

Overview on European Union Antidiscrimination Legislation on the grounds of Sexual Orientation and Gender Identity

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This rapport is dedicated to all the transsexual, transgender and intergender persons in Denmark.

Key words: EU Institutions, Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC), Council Directive prohibiting discrimination on grounds of racial or ethnic origin (2000/43/EC), Commission proposal for a new antidiscrimination directive 2008, Council Directive 2004/58 on free movement, ILGA Shadow directive, Article 13 in the Amsterdam treaty, Human Rights, Fundamental Freedoms, Human Dignity, the Copenhagen Criteria, General Principles of EU law, The European Union Agency for Fundamental Rights, positive obligations, negative obligations, directives, regulations, Victimisation, Discrimination, harassment, Acquis Communautaire, Open Method of Coordination.

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Respekten for menneskerettigheder både juridisk, politisk og socialt er i Europa nået langt takket været en lang historie om entusiasme og aktivisme. Det, vi allerede har nået, giver os nogle rammer med mere plads til mangfoldighed og rum til forskelighed i samfundet.

Alligevel er der stadig et stykke vej til at få fjernet en strukturelt heteroseksistisk system, der har været dybt diskriminerende mod dem der ikke passede ind i dette. Endnu i dag findes der love som diskriminerer lesbiske, bøsser, biseksuelle og transseksuelle og undertrykker vores menneskerettigheder. Adfærd som hate crimes i form af fysisk eller psykisk vold eller endda mord er eksplicite eksempler på, at vi stadig er en gruppe udsat for vold og undertrykkelse.

Dette skrift vil forklare nogle begreber om EU's antidiskriminationslovgivning og EU generelt. Målet med skriftet er at formidle visse dele af EU lovgivning, så læseren bliver i stand til at forstå, hvad EU's antidiskriminationlovgivning dækker – og gøre brug af den, hvis man mener ens rettigheder bliver trådt på.

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Foreword

This overview on EU antidiscrimination legislation on grounds of sexual orientation and gender identity has a double aim, to be used as an introduction to EU antidiscrimination legislation as well as to be used as introduction to the general functioning of the EU for those that still are unfamiliar to it.

Years of studying the EU have awakened my awareness on the difficulties that might arise in understanding the maze of European acts, jargon, policies and different roles performed by the EU institutions and organs. However I believe this complexity should not hinder anybody from the understanding of his/her fundamental rights as guaranteed by the EU legislation by itself or in close relation with national legislation. The complex nature of the EU system should neither impede the EU lesbian, gay, bisexual and transsexual (hereafter LGBT) citizens to know where to recur or which action is needed to be taken in case they rights get violated.

I hope this overview also helps those interested in knowing more about the EU and EU antidiscrimination legislation on grounds of sexual orientation or gender identity in having a broader view and understanding on some basic concepts indispensable in understanding how antidiscrimination legislation works and is treated, and which new challenges are still to be tackled on the matter.

Last but not least in this foreword, I would like to show my gratitude to the Members of the board of the LBL International Branch for their general support through the process of elaboration of this rapport. A special and emotional thank you is particularly addressed to Martin K.I. Christensen and Hanne Bielefeldt.

The Author.

Human dignity and Human Rights

As referred in the Universal Declaration of Human Rights, Human Dignity and Human Rights are inextricably related, being the former the main justification for the codification of the later and for their absolute and universal application.

However a large number of civil and political rights have been restricted to heterosexuals and non-transsexual persons until very recently. Economic, Social and Cultural rights are still a matter of discussion without final consensus regarding which groups or communities (hereunder the LGBTI) are covered under their scope. Still nowadays it can be identified a number of authoritarian countries which legislative system explicitly violates the dignity and Human Rights of the LGBTI persons, whereas other countries that are considered to have a democratic system clearly express serious regressive tendencies on certain aspects; if not directly in their legislation certainly through their policies.

However we can also find an important positive and parallel development to the one aforementioned in countries where there has been taken important steps forward for the protection of LGBTI persons legislatively and through certain public policies. Therefore not only regressive but also progressive tendencies can be found worldwide.

In spite of all these currently performed developments or counter-developments, we can also find concepts which value never changes, and that they almost are a matter of consensus worldwide, at least theoretically. These concepts legitimate a system based on the rule of law a building up the main pillars of our coexistence in democratic societies. Human dignity, Freedom, Solidarity and Equality are some of those core concepts.

Among those concepts, Human Dignity is the main characteristic that makes us humans equal irrespectively of our secondary attributes such as race, ethnic origin; religion or believe, sexual orientation, sexual identity, gender, sex, nationality or similar. Human dignity is defined in law philosophy as being absolute, inherent and universal.

- Human dignity is **absolute** because it does not admit ad hoc modifications or divisions based on hierarchical or sectarian conceptions on human nature and therefore cannot be alienated.
- Human dignity is **universal** because it is to be found both diachronologically and synchronologically throughout the current living humanity and in our human history.
- Human dignity is **inherent** to each human being, which means we are automatically entitled to it by birth.

Since all human beings are born equal in dignity a codified system of Human Rights was established after Second World War. Discrimination on grounds of sexual orientation or gender identity challenges however directly the main pillars of our common system of Human Rights and Individual freedoms². A violation of a Human Right is not only an aggression against a single person but also against the whole humanity. Furthermore since Human Rights are per definition **interdependent**, a violation of a Human Right inevitably also means the violation of other Human Rights.

Human Rights imply both positive and negative obligations; these obligations are not to be understood in a normative way as just good or bad but rather as follows:

Negative obligations imply that an action taken by a state against an individual should be reasonable, lawful, foreseeable and precise enough with a legitimate aim such as the protection of morals or the rights of others; also necessary, relevant, sufficient and proportional. With other words, states shall **protect** Human Rights not creating measures that hinder the use of them or might interfere in their practice.

² A fundamental freedom is a form of mentioning a human right where individual action or personal initiative plays a central role. In this way Right to life is a human right whereas right of freedom of assembly it could be understood as an individual freedom. The differences between both terms are though nominal rather than conceptual.

Positive obligations imply that the state in case has the obligation to protect (prevent violations of third parties) and the obligation to fulfill his obligations. States have firstly the obligation of **conduct** which implies planning all reasonable actions required in order to protect Human Rights and secondly the obligation to **result**, which means that those planned targets, should be achieved in order to protect de facto Human Rights. Generally speaking a positive obligation exhorts states adopting measures in order to **promote** human rights actively.

Human rights were first codified in 1948 with **the Universal Declaration of Human Rights and Fundamental Freedoms**³. Taking point of departure in the Universal Declaration of Human Rights two explanatory and binding covenants on Human Rights, namely **the Covenant on Civil and Political Rights** and **the Covenant on Economic, Social and Cultural Rights**⁴ were written.

In spite of the fact that these covenants were written and ratified universally in 1948 due to the creation of the United Nations, certain civil and political rights were already guaranteed since the 18th century after the *Virginia declaration of Rights in 1776* and the *Déclaration des Droits de l'homme et du citoyen in 1789*. Although not the entire population of the countries where such legislations were enforced was protected. Some of these clear exceptions were blacks, women, peasants, children, homosexuals, bisexuals, transsexuals and intersexuals towards whom certain rights were denied, ignored or even there were certain legal provisions used to persecute them until the 20th century.

Clarifying certain misunderstandings: Are there specific LGBT rights?

Gays, Lesbians, Bisexuals and Transsexuals are generally not claiming specific group rights specifically aimed towards them; therefore talking about LGBT rights is conceptually incorrect.

LGBT activists claim rights such as freedom of assembly and demonstration, freedom of expression, right to marriage or right to family life which are Human Rights. These Human Rights

³ <http://www.un.org/Overview/rights.html>

⁴ <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

are sometimes denied to LGBT persons only because their sexual orientation or gender identity, which contradicts the very essence of Human Rights. In this way the supporters of the Yogyakarta principles are aware of this grave and paradoxical situation⁵. The Yogyakarta principles were established in 2006 and are aiming to find a satisfactory and effective way to applying and mainstreaming Human Rights universally and absolutely irrespectively of a determinate sexual orientation or gender identity.

From a historical perspective, especially after the Holocaust and the rest of Crimes Against Humanity committed under Second World War there has being a special emphasis on the codification of provisions in democratic legal systems aiming to protect Human rights .This development has also led up to the special protection of the persons belonging to certain minority groups and concrete regional declarations and covenants taking into account certain regional peculiarities such as the *African charter on Human and Peoples Rights*⁶ or the *European Framework Convention for the protection of national minorities*⁷.

Since 2004 the United nations created an independent organ for the protection of Human rights, the Human Rights Council⁸, and three LGBT organizations ILGA- Europe⁹, LSVD¹⁰ and LBL¹¹ acquired consultative status in The ECOSOC¹² in 2006 (for more details about consultative status

⁵ <http://www.yogyakartaprinciples.org/>

⁶

http://www.unicri.it/wwd/trafficking/legal_framework/docs/african_charter_on_human_and_people_s_rights_27_june_1981.pdf

⁷ http://book.coe.int/EN/ficheouvrage.php?PAGEID=36&lang=EN&produit_aliasid=1960

⁸ <http://www.un.org/rights/>

⁹ <http://www.ilga-europe.org/>

¹⁰ Leben un Schuwulverband in Deutschland. <http://www.lsvd.de/>

¹¹ <http://www.lbl.dk/>

¹² <http://www.un.org/ecosoc/>

consult Didde Margrethes Nielsen's *Handbook Concerning UN Accreditation for LGBT Organizations*¹³)

One of the main actors that have contributed in changing discriminatory legislations and adopting positive policies aimed to combat discrimination, stigma, marginalization, and oppression of certain groups regionally and internationally, has been the European Union. In the following chapter there will be an explanation of certain important issues regarding EU antidiscrimination legislation that might be interesting for an unfamiliar reader of EU studies.

A Regional Human Rights Actor, The European Union

The European Union is a complex supranational organisation trying to tackle some of the new challenges raised from our globalised period. Most of the European countries are members of the European Union¹⁴, whereas those that do not enjoy membership in the EU are currently either negotiating admission or cooperating actively with the EU through organizations such as the EEA (European Economic Area) or the Council of Europe.

The European Union plays an active role in combating discrimination based on sexual orientation and gender identity not only in Europe but also worldwide. Respect to Human Rights and Fundamental Freedoms is a prerequisite to be fulfilled for those countries aspiring to obtain European economical aid, as it is specified in the first¹⁵ and second¹⁶ Yaoundé conventions, the Lomé convention¹⁷ or the Cotonú agreement¹⁸, dealing with development countries.

¹³ http://www.ilga-europe.org/europe/notice_board/resources/hanbook_for_lgbt_organisations_on_un_ngo_status

¹⁴ with the exception of Serbia, Kosovo, Albania, Ukraine, Georgia, Armenia, Azerbaijan, Turkey, Belarus, Russia, Iceland, Norway, Switzerland, the Former Yugoslavian Republic of Macedonia, Montenegro and Croatia

¹⁵ <http://www.ena.lu/signing-yaounde-convention-20-july-1963-020700841.html>

¹⁶ http://www.acpsec.org/en/about_us.htm

¹⁷ <http://www.acpsec.org/en/conventions/lome1.htm>

¹⁸ <http://www.acpsec.org/en/conventions/cotonou/accord1.htm>

Concrete Situation of LGBT rights after the Amsterdam Treaty¹⁹

Since the **Amsterdam treaty** came in force the EU executive and legislative powers have a legal basis for creating secondary antidiscrimination law based on other grounds than nationality and gender. The European Court of Justice (ECJ) has since also a clause it can refer to when considering cases of discrimination, namely the antidiscrimination clause or article 13th of this treaty:

‘Without prejudice to the other provisions of this Treaty, and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.

Through the last years, the European Court of Justice has also built in the form of **case law** an important body of binding verdicts that prohibit certain discriminatory actions against homosexuals, bisexuals, transsexuals, transgenders and intersexuals. Furthermore, both secondary legislation and soft law together with the aforementioned ECJ case law, the common legislative traditions of all the Member States, and the European Acquis Communautaire²⁰ have contributed to the establishment of **the principles of equality and non discrimination as Fundamental Rights in EU law**.

The first case when the ECJ referred to the Common legislative traditions of the Member States which established the principles of Equality non discrimination and respect for Fundamental Rights as principles embedded in EU law was with the case *J. Nold, Kohlen- und Baustoffgroßhandlung versus Commission of the European Communities* in 1974²¹. Since this

¹⁹ <http://europa.eu/scadplus/leg/en/s50000.htm>

²⁰ The “crop” of treaties.

²¹ http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=673J0004

case, Human Rights have been a clear reference in the judges of the ECJ **as long as** there has been a clear and substantial link between Human Rights and Community law.

One of the peak moments in the development of a major presence of Human Rights within the EU was with the Establishment of **the Charter of Fundamental Rights of the European Union** in 2000²².

In order to guarantee that the new countries aspiring to obtain membership of the EU, fulfill with EU Human Rights standards and the rule of law, there were codified the **Copenhagen Criteria** in 1993 among which it can be read the condition sine quae non in order to be admitted in the EU “*stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities*”²³ “. The lack of fulfillment of the Copenhagen Criteria is a substantial reason for closing further negotiations to any candidate country²⁴.

The European Union Agency for Fundamental Rights

The European Union Agency for Fundamental Rights²⁵ (the former European Monitoring Centre on Racism and Xenophobia) is an independent European Agency that cooperates with different organisations, NGOs and the Council of Europe in matters concerning Human Rights, Fundamental Freedoms and discrimination. The Agency also gives assistance and expertise relating to fundamental rights to the Community and the Member States when implementing community law, a task developed before by ad hoc groups of legal experts.

The European Agency for Fundamental rights does still not have the competences to deal with individual complaints; and nor have the national agencies that deal with issues of discrimination on different grounds **except discrimination based on race or ethnic origin** that has an especial

²² http://www.europarl.europa.eu/charter/pdf/text_en.pdf

²³ http://europa.eu/scadplus/glossary/accession_criteria_copenhagen_en.htm

²⁴ The Lack of fulfillment of the Copenhagen Criteria was one of the arguments mentioned in order to stop membership negotiations with turkey.

²⁵ <http://eumc.europa.eu/fra/index.php>

status in relation to other grounds of discrimination, and therefore it is dealt by its own directive, council Directive 2000/43/EC. The differences between Council Directive 2000/78 and Council Directive 2000/43/EC explain why discrimination on race or ethnic origin is approached de facto differently. Diverse LGBT groups, groups representing the interests of the elderly, handicapped or religious minorities have expressed their disconformities with the approach that has been taken by the EU which gives a privileged situation to a certain group of persons (those belonging to ethnic or racial minorities) than other belonging to other marginalized groups such as the elderly, LGBT's or the handicapped. Therefore after a substantial lobby campaign developed by certain interest groups (hereunder ILGA-Europe), the Commission has newly (july 2008) created a directive proposal which aim is to cover all grounds of discrimination mentioned in Amsterdam Article 13, with the same conditions as "race or ethnic origin" are currently covered and protected by Directive 2000/43/EC. **In order to adopt this new directive the Council has to act unanimously and in codecision with the European Parliament**

The Employment Directive (Council Directive 2000/78²⁶ or the framework directive) and Council Directive 2000/43/EC²⁷

The Employment Directive (Council Directive 2000/78 often called the framework directive) prohibits discrimination on grounds of sexual orientation in the area of employment and occupation. Before the Treaty of Amsterdam came into force in 1997, there was not a proper legal basis to deal with problems of discrimination motivated by homophobia within EU law (**although it was possible to deal with through the individual legislative systems of some of the member states such as France Denmark, Sweden, the Netherlands, Irelands Spain and Finland²⁸**).

²⁶ http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002L0078&model=guichett

²⁷ http://europa.eu/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf

²⁸ Sexual Orientation and Gender Identity discrimination: The case law of the ECtHR and the ECJ. Robert Wintemute. <http://www.ilga->

In spite of the big step that this Directive has meant in tackling discrimination on grounds of sexual Orientation in the area of employment as aforementioned, diverse LGBT groups have expressed their disconformities with the fact that its sister directive tackling discrimination based on race (**Council Framework Directive 2000/43/EC**) has a much broader scope.

Discriminations on sex, religion or belief, disability, age or sexual orientation are only covered in the area of employment and occupation; however the material scope of Council Directive 2000/78/ EC does not cover education, access to goods and services, housing, social protection or social advantages as the other Directive does for the ground of race or ethnic origin.

The Racial Equality Directive has a provision that exhorts the creation of a specialised national body for the promotion and monitoring of equal treatment on grounds of race and ethnic origin. In the case of Denmark such a body is the **Danish Institute for Human Rights**²⁹ that also can deal with individual complaints. No such specialised bodies are required to be created by the Employment Equality Directive for LGBT persons, the elderly / youngsters, religious minorities or the handicapped.

Obviously it is strongly paradoxical that there exist two different scopes for similar grounds of discrimination registered under same treaty provision. Since discrimination is basically defined by “treating two similar things unequally or two different things equally” it appears discriminatory to have two different directives covering similar grounds of discrimination. In order to solve this problem the Commission has elaborated a directive proposal³⁰ which aim is to cover all the grounds of discrimination of article13 within all the EU areas of competence. However until the new Commission proposal is adopted by the Council this is the current situation with regard to antidiscrimination legislation in the EU.

europe.org/europe/litigation_in_the_european_courts/sexual_orientation_and_gender_identity_discrimination_the_case_law_of_the_european_court_of_human_rights_and_the_european_court_of_justice

²⁹ <http://menneskeret.dk/>

³⁰ http://www.ilga-europe.org/europe/campaigns_projects/campaign_for_a_new_european_anti_discrimination_legislation

In spite of the Racial Discrimination directive and the Employment directive have substantial differences they have also have important similarities such as the definitions of discrimination and the possibility of taking steps forward positive actions (though not compulsory) and the lack of requirement of a shared burden of proof.

	Racial Equality Directive		Employment Equality Directive
<u>Material scope</u>	1. employment and occupation 2. education, access to goods and services including housing, social protection and social advantages	<	1. employment and occupation
<u>Definitions of discrimination</u>	Direct, Indirect, Harassment, Victimization,	=	Direct, Indirect, Harassment, Victimization,
Positive Action	<i>Permitted</i> NOT obligatory	=	<i>Permitted</i> NOT obligatory
Exceptions	Genuine Occupational requirement		Genuine Occupational requirement Particular exceptions to age discrimination
Provision for specialised body for the promotion of equal treatment	YES	<	NO

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³¹ Scheme taken from a Lobby Dossier on EU Antidiscrimination Legislation elaborated by Astrid Waterinckx, Karima Zahi , Miguel Obradors Campos and Mualla Cirakli,. Catholic University of Leuven 2004.

Council Directive 2004/58 on free movement³²

Besides the two aforementioned Council directives another Directive playing an important role towards the equal treatment of EU citizens irrespectively of their sexual orientation or gender identity is the **Council Directive 2004/58 on free movement**.

One substantial aim of the “Free movement Directive” or directive EC/2004/58 is to solve the discriminatory differences between **marriage and registered partnerships** with regard to the free movement of citizens in the EU. This means that same sex couples from countries where they still do not have access to marriage but to registered partnership are perceived to have the same rights as those that are united in marriage. Since still in many EU countries homosexuals only have access to registered partnerships, the creation of this directive means therefore a big step in decreasing the discrimination among heterosexual and non heterosexual couples as it was reflected by ECJ Judgment Example of this can be seen in *Lisa Jacqueline Grant v South-West Trains Ltd*³³ in 1998 and, *D and Kingdom of Sweden v Council of the European Union*, 31 May 2001³⁴.

However those same sex couples that cannot have access to either marriage or registered partnership in their home country they do not enjoy free movement in the EU de facto. At the same time all those same sex couple united in marriage or in registered partnership in countries that allow such unions cannot enjoy their rights in countries where such unions are still not legislated. Therefore the free movement principle is violated vis-à-vis homosexuals or bisexuals in a same sex relationship.

³² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:229:0035:0048:EN:PDF>

³³ http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61996J0249&lg=EN

³⁴ http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61999J0122&lg=EN

What is a directive?

A directive is a legislative act. This is to say a statement of law³⁵ passed by a legislative body. The legislative bodies of the European Union are the Council of the European Union (or the Council) and the European Parliament in certain cases. A statement of law can be passed either by the Council by itself or by the Council and the European Parliament together. The European Parliament does not have the competences to pass legislative acts by itself. The executive body that proposes community legislation in the first pillar³⁶ is the European Commission, though in the second pillar the right to legislative initiative lies on the Council and in the third pillar on both the Commission and Council depending on the area. For more details regarding the EU pillars structure consult the Appendix 2.

The European Commission is the only body that can propose new European Legislation in matters concerning the Community pillar³⁷. Normally the European Commission elaborates its proposals against the background of a duly consultation procedure vis-à-vis civil society and other European bodies such as the European Parliament, the Committee of the Regions, The Economic and Social Committee and different NGO's and interested groups that has consultative status³⁸, hereunder ILGA Europe. ILGA Europe³⁹ is the main LGBT umbrella organisation/interest group based in the European Continent with headquarters in Brussels.

³⁵ A law is a principle or a rule created by a legislative body that establishes a framework of coexistence that must be respected. In democratic societies or organizations, there are independent bodies from those which created the law and that ensure laws are respected; these bodies are more generally known as Courts. In the EU there is The European Court of Justice, the Court of First Instance and the Court of Auditors.

³⁶ See the appendixes to have an explanation on what the first pillar is.

³⁷ For more information about the pillars, have a look further on on this handbook.

³⁸ In order to see what consultative status means, have a look to LBL's handbook on...

³⁹ <http://www.ilga-europe.org/>

Differences among legal acts

In order to understand European legislation, it is important to take into account the differences between the natures of the different legal acts, since they develop different ways for implementation of primary law.

A directive is a legislative act that dictates which goals to achieve but not the means through which the goal is to be achieved. There is a certain period of transposition of a directive, after which the directive is to be considered embedded in national law⁴⁰.

On the other hand **regulations** have a **direct effect**, which means that they are applicable when adopted without the need of being implemented in national law. Regulations in opposition to directives do not leave any margin of appreciation to each country in adopting particular rules depending on its particular idiosyncrasy.

A **framework decision** is a legislative act adopted in order to approximate existing laws of the Member States. Framework decisions are binding to the result to be achieved but leave the choice of form and methods of implementation to the national authorities.

Framework decisions are normally adopted in the third pillar, namely Cooperation in civil and political matters and not in the Community pillar.

Decisions are legislative acts used for any other propose other than the one obtained through framework decisions.

There are other texts of soft law produced by the different organs or institutions; mainly they are **recommendations** and **opinions** which in contrast to the previously mentioned legislative acts do not have a binding nature.

⁴⁰ A Framework Directive is a directive that establishes a common Framework approach rather than a particular one.

The process of creation of EU legislation

The large EU legislative procedure in the Community Pillar can be developed in four main ways before achieving the final legislative act: Consultation, Cooperation and Codecision.

- The **Codecision** procedure is when both the Council and the European Parliament co-legislate and determine altogether the final legislative act.
- The **Consultation** procedure is when either the Council must ask the European Parliament its opinion on the amendments that the Council adds or takes from the Commission proposal (compulsory consultation) or when the Council can ask the European Parliament on certain matters (optional consultation)
- The **Cooperation** procedure is a procedure in between the codecision and consultation. The European Parliament can have an influence in the final legislative act if most of the Member States that constitute the Council agree with its position before voting by qualified majority.
- The **Assent** procedure. It happens when the EP only have the possibility of approving or rejecting the final legislative act to be adopted by the council.

Amsterdam Article 13 dealing with discrimination requires a codecision procedure between the European Parliament and the European council in order to elaborate legislation based on this article.

III Particular transsexual, transgender and intergender issues

Antidiscrimination legislation covering the rights of transsexual, transgender or intergender persons does not have a coherent or solid structure within Community law nor a concrete legal basis on the treaties. When referring to discrimination specifically against **Transsexuals** the ECJ has referred to those clauses covering discrimination based on sex, normally being a sex reassignment a condition

to be fulfilled before invoking this ground of discrimination as seen in *Sarah Margaret Richards v Secretary of State for Work and Pensions* in 2006⁴¹.

The ECJ has in general taken point of departure the particular national legislation of the member states when dealing with cases about Trans persons. When the legislation of a member state recognises the right of a transsexual person to vindicate his or her psychological sex in his or her documents but de facto he or she is treated as a person of his or her original biological sex then discrimination is considered to occur. However when the legislation of a member state does not provide such a right to a transsexual person or even requires a surgery in order to recognise the condition of transexuality discrimination is not considered happening. This is caused because the only legal basis currently existing in order to refer to trans issues is **discrimination based on sex or gender**, if the sex claimed by a transsexual person is not even recognised by the member state in case the person has little to do in the European Court of Justice.

Transgender persons Since transgender persons do not normally fulfil a sex resignation they never see their rights protected by the provision that covers sex or gender discrimination. Against this big legal void a provision tackling **gender identity** appears extremely important.

Intergender rights are still neither recognised in Community Law nor in any Member State, since there is no concrete clause on **gender identity** either nationally or in the European treaties. In this way intergender persons are forced to perform in alienation either by the so-called masculine or feminine gender when relating their situation to a context or to concrete legal framework.

⁴¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0423:EN:NOT>

Appendixes

1) What is understood by Discrimination, Victimization and Harassment?

Discrimination is a phenomenon of structural nature. Discrimination is intimately related to oppression, stigma, marginalisation, lack of power and cultural imperialism, which normally are interdependent. Discrimination can also acquire different forms, it can be direct to indirect, different numbers from single to double or multiple, or can have different grounds such as race, ethnic origin, religion or belief, or sexuality.

Discrimination can only be defined in a relational situation. Discrimination happens when two persons in similar positions are treated differently because of their race, gender, sexual orientation or because two persons in different situations are treated equally because of the grounds that were mentioned before. Discrimination is also related with the notions of **Harassment and Victimization**.

A person is victimized when this person is persecuted or treated unfairly because he or she has lawfully made a complaint or has supported somewhere else in making a complaint.

A person is harassed when this person is persecuted in such a way that he or she feels intimidated, degraded or humiliated.

Discrimination, harassment and victimization can produce isolation and lack of normal work interaction or synergy together with lack of effectiveness, decline of personal self esteem or even depression. Discrimination, harassment and victimization can be performed physically, verbally or/and psychologically. It is habitual that a person that has suffered discrimination, harassment or victimization appears to have bad conscience or interiorises the discriminatory situation as “normal”. Therefore it is important that a person that suffers discrimination verbalizes how he or she perceives the situation or a person that realises that a discriminatory behavior is taking place in his or her surrenders⁴² takes action against it.

⁴² For more information on discrimination have a look to the following homepages:

Appendix 2) The EU structure

The three Communities - the six treaties

Sometimes it can be confusing to see both terms the **European Union** and the **European Community**. Which term is the right one? Both, the answer is closely related with the process of European integration.

The treaties of Rome established in 1958 the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). In 1951 the **Treaty of Paris** established the European Coal and Steel Community (ECSC)

The three Communities then merged in 1965 in the so called, **Merged Treaty**. Although they remained as separate entities from each other. The European Coal and Steel Community expired in 2002. Some propose that the European Atomic Energy Community (Euratom) should also follow the steps of the ECSC and disappear.

The Single European Act 1987

The SEA is the main reform within the three communities produced since the treaties of Rome and Paris. One of the main goals in the SEA was achieving an **internal market**⁴³, which legal and

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- Stop-Discrimination in the EU: <http://www.stop-discrimination.info/>
 - Double discrimination in the European Union:
http://ec.europa.eu/employment_social/emplweb/publications/publication_en.cfm?id=125
 - Green Paper on Equality and anti-discrimination in the European Union:
http://ec.europa.eu/employment_social/publications/2004/ke6004078_en.pdf
 - Eurobarometer 263: Antidiscrimination in the European Union:
http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_en.pdf
 - 2007: European year for equal opportunities for all
http://ec.europa.eu/employment_social/eyeq/index.cfm

⁴³ The Treaties of Rome created a Customs Union not an internal market.

institutional mechanisms were provided by this treaty; but also the introduction of the **cooperation procedure** between the Council and the EP and the important step from unanimity to qualified majority voting in the Council.

The European Economic Community became the European Community or the “first pillar” in 1992, after the **Maastricht Treaty**. The Maastricht Treaty created also the European Union and the pillars system; this is the reason why the Maastricht treaty is also known as **the treaty of the European Union**.

Structure of the EU derived from the Amsterdam Treaty

The European Union is, after Maastricht, composed by the European Community (first pillar) and the Common Foreign and Security Policy (CFSP) or second pillar and Police and Judicial Co-operation in Criminal Matters (PJCC) or third pillar.

The Community Pillar has a supranational nature⁴⁴. The Member states of the European Union pull their sovereignty in the first pillar in order to legislate on certain areas together. The European

A customs Union is when two or more countries abolish all tariffs on their mutual trade in all goods and, in addition, adopt a common external tariff on all imports of goods.

A Common Market is when a customs union is adopted and in addition it is permitted the free movement of all factors of production across the members that compound the common market. In the EC (later EU) the Common Market is generally known as the Internal Market with its three freedoms: Free movement of Goods, free movement of Capitals, the three movement of persons.

⁴⁴ www.europa.eu

The Community Pillar covers issues of

-Customs Union and Single market

-Common Agricultural Policy

-Common Fisheries Policy

-EU competition law

-Economic and monetary union

-EU-Citizenship

-Education and Culture

Commission as independent institution representing the general interests of the Union proposes further legislation on those areas. **The principle of primacy of Community law** over the law of the individual Member States governs these areas. Within the first pillar we can find either exclusively competences of the EU or shared competences with the MS, all of them are regulated by **the principles of division of competences, proportionality and subsidiary**.

The principle of division of competences exhorts the Member States or the EU Institutions not to exceed their competences as conferred by the treaties.

The principle of proportionality exhorts that any action shall not exceed its scope in relation to its means.

The principle of subsidiary exhorts that when having shared competences the Member States and the Community, an action should be taken in the most appropriate level.

The Second Pillar, the Common Foreign and Security Policy (CFSP)⁴⁵, and **The third pillar**, the Police and Judicial Co-operation in Criminal Matters (PJCC)⁴⁶ are intergovernmental and are ruled

-Trans-European Networks

-Consumer protection

-Healthcare

-Research Environmental law

-Social policy

-Asylum policy

-Schengen treaty

-Immigration policy , also covered by the second and third pillar

⁴⁵ The Common Foreign and Security Policy comprehends these areas:

-**Human rights**

-Democracy

-Foreign aid

by other procedures, actors and legislative acts than those comprehended under the Community Pillar⁴⁷.

Human rights play an important role in the EU. In principle Human Rights and non discrimination related issues are a matter of intergovernmental cooperation. However since the protection of Human Rights and fundamental freedoms and antidiscrimination are parts of the general principles of EU law, the European Court of Justice can have an important role in issues where there is a **direct link** between human rights and Community law.

After Maastricht in 1993, amending the treaty of Rome that established the EEC, there were adopted other treaties that amended the EEC treaty (later known as the Treaty establishing the European Community) previous existing to their existence. The treaties together with all secondary legislation constitute, what is generally known as the **EU Acquis Communautaire**⁴⁸.

-European Security and Defense Policy

-Peacekeeping

⁴⁶ Police and Judicial Co-operation in Criminal Matters currently comprehends the following areas:

-Drug trafficking and weapons smuggling

-Terrorism

-Trafficking in human beings

-Organised crime

-Bribery and fraud

Some of the areas of the third pillar are progressively moving towards the second pillar.

⁴⁷ www.europa.eu

⁴⁸ Since the treaties of Rome, the history of the European integration can be analysed in the light of three main perspectives: Widening, deepening, Enlargement. The ulterior treaties that amended the treaties of Rome can be perceived according to the three aforementioned perspectives. Widening answers to the challenges dealt by the Single European Act or Maastricht, Widening responses to Maastricht again, the Treaty of Amsterdam, the Treaty Establishing a Constitution for Europe and The Lisbon Treaty, whereas Enlargement is mostly reflected by the Treaty of Amsterdam, The Treaty of Nice or the ulterior Treaties

A milestone step between the treaties of Rome and Maastricht worth to mention before analysing the developments after Maastricht is the Single European Act.

After Maastricht

The treaty of Amsterdam 1997

One of the main aims of the Amsterdam treaty was to realise an institutional restructure of the EU and to make a new redistribution of the voting system, which is not the reason why Amsterdam played a significant role since the whole discussion was taken again up under the Nice treaty. However Amsterdam meant an important advance in what is understood as “**soft politics**”. In Amsterdam it was introduced the concept of European Citizenship, the powers of the European Parliament were increased providing more democratic legitimacy to the EU system and it was also adopted the antidiscrimination clause (article 13) prohibiting discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Treaty of Nice, 2003

The treaty of Nice aimed in principle to overcome the difficulties in restructuring the internal functioning of the Union in order to be able to approach the challenges provided by the Eastern Enlargement; however, as in Amsterdam, such challenges required once again another round of negotiations and an ulterior treaty not adopted yet.

Constitutional treaty, 2004

The constitutional Treaty or Treaty establishing a Constitution for Europe was one of the major reforms after Maastricht aiming to reform the structure and the functioning of the Union. The Constitutional Treaty included a preamble with the European Charter of fundamental Rights, it merged the whole pillar structure and it gave entire legal personality to the EU. However, the Constitutional Treaty was rejected by the peoples of Europe by referendum.

The treaty of Lisbon (2008)

The Lisbon treaty was expected to be ratified in 2008. It was the newest treaty that has been negotiated. It tried to take most of the steps reflected in the constitutional Treaty avoiding the measures where the Member states had to give up certain sovereignty and in this way it was avoided compulsory referenda. Only Ireland held referendum on the adoption of the treaty, which was finally rejected.

Appendix 3) EU Law and the three freedoms

Since the Single European Acts in 1987 EU law is governed by three main principles of freedoms: the free movement of goods, the free movement of persons and the free movement of capital, all of them with their certain rules and treatment.

- **Free movement of Goods**

Any restriction to the free movement of goods is prohibited by EU law. For example, a country cannot prohibit the importations of a certain good because it has to be in a concrete container with a fixed shape.

- **Free movement of Capitals**

Any measure that hinders the free movement of capitals is prohibited in the EU, with the unique and questionable exception of Bank transactions

- **Free movement of persons**

Any measure that prohibits the free movement of persons is prohibited in the Union. You or your partner free movement is restricted because of your sexual orientation or gender identity throughout the EU, it is a matter that directly concerns the ECJ.

EU antidiscrimination legislation might not be a matter of front news in most western European countries. However, antidiscrimination legislation on grounds of sexual orientation and gender identity might be socially challenging in countries that criminalised homosexual relations or transsexuals until very recently (e. g Cyprus first decriminalised homosexuality in 1999). The Copenhagen criteria created a general framework that the candidate countries shall respect in order to enter the EU; part of this framework is respecting the rule of law and Human Rights including those of the minority groups. Unfortunately once they are part of the European Union some of the countries manage to interpret EU antidiscrimination legislation in such a way that a structural system of homo and transphobia is perpetuated (e.g Poland and Latvia).

Article 7th of the Treaty establishing the European Union makes it possible to restrict certain rights to those countries that do not comply with their obligations vis-à-vis Fundamental Rights. **This clause however has never been used in spite of the aggressive political climate created by certain governments against minority groups (hereunder the LGBT community)** such as Poland under the Kaczynski.

These regressive political movements that do not comply with the principles of respecting Human rights are broadly supported by certain radicalised interest groups or movements (such as the Catholic Church in Southern and eastern Europe or the Protestant Church in punctual enclaves such as the Faroe Islands⁴⁹) creating instability inside our frontiers and challenging the main pillars of our democratic systems.

⁴⁹ However the Faroe Islands as Greenland, in spite of being part of the Kingdom of Denmark are not part of the European Union.

Appendix 4) The European Institutions

The European Institutions are the European Parliament⁵⁰, the European Commission⁵¹, The European Council and the Council of the European Union⁵², The Court of Justice⁵³, and the Court of Auditors⁵⁴. Other relevant organs in the European Union are the Committee of the Regions⁵⁵, the Economic and Social Committee⁵⁶, the European central⁵⁷ and investment bank⁵⁸ and the European Ombudsman⁵⁹.

There is a slight difference between Institutions and Organs in EU jargon. An Institution is basically a body on which the Member States pool their sovereignty together on specific matters or joint interests. An organ is a mere consultative body that cannot produce binding documents. Member states do not **delegate** sovereignty in the EU institutions but **pool** their sovereignty together which is radically different.

- **The European Parliament**

In the European Union there is not a clear legislative and executive institution. The European Parliament is one of the institutions together with the European Council that can create final legislative acts, though not entirely by itself.

⁵⁰ <http://www.europarl.europa.eu/>

⁵¹ http://ec.europa.eu/index_en.htm

⁵² <http://consilium.europa.eu/showPage.ASP?lang=en>

⁵³ <http://curia.europa.eu/>

⁵⁴ http://eca.europa.eu/portal/page/portal/eca_main_pages/splash_page

⁵⁵ <http://www.cor.europa.eu/>

⁵⁶ http://www.eesc.europa.eu/index_en.asp

⁵⁷ <http://www.ecb.int/home/html/index.en.html>

⁵⁸ <http://www.eib.org/>

⁵⁹ <http://ombudsman.europa.eu/>

According to the treaties, the European Parliament represents the peoples of Europe and its diversity is represented by a maze of different political groups, Committees, Subcommittees, Delegations and Intergroups, which have different levels of competences and influence.

The first subdivision in the EP is to be found among its Political groups, secondly among its Committees and thirdly among its intergroups and delegations

Political groups: the European Parliament is represented by different political groups as it happens in the national parliaments. However we can find the situation where two different political groups in the Member States are placed under the same political group in the EP.

A Committee is a group created by different MEPs that discuss a certain matter and creates official opinions and legislative documents on behalf of the EP. Each Committee can nominate a rapporteur when writing a recommendation or an opinion on a concrete issue. Committees are subdivided in subcommittees.

A delegation is an ephemeral group created in order to tackle an ad hoc external matter of interest. Delegations represent officially the EP abroad.

An Intergroup is a group composed by members of the European Political groups that have a common interest in a certain area. An Intergroup cannot unilaterally produce official documents but the individual MEPs that compound it are able to do it. Michael Cashman is the president of the Intergroup for LGBT rights⁶⁰.

The European Parliament elaborates not only hard law but also soft law in form of opinions and recommendations. A large list of EP activities regarding LGBT issues can be found here:

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

⁶⁰ <http://www.lgbt-ep.eu/news.php>

The European Parliament has not always had the same level of influence as it has nowadays in neither the outcome of European legislation nor so much popular legitimacy. In its early years the representatives of the EP were elected indirectly by the national parliaments. Nowadays they are elected by universal suffrage. Besides the EP is increasing its role through the legislative process vis-à-vis the European Council. A milestone in the history of the European Parliament is when in 2004 the EP voted against the proposed Commission because of the discriminatory comments against women and homosexuals pronounced by the aspirant to be Commissioner for Justice, Freedom and Security, Rocco Buttiglioni.

All in all, still nowadays the EP can be considered as an institution with peripheral influence compared with the European Commission or the Council

- **The European Council**

The European Council consists of the heads of states and governments in the member states. It meets twice a year and discuss general matters and prepare new treaties.

- **The Council of the European Union (most generally known as the Council) ⁶¹**

The Council of the European Union represents the different governments of the Member States into the European Union. In Brussels there is the permanent Secretary of the Council that prepares all the meetings of the different ministers and prime ministers. The Council is the organ per excellence that elaborates legislative acts. Sometimes in close cooperation with the European Parliament but other times it only consults the European Parliament depending on the legislative procedure that is supposed to be followed. Depending on which the legal basis it uses, the Council can adopt new legislation either by unanimity or majority voting.

⁶¹ Not to be confused with the Council of Europe

- **The European Commission**⁶²

The European Commission is the European institution, executive body and driving force per excellence. Its goal is to represent the general interests of the Union and to coordinate the Union work. The European Commission is an independent institution and therefore each commissioner cannot represent the interests of individual states. So far there are 27 Commissioners, one per each member state. The European Commission is the only institution that has right to initiative in the legislative process in matters concerning the Community pillar, although it consults through green papers or other ways certain groups that could have a direct general interest in the new legislation and also the European Economic and social Committee, which represents the interests of certain interest groups, the Committee of the Regions, representing the regional and local interests and the COREPER, which is the Committee of Permanent Representatives of the Member States in Brussels.

The European Court of Justice⁶³

The European Court of Justice is one of the three the judicial bodies, the other being the Court of First Instance, created by the Nice Treaty and with only limited competences and the Court of Auditors dealing with issues about the EU budget. The goal of the ECJ is to ensure that both the EU institutions and the Member States compile with their obligations vis-à-vis community law and do not exceed their competences. The European Court of Justice has experienced an important development from its creation where basically it focused on the internal market and Economic issues. Through time the Court has become more and more “activist” especially with regard to Human Rights. For justifying its major emphasis on human rights the ECJ has always referred to the Common traditions for protection and promoting human rights of the different Member states and to our Common Membership in the Council of Europe.⁶⁴⁶⁵

⁶² http://ec.europa.eu/index_en.htm

⁶³ <http://curia.europa.eu/>

⁶⁴ <http://www.coe.int/>

⁶⁵ Other institutions and bodies are the Court of Auditors controlling the management of the EU budget, the European Economic and Social Committee that comprehends a number of organisations related to civil society and

To see an overview of litigation in the ECJ related to LGBT issues have a look to *ILGA-Europe Summary on Sexual Orientation and Gender Identity Discrimination: the Case Law of the European Court of Human Rights and the European Court of Justice*⁶⁶.

interested in economy and social aspects, the Committee of the Regions, representing the interests of regional and local authorities, the European Central Bank which labour focuses on the monetary policy the common currency, Euro, the European Ombudsman dealing with maladministration by any EU institution or body and the European Investment Bank which by financing investment projects helps to achieve certain EU objectives.

⁶⁶ http://www.ilga-europe.org/europe/litigation_in_the_european_courts

Recommended further reading.

Green Paper on Equality and ant-discrimination in the European Union:

http://ec.europa.eu/employment_social/publications/2004/ke6004078_en.pdf

ILGA_Europe Shadow Directive: [http://www.ilga-](http://www.ilga-europe.org/europe/news/ilga_europe_launched_shadow_directive_for_further_protection_against_sexual_orientation_discrimination)

[europe.org/europe/news/ilga_europe_launched_shadow_directive_for_further_protection_against_sexual_orientation_discrimination](http://www.ilga-europe.org/europe/news/ilga_europe_launched_shadow_directive_for_further_protection_against_sexual_orientation_discrimination)

Commission new Directive proposal: [http://www.ilga-](http://www.ilga-europe.org/europe/campaigns_projects/campaign_for_a_new_european_anti_discrimination_legislation)

[europe.org/europe/campaigns_projects/campaign_for_a_new_european_anti_discrimination_legislation](http://www.ilga-europe.org/europe/campaigns_projects/campaign_for_a_new_european_anti_discrimination_legislation)

Stop-Discrimination in the EU: <http://www.stop-discrimination.info/>

Eurobarometer 263: Antidiscrimination in the European Union:

http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_en.pdf

Books

EU Law: Text, Cases and Materials, Gráinne de Búrca and P.P.Craig. 4th ed., Oxford U. Press, 2007

Constitutional law of the European Union. Koen Lenaerts and Piet Van Nuffel. Thomsom 2004

EU material

Europe Direct Online Assistance:

http://ec.europa.eu/europedirect/write_to_us/web_assistance/index_en.htm

2007: European year for equal opportunities for all

http://ec.europa.eu/employment_social/eyeq/index.cfm

Summary on ECJ and ECtHM law: [http://www.ilga-](http://www.ilga-europe.org/europe/litigation_in_the_european_courts/sexual_orientation_and_gender_identity_discrimination_the_case_law_of_the_european_court_of_human_rights_and_the_european_court_of_justice)

[europe.org/europe/litigation_in_the_european_courts/sexual_orientation_and_gender_identity_discrimination_the_case_law_of_the_european_court_of_human_rights_and_the_european_court_of_justice](http://www.ilga-europe.org/europe/litigation_in_the_european_courts/sexual_orientation_and_gender_identity_discrimination_the_case_law_of_the_european_court_of_human_rights_and_the_european_court_of_justice)

Glossary of acronyms used

ECHR: European Convention of Human Rights (based in Strasbourg)

ECtHR: European Court of human Rights (based in Strasbourg)

ECJ: The European Court of Justice

ECI: European Court of First Instance

MS: Member State

EP: European Parliament

MEP: Member of the European Parliament

ECOSOC: United Nations, Economic and Social Council

Data bases for EU law:

Eurolex (Legislation adopted) <http://eur-lex.europa.eu/es/index.htm>

Celex: <http://www.adinfo.com/celex.htm>

Prelex (Legislation in preparation) <http://ec.europa.eu/prelex/apcnet.cfm?CL=en>