The prohibition of discrimination based on sexual orientation in the case-law of the ECtHR and the CJEU

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A. Introduction

People whose identity and inclinations conflict with those deemed acceptable according to the prevailing social norms of the time and culture in which they live stand at risk of being discriminated against by public power and by private persons alike. This is particularly evident when the difference pertains to the most intimate sphere, as is the case with persons falling under the LGBTI (Lesbian, Gay, Bisexual, Transgender, Intersexual) label. This paper will examine the question of whether and to what extent sexual orientation is protected from discrimination in Europe, focusing on the system of guarantees developed by the European Court of Human Rights and by the European Court of Justice in their case-law.

After an introductory section, which highlights the particularities presented by the equality clause and, consequently, the prohibition of discrimination when referred to cases of discrimination on grounds of sexual orientation, the paper devotes a section each to the jurisprudence of the ECtHR and CJEU, describing the most significatant cases in which each Court ruled on matters relating to sexual orientation in different areas of concern.

The final section builds on that analysis to discuss how the dialogue between the courts has developed and how different methodological approaches may shape future decisions on sexual orientation, especially in the light of the very recent *Coman* judgement by the CJEU.

B. The prohibition of discrimination based on sexual orientation in Europe

I. The principle of equality and the necessity of protection from discrimination for LGB people

Along with freedom, equality is one of the pillars on which any system of protection of human rights rests. As a necessary corollary, protection of equality among human beings requires the presence of a legal framework able to effectively curtail violations of this principle, that is, effective prohibition of discrimination.

Equality can be defined as the duty to treat in the same way similar situations, while different situations are to be treated differently.[1] This definition of equality, dating

1 *Tobler*, Equality and Non-Discrimination under the ECHR and EU Law – A Comparison Focusing on Discrimination against LGBTI Persons, ZaöRV 2014, p. 530.

back to Aristoteles,[2] represents the most basic understanding of formal equality, or equality before the law, and offers the flank to criticism stemming from its merely relative nature. Taken at face value, it gives very little guidance on what constitutes similar situations calling for similar treatment. Hypothetically a legislator relying exclusively on it to avoid discrimination could be able to affirm that, for example, men and women or people of different races or people having differing sexual orientations are not the 'same' and can or should therefore be treated differently.[3] It is therefore extremely important that potential badges of discrimination are adequately explicated in the non-discrimination provision and that courts apply at least a test of reasonability to instances of differential treatment, so that arbitrary distinctions can be sanctioned for their discriminatory character.

This research limits itself to the case-law referring to discrimination based on sexual orientation in a stricter sense, excluding issues pertaining to gender and, in particular, discrimination against Transgender and Intersexual people.

For this purpose, sexual orientation will be defined according to the Yogyakarta Principles as referring to: 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender.'[4] Sexual orientation should therefore be understood to represent not a personal choice or taste, but rather a key element of each individual's personal identity. Heterosexuality is usually accepted by societies as the standard form of sexual orientation and regards people being exclusively attracted by people of a different gender,[5] while homosexuality is the exclusive attraction to people of the same gender, with Lesbian and Gay being the terms used to refer, respectively, to female and male homosexuals.

Finally, bisexuality is the attraction to people of more than one gender. In this work the acronym LGB will be used to refer to the latter three categories.

LGB people have very often had to face serious forms of victimisation and discrimination, and even today the mere fact of performing an act of intimacy with a person of the same sex might put an individual at risk of capital punishment in eight

2 *Mulder*, EU Non-Discrimination Law in the Courts, 2017, p. 20.
3 Ibid., p. 21.
4 *International Commission of Jurists*, Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2007, Preamble, para. 4.
5 Ibid., para. 5, defining 'gender' as: 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'.

States of the world.[6] People belonging to sexual minorities still suffer many forms of violent persecution by both public authorities and private individuals or groups in many areas of the world, ranging from social exclusion, to assault, sexual assault, torture, corporal punishment and homicide.[7] Even where there is no provision criminalising bi- and homosexuality and the legal order is, at least in principle, more liberal, as is the case in Europe, the risk of discrimination and social exclusion remains high,[8] making it necessary for sexual orientation to be specifically protected against discrimination by the international and supranational authorities represented, respectively, by the European Court of Human Rights and the Court of Justice of the European Union.

II. The recognition of sexual orientation as a prohibited ground of discrimination

1. The European Convention of Human Rights

The ECHR prohibits discrimination with its Art. 14, the formulation of which forbids discrimination based on a list of reasons, including 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth', but not explicitly sexual orientation.

This apparently unsurmountable obstacle to the protection from discrimination based on sexual orientation in the ECHR system should, however, be relativised by the consideration that the list in Art. 14 must be understood as possessing an open-ended character, as shown by the use of the terms 'on any grounds such as' and 'other status'. The fact that the list is not exhaustive implies that any form of differential treatment relating to rights guaranteed by the convention must be justified with ob-

6 *Carroll/Ramón Mendos*, State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition, 12th ed. 2017, p. 40. The States concerned are: Iran, Iraq (by non-State actors), Nigeria (in 12 of its federal States), Saudi Arabia, Somalia (in the Southern regions), Syria (by non-State actors), Sudan, Yemen. The capital punishment is foreseen also in the legal provisions five other States (Afghanistan, Mauritania, Pakistan, Qatar, UAE) which however do not carry out death penalties for same-sex acts.

7 *O'Flaherty/Fisher*, Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles, Human Rights Law Review 8/2008, pp. 207, 208-214; *Brown*, Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles, Michigan Journal of International Law, 31/2010, pp. 828-833, *Bejzyk*, Criminalization on the Basis of Sexual Orientation and Gender Identity: Reframing the Dominant Human Rights Discourse to include Freedom from Torture and Inhuman and Degrading Treatment, Canadian Journal on Women and the Law, 29/2017, p. 395. See also reports by the NGO Human Rights Watch at https://www.hrw.org/topic/lgbt-rights (16/07/2018).

8 *Council of Europe,* Discrimination on grounds of sexual orientation and gender identity in Europe, 2nd ed. 2011, pp. 52-62.

jective reasons or be considered by the ECtHR a forbidden arbitrary discrimination,[9] so much that it has been regarded as 'the epitome of an open-model non-discrimination clause'.[10]

The case-law of the Court explicitly dealing with the recognition of sexual orientation as a discrimination ground needed however a relatively long time to develop, as it was not until the *Salgueiro da Mouta Silva v. Portugal*[11] case that the ECtHR found a violation of Art. 14 based on the discrimination ground of sexual orientation.

The second problematic aspect of the ECHR's non-discrimination clause is that it is only applicable to situations of discrimination arising 'in the enjoyment of the rights and freedoms set forth in this Convention', and thus seems to depend necessarily on the violation of a substantial Convention right for its application. The apparent ancillary nature of Art. 14 lead it to be considered as the 'Cinderella'[12] among Convention articles, with the frequency of its application being limited by the Court's inclination to focus on finding violations of substantial articles even in cases in which discrimination could be seen as playing an important role.[13] However, the requirement that discrimination, to be prohibited under Art. 14 ECHR, has to fall within the scope of Convention rights, has been given a wide interpretation by the Court, by developing the concept of the 'ambit' of Convention Rights.[14] The non-discrimination provision can therefore be interpreted as having 'autonomous meaning, but accessory scope',[15] meaning that Art. 14 can be applied to many situations which fall within the 'ambit' of a Convention right, without the need to find a substantive breach of the underlying right.[16]

The definition of 'ambit' for the purposes of the application of Art. 14 articulated by *Baker* as 'the area in which a person is enjoying a right set out in the Convention,

9 *O'Connell*, Cinderella comes to the Ball: Art. 14 and the Right to Non-discrimination in the ECHR, Legal Studies, 29/2009, p. 223. For a stricter approach, tendentially limiting prohibited differentiations to 'suspect grounds', see *Petersen*, The Principle of Non-discrimination in the European Convention on Human Rights and in EU Fundamental Rights Law, in: Nakanishi (ed.), Contemporary Issues in Human Rights Law: Europe and Asia, 2018, p. 135.

10 *Arnardóttir*, Equality and Non-Discrimination under the European Convention on Human Rights, 2003, p. 34.

11 ECtHR, App. No. 33290/96, *Salgueiro da Silva Mouta v. Portugal*, judgement of 21 December 1999, para. 36.

12 *O'Connell*, (fn. 9), p. 212.

13 Examples of this attitude are landmark cases for the rights of LGB people such as ECtHR, App. No. 7525/76, *Dudgeon v. UK,* judgement of 22 October 1981; or ECtHR, App. No. 31417/96 and 32377/96, *Lustig-Prean v. UK*, judgement of 27 September 1999.

14 ECtHR, App. No. 8777/79, *Rasmussen v. Denmark*, judgement of 28 November 1984, para. 29.

15 *Arnardóttir*, (fn. 10), p. 36.

16 *O'Connell*, (fn. 9), p. 215. See also *Fredman*, Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights, Human Rights Law Review, 16/2016, pp. 275-277.

according to the ordinary understanding of the right in the relevant society'[17] appears to be a particularly effective one.

Still, the presence of an ambit requirement, however widely interpreted, must mean that there are situations in which arbitrary differential treatment falls outside the scope of application of the Convention. In this regard, the introduction of a general non-discrimination clause by Art. 1 of Protocol 12[18] should help claimants whose factual situation might constitute discrimination but refers to areas that may not be covered by the ambit of any convention right.

The very limited number of ratifications so far unfortunately makes it difficult to assess how much of an actual positive effect Protocol 1 will have on the development of the ECtHR's case-law on discrimination based on sexual orientation.

2. European Union Law

The primary law of the European Communities originally did not include any general non-discrimination clause, but only Art. 7 of the Treaty Establishing the European Economic Community on the prohibition of discrimination based on nationality, as well as the principle of equal pay for men and women enshrined in Art. 119 EEC Treaty.

It should then come as no surprise that the claim in the *Grant v. South West Trains*[19] case by a British woman living with another woman that EU law should be interpreted in such a way as to allow her to receive travel benefits to visit her companion as she would have been entitled to, had one of the two persons in the couple been a male, failed, once the Court of Justice assessed that the case could not be framed as one of sex-based discrimination, given that there was at the time no EU competence on discrimination based on sexual orientation.

It wasn't until the revision to the Treaty of Maastricht by the Treaty of Amsterdam, that a more general non-discrimination clause was introduced in the Treaty.

Art. 13 EC Treaty (which has now become Art. 19 of the Treaty on the Functioning of the European Union after the entry into force of the Treaty of Lisbon), however, is not a directly applicable disposition prohibiting discrimination, but rather an enabling provision giving the European legislator[20] the power to 'take appropriate action

17 *Baker*, The Enjoyment of Rights and Freedoms: A New Conception of the 'Ambit' under Article 14 ECHR, The Modern Law Review 69(5)/2006, p. 734.

18 The Protocol entered into force on the 1st April 2005, but has thus far only been ratified by 10 out of 47 States parties to the ECHR. Particularly notable are the missing ratifications by Germany, the Russian Federation, the UK and Italy.

19 CJEU, case C-249/96, *Grant v. South West Trains*, ECLI:EU:C:1998:63.

20 Precisely Art. 19, para. 1 refers to the Council acting unanimously upon a proposal by the Commission (Art. 17 para. 2 TEU) under a special legislative procedure requiring the European Parliament's assent, while originally Art. 13 only required the EP to be consulted by the Council.

to combat discrimination'. To the surprise of some contemporary observers,[21] the new provision included sexual orientation in its list of prohibited grounds of discrimination, which had a closed character, unlike the one in Art. 14 ECHR. The 'appropriate action' mentioned in Art. 13 EC Treaty consisted in the adoption of Directive 2000/78/EC, the Framework Directive for equal treatment in occupation and employment. The Framework Directive, besides introducing sexual orientation as a discrimination ground, included some rather innovative provisions relating to the prohibited forms of discrimination, such as the prohibition of harassment and of instructions to discriminate.

As will be seen in the relevant section of this paper,[22] however, the Court did not find any case of discrimination based on sexual orientation in the sense of Art. 2, para 1 of the Framework Directive, read in conjunction with Art. 1 of the same Directive, before the *Maruko*[23] case, decided in 2008 and, even then, framed its judgement in a particularly narrow way, by referring only to direct discrimination and leaving to national courts the question of the comparability *in concreto* between the two situations.[24]

The Treaty of Lisbon introduced, with the new Art. 10 TFEU, an 'aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' in the definition of EU policies and activities, but this disposition is considered not to have any direct applicability, nor to represent a legal basis for the adoption of legislative acts by the EU legislator.[25]

The most significant innovation brought about by the Treaty of Lisbon consists, instead, in the provision of Art. 6 para. 1, giving to the Charter of Fundamental Rights of the European Union of 7 December 2000 (Charter or CFR), the same legal standing as the Treaties. In this way the general equality principle of Art. 20 and Art. 21 para. 1, prohibiting discrimination, became part of the primary law which the CJEU must take into account in its judgements.

The non-discrimination clause of Art. 21 para. 1 CFR differs from that of Art. 14 ECHR for its more modern list of discrimination grounds, explicitly including

21 *Bell*, Anti-Discrimination Law and the European Union, 2002, p. 104. For the redactional history of the inclusion of this provision in the Treaty of Amsterdam, see *Mos*, Of Gay Rights and Christmas Ornaments: The Political History of Sexual Orientation Non-discrimination in the Treaty of Amsterdam, Journal of Common Market Studies 52(3)/2014, pp. 636-644.

22 See infra D.

23 CJEU, case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, ECLI:EU:C:2008:179.

24 *Bell*, Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law, The American Journal of Comparative Law 60(1)/2012, p. 139.

25 *Rossi*, in: Calliess/Ruffert (eds.), EUV/AEUV Kommentar, Art. 10 AEUV, Rn. 1-6; *Pudło*, Anforderungen des EU-Rechts in Bezug auf die sexuelle Orientierung, in: Classen/Richter/Łukańko (eds.), »Sexuelle Orientierung« als Diskriminierungsgrund: Regelungsbedarf in Deutschland und Polen?, 2016, pp. 29-30.

sexual orientation, and for its general nature, which does not require a contextual violation of other Charter rights.[26]

Finally, the European Commission proposed the adoption of a new anti-discrimination directive, replacing and modernising Directive 2000/78/EC, while extending its scope to 'social protection, social advantages, education and goods and services, including housing'.[27]

Despite its relatively unambitious character, in which the Commission 'shied away from innovation in areas such as multiple discrimination or the promotion of equality',[28] the proposal, needing unanimity in the Council as per Art. 19 TFEU, has since been blocked by the lack of such a political consensus among EU Member States.[29]

III. Comparability requirements and States' margin of appreciation: a 'movable' standard

Protection from discrimination relies on the Courts' finding the situation raised by the claimant to be comparable to another situation which is or would be treated differently, despite the lack of an objective element differentiating them, thus giving rise to an infringement of the non-discrimination provision.[30] The objective element in question can be accepted as excluding prohibited discrimination if it pursues a legitimate aim and is proportionate. Proportionality can be further explained as a requirement that actions taken be adequate to the aim pursued, that the difference in treatment be necessary and that the rights at play be balanced fairly.

According to the case-law developed by the ECtHR, States retain a margin of appreciation when establishing what constitutes a legitimate aim, motivated by 'pressing social needs' and 'necessary in a democratic society'. The breadth of this margin of appreciation must not be understood to be something fixed *a priori*, but a movable limit within States' discretion, depending on several factors, most prominent of which is that of whether a broad consensus among Member States can be found with regard to the invidious character of a certain discrimination.[31] Where such a consensus is easy to extrapolate, for example because a large majority of national legislation contain

26 For an overview of the protection from discrimination under the CFR, see *Handbook on European Non-Discrimination Law,* pp. 35-38 and *Petersen*, The Principle of Non-discrimination in the European Convention on Human Rights and in EU Fundamental Rights Law, in: Nakanishi, (fn. 9), pp. 129, 139-140.

27 *Bell*, Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive, The Equal Rights Review 3/2009, p. 7.

28 Ibid., p. 16.

29 *Ellis/Watson*, EU Anti-Discrimination Law, 2nd ed. 2012, pp. 372-379; *Wintemute*, European Law Against Discrimination on Grounds of Sexual Orientation, in: Boele-Woelki/Fuchs (eds.), Same-sex relationships and beyond: Gender matters in the EU, 2017, pp. 90-191.

30 *Arnardóttir*, Non-Discrimination under Article 14 ECHR: The Burden of Proof, Scandinavian Studies in Law 51/2007, p. 32.

31 *Arnardóttir,* The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights, Human Rights Law Review 14/2014, pp. 650-652.

similar provisions, States will enjoy only a very narrow margin to deviate from this standard. Where, instead, as is the case on family matters and the degree of legal recognition to be given to same-sex unions, national legislations differ significantly, no such standard can be found, and the Court leaves a wide margin of appreciation to States, considering them to be better placed to assess social needs at the national level.[32]

The combination of the requirement of comparability with the doctrine of the margin of appreciation is especially troublesome for the protection from discrimination based on sexual orientation, because it is often the legislator itself that creates a situation of incomparability by opening some institutes, such as marriage or adoption, only to heterosexual couples and, as seen above, both courts tend to recognise a wide margin of appreciation to States in this area.

On the other hand, when it comes to rights other than those relating to the area of marriage and family life, the approach taken by the ECtHR is much stricter. Despite it not being a badge of discrimination explicitly mentioned in the list of Art. 14, sexual orientation is understood by the court to be a suspect ground of discrimination, entailing as such a strict scrutiny by the Court on the justifications brought forward by States, which will need to be based on 'particularly convincing and weighty reasons',[33] in order to be accepted by the Court. More recently, cases such as *Identoba*,[34] seem to point in the direction of the ECtHR granting the status of a 'vulnerable group'[35] to sexual minorities,[36] which would require the Court to take some first steps in the direction of recognising substantive equality rights for LGB people.

32 *Shahid*, The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights, Erasmus Law Review 3/2017, pp. 186-188.

33 Out of many authorities, see ECtHR, App. nos. 33985/96 and 33986/96, *Smith and Grady v. the United Kingdom v. France*, judgement of 27 September 1999, para. 94; ECtHR, App. No. 43546/02, *E.B. France*, judgement of 22 January 2008, para. 91; ECtHR, App. Nos. 67667/09 et al., *Bayev v. Russia*, judgement of 20 June 2017, para. 89.

34 ECtHR, App. No. 73235/12, *Identoba and Others v. Georgia*, judgement of 12 May 2015.

35 On the ECtHR case-law relating to vulnerable groups, see *Peroni/Timmer*, Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law, International Journal of Constitutional Law 11(4)/2013, pp. 1056-1085.

36 *Ducoulombier*, The Protection of Sexual Minorities in Europe: Strenghts and Weaknesses, in: Ippolito/Iglesias Sánchez (eds.), Protecting Vulnerable Groups – The European Human Rights Framework, 2015, pp. 202-203; *Arnardóttir*, Vulnerability under Article 14 of the European Convention on Human Rights. Innovation or Business as Usual?, Oslo Law Review 4(3)/2017, p. 163.

C. Forms of discrimination addressed in the case law of the ECtHR

I. Prohibition of criminalisation based on sexual orientation

1. Criminalisation of same-sex acts as a violation of Art. 8 ECHR

The most severe and ancient form of discrimination connected to sexual orientation is that which makes it illegal to have a different sexual orientation than the one assumed to be the standard by social norms. Criminalisation based on sexual orientation usually presents itself in the form of criminal law provisions making it illegal to have intercourse with persons of the same sex or, in some cases, to publicly identify as homosexual or bisexual.

It can also arise from differences in the age of consent for sexual intercourse, which will be addressed in the next paragraph.

The leading case in this area is *Dudgeon v. United Kingdom,*[37] in which 'sexual life' was for the first time recognised as being part of 'private life' as protected by Art. 8 ECHR, and therefore the Northern Irish provisions criminalising sexual acts between consenting adult males constituted an infringement in the claimant's right to privacy.[38]

A notable element of this case consists in the fact that the claim did not relate to an actual criminal prosecution or sentence, but to investigative acts and, most importantly, to the fact that the mere existence of the criminalising provision was deemed to be liable to cause 'fear, suffering and psychological distress'.[39] The fact that the Court found a violation of Art. 8 ECHR in this case underlines how dangerous and damaging even the abstract presence of criminal provisions can be for the material and psychological well-being of homo- and bisexual persons, transforming them into 'potential victims'[40] and thus causing lasting damage to their right to privacy.

This risk of victimisation even in the absence of active persecution was later explicitly mentioned in a similar case concerning the criminalisation of homosexual activity in the Republic of Ireland: 'one of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasion, to depression and the serious consequences which can follow'.[41]

The claimant in *Dudgeon* had tried to raise the issue of a violation of Art. 14, read in combination with Art. 8, but the Court was satisfied with finding a violation of the substantive right to private life and did not deem it necessary to judge on the question of the discriminatory nature of the provision, despite it being possible to argue that

37 ECtHR, App. No. 7525/76, *Dudgeon v. United Kingdom*, judgement of 22 October 1981. See also ECtHR, App. No. 15070/89, *Modinus v. Cyprus*, judgement of 22 March 1993.
38 ECtHR, *Dudgeon v. United Kingdom*, (fn. 37), para. 41.
39 Ibid., para. 37.
40 *Kamiński*, Anforderungen der EMRK in Bezug auf die sexuelle Orientierung, in: Classen/Richter/Łukańko (eds.), (fn. 25), p. 13.
41 ECtHR, App. No. 10581/83, *Norris v. Ireland*, judgement of 26 October 1988, para. 21.

the law itself discriminated against consensual sexual acts between male homosexuals in comparison to the same acts between heterosexuals or female homosexuals.[42]

2. Discrimination relating to the age of consent for sexual intercourse

The ECtHR found violations of Art. 14, read in conjunction with Art. 8 in those cases in which the criminalisation of homosexual acts was not absolute, but depended on the setting of a higher age of consent for those acts, when compared to the general age of consent for sexual intercourse.

The cases referred to the United Kingdom[43] and Austria.[44] In the United Kingdom the law in question set 16 years as the age of consent, but exceptionally provided for a higher age of consent (18 years) for acts between homosexuals, while the Austrian law criminalised acts between adult males and males aged between 14 and 18 years, the same not being provided for with regards to females.

In the *Sutherland* case the European Commission of Human Rights found a violation of Art. 8 ECHR taken in conjunction with Art. 14 ECHR,[45] but the Court did not have occasion to rule on its merits, since the case was struck out in accordance to Art. 37 para 1 ECHR after the UK amended its legislation, lowering the age of consent to 16 years also for male homosexual acts.[46] The leading case can thus be identified as *L. & V. v. Austria*.[47] The Court found that Austria had not been able to convincingly prove why such a distinction between heterosexual and homosexual relationships between adults and consenting adolescents over 14 years of age could be justified.

The provision in question, according to the Court, 'embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority',[48] whereas only 'convincing and weighty reasons'[49] could have justified such a difference of treatment.

The Court was not satisfied with States simply eliminating these provisions from their national criminal law, but required, in successive cases, the full rehabilitation of affected persons and the removal of related entries from criminal records.[50]

42 ECtHR, *Dudgeon v. United Kingdom*, (fn. 37), para. 69.
43 ECtHR, App. No. 25186/94, *Sutherland v. United Kingdom*, judgement of 27 March 2001; ECtHR, App. No. 53760/00, *B.B. v. United Kingdom*, judgement of 10 February 2004.
44 See, among many: ECtHR, App. no. 39392/98, *L. and V. v. Austria*, judgement of 9 January 2003; ECtHR, App. No. 45330/99, *S.L. v. Austria*, judgement of 9 January 2003; ECtHR, App. No. 5263/03, *Wolfmeyer v. Austria*, judgement of 26 May 2005.
45 ECtHR, App. No. 25186/94, *Sutherland v. United Kingdom (Report of the Commission)*, judgement of 1 July 1997, paras 66-67.
46 ECtHR, *Sutherland v. United Kingdom*, (fn. 43); ECtHR, *B.B. v. United Kingdom*, (fn. 43), para. 20. See Sexual Offences (Amendment) Act 2000, c. 44, section 1.
47 ECtHR, *L. and V. v. Austria*, (fn. 44).
48 Ibid, para. 52. The bias would consist in the reception of an outdated conception of male homosexuality as smething inherently predatory, needing social control and legal limits.
49 Ibid., para. 53.
50 ECtHR, App. nos. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07, *Case of E. B. and Others. v. Austria*, judgement of 7 November 2013.

II. Protection from inhuman and degrading treatment

The prohibition of discrimination can also be relied upon before the ECtHR in cases which relate to violations of Art. 3 ECHR, that is, the prohibition of torture, inhuman or degrading treatment or punishment. These belong to the most serious violations of the rights protected by the ECHR and can present themselves in two main ways. The first consists in State-directed or tolerated acts of brutality against people expressing their differing sexual orientation (*Identoba)*, while the other consists in the mistreatment of prisoners because of their sexual orientation (*X. v. Turkey, Stasi v. France*).

In the *Identoba* case, taking place in Georgia, a pro-LGBT demonstration was confronted by a counter-manifestation, whose members threatened, engaged in homo- and transphobic insults and displayed other intimidating behaviour without the demonstrators receiving adequate protection from police forces, despite their presence at the demonstration. The incident was then not seriously investigated by State authorities.

The Court, for the first time in the field of hate speech against the LGBTI community, considered the events to represent a violation of Art. 3, read together with Art. 14, because of the backdrop of prevailing homophobia in Georgian society: 'Negative attitudes against members of the LGBT community have become more or less prevalent in some quarters of Georgian society. It is when assessed against that background that the discriminatory overtones of the incident of 17 May 2012 and the level of vulnerability of the applicants, who publicly positioned themselves with the target group of the sexual prejudice, are particularly apparent'.[51]

As *Dunne* commented, 'in addition to conferring an absolute protection, the Court's invocation of Article 3 acknowledges the particularly harmful consequences of bias motivated crimes for the LGBT community'.[52]

In the second group of cases, which concerns the mistreatment of prisoners in detention facilities because of their homosexuality, it is interesting to consider the *X. v. Turkey*[53] case.

In this case the claimant invoked a violation of Art. 3, taken in conjunction with Art. 14, because he had been placed in solitary confinement for the time of his detention in a Turkish jail under the pretext of protecting him from the risk of violence by other inmates.[54] While such a protective measure might, in principle, have been not only justified, but required by the obligation on States to protect individuals in criminal custody from being mishandled by other detainees,[55] a detainee's 'sexual orientation cannot serve as a pretext for the prison authorities to inflict on him a different type of violence which is also motivated by his sexual orientation.'[56]

51 ECtHR, *Identoba and Others v. Georgia*, (fn. 34), para. 68.
52 *Dunne*, Enhancing sexual orientation and gender-identity protections in Strasbourg, Cambridge Law Journal 75(1)/2016, p. 7.
53 ECtHR, App. No. 24626/09, *X. v. Turkey*, judgement of 9 October 2012.
54 Ibid., para. 42.
55 ECtHR, App. no. 25001/07, *Stasi v. France*, judgment of 20 October 2011, paras 78-80.
56 *Edel*, Case Law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity, 2015, p. 54.

III. Freedom of expression, assembly or association

Another form of discrimination based on sexual orientation consists in the prohibition of the public manifestation of opinions favourable to same-sex relationships, such as in cases relating to administrative fines being levied for the diffusion of so-called 'homosexual propaganda',[57] to the prohibition of pride parades[58] or to the refusal of registration for associations active in the defence of the rights of the LGBTI community.[59]

These acts have been ruled by the ECtHR to constitute violations of Art. 10, protecting freedom of expression, or Art. 11, protecting freedom of assembly and association, read in conjunction with Art. 14, because, in all these cases, the infringement of the substantial right is motivated, at least in part, by some form of discriminatory bias.

In the *Bączkowski and Others v. Poland* case, the refusal to grant authorisation for a public march in support of LGBT rights had been justified with apparently neutral technical reasons, but the outspoken anti-homosexual bias publicly expressed by the authority in charge of granting the permit (the Mayor of Warsaw) was considered reasonably likely to 'have affected the decision-making process in the present case and, as a result, impinged on the applicants' right to freedom of assembly in a discriminatory manner'.[60]

Similar circumstances of bias by the authority, which should have authorised a homosexual pride parade appear in the *Alekseyev v. Russia* case. Here it is to be noted how the authorities' argument that there was a risk of violence by counter-demonstrators which justified the prohibition of pride parades gave the Court occasion to state that 'it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority.'[61]

Recently Russia came again to the attention of the ECtHR for several pieces of its federal and local legislation making it an administrative offence to distribute to the public what has been described as 'homosexual propaganda'.[62]

The case on point is *Bayev v. Russia,* where the applicants had committed the administrative offence of 'public activities aimed at the promotion of homosexuality among minors'.[63] While the Court spent most of the time in its reasoning addressing the violation of Art. 10 taken as such, it also judged such an administrative offence to have a discriminatory character and thus give rise to a violation of Art. 14, taken in

57 ECtHR, *Bayev v. Russia*, (fn. 33).
58 ECtHR, App. No.1543/06, *Bączkowski and Others v. Poland*, judgement of 3 May 2007; ECtHR, App. No. 4916/07 et al., *Alekseyev v. Russia*, judgement of 21 October 2010.
59 ECtHR, App. No. 12200/08, *Zhdanov and Rainbow House v. Russia*, judgement of 11 March 2011.
60 ECtHR, *Bączkowski and Others v. Poland*, (fn. 58), para. 100.
61 ECtHR, *Alekseyev v. Russia*, (fn. 58), para. 81.
62 *Johnson*, 'Homosexual Propaganda' Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?, Russian Law Review 3(2)/2015, p. 44.
63 ECtHR, *Bayev v. Russia*, (fn. 33), para. 7.

conjunction with Art. 10, as it seems to state the 'inferiority of same-sex relationship compared with opposite-sex relationships',[64] without offering a justification sufficient to fulfil the strict level of scrutiny developed by the Court in cases of discrimination based on sexual orientation. This case showed a significant ideological rift within the Court, as the Russian Judge Dedov penned a very strong dissenting opinion, in which he firmly rejected the approach taken by the Court's majority, emphasising instead the overwhelming necessity of leaving a wide margin of appreciation to States on measures concerning the protection of children and of the traditional family.[65] Dedov's opinion was sharply criticised for his attempt to link homosexuality and paedophilia, which showed worrying signs of a Court's Judge holding unacceptable homophobic biases.[66]

The prohibition of discrimination based on sexual orientation also plays an important role in serving as a justification for national provisions sanctioning discriminatory and offensive speech aimed at Lesbian, Gay or Bisexual persons, as was the case in *Vejdeland v. Sweden*.[67]

In this case, which in certain respects represents a mirror image of *Bayev v. Russia*, the applicant had been subject to criminal proceedings and sanctioned with a fine for having distributed leaflets in a school expressing contempt for homosexuals. The claimant's application was rejected by the Court, which found the measures undertaken by Sweden not to be disproportioned to the legitimate aim pursued and to be 'necessary in a democratic society for the protection of the reputation and the rights of others'.[68] The ECtHR did not, however, go as far as to consider the act to be a form of hate speech, something which would have been the preferred solution for Judge Yudkivskaya and Villiger, according to their concurring opinion.[69]

IV. Discrimination based on sexual orientation in the family sphere

1. Recognition of same-sex couples as families and lack of claim to equal access to marriage

The Court has traditionally exercised great restraint for what concerns marriage and family life, allowing States a very wide margin of appreciation in terms of whether to recognise same-sex civil unions or marriages, and still refusing to interpret Art. 8 or Art. 12 as imposing an 'obligation on Member States to grant same-sex couples access to marriage'.[70]

64 Ibid., para. 90.
65 Ibid., Dissenting Opinion of Judge Dedov.
66 *Lavrysen*, Bayev and Others v. Russia: on Judge Dedov's outrageously homophobic dissent, https://strasbourgobservers.com/2017/07/13/bayev-and-others-v-russia-on-judge-dedovs-outrageously-homophobic-dissent/ (16/07/2018).
67 ECtHR, App. No. 1813/07, *Vejdeland v. Sweden*, judgement of 9 February 2012.
68 Ibid., para. 59.
69 Ibid., Concurring Opinion of Judge Yudkivska joined by Judge Villiger, para. 2.
70 ECtHR, App. No. 40183/07, *Chapin and Charpentier v. France*, judgement of 9 June 2016, para. 39.

At the same time, one of the first cases in which the ECtHR found discrimination based on sexual orientation and applied a strict scrutiny to the justifications adduced by the State, was *Karner,*[71] which related to rights in the field of contractual law and succession arising from cohabitation by a same-sex couple.

Same-sex couples living in a stable relationship, especially if this includes cohabitation, have been deemed to be covered by the notion of family life in the *Schalk and Kopf v. Austria*[72] case, even though the lack of access to marriage was not, in the case, recognised as a violation of Art. 8 read together with Art. 14.

This decision rests on the consideration that the margin of appreciation left to States is not something fixed,[73] but rather a moving variable decisively influenced by the level of consensus among member states on a certain issue. Since no such consensus can be found on the matter of recognising same-sex marriage as a human right covered by Art. 8, it follows that States, as the authorities best placed to assess societal demands relating to such an institution so deeply charged by social and cultural elements which change from one society to the other,[74] retain a wide margin of appreciation on the matter and the ECtHR cannot be in the position of forcing them to adopt a unitary approach.

The decision in *Schalk and Kopf* can, nonetheless, be considered a step forward in terms of the recognition given to same-sex couples, because it overrules longstanding case-law which considered same-sex partnerships to only be covered by the notion of 'private life',[75] meaning that, while States retain the wide margin of appreciation mentioned above, some sort of legal protection for these couples becomes necessary and any different treatment between unmarried couples of different and same sex can be at risk of violating Art. 14.

The consequence of this approach can be seen in the *Vallianatos v. Greece*[76] case, in which the opening of civil partnerships only to persons of different sex was deemed to be a violation of Art. 14, taken in conjunction with Art. 8. The differential treatment could not be justified by the need to preserve the traditional family, cited by the Greek government as one of the legitimate aims pursued by the exclusion of same sex couples from civil partnerships.

71 ECtHR, App. No. 40016/98, *Karner v. Austria*, judgement of 24 July 2003, para. 41.
72 ECtHR, App. No. 30141/04, *Schalk and Kopf v. Austria*, judgement of 24 June 2010. For the recognition of same sex couples as falling within the notion of family life, see para. 94.
73 *Doty*, From Fretté to E.B.: The European Court of Human Rights on Gay and Lesbian Adoption, Law & Sexuality: Review of Lesbian, Gay, Bisexual & Transgender Legal Issues 18/2009, 2009, p. 133; *Shahid*, (fn. 32), p. 194.
74 *Kamiński*, in: Classen/Richter/Łukańko (eds.), (fn. 25), p. 16.
75 Such as ECtHR, *Dudgeon v. United Kingdom*, (fn. 37), para. 41, recognizing sexual life as an element of private life.
76 ECtHR, App. Nos. 29381/09 and 32684/09, *Vallianatos v. Greece*, judgement of 7 November 2013.

The court, in fact, relied on the notion of the ECHR as a 'living instrument'[77] to establish that evolutions in civil society made it clear that 'there is not just one way when it comes to leading one's family or private life'.[78]

Following the *Vallianatos* jurisprudence it was therefore mandatory for States to open civil partnerships to couples of the same sex, if the political decision is made to introduce this institute in the national legal orders, but States remained free to do so or to continue only accepting the 'traditional' marriage between persons of different sex.

In this regard, a significant evolution is represented by two cases concerning Italy, namely *Oliari*[79] and *Orlandi*[80] in which the ECtHR, building upon its ruling in *Schalk* and *Kopf* and considerations about the Convention as a living instrument, concluded that Italy violated Art. 8 ECHR by not providing same-sex couples with a minimum of legal protection represented by the possibility to see their relationship recognised as a civil partnership.[81]

2. Exercise of parenthood rights and adoption

In the field of family rights, another area in which the Court developed its case-law is that of the recognition of the right for homosexuals not to be discriminated in their exercise of parenthood as well as the question of the opening of adoption for same-sex couples.

The leading case relating to parental rights is *Salgueiro da Silva Mouta v. Portugal*[82] in which a violation of Art. 14, taken in conjunction with Art. 8 was found with respect to the situation of a father who had been denied custodial rights for his child after divorcing his wife, because of his homosexuality.

The case is, in the first place, noteworthy for ruling for the first time that sexual orientation as such has to be considered a prohibited ground of discrimination, despite it not being explicitly included in Art. 14's list of grounds, thus remarking the open-ended nature of this provision.[83] In the merits, the ECtHR ruled that the national court had not just regarded the interests of the child as such, but had introduced in its reasoning considerations related to the fact that the applicant was a homosexual man living with another man and that this 'new factor' had played a decisive role in the

77 ECtHR, App. No. 5856/72, *Tyrer v. the United Kingdom*, judgement of 25 April 1978, para. 31.
78 ECtHR, *Vallianatos v. Greece*, (fn. 76), para. 84.
79 ECtHR, App. Nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*, judgement of 21 July 2015.
80 ECtHR, App. Nos. 26431/12; 26742/12; 44057/12 and 60088/12, *Orlandi and Others v. Italy*, judgement of 14 December 2017.
81 *D'Amico/Nardocci*, Homosexuality and Human Rights after Oliari v. Italy, in: Boele-Woelki/Fuchs (eds.), Same-sex relationships and beyond: Gender matters in the EU, 2017 pp. 173-176.
82 ECtHR, *Salgueiro da Silva Mouta v. Portugal*, (fn. 11).
83 *Arnardóttir,* (fn. 10), p. 34; *O'Connell*, (fn. 9), p. 222. See also above, at para. B.II.1.

final decision.[84] Portugal had therefore made an arbitrary distinction between comparable situations, thus violating the ECHR's prohibition of discrimination.

The matter of access to adoption rights by same-sex couples is one in which a certain margin of appreciation is still left to States, the extent of which varies according to whether the request for adoption comes from inside or outside a married couple, with States still being able to restrict access to adoption to married couples and to exclude, as seen above, same-sex couples from access to marriage.[85]

The question of adoption by same-sex couples outside marriage saw a significant evolution over less than ten years between two cases, both originating from France.

In 2002 the ECtHR had ruled, in its *Fretté v. France*[86] judgement, that a difference in treatment resulting in the impossibility for a homosexual woman to have access to adoption as a single woman could be justified, whereas in 2008 the Court came to opposite conclusions in the *E.B. v. France*[87] case.

In the first case considerations about the lack of a European consensus on access to adoptions by homosexual persons played an important role, leaving national authorities with a broad margin of appreciation when assessing the child's best interest and thus allowed the restriction of adoptions by singles to heterosexuals to pass the legitimate aim and proportionality test.[88]

Although the Court did not explicitly mention an evolution in this consensus in the *E.B. v. France* judgement, it can be argued that it still took notice of legal and scientific developments to apply a stricter test, similar to the one in *Salgueiro da Silva Mouta v. Portugal*. According to this case, distinctions based on sexual orientation represent a breach of Art. 14, demonstrating again the importance of the notion of the Convention as a 'living instrument'.

The opening of adoptions for singles in the *E.B. v. France* case is, however, based on the state of national legislation and the same standard was applied by the Court also to the matter of the adoption of the biological child of a partner by the other partner in a homosexual relationship. Where national legislation restricts this form of adoption to married couples, there is no room for finding a violation of Art. 14 because unmarried homo- and heterosexuals are in the same legal position, and the argument that only heterosexual couples can resort to marriage to get access to stepchild adoption is unconvincing, as long as States retain full discretion regarding the definition of marriage.

84 ECtHR, *Salgueiro da Silva Mouta v. Portugal*, (fn. 11), para. 28. See *Helfer*, Salgueiro da Silva Mouta v. Portugal; A.D.T. v. United Kingdom, American Journal of International Law. 95(2)/2001, pp. 422-429.

85 *Edel*, (fn. 56), p. 85.

86 ECtHR, App. no. 36515/97, *Fretté v. France*, judgement of 26 February 2002.

87 ECtHR, *E.B. v. France*, (fn. 33). See *Bainham*, Homosexual Adoption, Cambridge Law Journal 67/2008, pp. 479-481.

88 ECtHR, *Fretté v. France*, (fn. 86), paras 41-42; *Willoughby Stone*, Margin of Appreciation Gone Awry: The European Court of Human Rights' Implicit Use of the Precautionary Principle in Frette v. France to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation, Connecticut Public International Law Journal 3/2003, p. 292 (pointing out the inappropriateness of the precautionary principle in human rights matters).

This consideration explains the logic behind the apparently conflicting decisions in *Gas and Dubois v. France*[89] of 2012 and *X. and Others v. Austria*[90] of 2013. According to French legislation at the time, in fact, this form of adoption was only open to married couples leading to the rejection of the claimants' application, whereas in Austria it was allowed for unmarried heterosexual couples, thus involving an unlawful discrimination based on sexual orientation and an obligation for the Austrian State to allow stepchild adoption for homosexual couples, while France was not required to do the same.

V. Access to employment

Another field in which discrimination based on sexual orientation plays a significant role is that of employment, especially in the form of LGB persons being barred from service in the armed forces, as in the *Lustig-Prean and Beckett v. the United Kingdom*[91] case. The applicants had been administratively discharged from service with the Royal Navy on account of their homosexuality, which was recognised by the Court as a violation of Art. 8 on the respect for private life.

In assessing whether the infringement of the applicants' right to privacy by the investigation on their sexual orientation and their subsequent dismissal had been justified, the Court noted that: 'the European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority.'[92] The Government's argument was thus found to be insufficient to avoid finding a violation of Art. 8.[93] This landmark case led to a series of subsequent cases concerning members of the UK armed forces,[94] but the ECtHR declined to assess the potential for a breach of Art. 14 together with Art. 8, despite the likely discriminatory background of such a policy.

D. Forms of discrimination addressed in the case law of the CJEU

I. Prohibition of discrimination in the field of employment under EU Law

The first cases relating to discrimination based on sexual orientation to reach the Court of Justice highlighted the lack of protection for LGB people in employment under EC

89 ECtHR, App. No. 25951/07, *Gas and Dubois v. France*, judgement of 15 March 2012, para. 69.
90 ECtHR, App. No. 19010/07, *X. and Others v. Austria*, judgement of 19 February 2013, paras 112-116, 131.
91 ECtHR, App. No. 31417/96 and 32377/96, *Lustig-Prean and Beckett v. United Kingdom*, judgement of 27 September 1999.
92 Ibid., para. 97.
93 Ibid., para. 104.
94 See ECtHR, App. Nos. 33985/96 and 33986/96, *Smith and Grady v. UK*, judgement of 27 September 1999, para. 115 for the Court's reasoning that in the case the discrimination claims amounted to 'the same complaint seen from a different angle'; ECtHR, App. Nos. 43208/98 and 44875/98, *Perkins and R v. UK*, judgement of 22 January 2003.

law before the entry in force of Art. 13 EC (now Art. 19 TFEU) and the adoption of Directive 2000/78/EC.

In particular, in the *Grant v. South-West Trains*,[95] the barring of a lesbian woman from receiving employment-related benefits was not found in violation of Art. 141 EC Treaty, nor of Directive 76/207 on the principle of equal treatment between men and women, establishing a distinction between discrimination based on gender and on sexual orientation.[96]

The Court, while admitting its lack of competence on the matter, left the door open for a legislative intervention by the EU, following the entry into force of Article 13 EC Treaty.

After the entry into force of this legal basis, the Framework Employment Directive[97] was adopted by the Council, paving the way for a new strand of case law on the matter of sexual orientation discrimination in the workplace.

A landmark case is *Maruko v. Versorgungsanstalt der deutschen Bühnen*[98] in which a man living in a registered civil partnership with another man went to court after having been denied the payment of a surviving spouse's pension upon the death of his partner.

The Court of Justice ruled on the preliminary question submitted to it by the national court in the sense that such a pension benefit was a form of remuneration and therefore engages the applicability of Art. 141 EC Treaty on equal pay and the Framework Directive. The denial was a damaging measure creating a situation of objective and direct discrimination in treatment between married couples and couples living in a civil partnership.

Thus, if the State grants certain duties and rights comparable to those entailed by marriage to persons living in a registered civil partnership, it cannot then discriminate the latter because of their sexual orientation without violating Directive 2000/78/EC.[99]

The same approach, based on the comparability between rights and duties conferred by law to people living in marriages and civil partnerships, was followed and further clarified by the CJEU in the *Römer v. Freie und Hansestadt Hamburg*[100] case of 2011, which could be seen as a step in the direction of recognition by the EU of equality

95 CJEU, *Grant v. South West Trains*, (fn. 19).

96 *Bell*, Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v. S to Grant v. SWT, European Law Journal 5(1)/1999, p. 70; *Bamforth*, Sexual Orientation Discrimination after Grant v. South-West Trains, in: The Modern Law Review 63(5)/2000, pp. 697-701; *Walters*, Sexual Orientation Discrimination in the European Union: The Framework Directive and the Continuing Influence of the European Parliament, in: International Journal of Discrimination and the Law 8/2007, p. 268.

97 *Ellis/Watson*, (fn. 29), pp. 274-301 for a detailed analysis of the Framework Directive; See also above, para. B.II.2.

98 CJEU, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, (fn. 23).

99 *Pudło*, in: Classen/Richter/Łukańko (eds.), (fn. 25), p. 34.

100 CJEU, case C-147/08, *Römer v. Freie und Hansestadt Hamburg,* ECLI:EU:C:2011:286. See also CJEU, case C-267/12, *Frédéric Hay. v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, ECLI:EU:C:2013:823, para. 47.

between married heterosexuals and same-sex couples who cohabitate, when national law regulates both situations.[101]

II. Marriage recognition for the purposes of EU Law

Since the adoption of Directive 2004/38,[102] EU Law includes provisions granting freedom of movement to family members of EU citizens inside the European legal space.[103]

It does however not define some key terms, such as 'spouse', 'registered partner' or 'partner' in a way which explicitly includes or excludes same-sex couples.

The question of whether an interpretation of the Directive in a way that includes them is possible or, indeed, required by primary law and, in particular, the CFR's non-discrimination clause, had been addressed in doctrine by *Bell*[104] and later *Tryfonidou*,[105] but has only very recently been solved by the Court in the *Coman*[106] case.

The case originated from a dispute before Romanian courts relating to the right to receive a residency permit for a non-EU national married in Belgium to a Romanian citizen of the same sex. Under Directive 38/2004, Art. 7 para. 2, read together with Art. 2 no. 2, 'spouses' of EU citizens must be granted residency, but for 'registered partners', this obligation is only applicable if civil partnerships are recognised also by the legal order of the host state.

Since Romania does not recognise any form of union apart from marriage between persons of different sex, the case hinged upon the term 'spouse' that the ECJ interpreted autonomously for the purposes of EU law in such a way as to cover all marriages legally concluded in a Member State, regardless of whether same-sex unions were recognised in the host country.[107] The Court's judgement has been welcomed both for its symbolic nature and for the significant constitutional step forward which it

101 *Falletti*, LGBTI Discrimination and Parent-child relationships: Cross-border Mobility of Rainbow Families in the European Union, Family Court Review 52/2014, p. 34.

102 Directive (EC) No. 38/2004 of 29 April 2004 on the right of citizens and their family members to move and reside freely within the territory of the Member States, OJ L 158 of 30/04/2004, pp. 77-123.

103 On the principle of freedom of movement for EU citizens, see *Herdegen*, Europarecht, pp. 278-286.

104 *Bell*, Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union, European Review of Private Law 5/2004, p. 622.

105 *Tryfonidou*, EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition, Columbia Journal of European Law 21(2)/2015, pp. 195, 245.

106 CJEU, case C-673/16, *Coman and Others v. Inspectoratul General pentru Imigrări e Ministerul Afacerilor Interne*, ECLI:EU:C:2018:385.

107 Ibid., para. 45: 'Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law'.

represents, as the first case in which the CJEU imposed to Member States an obligation to recognise same sex marriage, if only for the purposes of the Citizens' Directive.[108]

III. Public health as a justification for differential treatment: exclusion of homosexuals from blood donor status

The approach taken by the CJEU in assessing justifications for differences of treatment based on sexual orientation can be well observed in a case relating to the exclusion of a homosexual an from becoming a blood donor.

Dangers of transfusion include the risk of transmitting acute infections, namely through infection with HIV, which highlights the importance of donators' selection and tests.

In the EU, Directive 2002/98/EC, Art. 21[109] foresees a duty to perform preemptive tests on each blood donation. Requirements for blood donors are defined in the implementation Directive by the Commission, 2004/33/EC.[110] Its third Annex allows for the permanent deferral from blood donations of 'persons whose sexual practices cause a heightened risk of infection through blood.'[111]

In France the Directive has been implemented in such a way as to provide for an absolute exclusion of 'men who have sex with other men'. This provision was challenged before the ECJ in the *Léger*[112] case, originating from a case brought before the French courts by Mr. Léger, whose application to donate blood had been declined by the health authorities on account of his having had sexual relationships with other men.

In the judgement, the ECJ concluded that the objective of minimising the risk of infection is a legitimate aim for the purposes of Art. 52 para. 1 CFR as it corresponds to the objective of a high level of protection for health required by Art. 35 CFR. The differential treatment for homosexuals could then be considered justified, as long as it complied with the proportionality criteria of Art. 52 para. 1 CFR. The judgement can be considered an overall satisfactory application of the proportionality test for jurisdiction in a particularly delicate situation in terms of the balancing of the rights at play, but could be criticised for its lack of proper assessment of the adequacy requirement.[113]

108 *Tryfonidou*, Free Movement of Same-Sex Spouses within the EU: The ECJ's Coman judgment, https://europeanlawblog.eu/2018/06/19/free-movement-of-same-sex-spouses-within-the-eu-the-ecjs-coman-judgment/ (16/07/2018).

109 Directive (EC) No. 98/2002 of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components, OJ L 33 of 08/02/2003, pp. 30-40, Art. 21.

110 Commission Directive (EC) No. 33/2004 of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components, OJ L 91 of 30/03/2004, pp. 38-57.

111 Annex III to the Dir. 2004/33/EC, Nr. 2.1.

112 CJEU, case C-528/13, *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes et Établissement français du sang*, ECLI:EU:C:2015:288.

113 *Łukańko*, in: Classen/Richter/Łukańko (eds.), (fn. 25), pp. 41, 50.

In particular, the ECJ focuses on the requirement of necessity, according to which the measure can only be justified if no other less intrusive means or no different techniques would have been adequate to reach the same level of protection for public health. It is for national courts to assess whether this is the case in the concrete situation.[114]

IV. Right to the recognition of refugee status based on sexual orientation

The risk of discrimination based on sexual orientation in the home country can serve as a basis to have a claim to refugee status according to EU Law.[115] This principle found a first application in the *X, Y, and Z v. Minister voor Immigratie en Asiel*[116] case from 2012. Here the Court stated that sexual orientation is an important element of a person's identity.[117] Refugee status has therefore to be granted, when the State can establish that homosexual acts are not only criminalised, but effectively persecuted with jail terms in the country of origin.[118] The CJEU also held that '[w]hen assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation'.[119] This is because sexual orientation is a characteristic so fundamental to a person's identity that no one can be required to renounce it.

The ECJ had then to rule on which means are available to national authorities for the task of evaluating the genuine character of claims to refugee status based on the risk of persecution for sexual orientation in the country of origin and, in the *A. and Others v. Staatssecretaris van Veiligheid en Justitie v. Staatssecretaris van Veiligheid en Justitie*[120] set some limits to the means available for this objective. According to the Court, it is on one hand possible to investigate these claims, but the means used cannot be so invasive of the private sphere of the concerned person that they violate his or her fundamental right to the respect of personal dignity.

The latest development in this topic is represented by the *F. v Bevándorlási és Állampolgársági Hivatal*[121]case, decided on 25 January 2018, in which the ECJ specified the criteria which it had started to develop with the *A. and Others* case, with special regard to the question of the admissibility of psychological evaluations through

114 Ibid., para. 67. For the assessment necessity the main problem regards the so-called 'diagnostical window' between contagion and its evidence in blood testing.
115 Directive (EU) No. 95/2011 of 13 December 2011 on standards for the qualification of third-country nationals […], OJ L 337 of 20/12/2011, pp. 9-26, Art. 13, in connection with Art. 10, para. 1, lit. d, last subpara.
116 CJEU, case C-199/12 to C-201/12, *X, Y, and Z v. Minister voor Immigratie en Asiel,* ECLI:EU:C:2013:720.
117 *Pudło*, in: Classen/Richter/Łukańko (eds.), (fn. 25), p. 36.
118 Ibid.
119 CJEU, *X, Y, and Z v. Minister voor Immigratie en Asiel,* (fn. 116), para. 76.
120 CJEU, case C-148/13 to C-150/13, *A. and Others v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2014:2406.
121 CJEU, case C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal,* ECLI:EU:C:2018:36.

psychometrical tests to assess sexual orientation. These tests, whose scientific reliability is highly questionable,[122] create such a serious interference in the applicant's private sphere that, in the view of the Court: 'the impact of an expert's report such as that at issue in the main proceedings on the applicant's private life seems disproportionate to the aim pursued,'.[123] Furthermore, the Court questioned the 'genuinely free nature of consent from applicants under these circumstances'.[124]

In conclusion, while the Court did not fully accept the principle of self-declared sexual orientation, it stressed how, in these cases, the central element for the purposes of establishing the legitimacy of the claim to refugee status is the fact that the claimant could be considered a member of a particular social group by the actor of the persecution, regardless of whether such status is in effect possessed by the person in question.[125]

E. Assessment of similarities and differences in the approaches adopted by the two courts

I. The dialogue between ECtHR and CJEU in the case-law relating to sexual orientation

While there is no formal hierarchical relationship between the ECtHR and the CJEU,[126] both Courts have been conducting a form of jurisprudential dialogue and take into account developments in each other's case-law. In particular, it must be observed how the Court of Justice of the European Union seems to follow a pattern of waiting for the ECtHR to weigh in on major legal problems, before ruling on them in such a way which extends the protection offered by EU law to human rights, at least in the area of discrimination based on sexual orientation.

A glaring example of this conservative approach can be found by observing the historical evolution of the case-law relating to the field of employment.

As seen in the preceding chapters, the then Court of Justice of the European Communities denied in the *Lisa Grant v. South-West Trains*[127] case its competence on ruling on a situation of possible discrimination based on sexual orientation, refusing to consider it to be part of gender-based discrimination and to apply the relevant anti-

122 *Ferreira/Venturi,* Testing the Untestable: The CJEU's Decision in Case C-473/16, F V Bevándorlási És Állampolgársági Hivatal, http://www.asylumlawdatabase.eu/en/journal/testing-untestable-cjeu%E2%80%99s-decision-case-c-47316-f-v-bev%C3%A1ndorl%C3%A1si-%C3%A9s-%C3%A1llampolg%C3%A1rs%C3%A1gi-hivatal (16/07/2018).

123 CJEU, *F. v. Bevándorlási és Állampolgársági Hivatal*, (fn. 121), para. 59.

124 Ibid., paras 52-53.

125 Ibid., para. 31; *Ferreira/Venturi*, (fn. 122), p. 3.

126 See, on the current relationship between the two Courts and the impediments to the accession by the EU to the ECHR: CJEU, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454.

127 CJEU, *Grant v. South West Trains*, (fn. 19).

discrimination case-law[128] by way of analogy to this area. This lack of protection continued even after the entry into force of the Treaty of Amsterdam and the subsequent adoption of Dir. 2000/78 on the legal basis provided by the new Art. 13 EC Treaty and the ECtHR ruling on the illegitimacy of excluding homosexual individuals from service in the armed forces in *Lustig-Prean and Beckett v. UK*.[129]

Recognition of discrimination based on sexual orientation as a breach of Dir. 2000/78/EC had to wait for the ECtHR to judge on a case relating not anymore to an individual, but to a same-sex couple's rights, the *Karner v. Austria*[130] case from 2003. The case referred to succession in a tenement's rental contract and the ECtHR held that it was incompatible with Art. 14 read in conjunction with Art. 8 ECHR that the same-sex partner of the original party to the rental contract had been excluded from automatic succession as a party to it after his partner's death.

The CJEU then found a similar form of discrimination in 2008 in the *Maruko*[131] landmark case. The Luxembourg's Court did not explicitly cite *Karner* in its decision, but it is relatively easy to infer that the overruling of its preceding decisions on the matter owed a lot to the development of the ECtHR's case-law in *Karner*, which had also been referred to by the claimant in the main proceedings at the hearing before the Court of Justice.[132]

The judgement came, however, with a number of limitations attached to it, which showed a certain amount of restraint on the ECJ's part and unwillingness to touch areas in which the ECtHR left a wide margin of appreciation to member States. The Court, in fact, applied only the standard of direct discrimination and not that of indirect discrimination, which would have potentially opened the way for claims of violation of the Framework Directive even in countries in which same-sex civil partnerships were not recognised.[133] The ECJ also exercised restraint in the language used, exemplified by the usage of terms like 'persons of the same sex'[134] rather than using more semantically charged expressions such as 'couples' or 'families'.

It can be argued, following Robert Wintemute's views, that the CJEU tries to avoid going further than standards firmly set in the jurisprudence of the ECtHR because it 'is a part-time human rights court that seeks to apply the minimum standards of the ECHR but […] is often cautious about anticipating improvements in the ECHR's case law, or being 'more generous' than the ECtHR'.[135] The CJEU needs also to take into account its limited jurisdiction on human rights matters according to Art. 51 para 1 CFR, when compared to the more general mandate of the ECtHR and

128 Ibid., para. 47.
129 ECtHR, *Lustig-Prean v. UK*, (fn. 13), paras 97-105.
130 ECtHR, *Karner v. Austria*, (fn. 71).
131 CJEU, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, (fn. 23).
132 *Wintemute*, in: Morano-Foadi/Vickers, pp. 179, 185.
133 Ibid.
134 CJEU, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, (fn. 23), paras 67 and 73. See also *Römer v. Freie und Hansestadt Hamburg*, (fn. 100), paras 44 and 52.
135 *Wintemute*, in: Morano-Foadi/Vickers, (fn. 132), p. 192.

the need not to act in ways which would unduly infringe upon the area reserved to the competence of Member States.[136]

More recently, however, the CJEU seems to be more willing to go beyond the established case-law of the ECtHR, as was the case in a sequence of judgements about the right to the recognition of the status of refugees as a consequence of persecution in the country of origin on the basis of sexual orientation.

The CJEU ruled that a concrete risk of criminal prosecution in the country of origin for the applicant's sexual orientation would be enough to give raise to a claim to refugee status,[137] whereas the ECtHR has so far dismissed cases of the same nature.[138] The Court of Strasbourg, despite a strong dissent by Judge Power-Forde, who explicitly cited EU case-law on the matter,[139] took the stance that concealing one's sexual orientation for the foreseeably short period necessary to apply for a family reunion visa in their country of origin would not be an excessive burden on the applicant's human rights.[140]

The CJEU had, instead, considered that similar requirements of discretion and concealment would be 'incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it'.[141]

It is possible that this shift of attitudes could be due to the entry into force of the European Union Charter of Fundamental Rights, which provided the CJEU with a more direct and explicit catalogue of rights.

It must be noted, however, that the Court likely followed the guidance of national case law from the UK on this matter,[142] as well as having a basis in secondary law offered by Directive 2011/95/EU in terms of minimum standards for the recognition of refugee status and other forms of international protection, which is something lacking in the ECHR system.

II. The search for a broad consensus among Member States by the ECtHR contrasted with the CJEU 'autonomous interpretation' approach

Another way in which the Court of Justice appears to have adopted a more flexible stance compared to the ECtHR is that of the interpretative methods and standards used in cases relating to family law.

136 Ibid., p. 193.
137 CJEU, *X, Y, and Z v. Minister voor Immigratie en Asiel*, (fn. 116).
138 ECtHR, App. No. 71398/12, *M.E. v. Sweden*, judgement of 26 June 2014 (the case was appealed before the Grand Chamber, but the ECtHR did not take the opportunity to revise the controversial judgement by the Chamber, since Sweden had meanwhile taken a decision more favourable to the applicant's interests).
139 Ibid., Dissenting opinion of Judge Power-Forde, p. 31.
140 ECtHR, *M.E. v. Sweden,* (fn. 138)*,* para. 88.
141 CJEU, *X, Y, and Z v. Minister voor Immigratie en Asiel*, (fn. 116), para. 70.
142 UK Supreme Court, 2010 UKSC 31, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, judgement of 7 July 2010.

As seen above, the practical results have, until recently, not substantially diverged from those reached by the ECtHR. However, it must be noted that the CJEU does not seem to be bound in its reasonings by the same rigid standard as the ECtHR, according to which there must be a wide consensus among member states to limit their margin of appreciation. Only then situations such as marriage and civil partnership could be considered to be comparable for the purposes of the application of the discrimination test. The ECJ, in fact, considered, already in the *Maruko* case, such situations to be comparable, as long as the national law of the particular member State concerned 'places persons of the same-sex in a situation comparable to that of spouses so far as concerns that survivor's benefit'.[143] Thus, it could avoid the 'nominalist' barrier posed by the term 'marriage' to ECtHR case-law.

Even if the material content of the decision in *Maruko* was relatively narrow and did not entail a significant enlargement of the scope of the protection from discrimination afforded to same-sex couples by the CJEU compared to the ECtHR, some elements of the Court's reasoning point at a significantly larger degree of methodological flexibility.

Moreover, the very recent *Coman* case represents a true 'leap forward' by the CJEU from the up to this moment most advanced examples of ECtHR jurisprudence granting family rights to same-sex couples, such as the *Orlandi* case.

The use of the notion of autonomous interpretation for the purposes of EU law allowed, in fact, the Court to sidestep the question of the assessment of whether there was a consensus on the definition of marriage among EU member states in order to create an obligation to recognise same-sex marriages legitimately concluded in any EU member State, at least for the purposes of freedom of movement inside the EU legal space.[144] This approach could spur the CJEU in future cases to go further than *Maruko* and, relying also on the conclusions by the ECtHR in *Oliari* and *Orlandi* that the lack of recognition of at least civil partnership status for same-sex couples might be in breach of Art. 8 ECHR in conjunction with Art. 14 ECHR,[145] apply the principle of non-discrimination in the field of employment also to same-sex couples in countries which do not (yet) include a legal recognition for same-sex civil partnerships in their legislations.

As to the Court of Strasbourg, it remains to be seen whether and how far this development might cause it to re-assess its doctrine on the matter of same-sex marriage and the extent of the consensus on it among States parties to the ECHR.

The Court could potentially start to find situations in which same-sex civil partnerships could be in a comparable legal situation to heterosexual marriages, especially in matters concerning EU Member States in which the future case-law of the CJEU might require them to be treated in the same way also in areas covered by EU law other than freedom of movement. It must, however, always be kept in mind that the need for the ECtHR for its decisions to be accepted by States, given the lack of strong

143 CJEU, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, (fn. 23), para. 72.
144 See above, para. D.II.
145 ECtHR, *Oliari and Others v. Italy*, (fn. 79), para. 185; *Orlandi and Others v. Italy*, (fn. 80), para. 210.

enforcement mechanisms will necessarily limit the 'bravery' of the Courts in areas in which national legislations are still widely divergent.

F. Conclusions

The system of prohibitions of discrimination guaranteed by the ECHR and by EU law, as interpreted by the ECtHR and CJEU in their respective case-law, is undoubtedly among the most advanced in the world when it comes to the rights of LGB people. Clear protection is offered both from the most severe violations of basic rights and for the expression of bi- and homosexual identity inside family units.

The situation could, however, certainly be improved in many ways, for example through a more decided application of the principle that sexual minorities should be protected as a vulnerable group as well as through the application of the doctrine of indirect discrimination to sexual orientation.

Despite progress observed in the case-law over the last two decades, the lack of autonomous nature of Art. 14 ECHR still represents an obstacle for the ECtHR in the development of its case-law on discrimination, but the entry into force of Protocol 12 to the Convention should hopefully reinforce the range of tools for the Court to tackle discrimination, especially if more and more Council of Europe member States were to ratify the Protocol.

As to the CJEU, the recent developments in its case-law analysed in this work can only be praised from the point of view of a widening and deepening of the standards of protection from discrimination based on sexual orientation.