mere minimum legislation, the Member States are free to adopt more far-reaching national legislation.[127] Nevertheless, a clear signal from the EU on such matters would be helpful. As was already stated, whilst the ECHR is broader in scope than EU law, it is weaker in terms of enforcement. Accordingly, EU law may be more effective in practice.

c) The Meaning of Discrimination

Further differences between the ECHR and EU law that can be illustrated with respect to the prohibition of discrimination on grounds of sexual orientation concern the interpretation of the concepts of discrimination and justification – differences that exist despite the common starting point of an Aristotelian understanding of equality with its focus on comparability.

aa) Comparability

In both legal systems, the issue of comparability presents numerous challenges. *Manenc*[128] provides an example in the framework of the ECHR. The case concerned a pension regulation in France which treated cohabitating and married couples differently, allegedly leading to indirect discrimination on grounds of sexual orientation (namely in view of the fact that marriage was not open to same-sex couples in France at the relevant time). However, the ECtHR held that there is no particular disadvantage to same-sex couples, since the registered partnership (PACS) is open to both heterosexual and homosexual couples in France, and since more of the former have cho-

[127] Compare in this context *A. McColgan*, National Protection beyond the two EU Anti-discrimination Directives. The Grounds of Religion and Belief, Disability, Age and Sexual Orientation beyond Employment (for the European Commission), 2013.

[128] ECtHR, *Manenc v. France* (Application No. 66686/09), decision of 21.9.2010. The action was declared inadmissible.

sen it. In other words, the Court compared the group of heterosexual couples who have chosen the PACS with the group of homosexual couples who did the same. However, as is noted in the Dutch-language Commentary on the ECHR,[129] this comparison overlooks the fact that the problem of the case resided in the lack of a possibility for homosexuals to opt for marriage as an alternative and, thereby, for the more favourable treatment. Seen in this way, same-sex couples were indeed more affected than opposite-sex couples. As it was, the Court's approach to the issue of comparability made a finding of discrimination impossible.[130]

Against this background, the recent judgment in the case of *Vallianatos and Others v. Greece*[131] forms a favourable contrast. The case concerned the question of whether Greece discriminated against same-sex couples by introducing a civil union for heterosexual couples only. The Greek Government argued that the fact that same-sex couples cannot have biological children together justified limiting civil unions to different-sex couples. However, the Court did not consider this difference legally relevant. Instead, referring to the previous case of *Schalk and Kopf*, it reiterated that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Therefore, the Court considered that the applicants were in a comparable situation to different-sex couples as regards their need for legal recognition and protection of their relationship. According to one commentator, it is somewhat ironic that *Schalk and Kopf*, which established that there is no positive obligation for contracting states to provide same-sex couples with partnership recognition, should be used in this way.[132]

Turning to EU law, in the cases of *Maruko* and *Römer* the finding of discrimination depended on the comparability of the registered partnership for same-sex couples under German law with marriage. In *Maruko*, the CJEU explained that the comparison to be made must not be global and abstract,

[129] *J. H. Gerards* (note 2), C.1.5.2 Geschiedenis van erkenning van het concept van indirect onderscheid.

[130] Also critical with respect to the Court's approach to comparability (in a more general context) is *J. Nozawa*, Drawing the Line: Same-sex Adoption and the Jurisprudence of the ECtHR on the Application of the "European Consensus" Standard under Article 14. *X and Others v. Australia*, App. No. 19010/07, Judgment of the European Court of Human Rights (Grand Chamber) of 19.2.2013, Utrecht Journal of International and European Law 29 (2013), 66.

[131] ECtHR, *Vallianatos and Others v. Greece* (Application Nos. 29381/09 and 32684/09), judgment of 7.11.2013.

[132] *P. Johnson*, Vallianatos Judgment on Sexual Orientation Discrimination in Civil Partnerships, guest commentary posted on 8.11.2013 on the ECHR Blog by *A. Buyse*, <http://echrblog.blogspot.co.uk>.

but rather specific and concrete in the light of the benefit concerned. On the basis of the analysis of German law carried out by the national court requesting a preliminary ruling, the Court made it clear that registered life partnership is to be treated as equivalent to marriage as regards the widow's or widower's pension. This was subsequently confirmed in *Römer*. Comparability in such cases being an issue of the legal and factual context, it must be concluded that the relevance of case-law such as *Maruko* and *Römer* differs in different countries of the European Union.[133] It also implies that there is no protection where it is most needed, namely in national systems where homosexual relationships find no legal recognition.[134] More fundamentally, the Court has been criticised for reinforcing a binary way of thinking with respect to relationships, which reinforces the traditional hetero-normative ideal of the nuclear family which privileges dependencies and gender roles.[135]

As noted above, the more recent EU law case of *Hay,* like the ECHR case of *Manenc*, concerned the French PACS. With respect to the requirement of comparability, the CJEU stated that as regards the days of paid leave and the bonus which the provisions at issue in the main proceedings grant to employees on the occasion of their marriage, it is necessary to examine whether persons who enter into a marriage and persons who, being unable to marry a person of their own sex, enter into a PACS, are in comparable situations. In other words, the Court used a different and, it is submitted, more appropriate comparison than the ECtHR did in *Manenc*. Indeed, the CJEU noted in *Hay* that although the PACS may also be concluded by persons of different sexes, and although there may be general differences between the systems governing marriage and the PACS arrangement, the latter was, at the time of the facts in the main proceedings, the only possibility under French law for same-sex couples to procure legal status for their relationship which could be certain and effective against third parties. The Court found that, like marriage, the PACS constitutes a form of civil union under French law which places the couple within a specific legal framework entailing rights and obligations in respect of each other and vis-à-vis third parties. From this, the Court concluded that as regards benefits in terms of pay or working conditions, such as days of special leave and a bonus like those at issue in the main proceedings, granted at the time of an employee's

133 *C. Tobler/K. Waaldijk*, Case C-267/06 Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, CML Rev. 46 (2009), 723 (743).

134 *G. Toggenburg* (note 100), 181.

135 *J. Mulder*, Some More Equal than Others? Matrimonial Benefits and the CJEU's Case-law on Discrimination on the Grounds of Sexual Orientation, Maastricht J. Eur. & Comp Law 2013, 505 (514 et seq.).

marriage – which is a form of civil union – persons of the same sex who cannot enter into marriage and therefore conclude a PACS are in a situation which is comparable to that of couples who marry. The Court found other differences to be irrelevant.

A final remark on comparability concerns the distinction between direct and indirect discrimination under EU law. In the legal definitions of these concepts in the most modern generation of EU secondary law, comparability is explicitly mentioned only with respect to direct discrimination. Indeed, it has been argued that comparability of situations should not be a requirement with respect to indirect discrimination.[136] However, to date there is no CJEU case-law to confirm this argument. Previous case-law on indirect sex discrimination did include the requirement of comparability.[137]

bb) Direct and Indirect Discrimination, and Justification

A comparison of the case-law of the ECtHR and the CJEU on sexual orientation is particularly interesting with respect to the distinction between direct and indirect discrimination. As already stated, both legal orders recognise these legal concepts, though EU law is more developed in this respect. In addition, there are important differences in terms of the approach to justification. The case-law on discrimination on grounds of sexual orientation may serve as an illustration, even though there has been no finding of *indirect* discrimination on grounds of sexual orientation by the ECtHR or the CJEU.[138]

The lack of findings of indirect discrimination is not surprising with respect to those cases involving a differentiation explicitly made on the basis of homosexuality, as in all the cases so far judged by the ECtHR and in the EU law case of *ACCEPT* (concerning a speech act explicitly related to homosexuality). It was, however, much more of a surprise in the EU law case of *Maruko,* as subsequently confirmed in *Römer* and *Hay*, since these cases

136 E.g. *D. Schiek/L. Waddington/M. Bell* (note 52), 468; *J. Mulder* (note 135), 515; also Advocate General *Jääskinen* in his opinion on the *Römer* case, para. 152.

137 E.g. CJEU, Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich* [2004] ECR I-5907.

138 Note, however, that according to *de Schutter* the failure to take into account relevant differences could be seen as indirect discrimination; *O. de Schutter*, The Prohibition of Discrimination under European Human Rights Law. Relevance for EU Racial and Employment Equality Directives (for the European Commission), 2005, 52. In that sense, the ECtHR's judgment in the case *E.B. and Others v. Austria* might be seen as an indirect discrimination case. However, the ECtHR does not mention indirect discrimination – in the present writer's opinion rightly so, as indirect discrimination in the context of same treatment should be reserved to cases where the different treatment is only apparently different; compare *C. Tobler* (note 50), 219 et seq.

involve a differentiation based on marital status (namely *Maruko* in relation to an occupational pension granted by the former employer of a deceased worker to the surviving spouse, who, under the relevant German legislation, could only be an opposite-sex person; *Römer* in relation to the calculation of an occupational pension in the form of a supplementary retirement pension for former employees of a local authority and their survivors, with the method of calculation favouring married recipients over those living in a registered life partnership; and *Hay* in relation to benefits that were granted upon the employee's entering the state of marriage).

In *Maruko*, it was argued before the CJEU that the pension regulation at issue leads to indirect discrimination against homosexual workers, who cannot build up an entitlement to a survivor's pension for their same-sex partners even if their partnership is registered under the law. This approach was supported by Advocate General *Ruiz-Jarabo Colomer* and by the European Commission. However, the Court, having stated that registered life partners are treated less favourably than surviving spouses as regards entitlement to the survivor's benefit, found that,

> "if the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78" (*Maruko*, para. 78).

There are no explanations in the judgment for this approach, an approach which in fact means that apparently neutral differentiation criteria whose effect is the exclusion of all persons of a protected group must be seen as leading to direct discrimination and which, therefore, together with the earlier sex equality case of *Nikoloudi*,[139] draws a new dividing line between direct and indirect discrimination under EU law.[140] As the Court stated in the subsequent case of *Hay* (para. 44):

> "The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed."

[139] CJEU, Case C-196/02 *Vasiliki Nikoloudi v. Organismos Tilepikoinonion Ellados AE* [2005] ECR I-1789.

[140] *C. Tobler/K. Waaldijk* (note 133), 735 et seq., and *C. Tobler*, Limits and Potential of the Concept of Indirect Discrimination (for the European Commission), 2008, 48 et seq.; see also *C. Tobler/J. Beglinger* (note 27), Chart 10/12.

As is noted in the Handbook on European non-discrimination law,[141] this is the same approach as in the *Eastleigh* case from the UK,[142] where the then House of Lords of the UK found direct sex discrimination in the context of a differentiation based on different statutory retirement ages for men and women. The Handbook seems to imply that this approach should also be followed under the ECHR. However, given the ECtHR's generally more hesitant approach to indirect discrimination, it is doubtful that it would do so should a comparable case arise before it.

As for EU law, it has been suggested that an assessment of the *Maruko* case in the light of indirect discrimination would have been more beneficial, because it would have enabled the Court to assess the detrimental effect of matrimonial benefits on many groups in society.[143] However, a finding of direct discrimination is more beneficial for the applicant with respect to the issue of justification. The Court's judgment does not mention justification. One commentator suggested that the Court opted for a finding of direct discrimination in order to exclude the justification argument of fostering traditional marriage as previously accepted by German courts on the basis of Art. 6(1) of the German Basic Law, i.e. the country's Federal Constitution[144] (subsequently, this approach was revised).[145]

As was already noted,[146] under EU law usually only the justification grounds explicitly stated in the law can be relied on in the case of direct discrimination. Indeed, in *Hay* (para. 46), the Court noted that

> "as the discrimination is direct, it may be upheld, not on the basis of a 'legitimate aim' within the meaning of Article 2(2)(b) of Directive 2000/78, as that provision covers only indirect discrimination, but only on one of the grounds referred to in Article 2(5) of that directive, namely public security, the maintenance of public order and the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others".

Other grounds allowing for differential treatment are occupational requirements (Art. 4) and positive action (Art. 7). In *Hay* (para. 47), the Court further reaffirmed the general approach under EU law according to which

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141 Handbook on European Non-discrimination Law (note 88), 26. See also *C. Tobler/K. Waaldijk* (note 133), 740.

142 *James v. Eastleigh Borough Council* [1990] UK House of Lords, judgment of 6.6.1990.

143 *J. Mulder* (note 135), 521.

144 *M. Lembke*, Sind an die Ehe geknüpfte Leistungen des Arbeitgebers auch an Lebenspartner zu gewähren?, NJW 61 (2008), 1631 (1633).

145 *H. Graupner*, Comparing People or Institutions? Sexual Orientation Discrimination in the Court of Justice of the European Union, in: K. Boele-Woelki/A. Fuchs (note 123), 271 (278).

146 See III. 7. above.

derogation grounds have to be interpreted restrictively. This means that they cannot be interpreted to include other matters such as the protection of the traditional family. In contrast, this latter aim might very well fall within the notion of objective justification that is part of the definition of the legal concept of indirect discrimination.

In *Römer*, the national court requesting a preliminary ruling from the CJEU specifically raised the question of whether the objective of the protection of marriage, contained in Art. 6(1) of the German Basic Law, could justify direct discrimination on the ground of sexual orientation. In this respect, the Court merely observed as a preliminary point that whilst under the present EU law legislation on the marital status of persons falls within the competence of the Member States, for the field of employment and occupation, Directive 2000/78/EC aims to combat, among others, discrimination on the ground of sexual orientation with a view to putting into effect in the Member States the principle of equal treatment. Again, this implies that the Directive's distinction between the (in principle) broad justification possibilities in the case of indirect discrimination and the more narrow statutory justification for direct discrimination applies.

Returning to the ECHR, the distinction between direct and indirect discrimination is, in spite of the Convention's open list of discrimination grounds, of practical relevance here due to the different levels of scrutiny applied by the ECtHR with respect to justification, i.e. the requirement of very weighty reasons or otherwise. Sexual orientation is among those discrimination grounds for which the Court requires "particularly convincing and weighty reasons", meaning that State's margin of appreciation in this field is narrow and that differences based solely on considerations of sexual orientation are unacceptable (e.g. *Vallianatos and Others v. Greece*). The concept of indirect discrimination is able to bring cases within the ambit of the prohibition of discrimination on grounds of sexual orientation, cases which otherwise might lead to a less strict approach on the level of justification.

With respect to the protection of the family founded on a union of a man and a woman, the ECtHR reiterated in *Kozak v. Poland* that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason that might justify a difference in treatment, in particular with a view to the interest of any children concerned.[147] It added, however, that, given

[147] At the same time, it has so far not been accepted by the court that such difference in treatment is indeed in the interests of the child; see *N. Koffeman*, (Annotation of *X and Others v. Austria*), EHRC 2013/104; ECtHR, *X and Others v. Austria* (Application No. 19010/07), judgment of 19.2.2013.

that the Convention is a living instrument to be interpreted in the light of present-day conditions,

> "the State, in its choice of means designed to protect the family and secure […] respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life" (para. 98).

Recognising that striking a balance between the protection of the traditional family and the Convention rights of sexual minorities is a difficult and delicate exercise which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition, the Court then referred to the State's narrow margin of appreciation in adopting measures that result in a difference based on sexual orientation and held that a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted as necessary for the protection of the family viewed in its traditional sense. The Court therefore found that there had been a violation of Art. 14, taken in conjunction with Art. 8 ECHR.

In *Vallianatos* the protection of the family in the traditional sense was also brought forward by the Greek Government in terms of justification for the fact that the Greek legislator introduced the new status of the "civil union" only for couples of different sex. In this case, the Court referred to a trend currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. It pointed out that nine Signatory States to the Convention provide for same-sex marriage and seventeen States authorise some form of civil partnership for same-sex couples. According to the Court, the trend emerging in the legal systems of the Council of Europe States

> "is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples. In other words, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, include same-sex couples in its scope. Moreover, this trend is reflected in the relevant Council of Europe materials. In that regard the Court refers particularly to Resolution 1728(2010) of the Parliamentary Assembly of the Council of Europe and to Committee of Ministers Recommendation CM/Rec(2010)5 […]. The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention […]. Nevertheless, in view of the fore-

going, the Court considers that the Government have not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of [the Greek law in question]." (*Vallianatos*, paras. 91 and 92)

As *Doty*[148] notes with respect to previous case-law, the ECtHR's increasingly strict approach with respect to discrimination against homosexuals in this field is largely due to its recognition of the nature of the Convention as a living instrument.

d) Finally: The Role of Soft Law

In the field of discrimination on grounds of sexual orientation, soft law documents appeared earlier than with respect to the legal situation of intersex and trans people. In this context, the European Parliament's Resolution on equal rights of homosexuals and lesbians in the EU of 1994[149] and PACE Recommendations 1470 (2000)[150] and 1474 (2000)[151] may be mentioned in particular, in addition to more recent documents on sexual orientation, as already mentioned (including in particular, on the side of the CoE, the *Haugli* Report "Tackling discrimination on the grounds of sexual orientation and gender identity" of 2013, PACE Resolution 1728 (2010) and Recommendations 1915 (2010) and 2021 (2013) as well as CM Recommendation (2010)5); on the side of the EU notably the FRA report "Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States. Summary of findings, trends, challenges and promising practices" of 2011 and FRA Opinion 1/2013 on the situation of equality in the European Union 10 years on from initial implementation of the equality directives; and the Handbook on European non-discrimination law published jointly by the FRA and the ECtHR), but also including more generally the practically extremely useful "How to Present a Discrimination Claim – Handbook on Seeking Remedies under the EU Non-discrimination Directives" published by the European Commission and

148 *K. A. Doty*, From *Fretté* to *E.B.*: The European Court of Human Rights on Gay and Lesbian Adoption, Law and Sexuality Review 8 (2009), 121 (133).

149 EU, European Parliament Resolution on equal rights for homosexuals and lesbians in the EC, OJ 1994 C 61/40.

150 CoE, Parliamentary Assembly Recommendation 1470 (2000), "Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe" of 30.6.2000, see <http://assembly.coe.int>.

151 CoE, Parliamentary Assembly Recommendation 1474 (2000) on the "Situation of lesbians and gays in Council of Europe member states" of 26.9.2000, see <http://assembly.coe.int>.

intended to provide simple and basic guidance to victims of discrimination on identifying a discrimination situation, checking whether it is lawful or unlawful and then planning (legal) action.[152]

The ECtHR's judgment in the case of *Vallianatos* shows that even in a legal context that is more developed than the law concerning discrimination against intersex or trans persons, soft law documents may be useful in order to underpin a Court's finding of discrimination – though not only here, but also in situations where political developments go against the protection of a certain group of people from discrimination, as mentioned in the introduction.

V. Conclusion

In their articles on gender discrimination, both *Besson*[153] and *Burri*[154] conclude that very different approaches with respect to discrimination under the ECHR and EU law emerge from the ECtHR's and the CJEU case-law, in spite of judicial dialogue and references in particular in the case-law of the CJEU to case-law of the ECtHR. They observe that such a situation might lead to contradictory solutions to concrete cases, for example with respect to the distinction between direct and indirect discrimination and the possibility of justification. *Haverkort-Speekenbrink*,[155] while acknowledging the possibility of conflicts, argues that in practice the end result of applying the different approaches "may not be so different after all". There is agreement, however, on the fact that the accession of the EU to the ECHR, as envisaged by Art. 6(2) TEU,[156] may bring about certain changes. More specifically, *Gerards*[157] argues that whilst generally the CJEU might have to adapt its interpretations and definitions to the well-established and long-standing human rights case-law of the European Court of Human Rights, in the specific field of non-discrimination law it might be the other way round

[152] *L. Farkas*, How to Present a Discrimination Claim – Handbook on Seeking Remedies under the EU Non-discrimination Directives (for the European Commission), 2012.

[153] *S. Besson* (note 5), 676 et seq.

[154] *S. D. Burri* (note 6), 102 et seq.

[155] *S. Haverkort-Speekenbrink* (note 7), 329.

[156] On the accession, see e.g. *J. P. Jacqué*, The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, CML Rev. 48 (2011), 995; and *K. Raba*, The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms – Overview on the Accession Agreement, ERA Forum 2013, 557.

[157] *J. Gerards* (note 42), 102.

in order to provide for a high level of protection offered by Art. 14 ECHR in line with the sophisticated doctrine in the case-law of the CJEU. Similarly, *Besson*[158] and *Haverkort-Speekenbrink*[159] expect that the minimum and subsidiary character of the ECHR should avoid a levelling down where EU law is more advanced than the non-discrimination law under the ECHR. On the level of soft law, the above-mentioned Handbook on European non-discrimination law jointly published by the EU's Fundamental Rights Agency (FRA) and the Council of Europe's ECtHR may be seen as an attempt to bring the two legal orders closer to each other even before accession.

Turning more specifically to LGBTI rights and non-discrimination, it has been seen that they came into the picture only gradually and that there are still important lacunae, in particular with respect to intersexual and transgender people. It is here that soft law can and should play an especially meaningful role. Against this background, the European Parliament's adoption, after the conclusion of this research, of a report calling on the European Commission to adopt an EU Roadmap tackling homophobia, transphobia and discrimination on the grounds of sexual orientation and gender identity (the "*Lunacek* Report")[160] is certainly welcome.

158 *S. Besson* (note 5), 676 et seq.

159 *S. Haverkort-Speekenbrink* (note 7), 329.

160 Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, adopted on 4.2.2014, see <http://www.europarl.europa.eu>.